20-3366

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

COMMUNITY HOUSING IMPROVEMENT PROGRAM, RENT STABILIZATION ASSOCIATION OF N.Y.C., INC., CONSTANCE NUGENT-MILLER, MYCAK ASSOCIATES LLC, VERMYCK LLC, M&G MYCAK LLC, CINDY REALTY LLC, DANIELLE REALTY LLC, FOREST REALTY, LLC,

Plaintiffs-Appellants,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

ANDREW J. PINCUS
REGINALD R. GOEKE
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

TIMOTHY S. BISHOP
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

ROBERT W. HAMBURG
MAYER BROWN LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 506-2500

Attorneys for Plaintiffs-Appellants

—against—

CITY OF NEW YORK, RENT GUIDELINES BOARD, DAVID REISS, CECILIA JOZA, ALEX SCHWARZ, GERMAN TEJEDA, MAY YU, PATTI STONE, J. SCOTT WALSH, LEAH GOODRIDGE, SHEILA GARCIA, RUTHANNE VISNAUSKAS,

Defendants-Appellees,

N.Y. TENANTS AND NEIGHBORS (T&N), COMMUNITY VOICES HEARD (CVH), COALITION FOR THE HOMELESS,

Intervenors.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

INTRODUCTION

The RSL is the most burdensome rent regulation scheme in the country. When New York lawmakers imposed still more restrictions on property owners in 2019 by enacting the HSTPA, it was touted as providing "the strongest tenant protections in history." Pl. Br. 1.[1]

In defending the RSL's constitutionality, however, the City, State, and Intervenors (collectively, "Defendants") dramatically change their tune. They strive to characterize the law benignly—as preventing "rent profiteering" and limiting unjustified evictions—and address only in passing the RSL's most critical feature: once an apartment is rented, that property is effectively commandeered by the State, locked-in to the RSL system in perpetuity. The owner loses virtually all of her fundamental property rights—she cannot decide who may live in the apartment; virtually never can reclaim apartments for her own use; and has little or no ability to change the use of the building, or replace it with another structure.

[1] Plaintiffs adopt the defined terms in their Opening Brief ("Pl. Br."). Defendants' briefs are cited as "City Br." (Doc. 148), "State Br." (Doc. 149), and "Inter. Br." (Doc. 147).

Defendants also try to mask the draconian effects of the RSL's regulation of rent levels. Ignoring the Complaint's allegation that rent increases have covered only half of the Rent Guidelines Board's ("RGB") own calculation of growth in owners' operating costs (Pl. Br. 7), Defendants claim that owners' revenue exceeds operating costs. State Br. 21, City Br. 49. But that assertion (based on facts outside the Complaint) is misleading, because it includes revenue generated from all sources, not only rent stabilized units. It also ignores the HSTPA's dramatic reductions in owners' ability to recover the cost of repairs and upgrades (Pl. Br. 49-50), that will only push owners further into the red. Indeed, the newspaper article cited by the State (State Br. 23 n.22)—again outside the Complaint—says sales of RSL buildings are increasing because prices have dropped due to the law's heavy regulatory burden.

Defendants state that the RSL's purpose is to protect "especially low-income, elderly, and disabled tenants." State Br. 1. Even if the RSL were designed to achieve that purpose (it is not), Defendants do not dispute that permissible rent increases are set in part based on tenants' ability to pay and the cost of that subsidy is not borne by the public at large. Instead, the entire cost of limiting rent levels for the benefit of

lower-income tenants is imposed on a small subset of property owners—even though the renters' inability to pay market rent is based on their individual circumstances, not caused by the targeted owners. Nor do these owners receive any individualized reciprocal benefit for providing the subsidy.

The plain language of the RSL, and the real-world effects detailed in the Complaint, demonstrate—much more than plausibly—that the RSL is unconstitutional on its face. The RSL's elimination of property owners' basic rights to control who may occupy their property and to determine the use of their property effects a physical taking. Defendants try to cast this lawsuit as a familiar attack on the RSL, relying heavily on cases upholding prior iterations of the law. But their arguments fail to account for intervening Supreme Court precedent and the recent changes to the RSL that increased its intrusion on property rights. And, because those legal rules apply across-the-board to all RSL properties, the law is invalid on its face.

The RSL also effects a regulatory taking—also on a facial basis—for two independent reasons. First, it imposes on some property owners the cost of a public benefit—rent adjustments based upon tenants' ability

to pay—to remedy a problem (inability to pay) that those owners did not cause. As Justices Scalia and O'Connor explained in their dissent in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), that violates the Takings Clause. Second, the RSL fails the general regulatory taking standard based on an "ad hoc, factual inquir[y]" into the law's effects. *Penn Central Transportation Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978); *Pa. Coal Co. v. Mahon,* 260 U.S. 393, 417 (1922).

