To Be Submitted By:
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APL-2018-00226

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Court of Appeals

STATE OF NEW YORK

JAMES TAYLOR and TAMARA JENKINS,

Plaintiffs-Respondents,

against

72A REALTY ASSOCIATES, LP and JANET ZINBERG,

Defendants-Appellants.

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

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Stuart Davidson-Tribbs, Jennifer Seide, Jacobus Gomes, Daniel Larkin, Morgan Castilla, and Eric Rochman (collectively, the "*Amici*") respectfully submit this brief as *amici curiae*. For the reasons detailed below 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 the registration of regulated rent. Each of these cases presents questions that will affect thousands of tenants in pending actions before the lower courts.

In this action, the *Amici* submit their brief to resolve one such question: how to set the legal regulated rent for apartments where the landlord either deregulated the apartment, post-*Roberts*,[2] and/or failed to re-register the apartment promptly, post-*Gersten*.[3] More specifically, in setting the legal regulated rent, should a landlord be entitled to vacancy increases, Individual Apartment Improvement ("IAI")

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

[2] "*Roberts*" refers to *Roberts v Tishman Speyer Properties, L.P.*, (13 NY3d 270 [2009]). In that decision, this Court held that luxury deregulation was unavailable in buildings receiving J-51 benefits.

[3] "*Gersten*" refers to *Gersten v 56 7th Ave, LLC*, (85 AD3d 189 [1st Dept. 2011]). In that decision, the First Department held that *Roberts* applied retroactively, and landlords were directed to re-register deregulated apartments, promptly.

increases, and Major Capital Improvement ("MCI") increases, when the post-*Roberts*, post-*Gersten* tenants (in occupancy during the period when such increases were sought), was not informed of their rent-stabilized rights? The answer is no.

Here, neither Defendants-Appellants 72A Realty Associates and Janet Zinberg ("Appellants") nor Plaintiffs-Respondents James Taylor and Tamara Jenkins ("Respondents") provides a comprehensive analysis as to how to calculate the legal regulated rent under HSTPA.

Rather than squarely addressing HSTPA, Appellants argue that the statute is unconstitutional. While HSTPA is undoubtedly constitutional, Appellants cannot properly raise such an argument, because the requisites of CPLR 1012(b) and Executive Law § 71 have been ignored. Until such time as that oversight is remedied, no constitutional challenge may be raised.

As for Respondents, they provide no substantive analysis as to how the legal regulated rent is to be determined, post-*Roberts*, under the HSTPA, nor address what constitutes "lawful increases" under the Act. That is understandable, because Respondents were the only tenants in occupancy during the period in which the apartment was impermissibly deregulated, and they remain in occupancy, today.

However, determining the legal regulated rent, post-*Roberts*, is crucially important for *Amici*. Their landlords either deregulated their apartments, post-*Roberts*, failed to re-register them, post-*Gersten*, or both. When their landlord

eventually re-registered their apartments (ostensibly in reliance on DHCR's guidance), the landlords took credit for statutory increases, including some mix of Major Capital Improvement ("MCI") increases, Individual Apartment Improvement ("IAI") increases, and vacancy increases. But, because the landlord was treating the subject unit as deregulated, the notifications precedent to such increase were not provided. In such circumstances, *Amici* posit that it would be impermissible for their landlords to take credit for such increases as "lawful increases."

Respectfully, the *Amici* submit that in issuing its order on this Appeal, to avoid further confusion in the lower courts, that this Court: (a) make clear how to establish the legal regulated rent, post-*Roberts* (as outlined below); and (b) explain that a landlord may not take statutory increases when the notifications precedent to such increases were not provided; or, alternatively; (c) specifically indicate that the Court is taking no position on whether statutory increases may be applied when the notifications precedent to such increases were not provided, and is leaving that issue open for future resolution.

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* resides in an apartment that was deregulated after *Roberts*, and/or failed to be registered promptly, after *Gersten*. Yet, for those apartments that were eventually re-regulated, the landlord took advantage of increases ordinarily available under the rent-regulations to landlords following those legal requirements.

