No. APL-2018-00222

To be argued by:
ESTER MURDUKHAYEVA
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State of New York
Court of Appeals

Action No. 1

In the Matter of the Application of

REGINA METROPOLITAN CO., LLC,

Petitioner-Respondent,

v.

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Appellant,

LESLIE E. CARR and HARRY A. LEVY,

Intervenors-Respondents,

For a Judgment Pursuant to Article 78 of
the Civil Practice Law & Rules.

(*Caption continues inside front cover.*)

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Supreme Court, New York County, Index No. 101235/15 and 101236/15
First Department No. 5026

(*Caption continues from front cover*)

Action No. 2

In the Matter of the Application of

LESLIE E. CARR and HARRY A. LEVY

Petitioners,

v.

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent,

REGINA METROPOLITAN CO., LLC,

Intervenor-Respondent,

For a Judgment Pursuant to Article 78 of
the Civil Practice Law & Rules.

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PRELIMINARY STATEMENT

In *Roberts v. Tishman Speyer Properties, L.P.*, this Court held that residential building owners receiving certain tax benefits are required to keep apartment units subject to rent stabilization for at least as long as the owners receive the tax benefits. *See* 13 N.Y.3d 270 (2009). *Roberts* represented a major shift in industry practice: for more than a decade prior to *Roberts*, many owners receiving such benefits had prematurely (and thus unlawfully) deregulated their apartments based on an erroneous interpretation of the governing statutes. As a result, thousands of New Yorkers were subjected to unlawful market rents for what should have been rent-stabilized units. Many of these individuals, including the tenants involved in this case, have filed rent-overcharge complaints.

This appeal involves a challenge to the manner in which the New York State Division of Housing and Community Renewal (DHCR) has applied *Roberts* in such rent-overcharge proceedings. As a general matter, overcharges are calculated based on the difference between the rent actually collected and the "legal regulated rent" charged on the "base date" (which is four years prior

to the date of the complaint), with adjustments for certain authorized increases. In most garden-variety overcharge cases, a set of statutory and regulatory provisions known collectively as the Four-Year Rule generally limit DHCR's review of the apartment's rental history to the four years preceding the filing of the overcharge claim.

In this case, however, the owner of the subject apartment deregulated the unit in 2003—more than six years before this Court's decision in *Roberts* and the filing of this rent-overcharge complaint. The parties now agree that this deregulation was unambiguously unlawful in light of *Roberts* and that the rent charged on the applicable base date was a facially illegal market rent rather than a statutorily mandated regulated rent. In light of this illegality, DHCR instead calculated the base date rent by looking to the apartment's last registered stabilized rent from 2003, and crediting the owner with more than $1,000 of increases to which it could have been entitled under the rent-stabilization laws.

Supreme Court, New York County (Schlesinger, J.) upheld DHCR's methodology. In a 3-2 decision, the Appellate Division,

First Department reversed, holding that DHCR's approach violated the Four-Year Rule because it relied, in part, on rental history from 2003—six years before the filing of the rent-overcharge claim.

This Court should reverse and uphold DHCR's order. As Supreme Court and the two Appellate Division dissenters recognized, DHCR's methodology was a reasonable response to the sea change caused by this Court's decision in *Roberts*. This Court has repeatedly recognized that the Four-Year Rule is not inviolate when, as here, a mechanical application of the Rule would require DHCR to disregard competing statutory mandates—such as the statutes interpreted by this Court in *Roberts*—or would otherwise frustrate the purposes of the rent-stabilization laws. This Court has also recognized that DHCR may, in certain circumstances, refer to an apartment's rental history beyond the immediately preceding four years if there is good reason to believe the reported base date rent is illegal or otherwise unreliable. Here, that showing was indisputably satisfied: the parties do not dispute that the base date rent was unlawful under *Roberts*. This Court should accordingly

reverse the decision below and uphold DHCR's reasonable implementation of *Roberts*.

QUESTION PRESENTED

Whether DHCR reasonably responded to a decision from this Court declaring more than a decade of luxury deregulation to be unlawful by looking to records dating more than four years prior to the filing of a rent-overcharge complaint to determine the legal regulated rent for purposes of a rent-overcharge proceeding.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

1. New York's rent-stabilization laws

In 1969, the New York State Legislature enacted the Rent Stabilization Law in response to an "intractable housing emergency in the City of New York" resulting from a shortage of affordable housing.[1] *Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 389

[1] The Rent Stabilization Law (RSL) is printed at McKinney's Unconsol. Laws of N.Y., T. 23, ch. 4 (§§ 26-501 to 26-520). In 1974, the Legislature extended rent stabilization to Rockland, Westchester, and Nassau Counties. *See* McKinney's Unconsol. Laws of N.Y.,

(1994). The Rent Stabilization Law included express legislative findings that owners "were demanding exorbitant and unconscionable rent increases" and that "such increases were being exacted under stress of prevailing conditions of inflation and of an acute housing shortage." Rent Stabilization Law (RSL) § 26-501. The Legislature determined that these "increases and demands were causing severe hardship to tenants" and that "unless such accommodations are subjected to reasonable rent and eviction limitations, disruptive practices and abnormal conditions will produce serious threats to public health, safety and general welfare." *Id.*

The Rent Stabilization Law has been amended and reenacted numerous times, with the most recent amendments taking effect in 2015. *See* Rent Laws of 2015, ch. 20, pt. A, 2015 McKinney's N.Y. Laws 34, 36. When reauthorizing the Rent Stabilization Law in 2015, the Legislature concluded that "a serious public emergency continues to exist in the housing of a considerable number of

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T. 23, ch.5, §§ 8621-8634 (Emergency Tenant Protection Act, as added by L. 1974 c. 576 § 4, as amended). The ETPA and its implementing regulations are substantially similar to the Rent Stabilization Law and its regulations.

persons within the City of New York," and therefore "reaffirm[ed] and repromulgate[d]" the prior legislative findings. RSL § 26-502.

The central purpose of rent stabilization has always been "to preserve affordable housing for low-income, working poor and middle-class residents in New York City" and its surrounding counties. *Matter of Santiago-Monteverde*, 24 N.Y.3d 283, 289 (2014); RSL § 26-501 (law intended "to prevent speculative, unwarranted and abnormal increases in rents"). The rent-stabilization statutes accomplish this goal by (i) setting a maximum legal rent for a covered apartment, as determined by statutory criteria; and (ii) prohibiting owners from charging more than that maximum legal rent. RSL §§ 26-511, 26-512.