Finally, the law violates due process. In an attempt to identify at least one "legitimate government interest" addressed by the RSL, Defendants and their *amici* contend that the law promotes "neighborhood stability." *E.g.*, City Br. 60. That is, by granting tenants a lifelong possessory interest in rent-regulated apartments (an interest that can be transferred to successors), the RSL discourages tenants from moving. Defendants therefore concede what economists have known for years—the RSL *decreases* the availability of housing in New York City by incentivizing tenants to remain in apartments regardless of their changing needs. It contributes to, rather than ameliorates, any "housing emergency" resulting from low vacancy rates.

ARGUMENT

I. Plaintiffs Plausibly Allege That The RSL Effects A Physical Taking.

Plaintiffs' Opening Brief explains (at 22-26) that the RSL's very substantial restrictions on owners' rights to control access to, use, and dispose of regulated properties eliminate the most fundamental "sticks" in the owners' bundle of property rights. Physical takings claims have been sustained on far less. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

Defendants strive mightily to demonstrate that owners retain substantial rights, but the RSL's clear terms undermine their assertions.

For example, Defendants contend that owners can "remove a regulated building from the rental market when they seek to demolish the building subject to certain findings by" the state housing agency. State Br. 40. The ability to demolish one's own building to use the property is hardly a substantial right,[2] and an owner cannot do even that

[2] Requiring an owner to destroy her own property to avoid the government's physical occupation of that property is the epitome of a taking—not evidence of no taking. *See, e.g., Cebe Farms, Inc. v. U.S.*, 116 Fed. Cl. 179, 192 (Fed. Cl. Ct. 2014) ("[P]hysical takings involve physical occupation or destruction of property.") (internal quote omitted).

without securing new housing for all of the existing tenants "at the same or lower legal regulated rent in a closely proximate area," paying any extra rent in the tenant's new apartment for six years (and moving costs), or paying tenants a large relocation stipend. Pl. Br. 26.[3]

Owners cannot change the use of the property from residential rental to commercial rental. A commercial use is permitted only if the owner uses the entire building for the owner's (non-rental) business. Pl. Br. 25.

Other "rights" identified by Defendants are so heavily restricted that they are effectively illusory:

- owners can "convert the building to a condominium or cooperative *if they obtain purchase agreements from 51 percent of residents*";
- owners can "remove the building from regulation *when they rehabilitate at least 75% of building-wide and individual*

[3] It is not uncommon for tenants in stabilized units, armed with the power to delay or halt the conversion or redevelopment of a building, to exact substantial payments from building owners for relinquishing their right to lease renewals—demonstrating the huge value of the rights that the RSL transfers from owners to tenants. *See* JA-69-70 ¶¶129, 130 (describing multi-million dollar tenant buy-outs).

housing accommodations in buildings found to be in substandard or seriously deteriorated condition";[4]

- owners can "select their own tenants upon vacancy" *but must rent to a tenant and her successors unless the tenant engages in misconduct*;
- owners can "refuse to renew leases to tenants who do not use regulated units as their primary residence" *but, again, absent misconduct must offer renewal leases to tenants and their successors*;
- owners can "expeditiously evict tenants on a variety of grounds" *all of which involve tenant misconduct and are therefore in the exclusive control of tenants*.

State Br. 40-41 (emphases added); *see also* Pl. Br. 22-26.

Moreover, the HSTPA eliminated the Luxury Decontrol and High-Income Decontrol provisions, which provided avenues for removing units from RSL regulation. Pl. Br. 8. The RSL now includes no such mechanisms for de-controlling apartments.

Defendants contend that the property rights that the RSL leaves to owners are sufficient to preclude a physical taking claim. State Br. 40-42; City Br. 31-38.

[4] The rehabilitation-after-deterioration criteria is illusory because owners must keep buildings in habitable condition while occupied. *See* N.Y. Real Prop. Acts. §235-b.

But the Supreme Court has repeatedly held that a physical taking may occur even when the owner retains some right or title in the properties. *See* Pl. Br. 31.[5] And the Court has also made clear that an owner's right to sell property cannot foreclose a physical taking. *See Horne*, 576 U.S. at 363 ("in *Loretto*, we held that the installation of a cable box … was a *per se* taking, even though [Loretto] could of course still sell and economically benefit from the property").

Here, owners retain only extremely limited authority to determine who occupies their property, to change the use of the property, and to reclaim the property for themselves. Plaintiffs have therefore stated a physical taking claim. *See also* N.Y. Ass'n Realtors Am. Br. 8-29; National Ass'n of Realtors Am. Br. 4-11; Cato Inst. Am. Br. 3-13.

Defendants' other arguments against the physical taking claim are just as flawed.

---

[5] *See also John R. Sand & Gravel Co. v. United States,* 457 F.3d 1345, 1357 (Fed. Cir. 2006) (citation omitted) ("substantial" incursions may constitute takings, as opposed to "transient and relatively inconsequential incursion[s]").

A. *Yee* Confirms That The RSL Effects A Physical Taking.

Defendants rely principally on *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992), asserting that *Yee* precludes physical takings claims based upon rent-regulation laws. City Br. 25; State Br. 32-33; Inter. Br. 20-25. That is wrong: *Yee* weighs heavily in favor of finding a physical taking here.

