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Court of Appeals

of the

State of New York

DANIEL COLLAZO, MICHELLE COLLAZO, CHRISTOPHER ORTIZ, ANGELA WU, RENANA BEN-BASSAT, JONATHAN ROSS, BENJAMIN SHEFTER, MICHAEL SUH, JOHN WEISS, HOLLY WEISS, GABRIEL KRETZMER-SEED, NINA KRETZMER-SEED, CATHERINE ELLIN, NURIKA PADILLA, ALYSSA HENSKE, DANIEL ABAROA, DIANA POTTS, TIA TRATE, TYSON COLLAZO, RITA LOMBARDI, YANIRA SANCHEZ, DARIEL RODRIGUEZ, MEIR LINDENBAUM, SHARON GORDON, RUSSELL POLTRACK, MEGAN BOYCE, ELAN KATTAN, SHOSHANA COHEN, JONATHAN ABIKZER and ALEXANDRA ABIKZER,

Plaintiffs-Appellants,

– against –

NETHERLAND PROPERTY ASSETS LLC
and PARKOFF OPERATING CORP.,

Defendants-Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS IN RESPONSE TO BRIEF OF *AMICI CURIAE* LEGAL SERVICES NYC, THE LEGAL AID SOCIETY, BROOKLYN DEFENDER SERVICES, CATHOLIC MIGRATION OFFICE, HOUSING CONSERVATION COORDINATORS, JASA/LEGAL SERVICES FOR THE ELDERLY IN QUEENS, MAKE THE ROAD NY, MOBILIZATION FOR JUSTICE AND LENOX HILL NEIGHBORHOOD HOUSE

KUCKER & BRUH, LLP
747 Third Avenue, 12th Floor
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

Date Completed: October 25, 2018

DISCLOSURE OF PARENTS, SUBSIDIARIES AND AFFILIATES

None.

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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 of Legal Services NYC, The Legal Aid Society, Brooklyn Defender Services, Catholic Migration Office, Housing Conservation Coordinators, JASA/Legal Services for the Elderly in Queens, Make the Road NY, Mobilization for Justice, and Lenox Hill Neighborhood House (collectively, the "*Amici*"), as *amici curiae*.[1]

PRELIMINARY STATEMENT

The *Amici*'s brief focuses entirely on concerns that, as detailed below, are unquestionably *not* at stake in this case. For that reason, it is not surprising that none of the issues the *Amici* now raise were preserved in the lower court for this Court's review. That lack of preservation in itself requires the rejection of each of the *Amici*'s arguments. But wholly apart from that (fatal) flaw, none of those arguments could properly have any impact on this Court's analysis because all of them are beside the point.

As detailed in Respondents' Brief, this case turns on the application of the doctrine of primary jurisdiction – which, under decades of State-wide jurisprudence, "*generally enjoins* courts having concurrent jurisdiction [with an

[1] References to "*Amici* Br." are to the brief submitted by the *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 "R.__" are to the printed Record on Appeal.

agency] *to refrain* from adjudicating disputes within an administrative agency's authority, particularly where the agency's specialized experience and technical expertise is involved." *Sohn v. Calderon*, 78 N.Y.2d 755, 812 (1991) (citation omitted). Although it is "not without exception" and permits courts, in the exercise of discretion, to consider factors that may counsel in favor of court intervention (*id.*), absent such factors courts "may not resolve in the first instance" controversies to which the doctrine applies. *People v. Correa*, 15 N.Y.3d 213, 228 n.2 (2010). The lower court correctly applied that doctrine in exactly the way the case law instructs. (*See* Resp. Br. at 11-33).

Ignoring this jurisprudence entirely, the *Amici* ask this Court to re-analyze this case under a different doctrine: the common law doctrine of "prior jurisdiction," which (as detailed below) speaks not to the division of labor between courts and agencies, but rather to the relationship among different courts of coordinate jurisdiction. That doctrine is inapposite here because this case is not about the relationship between or among courts; it is about the relationship between courts and agencies. The doctrine of "prior jurisdiction" has nothing to do with that relationship. (Point I).

