APPENDIX

APPENDICES

APPENDIX A

59 F.4th 540

United States Court of Appeals, Second Circuit

August Term 2021

No. 20-3366-cv

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

NEW YORK TENANTS AND NEIGHBORS; COMMUNITY VOICES HEARD; COALITION FOR THE HOMELESS, *Intervenors*,

v.

CITY OF NEW YORK; RENT GUIDELINES BOARD, DAVID REISS, ARPIT GUPTA, ALEX SCHWARZ, CHRISTIAN GONZALEZ-RIVERA, CHRISTINA DEROSE, ROBERT EHRLICH, CHRISTINA SMYTH, SHEILA GARCIA, ADÁN SOLTREN,* *Defendants-Appellees*.

Appeal from the United States District Court for the Eastern District of New York
No. 19 Civ. 4087 (ERK), Eric R. Komitee, District Judge, Presiding.

* Several new members have been added to the Rent Guidelines Board since this case was filed and have thus been automatically substituted for the former members as the defendants in this case pursuant to Fed. R. App. P. 43(c)(2).

(Argued February 16, 2022; Decided February 6, 2023)

Before: CALABRESI, PARKER, and CARNEY, *Circuit Judges*.

Plaintiffs-Appellants, individuals who own apartment buildings in New York City subject to the relevant Rent Stabilization Law (RSL), appeal from a judgment of the United States District Court for the Eastern District of New York (Komitee, J.). The court dismissed the complaint pursuant to Rule 12(b)(6). Plaintiffs-Appellants alleged that the RSL, as amended in 2019, effected, facially, an unconstitutional physical and regulatory taking. The District Court held that Plaintiffs-Appellants failed to state claims for violations of the Takings Clause. We **AFFIRM**.

BARRINGTON D. PARKER, Circuit Judge:

The New York City Rent Stabilization Law ("RSL") was first enacted in 1969 as part of a decades-long legislative effort to address the myriad problems resulting from a chronic shortage of affordable housing in the City. The RSL is designed to prevent excessive rent levels and to ensure that property owners can earn a reasonable return by, among other things, capping rent increases and limiting the legal grounds for evictions. Over time, however, the Legislature has amended the law in response to changing political and economic conditions. Sometimes the statute has provided stronger protections for tenants and at other times for property owners. The RSL was most recently amended by the Housing Stability and Tenant Protection Act of 2019 ("HSTPA"). The constitutionality of

this amendment and of the RSL as amended are the subject of this appeal.

The Appellants (the "Landlords") are individual property owners and not-for-profit trade associations whose members include managing agents and property owners of both rent-stabilized and non-rent-stabilized properties. They sued to invalidate the RSL and the HSTPA on the grounds that their provisions are unconstitutional because they, facially, effect a physical as well as a regulatory taking in violation of the Fifth Amendment. The Landlords further claim that the RSL and New York City's 2018 emergency declaration triggering rent stabilization are irrational in violation of the Substantive Due Process Clause of the Fourteenth Amendment. The United States District Court for the Eastern District of New York (Komitee, J.) held that the RSL was constitutional and dismissed the Complaint. *See* Fed. R. Civ. P. 12(b)(6). This appeal followed.

BACKGROUND

In an entirely unregulated market, rent levels are governed solely by the law of supply and demand.[1] *See* Brief for Nat'l Ass'n of Realtors as *Amicus Curiae* at 19. Such a market, however, can be unforgiving. It has little regard for the consequences it produces, whether they are inadequate returns on investment, exorbitant rents, housing shortages, deteriorating housing stock, or homelessness. To address these problems,

[1] The history of rent stabilization discussed here constitutes a matter of public record of which we are entitled to take judicial notice. *See Caha v. United States*, 152 U.S. 211, 222 (1894). Since this history is not part of the underlying Complaint, it does not form the basis of our Fed. R. 12(b)(6) analysis.

the City, State, and federal governments have, over the past century, regulated the New York City rental market.

The City's first rent regulations were passed in response to severe housing shortages around the time of World War I.[2] The war caused new construction to fall and rents to soar.[3] In response, renters organized rent strikes, and escalating confrontations between landlords and tenants ensued.[4] Ultimately, the State Legislature stepped in and passed the City's first rent control program in 1920, which capped rent increases and prevented evictions without cause.[5] The regime, which expired after ten years, was the subject of on-going litigation.[6] The housing problems responsible for the legislation and the litigation abated somewhat

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[2] Robert M. Fogelson, The Great Rent Wars: New York, 1917–1929 18 (2013).

[3] Robert W. De Forest & Lawrence Veiller, The Tenement House Problem 369 (1903); "Workmen Need Homes," *New York Times*, June 9, 1918 at R92.

[4] *See e.g.*, Woman Accused of Calling Tenants in Apartment 'Scabs,'" *New York Times*, July 18, 1919 at 6; "20,000 Organize for Rent Strike," *New York Times*, April 24, 1920 at 1; "The Threatened Rent Strike," *New York Times*, April 28, 1920 at 10; "4,500 Bronx Tenants Go on Rent 'Strike,'" *New York Times*, Dec. 3, 1920 at 2.

[5] *See e.g.*, "Mayor Supports Rent Control Bill," *New York Times*, Mar. 11, 1920 at 17; "1,800 Go To Albany for Rent Fight," *New York Times*, Mar. 23, 1920 at 3; "Rent Laws in Practice," *New York Times*, April 9, 1920 at 12.

[6] *See, e.g.*, "Testing the Rent Laws," *New York Times*, Oct. 21, 1920 at 11.

as a consequence of a resurgence of housing construction in the mid-1920s.[7]

The next regime of rent control was enacted by the federal government. In 1942, President Franklin D. Roosevelt signed into law the Emergency Price Control Act (EPCA).[8] The EPCA was passed in response to inflationary pressures brought about in part by World War II and created a nationwide system of price controls. The law froze New York City rents at 1943 levels for several years until Congress allowed it to expire, replacing it with the Federal Housing and Rent Act of 1947.[9] Under that statute, buildings constructed after February 1, 1947, were exempted from controls while older buildings remained covered.

A few years later, Congress passed the 1949 Federal Housing Act, which permitted States to take control of rent regulation.[10] Then, in 1950, New York created the Temporary State Housing Rent Commission, which regulated landlord-tenant relationships—including over 2 million rental units in the City.[11] Those regulations touched upon, among other things, rent levels and legal grounds for evictions.

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[7] *See e.g.*, "Building Revival Breaking Records," *New York Times*, July 16, 1922 at R1. "Housing Crisis Over, Surplus of Homes, Realty Men Argue," *New York Times*, Oct. 18, 1923 at 1; *Final Report of the Joint Legislative Committee on Housing*, 1923 at Ch. 1-6.

[8] *See* 56 Stat. 23 (repealed 1947).

[9] Pub. L. No. 129, 80th Cong., 1st Sess. (June 30, 1946).

[10] Pub. L. No. 171, 81st Cong., 1st Sess. (July 15, 1949).

[11] Morton J. Schussheim, High Rent Housing and Rent Control in New York City (Apr. 1958).

The City's modern regime of rent regulations was introduced in 1969 by the RSL. The RSL established the Rent Guidelines Board ("RGB")—an official body whose members represent the interests of landlords, tenants, and the public—which was charged with setting the amounts by which rents could be increased.[12] In carrying out this function, the RGB was obligated to consider the economic condition of the housing market, certain costs for which landlords were responsible, the returns generated to landlords, the housing supply, and increases to the cost of living.[13]

The RSL has been amended several times. In 1971, for example, the State passed the Emergency Tenant Protection Act ("ETPA"), which permits the City to renew the protections of the RSL when it declares a "housing emergency" based upon a set of statutory criteria. N.Y. Unconsol. Law tit. 23 8623.a (McKinney). Later, in the 1980s, tenants' protections were extended to their successors.[14] In 1993, the law was again amended to permit the deregulation of apartments that either housed high-income tenants or became vacant.[15]

Recently, the RSL was amended by the HSTPA,[16] which was passed in "response to an ongoing housing shortage crisis, as evidenced by an extremely low vacancy rate" that caused tenants to "struggle to secure

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[12] 23 N.Y. Unconsol. Laws § 26-510(a).

[13] 23 N.Y. Unconsol. Laws § 26-510(b).

[14] 9 NYCRR 2520.6 (1987).

[15] *See generally Roberts v. Tishman Speyer Props.,* 13 N.Y.3d 270, 279 (2009).

[16] 2019 N.Y. Laws ch. 36, available at https://perma.cc/TH4B5WNQ.

safe, affordable housing" and municipalities to "struggle to protect their regulated housing stock." Sponsor's Mem., 2019 N.Y. Laws ch. 36. The HSTPA limited landlords' capacity to charge excess rent attributed to major capital improvements and individual apartment improvements. *See* 2019 N.Y. Laws ch. 36, Part K. The law repealed vacancy decontrol and high-income decontrol, which had removed units from regulation when the rent or tenant's income reached a specified level. The law also repealed certain vacancy and longevity increases, which had permitted landlords to raise rents above the otherwise allowable amounts if a unit became vacant or if a tenant had remained in place for an extended period. *See id.*, Parts B & D. In addition, the law limits landlords to recovering one rent-stabilized unit per building for personal use upon a showing of necessity, with additional restrictions when the affected tenant is a senior citizen or disabled. *See id.*, Part I. These amendments are the main subject of this appeal.

This regulatory regime has all along been the subject of sharp disagreements: landlords believed that their investment returns were too low and that they retained too little control over their properties while tenants believed that their rents were too high. Landlords in particular have consistently contended the regulations impeded their ability collect sufficient rents to fund required maintenance and improvements and to generate reasonable investment returns. Landlords have consistently contended that the RSL has failed to achieve its stated goal of increasing the

availability of housing to low- and moderate-income residents.[17]

The Appellees, on the other hand, contend that the RSL did not go far enough to enable people of modest incomes to live in the City.[18] They further contend that in enacting the RSL, New York's elected representatives were well aware of the role that rent stabilized housing played in increasing the supply of apartments for low- and moderate-income residents and reducing community disruption resulting from frequent turnover, tenant dislocation, and eviction. These RSL protections, they argue, enable families to establish long-term homes and, in turn, allow neighborhoods to flourish.[19]

The City contends that the vast majority of those who benefit from rent stabilization are low- and middle-income people. In 2016, the median income for rent stabilized households was $44,560, one third lower than the median income for private, non-

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[17] *See, e.g.,* Brief for Nat'l Apt. Ass'n and Nat'l Multifamily Hous. Council as *Amicus Curiae* 23.

[18] *See, e.g.,* Brief for Nat'l Hous. Law Project et al. as *Amicus Curiae* 12.

[19] The Appellees argue that "[i]f the rent-regulated housing stock in New York continues to diminish, the homeless population will grow to unimagined levels ... [and the] elimination of the rent laws would lead to a wave of evictions and homelessness unseen in New York since the Great Depression." Testimony of The Coalition for the Homeless before the NY State Assembly Committee on Housing, January 2011, available at https://www.coalitionforthehomeless.org/wpcontent/uploads/2014/07/TestimonyRentRegulationJan202011.pdf.

regulated households.[20] Of the city's 946,000 rent stabilized apartments, 189,000 units (20%) were occupied by families living below the poverty line. And more than 600,000 units (64%) were occupied by families who qualify under HUD classifications as low-income, very low-income, or extremely low-income. Eliminating rent stabilization, the Appellees contend, would undoubtedly result in a surge of homelessness. It would also result in a dynamic whereby large swaths of essential workers who help maintain our vibrant City, including police officers, teachers, healthcare workers, and emergency service personnel, would be unable to afford to live here.[21] *See generally* Brief of District Council 37 as *Amicus Curiae*. Who has the better of these arguments is not an issue on this appeal.

Throughout its life, this regulatory regime has been the subject of continual attention in the State and City Legislatures. This is hardly surprising. Striking an appropriate balance between the sharply

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[20] N.Y.C. Dep't of Hous. Pres. & Dev., Sociodemographics of Rent Stabilized Tenants 4 (2018), available at https://www1.nyc.gov/assets/hpd/downloads/pdfs/services/rent-regulation-memo1.pdf[.]

[21] The City also argues that while sudden rent increases of any size can be difficult to absorb for tenants across income levels, even a minimal increase can be catastrophic for low-income tenants. In recent years, approximately 175,000 households in rent stabilized housing were unable to afford even a $25 increase in their monthly rent. The State and City Legislatures determined that the RSL helps guard against the dislocation of hundreds of thousands of New Yorkers. *See* Oksana Mironova, *Testimony: NYC Needs a Rent Freeze*, Cmty. Serv. Soc'y (May 5, 2020), available at https://www.cssny.org/news/entry/testimony-nyc-rgb-rent-freeze.

diverging interests of landlords and tenants involves negotiation and compromise over a very long list of complicated and difficult questions. Resolving such questions is a quintessential function of a legislature. At the end of the day, it is highly probable—indeed, virtually certain—that no interested party will be entirely satisfied by what the legislature does.

Rent regulation in the City has also been the subject of decades of litigation. Property owners have challenged New York rent control and stabilization regulations on a host of grounds, contending that it violates the Takings Clause, the Contracts Clause, the Equal Protection Clause, and the Due Process Clause. *See Harmon v. Markus*, 412 F. App'x 420 (2d Cir. 2011); *W. 95 Hous. Corp v. N.Y.C. Dep't of Hous. Pres. & Dev.*, 31 F. App'x 19 (2d Cir. 2002); *Fed. Home Loan Mortg. Corp. v. New York State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45 (2d Cir. 1996); *Rent Stabilization Ass'n of City of New York v. Dinkins*, 5 F.3d 591 (2d Cir. 1993); *Greystone Hotel Co. v. City of New York*, 13 F. Supp. 2d 524 (S.D.N.Y. 1998); *Silberman v. Biderman*, 735 F. Supp. 1138 (E.D.N.Y. 1990); *Tonwal Realties, Inc. v. Beame*, 406 F. Supp. 363 (S.D.N.Y. 1976); *Somerset-Wilshire Apts., Inc. v. Lindsay*, 304 F. Supp. 273 (S.D.N.Y. 1969); *Rent Stabilization Ass'n of New York City, Inc. v. Higgins*, 83 N.Y.2d 156 (1993); *Teeval Co. v. Stern*, 301 N.Y. 346 (1950). Each of these challenges failed.

PROCEDURAL HISTORY

After the passage of the HSTPA, the Landlords sued the Appellees in the United States District Court for the Eastern District of New York. They alleged that the newly amended RSL effected, facially, a physical as well as a regulatory taking and that it violated

the Fourteenth Amendment's Due Process Clause. While the Landlords initially raised facial and as-applied claims, the latter were abandoned. Therefore, the only claims that remain are facial challenges. A companion case, *74 Pinehurst LLC v. New York*, addresses as-applied claims brought by other landlords. An opinion deciding that case also issues today. The defendants moved under Rule 12(b)(6) to dismiss the Complaint, and Judge Komitee granted the motion in a thorough and well-reasoned opinion. The court held that a physical taking occurs when there is a deprivation of the "entire bundle of property rights" in the property interest in question. That bundle includes the "rights to possess, use and dispose of [the property]." *Community Housing Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 43 (E.D.N.Y. 2020). The court reasoned that because the RSL restricts only the plaintiffs' right to use the property—but not to possess or dispose of it—the claims failed to make out a physical taking.

The court next turned to the substantial difficulties associated with facial regulatory takings challenges. It observed that the Landlords were unable to identify a case where a facial challenge to rent-control-related legislation had succeeded. The court acknowledged the possibility that the RSL could effect an as-applied regulatory taking, but noted that "it is unlikely that [it] will be identified in the context of a facial challenge." *Id*. at 45.

Next, applying factors set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)—economic impact, interference with investment-backed expectations, and character of the governmental action—the court dismissed the facial

regulatory takings claim. It reasoned that the Landlords had not demonstrated that the RSL was unconstitutional in all of its applications. This appeal followed. We review *de novo* the district court's dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

DISCUSSION

I

A

The Landlords have leveled a facial challenge to the RSL. To prevail on a facial challenge, the plaintiff must "establish that no set of circumstances exists under which the [challenged] Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). In other words, the plaintiff must show that the statute "is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Rep. Party*, 552 U.S. 442, 449 (2008). Facial challenges to the RSL have regularly fallen short of this high bar. *See, e.g., Rent Stabilization Ass'n v. Dinkins*, 5 F.3d at 595; *W. 95 Hous. Corp.*, 31 F. App'x at 21. The Landlords suggest, however, that this is no longer the correct standard to apply to the facial challenges they bring. They contend that, instead of applying *Salerno*'s well-established standard, this Court should utilize one of two more lenient approaches to striking down statutes on a facial challenge. We disagree.

They first argue that because "'[t]he proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant,'" the facial challenge should focus on the law's effect on only those landlords who wish not to comply with its strictures. Appellants' Br. at 35

(quoting *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015)). A close reading of *Patel* makes clear that, when the Supreme Court referenced "the group for whom the law is a restriction," it meant those to whom the law actually applies, not those for whom it has no plausible application—that is, those for whom the law is "irrelevant." *Patel*, 576 U.S. at 419.

In *Patel*, the Supreme Court considered a facial challenge to a statute authorizing certain warrantless searches. *Id.* at 417. In response to the challenge, the City cited situations in which a warrant was not required under already established law: that is, "situations where police are responding to an emergency, where the subject of the search consents to the intrusion, and where police are acting under a court-ordered warrant." *Id.* at 417–18. It argued that those situations showed that a warrantless search was permissible in some circumstances, and so the new law permitting certain warrantless searches could not be "unconstitutional in all of its applications," as *Salerno* required. *Id.* The Court rejected this argument, reasoning that when faced with exigent circumstances or a court-ordered warrant, "the subject of the search must permit it to proceed irrespective of whether it is authorized by statute." *Id.* at 418–19. The Court distinguished the City's examples as "irrelevant to our analysis because they do not involve actual applications of the statute." *Id.* at 419. Thus, by defining the focus of a facial challenge as resting on its effect on those "for whom the law is a restriction," the Supreme Court merely clarified that facial challenges to a statute must establish its unconstitutionality in all "applications of the statute in which it actually authorizes or prohibits conduct." *Id.* at 418 (emphasis added). The Court's decision in *Patel*, therefore, only

clarified the scope of *Salerno*'s standard for facial challenges. It did not reject or relax the *Salerno* standard.

As a separate basis for avoiding the rigors of *Salerno*, the Landlords rely on *United States v. Stevens*, 559 U.S. 460 (2010), arguing that to succeed on their facial challenge, they need only establish *either* "'that no set of circumstances exists under which [the statute] would be valid, *or* that the statute lacks any plainly legitimate sweep.'" Appellants' Br. at 35 (quoting *Stevens*, 559 U.S. at 472) (emphasis in brief). The Landlords contend that, in its use of the phrase "plainly legitimate sweep," the *Stevens* Court held that a facial challenge in any legal domain can succeed by meeting either one of these two standards. Again, we are not persuaded.

In *Stevens*, a criminal defendant challenged the statute of his conviction—criminalizing the creation, sale, or possession of depictions of animal cruelty—as facially invalid under the First Amendment. 559 U.S. at 464–65, 467. But in assessing the challenge, the Supreme Court stated that the choice between the two standards under discussion (valid in "no set of circumstances" or "lacking any plainly legitimate sweep") was "a matter of dispute that we need not and do not address." *Id.* at 472. Thus, it did no more than recognize that "[i]n the First Amendment context," it has determined that "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 472 (quoting *Wash. State Grange*, 552 U.S. at 449 n.6).

We understand *Stevens*, then, not as rejecting *Salerno*'s demanding standards for facial challenges

generally, but as reinforcing the principles that (i) *Salerno* provides the prevailing standard for facial challenges to statutes outside the context of the First Amendment, and (ii) a different, more challenge-friendly standard has developed in the context of statutes affecting First Amendment rights. Neither *Stevens* nor any other case the Landlords cite has applied this relaxed standard outside of the First Amendment context, nor supports its extension beyond that setting. Indeed, in observing that "[f]acial challenges are disfavored for several reasons," the Supreme Court reminded us that "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange*, 552 U.S. at 451. Especially where, as here in the rent stabilization context, the regulatory regime at issue has both persisted and been adjusted over time, reflecting finely tuned, legislative judgments, we must exercise caution in entertaining facial challenges. Neither *Patel* nor *Stevens*, thus, lower the high bar the Landlords must satisfy to assert a facial challenge.

B

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amends. V, XIV, § 1. That requirement applies to all physical appropriations of property by the government. *See Horne v. Dep't of Agriculture*, 576 U.S. 350, 360 (2015). When the government effects a physical appropriation of private property for itself or another—whether by law, regulation, or another means—a per se physical taking has occurred. *Cedar*

Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021). Examples of physical takings include using eminent domain to condemn property, *see United States v. General Motors Corp.*, 323 U.S. 373, 374–75 (1945); taking possession of property without taking title to it, *see United States v. Pewee Coal Co.*, 341 U.S. 114, 115–17 (1951); and occupying property by, for example, building a dam that causes recurring flooding, see *United States v. Cress*, 243 U.S. 316, 327–28 (1917).

The Supreme Court has, over the years, considered various Takings Clause challenges to government actions. *See e.g., Griggs v. Allegheny Cnty., Pa.*, 369 U.S. 84 (1962); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012). In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Supreme Court considered a statute requiring landlords to permit cable companies to install equipment on the landlords' properties. The Court held that such a mandatory invasion amounted to a permanent physical occupation by a third party—the cable companies—of the landlords' properties and was therefore a *per se* physical taking. In addition, the Court concluded that such a physical occupation deprived landlords of the entire "bundle of rights" associated with owning property. *Id.* at 435.

A decade later, in *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court declined to apply to this logic to rent-control laws and rejected a Takings Clause challenge. *Yee* involved a mobile-home rent control ordinance that set rent at below-market rates. The Court held that the ordinance—even considered in conjunction with other state laws effectively permitting tenants to remain at will—was not a physical

taking. It reasoned that the statutes did not facially require landlords to rent their properties in perpetuity because evictions were permitted in some conditions, *id*. at 528, and because the "tenants were invited by petitioners, not forced upon them by the government," *id*. The Court further noted that States have wide latitude to regulate the landlord-tenant relationship, such as by placing "ceilings on the rents the landowner can charge or requiring the landowner to accept tenants he does not like." *Id*. at 529 (cleaned up).

In *Horne*, in contrast, the Court found that a physical taking had occurred. In that case the Court considered a challenge to a Department of Agriculture marketing order requiring raisin growers to hand over a percentage of their crop to the government. 576 U.S. at 350. The Court held that the statute effected a physical taking because raisins are physically transferred from the growers to the government and title is passed, thereby depriving owners of the entire bundle of rights to their property. *Id*. at 361. The Court also held that the government cannot condition a party's permission to engage in interstate commerce on complying with a regulation that effects a physical taking. *Id*. at 364–67.

Most recently, in *Cedar Point* the Court evaluated a regulation granting labor organizations the "right to take access" to an agricultural employer's property for up to 120 days a year to solicit support for unionization. 141 S. Ct. at 2069. The Court held that because the regulation granted a right to invade the grower's property it amounted to a per se physical taking. *Id*. at 2072. *Cedar Point*, however, emphasized that "[l]imitations on how a business generally open

to the public may treat individuals ... are readily distinguishable from regulations granting a right to invade property closed to the public." *Id*. at 2076–77.

Our court has also considered various Takings Clause challenges to regulations, including some to earlier versions of New York's RSL. *See, e.g., Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 94–95 (2d Cir. 1992) (finding that denying a land use permit did not constitute a physical taking); *Fed. Home Loan Mortg. Corp*., 83 F.3d at 48 (finding application of rent stabilization laws to a previously exempt building did not violate the Takings Clause); *Harmon*, 412 F. App'x at 422 (holding City's rent stabilization law did not effect a permanent physical occupation of a landlords' property in violation of Takings Clause).

B [sic]

Applying these principles, we conclude that no provision of the RSL effects, facially, a physical occupation of the Landlords' properties. In *Cedar Point*, the Court held that the government may effect a physical occupation of property by granting a third party the right to invade "property closed to the public." 141 S. Ct. at 2077.[22] That has not occurred here. Rather, the Landlords voluntarily invited third parties to use their properties, and as the Court explained in *Cedar*

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[22] We reject Appellants' reliance on the Supreme Court's per curiam opinion in *Pakdel v. City and County of San Francisco*, 141 S. Ct. 2226 (2021). There, the district court had ruled on the merits of physical takings claims prior to the Supreme Court's ruling in *Cedar Point Nursery*, and therefore the Court in remanding the case merely stated that the Ninth Circuit "may give further consideration to these claims in light of [the] recent decision in *Cedar Point Nursery v. Hassid*." 141 S. Ct. at 2229 n. 1. That directive is of no moment here.

Point, regulations concerning such properties are "readily distinguishable" from those compelling invasions of properties closed to the public. *Id*. As the Supreme Court made pellucid in *Yee*, when, as here, "a landowner decides to rent his land to tenants" the States "have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." 503 U.S. at 528–29; see also *Loretto*, 458 U.S. at 440 ("This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails."); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922). The numerous cases that affirm the validity of rent control statutes are the necessary result of this long line of consistent authority. *See, e.g., Bowles v. Willingham*, 321 U.S. 503 (1944); *Block v. Hirsh*, 256 U.S. 135 (1921).

Nor does the RSL compel the Landlords "to refrain in perpetuity from terminating a tenancy." *Yee*, 503 U.S. at 528. The statute sets forth several grounds on which a landlord may terminate a lease. These include failing to pay rent, creating a nuisance, violating provisions of the lease, or using the property for illegal purposes. 9 NYCRR § 2524.3. It is well settled that limitations on the termination of a tenancy do not effect a taking so long as there is a possible route to an eviction. *Cf. Yee*, 503 U.S. at 528 (concluding that a statute requiring that evictions be given with 6- or 12-months' notice is not a compelled physical invasion in violation of the Takings Clause); *Harmon*, 412 F. App'x at 422 (finding New York's rental stabilization

law at the time did not give rise to a physical taking partially because the landlords retained the right to "evict an unsatisfactory tenant"); *Higgins*, 83 N.Y.2d at 172 (family succession amendments to rent control and rent stabilization regulations did not effect unconstitutional taking where owner's right to evict unsatisfactory tenant was not altered); *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 163 (S.D.N.Y. 2020) (finding that a temporary halt on evictions did not amount to a physical taking).[23]

All in all, as with previous versions, the RSL "regulates land use rather than effecting a physical occupation." *W. 95 Hous. Corp.*, 31 F. App'x at 21. The caselaw is exceptionally clear that legislatures enjoy broad authority to regulate land use without running afoul of the Fifth Amendment's bar on physical takings. See *Yee*, 503 U.S. at 527.

C [sic]

The Landlords contend that the RSL effects, facially, a physical taking because it requires them to offer tenants renewal leases, interferes with their ability to evict tenants and reclaim units for personal use, and allows tenancies to be transferred to successors. These provisions, according to the Landlords, amount to a permanent physical occupation compelled by the government.

We disagree. None of these provisions involve unconditional requirements imposed by the legislature. Landlords, instead, must adhere to these provisions

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[23] Because we conclude that the Landlords have not been deprived of their right to exclude, we agree with the District Court that they have not been deprived of their "entire bundle of rights" in their properties.

only when certain conditions are met. Consider, for example, the statute's successorship provisions. No tenant enjoys an unfettered right to transfer tenancy rights to a successor. Instead, the successor must meet a host of requirements, such as, for example, being a member of the tenant's family who has already lived in the apartment for two years. What is more, even assuming *arguendo* that the successorship provisions do unconditionally require landlords to rent to uninvited successors, that would deprive the Landlords only of the ability to decide *who* their incoming tenants are. That limitation, as the Supreme Court has recognized, has "nothing to do with whether [a law or regulation] causes a physical taking." *Id*. at 530–31.

