To be Argued by:
ADRIENNE B. KOCH
(Time Requested: 30 Minutes)

APL-2018-00108
New York County Clerk's Index No. 157486/16

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.

SUPPLEMENTAL BRIEF FOR DEFENDANTS-RESPONDENTS

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Date Completed: August 2, 2019

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Pursuant to the Court's direction, defendants-respondents Netherland Property Assets LLC and Parkoff Operating Corp. (collectively, "defendants") respectfully submit this supplemental brief to address the impact, if any, of the Housing Stability and Tenant Protection Act of 2019 (L. 2019 ch. 36; hereinafter, the "2019 Act") on the issues that are before the Court on this appeal.[1]

PRELIMINARY STATEMENT

Based on their June 19, 2019 letter to the Court, we understand plaintiffs' position to be that § 3 of Part F of the 2019 Act requires reinstatement of their rent overcharge claims, which were dismissed by the lower courts pursuant to the common-law doctrine of primary jurisdiction. They contend that Part F governs those claims because it specifies that it applies to "claims" that are "pending" as of its effective date. They further contend that Part F requires reinstatement of those claims because it provides in § 3 that the courts and DHCR have concurrent jurisdiction over rent overcharge claims, "subject to the tenant's choice of forum." This, they say, requires the Court to reverse the Appellate Division's Order and direct that their rent overcharge claims be adjudicated in the Supreme Court.

Plaintiffs are incorrect on all counts. The specification that Part F of the 2019 Act is retroactive only with respect to "claims" that are "pending" on its

[1] Terms not otherwise defined herein have the meanings assigned to them in defendants' principal brief on this appeal (sometimes cited herein as "Resp. Br."). "Reply Br." refers to plaintiffs' Reply Brief.

effective date makes the statute inapplicable to plaintiffs' claims because by the time the 2019 Act took effect those claims had been dismissed. Under well-settled law, a claim that has been dismissed is *not* pending, regardless of the status of any appeal. Indeed, the very reason why this Court has jurisdiction over plaintiffs' appeal is precisely because no claim is pending. The Legislature must be presumed to have understood this common-law principle when it chose to limit Part F's retroactivity to pending "claims," rather than making the amendments applicable to all pending "actions" or "proceedings" (as it did when it amended the same statutes in 1997). The 2019 Act therefore does not change the primary jurisdiction analysis, and the Appellate Division's Order should be affirmed for the reasons set forth in defendants' principal brief. (Point I).

If the Court disagrees and concludes that Part F of the 2019 Act applies to plaintiffs' claims, it should nevertheless affirm that Order. Contrary to plaintiffs' position, Part F's provision respecting concurrent jurisdiction does not abrogate the common-law doctrine of primary jurisdiction. There is nothing in the language of the statute or in its legislative history to suggest that the Legislature even considered that doctrine, much less intended to strip courts of the discretion it vests in them. Rather, the language the Legislature added simply clarifies that DHCR does not have *exclusive* jurisdiction over rent overcharge claims – an issue as to which, as detailed below, the courts had been chronically misreading the prior

version of the statute. Clarifying that the courts and DHCR have concurrent jurisdiction does not limit the applicability of the doctrine of primary jurisdiction; to the contrary, the doctrine applies *only* where such concurrent jurisdiction exists. Without a specification that the tenant's choice of forum cannot be overridden by otherwise-applicable legal principles, the statement that the tenant has the right to choose the forum is nowhere near explicit enough to warrant a conclusion that the Legislature intended to abrogate that common-law doctrine, overrule decades of precedent, and eliminate a discretionary power that had heretofore been vested in the courts. The doctrine of primary jurisdiction continues to apply, and (as detailed in defendants' principal brief) it was properly applied here. (Point II).

* * * * *

Before turning to a full discussion of the arguments summarized above, we pause to note two aspects of the 2019 Act that unquestionably do bear on some of the other arguments that are before this Court.

First, in their *amici curiae* brief on this appeal, Legal Services NYC, The Legal Aid Society, and others (collectively, the "Legal Aid *Amici*") argue (at 20-26) that "widespread prejudice" will result if courts retain the ability to dismiss rent overcharge claims under the doctrine of primary jurisdiction. This assertion is based in part on express assumptions that (a) landlords will retain the right to implement substantial rent increases by raising a "preferential rent" to a much

higher "legal rent" (*see id.* at 20-21); and (b) a practice the Legal Aid *Amici* describe as "blacklisting" will continue (*see id.* at 25-26). Both of those predicates have been eliminated by the 2019 Act: landlords are now required to maintain any "preferential rent" for the life of the tenancy (2019 Act, Part E, §§ 1 and 2), and "blacklisting" is now prohibited (*id.*, Part M, § 26). As detailed in defendants' brief in response to the Legal Aid *Amici* (at 12-18), the "widespread prejudice" those *amici* postulate is neither at issue in this case nor borne out by the cases they cite. But in all events, the 2019 Act eliminates much of the stated predicate for their concern.

