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John P. Asiello, Chief Clerk
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207-1095
Via Federal Express

Re: Taylor v. 72A Realty Associates
APL-2018-00226

Defendant-Appellant 72A Realty respectfully submits this letter pursuant to the instructions in this Court's September 17, 2019 letter advising the parties that it will accept further argument on the following questions:

- Whether the L 2019, Ch 36 – the Housing Stability and Tenant Protection Act of 2019 (HSTPA) – governs the issues presented on this appeal;
- If the HSTPA rather than the law in effect when this case began in 2014 and when the decision was rendered in 2017 is used, what is the appropriate application of the HSTPA; and
- "the propriety and desirability of this Court determining such questions in the first instance on this appeal."

Applying the HSTPA to this case and other pending J-51 overcharge cases would be unconstitutional under both the U.S. and New York constitutions. The HSTPA significantly expands overcharge liability and penalties for owners who did nothing wrong other than rely on DHCR guidance that was unchallenged for a decade. Applying the HSTPA would be particularly unfair to the Defendant-Appellant because it would turn the instant, pending case from one where there should be no overcharges to one where there is an overcharge and the Defendant-Appellant is newly liable for the penalties of mandatory attorneys' fees and treble damages. This creates an *ex post facto* type, constitutional problem.

The facts are recounted in Defendant-Appellants February 6, 2019 Brief (hereinafter Defendant Brief) at pp 11-20. This case and the companion cases of *Matter of Regina Metro. Co., LLC v. New York State Div. Hous. & Community Renewal*, 164 AD3d 420 (1st Dept. 2018) and *Raden v. W 7879, LLC*, 164 AD3d 440 (1st Dept. 2018) all involve overcharge claims for apartments that were luxury deregulated while a J-51 abatement was in effect years before this Court's decision in *Roberts v. Tishman Speyer Props., L.P.,* 13 NY 3d 270 (2009). The courts in all the cases found that the owners acted in reliance on DHCR guidance and that there was no evidence of fraud. In *Regina* and *Raden* the courts correctly applied the four-year rule of the RSL and found there were small overcharges but no treble damages or attorneys' fees due. In this case, *Taylor v. 72A Realty Assoc., L.P.*, 151 AD3d 95 (1st Dept. 2017), a different First Department panel deliberately chose not to apply the four-year rule and substituted a novel method of calculating the base date rent and overcharges. Had the court correctly applied the old law there would have been no overcharges – in fact, the Plaintiff-Tenants were undercharged (Defendant Brief 8, 14-15,43-45; Defendant Reply Brief 1). But there will be overcharges and accompanying liability for treble damages and mandatory attorneys' fees if the HSTPA is applied.

This case also deals with a unique issue not addressed in other cases – what is the effect that Plaintiff's case commenced 12 years after the J-51 had expired? Defendant argued below that even though it offered the Plaintiffs a stabilized lease as required by *72A Realty Assoc. v. Lucas*, 101 AD3d 401 (1st Dept 2012), Plaintiffs should not be considered rent stabilized since the holding in *Lucas* had no legal basis and is contrary to the legislature's intent that regulation would end when the J-51 ends. The courts below, relying solely on *Lucas*, rejected this argument. While *Roberts* held that buildings could not simultaneously receive J-51 benefits and luxury decontrol benefits, this Court has never addressed "what effect the expiration of J-51 benefits would have on the rent-regulated status of affected apartments." *Taylor supra* at 102. This issue has been preserved on appeal. The HSTPA is silent on the issue This Court should rule on the issue on this appeal regardless of whether or not the HSTPA is applied (*see infra* Sec III). If this Court finds the Plaintiffs should have been considered free market when the J-51 ended back in 2002 then the remaining issues are moot.

I. THIS COURT SHOULD DECIDE, ON THIS APPEAL, WHETHER AND HOW TO APPLY THE HSTPA TO PENDING POST-*ROBERTS*, J-51 OVERCHARGE CASES

The Appellate Division First Department recently decided to apply the HSTPA to a pending J-51 overcharge case in *Dugan v. London Terrace Gardens*, 2019 NY Slip Op 06578 (September 17, 2019). That case has been pending for over 10 years and involves hundreds of tenants. As will be described below (Sec II.A.4), *Dugan* incorrectly held that there is no due process bar to applying the HSTPA retrospectively to pending cases.

There will be no benefit to remanding these pending cases to the lower courts. This Court will not receive any additional feedback from other courts since every lower court is now bound by *Dugan,* including the cases on appeal to this Court if they are remanded before this Court decides on the applicability of the HSTPA to pending J-51, overcharge cases. In fact, on information and belief, the owner's attorney in *Dugan* is moving before the Appellate Division for permission to appeal to this Court.

As this Court's letter noted, this case and four other cases are impacted by the question of whether or not to apply the HSTPA. Sending them back to the lower courts to decide if and/or how to apply the HSTPA would be a waste of judicial resources and time and impose an unnecessary delay on all the parties in these cases that have been pending for many years. There are many, perhaps hundreds, of other post-*Roberts*, J-51, pre-HSTPA overcharge cases pending at all levels of the court system and before the relevant administrative agency, the DHCR. It would be the antithesis of judicial economy to require each of those cases to individually decide if and how to apply the HSTPA.

