COURT OF APPEALS
STATE OF NEW YORK

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In the Matter of

DCH AUTO, as Tenant Obligated to Pay Taxes and DCH INVESTMENTS INC. (NEW YORK), as Tenant Obligated to Pay Taxes,

APL 2021-00103

Petitioners,

- against -

THE TOWN OF MAMARONECK, a Municipal Corporation, its Assessor and Board of Assessment Review and THE VILLAGE OF MAMARONECK, a Municipal Corporation, its Assessor and the Board of Assessment Review,

Respondents,

For a Review under Article 7 of the RPTL.

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BRIEF OF PROPOSED *AMICUS CURIAE* INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. (ICSC) IN SUPPORT OF PETITIONERS' APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to New York Court of Appeals Rule of Practice 500.1(f), International Council of Shopping Centers, Inc. (d/b/a ICSC), states that it is a not-for-profit corporation and that it has no parent and no subsidiaries.

ICSC is affiliated with International Council of Shopping Centers Foundation, Inc., and ICSC Foundation Canada.

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SUMMARY STATEMENT

This brief is submitted by International Council of Shopping Centers, Inc. (d/b/a ICSC), subject to its motion for leave to file as *amicus curiae* pursuant to 22 NYCRR 500.23(a)(1), in support of the appeal by Petitioners-Appellants DCH Auto and DCH Investments Inc. (New York) (collectively "Petitioners") of the "So Ordered" Stipulation and Judgment Dismissing Severed Proceedings entered on January 27, 2021 by Supreme Court, Westchester County, which brings up for review the Decision and Order of the Appellate Division, Second Department dated December 11, 2019, in *Matter of DCH Auto v. Town of Mamaroneck*, 178 A.D.3d 823 (2d Dep't 2019) (hereinafter "*DCH Auto*").

Commercial leases, including those entered into by ICSC members, frequently pass along the obligation to pay real property taxes to the tenant and grant the correlative authority to the tenant to commence administrative and judicial challenges of the assessments on which those taxes are based ("Net Leases"). Because of the contractual obligation to pay taxes, a tenant of a Net Lease ("Net Tenant") is the party actually aggrieved by excessive, unequal or unlawful assessments and is typically the party who files the administrative complaint under New York Real Property Tax Law ("RPTL") Article 5 and thereafter commences a judicial review proceeding under RPTL Article 7.

DCH Auto holds for the first time that a Net Tenant is barred from filing an Article 7 petition unless the Article 5 administrative complaint was filed by or in the name of the landlord/owner.

Net Leases typically do not require the landlord/owner to file the Article 5 administrative complaint, but instead assign to the Net Tenant the obligation to pay, and the right to challenge, real property taxes and assessments (and the right to receive any refund). The effect of *DCH Auto* is to nullify such provisions of a typical Net Lease transferring to the tenant full responsibility for handling all phases of real property taxation, including administratively challenging the assessment. Nullifying such provisions of a typical Net Lease has profound implications for the shopping center industry, as well as other tenants (and owners) subject to Net Leases.

Under *DCH Auto*, landlord/owner members of ICSC stand to be adversely affected, as they may be compelled to file administrative complaints for their tenants, even though they bargained away that responsibility in their Net Leases.

Under *DCH Auto*, many thousands of Net Tenant members of ICSC stand to be adversely affected. Thousands of pending Article 7 petitions filed by Net Tenants may be dismissed without recourse or review on their merits. This is because it is virtually universal practice among attorneys representing Net Tenants to file Article 5 administrative complaints on behalf of the tenant under the contractual provisions or other express authority from the landlord/owner. Upon an adverse administrative

determination, the Net Tenants have historically filed the Article 7 petitions for judicial review of assessments. Universal authority in New York has long recognized that Net Tenants have standing to commence proceedings for judicial review under RPTL Article 7 as they are aggrieved by the assessment. Longstanding practice, supported by the State Department of Taxation and Finance's promulgated regulation and interpretation of RPTL § 524(3) (*see* Petitioners' Brief pp. 46-47), treated Net Tenants as having standing to file an Article 5 administrative complaint.

To deprive Net Tenants of the right to file the administrative complaint creates an untenable paradox: post-*DCH Auto*, Net Tenants face dismissal of timely, sufficiently plead and properly commenced tax certiorari cases because they are unable to retroactively cure a novel condition precedent, that the administrative complaint be filed in the landlord/owner's name, to commencing an Article 7 proceeding.

If this Court does not reverse *DCH Auto*, the impact on ICSC members (and all Net Tenants in New York legally obligated to pay real property taxes and contractually authorized to grieve them) will be catastrophic, because the contractual allocation of the right to contest real property assessments, which is an essential and bargained-for element of a Net Lease, will be abrogated and thousands of pending tax certiorari petitions face dismissal *ex post facto*, without recourse to the constitutional protections against unequal or excessive assessment.

DCH Auto principally and erroneously relies on two prior decisions: *Matter of Circulo Housing Development Fund Corp. v. Assessor of City of Long Beach*, 96 A.D.3d 1053 (2d Dep't 2012) ("*Circulo*") and *Matter of Larchmont Pancake House v. Board of Assessors*, 153 A.D.3d 521 (2d Dep't 2017) ("*Larchmont I*"). Both *Circulo* and *Larchmont I* held that "person whose property is assessed" in RPTL § 524(3) is limited to the property "owner." But neither *Circulo* nor *Larchmont I* addressed the interpretation or application of RPTL § 524(3) in the factual context of Net Tenants legally obligated to pay real property taxes and contractually authorized to challenge assessments by Net Leases. The petitioners in *Circulo* and *Larchmont I* were neither legally obligated to pay real property taxes nor expressly authorized to challenge the assessments. The Petitioners in *DCH Auto*, like many of ICSC's members who are Net Tenants, are legally obligated to pay real property taxes and contractually authorized to challenge the assessment.