Second, plaintiffs' argument that dismissal under the doctrine of primary jurisdiction was improper is based in part on an assertion that "legal issues left unresolved in the wake of" this Court's decision in *Roberts v. Tishman Speyer Props. L.P.*, 13 N.Y.3d 270 (2009), must be resolved by the courts in the first instance. (*See* App. Br. at 29; *see id.* at 31-32, 37-38; Reply Br. at 5-12). The 2019 Act, however, imposes a new formula for the calculation of legal regulated rent and provides specific guidance for the determination of rent overcharge claims. *See* 2019 Act, Part F, §§ 1-2. The Legislature has, in other words, "settled" the law to the extent it could previously have been said to be "unsettled." It should be for DHCR to determine in the first instance how its regulations will

apply in light of the new statute. *See Andryeyava v. New York Health Care, Inc.*, 33 N.Y.3d 152, 174-76 (2019).

For these reasons, the passage of the 2019 Act makes affirmance even more appropriate. For the reasons detailed below, nothing else about the Act counsels otherwise.

ARGUMENT

I. PART F OF THE 2019 ACT DOES NOT APPLY TO PLAINTIFFS' RENT OVERCHARGE CLAIMS BECAUSE THOSE CLAIMS WERE NOT "PENDING" ON ITS EFFECTIVE DATE

A. Because Plaintiffs' Rent Overcharge Claims Had Been Dismissed By The Effective Date Of The 2019 Act, They Were Not Pending On That Date Within The Meaning Of Part F's Retroactivity Provision

The 2019 Act specifies that the provisions set forth in Part F "shall apply to any *claims pending* or filed on and after" its June 14, 2019 effective date. 2019 Act, Part F, § 7 (emphasis added). Accordingly, those provisions – on which plaintiffs rely for their argument that the 2019 Act requires reinstatement of their rent overcharge claims – cannot not apply here unless those claims were "pending" as of June 14, 2019. By that date, however, those claims had been dismissed by the lower court and that dismissal had been affirmed by the Appellate Division. (*See* R.6-8, 100-01). As this Court has repeatedly recognized, a claim that has

been dismissed is not "pending," even while that dismissal being appealed.[2] Part F of the 2019 Act is therefore inapplicable on its face.

Importantly, plaintiffs' appeal is before this Court pursuant to this Court's own grant of leave to appeal. (*See* R.99). This Court could not have granted such leave unless the Appellate Division's Order was "final." *See* CPLR 5602(a). That Order would not have been final if it left any claim pending, in whole or in part. *See Morton v. State*, 15 N.Y.3d 50, 55 n.1 (2010) (noting that prior motion for leave to appeal had been dismissed "for lack of finality" because a "claim . . . remained pending"); *Birnbaum v. State*, 73 N.Y.2d 638, 644 n.2 (1989) (prior motion for leave to appeal was "dismissed for nonfinality" because order granting summary judgment "left other causes of action pending"); *accord Burke*, *supra*, 85 N.Y.2d at 16 ("an order dismissing or granting relief on one or more causes of action arising out of a single contract would not be impliedly severable and would not be deemed final where other claims or counterclaims derived from the same

[2] *See, e.g., Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 783 (2012) (distinguishing between "claim" that "remains pending," one that was "dismissed," and one that was "reinstated"); *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, 1 N.Y.3d 478, 482 n.1 (2004) (distinguishing between "claims" that "remain pending" and "claims" that "have been dismissed"); *Sirlin Plumbing Co. v. Maple Hill Homes, Inc.*, 20 N.Y.2d 401, 403 (1967) (noting "interrelationship between the claim that was dismissed and the claims still pending"); *accord Burke v. Crosson*, 85 N.Y.2d 10, 18 n.4 (1995) (referring to "the dismissed claim and the pending claim").

contract or contracts were left pending"). Thus, in granting leave to appeal, this Court necessarily determined that plaintiffs have no pending claims.