The process for calculating a legal rent begins by determining the appropriate "base date" rent—generally the legal rent that was charged for the same apartment four years earlier. *See id.* §§ 26-512(b), 26-516. An owner is entitled to specified annual percentage increases from the base date rent, as well as an increase of 20% for a two-year lease when an apartment becomes vacant, and higher increases if the last vacancy occurred more than eight years ago.

See id. § 26-511(c)(5-a). An owner is also entitled to limited rent increases to recover costs associated with improvements to particular apartments—so-called "individual apartment improvements." *See id.* § 26-511(c)(13). Similarly, an owner may charge limited rent increases to recover costs associated with "major capital improvements" to the entire building that are depreciable under federal tax law. *See id.* § 26-511(c)(6). Owners are required to offer a one- or two-year renewal lease to rent-stabilized tenants at rents consistent with the statutory and regulatory restrictions on permissible raises. *Id.* § 26-511(c)(4).

As a general matter, an owner is entitled to permanently "deregulate" a rent-stabilized apartment when, as a result of the authorized rent increases described above, the maximum monthly legal rent exceeds a statutorily defined "luxury" threshold, and one of two additional conditions is satisfied: (i) the apartment becomes vacant, or (ii) the total combined income of its tenants exceeds a statutorily defined amount in each of the two preceding years. *See id.* §§ 26-504.1 to 26-504.3. Between 1993 and 2011, the luxury

threshold was $2,000 per month.[2] *See* Ch. 253, § 4, 1993 N.Y. Laws 2667, 2669. But luxury deregulation is subject to an important exception: it is categorically unavailable if an apartment is subject to rent stabilization "by virtue of receiving tax benefits" pursuant to the Real Property Tax Law. *See* RSL §§ 26-504.1, 504.2(a). See also *infra* at 14-15. This exception is intended to cover the situation where an owner receives valuable tax benefits on the condition that it create or maintain rent-stabilized units; in such cases, the owner is required to maintain rent stabilization for at least as long as it receives the tax benefits.

Owners must include a rider in every rent-stabilized lease that informs tenants of the rights and duties of landlords and tenants, and must file with DHCR an annual registration statement listing, among other information, the maximum legal rent for a particular apartment. *See* RSL §§ 26-511(d), 26-517(a); 9 N.Y.C.R.R. § 2522.5(c).

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[2] The luxury threshold amount has been raised several times since 2011, and is currently $2,700 per month, plus subsequent guideline increases. *See* RSL §§ 26-504.2, 26-504.3.

2. The four-year statute of limitations for rent-overcharge claims

A rent-stabilized tenant may file a rent-overcharge action either before DHCR or in Supreme Court to recover damages, interest, and other compensation in cases where an owner has collected more rent than legally permissible. *See* RSL § 26-516(a)-(c); *see also* Emergency Tenant Protection Act (ETPA) § 8632(a)(1)(f). The rent-stabilization laws impose treble damages for overcharges, unless the owner can demonstrate by a preponderance of the evidence that the overcharge was not willful. *See* RSL § 26-516(a). In cases where the owner rebuts the presumption of willfulness, the damages are set at the amount of the overcharge and interest. *See id.*

As a general matter, the "legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement (or if more recently filed, the initial registration statement) plus in each case any subsequent lawful increases and adjustments." *Id.* § 26-516(a)(i). If "the amount of rent set forth in the annual rent registration statement filed four

years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter." *Id.*

Rent-overcharge complaints are subject to a four-year statute of limitations that bars recovery of overcharges collected more than four years prior to the date a complaint is filed, i.e., the base date. *See id.* § 26-516(a)(2); C.P.L.R. 213-a. As discussed in more detail below, the same statutory provisions that set forth the statute of limitations also generally limit the relevant "rental history" of an apartment to records within the four years prior to the commencement of the rent-overcharge action. *See* RSL § 26-516(a)(2); C.P.L.R. 213-a. These statutory provisions are collectively referred to as the "Four-Year Rule."

The four-year statute of limitations on recovery of damages is not at issue in this case. Rather, the dispute between the parties is about the effect of the evidentiary component of the Four-Year Rule on the determination of the legal regulated rent.

3. The evidentiary component of the Four-Year Rule

The evidentiary component of the Four-Year Rule is codified in several locations. First, section 26-516(a)(2) of the Rent Stabilization Law and C.P.L.R. 213-a each "preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the" rent-overcharge complaint. *See* RSL § 26-516(a)(2); C.P.L.R. 213-a. Second, the Rent Stabilization Law further provides that "[a]ny owner who has duly registered a housing accommodation . . . shall not be required to maintain or produce any records relating to rentals of such accommodation for more than four years prior to the most recent registration or annual statement for such accommodation." RSL § 26-516(g). Third, the Rent Stabilization Code (the collection of regulations promulgated by DHCR pursuant to the Rent Stabilization Law) provides that, as a general matter, "the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint . . . shall not be examined." 9 N.Y.C.R.R. § 2526.1(a)(2)(ii). This Court has explained that the primary purpose of the evidentiary component of the Four-Year

Rule is to "alleviate the burden on honest landlords to retain rent records indefinitely." *Thornton v. Baron*, 5 N.Y.3d 175, 181 (2005).

Although these provisions appear categorical, the evidentiary component of the Four-Year Rule has never been deemed "inviolate." *Matter of H.O. Realty Corp. v. State of N.Y. Div. of Hous. & Community Renewal*, 46 A.D.3d 103, 109 (1st Dep't 2007). To the contrary, "exceptions have been made in its application where circumstances and policy considerations dictate." *Id.* This Court has repeatedly held that courts adjudicating rent-overcharge claims may look at rental history beyond the preceding four years under appropriate circumstances. *See, e.g.*, *Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 16 (2015); *Scott v. Rockaway Pratt, LLC*, 17 N.Y.3d 739, 739 (2011); *Matter of Grimm v. State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 N.Y.3d 358, 367 (2010); *Matter of Cintron v. Calogero*, 15 N.Y.3d 347, 355 (2010); *Thornton*, 5 N.Y.3d at 180-81.

In 2014, DHCR amended its regulations to codify various exceptions to the evidentiary component of the Four-Year Rule. *See* 9 N.Y.C.R.R. § 2526.1(a)(2). In addition to the exceptions expressly

recognized by this Court and the Appellate Division, the agency adopted several other exceptions as reasonable applications of existing case law to analogous factual circumstances. *See id.* The 2014 Amendments are not at issue in this case.

