BOLSTERING NEW YORK'S TENANT PROTECTION LAW: ENSURING RETROACTIVE APPLICATION UNDER THE HEIGHTENED *REGINA* STANDARD

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INTRODUCTION

Rent regulation laws have long been a cornerstone of the New York City and New York State housing markets, enacted to combat excessive

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rent increases[1] that risked pricing out low- and middle-income tenants.[2] On June 14, 2019, the New York State Legislature enacted the Housing Stability and Tenant Protection Act (HSTPA),[3] which brought sweeping changes to New York's rental laws, including regulated and unregulated buildings.[4] The HSTPA significantly expanded tenant protections across New York State, and specifically in New York City,[5] which currently has one of the highest monthly rent medians in the country.[6] The passage of the HSTPA was the realization of long-fought-for goals by New York's Democratic lawmakers and tenants' rights advocates,[7] which were, among other things, to "provide permanent rent regulation protections to covered buildings" and "extend tenant protections statewide."[8]

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1 N.Y.C., N.Y., ADMIN. CODE § 26-501 (2023) ("[M]any owners of housing accommodations in multiple dwellings, not subject to the provisions of the city rent and rehabilitation law . . . , were demanding exorbitant and unconscionable rent increases . . . which led to a continuing restriction of available housing . . . ."); N.Y. UNCONSOL. LAW § 8602 (McKinney 2023) ("The legislature hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons in the state of New York . . . [and that] preventive action by the legislature continues to be imperative . . . in order to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements . . . .").

2 SPONSOR MEMO, S. 242-6458, Reg. Sess. (N.Y. 2019) ("Today, the City of New York and municipalities in Nassau, Westchester, and Rockland counties struggle to protect their regulated housing stock, which provides and maintains affordable housing for millions of low and middle income tenants."). In 2021, the median household income for tenants in rent-controlled units in New York City was $24,000, median household income for rent-stabilized tenants was $47,000, and $62,690 for tenants in unregulated units. N.Y.C. DEPT. OF HOUS. PRES. & DEV., 2021 NEW YORK CITY HOUSING AND VACANCY SURVEY SELECTED INITIAL FINDINGS 47 (2022), https://www1.nyc.gov/assets/hpd/downloads/pdfs/services/2021-nychvs-selected-initial-findings.pdf [https://perma.cc/MF6F-QMAH].

3 Housing Stability and Tenant Protection Act of 2019, ch 36, 2019 N.Y. Laws 154 (codified in scattered sections of N.Y. C.P.L.R. (McKinney 2023), N.Y. GEN. BUS. LAW (McKinney 2023), N.Y. GEN. OBLIG. LAW (McKinney 2023), N.Y. JUD. LAW (McKinney 2023), N.Y PENAL LAW (McKinney 2023), N.Y. PUB HOUS. LAW (McKinney 2023), N.Y. REAL PROP. LAW (McKinney 2023), N.Y. REAL PROP. ACTS. LAW (McKinney 2023), N.Y. REAL PROP. TAX LAW (McKinney 2023), N.Y. UNCONSOL. LAW (McKinney 2023)).

4 Vivian Wang, *New Rent Laws Pass in N.Y.: 'The Pendulum Is Swinging' Against Landlords*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/nyregion/rent-laws-ny-deal.html [https://perma.cc/BK4K-TGS9] ("New York lawmakers on Friday passed a sweeping package of rent laws designed to dramatically enhance tenant protections and reshape the state's housing landscape . . . .").

5 *Id.* ("The laws would immediately transform life for the 2.4 million people who live in roughly one million rent-regulated apartments in New York City, by closing loopholes that have allowed landlords to raise rents or deregulate properties.").

6 *Zumper National Rent Report*, ZUMPER (Nov. 17, 2022) https://www.zumper.com/rent-research/new-york-ny [https://perma.cc/34NP-9ZWW] (stating that the median rent in New York City was $3,775 in November 2022).

7 Luis Ferré-Sadurní, *Tenants May Get More Protections in New York City, After Decades of Battles. Here's Why.*, N.Y. TIMES (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/nyregion/ny-rent-laws-regulation.html [https://perma.cc/YV5D-XXA8].

8 SPONSOR MEMO, S. 242-6458, Reg. Sess. (N.Y. 2019).

The HSTPA faced fierce opposition from landlords prior to its passage[9] and has continued to be the subject of litigation across New York since its enactment.[10] Real estate groups and landlords argue that better tenant protections, such as those provided by the HSTPA, are an "existential threat" to landlords that "will lead to disinvestment in the city's private sector rental stock"[11] and to an "erosion in the quality of housing" throughout New York.[12] While that has not happened in the years since the enactment of the HSTPA, litigation has not let up.[13] These intense and coordinated attacks by landlords threaten to upend the hard-fought wins that the HSTPA has ushered in for tenants. Already, parts of the Act have been chipped away by legal challenges.[14]

The most successful challenges to date against the HSTPA have involved claims against its retroactive application.[15] In 2020, the New

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9 Sharon Otterman & Matthew Haag, *Rent Regulations in New York: How They'll Affect Tenants and Landlords*, N.Y. TIMES (June 12, 2019), https://www.nytimes.com/2019/06/12/nyregion/rent-regulation-laws-new-york.html [https://perma.cc/WN4J-G74F]; Gerald Lebovits, John S. Lansden & Damon P. Howard, *New York's Housing Stability and Tenant Protection Act of 2019: What Lawyers Must Know*, 29 J. AFFORDABLE HOUS. & CMTY. DEV. L. 75, 122–23 (2020).

10 *E.g.*, Regina Metro. Co., LLC v. N.Y. State Div. Hous. & Cmty. Renewal, 154 N.E.3d 972 (N.Y. 2020); Cmty. Hous. Improvement Program v. City of New York, 492 F. Supp. 3d 33 (E.D.N.Y. 2020), *aff'd*, 59 F.4th 540 (2d Cir. 2023); Harris v. Israel, 142 N.Y.S.3d 497 (App. Div. 2021); 160 E. 84th St. Assocs. LLC v. N.Y. State Div. Hous. & Cmty. Renewal, 159 N.Y.S.3d 845, 846 (App. Div. 2022); Karpen v. Andrade, 166 N.Y.S.3d 822 (App. Term 2022) (unreported table disposition); 335-7 LLC v. City of New York, 524 F. Supp. 3d 316 (S.D.N.Y. 2021); Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc. v. New York, No. 19-CV-11285, 2021 WL 4198332, at *20 (S.D.N.Y. Sept. 14, 2021); 300 Wadsworth LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 158207/2020, 2022 WL 135332, at *7 (N.Y. Sup. Ct. Jan. 14, 2022), *aff'd*, 178 N.Y.S.3d 487, 488–89 (App. Div. 2022); Richmond Hill 108 LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 728474/2021, slip op. at 5 (N.Y. Sup. Ct. Oct. 3, 2022); 101 E. 16th St. Realty LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 150504/2023, 2023 WL 3819100, at *3 (N.Y. Sup. Ct. June 5, 2023).

11 Luis Ferré-Sadurní, Jesse McKinley & Vivian Wang, *Landmark Deal Reached on Rent Protections for Tenants in N.Y.*, N.Y. TIMES (June 11, 2019), https://www.nytimes.com/2019/06/11/nyregion/rent-protection-regulation.html [https://perma.cc/94TQ-BAGA] ("The deal was a significant blow to the real estate industry, which contended that the measures would lead to the deterioration of the condition of New York City's housing.").

12 Otterman & Haag, *supra* note 9.

13 *See* sources cited *supra* note 10 and accompanying text.

14 *See Regina*, 154 N.E.3d at 1001 (holding that Part F cannot be applied retroactively); *Harris*, 142 N.Y.S.3d at 499 (holding that Part I cannot be applied retroactively); *Cmty. Hous. Improvement Program*, 492 F. Supp. 3d at 54 (holding that plaintiffs could move forward on their as-applied regulatory takings claims); *101 E. 16th St. Realty LLC*, 2023 WL 3819100, at *3 (holding that Part K could not be applied to pending applications submitted prior to the HSTPA's passage).

15 *Regina*, 154 N.E.3d at 1003 ("In the retroactivity context, a rational justification is one commensurate with the degree of disruption to settled, substantial rights and, in this instance, that standard has not been met. Thus, the overcharge calculation and treble damages provisions in Part F may not be applied retroactively, and these appeals must be resolved under the law in effect at the time the overcharges occurred."); *Harris*, 142 N.Y.S.3d at 499 ("Like the amendment in *Regina*

York Court of Appeals held in *Regina Metropolitan Co. v. New York State Division of Housing and Community Renewal* that Part F, which established a new formula for calculating damages that landlords owe for overcharging tenants in rent-regulated units, could not be applied retroactively to pending or past cases.[16] In its decision, the Court of Appeals articulated a new and more restrictive test that the New York State Legislature must meet when seeking to apply laws retroactively.[17] The court required that the Legislature expressly state the temporal effects of each part of a statute, and that if it intends a part to be applied retroactively it must state so within the text of the law.[18] Additionally, the New York Legislature must provide a rational basis on par with the degree of retroactive effect[19] and state that it considered the potential for the retroactive application of that part of the law to have harsh impacts or effect "settled expectations," but that it chose to apply the law retroactively nonetheless.[20] Cases citing the *Regina* standard seeking to overturn other parts of the HSTPA soon followed.[21] One such case was *Harris v. Israel*, where the Appellate Division held that Part I, which limits an owner's ability to retake units for personal use to no more than one unit, could not be applied retroactively under the standard set by *Regina*

Metro, this amendment 'impair[s] rights owners possessed in the past, increasing their liability for past conduct and imposing new duties with respect to transactions already completed.' Therefore, a presumption against retroactivity applies." (alteration in original) (citation omitted) (quoting *Regina*, 154 N.E.3d at 991)).

16 *Regina*, 154 N.E.3d at 1003.

17 *Id.*

18 *Id.* at 993 (explaining that "claims pending" or "applicable to all leases" was not sufficient to satisfy the "requisite *textual assurance* that the Legislature considered the significant impact of reviving barred claims, upsetting the strong public policy favoring repose, and that it desired that result" (emphasis added)).

19 *Id.* at 1003 ("In the retroactivity context, a rational justification is one commensurate with the degree of disruption to settled, substantial rights and, in this instance, that standard has not been met.").

20 *Id.* at 1001.

21 Cmty. Hous. Improvement Program v. City of New York, 492 F. Supp. 3d 33 (E.D.N.Y. 2020), *aff'd*, 59 F.4th 540 (2d Cir. 2023); Harris v. Israel, 142 N.Y.S.3d 497, 499 (App. Div. 2021); 160 E. 84th St. Assocs. LLC v. N.Y. State Div. Hous. & Cmty. Renewal, 159 N.Y.S.3d 845, 846 (App. Div. 2022); Karpen v. Andrade, 166 N.Y.S.3d 822 (App. Term 2022) (unreported table decision); 335-7 LLC v. City of New York, 524 F. Supp. 3d 316 (S.D.N.Y. 2021); Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc. v. New York, No. 19-CV-11285, 2021 WL 4198332, at *20 (S.D.N.Y. Sept. 14, 2021); 300 Wadsworth LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 158207/2020, 2022 WL 135332, at *7 (N.Y. Sup. Ct. Jan. 14, 2022), *aff'd*, 178 N.Y.S.3d 487, 488–89 (App. Div. 2022); Richmond Hill 108 LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 728474/2021, slip op. at 5 (N.Y. Sup. Ct. Oct. 3, 2022); 101 E. 16th St. Realty LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 150504/2023, 2023 WL 3819100, at *3 (N.Y. Sup. Ct. June 5, 2023).

because the Legislature failed to indicate that it had "considered [the] harsh and destabilizing effect on [petitioner's] settled expectations."[22]

Challenges under the same theory have ensued to limit other parts of the HSTPA. This Note focuses on potential and ongoing claims invoking *Regina* against the retroactive application of Part K, which governs Major Capital Improvements (MCIs).[23] MCIs are building-wide enhancements or replacements that are considered "essential for the preservation, energy efficiency, functionality, or infrastructure of the entire building."[24] They are one of three ways in which landlords may increase regulated base rents during a lease term beyond what has been set by the Division of Housing and Community Renewal (DHCR) or Rent Guidelines Boards (RGB).[25] MCIs were created to incentivize landlords to keep rent-regulated residential buildings in good repair by allowing them to not only pass off the cost of those improvements to tenants but also to make a profit by adding an additional fee to the capped rents.[26] However, landlords have long abused these allowances by making unnecessary and expensive alterations that they can pass onto tenants, such as building luxury lobbies,[27] and sometimes by making

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22 *Harris*, 142 N.Y.S.3d at 499 (second alteration in original) (quoting *Regina*, 154 N.E.3d at 1001).

23 Housing Stability and Tenant Protection Act of 2019, ch 36, pt. K, 2019 N.Y. Laws 154, 171–85 (codified at N.Y. UNCONSOL. LAW §§ 8584, 8626, 8628, 8628-a, 8630-b, 26-405, 26-405.1, 26-511, 26-511.1, 26-517.1 (McKinney 2023)).

24 N.Y. UNCONSOL. LAW § 8588-a(1)(b) (McKinney 2023). Routine maintenance or repairs do not qualify as MCIs; both are instead intended to be covered by base rent. Vicki Been, Ingrid Gould Ellen & Sophia House, *Laboratories of Regulation: Understanding the Diversity of Rent Regulation Laws*, 46 FORDHAM URB. L.J. 1041, 1064 (2019) ("MCIs cover only new installations and complete replacements, not repairs of old equipment.").

25 *Fact Sheet #1: Rent Stabilization and Rent Control*, N.Y. STATE HOMES & CMTY. RENEWAL OFF. OF RENT ADMIN. 2–3 (2022), https://hcr.ny.gov/system/files/documents/2022/09/fact-sheet-01-09-2022.pdf [https://perma.cc/7QPZ-GHSH] (explaining that rent may be increased during a lease term with (1) "written consent of the tenant . . . if the owner increases services or equipment, or makes improvements to an apartment"; (2) DHCR approval of MCIs; and (3) DHCR approval due to hardship).

26 Been, Ellen & House, *supra* note 24, at 1063 ("[MCI] increases help incentivize property maintenance and needed repairs, but can allow housing to become less affordable."); *see* TIMOTHY L. COLLINS, AN INTRODUCTION TO THE NEW YORK CITY RENT GUIDELINES BOARD AND THE RENT STABILIZATION SYSTEM 75 (rev. ed. 2020), https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/01/intro2020.pdf [https://perma.cc/8433-SMNY] (explaining that "[i]n an attempt to maintain and improve the condition of rent regulated housing in New York, owners who undertake building-wide major capital improvements (MCI's) have historically been allowed increases in base rents over and above annual rent guidelines . . . to compensate them for such investments").

