COURT OF APPEALS
OF THE STATE OF NEW YORK
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DANIEL COLLAZO, et al., **APL-2018-00108**

Plaintiffs-Appellants, **INDEX NO. 157486/16**

-against-

NETHERLAND PROPERTY ASSETS LLC,
and PARKOFF OPERATING CORP.,

Defendants–Respondents,
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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, IN SUPPORT OF PLAINTIFFS-APPELLANTS

LEGAL SERVICES NYC
Edward Josephson, Director of Litigation
105 Court Street
Brooklyn, NY 11201
(718) 237-5500

THE LEGAL AID SOCIETY
Seymour James, Esq., Attorney in Charge
Judith Goldiner, Esq., Attorney in Charge
Jennifer Levy, Supervising Attorney
Ellen Davidson, Staff Attorney
199 Water Street
New York, New York 10038
(212) 577-3536

TABLE OF CONTENTS

Table of Authorities

Statutes

Secondary Sources

PRELIMINARY STATEMENT

This brief is submitted by nine non-profit legal services programs for low income New Yorkers as proposed *amici curiae* herein, in support of Plaintiffs-Appellants Daniel Collazo, *et al.*

The Appellate Division in its ruling below upheld the decision of the trial court to dismiss this action without prejudice to commencement of a proceeding before the New York State Division of Housing and Community Renewal (DHCR). Although this Court and the Appellate Divisions in both First and Second Departments have repeatedly exercised their jurisdiction to determine rent stabilized rents and award overcharge damages to tenants, the Appellate Division's ruling herein appears to authorize the trial courts to dismiss such actions based on an exercise of their discretion that is governed by no standards. The ruling below thus undermines the long-established precept that the courts and DHCR exercise concurrent jurisdiction over rent overcharge issues, and creates utter uncertainty among both landlords and tenants as to which cases and claims will be adjudicated by the courts, and which ones referred to DHCR.

As explained below, the Appellate Division's ruling also has potential to cause widespread prejudice particularly to low-income tenants, who may be

relegated to filing overcharge complaints with DHCR even though they could be subjected to summary eviction proceedings before DHCR can adjudicate the merits of their claims. The precedent created by the Appellate Division's ruling will have the effect of weakening statutory tenant protections that are needed more than ever at a time when over 60,000 individuals, including children, currently reside in the City's shelter system.

The proposed *amici* urge this Court to reverse the judgment of the Appellate Division below.

INTERESTS OF AMICI CURIAE

Legal Services NYC

Legal Services NYC, through its eighteen community-based offices and numerous outreach sites located throughout each of the city's five boroughs, provides expert legal assistance to low income New Yorkers. Historically, Legal Services NYC's key priority areas have included housing, government benefits and family law. LSNYC has represented long-term rent stabilized tenants whose landlords have sought to collect rents far in excess of the amounts permitted by law, or who seek tenants' evictions after revoking "preferential rent" agreements and offering the tenants new leases with unaffordable, and unlawful, rents. Our office

frequently files cases in Supreme Court when necessary to vindicate clients' rights under rent stabilization, particularly where groups of tenants have similar claims that are most efficiently adjudicated in a group action. Legal Services NYC has a substantial interest in the outcome of this appeal.

The Legal Aid Society

The Legal Aid Society is the oldest and largest program in the nation providing direct legal services to low income families and individuals. Through a network of ten neighborhood and courthouse-based offices in all five boroughs and twenty-three city-wide and special projects, the Civil Practice provides free direct legal assistance in thousands of matters annually. The Society's legal assistance includes a full range of legal problems in the areas of immigration, domestic violence and family law, employment, housing and public benefits, foreclosure prevention, elder law, tax, community economic development, health law and consumer law.

The Legal Aid Society represents numerous rent stabilized tenants who face eviction and displacement due to overcharges collected by their landlords. LAS files overcharges cases in Supreme Court when it is the forum best suited to providing full relief to its clients and preventing the threat of eviction, including

where groups of tenants have similar claims. The Legal Aid Society has a substantial interest in the outcome of this appeal.

