APL-2019-00172

To be argued by:
ERIC LEE
15 minutes requested

Court of Appeals
State of New York

In the Matter of the Application of

PEOPLE CARE INCORPORATED d/b/a ASSISTED CARE,

Petitioner-Respondent,

against

THE CITY OF NEW YORK HUMAN RESOURCES ADMINISTRATION; and ROBERT DOAR, in his official capacity as Administrator of the City of New York Human Resources Administration and Commissioner of Social Services,

Respondents-Appellants.

BRIEF FOR APPELLANTS

JAMES E. JOHNSON
Corporation Counsel
of the City of New York
Attorney for Appellants
100 Church Street
New York, New York 10007
Tel: 212-356-4053 or -0852
Fax: 212-356-1148
erlee@law.nyc.gov

DEVIN SLACK
SCOTT SHORR
ERIC LEE
of Counsel

December 6, 2019

Reproduced on Recycled Paper

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes

TABLE OF AUTHORITIES (cont'd)

Page(s)

Other Authorities

TABLE OF AUTHORITIES (cont'd)

Page(s)

PRELIMINARY STATEMENT

The New York City Human Resources Administration (HRA) appeals from a 3-2 decision in which the Appellate Division, First Department, curtailed HRA's authority to audit and recoup Medicaid funds. Because this decision misreads a contract and its surrounding legal framework, this Court should reverse.

Over a decade ago, HRA completed a routine audit of People Care, a former contracted Medicaid provider of personal care services, on behalf of the New York State Department of Health (DOH). People Care refused to return $7 million in Medicaid funds that had been earmarked under a state statute for the recruitment and retention of personal care workers. Instead of spending the money properly when allocated, People Care's owners held onto it, later using it to help finance the sale of the company to a dubiously formed employee stock ownership plan, sparking a class action lawsuit and a federal investigation.

To fend off HRA's attempt to recoup the money, People Care filed this article 78 proceeding. The majority below erroneously concluded that HRA could not audit and recoup the $7 million,

even while acknowledging HRA's authority to audit and recoup the rest of the Medicaid funds disbursed under the same contract.

No credible basis exists for treating the $7 million differently. The contract expressly grants HRA broad authority to audit and recoup Medicaid funds because it incorporates a strict reimbursement formula, approved by DOH, that limits People Care's expenses and profits. People Care not only accepted the $7 million under the contract, but even revised its bookkeeping in anticipation that HRA would audit the funds.

The regulatory backdrop supports HRA's reading of the contract. The statute that earmarked the funds described them as adjustments to HRA's contractual rates. DOH has accepted all Medicaid funds recouped by HRA for years, including the type of funds involved here. And in this very litigation, DOH has affirmed that it has long authorized HRA, its local Medicaid agent, to audit and recoup all Medicaid funds contractually disbursed to personal care services providers. The majority below has mistakenly thwarted ongoing state and local efforts to ensure that Medicaid funds are properly spent.

QUESTIONS PRESENTED

1. Did the Appellate Division majority err in granting the petition because, as the local agency responsible for administering the Medicaid program on behalf of DOH in New York City, HRA has the authority to audit and recoup all misspent or unspent Medicaid funds disbursed under its contracts with its personal care services providers?

2. Did HRA rationally seek to recoup from People Care $7 million in Medicaid funds earmarked for frontline personal care workers that the company's former owners initially left unspent, but later used as part of a suspect transaction that triggered a class action lawsuit by workers and a federal investigation?

STATEMENT OF THE CASE

A. The provision of personal care services under New York's Medicaid program

Medicaid is a cooperative federal and state program that provides medical services for qualifying financially needy individuals. *See* 42 U.S.C. § 1396-1; Soc. Serv. L. (SSL) §§ 363, 363-a; *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 610 (2012). In New York State, DOH administers Medicaid in

conjunction with its 58 local social services districts, each of which remains responsible for certain parts of the program within its own boundaries (Record (R) 46-47).[1] *See* SSL §§ 17, 20, 34, 62, 365; *Rodriguez by Rodriguez v. City of New York*, 197 F.3d 611, 613 (2d Cir. 1999); *Beaudoin v. Toia*, 45 N.Y.2d 343, 347 (1978). The federal government, the State, and the local districts all contribute to funding Medicaid. *Matter of County of Chemung v. Shah*, 28 N.Y.3d 244, 256 (2016). The City of New York constitutes a single local district, led by HRA. SSL § 61(1).

One of the Medicaid benefits available to eligible New Yorkers is personal care services. *See* SSL § 365-a(2)(e); 18 NYCRR § 505.14(a). These services assist elderly or disabled Medicaid recipients with the activities of daily life in their homes, such as feeding, bathing, personal grooming, meal preparation, basic housekeeping, and the administration of medication. *See* 18

---

[1] In 1996, the Legislature dissolved the New York State Department of Social Services and transferred its Medicaid responsibilities to DOH. *See Golf v. New York State Dep't of Soc. Servs.*, 91 N.Y.2d 656, 659 n.1 (1998); L. 1996, ch. 474, § 242. For simplicity's sake, this brief uses DOH as a reference for both agencies.

NYCRR § 505.14(a); *Kuppersmith v. Dowling*, 93 N.Y.2d 90, 94 (1999).

For Medicaid recipients outside of DOH's managed care programs, like the recipients People Care serviced here, DOH delegates tremendous responsibility to its local districts over the administration of personal care services. *See* SSL § 364-j. Under DOH's supervision, local districts like HRA are entrusted with evaluating a Medicaid recipient's eligibility for such services and determining how many hours of services a recipient should receive, based on a detailed assessment of the recipient's needs. 18 NYCRR § 505.14(b).

Local districts also contract with non-profit, for-profit, or individual providers for the provision of personal care services. *Id.* § 505.14(c). And local districts are responsible for first-line oversight, including monitoring the training of a provider's workforce, assessing a provider's performance in delivering services, and reviewing a provider's fiscal practices. *Id.* § 505.14(c)-(g). DOH, however, remains responsible for paying the providers through its claims and payments management system,

the Medicaid Management Information System (MMIS) (R47-48, 73-74).

1. HRA's achievement of Medicaid savings by using its rate-setting authority to audit and recoup Medicaid funds from contracted providers

HRA contracts with over 60 providers to offer personal care services to Medicaid recipients in the City (R47). *See* 18 NYCRR § 505.14(c). HRA awards these contracts after issuing requests for proposals and reviewing the qualifications of the providers who respond (R149). *Id.* § 505.15(c)(8). All of HRA's provider contracts must be approved by DOH (R151). *Id.* § 505.14(c)(4)(ii).

