

To be Argued by:  
JASON R. VITULLO  
(Time Requested: 15 Minutes)

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# New York Supreme Court

## Appellate Division—Second Department

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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.,

**Docket No.:**  
**2017-08366**

*Plaintiffs-Appellants,*

– and –

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

*Intervenor-Plaintiffs-Appellants,*

*(For Continuation of Caption See Inside Cover)*

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### **BRIEF FOR INTERVENOR-DEFENDANTS-RESPONDENTS**

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– against –

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 DHCR of Housing and  
Community Renewal,

*Defendants-Respondents,*

– and –

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

*Intervenor-Defendants-Respondents.*

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# TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED .....	1
PRELIMINARY STATEMENT .....	1
BACKGROUND .....	3
A. Intervenor-Defendants-Respondents .....	3
B. Division of Housing and Community Renewal .....	4
C. Landlord Abuses and Fraud .....	5
D. The 2014 Amendments .....	6
E. Tenant Protection Unit .....	8
F. Statutory Treble Damages and DHCR Policy Statement 89-2 .....	10
G. Procedural History .....	12
ARGUMENT .....	13
I. THE 2014 AMENDMENTS ARE CONSISTENT WITH STATUTORY LAW AND JUDICIAL PRECEDENT .....	15
A. RSC § 2526.1(a)(2)(iv) .....	17
B. RSC § 2526.1(a)(2)(viii) .....	19
C. Appellants’ Challenges to the Remaining 2014 Amendments .....	22
II. THE 2014 AMENDMENTS DO NOT VIOLATE THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS .....	27
A. Administrative Agencies Can Promulgate Regulations to Implement the Legislature’s Directives .....	28
B. An Application of the <i>Boreali</i> Factors Demonstrates that DHCR Engaged in a Proper and Modest Exercise of Interstitial Rulemaking .....	31
i. DHCR Did Not Exceed Its Authority by Balancing Social and Economic Concerns .....	31
ii. DHCR Did Not Write on a “Clean Slate” .....	35
iii. DHCR Did Not Act in Areas Where the Legislature Failed to Reach Agreement .....	37
iv. The 2014 Amendments Required DHCR’s Expertise .....	40

- III. PLAINTIFFS FAIL TO STATE ANY DUE PROCESS VIOLATION.....43
  - A. Appellants Cannot Show a Deprivation of Property Based on Non-Binding Recommendations Subject to Further Administrative Review.....45
  - B. Even if the TPU Audit Findings Were Binding, Appellants Fail to Show the Deprivation of Any Recognized Property Interest .....48
    - i. Landlords Do Not Have a Protectable Property Right in Charging a Certain “Maximum” Rent.....48
    - ii. Landlords Do Not Have a Protectable Property Right in a “Safe Harbor” from Statutory Treble Damages for Past Overcharges.....51
  - C. TPU Affords Landlords Adequate Process .....55
- CONCLUSION.....56

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>2115 Wash. Realty, LLC v. Hall</i> , 55 Misc. 3d 1213(A) (Civ. Ct. Bronx Cty. 2017).....	16
<i>Matter of 218 E. 85th St., LLC v. N.Y. State Div. of Hous. &amp; Cmty. Renewal</i> , 23 Misc. 3d 557 (Sup. Ct. N.Y. Cnty. 2009) .....	22
<i>Matter of 554 W. 181 LLC v. N.Y. State Div. of Hous. &amp; Cmty. Renewal</i> , 30 Misc 3d 1233(A) (Sup. Ct. N.Y. Cnty. 2011) .....	53
<i>Matter of Acevedo v. N.Y.S. Dep’t of Motor Vehs.</i> , 29 N.Y.3d 202 (2017) .....	<i>passim</i>
<i>Agencies for Children’s Therapy Servs., Inc. v. N.Y. State Dep’t of Health</i> , 136 A.D.3d 122 (2d Dep’t 2015).....	29, 35
<i>Ahmed v. City of New York</i> , 129 A.D.3d 435, 440 (1st Dep’t 2015).....	34
<i>Allerton Coops Tenants Ass’n v. Biderman</i> , 189 A.D.2d 249 (1st Dep’t 1993) .....	48, 49
<i>Alvarez v. Prospect Hosp.</i> , 68 N.Y.2d 320 (1986) .....	13
<i>Argo v. Hills</i> , 425 F. Supp. 151 (E.D.N.Y. 1977) .....	53
<i>Avon Furniture Leasing, Inc. v. Popolizio</i> , 116 A.D.2d 280 (1st Dep’t 1986) .....	33
<i>Boreali v Axelrod</i> , 71 N.Y.2d 1 (1987) .....	<i>passim</i>
<i>Bourquin v. Cuomo</i> , 85 N.Y.2d 781 (1995) .....	37
<i>Cintron v. Calogero</i> , 15 N.Y.3d 347 (2010) .....	36

<i>Clark v. Cuomo</i> , 66 N.Y.2d 185 (1985) .....	42
<i>Coffina v. N.Y. State Div. of Hous. &amp; Cmty. Renewal</i> , 61 A.D.3d 404 (1st Dep’t 2009) .....	21, 36
<i>Consolidated Edison Co. v. Department of Env’tl. Conservation</i> , 71 N.Y.2d 186 (1988) .....	28
<i>Matter of DeSilva v. N.Y. State Div. of Hous. &amp; Cmty. Renewal, Office of Rent Admin.</i> , 34 A.D.3d 673 (2d Dep’t 2006) .....	55
<i>Faith Ministries Inc. v N.Y. State Div. of Hous. &amp; Cmty. Renewal</i> , 2010 N.Y. Misc. LEXIS 5579 (Sup. Ct. N.Y. Cnty. Nov. 8, 2010) .....	53
<i>Matter of Fieldbridge Assoc., LLC v. DHCR</i> , 87 A.D.3d 598 (2d Dep’t 2011) .....	23
<i>Matter of Graham Ct. Owners Corp. v N.Y. State Div. of Hous. &amp; Cmty. Renewal</i> , 71 A.D.3d 515 (1st Dep’t 2010) .....	10
<i>Greater N.Y. Taxi Ass’n v. New York City Taxi &amp; Limousine Comm’n</i> , 25 N.Y.3d 600 (2015) .....	28
<i>Griffith v. FLRA</i> , 842 F. 2d 487 (D.C. Cir. 1988) .....	50
<i>Grimm v. State of N.Y. Div. of Hous. &amp; Cmty. Renewal, Office of Rent Admin.</i> , 15 N.Y.3d 358 (2010) .....	18, 19, 36
<i>Hatanaka v. Lynch</i> , 304 A.D.2d 325 (1st Dep’t 2003) .....	33
<i>IG Second Generation Partners L.P. v. N.Y. State Div. of Hous. &amp; Cmty. Renewal</i> , 10 N.Y.3d 474 (2008) .....	54
<i>Justiana v. Niagara Cnty. Dep’t of Health</i> , 45 F. Supp. 2d 236 (W.D.N.Y. 1999) .....	35
<i>Kraebel v. New York City Dep’t of Hous. Pres. &amp; Dev.</i> , 959 F.2d 395, 405 (2d Cir. 1992) .....	49

<i>Matter of Leadingage N.Y., Inc. v. Shah,</i> 153 A.D.3d 10 (3d Dep’t 2017).....	28
<i>Mathews v. Eldridge,</i> 424 U.S. 319 (1976).....	44
<i>Medical Soc’y of New York v. Serio,</i> 100 N.Y.2d 854 (2003).....	28
<i>Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dep’t of Health &amp; Mental Hygiene,</i> 23 N.Y.3d 681 (2014).....	32, 34
<i>Matter of Pastreich v. N.Y. State Div. of Hous. &amp; Cmty. Renewal,</i> 50 A.D.3d 384 (1st Dep’t 2008).....	21
<i>Rent Stabilization Ass’n v. Higgins,</i> 83 N.Y.2d 156 (1993).....	<i>passim</i>
<i>Rubin v. Eimicke,</i> 150 A.D.2d 697 (2d Dep’t 1989).....	56
<i>Sidberry v. Koch,</i> 539 F. Supp. 413 (S.D.N.Y. 1982).....	49
<i>Srubar v. Rudd, Rosenberg, Mitofsky &amp; Hollender,</i> 875 F. Supp. 155 (S.D.N.Y. 1994).....	49
<i>Matter of Sugihara v. State of N.Y. Div. of Hous. &amp; Cmty. Renewal, Office of Rent Admin.,</i> 13 Misc. 3d 1239(A), (Sup. Ct. N.Y. Cty. 2006).....	20, 22
<i>Thornton v. Baron,</i> 5 N.Y.3d 175 (2005).....	18, 19, 36
<i>Two Associates v. Brown,</i> 513 N.Y.S.2d 966 (1st Dep’t 1987).....	29
<i>Woodner v. Eimicke,</i> 87 Civ. 8872 (MJL), 1990 U.S. Dist. LEXIS 8636 (S.D.N.Y. July 13, 1990)...	49
<i>Zuckerman v. City of N.Y.,</i> 49 N.Y.2d 557 (1980).....	13

**Statutes**

Emergency Tenant Protection Act (“ETPA”), 9 NYCRR § 8630(a)(2).....50

ETPA § 8632.....36

ETPA § 8626(d).....36

Pub. Hous. L. §§ 11, 12 .....8

Pub. Off. L. § 9 .....8

Rent Act of 2011 .....*passim*

Rent Act of 2015 .....14, 40

Rent Regulation Reform Act of 1997 .....18

Rent Stabilization Law (“RSL”) § 26-511(b).....33

RSL § 26-511(c).....*passim*

RSL § 25-511(d) .....36

RSL § 26-514 .....23

RSL § 26-516.....*passim*

RSL § 26-517 .....36

State Administrative Procedure Act. ....12, 32

**Other Authorities**

CPLR 3212(b).....13

DHCR Policy Statement 89-2 .....*passim*

Rent Stabilization Code (“RSC”), 9 NYCRR § 2520.5(o).....9

RSC § 2522.4 .....23

RSC § 2523.4 .....25, 26, 50

RSC § 2526.1(a)(2).....*passim*

## **QUESTIONS PRESENTED**

1. Did the IAS Court properly hold that the 2014 Amendments to the Rent Stabilization Code, which codify existing case law and advance the objectives of the Rent Statutes, are consistent with those Statutes?
2. Did the IAS Court properly hold that the Division of Housing and Community Renewal (“DHCR”) did not violate the constitutional principle of separation of powers when it exercised its broad rulemaking authority to amend the Rent Stabilization Code and improve the enforcement and administration of the Rent Statutes?
3. Did the IAS Court properly hold that the nonbinding recommendations of DHCR’s audit unit do not deprive Appellants of any due process rights?

