STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

BARBARA D. UNDERWOOD
SOLICITOR GENERAL
DIVISION OF APPEALS & OPINIONS

October 17, 2019

John P. Asiello
Chief Clerk
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207

Re: *Matter of Regina Metropolitan, LLC v. DHCR*,
No. APL-2018-00222

Dear Mr. Asiello:

I write on behalf of appellant New York State Division of Housing and Community Renewal (DHCR) in response to the Court's September 17, 2019, letter inviting supplemental argument regarding the effect of the recently enacted Housing Stability and Tenant Protection Act of 2019 (HSTPA) on this appeal.

This case arises from a rent-overcharge complaint filed with DHCR by respondents Harry A. Levy and Leslie E. Carr ("Tenants") against Regina Metropolitan, LLC in 2009.[1] In the administrative proceeding, DHCR determined that there had been an overcharge because Regina Metropolitan unlawfully deregulated the subject apartment in 2003 pursuant to an erroneous understanding of the law that was

[1] The factual and procedural history of this case is set forth at pages 13-29 of DHCR's opening brief. The summary contained in this letter is offered for the Court's convenience.

subsequently corrected by this Court's decision in *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270 (2009). DHCR calculated the amount of the overcharge by reconstructing the legal regulated rent that could have been charged if Regina Metropolitan had not unlawfully deregulated the apartment. In the same order, DHCR rejected Tenants' requests for treble damages and legal fees.

Regina Metropolitan and Tenants filed separate C.P.L.R. article 78 petitions challenging DHCR's determination. As relevant here, Regina Metropolitan argued that DHCR had erred by looking at rental history records older than four years prior to the date of the complaint to establish the base date rent and calculate the overcharge. Tenants argued that DHCR should have used alternative formulas to calculate the overcharge, and should have granted treble damages and legal fees. Supreme Court, New York County (Schlesinger, J.) rejected both sides' claims and affirmed DHCR's order in its entirety. (Record on Appeal (R.) 16.) A divided panel of the Appellate Division, First Department "modified, on the law, to grant landlord's petition to the extent of remanding the matter to DHCR to recalculate the base date rent by looking back to four years before the filing of the overcharge complaint, and otherwise affirmed." (R. 361.)

DHCR moved in the Appellate Division for leave to appeal to this Court. DHCR's motion was limited to the only issue on which the Appellate Division's decision was adverse to the agency—the lawfulness of DHCR's use of records older than four years prior to the complaint to determine the base date rent and calculate the overcharge. The First Department granted DHCR's motion on December 4, 2018. (R. 397-398.) Instead of seeking leave, Tenants filed a notice of appeal in this Court. On December 11, 2018, this Court dismissed Tenants' appeal for lack of finality. *See Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 32 N.Y.3d 1085 (2018). Tenants did not move for reconsideration in this Court, nor did they attempt to seek leave in the Appellate Division following this Court's order. On June 27, 2019, this Court granted Regina Metropolitan's motion to strike the portions of Tenants' briefs pertaining to legal fees and treble damages, therefore recognizing that these issues are outside the scope of this appeal. *See Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. &*

Community Renewal, 33 N.Y.3d 1062 (2019); Letter from John P. Asiello (June 27, 2019).

I. The HSTPA Permits Review of All Relevant Rental History in Rent-Overcharge Proceedings.

The sole question presented in this appeal is whether, in the course of adjudicating a rent-overcharge dispute, DHCR can rely on records older than four years to establish the base date rent and corresponding overcharge when the rent actually charged on the base date was unlawful or unreliable. The HSTPA conclusively answers that question in the affirmative.

Specifically, the new Rent Stabilization Law (RSL) § 26-516(h), *added by* Ch. 36, pt. F, § 5, 2019 N.Y. Laws (LRS), pp. 13-14, provides as follows:

> Nothing contained in this subdivision shall limit the examination of rent history relevant to a determination as to: (i) whether the legality of a rental amount charged or registered is *reliable* in light of all available evidence including but not limited to whether an unexplained increase in the registered or lease rents, or a fraudulent scheme to destabilize the housing accommodation, rendered such rent or registration unreliable.

(emphasis added).

Another provision of the HSTPA likewise directs DHCR to "consider all available rent history which is reasonably necessary" to determine a rent overcharge, without temporal limitations. RSL § 26-516(a), *amended by* Ch. 36, pt. F, § 4, 2019 N.Y. Laws (LRS), p. 12. Further, the HSTPA eliminates the statutory language on which the First Department relied in rejecting DHCR's methodology below (R. 370)—namely, text that purported to preclude "any look back at a unit's rental history beyond the four-year limitations period." RSL § 26-516(b)(i), *amended by* Ch. 36, pt.

F, § 1, 2019 N.Y. Laws (LRS), p. 9; *see also* C.P.L.R. 213-a, *amended by* Ch. 36, pt. F, § 6, 2019 N.Y. Laws (LRS), p. 14.