Brooklyn Defender Services

Brooklyn Defender Services ("BDS") is a public defense office that represents people in Brooklyn who have been charged with a crime, face abuse or neglect allegations, or face deportation proceedings. BDS has specialized staff that work with adolescents and young parents, people who have been trafficked, veterans and other vulnerable populations who are caught up in one or more legal system. BDS also provides legal services and social work assistance for clients including housing, benefits, immigration, employment, drug and alcohol treatment, and mental health services. BDS civil justice practice represents some of the city's most vulnerable tenants in summary housing court proceedings and in front of administrative bodies. Its attorneys routinely represent rent regulated tenants who are facing extreme hardship or imminent eviction based on unlawful rent overcharges; the ability to raise these issues as defenses and counterclaims in appropriate judicial forums is essential to maintaining affordable housing and ensuring these tenants are not evicted while waiting for DHCR to review their overcharge complaints. Based both on its direct representation of affected tenants as

well as the needs of our larger constituency Brooklyn Defender Services has a substantial interest in the outcome of this litigation.

Catholic Migration Services

Catholic Migration Services ("CMS") seeks to empower immigrant communities to assert their basic rights and to access effective and culturally competent legal representation. Its mission is to serve low-income immigrants in Brooklyn and Queens, regardless of religion, national origin, or immigration status. Since 1971, CMS has helped tens of thousands of immigrants adjust their immigration status, obtain asylum, become naturalized citizens, and receive other forms of immigration relief. In 2009, CMS created its immigrant workers' rights program to help low-wage immigrant workers assert their rights in the workplace, recover unpaid wages, report unsafe and life-threatening conditions in the workplace, and fight discrimination in employment. In 2005, CMS created its housing legal services program and has helped thousands of low-income tenants in eviction proceedings, assisted them in obtaining much needed repairs, and helped them obtain rent reductions and rent overcharge awards.

Housing Conservation Coordinators, Inc.

Housing Conservation Coordinators, Inc. (HCC) is a community-based, not-for-profit organization anchored in the Hell's Kitchen/Clinton neighborhood of Manhattan's West Side. Since its founding in 1972, HCC has been dedicated to advancing social and economic justice and fighting for the rights of poor, low-income and working individuals and families. With a primary focus on strengthening and preserving affordable housing, HCC seeks to promote a vibrant and diverse community with the power to shape its own future. HCC provides legal representation, tenant and community organizing, and installation of energy efficient building systems through its weatherization program.

Through legal representation and tenant organizing, HCC annually advocates for hundreds of tenants living in rent stabilized apartments in New York City. HCC routinely helps tenants whose landlords have sought to collect rents far in excess of the amounts permitted by law or whose landlords have improperly deregulated their apartments. Both of these actions not only subject HCC's clients to summary eviction proceedings when they are unable to pay an illegally high rent or refused a renewal lease, but they also exacerbate the affordable housing crisis of New York City. Thus, the Trial Court's dismissal of the proceeding below, as affirmed by the Appellate Division, greatly impacts HCC's clients.

JASA/Legal Services for the Elderly in Queens

Since 1981, JASA/Legal Services for the Elderly in Queens (JASA/LSEQ) has provided civil legal services to Queens County residents aged 60 and older who have the greatest social and economic need. JASA/LSEQ's focus is on those areas that affect low income New Yorkers, including evictions, foreclosures and real property fraud; SSI and Social Security; and healthcare. LSEQ represents tenants in summary eviction proceedings in Queens Housing Court, as well as affirmative litigation in Supreme Court. Last year JASA/LSEQ assisted over 1100 older New Yorkers with their housing and eviction problems. Many of our clients have resided for decades in New York's rent-regulated apartments and have faced unlawful rent and charges which threaten their ability to remain in their homes and communities. Without the right to have these claims determined by the courts many of our clients will be unable to afford the challenged rent awaiting a DHCR decision and will be displaced. Because of the direct and profound impact this case will have on LSEQ clients and Queens' seniors, JASA/LSEQ has a substantial interest in the outcome of this appeal.

Make the Road New York

Make the Road New York (MRNY) is a nonprofit, membership-based community organization that integrates adult and youth education, legal and survival services, and community/civic engagement in a holistic approach to help working class and low-income New Yorkers improve their lives and neighborhoods. MRNY has a membership of 21,000 primarily immigrant New Yorkers focused around vibrant community centers in Bushwick, Brooklyn; Jackson Heights, Queens; Port Richmond, Staten Island; Brentwood, Long Island; and Westchester County.

MRNY members and their families are among the most severely affected by New York City's housing affordability crisis. MRNY provides free legal services to hundreds of tenants each year, educates tenants about their rights, and organizes tenants to advocate for safe, accessible housing conditions. Tenant rights meetings in its community offices are attended by more than one hundred community members each week, in addition to tenant association meetings organized by MRNY in apartment buildings in Brooklyn, Queens, and Staten Island. MRNY's 2011 report "Rent Fraud" described widespread abuse due to lax enforcement by DHCR and helped lead to the creation of the Tenant Protection Unit.

