No. APL-2018-00108 To be submitted

State of New York
Court of Appeals

DANIEL COLLAZO, et al.,

Plaintiffs-Appellants,

v.

NETHERLAND PROPERTY ASSETS LLC and
PARKOFF OPERATING CORP,

Defendants-Respondents.

BRIEF FOR AMICI CURIAE NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL AND NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL

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INTERESTS OF AMICI CURIAE

The Attorney General of the State of New York and the New York State Division of Housing and Community Renewal (DHCR) submit this amicus curiae brief in support of plaintiffs-appellants.

At issue in this appeal are two legal questions that directly affect amici. The first issue is whether the doctrine of primary jurisdiction authorizes courts to dismiss tenants' rent-overcharge claims and effectively require them to be filed with DHCR in the first instance. The second issue is whether General Business Law (GBL) § 349 prohibits landlords' misrepresentations to tenants and the public about the regulatory status or legal rents of apartments.

The Attorney General and DHCR have a strong interest in the answers to both questions. The Attorney General investigates and brings judicial enforcement actions against property owners who engage in deceptive leasing practices, tenant harassment, and other violations of consumer-protection and housing laws, using GBL § 349 and other statutes. And DHCR administers New York's rent-stabilization laws and shares concurrent jurisdiction with state courts to adjudicate rent-overcharge complaints filed by tenants occupying

nearly one million rent-stabilized housing accommodations in the State. DHCR has a particular interest in the proper application of the primary jurisdiction doctrine because that doctrine involves issues about the agency's expertise and authority that DHCR is uniquely equipped to explain, and because the misapplication of that doctrine will strain the agency's resources and undermine its statutory mission.

The courts below answered both questions incorrectly, in ways that seriously impair the ability of amici to enforce the law in this area. First, the lower courts held that the tenants' rent-overcharge claims belonged not in court but in administrative proceedings at DHCR, under the primary jurisdiction doctrine. But the Legislature did not intend to give DHCR primary jurisdiction over garden-variety rent-overcharge disputes, and DHCR has never maintained that such disputes require specialized agency expertise beyond the ken of the courts. Moreover, while this appeal was pending, the Legislature provided expressly, in the Housing Stability and Tenant Protection Act of 2019 (HSTPA), that the concurrent jurisdiction of the courts and DCHR over rent-overcharge disputes is "subject to

the tenant's choice of forum." The courts below erred in failing to give appropriate weight to plaintiffs' choice of a judicial forum.

Second, the courts below erroneously held that GBL § 349 does not extend to landlord-tenant disputes because such disputes involve "private" rather than "consumer-oriented" misconduct. But landlords can engage in consumer-oriented deceptive practices within the ambit of GBL § 349 by making their rental units available at market rates to the public at large—thereby falsely representing to the public and to individual current and prospective tenants that their units were not rent-stabilized. Consistent with this principle, this Court has long recognized that landlord-tenant disputes are not as a class excluded from the reach of New York's consumer-protection laws.

QUESTIONS PRESENTED

1. Whether the Appellate Division erred in affirming the dismissal of plaintiffs' rent-overcharge claims under the doctrine of primary jurisdiction.

2. Whether the Appellate Division erred in affirming the dismissal of plaintiffs' GBL § 349 claim where the complaint alleged that defendants misrepresented the regulated status of rental units and thereby charged unlawful market rents.

STATEMENT OF THE CASE

A. Statutory Framework

1. New York's rent-stabilization statutes

a. Regulation and deregulation of rent-stabilized housing units

The Rent Stabilization Law was first enacted in 1969 in response to an "intractable housing emergency in the City of New York" resulting from a shortage of safe and affordable housing. *Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 389 (1994). In 1974, the New York State Legislature extended rent stabilization to Rockland, Westchester, and Nassau Counties in the Emergency Tenant Protection Act (ETPA), which is substantially similar to the

Rent Stabilization Law. *See* McKinney's Uncons. Laws of N.Y. §§ 8621-8634 (added by Ch. 574, § 4, 1974 N.Y. Laws 1510-1512, as amended). The Rent Stabilization Law and ETPA have been amended and reenacted multiple times—most recently, in the HSTPA. *See* Ch. 36, 2019 N.Y. Laws (LRS) (eff. June 14, 2019).[1]

The central purpose of rent stabilization has always been "to prevent speculative, unwarranted and abnormal increases in rents" and "to forestall profiteering, speculation, and other disruptive practices tending to produce threats to the public health, safety and general welfare." Rent Stabilization Law (RSL) § 26-501; *see also Matter of Santiago-Monteverde*, 24 N.Y.3d 283, 289-90 (2014). The rent-stabilization statutes and their implementing regulations accomplish this goal by (i) setting a maximum legal rent for a covered apartment; and (ii) prohibiting owners from charging more than that maximum legal rent. RSL §§ 26-511, 26-512. Owners are also limited in when and by how much they may increase rents over

[1] All citations to the HSTPA refer to the Legislative Retrieved System pagination and appear in the following format: Ch. 36, pt. __, § __, p. __.

time and must offer renewal leases to rent-stabilized tenants. *See generally id.* An owner who charges rent in excess of these statutory and regulatory requirements is subject to treble damages unless the owner can demonstrate that the overcharge was not willful. *See id.* § 26-516.

