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Court of Appeals

of the

State of New York

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Plaintiffs-Appellants,

– against –

NETHERLAND PROPERTY ASSETS LLC
and PARKOFF OPERATING CORP.,

Defendants-Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS IN RESPONSE TO BRIEF OF *AMICI CURIAE* NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL AND NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL

KUCKER & BRUH, LLP
747 Third Avenue
New York, New York 10017
Tel.: (212) 869-5030
Fax: (212) 944-5818

KATSKY KORINS LLP
605 Third Avenue
New York, New York 10158
Tel.: (212) 953-6000
Fax: (212) 953-6899

Attorneys for Defendants-Respondents

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DISCLOSURE OF PARENTS, SUBSIDIARIES AND AFFILIATES

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Defendants-Respondents Netherland Property Assets LLC and Parkoff Operating Corp. (collectively, "defendants") respectfully submit this brief in response to the brief filed by the Attorney General of the State of New York (the "Attorney General") on behalf of her office and the New York State Division of Housing and Community Renewal ("DHCR"; collectively, the "AG *Amici*") as *amici curiae*.[1]

PRELIMINARY STATEMENT

The AG *Amici* argue that the lower court erred both in dismissing plaintiffs' Rent Stabilization Law ("RSL") claims under the doctrine of primary jurisdiction and in dismissing plaintiffs' General Business Law ("GBL") § 349 claim on the ground that that statute does not apply to the conduct and harms alleged in plaintiffs' complaint (the "Complaint"). On both counts, the AG *Amici*'s arguments for reversal cannot be squared with the record or the applicable precedent.

[1] References to "AG Br." are to the brief submitted on behalf of the AG *Amici*; references to "Respondents' Brief" or "Resp. Br." are to defendants' principal brief on this appeal; references to "Add-__" are to the Addendum attached to that brief; references to "Respondents' Supplemental Brief" or "Resp. Supp. Br." are to defendants' Supplemental Brief dated August 2, 2019; references to "Appellants' Brief" or "App. Br." are to the principal brief of plaintiffs-appellants ("plaintiffs"); references to "Appellants' Supplemental Brief" or "App. Supp. Br." are to the plaintiffs' Supplemental Brief dated August 2, 2019; references to "R.__" are to the printed Record on Appeal.

On primary jurisdiction, the AG *Amici* agree with defendants on two key points. First, they agree that – even after the statutory amendments embodied in the Housing Stability and Rent Protection Act of 2019 (the "HSTPA") – courts retain the ability to dismiss rent-overcharge claims under the doctrine of primary jurisdiction "in appropriate cases." (AG Br. at 18; *accord id.* at 25). In this respect, defendants and the AG *Amici* are on common ground in disagreeing with plaintiffs, whose position is that the doctrine cannot apply to such claims as a matter of law. (*See* App. Br. at 20-25; Add.26-30; App. Supp. Br. at 2-8).

Second, the AG *Amici* agree with defendants that the HSTPA's specification that courts have jurisdiction over rent-overcharge claims was intended to "codify" the prior judge-made rule that – contrary to what the governing statutes actually said – courts both within and outside the City of New York have concurrent jurisdiction with DHCR over such claims. (AG Br. at 8; *see id.* at 9, 21; *accord* Resp. Supp. Br. at 12-18). Here, too, they are on common ground with defendants in disagreeing with plaintiffs (*cf.* App. Supp. Br. at 2-8).

Where defendants and the AG *Amici* part ways with respect to the HSTPA is on the question of whether its amendments to § 12(b) of the Emergency Tenant Protection Act (McKinney's Unconsol. Laws § 8632(b)) and to RSL § 26-516(a)(2) do more than codify that prior judge-made rule. According to the AG *Amici*, those amendments *also* substantially narrowed the common-law doctrine of

primary jurisdiction, and "require[] courts to give great weight to a tenant's choice of forum" in exercising their discretion to determine whether a claim should be dismissed under that doctrine. (AG Br. at 25). This, they assert, requires reversal here because (according to them) "defendants failed to identify *any* feature of the underlying disputes that would distinguish them from the mine-run overcharge case in a way that would justify" such dismissal. (*Id.* at 18, emphasis added). The AG *Amici* are incorrect on both of these points.