In September 2019, the First Department held that the HSTPA "makes clear that courts must examine all available rent history necessary to determine the legal regulated rent." *Dugan v. London Terrace Gardens, L.P.*, 2019 N.Y. Slip Op. 06578, at *3 (1st Dep't Sept. 17, 2019). Accordingly, the First Department determined that the HSTPA "resolves th[e] conflict" regarding the appropriate methodology for calculating overcharges in post-*Roberts* cases created by several First Department decisions, including in this case.[2] *See id.*

II. The HSTPA Applies to Pending Proceedings.

Whether, and to what extent, a statute applies "retroactively" to pending proceedings is "a matter of ascertaining the legislative intent, subject to applicable constitutional limitations." *Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 15 N.Y.2d 443, 453 (1965); *see also Knapp v. Fasbender*, 1 N.Y.2d 212, 219 (1956). Here, the Legislature expressly addressed the question: the HSTPA states that the amendments discussed above "shall take effect immediately and shall apply to any claims pending" on or after the effective date—that is, June

[2] In *Taylor v. 72A Realty Associates, L.P.*, the First Department held that a fact-finder in a post-*Roberts* overcharge case may examine rental records older than four years to determine the base date rent and overcharge, even in the absence of fraud. 151 A.D.3d 95, 106 (1st Dep't 2017), *lv. granted*, 2018 N.Y. Slip Op. 90758(U) (1st Dep't 2018). In three subsequent cases, including this one, different panels of the First Department precluded review of older rental records in post-*Roberts* cases. *See Matter of Regina Metro., Co. LLC v. New York State Div. of Hous. & Community Renewal*, 164 A.D.3d 420 (1st Dept. 2018), *lv. granted*, 2018 N.Y. Slip Op. 89914(U) (1st Dept. 2018); *Raden v. W 7879, LLC*, 164 A.D.3d 440 (1st Dept. 2018), *lv. granted*, 2018 N.Y. Slip Op. 89000(U) (1st Dept. 2018); *Reich v. Belnord Partners, LLC*, 168 A.D.3d 482 (1st Dep't 2019), *lv. granted*, 2019 N.Y. Slip Op. 70671(U) (1st Dept. 2019). All four cases are currently pending in this Court.

14, 2019.[3] *See* Ch. 36, pt. F, § 7, 2019 N.Y. Laws (LRS), p. 14. Such language has been recognized to reflect a legislative intent of application to cases that are pending in court on the effective date. *See, e.g.*, *Weissblum v. Mostafzafan Found. of N.Y.*, 60 N.Y.2d 637, 638-39 (1983).

The rent-overcharge "claim" involved in this case is "pending" in at least two related ways. First, the claim is pending before DHCR because the Appellate Division remanded to the agency to recalculate the base date rent and overcharge, albeit subject to an erroneous limitation of a four-year records period that has since been corrected by the HSTPA. (R. 361.) Second, this appeal over the validity of DHCR's disposition of the overcharge claim remains pending as well. As the First Department recently held, the HSTPA applies to overcharge claims that are pending on appeal on the HSTPA's effective date. *Dugan*, 2019 N.Y. Slip Op. 06578, at *3. Under similar circumstances, this Court has applied an amended version of a statute to resolve an appeal in a C.P.L.R. article 78 proceeding where the Legislature amended the law after the Appellate Division had issued its decision. *See Matter of City of New York v. Wing*, 94 N.Y.2d 466, 472-73 (2000); *see also Tartaglia v. McLaughlin*, 297 N.Y. 419, 424 (1948) (applying new statute in summary proceeding to recover possession of property where a warrant had not yet issued notwithstanding a final order).

Further supporting the HSTPA's application here is the fact that the relevant amendments are the types of remedial and procedural provisions that "constitute an exception to the general rule that statutes are not to be given a retroactive operation" in pending proceedings. Statutes §§ 54-55, 1 McKinney's Cons. Laws of N.Y. (Westlaw); *see Longines-Wittnauer*, 15 N.Y.2d at 453. The provisions at issue here are intended to better protect tenants from unreasonable rent increases and to preserve the stock of regulated apartments within New York State. *See, e.g.*, Introducer's Mem. in Supp. for Bill S6458 (LRS). Moreover, the relevant amendments are procedural because they do not create new substantive rights or impair any vested rights, but rather "facilitate[] the

[3] The HSTPA contains fifteen parts, each with their own language regarding the effective date and retroactive application. *See* Ch. 36, § 1, 2019 N.Y. Laws (LRS), p. 2.

enforcement . . . of pre-existing rights" by addressing the scope of relevant evidence that DHCR may consider in a rent-overcharge proceeding. *Longines-Wittnauer*, 15 N.Y.2d at 454. While landlords may complain that the HSTPA's more flexible evidentiary rules favor tenants, "[o]ne cannot claim a vested property interest in continuing to receive a statutory benefit unless statutory language clearly granting a vested right . . . is present." *American Economy Ins. Co. v. State*, 30 N.Y.3d 136, 156-57 (2017), *cert. denied*, 138 S. Ct. 2601 (2018). No such language was present here.