The *Amici* next complain that the lower court's dismissal was not based on any "ascertainable standards." This, however, is exactly wrong. As detailed below and in Respondents' Brief, the doctrine of primary jurisdiction is straightforward

and was properly applied here. Under the clear jurisprudence of this Court and all of the Appellate Divisions, it required dismissal of plaintiffs' claims because (a) the only issues they raise are within the core competence of the Division of Housing and Community Renewal ("DHCR"); and (b) all of the factors presented to the court below that could possibly have weighed in its discretion favored dismissal. There is no basis for reversal on that ground. (Point II).

The *Amici* devote the balance of their brief to arguing that the Appellate Division's Order will cause widespread prejudice to low income tenants, who may face eviction, "blacklisting," or various other harms if their rent overcharge claims cannot be heard in court. But the plaintiffs in *this* case neither showed nor even attempted to show that they might actually face any of the dire consequences the *Amici* now hypothesize – and indeed, the Record is to the contrary. In a case where such consequences might actually occur, a tenant who wished to proceed in court could and would raise them as a factor for the court's consideration in exercising its discretion on a motion to dismiss under the doctrine of primary jurisdiction. But that is not *this* case. (Point III).

In short, the *Amici* offer no basis on which this Court should disturb the Appellate Division's Order.

ARGUMENT

I. THE *AMICI*'S ARGUMENT ABOUT PRIOR JURISDICTION IS BOTH UNPRESERVED AND ENTIRELY MISPLACED

The *Amici*'s argument that dismissal of this action was "contrary to the doctrine of prior jurisdiction" (*Amici* Br. at 11-14) was not raised or even hinted at in the lower court. (*See* Add.17-31; R.82-84). Accordingly, it is not properly before this Court. *See* 22 N.Y.C.R.R. § 500.23(a)(4) (*amicus curiae* "shall not present issues not raised before the courts below.").[2] But wholly apart from this defect, that argument provides no basis for reversal. The common law doctrine of "prior jurisdiction" only applies where there are multiple proceedings in different *courts* of coordinate jurisdiction; it says nothing to the kind of concurrent jurisdiction that is at issue here: that of courts and agencies. *That* kind of concurrent jurisdiction is governed by the well-settled principles of primary jurisdiction that are detailed in Respondents' Brief at 11-22.

None of the cases the *Amici* cite in support of their argument that "the courts have long applied" the doctrine of prior jurisdiction to require matters to be

[2] *Accord Merrill by Merrill v. Albany Med. Cntr. Hosp.*, 71 N.Y.2d 990, 991 (1988) ("While the Appellate Division has jurisdiction to address unpreserved issues in the interest of justice, the Court of Appeals may not address such issues in the absence of objection in the trial court."); *see generally* A. Karger, The Powers of the New York Court of Appeals, § 14:1 (2017) ("The Court's power of review is further limited by the requirement that a claim of error of law on the part of the courts below must, in general, have been duly preserved for review by appropriate motion, objection or other action in the *nisi prius* court in order to be reviewable as a question of law.") (collecting cases; footnote omitted).

adjudicated in the first forum in which they were brought (*see Amici* Br. at 12) speak to the issues actually at stake here. Many of them pre-date the 1962 enactment of the CPLR, which largely obviated the need for this common law doctrine by codifying a party's right to seek dismissal or a stay based on the pendency of another action between the parties for the same relief. *See* CPLR 3211(a)(4).[3] Of those that do not pre-date that enactment, (a) in one, a losing party sought to nullify a judgment entered by the Supreme Court based on an argument that the matter should have been adjudicated in Surrogate's Court, and the court declined to award such relief on the ground that the Supreme Court had jurisdiction to enter the judgment it had entered[4]; (b) in another, the court held that the Supreme Court should have exercised its power to transfer the matter to Surrogate's Court (whose jurisdiction had previously been invoked), based largely on principles that require, "wherever possible," that "all litigation involving the property and funds of a decedent's estate be disposed of in the Surrogate's Court"[5]; and (c) in another, after noting that the general rule for declaratory judgment actions is that "it is an abuse of discretion to entertain jurisdiction [in such an

[3] Indeed, many of them also pre-date the enactment of the Rent Stabilization Law in 1969, and more than half of them pre-date even the creation of DHCR in 1939. It is therefore hardly surprising that they say nothing to the circumstances in which a court may defer to that agency under that statute.