Initially, each local district in New York was responsible for setting its own Medicaid reimbursement rates for its personal care services providers. *Ulster Home Care Inc. v. Vacco*, 268 A.D.2d 59, 62 (3d Dep't 2000), *rev'd on other grounds*, 96 N.Y.2d 505 (2001). In the early 1990s, the Legislature ordered DOH, in consultation with its local districts and providers, to devise a statewide rate-setting methodology that would ensure a more cost-effective delivery of personal care services. *See* 1990 N.Y. Laws 1019-20;

Ulster, 268 A.D.2d at 62. Since then, to control Medicaid spending, DOH has paid providers under a methodology that reflects their actual costs and that authorizes the audit and recovery of funds. *See* 18 NYCRR §§ 505.14(h)(7)(i)-(v), 517.1, 518.1.

At the same time, because HRA pioneered a cost-based methodology well before DOH adopted its own, DOH permits any local district to use an "alternative rate methodology" to set its own tailored reimbursement rates for its personal care services providers (R216). *See* 18 NYCRR § 505.14(h)(7)(v). But to ensure some degree of uniformity, DOH requires local formulas to be based on providers' actual costs, and to include specifications "comparable" to DOH's baseline formula. *Id.* § 505.14(h)(7)(v)(b).

Since the 1980s, and with DOH's approval, HRA has used its own formula to create individualized cost-based reimbursement rates for each of its contracted personal care services providers (R143-51). *See* 18 NYCRR § 505.14(h)(7)(v); SSL § 367-a(1)(a). HRA designed its formula to encourage non-profit providers to control their operating costs and to deter for-profit providers from pocketing revenues meant for home attendant salaries and

benefits as extra profits (R146, 148). HRA's formula has saved tens of millions of taxpayer dollars every year, and its reimbursement rates have been far lower than those elsewhere in the state (R145).

HRA achieves these results through a two-step process: "rate setting" and the "recovery of funds" (R145-48). First, HRA carefully calculates the Medicaid reimbursement rate for each provider (*id.*). Second, HRA diligently recovers Medicaid funds through audits and recoupments done on an annual basis (*id.*).

Both steps are "integral components" of HRA's local formula, as information gleaned from the audits is used to adjust the reimbursement rates of for-profit providers (*id.*). And as DOH is responsible for paying providers (through MMIS), HRA returns the funds recovered under its formula to DOH (R48, 65).

In April 2017, HRA changed its local formula, dropping its individualized reimbursement rates and instead adopting a set of uniform reimbursement rates for all providers. Because the new methodology is prospective in nature and DOH has channeled much of the Medicaid population into managed care, HRA now

conducts only limited audits and no recoupments under the new formula. Consistent with past practice and relevant regulations, DOH approved these changes. *See* 18 NYCRR § 505.14(h)(7)(v).

HRA, however, remains responsible for auditing and recouping Medicaid funds paid to each of its personal care services providers under its old cost-based alternative rate methodology, the formula embodied in the parties' contract here. Because these audits are time- and labor-intensive, HRA's audit and recoupment process is several calendar years behind the actual fiscal years of the audits. HRA has since conformed its audit and recoupment efforts to the Appellate Division's decision, pending a final ruling from this Court on the scope of its authority.

2. The parties' contract that authorized HRA to audit and recover Medicaid funds

People Care had been one of HRA's contracted providers since at least the mid-1990s (R151).[2] In November 2001, HRA and

[2] People Care's contracts with HRA expired in 2015. People Care withdrew its proposals for more contracts after it failed in court to preclude HRA from requesting information during the procurement process about the federal investigation into its employee stock ownership plan. *See infra* Point II.

People Care signed a contract, which DOH approved, that authorized the company to provide personal care services to Medicaid recipients in New York City (R70-141, 151).[3] *See* 18 NYCRR § 505.14(c)(4)(ii).

The contract's reimbursement rate, at $13.75 an hour, reflected three principal components: (1) direct wages and fringe benefits for personal care workers; (2) general administrative and indirect labor costs; and (3) a fixed profit margin of 3% (R77). Because HRA aimed to supply People Care with a set caseload, the rate reflected the company's maximum projected expenses under HRA's local formula (R51, 80). People Care's Medicaid payments were then based on the rate multiplied by the number of authorized service hours billed by the company (R48).

To ensure that public funding paid for only authorized spending, the contract limited how People Care could use its funds, defined broadly in the contract as "money or anything of

---

[3] HRA and People Care signed four separate contracts that covered the delivery of personal care services in Manhattan, the Bronx, Brooklyn, and Queens (R167-74). Because the contracts are virtually identical, we refer to the contracts as a single document (R47).

value" transferred by HRA or DOH, including but not limited to rate payments (R72). Specifically, the contract prohibited People Care from using its funds on "[a]ny expense not actually incurred in the performance" of the contract or on "[a]ny expense which violates any provisions" of the contract (R74, 78-79). The contract also specified that money received as part of the rate for direct wages and fringe benefits of personal care workers could only be used for that purpose, unless otherwise directed by HRA (R79).

The contract also controlled how People Care would receive its Medicaid funds, which were paid out by DOH through MMIS (R74-80). Under the contract, People Care could not be paid in excess of "Allowable Payments" (R74). The contract defined "Allowable Payments" as "expenditures for labor, services, and equipment made by [People Care]" determined by HRA to be in accordance with the contract and the company's approved budget, and which were "reasonable and necessary to [its] proper discharge of its obligations" (R71). People Care also could not be paid until its claims for reimbursement were "verified by billings" submitted in accordance with established procedures (R74).

Finally, the contract afforded HRA extensive authority to audit and recover Medicaid funds from People Care. The contract stated that HRA had the right to recoup any money allocated for direct and indirect labor costs that exceeded the actual costs that People Care incurred in those categories (R76). More broadly, the contract authorized HRA to recover any funds spent in violation of the contract (R78-79). Additionally, People Care's requests for Medicaid payments, as well as its books, were all subject to annual audits (R71, 97, 104-05, 107). And the contract required People Care to maintain books that "sufficiently and properly reflect all direct and indirect costs of any nature" expended in its performance of the contract (R93, 105).