During the time period relevant to this case, an owner was able to permanently "deregulate" a rent-stabilized unit—i.e., remove it from the protections of the Rent Stabilization Law—when, as a result of authorized rent increases, the maximum monthly legal rent exceeded a statutorily defined "luxury" threshold amount, and one of two additional conditions was satisfied: (i) the apartment became vacant, or (ii) the total combined income of its tenants exceeded a statutorily defined amount in each of the two preceding years.[2] But luxury deregulation was subject to an important exception: it was categorically unavailable if an apartment was subject to rent stabilization "by virtue of receiving tax benefits" pursuant to the Real Property Tax Law (RPTL)—including the tax

[2] The Legislature repealed the provisions permitting luxury deregulation in the HSTPA. *See* Ch. 36, pt. D, § 5, p. 6.

benefits at issue in this case under what is known as the "J-51 program." *See id.* §§ 26-504.1, 26-504.2(a), *repealed by* Ch. 36, pt. D, § 5, p. 6. See also *infra* at 11-14. This exception was intended to cover the situation where an owner received valuable tax benefits on the condition that it create or maintain rent-stabilized units; in such cases, the Legislature required the owner to maintain rent stabilization for at least as long as it received the tax benefits.

b. The role of DHCR and the courts in adjudicating rent-overcharge complaints

DHCR is the state agency charged with administering the regulation of residential rents under the rent-stabilization laws. *See* Ch. 403, § 3, 1983 N.Y. Laws 1777, 1778; *see also* Ch. 888, § 2, 1985 N.Y. Laws 3357, 3358. Among other things, DHCR adjudicates rent-overcharge complaints and is authorized to issue orders awarding damages to tenants. RSL § 26-516(a)-(c).

DHCR does not have exclusive jurisdiction over rent-overcharge complaints and has long shared authority to adjudicate such cases with state courts. *See Wolfisch v. Mailman*, 182 A.D.2d 533 (1st Dep't 1992); *Crimmins v. Handler & Co.*, 249 A.D.2d 89, 90

(1st Dep't 1998). Indeed, New York law expressly provided for such concurrent jurisdiction even before the recent enactment of the HSTPA. At the time this lawsuit was filed, section 12(a)(1)(f) of the ETPA (which applies to rent-stabilized units in the counties outside New York City) provided:

> 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 counter claim in a court of competent jurisdiction for damages equal to the overcharge and the penalty provided for in this section[.]

ETPA § 12(a)(1)(f) (Uncons. Laws § 8632(a)(1)(f)). Although the Rent Stabilization Law (which applies to New York City units) did not include a similar express provision conferring concurrent jurisdiction, the First and Second Departments had long held that New York City tenants could likewise bring rent-overcharge claims either in state courts or before DHCR. *See, e.g.*, *Downing v. First Lenox Terrace Assoc.*, 107 A.D.3d 86, 91 (1st Dep't 2013), *aff'd*, 24 N.Y.3d 382 (2014); *Matter of Rockaway One Co., LLC v. Wiggins*, 35 A.D.3d 36, 39 (2d Dep't 2006).

c. The Housing Stability and Tenant Protection Act of 2019 (HSTPA)

In the HSTPA, the Legislature addressed, among other things, the appropriate forum for rent-overcharge claims and made several clarifications relevant to this appeal. The relevant amendments clarify and confirm the Legislature's long-standing intent to give substantial weight to the tenants' choice of forum in rent-overcharge disputes.

First, for New York City, the HSTPA amended the Rent Stabilization Law to codify the concurrent-jurisdiction rule. *See* RSL § 26-516(a)(2), *amended by* Ch. 36, pt. F, § 4, pp. 12-13 (stating that a rent-overcharge complaint "may be filed with [DHCR] or in a court of competent jurisdiction"). In addition, the HSTPA amended section 12(b) of the ETPA (which applies to New York City) to provide that, unless a tenant has filed and not withdrawn a rent-overcharge complaint with DHCR, nothing shall "prevent a tenant or tenants, claiming to have been overcharged, from commencing an action or interposing a counterclaim in a court of competent jurisdiction" and further, that "[t]he courts and [DHCR] shall have concurrent jurisdiction, subject to the tenant's choice of forum."

ETPA § 12(b) (Uncons. Laws § 8632(b)), *amended by* Ch. 36, pt. F, § 3, p. 12.

Second, for the counties outside of New York City, the HSTPA amended section 12(a)(1)(f) of the ETPA to include the same language as applies to New York City tenants: "[t]he courts and [DHCR] shall have concurrent jurisdiction, subject to the tenant's choice of forum." ETPA § 12(a)(1)(f) (Uncons. Laws § 8632(a)(1)(f)), *amended by* Ch. 36, pt. F, § 1, p. 10.

These provisions of the HSTPA apply "to any claims pending or filed on or after" the effective date of June 14, 2019. *See* Ch. 36, pt. F, § 7, p. 15.