[4] *Zeglen v. Zeglen*, 150 A.D.2d 924, 925 (3d Dept. 1989).

[5] *Burmax Co., Inc. v. B&S Indus., Inc.*, 135 A.D.2d 599, 601 (2d Dept. 1987) (citations and internal quotations omitted).

action] when another action is pending in which all factual and legal issues can be determined," the court declined to dismiss or stay a declaratory judgment action because, although there was a prior action pending, it did not encompass all of the issues at stake in the declaratory judgment action.[6] None of these cases has any bearing on the question of whether or under what circumstances a court should defer to an agency under the doctrine of primary jurisdiction.

In the only other case the *Amici* cite where prior jurisdiction was discussed, the court explained that the doctrine "has typically been invoked to stay parties from seeking relief from another *court* of concurrent jurisdiction, where one *court* has already acquired jurisdiction over the matter," and exists "to prevent inconsistent determinations, to promote judicial economy, and to provide for the orderly administration of justice." *Commandeer Realty Assoc., Inc. v. Allegro,* 49 Misc.3d 891, 907, 908 (Sup. Ct. Orange Co. 2015) (emphasis added). In *Commandeer,* the Supreme Court applied the doctrine to rule – in what it emphasized was a matter of first impression – that once a municipal annexation process had been commenced by the filing of an annexation petition no other municipality may adjudicate a later annexation petition relating to the same territory until the first annexation process has concluded. *See* 49 Misc.3d at 893. But it did so after a lengthy analysis in which it concluded that in the matter before

[6] *Davis Const. Corp. v. Suffolk County,* 112 Misc.2d 652, 656 (Sup. Ct. Suffolk Co. 1982) (collecting cases; citations omitted).

it the principles were the same as those at stake where a party attempts to sue in one court based on claims that are already pending in another court: the "risk of incompatible . . . results" and the potential for "abuse" as a result of "[e]ven a minuscule overlap in the territory proposed for annexation" warranted granting a writ of prohibition to prevent the relevant municipalities from processing the later-filed petition until proceedings on the first-filed one were concluded. *Id.* at 914-916. This, too, says nothing to what a court may or should do when presented with a request to defer to an agency under the doctrine of primary jurisdiction.

Each of the other cases the *Amici* cite on this point is similarly inapposite:

a) In *Lex 33 Associates, L.P. v. Grasso*, 283 A.D.2d 272 (1st Dept. 2001), the court ruled that it was error to transfer a case to the Housing Part of the New York City Civil Court because the claim at issue sought declaratory relief, which that court could not grant.

b) In *Shadick v. 430 Realty Co.*, 250 A.D.2d 417 (1st Dept. 1998), the court affirmed a judgment entered by Supreme Court, finding that that court was an "appropriate forum for the instant declaratory judgment action . . . since there was no summary proceeding pending in the Civil Court at the time the action was commenced, and defendants went forward with disclosure in the Supreme Court action without objection."

c) In *Varkonyi v. S.A. Empresa De Viacao Airea Rio Grandense (Varig)*, 22 N.Y.2d 333, 338 (1968), the Court – after a discussion of factors that should be considered in determining a motion to dismiss on *forum non conveniens* grounds – remitted the case to the Appellate Division so that court could "make its own judgment on the basis of all the relevant factors." The language quoted in the *Amici*'s brief (at 13) – which itself is a quote from *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) – is from the separate opinion of Judge Keating concurring in the judgment but dissenting from the Court's decision to remit the matter for further consideration of the "relevant factors"; unlike the Court's majority, Judge Keating would have ruled that *forum non conveniens* dismissal was inappropriate.

d) In both *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 208 (1st Dept. 2013), and *Anagnostou v. Stifel*, 204 A.D.2d 61 (1st Dept. 1994), courts applied the familiar factors that apply to a *forum non conveniens* analysis.