Yee held that the California laws requiring a property owner to rent mobile home pads to successor tenants did not effect a physical taking claim because a property owner "who wishes to change the use of his land may evict his tenants albeit with 6 or 12 months' notice." *Id.* at 527-28. The Court said a "different case would be presented" if the challenged law required the owner to continue renting the property. *Id.*

The Court thus made clear that its holding depended on a property owner's ability to regain possession of her property by changing its use—and to do so in a short period of time. And it distinguished the situation in which the owner could not regain possession—where the statute "com-pel[ed]a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Id.* at 528.

That is precisely what the RSL does. As explained above, owners are not free to change the use of their property simply by notifying tenants in regulated units that they wish to change the use of the property or to reclaim it for their own use. Changes in the use of the property are either prohibited or require the permission of the tenants or the government or substantial expenses and protracted timelines that make changes virtually impossible. Pl. Br. 22-26.

That distinction is critical. *Yee* rests on the conclusion that, although requiring an owner to accept a tenant she did not select intrudes on her rights, it is a limited intrusion as long as the owner was planning to continue to rent the property. Requiring an owner to continue to rent the property when the owner wishes to change its use or simply withdraw from the market is a much greater intrusion—eliminating the owner's right to determine the use of her property: to change it from residential to commercial, use it as a personal residence, sell units or the entire property, or demolish the building and construct a new structure for the same or different purposes. *Yee* indicates that these greater limitations on core property rights effect a physical taking.

The City simply ignores this critical distinction when it argues that

the "RSL goes no further in creating a 'perpetual tenancy' than the laws at issue in *Yee*." City Br. 28. The statute at issue in *Yee* did not prevent owners from changing the use of their property—if an owner wanted to make such a change, she could regain possession of the property. That is not permissible under the RSL.

Indeed, as the State candidly acknowledges (at 19), the HSTPA's purpose was "prevent[ing] the rapid and escalating loss of regulated units"—in other words, to prevent owners from changing the use of their property. *See also* JA-50 ¶¶65-66.

Because the RSL's effect, and purpose, are to prevent owners from changing the use of regulated property—forcing owners to continue to accept tenants notwithstanding their desire to change the use of their property—the RSL effects a physical taking.

B. Defendants' Other Arguments Rest On Superseded And Inapposite Decisions.

Defendants advance a variety of other challenges to Plaintiffs' physical takings claim. All are meritless.

First, Defendants argue that Plaintiffs acquiesced to the RSL's unconstitutional restrictions by voluntarily participating in the rental mar-

ket. State Br. 33; City Br. 25-26. But that contention is squarely precluded by *Horne v. Department of Agriculture,* 576 U.S. 350, 365 (2015). *Horne* expands on the Court's earlier decision in *Palazzolo v. Rhode Island,* 533 U.S. 606, 627 (2001), which made clear that there is no "expiration date on the Takings Clause."

Defendants try to distinguish *Horne* by arguing that, unlike the raisin growers there, Plaintiffs "willingly accept tenants' presence in apartments when they choose to become landlords" and Plaintiffs remain free to collect rents, albeit at capped rates and subject to the RSL's other restrictions. *See* State Br. 38-39; City Br. 29-30. But *Horne* rejected the government's contention that raisin growers lost the protection of the Takings Clause because they "voluntarily choose to participate in the raisin market"; voluntarily entering the rental market is no different. *See also* Pl. Br. 33 & n.9.[6]

---

[6] Defendants dispute our argument (Pl. Br. 32-34) that *Horne* undermines *Federal Home Loan Mortgage Corp. v. N.Y. State Div. of Housing & Community Renewal*, 83 F.3d 45 (2d Cir. 1996). *See* State Br. 38-39. They contend that *Horne* is limited to physical confiscations of property, and that the RSL does not effect a physical taking, because the owner makes an initial decision to allow a tenant to occupy her property. That contention is circular, because it depends on the conclusion that the RSL does not effect a compelled physical occupation of the property. But the

Second, Defendants assert that *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987), and *Buffalo Teachers Federation v. Tobe,* 464 F.3d 362, 374 (2d Cir. 2006), stand for the proposition that owners suffer no taking because they can collect rent from tenants in regulated units. State Br. 39. But those cases merely observe that limits on rent levels by themselves do not constitute physical takings, not that the ability to charge some rent forecloses all physical takings claims. Plaintiffs' physical takings claim does not turn the RSL's regulation of rent levels, but rather on the perpetual physical invasion of regulated properties that the RSL imposes, stripping Plaintiffs of their ability to use and control their properties.

Third, Defendants argue that tenants are not "strangers" to Plaintiffs, in light of the contractual relationship between tenants and landlords—and therefore a tenant's occupation of an apartment cannot constitution a physical taking. City Br. 27 (citing *Loretto* and *FCC Power*).