Circulo and *Larchmont I* both involved petitioners that ultimately lacked standing to challenge a tax assessment because of the absence of a legal relationship with the property "owner."[1] Yet *DCH Auto* erroneously cites *Circulo* and *Larchmont*

[1] Indeed, this Court in *Matter of Larchmont Pancake House v. Board of Assessors*, 33 N.Y.3d 228 (2019) ("*Larchmont II*"), affirmed *Larchmont I*, but not it's interpretation of RPTL § 524(3). Instead, *Larchmont II* held that the petitioner was "a non-owner with no legal authorization or obligation to pay the real property taxes," and thus was "not an aggrieved party within the meaning of RPTL article 7." *Larchmont II*, 33 N.Y.3d at 236 (emphasis added). As a result, this Court has yet "to consider the parties' dispute concerning the scope of appropriate challengers under RPTL 524." *Id.* at 240-41.

I to justify ruling that the Petitioners lacked standing to challenge a tax assessment despite the presence of a legal relationship with the property owner.

Furthermore, because *DCH Auto* applies the putative interpretation of RPTL § 524(3) espoused in *Circulo* and *Larchmont I* -- both founded on the peculiar facts that involved non-owner, non-obligated-taxpayers -- to a contractually-obligated and authorized taxpayer, *DCH Auto* creates new law that conflicts with and appears to overturn without discussion both Appellate Division and Supreme Court rulings in other departments that contradict the reasoning in *Larchmont I* or which expressly rejected the application of *Larchmont I* to Net Tenants so obligated and authorized.

In *DCH Auto*, the Second Department also affirmed without consideration the trial court's novel and erroneous ruling, in Index No. 23040/09 (Sup. Ct. Westchester Co., Feb. 10, 2017) (O. Peter Sherwood, J.),[2] that filing a RPTL § 524 complaint in the 'wrong' name -- the tenant-taxpayer instead of the owner -- was "a fundamental error which the courts cannot cure." Compendium at 16; *DCH Auto* at 825.

If this second error in *DCH Auto* were to stand, it would effectively overrule, without discussion or consideration, the substantial precedent holding that imperfect identification of a complainant is a curable defect that should not operate to bar

[2] The decision and order of Justice Sherwood entered December 16, 2016, *see* Compendium pp. 8-17 or Exhibit E to the Affirmation of Peter Basil Skelos dated February 21, 2022 ("Skelos Affirmation"), was incorporated in the above-cited judgment affirmed by the Second Department. *See* Compendium at 3-7.

judicial review of tax assessments. This new rule would elevate technicality over substance in conflict with this Court's precedents regarding the remedial purpose of judicial review of tax assessments. This second error must be reversed by this Court, because longstanding precedent cannot be overruled by implication and because the new rule threatens drastic legal and economic consequences for tenant-taxpayers including ICSC's members throughout the state.

ARGUMENT

ICSC respectfully requests that the judgment and decision and order of the Appellate Division be reversed, based upon the following arguments which further support and amplify the grounds set forth by Petitioners in their brief.

POINT I

DCH AUTO'S INTERPRETATION OF RPTL § 524(3) IS ERROR AND SHOULD BE REVERSED BECAUSE IT RELIES EXCLUSIVELY ON CASES THAT DO NOT SUPPORT IT AND IS CONTRADICTED BY PAST PRECEDENT AND RECENT CASES ON POINT

The Second Department's interpretation of RPTL § 524(3) -- finding Net Tenants have no standing to challenged assessments under RPTL § 524(3) because "person whose property is assessed" is interpreted to be limited to owners -- is erroneous because it relies exclusively on precedent that did not consider and does not support such a ruling, namely *Circulo* and *Larchmont I*.

The Second Department's interpretation of RPTL § 524(3) is also erroneous because it constitutes new law that fails to consider and reconcile conflicting authorities in other courts (and state agencies, *see* Petitioners' Brief pp. 46-47).

ICSC respectfully submits that this Court should reverse and hold that tenants legally obligated to pay real property taxes and contractually authorized to challenge assessments have standing to do file a complaint under RPTL § 524(3).

A. *DCH AUTO*'S INTERPRETATION OF RPTL § 524(3) IS NOT SUPPORTED BY THE NARROW RULINGS IN *CIRCULO* AND *LARCHMONT I*, WHICH WOULD BE IMPROPERLY EXPANDED THEREBY

Prior to *DCH Auto*, no decision held that a taxpayer contractually obligated to pay real property taxes and expressly authorized to challenge the tax assessment was nonetheless barred from filing an administrative complaint pursuant to RPTL § 524(3) because it was not the property owner. *DCH Auto* presents no basis for its restrictive interpretation that "person whose property is assessed" in RPTL § 524(3) is limited to "owner" other than three decisions: *Circulo*, *Larchmont I* and the wholly inapt *Grecian Garden Apartments, Inc. v. Barlow*, 71 Misc. 2d 457 (Sup. Ct. Monroe Co. 1972).[3]

[3] *Grecian Garden Apartments* held that a tenant-taxpayer was an aggrieved party with standing to bring an Article 7 petition even if it was not the administrative complainant (in that case, an agent of the owner). 71 Misc. 2d at 458-59. This holding in no way supports the reverse, that a tenant-taxpayer lacks standing to bring an Article 7 petition because the tenant-taxpayer was the administrative complainant.