Furthermore, none of the caselaw on which the Landlords rely lends any appreciable support to their contention that the RSL effects, facially, a physical taking. The Landlords' reliance on *Loretto*, *Horne*, and *Cedar Point*, their main authority, is misplaced for a common reason: None of them concerns a statute that regulates the landlord-tenant relationship, and none restricts—much less upends—the State's longstanding authority to regulate that relationship.[24]

Moreover, *Yee*, the only case on which the Landlords rely that does involve a statute regulating the landlord-tenant relationship, confirms our conclusion.

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[24] Nor is the Landlords' position supported by their reliance on *Horne* for the proposition that the "voluntary participation in the market [cannot] excuse or absolve the government of liability for a taking." Like the District Court, we reject Appellants' claims not because we conclude that they have acquiesced in a physical taking, but because "no physical taking has occurred in the first place."

Yee, as noted, involved a facial challenge to rent control statutes that limited owners' ability to terminate tenancies where the initial tenant had transferred her rights to another. 503 U.S. at 523–24. Like the Landlords here, the petitioners argued that the law effectively forced property owners to rent the property out to these individuals and prevented owners from changing the use of their property. The Court upheld the law because it merely limited—but did not bar—an owners' ability to do both of these things. *Id.* at 527–28. The same is true here.

II

The Landlords also mount a facial regulatory taking challenge to the RSL. Legislation effects a regulatory taking when it goes "too far" in restricting a landowner's ability to use his own property. *Horne*, 576 U.S. at 360; *Yee*, 503 U.S. at 529; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In determining whether a use restriction effects a taking, we apply the balancing test set out in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), a case involving a challenge to New York City's historical preservation law, N.Y.C. Admin. Code, ch. 8–A, § 205–1.0 et seq. (1976).[25]

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[25] We are unpersuaded by the Landlords' argument that the appropriate standard under which to determine whether a taking has occurred comes from a dissent in *Pennell v. City of San Jose*, 485 U.S. 1 (1988). As we have noted, "Justice Scalia's [*Pennell*] dissent was just that; a majority of the Supreme Court has yet to adopt Justice Scalia's reasoning." *Garelick v. Sullivan*, 987 F.2d 913, 918 (2d Cir. 1993). This dissent, we have pointed out, is "in tension (if not conflict) with well established Fifth Amendment doctrine granting government broad power to determine the proper subjects of and purposes for regulatory schemes." *Id.*

Penn Central instructs courts to engage in a flexible, "ad hoc, factual inquir[y]" focused on "several factors that have particular significance." 438 U.S. at 124. Three of them are: (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Id*. The Landlords assert that, taken together, these factors support their characterization of the RSL as a facial regulatory taking. We disagree.

As to the economic impact of the regulation, the Landlords contend that the RSL has a direct and substantial negative economic impact on rent-stabilized properties in New York City because stabilized rents are on average 25% lower than market rents and permissible rent increases are outpaced by increases in operating costs. In short, the Landlords contend that the RSL forces property owners to choose between making losing investments or letting their properties deteriorate. They allege that rent-stabilized properties are worth 25% to 50% less than similar properties with market-rate units.

The RSL may well have an appreciable economic impact on the profitability of some buildings subject to its provisions. When permissible rent increases are outpaced by operating cost increases, the result may be a reduction or, in some cases, the elimination of net operating income. We acknowledge that some property owners may be legitimately aggrieved by the diminished value of their rent-stabilized properties as

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Accordingly, we decline to employ a test that has never been adopted by the Supreme Court.

compared with their market-rate units. Furthermore, we understand that many economists argue that rent control laws are an inefficient way of ensuring a supply of affordable housing. But while legislative judgments may take into account these varying policy perspectives, we are bound to follow the standard set forth for a facial regulatory taking under *Penn Central*. Appellants have simply not plausibly alleged that every owner of a rent-stabilized property has suffered an adverse economic impact that would support their facial regulatory takings claims. Thus, Appellants did not plausibly allege the economic impact factor on a facial basis, and this factor thus weighs against the conclusion that the RSL effects a regulatory taking on its face.

Instead of alleging that every landlord has suffered an adverse economic impact, the Landlords principally rely on data purporting to show the average economic effects of the RSL. But these effects do not establish that the RSL can never be applied constitutionally, which is the requirement for a facial challenge. As the Supreme Court stated in *Concrete Pipe & Prods. of Cal.*, the "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 645 (1993); *see also Park Ave. Tower Assocs. v. City of New York*, 746 F.2d 135, 139–40 (2d Cir. 1984) (collecting cases rejecting takings claims where property value declined by 75% to 90%). We therefore conclude that the economic impact factor of the *Penn Central* analysis does not support the Landlords.

With respect to the Landlords' investment-backed expectations, once again, we can assume

arguendo that some property owners may have had their investment-backed expectations thwarted by the current iteration of the RSL. Thus, we may assume some property owners may not have expected, for example, that the 2019 RSL would eliminate the possibility of preferential rent increases or sunset provisions. However, the Landlords have failed to establish that the RSL interferes with every property owner's investment-backed expectations, which is required on a facial challenge, because such expectations can be assessed only on a case-by-case basis.

Different landlords, who purchased properties at different times and under different RSL regimes, will necessarily have a range of differing expectations. Some may have been aggrieved by various provisions of the RSL, while others may not have been and, indeed, others may have seen the profitability of their investments rise. It is therefore impracticable to assess a class of owners' expectations without analysis on an individualized basis. Moreover, we must consider the reasonableness of alleged investment-backed expectations vis-à-vis those who can "demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Allen v. Cuomo*, 100 F.3d 253, 262 (2d Cir. 1996) (internal quotation marks omitted). We cannot make that analysis on a groupwide basis in a case where, as here, the challenged statute has been in place for half a century, and most, if not all, current landlords purchased their properties knowing they would be subject to the RSL. Given the RSL's ever-changing requirements, no property owner could reasonably expect the continuation of any particular combination of RSL provisions. As the New York Court of Appeals has noted, "no party doing business in a

regulated environment like the New York City rental market can expect the RSL to remain static." *Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 369 (2020). Accordingly, we conclude that the investment-backed expectations factor does not support the contention that the RSL has effected, facially, a regulatory taking.

Turning to the character of the taking, a regulatory taking "may more readily be found when the interference with property can be characterized as a physical invasion by government." *Penn Central*, 438 U.S. at 124. The Landlords argue that the RSL constitutes a physical invasion because it burdens property owners with non-removable tenants and, in so doing, eliminates landlords' rights to determine the use of their property or to use it themselves. They contend that the RSL confers a local public assistance benefit on tenants that is inappropriately funded by a subset of New York City building owners rather than the government.

We are not persuaded. The Supreme Court has instructed that in analyzing the "character" of the governmental action, courts should focus on the extent to which a regulation was "enacted solely for the benefit of private parties" as opposed to a legislative desire to serve "important public interests." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485–86 (1987). The character of the government action in Penn Central, for example, cut against a finding of a taking because the law was part of a "comprehensive plan to preserve structures of historic or aesthetic interest" and applied to hundreds of sites. 438 U.S. at 132. In reaching this conclusion, the Court relied on

the "judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole." *Id.* at 134.

Here too, the RSL is part of a comprehensive regulatory regime that governs nearly one million units. Like the broad public interests at issue in *Penn Central*, here, the legislature has determined that the RSL is necessary to prevent "serious threats to the public health, safety and general welfare." N.Y.C. Admin. Code § 26-501. No one can seriously contend that these are not important public interests and courts are not in the business of second-guessing legislative determinations such as this one. The fact that the RSL affects landlords unevenly is of no moment because, as the *Penn Central* Court noted, "[l]egislation designed to promote the general welfare commonly burdens some more than others." 438 U.S. at 133. Accordingly, the character of the regulation does not support the conclusion that the RSL effects a regulatory taking.

Finally, the Landlords urge this Court to consider two additional, less commonly cited *Penn Central* factors that, they argue, tend to show that the RSL results in a regulatory taking: noxious use and a lack of a reciprocal advantage. Even assuming for the sake of argument that these factors apply, the claims fail.

First, the Landlords assert that because the RSL does not address a safety issue or "noxious use" of a property, this factor supports the conclusion that a regulatory taking has occurred. This argument relies on a logical fallacy that because noxious use laws typically do not constitute takings, the RSL must be a

taking because it does not govern noxious use. We have never held that *only* regulations of noxious uses can survive takings challenges. Merely because the existence of noxious use regulation can overcome a takings challenge does not mean that, conversely, the lack of noxious use regulation supports a takings challenge. Accordingly, this factor does not support the Landlords' takings claim.

The Landlords' reliance on the "reciprocity of advantage" factor fares no better. Citing Justice Rehnquist's dissent in *Penn Central*, they argue that the RSL effects a regulatory taking because the Fifth Amendment prohibits the placing of an inordinate share of a public burden on a private individual. With this argument, the Landlords urge us to read a dissent as providing us with governing law. We can't do that. As the legislature has found, the RSL provides reciprocity of advantage: the RSL results in significant state- and citywide benefits—including to landlords—by preventing tenant dislocation and preserving neighborhood stability. Although what specific value a particular landlord receives from these benefits may be hard to quantify, that difficulty does not render the RSL a taking. As the Court said in *Keystone Bituminous Coal Ass'n*, "[t]he Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received." 480 U.S. at 491 n.21. Accordingly, a supposed lack of a reciprocal advantage does not render the RSL a regulatory taking.

III

Finally, the Landlords contend that they have plausibly alleged that the RSL and the 2018 City

Council emergency declaration violate the Due Process Clause of the Fourteenth Amendment. Again, we disagree. The Landlords argue that the RSL is not "rationally related" to alleviating the housing shortage, securing housing for low-income residents, addressing rent profiteering, or promoting neighborhood stability. To the contrary, the Landlords say, the law reduces the housing supply, secures housing for the wealthy, increases rent for uncontrolled units, and discriminates in favor of tenants over owners. Supporting their view, the Landlords, as we have seen, point to various economists who argue that the RSL, in several respects, causes more harm than good.

But as the Supreme Court has noted, the Due Process Clause cannot "do the work of the Takings Clause" because "where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 720–21 (2010) (cleaned up); *see Albright v. Oliver*, 510 U.S. 266, 273 (1994); *Harmon*, 412 F. App'x at 423. In any event, as the Court has noted, the liberties protected by due process "do not include economic liberties." *Stop the Beach*, 560 U.S. at 721.

Furthermore, even if a due process challenge were available, Appellants' arguments would still fail. In evaluating a due process challenge, we would conduct a rational-basis review, see *Pennell*, 485 U.S. at 11–12, which requires a law to be "rationally related to legitimate government interests," *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). A rational basis

review is not a mechanism for judges to second guess legislative judgment even when, as here, they may conflict in part with the opinions of some experts. *See, e.g., F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313–14 (1993) ("Where there are plausible reasons for Congress' action, our inquiry is at an end.") (internal quotation marks omitted). Rather, it is a deferential standard that allows a law to survive if any of its justifications is valid. *See Preseault v. I.C.C.*, 494 U.S. 1, 18 (1990). Here, the RSL was primarily enacted to permit low- and moderate-income people to reside in New York City when they otherwise could not afford to do so. *See* N.Y.C. Admin. Code § 26-501. It is beyond dispute that neighborhood continuity and stability are valid bases for enacting a law. *See Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992). Appellants' Due Process challenge thus fails.

CONCLUSION

For these reasons, we **AFFIRM** the judgment of the District Court.

APPENDIX B

UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, in the 6th day of February, two thousand twenty-three,

Before: Guido Calabresi,

Barrington D. Parker,

Susan L. Camey,

Circuit Judges.

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,

New York Tenants and Neighbors, Community Voices Heard, Coalition for the Homelss,

Intervenors,

v.

City of New York; Rent Guidelines Board, David Reiss, Arpit

JUDGMENT

Docket No. 20-3366

Gupta, Alex Schwarz, Christian Gonzalez-Rivera, Christina Derose, Robert Ehrlich, Christina Smyth, Shelia Garcia, Adán Soltren,

Defendants-Appellees.

The appeal in the above captioned case from a judgment of the United States District Court for the Eastern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED.

For the Court:

Catherine O'Hagan Wolfe,

Clerk of Court

[seal]

APPENDIX C

492 F. Supp. 3d 33

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COMMUNITY HOUSING IMPROVEMENT PROGRAM, RENT STABILIZATION ASSOCIATION OF N.Y.C., INC., CONSTANCE NUGENT-MILLER, et al.,

Plaintiffs,

-against-

CITY OF NEW YORK, RENT GUIDELINES BOARD, DAVID REISS, CECILIA JOZA, ALEX SCHWARTZ, GERMAN TEJEDA, MAY YU, et al.,

Defendants.

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74 PINEHURST LLC, 141 WADSWORTH LLC, 177 WADSWORTH LLC, DINO PANAGOULIAS, DIMOS PANAGOULIAS, et al.,

Plaintiffs,

-against-

STATE OF NEW YORK, NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL, RUTHANNE VISNAUSKAS, et al.,

Defendants.

19-cv-4087(EK)(RLM), 19-cv-6447(EK)(RLM)

Signed 09/30/2020

MEMORANDUM AND ORDER

ERIC KOMITEE, United States District Judge:

Rent regulations have now been the subject of almost a hundred years of case law, going back to Justice Holmes. That case law supports a broad conception of government power to regulate rents, including in ways that may diminish — even significantly — the value of landlords' property.

In 2019, the New York State legislature amended the state's rent-stabilization laws (RSL). As amended, the RSL now goes beyond previous incarnations of the New York statute in its limitations on rent increases, deregulation of units, and eviction of tenants in breach of lease agreements, among other subjects. Plaintiffs claim that in light of the 2019 amendments, the RSL (in its cumulative effect) is now unconstitutional.

This opinion concerns two cases. Plaintiffs in *Community Housing Improvement Program v. City of New York* (19-cv-4087) are various landlords and two landlord-advocacy groups, the Community Housing Improvement Program and the Rent Stabilization Association (the "CHIP Plaintiffs"). Plaintiffs in *74 Pinehurst LLC v. State of New York* (19-cv-6447) are landlords 74 Pinehurst LLC, Eighty Mulberry Realty Corporation, 141 Wadsworth LLC and 177 Wadsworth LLC, and members of the Panagoulias family (the "Pinehurst Plaintiffs"). Because of the significantly overlapping claims and issues of law in the two cases, the Court addresses them here in a single opinion.[1]

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[1] The Court does not, however, consolidate the cases. Accordingly, the Court issues a separate judgment in CHIP, as directed below.

Pursuant to 42 U.S.C. § 1983, Plaintiffs assert (a) a facial claim that the RSL violates the Takings Clause (as both a physical and a regulatory taking); (b) in the case of certain Pinehurst Plaintiffs, a claim that the RSL, as applied to them, violates the Takings Clause (as both a physical and a regulatory taking); (c) a facial claim that the RSL violates their due-process rights; and (d) a claim that the RSL violates the Contracts Clause, as applied to each Pinehurst Plaintiff.[2] They seek an order enjoining the continued enforcement of the RSL, as amended; a declaration that the amended law is unconstitutional (both on its face and as-applied); and monetary relief for the as-applied Plaintiffs' Takings and Contracts Clause claims.

Supreme Court and Second Circuit cases foreclose most of these challenges. No precedent binding on this Court has ever found any provision of a rent-stabilization statute to violate the Constitution, and even if the 2019 amendments go beyond prior regulations, "it is not for a lower court to reverse this tide," *Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 47 (2d Cir. 1996) (*FHLMC*) — at least in response to the instant facial challenges. Accordingly, the Court grants Defendants' motions to dismiss the facial challenges under the Takings Clause, the as-applied claims alleging physical takings, the due-process claims, and the Contracts Clause claims — as to all Plaintiffs. The Court denies, at this stage, the motions to dismiss the as-applied regulatory-takings claims brought by certain Pinehurst Plaintiffs only. Those claims may face a "heavy

[2] Each Pinehurst Plaintiff brings as-applied challenges under the Takings Clause and Contracts Clause except for 177 Wadsworth LLC, which only brings an as-applied claim under the Contracts Clause.

burden," *see Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987), but given their fact-intensive nature, it is a burden those Plaintiffs should be afforded an opportunity to carry, at least to the summary-judgment stage.

I. Background

New York City has been subject to rent regulation, in some form, since World War I. But the RSL is of more recent vintage. It traces its roots to 1969, when New York City passed the law that created the Rent Guidelines Board (RGB) — the body that, to this day, continues to set rents in New York City. Five years later, New York State passed its own statute, which amended the 1969 law. Together, these laws formed the blueprint for today's RSL. The State and City have amended the RSL repeatedly since its initial enactment, culminating with the amendments at issue here.

The 2019 amendments, enacted on June 14, 2019, made significant changes. Most notably, they:

- Cap the number of units landlords can recover for personal use at one unit per building (and only upon a showing of immediate and compelling necessity). N.Y. Reg. Sess. § 6458, Part I (2019).
- Repeal the "luxury decontrol" provisions, which allowed landlords, in certain circumstances, to decontrol a unit when the rent reached a specified value. *Id*. at Part D, § 5.
- Repeal the "vacancy" and "longevity" increase provisions, which allowed landlords to charge higher rents when certain units became vacant. *Id*. at Part B, §§ 1, 2.

- Repeal the "preferential rate" provisions, which allowed landlords who had been charging rates below the legal maximum to increase those rates when a lease ended. *Id*. at Part E.
- Reduce the value of capital improvements — called "individual apartment improvements" (IAI) and "major capital improvements" (MCI) — that landlords may pass on to tenants through rent increases. *Id*. at Part K, §§ 1, 2, 4, 11.
- Increase the fraction of tenant consent needed to convert a building to cooperative or condominium use. *Id*. at Part N.
- Extend, from six to twelve months, the period in which state housing courts may stay the eviction of breaching tenants. *Id*. at Part M, § 21.

II. Discussion

A. State Defendants' Eleventh Amendment Immunity

Before turning to Plaintiffs' constitutional claims, the Court must address certain defendants' assertion of immunity from suit. The "State Defendants" — the State of New York, the New York Division of Housing and Community Renewal (DHCR),[3] and DHCR Commissioner RuthAnne Visnauskas — argue that the Eleventh Amendment bars certain claims against them.[4] State Defendants' Motion to Dismiss for Lack

[3] The DHCR is the New York State agency charged with overseeing and administering the RSL.

[4] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of

of Jurisdiction in Part, ECF No. 67. The State Defendants did not raise the Eleventh Amendment defense until oral argument on their motion to dismiss for failure to state a claim — after the 12(b)(6) motions had been fully briefed. This omission is difficult to understand, to say the least; nevertheless, the Court must resolve these arguments, as they implicate its subject-matter jurisdiction. *See Dube v. State Univ. of N.Y.*, 900 F.2d 587, 594 (2d Cir. 1990); *see also* Fed. R. Civ. P. 12(h)(3).

The parties agree that sovereign immunity bars Plaintiffs' Due Process and Contracts Clause claims (with certain exceptions). Plaintiffs' Response to State Defendants' Motion to Dismiss for Lack of Jurisdiction in Part at 1, ECF No. 71. Therefore these claims cannot proceed against the State Defendants, except to the extent they seek declaratory relief against DHCR Commissioner Visnauskas (as explained below). The parties dispute, though, whether the Eleventh Amendment immunizes states against takings claims. *Id.*

There is an obvious tension between the Takings Clause and the Eleventh Amendment. The Eleventh Amendment provides the states with immunity against suit in federal court. Plaintiffs contend, however, that the Takings Clause's "self-executing" nature (meaning, its built-in provision of the "just compensation" remedy) overrides the states' immunity. In support, they cite several cases that have reached that conclusion (or related conclusions). *See, e.g., Manning*

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any Foreign State." U.S. Const. amend. XI. Though the text does not speak to suits against states by their own residents, the Supreme Court held in *Hans v. Louisiana*, 134 U.S. 1 (1890), that the amendment also generally precludes such actions in federal court.

v. N.M Energy, Minerals & Nat. Res. Dep't, 144 P.3d 87, 97-98 (N.M. 2006) (holding that the State of New Mexico could not claim immunity from regulatory-takings claims because the "'just compensation' remedy found in the Takings Clause . . . abrogates state sovereign immunity"); *see also Hair v. United States*, 350 F.3d 1253, 1257 (Fed. Cir. 2003) (holding that the federal government cannot claim immunity from takings claims because the Takings Clause is "self-executing"); *Leistiko v. Sec'y of Army*, 922 F. Supp. 66, 73 (N.D. Ohio 1996) (same).

Despite the fact that the Eleventh Amendment and Takings Clause date back so long, neither the Supreme Court nor the Second Circuit has decisively resolved the conflict. The Second Circuit recently affirmed a decision that held the Eleventh Amendment to bar a takings claim, but in a non-precedential summary order that did not analyze the question in detail. *Morabito v. New York*, 803 F. App'x 463, 464-65 (2d Cir. 2020) (summary order) (affirming because the Eleventh Amendment "generally bars suits in federal courts by private individuals against non-consenting states"), *aff'g* No. 6:17-cv-6853, 2018 WL 3023380 (W.D.N.Y. June 18, 2018). Thus the Court must reach the question squarely.

The overwhelming weight of authority among the circuits contradicts the cases cited by Plaintiffs, supra. These cases hold that sovereign immunity trumps the Takings Clause — at least where, as here, the state provides a remedy of its own for an alleged violation.[5] The reasoning of one such case, *Seven Up*

[5] *See* N.Y. Const. art. I, § 7(a) ("Private property shall not be taken for public use without compensation."). No court has reached the ultimate question of whether the Takings Clause

Pete Venture v. Schweitzer, 523 F.3d 948 (9th Cir. 2008), is instructive. In that case, the Ninth Circuit analogized the question of Takings Clause immunity to the Supreme Court's holding in *Reich v. Collins*, which concerned a tax-refund due-process claim. 513 U.S. 106 (1994). In *Reich*, the plaintiff sued the Georgia Department of Revenue and its commissioner in federal court to recover payments he had made pursuant to a tax provision later found unconstitutional. *Id.* at 108. The Supreme Court held that when states require payment of contested taxes up front, the Due Process Clause requires them to provide, in their own courts, a forum to recover those payments if the revenue provision in question is later held invalid — even if the Eleventh Amendment would bar the due-process claim in federal court. *Id.* at 109.

The Ninth Circuit in *Seven Up* reasoned that the Takings Clause, like the Due Process Clause, "can comfortably co-exist with the Eleventh Amendment immunity of the States," provided state courts make a "constitutionally enforced remedy" available. *Seven Up*, 523 F.3d at 954-55. *Seven Up*'s conclusion is consistent with the weight of circuit authority. *See Bay Point Props., Inc. v. Miss. Transp. Comm'n*, 937 F.3d 454, 456-57 (5th Cir. 2019) (holding that Eleventh Amendment barred takings claim in federal court, where plaintiff had already sued in state court but received less compensation than he sought); *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1213-14 (10th Cir. 2019) (holding that the Eleventh Amendment barred a federal takings claim against the State of Utah, after confirming that Utah offered a forum for the

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usurps the Eleventh Amendment when no remedy is available in the state courts. Given New York's express remedy, this Court need not reach that issue.

claim); *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014) (concluding "that the Eleventh Amendment bars Fifth Amendment taking claims against States in federal court when the State's courts remain open to adjudicate such claims"); *Jachetta v. United States*, 653 F.3d 898, 909-10 (9th Cir. 2011) (holding that the Eleventh Amendment barred claims brought against the state in federal court under the federal Takings Clause, but that the plaintiff could seek Supreme Court review if the state court declined to hear the claim); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 526-28 (6th Cir. 2004) (holding that Eleventh Amendment immunity barred federal takings claim, but that state court "would have had to hear that federal claim"), *overruled on other grounds San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323 (2005).

These cases give effect to the Supreme Court's admonition that:

> [T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . .

Alden v. Maine, 527 U.S. 706 (1999).

There are fleeting suggestions to the contrary in Supreme Court authority, but none of them compel the opposite conclusion. Most recently, in *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019), the Supreme Court cast doubt on the notion that the availability of

state-law relief should determine whether federal courts may hear takings claims. *Id.* at 2169-71 (stating that the existence of a state-law remedy "cannot infringe or restrict the property owner's federal constitutional claim," and that to hold otherwise would "hand[ ] authority over federal takings claims to state courts") (internal quotations omitted). Similarly, in *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304 (1987), the Supreme Court rejected an argument that, based on the "prohibitory nature of the Fifth Amendment, . . . combined with principles of sovereign immunity," the Takings Clause is merely a "limitation on the power of the Government to act," rather than a "remedial provision" that requires compensation. *Id.* at 316 n.9.[6]

But these cases do not control here. They establish, at most, that the Takings Clause can overcome court-imposed — rather than constitutional — restrictions on takings claims. See *Knick*, 139 S. Ct. at 2167-68 (overruling *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which had established court-imposed rule requiring plaintiffs to exhaust state remedies before bringing a takings claim in federal court); *First English*, 482 U.S. at 310-11 (invalidating state precedent that prevented plaintiffs from recovering

[6] Some have argued that this footnote proves the Takings Clause trumps sovereign immunity, insofar as it suggests sovereign immunity does not strip the Takings Clause of its remedial nature. *See, e.g.*, Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493 (2006). But that reading is far from obvious, and it would, in any event, be dictum (because the defendant in First English was a county, which cannot invoke sovereign immunity).

compensation for damages incurred before a state court found there was a taking). Neither case had occasion to decide whether the Takings Clause overrides other constitutional provisions like the Eleventh Amendment. Knick and First English, therefore, do not compel the conclusion that the Takings Clause trumps sovereign immunity.

Accordingly, New York State, the DHCR,[7] and Commissioner Visnauskas (to the extent Plaintiffs seek monetary relief in her official capacity) will be dismissed from this litigation.

This holding may not have the profound impact that one might initially surmise. Plaintiffs may continue to seek prospective remedies — like an injunction — against state officials under *Ex Parte Young*, 209 U.S. 123 (1908), and New York State remains obligated (via its own consent) to pay just compensation for takings under the New York State Constitution. Moreover, the Eleventh Amendment does not affect Plaintiffs' claims for money damages against the City of New York, the RGB, or the members of the RGB.

Sovereign immunity also does not bar the remaining damages claims (for just compensation) against Commissioner Visnauskas in her individual

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[7] Sovereign immunity extends to state agencies like the DHCR as well, because they are an arm of the state. *See, e.g., Schiavone v. N.Y. State Office of Rent Admin.*, No. 18-cv-130, 2018 WL 5777029, at *3-*4 (S.D.N.Y. Nov. 2, 2018) (Eleventh Amendment bars suit against DHCR); *Helgason v. Certain State of N.Y. Emps.*, No. 10-cv-5116, 2011 WL 4089913, at *7 (S.D.N.Y. June 24, 2011) (same) *report and recommendation adopted sub nom. Helgason v. Doe*, 2011 WL 4089943 (S.D.N.Y. Sept. 13, 2011); *Gray v. Internal Affairs Bureau*, 292 F. Supp. 2d 475, 476 (S.D.N.Y. 2003) (same).

capacity.[8] But to establish individual liability, Plaintiffs must allege that Commissioner Visnauskas was "personal[ly] involve[d]" in the alleged regulatory takings. *Grullon v. City of New Haven*, 720 F.3d 133, 138 (2d Cir. 2013). Although Plaintiffs allege that Commissioner Visnauskas is personally responsible for enforcing and implementing particular aspects of the RSL,[9] the core of their claims is that the enactment of the 2019 amendments, as a whole, violates the Constitution. Because they do not allege that Commissioner Visnauskas had any involvement at that broader stage, these claims must be dismissed under Rule 12(b)(6). *See Morabito*, 803 F. App'x at 466 (allegation that state official could "modify or abolish" the challenged regulation was inadequate); *Nassau & Suffolk Cnty. Taxi Owners Ass'n, Inc. v. New York*, 336 F. Supp. 3d 50, 70 (E.D.N.Y. 2018) (dismissing claim because plaintiffs did not allege that the officials were "involved in the creation or passage" of the challenged regulation). Commissioner Visnauskas is not completely dismissed from this action, however, because

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[8] Moreover, the Eleventh Amendment does not bar Plaintiffs' Contracts Clause claims against Commissioner Visnauskas for declaratory relief (in her official capacity) or for damages (in her personal capacity). As explained below, those claims are dismissed on the merits, as are Plaintiffs' due-process claims against Commissioner Visnauskas for facial declaratory and injunctive relief.