---

law does just that because it compels the owner to continue to accept tenants even if she would prefer to convert the property to a different use, demolish it, or reclaim it for her own residential use. That prohibition on the owner's control of her property is as much a physical taking as the seizure of the raisins in *Horne*.

The Supreme Court has said that property owners "suffer[] a special kind of injury when a *stranger* directly invades and occupies the owner's property" (*Loretto*, 458 U.S. at 436), but whether the tenant is literally a stranger is not determinative of the owners' ability to assert a physical takings claims. The critical question is whether the owner has permitted the individual to occupy her property, and the RSL's succession provisions require owners to permit occupation of their property by individuals not selected by the owner.

Fourth, Defendants point to the summary orders cited by the District Court. *See* State Br. 38. Plaintiffs have already explained (Br. 32-33) that *Horne* rejected the acquiescence theory upon which those summary orders rested, and the HSTPA has since increased the restrictions imposed by the RSL, making those orders inapposite here.

C. Plaintiffs' Facial Challenge Is Proper.

The RSL provisions that limit an owner's ability to determine who may occupy her property and the use of the property apply equally to all RSL-regulated properties. A facial challenge is therefore entirely appropriate. Pl. Br. 34-35.

Perhaps for that reason, the State does not appear to challenge Plaintiffs' assertion of the physical taking claim on a facial basis. Only the City and Intervenors assert that a facial claim is unavailable. City Br. 30-39; Inter. Br. 15-23. Their arguments rest on an erroneous view of both the standard governing facial claims and of the allegations here.

To begin with, these Defendants argue that *United States v. Salerno,* 481 U.S. 739, 745 (1987), requires Plaintiffs to allege that every owner of a regulated property is unconstitutionally burdened. City Br. 39-41, Inter. Br. 15-19.

But that standard would preclude virtually every facial challenge, which it is why it has not been applied by the Supreme Court.[7] As the Court explained in *City of Los Angeles v. Patel,* 576 U.S. 409, 418 (2015), a facial challenge focuses on "the group for whom the law is a restriction, not the group for whom the law is irrelevant."

[7] "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself (even though the defendants in that case did not claim that the statute was unconstitutional as applied to them, [] the Court nevertheless entertained their facial challenge)." *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion).

That does not mean every RSL property owner—as the City claims (Br. 40)—but rather those RSL property owners whose actions are limited by the law's constraints. As *Patel* explains, the court considers "only applications of the statute in which it actually authorizes or prohibits conduct." 576 U.S. at 418. With respect to that group—property owners who wish to change the use of their property and are prohibited from doing so—the RSL's restrictions apply in the same manner.

Moreover, to succeed on their facial claims, Plaintiffs need only allege that the RSL is unconstitutional in a "large fraction of cases" or lacks "plainly legitimate sweep." Pl. Br. 35 (citing *United States v. Stevens,* 559 U.S. 460, 472 (2010)). Defendants argue that *Stevens* applies only in the First Amendment context. City Br. 40-41; Inter. Br. 18. But *Stevens* cites *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring), as the source of that legal standard—and *Glucksberg* did not involve a First Amendment claim. *See United States v. Decastro*, 682 F.3d 160, 168 (2d Cir. 2012) (applying "plainly legitimate sweep" test outside of First Amendment context).[8]

[8] Defendants (Inter. Br. 16-17) support their reliance on *Salerno* by citing *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591 (2d Cir. 1993), but that

II. Plaintiffs Plausibly Allege That The RSL Effects A Regulatory Taking.

The RSL effects a regulatory taking for two independent reasons: (1) it forces a subset of property owners to bear a burden that should be borne by the public at large; and (2) the "ad hoc, factual inquir[y]" into the nature and impact of the RSL shows that the law "goes too far." Pl. Br. 36-59.

A. The RSL Improperly Imposes On A Select Group—RSL Property Owners—A Public Burden That Should Be Borne By Society As A Whole.

By requiring rent levels to be set based on tenants' ability to pay, the RSL singles out a subset of property owners in New York to bear the cost of addressing a societal problem that those owners did not cause—the low incomes of some New Yorkers that require subsidized rent levels—and therefore effects a taking for the reasons expressed by Justices Scalia and O'Connor in their *Pennell* dissent. Pl. Br. 37-43; *see* National Apartment Association and National Multifamily Housing Council Am. Br. 5-6, 14-17.[9]

---

decision pre-dates *Patel* and the other decisions cited above. That also is true of the unpublished opinions that Defendants invoke.