As a threshold matter, the AG *Amici* do not meaningfully address the HSTPA's retroactivity provision, which makes clear that it does not apply to plaintiffs' claims. (*See infra*, Point I.B.1). But wholly apart from this failure, the AG *Amici*'s argument that the statute should be read to alter the long-standing common-law doctrine of primary jurisdiction contradicts both its plain language and every applicable tool of statutory construction. Based on that language and those tools, the doctrine applies with the same force in cases governed by the HSTPA as it did prior to the statute. (*See infra*, Point I.B.2).

Moreover, the AG *Amici*'s assertion that no "feature of the underlying disputes" warranted dismissal under that doctrine ignores not only the consistent precedent of the courts of this State (under which such dismissal would have been appropriate *regardless* of any such "feature"), but also the record here – which reveals several such features that defendants identified in the lower courts and

plaintiffs declined to address. Even under the version of the doctrine that the AG *Amici* urge this Court to adopt, this would be enough to support affirmance of the lower court's discretionary determination. (*See infra*, Point I.C).

There is, however, a more fundamental flaw in the AG *Amici*'s primary jurisdiction analysis: it is based almost entirely on federal precedent, which the AG *Amici* ask this Court to follow in order to reach a result that (as detailed below) is contrary to the well-developed precedent of the courts of this State. The AG *Amici* offer no reason that would justify such a change in the law – which no party sought below, and which (as the AG *Amici* apparently concede) is not mandated or even hinted at in the HSTPA. This Court should not accept the AG *Amici*'s invitation to upend the settled jurisprudence in this manner – *particularly* in light of the fact that the Legislature only recently forewent an opportunity to do so. (*See infra*, Point I.A).

The AG *Amici*'s argument about GBL § 349 similarly ignores the clear precedent of this Court. Under that precedent, defendants' "fail[ure] to disclose their non-compliance with the rent-stabilization laws" (which the AG *Amici* admit is the only "deception" in which defendants are alleged to have engaged – *see* AG Br. at 33) *cannot* give rise to a GBL § 349 claim on top of plaintiffs' RSL claim. *See Schlessinger v. Valspar Corp.*, 21 N.Y.3d 166, 172-73 (2013). As well, only a party injured as a result of *deception* (rather than something else, such as a

violation of the RSL) may assert a claim under GBL § 349. *See City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 621 (2009). Because plaintiffs' injury stems entirely from alleged violations of the RSL that have nothing to do with deception, their claims are cognizable only under that statute and not under GBL § 349.

We submit that this precedent requires affirmance here. But to the extent there could be any doubt, it is dispelled by the fact that when the Legislature addressed these matters at length in the HSTPA, it did nothing to overrule the caselaw that expressly holds that GBL § 349 does not apply to conduct governed by the RSL. The AG *Amici*'s argument should be rejected for any or all of these reasons. (*See infra*, Point II).

* * * * *

We pause to note one further point. The AG *Amici* have ample tools available to enable them (in their words) to "police deceptive conduct in the housing market" (*see* AG Br. at 38), and the Legislature only recently gave them even more. It also made substantial additional funding available to *DHCR* (but not the courts) to enable it to fulfill its mission. (*See* Resp. Supp. Br. at 19-20). As a matter of policy, those choices were the Legislature's to make. If the AG *Amici* needed more than that, they should have sought it in the Legislature in connection

with the comprehensive overhaul in which that body gave them virtually everything they asked for.

Instead, the AG *Amici* now ask this Court to change the applicable legal principles in ways the Legislature did not. We respectfully submit that the context of that request makes it especially appropriate for this Court to decline it.

ARGUMENT

I. THE AG *AMICI*'S ARGUMENTS ABOUT PRIMARY JURISDICTION PROVIDE NO BASIS FOR REVERSAL

A. The Court Should Not Accept The AG *Amici*'s Invitation To Completely Revamp The Doctrine Of Primary Jurisdiction As It Has Consistently Been Applied In The Courts Of This State

As noted above, the AG *Amici*'s arguments about the impact of the HSTPA are inconsistent with the language of the statute and the applicable principles of statutory construction. The reasons why this is so are detailed below in Point I.B. But the AG *Amici* also start from the premise that the way the courts of this State apply the doctrine of primary jurisdiction – which affects not only this area of the law, but also numerous others – should be fundamentally altered to match what they describe as the practice in federal court. That premise finds no support in the law.