Mobilization for Justice

Mobilization for Justice, Inc. (formerly MFY Legal Services, Inc.) envisions a society in which there is equal justice for all. Our mission is to achieve social justice, prioritizing the needs of people who are low-income, disenfranchised or have disabilities. We do this through providing the highest quality direct civil legal assistance, providing community education, entering into partnerships, engaging in policy advocacy, and bringing impact litigation. We assist more than 12,000 New Yorkers each year, benefitting over 25,000. Representing rent-regulated tenants has been one of our core practice areas for more than 50 years. Because of the far-reaching implications of this matter for our clients, Mobilization for Justice has a substantial interest in its outcome.

Lenox Hill Neighborhood House

Lenox Hill Neighborhood House, widely recognized as one of New York's premier nonprofit organizations, is a 123-year-old settlement house that provides an extensive array of effective and integrated human services—social, educational, legal, health, housing, mental health, nutritional and fitness—which significantly improve the lives of thousands of people in need each year, ages 3 to 103, on the East Side of Manhattan.

Lenox Hill Neighborhood House's Legal Advocacy Department is a preeminent provider of free, comprehensive civil legal services to thousands of individuals and families each year. Its attorneys and advocates serve frail older adults, people with disabilities, immigrants, low-wage workers and low-income families on the East Side of Manhattan, including East Harlem and Roosevelt Island, using a multi-disciplinary holistic approach to legal representation. Annually, its housing team represents hundreds of tenant households in both affirmative and defensive work in housing court, Supreme Court, and administrative forums.

Many of its housing clients live in rent-regulated housing, and many face eviction for nonpayment of rent in excess of what they lawfully can be charged. The ability of Lenox Hill's clients to challenge unlawful rents in court is critical to its mission and to the integrity of the communities it serves. As eviction prevention advocates working to prevent homelessness, Lenox Hill Neighborhood House has an interest in ensuring that the Supreme Court exercises its concurrent jurisdiction to hear rent overcharge and regulatory status cases when brought in that forum. Preserving rent-regulated units is integral to our interest in safeguarding the City's stock of affordable housing and preventing families from entering the City's emergency shelter system.

ARGUMENT

I. DISMISSAL OF THIS ACTION IS CONTRARY TO THE DOCTRINE OF PRIOR JURISDICTION.

Article VI, § 7 of the New York State Constitution establishes the Supreme Court as New York's court of original jurisdiction, empowered, unless expressly proscribed, to hear all matters arising under the laws of the State of New York. This grant of power, of course, does not require that all cases be heard at the Supreme Court in the first instance, but it does create a presumption that for cases that may be heard before another tribunal, there will be concurrent jurisdiction. A case can be heard in either forum at the election of the party initiating the proceeding.

The Constitution vests the legislature with the power to create causes of action and classes of proceedings, and provides that "the supreme court shall have jurisdiction over such classes of actions," though "the legislature may provide that another court or courts shall also have jurisdiction." NY Const, art VI, § 7(b). Thus, where the legislature creates a cause of action that may be heard in multiple forums, and does not explicitly limit where it is heard, it is presumed that the Supreme Court has equal and concurrent jurisdiction.

Where there is concurrent jurisdiction, the courts have long applied the additional principle of "prior jurisdiction," which holds that if the forum in which

the proceeding is first brought has "adequate power to administer full justice," that initial forum should maintain jurisdiction. 1 NY Jur 2d Actions § 107*; Colson v. Pelgram,* 259 NY 370 (1932); *Schuehle v. Reiman,* 86 N.Y. 270 (1881); *Zeglen v. Zeglen*, 150 A.D.2d 924, 925 (3rd Dept.1989) ("in courts of concurrent jurisdiction of a particular subject matter the court first assuming jurisdiction should retain the action"); *Burmax Co. v. B & S Industries, Inc.*, 135 A.D.2d 599, 601 (2nd Dep't 1987) ("a guiding principle as to the invocation of each court's jurisdiction is that if both tribunals, whose interference has been invoked, have equal or concurrent jurisdiction, it should continue to be exercised by that one whose process was first issued"); *Obedin v. Masiello*, 4 AD2d 705, 706 (2nd Dept 1957) ("the subsequent summary proceeding commenced by respondents in the District Court could not oust the Supreme Court of its prior jurisdiction"). The policy underlying the prior jurisdiction rule is to promote judicial economy and to provide for the orderly administration of justice. *Commandeer Realty Assoc., Inc. v Allegro*, 49 Misc3d 891, 908 (Sup. Ct Orange Co. 2015).