Stuart Davidson Tribbs is a plaintiff in *Davidson Tribbs v 326-338 E 100th LLC,* (Index No. 150179/2018 [Sup Ct, NY County]).[4] The landlord deregulated his unit, post-*Roberts*.[5] In 2018, the landlord eventually re-registered his unit. And when it did so, it utilized some combination of vacancy increases, IAI increases, and MCI increases to re-establish the legal regulated rent - - even though the landlord was not treating the tenant in occupancy, at the time that the acts giving rise to such increases, as rent-stabilized, as the law required. In opining on Davidson-Tribbs's legal regulated rent, DHCR specifically (and inexplicably) allowed a vacancy increase for a tenant who was provided a free-market lease.[6]

Jennifer Seide is a plaintiff in *Seide et ano. v 25-21 31st Avenue LLC* (Index No. 717276/2018 [Sup Ct, Queens County]).[7] The landlord deregulated her unit,

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[4] Sachar Aff., ¶ 11.
[5] Sachar Aff., Ex. B.
[6] Sachar Aff., Ex. C
[7] Sachar Aff., ¶ 12

post-*Roberts*.[8] Her landlord did not re-register her apartment until 2016.[9] And when it did so, it utilized some combination of vacancy increases, IAI increases, and MCI increases to re-establish the legal regulated rent - - even though the landlord was not treating tenant in occupancy, at the time that the acts giving rise to such increases, as rent-stabilized, as the law required.[10]

Jacobus Gomes is a plaintiff in *Gomes et ano. v Vermyck LLC*, (Index No. 0713219/2018 [Sup Ct, Queens County]).[11] The landlord deregulated his unit, post-*Roberts*.[12] His landlord did not re-register his apartment until 2016.[13] And when it did so, it utilized some combination of vacancy increases, IAI increases, and MCI increases to re-establish the legal regulated rent - - even though the landlord was not treating tenant in occupancy, at the time that the acts giving rise to such increases, as rent-stabilized, as the law required.[14]

Daniel Larkin is a plaintiff in *Woodson et ano. v Convent 1 LLC, et ano.,* (Index No. 160547/2018 [Sup Ct, NY County]).[15] The landlord deregulated his unit, pre-*Roberts*.[16] His landlord did not re-register his apartment promptly, after *Gersten*

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[8] Sachar Aff., Ex. D.
[9] *Id.*
[10] *Id.*
[11] Sachar Aff. ¶ 13
[12] Sachar Aff., Ex. E.
[13] *Id.*
[14] *Id.*
[15] Sachar Aff. ¶ 14
[16] Sachar Aff., Ex. F.

(and, indeed, waiting some five (5) years after that decision).[17] When the landlord did so, it utilized some combination of vacancy increases, IAI increases, and MCI increases to re-establish the legal regulated rent, even though the landlord was not treating tenant in occupancy, at the time that the acts giving rise to such increases, as rent-stabilized, as the law required.[18]

Morgan Castilla is a plaintiff in *Yang, et al., v Creative Industries Inc., et ano.*, (Index No. 155681/2017 [Sup Ct, NY County]).[19] The landlord deregulated her unit, pre-*Roberts*, and did not register promptly, after *Gersten* (and, in fact waited some six (6) years after that decision to register).[20] And when it did so, it utilized some combination of vacancy increases, IAI increases, and MCI increases to re-establish the legal regulated rent - - even though the landlord was not treating tenant in occupancy, at the time that the acts giving rise to such increases, as rent-stabilized, as the law required.[21]

Eric Rochman is a plaintiff in *Mahmood et al.v Riverside 1795 Associates L.L.C. et al.*, Index No. 157260/2019 [Sup Ct, NY County]).[22] The landlord deregulated his unit, pre-*Roberts*, and did not promptly register, after *Gersten* (and,

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[17] *Id.*
[18] Sachar Aff., Ex. G.
[19] Sachar Aff., ¶ 15.
[20] Sachar Aff., Ex. I.
[21] *Id.*
[22] Sachar Aff., ¶ 16.

in fact waited six (6) years to register).[23] And when it did so, it utilized some combination of vacancy increases, IAI increases, and MCI increases to re-establish the legal regulated rent - - even though the landlord was not treating tenant in occupancy, at the time that the acts giving rise to such increases, as rent-stabilized, as the law required.[24]

ARGUMENT

I. HISTORY OF RENT-REGULATION IN J-51 BUILDINGS, POST-*ROBERTS*

The post-*Roberts* history of rent regulation should leave DHCR and landlords ashamed, and meet with this Court's sharp disapproval at the disrespect shown to its rulings.

In 2009, this Court entered its ruling in *Roberts*, holding that luxury deregulation was unavailable in buildings receiving tax incentives pursuant to the J-51 Program. *Roberts* did not decide every aspect of rent regulation relating to that Program Program and made clear that there were still "issues yet to be decided, including retroactivity, class certification, the statute of limitations, and other defenses that may be applicable to particular tenants." (*Roberts* at 287.) One thing was clear: luxury deregulation was impermissible, post-*Roberts*.