[9] The City alone contends (Br. 55-56) that the Complaint does not raise this claim. But Plaintiffs challenged the entire RSL, and specifically the

Defendants do not dispute that the RSL requires rent levels to be set based in part on tenants' ability to pay or that the RSL provides a public benefit of the type normally paid for by the general funds raised through taxation. Nor could they, given the New York Court of Appeals decision in *In re Santiago-Monteverde*, 22 N.E.3d 1012 (2014), endorsing both propositions. *See* Pl. Br. 42-43.[10]

Defendants argue that *Garelick v. Sullivan*, 987 F.2d 913 (2d Cir. 1993), precludes reliance on the *Pennell* dissent. This Court did point out that the dissent's reasoning had not been adopted by the majority—but neither was it rejected, because the majority declined to address the issue. Importantly, *Garelick* did not involve a claim that price controls (there, Medicare payment levels) were being set based on ability to pay—the plaintiffs' claim was far broader: that the Medicare program itself was designed to benefit lower-income older Americans. The Court's rejection therefore rested on the conflict between that argument and Supreme

---

provisions regarding calculation of permissible rent levels and their effect on owner income and property values. JA-117-25 ¶¶283-307.

[10] The State attempts (53 n.35) to distinguish *Santiago-Monteverde* because the issue arose in the bankruptcy context. But what is critical is the New York court's characterization of the RSL benefit, which was not dependent on the particular context in which it addressed that question.

Court precedents recognizing the government's "broad power to determine the proper subjects of and purposes for regulatory schemes." *Id.* at 917. It did not address *Pennell*'s narrower focus—price-setting based on the purchaser's ability to pay—that rests on the long-recognized principle that the Takings Clause bars the government from requiring "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *E.g.*, *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Murr v. Wisconsin,* 137 S. Ct. 1933 (2017).

Defendants also argue that the *Pennell* dissent's reasoning was rejected in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). State Br. 56-59, City Br. 57-58.

But Defendants misread *Lingle*. There, the Court rejected the holding in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) that a failure to "substantially advance" a legitimate government interest constitutes a separate test for evaluating an alleged taking. Nothing in *Lingle* addresses the different, narrower question whether government may shift onto a discrete set of property owners the cost of subsidizing tenants whose financial challenges the property owners did not cause. Certainly there is no basis for concluding that *Lingle* overruled *Armstrong* and the other

cases embodying the governing principle that the Supreme Court reaffirmed in its *Murr* decision, which post-dates *Lingle*.

Finally, the State argues (at 58-59) that the reasoning of the *Pennell* dissent does not apply, because that case addressed individualized determinations of rent reductions based on ability to pay, which the RSL considers on an across-the-board basis. That distinction makes no sense. Surely the protections of the Takings Clause cannot be circumvented by imposing a *heavier* unjustified burden on property owners.

B. The RSL Effects A Taking Under The Multi-Factor Regulatory Takings Standard.

In disputing Plaintiffs' claim based on the multi-factor regulatory takings test, Defendants urge the Court to apply a rigid standard with a limited, fixed set of factors. State Br. 44-45; City Br. 44. But the Supreme Court has directed the opposite approach, stating that "[a] central dynamic of the Court's regulatory takings jurisprudence" is "its flexibility." *Murr*, 137 S. Ct. at 1943; *see also Mahon*, 260 U.S. at 417 (setting out non-exhaustive set of factors); *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003) (regulation not invalid under *Penn Central* test nevertheless constituted a taking).

Thus, Defendants argue that Plaintiffs' regulatory takings claim cannot survive because they do not allege a deprivation of "all economic value" in their properties. City Br. 43. But that requirement applies only to a special category of "*per se* takings" in which the challenged law destroys all economically beneficial use of the property. *See Lucas v. S.C. Coastal Comm'n*, 505 U.S. 1003 (1992). *Lingle* makes clear that, outside of *Lucas*'s special test for *per se* takings, a plaintiff asserting a regulatory taking need not show total destruction of all economically beneficial use. 544 U.S. at 537-39.

The flexible, ad hoc regulatory takings analysis confirms that Plaintiffs have stated a claim. Pl. Br. 44-55; Pacific Legal Foundation Am. Br. 5-17.

1. Character Of The Government Action

The character of the RSL is critical to the takings analysis. Pl. Br. 46-48. Defendants characterize the RSL as merely "regulat[ing] a landlord-tenant relationship" or confer[ring] a "public assistance benefit" (State Br. 52-54; City Br. 54-55), but ignore that the RSL authorizes virtually perpetual physical occupation of owners' properties and deprives owners of the ability to change the use of their property.

That physically intrusive "character" of the RSL weighs decisively in favor of a regulatory taking. Pl. Br. 47; *Kaiser Aetna*, 444 U.S. at 176 (property owner's right to exclude others is "one of the most essential sticks in the bundle of rights").

The City argues that the RSL "does not authorize the government to use rent-stabilized apartments." City Br. 55 (citing *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226-27 (1986)). But *Connolly* did not involve real property, and nothing in that decision requires the government itself to use or occupy real property before a taking occurs. To the contrary, a taking occurs if the government authorizes third-parties to use or occupy property private property. *Loretto*, 458 U.S. at 422-23 (taking where government required owners to allow third-party cable installers to access property).