## **PRELIMINARY STATEMENT**

Plaintiffs-Appellants and Intervenor-Plaintiffs-Appellants (collectively, “Appellants”) are landlords and landlord associations who ask this Court to vacate the well-reasoned order of the IAS Court, and override the judgment of the agency tasked with managing New York’s rent stabilization system, in order to completely dismantle a series of critical amendments to the Rent Stabilization Code that have been in effect for nearly four years.

The 2014 Amendments were promulgated by the Division of Housing and Community Renewal (“DHCR”) after an extensive comment period open to all stakeholders, and sought to put an end to several common forms of fraud and abuse by landlords—consistent with DHCR’s statutory mandate to “protect[] tenants and the public interest,” Rent Stabilization Law (“RSL”) § 26.511(c)(1). DHCR detailed its rationale for each amendment in a comprehensive Regulatory Impact Statement issued in conjunction with the 2014 Amendments.

Appellants seek to turn back the clock in order to resume the abusive practices that adversely impacted tenants in rent-stabilized housing and undermined the objectives of the Rent Stabilization Law. While Appellants cloak their grievances in constitutional claims, they come nowhere close to demonstrating that the 2014 Amendments violated separation of powers principles or their due process rights. The foundation for each of Appellants’ criticisms is instead that landlords simply preferred the rent regulations in effect prior to the 2014 Amendments. But Appellants’ enjoyment of regulations that unduly favored their interests, and detrimentally impacted tenants’ rights, does not create a constitutionally protected property interest. Appellants cannot point to any deprivation of property rights associated with the 2014 Amendments or the operation of the TPU—let alone a deprivation that failed to comport with due process principles. DHCR also did not violate separation of powers principles

when it revised existing regulations that in practice proved ineffective and inconsistent with both DHCR's statutory mandate and intervening judicial authority. Rather, the undisputed factual record demonstrates that DHCR acted well within its statutory authority in promulgating the amendments.

In a thoughtful and comprehensive opinion, the IAS Court appropriately denied Appellants' motion for summary judgment, and granted summary judgment in Respondents' favor. This Court should affirm.

## **BACKGROUND**

### **A. Intervenor-Defendants-Respondents**

Intervenor-Defendants-Respondents ("Intervenor-Respondents") are community organizations whose members primarily reside in rent-stabilized and rent-controlled apartments in New York City. As such, they are directly impacted by New York rent regulations, and directly benefit from the critical 2014 Amendments to those regulations. Make the Road New York is an organization with roughly 22,000 members, whose mission is to empower Latino and working-class communities through organizing, policy innovation, and survival services. New York State Tenants and Neighbors similarly seeks to empower and educate tenants, preserve affordable housing, and strengthen tenant protections. The Association for Neighborhood and Housing Development is a member association of not-for-profit neighborhood-based affordable housing organizations in all five

boroughs of New York City, which works directly with thousands of tenants facing poor physical conditions and displacement pressure.

B. Division of Housing and Community Renewal

The Division of Housing and Community Renewal is a New York State agency with broad authority to administer and enforce the Rent Statutes.<sup>1</sup> DHCR has authority to promulgate and amend regulations in 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”). DHCR also has authority to enforce both the Rent Regulations and the Rent Statutes, both in response to tenant complaints and on its own initiative, RSL § 26-516(a). DHCR is explicitly authorized to “administer oaths, issue subpoenas, conduct investigations, make inspections and designate officers to hear and report.” RSL § 26-516(f). The Legislature has reaffirmed this broad authority on several occasions. In the Rent Act of 2011 (the “2011 Act”)—which augmented certain tenant protections and precipitated the 2014 Amendments to the Rent Regulations now challenged by Appellants—the Legislature explicitly affirmed the DHCR’s authority to

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<sup>1</sup> As referred to herein, “Rent Statutes” includes the New York Rent Stabilization Law (“RSL”) and the substantively identical Emergency Tenant Protection Act (“ETPA”), N.Y. Uncons. Laws §§ 8622 et seq. (McKinney 2016), which extends the protections in the RSL to Nassau, Rockland, and Westchester Counties.

“promulgate rules and regulations to implement and enforce” the rent stabilization laws. N.Y. Laws of 2011, ch. 97, Part B, § 44.

The Legislature has afforded DHCR this broad authority so that it can “insure that the level of fair rent increase established under [the Rent Statutes] will not be subverted and made ineffective.” RSL § 26-511(c)(5). This was precisely the objective of the 2014 Amendments.

### C. Landlord Abuses and Fraud

In the years leading up to the 2011 Act and 2014 Amendments, Intervenor-Respondents witnessed firsthand several practices used by landlords to illegally increase rent in regulated apartments, or even improperly remove apartments from the rent regulation system. For example, landlords asserted specious or inflated “Individual Apartment Improvements” during vacancy periods to increase rents beyond permissible levels. (R. 902.) Landlords would similarly raise rents in entire buildings based on supposed major capital improvements, while at the same time failing to remedy immediately hazardous conditions on the premises. (R. 900-901.) Landlords also frequently used “preferential rents” over the course of several years in order to disguise illegal base rent increases and deter tenants from challenging those practices—and would then revert to the improperly inflated “base rent” and use the so-called “Four-Year Rule” to shield the underlying fraudulent practices from scrutiny. (R. 897-899.) In promulgating the 2014

Amendments, DHCR in part sought to curtail these abusive practices and close loopholes in the current regulations that were frequently used to subvert rent increase protections in the Rent Statutes. (*See, e.g.*, R. 895-911.)

D. The 2014 Amendments

Following the enactment of the 2011 Act, DHCR 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. (R. 85-86.) DHCR initiated this process consistent with its authority to “implement and enforce” the Rent Statutes (2011 Act, § 44), as well as its statutory 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 Rent Statutes. RSL § 26-511(c)(1) & (2). (*See* R. 85.)

Before enacting the 2014 Amendments, DHCR received comments from the public, both at a public hearing and via written submissions. (R. 86-87.) Both landlord and tenant representatives engaged extensively in this process, and DHCR considered suggestions and comments from all stakeholders. (*Id.*) Following this period for public comment, DHCR promulgated the final 2014 Amendments on January 8, 2014. In doing so DHCR submitted a notice of adoption to the state register, and published an assessment of the public comments received on the

proposed rules. (R. 87-88, 386-404.) DHCR’s Assessment of Public Comments explained, analyzed, and provided a detailed response to the major comments it received in relation to each amendment. (R. 386-404.)

Appellants suggest that the 2014 Amendments were solely the result of advocacy by tenants’ rights associations such as Intervenor-Respondents, and that the changes made to the Rent Regulations effectuated a “historic shift in regulatory policy and practice” solicited by those organizations. (Pl. App. Br. at 6-7.)

Appellants ignore several salient facts. First, DHCR rejected the vast majority of recommendations made by tenants’ organizations—and thus the amendments that Appellants now challenge fall well short of the “historic shift” advocated by those groups. Second, landlord representatives were intimately involved in the public regulatory process. Not only did they write letters and participate in public forums, landlord representatives were also afforded a private meeting with high-ranking officials from DHCR, including the Commissioner, to discuss the proposed amendments. (R. 1006-1010.) Third, the 2014 Amendments in large part addressed landlord abuses that arose from amendments DHCR had promulgated back in 2000. According to the Deputy General Counsel of DHCR, the 2000 Amendments were “the product of extensive conversations with the real estate industry” and contained “nothing that was favorable to tenants” but rather “bought into everything that the owners wanted.” (R. 1005, 1014-1015.)

Contrary to Appellants' claims, the 2014 Amendments did not profoundly expand the longstanding core rights of tenants or intensify the restrictions placed on landlords. The 2014 Amendments are instead modest changes that improve the enforcement of existing rent stabilization laws, in response to landlords' frequent violations of the rent control system and efforts to stymie tenants from exercising their own legal rights.

E. Tenant Protection Unit

In 2012, the Commissioner of the DHCR delegated to the newly-created Tenant Protection Unit ("TPU") DHCR's longstanding authority to "investigate and prosecute" violations of the Rent Statutes and Rent Regulations—in particular, rent overcharges. (R. 57-58.) The creation of the TPU, and delegation of DHCR's enforcement authority to it, was entirely consistent with the Rent Statutes. As detailed above, DHCR has statutory authority to "conduct investigations" and "make inspections," RSL § 26-516(f), including on its own initiative, *id.* § 26-516(a). The commissioner of DHCR also has authority to delegate these responsibilities to other individuals (*see* Pub. Hous. L. §§ 11, 12; Pub. Off. L. § 9)—in this instance, the Deputy Commissioner of the TPU. Though not necessary to support this unexceptional delegation of existing regulatory authority, several statements in the legislative record show that the creation of the TPU was consistent with the Legislature's objectives in the 2011 Act, which explicitly

affirmed DHCR’s authority to take measures necessary to “implement and enforce” the rent stabilization laws. N.Y. Laws of 2011, ch. 97, Part B, § 44.<sup>2</sup> DHCR later explicitly codified the TPU as part of the 2014 Amendments.<sup>3</sup>

Consistent with its delegated authority, DHCR’s TPU routinely audits rent-regulated apartments that show “significant” rent increases following a vacancy. (R. 62.) Both during and after the TPU audit, landlords are afforded ample procedures by which they can justify the current rent. First, during the audit itself, landlords have an opportunity to submit correspondence and documentary evidence in support of recent individual apartment improvements or other justifications for the increase in rent. (*Id.*) Appellants acknowledge this in their brief. (Pl. App. Br. at 54.) After considering any submissions by the landlord along with other evidence, the TPU issues a non-binding recommendation. (R. 62-

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<sup>2</sup> 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 April 8, 2018); *id.* at 174, 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 April 8, 2018).

<sup>3</sup> See RSC § 2520.5(o) (“The office of the Tenant Protection Unit (TPU). The office of the DHCR designated by the commissioner to investigate and prosecute violations of the ETPA, the RSL and the city and State rent laws. In furtherance of such designation, the TPU may invoke all authority under the ETPA, RSL, RSC and the State and city rent laws and the regulations thereunder that inures to the commissioner, DHCR or the Office of Rent Administration. . . .”).