27 *See* Sydney Leasing, L.P. v. N.Y. Div. of Hous. & Cmty. Renewal, 128 N.Y.S.3d 536, 538 (App. Div. 2020) ("[I]t is the DHCR's long-standing policy that the renovation or modernization of a lobby is considered an ordinary repair, maintenance, and/or a cosmetic upgrade rather than a

improvements that allowed buildings to be removed from regulation altogether.[28] Even beneficial improvements have led to extreme rent increases that make apartments unaffordable.[29] The new MCI regulations under the HSTPA seek to resolve many of these issues.[30]

Under the old legal regime, MCI increases were permanent once added to rent, allowing landlords to not only recoup, but to profit significantly and indefinitely beyond the capped rent from low- and middle-income tenants.[31] In enacting the HSTPA, the New York State

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building-wide MCI."); Neil Demause, *How NYC Landlords Kill Affordable Housing by Simply Making Repairs*, VILLAGE VOICE (June 24, 2016), https://www.villagevoice.com/2016/06/24/how-nyc-landlords-kill-affordable-housing-by-simply-making-repairs [https://perma.cc/Z8BF-GVXK] (detailing a story from 2016 in which Rudin Management applied for a $60 million MCI for replacing white bricks with terra-cotta tile on the building's facade, resulting in a $220 increase per room).

28 SPONSOR MEMO, S. 242-3693, Reg. Sess. (N.Y. 2019) ("Tenants whose rents include MCIs often end up paying hundreds of dollars per room in addition to the legal regulated rent. While the rent laws are designed to protect tenants, this program has allowed for rent increases, which can lead to deregulation of the unit, and housing instability or homelessness for the tenant."); *see* Lebovits, Lansden & Howard, *supra* note 9, at 100 ("An additional tenant concern is that landlords use these increases to deregulate stabilized apartments and thus decrease the already scarce affordable housing stock.").

29 In one instance, tenants living at 215 E. 68th St. were notified of an MCI increase that led to an $800 a month increase to one couple's rent. Carl Campanile, *Couple Could Face Over $800 Rent Hike in Stabilized Apartment*, N.Y. POST (Feb. 24, 2019 10:47 PM), https://nypost.com/2019/02/24/couple-could-face-over-800-rent-hike-in-stabilized-apartment [https://perma.cc/6LKM-35S5]; *see* Demause, supra note 27; COLLINS, *supra* note 26, app. N1 at 5 (citing a tenant comment that stated that they are paying a monthly $180 MCI increase); Lebovits, Lansden & Howard, *supra* note 9, at 100 ("[T]enants argue . . . that the resulting building-wide rent increases have caused the very hardship and dislocation of tenants and families that rent regulation is intended to prevent."); David Barstow, Susanne Craig & Russ Buettner, *Trump Engaged in Suspect Tax Schemes as He Reaped Riches From His Father*, N.Y. TIMES (Oct. 2, 2018) https://www.nytimes.com/interactive/2018/10/02/us/politics/donald-trump-tax-schemes-fred-trump.html [https://perma.cc/KDN3-NZ3K] ("[T]he Trumps got approval to raise rents on thousands of apartments by claiming more than $30 million in major capital improvements.").

30 Housing Stability and Tenant Protection Act of 2019, ch 36, pt. K, 2019 N.Y. Laws 154, 171–85 (codified at N.Y. UNCONSOL. LAW §§ 8584, 8626, 8628, 8628-a, 8630-b, 26-405, 26-405.1, 26-511, 26-511.1, 26-517.1 (McKinney 2023)); *see also* Amy Plitt, *Legislators Seek to Outlaw NYC Rent Hikes to Major Apartment Improvements*, CURBED N.Y. (Feb. 26, 2019, 1:10 PM), https://ny.curbed.com/2019/2/26/18236584/new-york-rent-stabilization-major-capital-improvements-legislation [https://perma.cc/642K-D2XL] (quoting New York State Senator Michael Gianaris as stating that "[t]oo many tenants are priced out of their homes because of MCIs whose only improvement seems to be the landlord's bottom line," after introducing legislation to reform the MCI program that evolved into Part K of the HSTPA).

31 *Fact Sheet #24: Major Capital Improvements (MCI)*, N.Y. STATE HOMES & CMTY. RENEWAL OFF. OF RENT ADMIN. 1 (2019), https://hcr.ny.gov/system/files/documents/2020/11/fact-sheet-24-10-2019.pdf [https:// perma.cc/6AST-L8L5] (detailing changes to the MCI program, such as the expiration of increases after thirty years and a lowered monthly increase cap); *see also Strengthening New York State Rent Regulations*, N.Y. STATE HOMES & CMTY. RENEWAL 10, https://hcr.ny.gov/system/files/documents/2020/02/rent-regulation-hstpa-presentation.pdf

Legislature moved to mitigate the cost of unexpected rent increases that MCIs can create by lowering the monthly increases, limiting what qualifies as an MCI, and ending the increase after thirty years.[32] However, with MCI increases already attached to many New York apartments,[33] the retroactive application of Part K of the HSTPA is the only way to ease the burden of previous MCI fees already placed on these units.

Landlords have recently sought to overturn Part K's new tenant protections.[34] While these arguments have not yet succeeded at invalidating Part K, the barrage of claims have yet to let up and have some merit.[35] *Regina* itself claimed that many other parts of the HSTPA—Parts A through D and Parts G through O—would not fall to the same challenge as Part F because the plain text of the other parts of the statute was purely prospective and the temporal reach was clear.[36] But the timing provisions of Part K are anything but clear.[37]

Therefore, to overcome these very plausible challenges to the retrospective reach of the law, the Legislature must make their intent that the law be applied retroactively crystal clear.[38] Currently, the plain text of Part K is ambiguous as to when its provisions are to apply to past, pending, or prospective MCIs, and fails to comport with the heightened *Regina* standard.[39] If Part K is applied only prospectively, many buildings

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[https://perma.cc/RS54-JDV7] (explaining that before the HSTPA "[l]andlords were entitled to a permanent legal rent increase for" MCIs).

32 Housing Stability and Tenant Protection Act pt. K.

33 Demause, *supra* note 27 ("Major Capital Improvements[] will allow city landlords to reap [a] windfall estimated to be more than $270 million this year, according to state figures.").

34 *See* Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc. v. New York, No. 19-CV-11285, 2021 WL 4198332, at *20 n.25 (S.D.N.Y. Sept. 14, 2021); Cmty. Hous. Improvement Program v. City of New York, 492 F. Supp. 3d 33, 51 (E.D.N.Y. 2020), *aff'd*, 59 F.4th 540 (2d Cir. 2023); 300 Wadsworth LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 158207/2020, 2022 WL 135332, at *7 (N.Y. Sup. Ct. Jan. 14, 2022), *aff'd*, 178 N.Y.S.3d 487, 488–89 (App. Div. 2022); Richmond Hill 108 LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 728474/2021, slip op. at 5 (N.Y. Sup. Ct. Oct. 3, 2022); 101 E. 16th St. Realty LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 150504/2023, 2023 WL 3819100, at *3 (N.Y. Sup. Ct. June 5, 2023).

35 *See 101 E. 16th St. Realty LLC*, 2023 WL 3819100, at *3 (holding that applying Part K of the HSTPA to pending MCI applications is impermissibly retroactive); *see also Bldg. & Realty Inst. of Westchester & Putnam Cntys.*, 2021 WL 4198332, at *20 n.25; *Cmty. Hous. Improvement Program*, 492 F. Supp. 3d at 51; *300 Wadsworth LLC*, 2022 WL 135332, at *7; *Richmond Hill 108 LLC*, No. 728474/2021, slip op. at 5.

36 Regina Metro. Co., LLC v. N.Y. State Div. Hous. & Cmty. Renewal, 154 N.E.3d 972, 994 (N.Y. 2020) ("The legislation is almost entirely forward-looking—only Part F's effective date provision contains language referring to prior claims.").

37 *See infra* Part III; *see also 101 E. 16th St. Realty LLC*, 2023 WL 3819100, at *1 ("Pt. K. Section 18 was silent as to the application of the HSTPA's changes on pending determinations.").

38 Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994) ("If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.").

39 *See Regina*, 154 N.E.3d at 1003–04; *Richmond Hill 108 LLC*, No. 728474/2021, slip op. at 3.

will remain subject to the old legal regime, allowing increases to remain permanent,[40] and hindering the Legislature from correcting the problem of housing instability across New York.[41] To clarify the timing provisions of Part K of the HSPTA, and to comport with the requirements of retroactive lawmaking laid out in *Regina*, the New York Legislature should clearly define the retroactive reach of Part K, state its rational basis for applying it retroactively, and explain that it has considered the degree of the impact of the retroactive law on "settled expectations."[42] These steps would allow tenants to receive the full benefits of the law.

Part I of this Note will provide a background on rent regulation in New York, with a focus on New York City, and discuss intensified tenant protections brought about by the passage of the HSTPA. It will then provide an explanation of MCIs under prior law, and changes to MCIs under the HSTPA. Part I will finish with a discussion of the United States Supreme Court standard for the retroactive application of law and the new standard that the New York Court of Appeals laid out in *Regina*.[43] Part II will discuss the prospective and retroactive timing issues associated with the current MCI provisions of the HSTPA found in Part K and its vulnerability to litigation. It will analyze the intent of the New York Legislature and conclude that Part K must be applied retroactively to comply with the purpose of the law.[44] Part III will propose that the New York Legislature amend the MCI provisions of the law to clarify that its temporal reach should be retroactive when applied to past and pending MCIs to ensure that MCI increases are eventually phased out of base rents. Part III will also suggest how this may be done in a manner that comports with *Regina*.[45]

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40 *Strengthening New York State Rent Regulations*, *supra* note 31, at 10 (explaining that before the HSTPA "[l]andlords were entitled to permanent legal rent increase[s] for" MCIs).

41 SPONSOR MEMO, S. 242-6458, Reg. Sess. (N.Y. 2019) (stating that the justification for the HSTPA is that "[r]ent regulations were enacted in response to an ongoing housing shortage crisis . . . . Under tight rental markets, tenants struggle to secure safe, affordable housing, and landlords have little incentive to keep tenants in place long term by offering consistently low rent increases. Today, the City of New York and municipalities in Nassau, Westchester, and Rockland counties struggle to protect their regulated housing stock, which provides and maintains affordable housing for millions of low and middle income tenants. Rent regulations have been proven to protect tenants while allowing owners to invest in their buildings.").

42 *Regina*, 154 N.E.3d at 1001.

43 *See infra* Part I.

44 *See infra* Part II.

45 *See infra* Part III.

I. BACKGROUND

A. *Brief History of Rent Regulation in New York City*

New York's Office of Rent Administration states that the purpose of rent regulation is twofold: "to protect tenants in privately-owned buildings from illegal rent increases and to allow owners to maintain their buildings while realizing a reasonable profit."[46] Rent regulation covers both rent-controlled and rent-stabilized units in New York City and several other municipalities throughout New York State.[47]

Rent control applies to residential buildings built before 1947, and to tenants living in those units continuously since 1971[48] or lawful tenant successors.[49] These tenants have a right to renewal without re-signing a lease[50] and are entitled to regulated services. In New York City, rent-control rates are set by DHCR and minimally increased every two years.[51] In contrast, rent stabilization laws generally apply to buildings with six or more units built after 1947 but before 1974.[52] They also include many new

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46 *Fact Sheet # 1: Rent Stabilization and Rent Control*, *supra* note 25, at 1.

47 N.Y. UNCONSOL. LAW §§ 8601–8617 (McKinney 2023) (New York State rent control laws); *id.* §§ 26-401 to -417 (New York City rent control laws)); *id.* §§ 8621–8634 (Emergency Tenant Protection Act of 1974, creating rent stabilization laws across New York State); *id.* §§ 26-501 to -520 (New York City rent stabilization laws). Rent-stabilized units exist within New York City, Nassau, Westchester, Rockland, and Ulster counties, but the HSTPA has extended the ability to enact rent stabilization to all localities in New York. *Fact Sheet # 1: Rent Stabilization and Rent Control*, *supra* note 25, at 1. New York City, Nassau, and Westchester counties all contain rent-controlled buildings. *Rent Control: Overview*, N.Y. STATE HOMES & CMTY. RENEWAL, https://hcr.ny.gov/rent-control [https://perma.cc/7RDV-BTAV].

48 *Rent Control: Overview*, *supra* note 47; *see also Fact Sheet # 1: Rent Stabilization and Rent Control*, *supra* note 25, at 1.

49 *Fact Sheet # 30: Succession Rights*, N.Y. STATE HOMES & CMTY. RENEWAL OFF. OF RENT ADMIN. 1 (2019), https://hcr.ny.gov/system/files/documents/2020/11/fact-sheet-30-11-2019.pdf [https://perma.cc/T64X-SPW9] ("[A] 'family member' of the tenant may have the right to a rent stabilized renewal lease or protection from eviction in an apartment under rent control when the tenant dies or permanently leaves the apartment.").

50 *Rent Control: Overview*, *supra* note 47 ("Under rent control law, tenants are not obligated to sign renewal leases, as these tenancies are statutory.").

51 *Fact Sheet # 1: Rent Stabilization and Rent Control*, *supra* note 25, at 2–3; *see also Fact Sheet #22: Maximum Base Rent Program (MBR)*, N.Y. STATE HOMES & CMTY. RENEWAL OFF. OF RENT ADMIN. 1–2 (2019), https://hcr.ny.gov/system/files/documents/2020/10/fact-sheet-22-09-2019.pdf [https:// perma.cc/VQE4-9J62] (defining "essential services" as "heat during the part of the year when required by law, hot water, cold water, superintendent services, maintenance of front or entrance door security . . . , garbage collection, elevator service, gas, electricity and other utility services").

52 *Fact Sheet # 1: Rent Stabilization and Rent Control*, *supra* note 25, at 1 ("Rent stabilization generally covers buildings built after 1947 and before 1974, and apartments removed from rent

buildings that receive certain tax benefits.[53] Rent increases for stabilized units are set each year by local rent guidelines boards, methods of eviction are limited, essential services must be provided, and tenants generally are entitled to a one- or two-year lease renewal.[54] Key differences between rent-controlled and rent-stabilized units are the amount and methods by which rents can be increased, and whether a tenant has a right to permanent renewal or a right to renewal of a set term of years lease.[55]

Whether rent controlled or rent stabilized, rent-regulated units generally have lower rents than unregulated units, with rent-controlled units tending to be the cheapest overall.[56] They represent less than half of all units in New York City—as of 2021, only 0.7% of total rentals remain rent controlled, and 44% remain rent stabilized[57]—but regulated units are the State's best method of protection against housing instability[58] as market-rate rents skyrocket to levels most New Yorkers cannot afford.[59]

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control. It also covers buildings that receive J-51, 421-a and 421-g tax benefits."); N.Y. UNCONSOL LAW § 8625(a)(4)(a)–(b) (McKinney 2023) (explaining that buildings "containing fewer than six dwelling units" are exempt from control); *see also* Diane Ungar, Comment, *Emergency Tenant Protection in New York: Ten Years of Rent Stabilization*, 7 FORDHAM URB. L.J. 305, 308, 308 n.28 (1979).