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[23] Sachar Aff., Ex. J.
[24] *Id.*

For some of the *Amici*, their landlords' response was to ignore *Roberts*, and keep deregulating as if this Court had never ruled. Davidson-Tribbs's landlord deregulated his apartment in 2015, six (6) years after *Roberts*. Seide's landlord deregulated her apartment in 2013; Gomes's landlord deregulated his apartment in 2010.[25]

DHCR was asleep at the wheel and did nothing prior to 2016 (as described below) to remedy the onslaught of post-*Roberts* deregulation. Tragically, it was (and is) decidedly easy to uncover impermissible post-*Roberts* deregulation – simply compare an earlier tax bill for a J-51 Building, with a later tax bill. Each will show the number of rent-regulated units. If the number in the later tax bill is smaller, the landlord was engaged in impermissible, post-*Roberts* deregulation.[26] As a result of DHCR's somnolence, thousands of New Yorkers remained in ignorance of their rent-stabilized rights, and lost their homes.

On August 18, 2011, the First Department, in *Gersten*, held that *Roberts* applied retroactively, and later explained:

> In 2011, this Court decided *Gersten v 56 7th Ave. LLC* (88 AD3d 189 [1st Dept 2011]), holding that *Roberts* has retroactive application. We reached our conclusion by reasoning that the Court of Appeals had not established a new principle of law; it only construed law that had been in effect for years (*id.* at 198). Although our decision in *Gersten* was appealed, the appeal was withdrawn in March 2012 (18 NY3d 954

[25] Not every landlord failed to follow this Court's decision. The landlord in *Reich v Belnord*, currently pending before this Court, actually provided a *Roberts* notice to their tenants.
[26] *Compare* Sachar Aff., Ex. K with Sachar Aff., Ex. L., (and Sachar Aff., Ex. M).

> [2012]). Since that time, controlling authority has required that owners who had previously luxury decontrolled apartments while still receiving J-51 tax benefits must register those apartments and retroactively restore them to rent stabilization.

Park v New York State Div. of Hous. & Cmty Renewal, (150 AD3d 105, 110-111 [1st Dept 2017]).

Like with *Roberts*, landlords' reaction to *Gersten* was to simply ignore the ruling. Larkin's landlord failed to restore his apartment to rent-stabilization for years. Castilla's landlord did likewise, as did Rochman's landlord. Uncovering post-*Gersten* wrongdoing is also incredibly easy. Compare the number of rent-stabilized units listed on a J-51 landlord's tax records with the number of units in the subject building. If the numbers do not match, then the landlord is engaged in wrongdoing.[27] Once again, DHCR failed to take that step, and thousands of more New Yorkers remained in ignorance of their rent-stabilized rights, and lost their homes.

It gets worse. Seven (7) years after *Roberts*, and five (5) years after *Gersten*, DHCR finally sent letters to New York landlords that participated in the J-51 Program.[28] Although recognizing that any tenant who was not provided a rent-stabilized lease during the pendency of their landlord's participation in the J-51 Program (even if participation had ended) was entitled to one, DHCR only required landlords currently in receipt of J-51 Benefits to advise their tenants of their rent-

[27] *Compare* Sachar Aff., Ex. N with Sachar Aff., Ex. O.
[28] A sample of the DHCR Form Letter is attached to the Sachar Aff., as Ex. P.

stabilized rights.[29] In other words, if the J-51 Benefit had expired, DHCR told landlords they could ignore this Court's *Roberts* decision and the First Department's *Gersten* decision. *Amici* are aware of no authority that would allow an executive agency to advise that landlords could ignore binding court decisions, especially in such cavalier a manner. For thousands of tenants, their landlords never registered, and the tenants remained in ignorance of their rent-stabilized rights. They remain so, today.