2. General Business Law § 349

GBL § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." GBL § 349(a). The statute "governs consumer-oriented conduct and, on its face, applies to virtually all economic activity." *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 55 (1999). "Consumer-oriented" conduct subject to section 349 includes all "acts or practices [that] have a broader impact on consumers at

large"—as opposed to "single shot transactions," such as "[p]rivate contract disputes, unique to the parties." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25-27 (1995).

B. Factual Background

1. The J-51 program

RPTL § 489 authorizes cities to adopt tax exemption and abatement programs conditioned on alterations or improvements to existing residential properties. *See* RPTL § 489(1)(a). Pursuant to this authority, New York City created the "J-51 program," which offers partial tax exemptions or abatement benefits to owners who make qualifying capital improvements to their residential properties. *See* Admin. Code of City of N.Y. § 11-243.

As a condition of participating in the J-51 program, owners must also agree (i) to subject apartments in buildings receiving J-51 benefits to the rent-stabilization laws, and (ii) to register those apartments with DHCR. *See id.* §§ 11-243(i)(1), 11-243(t), 11-243(dd)(2); 28 Rules of City of N.Y. 5-03(f). The Rent Stabilization Law likewise

provides that residential units in buildings receiving J-51 benefits are subject to state rent regulation. *See* RSL § 26-504(c).

2. This Court's decision in *Roberts* and subsequent developments

Prior to 2009, the law was unsettled with respect to whether and under what conditions owners could deregulate units receiving J-51 benefits. Between 1993 and 2019, the Rent Stabilization Law specified that luxury deregulation "shall not apply to housing accommodations which became or become subject to this law . . . by virtue of receiving tax benefits pursuant to section . . . four hundred eighty-nine of the real property tax law"—i.e., the specific statute that authorized the J-51 program. RSL §§ 26-504.1, 26-504.2(a), *repealed by* Ch. 36, pt. D, § 5, p. 6. Between 1996 and 2009, DHCR interpreted this language as barring luxury deregulation only when an apartment was subject to rent stabilization "*solely* by virtue of" receiving J-51 tax benefits; if the apartment was independently subject to rent regulation for some other reason (e.g., if it were in a qualifying building constructed between 1947 and 1974), it could be deregulated pursuant to the luxury deregulation provisions even if

the owner continued to receive J-51 tax benefits. *See Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270, 280-83 (2009) (describing prior regulatory history). In *Roberts*, this Court rejected DHCR's interpretation and held that all units receiving J-51 benefits were statutorily precluded from luxury deregulation, even if they were also rent-stabilized for some other reason. *See id.* at 285-87.

In 2011, the Appellate Division, First Department held that *Roberts* applied retroactively and thus required re-registration of J-51 units that had been improperly deregulated prior to 2009. *Gersten v. 56 7th Ave. LLC*, 88 A.D.3d 189, 198 (1st Dep't 2011), *appeal withdrawn*, 18 N.Y.3d 954 (2012). Following *Gersten*, "controlling authority has required that owners who had previously luxury decontrolled apartments while still receiving J-51 tax benefits must register those apartments and retroactively restore them to rent stabilization." *Matter of Park v. New York State Div. of Hous. & Community Renewal*, 150 A.D.3d 105, 110 (1st Dep't), *lv. dismissed*, 30 N.Y.3d 961 (2017).

In 2016, DHCR sent notices to owners of buildings receiving J-51 tax benefits who had not registered the rental units in those

buildings with the agency. (Record on Appeal (R.) 66-67.) DHCR's notices were the product of an administrative initiative to increase compliance with *Roberts* and subsequent case law. Accordingly, the notices did not create a new obligation to register, but rather reminded owners that *Roberts* and its progeny have long required owners to register units that were "subject to [r]ent [s]tabilization at the date of the receipt of the J-51 benefits." (R. 66.)

3. Defendants' unlawful deregulation of the subject apartments

Plaintiffs are current or former tenants of different apartments in a single Bronx building. (R. 12.) Between 1990 and June 2016, the building's owner participated in the J-51 program and received the corresponding tax benefits. (R. 13.) Nearly all of the subject apartments were unlawfully deregulated prior to *Roberts* and thus were improperly leased to plaintiffs at market rents pursuant to leases incorrectly stating that the units were "not subject to rent regulation." (R. 14-15.)

Although *Roberts* and *Gersten* were decided in 2009 and 2011, respectively, the owner did not take any action to restore the

building's rental units to rent stabilization until 2016, after receiving notice from the agency reminding it of the legal obligation to submit the units to rent regulation. (R. 66-71, 88-89.) At that time, the owner registered the units with DHCR and offered rent-stabilized leases to those plaintiffs who continued to reside in the building. (R. 89.) Plaintiffs maintain that, as a result of the owner's unlawful deregulation prior to *Roberts* and long delay in restoring the units to rent stabilization following *Roberts*, they have been substantially overcharged in their rents. (R. 16.)