The instant case has been pending for nearly six years. *Regina* and *Raden* have been pending for ten and nine years respectively. Having these cases linger for more years does not help any of the parties. If tenants are entitled to collect overcharges and penalties like treble damages and attorneys' fees they would prefer to get the money sooner rather than later. And if owners owe overcharges it is unfair to require them to pay extra years of nine percent statutory interest, a rate that is more than four times prevailing market interest rates, as well as additional years of overcharges. Both tenants and owners will benefit from the guidance only this Court can provide.

II THE HSTPA SHOULD NOT BE APPLIED IN THIS CASE

The new statute expands liability for past conduct by:

1. expanding overcharge liability from four to six years;

2. changing the way overcharges are calculated, moving the calculation of the base date rent from the four-year rule (i.e., the rent charged on the four-year base date with no consideration of prior rent history unless there are indicia of fraud) – to a new method of calculation and base date in § RSL 26-516 where:

> "the legal regulated rent for purposes of determining an overcharge, shall be 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 and adjustments. …[Courts and the DHCR] shall consider all available rent history which is reasonably necessary to make such determinations."

3. expanding liability for the penalty of treble damages from two to six years; and

4. changing the penalty of attorneys' fees from discretionary to mandatory.

This case was only still pending when the HSTPA was signed on June 14, 2019 because the First Department panel in this case chose to impose its own, idiosyncratic interpretation of the law, unsupported by any precedent, and refused to acknowledge its mistake by granting re-argument or permission to appeal. Appellant-Defendant brought this Court's decisions in *Matter of Grimm v. State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358 (2010) carving out a narrow fraud exception to the four-year rule and *Matter of Boyd v. New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 (2014) confirming that the four-year rule and the narrow fraud exception apply in J-51 overcharge cases, to the attention of the First Department panel that decided this case in 2017. Nevertheless, despite finding no evidence of fraud, the panel explicitly chose not to apply the four-year rule and this Court's limited exception to that rule set out in *Grimm* and *Boyd* and imposed a novel method of calculating overcharges. Defendant-Appellant moved to reargue or in the alternative for permission to appeal to this Court. The First Department panel once again ignored *Grimm* and *Boyd*, as well as to the unanimous decision in *Stulz v. 305 Riverside Corp.,* 150 A.D.3D 558 (1st Dept. 2017), *lv denied* 30 NY3d 909 – a J-51 overcharge case decided two days before the instant case that appropriately applied the four-year rule in the absence of fraud - and denied Defendant-Appellant's motion (*James Taylor et. al. v. 72A Realty Associates L.P. et al.*, 2017NYSlipOp 88644(U) Oct. 12, 2017; Defendant Brief 18).

A. APPLYING THE HSTPA TO THIS CASE WOULD VIOLATE DUE PROCESS UNDER THE U.S. AND NEW YORK CONSTITUTIONS

1) The Retrospective Application of the HSTPA to Pending J-51 Overcharge Cases Violates Due Process Under the Federal and State Constitutions

In *American Economy Ins. Co. v. State of New York*, 30 NY3d 136 (2017) this Court, relying on *Landgraf v. USI Film Products,* 511 US 244 (1994), held that,

> "A statute has 'retroactive effect,' however, if '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.' (*Id* [*Landgraf*] at 280)." *American Economy* at 147.

There is no doubt that applying the HSTPA to pending cases has "retroactive effect" because it "attaches new legal consequences to [landlord-tenant interactions] completed before its enactment." (*Landgraf supra* at 270). In the instant case it would require an examination of rent increases and records dating back 19 years and impose liability for the Defendant's correct determination under the law as it existed in 2013 when it gave the Plaintiffs a stabilized lease and in 2014 when this overcharge action commenced, that there was no overcharge, no need to adjust the rent and no need to refund money to the Plaintiffs.

"Retroactivity is generally disfavored in the law." *Eastern Enterprises v. Apfel,* 524 US 498, 532 (1998) (citing numerous cases, treatises and other sources dating back to the founding of this country and the English common law). "Even in areas in which retroactivity is generally tolerated, such as tax legislation, some limits have been suggested." *Id.* at 534.

This Court, relying on *Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y.,* 70 NY2d 451, 455 (1987) recently laid out those limits.

> "In *Replan,* this Court laid out a multi-factor balancing-of-equities test to determine whether a retroactive tax infringes on a taxpayer's due process rights (*see* 70 NY2d at 456). The important factors in determining whether a retroactive tax transgresses the constitutional limitation are (1) 'the taxpayer's forewarning of a change in the legislation and the reasonableness

> of ... reliance on the old law,' (2) 'the length of the retroactive period,' and (3) 'the public purpose for retroactive application' (*id.*)." *James Sq. Assoc. LP v. Mullen*, 21 NY3d 233, 246 (2013)

These factors mirror the due process concerns that,

> "The United States Supreme Court stated in *Landgraf v USI Film Products* that '[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted' (511 US 244, 265 [1994])." *James Sq. supra* at 246

This Court found the retroactive amendments in *James Sq.* unconstitutional because the plaintiff did not have forewarning of a change in the law and no opportunity to alter their behavior in anticipation of the amendments; the period of retroactivity – 16-32 months – was excessive; and the State failed,

> ". . . to set forth a valid public purpose for the retroactive application of the 2009 amendments. …It was not correcting an error in the tax code as in *Carlton*, or to prevent 'the loss of [single room occupancy] housing and to discourage the precipitous eviction of tenants' as in *Replan* (70 NY2d at 457)." *James Sq. supra* at 249.