Neither *Circulo* nor *Larchmont I* involved a petitioner contractually obligated to pay real property taxes or authorized in writing to challenge the tax assessment, nor do their holdings support *DCH Auto*. Both *Circulo* and *Larchmont I* ultimately relied on a factual context unquestionably not present here: the absence of a legal relationship between the petitioner and the property owner. Their holdings were also so reliant on their peculiar facts that the creation of a new rule of broad applicability based on those cases epitomizes the cautionary adage that "bad facts make bad law."

Circulo is both peculiar and distinguishable in several ways. The petitioner challenged the denial of real property tax exemption under RPTL § 420-a, for which ownership of the property is an express statutory prerequisite. 96 A.D.3d at 1053; RPTL § 420-a(1)(a). The question here, whether the definition of "person whose property is assessed" in RPTL § 524(3) includes entities other than the owner of a property, was not before the *Circulo* court, because a non-owner cannot seek or be granted an exemption under RPTL § 420-a. *Al-Ber, Inc. v. N.Y.C. Dep't of Fin.*, 80 A.D.3d 760, 761 (2d Dep't 2011); 10 Op. Counsel SBRPS No. 88, 1999 WL 1958301, at *1 (Aug. 30, 1999).

Because the petitioner claimed to own the property in question (as anyone seeking exemption must), the court's only consideration was whether the evidence supported or denied the petitioner's claim. *Circulo* found that the petitioner was not the property owner, on grounds unrelated to the interpretation of RPTL § 524(3): the

grantee's name on the property deed was not the corporate predecessor of the petitioner, but instead a nonexistent entity, due to the transposition of two words.[4] The court refused to look beyond the deed[5] and affirmed dismissal as to that property because the petitioner was "not the owner." 96 A.D.3d at 1055.

On its facts, *Circulo* effectively held that no one can lawfully challenge the taxes or seek an exemption on a parcel deeded to a nonexistent entity. The precedential value of that holding is limited, even in the rare case involving a typographical error in the deed.[6] Because it was decided on such a narrow, peculiar

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[4] Petitioner's corporate predecessor was "Circulo de la Hispanidad Housing Development Fund Corp.," the grantee of another parcel, the West Fulton Street property, that *Circulo* held was owned by the petitioner. *See* 96 A.D.3d at 1056. Conversely, the East Hudson Street property, unquestionably operated by the petitioner, was erroneously deeded to "Circulo de la Hispanidad Housing Fund Development Corp," a nonexistent entity. *See* appellate briefs annexed as Exhibit A to the Skelos Affirmation for a full discussion of the facts. The transposition of "Development" and "Fund" in the relevant deed is patently a mistake: The Private Housing Finance Law ("PHFL"), which governs the incorporation of such entities, states that the term "housing development fund corporation" or "housing development fund company" must be included as a part of the corporate name in the certificate of incorporation. PHFL § 573(2).

[5] *Cf. Abley Props., Inc. v. Reid*, 18 Misc. 3d 1103(A), 2007 WL 4410379, at *2 (Sup. Ct. Kings Co. Dec. 4, 2007) ("The error in grantee name is obviously just that since French Open Realty, LLC was admittedly not in existence at the time of the conveyance").

[6] Another court might deny a similar motion to dismiss on the grounds that substantial questions of fact exist regarding the allegations of ownership. *See, e.g., De Paulis Holding Corp. v. Vitale*, 66 A.D.3d 816, 817-18 (2d Dep't 2009) (affirming denial of motion to dismiss for failure to state a claim where the "defendant argue[d] that the documentary evidence of the deed 'flatly contradicted' the plaintiff's factual allegations and thus the allegations of the complaint should not be deemed true" because "essential facts have [not] been negated beyond substantial question").

Another court might, when considering the merits, find that a petitioner like the one in *Circulo* was the owner of the property as a matter of law based on the circumstances of the transaction. *See, e.g., Matter of Amityville Mobile Home Civic Ass'n v. Town of Babylon*, No. 09973/12, 2014 WL 1102391, at *1 (Sup. Ct. Suffolk Co. Feb. 25, 2014) (where a typographical error in the grantee's name in the deed mistakenly named the entity an "LLP" rather than an "LLC," the court considered that the "the 'LLP' entity did not exist in contrast to the LLC entity which was

issue, *Circulo* did not "reach the scope of appropriate challengers under RPTL § 524(3)" at issue in *DCH Auto*, because property "owned" by a nonexistent entity could never satisfy the requirements of RPTL § 524(3). A nonexistent entity can no more file a complaint on its own behalf than it can authorize a person to challenge the assessment or obligate another party to pay the taxes.

The peculiar facts of *Larchmont I* render it inapposite as well. The decision turned on the lack of formal legal relationship between two separate entities within a family business that temporarily lacked unity of ownership following the death of the family matriarch.

