SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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.,

Plaintiffs,

– 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 the Division of Housing and Community Renewal,

Defendants.

Index No. 501554/2014

IAS Part 66

Velasquez, J.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION TO DISMISS

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PRELIMINARY STATEMENT

This case involves a challenge to two parts of the State Division of Housing and Community Renewal's recent efforts to protect tenants in rent-stabilized apartments from landlords who seek to profit by charging illegal rents, cutting essential services, and even creating fraudulent schemes to escape regulation altogether.

First, in 2012, the Division created a new administrative unit called the Tenant Protection Unit. Charged with using the Division's existing statutory authority to "investigate and prosecute" violations of the rent stabilization laws, the Tenant Protection Unit uses its subpoena power and a system of proactive audits to uncover rent overcharge violations and seek voluntary compliance. When its voluntary compliance efforts fail, the Unit is empowered to bring enforcement actions before the Division's adjudicatory unit, which issues binding final administrative orders subject to judicial review.

Then, in 2014, the Division rolled out a series of amendments to its rent stabilization regulations. In addition to codifying the Tenant Protection Unit, the Division amended its existing regulations to, inter alia:

- Remove three hypertechnical prerequisites that tenants faced under the old regulation before they could obtain a rent reduction order against a landlord who eliminated essential services;
- Require landlords to include a detailed breakdown of the legal rent calculation in the mandatory lease rider to help tenants understand their rights under the rent stabilization laws;

- Allow, in rent overcharge proceedings, the review of rental history records beyond the normal four-year period in certain situations that, in the experience of the Division and the courts, are often covers for fraudulent schemes to escape regulation that would be rewarded without such review;

- Apply, in rent overcharge proceedings, the default formula for calculating the legal rent when the landlord fails to provide reliable records sufficient to establish the legal rent four years earlier; and

- Require landlords seeking to amend annual rent registration statements from prior years to apply to the Division, rather than allowing them to amend them as of right, a procedure that some unscrupulous landlords had used to quietly rewrite the rental history and cover up intentional rent overcharges.

Months after these amended regulations took effect, Plaintiffs — nine New York City landlords and three landlord associations — brought this pre-enforcement challenge against the Division and its Commissioner/CEO, Darryl Towns, seeking to declare the regulations invalid. Their claims fall into five general categories.

First, Plaintiffs claim that the creation of the Tenant Protection Unit violated the separation of powers because the Legislature considered budget requests seeking additional funding for the Unit but ultimately passed a budget without such funding. Second, they claim that the Tenant Protection Unit's audits violate their right to due process because those audits do not give landlords a sufficient opportunity to be heard and do not permit landlords to appeal the Unit's audit findings. Third, Plaintiffs claim that the amended regulations are invalid because they contradict the rent stabilization statutes. Fourth, Plaintiffs claim that the Division violated the Administrative Procedure Act when amending the regulations. Fifth and finally, Plaintiffs claim that in amending its regulations, the Division

violated the separation of powers by exceeding its lawfully delegated authority under the rent stabilization statutes.

A week after filing their complaint, Plaintiffs sought a temporary restraining order to enjoin the Division from enforcing the amended regulations. This Court (Steinhardt, J.S.C.) denied their motion, finding that Plaintiffs had failed to show that they would likely suffer irreparable harm absent a temporary restraining order. Now, on the same record, Plaintiffs move for a preliminary injunction seeking the same relief.

Plaintiffs' preliminary injunction motion should be denied. Absent an injunction, they are not likely to suffer irreparable harm. Plaintiffs' claimed injury is, at bottom, *monetary* — the loss of rents that they claim they are entitled to charge under the statutes but cannot charge under the amended regulations. And even if that monetary injury could constitute an irreparable harm, the threat of that monetary injury is hypothetical. Plaintiffs do not allege — let alone present evidence sufficient to carry their burden of proof on a preliminary injunction motion that would disrupt the status quo — that any of the amended regulations have been applied to any of the Plaintiffs in any proceeding that could yield a binding, final determination of their rights. Nor could they. The only way any of the amended regulations can be enforced against Plaintiffs and result in a final, binding determination of their right to charge any particular rent is in a rent overcharge proceeding. But if such a proceeding were brought against Plaintiffs, they could

raise their challenges to the amended regulations as defenses, which, if they had any merit, would avert Plaintiffs' injury.

Plaintiffs have thus failed to show that they will likely suffer irreparable harm absent an injunction, and their motion should be denied on that ground alone. But Plaintiffs' motion should also be denied because they have failed to show that they are likely to succeed on the merits of their claims. Indeed, the documentary evidence conclusively establishes that all of Plaintiffs' claims fail as a matter of law and should be dismissed.

First, Plaintiffs' claim that the mere creation of the Tenant Protection Unit violates the separation of powers fails as a matter of law. The Executive does not violate the separation of powers by creating an administrative unit within an agency to carry out the powers that the Legislature has lawfully granted to that agency, as the Court of Appeals has held.

Plaintiffs' claim that Tenant Protection Unit audits violate due process fares no better. Audits by the Unit merely *investigate* suspected violations of the rent stabilization laws and seek voluntary compliance from landlords. Because the audits do not result in binding determinations of landlords' rights, they do not implicate the Due Process Clause.

Likewise, Plaintiffs' claim that the amended regulations are invalid because they contradict the rent stabilization statutes fails as a matter of law. Courts have addressed the supposed conflicts alleged by Plaintiffs and have concluded that the

approach taken in the amended regulations is a permissible (and in some cases *required*) interpretation of those statutes.

Plaintiffs' Administrative Procedure Act claims also fail as a matter of law because landlords had actual notice of the single, de minimis failure to publish an alteration in one of the proposed amendments and in fact submitted comments on the proposed alteration, which the Division responded to.

Finally, Plaintiffs' claim that the amended regulations exceed the Division's lawfully delegated authority under the rent stabilization statutes is meritless. Each of the Division's amended regulations applies to an area that the Legislature has directed it to regulate, is grounded in the statutes' policy directives, and draws on the Division's extensive experience in administering the rent stabilization laws.

Plaintiffs' preliminary injunction motion should therefore be denied and their complaint should be dismissed.

FACTS AND STATUTORY BACKGROUND

A. The Rent Stabilization Laws

For nearly fifty years, the rent stabilization laws have "protect[ed] tenants from eviction as a result of rapidly spiraling rent increases" while simultaneously "allowing landlords reasonable rent increases." *Ansonia Residents Ass'n v. N.Y. State Div. of Hous. & Cmty. Renewal*, 75 N.Y.2d 206, 216 (1989). The heart of the rent stabilization laws is their formulation of a general method for establishing a

legal rent for covered apartments and their ban on charging more than that legal rent. *See* Unconsol. L. §§ 26-511 & 26-512.[1]

The rent stabilization laws establish the legal rent for a covered apartment by setting a base rent — generally the rent charged for that apartment four years earlier — and then authorizing certain prescribed increases. *See* Unconsol. L. §§ 26-512(b) & 26-516. Currently, for example, the laws allow a rent increase of 20% for a two-year lease when the apartment becomes vacant, and higher increases if the last vacancy occurred more than eight years ago. Unconsol. L. § 26-511(c)(5-a). The laws also allow owners who make improvements to the apartment (so-called "individual apartment improvements," or "IAIs") to increase the monthly rent by a specified fraction of the cost of those improvements if the current tenant consents to the increase in writing. Unconsol. L. § 26-511(c)(13). Similarly, the laws authorize rent increases when the landlord makes major capital improvements to the entire building that are depreciable under federal tax law. Unconsol. L. § 26-511(c)(6).

To create a contemporaneous rental history so that, in the event of a dispute, the legal rent can be accurately calculated, the laws require landlords to file an

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[1] The rent stabilization laws include the Rent Stabilization Law of 1969, which generally governs New York City, and the Emergency Tenant Protection Act of 1974, which extends the Rent Stabilization Law's protections to municipalities in Nassau, Rockland, and Westchester counties. The Emergency Tenant Protection Act and its implementing regulations are substantially identical to the Rent Stabilization Law and its regulations. To avoid burdening the Court with additional citations, we cite only the Rent Stabilization Law and its regulations in this brief, although the arguments apply with full force to the Emergency Tenant Protection Act as well.

annual registration statement with the Division listing, among other information, the legal rent and the actual rent. Unconsol. L. § 26-517(a).

The rent stabilization laws impose treble damages for willful overcharges to deter landlords from charging more than the legal rent. Unconsol. L. § 26-516.

To prevent landlords facing these legal rent limits from seeking to increase their profits instead by reducing expenses on basic services, the rent stabilization laws also require landlords to maintain the services they were providing when the laws took effect, as well as all other legally required services. Unconsol. L. § 26-514; *id.* § 26-511(c)(8). To give teeth to that requirement, the laws bar landlords from receiving rent increases, and even requires rent reductions, if they fail to maintain those services. Unconsol. L. § 26-514.

To help enforce landlords' compliance with these standards, the rent stabilization laws require every covered apartment's lease to include a rider informing tenants of the rights and duties of landlords and tenants under the laws. *See* Unconsol. L. § 26-511(d).

B. The Division's Statutory Responsibility To Enforce the Rent Stabilization Laws By Enacting Regulations, Investigating and Prosecuting Violations, and Adjudicating Disputes

From the outset, the Legislature envisioned a vital role for administrative enforcement of the rent stabilization laws. First, the Legislature understood that it lacked the institutional capacity and expertise necessary to craft the adaptable and precise legal contours needed for an effective rent stabilization regime. *Rent Stabilization Ass'n of N.Y.C. v. Higgins*, 83 N.Y.2d 156, 165 (1993). Accordingly, the

Legislature charged the Division of Housing and Community Renewal with enacting and amending regulations implementing the rent stabilization scheme. Unconsol. L. § 26-511(b). In addition to providing specific procedural and substantive requirements, the rent stabilization laws set the overarching policy objectives for the regulations, directing that they, among other things, "provide[] safeguards against unreasonably high rent increases," "protect[] tenants and the public interest," and "insure that the level of fair rent increase established under this law will not be subverted and made ineffective." Unconsol. L. § 26-511(c)(1)–(2) & (5). The Division has exercised this rulemaking authority often. *See Versailles Realty Co. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 76 N.Y.2d 325, 328–29 (1990).

Second, the Legislature understood that a rent stabilization regime could not be effective if its enforcement were entrusted solely to tenants, who are often unfamiliar with the intricacies of the complex laws and regulations in this area. Thus, the rent stabilization laws authorize not just tenants but also the Division to enforce the laws and regulations. The laws give the Division a broad array of investigatory powers, including the power to issue subpoenas. Unconsol. L. § 26-516(f). When the Division believes that a landlord has violated a law or regulation, it may bring rent overcharge proceedings. Unconsol. L. § 26-516(a).

Third, the Legislature understood that efficiently and accurately resolving disputes under the rent stabilization regime required an administrative adjudicatory process. To that end, the rent stabilization laws authorize the Division

to hear rent overcharge complaints and, after giving the landlord notice and an opportunity to be heard, issue binding administrative orders awarding damages. Unconsol. L. § 26-516(a)–(c). To ensure a fair adjudication, when the Division brings a rent overcharge complaint, independent Division personnel hear the complaint and issue the administrative orders. 9 NYCRR part 2527. An aggrieved party can challenge the Division's order by filing a petition for administrative review. Unconsol. L. § 26-516(h); 9 NYCRR part 2529. If the petition for administrative review is denied, the aggrieved party may challenge the Division's final order in Supreme Court by filing an Article 78 proceeding. Unconsol. L. § 26-516(d).

C. The Rent Act of 2011's Renewed Affirmance of the Division's Duty To Enact Regulations Enforcing the Rent Stabilization Laws

The Legislature passed the Rent Act of 2011, which amended the rent stabilization laws to make them more protective of tenants' rights. L. 2011, ch. 97, pt. B. Specifically, the Rent Act of 2011 limited owners to one vacancy rent increase per year, made it more difficult for owners to remove covered apartments from the rent stabilization regime, and lowered the permissible rent increase for individual apartment improvements.

The Act also reaffirmed the Division's statutory authority to enact regulations implementing both these new statutory changes and the unchanged provisions of the rent stabilization laws. L. 2011, ch. 97, pt. B, § 44.

The Governor signed the Act on June 24, 2011.

D. The Executive's Creation of the Tenant Protection Unit To Carry Out the Division's Statutory Authority To "Investigate and Prosecute" Violations of the Rent Stabilization Laws

Less than a year later, the Division created the Tenant Protection Unit. Under his longstanding statutory authority to delegate the Division's statutory powers to his designated deputies, the Division's Commissioner issued an order designating the Tenant Protection Unit to "investigate and prosecute" violations of the rent stabilization laws and regulations. Affirmation of Sheldon Melnitsky ("Melnitsky Aff.") Ex. A; *see also* Pub. Hous. L. §§ 11, 12; Pub. Off. L. § 9; 9 NYCRR § 2520.4.

The Tenant Protection Unit carries out its duty to "investigate and prosecute" rent overcharge violations in two primary ways — by seeking voluntary compliance and by bringing enforcement actions.

The Unit investigates suspected violations using the Division's statutory authority to "administer oaths, issue subpoenas, conduct investigations, [and] make inspections." Unconsol. L. § 26-516(f). The Unit proactively scrutinizes suspicious rent increase claims by issuing audit letters asking the landlord for documentation supporting the claimed increase. If the landlord fails to provide documentation sufficient to justify the claimed increase, the Unit first seeks the landlord's voluntary compliance by sending a letter explaining its belief that the claimed increase is improper and explaining how the landlord can correct the issue.

If the landlord refuses to voluntarily comply with the Unit's request, the Unit retains the prosecutorial discretion to bring a rent overcharge complaint either before the Division's Office of Rent Administration, which can issue binding

administrative orders subject to judicial review, or directly in Supreme Court. Fewer Aff. ¶¶20, 21. In a rent overcharge proceeding before the Office of Rent Administration, the Unit's audit determinations are not conclusive as to any issue. *Id.* ¶¶ 19, 22-24. Just because the Unit determines that a particular rent increase was unsupported does not mean that the Office of Rent Administration will agree with that determination or find that the landlord's overcharge was willful and subject to treble damages, as illustrated by two recent Office of Rent Administration orders. *Compare id.* Ex. A *with* Melnitsky Aff. Ex. B; *compare* Fewer Aff. Ex. B *with* Melnitsky Aff. Ex. C.

The Unit audited two landlords involved in this action — 141 Wadsworth, LLC (a named plaintiff) and Eastside Ventura, LLC (a member of one of the named plaintiff associations). Aff. of Michael Vinocur in Supp. of TRO & Prelim. Inj. ¶¶ 1, 5; Aff. of Joseph J. Sbiroli in Supp. of TRO & Prelim. Inj. ¶¶ 1, 5. 141 Wadsworth had claimed an individual apartment improvement increase of more than $1,300/month following a vacancy (meaning that no advance written tenant approval was needed), even though the prior tenant's rent had been less than $850/month — an increase of more than 156%. Vinocur Aff. Ex. 3, at 3–4. Eastside Ventura had claimed an individual apartment improvement increase of more than $1,100/month following a vacancy, even though the prior tenant's rent had been less than $1,500/month — an increase of more than 78%. Sbiroli Aff. Ex. 1, at 3.

The Unit sent initial audit letters to each landlord asking it to "submit all supporting documents that justify the cost of the" claimed individual apartment

increase, "includ[ing], but not . . . limited to: leases, bills, cancelled checks, receipts, contracts and invoices from contractors," as well as "the date the work was completed and the calculation of the new legal regulated rent." Vinocur Aff. Ex. 2, at 1. The letters told each landlord that if it did not have a contractor's itemized cost breakdown, it could instead submit a notarized affidavit explaining the work performed and including the installation dates, the contractors' and subcontractors' identities, and a cost breakdown. *Id.* The letters concluded by advising each landlord that a "failure to provide this documentation within thirty (30) days may result in further action by TPU to ensure that the rent(s) you charge is/are legal," which "could include, but is not limited to, TPU's commencement of an overcharge proceeding before the Office of Rent Administration." *Id.*

Both 141 Wadsworth and Eastside Ventura complied with the Unit's initial audit letters by submitting documentation in support of their claimed increases. Vinocur Aff. ¶ 7; Sbiroli Aff. ¶ 7. After reviewing that documentation, the Unit sent each landlord an audit determination letter explaining its views about the permissibility of the claimed increases. Vinocur Aff. Ex. 3; Sbiroli Aff. Ex. 1. In both cases, the Unit concluded that parts of the claimed increases were appropriate and part were not. Vinocur Aff. Ex. 3, at 1, 3–4; Sbiroli Aff. Ex. 1, at 1, 3. The audit determination letters told the landlords how to correct the issue, said that "[s]hould you decide not to rectify the legal rent within 30 days of this notice, TPU explicitly reserves the right to commence a legal action, which can result in a finding of

penalties and other relief," and concluded, "[w]e look forward to resolving this matter amicably." Vinocur Aff. Ex. 3, at 1–2; Sbiroli Aff. Ex. 1, at 1–2.

Eastside Ventura voluntarily complied with the audit determination letter's request to correct the issue. Fewer Aff. ¶ 29. 141 Wadsworth sent the Unit a response letter admitting that not all of its claimed costs were appropriate but disputing other parts the Unit's letter. Vinocur Aff. Ex. 4. The Unit then sent 141 Wadsworth an amended audit determination letter on January 16, 2014, changing its view about some but not all of 141 Wadsworth's claimed costs and again asking 141 Wadsworth to correct the issue. Fewer Aff. Ex. C. To date, 141 Wadsworth has not complied. Fewer Aff. ¶ 36.

The Unit's enforcement duties go beyond investigating and prosecuting rent overcharges. The Unit also investigates and prosecutes harassment complaints and other violations of the rent stabilization laws and regulations. For example, the Unit has undertaken proactive efforts to protect immigrant tenants from harassment by, for example, negotiating a voluntary settlement agreement with one landlord to end its unlawful practice of demanding tenants' social security numbers and proof of citizenship. Fewer Aff. ¶¶ 40-41. The Unit has also secured the registration of more than 29,000 rent-stabilized apartments that had not been properly registered. *Id.* ¶¶ 42-43. The Unit also enforces other rent regulatory laws governing rent-controlled apartments. *Id.* ¶ 39.

The Unit has not met with any disapproval by the Legislature. Since creating the Unit, the Governor asked the Legislature for additional funding for the Unit in

2012 and 2013. *See* Affirmation of David Feuerstein Ex. 17, at 55–56. Although the Legislature did not grant the requested additional funds — and as a result, the Division has operated the Unit using funds from its general budget appropriation — the Legislature has not passed any law disbanding the Unit, stripping it of its delegated powers, or limiting the Division's enforcement powers. *See* Melnitsky Aff. Ex. D

E. The Division's Latest Amendments of Its Regulations To Protect Tenants From Landlords Seeking To Escape Regulation

To address scenarios that its decades of experience administering the rent stabilization laws had revealed were rife with risks of fraud and abuse, the Division began the process of amending a number of its regulations in 2013. Accordingly, the Division filed its proposed amendments with the Secretary of State along with the appropriate regulatory impact statements, issued other analysis, held a public hearing, and submitted a notice of adoption along with a summary of the assessment of public comments for publication in the state register. *See* Melnitsky Aff. Exs. E, F.

The amended regulations included, among many others:

Codification of the Tenant Protection Unit: Satisfied with the results that the Tenant Protection Unit had achieved since its creation in 2012, the Division added a regulation codifying the Unit and designating it to "investigate and prosecute" violations of the rent stabilization laws and regulations. 9 NYCRR § 2520.5(o).

Rent reductions for failing to provide services: The Division made two changes to the regulation providing for rent reductions when a landlord fails to maintain required services. 9 NYCRR § 2523.4.

First, the old regulation required a tenant to give prior written notice of the service outage to her landlord, attach proof of that written notice to her rent reduction application, and file the application at least ten but no more than 60 days after giving that notice — all on pain of dismissal of her rent reduction application. The Division's experience showed that automatic dismissal for failing to follow those elaborate requirements too often screened out meritorious applications, especially from the most vulnerable tenants — the elderly, the infirm, those whose first language was not English, and those not represented by a lawyer. Melnitsky Aff. Ex. E. Accordingly, the new regulation encourages but no longer requires tenants to notify their landlords of the service outage in writing as a prerequisite to a rent reduction application. 9 NYCRR § 2523.4(c).