The same three factor analysis makes applying the HSTPA to this case unconstitutional. Defendant-Appellant had no forewarning of the change in the rent statute and had no opportunity to alter its behavior once it became clear to Defendant in 2013, after the final denial of permission to appeal in *72A Realty v. Lucas,* that Plaintiff-tenants had to be considered rent stabilized (Defendant Brief pp.14, 42). Defendant, relying on the previous statute and multiple decisions of this Court and the First Department thought it had to go back to the four-year base date rent to determine if there were any overcharges. Defendant calculated that there was no overcharge and no need to adjust the rent because all the rent increases in the previous four years were within the statutory guidelines (Defendant Brief pp.14-15). It offered the Plaintiffs a rent stabilized lease *before* the Plaintiffs commenced this action. The new statute changes the base date from four to six years and the mechanism for calculating the base date rent which, if applied to this case, will result in an overcharge. Had the Defendant anticipated in 2013 that a new rent law would be enacted in 2019 it would have adjusted the rent based on a six-year rather than four-year base date and refunded overcharges, if any, thereby avoided several years of overcharges that will be increased by the statutory nine

percent interest rate, a potential treble damages penalty and the instant litigation,2 which under the new statute will result in a mandatory attorneys' fee penalty.

Owners in pending cases are disadvantaged as compared to owners in actions commenced in the future. Owners have now received fair notice that they must examine the rent history going back six years, which would give them the opportunity to refund overcharges and adjust the rental amount. This will give them the opportunity to avoid litigation and mandatory attorneys' fees. Owners in pending cases have no opportunity to do this.

Like the retroactive statute in *James Sq.*, the retroactive period of the HSTPA is excessive. In this case, which has been pending since 2014, transactions dating back to 2000 – 19 years ago – will have to be re-examined. Since the HSTPA directs that courts "shall consider all available rent history", owners in pending cases could become liable for events dating back to 1984.

Finally, as in *James Sq.,* the legislature failed "to set forth a valid public purpose for the retroactive application of the" new statute to pending J-51 overcharge cases. While there may be an important public purpose for applying the HSTPA prospectively, "[T]he justifications that suffice for the prospective nature of a legislative enactment may not suffice for its retroactive nature…" *American Economy supra* at 158. See also, *Landgraf*, 511 US at 266 ("a justification sufficient to validate a statute's prospective application under the [Due Process] Clause 'may not suffice' to warrant its retroactive application"); *Pension Ben. Guar. Corp.,* 467 US at 730 ("The retroactive aspects of legislation ... must meet the test of due process[.]"). While prospective economic legislation carries the presumption of constitutionality, "[i]t does not follow ... that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Usery v. Turner Elkhorn Mining Co.*, 428 US 1, 16-17 (1976)

Unlike the situation in *American Economy supra* at 158, where this Court cited a specific legislative Memorandum in Support that justified retroactive impact of the new law, to date the legislature has not provided any justification for applying the HSTPA to pending cases.[1] The HSTPA is also quite different than the

[1] Neither the New York State Assembly Memorandum in Support of Legislation (A8281) nor the New York State Senate Introducer's Memorandum in Support (S6458) , both available at http://public.leginfo.state.ny.us, discuss or provide any justification for retroactive application of

RRRA of 1997 amendments to the rent law where the legislative sponsor's memorandum and the Governor's signing memorandum made clear the new statute was being applied to pending cases to counter mistaken court decisions that misapplied the four-year statute of limitations that had existed since 1984 and permitted examination of the rental history before the four-year period in overcharge cases (Defendant Brief pp.5-6; *see also infra* multiple cases cited in Section II.A.4).

Applying the HSTPA to pending J-51 overcharge cases does not even satisfy the looser standard of being "'rationally related to *any conceivable* legitimate State purpose' (citations omitted, emphasis in original)." *American Economy supra* at 158. Application to pending J-51 cases will do nothing to accomplish the purpose of the new statute and the RSL in general - preserving affordable housing for lower income tenants. No owners will be deterred from future overcharges. No tenants will be restored to apartments, no tenants will be spared eviction. The only tenants who will benefit from retroactive application to pending J-51 cases will be wealthy tenants like the Plaintiffs (both successful screenwriters) who during the previous 26 years (from the RRRA of 1993 establishing luxury deregulation until the HSTPA in 2019) the legislature had decided did not need the protections of the rent laws. The only thing retroactive application of the HSTPA to pending J-51 overcharge cases will do is punish owners who relied on the DHCR and did not engage in willful wrongdoing (*Borden v. 400 E. 55st St. Assoc. L.P.*, 24 NY3d 382, 398 (2014)) with higher overcharges, much higher treble damages, and the added imposition of mandatory attorneys' fees.

While greatly expanding the property owners' liability for overcharges and the severity of penalties imposed for it can, perhaps, be justified as necessary prospective protections for tenants, the absence of any articulated rationale for applying these terms retrospectively means the application to pending cases violates due process.

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the HSTPA to pending cases. Similarly, transcripts of the Assembly debate on the bill (http://www2.assembly.state.ny.us/write/upload/transcripts/2019/6-14-19.pdf#search=%228281%22) and the Senate debate on the bill (https://www.nysenate.gov/transcripts/floor-transcript-061419txt), do not show any discussion or justification for retroactive application to pending cases. The bill jacket for the statute has not been completed and is not available at this time.

