To be argued by: Joel M. Zinberg

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Court of Appeals
of the
State of New York

JAMES TAYLOR and TAMARA JENKINS,

Plaintiffs-Respondents,

— against —

72A REALTY ASSOCIATES, LP and JANET ZINBERG,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT IN RESPONSE TO BRIEF OF *AMICUS CURIAE* STUART DAVIDSON-TRIBBS, ET AL

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PRELIMINARY STATEMENT

Defendant-Appellant respectfully submits this Brief in Opposition to the Brief for Amicus Curiae in support of the Plaintiffs-Respondents dated November 22, 2019 (hereinafter "Amicus Brief"). The Amici are six tenants in six separate overcharge class actions pending before the Supreme Court, four in New York County and two in Queens County. There has been no decision on the merits in any of these cases.

The Amici assert that they are addressing a question that was supposedly not addressed by the parties to this case: is the owner entitled to various legal rent increases (e.g. vacancy, IAI, rent guidelines board, and MCI increases) in setting the legal regulated rent in an overcharge action "where the landlord either deregulated the apartment post-*Roberts*, and/or failed to re-register the apartment promptly post-*Gersten*." (Amici Brief p 1). They claim that no lawful increases during the period when the apartment was unregistered because of the confusion resulting from DHCR's mistaken pre-*Roberts* guidance should be counted toward calculating the legal regulated rent and that the rent should be frozen.

The Amici's argument should be disregarded by this Court because

- It ignores the confused legal landscape both before and after this Court's decision in *Roberts v. Tishman Speyer Properties, L.P.*, 13

NY3d 270 (2009) regarding the stabilized status and registration requirements for apartments that had been luxury deregulated while a J-51 was in effect;

- It addresses fact patterns that are not relevant to this case;
- The rent freeze issue has already been addressed by the parties to this action;
- The law in effect when this case was decided, multiple cases, the DHCR and the new law, the Housing Stability and Tenant Protection Act of 2019 (HSTPA), that this Court may apply to this pending case, all say that legal rent and overcharges should be calculated utilizing lawful increases and adjustments. The Amici do not cite any statute or case that does not involve owner wrongdoing to support their argument for a rent freeze.

The Amici also claim that there is no constitutional bar to retroactively applying the HSTPA to this pending case. Their constitutional arguments should be disregarded. They misrepresent the procedural posture of this case and misrepresent both the facts and the relevant law.

The Amici's proposed rent freeze and/or application of the HSTPA to this case would compound the unfair situation that Defendant-Appellant 72A Realty

already finds itself in through no fault of its own. 72A is a small family partnership, owning a single mid-sized building. In more than 50 years of ownership it has never been found guilty of an overcharge.

The Court below found that the Defendant-Appellant relied on DHCR guidance when it deregulated the subject apartment in the year 2000, that it proved the validity of the IAIs that brought the rent over the deregulation threshold and fully informed the tenant that the apartment had previously been stabilized and was being deregulated based on IAIs, and that it did not commit fraud or in any way impede the tenant from challenging its rental status or the legal rent over the succeeding 14 years. *Taylor v.72A Realty Assoc., L.P.*, 151 AD3d 95, 98 Ftn 3, 99, 102-103,104-105 (2017). Plaintiff-Respondents have not appealed any of these findings.

The court below also found that despite the Plaintiff-Respondent Jenkins being "the first tenant to live in the apartment after the improvements were made" in 2000 and "having direct knowledge of the condition of the apartment" at all times, when she challenged the rent in her 2014 overcharge claim she falsely "…alleged that the Owner had not made any improvements at all…" (*Taylor supra* at 103-104).