53 *Fact Sheet # 1: Rent Stabilization and Rent Control*, *supra* note 25, at 1

54 *Id.*

55 *Id.*

56 The 2021 New York City Housing and Vacancy Survey found that the median monthly rent of rent-controlled apartments was about $858, $1,400 for rent-stabilized apartments, and $1,825 for unregulated units. 2021 NEW YORK CITY HOUSING AND VACANCY SURVEY SELECTED INITIAL FINDINGS, *supra* note 2, at 17.

57 In 2021, there remained 1,006,000 rent-stabilized apartments in New York City, and only 16,400 rent-controlled apartments. *Id.* at 8; *see also* Ilaria Parogni & Mihir Zaveri, *Understanding Rent Regulation in N.Y.C.*, N.Y. TIMES (June 22, 2023), https://www.nytimes.com/2022/06/22/nyregion/rent-regulation-new-york.html [https://perma.cc/SPQ8-BPPN].

58 N.Y. UNCONSOL. LAW § 8581(1) (McKinney 2023) ("The legislature hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons in the state of New York . . . that there continues to exist an acute shortage of dwellings; that unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare . . . .").

59 *See* 2021 NEW YORK CITY HOUSING AND VACANCY SURVEY SELECTED INITIAL FINDINGS, *supra* note 2, at 17; *State of the City 2022: State of Renters and Their Homes*, NYU FURMAN ,CTR., https://furmancenter.org/stateofthecity/view/state-of-renters-and-their-homes [https://perma.cc/NL6Y-UPUX] (finding that 54.1% of New York City households were rent burdened in 2021); *see also* Luis Ferré-Sadurní & Mihir Zaveri, *New York Officials Failed to Address the Housing Crisis. Now What?*, N.Y. TIMES (AprilApr. 27, 2023), https:// www.nytimes.com/2023/04/27/nyregion/nyc-housing-crisis.html [https://web.archive.org/web/20230804052000/https://www.nytimes.com/2023/04/27/nyregion/nyc-housing-crisis.html] (discussing New York's failure to address the ongoing housing crisis and noting the increase in cost of living for New Yorkers).

The New York Legislature passed its first major rent control legislation, the 1946 Emergency Housing Rent Control Law,[60] in response to a severe housing shortage that followed World War II.[61] In 1950, that law was used to pause rent increases in the State and create a commission on rent regulation, eventually leading to the establishment of a state-run rent regulation system.[62] As the housing crisis in New York City continued to worsen, the City passed the Rent Stabilization Law of 1969 (RSL), creating rent-stabilized units for the first time.[63] In 1974, New York State passed the Emergency Tenant Protection Act (ETPA), which created a statewide rent stabilization program, and amended the Rent Control Law and the RSL.[64]

Many of the laws that followed benefitted landlords more than tenants.[65] The regulations increased what landlords could charge tenants

60 Emergency Housing Rent Control Law, ch. 274, 1946 N.Y. Laws 723 (codified as amended at UNCONSOL. §§ 8581–8597).

61 COLLINS, *supra* note 26, at 22, 24 ("In 1942, under the Emergency Price Control Act, the federal government established a price regulation system nationwide in response to the prospect of wartime shortages and inflation. . . . In 1946 the State of New York enacted 'stand by' legislation to preserve rent controls in the event that federal controls expired."); *see also* 335-7 LLC v. City of New York, 524 F. Supp. 3d 316, 320–21 (S.D.N.Y. 2021) ("During World War II, as labor was diverted to the war effort and the housing supply decreased, the federal government froze rents. . . . New York City . . . continued to experience a significant housing shortage. The State Legislature responded by passing the Emergency Housing Rent Control Law in 1946 . . . ." (citing Regina Metro. Co., LLC v. N.Y. State Div. Hous. & Cmty. Renewal, 154 N.E.3d 972, 1009–10 (N.Y. 2020) (Wilson, J., dissenting))).

62 COLLINS, *supra* note 26, at 24 ("In 1950 this legislation was activated with a rent freeze and the establishment of a commission to review rent regulation. In 1951, . . . the State adopted a system of rent regulation similar to the federal system . . . .").

63 Rent Stabilization Law of 1969, Local L. No. 16, 1969 N.Y. Local Laws 176 (codified as amended at N.Y.C., N.Y., ADMIN. CODE §§ 26-501 to -520 (2023)) (explaining that landlords not regulated by the RCL "were demanding exorbitant and unconscionable rent increases as a result of the aforesaid emergency, which led to a continuing restriction of available housing . . . and that such conditions constitute[ed] a grave emergency"); Ungar, *supra* note 52 , at 308 ("On May 6, 1969, in light of what had become a housing emergency in New York City, the Lindsay administration signed the Rent Stabilization Act of 1969 (RSL) into law.").

64 COLLINS, *supra* note 26, at 29 ("In 1974 the Legislature enacted the Emergency Tenant Protection Act of 1974 (ETPA) . . . the objective of which was to prevent excessive rent increases in the decontrolled sector of the rental housing market . . . .").

65 *See* Rent Regulation Reform Act of 1993, ch. 253, 1993 N.Y. Laws 2667 (codified as amended in scattered sections of N.Y. GEN. BUS LAW (McKinney 2023), N.Y. REAL PROP. TAX LAW (McKinney 2023), N.Y. TAX LAW (McKinney 2023), N.Y. UNCONSOL. LAW (McKinney 2023)) (allowing vacancy and luxury deregulation, increasing monthly payments for Individual Apartment Improvements (IAIs), and limiting damages available for tenants); Rent Regulation Reform Act of 1997, ch. 116, 1997 N.Y. Laws 1814 (codified as amended in scattered sections of N.Y. C.P.L.R. (McKinney 2023), N.Y. GEN. BUS LAW (McKinney 2023), N.Y PENAL LAW (McKinney 2023), N.Y. PUB HOUS. LAW (McKinney 2023), N.Y. REAL PROP. LAW (McKinney 2023), N.Y. REAL PROP. ACTS. LAW (McKinney 2023), N.Y. REAL PROP. TAX LAW (McKinney

and allowed for over a hundred thousand apartments to be deregulated.[66] The tides began to turn with the passage of The Rent Act of 2011, which limited how much landlords could increase rent due to vacancy and apartment alterations, and made it harder to deregulate apartments.[67] The Rent Act of 2015 again raised the bar for deregulation and further limited increases that could be added to rent for MCIs and Individual Apartment Improvements.[68] The most recent rent regulation law is the HSTPA, which passed in 2019.[69]

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

The HSTPA ushered in major changes for rent regulation and landlord-tenant relationships across New York State, and particularly in New York City. First, the HSTPA banned tenant blacklists[70] and significantly changed procedures for evictions to make them more tenant friendly.[71] These important changes apply to market-rate units as well as regulated ones.[72]

Most of the statute focuses on regulated units, though. One of the key changes is that it makes the rent regulation system permanent

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2023), N.Y. TAX LAW (McKinney 2023), N.Y. UNCONSOL. LAW (McKinney 2023)) (making it easier to deregulate units, eliminating certain family members from succession rights, and making it harder to file overcharge claims); The Rent Law of 2003, ch. 82, 2003 N.Y. Laws 2605 (codified as amended in scattered sections of N.Y. GEN. BUS LAW (McKinney 2023), N.Y. UNCONSOL. LAW (McKinney 2023)) (limiting the City's ability to pass rent-regulation laws, making it easier to deregulate units, and increasing stabilized units' base rents).

66 *See* sources cited *supra* note 65; N.Y.C. RENT GUIDELINES BD., CHANGES TO RENT STABILIZED HOUSING STOCK IN NYC IN 2018 16 (2019), https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2019-Changes.pdf [https://perma.cc/RCK2-X5KD] (finding that 298,426 units were deregulated between 1994 and 2018, with the net loss being 142,969 units); Lebovits, Lansden & Howard, *supra* note 9;9, at 95 (stating that luxury deregulation had "led to the loss of an estimated 170,000 rent-regulated apartments"); *see also* Josh Barbanel, *As Rents Rise, So Does Deregulation*, N.Y. TIMES (Nov. 16, 2003), https://www.nytimes.com/2003/11/16/realestate/as-rents-rise-so-does-deregulation.html [https://web.archive.org/web/20220801230532/https://www.nytimes.com/2003/11/16/realestate/as-rents-rise-so-does-deregulation.html].

67 COLLINS, *supra* note 26, at 36–37.

68 *Id.* at 37.

69 *Id.* at 13, 38.

70 Housing Stability and Tenant Protection Act of 2019, ch 36, pt. M, § 5, 2019 N.Y. Laws 154, 189–90 (codified at N.Y. REAL PROP. LAW § 227-f (McKinney 2023)); *see* Lebovits, Lansden & Howard, *supra* note 9, at 111.

71 Housing Stability and Tenant Protection Act, pt. M, §§ 6–24 (codified at scattered sections of N.Y. REAL PROP. LAW (McKinney 2023), N.Y. REAL PROP. ACTS. LAW (McKinney 2023)); *see* Lebovits, Lansden & Howard, *supra* note 9, at 108–19.

72 Lebovits, Lansden & Howard, *supra* note 9, at 107 (explaining that the HSTPA's sweeping changes expand to unregulated units).

throughout New York State.[73] Prior to the passage of the HSTPA, rent regulation laws needed to be renewed upon the evaluation that the vacancy rate was at or below five percent every four to eight years.[74] But the HSTPA makes rent regulation laws permanent so that they no longer require periodic renewal.[75] The renewal requirement often made rent regulation a political bargaining tool and meant that authorization to renew frequently took place at the last possible second.[76] Another related structural change is that local governments throughout the State are now empowered to enact their own rent regulation laws.[77]

The HSTPA also changes when and how regulated units can be deregulated or taken off the market. Now, rent-stabilized units can no longer be deregulated when rent is increased or occupants' income reaches a certain threshold,[78] and provisions that allowed landlords to increase rent by twenty percent if the apartment became vacant were repealed.[79] Relatedly, under prior law, owners could recapture regulated apartments for their own use or for immediate family, known as "[t]he 'owner-use' loophole."[80] The HSTPA now caps an owner's ability to

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73 Housing Stability and Tenant Protection Act, pt. A, § 2 ("The provisions of this act, and all regulations, orders and requirements thereunder shall remain in full force and effect thereafter."); *see also* SPONSOR MEMO, S. 242-6458, Reg. Sess. (N.Y. 2019) (summarizing Part A as "mak[ing] permanent the system of rent regulation in New York State").

74 Lebovits, Lansden & Howard, *supra* note 9, at 77 (explaining that under the old rent regulation laws "[r]ent regulation expired every 4 to 8 years to allow a State legislature to determine whether a housing emergency (vacancy 5% or less) continued to exist").

75 *Id.* at 77–81.

76 COLLINS, *supra* note 26, at 33 (detailing a pattern of last-minute extensions of rent-regulation laws, including four extensions of the Rent Regulation Reform Act of 1993 that "includ[ed] one in which Governor Cuomo entered the Senate chamber at 11:57 PM to sign a three-day extension before the midnight deadline").

77 Housing Stability and Tenant Protection Act, pt. A; *see also* SPONSOR MEMO, S. 242-6458 ("Municipalities struggling with the same housing pressures deserve to have the same access to rent regulations that New York City residents have had for decades. This would allow local governments the opportunity to protect their housing stock as well, so residents can afford to live there without the threat of eviction, the fear of rapid and unaffordable rent increases, or rent burden.").

78 Housing Stability and Tenant Protection Act, pt. D (repealing luxury deregulation from Emergency Housing Rent Control Law, Emergency Tenant Protection Act of 1974, and N.Y.C., N.Y., ADMIN. CODE §§ 26-403(k)(2)(e), 26-504.1 to -504.3); *see also* Lebovits, Lansden & Howard, *supra* note 9, at 95 ("In 1993, the rent laws were amended to include high-rent and high-income deregulation (luxury deregulation) provisions, permitting apartments with rents above a certain threshold ($2,774.76 under the prior law) to be removed from rent stabilization when they become vacant or the tenants' annual income rose by a certain amount ($200,000 under the prior law). . . . The new law abolishes luxury deregulation . . . .").

79 Housing Stability and Tenant Protection Act, pts. B, C (stating that rent guidelines boards are now prohibited from allowing longevity and vacancy increases). In the past, landlords could increase rent by 20% if the apartment became vacant, and an additional 0.6% a year once it had been vacant for eight years. Lebovits, Lansden & Howard, *supra* note 9, at 95.

80 Otterman & Haag, *supra* note 9.

reclaim regulated units to one unit, and the landlord must have an "immediate and compelling necessity."[81]

Finally, the HSTPA makes changes to how landlords can manipulate regulated rents. For example, the HSTPA eliminates the ability of a landlord of a regulated building to initially charge a lower rent than the legal base rent to entice tenants (known as preferential rents) and then increase to the legal amount when that lease expires.[82] Now, while the tenant remains in the unit, the preferential rent set in the lease remains the base rent by which all increases are calculated.[83] However, a landlord may increase to the higher allowed rent once the tenant vacates.[84] The HSTPA also limits the recovery available and lowers the monthly increases for MCIs,[85] which are the focus of this Note.

C. *Major Capital Improvements Before the HSTPA and Now*

MCIs allow owners to increase rent for all tenants when owners spend money on improvements that benefit the entire building; examples include a replacement boiler, new windows, or plumbing.[86] MCI increases must be approved by DHCR.[87] Applications for MCIs are generally filed after the work has begun or been completed as receipts are a vital part of the application process, and they must be filed within two years of completing the installation.[88] DHCR may grant a requested increase in whole, allowing a landlord to recoup the entire cost of the MCI from tenants or recoup the cost in part, or DHCR may deny the request.[89]

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81 N.Y. UNCONSOL. LAW § 26-408(b)(1) (McKinney 2023) (allowing eviction when "[t]he landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his or her own personal use and occupancy as his or her primary residence or for the use and occupancy of his or her immediate family as their primary residence provided, however, that this subdivision shall permit recovery of only one housing accommodation").

82 *Id.* §§ 8630(a-2), 26-511(c)(14); *see also* Lebovits, Lansden & Howard, *supra* note 9, at 98 ("HSTPA now makes preferential rents permanent while tenants remain in their apartment. All rent increases for lease renewals must be based on the preferential rent.").

83 *See* Lebovits, Lansden & Howard, *supra* note 9, at 98.

84 *Id.*

85 Housing Stability and Tenant Protection Act of 2019, ch 36, pt. K, 2019 N.Y. Laws 154, 171–85 (codified at N.Y. UNCONSOL. LAW §§ 8584, 8626, 8628, 8628-a, 8630-b, 26-405, 26-405.1, 26-511, 26-511.1, 26-517.1 (McKinney 2023)); *see* Lebovits, Lansden & Howard, *supra* note 9, at 111.

86 *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.4(a)(2)(d) (2023) (listing out the "Useful Life Schedule For Major Capital Improvements").

87 *See Fact Sheet #24: Major Capital Improvements (MCI)*, *supra* note 31, at 1; COLLINS, *supra* note 26, at 75.

88 *Fact Sheet #24: Major Capital Improvements (MCI)*, *supra* note 31, at 1–2.

89 *Id.* at 3 ("When processing is complete, DHCR will issue an order either granting a rent increase for the total amount requested, a partial amount, or denying the request.").

