2016 WL 4772991 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

RITE AID CORPORATION, Petitioner,
v.
Terie HUSEBY, Assessor and Board of Assessment Review of Town of Irondequoit, Respondents.
Rite Aid Corporation, Petitioner,
v.
Stephen Haywood, Assessor, and Board of Assessment Review of Town of Williamson, Wayne County, Respondents.

No. 16-36.
September 12, 2016.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department

# Reply Brief

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***1 THE EQUAL PROTECTION CLAIM POSED BY PETITIONER WAS PROPERLY PRESENTED AND PRESERVED IN THE STATE COURTS**

The argument of respondents Williamson and Irondequoit claiming that Petitioner Rite Aid Corporation failed to raise a federal question in prior state court proceedings is without merit.

**A. The Constitutional Argument was Set Forth in the Initial Article 7 Petitions at the Commencement of the Case.**

The Irondequoit case covered tax years 2008 through 2012. The Williamson case covered 2009 through 2011. A separate petition was filed for each tax year. Each town's cases were joined, heard and decided in a single trial to resolve all years by the same judge. The petitioner added the equal protection argument to the petitions in 2011 and again for Irondequoit in 2012. The filed petitions claim that the assessor applied the assessment law in an unfair and discriminatory manner in violation of the United States Constitution:

**Paragraph 15 in the Second Cause of Action:**

> 15. Upon information and belief, the Respondent has not applied the same rule, method or system of determining the valuation and computing the assessment upon the property or its benefit, without due process of law; said assessment is erroneous, unequal, excessive, unjust, inequitable, unreasonable and/or inappropriate for property of its type or class; ***2** *and said assessment constitutes an unjust and unlawful discrimination against said property so appearing on the said assessment roll*, (emphases added)

**Paragraph 23 in the Fourth Cause of Action:**

> 23. The petitioner has not been provided with fair and adequate notice and opportunity to be heard with respect the Petitioner's assessment and the taxation of its property because the Petitioner did not have adequate notice of its new assessment for the 2011 tax year in time to prepare for the hearing of the Board of Assessment Review, because the Respondents herein failed to follow the rules and regulations of the State Board of Real Property Tax Services and the laws of the State of New York with respect to the assessment of real property, *and because the rules and procedures of the State Board of Real Property Tax Services and the laws of the State of New York with respect to the assessment of real property violates the New York State and Federal Constitutions.* (emphases added)

These allegations were included in both towns' petitions challenging the 2011 tax year, and in the 2012 petition for Irondequoit. They are the first papers filed in the case. The cases for all years were joined and heard together by the same judge at trial resulting in a single decision.

***3** The trial court considered the petitioner's argument that the assessment of first generation drugstores was unjust, unlawful, and discriminatory. The petition clearly alleges that the assessor's assessment methodology, and the laws of New York which were the basis of that methodology, violated the New York State and Federal Constitutions. Therefore, the federal question was before the court at the trial covering all years. The respondent was on notice of the petitioner's federal claim.

  

**B. The Petitioner Did Not Have an Opportunity to Raise the Equal Protection Claim Before the New York Court of Appeals because Leave was Never Granted.**

Respondents claim that the petitioner's equal protection argument has not been preserved. Assuming for purposes of argument only, that the constitutional claim was not before the court at trial, the petitioner never had an opportunity to present the argument to either the Appellate Division or the Court of Appeals.

The trial court granted the petition and determined that the fair market value of a drugstore must be determined by comparing it to similar retail property. The court agreed that valuing an above market lease did not reflect the real property's market value.

In the reversal by the Appellate Division, that court for the first time held that a drugstore assessment must always be determined only by comparison to other first generation drugstore leases. It did not matter whether the lease reflected the market value of the real property alone. It is important to note that assessments are ***4** presumed correct in New York, so nobody ever knows how the assessor determines value. The Appellate Division decision mandate created an issue of first impression in this case.

An application for leave to appeal is not the same as a full argument on the merits. The moving party is to briefly explain why leave should be granted. The reason could be that the case has public significance, or to clear up a split in the prevailing authorities. The moving party does not delve into the merits of the entire case. In fact, the court discourages a lengthy application. Consequently, the petitioner never had an opportunity to challenge the new Appellate Division rule and could not fully present its constitutional argument to the New York Court of Appeals, because leave to appeal was never granted.

Note that this court may grant certiorari even if the petitioner did not raise the equal protection claim in prior proceedings. This court may decide a claim not raised before the lower courts when the parties have argued the matter in their briefs before the Supreme Court, and the Court's decision will reduce the likelihood of further litigation. See *Polar Tankers, Inc. v. City of Valdez, Alaska*, 557 U.S. 1,14 (2009). Here, Petitioner argues that taxing only owners of first-generation retail properties solely based on the value of their above market build-to-suit leases violates the equal protection rights of the taxpayer.

This issue is causing far too much litigation. In the last ten years, New York has produced nine drugstore appeals going both ways. Rite Aid has several hundred first-generation drugstores in New York and thousands across ***5** the nation. Walgreens and CVS each have more stores than Rite Aid. And this issue affects other retailers such as Walmart, Home Depot and Starbucks who finance their new stores using these leases. Therefore, the Supreme Court should grant certiorari because it will finally resolve this national issue and eliminate further litigation.

Pursuant to 28 U.S.C. §1257(a), this court will review a final judgment of a state court if the record as a whole shows that the federal claim was adequately presented in the state system. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 550 (1987). In its state court petition, the petitioner must cite either the federal source of law on which it relies or a case deciding its claim on federal grounds. *See Howell v. Mississippi*, 543 U.S. 440,444-45 (2005); *Adams v. Robertson,* 520 U.S. 83, 89 (1997). Both the Appellate Division and the New York Court of Appeals had before them petitions which clearly stated that the drugstore assessment method was unfair, discriminatory and in violation of the United States Constitution. The argument was adopted by the trial court in its decision. In addition, the petitioner never had an opportunity to address the Appellate Division's new rule of law because leave to the New York Court of Appeals was not granted. For these reasons, the respondent's argument that the issue was not preserved is without merit.

**THE RESPONDENTS ARE WRONG WHEN THEY CLAIM THE FOURTH DEPARTMENT DECISION VALUED ONLY THE REAL PROPERTY**

The respondents both argue that the Appellate Division Fourth Department valued the real property alone, and value is best reflected by comparing the store ***6** to other leased first generation properties, sold in what they call *the drugstore net lease submarket.* Since the court only valued the real property, respondents claim there is no discrimination here.

These submarket properties are all encumbered by leases, so sales of those properties reflect the value of the lease, and not

  

just the value of the real property alone. A lease also reflects the cost of a new custom built property, while all other taxpayer assessments are based on the market value of existing used real property alone. The Appellate Division decision goes further. Trial courts can no longer consider what the next user will pay to buy or lease the property in its current condition, even though these users are the market.

While the Appellate Division did not expressly say they were valuing the lease and not the real property, that is exactly what they did. That is the new rule of law that trial judges are now following. First generation properties can only be valued by comparing them to other properties encumbered by build-to-suit leases, where rents are based on cost. If the property is worth less without the lease, it is still valued based on its lease.

Fair market value should be what the next user will pay for the property in its current condition. That is no longer the case for first generation drugstores in New York, and in any other state that values these properties based solely on the net lease submarket.

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