> "[R]etroactive lawmaking is a particular concern for the courts because of the legislative 'tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals.' *Landgraf v. USI Film Products 511 U.S. 244,* 266 (1994); …If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership. ...Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them. Both stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation." *Eastern Enterprises, supra* at 548-549 (Justice Kennedy concurring in judgment and dissenting in part)

The constitution and the political system allow the legislature to favor tenants over owners in prospective legislation. But the HSTPA, which will place severe burdens on owners in pending, J-51 overcharge cases, cannot, without any articulated reason, be applied retroactively to transfer property from owners to tenants. Thus, in *Railroad Retirement Board v. Alton Railroad Co.* (295 US 330, 349-350) the Supreme Court struck down on due process grounds a new law requiring employers to pay pension benefits to former employees who had separated before the law was enacted, declaring it "arbitrary in the last degree" and "a naked appropriation of private property." As Professor Sunstein explained, "[t]he minimum requirement that government decisions be something other than a raw exercise of political power has been embodied in constitutional doctrine under the due process clause[.]" Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1692 (1984). The Due Process Clause (along with the Takings Clause and others) reflects a general "prohibition of naked preferences." *Id*. at 1689

2) <u>Applying the HSTPA to this Case Will Unconstitutionally Subject the Defendant to Retroactive Penalties of Mandatory Attorneys' Fees and Treble Damages</u>

Through six years of litigation, the Plaintiffs have never denied that if the four-rule had been applied as every other appellate court in the state applied it – utilizing the rent in effect on the four-year base date – there would be no overcharges and therefore no treble damages and no attorneys' fees. In fact, Plaintiff-Tenants were undercharged. (Defendant Brief 8, 14-15,43-45; Defendant

Reply Brief 1). Applying the HSTPA to this case will unconstitutionally subject Defendant to retroactive penalties.

The new statute changes the base date and the way overcharges are calculated. Under the old statute, in the absence of fraud, the base date rent was the rent in effect four years prior to the commencement of the overcharge action (see *Grimm supra*; *Boyd supra*; RSC 2526.1(a)(3)(I) & RSC 2520.6(e); Defendant Brief pp.20-22). The new statute changes the base date from four to six years and says the entire rent history should be used to ascertain a "reliable" rent on the base date. This will change this case from one with no overcharge to there being an overcharge which will subject the Defendant to having to pay overcharges and liability for the penalty of treble damages.

Applying the HSTPA to this case will also subject the Defendant-Appellant, to the penalty of attorneys' fees. The new statute amends RSL 516(a)(4) to change attorneys' fees in overcharge cases from discretionary (owner "may" be assessed) to mandatory ("shall" be assessed). Since moving from a four to a six-year base date and changing the method of calculating the base date rent will result in there being overcharges in this case, the new statute will penalize the Defendant by imposing attorneys' fees.

The rent statue explicitly labels both overcharges and treble damages as a "penalty" (RSL 26-516(a)). In *Borden supra*, this Court held that regardless of the statutory label, overcharges are compensatory and not a penalty. But it also held that treble damages are a "penalty" and "a separate punitive award." This mirrors the finding by the Appellate Division that, "By any reasonable measure, treble damages amount to a substantial penalty. It is punitive in nature and obviously designed to severely punish owners who deliberately and systematically charge tenants unlawful rents…." *Matter of H.O. Realty Corp. v. DHCR*, 46 AD3d 103,108 (1st Dept. 2007).

As this Court recognized in *Borden supra*, in J-51 cases in general, owners who relied on the DHCR did not "deliberately and systematically" overcharge. It recognized that it would be manifestly unfair to penalize owners for raising rents and failing to register an apartment at a time when, relying on the DHCR, they reasonably believed the apartments were exempt and need not be registered. In this case in particular, the Court below found that the Defendant-Owner relied on the DHCR, documented all the improvements needed to raise the rent and there was no evidence of fraud (*Taylor* supra at 98-99, 103-105, 98 ft 3). Yet unlike *Borden,*

where the tenant-plaintiffs sought to waive the treble damages penalty, the Plaintiffs in this case specifically sought treble damages (R.24-25).

It would also be hard to describe the mandatory imposition of attorneys' fees as anything other than punitive or a penalty (RSC 2526.1(d) describes overcharge attorneys' fees as "an additional penalty"; *Matter of Mountbatten Equities v New York State Div. of Hous. & Community Renewal*, 226 A.D.2d 128, 130 (1st Dept. 1996) describes the attorneys' fees in RSC2526.1(d) and RSL 26-516(a)(4) as a "sanction").

Imposing the new penalties in the HSTPA to pending, post *Roberts*, J-51 overcharge cases is not only manifestly unfair. It is unconstitutional.

In *Landgraf supra*, a new statute creating a right to recover compensatory and punitive damages for discrimination – the Civil Rights Act of 1991 - became law while a petitioner's appeal of an earlier civil rights action was pending. The Court held that the subsection authorizing retroactive punitive damages "would raise a serious constitutional question."

> "…the Ex Post Facto Clause not only ensures that individuals have 'fair warning' about the effect of criminal statutes, but also 'restricts governmental power by restraining arbitrary and potentially vindictive legislation.' (citations omitted)" *Landgraf supra* at 266-267.
>
> "The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question. See *Turner Elkhorn,* 428 U.S. at 17 (Court would 'hesitate to approve the retrospective imposition of liability on any theory of deterrence…or blameworthiness'); *De Veau v. Braisted,* 363 U.S. 144, 160, 4 L. Ed. 2d 1109, 80 S. Ct. 1146 (1960) ('The mark of an *ex post facto* law is the imposition of what can be fairly designated punishment for past acts'). See also *Louis Vuitton S.A. v. Spencer Handbags Corp.,* 765 F.2d 966, 972 (CA2 1985) (**retroactive application of [**civil**] punitive treble damages provisions** of the Trademark Counterfeiting Act of 1984 'would present a potential *ex post facto* problem')." (emphasis added) *Landgraf supra* at 281.