Second, the old regulation barred landlords from "any further increases in rent" until they restored the required service. To clarify that "any" means "any," the Division amended the regulation to say explicitly that the prohibition on rent increases while a service outage continues includes increases for vacancies and major capital improvements. 9 NYCRR § 2523.4(a)(1).

Rent increases for major capital improvements: The Division made two changes to the regulation barring any rent increases for building-wide major capital

improvements when there are immediately hazardous violations of law or service outages in the building. 9 NYCRR § 2522.4(a)(13).

First, the old regulation did not specify whether the ban on rent increases could be triggered only by immediately hazardous violations brought to the Division's attention by tenants or whether it could also be triggered by immediately hazardous violations that the Division learned of through other sources of information. In light of the fact that the City of New York now maintains a publicly accessible online database of current immediately hazardous violations throughout the city, the Division amended the regulation to make clear that it could consider information both from tenants and from other sources. 9 NYCRR § 2522.4(a)(13); *see* Housing Code Violation Data, HPDONLINE, N.Y.C. Dep't of Housing Preservation & Development, http://www.nyc.gov/html/hpd/html/pr/violation.shtml (last visited Mar. 24, 2014).

Second, the old regulation gave the Division only two options when responding to a landlord's application for major capital improvement rent increase while the building had immediately hazardous violations: dismiss the application outright or grant the application on condition that the landlord fix the violation within a reasonable time. In many situations both of those options proved too extreme. Dismissing the application outright sometimes caused landlords to lose their increases entirely because, by the time they fixed the violation and reapplied for the increase, the two-year statute of limitations on major capital improvement increases had run. 9 NYCRR § 2522.4(a)(8); *see also* Melnitsky Aff. Ex. E. On the

other hand, granting the application on condition that the landlord fix the violation within a reasonable time sometimes meant that landlords, already having pocketed the increase, did not fix the immediately hazardous violations for months. *See* Melnitsky Aff. Ex. E. The amended regulation adds a third option, allowing the Division to dismiss the application with leave to refile within 60 days, during which time the landlord's two-year statute of limitations to file the major capital improvement rent increase application is tolled. 9 NYCRR § 2522.4(a)(13).

Lease riders: The Division amended the regulation requiring leases for covered apartments to include a rider explaining the rights and duties of landlords and tenants under the rent stabilization laws to now include more information about the tenant's rights. 9 NYCRR § 2522.5(c)(1). The old regulation did not require the rider to break down how the new rent was calculated. The Division's experience showed that without such a breakdown, especially when the landlord claimed an individual apartment improvement rent increase following a vacancy, many tenants unschooled in the complex rent stabilization legal regime could not catch potential overcharges and other violations of their rights in the rent calculation. Melnitsky Aff. Ex. E. Accordingly, the Division amended the regulation to require lease riders to include a detailed description of how the rent was adjusted from the prior legal rent.

Rental history review regulations: The Division added seven subsections to the regulation limiting the records reviewable when calculating the legal rent, each covering a situation when records more than four years old are reviewable.

The old regulation barred any review of rent records more than four years old to calculate the legal rent, but common sense, years of experience, and a growing body of case law permitting (and in some circumstances *requiring*) the Division to review rent records more than four years old showed that rigid application of that four-year provision was not consistent with the rent stabilization laws. Accordingly, the amended regulation allows the Division to review rent records more than four years old:

- ***To determine whether an apartment is subject to the rent stabilization laws at all***. 9 NYCRR § 2526.1(a)(2)(iii). Common sense and case law dictate that when a landlord's defense against an overcharge claim is that the apartment became deregulated more than four years earlier, the Division must be able review the records underlying that defense, even if they are more than four years old. *See, e.g.*, *E.W. Renovating Co. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 16 A.D.3d 166, 167 (1st Dep't 2005).

- ***To determine whether the landlord engaged in a fraudulent scheme to deregulate the apartment***. 9 NYCRR § 2526.1(a)(2)(iv). A landlord who manipulated the rent four years earlier to unlawfully deregulate the apartment should not be able to hide behind the ban on reviewing records more than four years old. The case law accords, holding that the Division not only may but *must* look at records more than four years old to determine whether such a scheme exists. *See, e.g.*, *Thornton v. Baron*, 5 N.Y.3d 175, 179–81 (2005); *Matter of Grimm v. N.Y. State Div. of Hous. & Cmty. Renewal*, 15 N.Y.3d 358, 365–66 (2010); *H.O. Realty Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 46 A.D.3d 103, 108 (1st Dep't 2007).

- ***In a rent overcharge proceeding, when a rent reduction order issued more than four years ago remained in effect into the last four years***. 9 NYCRR § 2526.1(a)(2)(v). As the case law explains, "where an order issued prior to the [four-year] period imposed a continuing obligation on a landlord to reduce rent . . . the [ban on reviewing records more than four years old] would be no defense to an action based on a breach of that duty occurring within the [four-year] period." *Thornton*, 5 N.Y.3d at

180; *accord Matter of Cintron v. Calogero*, 15 N.Y.3d 347, 351 (2010).

- ***To determine whether an overcharge was willful***. 9 NYCRR § 2526.1(a)(2)(vi). The new regulation allows landlords to rely on rent records more than four years old to carry the burden of showing that a proven overcharge was *not* willful in order to avoid treble damages. *See H.O. Realty Corp.*, 46 A.D.3d at 105–06, 107–08. The new regulation does not, of course, require any landlord to produce such records.

- ***To determine whether the landlord qualifies for a longevity increase***. 9 NYCRR § 2526.1(a)(2)(vii). The rent stabilization laws entitle a landlord to a standard vacancy increase and to a larger vacancy increase if the landlord has not received a vacancy increase in the past eight years. Unconsol. L. § 26-511(c)(5-a). Determining whether a landlord is entitled to the larger "longevity" increase obviously requires reviewing rent records more than four years old. *Matter of Ador Realty, LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 25 A.D.3d 128, 134 (2d Dep't 2005).

- ***To determine the existence and conditions of a preferential rent***. 9 NYCRR § 2526.1(a)(2)(viii). A growing number of landlords claim to charge a "preferential rent" — that is, a rent below the legally permissible rent. While preferential rents can be legitimate discounts offered to desirable tenants or in neighborhoods with lower housing demand, the scope and geographic distribution of these discounts underscore the need for more rigorous oversight. The Division's recent experience has shown that landlords can and increasingly do use preferential rents to subvert rent limits at tenants' expense. *See* Melnitsky Aff. Ex. E. For example, a landlord can lure a tenant with a lease listing a low "preferential" rent and an unlawfully high "legal" rent, which the tenant never pays during the term of the lease and thus has little incentive to challenge at the time. Then, at the end of a lease term, the landlord can offer the tenant a renewal lease at the unlawfully high "legal" rent listed in the prior lease. The tenant, who has by then settled into the apartment, may be coerced into renewing at the unlawfully high "legal" rent if she cannot challenge the legitimacy of that rent, which may require reviewing rent records more than four years old. The Division's experience has shown that this example is not fanciful; in some 55% of instances where landlords claim to be charging a preferential rent, the Unit has assessed that the

claimed legal rent was unsupported. Reviewing rent records more than four years old when landlords claim to be charging a preferential rent is thus necessary so as not to reward unscrupulous tactics at tenants' expense. *Id.*

- ***When the apartment was vacant or temporarily exempt four years earlier***. 9 NYCRR § 2526.1(a)(2)(ix). Under the old regulation's blanket ban on reviewing rent records more than four years old, if the apartment was vacant four years ago, the legal rent was the next rent charged after that vacancy plus any subsequent lawful increases and adjustments. But the Division's experience has shown that post-vacancy leases are often unreliable. For example, landlords can more easily claim inflated or fraudulent individual apartment improvement rent increases during a vacancy, which do not require written tenant consent. Common sense dictates that those kinds of tactics should not escape review merely because an overcharge complaint happens to be filed exactly four years after a vacancy. Accordingly, the new regulation allows the Division to look to the rent charged immediately before the vacancy.

Default formula: The Division codified its longstanding default formula for calculating the legal rent when the normal calculation method cannot apply because no reliable rent records are available. 9 NYCRR § 2522.6(b). As explained above, the Division's experience revealed myriad fraudulent schemes to manipulate the registered rent, which, after four years, would become unchallengeable. *See supra* at 2, 18. Therefore, the Division (and its predecessor, the New York City Conciliation and Appeals Board) applied a default formula when the landlord failed to provide a complete rental history for the relevant period. *See, e.g.*, *61 Jane St. Assocs. v. N.Y.C. Conciliation & Appeals Bd.*, 108 A.D.2d 636 (1st Dep't 1985), *aff'd*, 65 N.Y.2d 898 (1985). The courts repeatedly held that to avoid rewarding landlords for those fraudulent schemes, the default formula applies to those schemes and more generally when the landlord fails to provide reliable records sufficient to establish

the legal rent four years earlier. *Id.*; *Thornton v. Baron*, 5 N.Y.3d 175, 180–81 (2005); *Levinson v. 390 W. End Assocs., LLC*, 22 A.D.3d 397, 400–01 (1st Dep't 2005); *Matter of Grimm v. N.Y. State Div. of Hous. & Cmty. Renewal*, 15 N.Y.3d 358, 365–66 (2010).

The Division amended its regulations to codify the default formula approved by that case law. Under the amended regulation, the default formula applies when the rent charged four years earlier cannot be determined, when the landlord fails to provide a full rental history for the past four years, and when the registered rent four years earlier is the product of a fraudulent scheme to deregulate the apartment. 9 NYCRR § 2522.6(b).

Annual rent registration: The Division made two changes to the regulations requiring landlords to file annual rent registration statements with the Division. 9 NYCRR §§ 2528.3 & 2528.4.

First, the old regulation was silent as to whether landlords could amend their rent registration statements for prior years without Division approval. The Division's experience over more than a decade revealed numerous instances where landlords filed initial registration statements (which both the Division and the tenant can review) but later filed unreviewed amended registration statements — a tactic that the Division and the courts understood can be used to cover up intentional overcharges by rewriting the rental history. *See, e.g.*, *Matter of Grimm v. N.Y. State Div. of Housing & Cmty. Renewal*, 15 N.Y.3d 358, 363, 366 (2010) (after receiving overcharge complaint, landlord immediately filed registration statements

retroactively for previous five years, suggesting a "fraudulent scheme" to "'circumvent[] the Rent Stabilization Law'") (citation omitted); *Classic Equities, LLC v. Garrity*, No. 01-310, 2001 N.Y. Misc. LEXIS 1321 (App. Term 1st Dep't Dec. 12, 2001) (per curiam) (after receiving overcharge complaint, landlord filed series of amended registration statements yet could not show that rents reported in initial registration statements were preferential rents justifying amendments). To detect and prevent those schemes, the Division changed the regulation to require owners to file an application with the Division in order to amend an apartment registration statement for a prior year. 9 NYCRR § 2528.3(c).

Second, the old regulation barred a landlord who failed to properly register an apartment from "any" rent increases until it registered the apartment. To clarify that "any" means "any," the Division amended the regulation to say explicitly that the prohibition on rent increases includes increases for vacancies and major capital improvements. 9 NYCRR § 2528.4(a).

The regulations took effect on January 8, 2014. Compl. ¶ 1, 6, 80, 111, 143, 148, 154, 158, 166, 171, 177, 185, 195.

F. This Action

Plaintiffs — nine landlords who say they are subject to the amended regulations and three landlord associations — filed this action on February 24, 2014. *See* Compl.

The complaint contains fifteen causes of action, claiming:

1. The Tenant Protection Unit violates their due process rights under the Constitution (¶¶ 200–14)

2. The creation of the Tenant Protection Unit violates the separation of powers (¶¶ 215–30)
3. The amended rental history review regulations violate the four-year statute of limitations in the rent stabilization laws and CPLR (¶¶ 231–42)
4. The amended rental history review regulations violate the rent stabilization laws that do not require landlords to retain rental history documents for more than four years (¶¶ 243–54)
5. The amended rental history review regulations violate the rent stabilization laws that limit review of rent records more than four years old in adjudicating rent overcharge complaints (¶¶ 255–66)
6. The amended default rule regulation violates the rent stabilization laws (¶¶ 267–78)
7. The amended regulation governing rent reductions for failing to provide services violates the rent stabilization laws (¶¶ 279–90)
8. The amended regulation governing rent increases for major capital improvements violates the rent stabilization laws (¶¶ 291–302)
9. The amended regulation governing first rents violates the rent stabilization laws (¶¶ 303–13)
10. The amended regulation requiring landlords to apply to the Division to amend rent registration statements for prior years violates the rent stabilization laws (¶¶ 314–26)
11. The amended regulation barring rent increases to landlords who fail to properly file the annual registration statement violates the rent stabilization laws (¶¶ 327–37)
12. The amended regulation governing lease riders violates the rent stabilization laws (¶¶ 338–49)
13. The amended regulation making it unlawful to file false documents with the Division violates the rent stabilization laws (¶¶ 350–61)
14. The amended regulations violate the Administrative Procedure Act (¶¶ 362–76)
15. Permanent injunction (¶¶ 377–85)

The complaint seeks a declaratory judgment that the challenged regulations are invalid and a permanent injunction enjoining the Division from enforcing the challenged regulations against them. Compl., prayer for relief.

By order to show cause, Plaintiffs moved on March 4, 2014, for a temporary restraining order enjoining the Division from enforcing the challenged regulations against them pending a hearing on their motion for a preliminary injunction. Plaintiffs simultaneously moved for leave to conduct expedited discovery. After reviewing Plaintiffs' brief and affidavits (the same papers that Plaintiffs have submitted here in support of their preliminary injunction motion), Justice Steinhardt denied their motion for a temporary restraining order, stating that she could not see how Plaintiffs would be harmed absent a temporary restraining order. Melnitsky Aff. Ex. G. Justice Steinhardt also denied Plaintiffs' motion for leave to conduct expedited discovery. Melnitsky Aff. Ex. G.

LEGAL STANDARD

A motion for a preliminary injunction must be denied when the moving party fails to establish: "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in [its] favor." *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988).

Even in the ordinary case, where the requested injunction is intended to preserve the status quo pending a trial, a preliminary injunction is a "'drastic'" remedy requiring the moving party to establish each of the three elements by "'clear and convincing evidence.'" *Alayoff v. Alayoff*, 112 A.D.3d 564, 565 (2d Dep't 2013)

(citations omitted). But the standard is considerably higher where, as here, the injunction would *disrupt* the status quo and effectively give the moving party the ultimate relief requested. In these situations, the motion must be denied unless the moving party can show that the requested injunction is "required by imperative, urgent, or grave necessity," and even then, only "upon clearest evidence." *Xerox Corp. v. Neises*, 31 A.D.2d 195, 197 (1st Dep't 1968); *accord Sithe Energies, Inc. v. 335 Madison Ave., LLC*, 45 A.D.3d 469, 470 (1st Dep't 2007). Indeed, the Court of Appeals has questioned whether such injunctions are "*ever* permissible in advance of final judgment." *Yome v. Gorman*, 242 N.Y. 395, 401–02 (1926) (emphasis added); *see also, e.g.*, *Bd. of Mgrs. of Britton Condo. v C.H.P.Y. Realty Assocs.*, 101 A.D.3d 917, 919 (2d Dep't 2012) (reversing grant of preliminary injunction because it "effectively altered the status quo and granted the plaintiff the exact relief which it sought in the complaint").

Here, Plaintiffs concede (Compl. ¶¶ 1 & 6) that their requested injunction would disrupt the status quo, halting the operations of a governmental unit that has been operational for years and the enforcement of regulations that have been in effect for months. They request that injunction solely on account of an alleged injury that is monetary (i.e., lost rent) and thus not irreparable as a matter of law. Moreover, their claimed injury is hypothetical, as explained below. *See infra* at 29–31. Plaintiffs have thus failed to show that, absent an injunction, they are likely to suffer irreparable harm, and their motion should be denied for that reason alone. But Plaintiffs have also failed to show by clear and convincing evidence a likelihood

of success on the merits of their claims — a second reason why their motion should be denied. Indeed, the documentary evidence establishes that Plaintiffs' claims fail as a matter of law, and thus should be dismissed entirely under CPLR 3211(a)(1).

CPLR 3211(a)(1) compels the dismissal of a complaint when the documentary evidence "'refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" *Sunset Café, Inc. v Mett's Surf & Sports Corp*., 103 A.D.3d 707, 709 (2d Dep't 2013) (citation omitted). Documentary evidence is evidence that is "'unambiguous, authentic and undeniable,'" *id.* (citation omitted), and includes government records and documents published on official government websites like the documents submitted as exhibits to the accompanying Affirmation of Sheldon Melnitsky. *See Brach v. Levine*, No. 3323/2012, 32 Misc. 3d 1213(A), 2012 N.Y. Misc. LEXIS 3327, at *8 (Sup. Ct. Kings Cnty. July 16, 2012) (documents posted on state agency's website); *Schottland v. Brown Harris Stevens Brooklyn, LLC*, 107 A.D.3d 684, 686 (2d Dep't 2013) (publicly filed documents); *see also Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co*., 61 A.D.3d 13, 19 (2d Dep't 2009) (courts may take judicial notice of public records, including regulations, and "official promulgations of government appear to be particularly appropriate for judicial notice").

Courts routinely address the types of claims alleged by Plaintiffs here on motions to dismiss. *E.g.*, *McKinney v. Comm'r of N.Y. State Dep't of Health*, 41 A.D.3d 252, 253 (1st Dep't 2007) (affirming dismissal of separation of powers claim under *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987)); *Equine Practitioners Ass'n v. N.Y.*

State Racing & Wagering Bd., 105 A.D.2d 215, 222 (1st Dep't 1984) (reversing denial of motion to dismiss claim that regulations were not within agency's statutory authority); *Matter of Hudson River Valley, LLC v Empire Zone Designation Bd.*, No. 1287/2011, 2012 N.Y. Misc. LEXIS 5103, at *29–30 (Sup. Ct. N.Y. Cnty. July 9, 2012) (granting motion to dismiss Administrative Procedure Act claim).

Finally, when a plaintiff challenges a regulation on its face, as opposed to as applied, the plaintiff's challenge will fail unless she can "'establish that *no set of circumstances* exists under which'" the regulation would be valid. *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003) ("A party mounting a facial constitutional challenge bears the substantial burden of demonstrating 'that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment.'") (citations omitted); *see also Matter of Acevedo v. N.Y. State Dep't of Motor Vehicles*, No. 2393/2013, 2014 N.Y. Misc. LEXIS 680, at *37 (Sup. Ct. Albany Cnty. Feb. 18, 2014) (applying this standard to facial challenge to regulation under *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987)). Here, with the exception of Plaintiffs' Administrative Procedure Act claims,[2] all of Plaintiffs' claims challenge the amended regulations on their face, and thus those claims must be dismissed if there

[2] Plaintiffs' claim that Tenant Protection Unit audits violate their due process rights appears to be both a facial challenge and an as-applied challenge to the Unit's audit of Plaintiff 141 Wadsworth. Compl. ¶¶ 16, 90, 93, 98–99. As explained below, the Unit's audit of 141 Wadsworth did not result in any final, binding determination of 141 Wadsworth's rights, so Plaintiffs' as-applied challenge fails as a matter of law.

is *any* set of circumstances under which the amended regulations could be validly applied.

ARGUMENT

POINT I

PLAINTIFFS HAVE FAILED TO SHOW THEY WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION BECAUSE THEIR ALLEGED INJURY IS, AT BOTTOM, MONETARY, AND EVEN THEN, HYPOTHETICAL

Plaintiffs' only claimed irreparable harms supposedly warranting a preliminary injunction are: (1) that Tenant Protection Unit audits and the Division's amended regulations violate their constitutional rights to due process and separation of powers, (2) that the Division's amended regulations have placed a "cloud" over their properties; and (3) that uncertainty under the amended regulations makes it difficult to effectively manage their properties. PI Br. at 51–53. None are sufficient to justify their requested injunction.