Because of how providers bill and how the reimbursement rate is inherently structured, these contractual provisions, which are uniform in HRA's contracts with personal care services providers, have been critical to HRA's efforts to deliver health care in a cost-effective manner (R145). In practice, a provider bills DOH for the entire package of personal care services hours under the HRA-authorized service plans for its Medicaid recipients, even

if all such services are not actually provided (R48-49). Additionally, the rate used by HRA reflects a provider's maximum projected labor expenses, even though a provider's personal care workers are unlikely, for example, to use all of their sick leave or work every holiday for overtime pay (R51). Both factors thus regularly result in excess Medicaid revenues that must be recouped from providers to ensure a fixed profit margin, as their revenues (the funds they receive from the government) typically exceed their actual costs (R49, 51).

3. The Medicaid funds earmarked for the recruitment and retention of personal care services workers who serve Medicaid recipients

In 2002, the Legislature decided to use hundreds of millions of dollars from the tobacco control and insurance initiatives pool to increase, on an annual basis, the "Medicaid rates of payment for personal care services" across the state. L. 2002, ch. 1, § 2; Pub. Health L. (PHL) § 2807-v(1)(bb)–(cc). Because personal care services has long been a low-wage industry, the Legislature passed the annual Medicaid rate adjustments so providers could

"improve their ability to recruit and retain qualified workers" with higher wages and quality benefits, which in turn would lead to better care for Medicaid recipients.[4] Memorandum in Support, N.Y. State Senate, 2002 McKinney's Session Laws of NY, at 1635.

To ensure that the new funds would be properly spent, the statute specified that providers could use the funds only to recruit and retain "non-supervisory personal care services workers or any worker with direct patient care responsibility," and expressly "prohibited [providers] from using such funds for any other purpose." PHL § 2807-v(1)(bb)(iii). The statute further required each provider to submit a written certification attesting to its compliance with this limitation and authorized DOH to conduct audits and recoup any funds used for an unauthorized purpose. *Id.* Finally, the statute provided that in New York City, the new funds would be computed and distributed as Medicaid rate

---

[4] *See* Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60454, 60458 (Oct. 1, 2013) ("The earnings of employees in the home health aide and personal care aide categories remain among the lowest in the service industry. Studies have shown that the low income of direct care workers continues to impede efforts to improve both the circumstances of the workers and the quality of the services they provide."); *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 81-82 (2015).

payments in accordance with a memorandum of understanding, which HRA and DOH signed shortly after the law's passage (R153-55). *Id.* § 2807-v(1)(bb)(i).

In accordance with the contract, HRA notified People Care in writing to explain that its contractual Medicaid reimbursement rate had changed (R77, 157). The rate's components for direct and indirect labor costs increased, but the profit component stayed the same because the statute limited the use of the new funds to the recruitment and retention of employees (R157). People Care's new annual rate became final and binding upon notification, as the company did not object under the procedures in the contract (R77).

B. HRA's attempt, backed by DOH, to recover $7 million in Medicaid funds from People Care for fiscal years 2003 and 2004

In April 2005, HRA notified People Care that its auditing process would be revamped as a result of the new law (R57, 159-65). HRA explained that beginning with audits for fiscal year 2003, People Care needed to ensure that its books would account for the new Medicaid funds (*id.*). HRA included instructions and accounting materials for People Care to follow and invited the

company to follow up with questions (*id.*). Instead of questioning HRA's authority to audit the new funds, People Care ultimately sent HRA certified financial statements consistent with the instructions (R57, 896, 933, 970, 1007, 1041, 1074, 1107, 1143).

In October 2008, HRA informed People Care that it had completed its audits of the company's certified financial statements for fiscal years 2003 and 2004 (R167-74). Because providers are not permitted to roll over Medicaid funding for use in future years, HRA concluded that People Care had to return roughly $10.8 million in Medicaid funds for those two years, including $7 million in funds earmarked for the hiring and retention of employees (R45, 65, 167-74).

People Care administratively appealed the audit, asserting that it did not need to return the $7 million because HRA did not have the authority to audit and recoup the money (R199). But People Care conceded that HRA had accurately audited everything else and agreed to return roughly $3.8 million in Medicaid funds (R45, 198).

Because of People Care's administrative appeal, HRA asked DOH to clarify how the $7 million should be treated (R176-77). DOH explained that payments allocated under Public Health Law § 2807-v are "in all legally relevant respects Medicaid payments to Medicaid providers" and are thus "subject to the same processes and audit procedures applicable to any other Medicaid payments" to the providers (*id*.).

Additionally, according to DOH, the statute's requirement that the funds "be expended for a particular purpose"—the recruitment and retention of personal care services workers—"should be generally understood as imposing an additional requirement with regard to such payments, not as supplanting or superseding preexisting requirements generally applicable to such Medicaid payments" to the providers, including the prohibition on rolling over funding (R176). Although "[f]rom time to time … in response to inquiries" DOH had indicated that it could accommodate expenditures for benefits and salaries that "might extend beyond the annual period in which such funds were received," DOH explained that "it has never been [its] position

that it was acceptable for a provider to simply retain this money without having in place an ongoing plan and process for expending it for the authorized purposes" (R176-77).

In March 2009, HRA denied People Care's administrative appeal (R179-80). HRA explained that because the funds were provided as part of the Medicaid reimbursement rate in the parties' contract, it had the authority to recover the $7 million (*id.*). HRA also explained that according to DOH, because funds appropriated under Public Health Law § 2807-v were Medicaid funds, any funds not spent "in the fiscal year received" and not subject to an "ongoing plan and process" in place for using the money for authorized purposes "must be returned" to HRA (*id.*). HRA thus renewed its demand that People Care return the $7 million in Medicaid funds because the company had not spent the money and had no ongoing plan and process in place to spend it in a lawful manner (*id.*).

C. This litigation

1. Supreme Court's initial decision dismissing the petition

In June 2009, three months after HRA rejected People Care's administrative appeal, the company brought this article 78 proceeding (R189-211). People Care sought an annulment of HRA's audit with respect to the $7 million in dispute and a permanent injunction preventing HRA from recouping the money (*id.*). HRA moved to dismiss the petition (R14).

Six months later, Supreme Court, New York County, granted HRA's motion to dismiss the petition because People Care failed to comply with the dispute-resolution procedures detailed in the parties' contract (R14). People Care appealed (*id.*).