If the increase is approved, the cost is then spread out across the tenants.[90] To calculate how the increase is distributed, the approved cost is divided by the amortization period, which is the period during which the monthly payment can slowly be increased to the maximum allowable amount.[91] That number is then divided by the number of rooms in the building.[92] The increase that each tenant pays is calculated by multiplying this final number by the number of rooms in a tenant's apartment.[93]

Put another way, when a landlord makes necessary improvements to a rent-regulated building, they can then pass the cost of those improvements off onto tenants.[94] But not only do the tenants pay for whatever improvements DHCR has allowed on top of the rent they already pay[95]: the landlord also then makes a profit off the tenants from these increases.[96] Once the cost of the MCI has been paid off over the amortization period, tenants are still required to continue to pay the increased rent.[97]

Prior to the enactment of the HSTPA, MCI increases were permanent once they were added to the base rent of a unit.[98] The amortization period was eight to nine years, depending on the number of units in the building.[99] Increases were capped at six percent of a tenant's yearly rent in New York City, and fifteen percent in the rest of the State.[100] The law also had a retroactive provision. When a landlord filed for an MCI, monthly increases immediately started to accrue.[101] Once the

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90 *Id.* at 7–8.

91 *Id.* at 1, 7

92 *Id.* at 7.

93 *Id.*

94 COLLINS, *supra* note 26, at 75 ("The concept of rewarding owners by increasing their internal rate of return has always been controversial, since the increase is basically financed by the tenants who occupy the building and do not have a significant role in approving the improvements.").

95 *Id.*

96 *Id.*; *see also* Richmond Hill 108 LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 728474/2021, slip op. at 6 (N.Y. Sup. Ct. Oct. 3, 2022) (explaining that subject to the HSTPA, the landlord would be able to collect $424,091.40 from tenants after being approved for $188,096.95 in MCI investment).

97 *Fact Sheet #24: Major Capital Improvements (MCI)*, *supra* note 31, at 1.

98 *Strengthening New York State Rent Regulations*, *supra* note 31, at 10; *see also* COLLINS, *supra* note 26, at 75.

99 N.Y. UNCONSOL. LAW § 8584(4)(a) (McKinney 2023).

100 Rent Act of 2015, ch 20, pt. A, § 29, 2015 N.Y. Laws 34, 48–49 (repealed 2019) ("The collection of any increase in the stabilized rent for any apartment . . . shall not exceed six percent . . . ."); Lebovits, Lansden & Howard, *supra* note 9, at 99 ("Annual rent increases were capped at 6% in New York City and 15% in the rest of the state.").

101 Iver Peterson, *The Need for Improving New York's M.C.I. Program*, N.Y. TIMES, July 16, 1989 (§ 10), at 1, https://www.nytimes.com/1989/07/16/realestate/the-need-for-improving-new-york-s-mci-program.html [https://perma.cc/DC8T-KYYD] ("There is also a temporary surcharge to make up for loss of the increase during the M.C.I. application period.").

application was approved, tenants were required to pay all of the accrued costs at once.[102] This meant that tenants were often surprised by large sums they suddenly owed in backpay.[103]

Under the HSTPA, MCI increases now expire after thirty years[104] and are capped at two percent statewide.[105] The amortization period has been lengthened to twelve or twelve and a half years, which lowers the monthly increase.[106] MCI increases can also no longer be applied to buildings with thirty-five percent or fewer regulated units.[107] Buildings that have ongoing hazardous violations on file will not be approved for MCIs,[108] and what qualifies as an MCI has been narrowed and limited to a reasonable cost schedule established by DHCR, as well as a schedule concerning how soon those items can be replaced and still qualify.[109] Additionally, when an owner applies for an MCI increase, all tenants are notified by DHCR and have sixty days under the HSTPA to respond.[110] Finally, the retroactive accruement provision has been entirely eliminated.[111] The increase only applies going forward once tenants have

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102 *Id.* ("The [MCI approval] process often takes two or three years and results in sharp temporary retroactive increases for tenants, to make up for the rent forgone in the application period. . . . [T]he retroactive increases can raise a rent bill 20 percent or more for a few years."); *see also* Richmond Hill 108 LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 728474/2021, slip op. at 2 (N.Y. Sup. Ct. Oct. 3, 2022) ("[The] 'retroactive' component, . . . would authorize the building owner to collect an additional temporary increase in the rent of each rent-stabilized apartment at the building by an amount equal to the amount of the monthly increase times the number of months which elapsed from the date the MCI Application was filed until the commencement date of the permanent increase . . . .").

103 Campanile, *supra* note 29 (noting that "tenants could be on the hook for retroactive payments dating back to April 2016 . . . , meaning [one particular family] would have to pony up $28,000").

104 *Fact Sheet #24: Major Capital Improvements (MCI)*, *supra* note 31, at 1.

105 N.Y. UNCONSOL. LAW § 8588-a(1)(h) (McKinney 2023).

106 *Id.* § 8584(4)(a).

107 *Id.* § 8588-a(1)(f); *see* Lebovits, Lansden & Howard, *supra* note 9, at 100 (explaining that DHCR is now restricted from approving MCIs "in buildings with 35% or fewer rent regulated tenants").

108 *Fact Sheet #24: Major Capital Improvements (MCI)*, *supra* note 31, at 4.

109 *Id.* at 4–5 (explaining the reasonable cost requirement and referencing the "Useful Life Schedule"); *see Operational Bulletin 2021-1: Reasonable Cost Schedule*, N.Y. STATE DIV. OF HOUS. & CMTY. RENEWAL OFF. OF RENT ADMIN. 4–8 (2021), https://hcr.ny.gov/system/files/documents/2021/01/operational-bulletin-2021-1-01-2021.pdf [https://perma.cc/V8DY-RQQL]; *Fact Sheet #33: Useful Life Schedule for Major Capital Improvements*, N.Y. STATE HOMES & CMTY. RENEWAL OFF. OF RENT ADMIN. 1 (2019), https://hcr.ny.gov/system/files/documents/2020/11/fact-sheet-33-09-2019.pdf [https://perma.cc/A95P-F8VQ].

110 *Fact Sheet #24: Major Capital Improvements (MCI)*, *supra* note 31, at 1, 4–5.

111 UNCONSOL. § 8588-a(1)(h).

received notice from DHCR that the increase has been granted, as opposed to immediately upon filing an application.[112]

Tenants' rights advocates and politicians argue that the MCI program created a sort of "moral hazard" problem, where guaranteed profits motivated landlords to delay basic maintenance at the risk of their buildings falling into disrepair so that the building would eventually require larger improvements that qualified for MCI increases.[113] The guarantee of a permanent rent increase incentivized greater risk-taking by landlords since they knew the cost of their choices to devalue the building would be covered by the tenants.[114] By limiting the profit available from MCIs and intensifying regulation of the program, the hope is that landlords will take less risks that cost tenants more, and that oversight will limit the rampant fraud associated with the program.[115]

In court filings, owners argue that these new provisions amount to a regulatory taking, interfering with "investment backed expectations" and making it impossible to fully recoup because of the extended repayment timeline that limits an owner's profits.[116] Owners also argue that these

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112 *Fact Sheet #24: Major Capital Improvements (MCI)*, *supra* note 31, at 4 ("MCI increases are effective and collectible on the first day of the first month following 60 days from the mailing date of the order.").

113 COLLINS, *supra* note 26, at 75 ("Representatives of tenant interests argue that the potential for MCI increases encourages owners to delay maintenance activity, for which no incentive is provided, in order to qualify for the MCI program and its investment incentives."); Demause, *supra* note 27 ("One common tactic is to actively neglect a building, then appeal to the state for mercy on the grounds that only a rent hike can pay for needed repairs.").

114 COLLINS, *supra* note 26, at 75; Demause, *supra* note 27 (noting that the MCI program incentivized the common practice of "allowing landlords to let their buildings fall into disrepair in order to exploit [this] loophole in rent laws").

115 *See* SPONSOR MEMO, S. 242-3693, Reg. Sess. (N.Y. 2019) ("[T]he current program has been rife with fraud and abuse. It has become clear that only a complete elimination of the program and rent rollback will suffice to protect the needs of tenants."); *see also* Demause, *supra* note 27 ("Tenant groups and housing experts alike say that lax oversight from the [DHCR], which is charged with monitoring these programs, has made it a never-ending battle to track overcharges.").

116 74 Pinehurst LLC v. New York, 59 F.4th 557, 562 (2d Cir. 2023) ("Pinehurst alleged that the amendments effected, facially and as applied, physical and regulatory takings in violation of the Takings Clause of the Fifth Amendment, and that they violated the Fourteenth Amendment's Due Process Clause."); Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc. v. New York, No. 19-CV-11285, 2021 WL 4198332, at *24 (S.D.N.Y. Sept. 14, 2021) ("Plaintiffs claim that the HSTPA interferes with the investment-backed expectations by changing the reimbursement rate and recoupment period for MCIs and IAIs."); *see also* Cmty. Hous. Improvement Program v. City of New York, 492 F. Supp. 3d 33, 39 (E.D.N.Y. 2020), *aff'd*, 59 F.4th 540 (2d Cir. 2023) (plaintiffs argued that they did not "expect the repeal of luxury decontrol or vacancy, longevity, and preferential-rate increases, or the reduction of recoverable IAIs and MCIs" (citations omitted)); 335-7 LLC v. City of New York, 524 F. Supp. 3d 316, 324 (S.D.N.Y. 2021) ("[Plaintiff] alleges that it invested $370,000 on major capital improvements for its rent-stabilized units in reliance on the prior provisions of the RSL, but estimates that it will only recover $291,000 in rent adjustments under the RSL.").

provisions violate the Contract Clause and their due process rights.[117] These substantive issues are beyond the scope of this Note, but a premise of these challenges is that the MCI provisions overall can only be applied prospectively, not to MCI increases or applications made prior to the statute's enactment.[118] However, were these provisions to be applied purely prospectively, MCI increases that took place prior to the passing of the HSTPA would remain permanent and capped at a higher percentage during the amortization period. Keeping the old regime in place for the many units subject to the prior laws would frustrate the intent of the Legislature and continue to impose expensive increases on low- and middle-income tenants that New York lawmakers could never remove.

D. *Retroactive Law and the Supreme Court*

The crux of the issue discussed in this Note is whether a New York court would find that Part K of the HSTPA should be applied retroactively, and, if not, the proper way to amend the law to ensure its retroactive application. The United States Supreme Court's precedent creates a presumption against retroactive federal lawmaking, drawn from the principle that individuals should have fair warning to comply with the law.[119] When a statute's temporal reach is ambiguous, this presumption that the statute should be applied only prospectively arises.[120] However,

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117 *Bldg. & Realty Inst. of Westchester & Putnam Cntys.*, 2021 WL 4198332, at *32 ("Plaintiffs allege that the HSTPA has impaired existing contractual relationships based on other provisions aside from preferential rents, which include limits on MCIs and IAIs that were already under contract . . . ."); *id.* at *27 n.34 ("Plaintiffs challenge various aspects of the HSTPA as violating due process. BRI Plaintiffs challenge the changes in MCIs and IAIs recoupment . . . ."); 101 E. 16th St. Realty LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 150504/2023, 2023 WL 3819100, at *1 (N.Y. Sup. Ct. June 5, 2023) ("Owners argued that DHCR's retroactive implementation of the new provisions violated their right to due process.").

118 *See Bldg. & Realty Inst. of Westchester & Putnam Cntys.*, 2021 WL 4198332, at *20 n.25 ("Plaintiffs further argue that *Regina Metro* and *Harris* should extentextend to the HSTPA's ParkPart K regarding MCIs."); *id.* at *27 n.34 (explaining plaintiff challenges to the "retroactive application" of Part K); 300 Wadsworth LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 158207/2020, 2022 WL 135332, at *55, 7 (N.Y. Sup. Ct. Jan. 14, 2022), *aff'd*, 178 N.Y.S.3d 487, 488–89 (App. Div. 2022) (stating that *Regina* does not support "landlord's argument that the DHCR's retroactive application of HSTPA, ParkPart K . . . would somehow violate its right to due process"); Richmond Hill 108 LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 728474/2021, slip op. at 3 (N.Y. Sup. Ct. Oct. 3, 2022) ("Petitioner concludes that DHCR improperly construed the MCI provisions of HSTPA as retroactive."); *101 E. 16th St. Realty LLC*, 2023 WL 3819100, at *3 ("DHCR's 'immediate' implementation of the HSTPA's MCI provisions were retroactive . . . .").

119 Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994).

120 *Id.* at 273; Fernandez-Vargas v. Gonzalez, 548 U.S. 30, 31 (2006); *see* Regina Metro. Co., LLC v. N.Y. State Div. Hous. & Cmty. Renewal, 154 N.E.3d 972, 994 (N.Y. 2020).

retroactive legislation is not per se unconstitutional.[121] In fact, the Supreme Court has long acknowledged that there are important reasons for allowing laws to be applied retroactively, such as to expedite elimination "of a remedial scheme,"[122] to prevent "indefinitely continuing violation[s],"[123] to allow for the implementation of regulations for the common good, such as taxes,[124] or to simply give full effect to the purpose of legislation.[125] Further, the Supreme Court has held that deference should be given to legislative judgment when the legislature has provided "clear congressional intent authorizing retroactivity."[126]

So as a matter of federal law, when there is clear legislative intent that a statute is to be applied retroactively, "unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give [that law] its intended scope."[127] The Supreme Court has even stated that the restrictions to applying civil legislation retroactively are "modest" and less stringent than for criminal laws.[128] The Court has held that unambiguous intent of the temporal reach of a statute suffices to show that the legislature considered fairness issues and the potential impacts of the retroactive law.[129] But, where the legislature has not provided "clear evidence of congressional intent that [the law] should apply to cases

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121 *Landgraf*, 511 U.S. at 273.

122 *Id.* at 259.

123 *Fernandez-Vargas*, 548 U.S. at 44.

124 *Landgraf*, 511 U.S. at 259, 267–68; DANIEL E. TROY, RETROACTIVE LEGISLATION 6, 33–35 (1998) ("The first type of retroactive law . . . consists of laws that are, on the face of the statute, 'effective' even before the date of their enactment. Such laws . . . most often come up in the tax context." (footnote omitted)).

125 *Landgraf*, 511 U.S. at 267–68 ("Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary.").

126 *Id.* at 272.

127 *Id.* at 267; *see also* Bank Markazi v. Peterson, 578 U.S. 212, 229 (2016) ("[W]hen a new law makes clear that it is retroactive, the arguable 'unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give [that law] its intended scope.' So yes, we have affirmed, Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases." (second alteration in original) (citation omitted) (quoting *Landgraf*, 511 U.S. at 267)).

128 *Landgraf*, 511 U.S. at 272 (stating that although the default is to apply laws prospectively, "the *constitutional* impediments to retroactive civil legislation are now modest").