B. Factual Background

1. The J-51 program

Section 489 of the Real Property Tax Law authorizes cities to adopt tax exemption and abatement programs conditioned on alterations or improvements to existing residential properties. *See* Real Property Tax Law (RPTL) § 489(1)(a). In 1955, New York City created a tax benefits program pursuant to the authority provided in section 489's predecessor statute. *See* Administrative Code of the City of New York (N.Y.C. Admin. Code) § 11-243 et seq. (prior version enacted by Local Law No. 118 (1955) of the City of N.Y. § 1). This program—now known as the J-51 program—offers partial tax exemptions or abatement benefits to owners who make qualifying capital improvements to their residential properties. J-51 benefits last for up to fourteen years (ten years, with a four-year phase-out) or thirty-four years (thirty years with a four-year phase-out),

depending on the type of residential units contained in the building. *See* N.Y.C. Admin. Code § 11-243(b)(10); RPTL § 489(1)(a)(6). The purpose of the J-51 program is to "eliminate unhealthy or dangerous conditions" in residential properties and to provide "incentives for upgrading existing residential multiple dwellings" to ensure the availability of safe affordable housing. *See* Debra S. Vorsanger, *New York City's J-51 Program: Controversy and Revision*, 12 Fordham Urban L.J. 103, 110-11 (1984).

In 1960, the Legislature amended state law to permit cities to condition the receipt of tax benefits on the owner's provision or maintenance of rent-regulated units. *See* Ch. 968, § 1, 1960 N.Y. Laws 1548, 1549 (currently codified at RPTL § 489(7)(b)(1)). The New York City Council subsequently modified the J-51 program to limit its benefits only to buildings covered by the then-existing municipal rent-control laws. *See* N.Y.C. Admin. Code § 11-243(i)(1) (prior version enacted by Local Law No. 50 (1960) of the City of N.Y. § 1). Since then, New York City has consistently required that, 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* N.Y.C. Admin Code §§ 11-243(i)(1), 11-243(t), 11-243(dd)(2); 28 RCNY 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

In *Roberts*, this Court considered whether owners receiving J-51 tax benefits could deregulate their rental units when the legal regulated rent for those units exceeded the luxury threshold. The relevant statutory language in the Rent Stabilization Law provides 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 authorizes the J-51 program. RSL §§ 26-504.1, 26-504.2(a).

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;

however, if the apartment was independently subject to rent regulation for some other reason, it could be deregulated pursuant to the luxury deregulation provisions even if the owner continued to receive J-51 tax benefits. *See Roberts*, 13 N.Y.3d at 280-83 (describing prior regulatory history). In *Roberts*, this Court held that DHCR's interpretation was "contrary to the plain text of the statute." *Id.* at 285. This Court thus held that all owners receiving J-51 benefits are statutorily exempt from eligibility for luxury deregulation while they receive such benefits, even if their rental units are also subject to rent stabilization for a different reason (and thus would be eligible for luxury deregulation absent the J-51 benefits). *See id.* at 285-87. Given the long-standing agency guidance and industry practice that *Roberts* was reversing, the Court acknowledged that its landmark decision might impose significant burdens and uncertainty on owners, tenants, and DHCR alike, but noted that such uncertainty was "no reason to eschew what we view as the only correct interpretation of the statute." *Id.* at 287.

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). The First Department explained that this Court's decision in *Roberts* did not establish a new principle of law, but rather construed a long-standing statutory prohibition. *Id.* at 198. 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); *see also Suarez v. Four Thirty Realty LLC*, 2019 N.Y. Slip Op. 01307 (1st Dep't Feb. 21, 2019).[3]

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[3] The First Department has also addressed the effect of the expiration of J-51 benefits on the regulatory status of subject apartments. The court has explained that "[a]n apartment that is subject to rent stabilization before receiving J-51 benefits reverts to its former pre-J-51 rent-stabilized status upon the expiration of those benefits," and the owner may accordingly "seek luxury

3. Regina Metropolitan's unlawful deregulation of the subject apartment

Regina Metropolitan Co., LLC owns an apartment building located at [redacted] West 96th Street in Manhattan. (Record on Appeal (R.) 63.) Regina Metropolitan began to receive J-51 tax benefits for the building in 1999, and continued to receive those benefits through 2010. (R. 67.)

The same rent-stabilized tenants occupied the apartment at issue in this case from October 1994 through May 2003. (R. 69, 300-303.) In 2002, the maximum legal regulated rent for the apartment reached $2,055.36—above the then-existing threshold for luxury deregulation. (R. 301.) Shortly thereafter, Regina Metropolitan petitioned to deregulate the apartment based on the tenants' purportedly high income. (R. 67-68.) DHCR rejected the petition, but the tenants nevertheless vacated the apartment in

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decontrol in appropriate cases." *Taylor v. 72A Realty Assoc., L.P.*, 151 A.D.3d 95, 100 (1st Dep't 2017). However, "a tenant in occupancy at the time an apartment was improperly deregulated by a landlord receiving J-51 benefits retains its rent-regulated status for the duration of its tenancy." *Id.* at 101; *72A Realty Assoc. v. Lucas*, 101 A.D.3d 401, 401-02 (1st Dep't 2012).

May 2003. (R. 68-69.) Regina Metropolitan proceeded to deregulate the apartment on the theory that the unit's maximum legal rent exceeded the luxury threshold when it became vacant. (R. 69.) Because Regina Metropolitan was participating in the J-51 program at this time, the apartment was in fact not eligible for luxury deregulation.

In July 2003, new tenants moved into the subject apartment pursuant to a two-year lease charging a market monthly rent of $4,500—more than twice the rent charged under the rent-stabilized lease that had expired just two months earlier. (R. 302.) In August 2005, these tenants vacated the apartment, and Harry Levy and Leslie Carr moved in pursuant to a two-year lease at a market monthly rent of $5,195. (R. 161-164, 302.) The August 2005 lease stated: "This apartment is not subject to rent regulation since the monthly rent is, at least, $2,000 which classifies this unit as a luxury deregulated apartment." (R. 164.)

In 2007 and 2008, Levy and Carr signed one-year renewal leases at a market rent of $5,700 and $6,150, in each respective year. (R. 165-166, 302.) The 2008 lease expired on July 31, 2009,

while *Roberts* was pending in this Court. (R. 302.) Regina Metropolitan did not offer Levy and Carr a written lease, but instead treated them as month-to-month tenants subject to a reduced market rent of $5,450 per month.[4] (R. 73-74, 174.) According to Regina Metropolitan, "[t]he reduced rent was based on legal uncertainty" surrounding *Roberts*. (R. 74.)