Louis Vitton supra presents a similar situation to the instant case. New mandatory civil treble damages were enacted 11 days before the start of a civil trial for violating the Trademark Counterfeiting Act. Under the old law treble damages were discretionary.

> "If a statute 'changes the legal consequences of acts completed before its effective date,' (citation omitted) it may run afoul of the Ex Post Facto Clause. Although the prohibition generally applies to criminal statutes, it may also be applied in civil cases where the civil disabilities disguise criminal penalties. …It is not unreasonable for defendants to suggest that the new punitive treble damages provision, if applied retroactively, would present a potential ex post facto problem.
> *Id* at 972.

The Supreme Court later clarified that,

> "A conclusion that the legislature intended to punish would satisfy an *ex post facto* challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the legislature has stated it." (citations omitted) *Smith v. Doe*, 538 US 84, 92-93 (2002)

In addition to adding a new mandatory penalty of attorney's fees, the HSTPA also retroactively expands the period for overcharge liability in pending cases from four to six years and increases the liability for "a **penalty** equal to three times the amount of such overcharge" from two to six years. These changes in the severity of the penalties assessed for overcharges also raise "a serious constitutional question."

The Due Process clause of the Fourteenth Amendment to the U.S. constitution imposes substantive limits on States' discretion to impose criminal penalties and punitive damages in civil cases. *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 US 424, 433-434 (2001). It prohibits excessive or arbitrary punishments because,

> "'elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive **fair notice** not only of the conduct that will subject him to punishment, but also **of the severity of the penalty** that a State may impose.'" *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 US 408, 416-417 (2003) (quoting *BMW of North America, Inc. v. Gore*, 517 US 559, 574). [emphasis added]

Defendant, relying on DHCR guidance, could not know prior to *Roberts* and its progeny – especially the 2013 final decision denying leave to appeal in *72A Realty Assocs. v. Lucas*, NY Slip Op 68006(U) (see Defendant Brief at 13-14, 40-44) – that its conduct could constitute an overcharge that could subject it to treble damages and fees. Defendant did not know until *Lucas* was decided that it would have to treat tenants like the Defendants as Stabilized twelve years after the J-51 ended (see *infra* Sec III). It did not receive notice in 2014 when this case commenced that it would have to go back six years and not four to determine if there was an overcharge and adjust the rent amount to avoid the accumulation of additional overcharges, interest, and penalties. It did not receive fair notice in 2000 that 19 years later the legislature would greatly expand the severity of the penalties it may impose (treble damages expanded from two to six years and discretionary attorneys' fees became mandatory).

In *Lacidem Realty Corp. v. Graves*, 288 NY 354, 357 (1942) this Court held,

> "'Whether a statute which by its express terms is retroactive will be sustained is usually a question of degree' (*People ex rel. Beck v. Graves,* 280 NY 405, 409). The situation here is sufficiently like that in *People ex rel. Beck v. Graves* (*supra*) to require a similar result."

Lacidem involved 1941 amendments taxing landlords' submetering operations that the legislature made retroactive to 1937. This Court held,

> "Under the circumstances we hold that this provision for full retroactivity 'is so harsh and oppressive as to transgress the constitutional limitation.' (*Welch v. Henry,* 305 U.S. 134, 137) We do not think this is a case where 'adequate forewarning' answers the question." *Lacidem supra* at 357.

If making taxes retroactive for four years was "harsh and oppressive" then expanding overcharge liability from four to six years, extending treble damage liability from two to six years and turning a case where there was no overcharge into one where there is an overcharge with mandatory attorneys' fees and a possible treble damages "penalty" is certainly "harsh and oppressive."

3) <u>The HSTPA will Unconstitutionally Lengthen the Statute of Limitations in Pending Cases</u>

Under the old four-year rule liability for years five and six prior to the complaint was time barred. This new statute extends the statute of limitations and

revives the Plaintiffs' cause of action for years five and six. This Court addressed whether the legislature could constitutionally revive a cause of action which had been barred prior to an amended statute in *Gallewski v. H. Hentz & Co*., 301 NY 164 (1950).

> "…the Legislature may constitutionally revive a personal cause of action where the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the Legislature were not effectuated." *Gallewski supra* at 174.

In *Gallewski*, where a brokerage firm made an unauthorized sale of securities owned by a man trapped in the Netherlands by the Nazi invasion who was subsequently murdered in a concentration camp, the case was indeed exceptional and denying recovery would have been a serious injustice. But there is nothing remotely resembling those circumstances in this case.

Similarly, in *Hymowitz v. Eli Lilly & Co.*, 73 NY2d 487, 507-508 (1989), this Court found that legislature "consciously created… a legislative response reviving previously barred actions" for hundreds of cases of women who suffered life threatening injuries from exposure to the drug DES. The long latency period between exposure and illness meant that these women were time barred and left without a remedy. This Court stressed "that the DES situation is a singular case" and presents an "unusual scenario, [in which] it is more appropriate that the loss be borne by those that produced the drug for use during pregnancy, rather than those who were injured by the use…." *Hymowitz supra* at 508. The Court found that the "exceptional circumstances" presented satisfied the requirements for the constitutionality of the claim revival statute under the New York State constitution (*Hymowitz supra* at 513-514).