Thus, while it is possible for the Supreme Court to decline jurisdiction where it has concurrent jurisdiction, refusing jurisdiction "does not seem to be authorized, unless the jurisdiction of [the other tribunal] has already been invoked." *Ludwig v Bungart,* 48 AD 613, 616 (2nd Dept 1900); *Metropolitan Trust Co. of City of New*

York v Stallo, 166 AD 639, 642 (1st Dept 1915). Conversely, where "another action between the same parties, in which all issues could be determined, is actually pending at the time of the commencement of an action for a declaratory judgment, the court abuses its discretion when it entertains jurisdiction." *Woollard v. Schaffer Stores Co.,* 272 N.Y. 304, 311 (1936); *Davis Const. Corp. v. Suffolk County,* 112 Misc.2d 652 (Sup. Ct Suffolk County 1982).

Plaintiffs generally have the right to chart their own procedural course, including their choice of strategy and forum, where no other proceeding is pending. *Lex 33 Associates, L.P. v. Grasso*, 283 A.D.2d 272, 273 (1st Dep't 2001), citing *Shadick v. 430 Realty Co.*, 250 A.D.2d 417 (1st Dep't 1998). Indeed, even where the defendant raises issues of *forum non conveniens*, courts hold that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Varkonyi v. S. A. Empresa De Viacao Airea Rio Grandense (Varig)*, 22 N.Y.2d 333, 341 (1968), citing, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *Anagnostou v. Stifel*, 204 A.D.2d 61 (1st Dept.1994); *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 208 (1st Dep't 2013).

The Appellate Division erred in departing from the principle that declining validly invoked jurisdiction is – and should be – the exception, not the rule, and that before declining jurisdiction, the courts must consider whether the alternative forum

has "adequate power to administer full justice." *Colson v. Pelgram,* 259 NY at 375. *Amici* have grave concerns that because of the looming threat of eviction, the unavailability of discovery, the inability to prosecute claims in concert, and the inability to obtain a stay, DHCR is a forum that often cannot provide full and adequate relief.

II. THE TRIAL COURT'S EXERCISE OF DISCRETION UNDER THE DOCTRINE OF PRIMARY JURISDICTION MUST BE BASED ON ASCERTAINABLE STANDARDS.

The doctrine of primary jurisdiction was authoritatively formulated in the Court of Appeals' ruling in *Capital Tel. Co. v Pattersonville Tel. Co.,* 56 N.Y.2d 11 (1982). The court made clear that where the courts and an agency have concurrent jurisdiction over a category of issues, judicial deferral to the agency is appropriate where it accomplishes particular policy goals.

> The doctrine of primary jurisdiction is intended to co-ordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render ineffective the statutes with which both are concerned, and to the extent that the matter before the court is within the agency's specialized field, to make available to the court in reaching its judgment the agency's views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency.

Id. at 22. Thus the Court of Appeals in *Capital Tel.* held that the trial court's

dismissal of the complaint was improper in the absence of a particularized need for "the agency's views."

In *Sohn v. Calderon*, 78 NY2d 755 (1991), the Court of Appeals, while citing *Capital Tel.*, employed a formulation of the primary jurisdiction doctrine using somewhat broader language than in its earlier decision. The Court stated:

> That doctrine, which represents an effort to "co-ordinate the relationship between courts and administrative agencies," 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.

Id. at 768. Again, the Court of Appeals' discussion emphasized that primary jurisdiction was to be employed to effectuate a *purpose*, i.e. coordination between courts and agencies, particularly where specialized expertise was needed. In neither *Capital* nor *Sohn* did the court suggest that deferral to the agency should be made purely on the basis of the court's convenience or disinclination to adjudicate matters routinely handled by the judiciary.

In *Matter of Rockaway One Co., LLC v Wiggins*, 35 AD3d 36 (2nd Dept 2006), the Appellate Division reaffirmed the courts' jurisdiction over rent overcharge disputes, finding that the Legislature had no intent to divest the Civil or Supreme Courts of their long-established general jurisdiction. Distinguishing

Capital Tel., the Appellate Division found that issues relating to vacancy increases in stabilized apartments are not "foreign to the courts" and do not require "the initial expertise of the DHCR." *Id.,* at 42. The court concluded that the Civil Court should not have declined jurisdiction over the tenant's overcharge counterclaims in favor of DHCR. *Id.*, at 43.