This Court issued its decision in *Roberts* in October 2009, declaring unlawful the luxury deregulation of J-51 units such as the subject apartment. As explained below, Levy and Carr promptly filed a rent-overcharge complaint with DHCR just two weeks after *Roberts* was decided. In July 2010, Regina Metropolitan complied with *Roberts* (and the First Department's subsequent decision in *Gersten*) by re-registering the subject apartment with DHCR, thereby restoring the unit to rent stabilization. (R. 303.) Regina Metropolitan's registration statement identified the maximum legal rent for the apartment as $5,571.64—the market rent that

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[4] In January 2010, Regina Metropolitan raised the month-to-month rent to $5,571.64. (R. 175, 278, 303.) In May 2010, Levy and Carr signed a two-year renewal lease "under protest" at a rate of $5,904.94. (R. 278, 303.)

Levy and Carr had been charged between January and May 2010. (R. 175, 303.) In October 2010, Regina Metropolitan filed retroactive registrations for the years 2005 through 2009 that also listed the market rents that tenants of the subject apartment had been charged for those years. (R. 302-303, 317.)

C. Procedural Background

1. Administrative proceedings

In November 2009, two weeks after *Roberts* was decided, Levy and Carr filed a rent-overcharge complaint with DHCR. (R. 74, 316.) The tenants argued that they were subject to a willful overcharge because Regina Metropolitan had fraudulently deregulated the apartment in 2003. (R. 316-318.) The tenants further contended that the base date rent for purposes of calculating the overcharge should be $2,096.47, the last properly registered legal rent prior to the unlawful deregulation.[5] (R. 316-318.)

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[5] The actual monthly rent charged pursuant to the lease reflected in that registration was $2,092.92. (R. 120.)

Regina Metropolitan responded that any overcharge was not willful because the owner had deregulated the subject apartment pursuant to DHCR's then-prevailing policy that such deregulation was appropriate. (R. 76-77, 318.) In addition, relying on the Four-Year Rule, Regina Metropolitan contended that the base date rent should be $5,195, the market rent that it charged on November 2, 2005, or four years prior to the complaint. (R. 318.) Using this base date rent, Regina Metropolitan calculated an overcharge of $15,084.92 (including interest). (R. 77.) In addition, Regina Metropolitan noted in a footnote that it had made improvements to the apartment during the brief 2003 vacancy; however, it did not submit documentation substantiating those improvements. (R. 76, 318.)

In February 2014, DHCR's Rent Administrator (RA) issued an order finding an overcharge. (R. 53-58.) The RA concluded that Regina Metropolitan's deregulation of the subject apartment, while unlawful, was not willful or fraudulent because it was due to a misunderstanding of the law that was corrected only after the fact by *Roberts*. (R. 55.) The RA nevertheless found that it would be

inappropriate to calculate an overcharge using the illegal market rent charged in November 2005. (R. 56.)

The RA utilized an alternate methodology to recreate the legal regulated rent that could have been charged on the base date if Regina Metropolitan had not unlawfully deregulated the apartment. The RA started with the last stabilized legal rent registered in 2003, and added more than $1,000 of increases to which Regina Metropolitan could have been entitled if the apartment had remained rent stabilized as was required (i.e., for vacancies, longevity, and major capital improvements). (R. 56.) The RA did not include increases for the individual apartment improvements to which Regina Metropolitan had alluded but failed to substantiate. (R. 319.) The RA calculated a corresponding base date rent of $3,325.24, and a total overcharge amount of $285,390.39 (including interest).[6] (R. 58.)

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[6] Using the same methodology, the RA determined that the current legal regulated rent for the apartment is $4,136.32, and ordered Regina Metropolitan to base any future rent increases on that amount. (R. 55.)

Regina Metropolitan and the tenants both filed Petitions for Administrative Review (PAR) with the agency. Regina Metropolitan contended that, in the absence of fraud, the Four-Year Rule requires that DHCR adopt the market rent charged on November 2, 2005, as the base date rent, even if that rent reflected the effect of an unlawful deregulation under *Roberts*. (R. 89-90.) In the alternative, Regina Metropolitan argued that the base date rent should be adjusted to include its purported individual apartment improvements, notwithstanding its failure to substantiate those improvements. (R. 90-92.) Levy and Carr argued that the overcharge was willful and fraudulent, and that the RA erred in not applying a more punitive formula to calculate the base date rent. (R. 34-35, 37, 42-43.) The tenants also sought legal fees. (R. 35.)

The administrative appeals were consolidated and denied in a decision issued in May 2015. (R. 34-51.) The PAR order affirmed the RA's determination that the deregulation of the subject apartment was neither willful nor fraudulent. (R. 47.) The PAR order also upheld the RA's methodology for calculating the base date rent. As the PAR order explained, the market rent charged in

November 2005 was "unreliable due to an erroneous deregulation prior to the base date," and "it was therefore correct to go back to the last legal regulated rent (which was prior to the base date herein) and to calculate the subsequent legal regulated rents based upon said last legal regulated rent." (R. 48.) Finally, the PAR order found that the RA correctly rejected Regina Metropolitan's unsubstantiated individual apartment improvements (R. 49), as well as the tenants' request for treble damages and legal fees (R. 50-51).

2. Article 78 petitions and Supreme Court's decision

Regina Metropolitan and the tenants filed separate petitions under article 78 of the C.P.L.R. (R. 253-263, 276-297.) Regina Metropolitan also obtained a stay of enforcement or collection of the overcharge, with the remainder of the agency's order "stay[ing] in full force and effect." (R. 17-18.)

In October 2016, Supreme Court, New York County (Schlesinger, J.) consolidated the proceedings, denied the petitions, and affirmed the agency's order in its entirety. (R. 8-16.) As relevant

to this appeal,[7] Supreme Court found that DHCR's methodology of calculating the base date rent was "understandable and rational." (R. 15.)

Supreme Court first noted that this Court and the Appellate Division have recognized exceptions to the evidentiary component of the Four-Year Rule and have permitted review of older rental history when necessary to establish a reliable base date rent. (R. 10.) Given the existing exceptions and the unique circumstances of this case, Supreme Court determined that DHCR appropriately adopted a methodology that accounted for the fact that, on the one hand, the market rent charged on the base date was illegal under *Roberts*, and, on the other hand, that Regina Metropolitan had

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[7] Supreme Court affirmed the agency's denial of Regina Metropolitan's requested increases for individual apartment improvements and Levy and Carr's requests for treble damages and legal fees. (R. 14-15.) Similarly, Supreme Court agreed with DHCR's determination that the apartment was not deregulated as a result of fraud. (R. 12-13.) The Appellate Division affirmed those holdings (R. 366-367, 377), and neither Regina Metropolitan nor the tenants have obtained leave to litigate these collateral issues before this Court. *See Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 32 N.Y.3d 1085 (2018) (dismissing tenants' attempted appeal as-of-right for lack of finality).

deregulated the apartment in accordance with "common practice under the then existing state of the law." (R. 15; *see also* R. 13.) Supreme Court therefore concluded that DHCR's methodology was rationally aimed at calculating an accurate overcharge amount while distinguishing between owners "that used various fraudulent means to escape giving its tenant a proper regulated rent" and owners that deregulated apartments unlawfully but pursuant to a good-faith misunderstanding of the law. (R. 13.)