63, 66-67.) If the TPU concludes that there has been an overcharge, and the landlord does not voluntarily adjust the rent and/or issue a refund in response to TPU's finding, TPU may then refer the matter to the Office of Rent Administration ("ORA") for a final determination and potential enforcement action. (R. 63-65.) Appellants concede that ORA affords landlords an opportunity to be heard that comports with due process. (R. 103 (Complt. ¶¶ 31-32); Pl. App. Br. at 7-8.)

F. Statutory Treble Damages and DHCR Policy Statement 89-2

Section 26-516a of the Rent Stabilization Law provides that a tenant in a rent-stabilized apartment who is overcharged rent is automatically entitled to collect treble damages from a landlord, unless the landlord proves that the overcharge was not willful:

Subject to the conditions and limitations of this subdivision, any owner of housing accommodations who, upon complaint of a tenant, or of the state division of housing and community renewal is found by the state division of housing and community renewal, after a reasonable opportunity to be heard, to have collected an overcharge above the rent authorized for a housing accommodation subject to this chapter shall be liable to the tenant for a penalty equal to three times the amount of such overcharge. If the owner establishes by a preponderance of the evidence that the overcharge was not willful the state division of housing and community renewal shall establish the penalty as the amount of the overcharge plus interest.

RSL § 26-516a (emphasis added); cf. *Matter of Graham Ct. Owners Corp. v Div. of Hous. & Cmty. Renewal*, 71 A.D.3d 515, 516 (1st Dep't 2010) ("Treble damages

were properly imposed because the owner failed to establish that its overcharges were not willful.”).

The “safe harbor” from treble damages that Appellants discuss in their briefs is a regulatory “policy statement” promulgated by DHCR, which under certain circumstances purports to override the statutory presumption of willfulness.

Specifically, DHCR Policy Statement 89-2 provides that a landlord’s “burden of proof in establishing lack of willfulness shall be deemed to have been met and therefore, the treble damages penalty is not applicable” where:

an owner adjusts the rent on his or her own within the time afforded to furnish DHCR with an initial response when initially served with the overcharge complaint initiated by the tenant, and submits proof to the DHCR that he or she has tendered, in good faith to the tenant, a full refund by check or cash of all excess rent collected, plus interest as provided by CPLR Section 5004.

(R. 836-37 (emphasis added).) As the IAS Court recognized, this “constitutes a regulatory policy exception to [the] statutory presumption since it provides that in certain circumstances, [DHCR] will ‘deem’ an overcharge to be ‘not willful,’ even if the overcharge was, in fact, willful and the landlord was otherwise subject to treble damages by statute.” (R. 24.)

By its terms this “safe harbor” applies only to complaints “initiated by the tenant.” (R. 836.) Moreover, the Policy Statement even explicitly states that it does not apply “if the overcharge case was initiated by DHCR and had been preceded by an investigation by DHCR or another government agency, during

which the owner, having been given notice, failed to take corrective action and issue a refund.” (R. 837.)

G. Procedural History

Appellants 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, Appellants filed a motion seeking to preliminarily enjoin enforcement of the 2014 Amendments, as well as other relief including expedited discovery. Respondents and Intervenor-Respondents submitted briefs in opposition to Plaintiffs’ motion on March 26, 2014. Respondents at the same time moved to dismiss this action. On October 27, 2014, the IAS Court denied Respondents’ motion to dismiss, and denied Appellants’ motion except that it granted both parties “expedited” and “limited” discovery into the constitutional issues raised by Appellants’ motion.

After nearly two years of discovery, both sides moved for summary judgment on September 16, 2016. Following substantial briefing as well as oral

argument on the competing motions, the IAS Court appropriately granted summary judgment in Respondents' favor, and denied Appellants' motion.

Intervenor-Plaintiffs-Appellants ("Intervenor-Appellants") filed a notice of appeal on July 17, 2017. Plaintiffs-Appellants followed with their own notice of appeal on August 9, 2017. On February 8, 2018, Appellants perfected their appeals.

### **ARGUMENT**

The IAS Court appropriately granted summary judgment in favor of Respondents, and correspondingly denied Appellants' motion. 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). "Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez*, 68 N.Y.2d at 324.

The 2014 Amendments have now been in place for nearly four years, and the passage of time has only weakened Appellants' claims of constitutional infirmities.

First, nothing in the extensive document or deposition discovery of DHCR taken by Appellants supports their claim that DHCR's promulgation of the 2014 Amendments contravened appropriate regulatory procedures.

Second, despite operating under the 2014 Amendments for nearly four years, Appellants still fail to identify any specific deprivation of due process rights suffered by any Appellant landlord or member of an Appellant landlord association. Indeed, at odds with their protestations of ongoing deprivations of property and irreparable harm, Appellants did not perfect their appeal until the final day of their six-month period for doing so. On the other hand, if Appellant landlords prevail, Intervenor-Respondents and their members will immediately lose vital legal protections. DHCR concluded based on its "twelve years of experience" administering the rent stabilization system under the prior regulations that these changes were necessary to remedy "unconscionable" regulations that "suppress[e] the filing of complaints by the most vulnerable tenants," and to address landlords' "more up-to-date schemes to deprive tenants of their legitimate rights as rent stabilized tenants." (R. 895, 903-05, 907.)

Third, 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 Appellants’ claims that the creation of the TPU and enactment of the 2014 Amendments were contrary to Legislative intent, the Legislature remained silent on these issues—and instead explicitly reaffirmed DHCR’s authority to take such measures as are necessary to “implement and enforce” the rent stabilization laws. *See id.* § 17.

The undisputed factual record below demonstrates that (1) the 2014 Amendments comport with the statutory scheme, as interpreted by judicial precedent; (2) DHCR acted well within its authority and expertise in promulgating the 2014 Amendments; and (3) Appellants’ due process rights are not infringed by the “Tenant Protection Unit” or any other aspect of the 2014 Amendments. This Court should affirm.

**I. THE 2014 AMENDMENTS ARE CONSISTENT WITH STATUTORY LAW AND JUDICIAL PRECEDENT**

As they did below, Appellants argue that the 2014 Amendments are invalid because they are “out of harmony” with the Rent Stabilization Laws. Though Plaintiffs-Appellants levy this broad allegation against the 2014 Amendments generally, in their brief they focus on just two amendments that they claim suffer from this defect: RSC §§2526.1(a)(2)(iv) and (viii).<sup>4</sup> Both of these provisions

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<sup>4</sup> At pages 27-30 of their brief, Plaintiffs-Appellants mistakenly refer to RSC § 2526.1(a)(2)(vii) in challenging DHCR’s authority to look back beyond four years in certain circumstances to determine the existence and terms of a preferential rent. (*See generally* Pl. App. Br. at 27-30.) That authority is actually set forth in RSC § 2526.1(a)(2)(viii). Subsection (vii), on the other

contain exceptions to the evidentiary component of the Four-Year Rule, which absent such an exception does not require landlords “to maintain or produce” records pertaining to a property’s rental history for longer than four years. RSL § 26-516(g).

It is undisputed that the “Four-Year Rule” is not absolute. As the IAS Court held, DHCR’s promulgation of these amendments was consistent with and effectively codified well-established judicial exceptions to that rule. *See 2115 Wash. Realty, LLC v. Hall*, 55 Misc. 3d 1213(A) (Civ. Ct. Bronx Cty. 2017) (acknowledging that “events dating back beyond the four-year statute of limitations may be considered in various circumstances,” and listing case law elucidating those circumstances). In holding that the 2014 Amendments are not inconsistent with the Four-Year Rule, the IAS Court underscored DHCR’s “broad mandate to promulgate regulations in furtherance of the . . . rent stabilization laws.”<sup>5</sup> (R. 31-32 (quoting *Rent Stabilization Ass’n v. Higgins*, 83 N.Y.2d 156, 168 (1993)).) Moreover, the Rent Statutes require that regulations instituted by

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hand, permits DHCR to look back beyond four years “for information regarding the length of occupancy.” RSC § 2526.1(a)(2)(vii). Accordingly, we discuss the statutory text and judicial precedent supporting RSC § 2526.1(a)(2)(viii) in responding to Plaintiffs-Appellants’ arguments on this issue.

<sup>5</sup> Plaintiffs-Appellants claim that “[t]he IAS Court...acknowledged that the Four-Year Rule Amendments were *not* the product of the 2011 Statutory Amendments and did not include such an exception.” (Pl. App. Br. at 27.) This is false. Rather, the IAS Court observed that “the Rent Act of 2011 expressly authorized DHCR to issue regulations pursuant to any law renewed or continued by this Act, including the rent stabilization laws.” (R. 32.)

DHCR “provide[] safeguards against unreasonably high rent increases and, in general, protect[] tenants and the public interest,” in addition to “requir[ing] owners not to exceed the level of lawful rents as provided by this law.” RSL § 26-511(c)(1), (2). DHCR acted squarely within its mandate, and according to the express purpose of the Rent Statutes, when it adopted certain well-defined exceptions to the Four-Year Rule.

A. RSC § 2526.1(a)(2)(iv)

The Rent Statutes’ Four-Year Rule generally limits DHCR’s examination of rental history in a rent overcharge case to records created in the four-year period preceding the overcharge complaint. RSC § 2526.1(a)(2)(ii). The 2014 Amendments did not change that default rule. Rather, they enumerated certain exceptions—already established by case law—that are necessary for DHCR to adequately enforce the Rent Statutes. One such exception is found in RSC § 2526.1(a)(2)(iv), which permits DHCR to reach beyond the default four years for a “limited purpose”—namely, to “determin[e] whether a fraudulent scheme to destabilize the housing accommodation or a rental practice proscribed under section 2525.3 (b), (c) or (d) rendered unreliable the rent on the base date.” Far from being “out of harmony” with the Rent Statutes, section 2526.1(a)(2)(iv) is necessary for DHCR to carry out its statutory mandate to “require[] owners not to exceed the level of lawful rents as provided by this law,” RSL § 26-511(c)(2).

Indeed, case law preceding the 2014 Amendments established a “fraudulent scheme” exception to the Four-Year Rule, and explained why such an exception is required by—and not “out of harmony” with—the Rent Statutes. In *Grimm v. State of N.Y. Div. of Hous. & Cmty. Renewal Office of Rent Admin.*, the Court of Appeals explicitly “conclude[d] that, where the overcharge complaint alleges fraud, . . . DHCR has an obligation to ascertain whether the rent on the base date is a lawful rent.” 15 N.Y.3d 358, 366 (2010). Applying the logic of its earlier decision in *Thornton v. Baron*, 5 N.Y.3d 175 (2005), which had also provided an exception to the Four-Year Rule in a case of alleged fraud, the Court of Appeals in *Grimm* explained that the lease at issue in *Thornton* was “void at its inception because its circumvent[ion of] the Rent Stabilization Law violated public policy.” *Grimm*, 15 N.Y.3d at 365 (quotation marks omitted). Put otherwise, the Four-Year Rule was not intended to apply to invalid leases.