Had the court below correctly applied the four-year rule as unambiguously

set out in the statutes and regulations and as applied by every other appellate court, including *Stulz v. 305 Riverside Corp*., 105 AD3d 558 (1st Dept 2017) *lv denied* 30 NY3d 909, decided two days before the instant decision, there would have been no overcharges and this case would not still be pending. The Plaintiff-Respondents have never denied that there would be no overcharges under the four-year rule calculation. *Stulz* had virtually identical facts to this case (including the same tenants' counsel) except for the fact that there was a small overcharge under the four-year rule as correctly applied in *Stulz* and there would have been no overcharges in this case. Both the Appellate Division and this Court denied leave to appeal to the tenant in *Stulz*. But the court below compounded their error in this case by denying Defendant-Appellant's motion for re-argument or for permission to appeal to the Court of Appeals despite being apprised of the decision in *Stulz* (*James Taylor et. al. v. 72A Realty Associates L.P.*, 2017 NY SlipOp 88644(U) Oct 12, 2017). They only granted permission a year later (December 13, 2018[1]) when *Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 164 Ad3d 420 (1st Dept 2018) and *Raden v. W7879, LLC*, 164 AD3d

[1]Please note that there is a typo in Appellant's Brief dated 2/6/19 to this Court at the top of p.2. The Brief states that the Appellate Division granted leave to appeal on Dec 13, 2019. The correct year as shown in the Order at R.263 was Dec 13, 2018 (The label at the top of the Record page has the same typo).

440 (1st Dept. 2018), decided the same day, both correctly applied the four-year rule and permission was granted in both cases to appeal to this Court. *Regina* and *Raden* presented similar fact patterns to this case with the difference being that, as in *Stulz*, correct application of the four-year rule resulted in small overcharges.

ARGUMENT

I. THE LEGAL LANDSCAPE PRE AND POST *ROBERTS*

Prior to this Court's 4-2 decision in *Roberts*, the State Division of Housing and Community Renewal (DHCR) had, since 1996, allowed owners whose properties were subject to rent stabilization prior to obtaining a J-51 abatement to luxury deregulate apartments while the J-51 was in effect. The Defendant-Appellant relied on DHCR guidance in deregulating the subject apartment in 2000 (*Taylor supra* at 99, 105 & 98 ft 3).

Roberts held that stabilized apartments could not be deregulated while a J-51 was in force. But the Court explicitly left certain issues open, "…including retroactivity, class certification, the statute of limitations, and other defenses that may be applicable to particular tenants." *Roberts supra* at 287. Of particular relevance to this case where the J-51 expired in the 2002/2003 tax year, a little more than two years after the tenant moved in,

> "The Court of Appeals did not address what effect expiration of J-51 benefits would have on the rent-regulated status of affected

> apartments, or how to calculate the rent-stabilized rents for apartments that were improperly removed from rent regulation." *Taylor supra* at 101

Neither the courts nor the DHCR provided much guidance. Until the decision in *72A Realty Assoc. v. Lucas*, 101 AD3d 401 (1st Dept 2012), *lv denied*[2] 2013 NYSlipOp 68006(U) (1st Dept 2013), no court had addressed the regulatory status of an apartment where the J-51 had expired 10 years earlier. And *Lucas* gave no guidance on how to compute rents or overcharges and did not dictate a requirement or timetable for rent registrations.

As is discussed below (see *infra* at pp. 10-12), *Gersten v. 56 7th Ave, LLC*, 85 AD3d 189 (1st Dept 2011), appeal withdrawn 18 NY3d 954 (2012), did not provide guidance on whether apartments in older buildings like Defendant-Appellant's would remain stabilized after J-51 expiration. In fact, *Gersten* undermined the rationale advanced by the Civil Court and Appellate Term in *Lucas* for continued rent stabilized status post J-51 expiration – both lower Courts found that the owner relied on the DHCR and did nothing wrong but they continued the stabilized status years after J-51 expiration because of the failure of the owner to provide an RSL §26-504 lease notice alerting tenants to the future expiration of J-51 benefits.

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[2]Both parties sought leave to appeal

> "Rent Stabilization Law §26-504(c) provides in its last clause that if the dwelling unit would have been subject to rent stabilization in the absence of J-51 benefits, the unit, upon expiration of the benefits, shall continue to be subject to regulation as if that subdivision had never applied. Thus, **the notice requirement plainly does not apply to dwellings such as the one here**, that were subject to rent regulation for a reason other than the receipt of J-51 benefits (see ***Gersten***, 88 AD3d at 195)[boldface added]." *Lucas supra* at 402 footnote.