C. Procedural History

In September 2016, plaintiffs filed a complaint in Supreme Court, New York County, seeking a declaratory judgment determining the legal regulated rent for their apartments, damages for rent overcharges in violation of the Rent Stabilization Law, and attorneys' fees. (R. 33-35.) Plaintiffs also sought damages and injunctive relief pursuant to GBL § 349. (R. 33-34.)

Defendants agreed that "there is no dispute that plaintiffs' apartments are rent stabilized," and contended that "[t]he only dispute here is over what the stabilized rent of plaintiffs' apartments

should be (and should have been for the last four years), and whether plaintiffs have in fact paid more than those amounts." (R. 89.) But defendants moved to dismiss (1) the Rent Stabilization Law claims on the ground that DHCR has primary jurisdiction over rent-overcharge disputes, and (2) the GBL § 349 claim on the ground that landlord-tenant disputes do not constitute a "consumer-oriented" practice within the scope of the statute.

Supreme Court (Cohen, J.) granted the motion in full. (R. 6-8.) Supreme Court acknowledged that it has concurrent jurisdiction with DHCR over the rent-overcharge claims, but held that there was no "specific reason to retain jurisdiction" because plaintiffs' lawsuit is not a putative class action (a type of proceeding that cannot be brought before DHCR), does not contain legal questions of first impression, and raises questions "about the applicability of the rent stabilization law and the proper amount of rent" that are "within the agency's specialized experience and technical expertise." (R. 7-8.) With respect to the GBL § 349 claim, Supreme Court concluded that a "private dispute between a tenant and a landlord

concerning a lease" is not "a consumer-related transaction within the ambit of GBL [§] 349." (R. 8.)

The Appellate Division, First Department, affirmed, holding that dismissal on the ground of primary jurisdiction was within Supreme Court's discretion and that the dismissal of the GBL § 349 claim was correct on the law. (R. 100-101.) This Court granted plaintiffs' motion for leave to appeal. (R. 98.)

ARGUMENT

POINT I

THE COURTS BELOW ERRED IN HOLDING THAT THE RENT-OVERCHARGE CLAIMS SHOULD BE DISMISSED UNDER THE DOCTRINE OF PRIMARY JURISDICTION AND RESOLVED ADMINISTRATIVELY BY DHCR

The courts below relied on the primary jurisdiction doctrine to dismiss the tenants' rent-overcharge claims, reasoning that individual rent-overcharge disputes fell within DHCR's administrative expertise and accordingly should be resolved by the agency in the first instance. The recently enacted HSTPA forecloses that reasoning. Even before the HSTPA, courts and DHCR indisputably had concurrent jurisdiction over garden-variety rent-overcharge

claims because the resolution of such claims did not require specialized agency expertise. In the HSTPA, the Legislature expressly clarified that this concurrent jurisdiction is "subject to the tenant's choice of forum"—a factor that the courts below did not consider. The Legislature also clarified that, unless a tenant had previously filed a rent-overcharge complaint with DHCR and not withdrawn that complaint, nothing "shall be deemed to prevent" the tenant from bringing the claim or counterclaim in court.

While this language does not prohibit courts from applying the primary jurisdiction doctrine to rent-overcharge claims in appropriate cases, it requires courts to give weight to tenants' choice of forum, and therefore forbids courts from dismissing all such claims on the ground that they raise disputes that fall within DHCR's concurrent jurisdiction. Here, defendants failed to identify any feature of the underlying disputes that would distinguish them from the mine-run rent-overcharge case in a way that would justify disregarding the deference that the Legislature required courts to give to tenants' choice of where their claims should be adjudicated.

A. The HSTPA Requires Courts to Give Great Weight to a Tenant's Choice of Forum.

The primary jurisdiction doctrine "'applies where a claim is originally cognizable in the courts'" but "'enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.'" *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147, 156 (1988) (quoting *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)). In such cases, a court may dismiss or suspend a proceeding "'pending referral of such issues to the administrative body for its views.'" *Id.* (quoting *Western Pac. R.R. Co.*, 352 U.S. at 64).

A fundamental purpose of the primary jurisdiction doctrine is to carry out the Legislature's explicit or implicit choice of the proper forum for adjudicating particular types of disputes. As the federal courts have explained,[3] "[w]hether the doctrine of primary jurisdiction applies in any particular situation depends on the extent to which

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[3] This Court's primary jurisdiction cases have expressly referenced federal precedents in defining the scope of the doctrine. *See, e.g.*, *Staatsburg*, 72 N.Y.2d at 156; *Hewitt v. New York, New Haven & Hartford R.R. Co.*, 284 N.Y. 117, 124 (1940).

[the legislative body], in enacting a regulatory scheme, intends an administrative body to have the first word on issues arising in juridical proceedings." *United States v. Culliton*, 328 F.3d 1074, 1082 (9th Cir. 2003) (quotation marks omitted); *see also Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994) ("Whether there should be judicial forbearance hinges therefore on the authority Congress delegated to the agency in the legislative scheme."). "[A] court must not employ the doctrine unless the particular division of power was intended" by the Legislature. *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1363 n.13 (9th Cir. 1987).

