Tom, J.P., Webber, Oing, Moulton, JJ.

6063-
6064 The People of the State of New York,
Respondent,

-against-

Ramon Lara,
Defendant-Appellant.

Ind. 2627/09

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Robert S. Dean, Center for Appellate Litigation, New York (Benjamin Wiener of counsel), for appellant.

Ramon Lara, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Susan Gliner of counsel), for respondent.

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Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered July 10, 2012, as amended July 16, 2012, convicting defendant, upon his plea of guilty, of murder in the second degree, and sentencing him to a term of 17 years to life, and order, same court (Kevin B. McGrath, J.), entered on or about April 7, 2017, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

After considering the factors set forth in *People v Taranovich* (37 NY2d 442, 445 [1975]), we conclude that the court properly denied defendant's constitutional speedy trial motion. Although there was substantial delay, it was satisfactorily explained, and relatively little of it was attributable to the

People. Almost all of the delay is directly attributable to defendant, because he fled to the Dominican Republic shortly after committing the murder. Had he not done so, or had he terminated his flight, the prosecution would not have been required to take any steps to extradite him (*see People v Diaz*, 81 AD3d 516 [1st Dept 2011], *lv denied* 17 NY3d 794 [2011]; *see also People v Ortiz*, 60 AD3d 563 [1st Dept 2009], *lv denied* 12 NY3d 919 [2009]). In any event, at the time of defendant's flight, while the United States had an extradition treaty with the Dominican Republic, that nation's law forbade any extradition of its own citizens, such as defendant. Accordingly, the police acted reasonably and in good faith by continuing to investigate defendant's whereabouts, but operating under the assumption that he could not be extradited. This conclusion is not undermined by the fact that Dominican extradition law changed somewhat during the period of delay at issue. Furthermore, defendant has not demonstrated that his ability to defend himself was prejudiced by the delay, and we find that the remaining *Taranovich* factors weigh against dismissal.

The court providently exercised its discretion in denying defendant's CPL 440.10 motion (*see People v Samandarov*, 13 NY3d 433, 439-440 [2009]). Based on the submissions on the motion, as well as the trial record, we conclude that defendant received

effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). We also find no need for a remand for an evidentiary hearing.

Defendant's claim that his attorney was ineffective in supposedly failing to investigate a valid justification defense was only supported by bare allegations and is contradicted by the record. In particular, just before defendant's guilty plea on June 12, 2012, counsel advised the court that after investigating a justification defense, and reviewing the forensic evidence, he concluded that a justification defense would be unsuccessful.

Nor did defendant offer any reliable proof to support his claim of actual innocence.

We have considered and rejected defendant's pro se claim regarding his assertion of actual innocence.

We perceive no basis for reducing the sentence.

The Decision and Order of this Court entered herein on March 22, 2018 is hereby recalled and vacated (*see* M-1740 decided simultaneously herewith).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 16, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Kahn, Moulton, JJ.

6754-
6755N Joel Raden, et al., Index 111725/10
Plaintiffs-Appellants,

-against-

W 7879, LLC, et al.,
Defendants-Respondents.

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Collins, Dobkin & Miller LLP, New York (Seth A. Miller of counsel), for appellants.

Kucker & Bruh, LLP. New York (Nativ Winiarsky of counsel), for respondents.

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Judgment, Supreme Court, New York County (Joan M. Kenney, J.), entered January 25, 2018, awarding plaintiffs damages for rent overcharges, affirmed, without costs. Appeal from order, same court and Justice, entered March 7, 2016, which confirmed the special referee's report, dismissed, without costs, as subsumed in the appeal from the judgment.

In 2010, pursuant to *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]), defendants determined that plaintiffs' previously rent-stabilized apartment had been improperly deregulated and that plaintiffs were entitled to a rent adjustment and a rent overcharge payment. Defendants calculated the overcharge according to Rent Stabilization Code (9 NYCRR) §2526.1, which provides that "[t]he legal regulated rent for

purposes of determining an overcharge shall be deemed to be the rent charged on the base date, plus in each case any subsequent lawful increases and adjustments" (subd [a][3][i]), and that "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 [overcharge] complaint is filed" (subd [a][2]). Defendants chose May 1, 2010 as the date on which plaintiffs would be deemed to have filed a claim for overcharges, in the absence of any such claim having been filed, and then used these 2526.1(a) standards to fix the base date for determining the overcharge as May 1, 2006, the date four years before they undertook their review. Defendants then reduced plaintiffs' rent and forwarded payment to them for the overcharges so reflected. In June 2010 defendants filed registrations for the years 2006, 2007, 2008 and 2009 in accordance with these recalculations.

Plaintiffs then brought the instant action seeking declaratory relief, additional overcharges, treble damages and attorneys' fees. After denying defendants' motion for summary judgment dismissing the complaint, Supreme Court referred the matter to a special referee to hear and report, directing the referee to calculate the legal rent under the DHCR regulations, calculate the overcharges, determine whether defendants had

willfully registered an illegal rent, and, in the absence of finding fraud or willfulness, apply the four-year statute of limitations to the overcharge claim.

After holding a hearing, the special referee issued a thorough report, concluding that defendants had not engaged in any fraud in deregulating the apartment, so that the look-back period was limited to four years, and that no willfulness had been shown in the deregulation, so that plaintiffs were not entitled to treble damages or attorneys' fees, and determined the stabilized rent and the amount of the overcharge accordingly. The referee found that setting the free market base date rent in May 2006 was a reliable method of establishing the stabilized rent and that further look-back was inappropriate, because every lease renewal stated that the apartment was not rent-stabilized and defendants could not have anticipated *Roberts*, which was contrary to industry practice at the time.

Supreme Court confirmed the report and entered judgment accordingly.

As we have explained in *Matter of Regina Metropolitan Co., LLC v New York State Div. of Hous. & Community Renewal* (__ AD3d __ [1st Dept 2018] [decided simultaneously herewith), 9 NYCRR 2526.1(a)(2)(ii) and CPLR 213-a are "categorical in barring any examination of a unit's rental history beyond the

four-year limitations period," with the sole exception being cases in which there is evidence that the landlord committed fraud in order to avoid the regulatory scheme (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366 [2010]).

In *Todres v W7879, LLC* (137 AD3d 597 [1st Dept 2016], *lv denied* 28 NY3d 910 [2016]), we considered the very building involved in this case and upheld a determination that this same landlord had not engaged in a fraudulent scheme to remove an apartment from the rent stabilization program and had not acted with willfulness. We therefore modified the ruling of Supreme Court to deny treble damages and to conclude that CPLR 213-a precluded examination of the rental history before the four-year period immediately preceding the filing of the action to recover overcharges.

The same result should obtain here. We choose to follow our prior ruling to the same effect in *Stulz v 305 Riverside Corp*.

(150 AD3d 558 [1st Dept 2017]), *lv denied* 30 NY3d 909 [2018]) rather than our decision in *Taylor v 72A Realty Assoc., L.P.* (151 AD3d 95, 105 [1st Dept 2017), for the reasons stated in *Regina Metropolitan* __ AD3d __, *supra*.

All concur except Richter, J. who dissents in a memorandum as follows:

RICHTER, J. (dissenting).

I respectfully dissent. I would reverse the judgment and remand the matter for a recalculation of the rent overcharge in accordance with *Taylor v 72A Realty Assoc., L.P.* (151 AD3d 95 [1st Dept 2017]), for the reasons explained in both *Taylor* and the dissent in *Matter of Regina Metropolitan Co., LLC v New York State Div. of Hous. & Community Renewal* (__ AD3d __ [1st Dept 2018]) ([decided simultaneously herewith]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 16, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, J.P.
Dianne T. Renwick
Peter Tom
Angela M. Mazzarelli
Jeffrey K. Oing, JJ.

5872
Index 160704/16

_____x

In re Mark F. Sloane, M.D., etc.,
Petitioner-Respondent,

-against-

M.G.,
Respondent-Appellant.
_____x

Respondent appeals from an order of the Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about December 27, 2016, which, among other things, after a hearing, granted petitioner's application for authorization to withdraw life-sustaining treatment from respondent, and denied Mental Hygiene Legal Service's objection to the decision of the guardian to withdraw life-sustaining treatment.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Margo Flug and Sadie Ishee of counsel), for appellant.

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP, Rochester (Allan Edward Silver of counsel), for respondent.

RENWICK, J.

This is an appeal from an order that authorized petitioner physician, after a hearing pursuant to the Surrogate's Court Procedure Act (SCPA-1750-b), to withdraw life-sustaining treatment from a developmentally disabled person (M.G.), in accordance with the decision of his guardian.[1] Applying SCPA 1750-b's best interests standard, Supreme Court granted the order over the objection of Mental Hygiene Legal Service (MHLS) that a meaningful inquiry into M.G.'s end-of-life wishes should have been conducted because M.G. had some prior capacity to make health care decisions (compare SCPA 1750-b with Public Health Law article 29-cc; *see also Matter of Chantel Nicole R.* (*Pamela R.*) 34 AD3d 99 [1st Dept 2006], *appeal dismissed* 8 NY3d 840 [2007]).

This case presents a similar equal protection claim to the one this Court rejected in *Chantel:* whether treating an intellectually and developmentally disabled person who had some prior capacity to make health care decisions[2] differently from a

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[1] "[L]ife sustaining treatment means medical treatment which is sustaining life functions and without which, according to reasonable medical judgment, that patient will die within a relatively short time period" (Mental Hygiene Law § 81.03(j)).

[2] "'Capacity to make health care decisions' means the ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of and

previously competent, non-disabled person[3] violates the equal protection rights of the intellectually and developmentally disabled person. In *Chantel*, we concluded that there was no violation of the Equal Protection Clause, because intellectually and developmentally disabled persons are not similarly situated to once competent persons and that the disparate treatment of the SCPA 1750-b was rationally related to a "legitimate [government] interest in advancing the right of [intellectually and developmentally disabled] persons to be free from prolonged suffering" (34 AD3d at 105). For the reasons explained below, we reject the equal protection challenge in this case as well.

Factual and Procedural Background

The facts leading to this Equal Protection claim are essentially undisputed. M.G. was an 80-year-old man with a fullscale IQ of 47. Before his December 2, 2016 admission to NYU Hospital Center (NYU), M.G. resided, for 35 years without a guardian, at a community residence for the developmentally

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alternatives to any proposed health care, and to reach an informed decision" (Public Health Law § 2980[3]).

[3] A "previously competent, non-disabled person" refers to one rendered incompetent by a catastrophic illness or accident. Throughout this opinion the terms "once competent" and "previously competent person," are used interchangeably.

disabled and made his own health care decisions.

On December 2, 2016, M.G. presented to NYU's Emergency Department complaining of shortness of breath. He was examined, and stayed overnight in the Observation Unit. On December 3, 2016, at 2:03 a.m., M.G. was discharged with a diagnosis of "Chronic Obstructive Pulmonary Disease, Exacerbation." However, on December 5, 2016, M.G. was brought back to NYU, after suffering cardiac arrest. He was diagnosed with anoxic brain injury and admitted to the intensive care unit. Due to the injury, M.G. was in a permanent vegetative state, dependent on a ventilator, and not responsive to verbal or noxious stimuli.[4] In addition, he suffered from multiple failures of the lungs, kidneys, and brain. His attending physician, petitioner Dr. Mark F. Sloane, opined that there was no meaningful hope of recovery. On December 8, 2016, further examinations by various doctors confirmed that M.G. lacked the capacity to make health care decisions.