The Appellate Division in *Lucas* instead held the apartment would remain stabilized 10 years after J-51 expiration because it had "been improperly deregulated as of the time that the tenant took occupancy." 101 AD3d at 402. The court cited no statutes or cases for its reasoning. Defendant-Appellant, the owner in *Lucas*, thought this novel interpretation violated the legislature's intent that stabilized status would end when a J-51ends (Defendant-Appellant's 2/6/2019 Brief to this Court hereinafter "Defendant-Appellant Brief" pp 46-50; Defendant-Appellant's 10/16/19 Letter Brief to this Court, hereinafter "Defendant-Appellant Ltr-Brief" pp 20-21) and that it (as well as the *Lucas* court's disregard of the four-year rule) should be reviewed by this Court because it would affect thousands of apartments then and in the future. But the Appellate Division denied both parties permission to appeal (2013 NYSlipOp 68006(U) (1st Dept 2013)).

The DHCR did not issue guidance of any kind until 2016[3] (see DHCR "J-51

[3]The Amici mislabel this as 2017 (Amici Brief at p 10).

Rent Registration Initiative - FAQs" Amici's Exhibit Q). Item 3 of the DHCR FAQs for the first time directed that tenants like the Plaintiff-Respondents who were deregulated while a J-51 that has since expired was in effect should be given "a stabilized lease renewal prior to the expiration of the current lease." Despite the lack of judicial or administrative guidance, Defendant-Appellant had already given the Plaintiffs-Respondents a rent stabilized renewal along with notice of their rights to challenge the rent within months of the final, 2013 decision in *Lucas* (within the statutorily defined "window period" 90-120 days before lease expiration), several months before Plaintiffs started their overcharge action (Defendant-Appellant Brief at pp 14-15).

DHCR FAQs item 3 also directed for the first time in 2016 that owners should "re-register" previously luxury deregulated apartments in buildings in which the J-51 had expired. Defendant-Appellant had already registered the subject apartment as stabilized in 2014 within the appropriate time frame after the Plaintiff-tenants had signed the stabilized lease renewal.

Item 6 in the DHCR FAQs told owners they should not file amended or late registrations for previous/missing years. Item 7 specified that, "DHCR will not be accepting amended registrations as part of this initiative, unless part of an order or directive issued by DHCR, the courts or another governmental agency that

supervises housing accommodations." This is precisely what occurred in 2014 when Defendant tried to register the subject apartment for the years 2000-2008 and was directed by the DHCR to request an Administrative Determination. That Determination was subsequently rejected by the DHCR which cited the Plaintiff-Respondents' objection to registering the apartment (see Defendant-Appellant Brief at pp 15-16).

Amici's claim that owners who were initially misled by the DHCR and then subsequently left adrift by the DHCR should be penalized by having rents frozen, regardless of what would be legal increases except for the failure to register, strains any sense of fairness or reality. Defendant-Appellant acted promptly and voluntarily to offer the Plaintiffs a stabilized lease and to register the apartment, as soon as it was clear that it was required to. The fact that Defendant was stymied in registering the apartment for the missing years by DHCR fecklessness and by the Plaintiffs themselves should not result in a rent freeze. Moreover, as discussed below (*infra* Section III) both the old law and HSTPA direct utilization of legal increases when calculating overcharges.

II. THE FACTS IN THE AMICI'S CASES ARE NOT RELEVANT TO THIS CASE

The six Amici allege "misconduct" by their landlords who deregulated while a J-51 was still in effect. In three cases deregulation allegedly occurred

post-*Roberts*. In the other three cases the apartments were allegedly deregulated pre-*Roberts* and the owners waited several years after the decision in *Gersten* to re-regulate the apartments (Amici Brief pp 3-4). Neither of these scenarios is relevant to the instant case where the J-51 expired 17 years ago, many years before *Roberts*, and the Defendant-Appellant did not know until *Lucas* was finally decided in 2013 that it had to consider the Plaintiff-Respondents in this case as rent stabilized (see Defendant-Appellant's Letr Brief, at pp 20-21; and Defendant-Appellant Brief at pp 41-42).