First, the mere *allegation* of a constitutional violation is insufficient to constitute irreparable harm. *Donohue v. Paterson*, 715 F. Supp. 2d 306, 315 (N.D.N.Y. 2010); *Air Transp. Int'l LLC v. Aerolease Fin. Grp.*, 993 F. Supp. 118, 124 (D. Conn. 1998) (collecting cases). Rather, courts look behind the allegation of a constitutional violation and examine "the nature of the constitutional injury" to determine whether monetary damages could make the moving party whole.[3] *Air*

[3] The cases cited by Plaintiffs are not to the contrary. In *Bray v. City of New York*, 346 F. Supp. 2d 480 (S.D.N.Y. 2004), participants in a monthly bicyclist rights parade sought to enjoin police officers from violating their due process rights by seizing their bicycles when the participants were not charged with

Transp. Int'l LLC, 993 F. Supp. at 124; *see also Savage v. Gorski*, 850 F.2d 64, 67–68 (2d Cir. 1988) (vacating preliminary injunction despite alleged First Amendment violation because "money damages could make [plaintiffs] whole for any loss suffered during this period" and thus "their injury is plainly reparable").

Here, Plaintiffs are transparent about the real nature of their alleged constitutional injury: a violation of their supposed right "to charge the maximum rent legally permitted under the Rent Stabilization Statutes." PI Br. at 40. Lost rents are a monetary injury insufficient to justify a preliminary injunction. *Matter of Rice*, 105 A.D.3d 962, 963 (2d Dep't 2013).

Moreover, even if lost rents could constitute irreparable harm, Plaintiffs have not shown that, absent an injunction, those lost rents might occur. Tenant Protection Unit audits are mere *investigations*, as explained below (*infra* at 35–38); the only way they can lead to a final, binding determination of Plaintiffs' right to charge any particular rent is through a rent overcharge proceeding before the Office

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any crime. Unlike here, the property they were threatened with being deprived of (their bicycles) was merely a *vehicle* for their expressive conduct — an injury that money damages could not remedy — and, not surprisingly, the court found irreparable harm. *Id.* at 483, 486–87, 489. Here, of course, Plaintiffs do not allege that the Division's amended regulations interfere with their ability to use their properties to express a constitutionally protected message; rather, Plaintiffs admit that their beef with the Division's amended regulations is that they interfere with their bottom line.

And *Donohue v. Mangano*, 886 F. Supp. 2d 126 (E.D.N.Y. 2012), is distinguishable because the constitutional violation in that case caused "an intangible harm that goes well *beyond* the potential economic loss — i.e., wage freezes, furloughs." 886 F. Supp. 2d at 152 (emphasis added). Here, by contrast, Plaintiffs do not identify any harm caused by the alleged constitutional violations other than monetary harm — i.e., lost rents.

of Rent Administration or a court of competent jurisdiction — in which Plaintiffs can raise their constitutional challenges to the Unit's existence and processes. Likewise, the amended regulations cannot be enforced against Plaintiffs resulting in a final, binding determination of their right to charge any particular rent except in a rent overcharge proceeding (and subsequent Article 78 proceeding) — in which Plaintiffs can raise their constitutional challenges to the amended regulations. If their arguments had merit (they do not), Plaintiffs would win those overcharge proceedings or subsequent article 78 proceedings, and they would suffer no harm. In other words, even without an injunction, there is no possibility that Plaintiffs will be deprived of their supposed right to charge the maximum legal rent without having had a full opportunity to assert their challenges. Their supposed harm is hypothetical.

Even more baseless is Plaintiffs' argument that the amended regulations place a "cloud" on their properties that "diminish the alienability of [those] properties." PI Br. at 52. The fact that Plaintiffs' brief cites *no* evidence in support of that argument is telling. Not one of the seven affidavits or 42 attached exhibits they submitted so much as *suggests* that any Plaintiff has attempted to sell a building but was unable to — let alone that it was the Division's amended regulations that *caused* any failed sale. An ipse dixit in a brief is hardly the "clearest evidence" necessary to justify an injunction upsetting the status quo. *Xerox Corp. v. Neises*, 31 A.D.2d 195, 197 (1st Dep't 1968).

Plaintiffs' argument that alleged uncertainty created by the Tenant Protection Unit and the amended regulations makes it difficult for them to effectively manage their properties fares no better. PI Br. at 52. None of the affidavits they submitted list any extra steps they have been forced to take to cope with that alleged uncertainty.[4]

In all events, Plaintiffs' delay in bringing this action further belies any claim of irreparable harm. They admit (Compl. ¶ 6) that the Tenant Protection Unit was created in February 2012. They admit (PI Br. at 28) that the Division published its proposed amended regulations in April 2013. And they admit (Compl. ¶ 1) that the Division's amended regulations took effect on January 8, 2014. Yet they waited until March 2014 to seek a preliminary injunction — more than *two years* after the Tenant Protection Unit began operations and months after the amended regulations took effect. That delay undermines their claim of urgency. *See, e.g.*, *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) ("Preliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect

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[4] More fundamentally, contrary to Plaintiffs' suggestion, the cases they cite (PI Br. at 52) do not stand for the proposition that the uncertainty to a business created by a new regulatory regime constitutes irreparable harm. The new rules in both cases cited by Plaintiffs threatened irreparable harm not because they created uncertainty about the plaintiffs' business operations but rather because the plaintiffs "will be unable to recover their losses if the [rules] are ultimately determined to be invalid." *Tafas v. Dudas*, 511 F. Supp. 2d 652, 669 (E.D. Va. 2007); *accord Synagro-WWT, Inc. v. Louisa Cnty.*, No. 01-cv-60, 2001 U.S. Dist. LEXIS 10987, at *10-11 (W.D. Va. July 18, 2001). Here, by contrast, before any of the amended regulations can be enforced against Plaintiffs in a final, binding determination of their rights (for example, in a rent overcharge proceeding), Plaintiffs will have an opportunity to raise all of the arguments they do here as to why those regulations are invalid.

the plaintiffs' rights. Delay [of ten weeks] in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action."); *Emmet & Co. v. Catholic Health E.*, No. 11-cv-3272, 2011 U.S. Dist. LEXIS 54935, at *6–7 (S.D.N.Y. May 18, 2011) (no irreparable harm where plaintiffs waited 45 days before seeking injunctive relief); *Mathematica Policy Research, Inc. v. Addison-Wesley Pub. Co.*, No. 89-cv-3431, 1989 U.S. Dist. LEXIS 6272, at *3-4, *6 (S.D.N.Y. June 5, 1989) (no irreparable harm where plaintiffs waited over three months before seeking injunctive relief).

POINT II

BECAUSE PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW, THEIR COMPLAINT SHOULD BE DISMISSED, AND *A FORTIORI* THEY CANNOT SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS AS NEEDED FOR A PRELIMINARY INJUNCTION

Plaintiffs have failed to show that they will likely suffer irreparable harm absent a preliminary injunction, and their motion should be denied on that ground alone. But a second reason why Plaintiffs' motion should be denied is that they have failed to show that they are likely to succeed on the merits of their claims. Indeed, the documentary evidence conclusively establishes that all of Plaintiffs' claims fail as a matter of law and should be dismissed under CPLR 3211(a)(1).

A. The Creation of the Tenant Protection Unit Did Not Violate the Separation of Powers

Plaintiffs' claim that the mere *creation* of the Tenant Protection Unit somehow violates the separation of powers is meritless. 9 NYCRR § 2520.5(o); Compl. ¶¶ 215–30; PI Br. at 32–38.

The Executive's creation of an administrative unit within an agency to carry out the powers that the Legislature has lawfully granted to the agency has never been held to violate the separation of powers. *E.g.*, *Bourquin v. Cuomo*, 85 N.Y.2d 781, 783–88 (1995) (Executive's creation of Citizens' Utility Board to represent interests of residential utility customers in proceedings before Public Service Commission did not violate separation of powers); *Clark v. Cuomo*, 85 N.Y.2d 185, 186, 189–91 (1985) (Executive's creation of Voter Registration Task Force to implement statutory directive of encouraging voter participation did not violate separation of powers). That is so even when the Legislature contemplated that a different entity would carry out those statutory powers. *Bourquin*, 85 N.Y.2d at 786 (rejecting argument that "the Legislature's decision to repose certain powers in [one entity] prevent[s] the [Executive] from establishing another governmental body intended to promote those same policies"); *Clark*, 66 N.Y.2d at 190 (fact that statute charged county boards of elections with distributing voter registration application forms did not mean Executive's creation of Voter Registration Task Force to carry out same duty violated separation of powers). To hold otherwise would hamstring the "'great flexibility' to be accorded the [Executive] in determining the methods of

enforcing legislative policy." *Bourquin*, 85 N.Y.2d at 785 (quoting *Clark*, 66 N.Y.2d at 189).

Plaintiffs' argument to the contrary (PI Br. at 10–12, 37) rests on the untenable premise that a legislative intent to *forbid* the creation of the Unit can be inferred solely from the fact that the Legislature contemplated budget requests seeking additional funding for the Unit but ultimately passed different budgets without such funding. *See also* Compl. ¶¶ 62–67, 223–27; Melnitsky Aff. Ex. D. The Court of Appeals rejected that premise in *Bourquin* (a case cited by Plaintiffs) and on numerous other occasions, explaining that the mere fact "'that proposed legislation similar to [the] 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.'" 85 N.Y.2d at 787–88 (citation omitted); *accord Clark*, 66 N.Y.2d at 190–91.

To the contrary, far from forbidding the Executive to create the Unit, the Legislature has affirmatively authorized the Commissioner of the Division to appoint officers and deputies and to delegate his statutory powers to them. *See* Pub. Hous. L. §§ 11, 12; Pub. Off. L. § 9. The Executive chose to create the Tenant Protection Unit to implement the statutory mandates of "protect[ing] tenants and the public interest," "provid[ing] safeguards against unreasonably high rent increases," and "requir[ing] owners not to exceed the level of lawful rents."

Unconsol. L. § 26-511(c)(1) & (2). Plaintiffs' attempt to second-guess the wisdom of that choice should be rejected.

B. Tenant Protection Unit Audits Do Not Result In Any Final, Binding Determination of Landlords' Rights and Thus Do Not Implicate the Due Process Clause

Plaintiffs' claim that Tenant Protection Unit audits violate their due process rights fails as a matter of law. Compl. ¶¶ 87–106, 200–14; PI Br. at 12–13, 39–45. That claim overlooks the elementary principle that state actions causing no "depriv[ation]" of life, liberty, or property do not implicate the Due Process Clause. N.Y. Const. art. I, § 6; *United States ex rel. Kirby v. Sturges*, 510 F.2d 397, 406 (7th Cir. 1975) (Stevens, J.) ("The due process clause applies only to proceedings which result in a deprivation of life, liberty or property."); *Moody v. Daggett*, 429 U.S. 78, 86–87 (1976) (due process does not require parole revocation hearing upon issuance of parole violator warrant if parolee has not been taken into custody as parole violator). Tenant Protection Unit audits merely "*investigate*" an owner's claimed right to a rent increase; they do not result in a binding determination carrying any legal consequences.[5] Melnitsky Aff. Ex. A; *see Concrete Pipe & Prods. v. Constr.*

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[5] Plaintiffs' claim that the Unit does not provide the due process protections of Article 3 of the Administrative Procedure Act fails for the same reason. *See* Compl. ¶ 372. The Administrative Procedure Act impose no more stringent due process standards than the State Constitution. *See* A.P.A. § 100 ("This act guarantees that the actions of administrative agencies conform with sound standards developed in this state and nation since their founding through constitutional, statutory and case law."). Indeed, Article 3 explicitly says that its due process protections apply only to "adjudicatory proceedings." *See, e,g.*, A.P.A. § 301(1) ("In an *adjudicatory proceeding*, all parties shall be afforded an opportunity for hearing within reasonable time.") (emphasis added); *id.* § 302(1) (setting forth requirements for record in "adjudicatory

Laborers Pension Trust for S. Cal., 508 U.S. 602, 618 (1993) ("[T]he 'rigid requirements [of due process] . . . designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity.'") (citation omitted) (omission in original).

To be sure, after an audit, the Unit may seek an enforceable order as to the legality of an owner's claimed rent increase by bringing a rent overcharge proceeding before the Office of Rent Administration. 9 NYCRR § 2527.2. But in such a proceeding, the Unit's audit findings are not conclusive as to any issue,[6] Fewer Aff. ¶¶ 17, 22-24, and the owner receives notice, 9 NYCRR § 2527.3(b), an opportunity to answer and present evidence, 9 NYCRR § 2527.4, the right to an administrative appeal, 9 NYCRR § 2529.1(a), the right to judicial review, CPLR §§ 7801 & 7803(4), and the right to appeal, CPLR §§ 5511 & 5602 — in short, all the procedural safeguards that due process requires.

Plaintiffs' argument, if accepted, would entitle individuals under investigation for violation of any law to a full-blown evidentiary hearing and appeal *before charges are ever brought*. For example, a debt collection agency using harassing collection methods would be entitled to an evidentiary hearing before the Attorney General could send it a cease-and-desist letter. Likewise, a Ponzi scheme

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proceeding"); *see generally* A.P.A. art. 3 (entitled "Adjudicatory Proceedings").

6 Moreover, just because the Unit determines that a particular rent increase was unsupported does not mean that the Office of Rent Administration will make the same determination or find that the landlord's overcharge was willful and subject to treble damages, as illustrated by two recent Office of Rent Administration orders. *Compare* Fewer Aff. Ex. A, *with* Melnitsky Aff. Ex. B; *compare* Fewer Aff. Ex. B *with* Melnitsky Aff. Ex. C.

operator who receives a Wells notice informing him that the U.S. Securities and Exchange Commission believes he has violated federal securities law would be entitled to appeal that notice — even if the Commission subsequently decides not to file a complaint. An interpretation of the Due Process Clause with such far-reaching and alarming implications cannot be correct.

The Tenant Protection Unit's audits of Plaintiff 141 Wadsworth, LLC and nonparty Eastside Ventura, LLC confirm that its audits do not result in binding determinations carrying any legal consequences. The Unit's initial letters asking the owners for documentation of the cost of the improvements meriting the claimed rent increase say that failure to provide the requested documentation "may result in further action by TPU to ensure that the rent(s) you charge is/are legal," which "could include" the "commencement of an overcharge proceeding before the Office of Rent Administration." Vinocur Aff. Ex. 2, at 1; Sbiroli Aff. ¶ 5. The Unit's follow-up letters, in response to the documentation submitted by the owners, say that several of the asserted costs were not permissible improvements meriting the claimed legal rent increase. Vinocur Aff. Ex. 3, at 1, 3–4; Sbiroli Aff. Ex. 1, at 1, 3. They also tell the owners how to correct the issue, say that "[s]hould you decide not to rectify the legal rent within 30 days of this notice, TPU explicitly reserves the right to commence a legal action, which can result in a finding of penalties and other relief," and conclude, "[w]e look forward to resolving this matter amicably" — hardly the language of a binding order. Vinocur Aff. Ex. 3, at 1–2; Sbiroli Aff. Ex. 1, at 1–2. Eliminating any possible remaining doubt that the Unit's audits result in no

binding determination of Plaintiffs' rights is the fact that 141 Wadsworth has flouted the Unit's request to correct the issue, refusing to file an amended registration with the corrected legal rent or to give the tenant an amended lease with the corrected legal rent. *See* Fewer Aff. ¶¶ 34-36.

But even if Plaintiffs were somehow correct that the Unit's audit determinations were binding orders, their claim would *still* fail as a matter of law because they would then be entitled to challenge those determinations by way of an Article 78 proceeding in Supreme Court, a procedure they concede (PI Br. at 7) affords due process. CPLR § 7801(1); CPLR § 7803(4); CPLR § 217(1).

In all events, Plaintiffs have not shown that there is "'no set of circumstances'" under which the Unit could conduct audits without violating their due process rights, as they must in their facial challenge. *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003) (citation omitted).

Finally, Plaintiffs' intimation (PI Br. at 3; Compl. ¶¶ 84 & 205) that the absence of codified criteria explaining how the Unit determines which owners to audit somehow violates their due process rights is meritless. If that were correct, then due process would require the police to codify the location of speed traps on public roads. Plaintiffs cite no support for that remarkable proposition. Their claim fails as a matter of law.

C. The Division Acted Well Within its Authority in Promulgating the Limited, Judicially Sanctioned Rent Review Amendments

The Rent Review Amendments validly provide for review of rental history records before the base date in certain situations where the New York courts have

deemed such review necessary to properly adjudicate a rental overcharge claim. The Rent Review Amendments further the policy objectives of the rent stabilization statutes: "providing safeguards against unreasonably high rent increases," Unconsol. L. § 26-511(c)(1), "requiring owners not to exceed the level of lawful rents as provided by [the rent stabilization laws]", *id.* § 26-511(c)(2), and ensuring "that the level of fair rent increase established under [the rent stabilization laws] will not be subverted and made ineffective," *id.* § 26-511(c)(5). *See also Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 87 N.Y.2d 325, 334 (1995) ("[T]he overarching goal of the regulatory scheme . . . is to protect tenants — who would otherwise be vulnerable to New York City's housing crisis — from eviction and spiraling rents."). Plaintiffs' objections to the Rent Review Statutes are contrary to those policy objectives and binding case law.

The enforcement provisions of the rent regulation statutes provide for a four-year statute of limitations on overcharge claims. Unconsol. L. § 26-516(a)(2) (providing "a complaint [of an overcharge] shall be filed with the [Division] within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed"). None of the Rent Review Amendments affects the statute of limitations for rent overcharge complaints, contrary to Plaintiffs' misleading claim (Compl. ¶¶ 119–22; PI Br. at 13–14).

The enforcement provisions of the rent stabilization statutes also provide that, generally, review of the rental history is limited to the four years preceding the filing of an overcharge complaint. Unconsol. L. § 26-516(a)(2). However, the courts have held that that general four-year rule is *not* absolute: "the four-year rule has not been inviolate, and exceptions have been made in its application where circumstances and policy considerations dictate." *H.O. Realty Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 46 A.D.3d 103, 109 (1st Dep't 2007).

By way of background, to adjudicate an overcharge claim, the Division must be able to determine the legally regulated rent, defined as the rent charged on the base date, i.e., the date four years prior to the filing date of a rent overcharge claim. 9 NYCRR § 2520.6(e). But the legally regulated rent cannot always be determined from the recent rental history, for reasons including the absence of reliable records. For this and other reasons, courts have held that the four-year limitation on review of rental history is antithetical to the statutory goals, and therefore not applicable, in certain situations. The Rent Review Amendments target those situations.

Plaintiffs' challenges to the Rent Review Amendments are based on a superficial, out-of-context reading of the statutes, but their unsupported challenges readily cede to a rational reading of the statutory scheme as a whole, in the context of its overall purpose. *Matter of Cintron v Calogero*, 15 N.Y.3d 347, 355 (2010).

Because the adjudication of rental overcharge claims is an area where the Division's experience and expertise are particularly crucial, its interpretation of statutes applicable to such adjudications is entitled to a higher level of deference.

See, e.g., *Missionary Sisters of Sacred Heart v. N.Y. State Div. of Hous. & Cmty. Renewal*, 283 A.D.2d 284, 286 (1st Dep't 2001) ("It is settled that where the interpretation of a statute involves a specialized knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts should defer to the administrative agency's interpretation unless irrational or unreasonable.") (internal quotation marks omitted).

In accordance with the statutes and judicial interpretations of those statutes, the Division's amended regulations allow review of pre-base date rental records to the extent necessary to determine: (i) its jurisdiction over the housing accommodation at issue, 9 NYCRR § 2526.1(a)(2)(iii); (ii) the legality of the rent charged on the base date, 9 NYCRR § 2526.1(a)(2)(iv); (iii) whether a rent reduction order was in place as of the base date, 9 NYCRR § 2526.1(a)(2)(v); (iv) whether an owner has submitted sufficient evidence to rebut the presumption of the willfulness of an overcharge, 9 NYCRR § 2526.1(a)(2)(vi); (v) the length of an occupancy that is claimed by an owner to have exceeded eight years, 9 NYCRR § 2526.1(a)(2)(vii); (vi) whether a preferential rent provision existed as of the base date and, if so, its conditions and terms, 9 NYCRR § 2526.1(a)(2)(viii); and (vii) the legal rent where the housing accommodation was vacant or temporarily exempt on the base date, 9 NYCRR § 2526.1(a)(2)(ix).