On December 12, 2016, Rachel Osher, M.G.'s cousin and

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[4] Bilateral tubes were also inserted into his chest, due to collapsed lungs, nasogatric tube was inserted into his nasal passages for nutrition and hydration, and he required dialysis.

guardian,[5] pursuant to SCPA 1750-b(1)(a), expressed her decision to move M.G. to hospice care and gradually withdraw life-sustaining treatment, pursuant to SCPA 750-b(4)(c)(ii). Dr. Sloane, with a second doctor's concurrence, determined that life-sustaining treatment imposed an extraordinary burden on M.G., in light of his medical condition and the expected outcome of treatment, given his multiple organ failures.[6] As a result, pursuant to SCPA 1750-b(4)(e)(ii), Dr. Sloane informed M.G.'s community residence and MHLS of the guardian's decision to withdraw life-sustaining treatment. MHLS, as counsel for M.G., objected, suspending the guardian's decision, pending judicial review, according to SCPA 1750-b(5)(a) & (6).

On December 22, 2016, Dr. Sloane petitioned to authorize the guardian to withdraw life-sustaining treatment from M.G., in his best interests, and to deny MHLS's objection, pursuant to SCPA 1750-b(6). Among other things, the petition asserted that neither the guardian nor anyone else was aware of M.G.'s wishes

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[5] Osher was appointed M.G.'s guardian after he became permanently vegetative.

[6] Under SCPA 1750-b(4)(b)(ii)'s "extraordinary burden" standard, the guardian must ascertain the burden of continued treatment and the likelihood of recovery in the event of medical intervention.

with respect to treatment for his current condition and that given M.G.'s multiple organ failures and the absence of meaningful hope of recovery, the guardian's decision to move M.G. to hospice care and gradually withdraw life-sustaining treatment was in M.G.'s best interests.

The hearing to determine whether to withdraw life-sustaining treatment from M.G. took place the next day. At the inception, MHLS moved to summarily dismiss the petition, arguing that petitioner should proceed under article 29-CC of the Public Health Law and not SCPA 1750-b, since M.G. was previously found to have capacity to request life-sustaining treatment, and thus a meaningful inquiry into his end-of-life wishes should control, rather than merely a "best interests" analysis, and that proceeding otherwise would violate his equal protection rights. Dr. Sloane, however, argued that the application was properly brought under SCPA 1750-b, since M.G. was in a permanent vegetative state, lacked capacity to make health care decisions, was developmentally disabled with a full-scale IQ of 47, had no advanced directives in place, and had not discussed his wishes with his guardian, who lived in Chicago, or anyone at his community residence.

At the hearing, Dr. Sloane testified that he had been M.G.'s

attending physician since he had begun treating him in NYU's intensive care unit, on December 5, 2016, when M.G. suffered cardiac arrest, causing him to sustain a brain injury due to lack of oxygen to the brain. As a result, M.G. had no capacity to make medical decisions, since he had no neurologic function and did not respond to stimuli or breathe without a ventilator. M.G. required intubation and mechanical ventilation because of the brain injury, was undergoing hemodialysis for kidney failure, and had suffered a bilateral pneumothorax (collapsed lung), requiring chest tubes to be placed in each lung. In addition, M.G. was fed through a nasogastric tube, which would need to be replaced with a PEG (percutaneous endoscopic gastronomy) tube inserted into his stomach. Dr. Sloane opined that the need for hemodialysis, the chest tubes, and ventilation were ongoing, that M.G.'s lack of cognitive ability could not be cured, and that there was no chance of meaningful neurological recovery.

Before his catastrophic illness, no one at NYU had asked M.G. whether he had a preference with regard to life-sustaining treatment. However, M.G.'s medical records indicate that on December 3, 2016, a "Full Code" order had been entered. Dr. Christopher Caspers, the Medical Director of the Observation Unit, explained that a Full Code meant that

> "in the event of cardiac or cardiopulmonary arrest, that we would do the components of what we consider for a full code in terms of resuscitating the patient, which would include chest compressions and ventilator support, and it can include defibrillation, and it could also include medications that are common to ACLS [Advanced Cardiac Life Support] protocol."

Dr. Caspers further explained that a Full Code did not address a patient's wishes regarding life-sustaining treatment. Instead, patients were informally assessed for the capacity to make health care decisions on an ongoing basis, as part of providing clinical care. Thus, if there was a Full Code order in a patient's chart, it was presumed that the patient was competent to make the decision.

The Full Code order was entered by Ursula Jemiolo, a physician assistant in the Observation Unit. Jemiolo testified that her discussions with M.G. entailed only CPR, with no discussion of other treatment options, such as dialysis and that M.G. had been able to make the decision regarding the code status. Jemiolo explained that, when ascertaining a patient's wishes as to Full Code status, she asked questions such as:

> "In case, when you cannot breathe on your own, do you want us to help you breathe by putting a tube down your throat . . . if it's necessary? Or, if the heart stops, do you want us to do chest compressions? Or . . . if you have

> abnormal heart rhythm, do you want us to use electricity to treat the abnormal rhythm? Medications by IV . . . If you can't breathe and your heart doesn't pump, do you want us to help you by using basic measures to keep your heart going and breathe for you?"

Jemiolo clarified that the foregoing discussion took place in "the context of keeping a person alive," as "CPR pertains to immediate measures" and "[i]t's not part of [her] practice to address life sustaining-measures. Only CPR." A Full Code order was cancelled upon the patient's discharge, which was the standard practice so that patients could change their basic directions depending on their medical condition at the time.

Christine Wilkins (Ph.D., M.S.W. and NYU's Advance Care Planning Program Manager) testified about her efforts to investigate palliative care for M.G. She contacted M.G.'s community residence and learned that he did not have any advance directives in place and had had no discussions about advance directives. The community residence caretakers informed Wilkins that, before M.G. was admitted to NYU, he had been his own guardian and had been able to make his own health care decisions. The community caretakers told Wilkins that M.G. had a cousin, Rachel Osher, who lived in Chicago and kept in touch with him. Wilkins spoke with Osher and learned that she had never spoken to

M.G. about his wishes regarding life-sustaining treatment. Wilkins, who had made these types of inquiries hundreds of times, stated that it was not unusual for a family member not to have discussed such treatment with a patient, because it "is typically a very difficult conversation to have." MHLS did not produce any witnesses or present any other evidence following Wilkins's testimony.

Supreme Court granted Dr. Sloane's application to the extent of authorizing him and other physicians, nursing staff, and designated employees and agents to withdraw life-sustaining treatment from M.G., in accordance with Osher's decision and Dr. Sloane's directives. At the same time, the court rejected MHLS's claim that treating M.G., a developmentally disabled person with prior health care decision capacity, differently from a previously competent, non-disabled person violated his equal protection rights.

Discussion

At the outset, we note that the alleged Equal Protection violation is now academic, since M.G. died within hours of the termination of his life-sustaining treatment. However, given that intellectually and developmentally disabled persons have varying capacity, this issue will likely recur and will otherwise

evade appellate review due to the likelihood of intervening deaths pending appeals involving the withdrawal (or withholding) of life-sustaining treatment. Under similar circumstances, courts have held that an exception to the mootness doctrine applies to appeals regarding end-of-life issues (*see e.g. Matter of M.B.*, 6 NY3d 437, 447 [2006]; *Matter of Storar*, 52 NY2d 363, 369-370 [1981], *cert denied* 454 US 858 [1981]).

As indicated, the decision to withdraw M.G.'s life-sustaining treatment was made pursuant to SCPA 1750-b, which sets the terms for end-of-life decision-making for people with intellectual and developmental disabilities. In contrast, if M.G. had not had an intellectual or developmental disability, the decision whether to withdraw life support would have been made pursuant to article 29-CC of the Public Health Law, known as the Family Health Care Decisions Act (FHCDA). MHLS argues that, as applied to M.G., a person with a developmental disability who had capacity to make his own health care decisions until a heart attack at age 80, New York's law governing the withdrawal of life-sustaining treatment for people with intellectual and developmental disabilities violates the Equal Protection Clauses of the Federal and State constitutions. MHLS argues that M.G.'s classification as a developmentally disabled person denied him a

meaningful inquiry into his end-of-life wishes, an inquiry that would be available to a non-disabled person with the "same prior decision-making capacity," under Public Health Law article 29-CC.

After reviewing the origins of the pertinent statute, as well as the new procedures it created, we conclude that, consistent with our holding *in Matter of Chantel Nicole R.* (34 AD3d 99 [1st Dept 2006]), treating M.G., a person with a developmental disability who had capacity to make his own health care decisions until his catastrophic illness, differently from a previously competent, non-disabled person does not violate the Equal Protection Clause. As explained below, contrary to MHLS's Equal Protection arguments, the legislature, in promulgating SCPA-1750-b, did not intend to situate intellectually and developmentally disabled persons who had previous health care decision-making capabilities similarly to non-disabled persons who were fully competent before their catastrophic illness. Nor does the best interests standard of SCPA 1750-b eliminate consideration of the wishes of intellectually and developmentally disabled persons in circumstances in which they had some

capacity to make health care decisions.

The Origins of the Health Care Decisions Act for Persons with Mental Retardation (HCDA)

The HCDA was designed to address the legal dichotomy that the Court of Appeals first highlighted in 1981 in a pair of cases consolidated on appeal titled *Matter of Storar and Matter of Eichner* (52 NY2d 363 [1981], *cert denied* 454 US 858 [1981]). In both cases, "the guardians of incompetent patients objected to the continued use of medical treatments or measures to prolong the lives of the patients who were diagnosed as fatally ill with no reasonable chance of recovery" (52 NY2d at 369-370). In *Matter of Eichner*, Brother Fox, an 83-year-old member of the Society of Mary, was being maintained by a respirator in a permanent vegetative state (*id.*). Based on statements he had made while competent, "[t]he local director of the society applied to have the respirator removed on the ground that it was against the patient's wishes" to have his life sustained artificially when there was no hope of recovery (*id.*). In *Matter of Storar*, "a State official applied for permission to administer blood transfusions to a profoundly retarded 52-year-old man with terminal cancer of the bladder" (*id.*). The patient's mother, who was also his legal guardian, refused to provide consent on the

ground that the transfusions would only prolong her son's discomfort and would be against his wishes if he were competent (*id.*).

In *Eichner*, the Court of Appeals allowed the guardian to discontinue respiratory support for Brother Fox, a patient who became incompetent due to illness but who had, before becoming incompetent, expressed the wish not to be kept in a vegetative state (*id.* at 371). *Eichner* was decided under the New York common-law principle that a competent adult generally has the right to make health care decisions, however rational or irrational, including the right to refuse life-sustaining treatment (*see Matter of Fosmire v Nicoleau*, 75 NY2d 218, 226-228 [1990]). If the individual suffers an illness or injury resulting in a loss of decision-making capacity, family and friends may obtain a court order authorizing the cessation of treatment if they can prove, by clear and convincing evidence of the patient's previously expressed views, that the individual would have refused life-sustaining treatment if capable of making that decision (*see Matter of Westchester County Med. Ctr., ex rel O'Connor*, 72 NY2d 517, 529 [1988]).