Specifically, the AG *Amici* rely entirely on federal precedent to argue that the doctrine of primary jurisdiction (a) should not apply unless the governing statute makes clear that the Legislature intended the agency to "have the first word

on issues arising in judicial proceedings" (AG Br. at 19-20); (b) should not apply if the governing statute expressly permits "an initial proceeding" to be brought in court without prior resort to the agency (*id.* at 20-21; *accord id.* at 28); and (c) should not apply if the issues involved are factual rather than legal (*id.* at 28-29). As detailed in Respondents' Brief, the precedent of this Court and the courts of this state dictate *exactly* the opposite: (a) the doctrine applies any time a dispute is within the core competence of an administrative agency (and not just when the governing statute indicates that the agency should "have the first word")[2]; (b) it

[2] *See generally* 2 N.Y. Jur.2d Administrative Law § 329 (under the doctrine of primary jurisdiction, "[i]n the absence of a clear contractual right the enforcement of which justifies court intervention, a court should decline to take initial jurisdiction of a matter within the competence of an administrative agency specially created to handle such matters.") (collecting authorities; footnotes omitted). The cases the AG *Amici* cite in support of their contrary assertion that under New York law the doctrine does not apply "just because" a claim falls within an agency's particular competence (AG Br. at 24, n.5) do not support that assertion. *See Capital Tel. Co., Inc. v. Pattersonville Tel. Co., Inc.*, 56 N.Y.2d 11, 22-23 (1982) (primary jurisdiction dismissal not required because agency had already ruled on relevant issues; if additional issues arise on which agency has not yet ruled, trial court will "be free to defer its action until those particular phases of the action have been considered by the [agency]"); *Ken-Vil Assoc. Ltd. Partnership v. New York State Div. of Human Rights*, 100 A.D.3d 1390, 1393 (4th Dept. 2012) (primary jurisdiction doctrine inapplicable because issue at stake – a question of contract interpretation – was not within the special competence of the agency); *Matter of Connolly v. Rye School Dist.*, 31 A.D.3d 444, 446 (2d Dept. 2004) (same); *Good v. American Pioneer Title Ins. Co.*, 12 A.D.3d 401, 402 (2d Dept. 2004) (primary jurisdiction doctrine inapplicable because matters involved were "questions of law"); *Manhattan Telecom. Corp. v. Best Payphones, Inc.*, 299 A.D.2d 178 (1st Dept. 2002) (holding that argument that matter fell within *exclusive* jurisdiction of agency was waived, and noting that in all events matter was a "routine account stated claim"); *Lauer v. New York Tel. Co.*, 231 A.D.2d

applies whenever an agency has concurrent jurisdiction with the courts (that is, when the governing statute on its face permits "an initial proceeding" to be brought in court)[3]; and (c) it applies where the issues involved are factual or mixed questions of law and fact, but (absent other factors) does *not* apply where the issues are only legal.[4] (*See* Resp. Br. at 11-15 and nn.7-14, and authorities cited therein). It is therefore not surprising that in the lower courts no one pressed the version of the doctrine of primary jurisdiction that the AG *Amici* now advocate.

The absence of any such argument below would be reason enough to reject it here as unpreserved. (*See* Resp. Br. at 7-8 and n.3, and authorities cited therein).[5]

126, 129-30 (3d Dept. 1997) (primary jurisdiction doctrine inapplicable because issues did not fall within agency's "special competence"); *Rochester Gas & Elec. Corp. v. Greece Park Realty Corp.*, 195 A.D.2d 956, 956-57 (4th Dept. 1993) (same).

[3] *See generally* 2 N.Y. Jur.2d Administrative Law §328 ("The doctrine of primary jurisdiction enjoins courts sharing concurrent jurisdiction to refrain from adjudicating disputes within an administrative agency's authority, particularly where the agency's specialized experience and technical expertise is involved.") (collecting authorities; footnote omitted).

[4] *See generally* 2 N.Y. Jur.2d Administrative Law § 330 ("[t]he doctrine of primary administrative jurisdiction does not apply where only a question of law is involved and there are no facts to consider or other considerations to weigh") (collecting authorities; footnotes omitted).

[5] This is especially so in light of the fact that the attempt to raise it for the first time in this Court is made not by a party, but by an *amicus curiae*. *See* 22 N.Y.C.R.R. § 500.23(a)(4) ("Movant [for *amicus curiae* relief] shall not present issues not raised before the courts below."); *accord Lezette v. Bd. of Educ., Hudson City Schl. Dist.*, 35 N.Y.3d 272, 282 (1974) ("an Amicus has no status to present new issues in a case") (collecting authorities).

