No. 24-690

In the Supreme Court of the United States

Leslie E. Carr and Harry A. Levy, Petitioners,

v.

New York State Division of Housing and Community Renewal,

Respondent,

Regina Metropolitan Co. LLC,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under proper application of *Loper Bright Enterprises v. Raimondo*, state courts should no longer mechanically defer to a state administrative agency's interpretation of a state statute, especially when the agency's interpretation violates a petitioners' Fifth and Fourteenth Amendment rights to due process and their Fourteenth Amendment rights to equal protection under the law?

PARTIES TO THE PROCEEDING

Petitioners (petitioners-appellants in the New York Court of Appeals) are Leslie E. Carr and Harry A. Levy.

Respondent (respondent-respondent in the New York Court of Appeals) is New York State Division of Housing and Community Renewal.

Intervenor-respondent (intervenor-respondent in the New York Court of Appeals) is Regina Metropolitan Co., LLC.

RELATED PROCEEDINGS

New York State Supreme Court, Appellate Division, First Department:

Carr et al. v. DHCR, No. 2022-03606 and 2023-00250 (June 6, 2023)

New York State Court of Appeals:

Carr et al. v. DHCR, No. 2024-433 (September 19, 2024)

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The decision by the New York State Appellate Division, First Department, denying Ms. Carr's appeal of a lower court decision is reported as *Matter of Carr v. New York State Div. of Hous. & Community Renewal*, 2023 NY Slip Op 02967 (June 6, 2023) [Pet. App. A-1 to A-7]; the denial by the same court of reargument of leave to appeal (August 31, 2023) [Pet. App. A-8 to A-10]; the denial of leave to appeal by the New York State Court of Appeals (May 16, 2024) [Pet. App. A-11-13]; and the denial of reargument by same court (September 19. 2024) [Pet. App. A-14 to A-16] are attached in the appendix.

Jurisdiction

Ms. Carr's motion to the New York State Court of Appeals to reargue and renew her petition was denied on September 19, 2024. Ms. Carr invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the final decision by the New York State Court of Appeals.

Constitutional Provisions Involved

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

> citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

This Court recently held in *Loper Bright Enterprises v. Raimondo*, 603 U.S. __(2024) that a federal agency is not entitled to automatic deference and that courts, not administrative agencies, have always had, and continue to have, the responsibility to interpret what a statute does or does not mean.

This case presents the question of whether *Loper* applies to the deference accorded to state administrative agencies by state courts.

In 2009, the petitioners filed an overcharge complaint with respondent, the New York State Division of Housing and Community Renewal (DHCR), the administrative agency responsible for enforcing New York's 1974 Emergency

Tenant Protection Act's (NY L. 1974, Ch. 5760) housing laws. In 2014, DHCR's original order by the Rent Administrator (RA) found that the landlord, Regina Metropolitan, had indeed substantially overcharged petitioners and, therefore, reset the legal rent retroactively for four years as well as reset the rent prospectively. The agency also asserted that the overcharge was not willful because the landlord had relied on a DHCR administrative advisory about the legal rent that was later found to be erroneous.

The RA further decided that the petitioners were, therefore, not entitled to attorney's fees, though overcharged, as the petitioners "would have obtained the same results for this proceeding without representation of counsel" and were not entitled to treble damages for fraud. On appeal of this original RA order, the Supreme Court justice pointedly disagreed with DHCR's rationale about attorney's fees but said she had no choice but to defer to the administrative agency (2016).

During the appellate proceedings, while the action was pending, New York adopted comprehensive remedial amendments to the housing laws, enshrined in a 15-part (A-O) law entitled the Housing Stability and Tenant

Protection Act of 2019 (HSTPA) [NY L. 2019, Ch. 36]. HSTPA now made mandatory attorney's fees for overcharged tenants, reinforced the definition of fraud to include indicia of fraud separate from any misinterpreted administrative advisory and set strict criteria for the retroactive and prospective determination of rent.

Two years later, New York's Court of Appeals, in a limited decision, reversed as an unconstitutional violation of landlord due process a section of HSTPA Part F (NY L. 2019, Ch. 36, Part F). The reversed section applied only to the retroactive determination of the legal base rent and restricted the calculation of any overcharge to the so-called 4-year lookback "recovery" period *(Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY 3d 332, 2020). The *Regina* Court did not address any other parts of the HSTPA or sections of Part F. The court remanded to DHCR to recalculate petitioners' overcharge, as well as specifically directing the agency to consider, per HSTPA Part F, our attorney's fees, as well as the application of the HSTPA's reinforced definition of fraud indicia.