This case is not about *forum non conveniens* or the competing jurisdiction of any courts. It is about the well-worn principles of primary jurisdiction that apply any time a claim requires determinations that are within the special competence of an agency. (*See* Resp. Br. at 11-14). None of these cases changes the analysis under those principles.

In short, the *Amici* cite no case where the doctrine of prior jurisdiction, *forum non conveniens*, or any other principle they raise has been applied – or even invoked – where, as here, the question was whether a court should defer to an agency with which it has concurrent jurisdiction so that the agency can make factual determinations that are within its technical expertise, subject to Article 78 review by the courts. Nor do we know of any. The principles the *Amici* cite, including the doctrine of prior jurisdiction, are simply not relevant here.

II. THE *AMICI'S* ARGUMENT ABOUT "ASCERTAINABLE STANDARDS" IS UNPRESERVED AND IGNORES BOTH THE GOVERNING CASELAW AND THE FACTS OF THIS CASE

Like their argument about "prior jurisdiction," the *Amici's* argument about "ascertainable standards" (*Amici* Br. at 14-20) was not preserved below. (*Cf.* Add.17-31; R.82-84). It is therefore not properly before this Court. (*See supra* at 4 and n.2). But it also ignores both the longstanding applicable legal principles and what was actually presented to the lower court. Accordingly, even if this Court considers it, it provides no basis for reversal.

In particular, the *Amici*'s complaint that the lower court "inverted the reasoning of the Court of Appeals by suggesting that it could dismiss a proceeding unless there existed a particularized reason for *retaining* jurisdiction" (*Amici* Br. at 17, emphasis in original) is *exactly* wrong. As detailed in Respondents' Brief (at 11-14), under decades of State-wide jurisprudence the doctrine of primary

jurisdiction "*generally enjoins* courts" to do exactly what the *Amici* complain that the lower court did here: "*refrain* from adjudicating disputes within an administrative agency's authority" unless presented with a reason, in the exercise of discretion, to adjudicate them. *See Sohn*, 78 N.Y.3d at 812 (emphasis added). Courts throughout the State – in a wide range of areas where agencies have concurrent adjudicative powers – have applied the doctrine in exactly that manner. (*See* Resp. Br. at 12-14 and nn.8-11). This is not the absence of a standard; it is a standard that is clear, simple, easily "ascertainable," and regularly applied by the courts without difficulty.

Of equal importance, the lower court most assuredly did *not* "dismiss[] the within complaint in the absence of any particularized reason to defer to the expertise of the DHCR," as the *Amici* postulate (*see Amici* Br. at 16-17). Rather, in the lower court defendants argued that dismissal under the doctrine of primary jurisdiction was a proper exercise of discretion because (a) some of the plaintiffs already had a proceeding pending before DHCR, where issues they insisted were "common" to all of them would be adjudicated; (b) by plaintiffs' own reckoning, a determination of their correct rent will require an analysis of DHCR's own records; and (c) for the court to adjudicate the claims of all of the plaintiffs would likely consume 63 trial days and years of pretrial proceedings, whereas DHCR can adjudicate them much more efficiently. (*See* Resp. Br. at 30-33, and material cited

therein). In contrast, plaintiffs argued *only* that the doctrine of primary jurisdiction did not apply to this kind of case as a matter of law; they offered no argument that if primary jurisdiction dismissal was not legally precluded it should nevertheless be denied as a matter of discretion. (*See* Add.26-30). Thus, once the lower court determined as a matter of law that it in fact *did* have the discretion to dismiss plaintiffs' claims under the doctrine of primary jurisdiction, the discretionary analysis proceeded based on the factors presented by defendants (with plaintiffs not having advanced any). Given the record before the lower court, the *Amici* cannot be heard to complain that the court should have *sua sponte* raised other countervailing considerations and denied the motion based on them. That is not the way the system works.

