To be Argued by:
DEBORAH RIEGEL
(Time Requested: 30 Minutes)

Court of Appeals No. APL-2019-00116
New York County Clerk's Index No. 159841/16

Court of Appeals
of the
State of New York

ELIZABETH REICH AND STANLEE BRIMBERG,

Plaintiffs-Appellants,

– against –

BELNORD PARTNERS, LLC and EXTELL BELNORD, LLC,

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 500.1(f) and 500.13(a) of the New York Court of Appeals Rules of Practice, the Plaintiff-Appellant, Belnord Partners, LLC, is a Foreign Limited Liability Company authorized to do business in the State of New York. Belnord Partners, LLC has no subsidiaries. Belnord Partners, LLC's parent is P9 Mezz, LLC. Belnord Partners, LLC's controlling affiliate is P9 Holdings, LLC.

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BRIEF FOR DEFENDANTS-RESPONDENTS

PRELIMINARY STATEMENT

Defendants-Respondents Belnord Partners LLC and Extell Belnord LLC ("Respondents") respectfully submit this brief in opposition to the appeal of plaintiffs-appellants Elizabeth Reich and Stanlee Brimberg ("Appellants") from a decision and order of the Appellate Division, First Judicial Department, entered January 15, 2019 (the "First Department Order") (R. 13a-15a).

By the First Department Order, the Court unanimously affirmed the decision and order of the Supreme Court, New York County, entered September 24, 2017 (the "Dismissal Order") (R. 5-11). The Dismissal Order (1) granted Respondents' motion to dismiss Appellants' rent overcharge claim; and (2) denied Appellants' pre-answer cross-motion for summary judgment on Appellants' first, second, and third causes of action (R. 5-11).

By order entered May 16, 2019 (R. 12a), the First Department granted Appellants leave to appeal to this Court. Pursuant to CPLR 5713, the Appellate Division certified only the following question to be reviewed by this Court: "Was the order of [the First Department], which affirmed the order of Supreme Court, properly made?" (R. 12a).

It is respectfully submitted that the First Department Order was properly made and should be affirmed in its entirety.

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether this Court's jurisdiction is limited to considering only the law in effect at the time the order appealed from was made, when the appeal from such order is granted by permission of the Appellate Division on the limited certified question of "was the order of the Appellate Division properly made?"

Answer Below: The Court did not answer this question

Whether, under the law existing on January 15, 2019, a tenant's rent overcharge claim is barred by the four-year statute of limitations and "four-your look back rule," when, for more than six years prior to the tenant filing a rent overcharge claim: (i) the tenant's apartment was duly registered with DHCR; (ii) the tenant's rent was only increased by lawful increases; (iii) the tenant executed rent stabilized leases in each year without challenge; and where (i) the tenant does not provide any justification for the six-year delay, despite being put on express written notice of his or her potential rights in 2010; and (ii) the tenant admittedly fails to raise a colorable claim of a fraudulent deregulation scheme by the landlord?

Answer of the Court Below: The Court below answered this question in the affirmative.

Whether a statute amending the statute of limitations for rent overcharge claims is applicable to revive and reinstate a rent overcharge claim that was duly dismissed as time-barred by Supreme Court two years prior to the enactment of the

statute, when such statute is made applicable to "claims pending" as opposed to "actions and proceedings pending?"

Answer of the Court Below: The Court below did not answer this question.

Whether a statute amending a statute of limitations may be interpreted to revive and reinstate a rent overcharge claim that was duly determined to be time-barred when it was asserted, if such statute does not contain an unequivocal and clear expression of intention to revive a time-barred claim?

Answer of the Court Below: The Court below did not answer this question.

Whether amendments to procedural statutes, such as the statute of limitations, may only be applied to procedural steps taken subsequent to the enactment of the effective date of statute and are inapplicable to reach backwards and invalidate prior, legally effective acts or nullify defenses adequately raised and determined.

Answer of the Court Below: The Court below did not answer this question.

COUNTERSTATEMENT OF FACTS

A. The Parties

Belnord Partners, LLC ("Belnord") is the owner of the building located at 225 West 86th Street in Manhattan (the "Building") pursuant to a deed dated March 12, 2015 (R. 35; 156-168). Extell Belnord, LLC is the former owner of the Building pursuant to a deed dated October 19, 2006 (R. 35; 151-155).

Appellants are the rent-stabilized tenants of Apartment 403 (the "Premises") in the Building, having commenced occupancy "in or around 2005" (R. 36).

B. In 2005, Appellants Agree to a Rent of $18,500 Per Month

In 2005, Appellants moved into the Premises pursuant to a five-year lease (the (the "Lease") (R. 36, 50-70).[1] Appellants agreed to pay a monthly rent of $18,500 for the Premises (R. 6-7, 65). The Premises is a luxury apartment with eight rooms; four bedrooms, a living-room, a dining-room, a kitchen and a maid's room (R. 136). The Lease provided for annual rent increases of $500 through May 2008, and then a fixed rent of $20,000 per month through April 2010 (R. 65). At the time of Appellants' initial occupancy in 2005, consistent with the then-interpretation of the law in the industry, Extell's predecessor treated the Premises as "luxury" deregulated, notwithstanding that it was receiving J-51 tax benefits (R. 34, 37).

[1] Prior to Appellants' occupancy, the Premises was allegedly owner-occupied and, thus, temporarily exempt from rent-stabilization (R. 37).

C. This Court Decides *Roberts v Tishman Speyer Properties, LP*

In October 2009, this Court decided *Roberts v Tishman Speyer Properties, LP*, 13 NY3d 270 (2009) ("*Roberts*"). This Court held that, notwithstanding long-standing industry and DHCR practice, owners were not allowed to "luxury" deregulate apartments based on high-rent during the owner's receipt of J-51 tax benefits, and instead, such apartments remained subject to rent-stabilization during the period of the owner's receipt of J-51 tax benefits (*id.*).

In *Roberts*, this Court expressly stated that it did not determine the retroactive effect of its decision or the applicability of the statute of limitations (*id.*, at 287). Thus, even after this Courts' decision in *Roberts*, it remained unclear to landlords and tenants whether apartments that were "luxury" deregulated long-prior to *Roberts*, such as the Premises, were subject to rent-stabilization under the *Roberts* decision and, if so, what the legal rents should be for such units.

D. Promptly After the *Roberts* Decision, Extell Registers the Premises and Rent with DHCR and Gives Appellants a Rent-Stabilized Lease

Notwithstanding the issues expressly left open in *Roberts*, promptly after *Roberts*, in 2010, Extell registered the Premises as rent-stabilized and offered Appellants a rent-stabilized lease (R. 36, 98, 136, 169-174). Extell also provided Appellants with a rider that (1) expressly advised Appellants in writing of the *Roberts* decision; (2) described the uncertainty regarding its retroactive application; (3) advised Appellants that significant questions existed as to, *inter alia*, the proper

rent to be charged under the lease; (4) expressly put Appellants on notice of their right to challenge the lawfulness of the rent in the lease; and (5) stated that pending further determinations by the Courts, Extell would treat the Premises as rent-stabilized, offer rent-stabilized renewal leases to Appellants, and calculate any and all rent increases pursuant to applicable rent-stabilization guidelines (the "Rider") (R. 9-10, 36, 136, 170-171). Appellants both signed the Rider in 2010 (and each year thereafter), demonstrating that they were informed about the *Roberts* decision and all of the foregoing (R. 136, 171).

E. Appellants Sign Rent-Stabilized Leases for Six Years Without Challenge

After the expiration of Appellants' 2010 rent-stabilized lease, Extell (and subsequently Belnord) continued to give Appellants rent-stabilized renewal leases each applicable year, in 2011, 2012, 2013, 2014 and 2016 (R. 7, 10, 36, 71-91)[2], at rents which increased the legal rent only in accordance with the lawful increases permitted by the the Rent Stabilization Law and Code ("RSL" and "RSC," respectively) (R. 14a, 7, 10, 71-91).[3] Moreover, in each year after *Roberts*, since

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[2] Each of the rent-stabilized renewal leases in 2010, 2011, 2012, 2013 and 2014 contained the Rider, signed by Appellants, repeatedly putting Appellants on notice of *Roberts* and the uncertainty of the legal rent (R. 71-88). In 2016, Belnord gave Appellants another two-year rent-stabilized renewal lease, with a lawful increase, a preferential rent, and a rider providing that "the Apartment is subject to the Rent Stabilization Law, as amended, solely because the building in which the Apartment is located is currently receiving J-51 tax benefits" (R. 89-91). Such renewal lease expired May 31, 2018, after this action was commenced (R. 89).

[3] Appellants were also provided with preferential rental rates below the legal rent (R. 71-91).

2010, Extell (and subsequently Belnord) registered the Premises with DHCR as rent-stabilized (R. 96-100).

F. After More than Six Years Without Asserting Any Challenge to their Rent-Stabilized Rent, Appellants Request a Standstill Agreement

In July 2016, more than six years after Appellants were on notice of *Roberts* and Respondents' registration of the Premises with DHCR, Appellants raised their rent overcharge claim for the first time (R. 35, 47-49). As a result, Appellants and Belnord entered into a "Standstill Agreement" (the "Standstill Agreement") (R. 35, 47-49). Pursuant to the Standstill Agreement, Appellants and Belnord agreed, *expressly for "statute of limitations" purposes*, that Appellants' rent overcharge claim and related claims shall be deemed commenced as of July 26, 2016 (R. 35; 47-49 [emphasis supplied]).[4] The Standstill Agreement provides, *inter alia*, that:

> [Appellants] wish to preserve their rights...as if the [Appellants] had asserted whatever claims they have concerning the rent regulatory status of the Apartment as well as the legal rent therefor, including any rent overcharge claim and related claims, in court or in an administrative proceeding on July 26, 2016. Stated differently, [Appellants] do not want to be barred by any applicable statutes of limitation for not commencing an action or proceeding by July 25, 2016.