129 *Id.* at 272–73 ("Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate.").

arising before its enactment,"[130] retroactive lawmaking can trigger Due Process, Contract, and Takings Clause challenges.[131]

When determining whether these clauses, which are the constitutional provisions most often called into question when a civil law is said to be retroactive,[132] have been violated, the question becomes "whether the new [legislation] . . . would impair rights a party possessed when [they] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[133] Answering these questions requires that courts employ a test laid out by the Supreme Court to determine whether the law constitutes retroactive lawmaking[134] and to what degree.[135]

If the legislature has expressly stated that a law is to apply retroactively, then the presumption against retroactive application does not apply.[136] The first step is to determine "whether [the legislature] has expressly prescribed the statute's proper reach."[137] This requires an inquiry into whether the temporal application of a statute is expressly stated by the legislature and whether the legislature has made clear that the law is to be applied retroactively. The next step is then to ensure that the law "meet[s] the test of due process" by determining whether the legislation has "a legitimate legislative purpose furthered by rational

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130 *Id.* at 286.

131 *Id.* at 266 (stating that "the antiretroactivity principle finds expression in several provisions of the Constitution" including the Contract Clause, "[t]he Fifth Amendment's Takings Clause," and "[t]he Due Process Clause"); *see, e.g.*, General Motors Corp. v. Romein, 503 U.S. 181, 183 (1992) ("Petitioners challenge . . . the statute mandating these retroactive payments on the ground that it violates the Contract Clause and the Due Process Clause . . . .").

132 *See Landgraf*, 511 U.S. at 271 ("The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights . . . ."); *see also* Eastern Enters. v. Apfel, 524 U.S. 498, 533 (1998) ("Our Constitution expresses concern with retroactive laws through several of its provisions, including the . . . Takings Clauses.").

133 *Landgraf*, 511 U.S. at 280 ("When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."); *see also* Fernandez-Vargas v. Gonzalez, 548 U.S. 30, 37–38 (2006).

134 Regina Metro. Co., LLC v. N.Y. State Div. Hous. & Cmty. Renewal, 154 N.E.3d 972, 991 (N.Y. 2020) (applying *Landgraf*'s "retroactivity criteria").

135 *See Landgraf*, 511 U.S. at 270 ("The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.").

136 *Fernandez-Vargas*, 548 U.S. at 40 ("It is not until a statute is shown to have no firm provision about temporal reach but to produce a retroactive effect when straightforwardly applied that the presumption has its work to do.").

137 *Landgraf*, 511 U.S. at 280; *Fernandez-Vargas*, 548 U.S. at 37.

means."[138] The Supreme Court has held that a challenger asserting a due process claim under the Fifth and Fourteenth Amendments must establish that the legislature lacked a reasonable legislative purpose in enacting the law.[139] When it comes to retrospective laws, the legislature must show that it had a reasonable purpose for the retroactive application of the law.[140] A rational purpose for the prospective application alone will not satisfy this requirement.[141]

If the plain text of the statute is not clear, then the court must look to the intent of the law and whether its purpose requires a retroactive effect.[142] To assess the intent of the law, courts are to look at legislative history, the broad language of the entire statute and the statutory scheme, canons of statutory construction, and the degree to which the retroactive provision of the statute disrupts settled expectations and impairs rights and past transactions.[143] The goal of this second step is to discover whether the statute requires retroactive effect to uphold the purpose of the law.[144] If a court finds clear legislative intent to apply legislation retroactively, then the presumption against retroactive application is rebutted.[145] However, if there is no such clear legislative intent, then the court asks whether applying the new law retroactively would impair past rights, increase liability for prior conduct, or disrupt settled expectations of past transactions.[146] If the court finds it would, then the statute is found

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138 General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) (quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984)).

139 *Id.*

140 *R.A. Gray & Co.*, 467 U.S. at 730 (stating that a retrospective law meets the test of due process "simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose").

141 Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16–17 (1976) ("It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.").

142 *Landgraf*, 511 U.S. at 272–73, 280 ("When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. . . . When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect . . . . If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.").

143 *Id.* at 270.

144 *Id.* at 272 (reiterating that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result" (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988))).

145 *Id.* at 280 ("If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.").

146 *Id.*

to have retroactive effect without clear intent from the legislature and the presumption against such effect kicks in.[147]

E. *The New Standard for Retroactive Law in New York*

New York's standard for retroactive law was recently intensified in one of the many legal challenges to the HSTPA, *Regina*.[148] *Regina* was a follow-up case to *Roberts v. Tushman Speyer Properties, L.P.*, which was decided in 2009, prior to the enactment of the HSTPA.[149] In *Roberts*, the Court of Appeals determined that several buildings had been improperly deregulated.[150] As a result of the mistaken deregulations, many tenants had been incorrectly overcharged for rent beyond what the RSL at the time allowed.[151] *Regina* was a follow-up case to determine the proper method to calculate the overcharges that could be recovered by tenants after *Roberts*.[152]

By the time *Regina* was decided, the HSTPA had become law. Prior to its enactment, the base rent for calculating overcharges was determined by looking at the rent from four years prior to the date of the overcharge filing, known as the "lookback period."[153] Courts would then add the allowable increases under the RSL to that base rent and compare that amount to what the tenant had actually been charged.[154] This meant that landlords only needed to maintain records for four years.[155] Part F of the HSTPA changed this formula.[156] It extended the lookback period to six years and eliminated the statute of limitations for when an overcharge

147 *Id.*

148 Regina Metro. Co., LLC v. N.Y. State Div. Hous. & Cmty. Renewal, 154 N.E.3d 972, 995, 1003–04 (N.Y. 2020).

149 *See generally* Roberts v. Tishman Speyer Props., L.P., 918 N.E.2d 900 (N.Y. 2009).

150 *Id.* at 906.

151 *Regina*, 154 N.E.3d at 977 ("[T]he Division of Housing and Community Renewal (DHCR) took the position that statutory language precluding luxury deregulation of apartments during receipt of J–51 benefits did not apply to buildings that were already subject to the RSL prior to receipt of those benefits. In *Roberts*, this Court rejected DHCR's long-standing statutory interpretation and concluded that luxury deregulation was unavailable in any building during receipt of J–51 benefits." (footnote omitted) (citing *Roberts*, 918 N.E.2d at 903, 905–07)).

152 *Id.* at 978 ("The central issue below in each of these cases . . . was how to calculate the 'legal regulated rent' in order to determine whether a recoverable overcharge occurred and its amount.").

153 *Id.* at 976.

154 *Id.*

155 *Id.* at 979 ("Together, the statute of limitations, lookback provision and record retention rules formed an integrated scheme for calculating overcharges based on a closed universe of records pertaining only to the apartment's rental history in the four years preceding the filing of the complaint.").

156 *Id.* at 987 ("Part F extended the four-year limitations period for overcharge claims to six years . . . .").

complaint could be filed, requiring that landlords keep records for six instead of four years.[157] The question before the Court of Appeals was which overcharge formula was to be applied, and whether the application of the new HSTPA formula would amount to an unconstitutional application of retroactive law under Due Process, Takings, or Contract Clause considerations.[158]

The Court of Appeals found that applying Part F retroactively would be unconstitutional as it increased liability and penalties for past transactions and conduct.[159] The court determined that the Legislature had failed to show it had properly considered this effect.[160] The court also stated that extending the statute of limitations revived time-barred claims, which would require a clear statement of intent within the statute. The Legislature failed to provide the required statement of intent, therefore the provision was found to be invalid.[161] The court ultimately held that the retroactive effect of Part F would violate due process because the Legislature had not provided a rational basis for the retroactive application commensurate with the degree of the retroactive effect.[162] Therefore, the Court of Appeals concluded that Part F of the HSTPA could not be applied retroactively to tenant overpayment claims that did not involve accusations of fraud against the landlord[163] because the retroactive effect would "impair[] rights owners possessed in the past,

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157 *Id.*

158 *Id.* at 976 (considering "whether the presumption against retroactive application of statutes has been rebutted and, if so, whether application of certain amendments relating to overcharge calculation in Part F to these appeals involving conduct that occurred years prior to its enactment comports with fundamental notions of substantial justice embodied in the Due Process Clause").

159 *Id.* at 989 ("[I]f applied to past conduct, the amendments to the statute of limitations, overcharge calculation and damages provisions in Part F of the HSTPA would impose new liability and thus have a 'retroactive effect'–altering substantive rights in multiple ways.").

160 *Id.* at 1001 ("[T]here is no indication here that the Legislature considered the harsh and destabilizing effect on owners' settled expectations, much less had a rational justification for that result.").

161 *Id.* at 992 ("If retroactive application would not only impose new liability on past conduct but also revive claims that were time-barred at the time of the new legislation, we require an even clearer expression of legislative intent than that needed to effect other retroactive statutes—the statute's text must unequivocally convey the aim of reviving claims.").

162 *Id.* at 1003 ("In the retroactivity context, a rational justification is one commensurate with the degree of disruption to settled, substantial rights and, in this instance, that standard has not been met."); *id.* at 976 ("Because such application of these amendments to past conduct would not comport with our retroactivity jurisprudence or the requirements of due process, we resolve these claims pursuant to the law in effect when the purported overcharges occurred.").

163 *Id.* at 985 ("We therefore decline to create a new exception to the lookback rule and instead clarify that, under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in *Roberts* overcharge cases, absent fraud.").

increas[e] their liability for past conduct and impos[e] new duties with respect to transactions already completed."[164]

In its reasoning, the *Regina* court laid out a stricter test for retroactivity than had previously been applied in New York or by the United States Supreme Court.[165] Although the *Regina* court found that Part F's language stating that it "shall apply to any claims pending" was "sufficiently clear," it still invalidated Part F's retroactive application.[166] This was despite noting that the Supreme Court in *Landgraf* had indicated that language referencing "pending" cases was "sufficient . . . to reflect a retroactive intent," triggering deference to the legislature.[167]

Instead, the Court of Appeals held that a legislature must not only clearly state its intent for a law to apply retroactively, but must also explain that it considered the effects of the law and still concluded that it should be applied retroactively.[168] Further, the court required that the legislature establish a rational basis for the retroactive effect related to the degree of unsettled expectations.[169] This requirement placed the burden to uphold the law against constitutional challenges on the legislature, and in so doing created a heightened standard of review beyond rational basis.[170] Accordingly, the legislature must now provide "a 'persuasive

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164 *Id.* at 991 ("Retroactive application of the overcharge calculation provisions in Part F implicates all three *Landgraf* retroactivity criteria . . . .by impairing rights owners possessed in the past, increasing their liability for past conduct and imposing new duties with respect to transactions already completed." (citing Landgraf v. USI Film Prods., 511 U.S. 244, 245 (1994))).

165 *Id.* at 1003 ("In the retroactivity context, a rational justification is one commensurate with the degree of disruption to settled, substantial rights and, in this instance, that standard has not been met. Thus, the overcharge calculation and treble damages provisions in Part F may not be applied retroactively, and these appeals must be resolved under the law in effect at the time the overcharges occurred."); *id.* at 1003–04 ("[T]he rational basis test . . . must be *meaningfully applied* . . . ." (emphasis added)); *id.* at 1021 (Wilson, J., dissenting) ("A party challenging a statute as violative of due process bears the burden 'to establish that the legislature has acted in an arbitrary and irrational way.' Here, not only does the majority strike down Part F, section 7 of the HSTPA in the face of . . . clear precedent, but it does so without requiring the parties challenging the HSTPA's constitutionality to prove anything." (citation omitted) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976))).

166 *Id.* at 988, 993; *see* Housing Stability and Tenant Protection Act of 2019, ch 36, pt. F, § 7 2019 N.Y. Laws 154, 165.

167 *Regina*, 154 N.E.3d at 993 (citing Landgraf, 511 U.S. at 259–260).

168 *Id.* at 1001 ("While prospective application of Part F to overcharges occurring after the effective date may serve legitimate and laudable policy goals, no explanation has been offered, much less a rational one, for *retroactive* application of the amendments to increase or create liability for rent overcharges that occurred . . . in the past.").

169 *Id.* at 1003 ("In the retroactivity context, a rational justification is one commensurate with the degree of disruption to settled, substantial rights and, in this instance, that standard has not been met.").

170 *See id.* at 1000–01 ("[T]here are limits on retroactive imposition of liability even when it is related to a rational statutory goal."). Additionally, the majority argued that it was merely applying

reason' for the 'potentially harsh' impacts of retroactivity."[171] This means that New York legislatures must preemptively include its rational basis in the statute it intends to apply retroactively, rather than the challenger having to show that "the legislature . . . acted in an arbitrary and irrational way," as the Supreme Court requires.[172]

Since *Regina* was decided, landlords have used this heightened standard to bolster their arguments that other parts of the HSTPA do not apply retroactively.[173] Already, the retroactive application of Part F and Part I of the HSTPA has been invalidated.[174] Many claimants in subsequent cases have argued that Part K, which discusses MCI increases and is the focus of this Note, fails the heightened standard and cannot be applied retroactively.[175] The next Part analyzes the strength of these arguments.

II. ANALYSIS: APPLYING THE *REGINA* TEST TO PART K

After *Regina*, the plain text of a statute itself must meet the heightened test to be applied retroactively. Part K's provisions risk purely

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"the rational basis test," as it and the United States Supreme Court had done many times before. However, the Court of Appeals inserted a new phrase to the application of the rational basis test, stating that it "must be meaningfully applied." *Id.* at 1003–04. In so doing, it further heightened the standard of review required to apply civil law retroactively in New York.

171 *Id.* at 995 (quoting Holly S. Clarendon Tr. v. State Tax Comm'n, 374 N.E.2d 1242, 1242 (N.Y. 1978)).

172 Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) ("It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."); *see also Regina*, 154 N.E.3d at 1012 (Wilson, J., dissenting) ("A party seeking to invalidate a statute on substantive due process grounds bears the burden to prove that the legislature acted without a rational basis.").

173 *See* Richmond Hill 108 LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 728474/2021, slip op. at 3 (N.Y. Sup. Ct. Oct. 3, 2022) ("Petitioner argues that DHCR's retroactive application of the MCI Provisions of HSTPA violated state and federal constitutional due process . . . ."); *see also* Harris v. Israel, 142 N.Y.S.3d 497, 499 (App. Div. 2021); Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc. v. New York, No. 19-CV-11285, 2021 WL 4198332, at *20 n.25 (S.D.N.Y. Sept. 14, 2021); Cmty. Hous. Improvement Program v. City of New York, 492 F. Supp. 3d 33, 51 (E.D.N.Y. 2020), *aff'd*, 59 F.4th 549 (2d Cir. 2023); 300 Wadsworth LLC v. New York State Div. Hous. & Cmty. Renewal, No. 158207/2020, 2022 WL 135332, at *7 (N.Y. Sup. Ct. Jan. 14, 2022), *aff'd*, 178 N.Y.S.3d 487, 488–89 (App. Div. 2022); 101 E. 16th St. Realty LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 150504/2023, 2023 WL 3819100, at *3 (N.Y. Sup. Ct. June 5, 2023).

174 *See Regina*, 154 N.E.3d at 1001; *Harris*, 142 N.Y.S.3d at 499.