In contrast, in *Storar*, the Court of Appeals refused to allow the guardian of the terminally ill and profoundly retarded

cancer patient to discontinue life-prolonging blood transfusions. The Court reasoned that there was no proof as to the patient's wishes since he had never been capable of making a reasoned decision about medical treatment (52 NY2d at 380). Although a guardian of a mentally retarded person was imbued under the common law with the authority to make a broad spectrum of health care decisions, this authority did not encompass the power to end life-sustaining medical treatment {*id*. at 381). Viewing the mentally retarded man as comparable to a child and the guardian's role as comparable to that of a parent, who may not deprive a child of life-saving treatment, the *Storar* Court concluded that the guardian of the 52-year-old mentally retarded man lacked the authority to order the cessation of blood transfusions (*id*. at 382). However, because it predicated its analysis on principles developed under the common law, which constrained the Court to find as it did, the Court encouraged the legislature to establish procedures governing the discontinuance of life-sustaining treatment for incompetent individuals, if it determined that this was desirable or appropriate (*id*. at 382-383).

The Statutory Scheme for Persons with Intellectual and Developmental Disability

In 2002, 20 years after *Storar*, the legislature took on the

issue of mentally retarded disabled persons who never had the competence to indicate a choice with regard to withholding or withdrawing life-sustaining treatment.[7] In enacting the Health Care Decisions Act for Persons with Mental Retardation (HCDA) (L 2002, ch 500, S. 3), the legislature clarified that when it had been determined that a mentally retarded individual lacks the capacity to make health care decisions (*see* former SCPA 1750), the individual's duly appointed guardian "shall have the authority to make any and all health care decisions," including "any decision to consent or refuse to consent to health care" (former SCPA 1750-b[1], cross-referencing Public Health Law § 2980[6]). All such decisions must be based "solely and exclusively on the best interests of the mentally retarded person and, when reasonably known or ascertainable with reasonable diligence, on the mentally retarded person's wishes, including moral and religious beliefs" (former SCPA 1750-b[2][a]). The factors that must be considered in determining the mentally

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[7] In 2016, the term "persons who are intellectually disabled" was substituted for the term "mentally retarded persons" throughout article 17-a (L 2016, ch. 198, effective July 21, 2016). In addition, throughout the SCPA, references to "mentally retarded" persons were changed to "intellectually disabled" persons (*id*).

retarded person's best interests, include "the dignity and uniqueness of every person; "the preservation, improvement or restoration of the . . . person's health"; "the relief of the . . . person's suffering by means of palliative care and pain management"; "the effect of treatment, including artificial nutrition and hydration, on the mentally retarded person; and the patient's overall medical condition" (former SCPA 1750-b[2][b]). A medical decision cannot be based on financial considerations or a failure to afford the mentally retarded individual the respect that would be afforded persons without mental retardation (former SCPA 1750-b[2][c]).

The statute further set forth a detailed procedure, intended to protect the mentally retarded person and prevent an improvident decision by a guardian, that must be followed before a guardian's decision to end life-sustaining treatment for the individual may be carried out (*see Matter of M.B.*, 6 NY3d 437, 442-444 [2006]). The individual's attending physician and a concurring physician "must determine to a reasonable degree of medical certainty and note on the mentally retarded person's chart" that the person has one of three conditions (a terminal condition, permanent unconsciousness, or "a medical condition other than such person's mental retardation which requires life-

sustaining treatment, is irreversible and which will continue indefinitely"), and that "the life-sustaining treatment would impose an extraordinary burden on such person" (former SCPA 1750-b[4][b]).

In enacting the HCDA, the legislature interpreted *Storar* as holding that, since mentally retarded persons never had the mental capacity to choose to withhold or withdraw life-sustaining treatment, their guardians could not be granted the authority to make such decisions for them (*see* Memo in Support, L 2003 at 2003-2004). The HCDA was enacted to remedy this gap in the common law. "The purpose of this bill is to explicitly provide guardians of mentally retarded persons with the authority to make health care decisions for such persons, including decisions regarding life- sustaining treatment under certain circumstances" (Sponsor's Memo, 2002 NY Legis Ann, at 279-280). In 2005, the legislature added a provision affording guardians of developmentally disabled persons the same end-of-life decision-making authority that guardian's of intellectually disabled persons had (L 2005 at 1740-1741).

The Statutory Scheme for Competent Persons Rendered Incompetent by Catastrophic Event

A different statutory scheme governs end-of-life

determinations for patients who were not intellectually or developmentally disabled before their catastrophic illness. In 2010, the legislature enacted FHCDA, at article 29-CC of the Public Health Law, in order to allow competent adults who lose decision-making capacity due to catastrophic illnesses to control their medical treatment (L 2010, ch 8). Pursuant to Public Health Law § 2994-d, the Surrogate must make health care decisions:

> "(i) in accordance with the *patient=s wishes*, including the patient's religious and moral beliefs; or"(ii) if the *patient's wishes* are not reasonably known and *cannot with reasonable diligence be ascertained*, in accordance with the *patient's best interests*. An assessment of the patient's best interests shall include: consideration of the *dignity and uniqueness* of every person; the possibility and extent of preserving the patient's life; the preservation, improvement or restoration of the patient=s health or functioning; the relief of the patient=s suffering; and any medical condition and such other concerns and values as a reasonable person in the patient's circumstances would wish to consider" (Public Health Law § 2994-d[4][a] [emphasis added]).

Public Health Law § 2994-d provides that "[i]n all cases, the surrogate's assessment of the patient's wishes and best interests shall be *patient-centered*; health care decisions shall be made on an individualized basis . . . and *consistent with the*

values of the patient, including . . . religious and moral beliefs, to the extent reasonably possible" (Public Health Law § 2994-d[4][b] [emphasis added]).

Analysis of the Equal Protection Claim

The Equal Protection Clause prohibits the government from treating people differently from others who are similarly situated (*City of Cleburne v Cleburne Living Ctr.*, 473 US 432, 446-447 [1985]). Because mentally disabled persons are not similarly situated to persons who were once competent, the government need not treat them the same (*id.*). When the government treats mentally disabled persons differently from non-mentally disabled members of society, its action need only be rationally related to a legitimate government interest to pass constitutional muster (*id.* at 446-448).

As the history of the HCDA set forth above demonstrates, the State attempted to balance and advance the competing interests of preserving life, on the one hand, and not prolonging suffering, on the other, for intellectually and developmentally disabled persons. In that vein, the inequity the statute intended to redress was not in equating the competency of mentally-disabled persons to that of competent persons, but the fact that the guardians of intellectually and developmentally

disabled persons were not allowed to make end-of-life health care decisions that competent persons could make for themselves. The legislature recognized that a different approach was needed and that special procedures were required to afford intellectually and developmentally disabled persons the same rights under the law as competent persons.

MHLS does not contend that these are not legitimate state interests. Rather, it argues that, in balancing these goals, there is no rational relation between treating intellectually and developmentally disabled persons who had some capacity to make their own health care decisions differently than once competent, non-disabled persons. It is this difference, MHLS claims, that violates the Equal Protection Clause. We disagree.

As indicated, the legislature promulgated a twofold approach to competent, non-disabled individuals. Under Public Health Law § 2994-d(4)(a)(i), the guardian's health care decision for the incapacitated person must be "in accordance with the patient's wishes, including the patient's religious and moral beliefs." The guardian must give effect to the incapacitated person's previously known competent wishes (commonly referred to as

substituted judgment[8]) and past values and preferences. If the patient's wishes are not reasonably known and cannot with reasonable diligence be ascertained, the guardian's decisions regarding health care for the incapacitated person must be in accordance with the patient's best interests (Public Health Law § 2994-d[4][a][ii]).

In the instant case, MHLS does not claim any equal protection violation due to Public Health Law § 2994-d's threshold mandate that any end-of-life decision for once competent patients be determined on the basis of the wishes expressed by the person while competent. However, this approach is not available for intellectually or developmentally disabled people under Section 1750-b. As indicated, the different treatment derives from the common law, as highlighted in *Storar* (52 NY2d 363). Competent persons are presumed capable of

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[8] Under the substituted judgment standard, the Surrogate's task is to reconstruct what the patient himself would want if he had decision-making capacity *(see Superintendent of Belchertown State Sch. v. Saikewicz*, 370 NE2d 417, 430-31 (Mass. 1977). The principle underlying this legal standard is the respect for autonomy; when a patient is not capable of making a decision for himself, we can nonetheless respect his autonomy by reconstructing, as best we can, the autonomous decision he would make if he were capable of making a decision. (*id. see also Matter of L.H.R.*, 321 SE2d 716, 722-23 [Ga. 1984]; *Matter of conservatorship of Torres*, 357 NW2d 332, 341 [Minn. 1984]; *Matter of Guardianship of Ingram*, 689 P2d 1363, 1372 [Wash. 1984]).

communicating their wishes regarding end-of-life medical decisions through advance directives, stating their preferences to others, or by designating a health care proxy to make decisions for them. Even if they become incompetent, under Public Health Law § 2994-d, their preferences should be honored. As consistently held by the Court of Appeals, living wills and other written or oral evidence of treatment wishes will provide the basis for withdrawing or withholding life-sustaining measures if the instructions qualify as clear and convincing evidence of the patient's wishes (*see e.g. Matter of Storar*, 52 NY2d at 368; *Westchester County Med. Ctr.,* 72 NY2d at 529-530 [1988]). But persons whose competence never rose to the level required for informed consent are in a different legal position.

MHLS, however, argues that the decision to terminate life support pursuant to SCPA's 1750-b's best interests standard violated M.G.'s equal protection rights by denying him, a developmentally disabled person who once had the capacity to make health care decisions, the same meaningful inquiry into his end-of-life wishes that a similarly situated non-disabled person would have received under the best interests analysis pursuant to article 29-CC of the Public Health Law. In our view, however, any perceived disparity in the treatment of an intellectually or

developmentally disabled person who formerly had some capacity to make health care decisions and the treatment of non-disabled persons is rational. The legislature has made the policy decision that while some intellectually and developmentally disabled persons may be higher-functioning than others, only mentally competent, non-disabled individuals have the full capacity to appreciate the consequences of the decision to end their life and, thus, that intellectually and developmentally disabled persons are not similarly situated to those who were once competent and may be treated differently with respect to an end-of-life decision. Such disparate treatment furthers a legitimate state interest.

Our holding here is consistent with our decision in *Matter of Chantel Nicole R.* (34 AD3d 99), in which, over the daughter's objection, we upheld a mother's guardianship of her mentally-retarded 26-year-old daughter, who had an IQ of 52 and was functionally independent in the area of self-care, but was found to be incapable of considering end-of-life questions, even in the abstract. MHLS argued that mentally retarded persons were denied equal protection when they were deprived of the common law right to personal autonomy had by competent adults who, while competent, articulated life-ending decisions, to which a guardian

was required to adhere pursuant to Public Health Law § 2994-d (34 AD3d at 101-102). This Court rejected the contention that SCPA 1750-b violated the patient's equal protection rights by treating mentally retarded persons differently from those who were once competent, finding that "*any disparity in treatment* of a mentally retarded person is *justified by legitimate state interests*, that respondent has been accorded due process and is not aggrieved on such grounds" (*id.* at 103 [emphasis added]). This Court reasoned:

> "The Surrogate properly concluded that a mentally retarded person's expression of a desire to continue life-sustaining measures is categorically distinguishable from the same desire expressed by a mentally competent individual because only the latter has the capacity to appreciate the consequences of the decision and thus the ability to make the choice to pursue an uninformed or irrational alternative . . . . The Equal Protection Clause only prohibits the government from treating persons differently from others who are similarly situated, and mentally retarded persons are not similarly situated to those who were once competent. The difference in treatment of discrete groups need only be rationally related to a legitimate government interest in order to pass constitutional muster (*Cleburne v Cleburne Living Center, Inc.*, 473 US 432, 446-448 [1985]), and retarded persons are appropriately treated differently when disparate treatment furthers a legitimate state interest and has a rational basis (*see Heller v Doe*, 509 US 312, 320-321 [1993])" (34 AD3d at 104-105).