If three of the Amici's owners deregulated after *Roberts*, that was clearly improper but of no relevance to this case where deregulation occurred nine years before *Roberts*. In the remaining three cases, where the owners allegedly deregulated prior to *Roberts* but did not "promptly" re-register, there is no question of how to treat an apartment when the J-51 had expired many years before as there was in this case. When that issue was resolved in *Lucas*, Defendant-Appellant promptly offered the Plaintiff-Respondents in this case a rent stabilized lease and registered the apartment shortly thereafter (Defendant-Appellant Brief pp 13-14).

Gersten did not provide any guidance to the Defendant-Appellant. The court below (*Taylor supra* at 101) claimed that once the *Gersten* appeal was withdrawn in 2012 it was "…clear from that point forward that owners had an obligation to

retroactively restore affected apartments to rent stabilization and register them [citing *Matter of Park v. New York State Div. of Hous. & Community Renewal*, 150 AD3d 105, 110 (1st Dept. 2017)]." *Park* was decided a month before the instant case. But *Gersten* did not give explicit instruction that a previously de-regulated apartment had to be re-registered when the J-51 had expired many years before. And neither *Gersten* nor any of the other cases that followed, up to and including *Park*, specified a timetable for registering the apartment or informed owners how to calculate rents and what to do about previously unregistered years.

The holding in *Gersten* that *Roberts* should be applied retroactively (*Gersten supra* at 196-198) was dicta (as was its holding on the statute of limitations) and was not applicable to the instant case. In *Gersten*, the Supreme Court had dismissed the tenant's action because the DHCR's deregulation order from 11 years earlier was binding and the statute of limitations for an Article 78 had long since expired (*Gersten* at 193-194). While the Appellate Division noted that *Roberts* should apply retroactively and rejected a six-year statute of limitations, it affirmed based on the preclusive effect of the 1999 DHCR luxury decontrol order based on collateral estoppel since the plaintiff-tenants had a full and fair opportunity to litigate whether their apartment was subject to luxury decontrol before the DHCR. The *Gersten* court did not need to decide the retroactivity of *Roberts* and it did not

offer guidance for owners in cases where there was no administrative decision. There was no directive to promptly re-register the apartment or to register the apartment for earlier years. Moreover, because the dispositive issue was administrative finality and not retroactivity, *Gersten* said nothing about the impact of J-51 expiration on continued stabilized status.

III. THERE IS NO REQUIREMENT THAT THE RENT BE FROZEN IN THIS POST *ROBERTS*, J-51 CASE

In the Court below Plaintiff-Appellants argued that the rent should be frozen at the last registered rent because the owner did not register the apartment as stabilized during the period when, following DHCR direction, it reasonably believed the apartment was exempt. The Court below rejected that argument.

> "We have recognized that in a *Roberts* situation where an owner had discontinued DHCR rent registrations based on a justifiable belief that the apartment was not subject to rent regulation, it should not be penalized by rolling back the rent to the last registered rent (*Park*, 150 AD3d at 113, citing *Jazilek v Abart Holdings, LLC*, 72 AD3d 529, 531, 899 NYS2d 198 (1st Dept 2010)." *Taylor supra* at 106.

Plaintiffs did not appeal this finding and cannot challenge it now (see 7/1/2019 Defendant-Appellant's Reply Brief, hereinafter "Def Reply Brief" Section II at pp 8-12). Nevertheless, they attempted to resurrect this argument in their brief to this Court on appeal (Plaintiff-Respondent's Brief pp.17-31; see also Defendant-Appellant's Reply Brief at 12-13 addressing Plaintiffs' renewed call to

utilize the default formula and at 14-16 addressing the Plaintiffs' renewed call for a rent freeze). Now the Amici make the same argument (Amici Brief pp 3, 11) without citing a single statute in support.