This case is not even remotely like *Hymowitz*. The only damage Plaintiffs might have suffered would be a small amount of money. They were not physically injured or displaced from their apartment. Moreover, unlike *Hymowitz*, there are no concerns about latency that impaired Plaintiffs' rights. The Court below found Plaintiffs had all the notice and information they needed in 2000 to challenge the rent increase over the deregulation threshold, challenge the DHCR policy of luxury deregulation while a J-51 was in effect or claim an overcharge (*Taylor supra* at 103-104). The Defendant had provided most of this information to the Plaintiffs and the rest was available through public records. The Defendant did nothing to hide relevant information or impede Plaintiffs' legal rights. Yet Plaintiffs waited 14 years to commence an action.

More recently, this Court held that, "…a claim-revival statute will satisfy the Due Process Clause of the State Constitution if it was enacted as a reasonable response in order to remedy an injustice." *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litigation*, 30 NY3d 377, 400 (2017). But there is little injustice to remedy in this pending, post *Roberts* case. Unlike the run of the mill overcharge case, post *Roberts* cases involve the luxury deregulation of apartments under the direction of the relevant administrative agency (DHCR) for tenants who, for the last 26 years until this new statute, the legislature had determined didn't need the protection of rent stabilization. The only class of people the new law will protect from injustice in post *Roberts,* J-51 cases is the wealthy who were luxury deregulated. The fact that the legislature has now decided that people making more than $200,000 a year need rent stabilization protection does not turn the possibility that some wealthy tenants who were mistakenly luxury deregulated while a J-51 was in effect and may have paid a little more than they should have into a grave "injustice." The Plaintiff-tenants in the instant case have never denied that they are successful, Oscar winning screenwriters and directors who sought and could easily afford the subject apartment at market rates (Defendant Brief p.11; R.55). Nor is the new statute, which not only extends the statute of limitations but also expands compensatory and treble damage liability, turns cases like the instant one from no overcharge to positive overcharge, and then mandates attorneys' fees, a "reasonable" response where the Defendant did nothing wrong other than follow DHCR direction.

Unlike the claim revival statutes at issue in *World Trade Center*, *Gallewski*, and *Hymowitz* which only extended the statute of limitations, the HSTPA combines a change the base date from four to six years and the period of liability from four to six years with a change in the substantive law to which that limitations period applies – i.e., how the legal regulated rent is determined and overcharges computed along with a new, longer liability period for treble damages. It would be as if the legislature simultaneously changed the statute of limitations for medical malpractice, the definition of malpractice and how damages are calculated and then applied the new statute to pending malpractice cases. Simultaneously changing the statute of limitation and the substantive law in a pending case is neither a "reasonable" nor a rational means of addressing legitimate legislative concerns in pending cases.

4) <u>The Appellate Division First Department Has Erroneously Concluded that Applying the HSTPA to Pending J-51 Cases Does Not Violate Due Process</u>

The Appellate Division First Department recently considered whether to apply the HSTPA to a pending J-51 case in *Dugan v. London Terrace Gardens*,

2019 NY Slip Op 06578 (September 17, 2019) – a J-51 overcharge case that has been pending for over 10 years and involves hundreds of tenants. The court rejected the defendant's claim that applying the HSTPA amendments to RSL 26-516 and CPLR 213-a to the pending litigation would violate due process. It relied on two cases – *Matter of Schutt v. New York State Div. of Hous. & Community Renewal*, 278 AD2d 58 (1st Dept. 2000) and *Matter of Brinckerhoff v. New York State Div. of Hous. & Community Renewal*, 275 AD2d 622 (1st Dept. 2000) – claiming that both cases applied the "newly enacted four-year statute of limitations" in the Rent Regulation Reform Act of 1997 (RRRA) to limit a fair market rent appeal (*Schutt*) and an overcharge complaint (*Brinckerhoff*). But the RRRA did not change or "newly enact" the statute of limitations. The four-year statute of limitations was established in 1983 legislation that became effective in 1984. Multiple cases and legislative memoranda make clear that the 1997 RRRA amendments to the rent law were explicitly passed to rectify judicial misinterpretations of the earlier statute. (Defendant Brief pp 5-6; Defendant's July 29, 2019 letter to this Court at p.3; & Defendant's August 30, 2019 letter to this Court at p.3) As this Court observed, the RRRA "clarified and reinforced the four-year statute of limitations applicable to rent overcharge claims by limiting examination of the rental history of housing accommodations prior to the four-year period preceding the filing of an overcharge complaint. (citations omitted)" *Thornton v. Baron*, 5 NY3d 175, 180 (2005).

The *Dugan* court approvingly noted that *Schutt* "found no due process infirmity because 'rent regulation does not confer vested rights' (citation omitted)." But this ignores a key factual difference between *Schutt* and *Brinckerhoff* and this case. *Schutt* and *Brinckerhoff* both involved tenants trying to have an earlier version of rent regulation that they believed was more lenient and advantageous to their claims applied. They could not have a vested interest in a rent regulation scheme. Defendant-Appellant, along with other owners, has property rights independent of the RSL. Those rights are impinged upon by rent regulation but they are not conferred by rent regulation. Retrospectively taking money from owners in the form of a lengthened statute of limitations, six years of overcharges rather than four, six years of treble damages liability rather than two and mandatory rather than discretionary attorneys' fees, very clearly does create a "due process infirmity." In addition, application to this pending case will permanently impair the Defendant's vested right to future rental income by lowering the legal rent collectible now and in the future. (*see infra* Sec II.B)

5) The HSTPA as Applied to Pending and Future Cases Will Violate Due Process by Penalizing Owners Who Were Previously Told They Could Discard Older Records

The old statute and multiple decisions of this Court and the First Department held that the rental history prior to the four-year base date could not be consulted to calculate an overcharge in the absence of fraud (Defendant Brief pp.20-28). Landlords were told they could discard older records. (See *Thornton v. Baron*, 5 NY3d 175, 181 (holding that the "purpose [of the four-year rule] was to alleviate the burden on honest landlords to retain rent records indefinitely"); *Boyd, supra* (holding that in the absence of fraud an owner need not produce renovation records to justify a rent increase more than four years prior to the overcharge complaint)).