On remand, in its first "final" order (February 2021), DHCR substantially

reduced the overcharge, refused to consider the submitted evidence of fraud and despite having indicated they would contact us for additional information prior to their "final" order, the agency never asked us to update our attorney's fee claim. Instead, the administrative agency, relying exclusively on interim attorney's fees evidence they had requested seven years earlier from the petitioners in December 2013, made a "reasonable" award purportedly limited to the administrative period. The award, less than 1% of our attorney's fees, did not, however, even include the majority of the administrative proceeding's months.

The landlord, then the petitioners, each filed a petition challenging this initial final order, but before any judicial intervention, the agency self-remanded its own order, saying it was doing so in response to the landlord's arguments.

Six weeks before the agency's second "final" order of November 2021, petitioners proactively submitted 155 pages of itemized legal fees reflecting their legal costs incurred to date.

The DHCR's subsequent and second "final" order of November 2021 modified the prospective rent such that the landlord, who was found to have overcharged the petitioners, now was

owed substantial arrears and was supposedly entitled to a significantly higher rent prospectively. The second order again failed to consider our fraud evidence or modify its denial of fraud and failed to even open our 155-page itemized legal fees document, instead maintaining the *de minimus* award of attorney's fees that reflected but a minority of the administrative period.

Petitioners appealed this second final order, raising *inter alia* due process and equal protection constitutional issues. The lower courts, applying the arbitrary, capricious and rational standard, deferred to the order of the administrative agency and denied our pleadings. New York's highest court, the Court of Appeals, denied our leave to appeal and denied our motion to reargue their denial of our leave to appeal, which is the basis for our writ herein.

REASONS FOR GRANTING THE WRIT

NY Court of Appeals is Wrong

The New York State Court of Appeals decision is wrong. The New York courts, by abdicating their own authority and deferring unreasonably to a state agency,

allowed the agency to violate fundamental constitutional rights, as detailed below. This Court now has the opportunity to clarify for state courts why state courts must use their independent judgment as judges and take the lead to interpret statutes. Absent intervention by this Court, the published decisions emanating from New York's landmark *Regina* decision and its offspring will potentially undermine the carefully-crafted *Loper* standard for the federal judiciary that this Court has spent many years developing.

1. The decision on attorney's fees discriminates against "administrative" litigants.

The plain text of the HSTPA mandated reasonable attorney's fees to petitioners who were overcharged, amending the prior law which had given DHCR discretion to award fees. It is unchallenged that we were overcharged.

In their appellate submissions, DHCR acknowledged that at the time the agency issued its second "final" decision, more than two years after the adoption of HSTPA, it had yet to lawfully amend its rules on attorney's fees pursuant to the New York State Administrative Procedure Act (SAPA) (NY L 1975, Ch. 82, § 200) as

required by statute. In *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988), this Court decided:

> "To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question..." (*Bowen* at 212)

It cannot possibly be challenged that we were entitled under the HSTPA to benefit from this section of the statute on attorney's fees. The statute's plain text included no limitations or exceptions other than that the award be reasonable.

DHCR, on its own authority and without following the SAPA protocols for the adoption of an amended rule, nevertheless decided that the statute applied only to the early months of the administrative proceedings. Nothing in the newly amended law, however, empowered the agency to refuse to examine and consider our updated evidence of attorney's fees for the entire administrative proceeding as well as for the subsequent judicial proceedings. Whether in the law or in our field, medical decision-making, determinations made without regard to the facts will inevitably

be neither rational nor, in this instance, constitutional.

We further argued that an attorney's fee award that was less than 1% could not be *reasonable* by any known definition of reasonable. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), Justice Brennan, concurring in part and dissenting in part, noted:

> "Even if the results obtained do not justify awarding fees for all the hours spent on a particular case, no fee is reasonable unless it would be adequate to induce other attorneys to represent similarly situated clients seeking relief comparable to that obtained in the case at hand" (*Hensley* at 449)

The appellate court's deference produced a result that undermined the clear legislative intent of the HSTPA to level the legal playing field between landlords and tenants.

In response to our appellate pleadings, the DHCR then improperly introduced, for the first time during the appellate proceedings, a new rationale for their denial of reasonable attorney's fees. DHCR claimed we had submitted our evidence too late to be considered. As we pointed out in response, New York's CPLR § 8601 clearly

says that attorney's fees, if they are to be awarded, are typically determined at the end of litigation, here with the second "final" Administrative Order of November 2021, an unremarkable rule that is customary throughout our nation's legal system, as we understand it, yet the appellate court deferred, endorsing DHCR's contrary position on timeliness.

The appellate court further excessively deferred to DHCR's administrative determination, and failed to employ its own jurisprudence, when it defended the agency by asserting that DHCR did not have jurisdiction to award fees incurred beyond the administrative phase.