3. The Appellate Division's decision

In a split decision and order issued on August 16, 2018, the Appellate Division, First Department reversed Supreme Court's holding as to the methodology for calculating the base date rent. (R. 360-396.) The three-justice majority held that, in the absence of fraud, the evidentiary component of the Four-Year Rule categorically bars DHCR from examining rental history from more than four years before the filing of an overcharge complaint. (R. 368-374.) However, the majority agreed that "DHCR is not limited to calculating the base date rent according to the market rate that obtained pursuant to the parties' lease," and indicated

that the agency has "the discretion to implement other methods of base date rent calculation," including sampling. (R. 375.) Accordingly, the majority remanded the matter to DHCR to "recalculate the overcharge and proper rent using a base date rent of four years before the filing of the overcharge complaint." (R. 376.)

The dissenting opinion, authored by Justice Gische and joined by Justice Kapnick, disagreed, finding that DHCR's methodology was necessary to give effect to *Roberts* and to the First Department's decision in *Gersten*, which found that *Roberts* applies retroactively. (R. 378-379.) As the dissent explained, the methodology used by DHCR in this case would apply only in post-*Roberts* cases where an owner unlawfully deregulated the apartment but did not engage in fraud or other affirmative misconduct in so doing. (R. 377.) The dissent further noted that appellate courts—including this Court—have never sanctioned a mechanical application of the Four-Year Rule, and, to the contrary, have "been flexible when the overcharge does not fit the typical case." (R. 389.)

In December 2018, the Appellate Division granted DHCR's motion for leave to appeal to this Court.[8] (R. 397-398.)

ARGUMENT

An agency action challenged in an article 78 proceeding may be reversed only if the underlying determination violated lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion. C.P.L.R. 7801, 7803(3). The determination of an administrative agency "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference." *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v. State of N.Y. Div. of Hous. & Community Renewal*, 46 A.D.3d 425, 428 (1st Dep't 2007), *aff'd* 11 N.Y.3d 859 (2008). "Even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." *Id.* at 429.

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[8] The First Department granted motions for leave to appeal in two additional cases raising the same issue: *Raden v. W. 7879, LLC*, APL-2018-214; *Taylor v. 72A Realty Assoc. L.P.*, APL-2018-226.

Here, there is no dispute that this Court's 2009 decision in *Roberts*, coupled with the First Department's decision in *Gersten*, overturned more than a decade of prevailing practice and rendered unlawful Regina Metropolitan's deregulation of the subject apartment in 2003. The only question in this appeal is whether DHCR responded reasonably to *Roberts*' sea change in the law. The Appellate Division erred in focusing entirely on the evidentiary Four-Year Rule in invalidating DHCR's approach. A mechanical application of the Four-Year Rule would, for many apartments, render toothless both this Court's decision in *Roberts* and the Rent Stabilization Law provisions that *Roberts* interpreted. In analogous circumstances, this Court has repeatedly recognized that the evidentiary Four-Year Rule should give way to more compelling statutory or policy concerns in order to avoid undercutting the broader goals of the rent-stabilization statutes. DHCR's approach to the Four-Year Rule here reasonably recognized the importance of implementing rather than disregarding *Roberts*.

POINT I

DHCR'S ORDER IS LAWFUL

A. A Flexible Application of the Four-Year Rule Is Necessary to Harmonize the Relevant Statutes and Give Effect to *Roberts*.

The First Department's decision here treats the evidentiary Four-Year Rule as the sole controlling legal doctrine and faults DHCR for assertedly failing to apply it. But this Court made clear in *Roberts* that, for J-51 units like the subject apartment, a separate set of statutory provisions is also of critical importance: namely, the Legislature's prohibition of such units' luxury deregulation. The conflict that DHCR faced here—as it has faced with many other units that were unlawfully deregulated more than four years before *Roberts*—was that a mechanical application of the Four-Year Rule would require the agency to essentially ignore the unlawful deregulation and apply a base date rent that improperly reflected the (illegal) market rent rather than the (statutorily mandated) stabilized rent. Faced with the choice of applying *Roberts* or instead rendering the decision a dead letter for many apartments, DHCR reasonably decided to apply this Court's interpretation of the Rent

Stabilization Law and give effect to this Court's declaration in *Roberts* that all owners receiving J-51 benefits were barred from deregulating their residential units while receiving such benefits.

DHCR's approach is entirely consistent with this Court's precedents. While the various statutory and regulatory provisions that constitute the evidentiary Four-Year Rule are written in apparently categorical terms, this Court and the Appellate Division have long held that the Four-Year Rule should not be applied inflexibly when doing so would undermine other provisions of the Rent Stabilization Law or the broader purposes served by the statute. These precedents reflect the broader principle that, when different parts of a statutory scheme appear to conflict, a court's role is not to elevate one part over another, but rather "to further the intent, spirit and purpose of a statute, [and] to harmonize all parts of a statute to give effect and meaning to every part." *Matter of Cintron*, 15 N.Y.3d at 355.

This Court directly considered such a statutory conflict in *Matter of Cintron*, which involved the question of whether the Four-Year Rule precluded a tenant from relying on rent-reduction orders

that were entered against the landlord more than four years prior to the rent-overcharge proceeding due to the landlord's violation of its duty "to reduce rent and make repairs as per Rent Stabilization Law § 26-514." *Matter of Cintron*, 15 N.Y.3d at 355. The owner had disregarded the rent-reduction orders and continued to collect full rent for more than fifteen years despite not making the necessary repairs; then, during the overcharge proceeding, the owner relied on the Four-Year Rule to argue that its unlawfully high rents constituted the base date rent.