Plaintiffs' objections to the Rent Review Amendments appear to be based primarily on fears that owners will be punished for their failure to retain records for

more than four years in reliance on existing statutes. But fear about how regulations *could* be applied falls short of what Plaintiffs must show in this facial challenge to the Rent Review Amendments; instead, they must show that there is "'no set of circumstances'" under which they could be validly applied. *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003) (emphasis added; citation omitted). In any event, Plaintiffs' fears are unfounded. The Division has never punished law-abiding owners for relying on existing statutes and regulations. The Division's regulations require it to consider "the equities involved" in any adjudication, 9 NYCRR § 2522.7, and explicitly provide that an amended regulation will not apply in a proceeding if "undue hardship or prejudice [would] result[]," 9 NYCRR § 2527.7.

Accordingly, the Rent Review Amendments, discussed below individually, are consistent with the rent stabilization statutes and the Division's rulemaking authority.

1. The Regulation Enabling the Division To Determine Whether an Apartment Is Subject To the Rent Stabilization Laws Is Valid.

The Rent Review Amendments provide that "nothing in this section shall limit a determination as to whether a housing accommodation is subject to the" rent stabilization statutes and regulations. 9 NYCRR § 2526.1(a)(2)(iii) (the "jurisdiction regulation"). There is nothing irrational or unreasonable about the Division promulgating a regulation authorizing it to make the necessary threshold determination of whether it has jurisdiction over an apartment for which a tenant has made an overcharge complaint. Plaintiffs' challenge to this regulation is irrational. Plaintiffs would have the Division precluded from determining its

jurisdiction prior to adjudicating an overcharge complaint. Plaintiffs' position has been rejected by the First Department, which refused to apply the four-year limitation to the threshold determination of jurisdiction. *See E.W. Renovating Co. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 16 A.D.3d 166, 167 (1st Dep't 2005) (The Division's "consideration of events beyond the four-year period is permissible if done . . . to determine whether an apartment was regulated.").

Moreover, the jurisdiction regulation is consistent with the existing regulations, which provide that "nothing contained herein shall limit a determination as to whether a housing accommodation is subject to the" rent stabilization statutes. 9 NYCRR § 2526.1(a)(ii).

Accordingly, the Division acted well within its authority in enacting the jurisdiction amendment.

2. The Regulation Enabling the Division To Determine the Existence of a Fraudulent Scheme To Destabilize an Apartment Is Valid.

Included in the Rent Review Amendments is a provision that the rental history prior to the base date "may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the housing accommodation [or the imposition of prohibited conditions upon a rental] rendered unreliable the rent on the base date." 9 NYCRR § 2526.1(a)(2)(iv) (the "anti-fraud regulation"). The anti-fraud regulation is a direct implementation of the Division's statutory mandate to "require[] owners not to exceed the level of lawful rents as provided by" the rent stabilization laws. Unconsol. L. § 26-511(c)(2).

The old regulations were silent as to how to calculate an overcharge when the rent charged on the base date was unlawful and could not, therefore, serve as a basis upon which to make any calculation. *Cf. Matter of Grimm v. N.Y. State Div. of Hous. & Cmty. Renewal,* 15 N.Y.3d 358, 365–66 (2010). That silence was resolved in *Grimm*, in which the Court of Appeals held that where a tenant's overcharge complaint stated a colorable claim that the owner engaged a fraudulent deregulation scheme, the Division was not only permitted but *required* to investigate the legality of the base-date rent, which necessarily entailed examination of rent records before the base date. *Id.* at 365–67.

Preventing owners from charging illegal rents and thereby profiting from fraud has a sound basis in the statutes, *see* Unconsol. L. § 25-511(c)(2), as the courts have readily held. *E.g.*, *Thornton*, 5 N.Y.3d at 181 (rejecting owner's "attempt to circumvent the Rent Stabilization Law in violation of the public policy of New York"); *H.O. Realty Corp.*, 46 A.D. 3d at 108 ("No one would seriously argue that any valid interest would be served by allowing a landlord who is a chronic offender of these regulations to bar from consideration any part of its history of charging tenants illegal rents just because the overcharges occurred four years before the most recent complaint."). As *Thornton* explained, it "surely was not the intent of the legislature" to permit an unscrupulous owner whose fraud went undetected for four years to "transform an illegal rent into a lawful assessment that would form the basis for all future rent increases." *Thornton*, 5 N.Y.3d at 181.

Thus, the anti-fraud regulation is entirely consistent with the rent stabilization statutes as interpreted by the courts. Plaintiffs' challenge to that regulation fails as a matter of law.

3. The Regulation Enabling the Division To Review Extant Rent Reduction Orders for Failure To Maintain Services Is Valid.

The rent stabilization statutes authorize the Division to issue orders requiring services to be maintained and to reduce the rent upon an owner's failure to maintain services. Unconsol. L. § 26-514. An owner subject to a rent reduction order is barred from "applying for or collecting any rent increases" while such a rent reduction order remains in effect. *Id.* Therefore, the regulation providing that a rent reduction order "remaining in effect within four years of the filing of a complaint pursuant to this section may be used to determine an overcharge or award an overcharge or calculate an award of the amount of an overcharge," 9 NYCRR § 2526.1(a)(2)(v) (the "rent reduction order regulation"), is a direct implementation of § 26-514.

Plaintiffs' characterization of this regulation as an exception to the four-year limitation on review of rental history records is incorrect. Rent reduction orders impose a continuing obligation upon owners to "reduce rent until the required services are restored or repairs are made." *Matter of Cintron v. Calogero*, 15 N.Y.3d 347, 354–55 (2010). The rent reduction order regulation is expressly limited to orders "remaining in effect within four years of the filing of a[n overcharge] complaint." 9 NYCRR § 2526.1(a)(2)(v). A rent reduction order that remains in effect at the time of an overcharge complaint is, therefore, part of the current rental

history. *Grimm*, 15 N.Y.3d at 356; *Thornton*, 5 N.Y.3d at 180 ("[W]here an order issued prior to the limitations period imposed a continuing obligation on a landlord to reduce rent . . . the statute of limitations would be no defense to an action based on a breach of that duty occurring within the limitations period."). Plaintiff's objection to this regulation is baseless.

The rent reduction order amendment is, accordingly, fully consistent with the rent stabilization statutes.

4. The Regulation Enabling the Division To Make Determinations As To the Willfulness of an Overcharge Is Valid.

The Rent Review Amendments contain a regulation permitting the Division to review the relevant records prior to the base date "[f]or the purpose of determining if the owner establishes by a preponderance of the evidence that the overcharge was not willful." 9 NYCRR § 2526.1(a)(2)(vi) (the "willfulness regulation"). The willfulness regulation is a proper exercise of the Division's rulemaking authority and is entirely consistent with the rent stabilization statutes.

Where an overcharge has been found, a statutory presumption of willfulness applies, and treble damages are awarded unless the owner rebuts that presumption by a preponderance of the evidence. Unconsol. L. § 26-516(a). But the issue of willfulness is adjudicated only *after* an overcharge has already been found; it is a separate inquiry concerning only the penalty, and thus the examination of rental history for that purpose does not violate the statute. *See H.O. Realty Corp.*, 46 A.D.3d at 107–08. As the First Department explained, the four-year limitation simply does not apply to willfulness determinations: "The four-year limitation

specifically refers to the period within which a rent may be challenged; it does not, by its terms, limit the period in which the owner can draw evidence to explain its actions to the four years immediately prior to the filing of the complaint." *Id.*

The willfulness regulation is consistent with the statutes and is a proper exercise of the Division's rulemaking authority. Plaintiffs' challenge to this regulation should be dismissed.

5. The Regulation Enabling the Division To Determine the Length of an Occupancy Claimed by a Landlord To Be Longer Than Eight Years Is Valid.

Landlords are entitled to a "longevity increase" once eight years have passed since the last vacancy increase for the apartment. Unconsol. L. § 26-511(c)(5-a); 9 NYCRR § 2522.8(a)(2)(ii). The landlord's entitlement to the longevity increase "thus depends upon a factual determination that there has been no vacancy increase with respect to the housing accommodation in question during the previous eight years." *Matter of Ador Realty, LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 25 A.D.3d 128, 132 (2d Dep't 2005). Accordingly, the Rent Review Amendments provide that for purposes of determining whether a landlord is entitled to a longevity increase, the Division may examine the relevant pre-base date records to determine the length of an occupancy claimed by an owner to exceed eight years. 9 NYCRR § 2526.1(a)(2)(vii) (the "longevity increase regulation"). The longevity increase regulation is a reasonable implementation of § 26-511(c)(5-a).

If applied strictly and without exception, the general four-year limit on reviewing rental history would make it impossible for the Division to grant landlords the longevity increases they are entitled to. *See Ador Realty*, 25 A.D.3d at

135 (explaining that four-year limit is "not neutral with respect to the purposes of the longevity increase, but destructive of those very purposes"). Therefore, the only interpretation that harmonizes the different statutes in a manner consistent with their overall purpose is to construe the general four-year limit on record review as not applicable to determinations of longevity increases, as the Second Department recognized. *Id.* at 134–35 ("Nothing in the legislative history suggests that either the statutory limitation on the Division's consideration of its records or the statutory prohibition against requiring the owner to maintain records was intended to apply to the Division's determinations with respect to longevity increases.").

The longevity increase regulation is thus fully consistent with the relevant statutes. Accordingly, Plaintiffs' challenge to the longevity increase regulation should be dismissed.

6. The Regulation Enabling the Division To Determine the Existence or Terms and Conditions of a Preferential Rent Is Valid.

The Rent Review Amendments allow the Division to examine pre-base date rent records "[f]or the purposes of establishing the existence or terms and conditions of a preferential rent under section 2521(c)," 9 NYCRR § 2526.1(a)(2)(vii), and to require owners to maintain and submit the rental history preceding a preferential rent, 9 NYCRR § 2521.2(c) (the "preferential rent regulations").

A landlord may offer a lease to a tenant at a rent lower than the legally regulated rent. Unconsol. L. § 26-511(c)(14). The lower rent is known as a "preferential rent." 9 NYCRR § 2521.2(a). The landlord may then offer a renewal lease to that tenant at the higher legally regulated rent, but only where (i) the lease

specifically provided that the preferential rent was offered for the term of the initial lease only, *Missionary Sisters of Sacred Heart v. N.Y. State Div. of Hous. & Cmty. Renewal*, 283 A.D.2d 284, 287–89 (1st Dep't 2001); and (ii) the higher legal regulated rent had been "previously established," *Matter of 10th St. Assocs. v. N.Y. State Div. of Hous. & Cmty. Renewal*, No. 108314/11, 2012 N.Y. Misc. LEXIS 1172, at *13 (Sup. Ct. N.Y. Cnty. Mar. 9, 2012), *aff'd,* 110 A.D.3d 605 (1st Dep't 2013).

Moreover, where a preferential lease rider expressly provides that the preferential rent will be offered to the tenant in renewal leases, the landlord is bound by that provision and may not charge the higher legal rent in a renewal lease. *See Matter of 218 E. 85th St., LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 23 Misc. 3d 557, 562 (Sup. Ct. N.Y. Cnty. 2009) ("[W]here the original lease or renewal lease provides that the tenant is entitled to further leases at the preferential rent for the duration of the tenancy, the 2003 amendment [to Unconsol. L. § 26-511(c)(14) permitting termination of preferential rents in renewal leases] does not negate that provision.").

Therefore, in the context of an overcharge claim, the Division must be able to determine whether a rent that the landlord claims is a preferential rent was in fact a preferential rent and whether the higher, legally regulated rent was in fact "previously established."

Here again, Plaintiffs' characterization of the preferential lease regulations as exceptions to the four-year rent review limit is mistaken. Because renewal leases generally must "be on the same terms and conditions as the expired lease," 9

NYCRR § 2522.5(g)(1), the existence vel non of a preferential lease rider is incorporated by reference into subsequent lease agreements. *See Matter of Pastreich v. N. Y. State Div. of Hous. & Cmty. Renewal*, 50 A.D.3d 384, 386 (1st Dep't 2008). Therefore, a preferential lease rider in an earlier lease is part of the current rental history that must be reviewed to adjudicate an overcharge claim, and is not precluded by the four-year limit. *Cf. Matter of Cintron*, 15 N.Y.3d at 356.

The Division's experience in adjudicating overcharge claims involving purported preferential rents underscores the importance of the preferential rent regulations. Moreover, in the Unit's overcharge investigations, it has found that for 55% of claimed preferential rents, the purported legally regulated rent was not supported by the record and was thus not previously established. *See* Melnitsky Aff. Ex. E.

Accordingly, the preferential rent regulations are consistent with the rent stabilization statutes and are a valid exercise of the Division's rulemaking authority. Plaintiffs' challenge to the preferential rent regulation should be dismissed.

7. The Regulation Enabling the Division to Determine Whether a Housing Accommodation Was Vacant or Temporarily Exempt on the Base Date Is Valid.

The Rent Review Amendments permit the Division to examine relevant pre-base date records "[f]or the purpose of establishing the legal regulated rent pursuant to section 2526.1(a)(3)(iii) where the apartment was vacated or temporarily exempt on the base date." 9 NYCRR § 2526.1(a)(2)(ix) (the "vacant or temporarily exempt regulation").

The amended regulations also provide that where an apartment is vacant or temporarily exempt on the base date, the legal regulated rent is the prior legal regulated rent for the apartment, adjusted for permissible increases. 9 NYCRR § 2526.1(a)(3)(iii). The old regulation provided that where an apartment was vacant or exempt on the base date, the legally regulated rent would be the rent agreed upon by the owner and the next occupying rent stabilized tenant, or a lower subsequently registered amount.

The amended regulation has sound support in judicial decisions and the policy considerations underlying the rent stabilization statutes. The pre-amendment regulation in effect permitted owners who charged free-market rents and improperly deregulated apartments to escape review simply because the apartment was fortuitously vacant or exempt on the base date. Courts have refused to permit improperly deregulated apartments to escape review because of such fortuitous circumstances and have required review of pre-base date records in order to establish the legally regulated rent. *72A Realty Assocs. v. Lucas*, 101 A.D.3d 401, 402 (1st Dep't 2012) (holding that pre-base date records must be reviewed to determine legally regulated rent where apartment was not validly deregulated).

The Division's experience adjudicating overcharge claims in cases where there was a vacancy or exemption on the base date showed that landlords were being effectively rewarded for failing to submit a full rental history. Melnitsky Aff. Ex. E. The Division's experience and expertise in adjudicating such claims entitles

it to a high degree of deference with respect to the vacant or exempt on the base date regulation. *Missionary Sisters of Sacred Heart*, 283 A.D.2d at 286.

The regulation governing apartments that were vacant or exempt on the base date is consistent with the rent stabilization statutes, and Plaintiffs' challenge to it should be dismissed.

D. The Division Acted Well Within its Authority in Promulgating Limited Amendments to the Default Formula

The Division is authorized, in situations where the legally regulated rent is unknown or disputed, to issue an order determining the legally regulated rent. 9 NYCRR § 2522.6(a). In certain situations necessitating such an order and where no reliable records were available to it, the Division has determined the legally regulated rent according to the "default formula," which uses the lowest rent charged on the base date for a comparably sized rent stabilized apartment in the same building. *See Thornton*, 5 N.Y.3d at 179–80. Although the default formula was not codified, the Court of Appeals in *Thornton* approved its use, reasoning that if it held otherwise, unscrupulous landlords would be, in effect, immunized from fraud. *Id.* at 181. Although the *Thornton* case involved an illusory tenancy scheme, *Thornton* cannot be read to limit the applicability of the default formula to situations with illusory tenancies: "we agree . . . that the default formula used by [the Division] to set the rent where no reliable rent records are available was the appropriate vehicle for fixing the base date rent here." *Id.* at 181. *Thornton* plainly endorsed the use of the default formula in situations "where no reliable rent records are available." *Id.* The Court of Appeals again confirmed in *Grimm* that the Division

is authorized to use the default formula "when no reliable records are available." 15 N.Y.3d at 366; *see also Levinson v. 390 W. End Assocs., LLC*, 22 A.D.3d 397, 400–01 (1st Dep't 2005) (relying on *Thornton*, holding that the default formula applied where "no valid rent registration statement was on file as of the base date").[7] Accordingly, Plaintiffs are wrong in asserting (PI Br. at 25) that the newly codified default formula "goes well beyond *Thornton*." The newly codified default formula is, on the contrary, entirely within *Thornton*.

The amended regulations codify the judicially sanctioned use of the default formula in situations where: (i) the rent charged on the base date cannot be determined; (ii) a full rental history from the base date is not provided; (iii) the base date rent is the product of a fraudulent scheme to deregulate the apartment; or (iv) landlords have engaged in certain proscribed rental practices, including an illusory tenancy. 9 NYCRR § 2522.6(b)(2). In such situations, the legally regulated rent is set at the lowest of: (i) the lowest legally regulated rent for a comparable apartment in the same building on the date the complaining tenant first occupied the apartment; (ii) the complaining tenant's initial rent less authorized reductions; (iii) the last registered rent paid by the tenant (if within the general four-year review period); or (iv) if no documentation exists for the foregoing, an amount based

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[7] *See also, e.g.*, *Matter of DeSilva v. N.Y. State Div. of Hous. & Cmty. Renewal*, 34 A.D.3d 673 (2d Dep't 2006) (Division properly applied default formula where landlord failed to submit rent records necessary to establish legal stabilized rent); *Clear Holding Co. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 268 A.D.2d 430 (2d Dep't 2000) (same).

on data compiled by the Division, using appropriate sampling methods. 9 NYCRR § 2522.6(b)(3).

Plaintiffs' objections to the codification of the default formula are baseless. To the extent Plaintiffs claim that the general four-year limit on reviewing records for rent overcharge claims precludes the application of the default formula in cases where no reliable base-date records are available (Compl. ¶¶ 126–27, 139), they are mistaken. There can be no question that in endorsing the application of the default formula in situations where no reliable records could be found, *Thornton* and *Grimm* unequivocally rejected the application of the four-year limit.

Moreover, to the extent that Plaintiffs argue for the application of the more lenient default formula previously codified in 9 NYCRR § 2522.6(b), (Compl. ¶¶ 128–30), the Court of Appeals expressly rejected that argument because that provision "in its plain terms applies only to judicial sales, bankruptcy proceedings and mortgage foreclosure actions." *Thornton*, 5 N.Y.3d at 181 n.5.

Plaintiffs also object to the deletion of 9 NYCRR § 2522.6(b)(5), which stated that that subdivision (i) did not impose any greater record-keeping obligations than those set forth in § 26-516(g) (requiring records to be retained for four years); and (ii) the statute of limitations for rental overcharge and a failure to file a registration statement is four years. Compl. ¶¶ 138–39. But Plaintiffs' objection is meritless. The deleted provisions are addressed fully in other regulations and were, therefore, redundant; deleting them did not affect Plaintiffs' rights and obligations. In any event, the Division's obligation to consider the equities remains in effect as an

ongoing protection against prejudice as a result of reliance on previous record-keeping regulations. 9 NYCRR § 2522.7.

The default formula in 9 NYCRR § 2522.6(b)(2)–(3) is a valid exercise of the Division's rulemaking authority.

E. Plaintiffs' Challenge To the Amended Regulation Barring Major Capital Improvement Rent Increases When There Are Immediately Hazardous Violations in the Building Fails as a Matter of Law

Plaintiffs fare no better with their claim challenging the regulation disallowing rent increases for major capital improvements when there are service outages or hazardous violations in the building. 9 NYCRR § 2522.4(a)(13); Compl. ¶¶ 152–64, 291–302; PI Br. at 19–21, 31, 36 n.30. That regulation, which gives owners an incentive to maintain required services and remedy hazardous violations, is a reasonable implementation of the statutory command that the Division "require[] owners to maintain all services" and the statutory "bar[]" on owners who fail to maintain services "from applying for or collecting" rent increases. Unconsol. L. §§ 26-511(c)(8) & 26-514; *see also Matter of Fieldbridge Assocs., LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 87 A.D.3d 598, 599 (2d Dep't 2011) (Division's revocation of major capital improvement rent increase due to immediately hazardous violations at building was not arbitrary and capricious); *Matter of Chelrae Estates, Inc. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 225 A.D.2d 387, 389 (1st Dep't 1996) (Division's suspension of major capital improvement rent increases due to owner's elimination of trash incinerator was not arbitrary and capricious).