Plaintiffs themselves have similarly admitted that none of their claims is pending: in their principal brief, they ask this Court to "reinstate[]" those claims. (App. Br. at 48). And in fact, that is exactly how this Court describes what it does when it reverses an order or judgment that dismisses a claim (as the Order on appeal here did with respect to plaintiffs' rent overcharge claims): it "reinstates" the claim.[3] If plaintiffs' dismissed rent overcharge claims were actually still

[3] *See, e.g., Estate of Schneider v. Finmann*, 15 N.Y.3d 306, 308 (2010) ("We now reverse [the order granting defendants' motion to dismiss the complaint] and reinstate plaintiff's claim."); *Walton v. New York State Dept. of Corr. Svcs.*, 13 N.Y.3d 475, 483 (2009) (referring to prior appeal in which "this Court reinstated [certain] claims" that had been dismissed as time-barred – *see* 8 N.Y.3d 186, 191 (2007)); *St. Lawrence Factory Stores v. Ogdensburg Bridge and Port Auth.*, 13 N.Y.3d 204, 208 (2009) ("the order of the Appellate Division should be modified to reinstate plaintiff's claim for reliance damages"); *Sanchez v. State of New York*, 99 N.Y.2d 247, 252 (2002) ("[w]e now reinstate the claim" for negligent supervision that the Appellate Division had dismissed); *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 323 (2002) (Appellate Division had dismissed plaintiffs' complaint; "[w]e now modify the order of the Appellate Division and reinstate these claims"). This Court uses the same terminology in describing reversals or modifications by the Appellate Division. *See, e.g., Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 581 (2017) (Supreme Court granted defendant's motion to dismiss certain claims, but Appellate Division "reinstated those claims"); *Applewhite v. Accuhealth, Inc.*, 21 N.Y.3d 420, 425 (2013) (Supreme Court granted summary judgment; Appellate Division "reversed and reinstated the claims"); *Salazar v. Novalex Contracting Corp.*, 18 N.Y.3d 134, 138-39 (2011) ("[t]he Appellate Division reversed so much of Supreme Court's order as granted defendants' motion for summary judgment dismissing [certain] claims . . . and reinstated those claims").

pending, it would make no sense to speak of "reinstating" them. This makes it doubly clear that those claims are *not* currently pending.

Each of these analyses points to the same result: because plaintiffs' rent overcharge claims were dismissed before the 2019 Act took effect, they were not pending as of its effective date. They are therefore not within the class of claims to which the Legislature intended Part F of the 2019 Act to apply.

B. The Pendency Of This Appeal Does Not Bring Plaintiffs' Claims Within The Retroactivity Provision Of Part F Of The 2019 Act

We anticipate that plaintiffs will argue that the pendency of this appeal brings their claims within the retroactivity provision of Part F of the 2019 Act. But this ignores the Legislature's express choice to limit Part F's applicability to pending "*claims*" rather than pending "actions" or "proceedings." The retroactivity language the Legislature chose stands in marked contrast to the retroactivity provision contained in the amendments to the Rent Stabilization Law that were embodied in the Rent Regulation Reform Act of 1997 (L. 1997 ch. 116; hereinafter, the "1997 Act"). Under that provision, the amendments embodied in the 1997 Act applied "to *any action or proceeding pending in any court* or any application, complaint or proceeding before an administrative agency on the effective date of this act, as well as any action or proceeding commenced thereafter." 1997 Act § 46(1). The 2019 Act cites the 1997 Act no fewer than six

times,[4] making clear that the Legislature was keenly aware of the text of the 1997 Act when it enacted the 2019 Act. Yet in crafting a retroactivity provision for Part F of the 2019 Act, the Legislature chose to specify that it applies only to "claims" – *not* "action[s]" or "proceeding[s]" – that are pending on its effective date.

The Legislature made that choice against a common-law backdrop in which claims that have been dismissed are *not* considered pending, even while on appeal. (*See supra*, Point I.A). The Legislature must be presumed to have been aware of that common-law rule when it made this choice. *See Gletzer v. Harris*, 12 N.Y.3d 468, 476 (2009) (Legislature "is presumed to be aware of the common law"). The choice thus signifies an intent *not* to make the 2019 Act applicable to claims (such as plaintiffs' rent overcharge claims) that had been dismissed prior to its effective date, regardless of the status of any appeal.

This Court cannot render that choice meaningless by reading "claims" to mean the same thing as "action[s]" or "proceeding[s]." *Commonwealth of N. Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55 (2013), is on point. There, this Court answered a certified question that asked whether the phrase "possession or custody" in CPLR 5225(b) (which governs turnover proceedings against "a person in possession or custody" of money or property belonging to a judgment debtor) "inherently encompasses the concept of control"

[4] *See* 2019 Act, Part A, § 6; *id.*, Part F, §§ 1, 4, 6; *id.*, Part J, § 16; *id.*, Part M, § 17.

and thereby authorizes a proceeding against a person who has the practical ability to direct someone else (in this case a subsidiary) to turn over the assets of the judgment debtor. *See* 21 N.Y.3d at 59-60. Focusing on the plain language of the statute – and comparing it to other provisions where the Legislature clearly intended to refer to material in a party's "possession, custody or control" and specifically said so – the Court concluded that the Legislature's omission of the word "control" from CPLR 5225(b) was a deliberate indication that the statute was intended to "require[] actual possession." *Id.* at 60-61; *see id.* at 62-63.