The new statute in the amended RSL § 26-516(h) says that DHCR or a court, "shall consider all available rent history which is reasonably necessary" to determine the legal regulated rents and overcharges. The statute explains at length that this includes all registrations or other public records and private records maintained by the owner or tenants. While the new statute amends § RSL 26-516(g) to purportedly change the number of years an owner is required to maintain or produce records from four to six it cautions, "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." This gives tenant-litigants license and the incentive to challenge every past registration and rent increase, no matter how old. The evidentiary burden is completely on the owner. Any owner who, in reliance on the old statute, discarded records, may now not have the records to document the legal rents, increases and registrations and may be penalized by having the rent revert to an ancient registered rent or determination by a default formula resulting in the penalties of treble damages and attorneys' fees. This violates,

> "… the basic protection against 'judgments without notice' afforded by the Due Process Clause, *Shaffer v. Heitner*, 433 U.S. 186, 217 (1977) (STEVENS, J., concurring in judgment), [that] is implicated by civil penalties." *BMW of North America, Inc. v. Gore*, 517 US 559, 574 n.22 (1996).

See also, Cox v. Louisiana, 379 US 559, 571 (1965) (unconstitutional to prosecute defendant where defendant reasonably relied on representations by police that statute permitted conduct in question).

B. APPLYING THE HSTPA TO PENDING J-51 OVERCHARGE CASES EFFECTS AN UNCONSTITUTIONAL TAKING UNDER THE FEDERAL AND STATE CONSTITUTIONS

Evaluating whether a government action is an unconstitutional taking "involves an examination of the 'justice and fairness' of the governmental action." *Eastern Enterprises* at 523 (citing *Andrus v. Allard*, 444 U. S.51, 65 (1979)). The inquiry "Is essentially ad hoc and fact intensive" and involves the analyzing of three factors: 1) the economic impact of the regulation; 2) its interference with reasonable investment backed expectations; and 3) the character of the governmental action." *Eastern Enterprises at* 523-524. See also *Lingle v. Chevron USA Inc.,* 544 US 528, 538-39 (2005) (identifying the "primary factors" as the "economic impact of the regulation on the claimant, and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," along with "the character of the government action.")

Supreme Court decisions have held "…that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Eastern* at 528-529. Neither Defendant 72A nor other owners in pending J-51 overcharge cases could have anticipated that the legislature would lengthen the statute of limitations, expand liability for overcharges from four to six years, and expand liability for penalties for treble damages (two to six years) and attorneys' fees (discretionary to mandatory). Owners bought and sold buildings, made investments in properties they already owned and retained or discarded records based on the four-year rule that had been in effect since 1984.

This Court has identified, "The threshold step in any Takings Clause analysis is to determine whether a vested property interest has been identified. …[and] that the mere obligation to pay money, without identification of a vested property interest, cannot constitute a taking (citations omitted)." (*American Economy supra* at 155). Surely, Defendant's (and other owners') ability to own and receive future rental income from its property qualifies as a vested interest. This is not simply a situation where applying the HSTPA to this case will result in an obligation to pay money (overcharges, attorney's fees, treble damages). Applying the HSTPA will change the legal rent that the Defendant is entitled to collect now and in the future from the current amount as determined by the old

four-year rule to a new, lower amount. This lower current legal rent will form the baseline to which future legal rent increases will apply. The RSL requires owners to renew a tenant's lease with proscribed increases for as long as the tenant, or their successors, care to stay. The government's action will permanently lower the value of the Defendant's property.

C. APPLYING THE HSTPA TO THIS CASE VIOLATES THE CONTRACT CLAUSE OF THE U.S. CONSTITUTION

> The Contract Clause of the US Constitution "prohibits states from enacting '[l]aw[s] impairing the Obligation of Contracts'" …"'The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." …the initial inquiry contains "three components: whether there is a contractual relationship, whether a change in the law impairs that contractual relationship, and whether the impairment is substantial." (citations omitted) *American Economy supra* at 149-150.

There is no question that there is a contractual relationship between the owners and tenants. Nor is there any question that applying the HSTPA to pending J-51 overcharge cases would change that relationship by, in many cases including the instant case, lowering the rent that may be obtained now and into the future and by requiring the refund of overcharges and the assessment of penalties that would not occur if the old law was applied. Finally, the impairment will be substantial. "'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.' (citations omitted)" (*American Economy supra* at 150). Few industries are as heavily regulated as housing has been in New York City over the past 70 years. Yet the legislature has never retroactively imposed as wide a change in the relationship between rent regulated tenants and owners, including determining the rental amounts that may be charged, as it has done in the HSTPA. By retroactively changing the way that base date rents and overcharges are calculated, the HSTPA changes the legal rent amounts of leases that are many years old and that owners previously had every reason to think were validly calculated.