The rejection of a rent freeze by the Court below is clearly the majority position on rent freezes in *Roberts* J-51 cases.

> "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. Preventing the owner from charging what is otherwise a legal rent, solely based on the lack of registration filings during the period before *Roberts* and *Gersten* were decided, would unfairly penalize the owner for action that was taken in good faith, relying upon DHCR's own interpretation of the law, without furthering any legitimate purpose of the rent stabilization laws (see *Dodd v 98 Riverside Dr., LLC*, 2012 NY Slip Op 31653[U] [Sup Ct, NY County 2012])." *Matter of Park, supra* at 113

See also, *Stulz v. 305 Riverside Corp*., 150 AD3d 558 (1st Dept 2017), decided two days before the instant case, rejecting the identical argument made in this case for a rent freeze.

The four-year rule, this Court and multiple other courts, the DHCR and now the new HSTPA, all allow the consideration of lawful rent increases in *Roberts* J-51 cases. There is no basis for a rent freeze.

The four-year rule as set out in RSC §2526.1(a)(3)(i) stated the rent for determining an overcharge was "the rent charged on the base date, plus in each

case any subsequent lawful increases and adjustments." RSC §2520.6(e) used the same language.

This Court instructed the overcharge calculation to "…set the 'legal regulated rent' as the rent charged on the 'base date' **…plus any subsequent lawful increases** [citations omitted] [emphasis added]." *Matter of Grimm v. State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin*., 15 NY3d 358, 365 (2010). Multiple First Department cases have used the same formula calculating in lawful increases in J-51 cases (See *Stulz supra, Regina supra, Raden supra, & Todres v. W7879, LLC.*, 137 AD3d 597 (1st Dept 2016)). Even though the Court below inappropriately disregarded the four-year rule, it included "…the applicable rent guidelines (and any other) legally permissible increases since February 2002, the expiration date of the first lease" (*Taylor supra* at 106) in its own novel method of calculating overcharges in the absence of registrations.

Similarly, the DHCR allowed adding all subsequent lawful increases to the most recent stabilized lease prior to improper deregulation (DHCR 2016 FAQs item 10).

The legislature could have rejected use of lawful increases to calculate overcharges in J-51 cases where there was no registration because of the owners' reliance on DHCR guidance. But it chose to preserve those increases in the

HSTPA. The HSTPA provides that,

> "…the legal regulated rent for purposes of determining an overcharge, shall be deemed to be the rent indicated in the most recent reliable annual registration statement… six years or more prior… **plus in each case any subsequent lawful increases and adjustments**." [emphasis added]

This language is identical to the 4-year rule language in the RSC.

The Amici try to argue that otherwise lawful increases (vacancy increases, IAI increases, rent guidelines board increases, MCI increases) somehow become unlawful in the J-51 *Roberts* setting. But all the cases relied on by the Amici for the proposition that guideline board increases are not allowed for unregistered apartments are inapposite since they deal with wrongdoing by the owners or were not overcharge cases. In *Matter of 215 W 88th St. Holdings LLC v. New York State Div. of Hous. and Community Renewal*, 143 AD3d 652 (1st Dept 2016) (Amici Brief at 15) there was fraud by the owner and the Court imposed the default formula found in *Thornton v. Baron*, 5 NY3d 175 (2005). In *Gold Rivka 2 LLC v. Rodriguez*, 2019 Slip Op 51341(U) (Civ Ct Bronx Cty) (Amici Brief p. 18) there was a large, unexplained rent increase and a subsequent false registration filing that was inconsistent with the lease. In *EMA Realty v. Leyva*, 64 Misc3d 11 (App Term 2nd Dept. 2019) (Amici Brief p. 18-19) the owner, acknowledged his responsibility to register the apartment after *Roberts* and *Gersten*, but then waited

more than four years to do so. But the case was a holdover proceeding and dealt with the apartment's regulatory status - it did not deal with overcharge calculations.