But there is ample other reason. The AG *Amici* do not explain why this Court should eschew an entire body of precedent – applicable in numerous fields including education, zoning, utilities, and various others (*see* Resp. Br. at 12-14 and nn.8-11) – to adopt a materially different version of the doctrine of primary jurisdiction. Nor do they explain why the version they describe is more appropriate to the needs of the State or the functioning of its courts and agencies, or is otherwise preferable to what the courts of this State have been doing for decades. Indeed, they do not even purport to consider what would happen to the courts of this State if their discretion under the doctrine were suddenly limited in the manner the AG *Amici* suggest, let alone offer any argument to justify the increased burden on those courts that such limits would inevitably cause. Even if their argument had been preserved, the fact that the result they advocate would upend the jurisprudence without any stated reason would warrant its rejection. (*See* Resp. Br. at 33-34 and nn.38-39, and authorities cited therein).

There is yet a further reason to reject the version of primary jurisdiction that the AG *Amici* advocate: it is not even an accurate portrayal of how the doctrine works in the federal courts. For example, citing *Tassy v. Brunswick Hosp. Ctr., Inc.*, 296 F.3d 65, 69 (2d Cir. 2002), they argue that a "case that involves unique and narrow factual dispute[s]" should not be dismissed on primary jurisdiction grounds because it "poses no risk of inconsistent interpretations of any broadly

applicable rule or policy." (AG Br. at 29, internal quotations omitted, alteration in AG Br.). In *Tassy*, however, the court observed that "the origin and evolution of the primary jurisdiction doctrine demonstrate" that its justifications and purposes are "*twofold*: the desire for uniformity *and* the reliance on administrative expertise." 296 F.3d at 68. The court then engaged in a detailed analysis of these two justifications and purposes.

After concluding "[w]ith respect to the first purpose" that "the desire for uniformity [did] not support the application of the doctrine of primary jurisdiction" because the case presented "a unique and narrow factual dispute," the court reasoned that "*[t]he more significant question*" was whether deferral to the agency would be appropriate in light of the agency's expertise. *Id.* at 69 (emphasis added; citation and internal quotations omitted). The court explained that this prong of the inquiry "asks whether an agency's review of the facts 'will be a material aid' to the court ultimately charged with applying those facts to the law." *Id.* at 73 (collecting cases; quoting *Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289, 305 (1973)). It also "emphasize[d]" that, as in the courts of this State, "primary jurisdiction is a discretionary doctrine." 296 F.3d at 72. Although the court ultimately found that deferral to the agency (a medical review board) was not warranted because the factual issue – whether the plaintiff had committed sexual harassment – was outside the agency's expertise, its analysis makes clear that the result might well

have been different if (as here) the issues involved were within that expertise. *Id.* at 69-70.

We submit that even under this formulation the dismissal here would have to be affirmed as a proper exercise of the lower court's discretion. (*See infra*, Point I.C). But we emphasize that it is *not* the formulation that applies in the courts of this State. As detailed above and in Respondents' Brief, the primary jurisdiction doctrine's "evolution" – the importance of which the *Tassy* court so strongly emphasized (*see supra* at 9-10) – has taken a different course in those courts than it has in the federal courts. As part of this evolution, in the federal courts the doctrine is considered a form of "abstention" – a uniquely federal concept that constitutes a narrow "exception" to those courts' "virtually unflagging obligation . . . to exercise the jurisdiction given them."[6] In the courts of this State, in contrast, absent countervailing factors dismissal under the doctrine is expressly favored whenever a matter is within the core competence of an agency. (*See* Resp. Br. at 34-38 and nn.40-43, and authorities cited therein). That is the settled jurisprudence of this State, and the AG *Amici* have offered no reason to change it.

[6] *Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 691 (3d Cir. 2011) (citations and internal quotations omitted) (cited in AG Br. at 26, 28).

B. The HSTPA Does Not Change The Analysis

The AG *Amici* do *not* argue that their suggestion that this Court adopt the federal version of primary jurisdiction is somehow mandated by the HSTPA. Instead, they argue only that the HSTPA narrows the scope of discretion under the doctrine and requires this Court to defer to plaintiffs' choice of forum absent compelling reasons not to do so. (*See* AG Br. at 19-24). This argument finds no support in the language of the statute or the applicable principles of statutory interpretation.