MHLS, however, argues that *Matter of Chantel Nicole R.* has been implicitly overruled by the Court of Appeals. On the

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 16, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

CORRECTED ORDER - SEPTEMBER 5, 2018

Friedman, J.P., Gische, Kapnick, Kahn, Moulton, JJ.

5026 In re Regina Metropolitan Co., LLC, Index 101235/15
Petitioner-Appellant, 101236/15

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent,

Leslie E. Carr,
Intervenor-Respondent.

- - - - -

Community Housing Improvement Program, Inc.,
Amicus Curiae.

- - - - -

In re Leslie E. Carr,
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent,

Regina Metropolitan Co., LLC,
Intervenor-Respondent.

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Horing, Welikson & Rosen, P.C., Williston Park (Niles C. Welikson of counsel), for Regina Metropolitan Co., LLC, appellant/respondent.

Vernon & Ginsburg, LLP, New York (Darryl M. Vernon of counsel), for Leslie E. Carr and Harry A. Levy, respondents/appellants.

Mark F. Palomino, New York (**Christina S. Ossi** of counsel), for respondent.

Graubard Miller, New York (Peter A. Schwartz of counsel), for amicus curiae.

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered October 24, 2016, denying the petitions to modify a determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated May 13, 2015, which affirmed an order of the rent administrator, dated February 26, 2014, to the extent that, for purposes of determining a rent overcharge, it calculated a base date rent by looking back more than four years from the rent overcharge complaint, and denied petitioner tenants' requests for treble damages and attorneys' fees, and dismissing the proceedings, modified, on the law, to grant landlord's petition to the extent of remanding the matter to DHCR to recalculate the base date rent by looking back to four years before the filing of the overcharge complaint, and otherwise affirmed, without costs.

This appeal follows in the long wake of *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]). In *Roberts*, the Court of Appeals held that apartments in buildings receiving benefits under the City's J-51 tax incentive program remain subject to rent stabilization for at least as long as the building continues

to enjoy J-51 benefits.[1] In *Gersten v 56 7th Ave. LLC* (88 AD3d 189 [1st Dept 2011], *appeal withdrawn* 18 NY3d 954 [2012]), this Court held that *Roberts* should be applied retroactively.

Rent Stabilization Law (RSL) § 26-517(a)(2) and CPLR 213-a set a four year limitations period for actions alleging rent overcharge. Therefore, a tenant who prevails on a *Roberts* claim is entitled to recoup only rent overcharges that accrued in the four years before the filing of the complaint (*see e.g. Matter of Gilman v New York State Div. of Hous. & Community Renewal,* 99 NY2d 144, 149 [2002]). The beginning date for the calculation of recoupment is known as the "base date."

The primary question presented in this appeal is how to determine the proper rent on the base date.

Petitioner Regina Metropolitan Co., LLC. (landlord) is the owner and landlord of the residential apartment building located at 27 West 96th Street in Manhattan. Effective during the 1999-2000 tax year, landlord began receiving J-51 tax benefits, and it continued to do so until 2013. The building was subject to rent stabilization before, and independent of, the receipt of

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[1] *See* Administrative Code of City of NY § 11-243(formerly § J51-2.5). The City's "J-51" program, authorized by Real Property Tax Law § 489, allows property owners who complete eligible projects to receive tax exemptions and/or abatements that continue for a period of years (see Administrative Code § 11-243[b][2], [3], [8]; 28 RCNY 5-03[a]).

such benefits. In 2003, when the tenant of the subject apartment vacated, the monthly regulated rent was $2,096.47, above the then applicable $2,000 threshold for vacancy deregulation. Landlord set the market rate rent for the subsequent tenant at $4,500. Petitioner tenants (tenants) moved into the building pursuant to a lease for the period August 1, 2005 to August 1, 2007, at a monthly rent of $5,195. The lease stated on its face that the apartment was not subject to rent regulation.

Landlord could not deregulate the apartment under Real Property Tax Law § 489(7)(b)(1) while simultaneously receiving J-51 tax benefits. Landlord maintains that it deregulated the apartment in 2003 due to a misunderstanding of the law -- a misunderstanding once widely held in the real estate industry and shared by DHCR -- which was later corrected by *Roberts* (13 NY3d 270 [2009], *supra*). It is uncontested that, in light of *Roberts* and *Gersten* (88 AD3d 189, *supra*), the unit was improperly deregulated and remains a rent-stabilized apartment. It is also uncontested that an overcharge ensued. What is contested, however, is the calculation of the overcharge and, specifically, the base date rent on November 2, 2005, four years before tenants' filing of the overcharge complaint.

Before DHCR, landlord maintained that the base date rent should be set at the amount that obtained on November 2, 2005,

pursuant to the tenants' lease, which was $5,195. Landlord contends that in the absence of any evidence of a fraudulent scheme to evade rent regulation, there is no support for avoiding the strict four-year limitations period of RSL § 26-517(a)(2) and CPLR 213-a.

Tenants argued before DHCR that there was evidence that landlord had engaged in a fraudulent scheme to evade rent regulation of the unit and that the correct rent should be set via the default formula specified in *Thornton v Baron* (5 NY3d 175 [2005]) or the similar default formulas under Rent Stabilization Code (RSC) (9 NYCRR)§ 2522.6(b)(2) and (3). Additionally, even if a default formula would not be appropriate, tenants asserted that the rent should be frozen at $2,096.47 because, as in *Jazilek v Abart Holdings, LLC* (72 AD3d 529 [1st Dept 2010]), landlord failed to file proper and timely rent registration statements. Tenants also sought treble damages and attorneys' fees.

The Rent Administrator (RA) did not fully agree with either landlord's or tenants' analysis. In an order dated February 26, 2014, the RA found that the landlord did not engage in a fraudulent scheme to avoid rent stabilization. He found that there had been a rent overcharge, but he did not calculate the base date rent according to either of the opposing methods urged

by landlord and tenants. Instead, the RA looked back beyond the four-year limitations period to find the last legal regulated rent, which was the $2,096.47 rent charged in 2003. To that amount the RA added all subsequent rent increases allowed under rent stabilization, and found the base date rent was $3,325.24. From this amount he calculated a rent overcharge of $207,192.59, plus interest, which came to $283,192.59.[2] The RA offered to hear evidence from the landlord concerning individual apartment improvements (IAIs) to the unit that could potentially increase the regulated rent. However, the landlord never offered such evidence to the RA. The RA further found that landlord had demonstrated that the overcharge was not willful and that treble damages were therefore not warranted. In so finding, the RA cited the general confusion about the impact of the J-51 program on rent stabilization before *Roberts* and *Gersten*. Finally, the RA found that tenants were not entitled to attorneys' fees.

Both sides filed Petitions for Administrative Review (PARs). The PARs were consolidated. The Commissioner affirmed the RA's order and denied the PARs. The Commissioner declined to hear landlord's evidence concerning alleged IAIs pertinent to the

[2]By contrast, landlord contends that had the RA calculated the overcharge using its method, the overcharge would have been $10,776.50, plus interest.

unit, on the ground that no such evidence was presented to the RA. Both sides filed article 78 petitions. Supreme Court denied the petitions, affirming DHCR's determination. We now modify.

Courts will not disturb an administrative agency's determination unless it lacks any rational basis (*see Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149 [2002], *supra*). An agency's interpretation of its own regulations "is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; *see Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008]). However, "where the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations" (*Roberts*, 13 NY3d at 285 [internal quotation marks omitted]).

We do not disturb DHCR's fact-finding. DHCR's determination that landlord did not fraudulently deregulate the unit has a rational basis. An increase in rent, standing alone, does not establish a fraudulent scheme to evade rent stabilization (*see Conason v Megan Holding, LLC*, 25 NY3d 1, 16 [2015]). Tenants point to suspicions about landlord's claimed IAIs and its failure

to provide a rent-stabilized lease at some unspecified time after *Roberts*. These vague assertions provide no basis for disturbing DHCR's finding that there was no evidence of fraud by landlord. As discussed at greater length below, the absence of fraud affects our analysis of how DHCR calculated the base date rent.

DHCR's denial of tenants' request for treble damages was rational. Landlord demonstrated that its deviation from rent stabilization was not willful. The Court of Appeals has held that a finding of willfulness "is generally not applicable to cases arising in the aftermath of *Roberts*. For *Roberts* cases, defendants followed the Division of Housing and Community Renewal's own guidance when deregulating the units, so there is little possibility of a finding of willfulness" (*Borden v 400 E. 55 St. Assoc., L.P.*, 24 NY3d 382, 398 [2014]). DHCR's determination as to attorneys' fees was within its discretion (*see* RSL § 26-516[a][4]).[3] It was also not arbitrary and capricious for DHCR to decline landlord's request to provide documentation of IAIs for the first time at PAR-level review (*see Matter of Gilman*, 99 NY2d at 150).

The most contentious issue presented in this appeal is how

[3]Tenants' reliance on RPL § 234 in support of their argument for attorneys' fees is misplaced. That provision does not apply to an administrative proceeding before DHCR (*Paganuzzi v Primrose Mgt. Co.*, 268 AD2d 213 [1st Dept 2000]).

to calculate the base date rent as of November 2, 2005. As described above, DHCR looked beyond the four-year limitations period to find the last legal regulated rent ($2,096.47 in 2003), and then added subsequent statutory increases to arrive at a base date rent of $3,325.24. This method of calculation violates the Rent Stabilization Law and the applicable statute of limitations.

RSL § 26-516(a)(2) provides:

> "[N]o 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 . . . . 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."

RSC § 2526.1(a)(2)(ii) states:

> "[T]he rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint . . . shall not be examined."

Finally, CPLR 213-a reads, in its entirety:

> "An action on a residential rent overcharge shall be commenced 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 any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the

commencement of the action."

While these provisions are detailed and categorical in barring any examination of a unit's rental history beyond the four-year limitations period, the Court of Appeals has carved out an exception for cases where there is evidence that a landlord engaged in a fraudulent scheme to evade rent regulation (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366 [2010]). In *Grimm*, the landlord raised the rent-stabilized rent upon vacancy in 2000 from $586.86 to $1,450, far in excess of the allowed increase. The tenants were also given a lease without a rent-stabilized lease rider. In 2004, the petitioner tenant moved into the apartment pursuant to a lease that did not say that the unit was rent-stabilized. The rent remained at $1,450. When the petitioner brought a rent overcharge complaint with DHCR in 2005, the rent administrator applied the four-year limitations period and found the base date rent to be the $1,450 specified in the applicable lease in 2001, and thus found there was no overcharge. The *Grimm* Court found that there was sufficient evidence that the landlord engaged in a fraudulent scheme to evade rent regulation. In such circumstances, "DHCR has an obligation to ascertain whether the rent on the base date is a lawful rent" (*id.* at 366). The Court of Appeals therefore affirmed this Court's remand to DHCR for

further fact-finding.

