To Be Submitted By:
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Court of Appeals

STATE OF NEW YORK

ELIZABETH REICH and STANLEE BRIMBERG,

Plaintiffs-Appellants,

against

BELNORD PARTNERS, LLC and EXTELL BELNORD, LLC,

Defendants-Respondents.

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Peter Gunther ("Gunther"), John Funk ("Funk"), Agnes Berecz ("Berecz"), Johanna Karlin ("Karlin"), Semi Pak ("Pak"), Bruce Hackney ("Hackney") and Timothy Smith ("Smith") (collectively, the "*Amici*") respectfully submit this brief as *amici curiae* in support of Plaintiffs-Appellants Elizabeth Reich and Stanlee Brimberg ("Appellants"). For the reasons detailed below – in addition to those detailed in Appellants' own briefing – the Order of the Appellate Division, First Department[1] should be reversed.

PRELIMINARY STATEMENT

This action is one of the quintet of currently pending cases which address the intersection of the Housing Stability and Tenant Protection Act of 2019 ("HSTPA,"), various tax benefits programs (such as J-51), and registration of regulated rent. Each of these cases presents questions that will affect thousands of tenants in currently pending actions before the lower courts. In this action, the *Amici* submit their brief to resolve one such question: how should the legal regulated rent be calculated when there is no reliable rent history filed and served upon the tenant?

In any rent overcharge claim, be it a J-51 class action, or a claim for fraudulently performed Individual Apartment Improvements, the first step is to determine the legal regulated rent. Only after that step, can it be determined if there

[1] Sachar Affirmation in Support of Motion for Leave to Appear as *Amici Curiae* ("Sachar Aff.") Ex. A.

is an overcharge, and if so, the amount of damages. Under HSTPA the legal regulated rent is determined as follows, in pertinent part:

> …[T]he legal regulated rent for purposes of determining an overcharge shall be the rent indicated in the most recent reliable annual registration statement filed and served upon the tenant six or more years prior to the most recent registration statement … plus in each case any subsequent lawful increases or adjustments.

RSL § 26-516(a), emphasis added. Thus, just to start the analysis of a rent-overcharge claim, two things are required: a "reliable annual registration statement" which was "filed and served upon the six or more years prior to the most recent registration statement."

But, what happens if there is no "reliable" annual registration six years prior to the most recent registration statement, or if there is no evidence such registration statement "was filed and served upon the tenant?" The words "or more" as utilized in HSTPA guide that the inquiry should go further back, until such time as a reliable registration statement is proffered that was served on the tenant then in occupancy.

For Appellants, there was never a rent registration, let alone one served upon the tenant then in occupancy. The entire rent-history, up until the time Appellants occupied the apartment, is a complete blank. (R. 92-95). There is no reliable rent registration.

Similarly, as the *Amici*'s rent-histories demonstrate, there are many circumstances in which no reliable rent histories ever exist, or it cannot be

demonstrated that such registrations were served upon the tenant. Take, for example, Karlin, a plaintiff in *Maddicks, et al. v Big City Realty LLC, et al.*, (Index No. 156847/2016 [Sup Ct., NY County]). Karlin resides in Apartment 4 at 408 W. 129th Street in Manhattan.[2] Her apartment's rent history shows that her apartment was occupied by Beatrice Lippett as a rent-stabilized tenant from 1984 to 1993. Apartment 4 was then listed as "vacant" for 1994.[3] There were no contemporaneous registrations in 1995 or 1996, although the apartment was belatedly registered as "vacant" for those two years in 1999, at the amount of $689.00.[4] In 1998, 1999, and 2000, the apartment was timely registered, but is again listed as "vacant" for each of those three years.[5] In 2001, the apartment was unregistered. In 2002, the apartment was registered, for one year, to David Wilson, in the amount of $1,000.00.[6] It was not registered for 2003 until 2007, at which time it was again registered as vacant.[7] Again, from 2004 to 2006 it was unregistered, registered again to a Lola Coleman in 2006 at $1,150.00, then not registered from 2007 to 2010.[8] In 2011, it was listed as temporarily exempt from rent-stabilization for one year, then never registered again.[9]