1. The Language Of The HSTPA Makes Clear That It Does Not Apply To Plaintiffs' Claims

As detailed in defendants' Supplemental Brief, because the HSTPA expressly applies only to "claims" that were "pending" on its effective date, the fact that plaintiffs' rent overcharge claims had been dismissed by that date places those claims outside the scope of the statute as a matter of law. (*See* Resp. Supp. Br. at 5-12, and authorities cited therein). The AG *Amici* offer no counter to this analysis. Instead, they baldly assert that the Legislature "expressly made these provisions of the HSTPA applicable to pending *proceedings* like this one." (AG Br. at 22, emphasis added). That is simply false. As explained in defendants' Supplemental Brief, whereas in some instances the Legislature has expressly made new statutes applicable to pending *proceedings*, here the Legislature specified that the relevant provisions of the HSTPA apply only to pending *claims*. This

distinction – which the AG *Amici* tacitly acknowledge (*see* AG Br. at 22) but do nothing to address – carries a difference as a matter of law, and makes the statute inapplicable here. (*See* Resp. Supp. Br. at 8-12, and authorities cited therein).

2. In Light Of Its Context And Legislative History, The Language Of The HSTPA Also Makes Clear That It Does Not Abrogate Or Narrow The Doctrine Of Primary Jurisdiction

Although we submit that the inapplicability of the HSTPA disposes of the AG *Amici*'s arguments about the statute, there is a second flaw in those arguments: the AG *Amici* have the analysis of legislative intent exactly backwards. The AG *Amici* agree with defendants that the HSTPA "codif[ied]" the prior judge-made rule that – contrary to what the governing statute had said before its amendment – DHCR's jurisdiction over rent-overcharge claims in New York City is *not* exclusive. (*Compare* AG Br. at 7-9 *with* Resp. Supp. Br. at 16-17). But they go on to argue that the Legislature should be presumed to have intended to do more than that (and, in particular, that it should be presumed to have intended to make the doctrine of primary jurisdiction available only where a "compelling reason" exists to apply it) simply because "the Legislature enacted [the HSTPA] against the backdrop of a series of lower court decisions . . . dismissing rent-overcharge claims on primary jurisdiction grounds." (AG Br. at 21-22; *see id.* at 23). This analysis contravenes black-letter principles of statutory interpretation.

As detailed in defendants' Supplemental Brief, this Court's precedent speaks with one voice: statutes should not be interpreted as abrogating or overruling common-law doctrines unless they expressly say so. (Resp. Supp. Br. at 20-21 and n.14, and authorities cited therein). Thus, the fact that the HSTPA was enacted "against the backdrop of a series of lower court decisions" that dismissed rent-overcharge claims on primary jurisdiction grounds means the *opposite* of what the AG *Amici* say it means: absent an express statement that the Legislature intended to alter the common-law doctrine that was applied in those cases (of which the Legislature must be presumed to have been aware), the doctrine remains intact. (*See* Resp. Supp. Br. at 20-21 and n.14, and authorities cited therein).

The fact that the HSTPA undisputedly contains no such statement is reason enough to conclude that the Legislature intended to leave the doctrine untouched.[7] But it is not the only reason. In addition, (a) the Legislature left intact certain

[7] In this regard, we note that – contrary to the AG *Amici*'s suggestion – the HSTPA does *not* say that "*nothing* shall 'prevent a tenant or tenants, claiming to have been overcharged, from commencing an action . . . in a court of competent jurisdiction.'" (AG Br. at 9, quoting HSTPA § 3, emphasis added). It instead says "*nothing contained in this section*" shall prevent such an action. HSTPA § 3 (emphasis added). Because primary jurisdiction is a common-law doctrine of broad application that is not "contained in" any statute, this language has no bearing on it. Moreover, that doctrine does not "prevent" a tenant from commencing an action in court; rather, it impacts what might happen *after* the tenant does so. As set forth in Respondents' Supplemental Brief, in this respect it is no different from numerous other legal principles that may cause an action properly brought in one forum to be transferred to another. (*See* Resp. Supp. Br. at 16 n.8, and authorities cited therein).