[9] Plaintiffs allege that Commissioner Visnauskas was personally "charged with implementing and enforcing" certain provisions of the RSL, including the personal-use restrictions and the MCI and IAI provisions. Pinehurst Complaint at ¶¶ 68, 127, ECF No. 1 (Pinehurst Compl.) (citing N.Y.C. Admin. Code § 26-511(b)) ("[N]o such amendments shall be promulgated except by action of the commissioner of the division of housing and community renewal").

Plaintiffs' surviving claims against her for declaratory relief may proceed under *Ex Parte Young*.

* * * * *

The Court turns next to Plaintiffs' substantive claims. Plaintiffs bring two types of challenge under the Takings Clause — they allege physical and regulatory takings. The CHIP Plaintiffs allege only facial challenges under both theories (i.e., they claim that the face of the statute effectuates a physical and regulatory taking in all applications). Certain Pinehurst Plaintiffs also bring as-applied takings challenges with respect to specific properties under both theories.

B. Physical Taking: Facial and As-Applied Challenges

When a government authorizes "a permanent physical occupation" of property, a taking occurs. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Physical takings are characterized by a deprivation of the "entire bundle of property rights" in the affected property interest — "the rights to possess, use and dispose of" it. *See Horne v. Dep't of Agric.*, 576 U.S. 350, 361-62 (2015) (quoting *Loretto*, 458 U.S. at 435) (internal quotations omitted). Examples include the installation of physical items on buildings, *Loretto*, 458 U.S. at 438, and the seizure of control over private property, *Horne*, 576 U.S. at 361-62 (crops); *United States v. Pewee Coal Co.*, 341 U.S. 114, 115-17 (1951) (mines).

In this case, all Plaintiffs retain the first and third strands in *Horne*'s bundle of rights, *supra*: they continue to possess the property (in that they retain title), and they can dispose of it (by selling). *See Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a

taking, because the aggregate must be viewed in its entirety."). The restrictions on their right to use the property as they see fit may be significant, but that is insufficient under the standards set forth by the Supreme Court and Second Circuit to make out a physical taking.

Recognizing as much in prior cases, the Second Circuit has held that "the RSL regulates land use rather than effecting a physical occupation." *W. 95 Hous. Corp. v. N.Y.C. Dep't of Hous. Pres. & Dev.*, 31 F. App'x 19, 21 (2d Cir. 2002) (summary order) (citing *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992)). The Circuit has rejected physical-takings claims against the RSL on multiple occasions. *See Harmon v. Markus*, 412 F. App'x 420 (2d Cir. 2011) (summary order); *Greystone Hotel Co. v. City of New York*, 98-9116, 1999 U.S. App. LEXIS 14960 (2d Cir. June 23, 1999) (summary order); *FHLMC*, 83 F.3d at 47-48. The incremental effect of the 2019 amendments, while significant to investment value, personal use, unit deregulation, and eviction rights, is not so qualitatively different from what came before as to permit a different outcome.

Plaintiffs attempt to overcome these Second Circuit cases by arguing that they rest in part on reasoning that the Supreme Court has since disparaged in *Horne*. In *Harmon* and *FHLMC*, the Second Circuit had invoked what Plaintiffs here call the "acquiescence theory" — the notion that the landlords chose, voluntarily, to enter the rental real estate business, and that they can exit it if they choose. In *Horne*, decided subsequently, this strain of reasoning came under criticism. *See Horne*, 576 U.S. at 365 (rejecting argument that "raisin growers voluntarily choose to participate in the raisin market" and could leave the

industry to escape regulation); *see also Loretto*, 458 U.S. at 439 n.17 (noting that "a landlord's ability to rent his property may not be conditioned on forfeiting the right to compensation for a physical occupation"). But *Horne*'s rejection of "acquiescence" theory does not save Plaintiffs' physical-takings claim. Plaintiffs' argument fails not because they have acquiesced in the taking of their property, but because under cases like *Loretto*, *Horne*, *Yee*, and others, no physical taking has occurred in the first place.

The Pinehurst Plaintiffs' as-applied physical challenges fail for the same reasons (to the extent they make them, which 177 Wadsworth LLC does not). No Plaintiff alleges that they have been deprived of title to their property, or that they have been deprived of the ability to sell the property if they choose. At most, these Plaintiffs allege that the manner in which they can remove apartments from stabilization — the so-called "off ramps" from the RSL regime — have been significantly limited.

Accordingly, the Court finds that Plaintiffs fail to state physical-taking allegations upon which relief can be granted, and dismisses these claims — both facial and as-applied — pursuant to Rule 12(b)(6).

C. Regulatory Taking – Facial Challenge

Like the physical-takings challenges, every regulatory-takings challenge to the RSL has been rejected by the Second Circuit. *See W. 95 Hous. Corp.*, 31 F. App'x 19 (summary order); *Greystone Hotel Co.*, 1999 U.S. App. LEXIS 14960 (summary order); *FHLMC*, 83 F.3d 45; *see also Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 595 (2d Cir. 1993) (construing plaintiff's facial attacks as as-applied challenges and dismissing them for lack of standing). Of course, it cannot be said

that there is no such thing as a regulatory taking in the world of rent stabilization, and it remains eminently possible that at some point, the legislature will apply the proverbial straw that breaks the camel's back.[10] If they do, however, it is unlikely that the straw in question will be identified in the context of a facial challenge. In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), for example, the Supreme Court rejected a regulatory-takings claim, noting that "we have found it particularly important in takings cases to adhere to our admonition that 'the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary.'" *Id.* at 10 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294-95 (1981)); *see also Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (regulatory-takings analyses are "essentially ad hoc, factual inquiries"). The Second Circuit has repeatedly disparaged facial challenges to the RSL. *See W. 95 Hous. Corp.*, 31 F. App'x at 21 (the difficulty of regulatory-takings analysis "suggests that a widely applicable rent control regulation such as the RSL is not susceptible to facial constitutional analysis under the Takings Clause"); *Dinkins*, 5 F.3d at 595 (trade association's challenge was "simply not facial," despite plaintiff's having characterized it as such, and "the proper recourse is for the aggrieved

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[10] The Supreme Court has spoken about the need for takings jurisprudence to redress this kind of incremental deprivation of property rights. *See, e.g., Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) ("If . . . the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature would be to extend the qualification more and more until at last private property disappeared.'") (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

individuals themselves to bring suit" on an as-applied basis). This is consistent with limitations on facial challenges generally. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990) (noting that outside of the First Amendment context, "facial challenges to legislation are generally disfavored").

In a facial challenge, Plaintiffs must demonstrate that "no set of circumstances exists under which [the RSL] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Put differently, such a claim fails if Defendants can identify any "possible set of . . . conditions" under which the RSL could be validly applied. *See Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987).

The Supreme Court has identified two distinct strains of regulatory-takings analysis. The first applies in the case of a regulation that "denies all economically beneficial or productive use of land." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *see also Lucas*, 505 U.S. at 1026 (applying the "categorical rule that total regulatory takings must be compensated"). This analysis is inapplicable here: Plaintiffs do not allege that they have been deprived of all economically viable use of their property.[11]

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[11] Pinehurst Compl. at ¶ 216 ("The RSL thus results in a decrease of 50 percent or more of a unit's value. The 2019 Amendments exacerbate this decrease in value and have caused rent-stabilized apartments to lose 20 to 40 percent (or more) of their value prior to enactment of the 2019 Amendments."); *id.* at ¶ 97 (the 2019 amendments "have reduced the value of the rent-stabilized buildings owned by Plaintiffs 74 Pinehurst LLC, 141 Wadsworth LLC, [and] 177 Wadsworth LLC . . . by 20 to 40 percent"); *id.* at ¶ 232 (the RSL has "decreas[ed] the resale value of Plaintiffs' properties"); CHIP Complaint at ¶ 274, ECF No. 1 (CHIP Compl.) ("The RSL's regulatory burdens have dramatically reduced the

Even without rendering property worthless, a regulatory scheme may still effectuate a taking if it "goes too far," in Justice Holmes's words. *Mahon*, 260 U.S. at 415. In the current era, courts apply the three-factor test of *Penn Central* to determine whether a regulation that works a less-than-total destruction of value has gone too far. The factors are: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with reasonable investment-backed expectations; and (3) the character of the governmental action in question. *See Penn Central*, 438 U.S. at 124. In applying these factors, the ultimate question is "whether justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (internal quotations omitted). The Court considers the *Penn Central* factors as they apply, first, to Plaintiffs' facial challenge, and then to the as-applied regulatory challenges, which are discussed in a separate section, *infra*.

Simply to apply these "ad hoc" factors to the instant facial challenge is to recognize why the RSL is not generally susceptible to such review. The first factor — economic impact — obviously needs to be calculated on an owner-by-owner basis, and those calculations will vary significantly depending on when a property was purchased, what fraction of its units are rent-stabilized, what improvements the landlord has

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market value of regulated properties, in some cases by over 50%"); *id.* at ¶ 298 ("[B]uildings where rent stabilized units account for almost 100% of the units can expect a price per square foot . . . of two-thirds less" than buildings where "0-20% of the units" are regulated).

made, and many other metrics. At best, Plaintiffs can make vague allegations about the average diminution in value across regulated properties. *See, e.g.*, Transcript dated June 23, 2020 at 59:19-24, *Community Housing Improvement Program v. City of New York*, 19-cv-4087, ECF No. 86 ("[CHIP Plaintiffs' counsel]: . . . . At the complaint stage, we don't have to have developed all of our evidence, even our own evidence, with respect to the economic impact.").[12] This lack of clarity surely arises because the diminution in value will vary significantly from property to property — making it virtually impossible to show there is "no set of circumstances," *Salerno*, 481 U.S. at 745, in which the RSL applies constitutionally.

The second *Penn Central* factor is the extent to which the regulation interferes with reasonable investment-backed expectations. "The purpose of the investment-backed expectation requirement is to limit recovery to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Allen v. Cuomo*, 100 F.3d 253, 262 (2d Cir. 1996) (internal quotations omitted). Accordingly, the nature of each landlord's investment-backed expectations depends on when they invested in the property and what they expected at that time. *Meriden Tr. & Safe Deposit Co. v. FDIC*, 62 F.3d 449, 454 (2d Cir.

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[12] *See also* Pinehurst Compl. at ¶ 94 (comparing the average "value per square foot" of regulated and unregulated buildings); *id*. at ¶ 101 (comparing landlords' average "operating costs" and "permitted [rate] increases"); CHIP Compl. at ¶ 273 (regulated units charge "on average 40% lower than market-rate rents, and in some units 80% lower"); *id*. at ¶ 274 ("unregulated properties are typically worth 20% to 40% more" than regulated ones), *id*. at ¶ 284 ("the income from non-regulated units can be as much as 60-90% higher than regulated units").

1995) ("[T]he critical time for considering investment-backed expectations is the time a property is acquired, not the time the challenged regulation is enacted."). And the reasonableness of these expectations will of course vary based on the state of the law when the property was purchased, among other things. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (the expectation must be "reasonable," which means it "must be more than a unilateral expectation or an abstract need") (internal quotations omitted); *see also Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 36-37 (1st Cir. 2002) (courts "should recognize that not every investment deserves protection and that some investors inevitably will be disappointed").

Plaintiffs cannot make broadly applicable allegations about the investment-backed expectations of landlords state- or city-wide. Different landlords bought at different times, and their "reliance," such as it was, would have been on different incarnations of the RSL. *See Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 38 (2012) (noting that the reasonable investment-backed expectations analysis is "often informed by the law in force" at the time). Even those who bought at the same time would have done so with different expectations, including some the law still allows. Given this range of expectations — some reasonable, others not — Plaintiffs cannot allege that the RSL frustrates the reasonable investment-backed expectations of every landlord it affects.

Finally, *Penn Central*'s third factor considers the "character of the taking." *See Penn Central*, 438 U.S. at 124 ("A taking may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the

benefits and burdens of economic life to promote the common good.") (internal citations omitted). But Plaintiffs cannot prevail without alleging the other two *Penn Central* factors at the facial level. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005) ("[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."). Accordingly, Plaintiffs' facial regulatory-takings claim is dismissed.

D. Post-Breach Relief Provisions

The RSL provisions that provide the most substantial basis for a facial challenge, in this Court's estimation, are contained in New York's Real Property Actions and Proceedings Law (RPAPL) Sections 749 and 753. As amended in 2019, these provisions dictate that even after the RSL has operated to eliminate "unjust, unreasonable and oppressive rents," N.Y.C. Admin. Code § 26-501, the state housing courts may still stay (for up to twelve months) the eviction of a tenant who fails to pay the reduced rent, if eviction would cause the tenant "extreme hardship." RPAPL § 753. In making the hardship determination, "the [housing] court shall consider serious ill health, significant exacerbation of an ongoing condition, a child's enrollment in a local school, and any other extenuating life circumstances affecting the ability of the applicant or the applicant's family to relocate and maintain quality of life." *Id.*

These "post-breach relief" provisions are aimed at requiring particular property owners to alleviate the hardships of particular tenants — including hardships that may arise from circumstances separate and distinct from the dynamics of supply and demand in

New York's rental housing market. That aim, while indisputably noble, nevertheless carries a "heightened risk that private property is being pressed into some form of public service," *Lucas*, 505 U.S. at 1018, and correspondingly puts more pressure on the "usual assumption that the legislature is simply adjusting the benefits and burdens of economic life" in a way that requires no recompense. *Id*. at 1017 (internal quotations omitted). Stated in terms of the current case, it can be argued that in Sections 749 and 753, the New York State legislature is not "adjusting" the terms of a contract between landlord and tenant in a regulated market, but rather drafting a landlord who is no longer subject to any enforceable contract at all (because the tenant is in breach) to provide an additional benefit — of up to one year's housing — because of the specific tenant's life circumstances.

Neither the Supreme Court nor the Second Circuit has squarely considered a regulation like the post-breach relief provisions here, but the Supreme Court came closest in *Pennell*, which also involved a statute that called on landlords to provide additional benefits on the basis of tenant "hardship." 485 U.S. 1. The City of San Jose had adopted a rent-control ordinance listing seven factors that a "hearing officer" was required to consider in determining the rent that a particular landlord could charge. *Id*. at 9. The Court described the argument that the seventh factor — the "hardship" factor — worked a taking:

> [T]he Ordinance establishes the seven factors that a hearing officer is to take into account in determining the reasonable rent increase. The first six of these factors are all objective, and are related either to the landlord's costs of providing an adequate rental unit, or to the

> condition of the rental market. Application of these six standards results in a rent that is "reasonable" by reference to what appellants contend is the only legitimate purpose of rent control: the elimination of "excessive" rents caused by San Jose's housing shortage. When the hearing officer then takes into account "hardship to a tenant" pursuant to [the seventh factor] and reduces the rent below the objectively "reasonable" amount established by the first six factors, this additional reduction in the rent increase constitutes a "taking." This taking is impermissible because it does not serve the purpose of eliminating excessive rents — that objective has already been accomplished by considering the first six factors — instead, it serves only the purpose of providing assistance to "hardship tenants."

Id.

In response to this argument, Justice Scalia would have held that a facial taking occurred. He concluded that in any application of the "hardship" provision, the city would not be "'regulating' rents in the relevant sense of preventing rents that are excessive; rather, it [would be] using the occasion of rent regulation (accomplished by the rest of the Ordinance) to establish a welfare program privately funded by those landlords who happen to have 'hardship' tenants." *Id.* at 22 (Scalia, J., concurring in part and dissenting in part).

A broad majority of the Court, however, declined to reach the facial-takings question, on the basis that it would have been "premature" to do so without record evidence that the hardship provision had ever actually been relied on to reduce a proposed rent increase. *Id.* at 9-10. The majority noted that there was

nothing in the law requiring the hearing officer to reduce rents on the basis of tenant hardship, and that the Court therefore lacked a "sufficiently concrete factual setting for the adjudication of the takings claim" presented. *Id.*

Applying *Pennell*'s reasoning, the facial challenge to the post-breach relief provisions here, too, must be deemed premature. Though Plaintiffs allege that application of the post-breach relief provisions is "far from uncommon," CHIP Plaintiffs' Supplemental Memorandum of Law in Opposition to Defendants' and Intervenors' Motions to Dismiss at 11, ECF No. 87 (quoting *Elmsford Apartment Assocs. v. Cuomo*, 20-cv-4062, 2020 WL 3498456, at *4 (S.D.N.Y. June 29, 2020)), they do not argue that any named Plaintiff in this case has been harmed by application of these provisions.

And the parties do not agree on how the provisions are likely to work in practice. Plaintiffs contend that the statutory provision conditioning stays on the tenant depositing rent payments is illusory because the statute provides no "enforcement mechanism" to force tenants to pay, see Pinehurst Plaintiffs' Supplemental Brief in Opposition to Defendants' Motions to Dismiss at 3, ECF No. 65 ("Although the statute purports to require a deposit of one year's rent as a condition of the tenant's post-breach occupancy, the statute contains no enforcement mechanism through which a property owner can require the tenant to make that deposit."). Defendants argue, however, that state courts do, in fact, enforce this requirement in practice, see, e.g., Pinehurst City Defendants' Supplemental Brief in Further Support of Their Motion to Dismiss the Complaint at 3, 5-7, ECF No. 68. Given these factual disputes, the Court must heed the *Pennell*

majority's admonition to avoid decision until the provision is challenged in a "factual setting that makes such a decision necessary." 485 U.S. at 10 (quoting *Hodel*, 452 U.S. at 294-95.

E. Regulatory Taking – As-Applied Challenge

Even in bringing their as-applied challenges, the Pinehurst Plaintiffs (except 177 Wadsworth LLC) must "satisfy the heavy burden placed upon one alleging a regulatory taking." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 493. But taking their allegations as true, certain as-applied Plaintiffs have alleged enough to survive a motion to dismiss. Indeed, there are unanswered questions about virtually every aspect of their claims.

Applying the first *Penn Central* factor, each as-applied Plaintiff alleges that the 2019 amendments significantly diminished the value of their properties. While the extent of this diminution remains to be determined with precision, Plaintiffs 74 Pinehurst LLC and 141 Wadsworth LLC allege that the 2019 amendments reduced the value of their regulated properties by twenty to forty percent beyond the diminution already occasioned by the pre-2019 RSL. Pinehurst Compl. at ¶ 97. And Eighty Mulberry Realty Corporation and the Panagouliases allege that the 2019 amendments "significantly reduced the value" of their rent-stabilized apartments, *id*. at ¶ 96, which now rent for roughly half the rate of unregulated apartments in the same building (or less), *id*. at ¶ 106. These alleged economic impacts, though insufficient

on their own,[13] are not so minimal to compel dismissal of the complaint at this stage.

But only two Plaintiffs (Eighty Mulberry Realty Corporation and the Panagouliases) adequately allege that the RSL violates their reasonable investment-backed expectations in its current cumulative effect. These Plaintiffs bought their properties at the dawn of the rent-stabilized era — either before the RSL was first enacted (Eighty Mulberry Realty Corporation, before 1950, *id.* at ¶ 17) or not long thereafter (the Panagouliases, in 1974, *id.* at ¶ 13). And they allege that the 2019 amendments not only frustrate their expectation to a reasonable rate of return, but also their expectation that some units would not be (or remain) regulated at all. *Id.* at ¶¶ 108-09.[14] The Panagouliases

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[13] *See Penn Central*, 438 U.S. at 131 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value not a taking); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87.5% diminution; same conclusion)); *see also Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 645 (1993) ("[M]ere diminution in the value of property, however serious, is insufficient to demonstrate a taking.").

[14] "The 2019 Amendments further undermine the investment-backed expectations of property owners, including Plaintiffs [the Panagouliases] and Plaintiff Eighty Mulberry [Realty] Corporation, by repealing the luxury- and high-income decontrol provisions described above . . . . Many property owners, including Plaintiffs [the Panagouliases] and Plaintiff Eighty Mulberry Realty Corporation, undertook significant capital improvements, improving the quality of their units, with the expectation that the apartments could be converted to market-rate rentals under the luxury- and high-income decontrol provisions. Repeal of the luxury- and high-income decontrol provisions eliminated the only mechanisms to transition a rent-stabilized apartment into a market-rate rental unit . . . . The luxury and high-income decontrol provisions had been the law for over 25 years, and formed the backbone of property owners' reasonable investment-backed

contend that the DHCR rejected their attempt to reclaim units for personal use, which effectively prevents them from using the property for other purposes. *Id*. at ¶¶ 63-64.[15] Although questions remain as to the nature and reasonableness of these expectations, it cannot be said, at this stage, that these allegations are inadequate. Discovery is needed to assess these claims.

The same is not true for the other as-applied Plaintiffs, 74 Pinehurst LLC and 141 Wadsworth LLC. Unlike Eighty Mulberry Realty Corporation and the Panagouliases, these Plaintiffs bought their properties under a different, and more mature, version of the RSL (as in effect in 2003 and 2008, respectively, see *id*. at ¶¶ 14-15).[16] By that point, the RSL had

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expectations that they could eventually charge market rents for their units." Pinehurst Compl. at ¶¶ 108-09.

[15] *Cf. Yee*, 503 U.S. at 528 (noting that those plaintiffs, unlike the Panagouliases, had failed to run the "gauntlet" of statutory procedures for changing the use of their property prior to bringing their takings claim). The Panagouliases also allege that they cannot put the property to commercial use due to zoning laws. *See* Pinehurst Compl. at ¶ 87.

[16] Whether the time of acquisition matters to the *Penn Central* inquiry appears to be subject to some debate among the Justices. *See Palazzolo*, 533 U.S. at 630 (*Penn Central* claims are "not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction"); *id*. at 637 (Scalia, J., concurring) ("In my view, the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking."). But for the moment, at least, the timing of purchase — even if not dispositive, in and of itself — remains at least significant, and the as-applied Plaintiffs here have very different purchase profiles in that regard. See *id*. at 633, 635 (O'Connor, J., concurring) (the *Palazzolo* majority's holding "does not mean that the timing of the regulation's enactment relative

taken its basic shape and become a fixture of New York law.[17] *Cf.* CHIP Compl. at ¶ 303 (the RSL was "nominally established as a temporary measure").

74 Pinehurst LLC and 141 Wadsworth LLC argue that they did not reasonably expect operating costs to outpace rate increases. Pinehurst Compl. at ¶¶ 98, 101, 237. Nor, these Plaintiffs claim, did they expect the repeal of luxury decontrol or vacancy, longevity, and preferential-rate increases, *id.* at ¶¶ 102, 104, 114, 120, 124, or the reduction of recoverable IAIs and MCIs, id. at ¶¶ 138-42.

But by the time these Plaintiffs invested, the RSL had been amended multiple times, and a reasonable investor would have understood it could change again. Under the Second Circuit's case law, it would not have been reasonable, at that point, to expect that the regulated rate would track a given figure, or that the criteria for decontrol and rate increases would remain static. *See*, *e.g.*, *id.* at ¶¶ 22, 99-100 (RGB sets permissible rates annually based on the rent set under the RSL in 1974); *id.* at ¶ 38 (luxury-decontrol introduced

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to the acquisition of title is immaterial to the *Penn Central* analysis," and "does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry"); *1256 Hertel Ave. v. Calloway*, 761 F.3d 252, 266-67 (2d Cir. 2014) (dismissing, despite *Palazzolo*, a *Penn Central* claim because plaintiff acquired title after the challenged law became a "background principle of the State's law of property," which made his expectation that the law would not change unreasonable).

[17] There were some background rent-regulation laws when Eighty Mulberry Realty Corporation and the Panagouliases bought their properties as well. As stated above, some form of rent regulation has existed in New York City since World War I. But these were very different regimes, and it is unclear whether and to what extent they applied to the properties at issue here.

in 1993); CHIP Compl. at ¶ 59 (vacancy and longevity increases introduced in 1997); Memorandum of Law in Support of Pinehurst State Defendants' Motion to Dismiss at 8, ECF No. 53 (luxury-decontrol amended in 1997). Because these Plaintiffs made their investments "against a backdrop of New York law" that suggested the RSL could change, *see 1256 Hertel Ave.*, 761 F.3d at 266-67, they cannot allege that the 2019 amendments violated their reasonable investment-backed expectations.

Finally, analysis of the RSL's "character" should be determined after discovery, when the precise effects of the RSL on these Plaintiffs becomes clearer.

The claims brought by 74 Pinehurst LLC and 141 Wadsworth LLC are therefore dismissed, while the claims brought by Eighty Mulberry Realty Corporation and the Panagouliases may proceed.

F. Due Process

Nor do the 2019 amendments violate the Due Process Clause of the Fourteenth Amendment. Plaintiffs argue that the RSL is not "rationally related" to increasing the supply of affordable housing, helping low-income New Yorkers, or promoting socio-economic diversity. Instead, they claim the law is counterproductive: it perpetuates New York's housing crisis, and fails to target the people it claims to serve. See CHIP Compl. at ¶¶ 70-155; Pinehurst Compl. at ¶¶ 159-88. The CHIP Plaintiffs also argue that New York City's triennial declaration of a "housing emergency" (which triggers the RSL) itself violates due process, because that decision is arbitrary and irrational. CHIP Compl. at ¶¶ 167-92.

In support, Plaintiffs allege that economists broadly agree that laws like the RSL do not work for

their intended purpose, and indeed may do substantially more harm than good. As one Nobel Prize-winning economist, cited in the Pinehurst Plaintiffs' complaint, put it in discussing San Francisco's rent-stabilization scheme:

> The analysis of rent control is among the best-understood issues in all of economics, and — among economists, anyway — one of the least controversial. In 1992 a poll of the American Economic Association found 93 percent of its members agreeing that "a ceiling on rents reduces the quality and quantity of housing." Almost every freshman-level textbook contains a case study on rent control, using its known adverse side effects to illustrate the principles of supply and demand. Sky-high rents on uncontrolled apartments, because desperate renters have nowhere to go — and the absence of new apartment construction, despite those high rents, because landlords fear that controls will be extended? Predictable . . . . [S]urely it is worth knowing that the pathologies of San Francisco's housing market are right out of the textbook, that they are exactly what supply-and-demand analysis predicts.

Paul Krugman, *Reckonings; A Rent Affair*, N.Y. Times (June 7, 2000); *see also* Pinehurst Compl. at ¶ 160 (citing Krugman article).

But the Court is engaged in rational-basis review here, not strict scrutiny. *See Pennell*, 485 U.S. at 11-12 (considering whether a rent-control statute was "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt"); *see also Lingle*, 544 U.S. at 545 ("[W]e have long eschewed . . . heightened scrutiny when addressing

substantive due process challenges to government regulation"). And in that context, the Court is bound to defer to legislative judgments, even if economists would disagree. *See*, *e.g.*, *Lingle*, 544 U.S. at 544-45 (disapproving of district court's assessment of competing expert testimony on the benefits of Hawaii's rent-control statute, and stating: "The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established . . . .").

Moreover, alleviating New York City's housing shortage is not the only justification of the RSL that the legislature offered. The RSL was also intended to allow people of low and moderate income to remain in residence in New York City — and specific neighborhoods within — when they otherwise might not be able to. *See* N.Y.C. Admin. Code § 26-501 (extending the RSL to prevent "uprooting long-time city residents from their communities"). The Supreme Court has recognized neighborhood stability and continuity as a valid basis for government regulation. *See Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992) ("[T]he State has a legitimate interest in local neighborhood preservation, continuity, and stability.") (citing *Village of Euclid*, 272 U.S. 365). And where, as here, there are multiple justifications offered for regulation, the statute in question must be upheld so long as any one is valid. *See Preseault v. I.C.C.*, 494 U.S. 1, 18 (1990) ("There is no requirement that a law serve more than one legitimate purpose."); *Thomas v. Sullivan*, 922 F.2d 132, 136 (2d Cir. 1990) (on rational-basis review, "we consider not only contemporaneous articulations of legislative purpose but also any legitimate policy concerns on which the legislature might conceivably have relied"). Accordingly, the due-process challenge is dismissed.