In *Abrams v Winter*, 121 AD2d 287 (1st Dep't 1986), the Attorney General initiated a proceeding in Supreme Court for violations of the rent stabilization laws, overcharge, and the failure to offer renewal leases. The Court rejected Defendant's argument that the Court should decline jurisdiction, stating: "If primary jurisdiction was applicable in this case, the court would be compelled to defer to the expertise of the DHCR for an adjudication …. But because it is regularly within the province of the court to determine whether violations of regulations have occurred, as is the case herein, the doctrine is inapplicable." *Id. See also, People v Port Distrib. Corp.,* 114 AD2d 259 (1st Dep't 1986) (in determining whether to apply the doctrine of primary jurisdiction the court must consider whether there is a need for agency expertise).

There is therefore nothing in the primary jurisdiction doctrine to support the action of the trial court below dismissing the within complaint in the absence of any particularized reason to defer to the expertise of the DHCR. Indeed, the trial 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, as long as the issue was also within DHCR's experience and expertise. *Slip op.* at 3.

As pointed out by Appellants herein, *all* of the issues implicated in this action, including the regulatory status of properties receiving J-51 benefits, the applicable statute of limitations, the existence of fraud, and the procedure for establishing new "base rents," have been regularly adjudicated by the courts and are in no way "foreign" questions requiring DHCR's expertise. *See Thornton v. Baron*, 5 NY3d 175 (2005) (fraud, application of default formula); *Conason v. Megan Holding, L.L.C.,* 25 NY3d 1 (2015); *Taylor v. 72A Realty Assoc., L.P.,* 151 AD3d 95 (1st Dep't 2017) (illegal J-51 deregulation, base date rent setting, registration issues); *Altschuler v. Jobman*, 135 AD3d 439 (1st Dep't 2016) (fraud, J-51, missing registrations).

As the Court explained in *Vazquez v. Sichel*, 12 Misc 3d 604, 608 (Sup Ct NY County 2005), to allow judges to simply "opt out" of adjudicating disputes in the absence of any specific compelling factors, "would place parties in these controversies at a disadvantage, compared to parties who have alternative forums for overcharge complaints, and undermine regularization, predictability, and uniformity of procedures …"

In the present case, the Appellate Division affirmed the trial court in a one sentence ruling relying upon its prior decision in *Olsen v. Stellar W. 110, L.L.C.*, 96 AD3d 440 (1st Dep't 2012), which similarly affirmed dismissal of an overcharge action despite the lack of any particularized reasons for deferral to DHCR. The *Olsen* court affirmed the dismissal based solely upon a generalized invocation of DHCR's "expertise in rent regulation," stating that DHCR "can investigate plaintiffs' fraud allegations, determine the regulatory status of the apartment, and, if warranted, apply the default formula adopted in *Thornton* [*v. Baron*] to determine the base rate" – all matters that the courts have repeatedly resolved without recourse to the agency. *Id.,* at 442.[1]

Amici respectfully submit that the holding in *Olsen* has led to precisely the negative consequences predicted by the court in *Vazquez*, where trial courts with utter lack of consistency either dismiss or accept jurisdiction over overcharge actions involving highly similar issues. *Compare, Pascaud v. B-U Realty Corp.,* 2017 WL 2998843 (Sup Ct NY County 2017) (adjudicating issues including the default formula, fraud, and J-51 deregulation); and *Casey v. Whitehouse Estates, Inc.,* 2017 WL 1161744 (Sup Ct NY County 2017) (fraud, J-51 issues, registration

[1] *Olsen* relied upon *Sohn v Calderon*, 78 NY2d 755 (1991) and *Davis v Waterside Hous. Co.,* 274 AD2d 318 (1st Dept 2000), *lv denied,* 95 N.Y.2d 770 (2000), which dismissed actions based on the *exclusive* jurisdiction of DHCR to hear cases involving demolitions and opt-outs

issues), *with*, *Mintzer v. 510 W. 184th St. LLC,* 2018 WL 1318664 (Sup. Ct. N.Y. Co. 2018) (citing DHCR's "expertise"); *ComFt. v. 118 2nd Ave. NY, L.L.C.*, 2017 WL 4708067 (Sup Ct NY County 2017) (finding issues of fraud and regulatory status are "unique" and require DHCR expertise); *Page v O'Porto Holding Co., Inc.*, 2015 WL 4722335 (Sup Ct NY County 2015) (dismissing tenant's case even where landlord *defaulted*); *Napolitano v. 118 2nd Ave. NY, L.L.C.*, 2017 WL 6039502 (Sup Ct NY County 2017) (allowing landlord to forum-shop by dismissing overcharge action based on landlord's *subsequently filed* DHCR petition for deregulation based on tenant's income level). Indeed, it appears that the very same individual judges capriciously accept and decline jurisdiction based on no consistent criteria. *Compare*, *Payton v. First Lenox Terrace Associates LLC.*, 2018 WL 3241898 at *3 (Sup. Ct N.Y. Co. 2018) ("issue of an apartment's regulatory status and potential rent overcharges should be decided by the DHCR"), *with*, *Brown v. 321 East 9th Street, LLC*, 2018 WL 878612 (Sup. Ct N.Y. Co. 2018) (dismissing tenant's overcharge claims after detailed analysis of facts and case law). In such a situation, neither tenants nor landlords can predict whether a given case will be adjudicated or dismissed, resources are wasted, and forum shopping is encouraged.