(R. 47).

[4] Extell was not a party to the Standstill Agreement (R. 49).

G. More than Six Years After Being Put on Express Notice of *Roberts*, Appellants Commence this Action Expressly "Under *Roberts*"

On November 22, 2016, more than six years after Appellants were expressly put on notice of *Roberts*, Appellants commenced this action expressly "under *Roberts*" (R. 34, ¶ 1). Notably, their Complaint falsely asserted that "Defendants have refused to recognize Plaintiffs' tenancy and leases as subject to RSL" (R. 40), despite the fact that the Premises had been registered as rent-stabilized *since 2010.*

Appellants' first cause of action seeks various forms of declaratory and injunctive relief regarding the regulatory status of the Premises, Respondents' rights to deregulate the Premises, and the proper lease forms and legal rents (R. 40-41). Appellants' second cause of action asserted a rent overcharge claim seeking a monetary award (R. 41-43). Appellants' third cause of action seeks to recover attorneys' fees (R. 43-44).

H. Respondents Move to Dismiss Appellants' Time-Barred Rent Overcharge Claim

Respondents moved to dismiss only Appellants' rent overcharge claim, arguing that: (1) Appellants' rent overcharge claim was unmistakably asserted after the expiration of the applicable four-year statute of limitations, particularly given the registration of the rent and Appellants' express notice of *Roberts* since 2010; and (2) there could be no finding of an overcharge as a matter of law because, since 2010, Respondents have registered the Premises as rent-stabilized, given Appellants rent-

stabilized renewal leases, and only increased the rent in such rent-stabilized leases in accordance with applicable rent-stabilization guidelines (R. 13-31, 101-132).

I. Appellants Cross-Move for Summary Judgment on All of Their Claims

In response to Respondents' pre-answer motion to dismiss Appellants' rent overcharge claim, Appellants cross-moved for summary judgment on all of Appellants' claims in the Complaint, including the first, second, and third causes of action (R. 133-192).[5] In support, Appellants submitted only a barebones, two-page "Joint Affidavit" stating that the factual basis for their summary judgment motion is detailed *entirely* in their Complaint (R. 135-136).

J. The Parties Submit Opposition and Reply

Respondents' opposition and reply (R. 193-216) highlighted the fact that, in Appellants' cross-motion, Appellants did not dispute their more than six-year delay in commencing this action, nor disputed that Respondents put Appellants on express notice of *Roberts* and their rights in 2010, and since that time, registered the Premises as rent stabilized, and only increased the rent by legal increases (R. 198).

In reply (R. 220-225), Appellants again did not dispute *any* of the above, nor offer any explanation for their extended, six-year delay. Instead, Appellants argued that the fact that "Defendants registered Plaintiffs' apartment as rent stabilized in

[5] Appellants' cross-motion was premature because issue had not been joined. Supreme Court did not expressly elect to convert Respondents' motion to dismiss into a motion for summary judgment pursuant to CPLR 3211(c), nor provide notice of same.

2010...is irrelevant" (R. 221), and "[t]here is simply no requirement...that the *Roberts* ruling, which Defendants apparently assume Plaintiffs should have been aware of even though they are not lawyers, somehow triggers a time requirement for the filing of an overcharge complaint" (R. 222).

THE DISMISSAL ORDER

On September 11, 2017, Supreme Court granted Respondents' motion to dismiss Appellants' rent overcharge claim and denied Appellants' cross-motion for summary judgment on their entire Complaint (R. 6-11). Supreme Court first recognized the undisputed facts that:

> Plaintiffs commenced their tenancy at the building in 2005 (before either defendants owned the building). Defendants' predecessor was receiving J-51 tax benefits at the time and plaintiffs' apartment was deregulated based on a high-rent vacancy...
>
> During the term of [Appellants' initial 5-year lease], the New York Court of Appeals decided the *Roberts* case. After this decision, Extell acknowledged that the apartment was subject to rent stabilization and gave plaintiffs a rent stabilized lease and registered the apartment with DHCR. After 2010, Extell and Belnord gave plaintiffs rent stabilized leases that incorporated lawful increases permitted by law.

(R. 6-7).

Supreme Court then distinguished this case from the facts in *Taylor v 72A Realty Assoc., L.P.* (151 AD3d 95, 105-106 [1st Dept 2017] ("Taylor")):

> In *Taylor*...the First Department concluded that even though there was no evidence of fraud by the owner when the tenants rent was set in 2000 (and the base date was February 2010), the Court considered rent well beyond the base date (*id.* at 105-06). However, that case involved numerous facts that distinguish it from the instant matter. The owner in *Taylor* waited until 2014 to file retroactive registrations with the DHCR, these registrations were filed less than four years before the filing of the complaint and the owner made these filings only when faced with

> litigation (*id.* at 106-107). Those facts are inapplicable here, where defendants registered the apartment starting in 2010, well before the instant litigation was brought, and directly informed plaintiffs about the *Roberts* decision.

(R. 8-9 [emphasis supplied]).

Supreme Court then also found that "[Appellants] reliance on *Altschuler v Jobman 478/480*, 135 AD3d 439 (1st Dept 2016), *lv denied* 28 NY3d 945 (2017) is similarly misplaced because in that case the First Department looked beyond the four year limitations period because 'plaintiff established a colorable claim of fraud'" (R. 9). Supreme Court continued that, in contrast, here, there is no fraud, stating:

> Here there is no evidence that defendants engaged in a fraudulent scheme to deregulate the apartment. Defendants claim, and plaintiffs have provided no evidence to the contrary, that the apartment was deregulated in a mistaken belief that it was no longer subject to rent stabilization. That belief changed after the *Roberts* decision and defendants took quick action to remedy the situation.

(R. 9).

Supreme Court also rejected Appellants' argument that there was no applicable statute of limitations for rent overcharge claims after *Roberts*, stating:

> Plaintiffs claim that there is no support for the claim that the *Roberts* ruling triggered a time requirement for filing an overcharge complaint. This argument makes little sense because it ignores the four-year statute of limitations period and the fact that plaintiffs were told back in 2010 about the *Roberts* decision. Plaintiffs did nothing until 2016. The fact that plaintiffs are not lawyers is immaterial--statute of limitations do not lose applicability

> simply because claimants are not lawyers. In any event, the rider attached to the 2010 lease invites plaintiffs to explore legal options…

(R. 9 [emphasis supplied]).

Accordingly, Supreme Court found that, whereas here, Appellants' sat on known rights *for more than six years* without any explanation, there was no reason *not* to apply both the four-year statute of limitations and four-year look back rule:

> Plaintiffs signed a lease in which future legal action regarding the lawfulness of the rent based on the *Roberts* decision is expressly contemplated. Instead of acting, plaintiffs waited and now ask this Court to overlook this inaction. However, plaintiffs have provided no reason why this Court should look beyond the four years. Defendants' motion to dismiss the second cause of action based on the statute of limitations is granted.

(R. 10 [emphasis supplied]).

Supreme Court then summarized its decision and rationale as follows:

> After the uncertainty that arose after the *Roberts* decision, some owners simply ignored the ruling and later scrambled to comply only after tenants brought overcharge complaints. But the defendants here did exactly what those owners (and the owner in *Taylor*) did not do—they acknowledged the *Roberts* decision, informed tenants about the ruling, quickly registered the apartment with the DHCR and provided subsequent rent increases in accordance with the applicable guidelines.
>
> The Court finds no reason to look beyond the four-year look back period where there is no indication of fraud by defendants—being mistaken about how the Court of Appeals was going to rule in *Roberts* does not automatically state a case for fraud. Further, plaintiffs provide no explanation why they waited so long to bring

> the instant action. Plaintiffs were told in 2010 about *Roberts* and they waited until 2016 to bring this case, after they had signed rent-stabilized leases in 2011, 2012, 2013, and 2014 [and 2016].

(R. 10 [emphasis supplied]).

Finally, Supreme Court denied Appellants' cross-motion "for summary judgment on all of Appellants' causes of action (for declaratory and injunctive relief, for rent overcharge and for attorneys' fees)" (R. 11). As two of Appellants causes of action remained to be determined by Supreme Court, Supreme Court designated the Dismissal Order as a "non-final disposition" order for purposes of appeal (R. 5).

DECISION OF THE COURT BELOW

The First Department unanimously affirmed the Dismissal Order by the First Department Order, dated January 15, 2019 (R. 13a-15a). The First Department held that: "Plaintiffs' claim for rent overcharges based on defendants' failure to charge rent stabilized rents while receiving J-51 tax benefits was correctly dismissed pursuant to CPLR 213-a" (R. 13a). The Court specifically recognized that: (1) "there is no fraud here"; and (2) "here, the tenant[s] received a rent stabilized lease and the landlord registered the rent with DHCR more than four years before any rent overcharge complaint was filed" (R. 14a). Specifically, the Appellate Division held:

> Consistent with both *Matter of Regina Metro. Co., LLC v New York Div. of Hous. & Community Renewal* (164 AD3d 420, 425-426 [1st Dept 2018]...) and *Taylor v 72A Realty Assoc., L.P.* (151 AD3d 95, 105-106 [1st Dept 2017]), there was no basis for considering the subject apartment's rental history more than four years before the commencement of the overcharge claim. In *Matter of Regina Metro. Co., LLC* (164 AD3d at 425-426), we held that fraud is the only exception to the four-year look back period to determine the legally regulated rent on the base date. There is no fraud here. In *Taylor v 72A Realty Assoc., L.P.* (151 AD3d at 105-106), we permitted a longer look back period under certain circumstances not necessarily indicative of fraud. Those circumstances are not present, where, as here, the tenant received a rent stabilized lease and the landlord registered the rent with DHCR more than four years before any rent overcharge complaint was filed

(R. 14a [emphasis supplied]).