G. Contracts Clause

The Pinehurst Plaintiffs also claim that the 2019 amendments, as applied to each of them, violate the Contracts Clause of Article I by repealing the RSL's so-called "preferential rates" provision.[18] This provision allowed landlords to raise rents on an expiring lease to the maximum rate that would otherwise apply to the unit. While the preferential-rates provision existed, many landlords, including each of the Plaintiffs here, Pinehurst Compl. at ¶ 120, allegedly offered "preferential" leases to tenants (*i.e.*, leasing rates discounted below even what the RGB would permit). These landlords expected, prior to repeal, that they could raise rates significantly when a preferential lease term ended. The 2019 amendments, however, prevent Plaintiffs from doing so by limiting future rates to the amount charged at the time the 2019 amendments were enacted (plus annual increases). *See* N.Y. Reg. Sess. § 6458, Part E, § 2 (2019).

Plaintiffs claim this violates the Contracts Clause in two ways. First, they claim that it extends the duration of all Plaintiffs' expiring, preferential leases (since now they must not only renew the lease, but also at the same preferential rates). Second, 74 Pinehurst LLC claims that, as to it, the 2019 amendments also required the retroactive reduction of rent — the most important term in the lease — in two particular lease agreements that it had executed before the amendment passed.

Plaintiffs' first claim — that the 2019 amendments revise the duration of their expiring leases —

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[18] The Contracts Clause prohibits states from "pass[ing] any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1.

is unavailing. As applied to future renewals, "[a] contract . . . cannot be impaired by a law in effect at the time the contract was made." *Harmon*, 412 F. App'x at 423. Future leases will be subject to the 2019 amendments from the onset. *See 2 Tudor City Place Assocs. v. 2 Tudor City Tenants Corp.*, 924 F.2d 1247, 1254 (2d Cir. 1991) ("Laws and statutes in existence at the time a contract is executed are considered a part of the contract, as though they were expressly incorporated therein.").

74 Pinehurst LLC, however, also alleges that the 2019 amendments revised the terms of two of its already executed leases. In resolving this claim, the Court must ask three questions: "(1) is the contractual impairment substantial and, if so, (2) does the law serve a legitimate public purpose such as remedy a general social or economic problem and, if such purpose is demonstrated, (3) are the means chosen to accomplish this purpose reasonable and necessary[?]" *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006). As explained below, 74 Pinehurst LLC's claim falters at stages two and three.

74 Pinehurst LLC adequately alleges that the 2019 amendments "substantially impair" its executed leases by affecting a critical term of their executed lease agreements — the monthly rent. *Cf. id.* at 368 (wage freeze substantially impaired unions' labor contracts because compensation is "the most important element[ ] of a labor contract"). But 74 Pinehurst LLC cannot surmount the second and third steps of the Contracts Clause analysis. The legislative purposes behind the RSL are valid (as explained above). *See Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 54 (2d Cir. 1998); see also *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 198-99 (1921);

Brontel, Ltd. v. City of New York, 571 F. Supp. 1065, 1072 (S.D.N.Y. 1983). And where, as here, the affected contract is between private parties, courts must "accord substantial deference" to the legislature's conclusions about how to effectuate those purposes. *Buffalo Teachers*, 464 F.3d at 369; *see also Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 994 (2d Cir. 1997). For the reasons articulated above in Section F (Due Process), the RSL passes muster under this deferential standard. 74 Pinehurst LLC's Contracts Clause claims are, therefore, dismissed.

III. Conclusion

For the reasons explained above, the Court grants Defendants' motions to dismiss all claims in *Community Housing Improvement Program v. City of New York* (19-cv-4087). The Court also grants Defendants' motions to dismiss all claims in *74 Pinehurst LLC v. State of New York* (19-cv-6447) except the as-applied regulatory-takings claims brought by Eighty Mulberry Realty Corporation and the Panagouliases. The Pinehurst Plaintiffs' claims against the State of New York and the DHCR are dismissed for lack of subject-matter jurisdiction, as are their claims for damages against DHCR Commissioner Visnauskas in her official capacity. The Clerk of Court is respectfully directed to enter judgment and close the action in CHIP (19-cv-4087), given that that action is now dismissed in its entirety.

SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COMMUNITY HOUSING IMPROVEMENT PROGRAM, RENT STABILIZATION ASSOCIATION OF N.Y.C., INC., CONSTANCE NUGENT-MILLER, et al., Plaintiffs, -against- CITY OF NEW YORK, RENT GUIDELINES BOARD, DAVID REISS, CECILIA JOZA, ALEX SCHWARTZ, GERMAN TEJEDA, MAY YU, et al., Defendants.	JUDGMENT 19-cv-4087 (EK)(RLM)
74 PINEHURST LLC, 141 WADSWORTH LLC, 177 WADSWORTH LLC, DINO PANAGOULIAS, DIMOS PANAGOULIAS, et al., Plaintiffs, -against- STATE OF NEW YORK, NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL, RUTHANNE VISNAUSKAS, et al., Defendants.	19-cv-6447 (EK)(RLM)

A Memorandum and Order of Honorable Eric Komitee, United States District Judge, having been filed on September 30, 2020, granting Defendants' motions to dismiss all claims in Community Housing Improvement Program v. City of New York (19-cv-4087); granting Defendants' motions to dismiss all claims in 74 Pinehurst LLC v. State of New York (19-cv-6447) except the asapplied regulatory-takings claims brought by Eighty Mulberry Realty Corporation and the Panagouliases; dismissing The Pinehurst Plaintiffs' claims against the State of New York and the DHCR for lack of subject-matter jurisdiction, as are their claims for damages against DHCR Commissioner Visnauskas in her official capacity; it is

ORDERED and ADJUDGED that Defendants' motions to dismiss all claims in Community Housing Improvement Program v. City of New York (19-cv-4087) is granted; that Defendants' motions to dismiss all claims in 74 Pinehurst LLC v. State of New York (19-cv-6447) is granted except the as-applied regulatory-takings claims brought by Eighty Mulberry Realty Corporation and the Panagouliases; and that the Pinehurst Plaintiffs' claims against the State of New York and the DHCR are dismissed for lack of subject-matter jurisdiction, as are their claims for damages against DHCR Commissioner Visnauskas in her official capacity

Dated: Brooklyn, NY
September 30, 2020

Douglas C. Palmer
Clerk of Court

By: */s/ Jalitza Poveda*
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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, v. CITY OF NEW YORK, RENT GUIDELINES BOARD, DAVID REISS, CECILIA JOZA, ALEX SCHWARZ, GERMAN TEJEDA, MAY YU, PATTI STONE, J. SCOTT WALSH, LEAH GOODRIDGE, AND SHEILA GARCIA, IN THEIR OFFICIAL CAPACITIES AS CHAIR AND MEMBERS, RESPECTIVELY, OF THE RENT GUIDELINES BOARD, AND RUTHANNE VISNAUSKAS, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF NEW YORK STATE HOMES AND COMMUNITY RENEWAL,	Case No. ___ **COMPLAINT**

DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendants.

Plaintiffs 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, and Forest Realty LLC (together, "Plaintiffs"), by their undersigned attorneys, for their Complaint allege as follows:

NATURE OF THE ACTION

1. This action challenges the constitutionality of the New York Rent Stabilization Laws that govern nearly one million apartments in New York City. These laws, together with the actions of the City Council making the law applicable in New York City and the decisions of the New York City Rent Guidelines Board setting permissible rent increases, violate the United States Constitution. They are arbitrary and irrational in violation of the Fourteenth Amendment's Due Process Clause; they effect a physical taking of property in violation of the Constitution's Takings Clause; and they constitute a regulatory taking of property in violation of the Takings Clause. The Rent Stabilization Laws are therefore facially unconstitutional.

2. The Rent Stabilization Laws are codified in several places, including the administrative code for the City of New York § 26-501 *et seq*. (also published as N.Y. UNCONSOL. LAW TIT. 23 § 26-501 *et seq*. (McKinney) (constituting the Rent Stabilization Law of 1969), and section 4 of chapter 576 of the laws of 1974 (constituting the Emergency Tenant Protection Act of 1974), which is found in Chapter 249-B of the Unconsolidated Laws (also published in N.Y. UNCONSOL. LAW TIT. 23 §§ 8621 *et seq*. (McKinney)). Further,

regulations promulgated under the 1974 Act, as amended can be found at 9 NYCRR §§ 2520 *et seq*. Those laws will be referred to throughout the Complaint as the "Rent Stabilization Laws" or "RSL."

3. The RSL was first enacted in 1969, and built upon (and provided an alternative to) the rent control laws then in existence. The RSL has been amended on multiple occasions, culminating in the most recent amendments, which were enacted in June 2019 (the "2019 Amendments"). Even prior to the 2019 Amendments, the RSL violated multiple provisions of the federal Constitution. With these amendments, those violations became even more apparent, and there can be no doubt that the RSL's irrationality and arbitrariness, and its web of restrictions override core rights of property owners and impose unconstitutional burdens on property owners of pre-1974 buildings with six or more units.

4. The RSL's harmful effects are not limited to the subset of property owners that are subject to its requirements. To the contrary, the law:

- Exacerbates New York's housing shortage by preventing the redevelopment of existing buildings to the full capacity permitted by zoning regulations;
- Makes market-rate apartments more expensive for the millions of New Yorkers not lucky enough to reside in or find a rent-stabilized apartment;
- Allows wealthy New Yorkers to continue to benefit unfairly from rent stabilization while

penalizing low and middle income tenants; and

- Deters property owners from making improvements to existing stabilized apartments, the majority of which pre-date World War II, by imposing significant restrictions on their ability to recover the cost of improvements, which will leave tens of thousands of apartments frozen in the past, with plumbing and wiring that is lawful but does not comply with current code requirements—and in addition will substantially reduce employment in New York's construction industry.

5. ***First*, the RSL violates Due Process**. State and City representatives have advanced a variety of claimed justifications for the RSL, including that it helps provide affordable housing for persons of limited means, that it is needed to maintain socio-economic and racial diversity in the city, and that it will help abate a "housing crisis" that otherwise exists in New York City. The RSL states that its purpose is to prevent unwarranted, speculative, and abnormal increases in rent that result from a housing shortage and that lead to dislocation and pose threats to the public health and welfare while also promoting a transition from a regulated housing market to a free market of normal bargaining between owner and tenant.

6. The RSL has applied in New York City continuously for 50 years, and the evidence is overwhelming that the RSL is not rationally related to achieving any of those objectives. The RSL on its face therefore violates the federal Constitution's guarantee of Due Process:

- The RSL does not in any way target its relief to low-income populations. There is no financial qualification standard at all for retaining or obtaining a rent stabilized unit. Rather, stabilized units are awarded to those who have the good fortune either to find an available stabilized unit or to have a relationship with someone who resides in one. As frequent news reports demonstrate, and studies confirm, hundreds of thousands of stabilized units are rented by New Yorkers who can afford to pay market rents. The percentage of low-income families living in RSL units is only marginally greater than those living in market-rate units, which further demonstrates that the RSL's benefits are not focused on low-income individuals and families. And the 2019 Amendments eliminated a provision in pre-2019 law that decontrolled an apartment once the rent exceeded $2,774 per month and the tenant's income was $200,000 or greater. This expansion, and the program's other characteristics, makes clear that the RSL is in no way rationally related to providing affordable housing for low-income individuals or families.
- For similar reasons, the RSL is not rationally related to promoting socio-economic or racial diversity. Nothing in the law directs RSL-regulated units to individuals and families who would increase diversity. Studies show that the RSL reduces diversity.

- Finally, the RSL is not rationally related to increasing the supply of housing in New York. The law has the opposite effect, operating to further reduce the availability of vacant apartments by preventing property owners from redeveloping properties to create additional apartments by making full use of permissible zoning density and incentivizing tenants to stay in units, even if the units are no longer appropriately sized for the tenants' needs. These restrictions on supply and availability of apartments in New York exacerbate the low vacancy rates that the government claims it is attempting to address. Indeed, the vacancy rate has remained below 5% Citywide for the entire 50 years the RSL has been in effect—a vacancy rate similar to that in many other major metropolitan areas around the country—confirming the lack of any rational relationship between the RSL and alleviation of a housing shortage.

7. The RSL applies in New York City as a result of the New York City Council's reflexive declaration of a housing emergency every three years for the past 50 years, most recently in 2018. Those declarations on their face separately violate Due Process because they are arbitrary and irrational.

8. The governing statute permits the New York City Council to declare a housing emergency when there is a vacancy rate of 5% or less—but provides that "[a]ny such determination" is to be made not just "on the basis of the supply of housing accommodations within such city," but also "the condition of such

accommodations and the need for regulating and controlling residential rents within such city . . .” N.Y. UNCONSOL. LAW § 8623.a (McKinney). The statute also allows the Council to limit its emergency finding to specified classes of the properties subject to the RSL.

9. The New York City Council has made its every-three-years emergency determinations without any meaningful support for or analysis of whether a housing emergency actually exists, whether only a particular class of housing is experiencing an emergency, and whether an emergency would be ameliorated by “regulating and controlling residential rents.” The Council did not establish any rational basis for determining that a housing emergency exists—the finding required by the statute. In fact, Defendants have failed to even identify the variables that should be used to determine whether an emergency exists (let alone the threshold at which those variables might be indicative of an emergency). That renders the Council’s determinations arbitrary and violative of Due Process.

10. Second, the RSL effects a physical taking of the properties subject to rent stabilization regulation. The RSL deprives property owners of their core rights to exclude others from their property and to possess, use, and dispose of their property. That physical taking without compensation renders the RSL on its face a per se violation of the federal Constitution’s Takings Clause.

11. The RSL accomplishes this taking through a web of regulations that individually and in their combined effect physically take rental properties

just as clearly as if New York City commandeered a leasehold interest or easement in RSL-regulated apartments outright:

- The government mandates the continued, indefinite occupation of rental properties by tenants. Owners cannot refuse to renew leases except in very narrow circumstances. The elimination of this right to exclude is not limited to the original tenant—the tenant may give his or her right to the unit to another person, and the property owner must allow that "successor" to renew his or her lease on government-dictated terms. The law thus confers a life estate with inheritance rights once an apartment is rented. And the 2019 Amendments further limit a property owner's ability to evict a tenant, including a stay of eviction for up to one year.
- The RSL effectively denies property owners the right to possess and use their own property. Although the law appears to give owners the right to recover possession for personal use, that provision is hedged with restrictions: the unit must be used as a primary residence, recovery of possession is not available to owners who hold property through a corporate form, and extends to only one owner even if the property is owned by multiple owners. The 2019 Amendments add a one-unit limitation and impose other new restrictions, replacing the previous "good faith" requirement with a showing of "immediate and compelling necessity" (a demanding standard), and precluding

the recovery of possession for personal use if the tenant has lived in the building for 15 years, unless the owner offers equivalent housing accommodation at the same stabilized rent in a nearby building.

- Property owners may not withdraw their buildings from the housing rental market to convert them to non-housing uses. Nor may they simply stop renting their property unless it presents a hazard or the owner will use it for his or her own business (and not rent any of the property to others). The owner may not demolish the building unless he or she pays to relocate all tenants (including payment of a moving expenses and a stipend and any increased rent).
- Prior to the 2019 Amendments, property owners could convert buildings into cooperatives or condominiums using either eviction or non-eviction plans. For non-eviction plans, owners had to obtain purchase agreements from only 15% of the tenants or bona fide purchasers, as long as the conversion would not result in eviction of any tenants. The 2019 Amendments eliminated eviction plans and require purchase agreements from 51% of tenants (without including other bona fide purchasers) under non-eviction plans. That effectively transfers from the property owner to the tenants the power to decide whether to dispose of the property through a cooperative or condominium conversion.

Physical occupation accomplished by regulation, as much as by direct seizure, violates the federal Constitution.

12. Third, the RSL on its face effects an uncompensated regulatory taking of private property. Each of the factors relevant to the Constitution's Takings Clause weighs strongly in favor of finding a regulatory taking.

- The RSL has a significant adverse economic effect on property values. A study assessing the impact of the law prior to the 2019 Amendments found that buildings with predominantly rent-stabilized units have 50% of the value of buildings with predominantly market-rate units. Even the City's property assessment guidelines concede that unregulated properties have a significantly greater value than regulated properties. The 2019 Amendments will further increase the economic burden on regulated properties, because they, among other things, impose restrictions on recovering the cost of improvements and by their express terms prevent owners from recovering anything close to the real cost of those improvements—even improvements that are required by law to, for example, comply with the City's building and housing codes. Recovery for improvements to individual apartments, for example, is limited to $15,000 in aggregate over a 15-year period, even if the actual cost was two, three, or more times that amount, and any such rent increase is materially limited and must be removed after 30

years, making full recovery of the value of the improvement implausible.

- For the same reasons, the RSL interferes substantially with investment-backed expectations. Moreover, amendments to the RSL, culminating in the 2019 Amendments have imposed greater and greater limitations on property owners' ability to recover the reasonable expenses associated with maintaining apartment units. And the de minimis rent increases permitted by the Rent Guidelines Board each year—below the Board's own calculation of the increase required to equal the growth in property owners' operating costs, and including two consecutive years of rate freezes—contribute to that interference.
- The RSL does not provide any reciprocal benefits to property owners. Regulations that impose restrictions on property—such as zoning—may be upheld because the restricted property also benefits from the restrictions on neighboring property. Rent stabilized properties receive no tax breaks or other government assistance. They are subject to the same expenses as properties with market-rate rentals. Moreover, the New York Court of Appeals has authoritatively determined that "a tenant's rights under a rent-stabilized lease are a local public assistance benefit." *Santiago-Monteverde v. Periera*, 22 N.E.3d 1012, 1015 (N.Y. 2014). It stated that "[w]hile the rent-stabilization laws do not provide a benefit paid for by the government, they do provide a benefit

conferred by the government through regulation aimed at a population that the government deems in need of protection." *Id*. at 1016. The government "has created a public assistance benefit through a unique regulatory scheme applied to private owners of real property." *Id*. at 1017 (emphasis added). But, as the Supreme Court has explained, the purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The RSL is thus a public assistance benefit program paid for by a discrete group of property owners, who themselves receive no benefit at all from the stabilization program, which weighs heavily in favor of finding a taking.

- The RSL is not targeted to prevent a nuisance or other noxious uses of property.
- Finally, as already discussed, the RSL effects a physical invasion of property, another factor pointing toward the existence of a taking.

13. Plaintiffs bring these claims under the Fifth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. § 1983 and 28 U.S.C. § 1331, and seek attorneys' fees pursuant to 42 U.S.C. § 1988(b). Plaintiffs seek declaratory and injunctive relief; they do not in this suit seek damages or compensation for Defendants' violation of their constitutional rights. *See* 28 U.S.C. § 2201(a) (district court "may declare the rights and other legal relations

of any interested party seeking such declaration, whether or not further relief is or could be sought"); Fed. R Civ. Proc. 57 ("[t]he existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate"). Declaratory and injunctive relief against future enforcement of the rent stabilization scheme will not only halt the deprivation of the constitutional rights of property owners, but will result in increased development of rental properties, better housing for a larger universe of renters, the amelioration of a constrained housing market, and will force New York City and State governments to adopt fairer and more efficient means of providing housing to those most in need.

14. Plaintiffs recognize that the requested relief would result in changes in the rental market. Relief issued by this Court can and should be crafted to address any hardship on tenants currently occupying rent stabilized units, and Plaintiffs will support such an approach. In addition, Defendants will have the opportunity to withdraw or modify the RSL to eliminate the constitutional violations.

15. Plaintiffs acknowledge that prior cases challenging the constitutionality of the RSL on various grounds have been unsuccessful, including *Harmon v. Markus*, 412 Fed. App'x 420 (2d Cir. 2011). Plaintiffs believe, however, that the factual allegations and legal claims in this Complaint, including recent changes in state law, distinguish Harmon and other cases.

PARTIES

16. Plaintiff Rent Stabilization Association of N.Y.C., Inc. ("RSA") is a not-for-profit trade association composed of over 25,000 managing agents and property owners of both rent stabilized and non-rent stabilized properties in New York. Among its core functions, RSA advocates on behalf of its members before the New York City Council, the New York State Legislature, and City and State agencies, including the Defendants New York City Rent Guidelines Board and State Division of Housing and Community Renewal, on an array of housing policy issues, including the issue of rent regulation. RSA also fills an informational and educational role, providing updates in the form of a monthly newsletter, seminars, and e-mails to its members relating to the requirements of State and City laws and regulations which impact upon the ownership and management of apartment buildings in the City. In addition to a staff of customer service agents, RSA provides compliance services to its members—and sometimes to non-members—to assist in their efforts to comply with statutory and regulatory requirements, including, but not limited to, annual rent registrations with the State Division of Housing and Community Renewal.

17. Plaintiff Community Housing Improvement Program ("CHIP") is a not-for-profit trade association representing owners and managing agents of more than 4,000 apartment buildings in New York City. Founded in 1966, CHIP has been a key participant in City and State housing policy for over 50 years, educating, advising and advocating on such diverse issues as lead paint, property taxes, water rates,

and rent regulation. CHIP provides its members with a variety of services, including advice relating to regulatory compliance and assistance to members who are facing legal challenges. CHIP advocates on behalf of its members at the local, City and State levels and provides regular updates on issues of importance to property owners.

18. Plaintiff Constance Nugent-Miller ("Nugent-Miller") is a resident of Brooklyn, New York. Ms. Nugent-Miller owns, and lives in, a six-unit residential apartment building located in Brooklyn, New York. Three of the units in Ms. Nugent-Miller's building are stabilized pursuant to the RSL. The property has been in Nugent-Miller's family since 1957, and she has owned it since 2005.

19. Plaintiff Mycak Associates LLC ("Mycak Associates") is a limited liability company organized under the laws of New York. Mycak Associates owns a residential apartment building located in Queens, New York. The building is comprised of 52 units, 21 of which are stabilized pursuant to the RSL. Mycak Associates has owned this property since 1972.

20. Plaintiff Vermyck LLC ("Vermyck") is a limited liability company organized under the laws of New York. Vermyck owns a residential apartment building located in Queens, New York. The building is comprised of 84 units, all of which are stabilized pursuant to the RSL. Vermyck has owned this property since 1973.

21. Plaintiff M&G Mycak LLC ("M&G") is a limited liability company organized under the laws of New York. M&G owns a residential apartment

building located in Manhattan. The building is comprised of 20 units, three of which are stabilized pursuant to the RSL.

22. Plaintiff Cindy Realty LLC ("Cindy Realty") is a limited liability company organized under the laws of New York. Cindy Realty owns a residential apartment building located in Jackson Heights, New York. The building is comprised of 84 units, 81 of which are stabilized pursuant to the RSL. Cindy Realty has owned the property since 1983.

23. Plaintiff Danielle Realty LLC ("Danielle Realty") is a limited liability company organized under the laws of New York. Danielle Realty owns a residential apartment building located in Brooklyn, New York. The building is comprised of 42 units, 37 of which are stabilized pursuant to the RSL. Danielle Realty has owned the property since 1998.

24. Plaintiff Forest Realty LLC ("Forest Realty") is a limited liability company organized under the laws of New York. Forest Realty owns a residential apartment building located in Forest Hills, New York. The building is comprised of 72 units, 61 of which are stabilized pursuant to the RSL. Forest Realty has owned the property since 1977.

25. Defendant City of New York is the government entity given the responsibility by the state of New York to determine the existence of a housing emergency and to establish and implement rent stabilization.

26. Defendant New York City Rent Guidelines Board ("Rent Guidelines Board") is the New York City government agency that determines what

those stabilized rents should be each year and determines any rate changes.

27. Defendant David Reiss is a Member and Chair of the Rent Guidelines Board.

28. Defendants Cecilia Joza, Alex Schwarz, German Tejeda, May Yu, Patti Stone, J. Scott Walsh, Leah Goodridge, and Shelia Garcia are Members of the Rent Guidelines Board.

29. Defendant Ruthanne Visnauskas is the Commissioner of the New York State Division of Housing and Community Renewal ("DHCR"). DHCR (through its Office of Rent Administration-ORA) oversees the administration of the two rent regulatory systems—rent stabilization and rent control—in the City of New York (there are approximately 20–30,000 rent control units and around 966,000 rent-stabilized units). That administration includes but is not limited to the system for the annual registration of all rent stabilized apartments, the processing of major capital improvement rent increase applications by owners, the processing of overcharge, service and other complaints by tenants, administrative hearings arising from challenges by owners and tenants to the determinations of such applications and complaints, and the promulgation of regulations, policy statements, fact sheets and operational bulletins supplementing and interpreting the State and City rent regulation statutes.

JURISDICTION

30. This Court has personal jurisdiction over each Defendant in New York and in this judicial

district because they each regularly transact business in this judicial district.

31. This Complaint alleges that Defendants have violated Plaintiffs' rights protected by the United States Constitution. Accordingly, this Court has subject-matter jurisdiction under the Supremacy Clause of the United States Constitution, Art. VI, Clause 2, and 28 U.S.C. §§ 1331 and 1343(a)(3). Plaintiffs seek declaratory and equitable relief under 28 U.S.C. § 2201 and 42 U.S.C. § 1983, and the award of attorneys' fees pursuant to 42 U.S.C. § 1988(b).

VENUE

32. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because a substantial part of the events giving rise to the claims alleged herein have occurred, and will continue to occur, in this district, and because a substantial portion of the property that is the subject of this action is located in this district.

STANDING

33. CHIP and the RSA each has organizational standing to bring this claim. They each (i) have suffered and continue to suffer an imminent injury in fact to their organization which is distinct and palpable; (ii) those injuries are fairly traceable to the Rent Stabilization Laws; and (iii) a favorable decision would redress their injuries. *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 109 (2d Cir. 2017).

34. As a result of the Rent Stabilization Laws, both CHIP and RSA have been forced to devote substantial time and resources to counsel their

members about how to register their properties under the law, how to abide by the maze of regulations governing the owners of rent stabilized properties, and how to react to claimed violations of the Rent Stabilization Laws. Both organizations have participated in the Rent Guidelines Board process as well as in the triennial renewal process. The RSA was responsible for the rent regulations set forth in the rent stabilization code until the transfer of jurisdiction for rent regulations (for both rent control and stabilization) in 1984 pursuant to the Omnibus Housing Act of 1983. Both RSA and CHIP counseled their members regarding advocacy related to the 2019 Amendments to the RSL, and RSA president Joseph Strasburg testified at an Assembly Housing Committee hearing concerning those amendments. Since the passage of the 2019 Amendments, the RSA and CHIP have expended considerable time and effort advising their members on the requirements of the revised law and how to comply with those modified requirements.

35. The time and money CHIP and the RSA have spent helping their members address the Rent Stabilization Laws has prevented them from spending those same resources assisting their members with other matters. This includes time and money that could be spent working on state and city legislative and regulatory issues, advising members on safety regulations, providing seminars for their members, and researching and advocating for housing policies that benefit both owners and tenants. This expenditure of time and resources constitutes an organization injury. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (equal housing non-profit would have organizational standing to challenge discriminatory

policies that forced it to expend time and resources investigating instances of discrimination and providing counseling to victims); *Nnebe v. Daus*, 644 F.3d 147, 156–57 (2d Cir. 2011) (counseling just a few suspended taxi drivers a year would grant association of taxi workers organizational standing to challenge New York City's taxi driver suspension policy). Here, both the RSA and CHIP have been forced to take action and spend resources advising their members on compliance with the Rent Stabilization Laws. This burden has been particularly great with respect to the 2019 Amendments, given the significance of those changes and novel legal questions that arise from these changes. These organizational injuries would be remedied by the relief sought in this action.