In 2017, eight (8) years after *Roberts*, and six (6) years after *Gersten*, DHCR issued the "J-51 FAQ"[30] which ostensibly advised landlords how to register apartments, post-*Roberts*. The J-51 FAQ utilized the DHCR Formula, which works as follows:

> **1.** Identify[] the rent stated in the most recent stabilized lease prior to the improper deregulation; then
>
> **2.** Identify[] and add[] to the rent, all subsequent vacancy and renewal leases and apply the appropriate statutory vacancy/longevity increases and guidelines increases set by the New York City Rent Guidelines Board that were in effect at that time, as well as adding any other lawful and document rent increases for Individual Apartment Improvements (IAIs) and/or Major Capital Improvements (MCI rent increases[....][31]

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[29] *Id.*
[30] Attached to the Sachar Affirmation as Ex. Q.
[31] *Id.*

Thus, for a landlord that deregulated an apartment, post-*Roberts*, or failed to retroactively register, post-*Gersten*, DHCR allowed that owner to take MCI increases, IAI increases, and vacancy increases. For example, to establish Davidson-Tribbs's legal regulated rent, his landlord took a vacancy increase for a tenant that first occupied the unit in 2014, and vacated in 2015, and who was provided with a "free market" lease while the landlord was in receipt of J-51 Benefits. DHCR actually allowed the landlord to take a vacancy increase, even though the landlord was in direct violation of *Roberts*, and *Gersten*.[32]

Statutory increases are only allowed if a landlord was treating the apartment as rent-stabilized at the time such increases are taken. DHCR's response to a landlord's multi-year failure to follow *Roberts*, and *Gersten*, is to pretend such failures never occurred, whitewashing the landlord's misconduct at the tenant's expense. DHCR's endorsement of a landlord's fraud cannot be countenanced.

How can this Court permit such a flagrant disregard of its binding authority, and that of the Appellate Division, by both DHCR, and New York City's landlords, by allowing utilization the DHCR Formula's statutory increases? Clearly, it should not.

[32] Sachar Aff., Ex. B

II. THE DHCR FORMULA IS ARBITRARY, CAPRICIOUS AND UNCONSTITUTIONAL. MOREOVER, IT REQUIRES TENANTS TO PAY FOR DHCR'S MISTAKES, AND THOSE OF THEIR LANDLORD

The DHCR Formula allows, as "lawful increases," MCI increase, IAI increases, vacancy increases, and RGB increases. Thus, as noted, the DHCR Formula requires pretending the landlord had treated the subject apartment as regulated, even though the landlord did the opposite, for years after this Court and the First Department held that regulation and re-registration was required. As explained below, not only should the DHCR Formula rent increases not be allowed under principles of fundamental fairness, allowing such increases violates the tenants' due process rights.

A. MCI Increases

A landlord may offset the cost of an MCI (a building-wide improvement, such as a new boiler), by seeking an increase of a rent-stabilized tenant's rent. As described in RSC § 2522.4, that process works as follows: a landlord performs the MCI, and seeks DHCR's permission to take the cost of that improvement as a rent increase. In turn, DHCR notifies each of the rent-stabilized tenants in the building, and the tenants are allowed to object to the cost of the MCI to DHCR. Eventually, DHCR either allows, or disallows, that MCI (in part based on the tenants' comments), and determines the amount of the resulting rent increase.

Here, however, Landlord was not treating Tenants, or their predecessors, as rent-stabilized. As a consequence, they were never informed of any MCIs, and never afforded the opportunity to object, as the RSC requires. Yet, when the apartment was re-registered, DHCR and Landlord saddled Tenants with MCI increases. It is simply unfair that, under the DHCR Formula, tenants (including the *Amici*), are forced to pay for MCIs upon which they did not have the opportunity to opine, and that it is arbitrary and capricious for DHCR to simply ignore the RSC's MCI notification requirements. Moreover, it violates fundamental due process considerations to require a tenant to pay for an MCI, when such tenant was denied an opportunity to participate in the MCI approval process, and was not even given notice of such proceeding, as the RSC requires.

B. IAI Increases

Rent-stabilized leases are required to be accompanied by an addendum, advising tenants if their landlord performed IAIs,[33] and sought the increases.[34] The contemporaneous tenant thus has an opportunity to challenge those IAIs.[35] The

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[33] IAIs are, axiomatically, work that "improves" the apartment. According to the First Department, such IAIs can include "the installation of new thermal break windows; the demolition of walls and construction of a new closet in one bedroom; the removal and installation of new kitchen cabinets and countertops; the installation of new appliances, including a dishwasher and refrigerator; the installation of a new sink, faucet and floor in the kitchen; the refinishing of all doors; and the installation of new tiles around the plumbing work and new closet shelving." (*Taylor v 72A Realty Assocs., L.P.*, 151 AD3d 95, 98–99 [1st Dept 2017])

[34] Attached to Sachar Affirmation as Exhibit R is a sample addendum, providing notice of IAI increases.

[35] It is important to challenge putatively performed IAIs promptly, because as time goes by wear and tear makes it difficult to tell when IAIs were performed.