Plaintiffs are wrong that the amended regulation is inconsistent with other parts of the statute. Neither of the two statutory provisions cited by Plaintiffs (PI Br. at 19) say that landlords are automatically entitled to rent increases whenever they make major capital improvements. Section 26-511(c)(6) says merely that the Division's regulations must "*provide[] criteria*" for granting and denying landlords' rent increase applications (which is exactly what the regulation does) and says that a prerequisite for granting a major capital improvement rent increase is that the improvement must be depreciable under the Internal Revenue Code (which the regulation does not affect). Unconsol. L. § 26-511(c)(6) (emphasis added). And § 26-511(c)(13) does not refer to major capital improvement increases at all, but rather applies only to rent increases for individual apartment improvements and service increases — rent increases that (unlike major capital improvement rent increases) require written tenant consent. Unconsol. L. § 26-511(c)(13). Accordingly, courts have held that the Division may properly deny a landlord's requested major capital improvement rent increase when there are immediately hazardous violations in the building. *E.g.*, *370 Manhattan Ave. Co., L.L.C. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 11 A.D.3d 370, 371–72 (1st Dep't 2004); *251 W. 98th St. Owners, LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 276 A.D.2d 265, 265–66 (1st Dep't 2000); *Matter of Weinreb Mgmt. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 24 A.D.3d 269, 270 (1st Dep't 2005).

In any event, nothing in the *new* Rent Stabilization regulation creates the parade of horribles dreamed up by Plaintiffs. 9 NYCRR § 2522.4(a)(13). To the

extent that any of those fanciful outcomes are possible, all were possible under the old version of the regulation, which (since its adoption in 1987) disallowed major capital improvement rent increases when there are service outages or hazardous violations in the building. As a result, Plaintiffs' challenge to that part of the Rent Stabilization regulation is not only meritless but also time-barred.

In all events, Plaintiffs' arguments about how the Division *could* enforce the amended regulation falls short of their burden on a facial challenge to show that there is "'*no* set of circumstances'" under which the regulation could be validly applied. *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003) (citation omitted).

Finally, Plaintiffs are wrong (PI Br. at 21; Compl. ¶¶ 158–60) that the Division's regulations do not provide for retroactive application of the newly amended regulation to major capital improvement rent increase applications filed before the regulation's amendment. The regulations expressly say that the amended version applies to all proceedings currently pending before the Division. 9 NYCRR § 2527.7 ("[U]nless undue hardship or prejudice results therefrom, this Code shall apply to any proceeding pending before the DHCR, which proceeding commenced on or after April 1, 1984, or *where a provision of this Code is amended . . . the determination shall be made in accordance with the changed provision*.") (emphasis added).

F. The Division's Elimination of Hypertechnical Prerequisites Before a Tenant Can Obtain a Rent Reduction Order Against a Landlord Who Fails To Maintain Required Services Does Not Contradict Any Statute

Equally unavailing is Plaintiffs' challenge to two changes to the regulation providing for rent reductions when an owner fails to maintain required services — one that encourages (but no longer requires) tenants to notify their landlords of the service outage in writing as a prerequisite to any rent reduction by the Division, and one that bars any rent increases while the service outage continues. 9 NYCRR § 2523.4(a)(1) & (c); Compl. ¶¶ 141–51, 279–90; PI Br. at 21–23, 31.

The new regulation's decision not to require the Division to automatically dismiss a tenant's rent reduction application solely because the tenant has not given prior written notice of the service outage to her landlord (9 NYCRR § 2523.4(c)) is a reasonable implementation of two statutory mandates: (1) that the Division "require[] owners to maintain all services," Unconsol. L. § 26-511(c)(8); and (2) that the Division "protect tenants," *id.* § 26-511(c)(1). Thirteen years of experience under the old regulation — which required the tenant to give prior written notice of the service outage to her landlord, required the tenant to attach proof of that written notice to her rent reduction application, and required the tenant to file the application at least ten but no more than 60 days after giving that notice, all on pain of dismissal of her application — showed the Division that strict application of those labyrinthine requirements screened out many meritorious applications, especially from tenants not represented by a lawyer, non-English-speaking tenants, and elderly and infirm tenants. *See* Melnitsky Aff. Ex. E.

Contrary to Plaintiffs' contention (PI Br. at 21–22 & 31), no statute says that the Division must dismiss a tenant's rent reduction application if the tenant has not first notified the landlord of the service outage in question. The only statute cited by Plaintiffs, Real Property Law § 235-b(3)(b), governs a *court's* calculation of damages in landlord-tenant actions for breach of the warrant of habitability caused by building workers' union strikes — not the *Division's* determination of rent reduction applications.[8] The statute, moreover, does *not* require the tenant to notify the landlord of the breach (let alone in writing) as a precondition to recovering such damages. The fact that the amended regulation encourages — but stops short of requiring — tenants to notify their landlords of the service outage before filing any rent reduction application does nothing to affect landlords' rights under Real Property Law § 235-b(3). In all events, the existing regulations require the Division to give a landlord notice of a tenant's rent reduction application, giving the landlord an opportunity to either contest the service outage claim or fix it; indeed, those existing regulations give landlords more time to do so when the tenant has not given the landlord prior notice of the service outage. 9 NYCRR § 2523.4(d)(2).

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[8] Real Property Law § 235-b(3) says:

> In determining the amount of damages sustained by a tenant as a result of a breach of the warranty set forth in the section, the court . . . (b) shall, to the extent the warranty is breached or cannot be cured by reason of a strike or other labor dispute which is not caused primarily by the individual landlord or lessor and such damages are attributable to such strike, exclude recovery to such extent . . . provided, however, that the landlord or [lessor] has made a good faith attempt, where practicable, to cure the breach.

The other part of the new regulation challenged by Plaintiffs — the ban on any further rent increases until the owner fixes the service outage giving rise to the rent reduction order (9 NYCRR § 2523.4(a)(1)) — directly implements the statutory command that owners who fail to maintain services "shall . . . be barred from applying for or collecting any further rent increases." Unconsol. L. § 26-514.

Plaintiffs argue (PI Br. at 21) that the new regulation's ban on further rent increases is inconsistent with two other statutes generally entitling owners to rent increases upon improvements and vacancies. Unconsol. L. § 26-511(c)(5-a) & (13). But those general statutes do not displace the more specific statute (*id.* § 26-514) barring owners from further rent increases until the service outage is cured — the statute that the new regulation implements. *See Roslyn Union Free Sch. Dist. v. Barkan*, 16 N.Y.3d 643, 648 (2011).

G. The Amended Regulation Requiring Landlords To Apply To the Division To Amend a Prior Year's Apartment Registration Statement Does Not Contradict Any Statute

Nor do Plaintiffs get any traction with their challenge to two changes to the regulations governing apartment registrations — one requiring owners to file an application with the Division in order to amend an apartment registration statement for a prior year, and one barring certain rent increases when the owner has failed to properly register the apartment. 9 NYCRR § 2528.3(c); 9 NYCRR § 2528.4(a). Compl. ¶¶ 169–82, 314–37; PI Br. at 23–24, 31.

The new regulation's requirement that owners seeking to amend an apartment registration statement for a prior year must file an application with the

Division (9 NYCRR § 2528.3(c)) prevents landlords from covering up intentional overcharges by filing truthful initial registration statements (which the Division reviews) but then later filing *unreviewed* amended registration statements to quietly rewrite the rental history. That concern is not hypothetical, as the case law illustrates. *See, e.g.*, *Matter of Grimm v. N.Y. State Div. of Hous. & Cmty. Renewal*, 15 N.Y.3d 358, 363, 366 (2010) (after receiving overcharge complaint, landlord immediately filed registration statements retroactively for previous five years, suggesting a "fraudulent scheme" to "'circumvent[] the Rent Stabilization Law'") (citation omitted); *Bradbury v. 342 W. 30th St. Corp.*, 84 A.D.3d 681, 684 (1st Dep't 2011) (landlord's filing of two false registration statements was "sham, filled with perjury, forgery, and fabrications and was designed to raise the rent of the apartment to an unlawful level, a level that would remove the unit from the protections of rent stabilization") (internal quotation marks and alterations omitted); *Classic Equities, LLC v. Garrity*, No. 01-310, 2001 N.Y. Misc. LEXIS 1321 (App. Term 1st Dep't Dec. 12, 2001) (per curiam) (after receiving overcharge complaint, landlord filed series of amended registration statements yet could not show that rents reported in initial registration statements were preferential rents justifying amendments).

Plaintiffs fail to cite a single statute precluding the new regulation's amendment application requirement. Nor could they: No statute entitles owners to amend prior registration statements as of right. Rather, Plaintiffs argue only that "[t]here is nothing in [the statutes] that provides any additional protocols . . . in the

event the Rent Regulated Owner is forced to amend his/her registration." PI Br. at 23. But "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." *GE Capital Corp. v. N.Y. State Div. of Tax Appeals*, 2 N.Y.3d 249, 254 (2004) (emphasis added).

With no statute even arguably precluding the new regulation's amendment application requirement, Plaintiffs fall back (PI Br. at 24) on a policy argument that the requirement creates a Catch-22 for owners who discover honest mistakes in prior registration statements, triggering a rent freeze if they try to correct the mistake or if they do not. Even if disagreement with the regulation's wisdom were a permissible ground for a court to invalidate it (and it is not, *Matter of Barie v. Lavine*, 40 N.Y.2d 565, 569–70 (1976)), Plaintiffs are wrong about *both* prongs of their supposed dilemma. The Division has never treated a registration containing a mistake as equivalent to a complete failure to file that triggers a rent freeze under Unconsol. L. § 26-517(e), as numerous cases show. *E.g.*, *Classic Equities, LLC*, 2001 N.Y. Misc. LEXIS 1321; *Matter of Paulsen Real Estate Corp.*, Admin. Rev. Docket No. SK710056RO (annexed as Ex. H to the Melnitsky Aff.); *Matter of Dalia Kandiyoti et al.*, Admin. Rev. Docket No. ML210114RT (annexed as Ex. I to the Melnitsky Aff.); *Matter of Joan Preston*, Admin. Rev. Docket No. ME410038RT (annexed as Ex. J to Melnitsky Aff.); *Matter of Adam Resnick*, Admin. Rev. No. QL410060RT (annexed as Ex. K to Melnitsky Aff.). Nor does an application to amend a prior registration statement trigger a rent freeze, contrary to Plaintiffs'

unsupported assertion. In any event, Plaintiffs' argument (PI Br. at 24) that under the amended regulation the Division "*can*" disallow rent increases falls short of the necessary showing on a facial challenge that there is "'*no* set of circumstances" under which the regulation could be validly applied. *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003).

The other change challenged by Plaintiffs — the ban on *any* rent increases when an owner fails to register the apartment (9 NYCRR § 2528.4(a)) — directly implements the statute providing that "[t]he failure to file a proper and timely . . . rent registration statement shall, until such time as such registration is filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement." Unconsol. L. § 26-517(e). Plaintiffs fail to identify any daylight — let alone any fatal inconsistency — between the regulation and the statute, and thus their claim challenging the regulation fails as a matter of law.

H. Plaintiffs' Challenge To the Amended Regulation Governing Lease Riders Fails as a Matter of Law

Equally meritless are Plaintiffs' challenges to the amended regulations requiring leases for rent-stabilized apartments to include riders setting forth the rights and obligations of tenants and owners. The rent stabilization statutes say that the lease rider "shall be in a form promulgated by the commissioner." Unconsol. L. § 26-511(d)(2).

The amended regulation governing lease riders provides that: (i) landlords must include in leases a detailed description of how the rent was adjusted from the

prior rent, 9 NYCRR § 2522.5(c)(1); (ii) tenants may, within sixty days of a lease's execution, obtain directly from the landlord the documentation supporting the purported basis, detailed in the lease, for the rent increase, 9 NYCRR § 2522.5(c)(1)(ii); (iii) where a landlord does not supply such requested documentation within thirty days, the tenant may withhold the amount of the rent increase until the documents are furnished or unless the landlord can otherwise show that the rent was legal, 9 NYCRR § 2522.5(c)(3).

Plaintiffs' challenge to the amended lease rider regulation is based on nothing more than speculative fears of widespread unilateral withholding of rent increases. Compl. ¶ 190. Plaintiffs' fears are baseless. Nowhere does the amended regulation permit the "unilateral withholding of rent" (Compl. ¶ 190). Moreover, the right of a tenant to request documentation supporting a rent hike calculation is not open-ended. The tenant must make such request within sixty days of the execution of the lease. 9 NYCRR § 2522.5(c)(1)(ii). Finally, tenants have no right to file a complaint unless and until thirty days pass and the owner has not responded to a request for supporting documentation. *Id.*

The Division's experience adjudicating overcharge claims has shown that individual apartment improvement rent increases upon vacancy (which do not require tenant approval) are among the most frequently relied-upon bases for rent increases to regulated apartments. Fewer Aff. ¶ 45. Before the Division amended the regulation, the only way tenants could obtain supporting documentation for rent increases was to file an overcharge complaint. The amended regulation offers an

alternative to costly and adversarial overcharge proceedings by requiring landlords to provide information about rent increases in the lease rider and providing tenants an opportunity to obtain the supporting documents.

The amended regulation imposes no new record-keeping burdens on landlords, who were already required to retain supporting documentation for rent increases for possible production to the Division. 9 NYCRR § 2522.5(b)(2). The amended regulation merely inserts needed transparency into the process of vacancy rent-setting, consistent with the policy objectives of the rent stabilization statutes.

The fact that the Legislature has not passed a law requiring rent history to be set forth in lease riders (PI Br. at 25) is irrelevant. *Bourquin v. Cuomo*, 85 N.Y.2d 781, 787 (1995) ("[T]hat proposed legislation [similar to the regulations at issue] was not passed does not indicate legislative disapproval of the programs contemplated by the [regulations].").

Plaintiffs' baseless challenge to the amended lease rider regulation should be dismissed.

I. The Amended Regulation Making It Unlawful To File False Documents With the Division Does Not Contradict Any Statute

Even more baseless is Plaintiffs' challenge to two changes to the regulation declaring certain landlord actions unlawful — one making it unlawful to file false documents with the Division and one making it unlawful to cause a tenant to not exercise her rights. 9 NYCRR § 2525.5; Compl. ¶¶ 194–99, 350–61. Indeed, Plaintiffs do not even attempt to show that they are likely to succeed on the merits of that claim, failing to mention it entirely in their brief.

That claim should be dismissed. The two changes to the regulation are reasonable implementations of the statute requiring the Division to "protect tenants and the public interest" and to "require[] owners not to exceed the level of lawful rents." Unconsol. L. § 26-511(c)(1) & (2). Plaintiffs cite no statute they claim is inconsistent with the new regulation.

J. Plaintiffs' Claim That the Amendment of the Regulation Governing Lease Riders Violated the Administrative Procedure Act Fails as a Matter of Law

Plaintiffs' conclusory, unsupported Administrative Procedure Act challenges are meritless. Their allegations only underscore that the Division substantially complied with the Act at all stages in amending the regulations. Courts routinely reject these types of conclusory challenges. For example, in *Rent Stabilization Association of New York City, Inc. v. Higgins*, 83 N.Y.2d 156 (1993), the Court of Appeals rejected an Administrative Procedure Act challenge where, as here, it was undisputed that the Division filed the proposed amendments with the Secretary of State, issued appropriate regulatory impact statements and other analysis, held a public hearing, and submitted a notice of adoption for publication in the state register. *Id.* at 175; *accord Matter of Gioia v. Lynch*, 306 A.D.2d 280 (2d Dep't 2003). Plaintiffs' disagreement with the substance of the amended regulations does not give them a viable Administrative Procedure Act claim.

The Division substantially complied with the Act in amending 9 NYCRR § 2522.5(c)(3). Plaintiffs allege that the proposed amendment to that regulation did not comply with the section 202(7) of the Act because the draft amendment "did not

disclose an actual language change to the Lease Rider Amendment." PI Br. at 46; Compl. ¶ 364. That section requires that proposed changes be denoted by underlining new language and enclosing to-be-deleted language in brackets. A.P.A. § 202(7)(a). The Division concedes that the initial draft amendment to 9 NYCRR § 2522.5(c)(3) failed to highlight one minor change of a few words.[9] But those omissions were trivial. More importantly, Plaintiffs do not allege they were unaware of those omissions — let alone that had they been aware of them, they would have made more or different comments on the proposed changes. To the contrary, landlords had actual notice of those omissions, *and indeed brought the omission to the Division's attention at the time*, as Plaintiffs' own submissions show. The Real Estate Board of New York, a landlords' trade association, submitted the following comment to the Division: "[The Division] must be working from an interim draft since this is not based on the current version of the code which starts with the phrase '(3) upon complaint by the tenant, permanent tenant or hotel occupant that he or she was not furnished with a copy of the lease rider . . . .'" Affirmation of David Feuerstein Ex. 31, at 26 (page 4 of comments from Real Estate Board of New

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[9] The old regulation provided: "Upon complaint by the tenant, permanent tenant or hotel occupant that he or she was not furnished with a copy of the lease rider . . . ." Melnitsky Aff. Ex. L

The amended regulation provides: "Where a tenant, permanent tenant or hotel occupant is not furnished, as required by the above provision, with a copy of the lease rider . . . ." Melnitsky Aff. Ex. F.

The original proposed amendment did not include brackets around the deleted phrases "Upon complaint by the," and "that he or she was" and did not underline the new terms "Where a," "is," and ", as required by the above provision," as required by section 202(7)(a). Melnitsky Aff. Ex. E.

York). After receiving this and other comments on the proposed amendment to 9 NYCRR § 2522.5(c)(3), the Division issued this statement with the Notice of Adoption:

> The proposed amendment of 9 NYCRR 2522.5(c)(3) was previously written incorrectly in that some words in the beginning of the paragraph that were being deleted were erroneously left out instead of being bracketed and several words that should have been underlined as new language were erroneously not underlined. The comments received on this section indicate that the commenters realized the error and commented on the substantive change as if the brackets and underlining were correctly in place. Therefore, this is a nonsubstantive change and no modification of the RIS, RFA, RAFA or JIS is required.

See Melnitsky Aff. Ex. F. The Division was entirely correct in concluding that because the commenters had actual notice of the proposed changes, the Administrative Procedure Act did not require it to start the amendment process all over again.

Plaintiffs' citation to *Long Island College Hospital v. New York State Department of Health*, 151 Misc. 2d 370 (Sup. Ct. Kings Cnty. 1991), only underscores the de minimis nature of the initial omission in the draft amendment to the regulation here. First, in *Long Island College Hospital*, the agency conceded that it had published *no* notice of proposed rulemaking — unlike here, where Plaintiffs had actual notice of the proposed change. *See* Feuerstein Decl. Ex. 31, at 26. Second, the amendment in *Long Island College Hospital* made a monumental change to the types of funds that the agency could designate as offsets to Medicaid reimbursements, resulting in the agency's designation of $12 million as an offset to the hospital's Medicaid reimbursement, *id.* at 372–73 — hardly comparable to the

minor amendment here, which in any event Plaintiffs had actual notice of and which the Division clarified in its subsequent statement.

K. Plaintiffs' Conclusory Allegation That the Division Failed To Meaningfully Consider Public Comments on the Proposed Amendments in Violation of the Administrative Procedure Act Cannot Survive a Motion To Dismiss

Plaintiffs' conclusory claim that the Division failed to meaningfully consider public comments on the proposed amendments in violation of section 202(5) of the Administrative Procedure Act amounts to nothing more than a disagreement with the substance of the amended regulations. Compl. ¶¶ 368–70; PI Br. at 47–48.

Plaintiffs' allegations fall far short of stating a claim for a violation of section 202(5) or 202-a. Section 202(5)(b) requires an agency to publish an assessment of public comments submitted or presented at a public hearing to proposed regulations containing: "(i) a summary and an analysis of the issues raised and significant alternatives suggested by any such comments, (ii) a statement of the reasons why any significant alternatives were not incorporated into the rule and (iii) a description of any changes made in the rule as a result of such comments." A.P.A. § 202(5)(b).