Similarly here, although language that would have made Part F of the 2019 Act applicable in all pending actions or proceedings was clearly available to the Legislature (and clearly at the top of its mind, inasmuch as such language appears in the 1997 Act that the Legislature cited repeatedly in the 2019 Act), the Legislature chose to say something else. That choice precludes a reading of the word "claim" that would make it coterminous with the words "action" or "proceeding." *Accord People v. Schulz*, 67 N.Y.2d 144, 150 (1986) ("The fact that the Legislature has seen fit to use markedly different language in the two provisions clearly indicates an intent that the two statutes be interpreted differently."). It therefore requires the conclusion that the 2019 Act does not apply to claims that have been dismissed.

Although all of this would be more than enough to support that conclusion, we note one further point. The 1997 Act is not the only place where the Legislature has used retroactivity language that specifies that a new enactment will apply to pending "actions," "proceedings," or "suits."[5] That the Legislature eschewed such language here and instead chose the narrower term "claims" is thus even more strongly indicative of its intent that the 2019 Act apply only to claims that have not been dismissed, rather than more broadly to all claims that are part of an action or proceeding that is pending at any appellate stage. *Accord Waldeck v. New York City Employees' Retirement System*, 81 N.Y.2d 804, 807 (1993) ("[t]he persistent legislative habit of including" particular language in other enactments makes its "omission" all the more meaningful).

[5] *See, e.g., Fox v. 85th Estates Co.*, 100 A.D.2d 797 (1st Dept.) (construing an amendment to Real Property Law § 226-b that specified that it applied to "all actions and proceedings pending on the effective date of this section"), *aff'd*, 63 N.Y.2d 1009 (1984) (order affirmed "for reasons stated in the memorandum of the Appellate Division); *In re Bailey*, 265 A.D. 758 (1st Dept.) (construing amendment to the General Corporation Law that specified that it applied to "all actions, suits or proceedings as may be pending and in which no final judgment has been made and entered at the time this act takes effect"), *aff'd sub nom. Application of Bailey*, 291 N.Y. 534 (1943); *Bernard by Bernard v. City Sch. Dist. of Albany*, 96 A.D.2d 995, 996 (3d Dept. 1983) (construing amendment to the CPLR that specified that it applied to "every action or proceeding" that "still is pending before a court" (*see* Act of June 21, 1983, L. 1983 ch. 318 § 3)).

Again, each of these analyses points to the same result: the Legislature's specification that Part F of the 2019 Act applies only to claims that are pending precludes its application to plaintiffs' previously-dismissed rent overcharge claims.

II. IN ALL EVENTS, THE 2019 ACT DOES NOT ABROGATE THE COMMON-LAW DOCTRINE OF PRIMARY JURISDICTION

If the Court agrees that Part F of the 2019 Act does not apply to plaintiffs' rent overcharge claims, then the Appellate Division's Order should be affirmed for the reasons set forth in defendants' principal brief. But if the Court concludes that Part F applies to those claims, their dismissal should nevertheless be affirmed because – contrary to plaintiffs' position – the 2019 Act does not deprive courts of the discretion to dismiss rent overcharge claims under the doctrine of primary jurisdiction.

Plaintiffs' argument that the 2019 Act eliminates such discretion is based on the following language, which the 2019 Act adds to § 8632(b) of the Unconsolidated Laws:

> Unless a tenant shall have filed a complaint of overcharge with [DHCR] which complaint has not been withdrawn, nothing contained in this section shall be deemed to prevent a tenant or tenants, claiming to have been overcharged, from commencing an action or interposing a counterclaim in a court of competent jurisdiction for damages . . . . The courts and [DHCR] shall have concurrent jurisdiction, subject to the tenant's choice of forum.

2019 Act, Part F, § 3. As noted in defendants' principal brief (at 15-17), language similar to this has been part of § 8632(a) of the Unconsolidated Laws – which

applies only *outside* of the City of New York – since 1983. Plaintiffs' position appears to be that the addition of this language to § 8632(b) – which applies *within* the City of New York – evidences a legislative intent to deprive the courts within that City of the discretion to dismiss rent overcharge claims under the doctrine of primary jurisdiction. But this reading cannot be squared either with the statutory language or with standard principles of statutory construction.