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from the Mitchell-Lama Program, respectively.

III. THIS APPELLATE DIVISION'S RULING WILL CAUSE WIDESPREAD PREJUDICE TO LOW INCOME TENANTS AND UNDERMINE THE PURPOSES OF THE RENT LAWS.

B. Tenants may face eviction before DHCR rules on their overcharge claims.

Tenants who file rent overcharge complaints at DHCR face the risk that their landlords will file eviction proceedings against them before DHCR can adjudicate their claims. In the experience of the *amici*, low income tenants frequently sign leases committing them to pay unlawfully inflated rents due to the tightness of the rental market, but later fall behind due to financial reverses, including loss of employment, illness or disability. Such tenants then face summary eviction even though an eventual DHCR determination might find that their monthly rent exceeded the lawful maximum and that their landlord actually owed the tenant reimbursement for past overcharges.

Many other tenants sign leases that allow them to pay a time limited affordable "preferential rent" while reserving an unlawfully high "legal regulated rent" that is chargeable upon expiration of the lease. When the "preferential" lease expires, the landlord may offer a lease for the higher unaffordable rent, presenting

the tenant with an impossible choice: refuse to sign the lease, and face a holdover proceeding, or agree to pay the unaffordable rent, and face a nonpayment proceeding. If such tenants file DHCR complaints prior to the expiration of their leases, they frequently will not receive determinations in time to prevent the filing of an eviction proceeding by their landlords. *See*, *IG Second Generation Partners L.P. v. DHCR*, 10 N.Y.3d 474 (2008) (four year delay after court remand); *Partnership 92 LP v. DHCR*, 46 A.D.3d 425 (1st Dep't 2007) (eight year delay); *Argo Corp. v. DHCR*, 191 A.D.2d 341 (1st Dep't 1993) (overcharge complaint pending over 18 months); *3103 Realty L.L.C. v. Kirbow*, 42 Misc 3d 1205(A) (Civ. Ct Kings County 2013) (tenant facing eviction after waiting six months for DHCR ruling).

Once in housing court, tenants have no guarantee that the housing court will stay its own proceeding pending a determination by DHCR. Many courts have followed the Appellate Term rulings in *Melohn Found. v. Bruck*, NYLJ, Nov. 26, 1986 at 7, col 1 (App Term, 1st Dept); *Fromme v. Perper*, NYLJ, May 16, 1987 at 12, col 1 (App Term, 1st Dept); *Marz Realty v. Reichman*, NYLJ, April 26, 2000, at 30, col 3 (App Term 2nd & 11th Jud. Dists); and *Obstfeld v. Roth*, NYLJ March 1, 1989, at 2, col 6 (App Term 2nd & 11th Jud. Dists), to deny stays and themselves refuse to reach the merits of overcharge claims even where the tenant will be

evicted before an administrative ruling on her overcharge claims. *See*, *3103 Realty L.L.C. v. Kirbow*, 42 Misc 3d 1205(A) (Civ Ct Kings County 2013) (refusing to vacate judgment or stay warrant although tenant had been waiting six months for DHCR ruling); *Parkash v. Charles,* NYLJ, May 3, 2000, at 27 col 4 (Civ Ct Bx County) (denying stay even where tenant won remand of unfavorable DHCR decision in an Article 78 proceeding); *3410 Kingsbridge Assoc. v. Martinez*, 161 Misc 2d 163, 168 (Civ. Ct Bx County 1994) (entering judgment for the landlord despite acknowledgement that "an unjust result may occur if the respondent is unable to satisfy a judgment, is thereafter evicted and is subsequently successful in her overcharge claim.")