In the aftermath of this Court's decision in *Roberts,* owners, including the Defendant, made leases (contracts) with tenants based on the four-year rule that has been in effect since 1984 to determine current legal rents. In this case, the Defendant-Appellant offered and the Plaintiffs signed a rent stabilized lease in 2013 with a rental amount based on the four-year rule. All the subsequent leases,

including the current lease, had rental amounts based on that lease and the four-year rule. The 2013 amount, the current rental amount and the rents into the future, ad infinitum, will change substantially if the HSTPA is applied. There are tens of thousands of owner-tenant pairs around the city in a similar situation where the contracts they executed in reliance on the old law will be substantially impaired by applying the HSTPA.

Defendant-Appellant and other owners in pending J-51 overcharge cases are in a situation akin to *Health Ins. Assn. of Am. v. Harnett*, 44 NY2d 302 (1978), as cited in *American Economy*, where this Court found an unconstitutional impairment of contracts.

> . . . our prior decision in *Moore v. Metropolitan Life Ins. Co.*(33 NY2d 304, 307 NE2d 554, 352 NYS2d 433 [1973]) was dispositive, insofar as the Court held in *Moore* that "'[w]here …the insurer [owner] does not have the right to terminate the policy [lease] or change the premium rate [rent] without consent of the [insured [tenant]], …statutes enacted subsequent to its original enactment cannot be applied'"(*Harnett,* 44 NY2d at 313, quoting *Moore*, 33 NY2d at 312). …"[w]hat is required is a choice open to the insurer [owner] to increase premiums [rents] or in the alternative, if it so elects, to terminate – thus, fail to renew – the policy [lease] and escape the added risk imposed by the statutory modification" (*Harnett*, 44 NY2d at 313).
> *American Economy supra* at 153

Owners subject to rent stabilization have neither the ability to increase rents beyond legally mandated amounts nor the ability to terminate or fail to renew leases for rent stabilized tenants. Applying the HSTPA to pending cases would impair the contracts owners and tenants entered into under the law as it existed prior to the enactment of the HSTPA.

III. THIS CASE PRESENTS A MATTER OF FIRST IMPRESSION WHICH IS NOT AFFECTED BY THE HSTPA AND SHOULD THEREFORE BE DECIDED BY THIS COURT ON THIS APPEAL

In *Roberts supra* at 279, this Court held that owners, "were not entitled to take advantage of the luxury decontrol provisions of the Rent Stabilization Law (RSL) while simultaneously receiving tax incentive benefits under the City of New

York's J-51 program." But, "The Court of Appeals did not address what effect the expiration of J-51 benefits would have on the rent-regulated status of affected apartments…." *Taylor supra* at 102.

The J-51 in this case expired in tax year 2002-2003, 12 years before Plaintiffs commenced the overcharge action (2014) and 15 years before the decision below (2017). Defendant-Appellant offered and Plaintiffs signed a rent stabilized lease shortly after *72A Realty Assoc. v. Lucas*, 101 AD3d 401 (1st Dept 2012), *72A Realty Assoc. v. Lucas*, 2013 NYSlipOp 68006(U) (1st Dept 2013, leave to appeal denied) was finally decided. *Lucas* held that a tenant luxury deregulated in reliance on DHCR regulations while a J-51 was in effect would remain stabilized years after the J-51 had expired solely because the deregulation had been "improper." This was a different reason than the one offered by the Civil Court and Appellate Term in *Lucas* for continuing the Plaintiffs' stabilized status and was unsupported by any statute or precedent.

Defendant-Appellant argued below that *Lucas* was wrongly decided and contrary to the legislative intent that stabilized status end when the J-51 expired. The court below, relying exclusively on *Lucas*, held that Plaintiffs retain their stabilized status as long as they maintain their tenancy (*Taylor supra* at 102). Neither the HSTPA nor any other court has addressed the effect the expiration of J-51 benefits would have on apartments that would have been luxury deregulated but were kept temporarily regulated while a J-51 was in effect.

Defendant-Appellant's arguments (Defendant Brief pp 46-50) should be considered on this appeal because the issue is not affected by the HSTPA. The subject apartment became free market when the legal rent exceeded the deregulation threshold upon vacancy in 2000 under then current law (RSL 26-504.2(a); *Altman v. 285 W. Fourth LLC*, 31 NY3d 178, 184-185 (2018)). It was temporarily maintained as stabilized while the J-51 was in effect but should have reverted to free market status when the J-51 expired. While the HSTPA eliminated luxury deregulations in the future, it does not address luxury deregulations that occurred in the past and it does not codify the decision in *Lucas* that apartments that were "improperly deregulated" in the past, while a J-51 was in effect, remain regulated for the duration of the tenancy. If Defendant-Appellant was entitled to consider the Plaintiffs as free market when the J-51 expired 17 years ago then their overcharge claim should be dismissed.

CONCLUSION

This Court should decide on this appeal that the HSTPA does not govern the issues presented on this appeal.

This Court should also find that the retrospective application of the HSTPA is unconstitutional under the New York State and U.S. Constitutions, especially as applied to these pending, J-51 overcharge cases and in particular, to this case where application of the HSTPA will retroactively penalize the Defendant-Appellant.

Finally, this Court should reverse that part of the Decision in the Court below that: (a) permitted a look back period of more than four years before the date of commencement of Plaintiff-Tenant's action, and (b) denied defendant-landlord summary judgment dismissing all claims for overcharges, treble damages, and attorneys' fees, and for such other and further relief this Court deems fair.

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