Amici landlords were not treating the apartments as rent-stabilized, and accordingly the tenants did not receive the required forms disclosing IAIs. How then, can DHCR allow a landlord to take credit for IAIs, when the tenant in occupancy was not informed such IAIs had been performed, and were subject to challenge, as the RSC required? Tenants who occupied after such IAIs were performed were similarly not provided notice.

By ignoring the RSC, and allowing the landlord to take credit for IAI increases, DHCR not only behaved in an arbitrary and capricious manner, it violated due process.

C. Vacancy Increases and RGB Increases

Nor should vacancy increases be afforded to a landlord that was not following the law. Prior to HSTPA, when a rent-stabilized apartment became vacant, a landlord was allowed to take a percentage increase in the rent, usually around 20%. The DHCR Formula allows the landlord a vacancy increase for the tenant who vacated even though that tenant was given a "free-market," not a rent-stabilized lease. In other words, the DHCR Formula pretends the vacating tenant was rent-stabilized, when it was not, contrary to the law.

A rent-stabilized lease is of significant value, and no landlord should be permitted to take credit when a tenant was not properly informed of their rent-

stabilized status, regardless of the reason, and then reap a vacancy increase when that tenant departs.

Nor are RGB increases allowed. The First Department has held a landlord who has not properly registered an apartment cannot take such increases. (*215 W 88th St. Holdings LLC v New York State Div. of Hous. and Community Renewal*, (143 AD3d 652, 653 [1st Dept 2016] ["However, we disagree with the court that [DHCR] acted within its legitimate powers when, in calculating the overcharge, it afforded the owner the benefit of the percentage increases it would have received, at each renewal, in accordance with the RGB[], had it been charging a legal, rent-stabilized rent ... The statute makes no allowance for circumstances such as a successor owner's good faith or reliance on agency determinations in its favor that are later rescinded."].) And, clearly, if RGB increases are not allowed (even if the landlord was relying, in good faith, on DHCR), other increases, such as the aforementioned vacancy increases, should similarly be barred.

In sum, the DHCR Formula seeks to shift the consequences for the willful disregard of *Roberts* and *Gersten* from the landlords, and onto New York City's rent-regulated tenants, the only innocent stakeholders. What could be more arbitrary or capricious (not to mention unconstitutional) than for DHCR to engage in a game of make-believe, and subject tenants to rent increases, when the landlords seeking such increases were never in compliance with the very regulations DHCR purports to

oversee, and, tenants were not provided the required notifications precedent to such increases? DHCR cannot waive the RSC's requirements to retroactively apply immunity to New York's landlords, at the expense of New York's tenants, when those landlords were disobeying this Court's, and the Appellate Division's directives.

Consequently, as the DHCR Formula is an arbitrary, invalid, and unconstitutional methodology to establish the legal regulated rent, it cannot be utilized.

Fortunately, HSTPA provides a necessary corrective. To remedy the years of post-*Roberts*, post-*Gersten* misconduct by J-51 landlords, this Court should employ the re-registration methodology provided by the Act.

III. RENT OVERCHARGE CLAIMS SHOULD BE CALCULATED PURSUANT TO HSTPA

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

A. Methodology One: The Last Reliable Rent

The first option provides:

> ...[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. So, the very first question to be resolved is "can we identify a reliable rent registration, served upon the tenant?" Technically, the analysis should stop here, because this question was never addressed below, and this action should be remanded to conduct that inquiry.

But thousands of tenants are waiting for guidance from this Court. So, for the purposes of this analysis, assume that the last "reliable" registration is the one preceding the impermissible deregulation, and that Landlord can meet its burden of proof by demonstrating that such registration was served upon the tenant then in occupancy. Then, the question moves on to what is meant by "subsequent lawful increases or adjustments."

As discussed above, it would be impermissible for Landlord to take an MCI increase, if the tenant was not provided with the required MCI notice (because they were not being treated as rent stabilized), nor given the opportunity to object, as provided by the RSC. Thus, any MCI increase, taken when then apartment was unregistered, would not be a "lawful increase or adjustment," because the landlord was acting contrary to law.[36]

Again, for reasons outlined more fully above, IAI increases would also not be permitted, unless the tenant was informed of such improvements, and given the

[36] MCI increases taken when the apartment was properly registered (even if registered at the proper amount), would be permissible, since the amount of the MCI increase is untethered to the legal regulated rent.

opportunity to verify them. It appears that Appellants were able to provide such evidence. But, for the *Amici* unless the landlord demonstrates not only that it has the required IAI documentary evidence (in the form of invoices, cancelled checks, and the like), but that the requisite disclosures were made to the contemporaneous tenant, such IAI increases would also not be a "lawful increase or adjustment."