As noted in defendants' principal brief (at 15-17), under § 8632(a), where a court *outside* the City of New York is presented with a rent overcharge claim, the court may certify it to DHCR. McKinney's Unconsol. Laws § 8632(a)(7). Alternatively, DHCR may intervene in the proceeding. *Id.* The statute contains no parallel provisions for claims brought in a court within the City of New York (*see* Resp. Br. at 17-18), and the 2019 Act did not add any such provisions. *See* 2019 Act §§ 3, 4. Thus, to conclude that the 2019 Act was intended to make discretionary dismissal under the doctrine of primary jurisdiction unavailable in courts within the City of New York, the Court would have to believe the Legislature intended to strip those courts of that common-law discretionary tool *without* also giving them the statutory power to certify matters to DHCR or giving DHCR the statutory right to intervene. This would leave those courts at a profound disadvantage, uniquely deprived of any vehicle through which to obtain DHCR's input on matters specifically within its expertise.

There is no reason to believe that the Legislature intended to impose such a burden on those courts. Neither the 2019 Act itself nor any aspect of its legislative history contains any mention of the common-law doctrine of primary jurisdiction or offers any indication that the Legislature either saw application of the doctrine as a problem or wished to change the common-law principles underlying it. Neither the Introducer's Memorandum in the Senate nor the Memorandum in Support in the Assembly says anything on the subject in their descriptions of Part F or in their discussions of the justification for the amendments.[6] Nor could we find a single word about this subject in any of the written submissions included in the available legislative history or anywhere in the floor debates or the over 1,000 pages of testimony the Legislature heard during the hearings on the 2019 Act.[7]

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[6] *See* New York State Senate Introducer's Memorandum in Support of S6458 (https://www.nysenate.gov/legislation/bills/2019/s6458, last viewed Aug. 1, 2019); New York State Assembly Memorandum in Support of A8281 (https://nyassembly.gov/leg/?default_fld=%0D%0A&leg_video=&bn=A08281&term=2019&Summary=Y&Memo=Y&Text=Y&Chamber%26nbspVideo%2FTranscript=Y, last viewed Aug. 1, 2019).

[7] The absence of any such mention during the legislative hearings held in connection with the 2019 Act is particularly telling because the Legislature heard extensively from multiple representatives of the Legal Aid *Amici* during those hearings. None of those representatives said anything in their testimony about discretionary dismissals under the common-law doctrine of primary jurisdiction. *See* New York State Assembly Standing Committee on Housing ("Assembly Committee"), Transcript of May 2, 2019 Public Hearing (https://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_a7577ba7df95cffb52a44a1cfdef08b1.pdf&view=1, last viewed Aug. 1, 2019) at 133-140 (testimony of Sateesh Nori and Teresa Defonso of The Legal Aid

Indeed, the only reference to the 2019 Act's jurisdictional language that we were able to find anywhere in the legislative history is an oblique one: in a five-page joint statement, the Senate Majority Leader and the Assembly Speaker mention that the Act "[a]llows tenants to assert their overcharge claims in court or at HCR." Joint Statement from Senate Majority Leader Andrea Stewart-Cousins and Assembly Speaker Carl Heastie on Historic Affordable Housing Legislation (https://nyassembly.gov/Press/files/20190611a.php, last viewed Aug. 1, 2019). This is nothing more than an indication that the courts and the agency have concurrent jurisdiction. It says nothing to suggest that the doctrine of primary

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Society); *id.* at 144-166 (panel questions and answers); Assembly Committee, Transcript of May 9, 2019 Public Hearing (https://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_054e3e6d9b0c66cbdc3a5ad664913144.pdf&view=1, last viewed Aug. 1, 2019) at 8-12 (testimony of Ellen Davidson of The Legal Aid Society); *id.* at 22-72 (panel questions and answers); *id.* at 317-322 (testimony of Debra Collura of The Legal Aid Society); *id.* at 342-348 and 363-366 (panel questions and answers); New York State Senate Standing Committee on Housing, Construction, and Community Development ("Senate Committee"), Transcript of May 22, 2019 Public Hearing (https://www.nysenate.gov/sites/default/files/05-22-19_albany_rent_regulation_final.pdf, last viewed Aug. 1, 2019) at 143-149 (testimony of Ellen Davidson of The Legal Aid Society); *id.* at 154-171 (panel questions and answers); Senate Committee, Transcript of May 23, 2019 Public Hearing (https://www.nysenate.gov/sites/default/files/05-23-19_newburgh_rent_regulation_final_1.pdf, last viewed Aug. 1, 2019) at 147-154 (testimony of Angel Estrada and Liliana Cobo of Make the Road). The Assembly Committee transcripts, including some not cited here, are also available at https://nyassembly.gov/av/hearings/, last viewed Aug. 1, 2019; the Senate Committee transcripts, including some not cited here, are also available at https://www.nysenate.gov/committees/housing-construction-and-community-development, last viewed Aug. 1, 2019.