differences between the procedures applicable within New York City and those applicable outside New York City, which make sense only if courts within New York City retain the discretion afforded them under the doctrine of primary jurisdiction (*see* Resp. Supp. Br. at 13)[8]; (b) there is nothing at all about the doctrine of primary jurisdiction in the statute's legislative history (Resp. Supp. Br. at 14-16); (c) the Legislature undertook no analysis of the impact of the statutory changes on the courts (*id.* at 19-20); and (d) the sponsors of the statute touted the increased funding that would become available to *DHCR* (*not* the courts) through increased fees, going so far as to say that because of that funding there would be *no* "meaningful state fiscal impact" (*id.*). These factors all point in the same direction: the HSTPA did nothing to limit the courts' discretion to dismiss rent-overcharge claims under the doctrine of primary jurisdiction. (*See id.* at 12-23).

[8] In particular, the statutory provision applicable to proceedings *outside* New York City specifies both that DHCR may intervene and that the courts may certify matters to DHCR to receive the agency's input; in contrast, the provision applicable to proceedings within New York City says no such thing. (*See* Resp. Br. at 15-18 and authorities cited therein; Resp. Supp. Br. at 13 and authorities cited therein). Contrary to the AG *Amici*'s suggestion (AG Br. at 31, n.7), as a matter of statutory interpretation this will likely mean that those tools are *not* available to enable courts within New York City to "obtain an agency's views" without invoking the doctrine of primary jurisdiction. *See generally* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 240 ("where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded").

C. The AG *Amici*'s Assertion That The Dismissal Of Plaintiffs' Claims Should Be Reversed Because This Is A "Mine-Run Rent Overcharge Case" Ignores Both The Record And The Applicable Standard Of Review

The AG *Amici* conclude their discussion of primary jurisdiction by arguing that plaintiffs' rent-overcharge claims should not have been dismissed because "defendants failed to identify any feature of the underlying disputes that would distinguish them from the mine-run overcharge case." (AG Br. at 18; *see id.* at 25-31). That argument suffers from three independently-fatal flaws.

First, plaintiffs did not argue below that primary jurisdiction dismissal would be an improper exercise of discretion in *this* case if the doctrine were available as a matter of law; instead, they argued only that the doctrine could never be applied in what they called "J-51 cases." (*See* Add.26-30). The AG *Amici*, in contrast, concede that the doctrine could in theory apply but argue that it should not have been applied on this record. As a threshold matter, because plaintiffs did not raise this argument below (and because defendants could and would have made a different record below if they had), it is not preserved for review by this Court. (*See supra* at 8 and n.5).

Second, under the doctrine of primary jurisdiction as it has consistently been applied by the courts of this State, dismissal would have been an appropriate exercise of the lower court's discretion simply because plaintiffs' rent-overcharge claims are within DHCR's core competence. (*See* Resp. Br. at 22-33, and

authorities cited therein). In other words, whether or not they are "mine-run" (as the AG *Amici* claim) is beside the point: as a matter of law, the doctrine does not require the claims to be out of the ordinary in any way.

Third, in characterizing plaintiffs' claims as "mine-run" the AG *Amici* ignore the record – which makes clear that in fact there were specific reasons why dismissal under the doctrine of primary jurisdiction was especially appropriate here. In particular:

(a) When the lower court ruled, there was a proceeding pending before DHCR in which that agency was already called upon to adjudicate many of the facts that plaintiffs' Complaint insisted were "common" to all of their claims. (*See* Resp. Br. at 31, and material cited therein). Although the existence of such a proceeding is not a prerequisite to a dismissal based on primary jurisdiction, both plaintiffs and the AG *Amici* concede that it is a factor that weighs in favor of such dismissal. (*See* App. Br. at 25-29; AG Br. at 29).

(b) Plaintiffs assert that a calculation of the proper rent for each of their apartments will require a review of DHCR's records going back as far as 18 to 20 years. (*See* Resp. Br. at 10, 32). The fact that DHCR already has these records further weighs in favor of allowing it to adjudicate the

factual issues at stake here in the first instance. (*See id.* at 32 and n.36, and material cited therein).

