

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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PORTOFINO REALTY CORP., PROMETHEUS REALTY :
CORP., SYLVAN TERRACE REALTY LLC, WINDSOR :
REALTY LLC, UNICORN 151 CORP., TUSCAN REALTY :
CORP., 90 STATE STREET ASSOCIATES, INC., 274 HENRY :
ASSOCIATES, INC., 141 WADSWORTH, LLC, RENT :
STABILIZATION ASSOCIATION OF N.Y.C., INC., :
COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC., :
and THE SMALL PROPERTY OWNERS OF NEW YORK, :
INC., :

Index No. 501554/2014

Plaintiffs, and

IAS Part 66

APARTMENT OWNERS ADVISORY COUNCIL, ADVISORY :
COUNCIL OF MANAGING AGENTS, THE BUILDING AND :
REALITY INSTITUTE OF WESTCHESTER & THE MID- :
HUDSON REGION, STEPPING STONES ASSOCIATES, L.P., :
and DEROSA BUILDERS INC., :

Velasquez, J.

Intervenor-Plaintiffs,

v.

NEW YORK STATE DIVISION OF HOUSING AND :
COMMUNITY RENEWAL and DARRYL C. TOWNS, as :
Commissioner of the NEW YORK STATE HOMES AND :
COMMUNITY RENEWAL and the DIVISION OF HOUSING :
AND COMMUNITY RENEWAL, :

Defendants, and

MAKE THE ROAD NEW YORK, NEW YORK STATE :
TENANTS & NEIGHBORS, and ASSOCIATION FOR :
NEIGHBORHOOD AND HOUSING DEVELOPMENT :

Intervenor-Defendants.

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**INTERVENOR-DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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Intervenor-Defendants Make the Road New York, New York State Tenants and Neighbors, and Association for Neighborhood and Housing Development (collectively, “Tenants”), respectfully submit this memorandum of law in support of Defendants’ September 16, 2016 Motion for Summary Judgment.

PRELIMINARY STATEMENT

Tenants are community organizations whose members primarily reside in rent-stabilized and rent-controlled apartments in New York City. As such, Tenants are directly impacted by New York rent regulations, and directly benefit from the critical 2014 Amendments to those regulations that Plaintiff Landlords challenge in this litigation.

Make the Road New York (“MTRNY”) is a member organization whose mission is to empower Latino and working-class communities through organizing, policy innovation, and survival services. *See* Affirmation of Marika Dias, Dkt. 87 (“Dias Aff.”) ¶ 3. MTRNY has over 14,000 members, many of whom live in rent-stabilized housing. *Id.* Likewise, the great majority of the 3,000-member New York State Tenants and Neighbors (“T&N”)—whose mission is to empower and educate tenants, preserve affordable housing, and strengthen tenant protections—are rent-stabilized or rent-controlled tenants. *See* Affirmation of Ricardo Gotla, Dkt. 88 (“Gotla Aff.”) ¶ 3. Finally, the Association for Neighborhood and Housing Development (“ANHD”) is a member association of not-for-profit neighborhood-based affordable housing organizations in all five boroughs of New York City. *See* Affirmation of Benjamin Dulchin, Dkt. 89 (“Dulchin Aff.”) ¶ 3. ANHD works directly with many thousands of tenants facing poor physical conditions and displacement pressure in their privately owned apartments. *Id.*

Tenants concur with Defendants—the New York State Division of Housing and Community Renewal (“DHCR”) and its former commissioner, Darryl C. Towns—that there is no

genuine issue of material fact as to the constitutionality or legality of the 2014 Amendments to New York’s rent regulations, including codification of DHCR’s Tenant Protection Unit (“TPU”), which Plaintiffs challenge in this litigation. The DHCR followed appropriate procedures in promulgating the Amendments, consistent with its broad statutory authority, and Plaintiffs have suffered no due process violations in the years that have passed since their institution.