Appellants do not challenge the validity of *Thornton* and *Grimm*; section 2526.1(a)(2)(iv) merely codifies these Court of Appeals holdings that identified an allegation-of-fraud exception to the Four-Year Rule as necessary to effectuate the purpose of the Rent Statutes. As the *Thornton* Court held, the Rent Regulation Reform Act of 1997, which “clarified and reinforced” the Four-Year Rule, was intended to “alleviate the burden on honest landlords to retain rent records

indefinitely . . . , not to immunize dishonest ones from compliance with the law.”

*Thornton*, 5 N.Y.3d at 181.

Plaintiffs-Appellants argue that this exception to the Four-Year Rule permits DHCR to reach beyond the default four years for any “mere ‘allegation’” of fraud. (Pl. App. Br. at 31.) But contrary to their arguments, the “plain words” of § 2526.1(a)(2)(iv) do not refer to “mere allegations.” Rather, the provision expressly describes itself as “limited,” and is intended to determine whether or not a “fraudulent scheme” existed. Indeed, the *Grimm* Court was careful to caution that its “holding should not be construed as concluding that fraud exists.” *Grimm*, 15 N.Y.3d at 366. Rather, the Court clarified, DHCR had an obligation to consider “the nature of petitioner’s allegations.” *Id.* at 367. In the more than four years that have passed since the enactment of the Amendments and the initiation of this litigation, Appellants have pointed to no example where § 2526.1(a)(2)(iv) was improperly invoked upon a “mere allegation” of fraud.

B. RSC § 2526.1(a)(2)(viii)

Appellants raise similar arguments concerning section § 2526.1(a)(2)(viii), which permits DHCR to review rental history past four years “[f]or the purposes of establishing the existence or terms and conditions of a preferential rent under

section 2521.2(c).”<sup>6</sup> This regulation does not violate the Rent Statutes; rather, it is also necessary to effectuate the overarching statutory provisions. As DHCR explained in promulgating this regulation, when a preferential rent has been in place for some time it is often necessary to look back beyond four years in order to determine the proper legal rent that could have been charged over that time period (absent a preferential rate agreement), and to then calculate the current legal rent authorized by statute. (R. 335-37.) This information is critical since in practice preferential rents have often been used to obfuscate the appropriate legal rent and to conceal unauthorized and improper increases to that rent. Moreover, it can be necessary to look back beyond four years to determine the terms governing an ongoing preferential rent agreement, including its duration.

New York courts have routinely recognized that looking back beyond four years is warranted in these circumstances, as the IAS decision noted. (R. 23-24.) Where evidence dated more than four years before the base date “is inextricably related to the issue” of lawful rent, such records “could”—and in fact “should”—be considered. *Matter of Sugihara v. State of N.Y. Div. of Hous. & Cmty. Renewal Office of Rent Admin.*, 13 Misc. 3d 1239(A), at \*7 (Sup. Ct. N.Y. Cty. 2006).

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<sup>6</sup> As discussed in note 4, *supra*, Plaintiffs-Appellants mistakenly cite to RSC § 2526.1(a)(2)(vii) in discussing this issue.

Section 2526.1(a)(2)(viii) merely codifies existing decisions that establish this principle.

Indeed, § 2526.1(a)(2)(viii) was promulgated based on First Department rulings that pre-dated the regulations Appellants now challenge. Specifically, in *Matter of Pastreich v. N.Y. State Div. of Hous. & Cmty. Renewal*, the First Department determined that, where a lease agreement “expressly stated that it was based on the same terms and conditions as the expiring lease” and other provisions and agreements attached to that lease, DHCR “acted irrationally” in ignoring the terms of the prior agreement—particularly with respect to preferential rents. That is, where the landlord ceased to offer the preferential rent in a subsequent lease renewal, despite the fact that the original agreement did not specify a limit on the number of lease renewals at the preferential rate, the original agreement and accompanying lease rider should have been considered even if they were dated more than four years before the base date. 50 A.D.3d 384, 386 & 387 (1st Dep’t 2008). The First Department similarly held in *Matter of Coffina v. N.Y. State Div. of Hous. & Cmty. Renewal* that it was “irrational” for DHCR not to look at original lease agreement, in order to determine whether rent was preferential or at the legal rate, even though it was dated more than four years before the base date. 61 A.D.3d 404, 405 (1st Dep’t 2009). Additionally, in *Sugihara v. DHCR*, the trial court held that it was necessary for DHCR to look at a lease rider that pre-dated the

four-year period to determine whether the parties intended to have “a preferential rent for the duration of the tenancy.” 13 Misc. 3d 1239(A), at \*6.<sup>7</sup>

C. Appellants’ Challenges to the Remaining 2014 Amendments

Finally, while Plaintiffs-Appellants broadly assert that “the 2014 Amendments added other requirements and conditions to owning rent-regulated apartments that go beyond what the Legislature itself had imposed through the Rent Regulated Statutes” (Pl. App. Br. at 33), they do not explain why they believe any provisions other than RSC §§ 2526.1(a)(2)(iv) and (viii) are “out of harmony” with the Rent Statutes. They simply complain, as they did below, that they are unhappy with the regulations.

For example, Plaintiffs-Appellants are galled by the imposition of “additional conditions” for increasing rent “for completed IAIs and MCIs.” (Pl. App. Br. at 34.) In their discussion of this amendment, they notably fail to mention that the “additional condition” is that DHCR will disallow a rent increase promised on property upgrades if there also are ongoing “immediately hazardous conditions” on the property. Following such a disallowance, DHCR gives landlords 60 days to

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<sup>7</sup> The same principle is reflected in the court’s decision in *Matter of 218 E. 85th Street, LLC v. DHCR*, which the IAS Court also cited. 23 Misc. 3d 557 (Sup. Ct. N.Y. Cnty. 2009). Appellants argue that the court in *218 E. 85th Street* did not expressly articulate an exception to the Four-Year Rule. (Pl. App. Br. at 28-29.) However, as part of its analysis, the *218 E. 85th Street* Court did permit consideration of a property’s rental history preceding the four-year statutory period. Moreover, DHCR represented that its position in *218 E. 85th Street*—in favor of the tenant—was dictated by the holding in *Sugihara*. *218 E. 85th Street*, 23 Misc. 3d at 560.

remedy the issue and refile, during which time DHCR tolls the deadline for such a filing. *See* RSC § 2522.4(a)(13). Plaintiffs-Appellants do not explain how such a provision is “out of harmony” with the Rent Statutes, which aim to “protect[] tenants and the public interest.” RSL § 26-511(c)(1). Moreover, that amendment is in accord with DHCR’s statutory directive to “require[] owners to maintain all services,” RSL § 26-511(c)(8), a provision preventing owners “from applying for or collecting” rent increases if the “owner has failed to maintain such services,” *id.* § 26-514, as well as case law recognizing DHCR’s preexisting authority to deny or even revoke approval of rent increases based on immediately hazardous conditions, *see Matter of Fieldbridge Assoc., LLC v. DHCR*, 87 A.D.3d 598, 599 (2d Dep’t 2011).

Intervenor-Appellants likewise fail to articulate any legitimate inconsistency between the 2014 Amendments and statutory law. They defer to “Defendant [*sic*] Portofino’s Brief” on “four year rule” issues, and then briefly argue that several other components of the 2014 Amendments are also “out of harmony” with the Rent Stabilization Laws. Like Plaintiffs-Appellants, they complain that they should be permitted to increase rents based on “Major Capital Improvements” despite there being a “lapse in service or ‘hazardous condition’ on the property.” (Int. App. Br. at 13.) Their assertion that DHCR lacks “authority” to deny

applications on this basis, and to promulgate regulations that set standards for such denials, fails for the reasons discussed above.<sup>8</sup>

Another amendment criticized by Intervenor-Appellants is DHCR's relaxation of an onerous "prior notice" requirement for rent reduction orders. In the Regulatory Impact Statement for the 2014 Amendments, DHCR explained that this "prior notice" requirement, which was first added to DHCR's regulations in 2000 at the insistence of landlord representatives, had in practice resulted in "the dismissal of meritorious service complaints" and was a "hurdle that suppress[ed] the filing of complaints by the most vulnerable tenants," including complainants with "limited English language proficiency" as well as the "elderly and infirm." (R. 903-05.) Among other things, DHCR found that landlords had turned the notice provision into a hyper-technical "strict pleading requirement," and were able to get valid complaints to DHCR dismissed if, for example, a tenant's prior notice did not detail the landlord's service failure with sufficient "specificity" or "failed to use the appropriate legal name of the owner." (R. 905.) Based on DHCR's observations during the decade that this rule was in place, DHCR concluded that

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<sup>8</sup> Intervenor-Appellants cite two N.Y.L.J. case summaries for their assertion that Courts "have specifically held that DHCR cannot deny MCI Applications if a landlord fails to maintain required services." (Int. App. Br. at 14.) However, at most these cases hold that in calculating an overcharge, DHCR should account for prior valid rent increases attributable to apartment improvements. Neither case precludes DHCR from promulgating regulations that—consistent with the Rent Statutes and DHCR's broad regulatory authority—preclude such rent increases in the first place based on ongoing immediately hazardous conditions or service failures.

“the continuation of the regulation in its present form is *untenable and unconscionable*.” (*Id.* (emphasis added).) Even though this notice requirement did not exist until it was added by in 2000 pursuant to DHCR’s rule-making authority,<sup>9</sup> Intervenor-Appellants now claim that DHCR lacks authority to undo this “unconscionable” rule since doing so would “eliminate due process” and be “out of harmony” with the Rent Statutes. (Int. App. Br. at 15-16.) To the contrary, DHCR can—and should—modify regulations that fail to have the desired effect, or have adverse unintended consequences. Here, consistent with its broad discretion and regulatory mandate to “protect[] tenants and the public interest,” RSL § 26-511(c)(1) & (2), DHCR modified this regulatory requirement in the 2014 Amendments to provide that while notice generally “should” be provided before filing a complaint, the “[f]ailure to provide such prior written notice will not be grounds for dismissal of the application.” RSC § 2523.4(c).