36. In addition, CHIP and RSA each have standing to challenge the Rent Stabilization Laws because their members are directly regulated by, and suffer injury as a result of, those laws, as demonstrated by their members who have appeared as Plaintiffs in this action. Those members, along with other CHIP and RSA members who own property subject to rent stabilization, have been and continue to be subjected to an invasion of a legally protected interest that is concrete and particularized, actual or imminent and not conjectural or hypothetical, and that will be redressed by the injunctive and declaratory relief sought in this suit without the need for participation of individual members as plaintiffs. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–561 (1992); *Hunt v. Wash. Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000).

37. Plaintiff Nugent-Miller is a member of RSA, and has been since 2005. Nugent- Miller joined RSA in order to take advantage of the educational benefits, advocacy, and support that RSA offers to property owners in New York City. Like other RSA members, Nugent-Miller owns a residential apartment building with units subject to the RSL, and has been injured as a direct result of the RSL. Among other things, Nugent-Miller has been forced to offer renewal leases to stabilized tenants at rental rates far below the market, and has twice been denied the opportunity to occupy a first floor unit in her own building in favor of a stabilized tenant. The value of Nugent-Miller's property has been substantially diminished by the RSL. As discussed herein, these injuries have been deepened by the 2019 Amendments to the RSL. She has standing to sue in her own right.

38. Plaintiffs Mycak Associates, Vermyck, and M&G are limited liability companies owned and controlled by the Mycak family, who have been members of CHIP and RSA for over 30 years. The Mycak family joined CHIP and RSA in order to take advantage of the educational benefits, advocacy and support that these trade associations offer to property owners in New York City. Mycak Associates, Vermyck, and M&G own residential apartment buildings with units subject to the RSL, and have been injured as a direct result of the RSL. Among other things, Mycak Associates, Vermyck, and M&G each have been forced to offer leases to tenants in stabilized units at levels far below market rates and have been afforded limited ability to recover the costs of repair and improvements. For several units, limits on rent increases and recoverable repair costs make continued

rental of those units prohibitive. Once the current tenants vacate, those units will not be re-rented and instead will be left vacant. The value of the property of Mycak Associates, Vermyck, and M&G has been substantially diminished as a result of the RSL. These injuries have been exacerbated by virtue of the 2019 Amendments to the RSL. Mycak Associates, Vermyck, and M&G have standing to sue in their own right.

39. Plaintiffs Cindy Realty, Danielle Realty, and Forest Realty are limited liability companies owned and controlled by the Katz family, who have been members of CHIP and RSA for over 30 years. The Katz family joined CHIP and RSA in order to take advantage of the educational benefits, advocacy and support that these trade associations offer to property owners in New York City. Cindy Realty, Danielle Realty, and Forest Realty own residential apartment buildings with units subject to the RSL and have been injured as a direct result of the RSL. Among other things, each has been forced to rent units at levels far below market rates, often to strangers who claim "succession" rights to occupy stabilized units decades after the original tenant took occupancy. Cindy Realty, Danielle Realty, and Forest Realty have limited or no ability to oust these strangers from their property. The value of the property of Cindy Realty, Danielle Realty, and Forest Realty has been substantially diminished as a result of the RSL. These injuries have been magnified by the 2019 Amendments to the RSL. Cindy Realty, Danielle Realty, and Forest Realty have standing to sue in their own right.

BACKGROUND

I. HISTORY OF THE NEW YORK RENT STABILIZATION LAWS

40. There are two different systems that operate in New York City to regulate the relationship between property owners and tenants, regardless of the tenant's income or wealth: rent control and rent stabilization.

41. Both systems follow a lineage of rent regulation all the way back to 1943 (and before that to World War I), when federal rent control was imposed. As federal rent controls were repealed, New York City and New York State continued the policy through to the present. The regulatory system of rent control is separate and distinct from that of rent stabilization, and the two regulatory schemes apply to different units and have different rules. This Complaint deals solely with the system of rent stabilization.

42. Rent control places limits on the rents charged to tenants living in apartments in buildings that were built before February 1, 1947. The rent control system that exists today was originally enacted in 1951. Prior to this, rent control laws had gone into effect in New York City following World War I, and after a period of de-regulation, rent control returned in the form of federal regulations during and after World War II. When the federal regulations expired in 1951, New York State rent regulations went into effect. Over the next few decades, the state and city both deregulated a variety of apartments and buildings from the scheme based on price and size.

43. Today, rent controlled apartments still exist, but only for tenants (or their successors) who have lived in their apartments since 1971 and who live in buildings that were constructed prior to 1947. Because of this requirement, by 2017 the number of rent-controlled apartments had dwindled to roughly 22,000, or 1.2% of rental units.

44. In 1969, New York City passed the first Rent Stabilization Law. This law placed limits on the rents that property owners could charge individuals living in apartments that were constructed after February 1, 1947 and before March of 1969 and that contained six or more units (buildings that failed to join a "real estate industry stabilization association" such as RSA, remained subject to rent control). This law also created Defendant Rent Guidelines Board ("RGB") to regulate whether and by how much the rents of stabilized units may be increased going forward. It also created the Conciliation and Appeals Board ("CAB") to deal with disputes arising from the statute, which was funded by the real estate industry stabilization association.

45. In 1971, the state legislature enacted vacancy decontrol measures, pursuant to which apartments that were previously subject to rent stabilization and rent control became deregulated once they became vacant. This permitted property owners to charge new tenants market rate rents for their units.

46. In January 1974, at the request of the Governor, the Temporary State Commission on Living Costs and the Economy of the State of New York issued a Report on Housing and Rents. In his introduction to the report, the Chairman of the Commission

explained that its recommendations were "based on an awareness of the effects of inflation and on the belief that no one sector should be asked to bear all the costs."

47. Although the report recommended abrogation of vacancy decontrol, it recognized that any return to rent stabilization should not disincentivize the very increase in supply of quality housing needed to address vacancy and affordability issues. The report explained that its recommendations were intended to allow "the minimum impact required by today's inflation to be passed on to the tenant population without either endangering the proper delivery of services, or inhibiting long term growth and renovation of our valuable housing stock." The Report explained that "increased costs must be reflected in the rent, otherwise essential services will be curtailed," and that "[t]he importance of permitting increased rents for essential capital improvements cannot be overemphasized. An owner should never be penalized for improving his property if such modifications either raise the level of services provided to the tenants or permit those services to be maintained at present levels."

48. In June of 1974, the New York State legislature passed the Emergency Tenant Protection Act of 1974 ("ETPA"), which amended the New York City Rent Stabilization Laws. The ETPA law applies to buildings that contain six or more units and were constructed prior to 1974 and are no longer subject to rent control. It also reinstituted rent stabilization for a variety of units that had been either de-controlled or destabilized due to vacancy between 1971 and 1974.

49. The Omnibus Housing Act of 1983 transferred administration of rent control from New York City, and of rent stabilization from the CAB, to DHCR.

50. Under the Rent Regulation Reform Act of 1993, the state began vacancy deregulation for high-rent apartments (termed "Luxury Decontrol"). *See* N.Y. REAL PROPERTY LAW Ch. 249-B, § 5(a)(13) (LexisNexis). In 1993, a unit with a legal regulated monthly rent of $2,000 at the time it became vacant would be excluded from rent stabilization. The Rent Act of 2011 raised the Luxury Decontrol threshold to $2,500 per month. The Rent Act of 2015 raised the threshold to $2,700, and provided that the threshold would continue to increase at the same rate as the one-year renewal adjustment adopted by the RGB (thereby making Luxury Decontrol a moving target that could be met only in limited circumstances because both the target and the permissible rent moved at the same rate each year). The threshold stood at $2,774.76 before Luxury Decontrol was completely repealed in the 2019 Amendments.

51. The Rent Regulation Reform Act of 1993 also adopted a high-income deregulation provision (termed "High Income Decontrol"). *See,* N.Y. REAL PROPERTY LAW, Ch. 249-B, § 5(a)(12) (LexisNexis); Admin. Code of the City of New York §§ 26-504.1–26.504.3. Under that provision, units that are occupied with tenants whose household income exceeded $250,000 (later reduced to $200,000) and whose rents exceeded the Luxury Decontrol threshold would also be subject to decontrol.

52. In 2014, the New York Court of Appeals conclusively determined that "a tenant's rights under a rent-stabilized lease are a local public assistance benefit." *Santiago-Monteverde*, 22 N.E.3d at 1015. The Court specifically held that the "rent-stabilization program has all the characteristics of a local public assistance benefit." *Id*. "Rent stabilization provides assistance to a specific segment of the population that could not afford to live in New York City without a rent regulatory scheme. And the regulatory framework provides benefits to a targeted group of tenants—it protects them from rent increases, requires owners to offer lease renewals and the right to continued occupancy, imposes strict eviction procedures, and grants succession rights for qualified family members." *Id*. at 1016.

53. The Court observed that "the rent-stabilization laws do not provide a benefit paid for by the government, they do provide a benefit conferred by the government through regulation aimed at a population that the government deems in need of protection." *Id*. (emphasis added). It concluded that the government "has created a public assistance benefit through a unique regulatory scheme applied to private owners of real property." *Id*. at 1016 (emphasis added).

A. ***Rent Stabilization Laws Triggered Upon Declaration of Emergency***

54. The 1974 Act establishes that a municipality may determine that there exists a "public emergency requiring the regulation of residential rents" if the vacancy rate in the municipality is 5% or less. N.Y. UNCONSOL. LAW § 8623.a (McKinney). The statute

requires that "[a]ny such determination shall be made by the local legislative body of such city . . . on the basis of the supply of housing accommodations within such city . . . , the condition of such accommodations and the need for regulating and controlling residential rents within such city . . ." *Id*. The applicability of Rent Stabilization Laws in New York City depends on the City Council making such an emergency determination. *Id*. § 8622.

55. That statutory scheme imposes a substantive obligation on the City of New York to go beyond merely declaring an emergency when vacancy rates are less than 5%, but rather to formulate a rational basis for determining whether that vacancy rate warrants the declaration of a public emergency, whether the existence of such emergency triggers "the need for regulating and controlling residential rents," whether there are specific classes of housing accommodations that should not be subject to the emergency, and whether the regulation of rents serves to abate the emergency. The City must rationally apply existing facts and data to make each determination.

56. Since the Emergency Tenant Protection Act of 1974 was passed, the New York City Council has voted to declare a "public emergency" every three years, thereby permitting the system of rent stabilization to continue indefinitely.

B. ***Rent Stabilization Laws Dramatically Limit Rents***

57. Rent stabilization mandates that owners offer below-market rents to tenants for indefinite and lengthy periods of time. Owners of rent-stabilized

units may increase the rent to existing tenants for any particular one- or two-year lease period only by the amount set by the Rent Guidelines Board. *See* 9 NYCRR § 2522.5.

58. The Board determined in 2018 and again in June of 2019 that property owners would be permitted to increase rents by 1.5% for one-year leases and 2.5% for two-year leases. For the six-year period from 2014 through 2019, the maximum one-year rent increases have been limited to 1.5% or less, with two years in which no rent increases were permitted. Over the 20-year period from 1999 through 2019, the RGB-permitted rent increases averaged 2.7% annually while expenses for property owners increased more than twice that rate, at 5.5%. The compounded effect of those sub-cost permitted rent increases over that 20-year period has been to increase stabilized rents by a total of 66%, while costs have increased over the same period by 169%.

59. Prior to 2019, owners had only very limited means to raise rents beyond the increases set by the RGB. Those included:

(a) Statutory Vacancy Allowance: Under the Rent Regulation Reform Act of 1997, when a tenant vacated a rent stabilized unit, the property owner could increase the rent for the next tenant by 20% for a two-year lease. 9 NYCRR § 2522.8; Admin. Code of the City of New York §26-511(c)(5-a). For one-year leases, the Statutory Vacancy Allowance permitted a 20% increase less the difference between the two-year rate increase permitted by the RGB and the one-year rate increase permitted by the RGB. 9 NYCRR §

2522.8; Admin. Code of the City of New York §26-511(c)(5-a).

(b) Longevity Increase: The Rent Regulation Reform Act of 1997 also permitted an additional increase in rent for tenants who had remained in a unit for a long period (known as a "Longevity Increase"). If there had been no vacancy increase in the prior eight years, the owner could increase the rent based on the following formula: 0.6% multiplied by the number of years since the last vacancy increase multiplied by the vacating tenants' legal rent. 9 NYCRR § 2522.8; *see,* ETPA of 1974 § 10.a.1; Admin. Code of the City of New York §26-511(c)(5-a).

(c) Major Capital Improvements ("MCI"s): When an owner undertook a major capital improvement to a building meeting certain statutory requirements, the owner could petition the DHCR for a rent adjustment amounting to the cost of the MCI amortized over an eight-year period (for buildings with 35 or fewer units), or a nine-year period (for buildings with more than 35 units). *See* Admin. Code of the City of New York §26-511(c)(6); 9 NYCRR § 2522.4. Any rent increase based on an MCI could not exceed 6% of the tenant's rent. The owner was required to document the costs of those improvements and was subject to DHCR audits of those improvements.

(d) Individual Apartment Improvements ("IAIs"): When an owner made a substantial modification or improvement to an individual apartment, the owner was permitted to adjust monthly rent by the amount of one-fortieth the cost of the improvement (for a building with 35 or fewer units) or one-sixtieth the cost of the improvement (for a building with more

than 35 units). *See* Admin. Code of the City of New York §26-511(c)(13).

(e)Preferential Rent Increases. Where owners charged tenants less than the legal regulated rent for a unit, the owner retained the right—upon lease renewal or vacancy of the tenant—to charge up to the legal regulated rent, as adjusted by applicable guideline increases. *See* Admin. Code of the City of New York §26-511(c)(14).

C. ***The Rent Stabilization Laws Deprive Owners of The Rights to Exclude and to Use, Occupy, and Possess their Properties***

60. As discussed in more detail below, the RSL (even prior to the 2019 Amendments) deprives owners of the right to exclude tenants from their property, dramatically limits the owners' right to use or occupy their own property, and even significantly limits the owners' right to freely dispose of their property.

61. The RSL, with very few exceptions, requires the property owners to renew the leases of their tenants at RGB-approved rates. Admin. Code of the City of New York § 26 511(c)(9); N.Y. UNCONSOL. LAW § 26 511(c)(9) (McKinney); 9 NYCRR § 2524.4. Given that all (or nearly all) RSL units were tenant occupied at the time the RSL came into existence in 1969, the obligation to renew leases prevented owners from excluding such tenants from their properties. The principal permissible reasons for tenant eviction all remain within the tenant's control, such as the tenant's non-payment of rent, the tenant's violation of a substantial obligation of his tenancy, the tenant's committing a nuisance, or the tenant's use of the unit for

an illegal purpose. 9 NYCRR §§ 2524.3. And renewal of a tenant's lease is mandatory unless a court determines that a tenant is not occupying the unit as his primary residence. Although non-renewal of a lease is permitted in certain circumstances where the owner seeks to occupy a unit, withdraw the unit from the market, or demolish a building, as discussed further below, those exceptions are limited to the point of impracticability by the RSL.

62. The lease renewal obligation extends not only to the tenant, but also to "successors," such as the tenant's family members or any person residing with the tenant as a primary residence who can prove emotional or financial commitment and interdependence with the tenant. 9 NYCRR §§ 2520.6, 2523.5(b)(1). And the tenant's right to renew the lease persists even if the tenant subleases the apartment for up to two years in any four-year period, and even if the sublease extends beyond the term of the tenant's lease. 9 NYCRR §§ 2525.6.

63. The RSL also dramatically limits owners' rights to use or occupy their own property. The RSL (prior to the 2019 Amendments) permitted an owner to decline to renew a lease if the owner or his or her immediate family member sought to occupy the units. Admin. Code of the City of New York § 26-511(b)(9). But those rights did not extend to any person who owns a building through an LLC or corporation, applied to only one owner of a building even if the building was owned through partnership, were materially limited if the tenant was older than 62 or disabled, and did not apply unless the owner could show a good-faith need for the unit.

64. The RSL also substantially limits an owner's ability to dispose of its own property. Among other limitations, owners may not refuse to renew a lease in order to withdraw a property from the market for purposes of non-housing rentals, nor even to permit the building to sit empty. *See*, *e.g.*, 9 NYCRR § 2524.5. A building may only be withdrawn from the market to be used for the owner's own (non-rental) business, or if the building represents a safety hazard and the cost of repair exceeds the value of the building. *Id.* Owners also may not demolish their own buildings without finding each and every tenant suitable housing and paying for all relocation expenses.

D. ***The 2019 Amendments Stripped Property Owners of Many of Their Few Property Rights***

65. On June 14, 2019, the New York State legislature passed what the New York Senate Majority leader termed "the strongest tenant protections in history." Assembly member Linda Rosenthal, the sponsor of one of the bills resulting in the 2019 Amendments, stated that "[w]e are losing affordable housing at an alarming rate." "My bills would help prevent the loss of thousands of units of affordable housing by making it harder to deregulate rent-stabilized units . . ." Assembly member Latoya Joyner echoed that purpose, stating that "we need to ensure that rent stabilized apartments remain rent stabilized."

66. Legislators confirmed that the purpose of preserving those rent stabilized units was to subsidize the cost of housing for New Yorkers, particularly for low and moderate income New Yorkers. In fact, the justification offered in support of the 2019

Amendments emphasized the need to "protect their regulated housing stock, which provides and maintains affordable housing for millions of low and middle income tenants."

67. As stated by Lucy Joffe, the Assistant Commissioner of Policy, New York City Department of Housing, Preservation & Development, "[r]ent stabilized apartments are both the largest source of low cost housing in the city and provide critical tenant protections that enable residents to remain in their homes and exercise the choice to stay in their neighborhoods."

68. In furtherance of its goal of precluding owners from using their properties for any purpose other than rent-stabilized housing, the legislature adopted several amendments, including:

(a) **Personal Use Exemption Dramatically Reduced.** The 2019 Amendments eliminated property owners' ability to recover possession of more than one unit within their own property for their own personal use and occupancy. Chapter 36 of the Laws of 2019, Part I. Even the right to recover one unit for use as the owner's primary residence is permitted only if the owner can show an "immediate and compelling necessity" for that one unit.

(b) **Luxury Decontrol Eliminated.** Part D of Chapter 36 of the Laws of 2019 repealed sections 26-504.1, 26-504.2, and 26-504.3 of the Administrative Code of the City of New York, which had deregulated units upon their vacancy when the rents reached a luxury threshold. Now, regardless of the rent levels

of the units, the units will remain subject to the limitations imposed by rent stabilization.

(c) **High Income Decontrol Eliminated.** Part D of Chapter 36 of the Laws of 2019 also repealed Sections 26-504.1, 26-504.2, and 26-504.3 of the Administrative Code of the City of New York, which deregulated units when the tenant had a high-income ($200,000 or more), and the rent met the Luxury Decontrol threshold. Now, regardless of the income of the tenants, the units will remain subject to the limitations of rent stabilization.

(d) **Cooperative and Condominium Conversion Dramatically Limited.** Part N of Chapter 36 of the Laws of 2019 amended the laws governing conversion of rental units to cooperative or condominium ownership. The Amendments eliminated the availability of eviction plans, and with respect to non-eviction plans now require written purchase agreements from 51% of all existing tenants. Previously, non-eviction plans required written purchase agreements from only 15% of units, which could be met through commitments by bona fide purchasers rather than tenants. By requiring purchase agreements from a majority of tenants, the 2019 Amendments literally transfer to the tenants the right to dispose of property through cooperative or condominium conversion. Given that bona fide purchasers no longer count toward the threshold, and the low likelihood that 51% of the existing rent-stabilized tenants—who are guaranteed subsidized, below-market rents—would opt to purchase a condominium unit (assuming they could afford it), the Amendments effectively eliminate

owners' ability to dispose of their building through co-operative or condominium conversion.

69. Consistent with the goal of ensuring that owners of rent stabilized units continued to subsidize the housing costs of tenants, the Legislature also eliminated most (if not all) of the means for increasing rents beyond the amounts permitted by the RGB. Specifically:

(a) **Statutory Vacancy Allowance Eliminated.** The 2019 Amendments repealed the law permitting statutory vacancy allowances. Chapter 36 of the Laws of 2019, Part B, §§ 1, 2.

(b) **Longevity Increase Eliminated.** The 2019 Amendments repealed the law permitting longevity increases. Chapter 36 of the Laws of 2019, Part B, §§ 1, 2.

(c) **Increases for Major Capital Improvements Dramatically Reduced.** The 2019 Amendments dramatically reduced the owners' ability to recover the costs of Major Capital Improvements (as explained in greater detail below). First, the Amendments extended the amortization period for reimbursement of major capital improvements from eight years to twelve years for buildings with 35 or fewer units, and from nine years to twelve and one-half years for buildings with more than 35 units. Chap. 36 of the Laws of 2019, Part K, §§ 4, 11. Second, the Amendments specified that any rent increases were temporary (compelling owners to disentangle and remove such increases as compounded over the years by RGB increases), and capped the period during which such increased rents could be charged to 30

years. *Id*. Further, the Amendments preclude owners from increasing rents on any existing tenant by more than 2 percent in any year to recover the MCI, which is one-third of the 6 percent annual increase permitted prior to the 2019 Amendments.

(d) **Increases for Individual Apartment Improvements Dramatically Reduced.** The 2019 Amendments dramatically reduced the value associated with IAIs. The Amendments cap at $15,000 in the aggregate the recoverability of IAIs over a 15-year period. Chapter 36 of the Laws of 2019, Part K, §§ 1, 2. They also significantly decrease the amount of any rent increase to one one-hundred-sixty-eighth (1/168th) of the cost of the IAI (for buildings with 35 or fewer units) and to one one-hundred-eightieth (1/180th) of the cost of the IAI (for buildings with more than 35 units). *Id*. They also make such rent increase temporary (compelling owners to disentangle and remove such increases as compounded by RGB increases), and cap any rent increase to 30 years. *Id*.

(e) **Preferential Rent Increases Eliminated.** The 2019 Amendments eliminated the right of owners who were charging rents below the legally regulated amount to increase those rents upon the lease renewal to the legal regulated rent, as adjusted by applicable guideline increases. Rather, the amount that may be charged to an existing tenant can be no more than the rent charged prior to renewal, adjusted by the most recent applicable guidelines increases. *See* Chapter 36 of the Laws of 2019, Part E.

II. THE RSL SOLUTION—HOUSING COSTS FOR SOME TENANTS SUBSIDIZED BY SOME PROPERTY OWNERS—IS NOT RATIONALLY RELATED TO THE STATED PROBLEMS TO BE SOLVED, AND CONSEQUENTLY HAS NOT SOLVED THOSE PROBLEMS

70. The RSL violates Due Process because it is an irrational, arbitrary and demonstrably irrelevant means to address its stated policy ends. Under the Fifth and Fourteenth Amendments to the Constitution, individuals may not be deprived of their property without due process of law. This protection of property rights is deeply rooted in American history and traditions, and is a fundamental right on which America was founded. *See*, *e.g.*, Federalist No. 10, at 78 (Madison) (C. Rossiter ed. 1961) (describing protection of property rights, especially in land, as "the first object of government"); Federalist No. 54, *supra*, at 339 (Madison) (government is "instituted no less for protection of the property than of the persons of individuals"). When, as here, Plaintiffs are being deprived of their property rights without any rational relationship between that deprivation and a legitimate government interest, the deprivation violates the Fifth and Fourteenth Amendments to the United States Constitution. Indeed, given the fundamental nature of the right to property—a right that is expressly articulated in the Constitution itself—Defendants must demonstrate that the RSL is narrowly tailored to achieving a compelling governmental purpose. Defendants cannot satisfy that standard.

71. Over the 50 years that the RSL has been in effect, Defendants have provided varying justifications for the restrictions imposed by the RSL. The RSL is not rationally related—let alone narrowly tailored—to achieve any of the ends that have been used to justify the extreme measures taken under the law.

72. First, the RSL has been justified as a means to provide affordable housing to low-income families, as confirmed by New York State's highest court. But the law's operative provisions are wholly disconnected from that goal. There is no requirement that RSL units can be rented only to low-income families. In fact, the only financial qualification for the application of the RSL—the provision permitting decontrol of a unit if the owner earns an income over $200,000 and the rent was above the Luxury Decontrol threshold—was removed from the RSL in the 2019 Amendments. As a result, there are numerous documented reports of stabilized units leased by families least in need of assistance. The data confirms that the RSL has not been targeted at all—let alone effectively or narrowly targeted—to families with low incomes.

73. Second, the RSL has also been justified by the need to increase the vacancy rate, and thereby remedy a purported "housing emergency." Even if there were evidence that any housing emergency existed (Defendants have failed to generate any record in support of the "emergency" finding, as discussed in the next section), the RSL not only fails to increase the vacancy rate, it exacerbates the vacancy problem by disincentivizing property development and incentivizing existing tenants to remain in units that may no

longer suit their needs. Such a law is not rationally related—let alone narrowly tailored—to remedying the low vacancy rate that purportedly underlies the housing emergency.

74. Third, there are other available alternatives that would help provide affordable housing to low-income families or help to increase the supply of housing generally. But, those alternatives would require support from all New York taxpayers, and therefore lack the apparent allure of imposing the financial burden entirely on a small subset of property owners, which underpins the RSL. As a result, the Defendants continue to use a subset of New York property owners to fund an RSL that is not rationally related to, and fails to, achieve the ends that it is claimed to serve.

A. ***The Justifications for the Claimed Housing Emergency Have Changed Over Time***

75. Defendants justify the RSL by reference to a claimed "housing emergency." But the nature of that asserted "emergency"—*i.e.*, the aspect of the housing market that supposedly gives rise to a state of emergency—has shifted significantly over the 50 years the law has been in effect.

76. The federal government initially enacted rent control during World War II as an effort to address the "emergency created by war, the effects of war and the aftermath of hostilities." *See* Emergency Housing Rent Control Law § 1.

77. When the RSL was first enacted in New York City in 1969—some 25 years after the allied victory in World War II—the initial declaration of a housing emergency in New York City carried the same

rationale: to address the "emergency created by war, the effects of war and the aftermath of hostilities." *See* RSL, Local Law 16 of 1969, §§ YY51-1.0 (later codified at Admin. Code of the City of New York § 26-501).

78. In 1974, when the New York State legislature enacted the Emergency Tenant Protection Act, language invoking the war-time rationale for rent regulation was retained. However, the legislature began to shift the basis of the housing emergency to an "acute shortage of housing accommodations." N.Y. UNCONSOL. LAW § 8622 (McKinney). In the ETPA, the legislature, for the first time, permitted the declaration of a housing emergency only when the vacancy rate fell below a specific minimum. Section 8623(a) delegated to the New York City Council the authority to declare a housing emergency when "the vacancy rate for the housing accommodations within such municipality is not in excess of five percent." As noted above, the legislature gave no basis for its decision to select 5% as the vacancy rate that could trigger an emergency. Nor has it ever revisited whether that threshold is appropriate given the changes in the economy, job market, and housing market since 1974.

79. The vacancy rate threshold to declare a housing emergency—5%—remains the same today as when it was arbitrarily adopted in 1974. But the nature of the "housing emergency" has again shifted. Testimony during the City Council's 2018 emergency declaration hearing by proponents of continuing the RSL scheme centered on the need for quality affordable housing for low-income individuals, reducing homelessness, and maintaining cultural, racial and socio-economic diversity in New York City.

80. For example, the Chair of the Committee on Housing and Buildings began the hearings concerning the emergency determination by declaring that "New York City's housing stock is increasingly becoming unaffordable for those, for the many seniors and families who live here and the housing vacancy survey shows that it is crucial for us to extend rent regulation for the next three years. . ." New York City Council Speaker Corey Johnson described rent regulation as "the most critical tool we have for maintaining affordable housing in New York City." After noting that the City "is struggling with a homelessness crisis," he then explained—before any testimony was provided—that "[t]oday we are taking the first step by renewing the findings that we are still in a housing crisis . . ."