175 *Richmond Hill 108 LLC*, slip No. 728474/2021, slip op. at 3; *Bldg. & Realty Inst. of Westchester & Putnam Cntys*, 2021 WL 4198332, at *20 n.25; *Cmty. Hous. Improvement Program*, 492 F. Supp. 3d at 51; 300 Wadsworth LLC, 2022 WL 135332, at *5; *101 E. 16th St. Realty LLC*, 2023 WL 3819100, at *3.

prospective application because the two percent cap, the removal of retroactive payments, the extended amortization period, the reasonable cost schedule, the thirty-year sunset, and the discontinuation of the program in buildings with thirty-five percent and fewer regulated units do not meet the standard.[176]

Many cases brought by landlords attempting to take a hatchet to the HSTPA have included claims against Part K.[177] Landlords argue that, like the overpay formula at issue in *Regina*, applying the new MCI provisions retroactively would increase their liability for past transactions—that is, money already spent on MCIs—and interfere with their settled expectations by expanding the repayment timeline, narrowing what qualifies for MCI increases, and limiting the profits they may reap from those increases.[178] These claims have rarely succeeded in litigation because claims arising out of MCIs have mostly been brushed aside by judges as being purely prospective, with the exception of a recent decision by the New York Supreme Court in which the court held that Part K could not be applied to petitioners' pending applications.[179] However, even after the *Regina* court stated that the remainder of the HSTPA was unlikely to fall to challenges similar to that of Part F because the remainder of the

176 Housing Stability and Tenant Protection Act of 2019, ch 36, pt. K, 2019 N.Y. Laws 154, 171–85 (codified at N.Y. UNCONSOL. LAW §§ 8584, 8626, 8628, 8628-a, 8630-b, 26-405, 26-405.1, 26-511, 26-511.1, 26-517.1 (McKinney 2023)).

177 *Bldg. & Realty Inst. of Westchester & Putnam Cntys.*, 2021 WL 4198332, at *10 ("Property Management alleges it is unable to recoup building and apartment renovations because of changes to IAIs and MCIs."); *Cmty. Hous. Improvement Program*, 492 F. Supp. 3d at 43, 51; *Richmond Hill 108 LLC*, slip op. at 5; *101 E. 16th St. Realty LLC*, 2023 WL 3819100, at *2–3.

178 *See Richmond Hill 108 LLC*, slip op. at 3; *Bldg. & Realty Inst. Of Westchester & Putnam Cntys.*, 2021 WL 4198332, at *20, *24 ("Plaintiffs claim that the HSTPA interferes with the investment-backed expectations by changing the reimbursement rate and recoupment period for MCIs . . . ."); *Cmty. Hous. Improvement Program*, 492 F. Supp. 3d at 43, 51; 74 Pinehurst LLC v. New York, 59 F.4th 557, 562, 567–68 (2d Cir. 2023) ("Pinehurst has leveled facial physical and regulatory taking challenges to the RSL. . . . [W]e hold that the investment-backed expectations factor fails to support the as-applied regulatory takings challenge.").

179 *See Bldg. & Realty Inst. of Westchester & Putnam Cntys.*, 2021 WL 4198332, at *20 n.25 ("The MCI changes in the HSTPA make it so that 'increases shall be collectible prospectively' and thus result in not impermissibly retroactive legislation." (quoting N.Y.C., N.Y., ADMIN. CODE § 26-511.1(8))). On June 5, 2023, the New York Supreme Court agreed with landlords' arguments and held that because petitioners "made [MCIs] to their buildings and completed and submitted all of the necessary paperwork before the HSTPA went into effect," DHCR could not apply the HSTPA's MCI provisions to the pending application of the petitioners. *101 E. 16th St. Realty LLC*, 2023 WL 3819100, at *3. However, the court failed to consider the Legislature's intent regarding Part K's timing, as both *Regina* and the United States Supreme Court require, thus disregarding retroactivity jurisprudence that allows for legislative intent to rebut the presumption against retroactive laws. *See id.*

Act was "entirely forward-looking,"[180] the Appellate Division held that Part I, which limits a landlord's ability to retake apartments for personal use, was unconstitutional when applied retroactively under *Regina*.[181] Much litigation around the HSTPA now seeks to water down other parts of the Act, as landlords are emboldened by their success with Part I and Part F.[182]

To date, Part K likely does not comport with the *Regina* standard.[183] Its timing provisions are textually ambiguous at best. Only one provision expressly states a pre-enactment application date;[184] the rest provide no clarification as to how each will apply to pending and past claims.[185] And in such a case of ambiguous temporal reach the courts must look for clear legislative intent.[186] In New York that intent must satisfy *Regina*.[187] This means that Part K is at risk of being applied purely prospectively.

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180 Regina Metro. Co., LLC v. N.Y. State Div. Hous. & Cmty. Renewal, 154 N.E.3d 972, 994 (N.Y. 2020) ("The legislation is almost entirely forward-looking—only Part F's effective date provision contains language referring to prior claims.").

181 Harris v. Israel, 142 N.Y.S.3d 497, 499 (App. Div. 2021) ("The pre-*Regina Metro* cases notwithstanding, the determination of the Court of Appeals that an owner's increased liability and the disruption of relied-upon repose are impairments to his or her substantive rights precludes any retroactive application of HSTPA Part I to this proceeding . . . .").

182 *See Bldg. & Realty Inst. of Westchester & Putnam Cntys.*, 2021 WL 4198332, at *20; *Cmty. Hous. Improvement Program*, 492 F. Supp. 3d at 43, 51; *101 E. 16th St. Realty LLC*, 2023 WL 3819100, at *3; *Richmond Hill 108 LLC*, slip op. at 5.

183 *See supra* Section I.E (describing the standard).

184 N.Y. UNCONSOL. LAW § 8588-a(1)(h) (McKinney 2023).

185 *See, e.g., id.* § 8588-a(1)(a); *id.* § 8584(4)(a). Housing Stability and Tenant Protection Act of 2019, ch 36, pt. K, 2019 N.Y. Laws 154, 171–85 (codified at N.Y. UNCONSOL. LAW §§ 8584, 8626, 8628, 8628-a, 8630-b, 26-405, 26-405.1, 26-511, 26-511.1, 26-517.1 (McKinney 2023)).

186 Landgraf v. USI Film Prods., 511 U.S. 244, 286 (1994) (determining that the temporal specifications of the text of § 102 of the Civil Rights Act of 1991 were ambiguous, and holding that because there was "no clear evidence of congressional intent" to "apply [§ 102] to cases arising before its enactment" that it must only be applied prospectively).

187 Regina Metro. Co., LLC v. N.Y. State Div. Hous. & Cmty. Renewal, 154 N.E.3d 972, 1001 (N.Y. 2020). Another piece of scholarship also identifies the ambiguities of Part K that make it vulnerable to challenges against its retroactive application. *See* Arjana Balaj, Note, *Retroactive Application and Its Setbacks to Addressing Housing Concerns in New York City: An Analysis of the* Regina Metro *Holding and Its Implications to Part K MCI Changes Pursuant to the HSTPA*, 42 PACE L. REV. 462, 482–84 (2022). However, Balaj argues that the Court of Appeals should apply a form of *Chevron* deference to legislation involving housing in New York City going forward. Chevron U.S.A.., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency . . . . In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. . . . [C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretation."). (footnote omitted)) The standard articulated by Balaj ignores the reasoning behind applying such deference to an administrative agency, such as agency expertise, and argues for a standard that is likely

The *Regina* court began its analysis not by looking for whether the Legislature spoke clearly about the temporal reach of the law, which is where the Supreme Court has stated the inquiry begins,[188] but at whether the law "impact[s] substantive rights"[189] by disrupting settled expectations or increasing liability for past conduct or transactions, and therefore has a retroactive effect.[190] In finding that it did, the Court of Appeals then asked whether the Legislature clearly intended such effect,[191] first by looking at the plain text of the law and then by looking at legislative history, canons of statutory interpretation, and the entire statutory scheme.[192] But the *Regina* court did not stop at finding the clear temporal reach of the law. Instead, it asserted that rebutting the presumption against retroactivity required language stating a rational basis for the retroactive effect commensurate with the degree of impact on settled expectations, and a finding that the Legislature considered the potentially harsh effect and still concluded that the law must be applied retroactively.[193]

There are several provisions in Part K that would likely fail the *Regina* test. The first provision is the two percent cap on MCI increases.[194]

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unworkable. In contrast, this Note argues that the Legislature must amend the law to comport with the *Regina* standard rather than fight against it.

188 *Landgraf*, 511 U.S. at 280 ("[A] court's first task is to determine whether Congress has expressly prescribed the statute's proper reach."); Fernandez-Vargas v. Gonzalez, 548 U.S. 30, 37 (2006) (explaining that to determine whether a statute's retroactive application "affect[s] a vested right or . . . impose[s] some [impermissible] burden," the Court "first look[s] to 'whether Congress has expressly prescribed the statute's proper reach,' and in the absence of . . . [express] language . . . tr[ies] to draw a comparably firm conclusion about the temporal reach specifically intended by applying its 'normal rules of construction.'" (citations omitted) (first quoting *Landgraf*, 511 U.S. at 280; and then quoting Lindh v. Murphy, 521 U.S. 320, 326 (1997))).

189 *Regina*, 154 N.E.3d at 991 ("Because the overcharge calculation provisions, if applied to past conduct, would impact substantive rights and have retroactive effect, the presumption against retroactivity is triggered.").

190 *Id.* at 989.

191 The Court of Appeals required indicators that "the Legislature considered the harsh and destabilizing effect on owners' settled expectations." *Id.* at 1001.

192 After finding that the retroactive effect of Part F would impact substantive rights, the court then looked to whether the presumption against retroactivity was rebutted by "a clear expression of the legislative purpose" for the law to have retroactive effect. *Id.* at 992 (quoting Gleason v. Gleason, 256 N.E.2d 513, 516 (N.Y. 1970)). The court also stated that the question that followed their first step was "whether the Legislature has expressed a sufficiently clear intent to apply the overcharge calculation amendments retroactively to these pending appeals." *Id.*

193 *Id.* at 992 ("[T]he expression of intent must be sufficient to show that the Legislature contemplated the retroactive impact on substantive rights and intended that extraordinary result."); *id.* at 1001 (stating that because the Legislature provided "no indication" or "explanation" in Part F that it had "considered the harsh and destabilizing effect on owners' settled expectations," Part F could only be applied prospectively).

194 N.Y. UNCONSOL. LAW § 8588-a(1)(h) (McKinney 2023); *Fact Sheet #24: Major Capital Improvements (MCI)*, *supra* note 31, at 1.

The provision states that the cap applies to MCIs that were "approved on or after June 16, 2012, and before June 16, 2019," as well as prospectively.[195]

The first point of inquiry under *Regina* is whether applying this provision would impact substantive rights and is therefore retroactive, triggering the presumption against retroactivity.[196] The *Regina* court found that disrupting an owner's expectation of earning a reasonable profit or upsetting reliance would violate a substantive right.[197] Applying the two percent cap to already-approved MCIs, pending applications, or applications yet to be filed could impact the anticipated profits of landlords because it would result in a lower monthly increase.[198] Under *Regina*, a New York court could find that upsetting such expectations would impact an owner's substantive rights and increase their liability for past transactions, triggering the presumption that the law is to be applied prospectively.[199]

This takes us to the next step under *Regina*, determining whether the Legislature has spoken clearly about the provision's temporal reach.[200] The plain text shows that the Legislature intended it to apply retroactively given that the effective date reaches back seven years prior to the law's enactment.[201] However, the statute fails to state clear legislative findings that would provide a rational basis for the retroactive effect, and it does not include any language expressly stating that the Legislature considered the harsh impact of unsettling an owner's expectations of their recoupment timeline and profit.[202] Legislative history, canons of statutory interpretation, and the entire statutory scheme may also be inspected for

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195 UNCONSOL. § 8588-a(1)(h).

196 *Regina*, 154 N.E.3d at 991.

197 *Id.* (stating that "[t]he Constitution merely mandates that a landlord earn a reasonable return" (quoting I.L.F.Y. Co. v. City Rent Rehabilitation Admin, 184 N.E.2d 575, 581 (N.Y. 1962))). The court also argued that the undermining of "considerable reliance interests" disrupted "substantive rights" and had a "retroactive effect." *Id.*

198 *See* Lebovits, Lansden & Howard, *supra* note 9, at 101 ("Landlords also cry foul that the retroactive element of the 2% cap unjustly penalizes landlords who relied on then-existing law."); Richmond Hill 108 LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 728474/2021, slip op. at 3 (N.Y. Sup. Ct. Oct. 3, 2022) ("Petitioner argues that DHCR's retroactive application of the MCI Provisions of HSTPA violated state and federal constitutional due process rights by imposing undue financial burden on petitioner and its property because (1) at the time it performed capital improvements and filed its MCI application, it had a reasonable expectation that application would be processed based upon the law in effect at the time; and (2) it had no way of knowing that the laws governing MCI application would change so that petitioner could decide whether to perform improvements and seek MCI increases.").

199 Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994).

200 *Regina*, 154 N.E.3d at 992.

201 N.Y. UNCONSOL. LAW § 8588-a(1)(h) (McKinney 2023).

202 *See Regina*, 154 N.E.3d at 992, 1001.

this requisite language.[203] The Senate Sponsor Memo for the HSTPA makes clear that it intended to lower the cap for MCIs previously approved to reduce the overall increases tenants must pay.[204] However, the legislative history fails to provide a stated rational basis for the retroactive application of this provision, and it also lacks a statement that the Legislature considered the potentially harsh effects of upsetting settled expectations. Therefore, the two percent cap provision does not satisfy the heightened *Regina* standard.[205]

Relatedly, the HSTPA eliminated the additional retroactive increase that started to accrue when the MCI application was filed, which was then added on top of the monthly increase.[206] MCI increases may now only begin once tenants receive notice that the owner's application has been approved, and tenants do not have to pay for the time the application is pending.[207] Owners argue that this change removes additional profit that they expected to earn under the old laws and increases their liability for transactions made for MCIs because they must now wait even longer to begin to be repaid for the costs.[208] While *Regina* stated that procedural changes (which these would seem to be) do not violate due process, the court determined that the application of Part F was not merely procedural because it expanded liability for past actions.[209] The application of this

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203 *Id.* at 978 ("We therefore examine the text of the relevant statutes, as the best indicator of legislative intent, mindful that legislative history may also be considered as an aid to interpretation." (citations omitted) (first citing Majewski v. Broadalbin-Perth Cent. Sch. Dist, 696 N.E.2d 978, 980 (N.Y. 1998); and then citing Altman v. 285 W. Fourth LLC, 99 N.E.3d 858, 861 (N.Y. 2018)). While the court stated that there is "certainly no requirement that particular words be used—and, in some instances[,] retroactive intent can be discerned from the nature of the legislation," the majority's analysis focused on the text of the law. *Id.* at 992. The court stated in a footnote that, "[t]he amendment adding the lookback rule was only one in this 'extensive[]' suite of amendments, and the breadth of the total legislative package has no bearing on the clarifying nature of that sole amendment." *Id.* at 999 n.26 (second alteration in original) (citation omitted) (quoting SPONSOR MEMO, S. 220-5553, Reg. Sess. (N.Y. 1997)).