jurisdiction will be unavailable; to the contrary, the doctrine *assumes* concurrent jurisdiction of the very type described in the 2019 Act. *See Sohn v. Calderon*, 78 N.Y.2d 755, 768 (1991) (doctrine of primary jurisdiction "generally enjoins courts having *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") (emphasis added, citation omitted).[8]

On the other hand, there is ample basis to believe that the Legislature had a different reason for adding this jurisdictional language to the statute. As noted in defendants' principal brief (at 26 n.27), prior to the 2019 Act courts adjudicating cases arising in the City of New York had repeatedly (and mistakenly) cited § 8632(a)(1)(f) as the basis for their conclusion that DHCR's jurisdiction over rent overcharge claims was not exclusive and that the courts had concurrent jurisdiction over such claims – apparently overlooking the plain language of the statute that

[8] The statute's specification that such jurisdiction is concurrent "subject to the tenant's choice of forum" (*see supra* at 12) does not change the analysis. The fact that a plaintiff has the initial choice of forum says nothing to whether a proceeding properly brought in one forum may be transferred to another. *See, e.g.*, CPLR § 602(b) (describing the authority of the supreme court and the county courts to "remove to [themselves] an action pending in another court" under certain circumstances); CPLR § 604 (describing authority of Supreme Court to "order that an issue of fact in an action pending in another court . . . be tried in the supreme court in another county"); 28 U.S.C. § 1441 (governing removal of cases from state court to federal court).

expressly makes that section inapplicable within the City of New York. (*See* Resp. Br. at 26 n.27).[9] Until the 2019 Act, the parallel section that *does* apply within the City of New York (§ 8632(b)) did *not* actually contain the language that these courts were citing as evidence that they had concurrent jurisdiction. (*See* Resp. Br. at 15-17). Accordingly, if that language were in fact what made DHCR's jurisdiction non-exclusive and gave the courts concurrent jurisdiction, then within the City of New York DHCR would actually have exclusive jurisdiction unless the Legislature added parallel language to § 8632(b). In the 2019 Act, the Legislature did exactly that.

We respectfully submit that if the Legislature had intended to do anything more than clarify that the statute does not give DHCR exclusive jurisdiction – and in particular if it had intended to overrule scores of cases[10] and abrogate the

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[9] *See, e.g., Matter of Smith*, 254 A.D.2d 424 (2d Dept. 1998); *Wolfisch v. Mailman*, 182 A.D.2d 533 (1st Dept. 1992); *Smitten v. 56 MacDougal Street Co.*, 167 A.D.2d 205, 206 (1st Dept. 1990); *Lirakis v. 180 Seventh Ave. Assocs. LLC*, 10 Misc.3d 131(A), 2005 WL 3358468, *1 (App. Term 1st Dept. 2005); *Vazquez v. Sichel*, 12 Misc.3d 604, 608 (Sup. Ct. N.Y. Co. 2005). Courts also frequently cite these (erroneous) cases as the basis for their jurisdiction. *See, e.g., Matneja v. Zito*, 163 A.D.3d 802, 803 (2d Dept. 2018) (citing *Wolfisch*); *Jenkins v. State Div. of Hous. and Comm. Renewal*, 264 A.D.2d 681 (1st Dept. 1999) (citing *Wolfisch*); *Crimmins v. Handler*, 249 A.D.2d 89, 90 (1st Dept. 1998) (citing *Wolfisch*); *Cvetichanin v. Trapezoid Land Co.*, 180 A.D.2d 503, 504 (1st Dept. 1992) (citing *Smitten*); *Solow v. Wellner*, 154 Misc.2d 737, 744 (App. Term 1st Dept. 1992) (citing *Wolfisch*), *aff'd as modified*, 205 A.D.2d 339 (1st Dept. 1994), *aff'd*, 86 N.Y.2d 582 (1995).

[10] As the cases cited in defendants' principal brief make clear, courts regularly and routinely apply the doctrine of primary jurisdiction to dismiss claims under the

common-law doctrine of primary jurisdiction that vests discretion in the courts and applies whenever a court and an agency have concurrent jurisdiction – it would have said so. The fact that it instead said nothing on the subject should be dispositive in itself.