If Plaintiff Landlords prevail in this action, Tenants and their members will lose vital legal protections and procedural tools necessary to combat pervasive landlord fraud and abuse. Indeed, before adoption of the 2014 Amendments, Tenants experienced firsthand the problems and regulatory abuses the Amendments were designed to remediate. For example, Tenants suffered from illegal rent overcharges, including but not limited to rent overcharges due to unsupported claims of Individual Apartment Improvements during a vacancy period. Tenants also witnessed landlords’ frequent use of preferential rents to disguise illegal regulated rents, and experienced rent hikes for supposed major capital improvements despite the continued presence of immediately hazardous conditions. Furthermore, Tenants would often have meritorious rent reduction applications dismissed solely on the basis of their inability to establish prior landlord notification. In the pre-Amendments period, Tenants endured such landlord abuse and harassment without access to appropriate remedies, and generally lacked any proactive enforcement of existing rent laws. *See, e.g.,* Dias Aff. ¶¶ 4, 6, 19-20; Gotla Aff. ¶¶ 4, 7, 13, 15-17; Dulchin Aff. ¶¶ 4, 6, 8, 14, 17-18.

The DHCR established the TPU and promulgated the 2014 Amendments in an attempt to remediate some of these longstanding flaws in the rent regulation regime. Even with the 2014 Amendments, the system is not perfect, and Tenants continue to seek additional

necessary protections that the DHCR declined to adopt in the 2014 Amendments. Nevertheless, the 2014 Amendments were an important and long overdue step forward.

By contrast, Plaintiff Landlords ask the Court to turn back the clock and undo these critical advancements based on unfounded claims that the DHCR failed to follow appropriate procedures, and that the TPU and 2014 Amendments somehow violate their constitutional rights. But as detailed below and in Defendants' brief, all evidence adduced in discovery supports the propriety and constitutionality of the procedures followed by DHCR in establishing the TPU and enacting the 2014 Amendments. Plaintiffs have likewise uncovered no evidence to support their allegations of due process violations.

Because no genuine issue of material fact exists as to any of Plaintiffs' claims, the Court should grant Defendants' motion for summary judgment.

BACKGROUND

In 1969, New York enacted the Rent Stabilization Law, Administrative Code of City of New York §§ 26-501 to 520 ("RSL"), to remedy "an acute shortage of dwellings which creates a special hardship to persons and families occupying rental housing" in New York City and "to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare" RSL § 26-501. The RSL balances the interests of landlords and tenants by providing for a system of regulated rent increases, while prohibiting eviction of tenants without good cause and assuring tenants of the right to lease renewals.

The Legislature extended the protections in the RSL to Nassau, Rockland, and Westchester Counties in 1974, by enacting the substantively identical Emergency Tenant

Protection Act (“ETPA”), N.Y. Uncons. Laws §§ 8622 et seq. (McKinney 2016). The RSL and ETPA, including subsequent amendments thereto, are collectively referred to herein as the “Rent Statutes.”

A. DHCR GIVEN BROAD AUTHORITY TO ENFORCE RENT STATUTES

In the Omnibus Housing Act of 1983, the Legislature delegated responsibility for implementing the RSL to the DHCR—which already possessed authority to administer rent regulations outside of New York City. Pursuant to this authorization, the DHCR now promulgates, amends, and enforces the New York City Rent Stabilization Code, 9 NYCRR §§ 2520-2531 (“RSC”), as well as the New York State Emergency Tenant Protection Regulations, 9 NYCRR §§ 2500-2511 (“TPR”) (collectively with the RSC, the “Rent Regulations”).

As this Court previously recognized, the DHCR possesses “broad authority to enforce the RSL.” Oct. 27, 2014 Order, Dkt. 119, at 4. The DHCR may take action in response to a tenant complaint or on its own initiative, RSL § 26-516(a), and is authorized to “administer oaths, issue subpoenas, conduct investigations, make inspections and designate officers to hear and report.” RSL § 26-516(f). It has authority not only to issue “the specific orders provided for by other provisions of this law,” but also “to enforce this law and the code by issuing, upon notice and a reasonable opportunity for the affected party to be heard, such other orders as it may deem appropriate.” RSL § 26-516(b).

In the Rent Act of 2011 (the “2011 Act”), the Legislature further strengthened the protections available to tenants by, *inter alia*, placing additional restrictions on rent increases and on removing apartments from rent stabilization entirely. In the 2011 Act, the Legislature also explicitly affirmed the DHCR’s authority to “promulgate rules and regulations to implement and enforce” the rent stabilization laws. N.Y. Laws of 2011, ch. 97, Part B, § 44.