[2] Sachar Aff. ¶ 8.
[3] Sachar Aff., Ex. B
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

From the records of the Automated City Register Information System ("ACRIS") there have been seven (7) separate owners of 408 W. 129th Street since the mid-1990s.[10] Whatever landlord records did exist to justify the rent history for Karlin's apartment appear to be long gone - - and, discovery to date demonstrates that landlord has been unable to produce a single piece of rental evidence (such as leases, or registrations) regarding her apartment's rent history.[11] There simply is no reliable rent history, let alone proof that any registration was ever served upon a tenant.

When a rent history – such as Karlin's – is unreliable, there must be some means of re-establishing the legal regulated rent. The rent regulations, modified slightly by HSTPA, state, "where the prior rent charged for the housing accommodation cannot be established, such rent shall be established by [DHCR]." (RSL § 26-516). Fortunately, in the Rent Stabilization Code, DHCR provided just such as methodology: the default formula, codified at RSC § 2522.6(b)(2) and (3). As the First Department recently explained, "the default formula is applied to calculate compensatory overcharge damages where no other method is available. Moreover, it is applied equally in cases in which the owner has engaged in fraud and in cases in which the base date rent simply cannot be determined or the rent history

[10] Sachar Aff., ¶ 9.
[11] Sachar Aff., ¶ 10.

is unavailable." (*Simpson v 16-26 E. 105, LLC*, 2019 NY Slip Op 07026 [1st Dept Oct. 1, 2019].)(*Amici*'s counsel herein is counsel for the tenants in *Simpson*.)

Thus, the answer to the question - how should the legal regulated rent be calculated when there is no reliable rent history filed and served upon the tenant? - is straightforward: the default formula.

Respectfully, the *Amici* submit that in issuing its order on this Appeal, to avoid further confusion in the lower courts, this Court either: (a) expressly provide that the DHCR default formula should be used when no reliable rent history exists, or there is no evidence that any rent registration was served upon the tenants, and that the both the lower courts, and DHCR may employ such formula; or, alternatively (b) specifically indicate that the Court is taking no position on the issue of whether the default formula should be utilized in circumstances where no reliable rent history exists, and is leaving the issue open for future resolution. An express statement from this Court, on that issue, will lend great clarity to the courts below.

INTERESTS OF THE *AMICI*

The *Amici* are each plaintiffs in overcharge class actions currently pending in the New York City courts. Each *Amici* is either rent-stabilized or, at a minimum, asserts that their apartment would be rent-stabilized, but for their landlord's misconduct. As such, the quintet of currently pending HSTPA appeals could be crucially important to resolving their claims – especially with respect to establishing,

or re-establishing, their legal regulated rent. Each *Amici* has a rent history that is unreliable, or non-existent.

As described above, Karlin's rent history is rife with twenty (20) years of unreliability. Registrations are late, the apartment is registered as "vacant" for multiple years or suddenly listed as temporarily exempt, and there are multi-year registration gaps. Karlin has no reliable rent history.

Pak was a tenant at Apartment 42 at 512 West 134th Street, and a plaintiff in *Maddicks*.[12] Apartment 42's rent history provides "REG NOT FOUND FOR SUBJECT PREMISES" from 1984 to 2001.[13] In 2002, the apartment is listed as "permanently exempt." From 2003 to 2009, the apartment is listed as "EXEMPT APARTMENT – REG NOT REQUIRED."[14] In 2010, the apartment is registered for the first time, and such registrations continue until 2013.[15] In 2014, the apartment is listed as "vacant," and in 2015 it was deregulated, some six years after *Roberts* (despite the building being in receipt of J-51 benefits).[16] It has not been registered with DHCR, since.[17] Again, there is no reliable rent history.