81. The Deputy Commissioner of Policy and Strategy at the New York City Department of Housing, Preservation and Development then testified that "[r]ent stabilization laws are a critical resource for about one million New York City households that must be protected and strengthened in order to provide lower income households the choice to live" in New York City. He explained that rent stabilization provides "the largest source of low cost housing in the City," and "supports our affordable housing work."

82. The war-time emergency rationale—already an anachronism more than 70 years after the end of World War II—was officially discarded in the 2019 Amendments. While the Legislature still purports to justify its law on the basis of an asserted "public emergency," it has now officially discarded its assertion that the emergency "was at its inception

created by war, the effects of war and the aftermath of war."

83. As discussed in more detail below, the RSL is not a rational means to achieve any of the ends advanced in support of the emergency rationale.

B. ***The RSL Does Not Target Affordable Housing to Those In Need***

84. Matt Murphy, then-Deputy Commissioner of Policy and Strategy at New York City's Department of Housing, Preservation, and Development stated: "Rent stabilization laws provide a critical resource for about one million New York City households that must be protected and strengthened in order to provide lower income households the choice to live in our great City amidst our housing crisis."

85. The RSL is not rationally related to (much less narrowly tailored to) the goal of ameliorating a lack of affordable housing for low-income individuals and families.

86. Rent-stabilized units are not awarded based on financial need. There is no part of the RSL that targets its relief to low-income populations. There is no means testing, financial qualification, or other requirement that rent-stabilized apartments be rented to persons or families at particular levels of area median income (AMI). Rather, stabilized units are awarded to those who have the good fortune either to find an available stabilized unit or to have a relationship with someone who resides in one. Indeed, given that the RSL requires owners to perpetually renew the lease of their tenants, the RSL incentivizes

owners with multiple potential tenants to choose tenants who may have higher incomes.

87. Not surprisingly, there are a plethora of examples—highlighted in the news with some frequency—of RSL units occupied by tenants who otherwise have substantial assets. Plaintiffs (and the association Plaintiffs' members) are frequently called upon to subsidize housing for well-heeled tenants. Data and studies confirm that the RSL is not benefiting low-income households, but is randomly benefitting those who win the RSL lottery.

88. **Examples of Misdirected RSL Benefits.** An analysis by the Wall Street Journal recently concluded that the "biggest beneficiaries of rent regulation in New York aren't low-income tenants across New York City, but more affluent, white residents of Manhattan." The analysis noted that renters in Manhattan received steep rent discounts of $1,000 to $2,000 per month, and that in all of Manhattan, median regulated rents were 53% below median market rate rents.

89. The Wall Street Journal analysis demonstrated that more affluent renters of regulated units received bigger discounts from market rents. It noted that a typical renter with an income in the top quarter of all New York households paid about $1,650 in rent for regulated units, compared with $2,700 in rent for a similar renter paying market rents, a discount of 39%. For a renter in the bottom quarter of income, the difference was 15%.

90. For example, one report stated that a polo-playing multimillionaire whose family owned a

300-acre estate in North Salem, NY lived in a rent-stabilized apartment for several years before it was decontrolled. A former Philip Morris executive lived in a rent stabilized apartment for nearly 20 years, while he and his wife bought a weekend home in the Berkshires. A former magazine editor and her husband who owned a photo agency lived in a rent-stabilized unit in the Upper West Side for 27 years, while at the same time owning a cottage on a 7-acre property in upstate New York.

91. The New York Times also reported in 2015 about one couple, both college professors who teach in Queens, NY, who each had separate rent-stabilized apartments in New York. Although the couple desired to move in together, neither wanted to give up their separate rent-stabilized apartments, for which they were respectively paying $2,070 and $1,500 a month. As one of them, who had been living in his duplex for 22 years, noted "it's the kind of thing that you don't give up without a really good reason." Rather than vacate their rent-stabilized apartments, the couple together bought a $188,000 vacation home in the Catskills.

92. **Data Confirm the Misallocation of RSL Subsidies.** One study found that in 2010, there were an estimated 22,642 rent-stabilized households that had incomes of more than $199,000, and 2,300 rent-stabilized households with incomes of more than $500,000. According to 2017 HVS data, there were 37,177 rent stabilized units occupied by households with incomes of at least $200,000 and 6,034 with incomes of at least $500,000.

93. It has been reported that rent stabilized households that earn more than $200,000 and live in below market-rate units pay a total of $271 million less annually than the average cost of an unregulated unit of the same size in a similarly priced neighborhood, an average savings of $13,764 per household per year.

94. The 2019 Amendments only exacerbate that problem by eliminating the High Income Decontrol provision, with the result that households earning more than $200,000 per year will be able to continue to enjoy rent stabilized rates. Further, by eliminating the Luxury Decontrol provision, units with rents exceeding $2,774 per month will remain stabilized, even though (according to the Wall Street Journal) the median household income of tenants in such units was $150,000 per year, and the average household income was around $210,000 per year.

95. **Research Confirms that RSL Subsidies are Randomly Distributed.** A mountain of scholarly research regarding the New York City housing market consistently shows that the rent regulation windfall is not targeted to low-income residents, but rather is dispensed quite randomly.

96. In a 1987 study in the Journal of Urban Economics, Peter Linneman concluded, using data from the 1981 New York City Housing and Vacancy Survey ("HVS"), that both the City's rent control and rent stabilization programs were targeted haphazardly, with benefits distributed quite randomly, leading Linneman to conclude that "the targeting of these benefits was poor." *See* Peter Linneman, *The Effect of Rent Control on the Distribution of Income among*

New York City Renters, 22 J. of Urban Economics 14-34 (1987).

97. A 2000 study by Dirk Early (using data from 1996) concluded not only that rent control and rent stabilization in New York City were poorly targeted, but also that the city's laws induced property owners to change the way they recruited tenants, giving preference to older and smaller households. *See* Dirk Early, *Rent Control, Rental Housing Supply, and the Distribution of Tenant Benefits*, 48 Journal of Urban Economics 185-204 (2000).

98. Data from 2010 published by New York University's Furman Center confirm that the percentage of low-income households living in rent stabilized and controlled units (65.8%) is only 12% higher than the percentage of low-income households living in market rate units (53.1%). And outside of core Manhattan, there is only an 8% difference, meaning that both market rate and rent stabilized units serve low income households in similar proportions. *See* https://cbcny.org/sites/default/files/REPORT_RentReg_06022010.pdf

99. Also in 2010, the Citizens Budget Commission ("CBC") published an analysis of rent regulated units in New York City using 2008 data, and reached the same conclusion as the preceding studies: the subsidy associated with rent regulation in New York City is poorly targeted. *See* Rent Regulation: Beyond the Rhetoric, Citizens Budget Committee (2010) at 11, available at https://cbcny.org/research/rent-regulation-beyond-rhetoric. The CBC found that

> Overall the average discount is about 31 percent or $5,500 annually. However, the discounts vary by income group. The greatest percentage discounts are for those with incomes below $20,000 annually and for those with incomes between $125,000 and $175,000.

100. These New York-specific studies are corroborated by research in other U.S. cities as well. In a 2007 study involving the effects of the end of rent regulation in Boston, David Sims concluded that low-income families were not well-served by rent regulation, with 26% of rent-controlled units occupied by tenants with incomes in the bottom quartile of the population, while 30% of rent-controlled units were occupied by tenants in the top half of the income distribution. *See* David P. Sims, *Out of Control: What Can We Learn from the End of Massachusetts Rent Control?*, 61 J. of Urban Economics 129-51 (2007). Margery Turner reached a similar conclusion regarding the Washington DC rental market. She determined that rent regulation did not benefit low-income renters efficiently and favored long-term renters (regardless of income level) over frequent movers. Margery A. Turner, *Housing Market Impacts of Rent Control: The Washington, D.C. Experience*, Urban Institute Report 90-1 (1990).

101. **2017 HVS Data Confirms that RSL Fails to Target Households in Need.** Plaintiffs have examined the 2017 HVS data (the most recent HVS data available) to compare the characteristics of tenants in stabilized and unstabilized units to the characteristics of the population of severely cost-

burdened renters in New York City. This examination produced to several conclusions.

102. First, tenants in rent-stabilized units have much higher incomes than the population of severely cost burdened renters. While almost 90% of severely cost-burdened renters have incomes less than $35,000, only 37.7% of stabilized tenants have incomes below $35,000. Thus the RSL does a particularly poor job at connecting the lowest-income renters (incomes below $35,000) with affordable housing.

103. Second, rent stabilized units also do not do a significantly better job of serving lower-income tenants than do unregulated units. For example, 12% of residents of unregulated units have incomes between $20,000 and $34,999 compared to 16.5% of stabilized tenants. The RSL similarly fails to target moderate-income tenants at a rate substantially greater than unregulated units. 78% of stabilized units are rented by households with incomes under $100,000, but so are 64% of unregulated units.

104. Third, the RSL distributes a significant portion of its benefits to higher-income renters. For example, over one third (34.2%) of stabilized units (and half of post-1947 stabilized units) in Manhattan are occupied by tenants with incomes of $100,000 or more. Twenty-two percent of all stabilized units, over 200,000 units, are rented to households with a family income of $100,000 or more.

105. Fourth, the RSL does not target the households most likely to face cost burdens due to rent. Married couples without children constitute the household type least likely to face a severe rental cost

burden—yet they are overrepresented among stabilized renters. Underrepresented among stabilized renters are single-parent households. Indeed, the average regulated tenant is only 34 years old, three years older than the average market-rate tenant.

106. The RSL therefore cannot be justified on the ground that it is rationally related to (much less narrowly tailored to) the goal of ameliorating a lack of affordable housing for low income individuals and families. It simply bears no rational relationship to achieving that goal because it does not match below-market-rent units with rent-burdened/low-income individuals nor does it help create a single new unit of housing.

107. Under Section 8623(b), a municipality that has declared a housing emergency may declare that the regulation of rents does not serve to abate the emergency, and in that way may remove one or more (or all) classes of accommodations from rent regulation. Yet, Defendants have failed to exercise that authority to determine whether rent regulation serves to abate any purported emergency.

108. The Council's repetitive declaration of a housing emergency across the entire city, despite the lack of data to support a housing emergency for apartments renting at $2,000 or more per month, exacerbates the poor targeting of households. According to the 2017 NYC HVS, apartments renting between $2,000 and $2,499 per month have a vacancy rate of 5.2%. Apartments renting at $2,500 or more per month have a vacancy rate of 8.74%. By declaring a city-wide housing emergency despite evidence that only certain segments of housing have a sub-5%

vacancy rate, the Council ensures that the RSL will apply to broad swaths of rental housing for which there is no emergency.

109. The data shows overwhelmingly, in stark contrast to the scant record developed by the New York City Council, *see, infra*, that the RSL is poorly targeted to address the supposed "emergency" of a shortage of affordable housing, and hence irrational and arbitrary. If Defendants had exercised the authority vested in them by the statute to investigate the issue, that conclusion would be readily apparent. Defendants' failure and refusal to exercise that statutory authority further deprives the Plaintiffs of their substantive right to Due Process.

C. ***RSL is Not a Rational Means of Ensuring Socio-Economic or Racial Diversity***

110. For many of the same reasons that rent regulation does not effectively target low-income households in need of affordable housing, it is not reasonably related to the goal of promoting socio-economic or racial diversity. The RSL is not targeted to assist underserved groups and, in fact, has instead been shown to increase gentrification.

111. For example, the recent Wall Street Journal analysis explained that white renters in rent-protected apartments benefited more than any other racial group, with a discount of 36% from market rates, compared with 16% for black renters and 17% for Hispanic renters.

112. In a 2002 study of rent regulation in New Jersey, Harvard researcher Edward Glaeser concluded that regulation was associated with an

increase in economic segregation in municipalities. *See* Edward L. Glaeser, *Does Rent Control Reduce Segregation?*, Harvard Institute of Economic Research Discussion Paper No. 1985 (2002). Regulation was similarly found to be an ineffective tool for economic and racial integration in California and Massachusetts. *See* Ned Levine, et al., *Who benefits from rent control? Effects on tenants in Santa Monica, California*, 56 J. of the American Planning Association 140-52 (1990); David P. Sims, *Rent Control Rationing and Community Composition: Evidence from Massachusetts*, 11 B.E. J. of Economic Analysis & Policy 1-30 (2011).

113. The RSL similarly does a poor job of targeting the racial or ethnic groups most in need. Rent stabilized units serve disproportionately high shares of white renters compared to the race and ethnicity of severely cost burdened renters. For example, although only 27% of severely cost burdened renters are white, 35% of stabilized units are occupied by white tenants.

D. ***The RSL is Not a Rational Means of Increasing the Vacancy Rate***

114. To the extent that the "housing emergency" is predicated on a low vacancy rate, it is not rationally related to remediating that vacancy rate. Rather, the RSL has the opposite effect, operating only to further reduce the availability of vacant apartments.

115. Rent stabilization acts as a price control, reducing the incentive for property owners to develop their properties to create additional space. Further, by

imposing a permanent physical occupation of buildings, it deters owners from being able to re-develop their properties to take advantage of a lot's unused zoning capacity (*i.e.*, air rights). By giving tenants the rights of ownership, rent stabilization deters the very rebuilding of properties necessary to increase the housing stock.

116. The 2019 Amendments exacerbate the RSL's adverse effect on supply in two ways. First, by eliminating opportunities for rent increases at times of vacancy or upon decontrol of units, the law makes continued operation and leasing of such units less attractive and precludes the additional income needed to fund creation of new units. Second, by capping the ability to recover investments for individual apartment improvements and major capital improvements, it deters the re-development necessary both to the return of units to market after vacancy and to the maintenance of quality housing stock.

117. The RSL also incentivizes tenants to stay in units longer, even if the units are no longer appropriately sized for the tenants' needs. The result is reduced turn-over and availability of apartments in New York, exaggerating the very impact—low vacancy rates—that the law was purportedly intended to address.

118. **RSL Deters Development in New York City.** Economic theory has demonstrated over and over that price controls (such as the RSL) will inevitably depress the supply of the goods being controlled. One economist who formerly served as an advisor to the U.S. Department of Housing and Urban Development described rent controls as "self-

defeating" and explained: "stringent rent controls inhibit the development of additional new rental units needed to remedy the problem that led to the adoption of the controls."

119. According to a poll of economists by the American Economic Review, a resounding 93% agree that "a ceiling on rents reduces the quantity and quality of housing available." *See* Richard M. Alston, et al., *American Economic Review, Is There a Consensus Among Economists in the 1990s?*, 82 American Economic Review 203-209 (1992). "The most fundamental criticism of rent regulation is that it perpetuates the very problem it was designed to address: a housing shortage," according to the Citizens Budget Commission. *See* Peter D. Salins, *Rent Control's Last Gasp*, CITY JOURNAL, Winter 1997, https://www.city-journal.org/html/rent-control%E2%80%99s-last-gasp-11951.html.

120. Studies in San Francisco and Boston confirm this effect. In their 2018 study of the San Francisco rental market, Diamond, McQuade and Qian concluded that rent regulation reduced the stock of rental housing, as property owners substitute away from supply of rent-controlled housing. They conclude that rent control produced a 15 percent reduction in the rental supply of small multi-family housing, leading to rent increases in the long run and the gentrification of San Francisco. Likewise, David Sims observed a similar impact in Boston, where it was estimated that rent regulation held thousands of units off the rental market. *See* David P. Sims, *Out of Control: What Can We Learn from the End of Massachusetts*

Rent Control?, 61 J. of Urban Economics 129-51 (2007).

121. The same impact can be observed in the New York City housing market—the RSL aggravates the very problem it is claimed to address by inhibiting re-development of existing properties and the creation of new rental units. Despite the fact that existing zoning regulations provide sufficient unused development envelope to dramatically expand the City's stock of apartments on property occupied by rent-stabilized units, that additional housing stock is not being built. Rent stabilization plays a key role in inhibiting that development. The RSL both reduces earnings from buildings that could be reinvested into further development of the buildings, and also tightly restricts owners' ability to demolish and rebuild their own buildings to provide additional capacity. As a result, research confirms that properties containing buildings subject to significant rent stabilization tend to be significantly less developed than properties containing unregulated buildings.

122. To begin with, existing zoning regulations, while contributing to the city's low vacancy rate, nonetheless still provide substantial room for the development of additional units. Using data from the New York City Department of City Planning, one report estimates that "[t]here is 1.8 billion square feet of unused development rights in residential zones alone. Built to their maximum envelope, these properties could accommodate more than a million units of housing."

123. Despite the available zoning capacity, data demonstrates that buildings subject to RSL

regulation are not developed to that capacity. Plaintiffs have analyzed 100 properties chosen at random within Manhattan, assessing the development of the properties in comparison with the zoned capacity of the properties. Half of those properties were 75% or more rent stabilized ("heavily stabilized properties"), and the other half were properties containing no stabilized units.

124. Of the 50 buildings that were heavily stabilized, the analysis showed that those buildings were underbuilt by an average of 18% (and a median of 22%). Put another way, these properties had roughly 20% of their capacity remaining available for development. Buildings on unregulated properties, by contrast, typically were built to a level that exceeded the zoned capacity (likely due to grants of special exceptions, acquisition of air rights, or grandfathered buildings built under different zoning rules). On average, the unregulated properties were developed to a level 22% greater than the zoned capacity.

125. If the heavily stabilized properties were developed to the same extent as the unregulated peer group, the result would be 420,487 additional square feet of living space. In other words, over 600 units of 700 square feet apiece would be available. This disparity of development between regulated and unregulated properties evidences that the RSL significantly contributes to the underdevelopment of properties and the reduction of housing stock, creating the very purported scarcity of units that are then used to justify continuing their existence.

126. The additional capacity within the sample set of the 50 heavily stabilized buildings

represents approximately 20% of the developed living space within that sample set. If the number of units in heavily stabilized buildings across New York (e.g., those with 75% or more stabilized units) were increased by 20%, it would add well over 100,000 additional units.

127. The underdevelopment of RSL-regulated properties is a direct result of the restrictions imposed by the RSL. As discussed, *infra*, mandatory lease renewals, succession rights, and limitations on an owner's ability to recover units under the RSL create massive barriers to redeveloping a building. Stabilized tenants—imbued by the RSL with a de facto property right in the stabilized unit—can simply refuse to leave unless convinced to do so with outsized buy-out payments.

128. As one report from New York University's Furman Center observed, "most incremental residential development will, by necessity, require the demolition of existing buildings and new construction on assembled sites. However, under state law, rent regulated tenants have certain rights which make it difficult and costly for the owners of buildings to gain vacant possession of their properties for redevelopment."

129. Stories of hold-out tenants and large property owner buy-outs are commonplace. In 2015, two tenants in a small townhouse on Manhattan's west side stood in the path of the Hudson Yards mega-development. The two individuals refused to vacate, leveraging the threat of continued litigation over the stabilization status of their units. The developer eventually was forced to pay them $25 million in a huge

buy-out. As one New York Times article notes, when a unit stands in the way of a large development, "a buyout can be like winning the lottery (complete with taxes). Lawyers for some tenants now look down at anything under $10 million for a single resident."

130. Another infamous tenant held out for $17 million when his unit stood in the way of a development on Central Park West. He had waited until the other tenants accepted payments to maximize the amount of his own.

131. **The 2019 Amendments Exacerbate the RSL's Significant Adverse Impact on Housing Supply.** As noted above, the 2019 Amendments remove the few avenues of deregulation available to owners, such as Luxury Decontrol and High Income Decontrol, and thus magnify substantially the development-limiting impact of the RSL.

132. The 2019 Amendments also eliminate statutory vacancy and longevity rent increases. The elimination of those rent increases, combined with the exceedingly low rent increases permitted by the RGB, dramatically reduces income from properties that might be used to fund the redevelopment of properties.

133. As explained above, the 2019 Amendments also materially limit the ability to recover expenditures for IAIs by (i) placing a $15,000 aggregate cap on the recoverability of IAIs over a 15-year period, (ii) significantly increasing the amortization period for recovering those investments, and (iii) capping the total period for recovering those investments to 30 years, after which the rent increases must be removed

(requiring owners to disentangle those increases from all other rent increases over the 30-year period). After accounting for the taxes owed on any rent increases, an owner will no longer be able to fully recover the present value of significant investments made in IAIs.

134. As one example, when tenants depart after years of occupancy, units often may need $50,000 or more in repairs and restorations to prepare that unit for the market. Under the 2019 Amendments, only $15,000 of those repairs could be passed along to tenants. Further, on a $15,000 investment, only $83 per month would be recoverable per month for buildings over 35 units, and after taxes, the amount recovered is closer to $62 per month. If that investment is funded with a loan to be repaid at 4% annually, the property owner will fail to recover even the full net present value of the $15,000 investment. As a result of those combined effects, building owners will either choose to re let with minimal (if any) improvements, resulting in the gradual deterioration of the building, or they will simply choose not to re let the unit at all. Under either scenario, either the quality of the housing stock, or the supply of that stock (or both) will be further restricted as a result of the 2019 Amendments.

135. For example, one CHIP and RSA member owns a twelve unit apartment building in the East Village. Each of the twelve units is stabilized pursuant to the RSL. One of these units (a studio that rents for less than $600 per month) has been occupied by the same tenant for more than four decades. Despite multiple complaints about the tenant—including repeated complaints that the tenant keeps several dogs

that are rarely taken out of the unit, emitting an unbearable odor in the summertime—the member has been unable to evict the tenant. Under the RSL, the tenant (and her dogs) have enjoyed an automatic right of renewal in the Village for four decades, at a rent far below market levels. When this unit becomes vacant, the member will face a decision. The unit needs substantial repairs before it can be re-rented, and in light of the 2019 Amendments, (1) the member can recoup only $15,000 of the costs of those repairs and (2) the unit will remain stabilized post-vacancy. The economics have made the decision. The member will turn off the lights and leave the unit vacant.

136. This is not an isolated case. Plaintiffs Mycak Associates, Vermyck, and M&G own buildings with stabilized units, long occupied by tenants at depressed rent levels, that they do not plan to repair and re-rent once vacated. The substantial investment required to renovate these units far exceeds the expected return, in light of the $15,000 cap on IAIs and the fact that the units will remain stabilized.

137. In addition to the limit on recovery of IAI expenditures, the 2019 Amendments also dramatically limit the recovery of expenditures on Major Capital Improvements (MCIs), by (i) increasing the amortization period for recovering those investments, (ii) capping the total period for recovering those investments to 30 years (after which they must be disentangled from other increases and removed from the rent), and (iii) limiting any rent increase needed to pay for such MCI to 2% per year (e.g., $30 on a $1,500/month lease).

138. Those collective limitations on MCIs will prevent owners from recovering the cost of many significant MCIs. For example, if an owner of a 30-unit building with an average rent per unit of $1,300 per month invested $200,000 in an MCI financed at 6% interest, the present value to the owner of the permissible rent increases per unit would be less than the present value of the MCI investment. As a result, many owners will choose not to reinvest through MCIs in their buildings. Absent investments in MCIs, building maintenance will be limited to only necessary improvements, resulting in dilapidated housing units and eventually the likely withdrawal of housing units from the housing stock.

139. Indeed, according to one recent analysis, changes under the 2019 Amendments could put over 414,000 units at risk within five years for heating outages, vermin infestations, mold or other housing quality issues.

140. The private equity firm Blackstone Group has reportedly halted renovations in Stuyvesant Town and Peter Cooper Village—comprising more than 11,000 units—due to the IAI and MCI restrictions in the 2019 Amendments. According to the report, Blackstone has ceased renovations on vacant units as well as larger construction projects. Only urgent maintenance, such as leaks or hot water service, will continue.

141. Despite a stated goal of increasing quality housing stock in New York City, the 2019 Amendments (and in particular the caps on the IAIs and MCIs) will result in either a deterioration of the quality of the housing stock or an elimination of units from

available capacity. Both outcomes demonstrate that the RSL is not rationally related to achieving its desired ends.

142. **RSL Reduces Turnover of Apartments, Resulting in Misallocation of Space.** Studies of the New York City market have consistently shown that rent regulation decreases residential mobility. Put another way, tenants fortunate enough to obtain rent-stabilized units stay in them, regardless of the suitability of the unit for the tenant in terms of size, location, and affordability relative to tenant wealth.

143. In that way as well, the RSL itself further decreases the vacancy rate. Indeed, in the 2017 HVS survey, the vacancy rate for private non-regulated units was 6.07%—above the threshold that would trigger the ability to declare a housing emergency. But the vacancy rate for rent stabilized units was only 2.06%.

144. Longer tenancy duration among regulated renters is plainly illustrated in the City's 2017 HVS data. Controlling for characteristics of residents, tenants of rent subsidized units stay in their apartments 3.43 years longer, on average, compared to residents of market-rate units.

145. Such increased duration of tenancy results in reduced turnover of apartments, and therefore exacerbates both the low vacancy rate and reduces the availability of units for individuals and families seeking apartments. Further, this reduced turnover also results in tenants staying in units that are no longer appropriate for their needs, thereby

resulting in a misallocation of available rental space or even safety risks due to overcrowding.

146. In 2003, using data on both rent controlled and rent stabilized units in 1990, Edward Glaeser and Erzo Luttmer examined household sizes and housing unit sizes (measured both by rooms and bedrooms) and found that "21 percent of New York apartment renters live in apartments with more or fewer rooms than they would if they were living in a free market city." *See* Edward L. Glaeser and Ezro F.P. Luttmer, *The Misallocation of Housing Under Rent Control*, 93-4 Am. Econ. Rev. 1027, 1028–29 (2003).

147. The Citizens Budget Committee reached a similar conclusion in 2010 regarding the misallocation of housing space in New York City resulting from rent regulation. It found that households in stabilized units under-consume space relative to those in the unregulated market, in order to take advantage of lower rents in the regulated sector. Conversely, it found that households in rent-controlled units over-consume space when compared to the unregulated market, as these renters tend not to move to smaller units when the number of members in the household declines. And the CBC observed a corresponding mismatch effect in the unregulated sector: households in the unregulated sector likely consume less space than they would absent rent regulation, due to reduced supply and higher market rents.

148. This "mismatch" effect is illustrated in the latest HVS data, which shows that stabilized tenants live in smaller units (as measured by number of

rooms or number of bedrooms) than analogous market rate tenants.

149. For all of these reasons, the RSL cannot be justified as rationally related to the goal of increasing the apartment vacancy rate so that more apartments are available to individuals and families seeking to move to New York City and to New Yorkers seeking to move to a new apartment. Rather, the RSL's effect is to increase the housing shortage in the City.

E. ***The RSL Has a Deleterious Impact on the Community at Large***

150. The irrational and arbitrary relationship between the RSL and the "housing emergency" it is claimed to address is further evidenced by the law's negative impacts on New York City, including higher rents in the unregulated market and reduced tax revenues for New York City.

151. **RSL Leads to Higher Rents in Unregulated Units.** The shortage of available rental housing caused by the RSL produces higher rents in the unregulated market. In a 2000 study, researcher Dirk W. Early determined that rent regulation in New York City increased rents in uncontrolled units and actually placed rent-regulated tenants in a worse position than they would be in the absence of rent regulation. Early found that lower rents in the uncontrolled market would provide the tenants in regulated units with more options, and options that better suited their needs than the regulated units. *See* Dirk W. Early, *Rent Control, Rental Housing Supply, and*

the Distribution of Tenant Benefits, Journal of Urban Economics 48(2).

152. Other researchers have found a more profound impact on market rents. A 1993 study by Steven B. Caudill, concluded that rents in uncontrolled units in New York City were between 22% and 25% higher than they would be in the absence of New York's rent regulatory scheme. *See* Steven B. Caudill 1993. Estimating the Costs of Partial-Coverage Rent Controls: A Stochastic Frontier Approach. Review of Economics and Statistics 75(4): 727-731.

153. **RSL Reduces Property Taxes.** The RSL also reduces property tax revenue available to New York City. Indeed, in the 2018 Fiscal Report for the bill extending the RSL, the City admits, "If . . . wholesale deregulation occurred, the City could see some increase in property tax revenue once property assessments were fully increased to reflect higher rents."

154. The Citizens Budget Committee, using 2010 data, estimated that the City loses $283 million in property tax revenue a year as a result of rent regulation.