The appellate court's position stands jurisdiction on its head. "Due process requires that the court [or administrative agency] which assumes to determine the rights of parties shall have jurisdiction[...]" (*Twining v. State of New Jersey*, 211 U.S. 78 (1908) at 110).

We had repeatedly requested that another arbiter be appointed to consider the 155-page file documenting our attorney's fees if there was any concern about DHCR's ability to review the legal fees for the entire proceeding. But the appellate court decision we challenge never addressed this request.

When, as here, courts bend too far over in deference to an administrative agency, they lose their balance, fall over and sustain a legal concussion. The resulting confusion is best prevented, paraphrasing *Loper*, if judges not administrators do the judging (*Loper* at 2252).

The appellate court's deference has not only allowed the administrative agency to violate our Fifth and Fourteenth Amendments right to due process but also our Fourteenth Amendment entitlement to equal protection under the law. Because DHCR's initial 'final" interpretation of the statute never underwent initial judicial scrutiny, the appellate court mistakenly allowed an agency's determination to create at least two classes of claimants who will always necessarily receive unequal treatment under the HSTPA on attorney's fees. One class of claimants, who initiate their complaints with the administrative agency, will never be able to recoup their reasonable fees for the entire proceeding, while those claimants who start their actions in court will.

The agency submissions, in response, asserted that HSTPA had memorialized "concurrent jurisdiction." As a result, DHCR claimed "different rules, when there is coordinate jurisdiction, can be used." This is *Chevron U.S.A. Inc., Et Al.*

v. Natural Resources Defense Council, Inc. 467 U.S. (1984) on steroids.

Concurrent jurisdiction was about procedural efficiency. It was clearly intended as a safety valve for a busy judiciary and perhaps a convenience for litigants. It did not give an administrative agency the unfettered right to interpret a statute with impunity and apply its own, unadopted interpretation that was contrary to the plain text of the statute. DHCR had no authority to condemn one class of tenants to a predetermined outcome that violated their Fourteenth Amendment rights simply because they selected Doorway #1. Had *Loper* been available to untie the hands of the state appellate court and remind the appellate judges of their proper role as the interpreters of statutes, the judges could have ordered DHCR to follow due process and consider the 155 pages of evidence. Thereby, this unconstitutional result would surely have been avoided.

All tenants are entitled to equal protection under the law, including those who by necessity, choice or even by mistake, initiate their complaint with the administrative agency rather than in court.

2. Decision is wrong because it allowed an agency to deny due process with respect to consideration of "fraud" evidence.

The landmark *Regina* Court decision reaffirmed that any fraud alleged pursuant to the New York high court's earlier decision in *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d. 270, 890 N.Y.S.2d 388 (2009) could not be willful because landlords had relied on a specific DHCR advisory which had misinterpreted the housing laws. But the *Regina* Court also clearly noted that the HSTPA had reinforced what constitutes indicia of statutory fraud with respect to the setting of rents for regulated apartments that was distinct from any reliance, innocent or willful, on an erroneous administrative advisory. The *Regina* Court did not disturb this reinforced and expanded definition, indeed the court made the point of highlighting it.

DHCR's *mea culpa* about its own advisory's misinterpretation of the prior law did not, and could not, relieve DHCR of its statutory administrative responsibility to consider evidence of fraud as denoted in HSTPA, as DHCR seems to assert. Further, in April 2024, New York

adopted an additional amendment to the HSTPA on statutory fraud (NY L. 2024, Ch. 95) which clarified any ambiguity that either the agency or landlords might rely on with respect to adjudicating a fraud claim.

It is unchallenged that the DHCR never considered the indicia of statutory fraud petitioners submitted in the 15 years of the litigation. Only once, during the appellate proceedings, did DHCR ever make any substantive reference to our evidence. There, yet again, DHCR claimed that the petitioners had untimely raised evidence, here with respect to fraud, during the appellate proceeding, long after the administrative proceeding had ended. It is unrebutted that the petitioners showed that the DHCR's claim was false, as we had submitted this evidence at the outset of the administrative proceedings. The evidence specifically highlighted by the DHCR had been date-stamped by the agency almost four years before DHCR had issued their original February 2014 decision denying fraud but awarding a substantial overcharge.

Despite this unchallenged scenario, the state appellate courts deferred to the agency, relying on the arbitrary, capricious and rational standard, and did not consider the fraud evidence. Judges

should judge. The state appellate courts should have allowed itself to consider the evidence, without worrying about deference to an administrative agency, particularly when the statute says fraud indicia must be considered and the origin of our complaint emanated from the agency's own advisory's misinterpretation of the law.