In November 2011, the Appellate Division, First Department, reinstated the petition and remanded to develop the record on whether HRA was "authorized to recoup" the $7 million and whether People Care was excused from exhausting the contractual dispute resolution procedures. *Matter of People Care Inc. v. City of New York Human Resources Admin.*, 89 A.D.3d 515, 516 (1st Dep't 2011). The Appellate Division noted that neither

Public Health Law § 2807-v nor the memorandum of understanding between DOH and HRA specifically delegated to HRA the authority to recoup the funds at issue. *Id.* But consistent with its decision to remand, the Appellate Division refrained from ruling definitively on whether HRA had the authority. *Id.*

2. Supreme Court's later decision enjoining HRA from recouping the excess Medicaid funds

On remand, because HRA initially had only filed a motion to dismiss, HRA filed its answer (R29-68). As an exhibit to its answer, HRA submitted an affidavit from John Ulberg, the State's Chief Financial Officer for Medicaid and the director of the DOH's Division of Finance and Rate Setting, laying out DOH's position (R215-18). Ulberg explained, as DOH had told HRA eight years earlier, that funds appropriated under Public Health Law § 2807-v for the recruitment and retention of frontline personal care services workers are Medicaid funds (R216-17). He also reiterated that the funds are subject to the "same rules and procedures applicable to all other Medicaid funds," including the authority of HRA, as the primary Medicaid administrator empowered to

determine reimbursement rates in New York City, to audit and recoup excess public funds paid to its personal care services providers under its local formula (*id.*).

Ulberg further explained that although Public Health Law § 2807-v authorized DOH to audit and recoup any earmarked funds unspent or used for purposes other than recruitment and retention, this mechanism "supplement[s], rather than supersede[s], [HRA's] existing auditing and recoupment authority regarding overpayments" of Medicaid funds for personal care services (R217). And he stated that DOH "does not perform fiscal audits of [HRA's] contracts with personal care services providers" because DOH recognized that HRA "is authorized to and does conduct annual audits" with respect to those providers (*id.*).

In February 2018, Supreme Court granted the petition, annulled HRA's audit concerning the $7 million, vacated its administrative determination, and enjoined it from collecting the funds (R11-28). The court concluded that HRA lacked the statutory and regulatory authority to recoup the funds (R24-28). The court also concluded that whether the contract permitted

HRA to audit and recoup the funds was "moot," as a contract that gave HRA the authority to do so would contravene Public Health Law § 2807-v, rendering the contract illegal (R27).

3. The Appellate Division's split decision on whether HRA has the authority to audit and recoup the excess Medicaid funds

In a 3-2 decision, the Appellate Division, First Department, affirmed (R1261-97). *See Matter of People Care Inc. v. City of New York Human Resources Admin.*, 175 A.D.3d 134 (1st Dep't 2019). The majority acknowledged, as People Care did, that HRA had broad authority under the contract to audit and recoup Medicaid funds (R1274, 1291-92). The majority similarly acknowledged that Public Health Law § 2807-v described the funds at issue as adjustments to HRA's Medicaid reimbursement rates for its providers (R1266, 1273).

Nevertheless, the majority rejected the contention that the funds were a "subset" of Medicaid funds (and therefore subject to HRA's contractual authority to audit and recoup) (R1272-73). The majority based that conclusion on its reading of the Appellate Division's 2011 decision, even though the earlier decision was

silent on the issue, and even though no one in the majority had participated in that decision.

The majority also held that Public Health Law § 2807-v and the memorandum of understanding between DOH and HRA, both of which supposedly denied HRA the necessary authority, superseded HRA's contract with People Care (R1273-74). According to the majority, because the funds in dispute were purportedly disbursed under a different methodology from HRA's local formula, the funds were not subject to HRA's audit and recoupment authority under the contract (R1274-75).

Finally, the majority rejected other grounds advanced for HRA's authority to audit the funds (R1275-76). The majority held that DOH's audit and recoupment regulations did not empower local social services districts like HRA to audit and recoup funds earmarked under Public Health Law § 2807-v (*id.*). And while faulting HRA for failing to secure "a delegation order" from DOH, the majority downplayed DOH's statements endorsing HRA's authority as mere opinion, even though DOH officials consistently explained that the funds at issue were simply Medicaid funds,

subject to the same audit and recoupment procedures applicable to all other Medicaid funds that People Care had received under the contract (R1277-78).

In a dissent, two justices concluded that the contract's "broad language" authorized HRA to audit and recoup the funds in dispute (R1286). The dissent noted that both Public Health Law § 2807-v and the memorandum of understanding expressly characterized the funds as Medicaid funding for personal care services providers (R1291-92). The dissent also pointed out that People Care never objected when HRA made clear that the funds at issue were being channeled through the contract as an increase in the company's Medicaid reimbursement rate (*id.*).

Additionally, the dissent explained that its interpretation of the contract did not contravene Public Health Law § 2807-v or the memorandum of understanding, as neither restricted local districts like HRA from conducting their own audits or vested the power to audit and recoup the funds at issue exclusively with DOH (R1288, 1295-96). According to the dissent, the majority erred in declining to defer to DOH's rational interpretation of the

statute, particularly because interpreting the statute required understanding the complex web of operational practices between DOH and HRA (R1294-95).

Finally, the dissent rejected the majority's effort to enlist the Appellate Division's 2011 decision for support (R1293). The dissent pointed out that the earlier decision never discussed the nature of the funds at issue or addressed whether the parties' contract gave HRA the necessary authority to recoup and audit the funds (*id.*). Because HRA had the authority to act and the parties' dispute fell within the scope of the contract's dispute-resolution procedures, the dissent added, People Care's failure to use those procedures required the petition's dismissal (R1296-97).

JURISDICTIONAL STATEMENT

The Court has jurisdiction to hear this appeal because the proceeding originated in Supreme Court and the Appellate Division's order finally determined it (R11-28). *See* CPLR 5601(a). HRA has an appeal as of right because there was a two-justice dissent on the law (R1283-94). *See id.*

ARGUMENT

POINT I

THE APPELLATE DIVISION ERRED IN SUSTAINING THE ARTICLE 78 PETITION

HRA sets and enforces its own Medicaid reimbursement rates for personal care services through its contracts with providers. The contracts grant HRA broad authority to audit and recoup any unspent or misspent funds. People Care received $7 million in Medicaid funds under the contract and even changed its bookkeeping practices in anticipation that HRA would soon audit the money, but the company failed to spend the funds during the fiscal years for which they were received. HRA thus had the right to demand that those funds be returned.