Other courts have granted stays pending a DHCR proceeding under appropriate circumstances. *Weissman v. Patton*, 2012 WL 3638849 (Civ Ct NY County 2012) (noting DHCR's exclusive authority to classify hotel units); *45-55 Gardner v Div. of Hous. and Community Renewal,* 166 Misc 2d 290 (Sup Ct Bx County 1995) (eviction proceeding stayed pending landlord's administrative appeal of ruling favorable to tenant); *24 Fifth Ave. Assoc. v. Marder*, NYLJ, Feb. 24, 1989, at 22 col 2 (App Term 1st Dept) (DHCR proceeding pending for four years, specialized issues regarding hotel services); *Pamela Equities Corp. v. McSween,* NYLJ, Apr. 16, 1997, at 29 col 4 (Civ Ct NY County); *176 West 87th Street*

Equities v. Amador, 151 Misc 2d 234 (Civ Ct NY County 1991) (DHCR already made overcharge finding under administrative appeal filed by landlord); *Fleur v. Croy*, NYLJ, Aug. 9, 1989, at 2 col 6 (Civ Ct NY County).

Still other courts have proceeded to adjudicate the overcharge issues notwithstanding the pending administrative proceedings, based on the principle enunciated in *Woltall Apts Inc. v. Byrd*, NYLJ, Apr. 2, 1993, at 4 col 6 (Civ Ct NY County), that if the tenant "is evicted because of her inability to afford the large increase, it will be small consolation to her if she discovers, after she loses her home, that the rent was illegally high all along." *See 100 Mosholu Parkway Assoc. v. Hughes*, NYLJ, Mar. 13, 1996, at 29 col 4 (Civ Ct Kings County); *275 Linden Realty Corp. v. Caraballa*, 5 Misc 3d 32 (App Term 2nd & 11th Jud. Dists 2004) (no agreed upon rent, landlord committing fraud).

Given the uncertainties faced by tenants in housing court, the Appellate Division's November 28 ruling permitting dismissal of tenant overcharge actions based on the trial court's unfettered discretion has the potential to cause widespread harm to tenants who would face eviction while DHCR adjudicates their overcharge claims. Although in some cases, the housing court might then allow such tenants to withdraw their DHCR complaints and seek resolution of overcharge issues in the eviction proceeding, *see, 157 Broadway Assoc. LLC v. Edouard,* 28 Misc 3d

140(A) (App Term, 1st Dep't 2010), such a result simply demonstrates the inefficiency of dismissing the tenants' Supreme Court actions in the first place.[2]

Accordingly, this Court should reverse the Appellate Division's ruling below, and affirm the right of tenants to file overcharge claims in Supreme Court. Such tenants, if their landlords subsequently commence eviction proceedings against them, could seek a stay or consolidation in the pending Supreme Court action without risking a denial of a stay in Civil Court. *See, Reynolds v. Div. Hous. and Community Renewal,* 199 AD2d 15 (1st Dep't 1993) (affirms consolidation of eviction case with the tenant's plenary overcharge action and then staying that action pending DHCR's determination of its pending proceeding); *Rodriguez v. Velardi,* 2014 WL 572933 (Sup Ct NY County 2014) (consolidating holdover proceeding with Supreme Court action); *Boyd v. Div. Hous. and Community Renewal*, 2011 WL 6012167 (Sup Ct NY County 2011), *revd on other grounds*, 23 NY3d 999 (staying nonpayment proceeding pending Article 78); *Gardner v. Div. Hous. and Community Renewal,* 166 Misc 2d 290 (Sup Ct Bx County 1995) (citing *Reynolds*, directing DHCR to expedite determination of PAR and staying landlord's eviction proceeding).

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[2] Some courts, however, refuse to follow *Edouard*, and proceed with the tenant's eviction while refusing the tenant's request to withdraw the administrative complaint in favor of the court's jurisdiction. *See, 3103 Realty LLC v. Kirbow*, 42 Misc3d 1205(A) at FN1 (Civ Ct Kings

C. Tenants' names may be placed on the "blacklist" maintained by tenant reporting bureaus if landlords commence eviction proceedings before DHCR rules on the overcharge claims.

Even if tenants are not evicted during the pendency of their DHCR complaints, without the possibility of seeking an injunction in Supreme Court, they may still suffer irreparable harm by being placed on the notorious tenant "blacklist" upon the commencement of summary proceedings by their landlords. As the court explained in *Pultz v. Economakis*, 8 Misc 3d 1022A (Sup Ct NY County 2005), *revd on other grounds*, 40 AD3d 24 (1st Dept 2007), *aff'd*, 10 NY3d 542 (2008),

> Plaintiffs argue that there are now various credit agencies whose primary business is to report to landlord subscribers, the names of all tenants who have appeared in the computer indices of Housing Court, no matter whether they were the petitioner or respondent, and without regard to whether they were successful in their proceedings. This "blacklist" potentially makes the finding of a rental apartment potentially very difficult if not impossible [citations omitted]. As plaintiffs are tenants of relatively modest means, the possibility of winding up on a blacklist should they ultimately lose, would be devastating.