Finally, the First Department held that:

> [P]laintiffs' motion for summary judgment on that claim and the dependent claims for treble damages and attorneys' fees was correctly denied. Plaintiffs abandoned their application for summary judgment on the claims for declaratory and injunctive relief by failing to make any arguments in support thereof on appeal.

(R. 14a-15a [emphasis supplied]).

ORDER GRANTING APPELLANTS LEAVE TO APPEAL ON A CERTIFIED QUESTION

In February 2019, Appellants moved before the Appellate Division for leave to appeal to this Court. By order entered May 16, 2019 (R. 12a), the First Department granted Appellants' motion for leave to appeal to the following extent:

> It is ordered that the motion [for leave to appeal] is granted, and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:
>
> > "Was the order of this Court, which affirmed the order of Supreme Court, properly made?"
>
> This Court further certifies that its determination was made as a matter of law and not in the exercise of its discretion.

(R. 12a [emphasis supplied]).

THE HOUSING STABILITY AND TENANT PROTECTION ACT OF 2019

On June 14, 2019, New York State enacted the Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36) (the "HSTPA"). The HSTPA was enacted more than *21 months after* Supreme Court dismissed Appellants' time-barred rent overcharge claim, *five months after* the First Department unanimously affirmed Supreme Court, and nearly *two months after* the First Department granted Appellants' leave to appeal to this Court on the certified question above.

Now, Appellants rely upon Part F of the HSTPA in an attempt to revive their time-barred and dismissed rent overcharge claim. As relevant here, HSTPA, Part F, § 4 amends RSL § 26-516 and HSTPA, Part F, § 6 amends CPLR 213-a (HSTPA, Part F, §§ 4, 6). As relied upon by Respondents, HSTPA, Part F, § 7 provides that the provisions of Part F "shall take effect immediately and shall apply to any claims pending or filed on and after such date..." (HSTPA, Part F, § 7 [emphasis supplied]).

ARGUMENT

POINT I

THE FIRST DEPARTMENT ORDER IS A NON-FINAL ORDER FOR PURPOSES OF THIS COURT'S JURISDICTION AND THUS, THIS COURT MAY ONLY ANSWER THE CERTIFIED QUESTION, WHICH NECESSARILY ONLY CONCERNS THE LAW AT THE TIME

As a threshold matter, the First Department Order is *not* an order that finally determined the *action* for purposes of this Court's jurisdiction on this appeal (as distinct from determining the rent overcharge *claim* is time-barred). Nor is the doctrine of implied severance applicable to deem it to be a final order. Accordingly, this Court's jurisdiction is strictly limited to answering *only* the question certified to this Court for review: "Was the Order of [the Appellate Division], which affirmed the order of Supreme Court, properly made?" (R. 12a). If the First Department was correct on January 15, 2019 when the First Department Order was made, then the certified question must be answered in the affirmative.

"[T]he Order of [the Appellate Division]" was made on January 15, 2019, well before the enactment of the HSTPA on June 14, 2019. Therefore, the certified question necessarily concerns only the law existing on January 15, 2019. To answer the certified question of whether the First Department Order was properly made, this Court need not, and indeed *cannot*, reach the issue of whether the HSTPA would apply to revive and reinstate Appellants' dismissed rent overcharge claim or otherwise change the result of the First Department Order (*see McMaster v Gould*,

240 NY 379, 385 [1925] ["This court reviews the question certified and no other...The decision may not be invalidated by a statute passed subsequently...If the court below was right when it certified the question, it is still right"] [emphasis supplied]). Under the laws existing on January 15, 2019, the First Department Order *was* properly made and should be affirmed (*see* Point II, *infra*), which answers the only certified question and ends the limited inquiry on this appeal.

Specifically, this appeal was granted by permission of the Appellate Division, and accordingly, this Court's jurisdiction is strictly limited by the State Constitution (*see Tyndall v New York Cent. & H.R.R. Co.*, 213 NY 691 [1915]). Specifically, New York State Constitution, Article 6, § 3(b)(4), provides that:

> Appeals to the court of appeals may be taken in classes of cases hereafter enumerated in this section...In civil cases and proceedings as follows:...
>
> (4) From a determination of the appellate division of the supreme court in any department, other than a judgment or order which finally determines an action or special proceeding, where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, *but in such case the appeal shall bring up for review only the question or questions so certified*; and the court of appeals shall certify to the appellate division its determination upon such question or questions...

([emphasis supplied]; *see also* CPLR 5601, 5602).

CPLR 5614 provides that "[t]he order of the court of appeals determining an appeal upon certified questions shall certify its answers to the questions certified..."

CPLR 5713 provides that:

> When the appellate division grants permission to appeal to the court of appeals, its order granting such permission shall state that questions of law have arisen which in its opinion ought to be reviewed. When the appeal is from a non-final order, the order granting such permission...shall certify the questions of law decisive of the correctness of its determination or of any separable portion of it."

(emphasis supplied).

In turn, CPLR 5611, captioned "When appellate division order deemed final" provides: "If the appellate division disposes of all the issues in the action its order shall be considered a final one."

As explained by this Court in *Burke v Crosson*, 85 NY2d 10 (1995):

> [A] 'final' order or judgment is one that disposes of all the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters. Under this definition, an order or judgment that disposes of some but not all of the substantive and monetary disputes between the same parties is, in most cases, nonfinal.

(*id.* at 15-16).

Thus, "a nonfinal order or judgment results when a court decides one or more but not all causes of action in the complaint against a particular defendant...but leaves other causes of action between the same parties for resolution in further judicial proceedings" (*Burke v Crosson*, 85 NY2d at 15-16).

Here, on its face, the First Department Order is a nonfinal order for purposes of this Court's jurisdiction within the meaning of the Constitution, as it did not finally determine the *action* between the parties (*see* New York State Constitution, Article 6, § 3[b][1], [4]). Instead, it disposed of only one, but not all of the claims in Appellants' Complaint (R. 32-46), and did not resolve Respondents' counterclaim. Specifically, it did not resolve Appellants' first cause of action for declaratory relief and injunctive relief, Appellants' third cause of action for attorneys' fees, or Respondents' counterclaim for attorneys' fees.[6] All of such claims remain subject to resolution in further judicial proceedings.

Consequently, Supreme Court marked the Dismissal Order as a "non-final disposition" (R. 5). In addition, in granting permission to appeal from the non-final First Department Order, the Appellate Division, in accordance with the New York State Constitution, Article 3, § 6(b)(4) and CPLR 5713, certified a single question for this Court's review, whether the First Department Order was properly made. This Court's jurisdiction is restricted to answering that question (*see* Constitution,

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[6] At the time of the Dismissal Order, Respondents had not answered the Complaint because Respondents made a pre-answer motion to dismiss Appellants' rent overcharge claim. Subsequent to the Dismissal Order, Respondents filed a "Verified Answer with Counterclaim" (NYSCEF Doc No 47) verified on March 9, 2018, asserting a counterclaim for their attorneys' fees incurred in the defense of this action. This Court may take judicial notice of Respondents' Verified Answer with Counterclaim. It is undisputed that said counterclaim for attorneys' fees has yet to be determined by Supreme Court.

Art. 3, §6[b][4]; *see generally Holt v Tioga County*, 56 NY2d 414, 418 [1982] ["[s]ince this appeal arises on a certified question, our review is limited..."]).

To be sure, this Court explained in *Burke v Crosson*, 85 NY2d 10 (1995) that:

> An exception to these general principles [of finality] exists in situations where the causes of action or counterclaims that have been resolved may be deemed to be "impliedly severed" from those that have been left pending. Where implied severance is available, the order resolving a cause of action or counterclaim is treated as a final one for purposes of determining its appealability or reviewability

(*id.* at 16).

However, as this Court expounded, a "close review" reveals that "the 'implied severance' doctrine has now evolved into a very limited exception to the general rule of nonfinality" (*id.*). Under this "very limited exception":

> [A]n order that disposes of some but not all of the causes of action asserted in a litigation between the parties may be deemed final under the doctrine of implied severance only if the causes of action it resolves do not arise out of the same transaction or continuum of facts or out of the same legal relationship as the unresolved causes of action

(*id.* [citations omitted]; *see also Sontag v Sontag*, 66 NY2d 554 [1986] ["[a]n order which finally adjudicates a cause of action *which is unrelated to, and independent of, another cause action in a complaint* or counter claim is final as to the former but not the latter"] [emphasis supplied]).

Here, the First Department Order (and the Dismissal Order) only disposed of Appellants' rent overcharge claim, but left unresolved claims between the same

parties arising out of the same continuum of facts and legal relationship for resolution in further judicial proceedings--including Appellants' claims for declaratory relief, Appellants' claims for injunctive relief, Appellants' claims for attorneys' fees, and Respondents' counterclaim for attorneys' fees.

In fact, in the First Department Order, the Court referred to Plaintiffs' "dependent claims...for attorneys' fees" (R. 14a [emphasis supplied]) and noted that, on appeal, "Plaintiffs abandoned their application for summary judgment on the claims for declaratory and injunctive relief" (R. 15a [emphasis supplied]), which claims remain subject to further judicial proceedings.

Moreover, in Appellants' reply on its cross-motion, Appellants argued: "the request for summary judgment on all causes of action is appropriate since all the causes of action relate to the second cause of action (R. 223 [emphasis supplied]). Appellants continued:

> [T]he overcharge claim [is] based on the fact that the Plaintiffs' apartment is rent stabilized due to the building's receipt of J-51 benefits....The first cause of action seeks a declaration that the apartment is rent stabilized due to the building's receipt of J-51 benefits, and the third cause of action seeks legal fees due to the overcharge -- both clearly are related to the second cause of action for an overcharge award...Here, the three causes of action are all related to each other.