The broad authority granted to the DCHR is fundamental to its ability to “insure that the level of fair rent increase established under this law will not be subverted and made ineffective.” RSL § 26-511(c)(5).

B. THE TENANT PROTECTION UNIT

In February 2012, Governor Cuomo announced the creation of the Tenant Protection Unit (“TPU”) sub-division within DHCR. Shortly thereafter, the commissioner of DHCR at the time, Darryl C. Towns, delegated authority to the TPU to “investigate and prosecute” violations of the Rent Statutes and Rent Regulations—in particular, rent overcharges. The DHCR has long possessed the authority to initiate and pursue investigations into such violations, *see supra*, and the Commissioner may delegate this authority to other individuals—here, the Deputy Commissioner of the TPU. *See* Pub. Hous. L. §§ 11, 12; Pub. Off. L. § 9; *see also* September 15, 2016 Affidavit of Sheldon Melnitsky (“Melnitsky Aff.”) ¶¶ 10-14.

The creation of the TPU, and delegation of DHCR’s enforcement authority to it, was consistent not only with the Rent Statutes, but also the Legislature’s stated objectives in enacting the 2011 Act.¹ As discussed further below, and contrary to Plaintiff Landlords’ claims,

¹ *See, e.g.*, Record of Proceedings, N.Y. State Assembly, Bill 8518, Statement of Assemblyman Lopez, at 149 (“We pass laws and then seldom are they enforced. This mandates, through language, an enforcement authority by DHCR.”) (available at <http://assembly.state.ny.us/write/upload/session/2011/20110624.pdf>) (last accessed September 16, 2016); *id.*, Statement of Assemblyman Jeffries (“[F]or the first time in more than 20 years, in 2011 we’re taking a meaningful step forward. And now the responsibility shifts to Governor Andrew Cuomo to bring life, as the Chairman indicated, to DHCR to enforce the law....”); Record of Proceedings, N.Y. State Senate, Bill 1544, Statement of Senator Krueger, at 6053 (describing Rent Act of 2011 as a “down payment on where we need to go by the new Governor” and expressing belief that “as the second year of his administration moves forward, we will get stronger protections, more enforcement”) (available at <https://www.nysenate.gov/transcripts/floor-transcript-062411v1txt>) (last accessed September 16, 2016).

the creation of the TPU did not violate separation of powers principles, and its operation does not infringe any due process right of landlords.

C. THE 2014 AMENDMENTS

Following the 2011 Act, the DHCR also initiated rulemaking procedures to implement aspects of the 2011 Act, align the Rent Regulations with recent judicial decisions, and otherwise address deficiencies in the substance and enforcement of the Rent Regulations. *See, e.g.,* Melnitsky Aff. ¶¶ 29, 31, 33. The DHCR initiated this process consistent with its authority to “implement and enforce” the Rent Statutes (2011 Act, § 44), as well as its mandate to provide necessary “safeguards against unreasonably high rent increases and, in general, protect[] tenants and the public interest,” and to require landlords “not to exceed the level of lawful rents as provided by” the RSL. RSL § 26-511(c)(1) & (2); *see also* Melnitsky Aff. ¶¶ 23-24.²

Before enacting the 2014 Amendments, the DHCR received comments from the public, both at a public hearing and via written submission. *See* Melnitsky Aff. ¶¶ 34-35, 39. Landlord representatives engaged extensively in this comment process. *See id.* Tenants also testified and submitted comments and recommendations, advocating greater protections for tenants. *See* Dias Aff. at ¶¶ 12-17; Gotla Aff. at ¶¶ 6-14; Dulchin Aff. at ¶¶ 7-13.

After this extensive period for public comment, the DHCR promulgated the final 2014 Amendments on January 8, 2014. The DHCR also submitted a notice of adoption to the state register, and published an assessment of the public comments received on the proposed rules. Melnitsky Aff. ¶ 40 & Ex. O. The DHCR’s Assessment of Public Comments explained, analyzed, and provided a considered response to the major comments for each amendment. *See id.*

² The DHCR initially implemented certain aspects of the 2011 Act in its 2012 amendments to the Rent Regulations, *see* Melnitsky Aff. ¶ 31, which Plaintiffs do not challenge.