Grimm invoked the Court's earlier decision in *Thornton v Baron* (5 NY3d 175 [2005], *supra*), which held that a lease provision was void as against public policy for exempting an apartment from rent stabilization based on an illusory tenant's agreement not to use the apartment as a primary residence. *Thornton* rejected the owner's contention that "the legal regulated rent should be established by simple reference to the rental history" on the date four years before the commencement of the overcharge action, because the lease and illegal rent violated public policy (5 NY3d at 180-181).[4]

The Court of Appeals has continued to require a showing of fraud or intentional wrongdoing before courts may allow any look back at a unit's rental history beyond the four-year limitations period. In *Matter of Boyd v New York State Div. of Hous. & Community Renewal* (23 NY3d 999 [2014], *rev'g* 110 AD3d 594 [1st Dept 2013]), a J-51 case, the Court of Appeals reversed this

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[4]In setting the base date rent, the Court held that it was not arbitrary and capricious for DHCR to use the default formula that it employs when reliable records are unavailable (*Thornton*, 5 NY3d at 181). In *Grimm*, the Court stated that its holding should not be construed to mean "that the default formula should be used in this case," only that "DHCR acted arbitrarily in disregarding the nature of petitioner's allegations and in using a base date without, at a minimum, examining its own records to ascertain the reliability and the legality of the rent charged on that date" (15 NY3d at 366-367).

Court's remand to DHCR for a fact-finding hearing regarding potential fraud and the legality of the base date rent. The Court, citing *Grimm*, held that the tenant "failed to set forth sufficient indicia of fraud to warrant consideration of the rental history beyond the four-year statutory period" (*id.* at 1000-1001). In *Conason v Megan Holding, Inc.* (25 NY3d 1 [2015], *supra*), the Court of Appeals found evidence that the landlord engaged in a "stratagem" to remove the tenants from the aegis of rent stabilization, and allowed a look back of more than four years at the unit's rental history (*id.* at 16).

Following these precedents, in the absence of evidence of fraud, this Court has declined to look back more than four years before the filing of the overcharge complaint to set the base date rent (*see Stulz v 305 Riverside Corp.*, 150 AD3d 558 [1st Dept 2017], *lv denied* 30 NY3d 909 [2018]; *Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105 [1st Dept 2017], *lv dismissed* 30 NY3d 961 [2017]; *Todres v W7879, LLC*, 137 AD3d 597 [1st Dept 2016], *lv denied* 28 NY3d 910 [2016]; *but see Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95 [1st Dept 2017]; *72A Realty Assoc. v Lucas*, 101 AD3d 401 [1st Dept 2012].

In the case at bar, DHCR was not arbitrary and capricious in finding that landlord did not engage in a fraudulent scheme to evade the Rent Stabilization Law. As a consequence, DHCR was

prohibited from looking at the unit's rental history before November 2, 2005.

In looking back beyond the four-year limitations period, the Commissioner relied on RSC § 2526.1[a][2][ix] and this Court's decision in *72 Realty Assoc. v Lucas* (101 AD3d 401 [1st Dept 2012]). Section 2526.1(a)(2)(ix) is inapposite, as it applies only to apartments that were "vacant or temporarily exempt from regulation pursuant to section 2520.11" (RSC § 2526.1[3][iii]). The apartment was not vacant, as tenants resided there during the relevant period. It was also not "temporarily exempt." Section 2520.11 lists specific situations where units are exempt from rent regulation, none of which fit the facts at bar. *72 Realty Assoc.* was decided before the Court of Appeals' decision in *Matter of Boyd* (23 NY3d 999), and it does not discuss *Grimm* or the need for some fraudulent behavior by the landlord as a predicate to an examination of rental history beyond four years.

After Supreme Court issued its decision affirming DHCR, this Court issued *Taylor v 72A Realty Assoc., L.P.* (151 AD3d 95 [1st Dept 2017], *supra*), another J-51 case, upon which the dissent relies. In *Taylor*, this Court allowed a look back of more than four years in the absence of fraud. The *Taylor* Court asserted correctly that the literal application of CPLR 213-a could "allow the owner to collect rent that might be in excess of what it

could have otherwise charged plaintiffs" if the landlord had properly understood the import of J-51 benefits (151 AD3d at 106). The Court in *Taylor*, and the dissent in this case, cite cogent policy reasons for calculating the rent using the method DHCR used here.

However, the legislature has made a different policy determination. It not only set a four-year limitations period, but it also explicitly barred any "examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint" (RSL § 26-516[a][2]). The Court of Appeals has found that the purpose of the four-year limitations period is "to alleviate the burden on honest landlords to retain rent records indefinitely" (*Thornton*, 5 NY3d at 181). The Court of Appeals has made what we have called a "limited exception" to the four-year limitations period in cases where landlords act fraudulently (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 68 AD3d 29, 33 [1st Dept 2009], *affd* 15 NY3d 358 [2010]). To expand this exception to landlords who have not engaged in fraud would create a much broader exception that would appear to negate the temporal limits contained in the Rent Stabilization Law and the CPLR.

Taylor runs athwart the Court of Appeals' decisions in *Grimm* and *Boyd* and the bulk of the authority of this Department,

discussed above. These decisions do not rest on the factors the dissent uses to distinguish them from the instant appeal. Rather, the relevant body of authority rests upon the presence, or absence, of fraudulent behavior by the landlord. Where, as here, there are insufficient indicia of a fraudulent scheme to evade rent regulation, there can be no consideration of the rental history beyond four years for the purpose of calculating a rent overcharge.

The dissent attempts to avoid CPLR 213-a's four-year limitation by stating that it is "logical" that CPLR 213-a's reference to the "rental history" means only the rental history found in the annual filings with DHCR. Using this unduly limited definition of "rental history," the dissent then argues that where, as here, there are no recent filings with DHCR (because the landlord thought that it had properly deregulated the apartment) courts may look back at evidence concerning rent charged before the base date, and that no predicate showing of fraud is necessary to do so. If the legislature had meant "rental history" to mean "rental history found in the annual filings with DHCR," it could have easily so stated. A far more reasonable interpretation of "rental history" would embrace not just agency records but also the records of the landlord and the tenant, as embodied in ledger books, cancelled checks, rent

receipts, expired leases, and the like. Thus, the absence in this case of DHCR rent registrations going back four years does not nullify the temporal strictures of CPLR 213-a.

The dissent asserts that application of the four-year limitations period specified by the legislature in the Rent Stabilization Law and the CPLR will leave tenants with "a right without a remedy." To the contrary, we have held that DHCR is not limited to calculating the base date rent according to the market rate that obtained pursuant to the parties' lease, and that the agency has the discretion to implement other methods of base date rent calculation that do not run afoul of the limitations period (*see Matter of 160 E. 84th St. Assoc. LLC v New York State Div. of Hous. & Community Renewal,* (160 AD3d 474 [1st Dept 2018]). Additionally, tenants who reside in apartments covered by *Roberts* are afforded the Rent Stabilization Law's limitations on rent increases, even if their apartments would

otherwise be subject to luxury decontrol absent the landlord's receipt of J-51 benefits.

Accordingly, we remand the matter to DHCR to recalculate the overcharge and proper rent using a base date rent of four years before the filing of the overcharge complaint.

All concur except Gische and Kapnick, JJ. who dissent in a memorandum by Gische, J. as follows:

GISCHE, J. (dissenting)

I respectfully dissent and would vote to uphold the methodology used by respondent New York State Department of Housing and Community Renewal (DHCR) to calculate the rent overcharge in this case.[1] It is neither arbitrary and capricious nor contrary to law. The methodology applies only to those cases in which a landlord overcharged the tenant, albeit mistakenly, by removing the apartment from rent stabilization at a time when the building was receiving J-51 tax benefits from the City of New York. In *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]), the Court of Appeals made it clear that although the DHCR had endorsed the underlying practice of luxury decontrolling apartments under these circumstances, it was in contravention of the plain language of the various laws affecting rent stabilization laws. As we have previously recognized, in deciding *Roberts*, the Court of Appeals left open many important issues resulting from its decision, some expressly, such as retroactivity and statute of limitations, and some sub **silentio**, such as how to calculate rents for apartments improperly deregulated (*see Taylor v 72A Realty Assoc. L.P.*, 151 AD3d 95, 101 [1st Dept 2017]). The courts and DHCR have since been

[1]I agree, however, with the majority on the collateral issues of penalties and attorneys' fees.

working to resolve these issues in a consistent and just manner.

In order to establish a base rent in this *Roberts* overcharge case, the DHCR looked at the last rent-stabilized rent publicly registered with the DHCR, which was in 2003, and then applied all of the rent-stabilized increases that otherwise would have been allowed during the relevant time. The DHCR methodology effectively establishes a base rent as if the landlord had adhered to *Roberts* and not improperly removed the apartment from rent stabilization. The overcharge award was then calculated using only the four-year period immediately preceding the date on which the overcharge complaint was filed. The gravamen of my disagreement with the majority's view is that in *Roberts* overcharge cases, determination of the base rent strictly prohibits any consideration of the last legally registered regulated rent where the rent was set more than four years before the filing of an overcharge complaint. As more fully explained herein, this limitation on the look back period for *Roberts* overcharge cases, which do not implicate fraud-based claims, was already rejected by a unanimous bench of this Court in *Taylor* (151 AD3d at 105). More importantly, the result in *Taylor* was warranted, if not mandated, by this Court's earlier, unanimous decision in *Gersten v 56th 7th Ave. LLC* (88 AD3d 189 [1st Dept 2011], *appeal withdrawn* 18 NY3d 954 [2012]), giving *Roberts*

retroactive effect. I further disagree with the majority's conclusion that its result is required by CPLR 213-a.

The landlord, DHCR, and the tenants all agree on most of the salient facts in these symbiotic article 78 proceedings, one brought by the landlord, the other by the complaining tenants. It is undisputed that the landlord deregulated apartment 10D at 27 West 96th Street, New York, New York, in 2003, when the rent rose to $2,096.47, which exceeded the threshold required for luxury decontrol at that time. The landlord, however, was simultaneously receiving tax incentives for the building under the City's J-51 program (*see* Administrative Code of City of NY § 11-243).[2] Those incentives did not expire until sometime in 2013. The landlord's actions at the time were in conformity with the DHCR's 1996 administrative interpretation of the applicable laws. Those actions, however, proved to be in contravention of the Rent Stabilization Laws (*Roberts*, 13 NY3d at 286, 287).

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[2] In New York City, multiple dwellings may qualify for tax incentives designed to encourage rehabilitation and improvements (see Administrative Code NY § 11-243 [formerly § J51-2.5]). The City's J-51 program, authorized by Real Property Tax Law § 489, allows property owners who complete eligible projects to receive tax exemptions and/or abatements that continue for a period of years (see Administrative Code § 11-243[b][2], [3], [8]; 28 RCNY 5-03[a]). Rental units in buildings receiving these exemptions and/or abatements must be registered with the Division of Housing and Community Renewal (DHCR), and are generally subject to rent stabilization for at least as long as the J-51 benefits are in force (see 28 RCNY at 5-03[f]).

As a consequence of its decision to luxury deregulate the apartment in 2003, the landlord stopped registering the rent with DHCR. The rent for the apartment was last publicly registered in 2003, before the tenants filed their overcharge complaint. The rent registered was $2,096.47, reflecting the amount the landlord charged an intervening tenant in occupancy before the complaining tenants. The landlord did not register that intervening tenancy or the rent charged, believing that the apartment was deregulated in 2003.

The complaining tenants first took occupancy of the apartment pursuant to a two-year lease effective August 1, 2005, at a monthly market rent of $5,195 per month. The lease was subsequently twice renewed, each time for a one-year term. The first renewal, effective August 1, 2007, was at a monthly rent of $5,700; the next renewal, effective August 1, 2008, was at a monthly rent of $6,150. The tenants subsequently became month-to-month tenants. It is undisputed that the tenants were never offered rent-stabilized leases and that the rents they were charged were free market rents, bearing no relationship to capped rent increases permitted under rent stabilization.