(R. 223-224 [emphasis supplied]).

In addition, in Appellants' instant brief, Appellants assert that a "question presented" is: "[s]hould the Tenants be awarded attorneys' fees if the Appellate Division and lower court's ruling on their cross-motion for summary judgment is reversed?" (Appellants' Brief, p. 4), acknowledging that their unresolved attorneys' fees claim is related to their first and second causes of action.

Notably, in *Burke v Crosson*, 85 NY2d 10 (1995), this Court made clear that where, as here, the remaining claims include a dependent claim for attorneys' fees, the subject order "cannot be deemed final" for purposes of this Court's jurisdiction:

> Viewed against these principles, the...order granting plaintiffs summary judgment on their first cause of action and dismissing the others cannot be deemed final. Although all of the substantive issues between the parties were resolved, the order was facially nonfinal, since it left pending the assessment of attorneys' fees—a matter that plainly required further judicial action of a nonministerial nature.
>
> Moreover, implied severance was not available under these facts as a means of converting that facially nonfinal order to a theoretically final one. The resolved causes of action for declaratory and monetary relief were based on the same continuum of facts as the unresolved...attorney-fee claim...
>
> It has previously been said that a request for back pay and a request for attorneys' fees arising from the same wrong are "but a single cause of action" and that "one cannot divide a single cause of action" by "dividing the damage" in this manner...So too, in this case...the pending request for attorneys' fees could not have been divided from the otherwise resolved causes of action and implied severance was necessarily unavailable

(*id.* at 17-18 [citations omitted] [emphasis supplied]).

Accordingly, this Court's jurisdiction is strictly limited to answering only the question certified to this Court by the Appellate Division: "Was the [First Department Order], which affirmed the order of Supreme Court, properly made?" Thus, if the Appellate Division was right on January 15, 2019, the certified question must be answered in the affirmative (*see McMaster v Gould*, 240 NY at 385).

POINT II

THE FIRST DEPARTMENT ORDER WAS PROPERLY MADE UNDER THE LAW EXISTING AT THE TIME SUCH ORDER WAS MADE

A. Under the Law Existing on January 15, 2019, the Four-Year Statute of Limitations and Look-Back Rule for Overcharge Claims Apply Absent a Colorable Claim of a Fraudulent Deregulation Scheme

On January 15, 2019, CPLR 213-a, entitled "Actions to be commenced within four years; residential rent overcharge," established an unequivocal four-year statute of limitations for residential rent overcharge claims (the "Four-Year Statute of Limitations"). It provided, in relevant part, that "[a]n action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged" (CPLR 213-a). This Four-Year Statute of Limitations was mirrored in the RSL and the RSC. Namely, RSL § 26-516(a)(2) provided:

> [A] complaint under this subdivision shall be filed with the [DHCR] within four years of the first overcharge alleged...

RSC § 2526.1(a)(2) provided:

> A complaint pursuant to this section must be filed with the DHCR within four years of the first overcharge alleged...

In addition to the Four-Year Statute of Limitations, CPLR 213-a also precluded the Court from examining the rental history of an apartment prior to the four-year period immediately preceding the commencement of a rent overcharge action (the "Four-Year Look-Back Rule"), providing:

> [N]o award or calculation of an award of the amount of any overcharge may be based upon an overcharge having

> occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action.

The Four-Year Look-Back Rule was also set forth in the RSL and RSC. Specifically, RSL § 26-516(a)(2) provided:

> [N]o determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed...This paragraph shall preclude examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this subdivision.

Likewise, RSC § 2526.1(a)(2) provided:

> [N]o determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed.

Additionally, RSC § 2526.1(a)(2)(ii) provided, in relevant part:

> Subject to subparagraph...(iv)...of this paragraph [a "fraudulent deregulation scheme exception," discussed *infra*], the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section...shall not be examined. This subparagraph shall preclude examination of a rent registration for any year commencing prior to the base date, as defined in section 2520.6(f) of this Title, whether filed before or after such base date.

Critically, in conjunction with the Four-Year Statute of Limitations and the Four-Year Look-Back Rule, RSL § 26-516(a)(i) provided that:

> [T]he 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...plus in each case any subsequent lawful increases and adjustments. Where 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][i] [emphasis supplied]).[7]

Generally, given the unequivocal language of CPLR 213-a, if a tenant brings an overcharge action more than four years after the "first overcharge alleged," then the action is time-barred (see *Direnna v Christensen*, 57 AD3d 408 [1st Dept 2008]; *Mozes v Shanaman*, 21 AD3d 854, 854-55 [1st Dept 2005], *lv denied* 6 NY3d 715 [2006] ["The four-year Statute of Limitations applicable to both administrative and judicial rent overcharge claims, by its terms, commences to run with the 'first overcharge alleged'...Since the first overcharges alleged by plaintiff tenants occurred no later than 1996, these actions commenced in 2003 are time-barred"] [citations omitted]; *Stoltz v Gilbert*, 13 Misc 3d 137[A] [App Term, 1st Dept 2006]).

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[7] In addition, RSL § 26-516(g) provided 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." RSC § 2523.7(b) provided that "[a]n owner shall not be required to produce any rent records in connection with proceedings under sections 2522.3 and 2526.1 [overcharge] of this Title relating to a period that is prior to the base date."

Here, the first overcharge alleged by Appellants in their Complaint was in 2005 (R. 41 ["Plaintiffs have been overcharged, inasmuch as their rents were unlawfully set at the inception of their tenancies [in 2005]..."]). Nevertheless, Appellants did not commence this action until, at the earliest, July 26, 2016 (R. 47), more than eleven years after the first overcharge alleged. In fact, in their instant brief, Appellants argue that the *Roberts* decision "was not unforeseen" (Appellants' Brief, p. 13). Even if the "first overcharge alleged" is liberally construed to be the first rent-stabilized rent charged to Appellants and registered with DHCR in 2010, after Appellants were expressly put on notice of *Roberts*, then Appellants still waited more than six years to commence this action, also well after the expiration of the Four-Year Statute of Limitations.

This Court has made clear that the Four-Year Statute of Limitations and Four-Year Look-Back Rule will apply to residential rent overcharge claims *unless* the tenant has a colorable claim of a fraudulent deregulation scheme (the "Fraudulent Deregulation Scheme Exception") (*see Conason v Megan Holding, LLC*, 25 NY3d 1 [2015], *rearg denied*, 25 NY3d 1193 [2015]; *Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 [2014]).

In *Conason v Megan Holding, LLC*, 25 NY3d 1 (2015), *rearg denied*, 25 NY3d 1193 (2015), this Court explained that:

> The principal issue on this appeal [was] whether CPLR 213–a's four-year statute of limitations completely bars

> this [residential rent overcharge] claim. Because of the unrefuted proof of fraud in the record, we conclude that section 213–a merely limits tenants' recovery to those overcharges occurring during the four-year period immediately preceding Conason's rent challenge...

(25 NY3d at 6 [emphasis supplied]).

In the underlying appeal in *Conason*, the Appellate Division (109 AD3d 724 [1st Dept 2013]) "held that 'the four-year statute of limitations is not a bar in a rent overcharge claim *where there is significant evidence of fraud on the record*" (25 NY3d at 11 [emphasis added by this Court]). After a detailed discussion of the Four-Year Statute of Limitations and the origins of the Fraudulent Deregulation Scheme Exception, this Court affirmed the Appellate Division's holding that the Four-Year Statute of Limitations did not bar the subject rent overcharge claim *because* the "tenants...advance[d] a colorable claim of fraud within the meaning of *Grimm*" (*id.* at 16). Specifically, this Court held that:

> Here, tenants do not just make a generalized claim of fraud. They instead advance a colorable claim of fraud within the meaning of *Grimm*—*i.e.*, tenants alleged substantial evidence pointing to the setting of an illegal rent in connection with a stratagem devised by Megan to remove tenants' apartment from the protections of rent stabilization (*compare Matter of Partnership 92 LP v. State of N.Y. Div. of Hous. & Community Renewal*, 11 NY3d 859, 860...with *Matter of Boyd v. New York State Div. of Hous. & Community Renewal*, 23 NY3d 999, 992 NYS2d 764, 16 NE3d 1243 [2014])...In light of *Thornton* and *Grimm*, Supreme Court in this case properly considered tenants' counterclaim alleging rent overcharges notwithstanding expiration of the four-year

> statute of limitations *to which such claims are generally subject* (*see Mozes v Shanaman,* 21 AD3d 854 [1st Dept 2005], *lv denied* 6 NY3d 715 [2006] [CPLR 213–a barred the plaintiff sublessees' overcharge complaints brought more than four years after each of their separate tenancies commenced]).

(*Conason v Megan Holding, LLC*, 25 NY3d at 16-17 [emphasis supplied]).

Notably, this Court cited *Mozes v Shanaman*, 21 AD3d at 854-855 with approval, as a case where, absent fraud, the tenants rent overcharge claim was time-barred. To further support and illustrate the *Conason* holding, this Court cited to its opinion in *Matter of Boyd v New York State Div. of Hous. & Community Renewal,* 23 NY3d 999 (2014) ("*Matter of Boyd*") as a direct comparison to an overcharge claim where, as here, the Fraudulent Deregulation Scheme Exception was not met, such that examination of the history beyond the base date was barred and the *registered* rent on the base date controlled (*Conason v Megan Holding, LLC*, 25 NY3d at 16-17).