For example, when a statute has conferred uniform ratemaking authority on a particular agency, courts have found legislative intent for an agency rather than a court to adjudicate rate disputes in the first instance. *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 441 (1907). By contrast, when a statute expressly "permits an initial proceeding in the district court . . . without any prior resort" to the agency, courts have found legislative intent to allow

judicial adjudication in the first instance. *PHC, Inc. v. Pioneer Healthcare, Inc.*, 75 F.3d 75, 80 (1st Cir. 1996).

The recent enactment of the HSTPA makes the determination of legislative intent here very clear. In the HSTPA, the Legislature directly addressed the forum question by adding language that the concurrent jurisdiction of the courts and DHCR over rent-overcharge claims is "subject to the tenant's choice of forum." ETPA § 12(a)(1)(f), (b) (Uncons. Laws § 8632(a)(1)(f), (b)). The Legislature further reiterated the long-standing rule that tenants may choose to file their rent-overcharge claims or counterclaims in court "without any prior resort" to DHCR. *PHC*, 75 F.3d at 80; *see* ETPA §§ 12(a)(1)(f), (b) (Uncons. Laws § 8632(a)(1)(f), (b)) (unless a tenant has previously filed and not withdrawn a rent-overcharge complaint with DHCR, nothing in this section "shall be deemed to prevent" a tenant from filing that claim or counterclaim in court). Moreover, the Legislature enacted these changes against the backdrop of a series of lower court decisions (including the First Department's decision in this case) dismissing rent-overcharge

claims on primary jurisdiction grounds.[4] The HSTPA thus unambiguously demonstrates the Legislature's intent to give substantial weight to tenants' choice of forum for resolution of their rent-overcharge claims, contrary to the Appellate Division's decision and others that have followed it.

The Legislature expressly made these provisions of the HSTPA applicable to pending proceedings like this one. Specifically, the Legislature provided that these provisions would take effect immediately and apply with respect to "any claims pending" on the effective date. Ch. 36, pt. F, § 7, p. 15. And this Court has long held that it is "required to decide [a case] on the basis of the law as it exists at the time of our decision." *Knapp v. Fasbender*, 1 N.Y.2d 212, 219 (1956). Contrary to defendants' suggestion (see 6/20/19 Letter from Adrienne Koch to John Asiello at 1), no due process principles preclude application of the HSTPA's forum provisions

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[4] *See e.g.*, *Williams v. Daphne Realty Corp.*, 2019 N.Y. Slip Op. 31739(U) (Sup. Ct. N.Y. County June 21, 2019); *Dodos v. 244-246 E. 7th Str. Invs., LLC*, 2019 N.Y. Slip Op. 31543(U) (Sup. Ct. N.Y. County June 3, 2019); *Way v. 37 Driggs Ave., LLC*, 2019 N.Y. Slip Op. 30437(U) (Sup. Ct. N.Y. County Feb. 26, 2019).

here: unlike claim-revival statutes, the HSTPA's forum provisions do not resurrect otherwise untimely claims, but simply confirm that the lower courts should have retained the jurisdiction that they always indisputably possessed over timely filed claims.

The reasoning of the courts below is incompatible with the HSTPA's choice-of-forum provisions. Contrary to the statute's direction that the concurrent jurisdiction of the courts and DHCR is "subject to the tenant's choice of forum," the courts below gave no weight to the tenants' choice to proceed in Supreme Court rather than the agency. (*See* R. 7-8, 100.) To the contrary, the courts flipped the HSTPA's strong presumption in favor of the tenants' choice of forum and searched for a "specific reason to *retain* jurisdiction" (R. 7), rather than requiring a compelling reason to disclaim the jurisdiction chosen by the tenants.

Moreover, the courts justified dismissal of the tenants' claims on the basis of generic factors that would apply to *any* rent-overcharge dispute, noting only that "questions raised about the applicability of the rent stabilization law and the proper amount of rent [are] within the agency's specialized experience and technical

expertise" (R. 8.) Even before the HSTPA, the primary jurisdiction doctrine would not have allowed a court to dismiss claims just because they fell within an administrative agency's authority or expertise.[5] Rather, dismissal was appropriate only where the agency's expertise was necessary to the resolution of a case because the issues presented were outside "the conventional competence of the courts." *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304-05 (1976); see also *infra* at 26-28. By providing that tenants can choose their preferred forum for rent-overcharge claims, the Legislature has now conclusively stated that, as a general matter, such disputes are equally within the competence of the agency and the courts.

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[5] *See, e.g.*, *Capital Tel. Co., Inc. v. Pattersonville Tel. Co., Inc.*, 56 N.Y.2d 11, 22 (1982); *Ken-Vil Assoc. Ltd. Partnership v. New York State Div. of Human Rights*, 100 A.D.3d 1390, 1393 (4th Dep't 2012); *Matter of Connolly v. Rye School Dist.*, 31 A.D.3d 444, 446 (2d Dep't 2006); *Good v. American Pioneer Title Ins. Co.*, 12 A.D.3d 401, 402 (2d Dep't 2004); *Manhattan Telecom. Corp. v. Best Payphones*, 299 A.D.2d 178, 178 (1st Dep't 2002); *Lauer v. New York Tel. Co.*, 231 A.D.2d 126, 129-30 (3d Dep't 1997); *Rochester Gas & Elec. Corp. v. Greece Park Realty Corp.*, 195 A.D.2d 956, 956-57 (4th Dep't 1993).