In *Larchmont I*, the petitioner business operated a restaurant on the property, both of which were owned by the same family. No formal legal relationship existed between the business and the property owner. Instead, they operated under an informal arrangement whereby the petitioner paid the taxes and costs of the property in exchange for rent-free occupancy. *See Larchmont II*, 33 N.Y.3d at 244-51. This arrangement continued without incident until 2009, when the matriarch of the family died. The petitioner entity was co-owned by mother and daughters, but the property was temporarily transferred to a trust before being transferred to the daughters.

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incorporated some four months before" and reviewed "numerous other real property transfer documents" in the transaction to find "under the circumstances presented, as a matter of law, the respondents demonstrated that the 2003 deed was intended to and did convey ownership of the subject property to [the] LLC") (emphasis added).

Larchmont I, 153 A.D.3d at 521. While the property was held in trust, the longtime taxpayer petitioner filed the Article 5 administrative complaints. *Larchmont I* held that the petitioner lacked standing to file the administrative complaint under RPTL § 524(3) because, for the tax years at issue, the petitioner paid the taxes without any legal obligation to do so. *Id.* at 522.

On appeal, this Court held that, regardless of the requirements of RPTL § 524(3), the petitioner was not an aggrieved party because the trust had given the petitioner no formal "legal authorization or obligation to pay the real property taxes." *Larchmont II*, 33 N.Y.3d at 240. Thus, the *Larchmont* cases were decided based on the absence of a formal legal obligation of the petitioner to pay the taxes. Even more *sui generis*, the absence of such a formal legal relationship -- not unusual for a family business (*see Larchmont II*, 33 N.Y.3d at 244) -- only became relevant because the ownership of the property and the petitioner temporarily differed after the mother's death. In *DCH Auto*, Petitioners have an express legal obligation to pay the taxes.

As stated by this Court, the "language of an opinion must be confined to the facts before the court. No opinion is an authority beyond the point actually decided, and no judge can write freely if every sentence is to be taken as a rule of law separate from its association." *Dougherty v. Equitable Life Assur. Soc'y of U.S.*, 266 N.Y. 71 (1934); *Campbell Sales Co. v. N.Y. State Tax Comm'n*, 68 N.Y.2d 617, 623 (1986) ("It is well settled that the language of any opinion must be confined to the facts

before the court.") (internal marks removed); *see also Brown v. Blumenfeld*, 103 A.D.3d 45, 62 (2d Dep't 2012) (where the court's "holding was made in the context of a case unlike [the case at issue]," it "may properly be interpreted as limited to such a factual circumstance").

To the extent cases driven by peculiar facts constitute precedent,[7] *Larchmont I* and *Circulo* at most stand for the limited proposition that a person who is (i) not the property owner, (ii) not legally obligated to pay the property taxes and (iii) not authorized to challenge assessments, does not have standing to file a complaint under RPTL § 524(3). In short, neither *Circulo* nor *Larchmont I* supports the novel rule in *DCH Auto* that taxpayers (i) legally obligated to pay the property taxes and (ii) contractually authorized by the owner to challenge assessments, are barred from filing complaints by RPTL § 524(3).

As a result of the foregoing, the Second Department's interpretation of RPTL § 524(3) in *DCH Auto* is founded on no supportive authority and thus serves to create new law out of whole cloth. This is error.

[7] *See, e.g., Zangiacomi v. Hood*, 193 A.D.2d 188, 193 (1st Dep't 1993) ("The circumstances in *Calla* were unusual and as *Calla* itself recognized, the case has limited application; its precedential value should be restricted to a precisely similar fact pattern.")

B. *DCH AUTO'S* INTERPRETATION OF RPTL § 524(3) BREAKS WITH RELEVANT PRECEDENT AND CASES THAT LOOKED BEYOND THE LANGUAGE OF *CIRCULO* AND *LARCHMONT I* TO CONSIDER WHETHER NET TENANTS WERE APPROPRIATE CHALLENGERS UNDER RPTL § 524(3)

DCH Auto's interpretation of RPTL § 524(3) is expressly at variance with the authority of the Third Department, *McLean's Dep't Stores, Inc. v. Comm'r of Assessments of City of Binghamton*, 2 A.D.2d 98 (3d Dep't 1956); *Big V Supermarkets, Inc., Store # 217 v. Assessor of Town of E. Greenbush*, 114 A.D.2d 726 (3d Dep't 1985), and the Fourth Department, *People ex rel. N.Y., W. Shore & Buf. Ry. Co. v. Johnson*, 29 A.D. 75 (4th Dep't 1898); *Ames Dep't Store, Inc., No. 418 v. Assessor*, 261 A.D.2d 835 (4th Dep't 1999). Additionally, the holding of *DCH Auto* is in direct conflict with Supreme Court rulings in the Fourth Department finding *Circulo* and *Larchmont I* do not apply to Net Tenants legally obligated to pay real property taxes and expressly authorized to challenge tax assessments.

In *McLean's*, the question of standing to file an administrative complaint was at the heart of the Third Department's decision, which involved a statutory scheme under a local law identical to the scheme under the RPTL (and equivalent former Tax Law). The Appellate Division held that "petitioner, as a lessee obligated to pay all taxes during the term of the lease, [was] a person aggrieved and thus entitled to the protection of the statute and, in consequence, eligible to undertake the procedure provided by the local law." *Id.* at 101 (relying on the "[fundamental] principal of

broad construction applicable to remedial statutes pertaining to the assessment and taxation of property") (emphasis added). This is the rule we advocate on behalf of the *amicus curiae*.