In an earlier J-51 case very much like this one, then Supreme Court Justice Gische rejected penalizing owners for failing to register apartments.

> "*Roberts* overcharge cases, such as this one, are not really about registration compliance; they are, in a broader sense, about the reach and application of the rent stabilization laws and how to now calculate a legal rent. At the time defendants would have been required to register a rent stabilized rent under *Roberts*, the DHCR did not even require such registration. Fixing the rent stabilization rent in hindsight based solely on defendants' failure to register would be unduly punitive for what was action otherwise taken in good faith, relying upon the agency's own interpretation of the law." *Baron v. Laurence Towers Company LLC*, 2012 NY SlipOp 32177(U) (S.Ct. NY Cty)

IV. AMICI'S ARGUMENTS ABOUT THE CONSTITUTIONALITY OF RETROACTIVELY APPLYING THE HSTPA TO THIS CASE SHOULD BE DISREGARDED

1. CPLR § 1012(b) and Executive Law § 71 Do Not Create a Procedural Barrier Because the Attorney General Has Received Notice

Despite the Amici's claim that CPLR § 1012(b) and Executive Law § 71 bar this Court considering the constitutionality of applying the HSTPA to this pending case (Amici Brief pp 2, 23), the Attorney General has received notice of the constitutional challenge to applying the HSTPA to these pending *Roberts* J-51 cases through multiple avenues. CPLR § 1012(b), Executive Law § 71, and the rules of this Court found at 22 N.Y.C.R.R. 500.9(b) are all designed to ensure that

the New York State Attorney General receives notice that the constitutionality of a state law is being questioned and has the opportunity to intervene. The Attorney General received the same September 17, 2019 Notice to the Bar regarding application of the HSTPA to these pending cases that the Amici received. In addition, the Attorney General has been served with multiple submissions from the owner-Respondent in *Regina* alerting them to the argument that it would be unconstitutional to apply the HSTPA retroactively – the Attorney General is acting as counsel to the Appellant DHCR in that case. Finally, Defendant-Appellant served notice on the Attorney General in this case. (see copy of notice sent to the Attorney General - attached as Exhibit C to Defendant-Appellant's 12/4/2019 Affirmation in Opposition to Amici's Motion for Leave to Appear as Amicus Curiae).

The cited sections contemplate notice when an appeal directly questions the constitutionality of a statute. 22 N.Y.C.R.R. 500.9(b) directs that, "… a copy of the notification shall be attached to the preliminary appeal statement." That was not possible in the peculiar circumstances of this case which was decided in 2017, permission to appeal was granted in late 2018, the Preliminary Appeal Statement was sent to the Court of Appeals on December 19, 2018, and the appeal was perfected in February 2019, five months before the HSTPA was enacted. Three

months after the HSTPA was enacted, in September 2019, this Court solicited parties' and amici's comments on the question of applying the HSTPA to the cases pending on appeal to this Court.

Defendant-Appellant obviously could not give the Attorney General notice before the HSTPA was enacted and before this Court solicited comments on its applicability to these pending cases. Moreover, Defendant-Appellant is not questioning the general constitutionality of the HSTPA. It is only questioning the constitutionality of retrospectively applying one part (Part F) of the HSTPA's 15 parts (Parts A-O) to the instant, pending, J-51 overcharge case.

2. Amici Fail to Address Relevant Case Law Regarding the Constitutionality of Retroactively Applying a New Statute to a Pending Case.

Amici (Amici's Brief pp 24-29) ignore this Court's decision in *James Sq. Assoc. LP v. Mullen*, 21 NY3d 233, 246 (2013) setting out a three-factor test to determine if retroactive statutory application violates Due Process. Amici do not address Defendant-Appellant's analysis showing that under each of the three factors of this test, retroactively applying the HSTPA to this case would unconstitutionally violate Due Process (Defendant-Appellant Ltr-Brief pp 5-7).