That the *Amici* are able to list cases in which the exercise of discretion has led to different results (*see Amici* Br. at 18-19) does not change the analysis. The *Amici* offer no argument (or even any suggestion) that the circumstances in those cases did not warrant those differences. Such is the nature of discretion: it allows for different results based on different circumstances. The fact that it has apparently operated that way in practice is no basis for this Court to upend decades of State-wide jurisprudence. (*See* Resp. Br. at 34 and n.39).

We emphasize that there is no basis for finding that the lower court abused its discretion in this case because defendants presented numerous reasons for

dismissal and plaintiffs came forward with no countervailing considerations. Contrary to what the *Amici* appear to assume, this most assuredly does *not* mean that courts will similarly dismiss even where the plaintiff *does* present considerations that weigh such dismissal. The *Amici's* lament that the discretionary rule is somehow not working is simply unfounded.

III. THE *AMICI'S* ARGUMENT ABOUT "WIDESPREAD PREJUDICE" IS WITHOUT BASIS

A. The "Widespread Prejudice" The *Amici* Postulate Is Not At Issue Here

Like their other arguments, the *Amici's* final argument – that the Court's ruling will cause tenants generally to face eviction, "blacklisting," and various other kinds of "prejudice" (*Amici* Br. at 20-28) – is not properly before this Court because it was not raised below. (*See supra* at 4 and n.2; Add.17-31; R.82-84). But although it makes no difference *why* these matters were not raised below, we note that the likely reason was that the possibility of eviction or the commencement of Housing Court proceedings that could lead to "blacklisting" was in fact not an actual problem for *these* plaintiffs. (*See* Resp. Br. at 36-37, and material cited therein). The parade of horribles the *Amici* set forth on pages 20-26 of their brief is simply not at stake in this action; if it were, plaintiffs would have presented it to the lower court.[7]

[7] We note as well that with respect to "blacklisting" – that is, being listed as having been named in an eviction proceeding in landlord-tenant court – the *Amici* appear

The result might be different in a case where the possibility of eviction actually existed; in such a case, that possibility might be among the matters a court would consider in exercising its discretion under the doctrine of primary jurisdiction. Indeed, absent other countervailing factors, it might be an abuse of discretion to dismiss a case based on primary jurisdiction in an instance where all of the threats the *Amici* hypothesize were actually present. But nothing about this case indicates or even suggests that that discretion will not adequately protect those hypothetical tenants from those threats because they were not at issue here.[8]

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to be saying that a tenant *might* be prejudiced *if* (a) he or she initiated a Supreme Court action claiming an overcharge, *and* (b) the complaint was thereafter dismissed based on primary jurisdiction, *and* (c) while an overcharge claim was pending before DHCR, the landlord commenced an eviction proceeding against the tenant. But being named as a respondent in a landlord-tenant proceeding is endemic to being a tenant. Indeed, even if an overcharge complaint in Supreme Court were not dismissed based on primary jurisdiction, there would be nothing to stop a landlord from commencing a separate eviction proceeding. In that instance, a tenant might seek an injunction staying the eviction proceeding until the overcharge complaint was adjudicated. A tenant whose overcharge claim was being determined by DHCR could similarly seek injunctive relief from a court of competent jurisdiction. (*See Amici* Br. at 25-26; *infra* at 17). Thus, such a tenant is at no greater risk of being blacklisted than one whose claims were proceeding in court.