The administrative complaint in *McLean's* was denied because the petitioner-lessee "failed to submit a power of attorney from the owner or have the owner present at the hearing" as required by Local Law No. 1 of 1943.[8] *Id.* at 100-101. The respondent asserted that the petitioner, as a lessee, was not an aggrieved person and moved to dismiss the tax certiorari petition in the absence of the power of attorney. The Supreme Court denied the motion and the Appellate Division affirmed.

City of Binghamton Local Law No. 1 and former Tax Law § 290-c (now RPTL § 706(2)) had the identical requirement to the extent that the petitioner was required to plead that it had served an administrative complaint with the local officials who had the authority to correct the assessment. *Id*. The Third Department's analysis in affirming the denial of the motion is instructive as to the very issue before this Court, *id.* at 100-101:

> Since the right of judicial review is preserved for the benefit of persons claiming to be "aggrieved", it clearly follows that every complainant whose status is comprehended by that term is entitled to complain to the board and obtain preliminary review necessarily precedent to the judicial proceeding. The conclusion

[8] While the court's holding interpreted a local law, the scope of the court's decision was not defined by a violation of the Home Rule Law. Rather, the court articulated a broader interpretation of standing to file an administrative complaint under the former Tax Law that contradicts the rulings in *Circulo*, *Larchmont I* and *DCH Auto*.

> that such is the meaning and intent of the local law seems inescapable. By no other construction could its validity be sustained.

The court in *McLean's* held that a "person claiming to be aggrieved" (now RPTL § 704(1)) is, by necessity, one and the same as the "person whose property is assessed" and that any person who has standing to seek judicial review may file an administrative complaint. In so holding, the court equated the petitioner's status as a lessee with ownership, *id.* at 101 (emphasis added):

> ... petitioner was, under its lease, the owner of such an interest in the property as to constitute it not only a person aggrieved but a person whose property was assessed, within the meaning of the local law. This court held in *People ex rel. Bingham Operating Corp. v. Eyrich* (265 App. Div. 562, 565) that the relator ... was not only a person "claiming to be aggrieved" but also a person "assessed" and ... "obviously means one whose pecuniary interests are or may be adversely affected".

Finally, speaking to the remedial nature of the statute, the court stated, *id.*:

> The principal of broad construction applicable to remedial statutes pertaining to the assessment and taxation of property is fundamental and that principle, of course, bears with equal force upon the interpretation of local enactments such as that here involved.

Similarly, *Big V Supermarkets* involved a partial lessee of a shopping center obligated by the lease to pay "all taxes and assessments" who, while unquestionably not the owner, filed the administrative grievance in its own name and subsequently commenced an Article 7 proceeding to challenge the tax assessment. The court

found that the lessee-taxpayer was an aggrieved party with standing to commence a proceeding under RPTL § 704. 114 A.D.2d at 727.

At least one Fourth Department case, *Johnson,* has interpreted a predecessor statute to RPTL § 524(3) to equate an administrative complainant with the person aggrieved. The court in *Johnson* rejected a similarly restrictive interpretation of former Tax Law § 36, which contained language similar to RPTL § 524(3), *see* 29 A.D. at 78 (alterations in original):

> Such complainant [person aggrieved] shall file with the assessors a statement, under oath, specifying the respect in which the assessment is complained of as incorrect, which verification must be made by the person assessed, or whose property is assessed, or by some person authorized to make such statement and who has knowledge of the facts stated therein.

In holding that a person authorized to verify an administrative complaint did not have to have personal knowledge of the facts, the court declared: "[Tax Law § 36] defines the procedure to be taken by persons or corporations who deem themselves aggrieved by over or unequal valuation, and, like all laws of procedure, is not to be strictly construed so as to deprive persons aggrieved of the remedy, but so construed as to advance the remedy given." 49 A.D. at 78.

In *Ames,* the Fourth Department held that a fractional tenant obligated to pay a proportional share of real property taxes, had "standing to maintain tax certiorari proceedings because its pecuniary interests are directly affected by the tax

assessment and because the lease grants it the right to contest the taxes in its own name or in the name of the lessor." 261 A.D.2d at 835 (emphasis added).

In the Fourth Department, several Supreme Court cases recently considered whether *Larchmont I*'s interpretation of RPTL § 524(3) bars Net Tenants from filing administrative complaints: *Rite Aid Corp. v. Town of Irondequoit Board of Assessment Review*, Index No. E2017001377 (Sup. Ct. Monroe Co. Mar. 6, 2018) ("*Rite Aid*"), *Walgreen Eastern Co. v. Assessor of Town of Brighton*, Index No. 2017/07289 (Sup. Ct. Monroe Co. Mar. 8, 2018) ("*Walgreen*"), and *Rite Aid Corp. v. Town of Williamson Board of Assessment Review*, Index No. 75978/13 (Sup. Ct. Wayne Co. May 17, 2018) ("*Rite Aid 2*" and with *Rite Aid*, the "*Rite Aid* cases").[9]

The petitioners in *Walgreen* and the *Rite Aid* cases, like many ICSC members, are commercial Net Tenants with a contractual obligation to pay real property taxes and authority to challenge assessments in administrative and judicial proceedings. The assessors, citing *Larchmont I*, moved to dismiss the Article 7 petitions because the petitioners filed the administrative complaints. *Walgreen* and the *Rite Aid* cases represent the cusp of many potential cases facing commercial Net Tenants if *DCH Auto* were to stand and underscore the prejudicial harm ICSC seeks to avoid.