See also, *Weisent v. Subaqua Corp.*, 16 Misc 3d 1115(A) (Sup Ct NY County 2007) (tenants may suffer irreparable harm since landlords often "refuse to rent to anyone whose name appears on [the blacklist] regardless of whether the existence of a litigation history in fact evidences characteristics that would make one an undesirable tenant"); *Denza v. Independence Plaza Assoc., L.L.C.*, 17 Misc 3d

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County 2013).

1122(A) (Sup Ct NY County 2007), *revd on other grounds,* 95 AD3d 153 (1st Dept 2012)(tenants "would be subject to blacklisting that could make finding a new rental apartment difficult"); *Bernhardt v. 411 Clinton St. Holdings, L.L.C*,. 51 Misc 3d 1229(A) (Sup Ct Kings County 2007) ("further, once Plaintiffs are put on a TSB blacklist, there is no practical way to remove them even if they ultimately prevail in a housing court proceeding).

To the extent that the Appellate Division's ruling authorizes trial judges to expose tenants to the harms arising from the tenant screening bureaus, without making any assessment as to whether their claims involve specialized issues requiring determination by DHCR, it may cause substantial harm to thousands of tenants who cannot pay facially unlawful rents in order to prevent the institution of summary proceedings against them.

D. Tenants may be prejudiced by the unavailability of discovery in DHCR proceedings.

There is an exchange of information before DHCR in agency actions, but that exchange occurs at the direction of the agency. It therefore depends on the agency's conception of the complaint and the facts necessary to prove the complaint. It is up to the agency to attempt to compel compliance or to decide, on its own, that the

information produced was sufficient. The tenants cannot demand interrogatories or conduct depositions. In cases where, for instance, it is necessary to establish fraud in order to determine the manner in which overcharges should be calculated, the manner in which information is exchanged in agency proceedings is inadequate. The lack of discovery overseen by a Court therefore works to the prejudice of tenant-complainants. *See e.g., Riccio v. Windermere Owners LLC*, 58 Misc.3d 1223(A) (Sup. Ct N.Y. Co. 2018) (deposition testimony helps establish willfulness of overcharge); *Pascaud v. B-U Realty Corp.*, 2017 WL 2998843 at *4 (Sup. Ct. N.Y. Co. 2017) (deposition helps establish landlord's fraud); *Rosenzweig v. 305 Riverside Corp.*, 35 Misc.3d 1241(A) at *5 (Sup. Ct N.Y. Co. 2012) (summary judgment denied based on *inter alia* deposition testimony of managing agent and contractor).

E. Tenants may be prejudiced by the inability to prosecute building-wide complaints.

Tenants do not have the option of initiating group complaints of overcharge before DHCR. In *amici*'s experience, this results in inconsistent results in the same buildings with the same underlying facts. DHCR does not have an internal procedure in place to ensure that cases with common parties and facts are

investigated in tandem. This not only creates a risk of unfair results, but wastes the time and resources of all parties to the proceedings. *See e.g.*, *435 Central Park West Tenant Ass'n v. Park Front Apartments, LLC*, 56 Misc.3d 772 (Sup. Ct N.Y. Co. 2017), *aff'd as modified*, __ AD3d __, 2018 WL 3650309 (1st Dep't 2018) (court rules rent stabilization status of building not preempted by federal use agreement); *Champagne v. Piller*, NYLJ February 1, 2018, p.29 (Sup. Ct Kings Co.) (tenant group awarded overcharge judgment arising from building-wide rent reduction order); *560-568 Audubon Tenants Ass'n v. 560-568 Audubon Realty, LLC,* 2017 WL 3578577 (Sup. Ct N.Y. Co. 2017) (tenant group properly states claims for rent overcharge).

CONCLUSION

For all of the foregoing reasons, this Court should reverse the order and judgment of the Appellate Division below.

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New York, New York

LEGAL SERVICES NYC
Edward Josephson, Director of Litigation
105 Court Street
Brooklyn, NY 11201
(718) 237-5538

THE LEGAL AID SOCIETY
Seymour James, Esq., Attorney-in-Charge
Judith Goldiner, Esq., Attorney-in-Charge
Jennifer Levy, Supervising Attorney
Ellen Davidson, Staff Attorney
Civil Law Reform Unit
199 Water Street
New York, New York 10038
(212) 577-3964

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