Likewise, no due process principles preclude the application of the HSTPA to this pending proceeding. The relevant provisions of the HSTPA do not resurrect otherwise untimely claims in this case; at most, they reasonably alter the rules of procedure and evidence applicable to an undisputedly timely overcharge complaint. In any event, even a pure claim-revival statute satisfies due process if it is "enacted as a reasonable response in order to remedy an injustice." *Matter of In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 400 (2017). Here, the HSTPA's elimination of the evidentiary Four-Year Rule was eminently reasonable given the substantial unfairness imposed by a mechanical application of that rule—including the unfairness inherent in Regina Metropolitan's position that an owner may illegally deregulate an apartment and charge an unlawful market rent that cannot be challenged after more than four years have passed. Indeed, the First Department has correctly rejected a due process challenge to the application of the same HSTPA provisions under similar circumstances. *See Dugan*, 2019 N.Y. Slip Op. 06578 at *4-5.

Finally, DHCR notes that the HSTPA applies only to those issues where this Court has jurisdiction—specifically, "those parts of the judgment that have been appealed and that aggrieve the appealing party." *Hain v. Jamison*, 28 N.Y.3d 524, 534 n.3 (2016) (quotation marks omitted). The HSTPA did not displace long-standing doctrines that affect the scope of judicial review, such as limitations on jurisdiction, rules regarding preservation and waiver, and other procedural requirements applicable to article 78 proceedings and plenary actions. Accordingly, many other provisions of the HSTPA (such as, for example, amendments

pertaining to legal fees and treble damages) are not relevant to this appeal.

III. This Court Should Resolve This Appeal Without Delay.

The only legal question presented in this appeal is whether DHCR can rely on records older than four years to establish the base date rent and corresponding overcharge when the rent actually charged on the base date was unlawful or unreliable. This Court need not address the application of the HSTPA to this case if it agrees with DHCR's argument (Br. for Appellant at 29-53; Reply Br. for Appellant at 4-32) that pre-existing law allowed the agency to look at rental records older than four years to establish the base date rent and overcharge in cases where the rent actually charged on the base date was an undisputedly unlawful market rent. If this Court so holds, it should reverse the Appellate Division's decision and affirm DHCR's order.

If this Court disagrees and finds that DHCR's review of older rental records was impermissible under pre-existing law, it should apply the HSTPA and (i) conclude that the Legislature's express changes to the evidentiary "look back" period for rent-overcharge claims apply to the current dispute; and (ii) reverse the Appellate Division's decision.[4] In either event, DHCR urges this Court to resolve this appeal without further remand on the legal questions at issue.

There are no prudential or jurisdictional limitations to the Court's ability to resolve whether and how the HSTPA applies to this appeal.

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[4] Although the HSTPA extended the period for which tenants can collect overcharge damages from four years to six years, this Court may affirm DHCR's order in its entirety because Tenants are not appellants in this proceeding and therefore cannot request additional affirmative relief. See *supra* at 2-3. In the alternative, DHCR is amenable to a limited remit for purposes of recalculating the overcharge under the extended damages period. In this case, the extended damages period is narrow because Tenants moved in to the apartment in August 2005, approximately four years and four months before the overcharge complaint was filed in November 2009. (R. 161-164; *see also* R. 74, 316.)

First, the Court has broad authority to resolve a pending appeal under intervening law. *See, e.g.*, *Robinson v. Robins Dry Dock & Repair Co.*, 238 N.Y. 271, 281 (1924). Second, whether and how the HSTPA applies to this appeal are pure questions of law that do not require further fact development. Finally, there is no reason to remand these questions to the First Department, which has already held that the HSTPA applies to pending appeals involving substantially similar issues. *Dugan*, 2019 N.Y. Slip Op. 06578, at *3.

DHCR strongly urges this Court to promptly resolve the legal issue presented in this case in light of the immense importance of the issue to the agency and the public. Thousands of New Yorkers were subjected to unlawful market rents for what should have been rent-stabilized units because owners like Regina Metropolitan had unlawfully deregulated those units prior to *Roberts*. Moreover, many owners have taken years to return wrongfully deregulated units to rent regulation, notwithstanding clear directives from the appellate courts that *Roberts* applies retroactively. Accordingly, there are a substantial number of pending administrative proceedings, article 78 petitions, and plenary actions that may be implicated by this Court's ruling. As of today, these matters are subject to substantial uncertainty because of the conflicting First Department decisions pending before this Court. DHCR therefore asks that this Court resolve this pending appeal without the unnecessary delay of remanding to the lower courts to address in the first instance the application of the new law to the legal issue presented in this case.

Respectfully submitted,

/s/ Ester Murdukhayeva

Ester Murdukhayeva
Assistant Solicitor General
Ester.Murdukhayeva@ag.ny.gov
(212) 416-6279

cc: Niles C. Welikson, Esq.
Horing, Welikson & Rosen, P.C.
Attorneys for Regina Metropolitan Co., LLC
11 Hillside Avenue
Williston Park, NY 11596

Darryl M. Vernon, Esq.
Yoram Solagy, Esq.
Vernon & Ginsburg, LLP
Attorneys for Leslie E. Carr and Harry A. Levy
261 Madison Avenue, 26th Floor
New York, NY 10016