B. Defendants Have Failed to Identify Any Persuasive Reason to Override the Tenants' Choice of Forum Here.

The HSTPA requires courts to give great weight to a tenant's choice of forum and precludes dismissal under the primary jurisdiction doctrine based on generic factors that would apply to any rent-overcharge dispute. At the same time, the HSTPA's choice-of-forum provisions do not by their express terms categorically foreclose a court from deferring to DHCR in a unique rent-overcharge dispute that presents a novel or especially technical question. In particular cases, there may be good reasons for such deference that would outweigh the tenant's choice to obtain a judicial resolution instead of an administrative one.

To determine whether such reasons exist in a specific case, courts should consider the traditional factors in the primary jurisdiction doctrine and decide whether a case involves the type of circumstances that would call for an initial exercise of administrative expertise. While this Court has not yet adopted a specific formulation of the factors for evaluating primary jurisdiction, the federal courts (including the Second Circuit) have converged on several factors that collectively seek to determine whether there are

compelling reasons for a court to disclaim or defer jurisdiction in favor of an agency determination. This Court should adopt this multi-factor analysis. Those factors include:

> (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;
>
> (2) whether the question at issue is particularly within the agency's discretion;
>
> (3) whether there exists a substantial danger of inconsistent rulings; and
>
> (4) whether a prior application to the agency has been made.

Ellis v. Tribune Tel. Co., 443 F.3d 71, 82-83 (2d Cir. 2006).[6] In addition, the Second Circuit has instructed courts to "balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings." *Id.* at 83 (quotation marks omitted). None of these

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[6] Other federal courts of appeal look to similar factors. *See, e.g.*, *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 760-61 (9th Cir. 2015); *Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 691 (3d Cir. 2011); *American Auto Mfrs. Assn. v. Massachusetts Dept. of Envtl. Protection*, 163 F.3d 74, 82 (1st Cir. 1998).

factors is dispositive and not every factor may be relevant in every case. However, the factors collectively reflect the narrow and limited circumstances under which deferral to an agency in the first instance is appropriate.

Here, none of these factors support overriding the tenants' choice of forum. First, this case does not present issues that fall outside of the conventional experience of judges. Because defendants admit that the subject apartments were improperly deregulated, the only issues to be adjudicated are (i) the proper rent for each apartment, and (ii) the amount of overcharges owed. (R. 89.) Defendants do not—and cannot—argue that these issues fall outside of the conventional experience of judges. To the contrary, lower courts regularly adjudicate these types of rent-overcharge issues, even in cases involving numerous apartments and extensive records. *See, e.g.*, *Cooper v. 85th Estates Co.*, 2017 N.Y. Slip Op. 51636(U) (Sup. Ct. N.Y. County Nov. 29, 2017); *Torres v. Mchedlishvili*, 2010 N.Y. Slip Op. 51238(U) (Civ. Ct. N.Y. County July 6, 2010). As the Second Department has held, issues pertaining to the calculation of legal rents for rent-stabilized tenants are "the

normal business of the courts." *Matter of Rockaway One Co.*, 35 A.D.3d at 42.

Second, for similar reasons, the questions presented in this case do not fall "particularly" within DHCR's discretion. While DHCR does have authority over rent-overcharge matters, DHCR has never taken the position that rent-overcharge disputes are uniquely within its area of expertise. To the contrary, courts have always had concurrent jurisdiction over such claims, and the HSTPA unambiguously allows tenants to pursue their claims in court without prior resort to DHCR. Where a statute expressly authorizes courts to address certain types of claims in the first instance, a "matter is not *particularly* within" the agency's discretion. *Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 692 (3d Cir. 2011) (emphasis in original).

Third, DHCR has also long taken the position that no threat to regulatory uniformity would be posed by allowing courts to adjudicate garden-variety rent-overcharge claims in the first instance. Courts have been adjudicating such claims alongside DHCR for decades. Moreover, defendants admit that the issues

presented in this case are factual ones specific to the rental history of plaintiffs' apartments and thus do not implicate broader questions that might affect DHCR's administration of the rent-stabilization laws. Br. for Defendants-Respondents (Resp. Br.) at 10. A case that involves "unique and narrow factual dispute[s] . . . poses no risk of inconsistent interpretations of any broadly applicable rule or policy." *Tassy v. Brunswick Hosp. Ctr., Inc.*, 296 F.3d 65, 69 (2d Cir. 2002) (quotation marks omitted).

Fourth, there is no dispute that this case involves numerous plaintiffs who have not previously filed a complaint with DHCR. Dismissal on the basis of primary jurisdiction is generally disfavored where "prior application to the agency is absent." *Ellis*, 443 F.3d at 89.