Amici also fail to address or rebut Defendant-Appellant's showing that applying the HSTPA to pending J-51 overcharge cases does not meet the most minimal requirement of Due Process analysis since it is not rationally related to

any legitimate legislative purpose (Defendant-Appellant's Ltr Brief p 8). This Court recently stated that the purpose of the rent stabilization laws is,

> "…to preserve affordable housing for low-income, working poor and middle class residents in New York City. …Rent stabilization provides assistance to a specific segment of the population that could not afford to live in New York City without a rent regulatory scheme." *Matter of Santiago-Monteverde*, 24 NY3d 283, 289-290 (2014)

Applying the HSTPA to these pending J-51 cases will not preserve affordable housing for "low-income, working poor and middle class residents in New York City." The tenants in these cases are wealthy persons who have demonstrated over many years that they can "afford to live in New York City without a rent regulatory scheme." The tenants in this case are both successful, Oscar winning screenwriters who paid between $2,200 and $3,783 per month in the years between 2000-2014 (Defendant-Appellant Brief at 11-15). The tenants in Regina have been paying $5,195 and more since they moved in in August 2005 (*Regina supra* at 421). The tenants in *Reich v. Belnord Partners* were able to afford between $18,500 to $20,000 a month between 2005-2010.

Moreover, these wealthy tenants will remain in residence, as stabilized tenants, regardless of whether or not the HSTPA is applied. They have already gained the substantial benefits and protections of stabilized status because of *Roberts*. And now, because of the repeal of high income deregulation under the

HSTPA, they can keep that status for as long as they like. The only thing applying the HSTPA to these pending J-51 cases to calculate overcharges will do is create a monetary windfall for wealthy tenants. It will not protect the tenancies or economic rights of tenants in any other setting.

Applying the HSTPA retroactively would create a situation analogous to *James Sq. supra* where this Court found,

> "...the State fails to set forth a valid public purpose for the retroactive application of the 2009 Amendments. . . . The retroactive application of the 2009 Amendments simply punished the Program participants more harshly for behavior that already occurred and that they could not alter." 21 NY3d at 249-250

In the instant case, applying the HSTPA rather than the old law will not merely create a windfall for the Plaintiff-Respondents. It will change this case from one where there was no overcharge and therefore no treble damages and no attorneys' fees, to one where there will be an overcharge, mandatory attorneys' fees, and liability for treble damages. The Amici do not address the fact that applying the HSTPA to the instant case would retroactively impose a penalty on Defendant-Appellant that would unconstitutionally violate Due Process (Defendant-Appellant's Ltr Brief pp 9-13).

Multiple cases also show that statutes of limitations can only be constitutionally, retrospectively, lengthened to correct an injustice in exceptional

circumstances which are missing in this case (Defendant-Appellant's Ltr Brief pp 13-15). The common "identifiable injustice" in all the cases this Court discussed in *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d 377 (2017), allowing a constitutional extension of the statute of limitations, is that the plaintiffs lost their ability to recover anything through no fault of their own because of exceptional circumstances like the outbreak of World War II or a long latency period between toxic exposures and the development of disease. But the tenants in these pending J-51 cases were not prevented from commencing actions and recovering overcharges by the four-year rule. Nothing barred the Plaintiff-Respondents from starting their overcharge case in 2014 or at any earlier time. There was no injustice that justified the HSTPA retroactively lengthening the statute of limitations from four to six years. And there was certainly no injustice that justified retroactively combining a change in the statute of limitations with a change in the substantive law for determining how to calculate overcharges.

Amici's sole discussion of the statute of limitations is to uncritically cite *Dugan v. London Terrace Gardens*, 177 AD3d 1 (2019) (Amici Brief p 24). But the conclusion in *Dugan* that retroactively lengthening the statute of limitations in pending cases does not present a constitutional problem relies on two cases that inaccurately claim that the Rent Regulation Reform Act of 1997 (RRRA) changed

the statute of limitations for pending rent overcharge cases. In fact, the four-year statute of limitations was established in 1983 (effective April 1, 1984) and was not changed by the RRRA. The RRRA was enacted to rectify judicial misinterpretations of the 1983 statute (Defendant-Appellant's Ltr Brief p 15). The RRRA did not change the statute of limitations - it "clarified and reinforced the four-year statute of limitations applicable to rent overcharge claims (citations omitted)." *Thornton supra* at 5.