The courts in *Walgreen* and the *Rite Aid* cases denied the motions to dismiss, holding that applying the interpretation of RPTL § 524(3) found in *Larchmont I* and

[9] *See* Compendium pp. 68-97 and Exhibits B, C and D to the Skelos Affirmation.

Circulo to Net Tenants was contradicted by the rules of statutory construction, decisional authority and deference to an overseeing state agency interpretation (*Rite Aid*, pp. 9-15; *Walgreen*, pp. 9-15; *Rite Aid 2*, pp. 9-15). Thus, these decisions are strong evidence of judicial disagreement with the rationale of *DCH Auto*. That the courts in *Walgreen* and the *Rite Aid* cases were compelled by the language of *Larchmont I* and *Circulo* to engage in an extensive analysis of the lofty imperatives of *stare decisis*, comity, statutory construction and agency deference speaks loudly to the need for this Court to undertake a similar analysis in considering *DCH Auto*'s interpretation of the law as it applies to Net Tenants.

Unless *DCH Auto* is reversed, thousands of presently-pending tax certiorari petitions filed by Net Tenants may face dismissal on motions similar to those made in *Walgreen* and the *Rite Aid* cases. *DCH Auto* thus raises the spectre of longstanding precedent being reversed without due consideration, with a "broad, unsettling effect" upon previously-established commercial practices, "caus[ing] disorder and confusion in public affairs." *Cf. King v. Cuomo*, 81 N.Y.2d 247, 256 (1993) (citing *Matter of McCann v. Scaduto*, 71 N.Y.2d 164, 178 (1987), *et al.*).

POINT II

DCH AUTO'S NOVEL HOLDING THAT IMPERFECT IDENTIFICATION OF A COMPLAINANT IS AN INCURABLE JURISDICTIONAL DEFECT IS ERROR AND MUST BE REVERSED

Even if this Court were to agree with the Second Department's interpretation of the scope of appropriate challengers under RPTL § 524, *DCH Auto* goes beyond that question: It purports to establish, with little discussion or justification, a novel and draconian consequence for parties who unwittingly fail to meet its interpretation of RPTL § 524.

This second novel holding, that imperfect identification of a complainant is an incurable jurisdictional defect that deprives the court of subject matter jurisdiction and cannot be cured -- even where the Net Tenant has actual authority to file on behalf of the owner -- equally undermines the remedial nature of tax assessment review proceedings by elevating form over substance and barring constitutional review of assessments on the basis of a mere technicality.

As with its application of RPTL § 524(3) to Net Tenants, *DCH Auto* cites as its only authority for this novel holding the same cases of *Circulo* and *Larchmont I*, neither of which address the question of whether imperfect identification of a complainant by a party with actual authority should deprive the court of subject matter jurisdiction.

Furthermore, in considering the equities of the scope of the courts' powers to cure technical defects, no weight should be given to the benefits to taxing jurisdictions or other taxpayers of depriving Net Tenants of the constitutional right to ensure assessments in no way exceed actual value, particularly given the remedial nature of tax assessment review proceedings.

A. TREATING IMPERFECT IDENTIFICATION OF A COMPLAINANT AS AN INCURABLE JURISDICTIONAL DEFECT CONTRADICTS PAST PRECEDENT WITHOUT DISCUSSION AND SUBVERTS THE REMEDIAL PURPOSE OF TAX ASSESSMENT PROCEEDINGS TO EMPOWER RETROACTIVE DISMISSAL ON THE BASIS OF AN ALLEGED TECHNICAL DEFECT

In the decision affirmed in *DCH Auto*, the Supreme Court held that filing a RPTL § 524 complaint in the wrong name -- the tenant-taxpayer instead of the owner -- was "a fundamental error which the courts cannot cure." Exhibit E at 9 (Compendium p. 16). The Supreme Court described this rule as being based on "law [that] is well settled," *id.*, but the cases it cited in support exclusively deal with forms of non-compliance with RPTL § 524 unrelated to the identity of the complainant: *City of Little Falls v. Bd. of Assessors of Town of Salisbury*, 68 A.D.2d 734, 738 (4th Dep't 1979) (Article 7 petition could not be amended to assert new grounds not alleged in the RPTL § 524 complaint); *Frei v. Town of Livingston*, 50 A.D.3d 1381, 1382 (3d Dep't 2008) (failure to file the RPTL § 524 complaint with the correct public official "deprives the court of jurisdiction"); *Lussi v. Bd. of Assessors*, 113 Misc. 2d 558, 560 (Sup. Ct. Essex Co. 1982) ("Since the [RPTL § 524] complaint ...

did not include inequality as a ground, an Article 7 proceeding could not have been taken alleging inequality.").

In affirming the Supreme Court's holding, the Second Department again relies exclusively on the inapt *Circulo*, *Larchmont I*, and *Grecian Garden Apartments*, 71 Misc. 2d at 458 (holding that the Article 7 proceeding was limited to the ground of inequality, because the administrative complaint did not allege that the assessment exceeded market value).

None of these cases stand for the proposition that imperfect identification of a complainant is jurisdictional error or an incurable defect. Instead, all of these cases stem from well-established rules for the elements of an RPTL § 524 complaint necessary to satisfy the condition of precedent RPTL § 706(2): specifying the parcel(s) at issue and the grounds for the relief sought through timely notice to the proper municipal officials (*see* Petitioners' Brief pp. 17-19).