Rent Stabilization Law so that they can be adjudicated in the first instance by DHCR – and they have been doing so for many years. (*See* Resp. Br. at 18 and n.20, and 32 n.36). In the past two years alone, courts have done so in at least the following cases: *Williams v. Daphne Realty Group*, 2019 N.Y. Slip Op. 31739(U), 2019 WL 2563999 (Sup. Ct. N.Y. Co. Jun. 21, 2019); *Dodos v. 244-246 East 7th Street Investors, LLC*, 2019 N.Y. Slip Op. 31543(U), 2019 WL 2341363 (Sup. Ct. N.Y. Co. Jun. 3, 2019); *Krupnick v. 2310 Drive Realty, LLC*, No. 707117/2018, 2019 WL 2718658 (Sup. Ct. N.Y. Co. May 29, 2019); *Marages v. 121 Realty (2013) LLC*, 2019 N.Y. Slip Op. 30751(U), 2019 WL 1359782 (Sup. Ct. N.Y. Co. Mar. 26, 2019); *Way v. 37 Driggs Ave., LLC*, 2019 N.Y. Slip Op. 30437(U), 2019 WL 934928 (Sup. Ct. N.Y. Co. Feb. 26, 2019); *Lev v. 328 Management Inc.*, No. 160439/2017, 2019 WL 341675 (Sup. Ct. N.Y. Co. Jan. 23, 2019); *Koslov v. BPP St Owner LLC*, No. 151410/2017, 2018 WL 6594379 (Sup. Ct. N.Y. Co. Dec. 11, 2018); *Hopkins v. West 137th 601 LLC*, 2018 N.Y. Slip Op. 33149(U), 2018 WL 6505403 (Sup. Ct. N.Y. Co. Dec. 11, 2018); *560-568 Audubon Tenants Ass'n v. 560-568 Audubon Realty LLC*, No. 154661/16, 2018 WL 4439433 (Sup. Ct. N.Y. Co. Sep. 14, 2018); *Payton v. First Lenox Terrace Associates LLC*, 2018 N.Y. Slip Op. 31442(U), 2018 WL 3241898 (Sup. Ct. N.Y. Co. Jun. 29, 2018); *Siguencia v. BSF 519 West 143rd Street Holding LLC*, No. 158420/2017, 2018 WL 1627246 (Sup. Ct. N.Y. Co. Mar. 30, 2018); *Boyens v. 12 East 86th Street LLC*, No. 159302/2017, 2018 WL 1612113 (Sup. Ct. N.Y. Co. Mar. 29, 2018); *Quinn v. Parkoff Operating Corp.* 59 Misc.3d 1202(A), 2018 WL 1387085 (Sup. Ct. N.Y. Co. Mar. 16, 2018); *Mintzer v. 510 West 184th Street LLC*, No. 152188/2015, 2018 WL 1318664 (Sup. Ct. N.Y. Co. Mar. 8, 2018); *Burton v. 198 West 10th Street LLC*, 2018 N.Y. Slip Op. 31591(U), 2018 WL 1172596 (Sup. Ct. N.Y. Co. Mar. 6, 2018); *Napolitano v. 118 2nd Ave. NY LLC*, No. 157229/2016, 2017 WL 6039502 (Sup. Ct. N.Y. Co. Dec. 6, 2017); *Wright v. 116 Ave. C Investors LLC*, No. 152718/2017, 2017 WL 5270661 (Sup. Ct. N.Y. Co. Nov. 13, 2017) ; *ComFt. v. 118 2nd Ave NY LLC*, No. 160948/2016, 2017 WL 4708067 (Sup. Ct. N.Y. Co. Oct. 19, 2017); *Chester v. Cleo Realty Associates, L.P.*, 2017 N.Y. Slip Op. 31673(U), 2017 WL 3396466 (Sup. Ct. N.Y. Co. Aug. 8, 2017).

The Legislature, however, did not simply fail to specify an intent to change the common law. It also undertook no analysis of the impact of such a change. This is especially significant in light of the fact that, as noted above, it did not simultaneously amend the statute to give courts within the City of New York the same tools to seek and obtain the assistance of DHCR that the statute gives courts outside that City.

The Legislature would not have saddled the courts with that increased workload without at the very least analyzing the fiscal implications of such a change. But the Legislature apparently gave no thought to any such implications, and made no effort to seek the views of the judicial branch on the subject. To the contrary, during the Senate floor debates the sponsor of the legislation noted that there would not be a "meaningful state fiscal impact to this bill" because increased funds would become available to *DHCR* through certain increases in fees payable to that agency. *See* New York State Senate Stenographic Record, Regular Session, June 14, 2019,[11] at 5516-17 (emphasis added). Similarly, during the floor debates in the Assembly the sponsor touted the fact that the legislation would "make significant and additional funds available to *[D]HCR* to fulfill its mission to protect and preserve affordable housing," creating a "better-funded agency". *See*

[11] https://www.nysenate.gov/transcripts/floor-transcript-061419txt, last viewed Aug. 1, 2019.