Finally, defendants argue that DHCR can resolve these issues "more efficiently and with less expense to all concerned." Resp. Br. at 11. As an initial matter, neither this Court nor the U.S. Supreme Court has ever identified judicial economy as a relevant basis for a court to decline jurisdiction in favor of an administrative agency. *See Tassy*, 296 F.3d at 68 n.2. As the Second Circuit has noted, considerations of judicial economy are especially inappropriate in

primary jurisdiction cases because "it will always be more economical, from a judge's point of view, to dismiss a case or quickly refer it to an administrative agency, instead of adjudicating it himself." *Id.*

Even if judicial economy were a relevant consideration, it would have to be balanced against the delays attendant to dismissal under the primary jurisdiction doctrine. *Ellis*, 43 F.3d at 90. Here, DHCR has substantial concerns that the lower courts' application of the primary jurisdiction doctrine would undermine rather than enhance the agency's ability to perform its responsibilities. Like all agencies, DHCR is subject to serious resource limitations that affect the timing of its administrative adjudications. Moreover, DHCR adjudicates overcharge complaints on an apartment-by-apartment basis and cannot use more broad-based and efficient procedural mechanisms available to courts, such as class actions. According to DHCR's internal records, the agency takes approximately twenty-two months to adjudicate the average rent-overcharge complaint, with an additional one-year period to complete the administrative appeal process. And further delays are inevitable if the losing party

at the administrative level seeks further judicial review in a C.P.L.R. article 78 proceeding. While such delay might be warranted in cases involving "highly complicated factual and policy disputes that [an agency] is uniquely well-situated to address," *id.*, this case does not present such issues for the reasons discussed above.[7]

POINT II

GENERAL BUSINESS LAW § 349 APPLIES TO DECEPTIVE PRACTICES IN RENTAL HOUSING

The courts below separately erred concluding that landlord-tenant disputes like the rent-overcharge claims at issue here are categorically outside the ambit of GBL § 349. (R. 8, 101 (citing *Aguaiza v. Vantage Props., LLC*, 69 A.D.3d 422 (1st Dep't 2010)).) The complaint alleges that defendants falsely represented to tenants and the public that the subject apartments were not rent-

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[7] A court may also obtain an agency's views without dismissing or deferring adjudication in favor of an agency determination. For example, a court may solicit an amicus brief from the agency in lieu of invoking the primary jurisdiction doctrine. *See, e.g.*, 33 Wright & Miller, *Federal Practice and Procedure* § 8366 (2d ed. Westlaw Apr. 2019 update). And an agency may elect to intervene or participate as an amicus in a particular action to ensure that its views are considered in the disposition of a case.

stabilized and that market rents could legally be charged for those apartments. (R. 19-32.) None of the reasons to affirm the dismissal of the GBL § 349 claim offered by defendants or the courts below has merit.

First, the Rent Stabilization Law does not provide the sole remedy for such practices, as defendants contend. *See* Resp. Br. at 38-40. No provision of New York law precludes plaintiffs from pursuing relief under separate but overlapping theories of liability. To the contrary, GBL § 349(g) expressly provides that "[t]his section shall apply to all deceptive acts or practices declared to be unlawful, *whether or not subject to any other law of this state*." GBL § 349(g) (emphasis added).

Second, defendants are wrong to suggest that the complaint fails to allege deceptive conduct. *See* Resp. Br. at 40. Among other things, the complaint alleges that "Defendants have represented to the public at large . . . that the apartments in the building are or were exempt from rent regulation." (R. 15.) Specifically, defendants erroneously registered many of the apartments as permanently exempt from regulation on DHCR's database. (R. 19-20, 22, 25-32.)

Defendants also offered leases to many of the plaintiffs in this case that affirmatively (and falsely) stated that the apartments were "not subject to rent stabilization." (R. 19-22, 24, 28-31.) In addition to these express misrepresentations, defendants impliedly represented that they were lawfully authorized to charge market prices for the apartments by failing to disclose their non-compliance with the rent-stabilization laws. *Cf. Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2001 (2016) (representations about a good or service are misleading when defendant fails to disclose noncompliance with "material statutory, regulatory, or contractual requirements").

Defendants agree that this conduct violates the Rent Stabilization Law (*see* Resp. Br. at 40), but fail to explain why it is not also deceptive. Defendants were able to charge inflated and unlawful market rents because of their express and implied misrepresentations about the regulated status of the subject apartments. Engaging in practices that "result in artificially inflated prices for defendant's products" is quintessentially deceptive conduct. *Cox v. Microsoft Corp.*, 8 A.D.3d 39, 40 (1st Dep't 2004). As a trial court correctly

held in recent case involving improper deregulation of rent-stabilized housing, a defendant may be liable under GBL § 349 where he "provided a lease which deceptively stated that the apartment was not rent-stabilized." *Haygood v. Prince Holdings 2012, LLC*, 2018 N.Y. Slip Op. 51182(U), at 9 (Sup. Ct. N.Y. County July 30, 2018).

Third, the conduct alleged in the complaint did not constitute merely "private disputes between landlords and tenants" rather than consumer-oriented practices, as the lower courts found. (R. 8, 101.) As an initial matter and as explained above, the landlords' misrepresentations here were directed not only at existing tenants but also at members of the general public—which included many of the plaintiffs who first moved in to the relevant apartments during the relevant time period. (R. 15.)