Intervenor-Appellants do not explain how this modest change to an earlier regulation contravenes the Rent Stabilization Law, and instead assert that the change “violate[s] logic by forcing disputes between landlords and tenants instead of facilitating amicable resolution between them.” (Int. App. Br. 16.) This policy argument is no reason for this Court to reverse DHCR’s judgment. First, as DHCR

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<sup>9</sup> See Notice of Adoption of Amendments to the Rent Stabilization Code, 2000-51 N.Y. St. Reg. 18 (Dec. 20, 2000).

explained in the regulatory impact statement, while the goal of the notice requirement was to encourage “voluntary compliance by owners,” it has not had that effect in practice and has instead been used by owners as a tool to defeat meritorious rent reduction applications based on mere “technicalities.” (R. 341-43.) Second, the 2014 Amendments still provide that notice “should” generally be provided before a tenant files a complaint. Moreover, in the event an owner is *not* given prior written notice of a complaint made to DHCR, the owner typically has an extra forty days to respond (and, ideally, to address any meritorious complaint in the interim).<sup>10</sup> DHCR’s modification of the “notice” requirement thus curtails the dismissal of meritorious complaints on technicalities, but still provides adequate time for a landlord to address complaints prior to any intervention by DHCR.

Intervenor-Appellants’ complaints regarding additional amendments fail for similar reasons. In each case, DHCR acted consistent with its statutory authority, and carefully explained its rationale—and responded to concerns raised by

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<sup>10</sup> Pursuant to the 2014 Amendments, after receiving a copy of a tenant’s complaint to DHCR, an owner typically has 20 days to respond if the owner had prior written notice of the issue, and 60 days to respond if the owner did not have prior written notice. *See* RSC § 2523.4(d)(2). However, irrespective of notice, the owner has 5 days to respond if the condition forced the tenant to vacate, and 20 days to respond if the issue pertains to heat, hot water, or another emergency. *See id.* Before these amendments, a tenant could submit a complaint to DHCR just 10 days after providing notice to the owner, and the owner then had 45 days to respond. (*See* R. 374-75.)

landlords—in the regulatory impact statement that accompanied its promulgation of the 2014 Amendments.

The IAS Court’s rejection of Appellants’ “out of harmony” argument should be affirmed.

## **II. THE 2014 AMENDMENTS DO NOT VIOLATE THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS**

The IAS Court also appropriately rejected Appellants’ separation of powers claim. As the IAS Court correctly concluded, the 2014 Amendments were an unexceptional exercise of DHCR’s authority to adopt regulations enforcing the rent control and rent stabilization laws. (R. 49-51.)

“[T]he separation of powers doctrine gives the Legislature considerable leeway in delegating its regulatory powers’ to an administrative agency to ‘administer the law as enacted by the Legislature.’” *Matter of Acevedo v. N.Y.S. Dep’t of Motor Vehs.*, 29 N.Y.3d 202, 221 (2017) (quoting *Boreali v Axelrod*, 71 N.Y.2d 1, 9-10 (1987) (alteration in original)). As to DHCR in particular, the Court of Appeals has emphasized the expansive nature of the rulemaking authority conferred on the agency, highlighting 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). DHCR must follow the procedural requirements set by the Legislature, but otherwise has expansive authority to carry out its mandate to “protect[s] tenants

and the public interest.” RSL § 26-511(c)(1). Indeed, the Court of Appeals has repeatedly recognized that DHCR’s promulgation of Rent Regulations will “inevitably require some changes in the legal relationship between landlords and tenants.” *Higgins*, 83 N.Y.2d at 168 (quoting *Versailles Realty Co. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 76 N.Y.2d 325, 328 (1990)).

With the 2014 Amendments, 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.

A. Administrative Agencies Can Promulgate Regulations to Implement the Legislature’s Directives

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). As such, 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 Leadingage N.Y., Inc. v. Shah*, 153 A.D.3d 10, 16 (3d Dep’t 2017) (“The cornerstone of administrative law is derived from the principle that the Legislature may declare its will, and after

fixing a primary standard, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation.” (quoting *Matter of Nicholas v Kahn*, 47 N.Y.2d 24, 31 (1979))). 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).<sup>11</sup>

Plaintiffs-Appellants’ analysis ignores the relevant precedent and demonstrates a misunderstanding of the role of administrative agencies under *Boreali*.<sup>12</sup> A challenged regulation violates separation of powers principles only in the extraordinary case where an executive agency unilaterally enacts a

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<sup>11</sup> Plaintiffs-Appellants concede that DHCR has “authority to administer the Rent Stabilization Law” but argue that it is prohibited from “creat[ing] new law[.]” (Pl. App. Br. at 35 (quoting *Two Associates v. Brown*, 513 N.Y.S.2d 966 (1st Dep’t 1987)) (emphasis omitted).) To the extent that Appellants are suggesting that DHCR lacks authority to engage in interstitial rulemaking that “go[es] beyond” but is consistent with the text of the Rent Statutes and their purposes, they are wrong. See *Agencies for Children’s Therapy Services*, 136 A.D.3d at 130. *Two Associates* stands only for the proposition that an agency cannot, by means of an informal operational bulletin, impose a policy that is directly contrary to the Court of Appeals’ interpretation of the governing statute. The court explained that “[t]he Commissioner may not so act in the absence of a legislative amendment of the Law or without properly moving to amend the Code as specified in the Law.” 531 N.Y.S.2d at 972.

<sup>12</sup> Intervenor-Appellants, meanwhile, state in their “Summary of the Argument” that the “2014 Amendments constitute a violation of the separation of powers doctrine under *Boreali*” and that the IAS Court erred by failing to hold as such, but do not otherwise address this issue in their brief.

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, 8 (1987) (overturning regulations that effectuated “a profound change in social and economic policy” without legislative mandate). 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 DHCR’s regulations in furtherance of the Legislature’s rent control and stabilization policies do not violate separation of powers principles. Likewise, and as the IAS Court correctly concluded, each of the *Boreali* factors supports upholding DHCR’s 2014 Amendments as a valid exercise of delegated rulemaking authority. (*See* R. 50 (“[A]ll of the *Boreali* factors support DHCR’s claim that it acted within the confines of its delegated powers and did not usurp the authority of the legislature in promulgating the 2014 Amendments.”).)

- B. An Application of the *Boreali* Factors Demonstrates that DHCR Engaged in a Proper and Modest Exercise of Interstitial Rulemaking
  - i. *DHCR Did Not Exceed Its Authority by Balancing Social and Economic Concerns*

Plaintiffs-Appellants misinterpret the first *Boreali* factor to prohibit any balancing of costs and benefits of proposed regulations. As recently as last year, the Court of Appeals expressly warned against this interpretation of *Boreali*,

explaining that “[b]alancing of costs and benefits is inherent in any rulemaking process, and our separation of powers jurisprudence should not be interpreted to foreclose an agency from considering the implications of its proposals.” *Acevedo*, 29 N.Y.3d at 223; *see also 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, 697-98 (2014) (the “Soda Ban” cases) (“*Boreali* should not be interpreted to prohibit an agency from attempting to balance costs and benefits.”). Rather, because “the promulgation of regulations necessarily involves an analysis of societal costs and benefits . . . cost-benefit analysis is the essence of reasonable regulation.” *Hispanic Chambers*, 23 N.Y.3d at 697 (emphasis added). This principle is not only common sense but is also codified by statute. The State Administrative Procedure Act *requires* DHCR to consider social and economic factors in promulgating regulations. *See* State Administrative Procedure Act § 202-a (requiring regulatory impact statement describing “the purpose of, necessity for, and benefits derived from the rule” and the “projected costs of the rule”).

The first *Boreali* factor only prohibits an agency from acting in the absence of “any legislative guidelines at all” as to how to balance the relevant interests. *Hispanic Chambers*, 23 N.Y. 3d at 698 (citing *Boreali v. Axelrod*, 71 N.Y.2d 1, 12 (1987)). This is not the case here. Through codification of the Rent Statutes and DHCR’s enforcement authority, 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., 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.”). Acting within that framework, DHCR has “discretion to strike a policy balance.” *Hatanaka v. Lynch*, 304 A.D.2d 325, 326 (1st Dep’t 2003). The fact that DHCR did so in promulgating the 2014 Amendments does not violate separation of powers.<sup>13</sup>

By contrast, in each of the cases cited by Plaintiffs-Appellants, the administrative agency was operating in the absence of any legislative guidance as to how to weigh the factors relevant to the particular regulation at issue. In the *Soda Ban* cases, for instance, “the Board’s enabling legislation contained a general,

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<sup>13</sup> Plaintiffs-Appellants lump with their first *Boreali* factor analysis an argument that RSL § 26-511(b) bars DHCR from “impair[ing] or diminish[ing] any right or remedy granted to any party by this law or any other provision of law.” (Pl. App. Br. at 39.) But, as discussed *supra*, the 2014 Amendments are entirely consistent with the Rent Statutes and therefore their application does not impair or diminish “any right or remedy granted to any party” by statute.

overarching mandate concerning the promotion of public health, but neither the legislature nor the City Council had ever promulgated a statute — or otherwise defined a policy—concerning excessive soda consumption.” *Acevedo*, 29 N.Y.3d at 224 (Court of Appeals explaining its earlier decision in the *Soda Ban* cases). The Court of Appeals therefore concluded that the Portion Cap Rule “amounted to a ‘new policy choice’ founded on inadequate legislative guidance.” *Id.* (citing *Hispanic Chambers*, 23 N.Y.3d at 700). Likewise, in *Ahmed v. City of New York*, the Taxi and Limousine Commission (TLC), acting solely on the basis of its mandate to “develop and improve taxi and limousine service,” approved a new deduction from driver receipts of \$0.06 per ride to fund a new program to pay for driver health care costs and disability coverage. 129 A.D.3d 435, 440 (1st Dep’t 2015). The First Department concluded that “nothing in the Charter or the enabling code provisions contemplates the establishment and outsourcing of a miniature health insurance navigation and disability insurance department” and that therefore the TLC had “manufactured a ‘comprehensive set of rules without benefit of legislative guidance.’” *Id.* (quoting *Boreali*, 71 N.Y.2d at 12). As opposed to the unprecedented regulatory actions in *Hispanic Chambers* and *Ahmed*, here DHCR merely enacted regulations, as it had done many times in the past, to implement the complex regulatory scheme and objectives set out by the Legislature in the Rent Statutes.