In *Matter of Boyd*, just as in this case, the tenant "filed her overcharge complaint more than four years after the building owner registered the monthly rent" (110 AD3d 594, 594 [1st Dept 2013], *rev'd* 23 NY3d 999 [2014] [emphasis supplied]). In reversing the Appellate Division, this Court held that DHCR properly used the registered rent on the base date because the tenant failed to "set forth sufficient indicia of fraud to warrant consideration of the rental history beyond the four-year statutory period" (*Matter of Boyd*, 23 NY3d at 1000-1001).

Likewise, in *Todres v W7879, LLC*, 137 AD3d 597 (1st Dept 2016), *lv denied*, 28 NY3d 910 (2016) ("*Todres*"), a post-*Roberts* overcharge case (R. 217-219),[8] this Court correctly held that because defendants "did not engage in a fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization," the lower court "should not have looked at the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action" (*id.*, at 598 [citations omitted] [emphasis supplied]; *see also Stulz v 305 Riverside Corp.*, 150 AD3d 558 [1st Dept 2017], *lv denied*, 30 NY3d 909 [2018] [in a post-*Roberts* overcharge case where the landlord "utilize[ed] the rent on the base date of four years prior to the filing of the complaint to compute the overcharges," affirming that the tenants' claims of post-*Roberts* fraud and other fraud were insufficient to look back to "the last legal rent paid by a rent-stabilized tenant...for the calculation of the current legal rent and overcharges"]). Thus, Appellants are unmistakably wrong when they categorically argue that Supreme Court dismissed Appellants' rent overcharge claim "[w]ith no precedential basis" (Appellants' Brief, p. 2) (*see also Breen v 330 E. 50th Partners, L.P.*, 154 AD3d 583, 584 [1st Dept 2017] ["The motion court correctly dismissed the rent overcharge

[8] Appellants claimed below that "all of the landlord's cited cases," including *Todres*, "did not involve a *Roberts* situation" (R. 191). Appellants are wrong (R. 208, 217-219).

claim, as plaintiff did not meet her burden of coming forward with any indicia of fraud to warrant looking beyond the limitations period..."]).

In comparison, in *Altschuler v Jobman 478/480*, 135 AD3d at 440, another post-*Roberts* overcharge case decided prior to *Todres*, the Court expressly applied the Fraudulent Deregulation Scheme Exception and found that: "*Because* plaintiff established a colorable claim of fraud...Supreme Court properly disregarded the rent charged four years prior to the filing of the rent overcharge claim..." (*id.* at 440 [emphasis supplied] [citations omitted]). Notably, in opposition to Respondents' motion to dismiss, Appellants relied heavily on *Altschuler*, arguing that it "is controlling" (R. 190-192, 222-223), and Appellants repeated the same claim that *Altschuler* "is controlling" on their first appeal. However, as Supreme Court correctly found, Appellants' "reliance on *Altschuler*...is...misplaced because in that case the First Department looked beyond the four year limitations period because 'plaintiff established a colorable claim of fraud'" (R. 9).[9]

Thus, here, where Respondents "did not engage in a fraudulent deregulation scheme to remove [the Premises] from the protections of rent stabilization" (*Todres*, 137 AD3d at 598) and instead affirmatively gave Appellants a rent-stabilized lease

[9] Notably, the overcharge action in *Altschuler* (Index No. 603556/09) was commenced by the tenants immediately after *Roberts*, not more than six years after the tenants were advised of *Roberts* and their apartment was registered with DHCR. Moreover, there is no indication in *Altschuler* that the Four-Year Statute of Limitations, *which can be waived by a defendant if not asserted* (*see* CPLR 3211[e]), was raised by the defendants or considered by the Court.

and registered the Premises as rent-stabilized with DHCR in 2010 promptly after *Roberts* and for more than six years prior to this action, Supreme Court properly applied the Four-Year Look-Back Rule and Four-Year Statute of Limitations to Appellants' belated overcharge claim (R. 9-10).

Moreover, after *Altschuler* and *Todres*, in *Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105 (1st Dept 2017), *lv dismissed* 30 NY3d 961 (2017) ("*Matter of Park*"), another post-*Roberts* rent overcharge case, the Appellate Division, First Department, citing *Todres*, found that:

> When the owner treated the apartment as deregulated in 2005 and discontinued rent registrations with DHCR, it did so based on a justifiable belief that the apartment was no longer subject to rent regulation and such filings were unnecessary...
>
> DHCR...properly concluded that there was no basis to look beyond the four-year limitation period...to challenge the rent...
>
> ...in this case, there is simply no evidence or indicia that the owner engaged in a fraudulent deregulation scheme to remove the apartment from the protections of the rent stabilization law (*Todres v W7879, LLC*, 137 AD3d 597, 598, 26 N.Y.S.3d 698 [1st Dept.2016], *lv. denied* 28 NY3d 910 [2016]). DHCR properly concluded that the owner did not engage in fraud when it removed the apartment from rent regulation in 2005 because it was relying on DHCR's own contemporaneous interpretation of the relevant laws and regulations. Similarly, DHCR rationally concluded that there was no fraud in the owner's failure to re-register the apartment until 2012, when the issue of the retroactive application of *Roberts* became apparent...Petitioner failed to raise a colorable claim of

> fraud warranting any further consideration of that issue (*Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999, 1000 [2014]).

(*Matter of Park*, 150 AD3d at 113-115 [emphasis supplied]).

Here, just as in *Matter of Park*, when the owner treated the Premises as exempt in 2005, it did so, as did every landlord, based on a justifiable belief that the Premises was no longer subject to rent regulation. The undisputed facts with respect to Respondents' actions post-*Roberts* are even more favorable here—Respondents (1) registered the Premises and rent with DHCR in 2010 promptly after *Roberts*, not even waiting for the issue of retroactivity to be decided, (2) expressly put Appellants on notice of *Roberts*, and (3) gave Appellants a rent-stabilized lease in 2010 (and thereafter, with lawful increases). It is beyond dispute that Appellants then just sat on their rights to challenge the rent-stabilized rent amount for more than six years (*compare 23rd St. Owner LLC v Seeber*, 55 Misc 3d 145[A] [App Term, 1st Dept 2017] ["The motion court correctly determined that the base date rent is the legal rent...Tenant failed to raise any triable issue as to fraud...so as to warrant consideration of the rental history beyond the four-year statutory period...Significantly, landlord complied with all of the rent registration requirements. Accordingly, the information on which tenant's overcharge claim is based was available when he moved into the apartment in 2010, at which time he was within the four-year period permitting a challenge to the rent without having to

show a fraudulent predicate"] [emphasis supplied]). Thus, here, there was no meritorious reason for the Court to disregard the applicable Four-Year Statute of Limitations or the Four-Year Look Back Rule, as the Courts correctly held.

Importantly, in Appellants' opposition and cross-motion below, Appellants did not dispute that they waited more than six years to commence this rent overcharge action after Respondents registered the rent as rent-stabilized with DHCR, gave Appellants a rent-stabilized lease, and advised Appellants of *Roberts* in 2010 (R. 135-138, 175-192, 198). Nor did Appellants' dispute that, in every rent-stabilized renewal lease since 2010, Respondents raised Appellants' rent in accordance with applicable rent-stabilization guidelines (R. 7, 135-138, 175-192, 198). Moreover, Appellants did not materially dispute below the absence of a colorable claim of a fraudulent deregulation scheme by Respondents (R. 135-138, 175-192, 198), as Supreme Court recognized (R. 9-10).

Indeed, on this appeal, Appellants again admit that, since registering the Premises as rent-stabilized in 2010, "[t]he subsequent renewal leases until 2016 were similar form leases...*with guideline increases*" (Appellants' Brief, p. 8 [emphasis supplied]). In the First Department Order, the Appellate Division relied upon the undisputed fact that: "[t]here is no fraud here" (R. 14a). Further, in distinguishing *Taylor*, the First Department relied upon the undisputed fact that: "here, the tenant[s] received a rent stabilized lease and the landlord registered the rent with DHCR more

than four years before any rent overcharge complaint was filed" (R. 14a). These undisputed facts cannot be, and are not, disputed on this appeal.

In fact, by cross-moving for summary judgment below, Appellants acknowledged that they had laid bare their proof with respect to any fraudulent deregulation scheme and required no discovery on the issue (*compare Bogatin v Windermere Owners LLC*, 98 AD3d 896 [1st Dept 2012] [holding that, unlike here, discovery was required on the limited issue "of the alleged fraudulent deregulation," because "in opposition to defendants' motion to dismiss the complaint, the plaintiff presented sufficient evidence that defendants had engaged in a fraudulent scheme to remove the subject apartment from rent regulation"]). In moving for summary judgment based solely on the Complaint, Appellants conceded they had no colorable claim of a fraudulent deregulation scheme.[10]

Thus, absent fraud, and especially because "[Appellants] were told back in 2010 about the *Roberts* decision [and] did nothing until 2016" (R. 9), and "[Appellants] provide[d] no explanation why they waited so long to bring the instant action" (R. 10), Appellants' rent overcharge claim was correctly dismissed as time-barred. Moreover, Supreme Court and the First Department correctly declined to

[10] To be sure, the undisputed facts make clear that Respondents did not engage in a fraudulent deregulation scheme, and instead, affirmatively took steps to immediately put Appellants on notice of *Roberts*, comply with the RSL and RSC, register and treat the Premises as rent stabilized, and only assess lawful rent increases each year since *Roberts*.

look beyond the four-year look back period where there was no fraud by Respondents and, where the rent was registered and set forth in a rent-stabilized lease for more than four years (*see Matter of Boyd,* 23 NY3d at 1000-1001).