Here, the Division fully complied with section 202(5)(b). Upon completing its review of public comments, the Division submitted Notices of Adoption to the Register, as required by section 202(5) of the Act, for publication in its January 8, 2014, issue, together with the supporting Statements, including assessments of

public comments and certified copies of the text.[10] *See* Melnitsky Aff. Ex. F. Because the assessment of public comments exceeded 2,000 words, the Division submitted a summary of that assessment for publication, as permitted by the Act. A.P.A. § 202(5)(c)(ii). The Division published the full assessment on its website on or about January 8, 2014. *See* "Rent Code Amendments 2014," New York State Homes & Community Renewal, http://www.nyshcr.org/Rent/RentCodeAmendments/ (last visited Mar. 24, 2014); *see also* Melnitsky Ex. M.

The Division considered and responded to the comments for *each* amended regulation, as the assessment of public comments and summary make clear. *See* Melnitsky Aff. Exs. F, M. The assessment of public comments summarized and analyzed the issues presented by the comments, discussed the alternatives, and discussed the changes made as a result of the comments. *See* Melnitsky Aff. Exs. F, M.

Plaintiffs' unsupported, conclusory allegation of a section 202(5) violation fails to identify how the Division purportedly failed to satisfy its criteria. *Id.* Plaintiffs' dissatisfaction with the substance of the amended regulations, however, cannot serve as the basis for an Administrative Procedure Act claim.

Nor do Plaintiffs plead anything more than a conclusory allegation that the Division's regulatory impact statement violated section 202-a of the Act. Compl. ¶ 371. As a review of the regulatory impact statement reveals, the Division

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[10] The Court may properly consider these public records on the Division's motion to dismiss under CPLR 3211(a)(1). *See Sunset Café, Inc. v Mett's Surf & Sports Corp.*, 103 A.D.3d 707, 709 (2d Dep't 2013).

"consider[ed] utilizing approaches which are designed to avoid undue deleterious economic effects or overly burdensome impacts of the rule on persons . . . ." A.P.A. § 202-a(1); *see* Melnitsky Aff. Ex E. As with their section 202(5) claim, Plaintiffs' dissatisfaction with the substance of the amended regulations does not amount to a section 202-a claim.

The only case cited by Plaintiffs, *Medical Society of New York, Inc. v. Levin*, 185 Misc. 2d 536 (Sup. Ct. N.Y. Cnty. 2000), underscores the feebleness of their challenge to the Division's regulatory impact statement. In *Levin*, the court identified specific deficiencies in the agency's regulatory impact statement — namely, that it failed to assess the costs of complying with the new regulations, that it failed to address whether the new regulations would generate additional paperwork, that it failed to discuss alternatives and why those alternatives were not adopted, and that it did not include a regulatory flexibility analysis. *Id.* at 545–47. Here, by contrast, Plaintiffs do not identify a single deficiency in the Division's regulatory impact statement other than to allege in conclusory fashion that it violated section 202-a(1). To the contrary, the Division's regulatory impact statement adequately assessed the amended regulations' effects on both tenants and landlords. Plaintiffs' challenge to the regulatory impact statement is nothing more than a substantive disagreement with the amended regulations; it does not state a claim that the regulatory impact statement inadequately assessed that impact in violation of the Administrative Procedure Act.

L. To the Extent Plaintiffs' Complaint Could Be Read To Assert a Separation of Powers Challenge To the Amended Regulations as a Whole, That Challenge Is Baseless

Finally, to the extent that, separate and apart from the individual challenges to each amended regulation, Plaintiffs' complaint could be read to challenge the amended regulations as a whole on the ground that the Division somehow engaged in legislative policy-making rather than administrative rulemaking, that challenge is meritless. *See* PI Br. at 32–38.

The Legislature gave the Division a detailed policy mandate governing the substance of its regulations, *see* Unconsol. L. §§ 26-511–26-517, and each of the Division's amended regulations is grounded in those policy directives, as shown above. Plaintiffs' argument (PI Br. at 35–36) that the Division wrote on a "clean slate" borders on the frivolous; the Division did not issue new regulations in a previously unregulated area but rather *amended* its existing regulations in an area that the Legislature has directed it to regulate. And the amended regulations draw on the Division's extensive experience in administering the rent stabilization laws (as explained above), addressing situations that (for example) the Division has seen are susceptible to manipulation to subvert the rent stabilization laws.

Boreali v. Axelrod, 71 N.Y.2d 1 (1987), could not be further afield. In *Boreali*, the Public Health Council, armed with nothing more than a statute enabling it to address "the preservation and improvement of public health in the state of New York," enacted an entirely new and comprehensive series of regulations banning smoking in a wide variety of indoor areas open to the public — even though that area had never before been regulated by the Council, and even though the new

regulations were aimed not only at improving public health but also at social and economic concerns that the enabling statute did not authorize the Council to address. 71 N.Y.2d at 6–7, 11–14.

Courts have thus consistently refused to hold that *Boreali* prohibits an agency's regulations where, as here, the regulations track the agency's statutory mandate. *E.g.*, *Rent Stabilization Ass'n of N.Y.C., Inc. v. Higgins*, 83 N.Y.2d 156, 170 (1993) (distinguishing *Boreali* and holding that Division acted within its statutory mandate in passing regulations expanding category of family members protected from eviction); *Festa v. Leshen*, 145 A.D.2d 49, 51, 62–63 (1st Dep't 1989) (holding that "the succession provisions of the Rent Stabilization Code are the produc[t] of a proper exercise of [the Division's] statutory authority to promulgate amendments to the Code" and distinguishing *Boreali*). "[B]y delegating to [the Division] the authority to adopt an amendment to the [rent stabilization regulations] which 'protects tenants and the public interest,' the Legislature clearly provided the agency with a broad mandate, which would inevitably require some changes in the legal relationship between landlords and tenants." *Festa*, 145 A.D.2d at 61 (quoting Unconsol. L. § 26-511). The Division's amended regulations here implement that statutory authority, and thus Plaintiffs' separation-of-powers challenge to the regulations as a whole fails as a matter of law.

POINT III

THE BALANCE OF THE EQUITIES TIPS SHARPLY IN THE DIVISION'S FAVOR BECAUSE ENJOINING THE REGULATIONS WOULD STRIP TENANTS OF VITAL PROCEDURAL SAFEGUARDS

Plaintiffs ask this Court to halt the operations of a governmental unit that has been operational for years and the enforcement of regulations that have been in effect for months. Compl. ¶¶ 1 & 6; *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, *C.J.*, in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'") (internal quotation marks omitted). Their requested injunction would strip vulnerable tenants of important procedural protections. And it would do so even though Plaintiffs have not alleged that a *single* rent overcharge proceeding claiming a *single* violation of a *single* amended regulation has been brought against a *single* Plaintiff — all to protect their supposed right "to charge the maximum rent legally permitted." PI Br. at 40. It would, in short, be inequitable as to the parties here and against the public interest. *See Lombard v. Station Square Inn Apartments Corp.*, 94 A.D.3d 717, 721–22 (2d Dep't 2012).

CONCLUSION

For these reasons, Plaintiffs' preliminary injunction motion should be denied and their complaint dismissed.[11]

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[11] Plaintiffs' brief requests expedited discovery (PI Br. at 54–56), but Justice Steinhardt has already denied that motion. Melnitsky Aff. Ex. G.

Dated: New York, New York
March 26, 2014

Respectfully submitted,

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APPENDIX OF RELEVANT RENT STABILIZTION STATUTES AND REGULATIONS

STATUTES

Unconsolidated Law § 26-511

Real estate industry stabilization association.

a. The real estate industry stabilization association registered with the department of housing preservation and development is hereby divested of all its powers and authority under this law.

b. The stabilization code heretofore promulgated by such association, as approved by the department of housing preservation and development, is hereby continued to the extent that it is not inconsistent with law. Such code may be amended from time to time, provided, however, that no such amendments shall be promulgated except by action of the commissioner of the division of housing and community renewal and provided further, that prior to the adoption of any such amendments, the commissioner shall (i) submit the proposed amendments to the commissioner of the department of housing preservation and development and allow such commissioner thirty days to make comments or recommendations on the proposed amendments, (ii) review the comments or recommendations, if any, made pursuant to clause (i) of this subdivision and make any revisions to the proposed amendments which the commissioner of the division of housing and community renewal deems appropriate provided that any such review and revision shall be completed within thirty days of receipt of such comments or recommendations and (iii) thereafter hold a public hearing on the proposed amendments. No provision of such code shall impair or diminish any right or remedy granted to any party by this law or any other provision of law.

c. A code shall not be adopted hereunder unless it appears to the division of housing and community renewal that such code:

> (1) provides safeguards against unreasonably high rent increases and, in general, protects tenants and the public interest, and does not impose any industry wide schedule of rents or minimum rentals;
>
> (2) requires owners not to exceed the level of lawful rents as provided by this law;

(3) provides for a cash refund or a credit, to be applied against future rent, in the amount of any rent overcharge collected by an owner and any penalties, costs, attorneys' fees and interest from the date of the overcharge at the rate of interest payable on a judgment pursuant to section five thousand four of the civil practice law and rules for which the owner is assessed;

(4) includes provisions requiring owners to grant a one or two year vacancy or renewal lease at the option of the tenant except where a mortgage or mortgage commitment existing as of April first, nineteen hundred sixty-nine, provides that the mortgagor shall not grant a one year lease;

(5) includes guidelines with respect to such additional rent and related matters as, for example, security deposits, advance rental payments, the use of escalator clauses in leases and provision for increase in rentals for garages and other ancillary facilities, so as to insure that the level of fair rent increase established under this law will not be subverted and made ineffective, provided further that notwithstanding any inconsistent provision of law, rule, regulation, contract, agreement, lease or other obligation, no owner, in addition to the authorized collection of rent, shall demand, receive or retain a security deposit or advance payment which exceeds the rent of one month for or in connection with the use or occupancy of a housing accommodation by (a) any tenant who is sixty-five years of age or older or (b) any tenant who is receiving disability retirement benefit or supplemental security income pursuant to the federal social security act for any lease or lease renewal entered into after July 1, 2002;

(5-a) provides that, notwithstanding any provision of this chapter, the legal regulated rent for any vacancy lease entered into after the effective date of this paragraph shall be as hereinafter provided in this paragraph. The previous legal regulated rent for such housing accommodation shall be increased by the following: (i) if the vacancy lease is for a term of two years, twenty percent of the previous legal regulated rent; or (ii) if the vacancy lease is for a term of one year the increase shall be twenty percent of the previous legal regulated rent less an amount equal to the difference between (a) the two year renewal lease guideline promulgated by the guidelines board of the city of New York applied to the previous legal regulated rent

and (b) the one year renewal lease guideline promulgated by the guidelines board of the city of New York applied to the previous legal regulated rent. In addition, if the legal regulated rent was not increased with respect to such housing accommodation by a permanent vacancy allowance within eight years prior to a vacancy lease executed on or after the effective date of this paragraph, the legal regulated rent may be further increased by an amount equal to the product resulting from multiplying such previous legal regulated rent by six-tenths of one percent and further multiplying the amount of rent increase resulting therefrom by the greater of (A) the number of years since the imposition of the last permanent vacancy allowance, or (B) if the rent was not increased by a permanent vacancy allowance since the housing accommodation became subject to this chapter, the number of years that such housing accommodation has been subject to this chapter. Provided that if the previous legal regulated rent was less than three hundred dollars the total increase shall be as calculated above plus one hundred dollars per month. Provided, further, that if the previous legal regulated rent was at least three hundred dollars and no more than five hundred dollars in no event shall the total increase pursuant to this paragraph be less than one hundred dollars per month. Such increase shall be in lieu of any allowance authorized for the one or two year renewal component thereof, but shall be in addition to any other increases authorized pursuant to this chapter including an adjustment based upon a major capital improvement, or a substantial modification or increase of dwelling space or services, or installation of new equipment or improvements or new furniture or furnishings provided in or to the housing accommodation pursuant to this section. The increase authorized in this paragraph may not be implemented more than one time in any calendar year, notwithstanding the number of vacancy leases entered into in such year.

(6) provides criteria whereby the commissioner may act upon applications by owners for increases in excess of the level of fair rent increase established under this law provided, however, that such criteria shall provide (a) as to hardship applications, for a finding that the level of fair rent increase is not sufficient to enable the owner to maintain approximately the same average annual net income (which shall be computed without regard to debt service, financing costs or management fees) for the three year period ending on or within six months of the date of an application pursuant to such criteria as compared with annual

net income, which prevailed on the average over the period nineteen hundred sixty-eight through nineteen hundred seventy, or for the first three years of operation if the building was completed since nineteen hundred sixty-eight or for the first three fiscal years after a transfer of title to a new owner provided the new owner can establish to the satisfaction of the commissioner that he or she acquired title to the building as a result of a bona fide sale of the entire building and that the new owner is unable to obtain requisite records for the fiscal years nineteen hundred sixty-eight through nineteen hundred seventy despite diligent efforts to obtain same from predecessors in title and further provided that the new owner can provide financial data covering a minimum of six years under his or her continuous and uninterrupted operation of the building to meet the three year to three year comparative test periods herein provided; and (b) as to completed building-wide major capital improvements, for a finding that such improvements are deemed depreciable under the Internal Revenue Code and that the cost is to be amortized over a seven-year period, based upon cash purchase price exclusive of interest or service charges. Notwithstanding anything to the contrary contained herein, no hardship increase granted pursuant to this paragraph shall, when added to the annual gross rents, as determined by the commissioner, exceed the sum of, (i) the annual operating expenses, (ii) an allowance for management services as determined by the commissioner, (iii) actual annual mortgage debt service (interest and amortization) on its indebtedness to a lending institution, an insurance company, a retirement fund or welfare fund which is operated under the supervision of the banking or insurance laws of the state of New York or the United States, and (iv) eight and one-half percent of that portion of the fair market value of the property which exceeds the unpaid principal amount of the mortgage indebtedness referred to in subparagraph (iii) of this paragraph. Fair market value for the purposes of this paragraph shall be six times the annual gross rent. The collection of any increase in the stabilized rent for any apartment pursuant to this paragraph shall not exceed six percent in any year from the effective date of the order granting the increase over the rent set forth in the schedule of gross rents, with collectability of any dollar excess above said sum to be spread forward in similar increments and added to the stabilized rent as established or set in future years;

(6-a) provides criteria whereby as an alternative to the hardship application provided under paragraph six of this subdivision owners of buildings acquired by the same owner or a related entity owned by the same principals three years prior to the date of application may apply to the division for increases in excess of the level of applicable guideline increases established under this law based on a finding by the commissioner that such guideline increases are not sufficient to enable the owner to maintain an annual gross rent income for such building which exceeds the annual operating expenses of such building by a sum equal to at least five percent of such gross rent. For the purposes of this paragraph, operating expenses shall consist of the actual, reasonable, costs of fuel, labor, utilities, taxes, other than income or corporate franchise taxes, fees, permits, necessary contracted services and noncapital repairs, insurance, parts and supplies, management fees and other administrative costs and mortgage interest. For the purposes of this paragraph, mortgage interest shall be deemed to mean interest on a bona fide mortgage including an allocable portion of charges related thereto. Criteria to be considered in determining a bona fide mortgage other than an institutional mortgage shall include; condition of the property, location of the property, the existing mortgage market at the time the mortgage is placed, the term of the mortgage, the amortization rate, the principal amount of the mortgage, security and other terms and conditions of the mortgage. The commissioner shall set a rental value for any unit occupied by the owner or a person related to the owner or unoccupied at the owner's choice for more than one month at the last regulated rent plus the minimum number of guidelines increases or, if no such regulated rent existed or is known, the commissioner shall impute a rent consistent with other rents in the building. The amount of hardship increase shall be such as may be required to maintain the annual gross rent income as provided by this paragraph. The division shall not grant a hardship application under this paragraph or paragraph six of this subdivision for a period of three years subsequent to granting a hardship application under the provisions of this paragraph. The collection of any increase in the rent for any housing accommodation pursuant to this paragraph shall not exceed six percent in any year from the effective date of the order granting the increase over the rent set forth in the schedule of gross rents, with collectability of any dollar excess above said sum to be spread forward in similar increments and added to the rent as established or set in future years. No

application shall be approved unless the owner's equity in such building exceeds five percent of: (i) the arms length purchase price of the property; (ii) the cost of any capital improvements for which the owner has not collected a surcharge; (iii) any repayment of principal of any mortgage or loan used to finance the purchase of the property or any capital improvements for which the owner has not collected a surcharge and (iv) any increase in the equalized assessed value of the property which occurred subsequent to the first valuation of the property after purchase by the owner. For the purposes of this paragraph, owner's equity shall mean the sum of (i) the purchase price of the property less the principal of any mortgage or loan used to finance the purchase of the property, (ii) the cost of any capital improvement for which the owner has not collected a surcharge less the principal of any mortgage or loan used to finance said improvement, (iii) any repayment of the principal of any mortgage or loan used to finance the purchase of the property or any capital improvement for which the owner has not collected a surcharge, and (iv) any increase in the equalized assessed value of the property which occurred subsequent to the first valuation of the property after purchase by the owner.

(7) establishes a fair and consistent formula for allocation of rental adjustment to be made upon granting of an increase by the commissioner;

(8) requires owners to maintain all services furnished by them on May thirty-first, nineteen hundred sixty-eight, or as otherwise provided by law, in connection with the leasing of the dwelling units covered by this law;

(9) provides that an owner shall not refuse to renew a lease except:

> (a) where he or she intends in good faith to demolish the building and has obtained a permit therefor from the department of buildings; or
>
> (b) where he or she seeks to recover possession of one or more dwelling units for his or her own personal use and occupancy as his or her primary residence in the city of New York and/or for the use and occupancy of a member of his or her immediate family as his or her primary residence in the city of New York, provided however, that

this subparagraph shall not apply where a tenant or the spouse of a tenant lawfully occupying the dwelling unit is sixty-two years of age or older, or has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent the tenant from engaging in any substantial gainful employment, unless such owner offers to provide and if requested, provides an equivalent or superior housing accommodation at the same or lower stabilized rent in a closely proximate area. The provisions of this subparagraph shall only permit one of the individual owners of any building to recover possession of one or more dwelling units for his or her own personal use and/or for that of his or her immediate family. Any dwelling unit recovered by an owner pursuant to this subparagraph shall not for a period of three years be rented, leased, subleased or assigned to any person other than a person for whose benefit recovery of the dwelling unit is permitted pursuant to this subparagraph or to the tenant in occupancy at the time of recovery under the same terms as the original lease. This subparagraph shall not be deemed to establish or eliminate any claim that the former tenant of the dwelling unit may otherwise have against the owner. Any such rental, lease, sublease or assignment during such period to any other person may be subject to a penalty of a forfeiture of the right to any increases in residential rents in such building for a period of three years; or

(c) where the housing accommodation is owned by a hospital, convent, monastery, asylum, public institution, college, school dormitory or any institution operated exclusively for charitable or educational purposes on a non-profit basis and either:

> (i) the tenant's initial tenancy commenced after the owner acquired the property and the owner requires the unit in connection with its charitable or educational purposes including, but not limited to, housing for affiliated persons; provided that with respect to any tenant whose right to

occupancy commenced prior to July first, nineteen hundred seventy-eight pursuant to a written lease or written rental agreement and who did not receive notice at the time of the execution of the lease that his or her tenancy was subject to non-renewal, the institution shall not have the right to refuse to renew pursuant to this subparagraph; provided further that a tenant who was affiliated with the institution at the commencement of his or her tenancy and whose affiliation terminates during such tenancy shall not have the right to a renewal lease; or

(ii) the owner requires the unit for a non-residential use in connection with its charitable or educational purposes; or

(d) on specified grounds set forth in the code consistent with the purposes of this law; or

(e) where a tenant violates the provisions of paragraph twelve of this sub- division.

(9-a) provides that where an owner has submitted to and the attorney general has accepted for filing an offering plan to convert the building to cooperative or condominium ownership and the owner has presented the offering plan to the tenants in occupancy, any renewal or vacancy lease may contain a provision that if a building is converted to cooperative or condominium ownership pursuant to an eviction plan, as provided in section three hundred fifty-two-eeee of the general business law, the lease may only be cancelled upon the expiration of three years after the plan has been declared effective, and upon ninety days notice to the tenant that such period has expired or will be expiring.