(c) This case involves 18 separate apartments that vary not only with respect to their individual rent histories, but also in how they have been treated under the RSL. According to the Complaint, three of those 18 apartments (occupied by six plaintiffs) were continuously treated as rent stabilized throughout the relevant period. A fourth one (occupied by two plaintiffs) was rent controlled until 2015, and was the subject of an ongoing Fair Market Rent Appeal with DHCR when plaintiffs brought suit. A fifth one is characterized in the Complaint as having been registered as rent stabilized for a portion of the relevant plaintiffs' tenancy. (*See* Resp. Br. at 9 and material cited therein). The balance were registered as rent-stabilized no later than 2016 – pursuant to a DHCR initiative. (*Id.* at 10 and n.5 and material cited therein). There is no suggestion that any two apartments are alike on any metric; to the contrary, plaintiffs' own description of the factual differences among them comprises the bulk of the factual allegations in their Complaint. (*See* R.19-32).

(d) In the lower court, defendants submitted evidence that, based on prior experience in one of the very cases on which plaintiffs relied, to try this

case would take an average of 3.5 trial days *per apartment* – suggesting a *63-day* trial (and many months of pre-trial proceedings). (*See* Resp. Br. at 32-33, and material cited therein). The lower court acted well within its discretion in concluding that DHCR – with its dedicated staff and streamlined procedures – is better situated to make the relevant factual determinations in the first instance, subject to Article 78 review.

We respectfully submit that these factors fully support the lower court's discretionary determination, *particularly* given that plaintiffs did not argue otherwise below. But we also note that if the lower court's actions are measured against the HSTPA – as the AG *Amici* assume they should be (*see* AG Br. at 21-24) – then there is even more reason to uphold that court's exercise of discretion: it should be for DHCR to determine in the first instance how the Rent Stabilization Code (DHCR's regulations, which plaintiffs cite as one of the bases for their rent-overcharge claims – *see* R.11-12; R.18; R.33; R.34) should be interpreted in light of that new statute. *See Terrace Court LLC v. New York State Div. of Housing and Comm. Renewal*, 18 N.Y.3d 446, 453-54 (2012) (emphasizing the deference to which DHCR's interpretation of its own regulations is entitled).

* * * * *

In sum, the AG *Amici*'s arguments about primary jurisdiction are not supported by the HSTPA, the applicable precedent, or the record. They should

accordingly be rejected, and the dismissal of plaintiffs' RSL claims should be affirmed.

II. THE AG *AMICI*'S ARGUMENTS ABOUT GBL § 349 SIMILARLY PROVIDE NO BASIS FOR REVERSAL

The AG *Amici*'s arguments about GBL § 349 are equally flawed. Most importantly, they do not address defendants' argument that plaintiffs' GBL § 349 claim amounts to an assertion that defendants violated that statute simply by engaging in conduct prohibited by the RSL and not telling plaintiffs they were violating that statute. To the contrary, they concede as much. (*See* AG Br. at 33: "defendants impliedly represented that they were lawfully authorized to charge market prices for apartments by failing to disclose their non-compliance with the rent-stabilization laws"). As explained in Respondents' Brief (at 40), this Court has already held that GBL § 349 "cannot fairly be understood" to permit such a claim, which would "stretch the statute beyond its natural bounds to cover virtually all misconduct by businesses that deal with consumers." *See Schlessinger*, *supra*, 21 N.Y.3d at 172-73.

This would be reason enough to reject the AG *Amici*'s arguments. But they suffer a second flaw: the AG *Amici* do not explain how any of plaintiffs' alleged damages were caused by *deception*. Importantly, plaintiffs do not allege that they entered into their leases as the result of any misrepresentation about the status or legal rent of their apartments. Their alleged damages do not arise from – or

depend upon – any such misrepresentation; they arise entirely from alleged rent overcharges under RSL § 26-516. RSL § 26-516 imposes liability where the rent charged was higher than it should have been; "misrepresentation" about an apartment's status or legal rent does not enter the calculus. Because no aspect of plaintiffs' alleged damages depends upon a finding of deception, their GBL § 349 claim cannot stand. (*See* Resp. Br. at 38-39).[9]

Each of these two flaws in the AG *Amici*'s arguments independently requires their rejection. But we note a further point. The AG *Amici* assert that defendants made misrepresentations to "many of the plaintiffs" when those plaintiffs were members of the public rather than in the context of an existing landlord-tenant relationship. (*See* AG Br. at 34). The Complaint, however, concedes that defendants' involvement with this building commenced on July 24, 2013 – when at least seven of the plaintiffs who claim that the status of their apartments was