B. Supreme Court and Appellate Division Correctly Distinguished *Taylor*; here, the Rent was Registered and Set Forth in a Rent-Stabilized Lease Promptly After *Roberts* and More than Six Years Before the Claim

Appellants' continued reliance on *Taylor*, in arguing that Respondents failed to establish the legal rent on the base date, is misplaced (Appellants' Brief, p. 17). As Supreme Court correctly held, *Taylor* is materially distinguishable from this case in numerous ways and the facts of *Taylor* are "inapplicable here" (R. 8-9).

Critically, in *Taylor*, the landlord filed DHCR registrations less than four years prior to the tenants' filing of the rent overcharge complaint and never gave the tenants a rent-stabilized lease (*id.* at 105-107; R. 8-9), as a consequence of which, the Appellate Division held the landlord could not establish the legal regulated rent on the base date and same was still subject to challenge (*see id.* at 105-107 ["Although the owner filed retroactive DHCR registrations in 2014...[t]hese registrations were filed less than four years before the filing of plaintiffs' complaint...Thus, they are subject to dispute...The Owner here failed to register apartment 5M and readjust the rent until 2014 when faced with this litigation"] [emphasis supplied]; *see* RSL § 26-516[a][i]). Simply, in *Taylor*, it was the

landlord's deliberate inaction and failure to take steps to comply with *Roberts* that preserved the tenants' overcharge claim.

Here, in contrast, Respondents immediately acted in accordance with *Roberts* by registering the Premises with DHCR, giving Appellants a rent-stabilized leases and notifying Appellants of *Roberts* (R. 9-10), *six years prior to the overcharge claim*, as a consequence of which, Respondents can and did establish the "legal regulated rent" on the base date in 2012. In stark contrast to the landlord in *Taylor*, Appellants do not dispute that Respondents registered the Premises and rent with DHCR and gave Appellants a rent-stabilized lease promptly after *Roberts* in 2010 and each year thereafter, more than six years prior to Appellants' overcharge claim challenging such rent. Thus, unlike in *Taylor*, at the time of Appellants' belated overcharge claim in 2016, the registered rents in 2010, 2011, and 2012 (which were set forth in rent-stabilized leases executed by Appellants without objection) were no longer subject to challenge, because Appellants did not challenge the registered rent-stabilized rent amounts for more than four years, notwithstanding their express knowledge of *Roberts* in 2010 (*see* former RSL § 26-516[a][i]).

It is by virtue of Appellants more than six-year delay after their rent was registered with DHCR that they were precluded from challenging that rent, a scenario not considered in *Taylor*. Indeed, in *Taylor*, the Appellate Division further clarified the reasoning of its holding, explaining that:

> We have recognized that in a *Roberts* situation where an owner had discontinued DHCR rent registrations based upon a justifiable belief that the apartment was not subject to rent regulation, it should not be penalized by rolling the rent back to the last registered rent (*Park*, 150 AD3d at 113, *citing Jazilek v Abart Holdings*, LLC, 72 AD3d 529, 531 [1st Dept 2010]). However, on the other hand, an owner *cannot use the lack of registration* or misapprehension of the law as a sword to establish a rent that clearly bears no relation to the appropriate parameters of rent regulation.

Here, as opposed to using "the lack of registration or misapprehension of the law as a sword" to establish an illegal rent, Respondents *registered* the rent with DHCR in 2010 (and each year thereafter) and *directly advised Appellants* of *Roberts* in 2010 *so they would be on notice of the law*. The rationale in *Taylor* does not apply. Appellants did nothing to challenge the registered regulated rent for more than six years and "now ask this Court to overlook this inaction" (R. 10).

In contrast to *Taylor*, in *Matter of Boyd*, where the tenant "filed her overcharge complaint more than four years after the building owner *registered* the monthly rent" (*Matter of Boyd*, 110 AD3d 594), this Court held that the overcharge claim was conclusively defeated because the tenant did not "set forth sufficient indicia of fraud to warrant consideration of the rental history beyond the four-year statutory period" (*Matter of Boyd*, 23 NY3d at 1000-1001). Thus, here, Supreme Court and the First Department properly concluded, based on sound reasoning and applicable law, that the facts in *Taylor* "are inapplicable here" (R. 10).

POINT III

IF THE FIRST DEPARTMENT ORDER IS DEEMED A FINAL ORDER, AND THIS COURT IS NOT LIMITED TO REVIEW OF THE CERTIFIED QUESTION, THE HSTPA DOES NOT APPLY TO REVIVE APPELLANTS' DISMISSED, TIME-BARRED RENT OVERCHARGE CLAIM

If this Court deems the First Department Order to be a final order for purposes of this Court's jurisdiction, and in turn, considers whether to apply the HSTPA to Appellants' dismissed rent overcharge claim, it is respectfully submitted that the HSTPA does not apply to revive and reinstate Appellants' dismissed and time-barred rent overcharge claim and thus, the First Department Order should be affirmed. Application of the HSTPA to resurrect Appellants' rent overcharge claim, which was dismissed as time-barred nearly two years prior to the HSTPA's effective date, would give the HSTPA unintended and unwarranted expansive retroactive effect.

Part F, § 7 of the HSTPA, upon which Appellants rely,[11] provides that: "This act (Part F) shall take effect immediately (June 14, 2019) and shall apply to any claims pending or filed on and after such date" (HSTPA, Part F, § 7).

"[W]hen presented with a question of statutory interpretation, [the] primary consideration is to ascertain and give effect to the intention of the [l]egislature" (*Kuzmich v 50 Murray St. Acquisition LLC*, 2019 NY Slip Op 05057 [2019]

[11] Notably, after arguing that the HSTPA should govern Appellants' dismissed rent overcharge claim, Appellants inconsistently argue that the "rent formulas" established under the old rent law should be applied to determine their legal rent (Appellants' Brief, pp. 22-26).

[citations omitted]). "[T]he reach of the statute ultimately becomes a matter of judgment [however] made upon review of the legislative goal" (*Matter of Duell v Condon*, 84 NY2d 773, 783 [1995] [citation omitted]). "In the construction of statutes, each word in the statute must be given its appropriate meaning, and sense must be brought out of the words used. Words will not be expanded so as to enlarge their meaning to something which the Legislature could easily have expressed but did not" (McKinney's Statutes § 94, Comment [citations omitted]).

Here, the Legislature's use of the phrase "claims pending" is unmistakably distinct from the language used by the Legislature in prior enactments of amendments to the *same* and related legislation. Namely, in 1997, the Legislature enacted the Rent Regulation Reform Act of 1997 ("RRRA-97") (L 1997, Ch 116). The RRRA-97 amended RSL § 26-516, the exact same provision amended by Part F of the HSTPA, to preclude calculation of rent overcharges based on a rental history prior to the four-year period preceding the filing of the action. Section 46 of the RRRA-97 provided that Section 33 would apply to "*any action or proceeding pending in any court* or any application, complaint, or proceeding before an administrative agency on the effective date of this act, as well as any action or proceeding commenced there after" (RRRA-97, § 46). That broad language certainly indicated a far more expansive intention by the Legislature as to what overcharge claims fell under the amended statute.

In enacting Part F of the HSTPA, the Legislature was certainly aware of, but did not use, the broad effective date language used in the RRRA-97 (*see* McKinney's Statutes, § 192 ["An amendatory act and the original statute are to be construed together, and the original act and the amendments are viewed as one law passed at the same time."]). In fact, Part F of the HSTPA amends the *same* section of law as Section 33 of the RRRA-97 amended.

Moreover, the Legislature directly referenced the RRRA-97 in § 6 of Part F of the HSTPA, *immediately prior to the effective date language in § 7* of Part F. Indeed, the Legislature has used the same or similar effective-date language as the language of RRRA-97 in a myriad of other legislative enactments.[12]

Significantly, in fact, in Part M of the HSTPA, *the Legislature used the phrase "actions and proceedings"* with respect to the effective date of Part M: "This act shall take effect immediately and shall apply to actions and proceedings commenced on or after such effective date" (HSTPA, Part M, § 29 [emphasis supplied]).

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[12] *See e.g.*, Real Property Law § 226-b, *as amd by* L 1983, ch 403 § 37 (eff June 30, 1983) (specifying that it is applicable to "all actions and proceedings pending on the effective date of this section"); General Corporation Law, § 61-a (eff April 14, 1941) (specifying that it is applicable to "all actions, suits or proceedings as may be pending and in which no final judgment has been made and entered at the time this act takes effect"); Act of June 21, 1983, L 1983 ch 318 § 3 (specifying that it is applicable to "every action or proceeding" that "still is pending before a court"); CPLR 2005, *as amd by* L 1983, c 318, § 3 (eff June 21, 1983) (specifying that it "shall apply in every action and proceeding hereto commenced and which either: still is pending before a court; or the time for taking of an appeal from any order or judgment in such action has not yet expired, and in all actions and proceedings hereafter commenced.").

Thus, it is beyond any serious dispute, that where the Legislature intended its amendments to apply to actions and proceedings, it expressly stated as such. Simply, if the Legislature intended Part F of the HSTPA to apply to any action or proceedings pending in any court, including appeals in such actions or proceedings, it knew how to do so and would have done so. It is well settled that when enacting a statute, the Legislature is presumed to act with deliberation and with knowledge of the existing statutes on the same subject (*see Theurer v Trustees of Columbia Univ. in City of New York*, 59 AD2d 196, 198 [3d Dept 1977] [explaining that, "[w]here existing statutes encompass the same subject matter, the Legislature is presumed to act with deliberation and with knowledge thereof"]).