The 2014 Amendments, *inter alia*, (1) further align the Rent Regulations with statutory changes in the Rent Act of 2011; (2) codify the TPU, *see* RSC § 2520.5(o); (3) clarify that covered landlords may not increase rents for vacancies and major capital improvements if the landlord fails to maintain required services, *see* § 2523.4(a)(1)-(2); (4) require covered landlords to include descriptions of prior rental adjustments in lease riders, *see* §2522.5(c); (5) align the Rent Regulations with case law holding that the DHCR may (or should) in some cases review rent records more than four years old, *see* RSC § 2526.1(a)(2)-(3); (6) align the Rent Regulations with case law specifying the conditions in which DHCR may apply the “default formula” to calculate the maximum rent of a regulated unit, *see* RSC §§ 2522.6(b), 2526.1(g); and (7) require covered landlords to file an application to amend an apartment registration, *see* RSC § 2528.3(c).

In response to years of systemic violations and abuses of the rent control system by landlords, the 2014 Amendments are modest changes that establish more effective means for tenants and the DHCR to discover and rectify violations of the existing regime. These amendments by no means effected the sweeping and comprehensive revision of the Rent Regulations advocated by Tenants. *See* Dias Aff. ¶¶ 13-16 & Exs. B-C; Gotla Aff. ¶¶ 7-10 & Exs. A-B; Dulchin Aff. ¶¶ 8-11 & Exs. B-C. Instead, the 2014 Amendments amount to a compromise that offered some much-needed reforms but left a large number of problematic regulations intact. *See* Dias Aff. ¶¶ 17-18; Gotla Aff. ¶¶ 11-15; Dulchin Aff. ¶¶ 12-16. Despite Tenants’ disappointment with aspects of this compromise, there is no question that DHCR followed appropriate procedures in enacting the 2014 Amendments, including giving all parties the necessary opportunity to be heard.

In short, contrary to Plaintiff Landlords' claims in this litigation, the 2014 Amendments did not profoundly expand the longstanding core rights of tenants or intensify the restrictions placed on landlords. Far from violating landlords' due process rights, the 2014 Amendments establish procedures that allow tenants, often the poor and disadvantaged, to vindicate their own legal rights. The 2014 Amendments are consistent with both the letter and spirit of New York's Rent Statutes.

D. PROCEDURAL HISTORY

Plaintiffs brought this action against the DHCR on February 24, 2014, alleging that the 2014 Amendments are unconstitutional and invalid because they (1) are inconsistent with the statutes upon which they are based; (2) constitute legislative policy-making and therefore violate the constitutional principle of separation of powers; (3) violate property owners' due process rights; and (4) were not adopted in compliance with the State Administrative Procedure Act.

On March 4, 2014, Plaintiffs filed a motion seeking to preliminarily enjoin enforcement of the 2014 Amendments, as well as other relief including expedited discovery. Defendants and Tenants submitted briefs in opposition to Plaintiffs' motion on March 26, 2014. Defendants at the same time moved to dismiss this action. After Plaintiffs opposed dismissal, both Defendants and Tenants submitted reply briefs in support of Defendants' motion on April 29, 2014. On October 27, 2014, this Court denied Defendants' motion to dismiss, and denied Plaintiffs' motion except that it granted both parties "expedited" and "limited" discovery into the constitutional issues raised by Plaintiffs' motion.

Nearly two years have passed since the Court's October 2014 Order. In the interim, Plaintiffs' discovery into the actual operation of the TPU and the new safeguards established by the 2014 Amendments has only weakened Plaintiffs' claims.

Moreover, in June 2015, during the pendency of this action, the Legislature passed and Governor Cuomo signed into law the Rent Act of 2015, which further strengthened protections for tenants by, *inter alia*, increasing the threshold for apartment deregulation and placing additional limitations on post-vacancy rent increases. *See* N.Y. Laws of 2015, ch. 20, Part A, §§ 7-16. Despite Plaintiffs’ protestations that the creation of the TPU and enactment of the 2014 Amendments were contrary to Legislative intent, the Legislature remained silent on these issues. Instead, the Legislature again reaffirmed the DHCR’s authority to promulgate regulations to implement and enforce the rent stabilization laws. *See id.* § 17.