204 SPONSOR MEMO, S. 242-6458, Reg. Sess. (N.Y. 2019) (summarizing the goals of the two percent cap provision as "[a]djust[ing] the annual cap for MCI rent increases approved within the prior seven years for continuing tenant" and "[r]educ[ing] rent increases paid by tenants").

205 *See supra* Section I.E (explaining the *Regina* heightened standard).

206 Housing Stability and Tenant Protection Act of 2019, ch 36, pt. K, § 7(h), 2019 N.Y. Laws 154, 179 (codified as amended at N.Y. UNCONSOL. LAW § 8588-a(1)(h) (McKinney 2023)) (instructing DHCR to "establish that temporary major capital improvement increases shall be collectible prospectively sixty days from the date of mailing notice of approval to the tenant").

207 *Id.*

208 Richmond Hill 108 LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 728474/2021, slip op. at 2 (N.Y. Sup. Ct. Oct. 3, 2022).

209 Regina Metro. Co., LLC v. N.Y. State Div. Hous. & Cmty. Renewal, 154 N.E.3d 972, 990 (N.Y. 2020) ("This amendment is not merely . . . a procedural change . . . ; it expands the scope of owner liability significantly based on conduct that was inoculated by the old law.").

provision of Part K to pending applications and past transactions could be found to impact substantive rights, as Part F was found to do.[210]

The plain text also does not give any indication of whether the change applies to pending and forthcoming applications, and simply instructs DHCR to implement this change.[211] Further, there is no language in the text showing that the Legislature considered the potential impact of the retroactive effect.[212]

The next questionable provision is the extended amortization period.[213] Landlords with pending applications or who began MCI increases under the prior law argue that the amended law applied to them has a retroactive effect since an extended amortization period would lower monthly rent increases.[214] This could be found to upset recoupment and profit expectations, and, therefore, impair substantive rights. The text of Part K states that the new amortization period only applies to MCIs approved after the effective date. However, the text provides no indication for what is to happen to pending applications and increases that haven't been fully recouped.[215] Further, the requisite language is nowhere to be found within the text or legislative history dealing with the amortization provision,[216] leaving the temporal reach ambiguous and unable to overcome the presumption against retroactive effect.

Other provisions of Part K that have been subject to retroactive application challenges are the reasonable cost schedule[217] and the updated definition of MCI under the HSTPA.[218] While there is no vested right in

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210 *Id.*

211 Housing Stability and Tenant Protection Act, pt. K, § 7(h).

212 *See id.*

213 N.Y. UNCONSOL. LAW. § 8584(4)(a) (McKinney 2023); *Fact Sheet #24: Major Capital Improvements (MCI)*, *supra* note 31, at 1.

214 Richmond Hill 108 LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 728474/2021, slip op. at 3, 5 (N.Y. Sup. Ct. Oct. 3, 2022); Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc. v. New York, No. 19-CV-11285, 2021 WL 4198332, at *24 (rejecting Plaintiffs argument that the "increase[e in the] minimum amortization period for MCIs" "made their properties entirely unprofitable" by lowering the value of their property).

215 *See* UNCONSOL. § 8584(4)(a).

216 UNCONSOL. § 8626; SPONSOR MEMO, S. 242-6458, Reg. Sess. (N.Y. 2019) (stating that the goal of the lengthened amortization period is to reduce rent increases but failing to examine the impact on landlords' settled expectations).

217 *Id.* § 8588-a(1)(a) (directing DHCR to "establish a schedule of reasonable costs for major capital improvements, which shall set a ceiling for what can be recovered through a temporary major capital improvement increase, based on the type of improvement and its rate of depreciation"); *see also Richmond Hill 108 LLC*, No. 728474/2021, slip op. at 2–3.

218 The definition of what will be approved for MCI increases has been tightened under the HSTPA. Housing Stability and Tenant Protection Act, pt. K, § 7 ("[A] temporary major capital improvement increase including the type of improvement, which shall be essential for the preservation, energy efficiency, functionality or infrastructure of the entire building, including

a statutory scheme remaining the same, especially in one as highly regulated as rent regulation,[219] the court in *Regina* still found that the due process rights of the owners subject to the new formula had been violated.[220] Therefore, in line with *Regina*, a court could find that a change in what defines an approvable MCI upsets settled expectations of owners who have already spent money on and begun improvements that no longer qualify for increases.[221]

The next step would then be to look for clear intent from the Legislature to apply the cost schedule to pending applications and owners whose transactions were completed under the old laws. The plain text does not expressly state that the law is to apply to "claims pending," as in Part F,[222] and does not provide a date in the past for approved MCIs.[223] However, MCIs take years to approve, and owners can apply within two years of completing an MCI,[224] meaning that transactions and construction could take place long before approval. Given this element of the MCI program, and the intent of the Legislature to narrow the

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heating, windows, plumbing and roofing, but shall not be for operational costs or unnecessary cosmetic improvements."). Previously, a major capital improvement was defined as "a major capital improvement required for the operation, preservation or maintenance of the structure." Rent Act of 2015, ch. 20, pt. A, § 30, 2015 N.Y. Laws 34, 49 (repealed 2019).

219 Regina Metro. Co., LLC v. N.Y. State Div. Hous. & Cmty. Renewal, 154 N.E.3d 972, 991 (N.Y. 2020) ("[N]o party doing business in a regulated environment like the New York City rental market can expect the RSL to remain static . . . .").

220 *Id.* at 976, 1004 ("While it may be unusual . . . to decline to apply a statute retroactively on due process grounds, it is also unusual for parties to ask the Court to apply retroactively legislation that alters substantive rights in the way that Part F does.").

221 *See generally Operational Bulletin 2021-1: Reasonable Cost Schedule*, *supra* note 109, at 4–8 (listing the updated Reasonable Cost Schedule for "improvements or installations that may qualify as an MCI"). In *Richmond Hill 108 LLC*, the owner was not able to recoup for a new trash compactor since it was removed from the MCI Reasonable Cost Schedule while the owner's application was pending. In denying recoupment for the trash compactor, the court emphasized that the owner was able to apply increases for everything *but* the trash compacter. The court stated that Richmond's profit, even without including the trash compactor, was still quite significant, recouping $424,091.40 from a claim of $188,096.95. It is likely that the case would have come out differently if more transactions the owner had made prior no longer qualified, if they had not made a profit, or they had not been able to fully recoup. Despite cases saying again and again that there is no right to these profits, the *Regina* court calls that into question. *Richmond Hill 108 LLC*, No. 728474/2021, slip op. at 5–6; *see also* 101 E. 16th St. Realty LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 150504/2023, 2023 WL 3819100, at *3 (N.Y. Sup. Ct. June 5, 2023) ("While petitioners may not have a right to any particular iteration of the MCI program in perpetuity, in this instance DHCR's 'immediate' implementation of the HSTPA's MCI provisions were retroactive, as they 'impair rights [petitioners] possessed when [they] acted, increase [petitioner's] liability for past conduct, or impose[] new duties with respect to transactions already completed.'" (first three alterations in original) (quoting *Regina*, 154 N.E.3d at 987)).

222 Housing Stability and Tenant Protection Act, pt. F, § 7.

223 *See* Housing Stability and Tenant Protection Act, pt. K, § 7.

224 *Fact Sheet #24: Major Capital Improvements (MCI)*, *supra* note 31, at 2.

definition of qualifying MCIs to essential needs,[225] a court could reasonably find that the purpose of the law supports applying the HSTPA to pending applications and prior transactions.

Further, the statutory scheme of the HSTPA and the original MCI bill, Senate Bill 3693, indicate an intended retroactive effect for Part K. Broadly, the HSTPA was enacted as a drastic measure to deal with the ongoing housing crisis that required immediate attention.[226] Delaying its application, as a purely prospective effect would do, would only prolong the crisis. Specifically, the Legislature in the Sponsor Memo for Senate Bill 3693, which eventually merged into Part K of the HSTPA, stated that the MCI program is "rife with fraud and abuse."[227] *Regina* explained that a legitimate legislative goal for retroactive legislation could include closing loopholes from those "seeking to escape [a law's] impact before enactment," and to correct a societal wrong.[228] The law is designed to do just that: correct a fraudulent program that harms the welfare of New York residents.[229] However, because the law and legislative history fail to provide a statement of their rational purpose and considerations of the retroactive effect, the law is likely to only be applied prospectively.

Next, one of biggest changes to the MCI program is that MCI increases are now temporary and are to be removed from the rent thirty years after the increase becomes effective.[230] The removal of increases

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225 SPONSOR MEMO, S. 242-6458, Reg. Sess. (N.Y. 2019) (summarizing Part K's goals, including "[l]imit[ing] approvals to [only] work for essential building functions and other improvements (e.g., heat, plumbing, windows, roofing)[,] exclud[ing] maintenance," and "[l]imit[ing] spending to [the] HCR schedule of reasonable costs for improvements").

226 *Id.* ("Rent regulations were enacted in response to an ongoing housing shortage crisis, as evidenced by an extremely low vacancy rate.").

227 SPONSOR MEMO, S. 242-3693, Reg. Sess. (N.Y. 2019); *see also* Chau Lam, *How NYC Landlords Continue to Use a Rent Law Loophole to Spike Regulated Rents*, GOTHAMIST (Aug. 22, 2022), https://gothamist.com/news/how-nyc-landlords-continue-to-use-a-rent-law-loophole-to-spike-regulated-rents [https://perma.cc/3XSL-TV54] ("But the various ways to raise rents beyond what a city panel dictated each year quickly became subject to abuse and fraud."); Sydney Leasing, L.P. v. N.Y. State Div. of Hous. & Cmty. Renewal, 128 N.Y.S.3d 536, 538–39 (App. Div. 2020) (affirming DHCR's denial of an MCI increase request of $1,043,007.41 after the landlord's "decision to demolish and rebuild the entire lobby"); Demause, *supra* note 27; Barstow, Craig & Buettner, *supra* note 29 ("One way to justify a rent increase was to make a major capital improvement. It did not take much to get approval; an invoice or canceled check would do if the expense seemed reasonable. The Trumps used the padded All County invoices to justify higher rent increases in Fred Trump's rent-regulated buildings.").

228 Regina Metro. Co., LLC v. N.Y. State Div. Hous. & Cmty. Renewal, 154 N.E.3d 972, 1001 (N.Y. 2020) (describing "preventing legislation from being undermined by those seeking to escape its impact before enactment" as an example of "retroactive application rationally further[ing] a legislative goal"); *id.* at 1003 ("The Legislature is entitled to impose new burdens and grant new rights in order to address societal issues . . . .").

229 SPONSOR MEMO, S. 242-3693, Reg. Sess. (N.Y. 2019).

230 N.Y. UNCONSOL. LAW § 8588-a (1)(g) (McKinney 2023).

from previously approved MCIs would be vulnerable to challenges from owners who could argue that doing so disrupts their settled expectations by lowering the overall base rent that landlords had been able to charge for years.[231] Even owners who have pending or forthcoming applications would have an argument that the thirty-year sunset provision significantly diminishes their anticipated profits.[232]

The plain language in Part K states that the thirty-year expiration only applies to MCI increases "issued after the effective date of the chapter."[233] However, the Legislature has indicated that this is not its intention, and instead intended to allow all MCI increases to sunset.[234] Another section of Part K states that "temporary major capital improvement increases shall be fixed to the unit and shall cease thirty years from the date the increase became effective."[235] The text is ambiguous as to whether this applies to all MCIs or solely to those that are approved prospectively. However, the legislative history and statutory scheme makes clear that the new laws should apply to all MCIs.

The New York Senate Committee Report states that the purpose of Part K is, in part, to "make[] increases temporary" and that "[r]ent surcharges would expire in thirty years."[236] This reinforces that the Legislature's intent was for MCIs to be temporary prospectively and retroactively. Additionally, the New York Senate Sponsor Memo for the bill that eventually merged into Part K of the HSTPA states that the purpose of amending the MCI program was to "[t]o eliminate the use of MCIs and relieve the current burden which MCIs place on rent regulated tenants." The summary of the law simply says that it "[e]liminates rent increase[s] for major capital improvements."[237] The "Justification" section of the Sponsor Memo for Senate Bill 3693 explains that "only a complete elimination of the program and *rent rollback* will suffice to protect the needs of tenants."[238] This purpose could not be accomplished without the retroactive application of the law. To fulfill the clear intent of the law to "rollback" rent increases, it must be possible to phase out all MCI increases after thirty years. Unfortunately, the plain text of the law lacks clarity on whether the Legislature intended for all MCIs, including

231 *See Strengthening New York State Rent Regulations*, *supra* note 31, at 10; *see also* COLLINS, *supra* note 26, at 75–76.

232 *See* 101 E. 16th St. Realty LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 150504/2023, 2023 WL 3819100, at *3 (N.Y. Sup. Ct. June 5, 2023).

233 N.Y.C., N.Y., ADMIN. CODE § 26–405(g) (2023); UNCONSOL. § 8588-a(1)(g).

234 SPONSOR MEMO, S. 242-6458, Reg. Sess. (N.Y. 2019).

235 Housing Stability and Tenant Protection Act of 2019, ch 36, pt. K, sec 4, § 26-511.1(a)(7), 2019 N.Y. Laws 154, 174 (codified at UNCONSOL. § 26-511.1(a)(7)); UNCONSOL. § 8588-a(1)(g).

236 N.Y. COMM. REP., S. 242-6458, Reg. Sess., at 3 (2019).

237 N.Y. S. BILL SUMMARY, S. 242-3693, Reg. Sess. (N.Y. 2019).

238 SPONSOR MEMO, S. 242-3693, Reg. Sess. (N.Y. 2019) (emphasis added).

MCIs that became effective prior to the enactment of the HSTPA, to eventually be removed. Further, the text and legislative history fail to provide the requisite findings to overcome the presumption against retroactivity under *Regina*.[239]

Finally, Part K states that MCI increases in buildings with thirty-five percent or fewer rent-regulated units are now prohibited.[240] This is arguably one of the most vulnerable changes made to Part K. Were this law to be applied retroactively, it would completely eliminate an owner's ability to participate in the MCI program, denying profit and recoupment from transactions already completed and upsetting an expectation that an owner would qualify for the program. There is a large backlog of review of MCI increases by DHCR, and its approval process can take a long time.[241] That means that there are likely many owners who have already spent money expecting to recoup and then profit who now will not be able to recover at all. The plain text of the law is ambiguous as to whether this would apply retroactively to tenants living in such buildings.[242] The question also becomes whether tenants are to stop paying increases immediately, or if this only applies to future MCI increases as it simply states that DHCR is to promulgate rules to this effect.[243]

Without amending the law to comply with *Regina*, the courts would likely find that Part K applies solely prospectively, ensuring that MCI increases remain a permanent addition to many rent-regulated buildings and frustrating the intent of the law. This would put some of the most vulnerable individuals at risk of being unhoused when the Legislature sought to protect them from this very possibility.[244] To stave off challenges, and to ensure that New York courts affirm the retroactive reach of Part K, the Legislature should amend Part K of the HSTPA to comport with Supreme Court precedent in upholding the retroactive

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239 Housing Stability and Tenant Protection Act, pt. K.