On November 2, 2009, two weeks after *Roberts* was decided by the Court of Appeals, the tenants filed a rent overcharge complaint with DHCR, alleging that the rent of $5,195, charged

and collected by the landlord on December 1, 2005, constituted an overcharge. While the overcharge complaint was pending, in 2010, the landlord filed DHCR rent registrations for the apartment for the years 2005 through 2010. The registrations reflected the market rents set forth in the non-rent-stabilized leases that were actually charged and collected from the tenants.

There is no dispute that under the authority of *Roberts*, the apartment should not have been luxury decontrolled in 2003 and that the tenants were entitled to a rent-stabilized lease and renewals for the duration of their tenancy (*see also 72A Realty Assoc. v Lucas*, 101 AD3d 401, 401-402 [1st Dept 2012] [*Lucas*]). Even though permissible increases (i.e., for a vacancy, major capital improvements [MCIs] and IAIs) may have brought the rent over the luxury decontrol threshold in 2003, the apartment remained subject to rent regulation until the first vacancy following the expiration of the J-51 benefits occurred (*Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105 [1st Dept 2017], *lv. dismissed* 30 NY3d 961 [2017]). The landlord would have been allowed to collect the rent, albeit in an amount over the threshold, but the tenants would have had the benefit of capped increases and rent-stabilized leases (*Park*, 150 AD3d at 111). There is also no dispute that in accordance with the applicable four-year statute of limitations, no overcharge

can be awarded for any period before November 2, 2005, which is four years before the tenants' overcharge complaint.

Even if the landlord was simply mistaken in returning the apartment to a free market rent in 2003, the fact remains that the landlord did not notify the tenants when they took occupancy in 2005 that the apartment was subject to rent stabilization or offer them a rent-stabilized lease. After 2003 (until 2010), there was no public record of the apartment's rent history filed with the DHCR, as otherwise required under the applicable rent stabilization laws.

The rent administrator found the last rent registered with the DHCR in 2003 reliable and used it to computationally determine the rent-stabilized rent that the landlord could have actually, legally, charged from 2003 forward to 2005. In this manner, the DHCR was able to establish that the legal regulated rent that the tenants could have been charged for the subject apartment on November 2, 2005 was $3,325.24 per month. This base rent consists of the last registered rent in 2003 of $2,096.47, plus permissible increases, including an MCI, a longevity bonus, and a vacancy increase. Based upon this computation, the rent administrator determined that the rent of $5,195 charged when the tenants first took occupancy in August 2005 was improper and, therefore, an overcharge. The methodology that DHCR applied

restores the apartment's rent-stabilized status and puts the parties back in the position they would have been in had the landlord followed the reasoning of *Roberts* in the first place.

In *Taylor*, this Court expressly addressed the issue of how to calculate base rents in *Roberts* overcharge cases. Although DHCR did not have the benefit of our decision at the time it made its determination[3], the methodology we endorsed in *Taylor* (151 AD3d at 105) is exactly the same methodology used by the DHCR when it affirmed the rent administrator's order and denied each side's petition for administrative review (PAR) in May 2015. The majority's rejection of DHCR's methodology in this case is directly contrary to our unanimous decision in *Taylor*. Although the majority cites this Court's decision in *Stulz v 305 Riverside Corp.* (150 AD3d 558 [1st Dept 2017], *lv. denied* 30 NY3d 909 [2018]), decided just two days before Taylor, *Stulz*'s limited discussion on the important issue raised by this appeal yields little analysis. More recently, in *Matter of 160 E. 84th St. Assoc. LLC v New York State Div. of Hous. & Community Renewal*, this court supported *Taylor's* important, take-away principle, that the illegal market rate rent charged by a landlord four years before an overcharge complaint is filed cannot serve as the

[3]*Taylor* was issued a year later, on May 25, 2017.

base date rent, even in the absence of fraud (160 AD3d 474, 474-475 [1st Dept 2018]). More importantly, *Taylor's* analysis, followed in this dissent, is warranted by cases that preceded *Stulz*. DHCR's methodology is analytically and logically required by our decision in *Gersten*. In *Gersten*, this court determined that retroactive application of *Roberts* was warranted because *Roberts* did not establish a new principle of law, but rather merely construed a statute that had been in effect for a number of years (88 AD3d at 198). In weighing the equities involved, this Court found that retroactive application of *Roberts* would protect tenants from rent increases in excess of those allowed under the Rent Stabilization Law. We cautioned that a contrary ruling, that is, applying *Roberts* only prospectively, would allow landlords to collect rent in excess of what was allowed by law, based upon a faulty statutory interpretation (*id.*).

If *Gersten* is to have any effect, the majority's adoption of the landlord's arguments limiting the look back period for establishing the base rent in *Roberts* overcharge cases must be rejected. Otherwise the tenants before us now, and others similarly situated, will have a right without a remedy.[4] They

[4]The majority, citing *Matter of 160 E. 84th St. Assoc.* (160 AD3d 474), asserts that the DHCR is not limited to calculating a base date rent according to the market rate charged, but does not explain how under its interpretation of the relevant statutes

will be entitled to the protections of the rent regulations, including a rent-stabilized lease and rent-regulated rents, but be unable to recover the full extent of their overcharges. Moreover, the landlords will be able to continue to charge fair market rents, in complete contravention of a retroactive treatment of *Roberts*.

This case illustrates my point. Using the landlord's methodology, which is to use the free market rent it charged and the tenant paid four years before the overcharge complaint was filed (i.e., $5,195 on November 2, 2005), results in a total overcharge of only $10,271.40, leaving the collectible rent at $6,334.12 as of the date of the parties' PARs. The market rent will serve as the base going forward for all future rent-stabilized tenants. However, using the methodology that DHCR applied, which is the same as what we endorsed in *Taylor*, results in an overcharge of $285,390.39 for exactly the same four-year period, using a base rent of $3,325.24. The collectible rent as of the date of the parties' PARs is $4,136.32. DHCR's approach is consistent with the balancing of

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that is possible. Moreover, the sampling method referred to in *Matter of 160 E. 84th St. Assoc.* is typically used where, because of fraud or other circumstances, the registered rental history for the subject apartment is unavailable or unreliable, which is not the situation here (*see Rent Stabilization Code* [9 NYCRR] § 2522.6[b][2]; *Thornton v Baron*, 5 NY3d 175, 181 n 5 [2005]).

the equities in *Gersten*, gives *Roberts* its retroactive effect, and recognizes that these kinds of overcharges are a special category of overcharge cases, which only emerged in the aftermath of *Roberts*.

The underpinnings of a *Roberts* overcharge complaint, unlike the complaints of other types of overcharges, is not based on claims of fraud or willfulness (*see Borden v. 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 398 [2014] [allegedly illegally deregulated apartments]). A finding of willfulness is generally not applicable to *Roberts* overcharge cases (*see Todres v W7879, LLC*, 137 AD3d 597 [1st Dept 2016], *lv denied* 28 NY3d 910 [2016]). I am not suggesting that the DHCR methodology use in this case applies in any overcharge case other than a *Roberts* overcharge. Given the unique circumstances of *Roberts* overcharges and their complicating factors, this methodology rectifies the erroneously deregulated rent and ensures that subsequent legal regulated rents are based upon a reliable rent. It restores the parties to the lawful position they would have been in had the *Roberts* interpretation of the applicable rent stabilization laws been followed at the relevant time.

One of the main issues raised by the landlord is that DHCR's methodology violates the four-year statute of limitations set forth in CPLR 213-a because the DHCR has impermissibly considered

the rental history preceding the base date of November 2, 2005. In its entirety, CPLR 213-a provides as follows:

> "An action on a residential rent overcharge shall be commenced 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 any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action" (emphasis added).

The Rent Stabilization Law contains similar language, limiting examination of the rental history to the four-year period preceding the filing of an overcharge complaint (*see* Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-516[a][2]). In relevant part, this section provides that "[w]here 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" (emphasis added) (*id.* § 26-516[a]).

Although the term "rental history" is not defined in CPLR 213-a, it logically refers to the rental history found in the annual filings with DHCR, given the four-year limitation's

purpose, which is to alleviate the burden on honest landlords' retention of rent records indefinitely (*Matter of Cintron v Calogero*, 15 NY3d 347, 354 [2010] [internal citations omitted]; *see also Thornton*, 5 NY3d at 180-181). This interpretation is also evident from Rent Stabilization Law § 26-516(a)(2), which defines the trigger for the four-year period within which to challenge a rent-stabilized rent as the rent set forth in the "annual rent registration statement filed four years prior to the most recent registration statement." Likewise, Rent Stabilization Law §26-516(g) provides that any owner that has registered a housing accommodation "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." These statutes strongly support an interpretation that the reference in the CPLR to a rental history is a reference to the rental history contained in public filings.

Whereas a rent-regulated apartment has a public, and therefore, discoverable "rental history," given the public records that must be filed with DHCR (Rent Stabilization Code § 2528.3), a free market apartment does not have a publicly available rental history because the rents for an unregulated apartment do not have to be registered with DHCR. There is no

need for such information because freely negotiated market rents are not subject to claims of overcharge. At bar, when the overcharge complaint was filed, there was no "rental history" for the apartment that could be used for the four-year look back period due to the landlord's treatment of the apartment as luxury decontrolled.

In construing CPLR 213-a's look back period, the courts have been flexible when the overcharge does not fit the typical case. For instance, where there is a rent reduction order in effect and it was imposed before the four-year limitations period -- even if many years earlier -- the order must be considered in calculating the rent overcharge the landlord owes (*Matter of Cintron*, 15 NY3d at 356). Other instances where a look-back of more than four years is warranted include the calculation of a longevity rent increase (*see Matter of H.O. Realty Corp. v N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 103,109 [1st Dept 2007], *citing Matter of Ador Realty, LLC v Div. of Hous. & Community Renewal*, 26 AD3d 128 [2d Dept 2005]), and to determine whether an apartment is subject to rent stabilization at all (*see East W. Renovating Co. v New York State Div. of Hous. & Community Renewal*, 16 AD3d 166, 167 [1st Dept 2005]). This is because the issue of an apartment's regulated status is inseparable from the issue of whether there is an overcharge.

Flexibility in the statute's application is also evident in those circumstances in which an apartment's rental history is unreliable, typically due to its fraudulent deregulation or some willful attempt to evade the rent regulation laws (*see e.g. Conason v Megan Holding, LLC*, 25 NY3d 1 [2015]; *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358 [2010]; *Thornton*, 5 NY3d 175). In those circumstances, overcharge claims permit review of an apartment's rental history before the four-year look back period in setting a base rent.

We acknowledge that there is no evidence here of a fraudulent scheme to deregulate the apartment, leading the majority to embrace the landlord's argument that strict application of the four year statute of limitations is required. Although the market rents in *Roberts* overcharge cases are not tainted by fraud, or some fraudulent scheme, they are, nonetheless, clearly incorrect under rent regulation. The last rent publicly filed with the DHCR is a reliable starting place to calculate the rent that could have been charged but for the improper deregulation. The filed rent should then be adjusted for allowable rent-stabilized increases to reliably determine the regulated rent that should have been filed for the apartment four years preceding the filing of any rent overcharge complaint.