ARGUMENT

Summary judgment pursuant to CPLR 3212(b) is appropriate where the moving party offers evidence demonstrating the “absence of any material issues of fact,” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986), and that judgment is appropriate “as a matter of law,” *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980). After defendants make a prima facie showing in support of summary judgment, such relief is appropriate unless plaintiffs “point to specific evidence” to rebut defendants’ evidence and establish that material issues of fact remain. *Karian v. G&L Realty, LLC*, 32 A.D.3d 261, 264 (1st Dep’t 2006). “[O]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form . . . ; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” *Zuckerman*, 49 N.Y.2d at 562.

A. THE 2014 AMENDMENTS DO NOT VIOLATE THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS

The DHCR’s promulgation of the 2014 Amendments, including codification of the TPU, constituted an unexceptional exercise of the agency’s authority to adopt regulations enforcing the rent control and rent stabilization laws. The “traditional” role of an agency is to

“apply[] technical expertise to implement legislative goals in situations too complex and detailed to be dealt with individually by the Legislature.” *Consolidated Edison Co. v. Department of Env'tl. Conservation*, 71 N.Y.2d 186, 192 (1988). Indeed, as to the DHCR in particular, New York courts have emphasized the expansive nature of the rulemaking authority conferred on the agency, highlighting the DHCR’s “broad mandate to promulgate regulations in furtherance of the rent control and rent stabilization laws.” *Rent Stabilization Ass’n v. Higgins*, 83 N.Y.2d 156, 168-69 (1993).

This authority has been acknowledged and upheld despite the observation that it “inevitably require[s] some changes in the legal relationship between landlords and tenants.” *Id.* (quoting *Versailles Realty Co. v. New York State Div. of Housing & Cmty. Renewal*, 76 N.Y.2d 325, 328 (1990)). As long as the DHCR “follows the procedural requirements which the Legislature has prescribed,” its “adopt[ion of] an amendment to the Code which ‘protects tenants and the public interest’” satisfies the “broad mandate” under which the agency operates. *Festa v. Leshen*, 145 A.D.2d 49, 59, 61 (1st Dep’t 1989) (quoting RSL § 26-511(c)(1)).

With the 2014 Amendments, the DHCR once again adopted appropriate regulations to further the “basic policy choices” (*Greater N.Y. Taxi Ass’n v. New York City Taxi & Limousine Comm’n*, 25 N.Y.3d 600, 609 (2015)) set forth by the Legislature in the Rent Statutes and amendments thereto. The 2014 Amendments, including codification of the TPU, fall well within the bounds of DHCR’s statutory authority to promulgate regulations consistent with the Legislature’s policies.

1. DHCR Engaged in a Proper and Modest Exercise of Interstitial Rulemaking

Agencies are authorized to “fill in the interstices in the legislative product,” *Medical Soc’y of New York v. Serio*, 100 N.Y.2d 854, 865 (2003); see also *Matter of NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Preserv.*, 27 N.Y.3d 174,

183 (2016). In doing so, an agency “can adopt regulations that go beyond the text of [its enabling] legislation, provided they are not inconsistent with the statutory language or its underlying purposes.” *Agencies for Children’s Therapy Servs., Inc. v. New York State Dep’t of Health*, 136 A.D.3d 122, 130 (2d Dep’t 2015) (quoting *Greater N.Y. Taxi Ass’n*, 25 N.Y.3d at 608) (alteration in original).

A challenged regulation violates separation of powers principles only in the extraordinary case where an executive agency unilaterally enacts a comprehensive regulatory scheme in a largely unregulated area and in the absence of a legislative mandate. *See Boreali v. Axelrod*, 71 N.Y.2d 1 (1987) (overturning regulations that “effectuated a profound change in social and economic policy” without legislative mandate, *id.* at 8). Such circumstances are not present in this case.

In *Boreali*, members of the Legislature tried and failed for several years to pass legislation restricting smoking in public areas. In response to this failure, the Public Health Council (“PHC”) promulgated regulations prohibiting smoking in a wide variety of public facilities. The Court of Appeals held that these regulations were invalid because, while the PHC was authorized as a general matter to regulate issues affecting the public health, the agency exceeded its authorization “when it used the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be.” *Boreali*, 71 N.Y.2d at 9.