This Court rejected the owner's argument and held that the rent-reduction orders must be considered in calculating the base date rent, even though the orders had been issued more than four years before the rent-overcharge proceeding. That approach, this Court reasoned, "best reconciles and harmonizes the legislative aims of both the four-year limitations/look-back period" and the owner's statutory obligation to "reduce rent and make repairs" under RSL § 26-514. *Id.* As this Court recognized, even though the rent-reduction orders had been issued more than four years prior to the date of the complaint, they subjected the owner to "a continuing

obligation" under the relevant statutory provisions; because that statutory obligation was "still in effect during the four-year period," it was "in fact part of the rental history which DHCR *must* consider." *Id.* at 356 (emphasis added). By contrast, ignoring the statutorily authorized rent-reduction orders would improperly give effect only to the Four-Year Rule, thus "thwart[ing] the goals of the Legislature in enacting Rent Stabilization Law § 26-514, namely, to motivate owners of rent stabilized housing-accommodations to provide required services, compensate tenants deprived of those services, and preserve and maintain the housing stock in New York City." *Id.* (quotation marks omitted).

As this Court did in *Matter of Cintron*, the lower courts have likewise recognized that the Four-Year Rule does not apply inflexibly when doing so would effectively require a court to disregard a separate statutory requirement that indisputably applies to the subject apartment. For example, in *Matter of Ador Realty v. Division of Housing and Community Renewal*, the Second Department held that the Four-Year Rule does not bar review of older records to determine whether a statutorily authorized

longevity increase would be warranted, because by law such an increase requires proof that the same tenant occupied an apartment for eight continuous years. *Matter of Ador Realty, LLC v. Division of Hous. & Community Renewal*, 25 A.D.3d 128, 136-39 (2d Dep't 2005). As the court explained, a strict prohibition on review of any records prior to four years would effectively make it impossible to challenge an owner's assertion of a longevity increase. *See id.* at 137. "Legislation cannot be read so as to reach an absurd result." *Id.*

Similarly, in *Matter of H.O. Realty*, the First Department rejected the argument that a fact-finder is prohibited from considering evidence dating beyond four years for purposes of determining whether the statutory remedy of treble damages would be warranted. *See Matter of H.O. Realty*, 46 A.D.3d at 108. As the court correctly reasoned, a rigid application of the Four-Year Rule under these circumstances "bears no rational relation to the objectives" of the Rent Stabilization Law, which include not just the Four-Year Rule's evidentiary goals but also the important objective

of accurately determining when the substantial penalty of treble damages is warranted. *Id.* at 108-09.

The principles set forth in these cases apply with equal force to the post-*Roberts* overcharge cases at issue here. *Roberts* squarely held that "the only correct interpretation" of the luxury deregulation provisions contained in the Rent Stabilization Law, as well as the provisions in state and local law authorizing the J-51 program, barred owners from deregulating rental units in buildings receiving J-51 benefits. *See Roberts*, 13 N.Y.3d at 287; RSL §§ 26-504(c); 26-504.1, 26-504.2(a); N.Y.C. Admin Code §§ 11-243(i)(1), 11-243(t), 11-243(dd)(2); 28 RCNY 5-03(f); *see also* RPTL § 489(7)(b)(1). And *Roberts* reached this decision in a case involving deregulations that occurred more than four years prior to the underlying complaint filed in 2007. *See Roberts*, 13 N.Y.3d at 282 (referencing deregulations beginning in 2001 and 2002). As with the owner in *Matter of Cintron*, Regina Metropolitan was thus subject to a continuous legal obligation to charge a stabilized rent—and only a stabilized rent—for the entire period that it received J-51 tax benefits: that is, from 1999 through 2010. *See Gersten*, 88

A.D.3d at 199 (holding that "the rent regulated status of an apartment is a continuous circumstance that remains until different facts or events occur that change the status of the apartment").

It is undisputed that Regina Metropolitan violated this continuous statutory obligation when it deregulated the subject apartment in 2003. And it is equally undisputed that the more than $5,000 market rent that it asks this Court to uphold here as the base date rent under the Four-Year Rule reflects that unlawful deregulation. As a result, applying the Four-Year Rule as Regina Metropolitan asserts would lock in a base date rent that is unlawful under both *Roberts* and the statutory provisions that it interpreted. *See Taylor v. 72A Realty Assoc., L.P.*, 151 A.D.3d 95, 106 (1st Dep't 2017). Moreover, such an application of the Four-Year Rule would effectively require DHCR to ignore Regina Metropolitan's continuous obligation to adhere to the Rent Stabilization Law's prohibition on luxury deregulation throughout the limitation period—a "part of the rental history which DHCR *must* consider." *Matter of Cintron*, 15 N.Y.3d at 356 (emphasis added). The Four-

Year Rule is not inviolate if its inflexible application would effectively render *Roberts* a nullity and "undermin[e] the statute's very purpose of preserving a stock of affordable housing." *Thornton*, 5 N.Y.3d at 182.

Allowing an unlawful market rent to serve as the base date rent under these circumstances is also inconsistent with the rationale of the Four-Year Rule. The four-year statute of limitations and its accompanying evidentiary rules are premised on the assumption that a rent-stabilized tenant had (but decided to forfeit) a meaningful opportunity to challenge any unlawful rents within that limitations period.[9] Here, however, agency guidance and industry practice at the time of the deregulation in 2003 sanctioned what Regina Metropolitan did. And Regina Metropolitan expressly

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[9] The Rent Stabilization Law expressly references the opportunity to challenge a registration statement during the limitations period, stating that "[w]here the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter." RSL § 26-516(a).

represented this (erroneous) view of the law to its tenants: here, for example, the tenants signed a market lease that expressly represented that the apartment was "not subject to rent regulation." (R. 164.) In light of this representation and the prevailing legal regime at the time, tenants had no reason or meaningful opportunity to file an overcharge complaint.[10] *Cf. Reich v. Belnord Partners, LLC*, 168 A.D.3d 482, 482 (1st Dep't 2019) (declining to extend four-year lookback period where a J-51 "tenant received a rent stabilized lease"). By contrast, once *Roberts* was decided, the tenants here acted promptly, filing a rent-overcharge claim within two weeks of this Court's decision.

To be sure, Regina Metropolitan deregulated the subject apartment in reliance on then-extant agency guidance and industry practice. However, an owner's reasonable reliance on pre-*Roberts* guidance merely rebuts the presumption of willfulness and exempts

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[10] Unlike high-income deregulation, vacancy-based deregulation provides no mechanism for a tenant to challenge the action at the time it is taken. *Compare* RSL §§ 26-504.2, *with* 26-504.3.

the owner from the treble damages that would otherwise apply to rent overcharges.[11] *See Borden v. 400 E. 55th St. Assoc. L.P.*, 24 N.Y.3d 382, 398 (2014). The absence of fraudulent intent does not alter the determination of liability or the calculation of the proper base date rent. *Matter of 160 E. 84th St. Assoc. LLC v. New York State Div. of Hous. & Community Renewal*, 160 A.D.3d 474, 474-75 (1st Dep't 2018); *72A Realty Assoc. v. Lucas*, 101 A.D.3d 401, 402 (1st Dep't 2012). Although *Roberts* represented a sea change in the law as understood by both DHCR and the industry, this Court "construed a statute that had been in effect for a number of years," and it is well-established that "judicial statutory construction does not create a new principle of law." *Gersten*, 88 A.D.3d at 197, 198; *see also Roberts*, 13 N.Y.3d at 287.