The majority below nevertheless concluded that the funds in dispute had to be audited and recouped by DOH outside of the contract, based on the majority's understanding of Public Health Law § 2807-v, which earmarked the funds, and a memorandum of understanding between DOH and HRA. The majority erred. Both the statute and the memorandum actually underscore that the funds fall within the DOH-approved contract, and therefore

within HRA's auditing and recoupment purview, because they expressly state that the funds would increase People Care's contractual Medicaid reimbursement rate. Indeed, no other understanding honors the parties' contract, their course of conduct, the regulatory context in which the parties formed the agreement, and DOH's repeated ratification of audits just like the one here. Only a reversal would fully recognize HRA's authority to audit and recoup misspent and unspent Medicaid funds, a power integral to its ability to ensure integrity in Medicaid spending.

A. HRA has the power to audit and recoup Medicaid funds.

In accordance with its "inherent authority" to scrutinize the quality and value of Medicaid services, DOH instructs all of its local districts to administer the provision of personal care services under Medicaid in a cost-effective manner. *Medicon Diagnostic Laboratories, Inc. v. Perales*, 74 N.Y.2d 539, 545 (1989); *see* SSL §§ 17(a), 20(2)-(3), 34(3), 56, 62(1), 365(1), 365-a(2)(e); 18 NYCRR § 505.14(a)-(h). As the largest local Medicaid administrator in the state, HRA has been extremely successful at securing cost-

effective care. The key to HRA's success has been its longstanding and unique rate-setting formula, which DOH has approved under the state regulations since the 1980s (R50, 143-51). *See* 18 NYCRR § 505.14(h)(7)(v).

Under its formula, HRA saves tens of millions of taxpayer dollars each year by tying a provider's reimbursement rate to a set budget with a fixed profit margin, and by conducting annual audits and recoupments to discover a provider's actual costs and to prevent improper or excess profits and spending (R145-48). HRA implements its formula through its local contracts, which DOH has also consistently approved for decades, because each provider has had (until recently) its own cost-based reimbursement rate (R151). *See* 18 NYCRR § 505.14(c)(4), (6).

More than just helpful regulatory background, this intricate regulatory framework *inheres* in HRA's contact with People Care. The contract specifies the company's reimbursement rate and its separate components, including the company's fixed profit margin of just 3% of its authorized costs (R74-77). The contract restricts the company's use of funds, defined broadly as "money or anything

of value" transferred by HRA or DOH, including but not limited to reimbursement rate payments (R72). In particular, the contract prohibits the company from using any funds in violation of the contract, or for expenses not actually incurred in the performance of the contract (R78-79). And the contract further prohibits the company from using rate payments meant for frontline personal care workers for any other purpose, unless otherwise directed by HRA (R79).

To enforce the fixed profit margin and the spending restrictions, the contract subjects the company's books to annual audits (R71, 93, 97, 104-05, 107). The contract also authorizes HRA to recoup any unspent money issued under the contract's reimbursement rate (R75-76). And as a catch-all, it permits HRA to recoup any funds spent in violation of the contract (R79).

Here, People Care received the $7 million at issue for the 2003 and 2004 fiscal years under the contract generally, and as adjustments to the direct and indirect labor components of its contractual rate specifically (R157). Under Public Health Law § 2807-v, People Care could use the money for a single purpose: to

benefit frontline personal care workers only. But HRA's audit uncovered that the company never spent the money in those years for that purpose. HRA thus rightfully demanded the return of those funds on DOH's behalf, as HRA did with the rest of the company's excess Medicaid funds (R45, 167-74). To allow People Care to retain any excess Medicaid funds would have turned the money into excess profit, in violation of the contract's strict 3% profit cap and its requirement that funds received as part of the rate's direct labor component be spent only for that purpose (R77-79, 157).[5]

Notably, People Care's own course of conduct after receiving the new funds confirmed this plain-language understanding of the contract. In January 2003, HRA informed People Care by letter, as their contract required, that the company's contractual reimbursement rate, at $13.75 an hour, had increased by $1.35

[5] Facts uncovered after the audit only strengthen HRA's case. *See infra* Point II. Because the $7 million at issue is undoubtedly "money or anything of value" transferred to the company, HRA also had the authority to recoup the money once it became known that People Care's former owners had used the funds not in performance of the contract, but as part of a transaction to sell their shares of the company (R72, 78-79).

because of the new law (R77, 157). In other words, the new funds were to be paid out as Medicaid funds under the contract, as part of People Care's reimbursement rate. HRA explained that the labor components of the contractual rate had gone up, but that the profit component remained the same, because the Legislature had earmarked the funds for frontline workers, while expressly barring any other use (R157).

Although the contract gave People Care the right to object to the changes to its rate, the company never did so (R77). As a result, People Care's increased rate, which now included the new funds, became final and binding soon after HRA notified People Care of the rate increase (*id.*). In the coming years, People Care would annually pocket, without objection, millions upon millions of Medicaid dollars thanks to this increased rate.

Nor did People Care object when HRA later explained, in 2005, that the company needed to carefully account for its use of the new funds in its books, so HRA could conduct its audits going forward (R57, 159-63). Instead, People Care dutifully conformed its accounting procedures to HRA's instructions and submitted

certified financial statements on the new funds for the very audit in dispute (R57, 896, 933, 970, 1007, 1041, 1074, 1107, 1143).

In short, on two separate occasions in 2003 and 2005, when it would have been opportune for People Care to challenge HRA's authority over the $7 million at issue, People Care did the opposite, actively choosing a course of conduct that acknowledged HRA's authority. People Care never found reason to question whether the funds fell within the contract, much less HRA's audit and recoupment authority, until late 2008, when the company's former owners suddenly needed a reason to fend off HRA's attempt to hold them to account.

Public Health Law § 2807-v hardly upset the common understanding set by the parties' contract, their course of conduct, and the broader regulatory backdrop. On the contrary, the statute reinforces that the new funds that People Care received were distributed under the contract and subject to HRA's authority. To be clear, the statute expressly provides that the funds are earmarked to increase DOH's fiscal share of HRA's "Medicaid rates of payment" for personal care services. PHL § 2807-

v(1)(bb)(i). And to underscore that the funds are Medicaid funds, the statute directly references the Medicaid program for personal care services in the Social Services Law. *Id.*

Both DOH and HRA thus understood that the new funds were Medicaid funds channeled to providers through HRA's contractual reimbursement rates, just disbursed on a tighter leash. In their memorandum of understanding, DOH and HRA repeatedly characterized the funds as "Medicaid rate adjustments" for HRA's contracted providers (R153-55).