New York State Assembly Stenographic Record, Regular Session, June 14, 2019,[12] at 23. (emphasis added). It was noted as well that the legislation would "give people opportunity to really right the wrongs and empower *[D]HCR* to take action and enforcement for all of the bad actors." *Id.* at 77 (emphasis added). All of this further supports the conclusion that the Legislature did not intend to impose on the courts the increased burden that would inevitably result if they were stripped of the discretion that the doctrine of primary jurisdiction vests in them. *See Cricchio v. Pennisi*, 90 N.Y.2d 296, 309 (1997) (rejecting proposed statutory interpretation that would have "fiscal implications" that were not "mentioned" in the legislative history).[13]

Should any doubt remain about which interpretation of the 2019 Act is correct, we respectfully submit that the Court should conclude that the Legislature simply clarified the statute rather than overruling decades of case law and abrogating a common-law doctrine. As the Court has repeatedly held, statutes are not to be interpreted as abrogating or overruling common-law doctrines unless they

[12] https://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_5f52288120d2b17c3390c6b44674be19.pdf&view=1, last viewed Aug. 1, 2019

[13] A portion of *Cricchio*'s substantive holding was implicitly overruled on federal statutory grounds in *Arkansas Dept. of Health and Human Svcs. v. Ahlborn*, 547 U.S. 268 (2006). *See Lugo v. Beth Israel Med. Cntr.*, 13 Misc.3d 681, 684-85 (Sup. Ct. N.Y. Co. 2006). That implicit overruling, however, does not call into question the soundness of the manner in which the Court analyzed the *state* statute it was construing in *Cicchio*.

expressly say so.[14] Moreover, "a statute should be construed in light of the problem to be cured and the event that prompted its enactment." *Gletzer, supra*, 12 N.Y.3d at 475; *accord* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 95 ("[t]he courts in construing a statute should consider the mischief sought to be remedied by the new legislation"). As neither the 2019 Act itself nor any portion of its legislative history indicates either that the Legislature intended to abrogate the doctrine of primary jurisdiction or even that it saw the application of that doctrine as a problem, the 2019 Act should not be construed as an abrogation of that doctrine.

* * * * *

In sum, based both on its plain language and on applicable principles of statutory construction, § 3 of Part F of the 2019 Act does not abrogate the common-law doctrine of primary jurisdiction or overrule the precedent pursuant to

[14] *See Morris v. Snappy Car Rental, Inc.*, 84 N.Y.2d 21, 28 (1994) (statutes are "deemed to abrogate the common law only to the extent required by the clear import of statutory language"); *Morell v. Balasubramanian*, 70 N.Y.2d 297, 302-03 (1987) (where nothing in statute or its legislative history suggests Legislature intended to alter a common-law principle, "[t]o read such an intention into the statute by implication would offend accepted canons of statutory interpretation"); *accord Krohn v. New York City Police Dept.*, 2 N.Y.3d 329, 336 (2004) (court "must presume that the City Council was aware of the common-law rule and abrogated it only to the extent indicated by the clear import of its enactment") (citation and internal quotations omitted); *see generally* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 301(b) ("The common law is never abrogated by implication, but on the contrary *it must be held no further changed than the clear import of the language used in a statute absolutely requires*.") (emphasis added).

which that doctrine applies to rent overcharge claims. Rather, it simply clarifies that DHCR and the courts have concurrent jurisdiction over those claims. Since such concurrent jurisdiction is the predicate for application of the doctrine of primary jurisdiction in the first place, the 2019 Act does not support plaintiffs' position that the doctrine is unavailable here.

We note one final point. The 2019 Act represented a comprehensive overhaul of the Rent Stabilization Law and related enactments. Much as the Legislature opted to change, however, it said nothing about the courts' ability to defer matters to DHCR under the common-law doctrine of primary jurisdiction (with which it must be presumed to have been familiar – *see Gletzer, supra*, 12 N.Y.3d at 476). This strongly suggests that the Legislature intended to leave in place the discretion that courts have enjoyed under that doctrine based on decades of precedent. *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).

This Court should be especially hesitant to strip the courts of that discretion by altering that doctrine in the face of the Legislature's failure to do so. It should instead affirm the Appellate Division's Order for the reasons set forth in

defendants' principal brief.

CONCLUSION

By its plain terms, Part F of the 2019 Act does not apply to plaintiffs' previously-dismissed rent overcharge claims. Moreover, even where it does apply, it leaves the common-law doctrine of primary jurisdiction firmly in place. That doctrine was properly applied here for the reasons set forth in defendants' principal brief. As detailed in that brief, the Appellate Division's Order should be affirmed.

Dated: New York, New York
August 2, 2019

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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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Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc., is 6,166 words.

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