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

Agencies engage in permissible, interstitial rulemaking when they act to find “a means to achieve the legislature’s expressed ends.” *Agencies for Children’s Therapy Services*, 136 A.D.3d at 131. Similar to the first *Boreali* factor, an agency violates this second factor only by acting in the absence of such legislative guidance.<sup>14</sup> The Court of Appeals has previously held that the Rent Statutes provide sufficient policy direction to satisfy this second *Boreali* factor. *See Higgins*, 83 N.Y.2d at 170.

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.” *Higgins*, 83 N.Y.2d at 168-69 (internal quotation omitted). The Rent Statutes cover each of the

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<sup>14</sup> Appellants cite a federal district court case for the principle that “New York law unequivocally provides that an administrative agency may not ‘adopt[] regulations that are substantially more restrictive than existing legislation,’ even if such regulations ‘carry out the legislature’s policies.’” Pl. App. Br. at 41 (quoting *Justiana v. Niagara Cnty. Dep’t of Health*, 45 F. Supp. 2d 236, 245 (W.D.N.Y. 1999)) (alterations and emphasis in original). But this is not the law as articulated by the Court of Appeals. *See Acevedo*, 29 N.Y.3d at 225 (“Nor does ‘the mere fact that the Legislature has enacted specific legislation in a particular field’ necessarily indicate that ‘broader agency regulation of the same field is foreclosed.’” (quoting *Matter of Consolidated Edison Co. of N.Y. v Department of Env’tl. Conservation*, 71 N.Y.2d 186, 193 (1988))). In addition, the regulations in *Justiana* went so far beyond as to be facially inconsistent with the statute at issue. *See* 45 F. Supp 2d. at 239 (noting, *inter alia*, that the statute permitted a restaurant to reserve 30% of its dining area for a smoking section whereas the regulation banned all smoking in the dining areas of restaurants).

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). Starting from these policy choices made by the Legislature, DHCR promulgated regulations in support of its mandate to “insure that the level of fair rent increase established under [the Rent Statutes] will not be subverted and made ineffective.” RSL § 26-511(c)(5).

In fact, many of the Amendments represent codification of relevant case law established over the last decade. *See, e.g., Grimm*, 15 N.Y.3d at 366 (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*, 61 A.D.3d at 404-05 (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 Amendments reflect modest adjustments to a preexisting 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); *see also Acevedo*, 29 N.Y.3d at 225 (“Even accepting petitioners’ claim that the legislature has repeatedly tried to reach agreement in this field, the dearth of successful legislation affords limited probative value in our analysis.”).

Appellants identify the introduction of S8050, a 2010 proposed bill that included certain provisions related to the Four-Year Rule, as evidence of legislative hostility to the Four-Year Rule amendments. (Pl. App. Br. at 43.) In

fact, S8050 was a 16-page bill that included a number of different proposed amendments to the Rent Statutes. The fact that the Legislature did not pass S8050 is not a clear indication of the Legislature's position on any discrete proposal.

Likewise, Appellants also identify three bills, each introduced in January 2013 as evidence of legislative hostility to prohibiting MCI increases based on "immediately hazardous" conditions (Class C violations). (Pl. App. Br. at 43 (citing R. 946; R. 951; R. 956).) However, those bills would have also blocked MCI increases based on the existence of "hazardous" conditions (Class B violations), a less severe category of violations. The 2014 Amendments do not extend to Class B violations.

Next, Appellants identify three bills that would have required additional information on rent increases and rent history as part of a lease rider. (Pl. App. Br. at 43-44 (citing R. 960, R. 965, R. 970-971).) As the IAS Court rightly noted, the legislature might have declined to act because it believed that DHCR already possessed the authority to take action itself. (R. 48 (*citing Matter of NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Preserv.*, 27 N.Y.3d 174, 184 (2016)).)

Lastly, Appellants argue that the fact that the Legislature "twice denied funding for the creation of the TPU is compelling evidence of the Legislature's intent that no TPU should exist." (Pl. App. Br. at 44 note 11.) The

fact that the Legislature declined to provide special funding to support the TPU does not render its creation unlawful. Rather, as discussed above, DHCR already had the authority to conduct investigations, and to delegate that authority to an internal division such as the TPU. The denial of discrete funding for TPU suggests, if anything, that the Legislature merely required the TPU to be funded from existing appropriations.

The nine bills tangentially related to four different provisions of the 2014 Amendments are not an indication, as in *Boreali*, that “the Legislature had repeatedly tried—and failed—to reach agreement” on the exact same subject, “in the face of substantial public debate and vigorous lobbying by a variety of interested factions.” 71 N.Y.2d at 13. But even in cases where the Legislature *has* repeatedly declined to act on bills containing identical proposals, the Court of Appeals has still refused to infer hostile intent from mere legislative inaction. In *Higgins*, for example, the Court refused to credit plaintiffs’ argument that legislative inaction was proof of hostile intent when 27 bills on the subject had been introduced in the Legislature (and not passed) prior to DHCR’s adoption of the regulations in question. 83 N.Y.2d at 170.

Appellants attempt to distinguish *Higgins* on the basis that the Court there noted that the Legislature subsequently “made substantial reforms in rent regulation” without addressing the subject of the regulation. (Pl. App. Br. at 45

(quoting *Higgins*, 83 N.Y.2d at 167).) Contrary to Appellants’ claim that “the Legislature has not made [subsequent] ‘substantial reforms’” relevant to the present inquiry (Pl. App. Br. at 45), the Legislature did in fact enact several changes to the Rent Statutes following the 2014 Amendments, in the Rent Act of 2015. N.Y. Laws of 2015, ch. 20.<sup>15</sup> Not only did the Legislature decline to overrule the 2014 Amendments, but it also reaffirmed DHCR’s broad authority to regulate in this area. N.Y. Laws of 2015, ch. 20, Part A, § 17 (“The division of housing and community renewal shall, pursuant to this act, promulgate rules and regulations to implement and enforce all provisions of this act and any law renewed or continued by this act.”). *Higgins* is thus directly on point and undermines Appellants’ arguments with respect to the second *Boreali* factor.

*iv. The 2014 Amendments Required DHCR’s Expertise*

The administrative record is replete with evidence that DHCR relied on its expertise in promulgating the 2014 Amendments. (*See, e.g.*, Consolidated Regulatory Impact Statement, R. 895 at § 3 (stating DHCR relied on “twelve years of experience in administration” of the regulations since the last major amendment, as well as “dialogue during this period with owners, tenants, and their respective

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<sup>15</sup> The Rent Act of 2015 “enact[ed] into law *major components of legislation* relating to ... rent regulation,” N.Y. Laws of 2015, ch. 20, Part A, § 1 (emphasis added). This legislation, *inter alia*, imposed additional limitations on a “rent increase after vacancy of a housing accommodation,” modified “deregulation thresholds,” *id.*, adjusted the calculation of rent increases following major capital improvements, *id.* §§ 29-30, and increased penalties that may be imposed on landlords for harassing tenants, *id.* § 28.

advocates,” including “one hundred forums and meetings on an annual basis”).)

The IAS Court cited this evidence from the administrative record, as well as deposition testimony from DHCR administrators, which according to the IAS Court demonstrated that “the 2014 Amendments were prompted by DHCR’s experience and extensive comments by landlord and tenant advocates, including comments received during a round of technical amendments in 2012 and the SAPA process in 2013-2014.” (R. 50.)

DHCR also relied on its specialized insight into the current operation of the Rent Regulations, and in certain respects amended regulations to ensure that they have their intended effect. For instance, DHCR noted that it was revising the definition of harassment to reflect “some of the more up-to-date schemes to deprive tenants of their legitimate rights” (Consolidated Regulatory Impact Statement, R. 907 at § 3k), which DHCR had observed through its experience and expertise in the operation of the Rent Statutes and Rent Regulations. DHCR similarly justified another amendment on the grounds that under the pre-existing regulatory scheme the registration requirements had in effect “corrupt[ed] the purpose of DHCR’s registration data base.” (*Id.*; R. 908-09 at § 3m.)

Despite these indications in the record that DHCR relied on its considerable experience administering the Rent Laws in drafting the 2014 Amendments, Appellants argue that the fourth *Boreali* factor cuts in their favor.

Appellants offer only two arguments. First, Appellants claim that what Appellants perceive as DHCR’s “failure” to “tailor a regulation that addresses its concerns without including innocent conduct” means that DHCR did not invoke its expertise in drafting the regulations. (Pl. App. Br. at 46.) In other words, Appellants ask the Court to take the fact that DHCR reached an outcome that Appellants dislike as evidence that DHCR did not rely on its considerable expertise in drafting the regulations. Appellants cite no authority for the remarkable proposition that a court should undertake its own evaluation of the *merits* of an agency action—or accept one party’s self-serving assessment of its merits—in evaluating the fourth *Boreali* factor. Second, as to the creation of the TPU, Appellants argue that DHCR could not have relied on its expertise because it engaged the consulting firm KPMG to assist in the implementation of the TPU. But the retention of a management consulting firm with “general organizational expertise” (R. 553) to assist in the implementing of certain TPU procedures does not negate DHCR’s authority or call into question the evident application of its own experience and expertise.<sup>16</sup>

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<sup>16</sup> Moreover, as the IAS Court noted, Appellants’ arguments that the creation of the TPU violated the separation of powers doctrine are unavailing because DHCR has express statutory authorization to create the internal administrative structures necessary to carry out its legislative mandate. (R. 50 (citing Public Housing Law §§ 11-12; Public Officers Law § 9).) Even absent that express authorization, the Court of Appeals has explained that it is within the inherent authority of the executive branch to establish new administrative structures to enforce legislation. *See Clark v. Cuomo*, 66 N.Y.2d 185, 189 (1985) (“[I]n this State the executive has the power to

The IAS court correctly concluded that DHCR relied on its expertise in developing the 2014 Amendments.

\* \* \*

The IAS Court thus properly applied the *Boreali* factors in concluding 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. Appellants’ attempt to transform their dissatisfaction with the substance of the regulations into a constitutional separation of powers claim should be rejected.

### **III. PLAINTIFFS FAIL TO STATE ANY DUE PROCESS VIOLATION**

Appellants also appeal the IAS Court’s award of summary judgment in favor of Respondents on Appellants’ due process claims. As below, Appellants do not clearly articulate the basis for this due process claim. Plaintiffs-Appellants broadly assert that the “2014 Amendments and TPU Violate Appellants’ Due Process Rights” (Pl. App. Br. at 48), but their actual allegations of purported due process violations appear to be limited to the TPU (as codified by the 2014 Amendments), and do not extend to any other aspect of the 2014 Amendments.<sup>17</sup> Focusing on the

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enforce legislation and is accorded great flexibility in determining the methods of enforcement.” (quoting *Rapp v. Carey*, 44 N.Y.2d 157, 163 (1978)).