And no less significantly, DOH has ratified HRA's treatment of the new funding as contractual Medicaid funds time and time again. Every year, DOH has readily accepted the fruits of HRA's efforts—millions of dollars in recouped Medicaid funds, including funds earmarked under Public Health Law § 2807-v—which DOH has almost certainly reallocated for future or preexisting Medicaid expenditures (R65, 151).

DOH has also repeatedly endorsed HRA's audit and recoupment authority in this very litigation. In 2009, prompted by People Care's newfound objection to HRA's authority, DOH

informed HRA that because the new funding was "in all legally relevant respects Medicaid payments to Medicaid providers," the money was "subject to the same processes and audit procedures applicable to any other Medicaid payments" to personal care services providers (R176). DOH also explained that the statutorily prescribed earmarked purpose of the funds—that the money be spent exclusively for the benefit of frontline workers—was "an additional requirement" that did not supplant or supersede any pre-existing conditions generally applicable to the Medicaid funds disbursed to these providers (*id.*).

Then in 2017, John Ulberg, the State's Chief Financial Officer for Medicaid, reaffirmed in a sworn affidavit that DOH's official position was that the new funds were Medicaid funds, because DOH was using the money to adjust the contractual Medicaid rates of HRA's providers (R215-18). Ulberg further explained that while Public Health Law § 2807-v authorized DOH itself to audit and recoup the earmarked funds, DOH's authority supplemented HRA's authority under its own contracts, as part of its rate-setting responsibilities, to audit and recoup Medicaid

funds (*id.*). In fact, Ulberg clarified that this was just a new variation on an old theme: because HRA's rate-setting authority inherently includes the power to audit and recoup funds disbursed under its local contracts, DOH has long authorized HRA to audit the providers in New York City (R59, 217).

In sum, every indicator confirms HRA's authority to audit and recoup the $7 million in Medicaid funds that People Care first hoarded and later (as further discussed below) misspent: from the contract's broad terms, to the intricate regulatory framework that shaped them, to the parties' course of conduct, to the legislative understanding of Public Health Law § 2807-v, and DOH's persistent endorsement and ratification of HRA's position.

B. The majority below erred in concluding that HRA lacked the necessary authority to act.

In sustaining the petition, the majority below misread Public Health Law § 2807-v and the memorandum of understanding as imposing barriers to HRA's authority to act—when none in fact exist. HRA's authority to audit and recoup is integral to its DOH-approved local formula and thus embedded in its DOH-approved

contracts. Nothing in the statute or the memorandum of understanding displaces that authority. Indeed, DOH, whose powers HRA has supposedly usurped and whose views are entitled to deference, explicitly agrees.[6]

1. Nothing in Public Health Law § 2807-v requires DOH to stop entrusting HRA with the administration of Medicaid funds for the City's contracted providers.

The majority erroneously asserted that if the contract authorized HRA to act, the contract would contravene Public Health Law § 2807-v (R1270-71). Although the majority never says so outright, it may have based its assertion, as Supreme Court did, on the proposition that a contract entered into in violation of a statute is an illegal undertaking (R27).

---

[6] The majority also insists that the funds in dispute were not Medicaid funds, on the grounds that the Appellate Division in its 2011 decision "necessarily" reached this conclusion (R1272). But this Court is free to reach a different conclusion, because the record here makes plain that the funds at issue are no less a part of People Care's contractual funding than the rest of the Medicaid funds. *See Rufo v. Orlando*, 309 N.Y. 345, 351 (1955). And, as the dissent correctly observed, nowhere in the earlier decision did the Appellate Division decide, much less mention, whether the funds in dispute were Medicaid funds, or whether HRA had the authority to audit and recoup the funds under the contract (R1293-94). The issue on appeal in 2011 was simply whether Supreme Court had erred in dismissing People Care's petition for failure to exhaust administrative remedies.

But this common law doctrine, meant to ensure that courts do not serve as "paymaster[s] of the wages of crime, or referee[s] between thieves" by denying parties to such acts the right to bring a breach-of-contract lawsuit, has no relevance here. *Stone v. Freeman*, 298 N.Y. 268, 271 (1948). People Care and HRA were not private parties engaging in illegal conduct; they entered into a valid contract for legitimate business and public policy purposes. DOH then approved the contract, as required for the contract to take effect, so HRA could safeguard the public fisc on DOH's behalf.[7] *See* 18 NYCRR § 505.14(c)(4)(ii).

In any event, as the dissent correctly observed, no conflict exists between Public Health Law § 2807-v and the contract (R1295-96). Although the statute permits DOH to audit and recoup earmarked funds, it does not make such authority

---

[7] Moreover, in limiting broad-brushed applications of this common-law doctrine, this Court has explained that "the violation of a statute that is merely *malum prohibitum* will not necessarily render a contract illegal and unenforceable," particularly where denying relief would be wholly out of proportion with public policy. *Benjamin v. Koeppel*, 85 N.Y.2d 549, 553 (1995). That principle applies here. Thwarting the government's ability to ensure that public funds are properly spent, under the guise of preventing nefarious illegality, makes no sense.

exclusive to DOH. Nor does the statute prohibit local social services districts like HRA from conducting their own audits of earmarked funds under their existing powers, based on preexisting arrangements blessed by DOH.

Had the Legislature intended otherwise, it would have done so explicitly. *See McGowan v. City of New York*, 53 N.Y.2d 86, 94 (1981) ("[I]n the absence of a manifestation of intent to change a long-established practice, ordinarily no design to do so will be attributed to legislative action."). Yet nothing in the legislative record or Public Health Law § 2807-v suggests as much. Nor is there anything in the statute or its legislative history to suggest that the Legislature wanted DOH to conduct myriad standalone audits of funds in New York City, a task not only unnecessarily inefficient, but also logistically difficult, as the funds were distributed under HRA's individualized reimbursement rates. DOH has thus interpreted the statute "to supplement, rather than supersede, HRA's existing auditing and recoupment authority," a reasonable interpretation entitled to judicial deference (R217). *See Salvati v. Eimicke*, 72 N.Y.2d 784, 791 (1988).