(10) specifically provides that if an owner fails to comply with any order of the commissioner or is found by the commissioner to have harassed a tenant to obtain vacancy of his or her housing accommodation, he or she shall, in addition to being subject to any other penalties or remedies permitted by law, be barred thereafter from applying for or collecting any further rent increase. The compliance by the owner with the order of the commissioner or the restoration of the tenant subject to

harassment to the housing accommodation or compliance with such other remedy as shall be determined by the commissioner to be appropriate shall result in the prospective elimination of such sanctions;

(11) includes provisions which may be peculiarly applicable to hotels including specifically that no owner shall refuse to extend or renew a tenancy for the purpose of preventing a hotel tenant from becoming a permanent tenant; and

(12) permits subletting of units subject to this law pursuant to section two hundred twenty-six-b of the real property law provided that (a) the rental charged to the subtenant does not exceed the stabilized rent plus a ten percent surcharge payable to the tenant if the unit sublet was furnished with the tenant's furniture; (b) the tenant can establish that at all times he or she has maintained the unit as his or her primary residence and intends to occupy it as such at the expiration of the sublease; (c) an owner may terminate the tenancy of a tenant who sublets or assigns contrary to the terms of this paragraph but no action or proceeding based on the non-primary residence of a tenant may be commenced prior to the expiration date of his or her lease; (d) where an apartment is sublet the prime tenant shall retain the right to a renewal lease and the rights and status of a tenant in occupancy as they relate to conversion to condominium or cooperative ownership; (e) where a tenant violates the provisions of subparagraph (a) of this paragraph the subtenant shall be entitled to damages of three times the overcharge and may also be awarded attorneys fees and interest from the date of the overcharge at the rate of interest payable on a judgment pursuant to section five thousand four of the civil practice law and rules; (f) the tenant may not sublet the unit for more than a total of two years, including the term of the proposed sublease, out of the four-year period preceding the termination date of the proposed sublease. The provisions of this subparagraph shall only apply to subleases commencing on and after July first, nineteen hundred eighty-three; (g) for the purposes of this paragraph only, the term of the proposed sublease may extend beyond the term of the tenant's lease. In such event, such sublease shall be subject to the tenant's right to a renewal lease. The subtenant shall have no right to a renewal lease. It shall be unreasonable for an owner to refuse to consent to a sublease solely because such sublease extends beyond the tenant's lease; and (h) notwithstanding the provisions of section two hundred

twenty-six-b of the real property law, a not-for-profit hospital shall have the right to sublet any housing accommodation leased by it to its affiliated personnel without requiring the landlord's consent to any such sublease and without being bound by the provisions of subparagraphs (b), (c) and (f) of this paragraph. Commencing with the effective date of this subparagraph, whenever a not-for-profit hospital executes a renewal lease for a housing accommodation, the legal regulated rent shall be increased by a sum equal to fifteen percent of the previous lease rental for such housing accommodation, hereinafter referred to as a vacancy surcharge, unless the landlord shall have received within the seven year period prior to the commencement date of such renewal lease any vacancy increases or vacancy surcharges allocable to the said housing accommodation. In the event the landlord shall have received any such vacancy increases or vacancy surcharges during such seven year period, the vacancy surcharge shall be reduced by the amount received by any such vacancy increase or vacancy surcharges.

(13) provides that an owner is entitled to a rent increase where there has been a substantial modification or increase of dwelling space or an increase in the services, or installation of new equipment or improvements or new furniture or furnishings provided in or to a tenant's housing accommodation, on written tenant consent to the rent increase. In the case of a vacant housing accommodation, tenant consent shall not be required. The permanent increase in the legal regulated rent for the affected housing accommodation shall be one-fortieth, in the case of a building with thirty-five or fewer housing accommodations, or one-sixtieth, in the case of a building with more than thirty-five housing accommodations where such permanent increase takes effect on or after September twenty-fourth, two thousand eleven, of the total cost incurred by the landlord in providing such modification or increase in dwelling space, services, furniture, furnishings or equipment, including the cost of installation, but excluding finance charges. Provided further that an owner who is entitled to a rent increase pursuant to this paragraph shall not be entitled to a further rent increase based upon the installation of similar equipment, or new furniture or furnishings within the useful life of such new equipment, or new furniture or furnishings.

(14) provides that where the amount of rent charged to and paid by the tenant is less than the legal regulated rent for the

housing accommodation, the amount of rent for such housing accommodation which may be charged upon renewal or upon vacancy thereof may, at the option of the owner, be based upon such previously established legal regulated rent, as adjusted by the most recent applicable guidelines increases and any other increases authorized by law. Where, subsequent to vacancy, such legal regulated rent, as adjusted by the most recent applicable guidelines increases and any other increases authorized by law is two thousand dollars or more per month or, for any housing accommodation which is or becomes vacant on or after the effective date of the rent act of 2011, is two thousand five hundred dollars or more per month, such housing accommodation shall be excluded from the provisions of this law pursuant to section 26-504.2 of this chapter.

d. (1) Each owner subject to the rent stabilization law shall furnish to each tenant signing a new or renewal lease, a rider describing the rights and duties of owners and tenants as provided for under the rent stabilization law of nineteen hundred sixty-nine. Such publication shall conform to the intent of section 5-702 of the general obligations law and shall be attached as an addendum to the lease. Upon the face of each lease, in bold print, shall appear the following: "Attached to this lease are the pertinent rules and regulations governing tenants and landlords' rights under the rent stabilization law of nineteen hundred sixty-nine".

(2) The rider shall be in a form promulgated by the commissioner in larger type than the lease and shall be utilized as provided in paragraph one of this subdivision.

e. Each owner of premises subject to the rent stabilization law shall furnish to each tenant signing a new or renewal lease, a copy of the fully executed new or renewal lease bearing the signatures of owner and tenant and the beginning and ending dates of the lease term, within thirty days from the owner's receipt of the new or renewal lease signed by the tenant.

Unconsolidated Law § 26-512

Stabilization provisions.

a. No owner of property subject to this law shall charge or collect any rent in excess of the initial legal regulated rent or adjusted initial legal

regulated rent until the end of any lease or other rental agreement in effect on the local effective date until such time as a different legal regulated rent shall be authorized pursuant to guidelines adopted by a rent guidelines board.

[Subsections (b)–(f) omitted]

Unconsolidated Law § 26-514

Maintenance of services.

In order to collect a rent adjustment authorized pursuant to the provisions of subdivision d of section 26-510 of this chapter an owner must file with the state division of housing and community renewal, on a form which the commissioner shall prescribe, a written certification that he or she is maintaining and will continue to maintain all services furnished on the date upon which the emergency tenant protection act of nineteen seventy-four becomes a law or required to be furnished by any state law or local law, ordinance or regulation applicable to the premises. In addition to any other remedy afforded by law, any tenant may apply to the state division of housing and community renewal, for a reduction in the rent to the level in effect prior to its most recent adjustment and for an order requiring services to be maintained as provided in this section, and the commissioner shall so reduce the rent if it is found that the owner has failed to maintain such services. The owner shall also be barred from applying for or collecting any further rent increases. The restoration of such services shall result in the prospective elimination of such sanctions. The owner shall be supplied with a copy of the application and shall be permitted to file an answer thereto. A hearing may be held upon the request of either party, or the commissioner may hold a hearing upon his or her own motion. The commissioner may consolidate the proceedings for two or more petitions applicable to the same building or group of buildings or development. If the commissioner finds that the owner has knowingly filed a false certification, it shall, in addition to abating the rent, assess the owner with the reasonable costs of the proceeding, including reasonable attorneys' fees, and impose a penalty not in excess of two hundred fifty dollars for each false certification.

The amount of the reduction in rent ordered by the state division of housing and community renewal under this subdivision shall be reduced by any credit, abatement or offset in rent which the tenant has received pursuant to section two hundred thirty-five-b of the real

property law, that relates to one or more conditions covered by such order.

Unconsolidated Law § 26-516

Enforcement and procedures.

a. 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. In no event shall such treble damage penalty be assessed against an owner based solely on said owner's failure to file a timely or proper initial or annual rent registration statement. 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. (i) Except as to complaints filed pursuant to clause (ii) of this paragraph, the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement, (or, if more recently filed, the initial registration statement) plus in each case any subsequent lawful increases and adjustments. Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter. (ii) As to complaints filed within ninety days of the initial registration of a housing accommodation, the legal regulated rent shall be deemed to be the rent charged on the date four years prior to the date of the initial registration of the housing accommodation (or, if the housing accommodation was subject to this chapter for less than four years, the initial legal regulated rent) plus in each case, any lawful increases and adjustments. Where the rent charged on the date four years prior to the date of the initial registration of the accommodation cannot be established, such rent shall be established by the division.

Where the rent charged on the date four years prior to the date of initial registration of the housing accommodation cannot be established, such rent shall be established by the division provided

that where a rent is established based on rentals determined under the provisions of the local emergency housing rent control act such rent must be adjusted to account for no less than the minimum increases which would be permitted if the housing accommodation were covered under the provisions of this chapter. Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter.

(1) The order of the state division of housing and community renewal shall apportion the owner's liability between or among two or more tenants found to have been overcharged by such owner during their particular tenancy of a unit.

(2) Except as provided under clauses (i) and (ii) of this paragraph, a complaint under this subdivision shall be filed with the state division of housing and community renewal within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed. (i) No penalty of three times the overcharge may be based upon an overcharge having occurred more than two years before the complaint is filed or upon an overcharge which occurred prior to April first, nineteen hundred eighty-four. (ii) Any complaint based upon overcharges occurring prior to the date of filing of the initial rent registration as provided in section 26-517 of this chapter shall be filed within ninety days of the mailing of notice to the tenant of such registration. This paragraph shall preclude examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this subdivision.

(3) Any affected tenant shall be notified of and given an opportunity to join in any complaint filed by an officer or employee of the state division of housing and community renewal.

(4) An owner found to have overcharged may be assessed the reasonable costs and attorney's fees of the proceeding and interest from the date of the overcharge at the rate of interest payable on a judgment pursuant to section five thousand four of the civil practice law and rules.

(5) The order of the state division of housing and community renewal awarding penalties may, upon the expiration of the period in which the owner may institute a proceeding pursuant to article seventy-eight of the civil practice law and rules, be filed and enforced by a tenant in the same manner as a judgment or not in excess of twenty percent thereof per month may be offset against any rent thereafter due the owner.

b. In addition to issuing the specific orders provided for by other provisions of this law, the state division of housing and community renewal shall be empowered to enforce this law and the code by issuing, upon notice and a reasonable opportunity for the affected party to be heard, such other orders as it may deem appropriate.

c. If the owner is found by the commissioner:

(1) to have violated an order of the division the commissioner may impose by administrative order after hearing, a civil penalty in the amount of one thousand dollars for the first such offense and two thousand dollars for each subsequent offense; or

(2) to have harassed a tenant to obtain vacancy of his or her housing accommodation, the commissioner may impose by administrative order after hearing, a civil penalty for any such violation. Such penalty shall be in the amount of two thousand dollars for a first such offense and up to ten thousand dollars for each subsequent offense or for a violation consisting of conduct directed at the tenants of more than one housing accommodation.

Such order shall be deemed a final determination for the purposes of judicial review. Such penalty may, upon the expiration of the period for seeking review pursuant to article seventy-eight of the civil practice law and rules, be docketed and enforced in the manner of a judgment of the supreme court.

d. Any proceeding pursuant to article seventy-eight of the civil practice law and rules seeking review of any action pursuant to this chapter shall be brought within sixty days of the expiration of the ninety day period and any extension thereof provided in subdivision h of this section or the rendering of a determination, whichever is later. Any action or proceeding brought by or against the commissioner under this

law shall be brought in the county in which the housing accommodation is located.

e. Violations of this law, or of the code and orders issued pursuant thereto may be enjoined by the supreme court upon proceedings commenced by the state division of housing and community renewal which shall not be required to post bond.

f. In furtherance of its responsibility to enforce this law, the state division of housing and community renewal shall be empowered to administer oaths, issue subpoenas, conduct investigations, make inspections and designate officers to hear and report. The division shall safeguard the confidentiality of information furnished to it at the request of the person furnishing same, unless such information must be made public in the interest of establishing a record for the future guidance of persons subject to this law.

g. Any owner who has duly registered a housing accommodation pursuant to section 26-517 of this chapter shall not be required to maintain or produce any records relating to rentals of such accommodation for more than four years prior to the most recent registration or annual statement for such accommodation.

h. The state division of housing and community renewal may, by regulation, provide for administrative review of all orders and determinations issued by it pursuant to this chapter. Any such regulation shall provide that if a petition for such review is not determined within ninety days after it is filed, it shall be deemed to be denied. However, the division may grant one extension not to exceed thirty days with the consent of the party filing such petition; any further extension may only be granted with the consent of all parties to the petition. No proceeding may be brought pursuant to article seventy-eight of the civil practice law and rules to challenge any order or determination which is subject to such administrative review unless such review has been sought and either (1) a determination thereon has been made or (2) the ninety day period provided for determination of the petition for review (or any extension thereof) has expired.

Unconsolidated Law § 26-517

Rent registration.

a. Each housing accommodation which is subject to this law shall be registered by the owner thereof with the state division of housing and community renewal prior to July first, nineteen hundred eighty-four

upon forms prescribed by the commissioner. The data to be provided on such forms shall include the following: (1) the name and address of the building or group of buildings or development in which such housing accommodation is located and the owner and the tenant thereof; (2) the number of housing accommodations in the building or group of buildings or development in which such housing accommodation is located; (3) the number of housing accommodations in such building or group of buildings or development subject to this code and the number of such housing accommodations subject to the local emergency housing rent control act; (4) the rent charged on the registration date; (5) the number of rooms in such housing accommodation; and (6) all services provided on the date that the housing accommodation became subject to this chapter.

a-1. Within thirty days of changing his address, the managing agent or, if there is no managing agent, the owner, of a building or group of buildings or development, such agent or owner shall advise the state division of housing and community renewal and all tenants of his new address.

b. Registration pursuant to this section shall not be subject to the freedom of information law provided that registration information relative to a tenant, owner, lessor or subtenant shall be made available to such party or his or her authorized representative.

c. Housing accommodations which become subject to this chapter after the initial registration period must be registered within ninety days thereafter. Registration of housing accommodations subject to the local emergency housing rent control act immediately prior to the date of initial registration as provided in this section shall include, in addition to the items listed above, where existing, the maximum base rent immediately prior to the date that such housing accommodations become subject to this chapter.

d. Copies of the registration shall be filed with the state division of housing and community renewal in such place or places as it may require. In addition, one copy of that portion of the registration statement which pertains to the tenant's unit must be mailed by the owner to the tenant in possession at the time of initial registration or to the first tenant in occupancy if the apartment is vacant at the time of initial registration.

e. The failure to file a proper and timely initial or annual rent registration statement shall, until such time as such registration is

filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement or if no such statements have been filed, the legal regulated rent in effect on the date that the housing accommodation became subject to the registration requirements of this section. The filing of a late registration shall result in the prospective elimination of such sanctions and provided that increases in the legal regulated rent were lawful except for the failure to file a timely registration, the owner, upon the service and filing of a late registration, shall not be found to have collected an overcharge at any time prior to the filing of the late registration. If such late registration is filed subsequent to the filing of an overcharge complaint, the owner shall be assessed a late filing surcharge for each late registration in an amount equal to fifty percent of the timely rent registration fee.

f. An annual statement shall be filed containing the current rent for each unit and such other information contained in subdivision a of this section as shall be required by the division. The owner shall provide each tenant then in occupancy with a copy of that portion of such annual statement as pertains to the tenant's unit.

g. Each housing accommodation for which a timely registration statement was filed between April first, nineteen hundred eighty-four and June thirtieth, nineteen hundred eighty-four, pursuant to subdivision a of this section shall designate the rent charged on April first, nineteen hundred eighty-four, as the rent charged on the registration date.

REGULATIONS

Delegation of Authority

9 NYCRR § 2520.4

Delegation of authority

The Commissioner of Housing and Community Renewal may delegate to a deputy commissioner, an assistant commissioner, a rent administrator or any other person or persons, the authority to carry out any of the duties and powers granted to him by the New York City Rent Stabilization Law or this Code, and the Emergency Tenant Protection Act of Nineteen Seventy-four as amended.

Designation of Unit to Investigate and Prosecute Violations of Rent Stabilization Laws

9 NYCRR § 2520.5(o)

Designations

(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. However, nothing contained herein shall limit the mission and authority of the Office of Rent Administration to administer and enforce the ETPA, the RSL, and the City and State rent laws and all such regulations promulgated thereunder.

Definitions: Legal Regulated Rent and Base Date

9 NYCRR § 2520.6(e) & (f)

Definitions

(e) Legal regulated rent. The rent charged on the base date set forth in subdivision (f) of this section, plus any subsequent lawful increases and adjustments.

(f) Base date. For the purpose of proceedings pursuant to sections 2522.3 and 2526.1 of this Title, base date shall mean the date which is the most recent of:

> (1) The date four years prior to the date of the filing of such appeal or complaint;
>
> (2) The date on which the housing accommodation first became subject to the RSL; o
>
> (3) April 1, 1984, for complaints filed on or before March 31, 1988 for housing accommodations for which initial registrations were required to be filed by June 30, 1984, and for which a timely challenge was not filed.

Preferential Rent Must be Previously Established and Set Forth in Vacancy and Renewal Lease

9 NYCRR § 2521.2(b) & (c)

Preferential Rents

(b) Such legal regulated rent as well as preferential rent shall be ["previously established" where:

> (1) the legal regulated rent is] set forth in [either] the vacancy lease or renewal lease pursuant to which the preferential rent is charged. [; or]
>
> [(2) for a vacancy lease or renewal lease which set forth a preferential rent and which was in effect on or before June 19, 2003, and the legal regulated rent was not set forth in either such vacancy lease or renewal lease, the legal regulated rent was set forth in an annual rent registration served upon the tenant in accordance with the applicable provisions of law, except that the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to section 2526.1 or 2522.3 of this Title shall not be examined.]

(c) Where the amount of the legal regulated rent is set forth either in a vacancy lease or renewal lease where a preferential rent is charged, [the amount of the legal regulated rent shall not be required to be set forth in any subsequent renewal of such lease, except that] the owner

shall be required to maintain, and submit where required to by DHCR, the rental history of the housing accommodation immediately preceding such preferential rent to the present which may be prior to the four-year period preceding the filing of a complaint [pursuant to section 2526.1 or 2522.3 of this Title shall not be examined].

MCI Increases are Disallowed due to Hazardous Violation

9 NYCRR § 2522.4(a)(13)

Adjustment of legal regulated rent

> (13) The DHCR shall not grant an owner's application for a rental adjustment pursuant to this subdivision, in whole or in part, if it is determined by the DHCR, based upon information received from any tenant or tenant representative or upon a review conducted on DHCR's own initiative that, as of the date of such application for [prior to the granting of approval to collect] such adjustment that the owner is not maintaining all required services, or that there are current immediately hazardous violations of any municipal, county, State or Federal law which relate to the maintenance of such services. However, as determined by the DHCR, such application may either be granted upon condition that such services will be restored within a reasonable time, or dismissed with leave to refile within sixty days which time period shall stay the two year filing requirement provided in section (a)(8) of this paragraph. [and] In addition, certain tenant-caused violations may be excepted.

Tenant's Right Lease Rider

9 NYCRR §2522.5(c)(1)

Lease agreements

> (1) For housing accommodations subject to this Code, an owner shall furnish to each tenant signing a vacancy or renewal lease, a rider in a form promulgated or approved by the DHCR, in larger type than the lease, describing the rights and duties of owners and tenants as provided for under the RSL including a detailed description in a format as prescribed by DHCR of how the rent was adjusted from the prior legal rent. Such rider shall conform to the "plain English" requirements of section 5-702 of

the General Obligations Law[,]. Copies of the form as promulgated by DHCR shall also be available in [Spanish, and] all languages that may be required pursuant to DHCR's language access plan. The rider shall be attached as an addendum to the lease. Upon the face of each rider, in bold print, in English and any other language as required by the DHCR language access plan, shall appear the following: "ATTACHED RIDER SETS FORTH RIGHTS AND OBLIGATIONS OF TENANTS AND LANDLORDS UNDER THE RENT STABILIZATION LAW." [("LOS DERECHOS Y RESPONSABILIDADES DE INQUILINOS Y CASEROS ESTAN DISPONIBLE EN ESPANOL")].