<sup>17</sup> Intervenor-Appellants, meanwhile, claim similar violations of due process by the TPU in the factual background section of their brief. (*See* Int. App. Br. at 5-6.) Although this is the only “due process” issue raised in their articulation of the “Questions Presented” on appeal (*see id.* at 2), Intervenor-Appellants lodge passing accusations of “effort[s] to eliminate due process” tied to other amendments (*e.g., id.* at 15, concerning the “notice” requirement discussed in Part I.C.,

TPU, Plaintiffs-Appellants allege due process violations in part based on what they call a “protectable, statutory right to charge the legally permitted rent under the Rent Stabilization Statutes.” (Pl. App. Br. at 49 (emphasis omitted).) That theory of due process appears to be based on the potential for an adverse substantive recommendation by the TPU in a given audit. Plaintiffs-Appellants also assert a due process violation tied to “rights contained in the Safe Harbor Provision” (Pl. App. Br. at 52), which they claim are lost by virtue of any TPU audit taking place. The IAS Court correctly rejected both theories and held that TPU audits do not deprive Appellants of any due process rights.

In evaluating Appellants’ due process claim, this Court should consider (1) whether Appellants have identified a protected interest, (2) whether sufficient procedural safeguards exist to protect Appellants from erroneous deprivation of that interest, and (3) the burdens that additional safeguards would place on DHCR. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). As explained below, Appellants have not even identified a protected property right of which they may be deprived through a TPU audit, and thus fail to satisfy the first element. But even assuming, arguendo, that Appellants could identify a protected property right, TPU audits do not violate Appellants’ due process rights since the TPU issues only non-binding

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*supra*). In each case, however, they fail to specify the property interest(s) at issue, how they suffer a deprivation thereof, or why the current procedures are inadequate. (See Int. App. Br. at 15, 16, 17, 19.)

recommendations. Those recommendations are then subject to *de novo* review by a separate entity that—as Appellants concede—affords ample procedural protections prior to any binding enforcement action, as well opportunities for administrative and judicial appeal.

Given Appellants’ fundamental failure to show a deprivation of any property right that results from non-binding TPU audits, we first address that element of their due process claim.

A. Appellants Cannot Show a Deprivation of Property Based on Non-Binding Recommendations Subject to Further Administrative Review

It is undisputed that the substantive findings of a TPU audit are not binding on landlords (*e.g.*, R. 64-65, 72-73).<sup>18</sup> Accordingly, those findings cannot “deprive” Appellants of any property interest. If a landlord does not voluntarily comply with the findings of the TPU, the matter may then be referred to the DHCR’s Office of Rent Administration for an independent adjudication.<sup>19</sup> At that stage a landlord has the opportunity to submit additional evidence in support of the current rent and underlying claimed Individual Apartment Improvement (“IAI”). (R. 72.) Appellants concede that the procedures available to them in proceedings

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<sup>18</sup> See also Int. App. Br. at 6 (acknowledging that the TPU process consists of a “demand for information and then a finding [by] the TPU,” and that landlords have an opportunity to address those findings “before an overcharge complaint is filed”).

<sup>19</sup> Plaintiffs-Appellants misleadingly assert that “the TPU audit process does not permit any internal administrative appeal” (Pl. App. Br. at 54). While there is no “internal” appeal within TPU, an overcharge finding made by the TPU is not binding on a landlord unless and until the matter is referred to the ORA for an independent adjudication.

before the ORA comport with due process. (R. 103 (Complt. ¶¶ 31-32); Pl. App. Br. at 7-8, 57.)

TPU's initial audit findings are not binding on ORA (R. 69, 72). Evidence provided in discovery also demonstrates that the ORA is not a mere rubber stamp of TPU recommendations: in some cases referred to ORA by the TPU, ORA reaches a different conclusion with respect to the appropriate rent following its independent review. Plaintiffs-Appellants, however, misstate both the scope and import of this issue. As to scope, Plaintiffs-Appellants' claim that "Respondents' own documents showed that TPU audits have produced incorrect results nearly 30% of the time (either because the results are wrong or because of 'procedural reasons')" (Pl. App. Br. at 53-54) is misleading in multiple respects.

First, and most significantly, the statistics cited by Plaintiffs-Appellants are limited to matters referred to ORA, and thus exclude instances in which (a) the TPU concluded through its audit that there was no overcharge or overstatement of rent by the landlord; or (b) the TPU did make such a finding, but the landlord voluntarily complied with TPU's recommendation before the matter was referred to ORA. Second, as reflected by the parenthetical, their calculation includes instances in which the matter was closed for procedural reasons and ORA did not make a substantive determination one way or the other. Third, in most cases in which ORA disagreed with TPU's finding, the owner had "submitted more

documentation/evidence to ORA.” (R. 838; *see also* R. 67-69 & 267.) In any event, the fact that ORA sometimes reaches a different conclusion does not, as Appellants argue, evidence a systemic deficiency in the TPU’s methods and procedures—just as the existence of appellate court reversals does not mean that trial courts are inherently flawed and should be disbanded. Indeed, this fact demonstrates that the ORA is a legitimate forum for landlords to dispute findings by the TPU in an advance of any binding decision or penalty. Those landlords are not prejudiced or deprived of any property interest by virtue of TPU’s non-binding recommendation.

Further, even if the ORA reaches the same conclusion as the TPU and orders a rent adjustment or overcharge payment, the landlord is not without further recourse. First, a landlord may petition for administrative review of that determination within DHCR. (R. 76-77.) Second, a landlord may challenge any final judgment by the ORA (including those that originate from a TPU audit referral) in an Article 78 petition. (*Id.*) As the IAS Court observed, “[t]he existence of this review procedure provides plaintiffs with due process.” (R. 21 (quoting *State v. Dennin*, 17 A.D.3d 744, 746 (3d Dep’t 2005)).

The IAS Court appropriately held this issue to be dispositive in denying Appellants’ due process claim. (R. 20-21.)

B. Even if the TPU Audit Findings Were Binding, Appellants Fail to Show the Deprivation of Any Recognized Property Interest

Even if TPU audit findings were binding on landlords—which they are not—Appellants’ due process claim would still fail since Appellants do not identify any legitimate protected property interest. On appeal, Plaintiffs-Appellants claim two different property interests: (1) a property interest of landlords to charge the “maximum” rent possible; and (2) a property interest in a “safe harbor” exception to statutory law that appears in a DHCR policy statement. Intervenor-Appellants discuss only the latter in their brief. As detailed below, neither is a cognizable property interest.

*i. Landlords Do Not Have a Protectable Property Right in Charging a Certain “Maximum” Rent*

Plaintiffs-Appellants claim that “New York courts have acknowledged that Appellants have a protectable, statutory right to charge the legally permitted rent under the Rent Stabilization Statutes.” (Pl. App. Br. at 49 (emphasis in original).) This assertion is flawed in multiple respects.

First, none of the cases cited by Plaintiffs-Appellants actually supports this claim. In the main case cited by Plaintiffs-Appellants for this point, the First Department stated that the “legal authority ... is not entirely clear” as to whether “there is a constitutionally protected property interest in legislation such as that establishing rent control or stabilization.” *Allerton Coops Tenants Ass’n v.*

*Biderman*, 189 A.D.2d 249, 253 (1st Dep’t 1993). The court did not have to resolve that issue, however, since it held that even assuming plaintiffs had such a right, it had not been violated given the facts presented in that case. *Id.* at 254. In another case cited by Plaintiffs-Appellants, *Woodner v. Eimicke*, No. 87 Civ. 8872 (MJL), 1990 U.S. Dist. LEXIS 8636 (S.D.N.Y. July 13, 1990), the court similarly did not need to resolve whether or not the plaintiff landlord had any of several alleged property rights, including a so-called “right to charge that rent legally permitted under the RSL.” *Id.* at \*12. That court also held that even if such a right existed, “plaintiff was clearly not deprived of his claimed property interest without due process of law since New York provides wholly adequate procedures through which plaintiff may obtain relief.” *Id.* at \*13-\*14.

The remaining cases cited by Plaintiffs-Appellants are similarly inapposite. Two cases assumed “arguendo” that *tenants* had a property interest in a rent-controlled apartment, but did not actually decide that issue—which, in any event, would not bear on whether a *landlord* had a property interest in charging a *particular rent*. See *Srubar v. Rudd, Rosenberg, Mitofsky & Hollender*, 875 F. Supp. 155, 164 (S.D.N.Y. 1994); *Sidberry v. Koch*, 539 F. Supp. 413, 418-19 (S.D.N.Y. 1982). Next, in *Kraebel v. New York City Dep’t of Hous. Pres. & Dev.*, the Second Circuit found that a landlord had a property interest in certain tax abatements to which she was “clearly and indisputably entitled by state law.” 959

F.2d 395, 405 (2d Cir. 1992). That decision did not decide whether or not the landlord had a right to charge tenants in rent-regulated apartments a particular rent. Finally, the last case cited by Plaintiffs-Appellants, *Griffith v. FLRA*, 842 F. 2d 487 (D.C. Cir. 1988), has nothing to do with rent—and, moreover, ultimately found that the plaintiff did *not* have a protected property interest. *See id.* at 495 (concluding that plaintiff did not have a property interest in a within-grade pay increase).

Appellants’ inability to identify any judicial precedent that supports this claimed property right is not surprising: Appellants also fail to point to any statutory language entitling landlords to charge a particular “maximum” rent. To the contrary, the Rent Stabilization Code specifically contemplates several situations in which a tenant will pay less than some other “maximum” rent. *See, e.g.*, RSC § 2523.4(a)(1) (authorizing DHCR to reduce rent where a landlord failed to maintain required services).

In other words, the Legislature charged DHCR with the authority to determine, consistent with the Rent Statutes and associated regulations, what rent is legally permitted; landlords do not have a constitutional right to some other “maximum rent” outside of DHCR’s determination. The 2014 Amendments challenged by the landlords are in accord with a statutory scheme that explicitly contemplates certain limitations on the rent that may be charged, and delegates to

DHCR the authority to enact and enforce regulations consistent with those principles. DHCR's doing so, including through TPU audits that make non-binding recommendations regarding the amount of rent that is consistent with this statutory scheme, does not infringe any "property interest" of landlords.

ii. *Landlords Do Not Have a Protectable Property Right in a "Safe Harbor" from Statutory Treble Damages for Past Overcharges*

Plaintiffs-Appellants, joined by Intervenor-Appellants, also claim that landlords have a protectable property right in a "safe harbor" set out in a DHCR policy statement. More specifically, Appellants claim that landlords have a "property interest" in this "safe harbor" that should apply to all rent overcharge proceedings conducted by the ORA, including in circumstances specifically excluded by the policy statement upon which they rely.