Notably, when the Legislature transferred the authority to audit Medicaid funds from the Department of Social Services to DOH in the 1990s, the Legislature did not explicitly mention local districts. *See* L. 1997, ch. 436, § 122(a), (e). Yet even People Care has never suggested that by failing to mention DOH's right to delegate its authority and responsibilities, or to acknowledge the role of a local district like HRA in auditing providers, the Legislature intended to vest the authority to audit exclusively with DOH. To the contrary, People Care has always conceded that HRA has the authority to audit and recoup Medicaid funds, even as it has belatedly sought to carve out the funds at issue from that authority (R45).

Thus, it should not be inferred, from the Legislature's silence, that Public Health Law § 2807-v precludes HRA from exercising its preexisting audit and recoupment powers—authority that DOH has repeatedly and specifically endorsed as a necessary part of HRA's rate-setting authority over personal care services providers. *See Auerbach v. Board of Educ.*, 86 N.Y.2d 198, 205 (1995). Courts "typically do not rely on legislative silence to

infer significant alterations of existing law." *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 72 (2013).

Public Health Law § 2807-v would have been a poor vehicle for the Legislature to use to impose such a drastic structural change to Medicaid administration. The statute merely catalogues how the State has sought to spend the money collected in the tobacco control and initiatives pool. It does not seek to redefine the relationship between DOH and HRA under the State's Medicaid program. And it should not be interpreted to upset decades of settled administrative policies and regulatory practices, especially when this Court has expressly recognized DOH's broad authority to determine which standards and procedures are "most suitable" for auditing Medicaid providers. *Mercy Hosp. of Watertown v. New York State Dep't of Social Servs.*, 79 N.Y.2d 197, 204 (1992). Indeed, it would have been particularly odd for the Legislature to silently restrict HRA's longstanding ability to audit and recoup Medicaid funds on DOH's behalf in a statute allocating hundreds of millions of Medicaid dollars annually that the Legislature took pains to guard against attempts by providers to profit in any way.

2. The memorandum of understanding between DOH and HRA does not govern HRA's audit and recoupment authority.

The majority also erroneously asserted that the memorandum of understanding between DOH and HRA precluded HRA from auditing and recouping the funds at issue (R1270-71). But the purpose of the memorandum was not to define HRA's audit and recoupment authority. As both Public Health Law § 2807-v(1)(bb)(i) and the memorandum itself explain, DOH and HRA entered into the memorandum to determine how the new funds would be "computed and distributed," a detail the Legislature deliberately left for them to sort out in light of HRA's numerous individualized reimbursement rates (R153-54).

The memorandum's only reference to auditing is in a single whereas clause, which merely states that DOH "may audit" HRA's providers. Such recitals do not constitute part of the operative agreement. *See, e.g., Jones Apparel Group, Inc. v. Polo Ralph Lauren Corp.*, 16 A.D.3d 279, 279 (1st Dep't 2005). Besides, that prefatory clause is entirely consistent with DOH and HRA's shared view that DOH's authority is complementary, not

exclusive. Nothing in the clause suggests that DOH intended to deny HRA the authority to audit and recoup the new Medicaid funds, which would have been a radical departure from DOH's well-established and repeated acceptance of HRA's authority to audit all Medicaid funds disbursed under its contracts.

And contrary to the majority's assertion otherwise (R1277-78), the memorandum's merger clause is equally irrelevant here (R154). Nothing in the record suggests that DOH and HRA intended for the memorandum to cover, much less curtail, HRA's existing contractual authority to audit and recoup. Thus, while the merger clause states that the memorandum "constitutes the entire understanding" the parties reached on the computation and distribution of the new funds, the clause has no bearing on HRA's authority to audit and recoup (*id.*). Indeed, HRA's authority to audit and recoup, bestowed by DOH under HRA's local formula and embodied in its contracts, in no way "affect[s] or interfere[s]" with its full compliance with the memorandum (*id.*).

Instead of recognizing that the memorandum simply laid out the basic calculations and conditions for HRA's contracted

providers to receive the new funds, the majority interpreted the memorandum as setting forth a new DOH method of reimbursement (R1275). According to the majority, because the contract between HRA and People Care provided that it would accommodate any new DOH "method of reimbursing" People Care, the memorandum "modified" HRA's contractual authority to audit, by granting DOH exclusive authority to audit the earmarked funds (R1266, 1273-75). This reasoning suffers from several flaws.

For one, the contractual provision that the majority invoked does not apply because DOH never adopted a new method of reimbursement. Under the contract, DOH's "method of reimbursement," or how People Care would be paid, is specifically identified as "through MMIS"—DOH's claims management and payment system (R74). The majority missed the fact that when HRA informed People Care that the new funds had increased its contractual Medicaid reimbursement rate, HRA made clear that the method of reimbursement would remain the same: DOH would still be paying the company through MMIS (R47-48, 73-74, 157). Thus, rather than finding a fatal flaw in the contract, the majority

simply misconstrued it, adopting an argument that even People Care never made below.

Even if the memorandum did create a new method of reimbursement (and it did not), the majority's reasoning fails on its own terms. The majority apparently concluded that once DOH changed its payment method, the change to the contract would be self-executing (R1274). But the contract itself provided that changes had to be made by HRA and People Care in writing, and nothing in the record shows that the parties made such a change (R117-18).

Moreover, as the dissent aptly noted, paying out the earmarked funds in a different way would not "somehow transform" the funds into "non-Medicaid funds that are exempt from HRA's contractual audit and recoupment authority" (R1292). Every penny that People Care received in earmarked funds was delivered under its contract with HRA, as part of its contractual Medicaid reimbursement rate. The majority thus erred in asserting that the memorandum, in allocating these funds for HRA's providers through their existing contracts, mandated that

the funds be audited and recouped exclusively outside HRA's regular auditing process, by a different entity, and in a less efficient way.

The majority focused on the memorandum because it evidently concluded that the only way that DOH could have authorized HRA to audit and recoup the earmarked funds was through a "delegation order" (R1283). But as the dissent correctly noted, no such formalities were required (R1293), particularly given the breadth of HRA's preexisting authority (*see supra* pp. 26-35). Although the majority turned to Social Services Law §§ 364-a and 368-c as support for the idea that a delegation order was required (R1272-73), both statutes concern DOH's Medicaid relationship with other state entities, not its own local social services districts. *See* SSL §§ 364-a, 368-c; L. 1983, ch. 83, § 13; 1983 McKinney's Session Laws of NY, at 2415, 2147.