Moreover, this Court has never held that disputes involving a contract are, as a class, excluded from the reach of GBL § 349. Rather, the Court has focused on the underlying nature of the transaction to determine whether it is a "single shot transaction" that is unique to the parties (such as the negotiation of a rental of Shea Stadium)

or a "typical consumer transaction." *Oswego*, 85 N.Y.2d at 25. Many typical consumer transactions that unquestionably fall within the scope of GBL § 349 culminate in a private contractual agreement—i.e., the purchase of a life insurance policy or internet service. *See Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 322 (2002). A defendant that solicits contracts from the public and enters into contracts with certain members of the public is not shielded from GBL § 349 liability by virtue of a contractual agreement. *See People v. Wilco Energy Corp.*, 284 A.D.2d 469, 471 (2d Dep't 2001). Such conduct is "not a private transaction occurring on a single occasion, but rather, conduct which affect[s] numerous consumers." *Id.* The contrary view endorsed by the courts below, if allowed to stand, would severely contract the scope and remedial power of GBL § 349.

In addition, this Court has recognized that business practices that affect housing—a basic consumer necessity—are consumer-oriented even when they are targeted at a discernible group of victims. *See Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46, 52-54 (2001). As this Court has noted, "a lease is more akin to a purchase of shelter and services rather than a conveyance of an estate." *Park*

W. Mgt. Corp. v. Mitchell, 47 N.Y.2d 316, 324 (1979). Accordingly, in *23 Realty Associates v. Teigman*, the First Department held that a real estate broker who inaccurately advertised apartments as rent-stabilized could be liable under New York City's Consumer Protection Law, which prohibits deceptive practices in the "sale, lease, rental, or loan of any *consumer* goods or services." 213 A.D.2d 306, 308 (1st Dep't 1995) (emphasis added). The First Department explained that "[a]n apartment dweller is today viewed, functionally, as a consumer of housing services," and that the "offering of rental housing is a legitimate area of interest for consumer protection against deceptive advertising and misrepresentation."[8] *Id.*

The lower courts here mistakenly relied on *Aguaiza v. Vantage Properties, LLC*, but that case is readily distinguishable. Specifically, *Aguaiza* involved a landlord who commenced baseless

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[8] Defendants attempt to distinguish *23 Realty* by noting that it involved misrepresentations made by a broker in violation of New York City's statute rather than GBL § 349. *See* Resp. Br. at 41. However, the relevant question decided in *23 Realty* is the same as the question presented here—whether misrepresentations about the legal status of rental housing constitute a consumer-oriented deceptive business practice.

eviction proceedings and engaged in other forms of tenant harassment. 69 A.D.3d at 422-23. In *Aguaiza*, "plaintiffs neither alleged that defendants made materially misleading statements of fact, nor were they ever deceived by any statements made by defendants." *Haygood,* 2018 N.Y. Slip Op. 51182(U), at 11. Here and in *Haygood*, by contrast, plaintiffs alleged that they were misled by defendants' misrepresentations regarding the legal rents that could be charged for their apartments. *Aguaiza* simply does not apply to the facts in this case.

In any event, *Aguaiza* was incorrectly decided to the extent it suggested that all matters of landlord-tenant relations, including tenant harassment, are "private disputes" outside of the scope of GBL § 349. 69 A.D.3d at 423. Tenant harassment, for example, aims to harass, evict, or buy tenants out of their apartments, enabling owners to raise rents for future tenants, or deregulate the rental units altogether, substantially raising the cost of housing for those apartments and affecting the availability of affordable housing. Numerous lower courts have therefore correctly held that the residential landlord-tenant relationship is sufficiently "consumer-

oriented" to fall within the scope of consumer-protection statutes. *See, e.g.*, *People v. Marolda Properties, Inc.*, 2017 N.Y. Slip Op. 32497 (Sup. Ct. N.Y. County Nov. 29, 2017); *Buyers & Renters United to Save Harlem v. Pinnacle Group N.Y. LLC*, 575 F. Supp. 2d 499, 512 (S.D.N.Y. 2008); *Meyerson v. Prime Realty Services LLC*, 7 Misc. 3d 911, 921 (Sup. Ct. N.Y. County 2005).

* * *

If left undisturbed, the lower courts' decisions will undermine the effectiveness of the laws that DHCR and the Attorney General are tasked with enforcing. An application of the primary jurisdiction doctrine that would allow courts to decline to adjudicate an entire class of cases would strain the already limited resources of DHCR and delay relief for injured tenants. Likewise, construing GBL § 349 as categorically precluding relief for conduct arising from the landlord-tenant relationship would hamper the Attorney General's ability to police deceptive conduct in the housing market and leave New Yorkers vulnerable to fraud and abuse. This Court should reverse the decision below.

CONCLUSION

This Court should reverse the Appellate Division's decision and remand for further proceedings.

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Ester Murdukhayeva, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,963 words, which complies with the limitations stated in § 500.13(c)(1).

Ester Murdukhayeva