The phrase "action or proceeding pending in any court" is markedly distinct from, and much broader than, the phrase "claims pending." The Legislature is presumed to be aware of caselaw construing the language "pending actions and proceedings" to apply to any actions still on appeal, even if determinations on the merits have been made, as this Court has previously held (*see Weissblum v Mostafzafan of New York*, 60 NY2d 637, 637-639 [1983] [construing an amendment to CPLR 2005 that was made applicable to "every action or proceeding still pending before a court"]; *Application of Rutherford Estates*, 301 NY 767, 768 [1950] [construing "pending proceedings" to include an appeal]; *see Pechock v New York State Div. of Hous. and Community Renewal*, 253 AD2d 655, 655 [1st Dept 1998]

[construing the language in RRRA-97 "any action or proceeding pending in any court" to include "the instant appeal"]; *see generally Gletzer v Harris*, 12 NY3d 468, 476 [2009]). As the Legislature is "presumed to be familiar" with existing case law, "where a statute has been interpreted by the courts, the continued use of the same language by the Legislature subsequent to the judicial interpretation is indicative that the legislative intent [was] correctly ascertained" (*Matter of Knight–Rider Broadcasting v Greenberg*, 70 NY2d 151, 157 [1987]; *see Desrosiers v Perry Ellis Menswear, LLC*, 30 NY3d 488, 497 [2017]). It follows that, the Legislature's intentional deviation from using the same language, subsequent to the judicial interpretation, is indicative that the Legislature had a different intention (*see Coane v American Distilling Co.*, 298 NY 197 [1948] [finding that a statute was prospective only because "significantly, omitted is a declaration found in a related provision [Laws 1941, ch. 350, adding § 61-a to General Corporations Law] that said section 'shall apply to all such actions, suits or proceedings as may be pending"], *citing* L 1941, ch 350, § 2).

With such knowledge, the Legislature chose to apply Part F of the HSTPA only to "claims pending," not "actions or proceedings pending in any court" (*see generally People v Schulz*, 67 NY2d 144, 150 [1986] ["The fact that the Legislature has seen fit to use markedly different language in the two provisions clearly indicates an intent that the two statutes be interpreted differently"]; *compare Theurer v*

Trustees of Columbia Univ. in City of New York, 59 AD2d at 198 ["adherence by the New York Legislature to its previous language is a substantial indication to us that class attendance was intentionally omitted as a requirements"]).[13]

Here, the Legislature departed from and rejected the effective-date language used in the RRRA-7 and instead used the narrower term "claims pending." The word "claims" should not be expanded to mean something that the Legislature could have expressed, but did not. Instead, given the Legislature's knowledge that "actions or proceedings pending" encompasses cases in which determinations on the merits have already been reached, the Legislature's use of the narrower phrase "claims pending," which does not include a claim that has been dismissed,[14] cannot be ignored (*see generally Perkins v Smith*, 116 NY 441, 448-449 [1889] ["Words having a precise and well settled meaning in the jurisprudence of [the State] are to be understood in the same sense when used in its statutes, unless a different meaning

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[13] Comparably, "[t]he legislature, by enacting an amendment of a statute changing the language thereof, is deemed to have intended a material change..." (McKinney's Statutes, § 193). Likewise, "[a] court may examine changes made in proposed legislation to determine intent" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584 [1998], *citing People v Korkala*, 99 AD2d 161, 166 [1998] ["rejection of a specific statutory provision is a significant consideration when divining legislative intent"] [additional citations omitted]).

[14] *See e.g.*, *Corsello v Verizon New York, Inc.*, 18 NY3d 777, 783 [2012] [referring to a claim that remains pending as distinct from a claim that was dismissed]; *MetLife Auto & Home v Joe Basil Chevrolet, Inc.*, 1 NY3d 478, 482, n. 1 [2004] [referring to claims that remain pending as distinct from claims that "have been dismissed]; *Burke v Crosson*, 85 NY2d at 18 n 4 [referring to the "dismissed claim and the pending claim"]; *Sirlin Plumbing Co. v Maple Hill Homes, Inc.*, 20 NY2d 401, 403 [1967] [referring to the "interrelationship between the claim that was dismissed and the claims still pending]).

is unmistakably intended"]; *see also Franklin v John Hancock Mut. Life Ins. Co.*, 298 NY 81, 84 [1948] ["in the decisional insurance law of New York, the word 'suicide,' on the one hand, and phrases like 'suicide...sane or insane,' on the other, long have had mutually and essentially divergent meanings which since nothing to the contrary appears the Legislature must here be taken to have recognized at the time of its enactment of the Insurance Law]).[15]

Notably, some Courts have already adhered to this logical interpretation (*see 315 Jefferson LLC v Antonio*, 2019 WL 3884587, 2019 NY Slip Op 29255 [Civ Ct, Kings County 2019] [having dismissed the rent overcharge claim on May 9, 2019, the Court denied a renewal motion after the enactment of the HSTPA, holding that the rent overcharge claim "was not pending at the time of the HSTPA enactment, having already been dismissed by this court," and opining that "[t]o hold otherwise

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[15] Notably, Black's Law Dictionary defines "pending" as "Remaining undecided; awaiting a decision" (Black's Law Dictionary [11th ed 2019]; *see e.g.*, *In re Moore*, 337 BR 79, 80-81 [Bankr EDNC 2005] ["Black's definition suggests that a case is no longer 'pending' after dismissal; once the case has been dismissed, there is nothing undecided remaining...That courts routinely equate 'pending' with 'not dismissed' is also reflected in *Hollowell v Internal Revenue Service (In re Hollowell)*, 222 BR 790, 794 (Bankr ND Miss 1998)...It is also reasonable to conclude from a policy standpoint that a case is no longer 'pending' once it has been dismissed."]).

Black's Law Dictionary defines a "claim" to be narrower than an action, as "a demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiffs ask for" (Black's Law Dictionary [11th ed 2019] [emphasis supplied]), and equates a "claim" to be akin to a "cause of action" (Black's Law Dictionary [11th ed 2019]). Likewise, Black's Law Dictionary defines a "stale claim," not a stale action, "as a claim that is barred by the statute of limitations or the defense of laches" (Black's Law Dictionary [11th ed 2019]). In contrast, "action" is defined as "a civil or criminal judicial proceeding" (Black's Law Dictionary [11th ed 2019]).

would give the HSTPA unintended retroactive effect notwithstanding that the prior decision of this court was decided based on the law existing at the time"]; *400 E 58 Owner LLC v Herrnson,* 64 Misc3d 1202[A] [Civ Ct, NY County 2019] [having dismissed the tenant's rent overcharge claim on June 13, 2019, the day before the HSTPA was enacted, the Court declined to apply the HSTPA because the claim was dismissed and not pending on the effective date of the Act"]).

Critically, as particularly relevant to this case, this narrower and reasoned interpretation would avoid giving the HSTPA unintended and unwarranted expansive retroactive effect so as to revive time-barred claims, particularly those previously determined by a Court to be untimely under CPLR 213-a. Certainly, without any statement as to the revival of time-barred claims, the legislature did not express any *clear* intent that Part F of the HSTPA was intended to revive, reinstate, or resurrect a *claim* that was already determined to be time-barred two years prior.

As this Court has repeatedly recognized, "[a]n intent on the part of the Legislature to effect so drastic a consequence [as to revive an already time-barred claim] must be expressed clearly and unequivocally" (*35 Park Ave. Corp. v Campagna*, 48 NY2d 813, 814-15 [1979] [declining to apply section 235-c of the Real Property Law, enacted after the action was commenced, to revive a claim already determined to be time-barred]). To wit, "[r]evival is an extreme exercise of legislative power [that] is not deduced from words of doubtful meaning.

Uncertainties are resolved against consequences so drastic" (*Hopkins v Lincoln Tr. Co.*, 233 NY 213, 215 [1922] [emphasis supplied] ["We find no token of a purpose to apply the statute by relation to rights already barred"]; *Sessa v State,* 63 AD2d 334, 336 [3d Dept 1978], *affd* 47 NY2d 976 [1979]; *see also Gleason v Gleason*, 26 NY2d 28, 36 [1970] ["It takes a clear expression of the legislative purpose...to justify a retroactive application"]). Thus, while the Legislature may have intended to apply the HSTPA to claims pending that have yet to be determined, any uncertainty as to whether the Legislature intended to *revive* claims *previously determined to be time-barred* must be resolved against consequences so drastic.

Comparably, when the Legislature has previously acted to revive and resurrect time-barred claims, it has been in extreme and understandable circumstances, *and* such statutes *expressly revived previously time-barred claims* and provided the claimant with a particular period of time within which to bring such previously time-barred claims (*see In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d 377, 406 [2017] ["our cases have taken a more functionalist approach, weighing the defendant's interests in the availability of a statute of limitations defense with the need to correct an injustice. Each time we have spoken on this topic, we described circumstances that would be sufficient for a claim-revival statute to satisfy the State Due Process Clause, with specific reference to the facts then before us...in each case, the legislature's revival of the plaintiff's claims for a limited

period of time was reasonable in light of that injustice"] [discussing cases concerning claim-revival statutes, including *Robinson v Robins Dry Dock & Repair Co.*, 238 NY 271 [1924] [claim revival statute [§ 23-a of the Civil Practice Act] excusing a lapse of time defense for death caused by a wrongful act or neglect of an employer, with a one year window to bring the action, after decedent was stripped of alternative remedy [a Worker's Compensation Act claim] due to a US Supreme Court ruling]; *Gallewski v H. Hentz & Co.*, 301 NY 164 [1950] [claim revival statute [§§ 27 and 28 of the Civil Practice Act] reviving time-barred actions by persons who had restricted access to the courts due to World War II]; *McCann v Walsh Constr. Co.*, 282 AD 444 [3d Dept 1953] [claim revival statute [L 1947, ch 77, § 624] amending the Worker's Compensation Law to allow for claims involving caisson disease, as potential claimants did not have knowledge the latent onset of the disease until many years after the statute of limitations expired], *affm* 306 NY 904 [1954]; *Hymowitz v Eli Lilly & Co.*, 73 NY2d 487 [1989] [upholding a claim revival statute [L 1986, ch 692, § 2] which revived time-barred actions regarding latent injuries caused by potential claimants' mothers taking diethylstilbestrol, as such claims were stale before they were discovered]).