The *Boreali* Court cited four factors in support of its conclusion. First, the Court held that PHC had arrived at its comprehensive regulatory scheme by balancing competing concerns of public health and economic costs while “acting solely on [its] own ideas of sound public policy.” *Id.* at 12. Second, PHC strayed from its statutory mandate and wrote “on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance.” *Id.* at

13. Third, PHC’s regulations concerned “an area in which the legislature had repeatedly tried—and failed—to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions.” *Id.* Fourth, the development of the regulations did not require expertise in the field of health. *Id.* at 14. Together, these “coalescing circumstances” demonstrated that PHC had arrogated to itself “[t]he open-ended discretion to choose ends . . . which characterizes the elected Legislature’s role.” *Id.* at 11.

New York courts applying *Boreali*’s four-factor test have repeatedly held that DCHR’s regulations in furtherance of the Legislature’s rent control and stabilization policies do not violate separation of powers principles. Each of the *Boreali* factors likewise supports upholding DHCR’s 2014 Amendments, including codification of the TPU, as a valid exercise of delegated rulemaking authority.

i. DHCR Did Not Exceed Its Authority by Balancing Social and Economic Concerns

Because “the promulgation of regulations necessarily involves an analysis of societal costs and benefits,” the Court of Appeals recently clarified that “*Boreali* should not be interpreted to prohibit an agency from attempting to balance costs and benefits.” *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dep’t of Health & Mental Hygiene*, 23 N.Y.3d 681, 697-698 (2014). According to the Court of Appeals, the dispositive factor as to the first element in *Boreali* was that the PHC had “not been given any legislative guidelines at all for determining how the competing concerns of public health and economic cost are to be weighed.” *Id.* (citing *Boreali*, 71 N.Y.2d at 12).

Through codification of the Rent Statutes and the enforcement authority of the DHCR, the Legislature has offered detailed guidance as to how DHCR should attempt to strike a balance between landlord compensation and the need for affordable housing for working persons

and families. *See, e.g., Hatanaka v. Lynch*, 304 A.D.2d 325, 326 (1st Dep’t 2003) (DHCR is “the agency to whose discretion th[e] legislative scheme” balancing these interests “has been delegated”); *Avon Furniture Leasing, Inc. v. Popolizio*, 116 A.D.2d 280, 283-84 (1st Dep’t 1986) (“The provisions of the Rent Stabilization Law represent a pragmatic balance between affording the owners of properties adequate periodic rent increases to enable them to properly maintain their properties in the face of rising costs, while at the same time affording to tenants an assurance against unreasonable escalations in rent and also various other rights and protections, including what has become the increasingly valuable right to purchase their apartments in the event of cooperative conversion.”). The 2014 Amendments closely follow the Legislature’s guidance and balance the interests at stake.

ii. DHCR Did Not Write on a “Clean Slate”

The rulemaking record and the regulations themselves show that the 2014 Amendments in substantial part just update, adjust, or clarify existing practices and procedures. *See Melnitsky Aff. Ex. N* (Notice of Proposed Rule Making and Regulatory Impact Statement). This factor likewise distinguishes this case from *Boreali*, where there was no legislation regulating the conduct at issue but the agency nonetheless “creat[ed] its own comprehensive set of rules without benefit of legislative guidance.” *Boreali*, 71 N.Y.2d at 13.

Here, the Rent Statutes provide a comprehensive statutory framework for ameliorating disruptive rent and eviction practices. As the Court of Appeals has explained, these statutes grant DHCR a “broad mandate to promulgate regulations in furtherance of the rent control and rent stabilization laws” and to impose “changes in the legal relationship between landlords and tenants.” *Rent Stabilization Ass’n v. Higgins*, 83 N.Y.2d 156, 168-69 (1993) (internal quotation omitted). The Rent Statutes cover each of the challenged regulations, including the Four-Year Rule, MCI rent increases, lease riders, rent registration, and interactions

between tenants and landlords prior to the filing of complaints. *See, e.g.*, RSL §§ 26-516, 26-511(c)(13), 25-511(d), 26-517; ETPA §§ 8632, 8626(d).