(i) For vacancy leases, such rider shall in addition also include a notice of the prior legal regulated rent, if any, which was in effect immediately prior to the vacancy, an explanation, and in a format prescribed by DHCR, [of] how the rental amount provided for in the vacancy lease has been computed above the amount shown in the most recent annual registration statement, as well as the prior lease, and a statement that any increase above the amount set forth in such registration statement is in accordance with adjustments permitted by the rent guidelines board and this Code.

(ii) Such rider shall also set forth that the tenant may, within sixty days of the execution of the lease, require the owner to provide the documentation directly to the tenant supporting the detailed description regarding the adjustment of the prior legal rent pursuant to paragraph (i) of this subdivision. The owner shall provide such documentation within thirty days of that request.

(iii) The method of service of the lease rider, the tenant request for documentation, and the owner's provision of documentation, together with proof of same, shall conform to the requirements set forth in the lease rider itself or such other bulletin or document rendered pursuant to section 2527.11.

[(ii)] (iv) [re-numbered only – text remains the same]

9 NYCRR §2522.5(c)(3)

(3) [Upon complaint by the] Where a tenant, permanent tenant or hotel occupant [that he or she was] is not furnished, as required by the above provision, with a copy of the lease rider pursuant to paragraph (1), [or] the notice pursuant to paragraph (2) [of this subdivision], or the documentation required on demand by paragraph (1)(ii) of this subdivision, the owner shall not be entitled to collect any adjustments in excess of the rent set forth in the prior lease unless the owner can establish that the rent collected was otherwise legal. In addition to issuing an order with respect to applicable overcharges, [the] DHCR shall order the owner to furnish the missing rider, [or] notice, or documentation. [In addition to such other penalties provided for pursuant to section 2526.2 of this Title, if the owner fails to comply within 20 days of such order, the owner shall not be entitled to collect any guidelines lease adjustment authorized for any current lease from the commencement date of such lease.] The furnishing of the rider, [or] notice, or documentation by the owner to the tenant or hotel occupant shall result in the elimination, prospectively, of such penalty. With respect to housing accommodations in hotels, noncompliance by the owner shall not prevent the hotel occupant from becoming a permanent tenant.

Codification of Judicially Sanctioned Default Rule

9 NYCRR §2522.6 (b)

Orders where the legal regulated rent or other facts are in dispute, in doubt, or not known, or where the legal regulated rent must be fixed

(1) Such order shall determine such facts or establish the legal regulated rent in accordance with the provisions of this Code. Where such order establishes the legal regulated rent, it shall contain a directive that all rent collected by the owner in excess of the legal regulated rent established under this section for such period as is provided in section 2526.1(a) of this Title, or the date of the commencement of the tenancy, if later, either be refunded to the tenant, or be enforced in the same manner as prescribed in section 2526.1(e) and (f) of this Title. Orders issued pursuant to this section shall be based upon the law and Code provisions in effect on March 31, 1984, if the complaint was filed prior to April 1, 1984.

(2)Where either (i) the rent charged on the base date cannot be determined, or (ii) a full rental history from the base date is not provided, or (iii) the base date rent is the product of a fraudulent scheme to deregulate the apartment, or (iv) a rental practice proscribed under section 2525.3 (b), (c) and (d) has been committed, the rent shall be established at the lowest of the following amounts set forth in paragraph (3).

(3) These amounts are:

(i) the lowest rent registered pursuant to section 2528.3 of this Code for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment; or

(ii) the complaining tenant's initial rent reduced by the percentage adjustment authorized by section 2522.8 of this Code; or

(iii) the last registered rent paid by the prior tenant (if within the four year period of review); or

(iv) if the documentation set forth in (i) through (iii) of this paragraph is not available or is inappropriate, an amount based on data compiled by the DHCR, using sampling methods determined by the DHCR, for regulated housing accommodations.

(4) However, in the absence of collusion or any relationship between an owner and any prior owner, where such owner purchases the housing accommodations upon a judicial sale, or such other sale effected in connection with, or to resolve, in whole or in part, a bankruptcy proceeding, mortgage foreclosure action or other judicial proceeding, and no records sufficient to establish the legal regulated rent were made available to such purchaser, such orders shall establish the legal regulated rent on the date of the inception of the complaining tenant's tenancy, or the date four years prior to the date of the filing of an overcharge complaint pursuant to section 2526.1 of this Title, whichever is most recent, based on either:

(i) [(1)] documented rents for comparable housing accommodations, whether or not subject to regulation

pursuant to this Code, submitted by the owner, subject to rebuttal by the tenant; or

(ii) [(2)] if the documentation set forth in subparagraph (i[1]) of this [subdivision] paragraph is not available or is inappropriate, data compiled by the DHCR, using sampling methods determined by the DHCR, for regulated housing accommodations; or

(iii) [(3)] in the event that the information described in both subparagraphs (i) [(1)] and (ii) [(2)] of this [subdivision] paragraph is not available, the complaining tenant's rent reduced by the most recent guidelines adjustment.

(5) This subdivision shall also apply where the owner purchases the housing accommodations subsequent to such judicial or other sale. [Notwithstanding the foregoing, this subdivision shall not be deemed to impose any greater burden upon owners with regard to record keeping than is provided pursuant to RSL section 26-516(g). In addition, where the amount of rent set forth in the rent registration statement filed four years prior to the date the most recent registration statement was required to have been filed pursuant to Part 2528 of this Title is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge any time thereafter.]

Consideration of Equities

9 NYCRR § 2522.7

In issuing any order adjusting or establishing any legal regulated rent, or in determining when a higher or lower legal regulated rent shall be charged pursuant to an agreement between the DHCR and governmental agencies or public benefit corporations, the DHCR shall take into consideration all factors bearing upon the equities involved, subject to the general limitation that such adjustment, establishment or determination can be put into effect with due regard for protecting tenants and the public interest against unreasonably high rent increases inconsistent with the purposes of the RSL, for preventing imposition upon the industry of any industry-wide schedule of rents or minimum rents, and for preserving the regulated housing stock.

Longevity Increases

9 NYCRR § 2522.8(a)(2)(ii)

Rent adjustments upon vacancy or succession

(a) The legal regulated rent for any vacancy lease entered into after June 15, 1997 shall be as hereinafter provided in this subdivision. The previous legal regulated rent for such housing accommodation shall be increased by the following:

> (1) if the vacancy lease is for a term of two years, twenty percent of the previous legal regulated rent; or
>
> (2) if the vacancy lease is for a term of one year, the increase shall be 20 of the previous legal regulated rent less an amount equal to the difference between:
>
> > (i) the two year renewal lease guideline promulgated by the Rent Guidelines Board applied to the previous legal regulated rent; and
> >
> > (ii) the one year renewal lease guideline promulgated by the Rent Guidelines Board applied to the previous legal regulated rent. In addition, if the legal regulated rent was not increased with respect to such housing accommodation by a permanent vacancy allowance within eight years prior to a vacancy lease executed on or after June 15, 1997, the legal regulated rent may be further increased by an amount equal to the product resulting from multiplying such previous legal regulated rent by six-tenths of one percent and further multiplying the amount of rent increase resulting therefrom by the greater of:
> >
> > (a) the number of years since the imposition of the last permanent vacancy allowance, or
> >
> > (b) if the rent was not increased by a permanent vacancy allowance since the housing accommodation became subject to the RSL and this Code, the number of years that such housing accommodation has been subject to the RSL and this Code. Provided that if the previous legal regulated rent was less than $ 300, the total increase

shall be as calculated above, plus $ 100 per month. Provided further, that if the previous legal regulated rent was at least $ 300 and no more than $ 500, in no event shall the total increase pursuant to this subdivision be less than $ 100 per month. All such increases shall be in lieu of any allowance authorized for the one or two year renewal component of the guideline promulgated by the Rent Guidelines Board, but shall be in addition to any other increases authorized pursuant to the RSL and this Code, including adjustments pursuant to section 2522.4 (a) of this Part, and any applicable vacancy allowance authorized by the Rent Guidelines Board.

Owners Must Maintain Required Services

9 NYCRR §2523.4(a)(1)

Failure to maintain services

(1) A tenant may apply to the DHCR for a reduction of the legal regulated rent to the level in effect prior to the most recent guidelines adjustment, subject to the limitations of subdivisions (c)-(h) of this section, and the DHCR shall so reduce the rent for the period for which it is found that the owner has failed to maintain required services. The order reducing the rent shall further bar the owner from applying for or collecting any further increases in rent <u>including such increases pursuant to section 2522.8 of this Title</u> until such services are restored or no longer required pursuant to an order of the DHCR. If the DHCR further finds that the owner has knowingly filed a false certification, it may, in addition to abating the rent, assess the owner with the reasonable costs of the proceeding, including reasonable attorney's fees, and impose a penalty not in excess of $250 for each false certification.

9 NYCRR §2523.4(a)(2)

(2) Where an application for a rent adjustment pursuant to section 2522.4(a)(2) of this Title has been granted, and collection of such rent adjustment commenced prior to the issuance of the rent reduction order, the owner will be permitted to continue to collect the rent adjustment regardless of the effective date of the rent reduction order, notwithstanding that such date is prior to the effective date of the order granting the adjustment. [In

addition, regardless of the effective date thereof, a rent reduction order will not affect the continued collection of a rent adjustment pursuant to section 2522.4(a)(1) of this Title, where collection of such rent adjustment commenced prior to the issuance of the rent reduction order.] However, an owner will not be permitted to collect any increment pursuant to section 2522.4(a)(8) that was otherwise scheduled to go into effect after the effective date of the rent reduction order.

9 NYCRR §2523.4(c)

(c) Except for complaints pertaining to heat and hot water or other conditions requiring emergency repairs, [B] before filing an application for a reduction of the legal regulated rent pursuant to subdivision (a) of this section, a tenant [must have] should [first] notify[ied] the owner or the owner's agent in writing of all the service problems listed in such application. A copy of the written notice to the owner or agent with proof of mailing or delivery [must] should be attached to the application. Applications should [may only] be filed with the DHCR no earlier than ten [10 and no later than 60] days after such notice is given to the owner or agent. Failure to provide such prior written notice will not be grounds for dismissal of the application. [Prior written notice to the owner or agent is not required for complaints pertaining to heat or hot water, or other conditions requiring emergency repairs.] Applications based upon a lack of adequate heat or hot water must be accompanied by a report from the appropriate city agency finding such lack of adequate heat or hot water.

9 NYCRR §2523.4(d)(2)

(2) Upon receipt of a copy of the tenant's complaint from the DHCR, an owner shall have twenty (20) [45] days in which to respond[.] if the tenant provided DHCR with the proof of the written notice to the owner. If the tenant did not provide proof of written notice to the owner, an owner shall have sixty (60) days in which to respond. If the tenant's complaint indicates that the tenant has been forced to vacate the premises, the owner shall have five (5) days to respond. If the complaint pertains to heat and hot water or to a condition which in DHCR's opinion may require emergency repairs, the owner shall have twenty (20) days to respond. Nothing herein shall preclude DHCR from granting an owner's request for a reasonable extension of time to respond in order to establish that service problems have been repaired. [the rest of the sections remains the same]

Prohibition on Filing of False Documents and Causing Tenant Not to Exercise Rights

9 NYCRR § 2525.5

Harassment

It shall be unlawful for any owner or any person acting on his or her behalf, directly or indirectly, to engage in any course of conduct (including but not limited to interruption or discontinuance of required services, or unwarranted or baseless court proceedings, or filing of false documents with or making false statements to DHCR) which interferes with, or disturbs, or is intended to interfere with or disturb, the privacy, comfort, peace, repose or quiet enjoyment of the tenant in his or her use or occupancy of the housing accommodation, or is intended to cause the tenant to vacate such housing accommodation or waive or not exercise any right afforded under this Code including the right of continued occupancy and regulation under the RSC and RSL.

Rent Review Amendments

9 NYCRR § 2526.1(a)(2)(ii)

Determination of legal regulated rents; penalties; fines; assessment of costs; attorney's fees; rent credits

> (ii) subject to paragraphs (iii), (iv), (v), (vi), (vii), (viii) and (ix) of this paragraph, the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section, and section 2522.3 of this Title, shall not be examined; [.] and [This subparagraph shall preclude] examination of a rent registration for any year commencing prior to the base date, as defined in section 2520.6(f) of this Title, whether filed before or after such base date shall be precluded. [Except in the case of decontrol pursuant to section 2520.11(r) or (s) of this Title, nothing contained herein shall limit a determination as to whether a housing accommodation is subject to the RSL and this Code, nor shall there be a limit on the continuing eligibility of an owner to collect rent increases pursuant to section 2522.4 of this Title, which may have been subject to deferred

implementation, pursuant to section 2522.4(a)(8) in order to protect tenants from excessive rent increases.]

9 NYCRR § 2526.1(a)(2)(iii)-(ix)

(iii) Except in the case of decontrol pursuant to section 2520.11(r) or (s) of this Title, nothing contained in this section shall limit a determination as to whether a housing accommodation is subject to the RSL and this Code, nor shall there be a limit on the continuing eligibility of an owner to collect rent increases pursuant to section 2522.4 of this Title, which may have been subject to deferred implementation, pursuant to section 2522.4(a)(8) in order to protect tenants from excessive rent increases.

(iv) In a proceeding pursuant to this section the rental history of the housing accommodation pre-dating the base date may be examined for the limited purpose of determining 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.

(v) An order issued pursuant to section 2523.4(a) of this Code remaining in effect within four years of the filing of a complaint pursuant to this section may be used to determine an overcharge or award an overcharge or calculate an award of the amount of an overcharge.

(vi) For the purpose of determining if the owner establishes by a preponderance of the evidence that the overcharge was not willful, examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section shall not be precluded.

(vii) For the purpose of determining any adjustment in the legal regulated rent pursuant to section 2522.8(a)(2)(ii) of this Title, or any adjustment pursuant to a guideline promulgated by the New York City Rent Guidelines Board that requires information regarding the length of occupancy by a present or prior tenant or the rent of such tenants, review of the rental history of the

housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section shall not be precluded.

(viii) For the purposes of establishing the existence or terms and conditions of a preferential rent under section 2521.2(c), review of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section shall not be precluded.

(ix) For the purpose of establishing the legal regulated rent pursuant to section 2526.1(a)(3)(iii) where the apartment was vacant or temporarily exempt on the base date, review of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section shall not be precluded.

9 NYCRR § 2526.1(a)(3)(iii)

Where a housing accommodation is vacant or temporarily exempt from regulation pursuant to section 2520.11 of this Title on the base date, the legal regulated rent shall be [the rent agreed to by the owner and the first rent stabilized tenant taking occupancy after such vacancy or temporary exemption, and reserved in a lease or rental agreement; or, in the event a lesser amount is shown in the first registration for a year commencing after such tenant takes occupancy, the amount shown in such registration, as adjusted pursuant to this Code.] the prior legal regulated rent for the housing accommodation, the appropriate increase under section 2522.8, and if vacated or temporarily exempt for more than one year, as further increased by successive two year guideline increases that could have otherwise been offered during the period of such vacancy or exemption and such other rental adjustments that would have been allowed under this Code.

Codification of Judicially Sanctioned Default Formula

9 NYCRR § 2526.1(g)

(g) Where the rent charged on the base date cannot be determined, a full rental history from the base date is not provided, or the base date rent is the product of a fraudulent scheme to deregulate the apartment or a rental practice proscribed under 2525.3(c) and (d) has been

committed, the rent shall be established at the lowest of the following amounts.

(1) the lowest rent registered pursuant to section 2528.3 of this Code for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment; or

(2) the complaining tenant's initial rent reduced by the percentage adjustment authorized by section 2522.8 of this Code; or

(3) the last registered rent paid by the prior tenant (if within the four year period of review; or

(4) if the documentation set forth in paragraphs (1)through (3) of this subdivision is not available or is inappropriate, data compiled by the DHCR, using sampling methods determined by the DHCR, for regulated housing accommodations.

However, in the absence of collusion or any relationship between an owner and any prior owner, where such owner purchases the housing accommodations upon a judicial sale, or such other sale effected in connection with, or to resolve, in whole or in part, a bankruptcy proceeding, mortgage foreclosure action or other judicial proceeding, and no records sufficient to establish the legal regulated rent were made available to such purchaser, such orders shall establish the legal regulated rent on the date of the inception of the complaining tenant's tenancy, or the date four years prior to the date of the filing of an overcharge complaint pursuant to this section, whichever is most recent, based on either:

(1) documented rents for comparable housing accommodations, whether or not subject to regulation pursuant to this Code, submitted by the owner, subject to rebuttal by the tenant; or

(2) if the documentation set forth in paragraph (1) of this subdivision is not available or is inappropriate, data compiled by the DHCR, using sampling methods determined by the DHCR, for regulated housing accommodations; or

(3) in the event that the information described in both paragraphs (1) and (2) of this subdivision is not available, the complaining tenant's rent reduced by the most recent guidelines adjustment.

This subdivision shall also apply where the owner purchases the housing accommodations subsequent to such judicial or other sale.

[(g)] (h) [re-lettered only – text remains the same]

Unit May Bring Overcharge Proceeding

9 NYCRR § 2527.2

Proceedings instituted by the DHCR

The DHCR may institute a proceeding on its own initiative whenever the DHCR deems it necessary or appropriate pursuant to the RSL or this Code.

Owner Receives Notice of Overcharge Proceeding Initiated by Unit

9 NCYRR § 2527.3(b)

Notice to the parties affected

(b) Where the proceeding is instituted by the DHCR, it shall forward to all parties affected thereby a notice setting forth the proposed action.

Owners Given Opportunity to Answer and Present Evidence in Overcharge Proceeding Initiated by Unit

9 NYCRR § 2527.4

Answer

A person who has been served with a notice of a proceeding accompanied by an application or complaint shall have no less than 20 days from the date of mailing in which to answer or reply, except that in exceptional circumstances, the DHCR may require a shorter period. Every answer or reply shall be verified or affirmed, and an original and one copy shall be filed with the DHCR.

Avoidance of Undue Hardship

9 NYCRR § 2527.7

Pending proceedings

Except as otherwise provided herein, unless undue hardship or prejudice results therefrom, this Code shall apply to any proceeding pending before the DHCR, which proceeding commenced on or after April 1, 1984, or where a provision of this Code is amended, or an applicable statute is enacted or amended during the pendency of a proceeding, the determination shall be made in accordance with the changed provision.

Transparency in Annual Rent Registrations

9 NYCRR § 2528.3(a)

Annual registration requirements

(a) An annual registration shall be filed containing the current rent for each housing accommodation not otherwise exempt, a certification of services, and such other information as may be required by the DHCR, pursuant to the RSL, RSC or section 2527.11.

9 NYCRR § 2528.3(c)

(c) An owner seeking to file an amended registration statement for other than the present registration year must file an application pursuant to sections 2522.6(b) and Part 2527 of this code as applicable to establish the propriety of such amendment unless the amendment has already been directed by DHCR or is directed by another governmental agency that supervises such housing accommodation.

9 NYCRR § 2528.4(a)

(a) The failure to properly and timely comply, on or after the base date, with the rent registration requirements of this Part shall, until such time as such registration is completed, bar an owner from applying for or collecting any rent in excess of: the base date rent, plus any lawful adjustments allowable prior to the failure to register. Such a bar includes but is not limited to rent adjustments pursuant to section 2522.8 of this title. The late filing of a registration shall result in the

elimination, prospectively, of such penalty, and for proceedings commenced on or after July 1, 1991, provided that increases in the legal regulated rent were lawful except for the failure to file a timely registration, an owner, upon the service and filing of a late registration, shall not be found to have collected a rent in excess of the legal regulated rent at any time prior to the filing of the late registration. Nothing herein shall be construed to permit the examination of a rental history for the period prior to four years before the commencement of a proceeding pursuant to sections 2522.3 and 2526.1 of this Title.

Owners Have Right to Administrative Appeal

9 NCYRR § 2529.1(a)

Persons who may file

(a) A petition for administrative review (PAR) of an order issued by a rent administrator may be filed by a party to the proceeding, or other necessary party, in the manner provided in this Part, where such petition alleges the errors upon which such order is based.