Nor would vacancy increases (except for that allowed for the rent-stabilized tenant who vacated prior to the impermissible deregulation) be considered a "lawful increase or adjustment." A rent-stabilized lease is of significant value, and no landlord should be allowed to take credit for a vacancy increase when tenants were misinformed as to their apartment's rent-stabilized status, (regardless of the reason), and then reap a vacancy increase when that tenant departs. Not surprisingly, when registration failures occur, courts disallow vacancy increases. (*Gold Rivka 2 LLC v Rodriguez*, 64 Misc 3d 1228(A) [Civ Ct, 2019] [vacancy and rent guidelines board increases barred because apartments were unregistered]; *EMA Realty v Leyva*, 64 Misc 3d 11 at 15 [App Term 2019] [lack of proper registrations barred vacancy increases].)

Finally, unless the apartment was registered, the landlord cannot take RGB increases. In *215 W 88th St. Holdings LLC*, the First Department reiterated that even when a landlord acts in purported "good faith" or relies on "agency determinations," it cannot take RGB increases if the apartment was not properly registered. (*Id.* at

653). While recognizing it was an "arguably harsh result," the First Department in opinion disallowed RGB increases during the period when an apartment was not properly registered with DHCR. (*Id.*).

That is all then relatively straightforward. Go back to the last reliable registered rent, make sure it was served upon the tenant, and take any increases, subject to the condition that such increases must be proper, and cannot be had for tenants who were not fully informed of their rent-stabilized rights.

But, what if methodology one is unavailable, either because the apartment was just registered for the first time, or because there is no reliable rent registration served upon a tenant? Methodologies two and three tell us.

B. Methodology Two: Initial Registrations

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.

Id. This methodology is applicable if the apartment was never registered, a complaint was never filed, and only goes into effect once that registration takes place. But, it is inapplicable here, and is almost impossible to imagine coming up in the context of a J-51 case.

C. Methodology Three: There is No Reliable Rent History

What if the landlord is unable to produce any reliable rent-registration, or demonstrate that any registrations were served upon the tenant? In that situation, one utilizes the third methodology, which provides:

> 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 granted.

DHCR directs litigants and the courts precisely how to determine the legal regulated rent under the third methodology: the default formula. And, it bears noting, that although the statute says "DHCR" courts (including this Court) use that to mean that DHCR's methodology should be deployed within the context of a dispute, not that every claim with an unreliable rent history should be sent to DHCR for determination. (*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-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].)

D. Determining the Legal Regulated Rent under the Default Formula

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 v 16-26 E. 105, LLC*, 2019 NY Slip Op 07026 [1st Dept Oct. 1, 2019].)[37] 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

[37] *Amici*'s counsel was counsel for the plaintiffs in *Simpson*.

(iii) the base date rent is the product of a fraudulent scheme to deregulate the apartment; or

(iii) 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)[.]

RSC § 2522.6(b)(3). Once the legal regulated rent is set, the difference between the lowest of the RSC § 2522.6(b)(3) options, and the rent actually charged, is the amount of the tenant's overcharge.

E. The Method of Last Resort: The DHCR Sample Method

The RSC § 2522.6(b)(3) default formula has one more potential methodology: the DHCR Sample Method. Subsection iv of RSC § 2522.6(b)(3) provides that: "if the documentation set forth in subparagraphs (i) through (iii) of this paragraph is not available or is inappropriate, [the legal regulated rent shall be set at] an amount based on data compiled by the DHCR, using sampling methods determined by the DHCR,

for regulated housing accommodations." It is premature to turn to the DHCR Sample Method, until all other possible registration methodologies have been exhausted.

IV. APPELLANTS' CONSTITUTIONAL CONCERNS ARE MAKEWEIGHT

In New York, legislation is not only presumed to be constitutional, but it is also presumed that the Legislature investigated and found the existence of a situation requiring remedial action (*see Montgomery v. Daniels,* 38 NY2d 41, 54 [1975]). Nevertheless, in their letter brief of October 16, 2019, Appellants argue that HSTPA is unconstitutional.