[8] Nor – contrary to the *Amici's* characterization (*Amici* Br. at 23) – does the Appellate Division's ruling "permit[] dismissal of tenant overcharge actions based on the trial court's unfettered discretion." The trial court's discretion under the doctrine of primary jurisdiction is not unbounded and a determination under that doctrine can be reversed if that discretion is abused. We emphasize, however, that here defendants presented the trial court with ample reasons why such dismissal was an appropriate exercise of that discretion *on these facts* and plaintiffs

The only other forms of "prejudice" the *Amici* cite are the absence of formal discovery in DHCR proceedings (*Amici* Br. at 27) and the claimed inability to "prosecute building-wide complaints" at DHCR (*id.* at 28). As noted in Respondents' Brief, if either of these concerns could (without more) form a basis for the denial of primary jurisdiction dismissal, the doctrine could not exist at all. (*See* Resp. Br. at 33-38). Inasmuch as the doctrine is supported by decades of State-wide jurisprudence spanning numerous areas of law (*see id.* at 12-14, nn.8-11), the *Amici*'s argument can and should be rejected on this basis alone. But it rings hollow wholly apart from that flaw. With respect to the absence of formal discovery, there is no reason in this case to believe that DHCR – which regularly processes rent overcharge claims, has the specialized expertise to do so, and possesses broad investigative and subpoena power – will not obtain the relevant information (much of which, according to plaintiffs' own complaint, is in DHCR's own records in the first place – *see* R.19-32) and reach the correct result based upon it. (*See* Resp. Br. at 35-36). With respect to "building-wide complaints," DHCR has procedures for consolidating cases on its own initiative or upon the application of a tenant. *See* 9 N.Y.C.R.R. § 2527.5(i). And of course, as a matter of law a properly-pled class action (which this action did not purport to be) is not subject to primary jurisdiction dismissal. (*See* Resp. Br. at 19).

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presented that court with *no* reasons why it would not have been. (*See* Resp. Br. at 30-33).

Any of the factors the *Amici* cite might, under proper circumstances, be part of a court's discretionary calculus in determining whether or not to dismiss under the doctrine of primary jurisdiction, and tenants are free to argue them together with any other factor that may be present in their particular circumstances. They will then be weighed against whatever factors are raised on the other side. This, however, brings us back full circle. We cannot emphasize enough how misplaced the *Amici's* argument – that the Appellate Division's Order somehow gives lower courts "unfettered" discretion to ignore all possible ill effects of a primary jurisdiction dismissal – is on the facts of *this* case. As noted above, defendants presented the lower court with numerous reasons why such a dismissal was warranted. (*See supra* at 10-11). Plaintiffs, in contrast, offered *no* countervailing factors for the lower court to consider in exercising its discretion. Instead, they argued only that as a matter of law "J-51 cases" are somehow exempt from the doctrine of primary jurisdiction (*see* Add.26-30) – an argument that the *Amici* do not even attempt to support.

The Appellate Division's Order thus says *nothing* about how a lower court should exercise its discretion when actually presented with reasons on both sides. Nor is there any cause to believe that a lower court actually presented with such reasons will not appropriately weigh them. There is, in short, no basis to believe

that any of the concerns the *Amici* raise will come to pass. Accordingly, those concerns provide no basis upon which to disturb the Appellate Division's Order.

B. The "Widespread Prejudice" The *Amici* Postulate Is Not Borne Out By The Cases They Cite

The fact that the kind of "prejudice" the *Amici* postulate is not at stake here (and accordingly was not raised below) is – and should be – dispositive of their argument about such prejudice. But that argument is also not supported by the cases the *Amici* cite.