[9] *Accord, e.g., Smokes-Spirits.Com, supra,* 12 N.Y.3d at 621 (no GBL § 349 claim lies unless the plaintiff suffered injury "as a result of" an alleged deception); *id.* at 623 ("Certainly, as a threshold matter, plaintiffs claiming the benefit of section 349 ... must charge conduct of the defendant that is consumer-oriented. . . . But such plaintiffs must also plead that they have suffered actual injury caused by a materially misleading or deceptive act or practice.") (citations and internal quotations omitted; first alteration in *Smokes-Spirits*); *Gale v. Internat'l Bus. Machines Corp.*, 9 A.D.3d 446, 447 (2d Dept. 2004) (complaint alleging a violation of GBL § 349 "must show that the defendant's material deceptive act caused the injury").

"misrepresented" to them[10] were *already* tenants in the building in an existing landlord-tenant relationship rather than members of the public at large. (R.13, ¶ 12; R.20, ¶ 70; R.24, ¶ 105; R.25, ¶116; R.27, ¶ 136; R.32, ¶ 178). It is perhaps for this reason that plaintiffs themselves did not make this argument below. Had they done so, defendants would have made further, more targeted arguments directed at those seven plaintiffs. This argument would therefore be precluded wholly apart from its other defects. (*See supra* at 8 and n.5).

The AG *Amici* baldly assert that an affirmance here "would hamper the Attorney General's ability to police deceptive conduct in the housing market and leave New Yorkers vulnerable to fraud and abuse." (AG Br. at 38). But they offer no reason to believe that the Attorney General actually needs GBL § 349 in order to perform that function. The Attorney General's office can and does prosecute such conduct under Executive Law § 63(12) (which allows the Attorney General to bring suit for "repeated fraudulent or illegal acts"). (*See* Brief of Defendants-Respondents in Response to Brief of *Amici Curiae* Consumer Advocacy Organizations, at 9-11, and material cited therein). If that statute and the other tools available to the AG *Amici* – including the tools most recently given to them under the HSTPA – were truly insufficient, they could and would have asked the

[10] Six of the plaintiffs acknowledge that they did not receive any such "misrepresentations." (*See* R.14, ¶ 23; R.15, ¶ 30).

Legislature to add language to the HSTPA overruling the precedent that has repeatedly held that a rent-overcharge claim cannot also give rise to a claim under GBL § 349 (*see* Resp. Br. at 38-43, and cases cited therein).

The Legislature's failure to include such language is a strong indication that it intended to leave that precedent in place. *See Desrosiers v. Perry Ellis Menswear, LLC*, 30 N.Y.3d 488, 497 (2017) ("the persuasive significance of legislative inaction . . . carries more weight where the legislature has amended the statute after the judicial interpretation but its amendments do not alter the judicial interpretation") (citation and internal quotations omitted"). Under it, the dismissal of plaintiffs' GBL § 349 claim should be affirmed.

CONCLUSION

Based on the long-established precedent of the courts of this State and the record established below, the lower court's dismissal of plaintiffs' RSL claims was a proper exercise of its discretion under the doctrine of primary jurisdiction. By its plain terms, the HSTPA does not change the analysis. The AG *Amici*'s arguments thus ask this Court to dramatically change the law in a way that the Legislature chose not to do in its recent comprehensive overhaul of the applicable statutes. They offer no reason for such a change, and there is none.

The AG *Amici*'s arguments about plaintiffs' GBL § 349 claim ignore both the record and the applicable precedent of this Court. Under that precedent –

which the Legislature chose to leave intact in its recent amendments to virtually every statute that might be invoked in connection with an allegation of rent-overcharge – the lower court correctly dismissed plaintiffs' GBL § 349 claim as a matter of law.

Accordingly, for the reasons detailed above and in all of defendants' prior briefing, the Appellate Division's Order should be affirmed.

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Respectfully submitted,

KATSKY KORINS LLP

By: _____
Adrienne B. Koch
Mark Walfish
Elan R. Dobbs
Haley E. Adams
605 Third Avenue
New York, New York 10158
(212) 953-6000

-and-

KUCKER & BRUH, LLP
By: James R. Marino
747 Third Avenue
12th Floor
New York, New York 10017
(212) 869-5030

Attorneys for Defendants-Respondents

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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KATSKY KORINS LLP
605 Third Avenue
New York, New York 10158
(212) 953-6000