In fact, many of the Amendments represent codification of relevant case law established over the last decade. *See, e.g., Grimm v. New York Div. of Hous. & Cmty. Renewal Off. of Rent Admin.*, 15 N.Y.3d 358, 366 (2010) (DHCR has obligation to look beyond four-year period to determine whether rent on base date was lawful where overcharge complaint alleges fraud); *Cintron v. Calogero*, 15 N.Y.3d 347, 355-56 (2010) (DHCR must consider rent reduction orders imposed outside the four-year period); *Coffina v. New York State Div. of Hous. & Cmty. Renewal*, 61 A.D.3d 404, 404-05 (1st Dep’t 2009) (DHCR required to consider lease agreements outside the four-year period to determine the existence and terms of a previously established legal regulated rent); *see also Thornton v. Baron*, 5 N.Y.3d 175 (2005) (establishing the default formula for calculating the legal rent where the rent on the base date is not calculable). Accordingly, DHCR acted under proper authorization and within the framework of the Rent Statutes, and did not “legislate” on a blank slate.

iii. DHCR Did Not Act in Areas Where the Legislature Failed to Reach Agreement

In *Boreali*, the Legislature repeatedly tried and failed to “reach agreement on the goals and methods that should govern in resolving a society-wide health problem.” *Boreali*, 71 N.Y.2d at 13. Here, by contrast, the 2014 Amendment reflect modest adjustments to a pre-existing administrative framework, and are consistent with longstanding legislative objectives. In such circumstances, the Court of Appeals has frequently rejected the notion that the Legislature’s failure to enact a bill should be taken as proof of “hostile legislative intent.” *Bourquin v. Cuomo*, 85 N.Y.2d 781, 787 (1995). The Court has cautioned that the fact that “proposed legislation similar to [an] Executive Order . . . was not passed does not indicate

legislative disapproval of the programs contemplated by the order. Legislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences.” *Id.* at 787-88 (quotation and citation omitted).

In their complaint, Plaintiffs ascribe great significance to the fact that the Legislature did not include a new appropriation for a Tenant Protection Unit in the New York State 2013-2014 budget. This is without consequence. The DHCR Commissioner is explicitly authorized by statute to appoint officers and deputies and to delegate his statutory powers to them. *See* Pub. Hous. L. §§ 11, 12; Pub. Off. L. § 9. The TPU is a sub-unit of the DHCR that investigates and prosecutes—but does not “adjudicate”—violations of the rent statutes. 9 NYCRR § 2520.5(o). As the TPU regulation makes clear, the TPU merely exercises the powers of the agency of which it is part. The fact that the Legislature declined to provide special funding to support the TPU does not render its creation or codification an “ultra vires” act, as Plaintiffs allege.

iv. The 2014 Amendments Required the DHCR’s Expertise

In *Boreali*, the challenged regulations were simply prohibitions on smoking in various places, and therefore required “no special expertise or technical competence in the field of health.” *Boreali*, 71 N.Y.2d at 14.

Here, to the contrary, the DHCR relied heavily on its specialized expertise and experience when adopting the 2014 Amendments, which are targeted rules “necessary to flesh out details of the broadly stated legislative policies embodied” in the Rent Statutes. *Id.* This judgment and experience is reflected in part by establishing the TPU as a sub-unit to assist DHCR in exercising its longstanding responsibility to investigate and prosecute violations of the Rent Statutes and Rent Regulations. The DCHR’s action reflected an appropriate response to years of pervasive abuses by landlords and ineffective means of enforcement, and was consistent

with its mandate to “insure that the level of fair rent increase established under [the RSL] will not be subverted and made ineffective.” RSL § 26-511(c)(5).

The DHCR’s reliance on its specialized expertise for the 2014 Amendments is also evidenced by the extensive opportunities for notice and comment by all stakeholders in advance of DHCR both proposing and adopting the 2014 Amendments, the DHCR’s detailed responses to those comments (*see* Melnitsky Aff. Ex. O, “Assessment of Public Comments for RSC”), the Regulatory Impact Statement (*see* Melnitsky Aff. Ex. N), as well as the final regulations themselves. *See also* Melnitsky Aff. ¶ 30 (DHCR relied on its “continuous dialogue with owners, tenants, and their advocates concerning perceived problems and their ideas for improving the regulations”).