In focusing on the memorandum, the majority missed the bigger picture: that DOH has consistently bestowed and acknowledged HRA's authority to act. Here, DOH granted HRA, its own local Medicaid agent in the City, the requisite authority

when it approved, under the personal care services regulations, HRA's local formula, which by design relies on audits and recoupments for savings. In fact, DOH promulgated the regulatory provision allowing local districts to apply their own formulas knowing that HRA had, years earlier and with DOH's support, successfully implemented a cost-based, audit-based, and recoupment-based formula (R145).

HRA then confirmed that authority when it approved People Care's contract. And DOH has time and again validated that authority by twice endorsing, in this very litigation, HRA's audit, and by accepting the fruits of HRA's Medicaid audits of its providers every year, including the $3.8 million recouped from People Care that went unchallenged here.

Ultimately, the majority embraced a contradiction: even though DOH has ordered HRA, its local agent, to contract for personal care services for Medicaid, to oversee the providers' work, to set their cost-based Medicaid reimbursement rates, and to review their fiscal practices, DOH somehow failed, or was deliberately denied the ability, to grant HRA the necessary

authority to ensure that its providers actually comply with their obligations to spend Medicaid money properly. Nothing here justifies such a result.

POINT II

HRA RATIONALLY SOUGHT TO RECOUP THE $7 MILLION IN MEDICAID FUNDS FROM PEOPLE CARE

Because HRA has the necessary audit and recoupment authority here, any challenge to HRA's exercise of that authority must be heard, if at all, under the dispute resolution procedures in the parties' contract (R119-23). In any event, HRA acted rationally in seeking to recoup the $7 million in earmarked funds.

Consistent with state law and as a matter of longstanding practice, DOH and HRA have administered Medicaid funds for personal care services on an annual cycle. HRA audits its providers on an annual basis (R50, 71, 105). DOH ties its general statewide formula to annual costs and trends. *See* 18 NYCRR § 505.14(h)(7). DOH also requires HRA to submit an annual plan on the provision of personal care services. *Id.* § 505.14(j). And

DOH allocates the very type of earmarked Medicaid funds in dispute "on an annualized basis." PHL § 2807-v(1)(bb)(i)(a).

Despite the annual nature of this Medicaid program, People Care contends that because the statute does not specify when the earmarked funds may be audited and recouped, the failure to spend the funds in the fiscal year they were allocated provides no basis for HRA, or even DOH, to recover the funds in an annual audit (R205-06). People Care misreads the statute. The law's constraints on what *providers* can do with earmarked funds do not restrain how or when the *government* can audit (R176, 217). PHL § 2807-v(1)(bb)(i). DOH therefore told HRA that because the earmarked funds were simply additional Medicaid funds parceled out in annual allotments under the contract's annualized formula (R154, 157), HRA was authorized to demand their return. After all, People Care had not spent the $7 million, earmarked to boost the pay and benefits of frontline workers immediately "in the fiscal year received," or informed HRA of an "ongoing plan and process in place for expending the funds," which meant money meant for workers had become excess profit (R176-77).

This Court should defer to DOH's rational interpretation and application of the statute. *See Int'l Union of Painters & Allied Trades v. New York State Dep't of Labor,* 32 N.Y.3d 198, 209 (2018); *Town of Lysander v. Hafner*, 96 N.Y.2d 558, 565 (2001). To accept People Care's blinkered interpretation would allow providers to retain earmarked funds indefinitely, or to use them for an unauthorized purpose, even though all other Medicaid funds must be audited and, if unspent, returned annually.

The events here only highlight the importance of HRA's audit and recoupment authority. Instead of using the funds at issue when they were allocated for the benefit of frontline workers only, People Care's former owners, Bruce Jacobson and Jerry Lewkowitz, used the money in connection with the sale of their People Care stock to a newly created employee stock ownership plan (R78-79, 208-09).

In 2014, People Care employees sued the trustee of their employee stock ownership plan, alleging that the trustee had breached its fiduciary duties when it purchased the company from Jacobson and Lewkowitz at the inflated price of $80 million. *See*

Douglin v. GreatBanc Trust Co., 115 F. Supp. 3d 404, 408 (S.D.N.Y. 2015). After the court granted the plaintiffs' unopposed motion for class certification, the parties settled the case.[8] *Id.* at 409. At the same time, the U.S. Department of Labor separately found after an investigation that Jacobson and Lewkowitz had sold the company to the employee stock ownership plan for more than its fair market value in violation of federal law. The former owners ultimately settled the investigation for $10 million.[9]

In short, HRA acted rationally in seeking to recoup the $7 million in Medicaid funds that People Care had not used, and lacked any imminent plans to use, for the exclusive benefit of frontline workers. Because DOH's interpretation of Public Health Law § 2807-v is rational, HRA properly demanded the return of

---

[8] Court Listener, Douglin v. GreatBanc Trust Company Inc. Docket, https://perma.cc/TMZ5-JJLP (captured Dec. 3, 2019).

[9] *See* U.S. Department of Labor, *$10M Settlement Reached with People Care and U.S. Labor Department*, https://perma.cc/64PA-8YY6 (captured Dec. 3, 2019) (discussing the settlement); Ruth Simon and Sarah E. Needleman, *U.S. Increases Scrutiny of Employee-Stock-Ownership Plans*, Wall St. J., June 22, 2014, https://perma.cc/V3NR-8R5B (captured Nov. 18, 2019) (discussing the federal investigation).

the funds, so that DOH could reallocate them for the benefit of Medicaid recipients.

CONCLUSION

This Court should reverse the Appellate Division's order, deny People Care's article 78 petition, vacate the injunction, and dismiss the proceeding.

Dated: New York, NY
December 6, 2019

Respectfully submitted,

JAMES E. JOHNSON
Corporation Counsel
of the City of New York
Attorney for Appellants

By: _____
ERIC LEE
Assistant Corporation Counsel

100 Church Street
New York, NY 10007
212-356-4053
erlee@law.nyc.gov

DEVIN SLACK
SCOTT SHORR
ERIC LEE
of Counsel

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 9,100 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.

ERIC LEE