The tenants were legally entitled to a rent-regulated lease for the apartment when they rented it in 2005, not a free market, unregulated lease. Although they accepted a free market lease, it is beyond cavil that they did not, nor could they, waive the protections of the of the rent stabilization laws, unless the landlord satisfied the conditions for such deregulation (*see Gersten*, 88 AD3d at 199).

As this Court explained in *Taylor*, and as the DHCR correctly determined here, the tenants cannot collect more than four years' worth of overcharges, but the rent permitted to be charged beginning four years before the overcharge is filed and in the years thereafter must be mathematically corrected so that it comports with permissible guideline and other increases. This is the only way the rent-regulated status of the apartment can truly be effectuated.

The majority's reliance on *Matter of Boyd v New York State Div. of Hous. & Community Renewal* (23 NY3d 999 [2014]) for a contrary result is misplaced, because *Boyd* is not a *Roberts* overcharge case.[5] Although *Boyd* did involve a rent-stabilized

[5]The Court of Appeals reversed this Court (110 AD3d 594 [1st Dept 2013]) and reinstated the judgment of Supreme Court, New York County (2012 NY Slip Op 31260[U]). The Supreme Court's and this Court's decisions provide useful facts not articulated in the Court of Appeals' decision.

apartment in a building receiving J-51 tax benefits, the apartment had never been luxury deregulated. The issue in *Boyd* was whether an overcharge complaint filed by the tenant more than four years after the first overcharge claimed was timely. The building owner had registered the monthly rent for the apartment, but the tenant, nonetheless, claimed that the landlord's fraud concerning certain asserted improvements (IAIs) to her apartment warranted disregard of the four-year look back period. The Court of Appeals dismissed the complaint because the tenant had not set forth sufficient indicia of fraud to warrant consideration of the registered rental history beyond the statutory four-year period allowed by CPLR 213-a.

A significant difference between *Boyd*, which was a fairly straightforward overcharge case, and the case before us is that the landlord in *Boyd* continued to file rent registrations with DHCR throughout, allowing the tenant to avail herself of such public information so she could have filed a timely complaint. Contrast that with the situation here, where the landlord stopped filing rent registrations with the DHCR in 2003, so there was no public record of the apartment's rental history available for the tenants to inspect before they filed a complaint (*see Matter of Sun v Lawlor*, 96 AD3d 685, 687 [1st Dept 2012] [tenant could have timely proceeded on his claim because DHCR's order was part of

its public record]).

Since the retroactive application of *Roberts* is intended to protect tenants from increases in excess of those permissible under the Rent Stabilization Law, the importance of setting a correct rent for this apartment is apparent not only for determining the overcharge due the complaining tenants but also for purposes of future rent calculations (*see Mon-Rose Realty Corp. v New York State Div. of Hous. & Community Renewal*, 255 AD2d 154 [1st Dept 1998]). Here, as in *Taylor*, although the base date rent is not tainted by fraud, or some fraudulent scheme, it is clearly an incorrect rent for this rent-regulated apartment. As this Court explained in *Taylor*, and as the DHCR correctly determined, the base date should be adhered to. Although the tenants cannot collect more than four years' worth of overcharges, the overcharges must be based on a mathematically recomputed base date rent that comports with permissible guideline increases. This is the only way that the rent-regulated status of the apartment can be truly effectuated.

We did not, in *Taylor*, disregard or extend the statute of limitations, nor do I propose doing so now (151 AD3d at 102 ["challenges to the level of rent charged must be made within [the] four-year limitations period . . . immediately preceding the filing of a complaint"]). We cannot, however, blindly use

the free market rent charged on the date four years prior to the filing of the rent overcharge claim without further investigation (*see Lucas*, 101 AD3d 402). While there may be no fraudulent deregulation here, the landlord's error, albeit non-venal, still resulted in increasing a rent-stabilized rent to a free market rent well beyond what was legally permissible. As we observed in *Gersten*, "a tenant should be able to challenge the deregulated status of an apartment at any time during the tenancy" (88 AD3d at 199). The issues of whether an apartment is rent-regulated and, if so, whether the rent charged was legal under the applicable rent laws cannot be teased apart, because they are inseparable issues. In putting the apartment back onto its rent stabilization track, further review of the rents charged after 2003, when the landlord deregulated the apartment, is unavoidable (*Taylor*, 151 AD3d at 105). It is the only way to determine the legally permissible rent-stabilized rent that the tenants should have been charged during the four-year period of overcharged rent.

The majority's reliance on *Matter of Park v New York State Div. of Hous. & Community Renewal* (150 AD3d 105 [1st Dept 2017], *lv dismissed* 30 NY3d 961 [2017]) and *Todres v W7879, LLC* (137 AD3d 597 [1st Dept 2016], *lv denied* 28 NY3d 910 [2016], *supra*) for its result is misplaced. *Todres* was a straightforward fraud

case where the court found that there was no fraudulent deregulation scheme; it did not involve an impermissible deregulation of the apartment during the landlord's receipt of J-51 tax benefits. *Matter of Park* illustrates a situation in which an apartment might have been improperly deregulated, but because of an intervening vacancy, the tenant asserting the overcharge had no standing to do so.

Taylor is not only completely harmonious with those cases, it also builds on principles this Court first explored in *Lucas* (101 AD3d 401), an even earlier case. *Lucas* was a *Roberts* overcharge case that involved an apartment's ongoing status as rent-regulated. The landlord in *Lucas* claimed that the IAIs were the reason for the rent's precipitous jump to more than $2,000 and its luxury deregulation. This Court rejected the application of CPLR 213-a's four-year look back period "in light of the improper deregulations of the apartment and given that the record does not clearly establish the validity of the rent increase that brought the rent-stabilized amount over $2,000" (*Lucas*, 101 AD3d at 402). *Lucas* remains viable and, contrary to the majority's analysis, neither *Grimm* nor *Boyd* affect its authority. *Lucas* is a *Roberts* overcharge case, not a fraud/fraudulent scheme case, so the *Grimm* analysis was not implicated, and *Boyd* involved an overcharge case not premised on *Roberts* luxury deregulation.

In sum, although the landlord's overcharge was not willful, and penalties are not warranted is this case, the tenants' recovery of the base amount of the rent overcharge is their actual, compensatory damages (*see Borden*, 24 NY3d at 389). Permitting a base rent fixed as a market rent would render *Roberts* and its progeny a nullity. This is not a policy-driven result, as the majority suggests, but warranted by a full and proper application of the applicable rent stabilization laws as interpreted by the courts of this State.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 16, 2018

CLERK

contrary, in *Matter of M.B.* (6 NY3d 437), the Court of Appeals explicitly rejected MHLS's current argument that because intellectually and developmentally disabled persons may have had health care decision-making capacity before their catastrophic illnesses, they may be situated similarly to other non-disabled people who previously had health care decision-making capacity (*id.* at 448).[9]

In *Matter of M.B.*, the guardian was appointed before the HCDA's effective date. The ward's physicians concluded that his illness was terminal and that his life-sustaining treatment substantially burdened him. MHLS objected to the guardian's request to disconnect the ward's respirator (*id.* at 449). MHLS agreed that stopping life-sustaining treatment was in the ward's best interests and was satisfied that the guardian had complied with all of the procedural and substantive safeguards required under the HCDA (*id.* at 450). Nevertheless, it argued that a guardian appointed before the HCDA's effective date needed to petition the court before he or she could request termination of

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[9] *Matter of M.B.* addressed the question of whether intellectually and developmentally disabled people were similarly situated to non-disabled people in the context of deciding whether SCPA 1750-b's provision of end-of-life decision making authority applied retroactively to previously appointed guardians.

life-sustaining treatment under the new procedures set forth in SCPA 1750-b (*id.*).

Under the HCDA, newly appointed guardians must address the health care capacity issue twice, once when initially appointed and again when making end-of-life decisions. Previously appointed guardians addressed the issue only when making a specific decision to end life-sustaining treatment. In *Matter of M.B.*, the Court of Appeals observed that the legislature had determined that it would serve no significant purpose to require each previously appointed guardian to commence proceedings "for the expansion of health care decision-making authority," given the procedural steps all guardians must follow under SCPA 1750-b, which include an inquiry into the intellectually or developmentally disabled person's capacity to make health care decisions (*id.* at 452-453).

MHLS argued that the common law inquiry was not equivalent to the guardianship certification process contemplated under the amended SCPA 1750-b because it occurred after the mentally retarded person was in medical crisis and therefore failed to adequately account for the possibility that the patient might once have had the capacity to make health care decisions (*id.* at 453). The Court of Appeals, however, found that MHLS's concerns

were misguided because "whether judicial intervention is sought in the context of a guardianship expansion proceeding or a SCPA 1750-b objection, the court must render a determination based on the present capacity of the mentally retarded person -- not abilities the patient may have once possessed" (*id.*). In addition, the Court noted, in circumstances in which the intellectually or developmentally disabled person formerly had some capacity to make medical decisions, the guardian is nonetheless required to base medical decision-making "on the best interests of the mentally retarded person and, when reasonably known or ascertainable with reasonable diligence, on the mentally retarded person's wishes, including moral and religious beliefs" (*Matter of M.B. 6* NY3d at 459, quoting former SCPA 1750-b[2][a]). Thus, as the Court of Appeals recognized, "the wishes of an intellectually or developmentally disabled individual who once had capacity to make health care decisions are not disregarded under the new statutory scheme" (*id.* at 454).

As alluded to by the Court of Appeals in *Matter of M.B.*, MHLS's equal protection argument incorrectly assumes that SCPA 1750-b's best interests standard is entirely separate from and independent of a mentally disabled person's wishes. While the best interests analysis is still paramount under SCPA 1750-b, the

legislature made a policy decision that not all intellectually and developmentally disabled persons should be treated the same by enumerating factors to be applied in determining best interest that allow the uniqueness of each disabled person to be taken into consideration and require consideration of the intellectually and developmentally disabled person's wishes.[10]

Indeed, best interests under the statute is an assessment of the benefits and burdens of the end-of-life decision performed by taking into account the enumerated factors, including "the preservation, improvement or restoration of the person['s] health" and "resumption or restoration of functions," as well as "the relief of the person['s] suffering" (SCPA 1750-b[2][b]). However, importantly, SCPA 1750-b explicitly includes an

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[10] Under the common law's traditional best interests analysis, treatment may be withdrawn where the burdens of treatment clearly outweigh any benefit to the patient. The traditional best interests analysis involves straightforward, rigid consideration of the current condition of the patient and the effects of the decision to withdraw life-sustaining treatment (*see* James F. Drane & John L. Coulehan, The Best-Interests Standard: Surrogate Decision Making and Quality of Life, 6 J. Clinical Ethics 20, 28-29 [1995]; Dennis Mazur & David Hickam, Patient Preferences: Survival vs. Quality of Life Considerations, 8 J. Gen. Int. Med. 374 [1993]). This approach is consistent with the traditional notion of a guardian=s responsibility toward helpless wards and the state=s parens patriae relation to incompetent persons (*see e.g. Matter of Grady*, 426 A2d 467, 481-483 [NJ 2002]).

additional layer of consideration of the person's "wishes," including "moral and religious beliefs." The legislature made the policy choice that the intellectually and developmentally disabled person's expressed interests are not to be ignored just because those expressions do not rise to the level of competence for informed consent.[11] The legislature recognized that the strict benefit and burden analysis dehumanizes patients by suggesting that only their present condition counts and thus ignores the "dignity and uniqueness of every person" (SCPA 1750-b[2][b]). Thus, SCPA's 1750-b best interests model explicitly encourages guardians to respect, to the greatest degree possible, the "dignity and uniqueness" of each person, reincorporating the beliefs and personality traits of the persons in life-sustaining decisions.