A. APPELLANTS HAVE NOT FOLLOWED CPLR 1012(b), NOR EXECUTIVE LAW § 71

Appellants' constitutional argument suffers from a threshold issue. They have not complied with CPLR 1012(b) nor Executive Law § 71, both of which require notice to the Attorney General when the constitutionality of a statute is raised, so that the Attorney General may intervene. Here, Appellants failed to provide the requisite notice and this Court is barred from considering any question regarding HSTPA's constitutionality. (*Luthmann v Gulino*, 131 AD3d 636, 637 [2d Dept 2015] [petitioner did not advise Attorney General of constitutional challenge, requiring dismissal of claim of unconstitutionality].)

B. HSTPA IS CONSTITUTIONAL

i. Retrospective Application of HSTPA Does Not Violate Due Process

HSTPA provides that the legislature intended the change in law to "take effect immediately, and shall apply to any claims pending or filed on or after such date[.]" (Laws 2019, ch 36 at Part A). It has long been understood that our state's legislature may, so long as it expresses such a desire clearly (as it did here), modify the statute of limitations to revive claims that were previously barred. Section 59 of McKinney's Statutes states, "[w]hen reasonably exercised, the Legislature has the power to change laws relating to limitations of actions as by shortening limitations in pending cases or reviving an action previously barred." (*Id.*; *Dugan et al v London Terrace Gardens, et al*, (177 AD3d 1 [1st Dept 2019]. [Legislature may expand statute of limitations, retroactively].)

In opposition to this authority, Appellants proffer *Landgraf v US1 Film Products*, (511 US 244 [1994]).[38] How *Landgraf* helps Appellants is a mystery. The pertinent language of that opinion provides:

> When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. <u>If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.</u>

[38] October 16, 2019 correspondence at 11.

Landgraf at 280, emphasis added. *Landgraf* posits that retroactive changes are allowable, and our legislature clearly and unequivocally indicated the change was to apply retroactively - it provided "[t]his act shall take effect immediately and shall apply to any claims pending or filed on and after such date[.]" (Laws 2019, ch 36 at Part A.)

ii. Applying HSTPA to Pending Litigation Does Not Violate the Contracts Clause

Next, Appellants argue that retroactive application of HSTPA would impermissibly impair their contract rights, and increase the scope of their liability.

Just over a month ago, in *Stafford et al v A&E Real Estate Holdings, LLC* ([Index No. 655500/2016]),[39] the Honorable Joel M. Cohen, of the Commercial Division, New York County Supreme Court, addressed a virtually identical argument raised by Appellants here, premised on the Contracts Clause of the United States Constitution. Because it is directly germane to Appellants' argument here, *Amici* quotes the opinion, at length. Justice Cohen wrote, in pertinent part:

> The statutory amendments at issue do not implicate the Contracts Clause. That is in part because the statute of limitations on rent overcharge claims is not for the subject of any contract. It is a creature of statute, governing the remedies available to tenants under rights secured by the rent control laws. Tellingly, Defendants cannot identify any express contractual obligation impaired, or even altered, by the new statute of limitations.[3] By contrast, cases implicating the Contracts

[39] Plaintiff's counsel here is counsel for the tenants in *A&E*.

Clause typically pit a government enactment directly against some identified contractual provision. [internal citations omitted].

***

"The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Am. Econ. Ins. Co.*, 30 N.Y.3d at 150. "In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past." *Id.*; *see Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413 (1983) ("[s]ignificant" to threshold inquiry "is the fact that the parties are operating in a heavily regulated industry"). On that score, the context surrounding the statutory amendments clearly preclude Defendants' constitutional argument.

Defendants are sophisticated participants in an extensively regulated industry, and the HSTPA marks only the latest legislative change to an area under tight legislative control. Indeed, the rent control apparatus is entirely a legislative invention, perpetuated by an array of interlacing statutes, regulations, and agencies. [internal citations omitted]. ... It may be true that Defendants purchased their contractual rights in the subject apartment buildings 'based on the expectation that overcharge claims were governed by a four-year statute of limitations.' (Defs.' Supp. Mem. of Law at 7). The enlarged statute of limitations on rent overcharge claims may expose Defendants *post-hoc* to a wider aperture of liability; and they may have, by operation of the law, assumed more risk than they bargained for. But "[w]hen [Defendants] purchased into an enterprise already regulated in the particular to which [they] now object[ ], [they] purchased subject to further legislation upon the same topic." *Veix v. Sixth Ward Bldg. & Loan Ass'n of Newark*, 310 U.S. 32, 38 (1940). Put differently, "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them.

***

By entering themselves into an arena subject to government regulation, Defendants submitted to the possibility that future regulations would dislodge their settled commercial expectations.