Conversely, cases dealing directly with identity of the complainant have held that failure to submit a written authorization from the property owner or "a defect with respect to the name of [the complainant]" in the RPTL § 524 complaint, "where there is proper authorization by the appropriate individual, is a 'technical defect which should not operate to bar the proceedings.'" *Rotblit v. Bd. of Assessors of Vill. of Russell Gardens*, 121 A.D.2d 727, 727 (2d Dep't 1986) (emphasis added) (citing, *inter alia*, *Great E. Mall, Inc. v. Condon*, 36 N.Y.2d 544 (1975)); *see Miller v. Bd.*

of Assessors of Town of Islip, 164 Misc. 2d 62, 65-66 (Sup. Ct. 1995), *aff'd,* 236 A.D.2d 408 (2d Dep't), *aff'd as modified on other grounds,* 91 N.Y.2d 82 (1997) (failure of petitioners to include authorization at either the RPTL § 524 complaint or Article 7 petition stage is "a mere technical defect, which would not bar the proceedings and is not a jurisdictional defect" and was cured by later submission); *Astoria Fed. Sav. & Loan Ass'n v. Bd. of Assessors*, 212 A.D.2d 600, 601 (2d Dep't 1995) (authorization dated in the wrong calendar year accompanying RPTL § 524 complaint was "properly cured by submission of a properly dated authorization *nunc pro tunc*"); *Shoecraft v. Town of North Salem*, 24 Misc. 3d 1233(A), 2009 WL 2449873 (Sup. Ct. Westchester Co. Aug. 10, 2009) ("it would work a manifest injustice" to dismiss the Article 7 petitions because "it is abundantly clear ... that the petitions properly named the parcel and the nature of the grievance, and were brought under the name of the actual lessee and resident of the premise.").

Importantly, and what provides a critical distinction between *Larchmont I* and *DCH Auto*, the undisputed facts here demonstrate that there is proper authorization by the appropriate individual.[10] There is no question that, even if RPTL § 524(3) did limit appropriate challengers to the owner of a property, the Petitioners in *DCH Auto* were authorized to file on behalf of the owner pursuant to the relevant lease terms

[10] The critical factor in this Court's *Larchmont II* decision was the absence of a formal legal relationship between the property owner and the taxpayer.

(*see* Petitioners' Brief, p. 22 n.9, pp. 58-59). The same is true of the many Net Tenants among ICSC's membership whose contract rights to challenge their tax assessment are adversely affected by *DCH Auto*.

And, as discussed above, subsequent to *Larchmont I* being decided, courts outside the Second Department have held that complainant identification issues similar to those presented in *DCH Auto* are curable. In *Walgreen* and the *Rite Aid* cases, the court held that, even if the respective petitioner-taxpayers did not fall under the definition of "person whose property is assessed" under RPTL § 524(3), the failure of the net tenant to submit an authorization by the property owner was not a jurisdictional bar but instead a curable defect and granted *nunc pro tunc* amendment of the RPTL § 524 complaints (*Rite Aid*, pp. 6-7; *Walgreen*, pp. 6-7; *Rite Aid 2*, pp. 6-7).

On appeal, the Second Department in *DCH Auto* did not address the Supreme Court's error in not granting *nunc pro tunc* amendment and, without any discussion of the ability to cure the defect or exultation of technicality over substance, found that Petitioner "failed to satisfy a condition precedent to the commencement of an RPTL article 7 proceeding since it was neither the owner, nor identified in the complaints as an agent of the owner." 178 A.D.3d at 825 (emphasis added). This summary rejection of past jurisprudence upholding the ability to cure of imperfect identification of a complainant elevates form over substance in conflict with this

Court's precedent. *See W.T. Grant Corp. v. Srogi*, 52 N.Y.2d 496, 513 (1981) ("because the [RPTL] relating to assessment review proceedings is remedial in character, it should be construed in such a way that the taxpayer's right to have his assessment reviewed and the appropriate relief granted should not be defeated by a pleading technicality"); *Great E. Mall*, 36 N.Y.2d at 548:

> The dual legal concepts that mere technical defects in pleadings should not defeat otherwise meritorious claims, and that substance should be preferred over form, are hardly novel. Nor should the fact that this is a proceeding to review a tax assessment require application of a different rule. As we said some years ago, "(t)he Tax Law relating to review of assessments is remedial in character and should be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be defeated by a technicality."

As a result, Net Tenant taxpayers who followed the universally-recognized procedure at the time for filing RPTL § 524 complaints[11] will have their right to judicial review of tax assessments terminated with prejudice and without recourse based on a heretofore-curable technicality, resulting in the potential collection of taxes on assessments for which there can be no judicial confirmation that they "in no case exceed full value." N.Y. Const. Art. 16, § 2. By departing from longstanding jurisprudence holding that technical defects in RPTL § 524 complaints should not defeat otherwise meritorious claims, *DCH Auto* undermines the state's "strong

[11] *See* Petitioners' Brief pp. 46-47, discussing longstanding procedure, practice and guidance regarding tenants authorized to challenge tax assessments in RPTL § 524 filings.

public policy favoring the disposition of actions on the merits." *See, e.g., Eastgate Corp. Park, LLC v. Assessor of Town of Goshen*, 54 A.D.3d 1036, 1039 (2d Dep't 2008); CPLR § 2001.