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[11] DHCR's finding that Regina Metropolitan did not act fraudulently or willfully is based not only on the owner's reliance on pre-*Roberts* guidance, but also on its timely corrective action. (R. 47, 50, 55-56.) Where an owner does not take timely corrective action and instead delays re-registering its units or notifying tenants, a fact-finder may reasonably find indicia of fraud or willfulness. *See Nolte v. Bridgestone Assoc. LLC*, 167 A.D.3d 498, 498-99 (1st Dep't 2018); *Kreisler v. B-U Realty Corp.*, 164 A.D.3d 1117, 1118 (1st Dep't), *lv. dismissed*, 32 N.Y.3d 1090 (2018).

As the dissent below correctly recognized, "courts have been flexible" in applying the Four-Year Rule "when the overcharge does not fit the typical case." (R. 389.) The cases arising from *Roberts* are by no means typical overcharge disputes. To the contrary, they involve the extraordinary occasion of a landmark decision from this Court invalidating a more than decade-long practice of luxury deregulation—including scores of deregulations that occurred more than four years before *Roberts* was decided. Under these circumstances, this Court's precedents did not compel DHCR to apply the Four-Year Rule in a manner that would effectively disregard *Roberts*.

B. DHCR's Methodology Is Consistent with This Court's Precedents in Cases Involving Unreliable Rents.

In addition to representing a reasonable balancing between competing statutory objectives, DHCR's approach to implementing *Roberts* also accords with this Court's recognition that the agency may examine a unit's prior rental history to determine whether the market rent charged on the base date was a reliable representation of the legal regulated rent.

Under the Rent Stabilization Law, the "legal regulated rent" is presumed to be "the rent indicated in the annual registration statement filed four years prior to the most recent registration statement," plus any lawful increases. RSL § 26-516(a); *see also* 9 N.Y.C.R.R. § 2526.1(a)(3)(i). But this Court has repeatedly and unambiguously held that, under certain exceptional circumstances, a fact-finder is entitled to review older rental history records to determine whether the rent charged on the base date was a sufficiently reliable legal regulated rent. And contrary to the Appellate Division's holding below (R. 369-371), this Court has not limited this principle to cases involving outright fraud.

In *Thornton*, for example, this Court held that an exception to the Four-Year Rule was necessary where the rent actually charged on the base date was the result of an unlawful lease, entered more than four years prior to the overcharge proceeding, that was alleged to be "void at its inception." *Thornton*, 5 N.Y.3d at 180-81. Although the underlying lease pre-dated the base date, this Court concluded that it was appropriate to review earlier rental history to determine whether the lease was in fact unlawful or contrary to public policy.

Such review confirmed that the lease was unlawful; because the monthly rent that the lease "purported to establish was therefore illegal," it could not serve as the legal regulated rent for purposes of calculating a rent overcharge. *Id.* at 181.

In *Matter of Grimm*, this Court likewise held that a fact-finder must "investigate the legality of the base date rent, rather than blindly us[e] the rent charged on the date four years prior" to the complaint in cases where a tenant makes a colorable claim that the actual rent charged on the base date was not a legal regulated rent because of fraud. *Matter of Grimm*, 15 N.Y.3d at 366. *Matter of Grimm* rejected the proposition that *Thornton* was limited to its facts—to the contrary, the Court made clear that a fact-finder has "an obligation to ascertain whether the rent on the base date is a lawful rent" if the tenant makes a sufficient showing that the actual rent charged on the base date was not a legal regulated rent. *Id.* In *Conason*, this Court applied the principle set forth in *Thornton* and *Matter of Grimm* in a case where the tenants presented "substantial evidence pointing to the setting of an illegal rent." *Conason*, 25 N.Y.3d at 16.

Here, the indications of the reported base date rent's illegality are far stronger than the circumstances this Court addressed in these prior cases. The claim of illegality here is not just colorable—the issue is squarely decided by a directly controlling decision from this Court. Regina Metropolitan agrees that the market rents it reported in its retroactively filed registrations are unlawful under *Roberts*. Indeed, it could not dispute the point. It is well-settled that the *market* rent charged on the base date (which is set by private agreement) by definition cannot be a legal *regulated* rent (which is dictated by law). *See Gordon v. 305 Riverside Corp.*, 93 A.D.3d 590, 592-93 (1st Dep't 2012). And it is equally well-established that an owner cannot "simply by virtue of having filed a registration statement, transform an illegal rent into a lawful assessment that would form the basis for all future rent increases." *Thornton*, 5 N.Y.3d at 181. Otherwise, owners could convert belated corrective measures into assurances of retroactive benefits arising from unlawful conduct. Under these exceptional circumstances, DHCR was entitled to look at records prior to the base date to "determine[] whether the rent the owner charged [tenants] on the base date

bears any relation to a permissible, rent-stabilized rent." *Taylor*, 151 A.D.3d at 106.

Contrary to the Appellate Division's decision (R. 369-371), this Court has never held that the principle first recognized in *Thornton* is limited to fraud. Instead, this Court stressed in *Matter of Grimm* that the fact-finder's inquiry should focus on "the reliability and the legality of the rent charged." 15 N.Y.3d at 367. In *Conason*, this Court similarly focused on "the reliability of the rent on the base date." 25 N.Y.3d at 18. And in *Thornton*, this Court focused not just on the fraudulent scheme that made the underlying lease defective, but also on the fact that the lease "circumvent[ed] the Rent Stabilization Law in violation of the public policy of New York." 5 N.Y.3d at 181. Fraud is not the only way in which a party can establish illegality, unreliability, or contravention of public policy. *See, e.g.*, *Riverside Syndicate v. Munroe*, 10 N.Y.3d 18, 23 (2008).

The Appellate Division was especially wrong to suggest (R. 370-371) that this Court's decision in *Matter of Boyd v. New York State Division of Housing and Community Renewal* established that fraud is the only circumstance in which a flexible application of the

Four-Year Rule applies. *See* 23 N.Y.3d 999 (2014), *rev'g* 110 A.D.3d 594 (1st Dep't 2013). The dispute in *Boyd* was not about the legality of a market rent charged on the base date, but about whether the owner fraudulently charged increases for individual apartment improvements prior to the base date. DHCR concluded that the tenant did not establish sufficient indicia of fraud in connection with those increases, and this Court affirmed the agency's order. This Court did not hold, and was not asked to hold, that fraud is the only ground on which an exception to the Four-Year Rule could apply. There is likewise no basis for the suggestion (R. 372) that *Boyd* overruled *Lucas* or any other Appellate Division precedent that recognized exceptions to the Four-Year Rule in the absence of fraud.