Stafford v A&E Real Estate Holdings, LLC, (2019 NY Slip Op 33039[U], 9-11 [Sup Ct, NY County 2019], emphasis added.) Justice Cohen's well-reasoned opinion rebuts Appellants' contractual impairment analysis, and is persuasive here.

iii. Applying HSTPA to Pending Litigation is not a "Taking"

Appellants further argue that HSTPA acts as an unconstitutional taking. Once again, that argument has been tried before, and failed. Justice Cohen's reasoning is again persuasive. He wrote:

> "The Takings Clause of the Fifth Amendment of the US Constitution, 'made applicable to the States through the Fourteenth Amendment, . . . provides that 'private property' shall not 'be taken for public use, without just compensation.' The New York Constitution similarly provides that '[p]rivate property shall not be taken for public use without just compensation.' (NY Const, art I, § 7(a))." *Am. Econ. Ins. Co.*, 30 N.Y.3d at 155.
>
> The Court of Appeals' decision in *Am. Econ. Ins. Co.* dictates the analysis as well as the result here. As the Court noted, "[t]he threshold step in any Takings Clause analysis is to determine whether a vested property interest has been identified." *Id.* Because Defendants "cannot identify any vested property interest impaired by the legislative amendment . . . their takings claim must fail." *Id.* While Defendants may lament the damage inflicted on their economic interests by the HSTPA, "the mere obligation to pay money, without identification of a **12 vested property interest, cannot constitute a taking." *Id.* Notwithstanding Defendants' position that "[t]he economic impact of such a retroactive change in the law is enormous and not necessary to address any wrongs which the Legislature identified," (Defs.' Supp. Mem. of Law at 6), this Court will not "dictate to the legislative body the choice of remedy to be selected; questions as to wisdom, need or appropriateness are for the Legislature." *I.L.F.Y. Co. v. City Rent & Rehab. Admin.*, 11 N.Y.2d 480, 490 (1962).

(*Stafford* at 11-12 [N.Y. Sup Ct, New York County 2019].)

iv. Appellants' Record Keeping Arguments are Errant

Appellants assert that the change in the record keeping requirements (from four to six years) somehow violate due process. Appellants' pearl-clutching results from a misreading of HSTPA.

RSL § 26-512(g) requires, as it has for years, that "[a]ny owner who has duly registered a housing accommodation pursuant to section 26-517 of this chapter 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." *Id.*, emphasis added. For deregulated apartments, the most recent registration statement would be the last time the apartment was registered before deregulation. Even prior to HSTPA, a landlord was obligated to put forth IAI evidence supporting deregulation at any time, even if such deregulation took place twenty (20) years ago.[40] For deregulated or purportedly deregulated tenants, retroactivity is an academic issue.

For regulated tenants, the previous statutory scheme required a landlord to "maintain" IAI records for four (4) years following the improvement for apartments that remained rent-regulated. Now, landlords are required to "maintain" such records for six (6) years.

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[40] In *Parkside Grp. v Leader*, (58 Misc 3d 160(A) [App Term 2018]), the Appellate Term, First Department, held that the subject apartment was rent-stabilized, because a landlord failed to present evidence supporting a deregulation, that took place in 1993.

As a hypothetical, assume that in June of 2018, a landlord disposed of records of an IAI performed in May of 2014 on a rent-stabilized unit. Under the previous regime the landlord was allowed to do so. The change to six years does not speak to that disposal, because a landlord already got rid of the records - - one cannot maintain what one has already been gotten rid of. What HSTPA does provide is that if a landlord still retains such records (meaning that they were not disposed of) that evidence must be maintained for two additional years, and going forward, a landlord must maintain records for six years. Nothing in the 2019 Rent Laws states that a landlord will be held liable solely for disposing of records as contemplated by the previous four (4) year retention requirement.

Moreover, we note that as to Appellants, such retention concerns appear to be illusory. As part of the First Department's opinion, it was clear that Appellants maintained records, from 2000, supporting the deregulation.

CONCLUSION

Respectfully, the *Amici* submit that in issuing its order on this Appeal, to avoid further confusion in the courts below, that this Court: (a) make clear how to establish the legal regulated rent, post-*Roberts* (as outlined herein); and (b) explain that a landlord may not take statutory increases when the notifications precedent to such increases were not provided; or, alternatively; (c) specifically indicate that the Court is taking no position on whether statutory increases may be applied with the

notifications precedent to such increases were not provided, and is leaving the issue open for future resolution. Such a holding will provide greater clarity to the lower courts.

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

A proportionally spaced typeface was used, as follows:

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Dated: November 22, 2019

Respectfully Submitted,

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