2. Plaintiffs’ Disappointment with the Result of the Regulatory Process Does Not Implicate Constitutional Concerns

Application of the *Boreali* factors demonstrates that DHCR’s promulgation of the 2014 Amendments constituted a valid and limited exercise of its authority and did not cross over into legislative policy-making. Plaintiffs’ attempt to transform their dissatisfaction with the substance of the regulations into a constitutional separation of powers claim should be rejected.

B. PLAINTIFFS HAVE NOT SUFFERED ANY DUE PROCESS VIOLATION

Plaintiffs allege that the operation of the TPU violates their due process rights. However, they cannot escape a fact that is fatal to their due process claim: the TPU does not issue legally binding administrative orders or otherwise make any findings that deprive landlords of legal rights. *See, e.g.*, September 15, 2016 Affirmation of Gregory C. Fewer (“Fewer Aff.”) ¶¶ 39-43; September 15, 2016 Affirmation of John Lance (“Lance Aff.”) ¶¶ 8-9, 14-15.

As set out in Defendants’ brief, any landlord who disagrees with the recommendation of the TPU—including a landlord who entirely refuses to comply with the TPU

audit process—is not without recourse within the DHCR. Rather, a landlord who does not voluntarily comply with the findings of TPU will be referred to the DHCR’s Office of Rent Administration (“ORA”) for an independent adjudication, including the opportunity to submit additional evidence in support of a claimed Individual Apartment Improvement (“IAI”). *Lance Aff.* ¶¶ 7, 10.

TPU’s audit findings are not binding on ORA. *Id.* ¶ 9. Indeed, discovery in this matter shows that while the ORA frequently agrees with the TPU’s recommendation following its independent review, it is not a “rubber stamp.” Rather, in many of the IAI disputes referred to and adjudicated by the ORA, the ORA approved the entire cost of a claimed IAI after the landlord submitted additional documentation or other evidence in support of the IAI. *Fewer Aff.* ¶¶ 43, 52-59 & Ex. J. These landlords were not prejudged by the TPU recommendation, even to the extent they failed to comply with the TPU audit process. *See Lance Aff.* ¶ 10. In a number of other cases to date, the ORA agreed with the TPU that an overcharge occurred, but did not impose treble damages on the overcharge. *See Fewer Aff.* Ex. J.

In cases where the ORA administrator agrees with TPU’s recommendation and orders the landlord to compensate a tenant for a rent overcharge, a landlord may petition for administrative review of that determination. *See Lance Aff.* ¶¶ 29-32. Additionally, a landlord may challenge a final judgment of the ORA—whether derived from a TPU recommendation or otherwise—through an Article 78 petition in Supreme Court. *Lance Aff.* ¶ 33; *see State v. Dennin*, 17 A.D.3d 744, 746 (3d Dep’t 2005) (“The existence of CPLR article 78 review . . . clearly provides due process.”).

Even to the extent the Plaintiffs could allege deprivation of a viable property interest, this procedure affords more than adequate due process protection.

For these reasons, along with those set forth in Defendants' brief, Plaintiffs as a matter of law cannot establish a due process violation and summary judgment is appropriate.

CONCLUSION

Contrary to Plaintiffs' allegations, the 2014 Amendments represented a modest, incremental, and wholly unexceptional exercise of DHCR's broad authority to promulgate interstitial regulations to effectuate statutory policy. As explained above and in Defendants' moving papers, the Amendments in part codified preexisting judicial precedent, and in general aimed to enhance accountability to protect tenants from observed abuses of the Rent Regulations. Similarly, the DHCR created the TPU to focus on exercising its longstanding statutory authority to investigate and prosecute such abuses. The TPU and 2014 Amendments never threatened—nor, in the years since their enactment, have they imposed—any violation of Plaintiffs' constitutional rights.

Back in 2014, Tenants and Defendants highlighted that Plaintiffs' Complaint alleged only inchoate and speculative injuries resulting from the 2014 Amendments. Plaintiffs' forecasted injuries have become no more concrete through discovery or the passage of two-and-a-half years since the Complaint was filed. By contrast, the passage of time has only exacerbated the harms Tenants would suffer if the Plaintiff Landlords succeeded in stripping away the important protections, and longstanding legislative objectives, implemented by the 2014 Amendments.

For the reasons set forth above and in Defendants' brief, Defendants' motion for summary judgment should be granted.

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Respectfully submitted,
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