Gunther, Funk, and Berecz are each plaintiffs in *Gunther v 31-62 29th Street PVP, LLC* (Index No. 717673/2018 [Sup Ct, Queens County]), a J-51 class action

[12] Sachar Aff. ¶ 11
[13] Sachar Aff., Ex. C
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*

currently pending in the Queens County Supreme Court.[18] They allege that their landlord violated the J-51 Program by failing to provide them, and their predecessors, with rent-stabilized leases while receiving tax benefits, as the law required. Like Appellants, these tenants' landlords failed to register their apartments when their apartments exited rent control.[19] Although their apartments should have been rent-stabilized, there is no reliable rent history, whatsoever, because their apartments were simply never registered, as legally mandated.

Hackney and Smith are tenants at 10 Hanover Square, and plaintiffs in *Hackney, et ano. v UDR 10 Hanover LLC* (Index No. 159652/2019 [Sup Ct, NY County]).[20] 10 Hanover Square participated in the 421-g tax program, but like many landlords participating in that program, did not register the apartments in their building, ostensibly under the belief that registration was not required.[21] In *Kuzmich v 50 Murray St. Acquisition LLC*, (34 NY3d 84, 89 [2019], *rearg denied*, 33 NY3d 1135 [2019]), this Court held that tenants in 421-g buildings, including Hackney and Smith, were to be afforded the protections of the rent-regulations. But, as shown by their Building's tax filings, Hackney and Smith's apartment has never been registered.[22] Thus, there is no reliable rent history.

[18] Sachar Aff. ¶ 12
[19] Sachar Aff., Exs. D and E.
[20] Sachar Aff. ¶ 13
[21] *Id.*
[22] Sachar Aff., Ex. F.

Thus, like Appellants, each of the *Amici* has an unreliable rent history. Any decision of this Court, describing how Appellants' rent should be calculated, could negatively impact the *Amici*, who are currently parties to rent-overcharge actions in the lower courts.

ARGUMENT

I. HSTPA AND THE SETTING OF A LEGAL REGULATED RENT

Under HSTPA the legal regulated rent is established through three potential methods. First,

> …[T]he legal regulated rent for purposes of determining an overcharge shall be the rent indicated in the most recent reliable annual registration statement filed and served upon the tenant six or more years prior to the most recent registration statement … plus in each case any subsequent lawful increases or adjustments.

RSL § 26-516(a), emphasis added. In Appellants' situation, and that of the *Amici*, this is impossible. For them, there is either no rent history at all, or the rent history is unreliable on its face. Of course, in these circumstances, there is no evidence that a rent-registration was served upon a tenant in occupancy at the time of such registration. The first option is unavailable.

The second option provides:

> [a]s to complaints filed within ninety days of the initial registration of a housing accommodation, the legal regulated rent shall be deemed to be the rent charged on the date six years prior to the date of the initial registration of the housing accommodation (or, if the housing accommodation was subject to this chapter for less than six years, the initial legal regulated rent) plus in each case, any lawful increases and

> adjustments. Where the rent charged on the date six years prior to the date of the initial registration of the accommodation cannot be established, such rent shall be established by [DHCR].

Id. The passage clearly is applicable to neither Appellants, nor the *Amici*, as initial registrations are not at issue.

Thus, turning to the last option, which guides:

> Where the prior rent charged for the housing accommodation cannot be established, such rent shall be established by [DHCR] provided that were a rent is established based on rentals determined under the provisions of the local emergency housing rent control act such rent must be adjusted to account for no less than the minimum increases which would be permitted if the housing accommodation were covered under the provisions of this chapter.

Id. That provision is fairly straightforward. If the rent cannot be established, a court should look to DHCR, and if DHCR looks towards a rent-controlled rental to determine the legal regulated rent, then those increases allowed by the RSL should be allowed.

The *Amici* submit that the last option applies, to both their units, and the Appellants. So, to establish a legal regulated rent, DHCR's input is required. Fortunately, DHCR has already promulgated a formula for determining the legal regulated rent in precisely this situation: the default formula.