155. The tax impact of the 2019 Amendments is far more drastic. A 2019 analysis estimated that these changes—and the steep drops in property values that they cause—will result in a $2 billion per year loss in property tax revenue. The tax revenue losses will be further exacerbated by an anticipated steep decrease in economic activity spurred by MCIs and IAIs that no longer make economic sense for property owners. To put these figures in context, a $2

billion dip in tax revenue (not even taking account of MCI- and IAI-related losses) could support a $500 monthly subsidy for over 300,000 rental units in New York City, almost a third of the rent stabilized units in New York.

F. ***Alternatives to the RSL Are Available That Are More Narrowly Tailored to the Goals Claimed to Underlie the RSL.***

156. Requiring a relatively small set of private property owners to subsidize housing costs for individuals with no demonstrated need for rental assistance is not only grossly inequitable, but also diverts valuable City and State resources away from programs that could actually help address the vacancy rates and provide low-income individuals with housing assistance.

157. Viable measures currently in place in New York and also employed elsewhere, such as housing vouchers or tax abatements, are rationally related to the challenges that the RSL purports to ameliorate but does not address or instead exacerbates. These alternatives not only come closer to furthering the stated goals of the RSL but also distribute the costs and benefits in an equitable manner. Unlike the RSL, they do not impose the burden of a costly "public assistance benefit" on the property rights of individual owners, but rather equally distribute the costs for these programs among society as a whole. And also, unlike the RSL, they actually target and help individuals who demonstrate a need for rental assistance.

158. **Housing Subsidies.** One alternative to the RSL is the use of direct housing subsidies. These

are already provided in the form of housing vouchers under the federal Section 8 program, which targets low-income individuals for housing assistance. Section 8 provides subsidies for individuals to use toward housing based on income and family size. There are approximately 100,000 households in New York City that benefit from this program. Rather than rely on off-balance sheet funding for housing subsidies, New York City and State could implement an analog of Section 8 to provide vouchers or other subsidies to renters.

159. These vouchers can be general, enabling the tenant to select any apartment, or "project-based," in which the voucher must be used for a certain property. Under the Section 8 program, the agency issuing the voucher ensures that the rent for the rental unit selected is reasonable for the area, and recipients of housing vouchers are expected to pay 30% of their income toward rent and utilities, or a minimum rent payment of up to $50, whichever is greater. Allowing individuals to choose where they use their housing vouchers enables lower-income families to move out of high-poverty neighborhoods and would increase diversity in New York City neighborhoods. Studies have shown that children who grow up outside of high poverty neighborhoods do better in school, attend college at high rates, and earn more money as adults.

160. Other examples of subsidy programs that might be expanded to address housing costs are the SCRIE and DRIE programs offered by New York City. The Senior Citizen Rent Increase Exemption (SCRIE) freezes rent for seniors who are in rent-regulated units, are the head of the household, make less

than $50,000, and pay more than one-third of their income to rent. The amount that the senior tenant is exempted from paying is returned to the owner as a property tax abatement credit. The Disability Rent Increase Exemption (DRIE) exists for disabled individuals and also provides owners with tax credits. There is no reason these programs cannot be extended to any elderly or disabled people who meet the income qualifications, not just those who live in rent-stabilized units. Clearly, programs already exist that are rationally related to accomplishing the goal of providing affordable housing without effecting an uncompensated taking from other private individuals.

161. Subsidies could also be provided through a more robust program providing assistance for home purchases, which would direct financial assistance to those who need it and would also promote home ownership. New York City's HomeFirst Down Payment Assistance program provides a forgivable loan of up to $40,000 to a handful of residents each year, but only first-time home buyers can participate. In Chicago and elsewhere, residents can receive down payment assistance even if they purchased a house before, so long as their income falls below a certain level. Unlike the RSL, which reduces housing stock and perpetuates permanent renting, a down payment assistance program available only to low income residents would make housing more affordable to New Yorkers. Some experts have also advocated government funded rent insurance programs, similar to other types of insurance policies.

162. Tax Credits. Another alternative to the RSL is a State renter's tax credit. New York State

already provides a tax credit of up to $500 to New York City renters whose household income does not exceed $200,000. Rather than fund low-income housing through stabilized tenancies and compelling property owners to bear the burden, this tax credit program could be increased and better targeted at those lower income tenants who spend more than 30% of their income on rent.

163. **Increasing Supply of Housing.** The best answer to a shortage of high quality affordable housing is more housing. In August 2018, a study by researchers Vicki Been (currently the newly appointed Deputy Mayor of Housing and Economic Development), Ingrid Gould Ellen and Katherine O'Regan of New York University's Furman Center concluded that "from both theory and empirical evidence, that adding new homes moderates price increases and therefore makes housing more affordable to low- and moderate-income families." *See Supply Skepticism: Housing Supply and Affordability*, Vicki Been, Ingrid Gould Ellen and Katherine O'Regan, August 20, 2018; available at http://furmancenter.org/research/publication/supply-skepticismnbsp-housing-supply-and-affordability.

164. There are many well-tested ways for states and cities to increase the supply of housing. For example, New York already operates the largest Public Housing Authority in the country, which provides affordable, subsidized housing to more than 400,000 people. Expanding that housing, or promoting partnerships between the Housing Authority and the private sector, would both address the vacancy issues and could also be targeted to low-income tenants.

165. Direct government subsidies or innovative financing programs can also encourage new construction to be provided to would-be tenants. In Denver, Colorado, for example, the city instituted a Revolving Affordable Housing Loan Fund in order to bridge the gap for developers between the federal government's 4% Low-Income Housing Tax Credit and the amount of financing needed to make certain low-income housing projects feasible. As developers pay back their loans, money goes back into the fund to pay for future affordable housing projects. New York City has developed similar financing programs, including the Extremely Low and Low Income Affordability (ELLA) program and the HPD "Mix and Match" program. Each of those programs are much more focused than is rent stabilization on providing benefits to low and middle-income tenants. The ELLA program targets development of housing for those with incomes between 30% and 50% of the area median income, and the Mix and Match program targets development of housing serving households with 60% to 130% of area median income.

166. In addition, zoning changes would enable developers to build more housing. Currently, New York State's Floor Area Ratio ("FAR") regulation prohibits building housing that is 12 times larger than the property it sits on. Though there are some exceptions to this rule, the overall impact is to artificially limit housing stock and increased density, which could otherwise be provided by the market. Indeed, one study identified 149 census tracts, mainly in Manhattan, that have the infrastructure and resources to support the creation of additional housing but which cannot add the needed residential density due in part

to the FAR regulations. Modification of the FAR regulations would enable the market to increase the housing supply to better meet demand.

III. THE NEW YORK CITY HOUSING "EMERGENCY" DECLARED EVERY THREE YEARS FOR THE LAST 50 YEARS WITH NO RATIONAL BASIS FOR THE DECISION—MOST RECENTLY IN 2018—VIOLATES DUE PROCESS

167. The RSL applies in New York City as a result of the New York City Council's declaration of a housing emergency every three years for the past 50 years, most recently in 2018. Those declarations violate Due Process because they are arbitrary and irrational.

168. The RSL, as amended, permits but does not compel the New York City Council to declare a housing emergency when there is a vacancy rate of 5% or less. It provides that "[a]ny such determination" is to be made not just "on the basis of the supply of housing accommodations within such city," but also based on "the condition of such accommodations and the need for regulating and controlling residential rents within such city. . ." N.Y. UNCONSOL. LAW § 8623.a (McKinney).

169. The RSL provides that a municipality may declare an emergency as to any class of housing accommodations if the vacancy rate for accommodations in that class is not in excess of 5%, and may declare an emergency as to all housing accommodations if the overall vacancy rate for housing accommodations in the municipality is not in excess of 5%. *Id.*

170. Section 8623.b provides that a municipality that has declared a housing emergency may at any time declare that the emergency is wholly or partially abated, or that the regulation of rents does not serve to abate the emergency, and in that way may remove one or more (or all) classes of accommodations from rent regulation.

171. By its terms, the New York statute permits, but does not require, the declaration of an emergency if the vacancy rate is at or below 5%. Put another way, the mere fact that there is a 5% (or lower) vacancy rate does not by itself provide a justification for declaring a housing emergency, but is instead a precondition to making a determination of whether such an emergency exists and there is "the need for regulating and controlling residential rents." N.Y. UNCONSOL. LAW § 8623.a (McKinney). Even when the vacancy rate in New York City is shown to be less than 5%, the City Council must separately consider and decide whether a housing emergency exists.

172. But the City Council turned that standard on its head, declaring a housing emergency because the overall New York City vacancy rate is 5% or less, regardless of whether the evidence supports that there is "the need for regulating and controlling residential rents" in the City or whether doing so would improve the "condition of [housing] accommodations" in the City. *Id.*

173. For five decades the New York City Council has simply authorized (and reauthorized) an "emergency" status in the City's housing market whenever the vacancy rate is less than 5%, without providing any meaningful support for or analysis of

whether a housing emergency actually exists that would be ameliorated by "regulating and controlling residential rents."

174. The Council has failed to make any assessment as to whether the regulation of rents pursuant to the RSL serves to abate the emergency that it has found to exist. To the contrary, after 50 years-plus of rent stabilization, the Council continues to find every three years that the "emergency" continues—an admission that the RSL has failed in its purposes.

175. The New York City Council made its most recent triennial housing emergency finding in 2018. The hearing it conducted leading to that 2018 finding shows the cavalier manner in which the Council imposes the RSL on the City's residents and property owners, without any rational demonstration that the statutory standard is satisfied.

176. Before declaring a housing emergency for 2018-2021, the New York City Council heard oral testimony from eighteen members of the public and three City officials. The majority of the speakers focused principally on reforms to the rent-stabilization system, such as eliminating vacancy deregulation, preferential rent, and major capital improvements increases. To the extent that questions were posed by City Council members, those questions focused on these issues of reform, rather than whether an emergency actually exists in the New York City housing market and whether the RSL addresses that emergency.

177. Roughly half of the speakers at the 2018 emergency finding hearing shared personal anecdotes

about their own experiences as rent-stabilized or rent-controlled tenants. To the extent that speakers referenced any specific data at all, it was derived from the initial findings of the HVS—the same data used to establish the 5% vacancy threshold necessary—but not sufficient—to authorize an emergency finding in the first place. Both CHIP and RSA submitted written testimony in opposition to the declaration of the emergency.

178. The HVS is conducted by the Census Bureau every three years and is sponsored by the New York City Department of Housing Preservation and Development ("DHPD"). While the HVS collects data on various characteristics of New York City's housing market, including population, households, housing stock and neighborhoods, the primary focus of the HVS is the rental vacancy rate. Since 1965, when the Census Bureau began conducting the HVS, the rental vacancy rate in New York City has never risen above 5%. A chart of the vacancy rates reported in the HVS from 1965 to the most recent report in 2017 is below:

Year	Vacancy Rate
1965	3.19%
1968	1.23%
1970	1.50%
1975	2.77%
1978	2.95%
1981	2.13%
1984	2.04%

1984	2.04%
1987	2.46%
1991	3.78%
1993	3.44%
1996	4.01%
1999	3.19%
2002	2.94%
2005	3.09%
2008	2.88%
2011	3.12%
2014	3.45%
2017	3.63%

179. The HVS does not provide a definition for the term "housing emergency." It does not present data or analyses aimed at establishing whether a housing emergency exists, or purport to propose a methodology for making that determination. Nor does it address the express statutory factors that must be applied to determine whether there is a need for rent regulation or how rent regulation affects the condition of residential housing. N.Y. UNCONSOL. LAW § 8623.a (McKinney).

180. Virtually no data other than the HVS was considered before the 2018 emergency finding was made. Oksana Miranova, a housing policy analyst from the Community Service Society, introduced some

meager non-HVS data generated through her organization's annual survey. That survey found a 13% decrease in the number of rent-regulated renters reporting a very serious or somewhat serious problem with housing affordability from 2015 to 2017. This study also found that in the same period, there was only a 2% decrease among unregulated renters. Ellen Davidson, a staff attorney at the Legal Aid Society, offered another statistic (based partially on HVS data): "In 1999, there were 1.1 [million] low income households that needed affordable apartments renting for under $800. At the time, there were 1.35 million apartments which rented for under $800 a month. Today, there are 867,000 households who need apartments that are renting for under $800 a month and[,] according to the recently released HVS, there are now 350,000 apartments renting for under $800."

181. The 2018 emergency finding received scant support from City witnesses. The City Council heard from three members of the DHPD. Matt Murphy, the then Deputy Commissioner of Policy and Strategy, focused on New York City programs outside the RSL aimed at providing affordable housing, including financing the construction and preservation of affordable homes and providing counsel for low-income tenants facing eviction. Elyzabeth Gaumer, the Assistant Commissioner for Research and Evaluation, described the initial findings of the 2017 HVS. Francesc Marti, the Assistant Commissioner for Government Affairs, answered questions about the Department's policy on certain state-level reforms, including the repeal of vacancy decontrol.

182. The DHPD presented data that the overall City-wide vacancy rate was 3.65% in 2017, rents had increased 6.2% since 2014, and there were 3,600 more vacant units in 2017 than in 2014. In addition, DHPD explained that an additional 69,000 units had been created since 2014. The DHPD also presented data based on self-reporting of individual tenants. It stated that 76.1% rated the condition of residential structures in their neighborhood as "Excellent" or "Good."

183. The written hearing record relating to the City Council's 2018 emergency finding was similarly meager. It contained statements from an additional eight people and organizations, including four statements advocating against renewal of the emergency finding. Of the statements in the written record favoring an "emergency" declaration, only two cited statistics not included in the HVS. Oksana Miranova (referenced above) provided a written statement including additional statistics from the Community Service Society's survey, such as: in 2014, the median rent burden for low-income rent regulated tenants was 48% of income, compared to 50% for unregulated tenants. The Legal Aid Society's written statement also included statistics from the 2018 Income and Affordability Study published by the NYC Rent Guidelines Board and a report from the Coalition for the Homeless. In each instance, the focus of the so-called emergency was the low vacancy rate—a factor already established by the HVS.

184. Defendants did not establish any rational basis for determining that a housing emergency exists—the finding required by the statute. In fact,

Defendants have failed even to identify the variables that should be used to determine whether an emergency exists (let alone the threshold at which those variables might be indicative of an emergency).

185. Prior emergency declarations were supported by similarly underdeveloped records. In 2015, for instance, the City Council heard from twenty-two people, including two City officials. Every speaker supported renewing the rent-stabilization laws. As in 2018, half of the speakers shared stories about either their own experiences as a rent-regulated tenant or their clients' experiences with rent regulation. To the extent that speakers referenced statistics, they primarily recited information from the initial findings of the HVS. In 2015, DHPD provided information that the City-wide vacancy rate was 3.45% for 2014, that the number of vacant available rental units had increased 7,000 since 2011, and that median rents had increased 4.3% since 2011.

186. In 2012, the City Council heard from twelve people, including two City officials. Eleven of the twelve supported renewing the RSL. In 2012, DHPD reported that the City-wide vacancy rate for 2011 was 3.12%. The number of vacant units had increased 6,000 since 2008, and median rents had increased by 4%. Before that, in 2009, DHPD reported the vacancy rate for 2008 was 2.88%. The median rent increased 4.2% (if adjusted for inflation) since 2005, and DPHD reported a decrease of 3,000 vacant units over that same time.

187. Details of the record from the last three "emergency finding" hearings are reflected in the chart below.

Year	Speakers	Speakers Favoring Renewal	Speakers Against Renewal	Additional Written Statements	Written Statements Favoring Renewal	Written Statements Against Renewal
2018	21	21	0	8	17	4
2015	22	22	0	2	11	1
2012	12	11	1	1	9	2

188. On the strength of this record, the New York City Council did in 2018 what it has done for the last 50 years: declared a housing emergency in New York City requiring the renewal of the RSL invasive and confiscatory statutory framework.

189. The City has failed to offer either a rational explanation or justification for its determinations. The City has failed to identify any thresholds constituting an "emergency," failed to articulate the criteria or bases for its triennial determination, and failed to explain, or even consider, whether the rent regulation that follows from its rote triennial determinations actually addresses the perceived housing emergency. As a result, the determinations on which the rent stabilization system rests are arbitrary and irrational and a violation of the Due Process and property rights of Plaintiffs and their members.

190. Certainly the mere fact that the vacancy rate is less than 5% does not justify the conclusion that a housing emergency exists in New York City. Data from the United States Census Bureau shows that at least eighteen of the top 75 metropolitan areas in the country have posted rental vacancy rates of less than 5% between 2015 and 2017. The statute provides that a vacancy rate below 5% is necessary but not sufficient to establish an emergency, and the record from the City Council emergency hearings does not address

how the actual City-wide vacancy rate is indicative of a market in a state of emergency. The City seems incorrectly to believe that so long as the vacancy rate is below 5%, an emergency exists regardless of other circumstances, just as the Council has done for decades despite a changing housing market.

191. Moreover, using the HVS data to establish a 5% vacancy rate for the entire city of New York is irrational. The vacancy rate varies across boroughs and type of housing—with vacancies for some areas and some types of housing well in excess of 5%. For example, the vacancy rate for rental properties with rents above $2,000 was 7.42%. The vacancy rate for all private non-regulated units (56% of the rental stock) was 6.07%. Even though the governing statute, Section 8623.b, provides that a municipality may at any time declare that an emergency is wholly or partially abated, Defendants failed to apply that authority with respect to those portions of the market for which the vacancy-rate threshold for an emergency determination has ceased to exist, such as for high-rent stabilized units.

192. The arbitrary 5% vacancy-rate threshold established by statute as authorizing a municipality to consider making a housing emergency determination only emphasizes the need for careful consideration by the New York City Council—separate and apart from the vacancy rate itself—whether a housing emergency actually exists. But the sparse record compiled in connection with the 2018 emergency finding, as in each of the prior findings, provides no basis whatsoever for the Council to do so. While perhaps politically popular, the rote renewal of the RSL on the

basis of such an "emergency finding" violates Due Process.

IV. THE RSL RESULTS IN UNCOMPENSATED PHYSICAL TAKINGS OF PRIVATE PROPERTY

193. "That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred." *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829) (Story, J.). Through the RSL, Defendants are violating this fundamental principle, depriving New York City property owners of their fundamental property rights, including their rights to exclude others from their property, and to possess, use and dispose of that property.

194. A government-sanctioned physical invasion of private property is a per se taking requiring compensation. The category of per se takings is not limited to physical seizure of property by the government; it also encompasses government-mandated placement of an object or a person on private property (e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435–36 (1982)), access easements of indefinite duration (*Dolan v. City of Tigard*, 512 U.S. 374 (1994)), and even flyovers that appropriate airspace (*United States v. Causby*, 328 U.S. 256 (1946)). The Supreme Court has held specifically that granting a "permanent and continuous right to pass to and fro'" over private property is a "permanent physical occupation." *Nollan v. Cal. Coastal Comm'n*, 483 U.S.

825, 831–32 (1987). As described below, multiple provisions of the Rent Stabilization Laws (including those from the 2019 Amendments) subject property owners to such physical invasions.

195. Rent stabilization imposes unconstitutional conditions on building owners' use of their property. In order to rent out a pre-1974, six-unit plus building covered by the RSL, a building owner must acquiesce in a set of rules that impose on the owner the indefinite physical occupation of rented units by tenants and their successors at below-market rents with any increases controlled by government regulation. An owner cannot participate in the rental market without acquiescing in that regulatory system, which (as discussed in detail below) effects a per se taking. And once a property is placed into that rental market, the owner's ability to leave the market is severely restricted. Government cannot condition an owner's ability to rent its property on the elimination of the owner's rights to exclude others from its property, and to possess, use and dispose of that property. *See Loretto*, 458 U.S. at 439 n.17 (holding that New York law effected a taking because "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation"); *Dolan*, 512 U.S. at 385 ("had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred").

196. Each individual provision of the Rent Stabilization Laws (including those from the 2019

Amendments), and the combined effect of all the provisions, constitutes a per se taking.

197. *First*, the RSL mandates the continued occupation of rental properties by tenants, and owners cannot refuse to renew leases to those tenants except under the narrowest of circumstances. Not only do owners have no way to remove the original tenant in the property, but they must suffer the intrusion of strangers—sub-lessors and successors of the tenant—the selection and admission of whom the owner is given no right to oppose. The "right to exclude others" from "one's property" is "'one of the most essential sticks in the bundle of rights'" that characterize property. *Dolan*, 512 U.S. at 393 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). That the Rent Stabilization Laws deprive property owners of that "essential stick" demonstrates that the laws effect a per se taking of the owner's property.

198. *Second*, the Rent Stabilization Laws complete their physical occupation of New York City property by taking from the property owners the right to possess, use, and dispose of property. "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' To the extent that the government permanently occupies physical property, it effectively destroys each of these rights." *Loretto*, 458 U.S. at 435 (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)). The RSL not only denies property owners the fundamental right to exclude others, but also denies them the rights of use, possession, and disposal, leaving property owners with only the shell of ownership.

199. Third, the RSL also dramatically limits the property owner's ability to dispose of his or her own property. Tenants may not be denied a lease renewal even if the owner wants to repurpose the building to non-housing rental purposes. *See* 9 NYCRR § 2524.5. If an owner wanted to cease offering the property for rent entirely—if the owner effectively wanted to go out of business and not use the property for any purpose—the RSL denies the owner the right to not renew his tenants' leases in all but the most extreme circumstances. *See* 9 NYCRR § 2524.5. If prior to the 2019 Amendments, the owner wanted to convert a building to cooperatives or condominiums, the owner could do so as long as he obtained purchase agreements from 15% of tenants or bona fide purchasers, and tenants did not have to give up any rights. The 2019 Amendments now give the right to decide on a condominium conversion to the tenants, 51% of whom must enter into purchase agreements. And even if the owner wanted to demolish his building, the owner cannot do so unless he relocates his tenants and potentially pays them a stipend for six years.

200. By denying property owners their right to exclude others, and stripping them of their right to possess, use and dispose of their own property, the RSL effects a physical taking of their property. This physical invasion of property is not a temporary action needed to address some fleeting emergency, but rather is a rule of indefinite duration. Indeed, after 50 years in existence, and with ritualistic renewal every three years during that period, the RSL has become a permanent fixture of New York City real estate. To underscore that point, in passing the Housing Stability and Tenant Protection Act of 2019, New York has

eliminated almost every avenue that allowed a transition from regulation to free market, eliminated any sunset period for the law, and imposed obligations on owners that extend more than thirty years into the future. *See* Thomas W. Merrill, *The Character of the Governmental Action*, 36 Vt. L. Rev. 649, 658 (2012) ("Very little in property law is 'permanent' in the sense of lasting forever"; *Loretto* instead had in mind as a permanent physical invasion "governmental action that amounts to the imposition of an easement of indefinite duration").

201. Unlike other rent control ordinances that merely fix a cap on the rents that can be charged, the RSL imposes a physical occupation on the nominal property owner, denying the owner all the significant elements of the bundle of property rights. Thus, "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto*, 458 U.S. at 435. In so doing, the RSL constitutes a per se taking, for which the property owner receives no compensation at all.

A. ***The RSL Requires Owners to Permit Tenants and Their Successors to Occupy Private Property for Lengthy and Indeterminate Periods of Time, Denying Owners the Right to Exclude.***

202. "[T]he 'right to exclude,' so universally held to be a fundamental element of the property right, falls within th[e] category of interests that the Government cannot take without compensation." *Kaiser Aetna*, 444 U.S. at 179–80 (holding that a government order that the owner of a marina open it to the

general public imposed "an actual physical invasion of the privately owned marina").

203. The Rent Stabilization Laws require property owners, with few exceptions, to provide tenants the option to renew their lease at RGB-prescribed rates. Admin. Code of the City of New York § 26-511(c)(9); 9 NYCRR § 2524.4. By requiring the owner to renew the lease of the existing lessee, the law deprives the owner of his or her fundamental right to exclude others from his or her own property. This imposition of a right for the tenant to renew his or her lease into the indefinite future, and fixing the terms of the offer for renewal, is a physical taking for which the Fifth Amendment requires just compensation. Yet owners receive no compensation for the forced housing of individuals not of their choosing at below-market rents.

204. That elimination of the right to exclude is not limited to the original tenant. There are a host of legal requirements that allow the tenant to give to another person the tenant's rights to the unit. These "succession" rights prevent owners from excluding strangers from the property, because they are forced to continue permitting the new "successor" tenant to renew his or her lease at below market rates.

205. The original tenant, for example, retains the right to give the rent-stabilized unit and the right to lease renewal to "any member of such tenant's family … who has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years, or where such person is a 'senior citizen,' or a 'disabled person' … for a period of no less than one year, immediately prior to the

permanent vacating of the housing accommodation by the tenant, or from the inception of the tenancy or commencement of the relationship, if for less than such periods, shall be entitled to be named as a tenant on the renewal lease." 9 NYCRR § 2523.5(b)(1).

206. Family members who can receive this benefit include not only a "spouse, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law or daughter-in-law of the tenant or permanent tenant," but also include "[a]ny other person residing with the tenant or permanent tenant in the housing accommodation as a primary or principal residence, respectively, who can prove emotional and financial commitment, and interdependence between such person and the tenant or permanent tenant." 9 NYCRR § 2520.6.

207. If any of these individuals move in with the original tenant and then wish to inherit the lease—and receive the right to automatic lease renewals at below market prices—the owner has no control over whether these individuals can live in his or her apartment unit. Instead, the owner is forced to continue perpetually renting the unit to individuals that he or she has no power to exclude from his or her property.

208. By way of illustration, Plaintiff Danielle Realty has stabilized units, occupied since 1975 that have now spanned three generations of the tenant family. The original tenants' granddaughter now occupies the unit. Her current rent is $1,289.10 per

month. The market rental value is more than double that amount.

209. The RSL system of succession is also ripe for abuse. For instance, Plaintiff Cindy Realty has husband and wife tenants who have occupied a stabilized unit since 1994. Cindy Realty became aware that several strangers were occupying the apartment and the tenant couple had moved to Florida. The couple claimed that the Florida home belonged to their son, and that he was the stranger living in the apartment in New York. It is too difficult and costly for Cindy Realty to prove the residence of the couple, and the son is likely to claim succession rights. Cindy Realty is thus saddled with a tenant it never approved.

210. In addition, the tenant also has the right at any time to sublet his or her rent-stabilized unit for two out of any four years and still have the right to renew, so long as the tenant "has maintained the unit as his or her primary residence and intends to occupy it as such at the expiration of the sublease." N.Y. UNCONSOL. LAW § 26-511(c)(12) (McKinney); 9 NYCRR § 2525.6.

211. The tenant even has the right to charge the sublessee a 10% rent premium for providing the sublessee with his or her own furniture. N.Y. UNCONSOL. LAW § 26-511(c)(12)(a) (McKinney); 9 NYCRR § 2525.6(b). On a $2,000 per month lease, the premium received by the tenant for the use of that furniture would be $200 per month. By contrast, an owner of a building with more than 35 units who invests $15,000 in IAIs for new furniture or furnishings would be capped at receiving $83 per month, less than half the amount the law permits his tenant to receive.

212. By denying the property owner the right to exclude a tenant upon the expiration of the tenant's lease, by denying the property owner the right to exclude successor tenants, and by denying the property owner the right to exclude sublessee tenants, the RSL has fundamentally constricted to the point of nonexistence the property owner's "right to exclude," a fundamental stick in the bundle of the tenant's property ownership rights.

213. This deprivation is even greater than an access easement (as in *Dolan*) where individuals are permitted to pass periodically. Under the RSL, individuals (many not of the owner's choosing) are permitted to take up permanent residency on a property, go to and fro as they wish, and for all practical purposes treat the property as their own – renting out the property, bequeathing to family members, or even selling their interest in the property back to its rightful owner. As the Supreme Court has noted, "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. . . To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury." *Loretto*, 458 U.S. at 436.