2. Direct And Substantial Economic Impact

Despite the fact that no court has fixed a precise diminution in value required under the regulatory-takings test (Pl. Br. 49-50) and notwithstanding *Penn Central*'s emphasis on the flexible, ad hoc standard governing regulatory takings claims, Defendants argue for a mechanical

rule that would defeat Plaintiffs' claims because Plaintiffs allege "only" a diminution in value of 50%. *E.g.*, State Br. at 50-51.

None of the cases Defendants cite hold, or even suggest, a bright-line rule that a diminution in value of 50% or less (or of any other percentage) automatically forecloses a regulatory takings claim, and the facts of those cases differ dramatically from the circumstances here. *Pompa Construction Corp. v. City of Saratoga Springs*, 706 F.2d 418 (2d Cir. 1983), involved a challenge to a zoning restriction, which courts historically have upheld because they "'secure[] an average reciprocity of advantage.' It is for this reason that zoning does not constitute a 'taking.'" *Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting) (quoting *Mahon*, 260 U.S. at 415). *See infra* 29-30 (explaining that the RSL confers no "average reciprocity of advantage" on property owners).

The claim in *Park Avenue Tower Associates v. City of New York*, 746 F.2d 135 (2d Cir. 1984), also challenged a zoning restriction—on the sole ground that it diminished their expected profits. The plaintiffs did not

allege the character of the challenged regulation, any diminution in value of their properties, or any other factor relevant to a regulatory taking.[11]

Defendants also argue that any diminution in value is mitigated by "hardship exemptions" that owners can seek in order to raise regulated rents. State Br. 51, City Br. 50; Inter. Br. 29-30. But the Complaint alleges in detail facts demonstrating that the exceptions are so rare, time-consuming, and impractical as to be illusory (JA-132-37 ¶¶332-50), and Plaintiffs are entitled to an opportunity to prove their claim.

The City, citing material outside the Complaint (Br. 49-50), argues that owners "saw rising net operating income for 13 consecutive years before 2017"… and that rents have increased by 40% between 1990 and

[11] Nor do the non-zoning cases cited by Defendants support their argument. For example, in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), the challenged law remedied a problem (a pension shortfall) that the plaintiff itself had created (by overpromising benefits and underfunding the pension plan). *Id*. at 641-47. The RSL forces the owners of rent-stabilized apartments to bear the burden of a societal problem that property owners did not cause or contribute to. *See supra* at 17-20.

2019." But at the pleading stage, courts "consider only the facts alleged in the [] complaint." *Kopec v. Coughlin*, 922 F.2d 152, 153 (2d Cir. 1991).[12]

Finally, Defendants argue (*e.g.*, City Br. 50) that the Complaint's allegations are insufficient because the diminution-in-value test should not be applied at the apartment level but instead on an entire-building basis. But, as the Supreme Court recently explained, "no single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors," including "the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land." 137 S. Ct. at 1945.

Here, state and local law treat the property on a per-unit basis; indeed, the RSL and other laws apply on a per-unit basis. Pl. Br. 50-51 n.16. The "physical characteristics" of the property also favor a per-unit approach; each apartment is separate and inhabited by a different tenant.

[12] That is particularly true when the basis for extra-Complaint assertions is a report produced by a Defendant after the action was filed. *See* City Br. 49 (citing report by Defendant RGB published in 2020).

Finally, no "special relationship" exists between stabilized and non-stabilized units in the same building, and the restrictions imposed by the RSL on rent-stabilized units offer no corresponding benefits to surrounding non-stabilized units. The *Murr* factors thus support—and certainly do not preclude—a per-unit approach.[13]

3. Interference With Investment-Backed Expectations

Plaintiffs explained (Br. 51-53) that the RSL interferes with owners' investment-backed expectations because of its dramatic adverse effect on the value of their properties. Defendants' contrary arguments are meritless.

To begin with, they claim (State Br. 46-47) that because the Legislature has changed the RSL since the law was first enacted in 1974—and

[13] Intervenors (but not the City or State) argue that Plaintiffs waived the argument that the proper "denominator" for calculating diminution in value is each unit. Inter. Br. 29 n.24. That is incorrect. The Complaint describes at length how the RSL applies to particular apartments. *See, e.g.*, JA-44-53 ¶¶50-69; JA-92-105 ¶¶202-246. And Plaintiffs expressly took that position before the District Court. JA-505 ("the right denominator [is] the apartment."). Intervenors fault Plaintiffs for not discussing the "denominator" issue in their post-argument supplemental briefing below, but fail to mention that the district court directed briefing only with respect to two, other specific issues. JA-508-09.

frequently debated additional changes—a property owner cannot have investment-backed expectations in RSL-regulated property. That theory, if adopted, would allow governments to override the protections of the Takings Clause as long as changes to applicable laws were frequently debated and occasionally adopted. The Court should not adopt a "frequently-shifting regulation" exception to the Constitution's protection.

That is particularly true because the Supreme Court has not adopted such a rule, but instead has made clear that regulatory takings can be found even in highly-regulated fields. *E.g.*, *Ruckelshaus*, 467 U.S. at 1010-16 (regulatory taking involving EPA pesticide-approval process); *Brown*, 538 U.S. at 235-36 (regulatory taking involving lawyers' IOLTA accounts).