Under the circumstances, under SCPA 1750-b, the determination of the functional capacity of the intellectually or developmentally disabled person is a necessary inquiry in the

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[11] *See* 2002 NY Legis Ann at 279; 2002 McKinney's Session Laws of NY, at 2002 - 2004); Budget Report, Bill Jacket, L 2002, ch 500 at 4; Memo from Dennis P. Whalen, Executive Deputy Commissioner State Department of Health, id. 8; Letter from Patricia W. Johnson, Counsel Assistant, State Commission on Quality of Care for the Mentally Disabled, id.; Letter from Mac N. Brandt, executive Director, id. at 16.).

best interests analysis. Of course, as for those intellectually and developmentally disabled persons with severe conditions, their mental capacity may be so diminished that they either cannot understand or cannot deliberate about health care decisions, particularly life-and-death decisions. For them, the benefit and burden analysis may be confined to their immediate well-being. But for those who, like M.B., had some health care decision-making capacity, the analysis for determining end-of-life decisions includes their values and wishes.

Accordingly, the patient's subjective preferences are not ignored in SCPA 1750-b's best interests analysis. The patient's right to "uniqueness and dignity" is not diminished if the patient is intellectually or developmentally incompetent. A guardian should examine the patient's subjective preferences and values in performing the obligation to promote the patient's well-being. The values and preferences of the patients serve as a guide to a best interests judgment. Of course, in certain circumstances, a guardian may override an expressed preference, for example, where there is clear evidence that the preference is irrational or destructive (that no rational person would have made such a determination). Ultimately, the reasonableness of a guardian's choice to stop or continue treatment should be

evaluated by considering the patient as a whole, including his or her values, physical and emotional interests, and ability to experience and enjoy life, so as to assure that intellectually and developmentally disabled persons are provided the right to die with the comfort and dignity that others cherish.[12]

Applying the considerations discussed above to the facts before us, we are satisfied that Supreme Court's decision with regard to M.G. was consistent with SCPA 1750-b's requirements for withdrawal of life-sustaining treatment. The undisputed medical evidence establishes that before his demise, M.G. was in a

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[12] Under SCPA 1750-b, the best-interest analysis is not conducted solely from the subjective point of view of the patient or the guardian, but is an inquiry into the value that the continuation of life has for the patient. The hope is to implement the patient's likely choice by having the guardian choose for the patient by weighing the precise elements of best interests as defined by the legislature, applying them in the fashion (i.e., according to the weighing) that an average person would want (see New York State Task Force on Life and the Law, When Others Must Choose: Deciding for Patients Without Capacity 74-75 [1992]; President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment 132-34 [1983]; President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions 178-79 [1982]). Thus, consistent with the legislative mandate that intellectually and developmentally disabled persons have the right to be treated with human dignity, the assumption is made that the person would prefer to be treated as the average human being would want to be treated (*see Matter of Doe*, 53 Misc 3d 829, 856 ([Sup Ct Kings County 2016]).

permanent vegetative state; he suffered from multiple organ failure of the lungs, kidneys, and brain. M.G. had no neurologic function and did not respond to stimuli or breathe without a ventilator. The medical expert's opinion was that the need for hemodialysis, the chest tubes, and ventilation were ongoing, that M.G.'s lack of cognitive ability could not be cured, and that there was no chance of meaningful neurological recovery. It was thus abundantly clear that M.G. was completely unable to interact with his environment, and that the medical probability that he would ever return to a cognitive sentient state, as distinguished from a chronic vegetative existence, was virtually non-existent. Any medical treatment administered would have provided minimal, if any, benefit and would only have postponed M.B.'s death rather than improve his life. In short, M.G.'s condition was irreversible, and treatment would have imposed an extraordinary burden on him (*see* SCPA 1750-b [4][b][i]; *see also Matter of Elizabeth M.*, 30 AD3d 780, 783-784 [3d Dept 2006]). The best interests of the patient under SCPA 1750-b embraces not only recovery or the avoidance of pain but also a dignified death. The guardian's decision conformed with the obligation to promote the patient's well-being, and to the extent possible, the decision of M.G. himself.

Finally, we reject MHLS's argument that Supreme Court made no effort to "investigate M.G.'s wishes and values more thoroughly before resorting solely to his perceived best interests." Contrary to MHLS's contentions, the problem was not that the court did not focus on the expressed preferences of the patient. There was a lack of evidence of what his desires would have been had he contemplated the catastrophic injury that later befell him. There was no evidence that conversations were had with him about his feelings or opinions about the withdrawal of life-sustaining treatment, and he did not execute any advance directives expressing his wishes. Nevertheless, we recognize that in promulgating SCPA 1750-b, the legislature intended the best interests standard to be a "patient-centered" approach. This requires the courts to explicitly deal with a patient's expressed preferences and wishes in conducting a best interests analysis.

Accordingly, the order of Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about December 27, 2016, which, among other things, after a hearing, granted petitioner's application for authorization to withdraw life-sustaining

treatment from respondent M.G., and denied Mental Hygiene Legal Service's objection to the decision of the guardian to withdraw life-sustaining treatment, should be affirmed without costs.

All concur except Tom, J. who concurs in a separate Opinion.

TOM, J. (concurring)

While I agree with the result reached by the majority, I write separately because I believe we should take this occasion to discuss the meaningful inquiry into end-of-life wishes that a person with developmental disabilities should be afforded under SCPA 1750-b and to clarify that the mandates of the statute need to be strictly adhered to in order that the person's best interests, including his or her known wishes, are met.

I agree with the majority's opinion that the application of SCPA 1750-b's "best interests" standard for a person who is intellectually disabled (SCPA 1750-b[2]), rather than the standard that applies under article 29-CC of the Public Health Law to a similarly situated non-disabled person (see Public Health Law § 2994-d[4]), did not violate M.G.'s equal protection rights (US Const, 14th Amend, § 1). Indeed, this Court has previously recognized that "a mentally retarded person's expression of a desire to continue life-sustaining measures is categorically distinguishable from the same desire expressed by a mentally competent individual . . . and [that] mentally retarded persons are not similarly situated to those who were once

competent" (*Matter of Chantel Nicole R.*, 34 AD3d 99, 104-105 [1st Dept 2006], *appeal dismissed* 8 NY3d 840 [2007]).

However, the Court of Appeals has held that under SCPA 1750-b,

> "in circumstances where the mentally retarded person formerly had some capacity to make medical decisions, the guardian is nonetheless required to base medical decision-making 'on the best interests of the mentally retarded person and, when reasonably known or ascertainable with reasonable diligence, on the mentally retarded person's wishes, including moral and religious beliefs' (SCPA 1750-b[2][a]). Thus, the wishes of a mentally retarded individual who once had capacity to make health care decisions are not disregarded under the new statutory scheme" (*Matter of M.B.*, 6 NY3d 437, 454 [2006]).

In other words, a guardian under SCPA 1750-b is obligated to attempt to ascertain, with reasonable diligence, the mentally retarded person's wishes regarding end-of-life treatment, including moral and religious beliefs. The guardian then makes his or her healthcare decision by considering the best interests of the person by looking at, inter alia, the dignity and uniqueness of every person; the preservation, improvement or restoration of the health of the intellectually disabled person; the relief of the suffering of the intellectually disabled person

by means of palliative care and pain management; the unique nature of artificially provided nutrition or hydration, and the effect it may have on the intellectually disabled person; and the entire medical condition of the person. The person's wishes, to the extent they are known or reasonably ascertainable, must also be considered by the guardian as part of the analysis.

The undisputed medical evidence at the hearing established that M.G. was in a permanent vegetative state, suffered from multiple organ failure, and had no neurologic function, that there was no chance of meaningful neurological recovery, and that there was essentially no probability that he would return to a cognitively aware state. The evidence also showed that any medical treatment would have provided minimal benefit at best, and would not have improved M.G.'s life. I agree with the majority that the best interests of the patient embraces the idea of a dignified death.

However, the only testimony regarding M.G.'s wishes came from the medical personnel at NYU; the guardian, Rachel Osher (M.G.'s cousin), did not appear or submit any evidence to the court. Dr. Sloane advised the court that Osher, who lives in Chicago, gave her hearsay oral approval for the withdrawal of

life-sustaining treatment. Dr. Sloane also testified that a few days before M.G. entered a vegetative state, he had appeared at the hospital, and was deemed competent to make a decision about resuscitation and CPR in the event his heart stopped or he could not breathe.

Ursula Jemiolo, a physician's assistant, testified that in accordance with M.G.'s wishes in the event of a cardiac or respiratory arrest she entered a "full code" in his record, which meant that basic measures would be used to keep his heart going and to breathe for him in the event his heart stopped or he could not breathe on his own. She clarified that this directive did not extend to life-sustaining treatment. Dr. Caspers similarly explained that the full code directive did not address the patient's wishes regarding life-sustaining treatment.

Regarding efforts to determine M.G.'s wishes, Christine Wilkins, NYU's Advance Care Planning Program Manager, testified that she contacted M.G.'s community residence and learned that he did not have any advance directives in place and had not had discussions concerning advance directives. The community residence caretakers informed Wilkins that, before he was admitted to NYU, M.G. had been his own guardian, able to make his

own health care decisions. Wilkins also spoke with Osher, and learned that the guardian had never spoken to M.G. about his wishes regarding life-sustaining treatment. M.G., represented by MHLS, did not present any evidence.

The lack of direct evidence from the guardian is particularly concerning because SCPA 1750-b obligates the guardian to base healthcare decisions on the best interests of the intellectually disabled person, including consideration of the person's wishes "when reasonably known or ascertainable with reasonable diligence." Where, as here, a special proceeding is commenced to authorize the guardian to withdraw life-sustaining treatment, this standard must require that the guardian directly advise the court of the factors that were considered in the best interests analysis, the person's wishes, or the efforts made to ascertain the person's wishes, and, to the extent wishes were ascertained, their impact on the best interests analysis.

Although the court may have considered the evidence regarding M.G.'s wishes presented by NYU's medical staff, it had no such evidence from the guardian. Although it is a moot issue in this case, I believe that, just as we considered the equal protection claim as an exception to the mootness doctrine, we

need to ensure that the guardian strictly complies with the provisions of SCPA 1750-b and that the best interests of the person (and where expressible, his or her wishes) are met. The procedure of SCPA 1750-b was not followed in this proceeding. It is not even known whether the guardian in this case knew of M.G.'s request for a full code only three days before he suffered a cardiac arrest with anoxic brain injury and went into a coma. M.G.'s request for a full code days before he became unconscious may have a significant relevance to or bearing on his wishes regarding life-sustaining treatment.

Therefore, I would hold that in order to establish that a guardian has complied with the obligations and decision-making standard under SCPA 1750-b, he or she must comply with the mandates of the SCPA 1750-b and inform the court of the factors that were considered in the best interests analysis, the person's wishes, or the efforts made to ascertain the person's wishes, and, to the extent wishes were ascertained, their impact on the best interests analysis. In this way, the court will be best positioned to determine whether the guardian met the requirements of the statute and whether or not the withdrawal or withholding

of life-sustaining treatment is in accord with the criteria set forth in the statute.

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about December 27, 2016, affirmed, without costs.

Opinion by Renwick, J. All concur except Tom, J. who concurs in a separate Opinion.

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 16, 2018

CLERK