As detailed at pages 10-12 *supra*, a tenant in rent-stabilized housing who is overcharged rent is presumptively entitled to collect treble damages from a landlord, unless the landlord proves that the overcharge was *not* willful. RSL § 26-516a. The "safe harbor" set out in DHCR Policy Statement 89-2 provides that a landlord's "burden of proof in establishing lack of willfulness shall be *deemed to have been* met and therefore, the *treble damages penalty is not applicable*" if in response to a "complaint *initiated by the tenant*" the landlord issues a refund, with interest, before the expiry of its time to submit a response to the complaint. (R.

836-37 (emphasis added).) By its terms, this safe harbor is limited to complaints “initiated by the tenant”—and for the avoidance of doubt, then explicitly excludes any overcharge case “initiated by DHCR” which “had been preceded by an investigation by DHCR or another government agency, during which the owner, having been given notice, failed to take corrective action and issue a refund.”

(R. 837.) As the IAS Court observed, the apparent “justification for this regulatory exception to the statutory presumption is to encourage landlords to correct a rent overcharge on their own volition soon after a complaint is brought to DHCR’s attention.” (R. 24.) However, for cases referred by the TPU (or potentially another governmental entity), “the owner was notified of a rent overcharge complaint through an earlier investigation, and already was given the opportunity to correct the violation ... but declined to correct it.” (R. 25; *see also* R. 17.)

Landlords do not have a “property interest” in any “safe harbor” from treble damages. By statute, treble damages are required unless the landlord can establish that the violation was not willful. Accordingly, if there is any “due process” violation owing to Policy Statement 89-2, it is that tenants—not landlords—have their due process rights infringed to the extent they suffer a willful overcharge but, when this regulatory “safe harbor” policy applies, are deprived of their statutory right to collect treble damages from the landlord.

Putting aside whatever rights exist or are infringed by the terms of the policy statement itself, landlords clearly do not have a property interest in the “safe harbor” applying even in circumstances explicitly carved out by that policy statement—as Appellants argue in this appeal.<sup>20</sup> Appellants ostensibly claim that DHCR is obligated to retain this regulatory “safe harbor” in all overcharge cases because landlords have become accustomed to this “vital tool by which they can pay any alleged overcharge prior to the completion of an ORA proceeding and automatically avoid the imposition of treble damages”—even in the case of willful violations. (Pl. App. Br. at 52.)

In support of this claim, Plaintiffs-Appellants cite *Argo v. Hills*, 425 F. Supp. 151 (E.D.N.Y. 1977). But *Argo* is inapposite. *Argo* merely holds that, where tenants had formed a “legitimate expectation” of notice and an opportunity to be heard on certain individual determinations based on currently-applicable provisions of local law, HUD had to provide the tenants with such process before making these individual determinations. *Id.* at 157-58. Here, the regulatory “policy statement” on which Appellants claim to have formed a “legitimate

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<sup>20</sup> Indeed, courts that have considered this limited “safe harbor” have repeatedly upheld DHCR’s strict application of its terms, and rejected claims by landlords—such as the one maintained here—that the “safe harbor” should apply more broadly. See, e.g., *Matter of 554 W. 181 LLC v. New York State Div. of Hous. & Community Renewal*, 30 Misc 3d 1233(A) (Sup. Ct. N.Y. Cnty. 2011) (rejecting challenge to treble damages award where plaintiff landlord issued a refund after the deadline established by Policy Statement 89-2, though still before ORA’s final decision); *Faith Ministries Inc. v New York State Div. of Hous. & Cmty. Renewal*, 2010 N.Y. Misc. LEXIS 5579 (Sup. Ct. N.Y. Cnty. Nov. 8, 2010) (same).

expectation” was explicitly narrowed by DHCR, and cases that fall outside its scope remain governed by the underlying statutory scheme. Appellants thus apparently believe that any regulation, or even policy statement, favorable to landlords must be maintained in perpetuity if landlords have formed an “expectation” that it would continue. However, “neither a property owner nor a tenant has a vested interest in beneficial regulations” or in their continued operation. *IG Second Generation Partners L.P. v. New York State Div. of Hous. & Cmty. Renewal*, 10 N.Y.3d 474, 482 (2008) (citing *I. L. F. Y. Co. v Temporary State Hous. Rent Comm’n*, 10 N.Y.2d 263, 270 (1961); *Versailles Realty Co. v New York State Div. of Hous. & Cmty. Renewal*, 76 N.Y.2d 325, 330 (1990)). The Due Process Clause does not prevent DHCR from revising its own generally applicable regulations.

Thus, to the extent the “safe harbor” does not apply, landlords’ conduct should be governed by the underlying statutory scheme.<sup>21</sup> However, the statutory presumption does not mean that ORA will in fact find willfulness and impose

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<sup>21</sup> Nevertheless, according to a Bureau Chief of the ORA, the ORA in practice still affords landlords the benefit of a “safe harbor” from treble damages in cases referred by the TPU if landlords “cooperat[e] with ORA once a rent overcharge proceeding has been filed.” (R. 74.) This constitutes a further infringement of tenants’ rights. It is not, however, dispositive of Appellants’ due process claims. While the IAS Court acknowledged this testimony, it did not “rel[y]” on it to “obviate” Appellants’ due process claims (Pl. App. Br. at 56). Appellants’ complaint that “[s]uch testimony is contradicted by the plain language of PS 89-2” (*id.*) is beside the point. As the IAS Court held, even if PS 89-2 was strictly enforced and landlords had no opportunity for a “safe harbor” from treble damages in cases referred by the TPU, landlords would still not suffer any deprivation of due process rights. (R. 17.)

treble damages. Rather, a landlord who is found by ORA to have overcharged a tenant has a full and fair opportunity to present evidence to ORA that the overcharge was not willful.<sup>22</sup> If the landlord “establishes by a preponderance of the evidence that the overcharge was not willful,” RSL § 26-516(a), it will not pay treble damages. If not, ORA will impose treble damages as required by statute.<sup>23</sup> As with any final order by the ORA, the landlord may then appeal that order.

The IAS Court correctly held that the inapplicability of a “safe harbor” regulatory exception to statutory law in certain situations, as set forth in the applicable policy statement, did not deprive landlords of any due process property right.

### C. TPU Affords Landlords Adequate Process

Finally, even if Appellants could show that TPU’s non-binding recommendation itself deprived landlords of a protected property interest, their due process claim fails for the third reason that TPU affords landlords an opportunity to be heard that comports with due process. Contrary to Appellants’ attempt to turn the “opportunity to be heard” into a literal standard, due process can be satisfied

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<sup>22</sup> See R. 836 (“When an owner receives notice that an overcharge has been determined and treble damages are about to be imposed, he or she will be notified to submit evidence within twenty-one (21) days to prove that the overcharge was not willful.”).

<sup>23</sup> This Court has recognized that this statutory scheme, which requires a landlord to establish lack of willfulness to avoid treble damages, does not deprive landlords of due process—including in circumstances where treble damages are assessed by DHCR without an evidentiary hearing. See, e.g., *Matter of DeSilva v. New York State Div. of Hous. & Cmty. Renewal Off. of Rent Admin.*, 34 A.D.3d 673 (2d Dep’t 2006).

through written submissions alone. *See, e.g., Rubin v. Eimicke*, 150 A.D.2d 697, 698 (2d Dep’t 1989) (absent a statutory requirement for a hearing, “all that due process requires is that reasonable notice be afforded to the parties to a proceeding and that they have an opportunity to present their objection,” which can be satisfied through written submissions). Appellants recognize that landlords have an opportunity to submit both correspondence and other materials in support of claimed IAIs and corresponding rent adjustments. (*See* Pl. App. Br. at 10-11, 54; *see also* R. 65.) The TPU will also at times speak directly with both tenants and owners of apartments under review. (R. 597.) Such procedures are more than adequate to satisfy due process, especially in connection with a nonbinding recommendation that is subject to further review by a separate adjudicatory process within DHCR.

\* \* \*

For all of these reasons, Appellants fail as a matter of law to state a “due process” violation based on the TPU, and this Court should affirm the IAS Court’s award of summary judgment in favor of Respondents.

### **CONCLUSION**

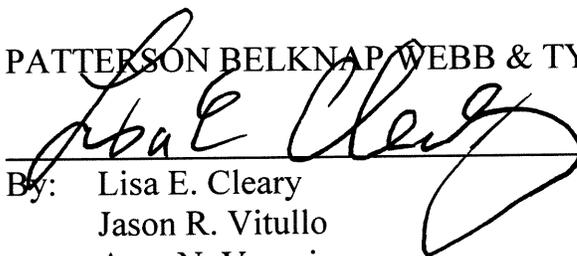
The 2014 Amendments were a modest, incremental, and unexceptional exercise of DHCR’s broad authority to promulgate interstitial regulations to effectuate statutory policy. The Amendments in part codified

preexisting judicial precedent, and in general aimed to enhance accountability to protect tenants from abuses of the Rent Regulations observed by DHCR under the prior regulations. Similarly, DHCR created the TPU to exercise DHCR's 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 Appellants' constitutional rights.

The judgment of the IAS Court should be affirmed.

Dated: New York, New York  
May 1, 2018

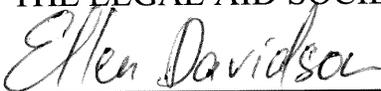
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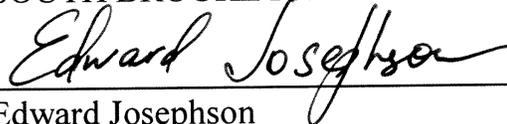
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**CERTIFICATE OF COMPLIANCE**

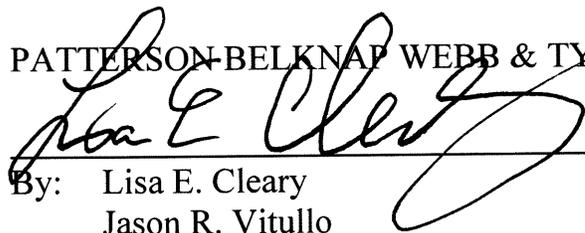
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Dated: New York, New York  
May 1, 2018

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