Amici's claim that HSTPA simply changes the four-year record keeping requirement in the RSL to a six-year requirement and that, "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." (Amici Brief p 29), is clearly wrong. Immediately after changing the four-year retention requirement to six years, the HSPTA added the following new language to RSL 26-516(g)

> "However, an owner's election not to maintain records shall not limit the authority of the division of housing and community renewal and the courts to examine the rental history and determine legal regulated rents pursuant to this section."

The HSTPA also added the following new language to RSL 26-516(h),

> "The division of housing and community renewal, and the courts, in investigating complaints of overcharge and in determining legal regulated rents, shall consider all available rent history which is

reasonably necessary to make such determinations…."

While the HSTPA only "requires" owners to maintain records for six years, it makes clear that if they discard records of any sort, including IAI records, they do so at their potential peril since the DHCR or a court may later determine it needs to see those records "in investigating complaints of an overcharge and in determining legal regulated rents." In addition, any owner who relied on the previous guidance that they could discard records after four years will be out of luck.

Moreover, the HSTPA amended CPLR 213-a, removing language

> "preclud[ing] examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action" and prohibiting determination and award of an overcharge "based upon an overcharge having more than four years before the action is commenced."

and replaced the old language with new language that,

> "…an overcharge claim may be filed at any time, and the calculation and determination of the legal rent and the amount of the overcharge shall be made in accordance with the provisions of law governing the determination and calculation of overcharges."

Tenants now have an incentive to demand examination of the entire rental history in the hopes that the owner discarded records that the court or DHCR now deem important.

Retroactive abolition of protection against liability for failing to maintain older records clearly violates, "… the basic protection against 'judgments without

notice' afforded by the Due Process Clause, [citations omitted] [that] is implicated by civil penalties." *BMW of North America, Inc. v. Gore*, 517 US 559, 574 n.22 (1996) (See Defendant-Appellant's Ltr Brief p 17) and violates the constitutional ban on retroactive imposition of penalties.

Amici's discussion of the Contracts Clause (Amici Brief pp 25-27) fails to acknowledge that a rent stabilized lease is a contract, albeit a contract that is heavily regulated and constrained by the rent stabilization laws. The RSL is a pervasive regulatory scheme that limits owners' abilities to determine rents, to terminate tenancies, to utilize their property for personal use, to alter the property and now, post HSTPA, to ever have the property exit regulation. But the fact that rent stabilized tenancies have been heavily regulated in the past does not give the legislature carte blanche to change the terms of multiple previous leases. In the instant case, applying the HSTPA will change the amount of rent that could be charged on several prior leases that were correctly calculated under the previous law and which will affect all subsequent leases, and retroactively subject the Defendant-Appellant to overcharge liability that includes newly augmented treble damage liability and mandatory attorneys' fees. (Defendant-Appellant's Ltr Brief pp 19-20)

Similarly, Amici's discussion of whether retroactive application of the

HSTPA to this pending case violates the Takings Clause of the Fifth Amendment of the U.S. Constitution, made applicable to the states through the Fourteenth Amendment, and the Takings Clause of the New York Constitution (NY Const, art 1, sec 7(a)) (Amici Brief p 27) fails to acknowledge that Defendant-Appellant's ability to own, utilize, and receive future rents from its property qualifies as a vested interest. Applying the HSTPA retroactively to this pending case will permanently lower the value of Defendant-Appellant's property by lowering past legal rents that form the basis for all future rents. That constitutes a taking without any, just or otherwise, compensation (Defendant-Appellant's Ltr Brief pp 18-19).

CONCLUSION

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

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

Pursuant to Part 500.13(c)(l) of the Rules of Practice of the
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