In fact, critically, *the exact same Legislature that enacted the HSTPA also enacted the Child Victims Act*, effective February 14, 2019 [L 2019, ch 11, § 3], which added CPLR 214-g (and amended CPLR 208) to expressly and unequivocally

revive time-barred claims for victims of certain sexual offenses. Significantly, such statute, by the same Legislature, *expressly states that even claims that were previously dismissed as time-barred by a Court are revived* (*see* CPLR 214-g). Specifically, CPLR 214-g now provides that

> [E]very civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense...which is barred as of the effective date of this section because the applicable period of limitation has expired...is hereby revived, and action thereon may be commenced not earlier than six months after, and not later than one year and six months after the effective date of this section. In any such claim or action:...(b) dismissal of a previous action, ordered before the effective date of this section, on grounds that such previous action was time barred...shall not be grounds for dismissal of a revival action pursuant to this section.

Here, no such express intent of the part of the Legislature to effect so drastic a consequence as to revive a claim previously determined to be time-barred is found in the HSTPA, nor should it be read into the Act. Rather, unlike the Child Victims Act, written by the same Legislature as the HSTPA, there is *no* indication whatsoever in the HSTPA that it was intended to revive claims previously determined to be time-barred (*see Hopkins v Lincoln Tr. Co.*, 233 NY at 215 ["We find no token of a purpose to apply the statute by relation to rights already barred"]). Certainly, the Legislature did not clearly and unequivocally express an intent that the HSTPA should apply to claims *previously determined* to be time-barred (*see 35*

Park Ave. Corp. v Campagna, 48 NY2d 813, 814-15 [1979] ["The proviso in the amendment (L.1976, ch. 828, s 2)...at best is ambiguous and does not indicate an intention to resurrect a cause of action"]).[16]

Accordingly, absent an unequivocal expression in the HSTPA (such as in the Child Victims Act), the HSTPA *cannot* be interpreted so as to revive a claim that is already barred by the statute of limitations at the time such claim was asserted. This is particularly true because the HSTPA can be read to accomplish what was actually intended *without* reviving time-barred claims that tenants had allowed to lapse. Specifically, the HSTPA provides tenants who have properly asserted their rent overcharge claims with greater rights, such as an extended six-year overcharge recovery period and look-back period, but it does not, in any way, permit tenants to revive and assert time-barred claims, without an unequivocal expression of such intent from the Legislature. If a tenant has already lost an alleged claim by letting

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[16] Appellants argue that, even absent a clear expression of legislative intent, the HSTPA should still apply to revive their previously dismissed and time-barred rent overcharge claim because the HSTPA is allegedly "remedial" in nature. However, as this Court has explained:

> Classifying a statute as 'remedial' does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to "supply some defect or abridge some superfluity in the former law..."General principles may serve as guides in the search for the intention of the Legislature in a particular case but only where better guides are not available..."

(*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d at 584 [citations omitted]).

the statute of limitations run, the HSTPA does not and should not provide another bite at the apple for such tenants, or revive such time-barred claims.

In fact, even if this Court finds that, by "claims pending," the Legislature actually intended Part F of the HSTPA to be applicable to any actions or proceedings in any court, including this case, this Court has previously explained that "it takes a clear expression...of legislative purpose to justify' a retrospective application of even a procedural statute so as to affect proceedings previously taken in such actions" (*Simonson v International Bank*, 14 NY2d 281 [1964] [emphasis supplied], *quoting Coane v American Distilling Co.*, 298 NY 197 [1948]).

Thus, as this Court explained, when applying retroactive *procedural* legislation to pending cases, such legislation is applied to "future steps and stages" of the pending case, but "[i]t is inapplicable unless in exceptional conditions, where the effect is to reach backward, and nullify by relation the things already done" (*Simonson v International Bank*, 14 NY2d at 289 [emphasis supplied], *quoting Matter of Berkovitz v Arbib & Houlberg*, 230 NY 261 [1921]). In turn, "[s]tatutes of limitations are considered procedural because they are deemed as pertaining to the remedy rather than the right" (*Portfolio Recovery Assoc., LLC v King,* 14 NY3d 410, 416 [2010]).

"As procedural statutes may not retroactively destroy rights already accrued, such application to pending matters is only to procedural steps taken subsequent to

the effective date of the statute" (*Auger v State*, 236 AD2d 177, 179 [3d Dept 1997] [emphasis supplied] [citations omitted]; *People ex rel Central New England Ry. Co. v State Tax Comm.*, 261 AD 416 [3d Dept 1941] ["This rule [of retroactive application of procedural changes in law to pending proceedings] has been generally understood to refer only to those pending actions in which the procedural step changed by the new law has not yet been taken...Unless procedure is to be involved in chaos it must be governed by the law regulating it at the time the question of procedure arises"] [emphasis supplied], *citing Southwith v Southwick*, 49 NY 510 [1872] [additional citations omitted]; *Charbonneau v State of New York*, 148 Misc2d 891, 895 [Court of Claims, 1990], *affd* 178 AD2d 815 [1991], *affd* 81 NY2d 721 [1992] ["when it is said that procedural statutes are generally retroactive, what is really meant is that they apply to pending proceedings, and *even with respect to such proceedings, they only affect procedural steps taken after their enactment*...Here, the defendant's answers were served almost three years ago. *To apply this statute would invalidate an already served answer which was legally effective and an affirmative defense of lack of personal jurisdiction properly and adequately raised*...A new rule should not be applied to invalidate prior, legally effective acts"] [citations omitted] [emphasis added]).

Similarly, here, to rule as Appellants suggest is to open up the Courts to chaos because innumerable cases where the Courts properly ruled under the old law, now

come back, and innumerable claims that were previously time-barred as of the effective date of the act will be asserted, without any clear expression from the Legislature. Therefore, even if the changes in the statute of limitations (or procedure for reviewing the legal rent) set forth in Part F of the HSTPA are made applicable to this case, such procedural changes *cannot*, and should not (and were not intended to) be applied to reach backwards to nullify steps already taken in the case--including to invalidate Respondents' valid affirmative defense that was properly and adequately raised more than two years ago, and properly found to be meritorious by Supreme Court in *2017*, nearly two years before the enactment of the HSTPA, and affirmed by the Appellate Division five months before the enactment of the HSTPA.

This application would harmonize the Legislature's intent in stating that the changes in the law should apply to "*claims* pending," rather than "actions or proceedings pending in any court," as it would limit the retroactive application of the changes in law in Part F of the HSTPA to only those procedural steps yet to be taken in those cases, *i.e.*, cases where there has been no adjudication of the statute of limitations or the particular change in law at issue--and it would not invalidate prior legally effective defenses and acts (*compare Charbonneau v State of New York*, 148 Misc2d at 895).

Finally, construing the HSTPA to apply to and revive Appellants' rent-overcharge claims would constitute a substantive and/or procedural due process

violation. As set forth above, prior to the HSTPA, Appellants (and all owners and landlords) operated pursuant to a statute that specifically said that (1) if a registered rent was not challenged within four years, it could not be challenged (*see* prior RSL § 26-516[a][i]); and, critically, (2) that, any owner that had duly registered a rent-stabilized unit *shall not be required to maintain any records relating to such units for more than four years* prior to the most recent registration [*see* RSL § 26-516[g]; RSC § 2523.7[b]). Now, if the HSTPA is construed as Appellants' request (which it should not be), the Legislature would be penalizing these same owners and landlords who disposed of records pursuant to then-applicable law, by permitting tenants (whose claims have lapsed) to look back as far as necessary to determine an overcharge claim, including to periods for which owners disposed of the relevant records pursuant to applicable law and therefore cannot defend such claims. Thus, without notice that such records must be maintained, such owners and landlords are deprived of the opportunity to present a defense. Such legislation cannot be justified by a rational legislative purpose.

Instead, the HSTPA can be and should be construed to avoid such drastic consequences and due process violations, particularly as the statute does not contain any unequivocal intention to revive previously time-barred claims.

POINT IV

IF THIS COURT APPLIES THE HSTPA TO REVIVE AND REINSTATE APPELLANTS' DISMISSED AND TIME-BARRED RENT-OVERCHARGE CLAIM, THIS MATTER MUST BE REMANDED FOR RESPONDENTS' TO ASSERT APPLICABLE DEFENSES, PERFORM ANY NECESSARY DISCOVERY AND ESTABLISH THE LEGAL RENT UNDER THE HSTPA

It is respectfully submitted that, if this Court determines that the HSTPA applies to revive Appellants' dismissed and time-barred rent overcharge claim, then such claim must be remanded to Supreme Court for adjudication of all relevant issues under the HSTPA. The Dismissal Order was issued prior to Respondents answering the complaint, and thus, Respondents have never asserted an answer to the second cause of action in the complaint (the rent overcharge claim). If such claim is revived and reinstated, Respondents must be provided an opportunity to answer the rent overcharge claim, perform any necessary discovery, and prove that the rent amount charged to Appellants was, in any event, a legal rent. None of the fact-intensive issues regurgitated in Appellants' brief can be determined by this Court, nor can this Court, without an answer from Respondents to the rent overcharge claim, determine if there was any overcharge in the first place (even under the HSTPA), whether treble damages are appropriate if any overcharge is found, whether a rent freeze is appropriate, or which party should be awarded attorneys fees. Instead, it is submitted that, if Appellants' rent overcharge claim is

revived and reinstated pursuant to the HSTPA (which it should not be), then such claim must be remanded for proper adjudication in Supreme Court.

CONCLUSION

It is respectfully submitted that the First Department Order should be affirmed, with costs.

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