More fundamentally, that argument—and Defendants' broader contention that owners "purchased their properties knowing they would be subject to the RSL" (State Br. 46)—have been rejected by the Supreme Court's decisions in *Horne* and *Palazzolo* holding that that a taking claim is not precluded because the plaintiff acquired the property, or entered the market, after adoption of the challenged regulatory scheme. Pl. Br. 32-33, 51-52. "[A] regulation that otherwise would be unconstitutional

absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title." *Palazzolo*, 533 U.S. at 629-30.[14]

Defendants assert (City Br. 53) that Plaintiffs could have expected the RSL, which undisputedly was enacted as an emergency measure requiring every-three-year renewal, to end. Pl. Br. 6, 52. Like the reasonable expectation in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1010-11 (1984), which was based on the provisions of a federal statute, the owners' expectations here were based on the RSL's own text.

Defendants also provide no cogent explanation how Plaintiffs could have expected the *unprecedented* HSTPA, which renders the RSL the most stringent rent regulatory regime in history. Pl. Br. 52-53.

[14] The State cites (Br. 49) *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 38 (2012), but the Court there was referring to general background principles of state property law, not the restrictions imposed by the challenged regulation.

4. Noxious Use

Defendants do not argue that the RSL eliminates a noxious use. They instead assert that this factor is irrelevant because it was not mentioned in *Penn Central*. City Br. 45 n.12; Inter. Br. 28.[15]

But that contention is inconsistent with *Penn Central* itself. 438 U.S. at 124-25 (takings analysis "depends largely upon the particular circumstances," because "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government"). And this consideration weighs in favor of finding a regulatory taking. Pl. Br. 48-49.

5. Reciprocity Of Advantage

The RSL singles out a discrete subset of property owners to bear substantial burdens without conferring any individualized benefits in return. Pl. Br. 53-55. Defendants cite generalized benefits that the RSL

[15] Intervenors incorrectly argue (Br. 28) that *Lucas* bars consideration of this factor. *Lucas*'s discussion of noxious-use cases instead confirms that the government's invocation of the police power cannot, by itself, preclude a takings claim. 505 U.S. at 1025-26 (rejecting approach that would "essentially nullify *Mahon*'s affirmation of limits to the noncompensable exercise of the police power").

might produce, such as "preventing tenant dislocation and preserving neighborhood stability." State Br. 55. But those "benefits" are not germane, because they are not specific to the property owners that bear the burden of the RSL's restrictions. *Penn Central,* 438 U.S. at 147-48 (Rehnquist, J., dissenting) (to the extent that some benefits might "accrue to all the citizens of New York City," "[t]here is no reason to believe that [owners] will enjoy a substantially greater share of these benefits" to reciprocate for bearing all of its burdens).

Defendants' reliance (Inter. Br. 31) on *Keystone* is thus misplaced; there, the Court was addressing individualized benefits that accrued specifically to the plaintiff, not generalized public benefits. 480 U.S. at 491 (citing with approval Chief Justice Rehnquist's dissent in *Penn Central*).

Intervenors point to lower taxes and less turnover among renters. Inter. Br. 42. But the government cannot avoid liability for a taking because its action diminishes the value of the plaintiff's property, reducing the plaintiff's tax burden—that is a recipe for neutering this constitutional protection. And reduced turnover is hardly a benefit when it comes with rent regulation and the RSL's other burdens. The absence of any

reciprocal benefit is a very substantial factor in favor of finding a regulatory taking.

C. Plaintiffs Plausibly Allege A Facial Claim

Defendants do not challenge the propriety of Plaintiffs' facial claim based on the *Pennell* dissent. Nor could they, because the challenged aspect of the law applies in the same way to all RSL-regulated properties.

But they do argue that Plaintiffs' regulatory taking claim based on the multi-factor test cannot be asserted on a facial basis. That contention is wrong, for several reasons.

Defendants rely on the erroneous interpretation of *Salerno*. *See supra* at 14-15. Under *Patel*, the relevant focus is the RSL properties burdened by the challenged regulations, which are burdened in the same way. Pl. Br. 55-59.

Most of the factors relevant to the regulatory taking analysis do not vary from apartment to apartment. Pl. Br. 56.[16] Defendants argue a

[16] The City points (Br. 42) to owners who voluntarily accepted RSL regulation in exchange for tax benefits. Plaintiffs do not include such owners, and those owners' voluntary acceptance of regulation excludes them from the facial challenge.

facial claim is impermissible because the reduction in value will differ from unit to unit. State Br. 50-51.

But Defendants do not—and cannot—demonstrate that Plaintiffs will be unable to show that, even though reductions in value vary, all RSL-regulated units suffer a reduction in value that is sufficient to establish a regulatory taking (when combined with the other relevant factors). That is what the Complaint alleges. JA-117-24 ¶¶ 283-302. Rather, Defendants' argument turns entirely on their erroneous assertion (State Br. 51) that even a 50% reduction in value is insufficient, which is contradicted by the Supreme Court's repeated emphasis on absence of a "set formula" for identifying regulatory takings.