II. DETERMINING AN OVERCHARGE UNDER THE RENT STABILIZATION CODE

The First Department recently explained, even after the passage of HSTPA:

> [T]he default formula is applied to calculate compensatory overcharge damages where no other method is available. Moreover, it is applied

> equally in cases in which the owner has engaged in fraud and in cases in which the base date rent simply cannot be determined or the rent history is unavailable.

(*Simpson* at *1) The default formula is codified by DHCR at RSC § 2522.6(b)(2) and (3). RSC § 2522.6(b)(2) provides:

> (2) Where either:
>
> (i) the rent charged on the base date cannot be determined; or
>
> (ii) a full rental history from the base date is not provided; or
>
> (iii) the base date rent is the product of a fraudulent scheme to deregulate the apartment; or
>
> (iv) a rental practice proscribed under section 2525.3(b), (c) and (d) of this Title has been committed, the rent shall be established at the lowest of the following amounts set forth in paragraph (3) of this subdivision.

Id. RSC § 2522.6(b)(3) describes how to calculate the rent once it is determined that the rent history is unreliable. It requires choosing the lowest resulting amount from three potential methodologies, and setting that as the legal regulated rent:

> (i) the lowest rent registered pursuant to section 2528.3 of this Title for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment; or
>
> (ii) the complaining tenant's initial rent reduced by the percentage adjustment authorized by section 2522.8 of this Title; or
>
> (iii) the last registered rent paid by the prior tenant (if within the four year period of review)[.]

Id.[23] Once the legal regulated rent is (re)established, the difference between the lowest of the RSC 2522.6(b)(3) options, and the rent charged, is the amount of the tenant's overcharge.

In a situation like that faced by *Amici*, and by Appellants, DHCR's default formula is required to reset the rent.

III. COURTS REGULARLY UTILIZE THE DEFAULT FORMULA

The Rent Stabilization Law does not explicitly state that a court may establish a new legal regulated rent, which was true both before, and after, the legislature enacted HSTPA. (*Thornton v Baron*, 4 AD3d 258, 259 [1st Dept 2004], *affd*, 5 NY3d 175 [2005] ["the Rent Stabilization Law does not expressly provide for setting a new legal regulated rent"].) However, courts, including this Court, have long utilized DHCR's default formula to establish a legal regulated rent. (*Thornton v Baron*, 5 NY3d 175, 181 [2005] ["[W]e agree with Supreme Court and the Appellate Division majority that the default formula used by DHCR to set the rent where no reliable rent records are available was the appropriate vehicle for fixing the base date rent here."]; *Meyer v 224 Lafayette St. Corp.*, 165 AD3d 598, 599 [1st Dept 2018] [illusory tenancy requires utilization of default formula]; *Kreisler v B-U Realty Corp.*, 164 AD3d 1117, 1118 [1st Dept 2018] [default formula appropriate to re-

[23] There is a fourth potential methodology established in subsection (iv), if neither of the three methodologies is available because there are no rent-stabilized units in the apartments.

establish legal regulated rent]; *Altschuler v Jobman 478/480, LLC.*, 135 AD3d 439, 440 [1st Dept 2016] [default formula utilized because rent history was unreliable]; *Cooper v 85th Estates Co.*, 57 Misc 3d 1223(A) [Sup Ct NY County, 2017] [default formula appropriate in light of rent history's unreliability].)

Accordingly, under longstanding practice, both the courts, and DHCR, may utilize the default formula.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Appellants' own briefing, the Appellate Division's order should be reversed. The *Amici* respectfully request that, when issuing its order in this appeal, this Court either: (a) expressly provide that the DHCR default formula should be used when no reliable rent history exists, or there is no evidence that any rent registration was served upon the tenants, and that the both the lower courts, and DHCR may employ such formula; or, alternatively (b) specifically indicate that the Court is taking no position on the issue of whether the default formula should be utilized in circumstances where no reliable rent history exists, and is leaving the issue open for future resolution.

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