The Second Department in *DCH Auto* affirmed the trial court's erroneous holding that imperfect identification of a complainant was "a fundamental error which the courts cannot cure," without discussing past precedents finding such a technical mistake to be curable. This is error, because *DCH Auto* overrules or contradicts by implication, without analysis, the longstanding jurisprudence cited above. *See New Amsterdam Cas. Co. v. Nat'l Union Fire Ins. Co. of Pittsburg*, 266 N.Y. 254, 261 (1935) ("An opinion which is to overrule all former precedents, and to establish a principle never before recognized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established.") (quoting U.S. Supreme Court Chief Justice John Marshall).

Ultimately, *DCH Auto*'s second novel holding, that Net Tenants with actual authority to file complaints should have their complaints dismissed and tax assessments forever barred because they were not so "identified in the complaints," is what most threatens the inequitable and drastic consequences discussed above. Thus, even if this Court were to agree with *DCH Auto*'s interpretation of the scope of appropriate challengers under RPTL § 524, upholding the ability of Net Tenants

with actual authority to file on behalf of the owner to cure any defect resulting from this change in interpretation of RPTL § 524(3) would best preserve the remedial character of the assessment review process.

B. RETENTION OF TAX RECEIPTS COLLECTED ON ASSESSMENTS THAT EXCEED FULL VALUE IS NOT A VALID BASIS TO JUSTIFY USING TECHNICAL DEFECTS TO UNDERMINE THE REMEDIAL PURPOSE OF ASSESSMENT REVIEW

If Respondents or other *amici* seek to argue that the Court should confirm the novel rule espoused in *DCH Auto* -- that an error in identification of the complainant, where there is actual authority to file on behalf of the owner, constitutes an incurable jurisdictional defect -- because permitting constitutionally-guaranteed review of tax assessments to proceed could harm taxing authorities and other taxpayers by resulting in refunds, that argument should be rejected outright.

Merely permitting tax assessment review to proceed has no impact on tax collections. It is axiomatic that no taxpayer is entitled to a refund unless a property assessment is found to have exceeded full value. Any refund represents the return of overpaid taxes. If the assessment was fair, the review process would yield no refund. Employing technical defaults to thwart the review process cannot be justified by appeal to the benefits to tax authorities or other taxpayers of retaining overpaid taxes.

"While we know that assessed valuations are based on budgetary needs, nevertheless, though it compels a higher tax rate, the Constitution and statutes

[requiring tax assessments not exceed full value] must be obeyed." *People ex rel. Penn. Tunnel & Terminal R. Co. v. Miller*, 26 N.Y.S.2d 232, 234 (Sup. Ct. 1941).

In other situations where the protection of statutory rights related to taxation would result in decreased tax revenue or a shifted tax burden, courts have rejected such arguments as irrelevant. *See Gay All. of Genesee Valley, Inc. v. City Assessor, City of Rochester*, 158 Misc. 2d 127, 130 (Sup. Ct. 1993), *aff'd as modified,* 201 A.D.2d 887 (3d Dep't 1994) (ruling that property entitled to exemption under RPTL 420-a must be exempt as a matter of right and that "references at oral argument to the tax burden placed on less affluent homeowners and to the [taxpayer's] healthy financial status are not relevant to the issues before the court"). Moreover, *Gay Alliance* rejected calls to consider the impact on tax revenue in the tax exemption context, where "statutory requirements should be construed strictly against the taxpayer." *Id.* at 132 (emphasis added). Here, the procedure to ensure that property be assessed at no greater than full value "is remedial in character and should be liberally construed" in favor of the taxpayer. *See W.T. Grant*, 52 N.Y.2d at 513; *Great E. Mall*, 36 N.Y.2d at 548.

CONCLUSION

For the foregoing reasons, we ask that this Court grant Petitioners' appeal and reverse the judgment, order and decision in *DCH Auto*.

Dated: Uniondale, New York
March 24, 2022

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR §§ 500.1(j) and 500.13(c) that the foregoing brief was prepared on a computer using Microsoft Word, and that

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COURT OF APPEALS
STATE OF NEW YORK

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In the Matter of

DCH AUTO, as Tenant Obligated to Pay Taxes and DCH INVESTMENTS INC. (NEW YORK), as Tenant Obligated to Pay Taxes,

Petitioners,

- against -

THE TOWN OF MAMARONECK, a Municipal Corporation, its Assessor and Board of Assessment Review and THE VILLAGE OF MAMARONECK, a Municipal Corporation, its Assessor and the Board of Assessment Review,

Respondents,

For a Review under Article 7 of the RPTL.

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Docket No:
APL 2021-00103

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

VICTORIA M. PRANZO, being duly sworn, says that I am not a party to this action, am over 18 years of age and reside in East Rockaway, New York.

On April 27, 2022, I served two true copies of the annexed **BRIEF OF PROPOSED *AMICAS CURIAE* INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. (ICSC) IN SUPPORT OF PETITIONERS' APPEAL, CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF COMPLIANCE** in the following manner:

by depositing same with an overnight delivery service in a wrapper properly addressed. Said delivery was made prior to the latest time designated by the overnight delivery service for overnight delivery. The address and delivery service are indicated below:

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VICTORIA M. PRANZO

Sworn to before me this
27th day of April, 2022

Notary Public

MARIBEL SONERA
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Qualified in Nassau County
Commission Expires March 5, 2024