The *Amici* begin with some examples of cases where DHCR took a long time to decide a matter, and then argue that (a) while an overcharge claim is pending before DHCR, a court may decline to stay an eviction proceeding based on the tenant's non-payment of rent, and (b) the result may be that a tenant is evicted before his or her overcharge claim can be determined. (*See Amici* Br. at 20-22). But this did not occur in any of the cases they cite as purported examples of this.[9] They then go on to list cases where (by their own characterization) courts

[9] *See, e.g.*, *3103 Realty L.L.C. v. Kirbow*, 42 Misc.3d 1205(A), 2013 WL 6818105 (Civil Ct. Kings Co. Dec. 16, 2013) (declining to vacate default judgment; no indication that a stay was ever requested); *3410 Kingsbridge Assocs. v. Martinez*, 161 Misc.2d 163, 164, 166 (Civil Ct. Bronx Co. 1994) (DHCR had already determined monthly rent and landlord did not dispute tenant's entitlement to pay that (lowered) amount going forward pending a resolution of landlord's petition for administrative review; warrant of eviction issued based on tenant's failure to comply with court-ordered stipulation). The *Amici* also cite a number of cases that are "reported" only in the New York Law Journal. (*See Amici* Br. at 21-22). It is not clear that these cases are properly before the Court given the *Amici*'s failure to

have granted stays or proceeded to adjudicate the overcharge claim themselves. (*Amici* Br. at 22-23). The *Amici* thus provide no evidence that the harms they describe are actually occurring (let alone that they are – or could be – "widespread"). The doctrine of primary jurisdiction gives courts ample discretion to retain jurisdiction where necessary to avoid those harms, and the *Amici* offer no reason to doubt that this is sufficient to protect against them.[10]

The *Amici* next argue that if a landlord commences a summary proceeding the tenant may be "blacklisted." (*Amici* Br. at 25-26). But in support of this assertion, the *Amici* cite only cases where courts have granted injunctions against the commencement of such proceedings. They do not explain why any tenant facing the possibility of such a proceeding could not similarly seek such an injunction.

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provide copies of them. *See* 22 N.Y.C.R.R. § 500.1(h). We note, however, that only one of those cases – *Parkash v. Charles*, cited on page 22 of the *Amici* Brief – actually involved an eviction, and that eviction occurred pursuant to a *stipulation* to which the tenant had agreed while represented by counsel. Eviction was not at stake or even mentioned in any of the others.

[10] In addition, DHCR can and does expedite proceedings "[o]n its own initiative, or at the request of a court of competent jurisdiction, or for good cause shown upon application of any affected party." *See* 9 N.Y.C.R.R. § 2527.5(j); *accord* DHCR Fact Sheet # 34 (indicating that DHCR will expedite the processing of a matter under various circumstances, including but not limited to where "[t]here is a threat of imminent eviction pursuant to a court proceeding which has actually been commenced") (available at http://www.nyshcr.org/Rent/FactSheets/orafac34.pdf, last viewed October 17, 2018). This provides tenants with additional protection.

The *Amici* cite no case in support of their argument that the absence of discovery and/or "the inability to prosecute building-wide complaints" in a DHCR proceeding will prejudice tenants. These arguments are addressed in full in Point III.A, above, and in the portions of Respondents' Brief that are cited therein. (*See supra* at 12-16). They, too, fail to support the *Amici*'s claim of "widespread prejudice."

In sum, far from showing any possibility of "widespread prejudice," the cases the *Amici* cite demonstrate that there is no reason to anticipate any such prejudice and ample reason to conclude that sufficient protections are in place to avoid it. They accordingly provide no grounds for reversal here.

CONCLUSION

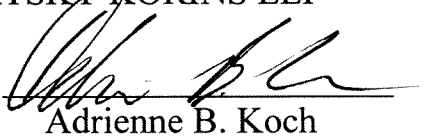
The *Amici*'s arguments can and should be rejected for the simple reason that they are unpreserved. But we emphasize in addition that the *Amici*'s arguments were not raised in the court of first instance because they are not relevant to *this*

case. Accordingly, even if this Court were to consider them, they should not change the result: the Appellate Division's Order should be affirmed.

Dated: New York, New York
October 25, 2018

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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Dated: October 25, 2018

KATSKY KORINS LLP

By: _____

Adrienne B. Koch
605 Third Avenue
New York, New York 10158
(212) 953-6000