DHCR's failure to consider our fraud evidence thus violated our fundamental Fifth and Fourteenth Amendments due process rights, especially in light of the continuing legislative commitment to support the public policy to prevent fraud with respect to regulated housing.

3. The court decision was wrong to allow an administrative agency to make new law on rent determination.

The plain text of HSTPA Part E, (NY L. 2019, Ch. 36, Parts E) undisturbed by the *Regina* Court, states that any tenant entitled to a renewal lease as of June 14, 2019 must be offered a lease consistent with the criteria established by a local Rent Guidelines Board. Petitioners so qualified.

DHCR's second "final" order, however, denied our pleadings and said that HSTPA

Part E did not apply to us because the landlord had always from the beginning of the litigation claimed a higher rent. DHCR's second "final" order then set a rent increase that was more than 20 times higher than the HSTPA's statutory guidelines. In *Stop the Beach Ren. v. Fla. Dept. of Env. Prot.*, 560 U.S. 702 (2010) at 2611, this Court unanimously ruled that the plaintiff did not have a forever right unless the plaintiff could show that before the court decision was rendered, or here, analogously, before the new law was adopted, that they had rights "superior to the State's right" to make changes, or rights to keep using a particular prospective rent schema even if the superseding law adopted a different methodology. DHCR cannot possibly show that the landlord's rights were "superior" to the superseding remedial law. DHCR's second "final" order was wrong to grant this forever right to the landlord and the appellate courts were wrong, therefore, to defer to the administrative agency's effort to make new law absent authority to do so.

In further response, the agency then asserted it was following *Regina*'s guidance to apply the controlling rule, New York Rent Stabilization Code § 2526.1(a)(3)(i), and that our appeal about this rule was untimely. The appellate

court deferred, adding that as the rule "became effective January 8, 2014", we should have filed an appeal within four months of the rule's effective date or "at the very least before the Court of Appeals" after *Regina* (2020).

Fealty to deference apparently fogged the court's perspective. On January 8, 2014 we were not litigating anything in any court. We did not at that time know of this rule's existence and, even if we had, we would not have had any reason to challenge this rule until *Regina* was handed down on April 2, 2020 and DHCR applied this rule to us on November 8, 2021. Thereafter, we timely filed our complaint two months later. In *Corner Post v. Board of Governors of Federal Reserve System*, 144 S.Ct. 2440 (2024), this Court decided that plaintiffs can challenge rules within six years of being injured by them, not just within six years of the rule's issuance.

Of noteworthy relevance, DHCR's initial "final order" five months earlier had arrived at the very opposite determination and had correctly set the rent in our case pursuant to the plain text of the statute until challenged by the landlord. We have faith that a state appellate court would have consistently interpreted the statute correctly had they reviewed the first

"final" administrative order and not deferred to DHCR's second "final" administrative order because of the limiting arbitrary, capricious and rational standard.

Under the cover of administrative deference, the appellate court, however, further enabled DHCR to abuse our constitutional rights. The court allowed the agency to assert, for the first time, following the landlord's pre-emptive pleadings during the appellate proceeding, an extra-judicial and extra-legislative redefinition of "recovery period" to justify its second "final" order decision-making:

The *Regina* Court had stricken, as an unconstitutional violation of landlord due process, the section of HSTPA Part F that had allowed fact-finders to expand retroactively the so-called look-back "recovery period" from four to six years in order to establish the base date rent. In its appellate submissions in support of the second "final" order for our complaint, DHCR now advanced a wholly new definition of recovery period. DHCR retroactively expanded the recovery period from four years to 15 years, an expansion that is not mentioned in the statute or in any case law including *Regina*. The agency then applied its new definition of recovery period to calculate supposed arrears.

The agency's decision to conceal their rationale until the appellate proceedings effectively denied us our Fifth Amendment due process right to respond earlier at a critical point in the proceedings as part of our Petition for Administrative Review (PAR). We were thus forced to always play catch-up and argue thereafter against a fait accompli. DHCR violated our Fourteenth Amendment right to equal protection under the law by applying to us alone a newly created 15-year recovery period. Likewise, the untimely introduction of this rationale denied the initial appellate arbiter, New York State Supreme Court, pre-decision briefing by all parties on the agency's interpretation and definition of recovery period as it affected our claim. A timely briefing would have helped the lower court render a fair decision on the merits.

CONCLUSION

We respectfully ask that this Court issue a writ of certiorari to review the judgment of the New York State Court of Appeals. Nothing less than the restoration of the proper and constitutional balance between state agencies and state courts is at stake.

December 2024 Harry A. Levy, *pro se*