240 UNCONSOL. § 8588-a(1)(f); *Fact Sheet #24: Major Capital Improvements (MCI)*, *supra* note 31, at 1, 4.

241 *See* Richmond Hill 108 LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 728474/2021, slip op. at 5 (N.Y. Sup. Ct. Oct. 3, 2022) (noting that approval for an MCI increase took almost two years); 101 E. 16th St. Realty LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 150504/2023, 2023 WL 3819100, at *1 (N.Y. Sup. Ct. June 5, 2023) (explaining that petitioners' MCI applications were pending prior to the enactment of the HSTPA, and DHCR's determinations were issued after); *see also* Demause, *supra* note 27.

242 UNCONSOL. § 8588-a(1)(f) ("[DHCR] shall promulgate rules and regulations applicable to all rent regulated units that shall: . . . . prohibit temporary major capital improvement increases for buildings with thirty-five per centum or fewer rent-regulated units . . . .").

243 *Id.*

244 SPONSOR MEMO, S. 242-6458, Reg. Sess. (N.Y. 2019).

application of laws[245] and with the more demanding requirements of the *Regina* court.[246]

III. PROPOSAL

MCI increases can make apartments meant for the most vulnerable entirely unaffordable.[247] Under the old regime, once MCI increases were added, the Court of Appeals held that they merged into a unit's base rent from which all future increases were calculated,[248] making tenants doubly liable for them. MCIs were enacted at a time when buildings were falling into disrepair, and landlords lacked the funds or motivation to fix them.[249] The increases were meant to motivate landlords to maintain their buildings in response to fears that they would otherwise refuse to do so.[250] However, landlords may be incentivized to do the opposite of the original intent of the law, such as putting off routine maintenance, knowing that when the time comes for MCI qualifying repairs, they will be able to make a profit off of replacements and labor that could have been avoided and to make unnecessary alterations.[251] The new law is meant to enhance protections against these challenges by lowering the monthly cap, mandating that MCIs expire after thirty years and narrowing what qualifies for MCIs,[252] therefore discouraging fraudulent use of the program.

The temporal reach of Part K, as written, is ambiguous, but the legislative scheme and history makes clear that retroactive application is an important part of this law and necessary for its purpose.[253] The intent of Part K is to roll back old MCI increases and make all future ones

245 Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

246 Regina Metro. Co., LLC v. N.Y. State Div. Hous. & Cmty. Renewal, 154 N.E.3d 972, 995, 1003–04 (N.Y. 2020).

247 *See* Campanile, *supra* note 29; Demause, *supra* note 27.

248 Bryan Ave. Tenants' Ass'n v. Koch, 84 N.Y.2d 960, 963 (1994).

249 Lebovits, Lansden & Howard, *supra* note 99, at 99 ("These capital expenditure provisions were available in New York City's first rent-stabilization code, . . . as lawmakers grappled with an epidemic of neglected and derelict buildings abandoned by landlords in the 1970s and 1980s . . . .").

250 Peterson, *supra* note 101, at 9 (quoting a landlord and landlord advocate who stated that "[n]obody would make any improvements if it weren't for the M.C.I. programs, because there would be absolutely no incentive to do it" (emphasis omitted)).

251 Demause, *supra* note 27; *see supra* Section I.C.

252 *See* Housing Stability and Tenant Protection Act of 2019, ch 36, pt. K, 2019 N.Y. Laws 154, 171–85 (codified at N.Y. UNCONSOL. LAW §§ 8584, 8626, 8628, 8628-a, 8630-b, 26-405, 26-405.1, 26-511, 26-511.1, 26-517.1 (McKinney 2023)).

253 *See* SPONSOR MEMO, S. 242-6458, Reg. Sess. (N.Y. 2019); SPONSOR MEMO, S. 242-3693, Reg. Sess. (N.Y. 2019).

temporary.[254] If the old laws are to continue to apply to all past MCIs, then those increases can never be rolled back and will remain a part of rents across the city in perpetuity. For example, without retroactive effect, tenants subject to pending and current increases may still be paying six percent monthly increases (fifteen percent outside of New York City), until the owner has recouped on their investment.[255] There are currently many tenants paying these MCI increases,[256] but because they are not tracked, it is hard to know how many units are actually burdened.[257] Further, because of who tends to live in these regulated units, we know that these increases are harming low- and middle-income families and individuals, while landlords continue to rake in the additional profits year after year for MCIs that they may have already recovered from and then some.[258] Additionally, many of the increases tenants still pay for today are from "improvements" that would not qualify now, and yet the increases continue to encumber units with no foreseeable end.[259] To allow these increases to continue indefinitely would be to frustrate the purpose of the law and to harm those it seeks to protect.

While the legislative history of Part K and the statutory scheme of the HSTPA seem to paint a clear picture of the law's temporal reach, they do not comport with the heightened standard of *Regina* required to uphold its retroactive effect.[260] In recent challenges, judges have batted away the idea that Part K would apply retroactively, finding that the text of the law does not support that interpretation.[261] While no courts have overturned Part K to date, the ongoing litigation and the continuous finding that Part K applies purely prospectively based solely on the text is

254 SPONSOR MEMO, S. 242-3693.

255 *See* Rent Act of 2015, ch 20, pt. A, § 29, 2015 N.Y. Laws 34, 48–49 (repealed 2019).

256 Demause, *supra* note 27, at 3 (noting that in 2016, MCIs allowed landlords across New York City to take in more than $270 million in increases).

257 *Id.* (explaining that no records are kept of MCI increases, and that "no one knows the full costs over time—officials say they don't keep records").

258 COLLINS, *supra* note 26, at 75–76 (quoting ERNST & WHINNEY & SPEEDWELL, INC., REVIEW OF THE MAJOR CAPITAL IMPROVEMENT PROGRAM 1 (1989)).

259 Housing Stability and Tenant Protection Act of 2019, ch 36, pt. K, § 7, 2019 N.Y. Laws 154, 178–80 (codified at N.Y. UNCONSOL. LAW § 8588-a(1)(b) (McKinney 2023)).

260 *See supra* Section I.D.

261 Cmty. Hous. Improvement Program v. City of New York, 492 F. Supp. 3d 33 (E.D.N.Y. 2020), *aff'd*, No. 20-3366-cv, 2023 WL 1769666 (2d Cir. Feb. 6, 2023); Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc. v. New York, No. 19-CV-11285, 2021 WL 4198332, at *20 (S.D.N.Y. Sept. 14, 2021); 300 Wadsworth LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 158207/2020, 2022 WL 135332, at *7 (N.Y. Sup. Ct. Jan. 14, 2022), *aff'd*, 178 N.Y.S.3d 487, 488–89 (App. Div. 2022); Richmond Hill 108 LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 728474/2021, slip op. at 5 (N.Y. Sup. Ct. Oct. 3, 2022).

a warning sign for decisions yet to come.[262] It is not clear what a judge will hold when asked directly to determine whether increases imposed prior to June 2019 may be subject to the amortization period, the new cap, or the thirty-year sunset, among just some of the new provisions, but the Legislature can and should take steps to head off these potential challenges.

The *Regina* court reiterated the longstanding doctrine to uphold the retroactive application of law where such application is essential for the law's intent.[263] The retroactive application of Part K is essential to the law. Without retroactive effect, it will take much longer for those who need these changes most to feel the benefits, if they ever do. Therefore, the New York State Legislature should amend Part K to comport with *Regina* so that it can withstand challenges to its retroactive application and eventually "rollback" all MCI increases. The Legislature should make clear that all of Part K, including the two percent cap, the expiration of the retroactive increase, the thirty-year sunset provision, the extended amortization period, the reasonable cost schedule and narrowed definitions, and the prohibition on MCI increases in buildings with thirty-five percent or fewer regulated units apply to pending applications and past MCI increases.[264]

To correct the societal harms created by the MCI program and to strengthen it against fraud, the Legislature should first clarify that the whole of Part K is to apply retroactively and prospectively, and it should do so within the text of the law.[265] Second, it must explain its rational basis for applying Part K retroactively.[266] The intent to correct fraud and loopholes within the laws, as well as to fix an unsustainable government system have all been found to be legitimate legislative purposes for

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262 *Cmty. Hous. Improvement Program*, 492 F. Supp. 3d at 33; *Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc.*, 2021 WL 4198332 at *20; *300 Wadsworth LLC*, 2022 WL 135332, at *7; *Richmond Hill 108 LLC*, No. 728474/2021 slip op. at 5; 101 E. 16th St. Realty LLC v. N.Y. State Div. Hous. & Cmty. Renewal, No. 150504/2023, 2023 WL 3819100, at *1 (N.Y. Sup. Ct. June 5, 2023).

263 Regina Metro. Co., LLC v. N.Y. State Div. Hous. & Cmty. Renewal, 154 N.E.3d 972, 997 (N.Y. 2020) (stating that "instances where retroactive application was central to the statute's purpose" is one type of retroactive statute that has been continuously upheld in courts); *id.* ("In cases where retroactivity is integral to full achievement of the fundamental purpose of the legislation, a rational basis for the retroactive effect may be readily identifiable.").

264 Housing Stability and Tenant Protection Act of 2019, pt. K.

265 *See* SPONSOR MEMO, S. 242-3693, Reg. Sess. (N.Y. 2019); Lam, *supra* note 227; Demause, *supra* note 27; Barstow, Craig & Buettner, *supra* note 29.

266 *Regina*, 154 N.E.3d at 995 ("[I]n order to comport with due process, there must be a 'persuasive reason' for the 'potentially harsh' impacts of retroactivity." (quoting Holly S. Clarendon Trust v. State Tax Comm'n, 374 N.E.2d 1242, 1242 (N.Y. 1978))).

retroactive laws.[267] The continuous increases frustrate the intent of the entire rent-regulation system.[268] Applying Part K retroactively is necessary to correct this issue and further the policy goals of rent regulation by eliminating a government scheme that the residents of New York can't afford any further delay on.[269]

Finally, the Legislature will also need to state that it believes the degree of upsetting the status quo of landlords is not entirely out of whack with the benefit of the retroactive effect, which would be to bring relief for tenants across New York. By including legislative findings and providing a rational basis, which it must assert is commensurate with the degree of retroactive effect, the Legislature will be able to establish that it has considered the potentially harsh effect of applying Part K retroactively, illustrated by its rational basis and its potential to interfere with transactions already completed, but that the law is to apply retroactively even so. This is the formula that *Regina* laid out for future legislatures to follow so that deference may be given to their legislative actions when determining the timing provisions of statutes.[270] While the *Regina* court seemingly requires a different standard than the Supreme Court,[271] the New York Legislature must operate under these new requirements to ensure that the important tenant protections enacted in the HSTPA are insulated from those who seek to weaken them and return New York to the old legal regime.

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267 *Id.* at 1001 (explaining that a rational basis for retroactive laws could include "closing a state-administered fund . . . that imposed unsustainable costs . . . or preventing legislation from being undermined by those seeking to escape its impact before enactment"); *id.* at 1002 (stating that the retroactive effect of Part F must serve "the policy goals of rent stabilization").

268 *Fact Sheet # 1: Rent Stabilization and Rent Control*, *supra* note 25, at 1.

269 American Economy Ins. Co. v. State, 87 N.E.3d 126, 159 (N.Y. 2017) ("Delaying the Fund's closure so that it could pay benefits on every qualifying reopened case arising from an injury occurring before the amendment's 2013 effective date would have delayed this intended legislative benefit to New York businesses and employers for years, if not decades. We therefore conclude that any retroactive impact of the legislation is justified by a rational legislative purpose."); Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730–731 (1984) ("Congress was properly concerned that employers would have an even greater incentive to withdraw if they knew that legislation to impose more burdensome liability on withdrawing employers was being considered. . . . Congress therefore utilized retroactive application of the statute to prevent employers from taking advantage of a lengthy legislative process and withdrawing while Congress debated necessary revisions in the statute.").

270 *Regina*, 154 N.E.3d at 991, 995–96, 1003–04.

271 *Id.*

CONCLUSION

MCI increases have been allowed to burden renters for over fifty years[272] and the 242nd New York State Legislature sought to finally ease that burden. The prospective application of the law will not be enough to undo the damage inflicted on tenants. The new laws involving MCIs should be applied retroactively so that increases can eventually be removed from base rents attached to regulated units.

In 2019, by enacting the HSTPA, the New York State Legislature changed the housing market across New York State to enshrine much needed improved tenant protections.[273] A year later, the New York Court of Appeals altered the standard for allowing retroactive law in a case involving that very legislation.[274] In so doing, the Court of Appeals set a heightened standard for what must be included in the text of a New York statute looking to get out from under the dead hand control of past legislatures and to right societal wrongs.

The old regime favored landlords and was rife with corruption due to a lack of regulation.[275] The Legislature's history reveals the intention of removing MCI increases altogether, but that same goal is not as clear in the text. The removal of these increases is a necessary step the Legislature should take. Unless the HSTPA can be applied retroactively, the tenant-landlord relationship will continue to be dictated by the laws of past legislatures, unable to move forward and progress. So that the MCI provisions of the HSTPA can withstand a legal challenge to their temporal application, the Legislature should amend the law by providing clear and unambiguous language (as required by *Regina*) to the effect that Part K is to apply retroactively as well as to future MCIs. This would rebut the presumption that laws should be applied solely prospectively. The statute must further be amended to state the rational basis for the law and for requiring a retroactive effect of Part K, as well as that the degree of disrupting expectations is on par with such effect. Finally, the law should be amended to make clear that the Legislature weighed the "potentially

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272 *See* Peterson, *supra* note 101; Ungar, *supra* note 52, at 309 n.41 (explaining that MCIs were allowed under the RSL when it was enacted in 1969); *see also supra* Section 1.C.

273 *See* Housing Stability and Tenant Protection Act of 2019, ch 36, 2019 N.Y. Laws 154 (codified in scattered sections of N.Y. C.P.L.R. (McKinney 2023), N.Y. GEN. BUS. LAW (McKinney 2023), N.Y. GEN. OBLIG. LAW (McKinney 2023), N.Y. JUD. LAW (McKinney 2023), N.Y PENAL LAW (McKinney 2023), N.Y. PUB HOUS. LAW (McKinney 2023), N.Y. REAL PROP. LAW (McKinney 2023), N.Y. REAL PROP. ACTS. LAW (McKinney 2023), N.Y. REAL PROP. TAX LAW (McKinney 2023), N.Y. UNCONSOL. LAW (McKinney 2023)).

274 *Regina*, 154 N.E.3d at 1003–04.

275 *See* SPONSOR MEMO, S. 242-3693, Reg. Sess. (N.Y. 2019); Lam, *supra* note 227; Demause, *supra* note 27; *see also* Barstow, Craig & Buettner, *supra* note 29.

harsh" effect of retroactivity against the benefits of the law and still concluded that Part K should be applied retroactively. The purpose of Part K requires retroactive effect, and the Legislature must make amendments to comport with the new requirements set by the Court of Appeals.