The City Defendants point (Br. 46-47) to other factors—the "number of rent-regulated units the landlord owns" and the fact that owners charge up to one-third of stabilized tenants "rents *below* the maximum permitted legal rate." But the proper measure of a taking depends on the diminution that each rent-stabilized unit suffers (*supra* at 24-25), so the number of stabilized units owned by a landlord is not relevant. And rents set below the maximum permissible level are irrelevant because the HSTPA locks those rent levels in place, permitting only those percentage

increases authorized by the RGB. JA-114 ¶278. In sum, Plaintiffs allege that all RSL-regulated units suffer a diminution in value sufficient to establish a regulatory taking, and they should be given the opportunity to adduce evidence proving that allegation—which would demonstrate that the RSL effects a regulatory taking on its face.

III. Plaintiffs Plausibly Allege A Due Process Claim.

Plaintiffs explained in their Opening Brief (at 59-65) that the RSL does not satisfy the rational basis standard, let alone the higher standard that should apply to laws that abridge fundamental property rights.

Defendants argue that the government's articulation of any purpose (no matter how detached from reality or the law's operation) satisfies due process, but rational basis review "is not meant to be 'toothless.'" *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012). In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the law failed rational basis review because a factual record developed after a bench trial showed no relationship between the law's "conceivable" purposes and the actual facts. 473 U.S. at 450 (stating that "[a]t least this record

does not clarify how" the state "rationally" could take the challenged actions).[17]

Defendants also emphasize *Lingle*'s observation that the district court there was required to choose (during a bench trial) "between the views of two opposing economists." 544 U.S. at 544-45. But Plaintiffs plausibly allege that the RSL works counter to its ostensible purposes by reducing housing supply and increasing rental prices (*see* JA-65-73 ¶¶114-41), a point on which economists and scholars agree. Tellingly, Defendants do not even attempt to dispute that reality.

Rather, Defendants and their *amici* attempt to cast one of the RSL's most detrimental effects—incentivizing tenants and their successors to entrench themselves in stabilized apartments for as long as possible, regardless of fit or need—as a legitimate government interest, which they euphemistically call "neighborhood stability." State Br. 61-62; City Br. 60-61; Inter. Br. 52-53.

---

[17] *Heller v. Doe*, 509 U.S. 312 (1993), which Defendants and their amici emphasize, is not to the contrary. The *Heller* record was developed through summary judgment and a preliminary-injunction hearing, and moreover, *Heller* confirms that a law "must find some footing in the realities of the subject addressed the legislation" to survive rational basis. 509 U.S. at 321.

Though a law need not have multiple legitimate purposes, courts have made clear that, even under rational basis review, there must be a "reasonable fit between [the] governmental purpose … and the means chosen to advance that purpose." *Reno v. Flores,* 507 U.S. 292, 305 (1993). Plaintiffs plausibly allege that no such fit exists here.

To the extent Defendants argue that "neighborhood stability" involves slowing gentrification, Plaintiffs plausibly allege that the RSL does the opposite. *E.g.*, JA-64 ¶110 ("The RSL . . . has instead been shown to increase gentrification."). More importantly, Plaintiffs plausibly allege this so-called "stability" leads to a decrease in the supply of affordable housing and a deterioration of existing supply, especially in light of owners' inability to recover expenditures to rehabilitate or improve apartments. JA-70-71 ¶134; JA-128-31 ¶¶317-27. Plaintiffs also plausibly allege that this supposed "stability" increases economic and racial segregation and discrimination by restricting housing mobility. JA-64-65 ¶¶110-14. Because these are not legitimate, lawful aims of government,

Defendants' reliance on "neighborhood stability" cannot satisfy rational-basis review.[18]

A law that perpetuates the housing shortage it was enacted to remedy is arbitrary and irrational—and therefore violates due process.

CONCLUSION

The Court should reverse the judgment of the District Court and remand the case for further proceedings.

[18] Defendants and their *amici* claim that the statistics show that most beneficiaries of rent stabilization are lower-income people. *E.g.*, City Br. 62. But Defendants cannot rely on information outside the Complaint, which alleges that the comparable numbers of lower-income people live in stabilized and non-stabilized housing. JA-61-62 ¶¶ 98-100.

Dated: May 7, 2021

Respectfully submitted,

/s/ *Andrew J. Pincus*

Andrew J. Pincus
Reginald R. Goeke
MAYER BROWN LLP
1999 K Street, NW
Washington DC 20006
(202) 263-3000

Timothy S. Bishop
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

Robert W. Hamburg
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for Plaintiffs-Appellants Petitioner certifies that this brief:

(i) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,991 words, including footnotes and excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(a)(7)(B)(iii); and

(ii) complies with the typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this document has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: May 7, 2021 /s/ *Andrew J. Pincus*