POINT II

DHCR'S METHODOLOGY IS RATIONALLY DESIGNED TO ADDRESS THE SPECIAL CIRCUMSTANCES OF POST-*ROBERTS* OVERCHARGE CASES.

For the reasons explained above, DHCR properly determined here that the illegal market rent charged on the base date was in violation of *Roberts* and thus not a reliable legal regulated rent. Having made that determination, DHCR had "broad equity

discretion" to develop an alternate approach to calculating an appropriate base date rent. *See Matter of 160 E. 84th St.*, 160 A.D.3d at 474. DHCR chose a methodology aimed at reconstituting the stabilized rent that could have been charged on the base date if the apartment had not been unlawfully deregulated in 2003. See *supra* at 23. Rather than simply adopting the last registered stabilized rent, DHCR credited Regina Metropolitan with more than $1,000 of increases to which it could have been entitled under the rent-stabilization regime. Contrary to the Appellate Division's decision, this methodology was rational and consistent with this Court's precedents involving the Four-Year Rule.

While the Appellate Division correctly noted that "DHCR is not limited to calculating the base date rent according to the market rate" charged on the base date, it erroneously held that the agency's "discretion to implement other methods of base date rent calculation" is limited to approaches that exclusively use data from within the four-year limitations period. (R. 375.) To be sure, DHCR could have (and in certain cases, has) utilized a sampling methodology that looks to the average stabilized rents for comparable units in

the same building as of the base date. *See Matter of 160 E. 84th St.*, 160 A.D.3d at 474. As the dissent noted (R. 384-385), this approach is typically reserved for situations where the rental history for a unit is unavailable or otherwise unknown. Likewise, this Court in *Thornton* and *Matter of Grimm* suggested that the appropriate methodology in cases where rental history has been rendered unreliable by fraud is the default formula, which "uses the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date." *Thornton*, 5 N.Y.3d at 180 n.1; *Matter of Grimm*, 15 N.Y.3d at 366 n.1.

However, the question in an article 78 proceeding is not whether the agency *could* have used a different methodology, but whether the methodology the agency *did* use was lawful and rational. As explained *supra* at 31-46, the methodology employed by DHCR is consistent with this Court's precedent regarding the Four-Year Rule. In addition, DHCR's approach represents a rational and considered method of determining the base date rent under the unique circumstances presented in post-*Roberts* overcharge cases.

The methodology challenged in this appeal applies to a specific (though substantial) subset of post-*Roberts* overcharge complaints: cases where (i) the tenants were charged an unlawful market rate on the base date; (ii) the overcharge occurred due to the owner's incorrect, but reasonably mistaken, interpretation of the governing law; and (iii) the owner took reasonable and timely corrective measures to restore unlawfully deregulated apartments to rent stabilization.[12] DHCR has determined that in such cases it is inappropriate to calculate the base date rent using the market rent urged by the owner, or alternative measures suggested by the tenants, such as the last registered stabilized rent or the default formula, which would result in a lower base date rent. Instead, DHCR has devised a methodology that aims to recreate the legal regulated rent that would have been charged but for the unlawful deregulation.

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[12] As explained *supra* at 40 n.11, a different permutation of facts in a *Roberts* overcharge case may well support a finding of fraud that warrants a different approach to calculating overcharges.

For the many different reasons discussed above, DHCR lawfully and rationally rejected applying the market rent charged in November 2005 as the base date rent. The disparity between the overcharge calculated by Regina Metropolitan ($15,084.92) and DHCR ($285,390.39) in this case highlights the ramifications of adopting the market rent as the base date rent. In addition, the difference between Regina Metropolitan's calculation of the monthly collectible rent going forward ($6,634.12) and DHCR's calculation of the same figure ($4,136.32) highlights the agency's concerns about the prospective effect of adopting a market rent as a base date rent. As the dissent correctly noted, the base date rent adopted in this overcharge action "will serve as the base going forward for all future rent-stabilized tenants." (R. 385.) The same is true for thousands of similarly situated tenants. DHCR therefore reasonably determined that it would be unjust (and wholly inconsistent with *Roberts* and *Gersten*) to allow Regina Metropolitan not only to reap a retroactive benefit in the form of a nominal overcharge award for its prior misapplication of the law, but also to collect wildly inflated rents on an ongoing basis.

DHCR likewise rationally determined that it would be improper to use a more punitive base date rent measure, such as the last-registered rent prior to deregulation or the default formula. As this Court has acknowledged, many owners who deregulated apartments prior to *Roberts* did so in reliance on prior agency guidance as well as a widespread industry practice. *See Borden*, 24 N.Y.3d at 398. DHCR expressly found that Regina Metropolitan did not act fraudulently or willfully in deregulating the apartment, and further found that the owner took meaningful and speedy corrective measures. (R. 47, 50, 55.) DHCR therefore rationally determined that it would be appropriate and fair to all parties to calculate both the overcharge and future collectible rents using a base date rent that approximates the legal regulated rent that would have been charged under a correct understanding of the law. As the dissent recognized, "DHCR's approach is consistent with the balancing of the equities in *Gersten*, gives *Roberts* its retroactive effect, and recognizes that these kinds of overcharges are a special category of overcharge cases, which only emerged in the aftermath of *Roberts*." (R. 385-386.)

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In *Roberts*, this Court acknowledged that "courts and litigants may experience some additional burden" as the result of litigation over collateral issues arising from the decision. *Roberts*, 13 N.Y.3d at 287. That prediction has borne out. Yet as this Court has also noted, "the ubiquity of the wrong must be addressed." *Borden*, 24 N.Y.3d at 398. In the years since *Roberts* and *Gersten* were decided, DHCR has sought to adjudicate the many resulting overcharge cases consistently, fairly, and in accordance with governing law. This Court should affirm DHCR's approach here as a reasonable and rational solution to an exceptionally challenging problem.

CONCLUSION

The Court should reverse the Appellate Division's decision and order to the extent it granted Regina Metropolitan's petition to remand to DHCR for recalculation of the base date rent and corresponding overcharge.

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Respectfully submitted,

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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 9,484 words, which complies with the limitations stated in § 500.13(c)(1).

/s/ Ester Murdukhayeva
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