214. Nor do the few exceptions to the renewal obligation create any meaningful relief for owners. The RSL purports to create exceptions if the owner seeks to recover possession for his own occupancy, the owner seeks to withdraw the unit from the rental market, a court determines that a tenant is not occupying the unit as his or her primary residence, or the owner seeks to demolish the building. But, as explained

below, the limitations applicable to each of those exceptions render the exceptions illusory.

215. That the RSL eliminates the property owner's "right to exclude" and transfers the owner's property rights to the tenant is highlighted by the many reported instances in which tenants have leveraged their rent-stabilization status to extract a large buyout from owners looking to convert their property. For example, one family of four received $1,075,000 to move out of their rent-stabilized Upper East Side two-bedroom apartment. The family had been paying $1,500 in rent. Another tenant received $425,000 to vacate his one-bedroom walk-up apartment in the East 50s. One Williamsburg property owner paid three tenants $188,000 each to leave their $1,800 per month apartments. One tenant even managed to secure a "five-figure buyout" for an apartment that she had moved out of and had been subletting for years.

216. If the RSL regulations truly permitted owners a means to exclude others from their properties, such large buyouts should never be necessary: The owner could exercise his or her available remedies. The existence of such substantial buyouts confirms the practical reality—the RSL transferred the owners' property rights and gave them to the tenant, who now has the ability to resell those rights.

217. The RSL does not only significantly limit the owner's right not to renew a tenant's lease; it also substantially eliminates the owner's ability to evict a tenant. Even before the 2019 Amendments, the property owner could only evict a tenant for failing to pay rent, creating a nuisance, or for violating the law—conduct that is solely within the tenant's control.

218. As a result of the 2019 Amendments, the property owner's ability to evict a tenant is even more significantly constrained. For example, Chapter 36 of the Laws of 2019, Part M, Section 21 permits a stay of execution of eviction for a period of one year if the tenant can demonstrate an inability to obtain other housing or to prevent hardship. Thus, even tenants who are breaking the law or failing to pay the lease on time may be entitled to a year of tenancy upon a showing of "hardship."

219. Not only do the 2019 Amendments make it more difficult to evict a tenant, but they also make it more difficult to select tenants in the first place. For example, the 2019 Amendment precludes property owners from refusing to lease to a tenant due to the tenant's past or pending landlord/tenant action, seals records of evictions, and precludes the sale of data regarding judicial proceedings related to residential tenancy. By precluding owners from refusing to offer leases to tenants with prior rental violations, the 2019 Amendments turn tenants with bad rental backgrounds into "protected classes," and preclude owners from excluding such tenants from their units. Through these revisions, the 2019 Amendments dramatically reduce the ability of owners to exercise their right to exclude through due diligence, making all the more significant the RSL's near-mandatory obligation to renew such tenants' leases.

220. Further, under the 2019 Amendments, units that were rented to charitable organizations to house vulnerable individuals or those who were homeless or at risk of becoming homeless (which units had previously been exempted from rent stabilization) will

become subject to stabilization, and the individuals living in those units are deemed to be tenants under the RSL. By extending the lease renewal protections to such tenants, the Amendments further impair owners' ability to select the tenants who live in their buildings

B. ***The RSL Denies Owners the Right to Occupy, Possess, and Use the Property.***

221. Even prior to the 2019 Amendments, the RSL effectively denied property owners the right to possess and use their own property. Although the law nominally permits owners to recover possession "for his or her own personal use and occupancy as his or her primary residence in the city of New York" (N.Y. UNCONSOL. LAW § 26-511(9)(b) (McKinney); 9 NYCRR § 2524.4), the limitations applicable to that provision—including those adopted in the 2019 Amendments—have effectively denied that precise right to property owners.

222. For example, owners who held properties through a corporate form were denied any right to recover property for their own use, and if the property was owned by a partnership, only one owner could claim the occupancy right. Owners were limited in their right to recover units leased by those who were older than 62 or disabled. N.Y. UNCONSOL. LAW § 26-511(9)(b) (McKinney). And owners that did recover units for their personal use were prevented for a period of years from subletting those units—a right that is freely given to other tenants.

223. The 2019 Amendments substantially undercut even the limited rights owners previously

enjoyed to take possession of their own property for their own use. Most critically, the 2019 Amendment prevents owners from recovering possession of more than one unit in their own building for the owner's own use and occupancy. Chapter 36 of the Laws of 2019, Part I, § 2. Thus, even if an owner desired to recover multiple units to serve as the owner's primary residence, the 2019 Amendments deny the owner that right. Moreover, even to obtain that one unit, the owner now must demonstrate an "immediate and compelling necessity" for the unit, a standard that has been very difficult to satisfy under the case law. And if the occupant of a unit has lived in the building for 15 years, an owner may not recover possession of that unit unless the owner can provide an equivalent accommodation at the same stabilized rent in a closely proximate area—which is an almost impossible task. Thus, the RSL effectively denies property owners the right to occupy, use and possess their own property.

224. **Not Available to Corporate Holders.** In the first instance, the right to recover possession of units applies only to properties held by "natural persons," not those held by corporate entities. *See,* 9 NYCRR § 2524.4 (granting right to owner who intends to use property as "his or her" primary residence); N.Y. UNCONSOL. LAW § 26-511(9)(b) (McKinney) (granting rights to owner where "he or she" seeks to recover possession). *See also Henrock Realty Corp. v. Tuck*, 52 A.D.2d 871, 872, 383 N.Y.S.2d 47, 47 (1976) (an owner seeking to recover possession of a dwelling for his own personal use must be a natural person); *1077 Manhattan Assocs., LLC v. Mendez*, 798 N.Y.S. 2d 714 (App. Div. 2004)("[O]nly a natural person and not a corporation can recover an apartment for personal use . . .

even when the principal of the corporation is its sole stockholder."). And where the unit is owned by more than one individual, only one of the owners may recover a unit for personal use. N.Y. UNCONSOL. LAW § 26-511(9)(b) (McKinney).

225. For liability and other reasons, most owners of rent stabilized properties hold those properties through a corporate form. They include Plaintiffs Mycak Associates LLC, Vermyck LLC, M&G Mycak LLC, Cindy Realty LLC, Danielle Realty LLC, and Forest Realty LLC. Where those corporate entities are owned by individuals, the individual would have to sacrifice all the protections of the corporate form, including protection from personal liability, trigger a taxable event by transferring the property into his personal name, and incur all the other costs of a major real estate transfer simply to be allowed to take possession and use his own property.

226. **Unable to Recover More than One Unit.** Even if a property is held by a natural person, that person may not recover possession of more than one unit for his or her own personal occupancy. Even before the 2019 Amendments (which expressly preclude the recovery of more than one unit), it was often difficult for owners to obtain possession of more than one unit for their own use or the use of their immediate family. For example, in *Raffo v. McIntosh*, 3 Misc. 3d 127(A) (N.Y. App. Term. 2004), where a property owner sought to recover an additional unit so that his elderly parents would have room to house a caretaker, the court determined that the owner had additional room in his own unit to house the caretaker, and

therefore did not demonstrate the requisite good faith need for the rent-stabilized unit.

227. The inability to take possession and use of one's own building deprives building owners of a fundamental right of property ownership, and leads to significant personal suffering, as would be expected when the government seizes a person's property.

228. Plaintiff Constance Nugent-Miller has experienced firsthand the toll that a denial of physical occupation can take. Nugent-Miller is a disabled owner of a six-unit walk-up in Brooklyn and has lived on the second floor of that building for thirteen years. She has twice been denied the ability to occupy a first floor unit in her own building.

229. In 2013, Nugent-Miller (also a registered nurse) was the primary caregiver for her terminally ill husband, who was painfully suffering from congestive heart failure, HIV, and Chronic Obstructive Pulmonary Disease (COPD). Climbing the stairs to the couple's second floor apartment became difficult, even dangerous, as his heart condition and overall health deteriorated. A solution existed. Nugent-Miller could simply move into one of her first floor apartments. She issued a notice of nonrenewal to a tenant in one of her first floor units—one of three stabilized apartments in the building. She even offered her own second floor stabilized unit to the first floor tenant she would be displacing. The tenant refused to cede the apartment. So Nugent-Miller took her case to housing court to recover possession of the unit. With her husband dying, the court dismissed her claim on a technicality. The RSL entitles the tenant to another lease term, the court found, because Nugent-Miller was late when

sending an earlier lease renewal notice, rendering the notice of non-renewal defective. Nugent-Miller and her husband were forced to stay on the second floor, and her husband's health worsened. She took him to the hospital shortly thereafter, where home hospice was recommended. He would be carried up the stairs after returning home. Nugent-Miller's husband died fifteen days later, on the second floor of her building.

230. In the aftermath of her husband's passing, Plaintiff Nugent-Miller developed physical ailments of her own. She began experiencing crippling nerve pain in her right leg in February 2015 and it progressively worsened. She also developed severe knee pain in the same leg. In November 2015, Nugent-Miller's doctor diagnosed her with a severely torn meniscus. She had it surgically repaired in November 2015. The surgeon identified arthritic tissue during the surgery, and told Nugent Miller she would soon need a total knee replacement. She has walked with the assistance of a cane since. Following the meniscus surgery, she scaled the stairs to her apartment sitting on each step. In light of her deteriorating medical condition, she again sought a first floor unit in her building for personal use. And she was again denied in housing court. Her pain was not severe enough, the court found, to trump her stabilized tenant's right to remain in her building. The judge offered:

> while the court does not want to make light of [Nugent-Miller's] pain and health issues, it does not find that the record establishes that [Nugent-Miller] has demonstrated that her condition is such to warrant her recovery of the subject premises for her own use from a

rent stabilized tenant that has resided there for more than 20 years.

231. Ms. Nugent-Miller has since qualified as "disabled" by the Social Security Administration. She continues to reside in her second floor apartment.

232. The 2019 Amendments now make impossible what was previously only implausible—the owner's ability to refuse lease renewal in order to obtain possession of more than one unit in his or her own building. Chapter 36, Part I § 2 amends New York Administrative Code Section 25-511(b)(9) such that the right to recover possession of a dwelling unit for the property owner's own personal use and occupancy is limited to "recovery of only one dwelling unit" per building. Thus, in even the smallest rent stabilized buildings (those with six units or more) the owner is deprived of the right to obtain possession or use of over 80% of his own building through non-renewal of tenant leases. For larger buildings, the owner could be deprived of the right to possess or use nearly 100% of his or her own building.

233. The immediate impact of that physical taking is exemplified by the circumstances of Bryan Liff, a nonparty property owner. Liff had been living in a co-op building with his wife and young daughter in Manhattan when they decided that they would buy a building of their own. For years Liff and his wife researched the New York City real estate market, monitored listings and financially planned with the goal of buying a building that would become their family home.

234. Finally, in 2019, the Liffs found a building in Harlem with eight studio-sized units. Four of the units could be renovated and combined into what would become their new home. The remaining four could be rented to defray costs. While all of the units in the building were stabilized, the Liffs' research told them of their right to occupy the units as owners. So the Liffs set about hiring architects and engineers, spending upwards of $25,000 to prepare for the buildout. They closed on the building on March 15, 2019, purchasing it for approximately $2.1 million.

235. To effectuate their plan, they promptly issued notices of non-renewal. Weeks later, the 2019 Amendments were passed, limiting personal use exception to a single unit. The Liffs' tenants—all young professionals—formed a tenants association and threatened legal action if they were forced to vacate his building. The Liffs were left without recourse. While they would gladly re-sell the building at a break-even price, the Liffs estimate that their three-month-old investment lost 20-25% in value when the 2019 Amendments were passed.

236. When the government decrees that a tenant's rights take precedence over the owner's own use and occupancy of a unit or building, the government has effectively seized that property to the same extent as if it had taken over the building as a government housing facility.

237. **Unable to Recover Units Held by Specific Tenants.** An owner is also limited in recovering an apartment "where a tenant or the spouse of a tenant lawfully occupying the dwelling unit is sixty-two years of age or older, or has an impairment which

results from anatomical, physiological or psychological conditions" which prevents "substantial gainful employment." N.Y. UNCONSOL. LAW § 26-511(9)(b) (McKinney). It does not matter whether the owner also is 62 or older, or has an impairment, or is even decades older than the tenant—the tenant still receives priority over the property owner.

238. When the tenant is over 62 or disabled, the owner must "offer[] to provide and if requested, provide[] an equivalent or superior housing accommodation at the same or lower stabilized rent in a closely proximate area" in order to regain his property for his own use. N.Y. UNCONSOL. LAW § 26-511(9)(b) (McKinney). Such an obligation effectively turns the owner into tenant—obligated to search out the next unit, and constrained even in the options he might consider.

239. The 2019 Amendments transferred even more rights of ownership from the property owners to the tenants. Specifically, the Amendments vest tenants living in a building for 15 years or more with tenure rights, such that their claim to living in that unit thereafter takes precedence over the owner's own right to take possession of the unit for his or her own personal use. *See* Chapter 36, Part I, § 2 (excluding from owner's right to recover possession those dwelling units where a tenant "has been a tenant in a dwelling unit in that building for fifteen years or more.").

240. Granting such tenure rights to the elderly, the infirm, and the long-term tenant does not even purport to address price gouging or some other purported market distortion, but confirms that the purposes of the RSL are to transfer the rights of property ownership from those the legislature disfavors—

property owners—to those class of individuals the legislature favors, as well as to use the property of a small group of owners to provide a public assistance benefit, which should otherwise be funded by the public.

241. **Obligation to Show Immediate and Compelling Necessity.** Even the ability to recover possession of that one dwelling unit has been substantially limited by the 2019 Amendments. It is no longer sufficient to simply show that the owner of the property or his immediate family seeks to occupy the property for his or her own personal use as his or her primary residence. Under the recent amendments, the owner must demonstrate some "immediate and compelling necessity" just to justify the ability to possess and use his or her own property.

242. Decisions in the analogous rent control context highlight how great a burden the "immediate and compelling necessity" test imposes on property owners. For example, in *Boland v. Beebe*, 62 N.Y.S.2d 8, 12 (Syracuse Municipal Court, 1946), the court found that "the landlord and her family are seriously overcrowded," with several children and their spouses living in one flat, and found that access to the rented unit was a "necessity," but deemed it not to be an immediate compelling necessity.

243. Similarly, in *Cupo v. McGoldrick*, 278 A.D. 108 (N.Y. App. Div. 1951), a property owner with an enlarged heart attempted to move from the fourth floor of her walk-up to the ground floor. Despite sworn testimony from the property owner's doctor that the fourth-floor apartment would "become increasingly dangerous to her health," the court affirmed a finding

of no "immediate and compelling" necessity after the tenant claimed that he once saw the property owner "climbing the stairs unnecessarily." *Id.* at 109–10.

244. Thus, under the 2019 Amendments, not only would Plaintiff Nugent-Miller have no ability to obtain for her own use a second (or alternative) unit in her own building, if she had not already lived in that building, she would likely be unable to even meet the showing of "immediate and compelling" necessity to obtain the use of a single unit in her own building.

245. **Limited Rights Upon Possession.** Even in the rare circumstance in which the owner is able to demonstrate an immediate and compelling necessity, the unit is not occupied by a tenured, elderly or infirm tenant, and the owner regains possession over one of his units, the owner is still limited in his rights to use that property. The owner is forbidden for three years from "rent[ing], leas[ing], subleas[ing] or assign[ing]" the unit "to any [other] person" except for "the tenant in occupancy at the time of recovery under the same terms as the original lease." N.Y. UNCONSOL. LAW § 26-511(9)(b) (McKinney). In other words, the owner cannot even sublease the property during that three-year period, a right that his tenants would enjoy if they occupied the property.

246. These multiple restrictions on an owner's ability to regain possession of units for the owner's personal use separately and together deny owners the right to occupy, possess and use their own property and effect an uncompensated physical taking of the property.

C. ***The RSL Denies Property Owners the Right to Freely Dispose of Their Property.***

247. The RSL also limits property owners' ability to freely dispose of their property. Property owners may not withdraw their buildings from the rental market to rent those buildings for non-residential purposes, nor can they simply withdraw their property from the rental market unless it presents a hazard or they seek to use the building for their own (non-rental) business. If a property owner wants to demolish its property, it must pay to relocate all its tenants. And under the 2019 Amendments, property owners now are very significantly constrained from converting rental buildings into cooperatives and condominiums. By dramatically limiting the ability of property owners to dispose of their own property, the RSL effects a physical taking of the property.

248. **Withdrawal from the Market.** One way to dispose of one's property might be to convert the property to other income-producing purposes, or even to exit the rental business entirely. The RSL drastically limits owners' ability to so dispose of their property.

249. The RSL includes a provision permitting the non-renewal of tenant leases in order to withdraw a building from the rental market. 9 NYCRR § 2524.5. But that provision so narrowly cabins the right of withdrawal as to deny that right almost entirely. For example, a building owner cannot withdraw a property from the market for purposes of non-housing rental (e.g., for commercial rental). 9 NYCRR § 2524.5 (withdrawal permitted only if the owner proves to the "satisfaction of the DHCR" that the owner "seeks in

good faith to withdraw any or all housing accommodations from both the housing and nonhousing rental market without any intent to rent or sell all or any part of the land or structure") (emphasis added).

250. The owner also cannot refuse to renew tenant leases in order to withdraw the property from the rental market for the purpose of allowing it to remain empty. Rather, the only time an owner can withdraw a property from the rental market (other than when the building is a safety hazard) is if the owner intends to use the property in connection with a business that he or she owns. 9 NYCRR § 2524.5 (owner must demonstrate "(i) that he or she requires all or part of the housing accommodations or the land for his or her own use in connection with a business which he or she owns and operates"). If the owner simply wants to retire from the business of apartment leasing and building maintenance, close his building to tenants, and hold the property in order to reap its appreciation in value, the owner may neither evict tenants nor refuse to renew their leases in order to do so.

251. Even the ability to withdraw a building that represents a safety hazard from the rental market is materially constrained. A property owner can only remove a building with substantial safety and health violations and hazards if the "cost of removing such violations would substantially equal or exceed the assessed valuation of the structure." 9 NYCRR § 2524.5. Thus, even if a building is a safety hazard, so long as the cost of repairs is less than the entire assessed value of the structure, the owner is still required to spend money to fix the property and cannot simply close the building down. 9 NYCRR § 2524.5.

Unlike other rent control regulations, the RSL precludes owners from simply evicting their tenants and changing the use of his or her land. Rather, owners are compelled to permit the continued physical invasion of their property by tenants. Indeed, this "preservation" of rent stabilized units is the stated goal of the 2019 Amendments.

252. **Demolition.** Under the RSL, property owners are deprived even of their right to freely demolish their own buildings. N.Y. UNCONSOL. LAW § 26-511(c)(9)(a) (McKinney); 9 NYCRR § 2524.5. As an initial matter, owners wishing to demolish must obtain necessary permits and demonstrate proof of financial ability to complete the undertaking—actions that can consume years.

253. Even if the owner can obtain the necessary permits, before the property owner can demolish his own property, he must still pay to relocate his tenants. The owner must pay a $5,000 stipend to the tenant and pay to relocate the tenant to comparable housing at the same or lower regulated rent in the same area (or pay the tenant a stipend for six years to make up the difference), provide the tenant with housing at the new building (with payment for interim housing, a stipend, and moving expenses), or provide the tenant with a set demolition stipend for six years. 9 NYCRR § 2524.5.

254. Specifically, pursuant to 9 NYCRR § 2524.5, owners who get approval for their demolition project must:

(1) relocate the tenant to a suitable housing accommodation . . . at the same or lower legal

regulated rent in a closely proximate area, or in a new residential building if constructed on the site, in which case suitable interim housing shall be provided at no additional cost to the tenant; plus in addition to reasonable moving expenses, payment of a $5,000 stipend, provided the tenant vacates on or before the vacate date required by the final order;

(2) where an owner provides relocation of the tenant to a suitable housing accommodation at a rent in excess of that for the subject housing accommodation, in addition to the tenant's reasonable moving expenses, the owner may be required to pay the tenant a stipend equal to the difference in rent, at the commencement of the occupancy by the tenant of the new housing accommodation, between the subject housing accommodation and the housing accommodation to which the tenant is relocated, multiplied by 72 months, provided the tenant vacates on or before the vacate date required by the final order; or

(3) pay the tenant a stipend which shall be the difference between the tenant's current rent and an amount calculated using the demolition stipend chart, at a set sum per room per month multiplied by the actual number of rooms in the tenant's current housing accommodation, but no less than three rooms. This difference is to be multiplied by 72 months.

255. Finding a comparable unit at the same or lower rental rates in a closely proximate area is often a difficult task. "Suitable housing accommodations" must be of similar size and features, and provide the same required services and equipment. Plus the unit must be "freshly painted before the tenant takes occupancy." And the tenant is given multiple

opportunities to object to the replacement unit, each time requiring a DHCR inspection and determination.

256. Thus, under the RSL, even the right to dispose of a property through demolition is substantially constrained. The ability to demolish one's own building only after paying for all the tenants to relocate and enjoy below-market rents for six years, is no relief from a forced physical taking. Instead, it is simply a taking in another form, ensuring that property owners will continue to subsidize for years to come the lifestyles of tenants lucky enough to find a rent-stabilized unit.

257. **Cooperative and Condominium Conversions.** As noted above, the 2019 Amendments have also effectively removed another option for owners to dispose of their property—the ability to convert buildings into cooperatives or condos. The 2019 Amendments eliminate "eviction plans" and require written purchase agreements from 51% of all existing tenants under "non-eviction" plans before a building can be converted to a cooperative or condominium. Chapter 36 of the Laws of 2019, Part N, § 1.

258. Prior to the 2019 Amendments, owners had been able to convert units to condos upon obtaining written purchase agreements from at least 15% of tenants (or bona fide purchasers who represent that they or one of their family members intend to occupy the unit). Rent stabilized tenants in the building would retain their regulated rights and were not required to purchase their unit. The 2019 Amendments now require purchase agreements from 51% of tenants, and bona fide purchasers no longer count toward that total.

259. Given that rent-stabilized tenants enjoy below-market rents with virtually no rent increases, there is little incentive for those tenants to purchase their units (assuming they had the resources to do so) and to take on the actual costs of ownership (such as maintenance costs) that are currently funded by owners. Thus, the 2019 Amendments effectively foreclose condo-conversion as a means for property owners to dispose of their properties. As recently reported, in response to this change in the law, the Chairman of the Council of New York Cooperatives and Condominiums concluded that "Condo conversions are effectively dead."

260. Thus, under the RSL—particularly after the 2019 Amendments—the goal of "preserving" rent stabilized units is achieved by denying the property owner any means of disposing of his property that would eliminate stabilized units. In any sale of the property, the buyer would be subject to the same RSL obligations (and thus the sale would result in the substantial diminution of economic value described below). The building may not be leased out for non-housing purposes nor may it be withdrawn from the market unless it is worth less than the cost of fixing it or unless the owner has a side-business that requires multiple stories of office space. Nor can the owner convert the building to cooperatives or condominiums. In fact, the only means for the owner to recover possession his own property is to demolish the rent stabilized building (which itself is very time consuming and costs millions). That the owner must demolish his own building to recover his property demonstrates how complete a physical taking is effected by the RSL.

D. *The 2019 Amendments Have Eliminated the Few Remaining Options for a Property Owner to Remove a Property from Rent Stabilization.*

261. As previously explained, the few instances in which a unit in a property might become decontrolled—Luxury Decontrol and High Income Decontrol—were eliminated by the 2019 Amendments. But, even prior to their elimination, those limited options for obtaining decontrol of a unit provided little meaningful relief to property owners from the RSL's physical takings.

262. **High Income Decontrol.** Prior to its elimination in 2019, High Income Decontrol granted property owners the right to petition the DHCR to remove a property from rent stabilization when two conditions were met—the controlled rent met the Luxury Decontrol maximum ($2,744.76) and the tenant had an income of over $200,000 for the last two years. *See* N.Y. UNCONSOL. LAW §§ 26-504.1, 26-504.3 (McKinney).

263. As reported, this generous standard legally permitted Faye Dunaway to rent a rent-stabilized apartment on the Upper East Side for $1,048.72 a month. So long as the unit was under the maximum rent ceiling for rent-stabilized units, her income made no difference in whether or not she could live in a below-market unit.

264. Given the need to reach the maximum statutory rent and have a tenant with income exceeding the statutory maximum, applications for high income decontrol were relatively rare. Compounding

those issues was the slow decision-making of Division of Housing and Community Renewal ("DHCR") (the unit assigned to act on luxury decontrol petitions). It has been reported that during the three-year period from January 1, 2011 through December 31, 2013, 8,185 luxury decontrol petitions were filed with the DHCR, but only 291 were approved.

265. The benefit of High-Income Decontrol was significantly diminished under the Rent Act of 2015, because the Luxury Decontrol threshold that triggers deregulation was made to increase by the same percentage each year as the RGB determines rents may increase, thereby keeping the threshold constantly beyond reach. In 2016, only 146 units were de-regulated based on High Income Decontrol.

266. **Luxury Decontrol.** Luxury Decontrol had similarly become a narrow exit door for rent stabilized units even prior to the 2019 Amendments. In 2016, only 4,690 units were deregulated because the unit's rent reached the then-ceiling of $2,700 and the apartment became vacant. That represents roughly .005% of the approximately one million rent-stabilized units in the City of New York.

267. In short, the RSL effects a physical taking of the properties it regulates. It first deprives the property owner of the fundamental right to exclude, by requiring owners to renew leases of existing tenants, their successor tenants and sub-lessees. It deprives the owner of the right to take possession for the owner's personal use of more than a single unit, and even then under circumstances so limited as to not be meaningful. It deprives the owner of the right to dispose of the property through withdrawal from the

market, or conversion into condos, and significantly impairs an owner's ability to demolish his own property. Finally, the law has now removed the few options under which a property owner might have ever removed units from the regulatory system.

268. It is no accident that the law has evolved—with the capstone of the 2019 Amendments—to deprive owners of all the rights of ownership, and to eliminate property owner's right to use their property for anything other than the compelled use of stabilized rental. Obtaining control over the rent stabilized units has been the declared goal of Defendants for some time.

269. In 2017, Mayor de Blasio stated that the hardest impediment to achieving his goals was "the way the legal system is structured to favor private property," which interferes with the "socialistic impulse" that he hears in the communities that would "like things to be planned in accordance to their needs." He acknowledged that he, too, would prefer that system, noting that "if I had my druthers, the city government would determine every single plot of land, how development would proceed. And there would be very stringent requirements around income levels and rents. That's a world I'd love to see . . ." He cited "[t]he rent freeze we did [that] reached over 2 million people," and got "affordable housing under our plan for 200,000 apartments."

270. As Senator Myrie stated during legislative consideration of the 2019 Amendments, the amendments are "the strongest package of tenant protections New York has seen in almost a century. For decades, our communities have lost hundreds of

thousands of rent regulated units, but with this legislation, we are putting power back in the hands of tenants."

271. Senator Addabbo made clear that "ensuring an adequate supply of affordable housing for individuals and families has always been a priority for me." NYC Council Speaker Corey Johnson remarked that "[t]hese transformative rent protections will help us tackle the homelessness crisis we are facing as a city…"

272. City and State regulators have taken for granted their ability to take the private property rights of New York City landowners to meet the perceived housing needs (and political demands) of their constituency, without the obligation to compensate the owners for any of those benefits. Separately, and combined, these very substantial restrictions on property owners' rights effect an uncompensated physical taking that is a per se violation of the Takings Clause.

V. THE RSL EFFECTS UNCOMPENSATED REGULATORY TAKINGS OF PRIVATE PROPERTY

273. The RSL effects not only a per se unlawful physical taking by depriving owners of their rights to use, possess, dispose of, and exclude others from their property; it also constitutes a regulatory taking of rental properties subject to the law. In an impermissible attempt to fund "a local public assistance benefit" by imposing very substantial burdens on a subset of property owners, these property owners have been subjected to the range of restrictions just discussed and, in addition, required to charge and

accept rental rates for RSL units that are on average 40% lower than market rate rents, and in some units 80% lower.

274. The RSL's regulatory burdens have dramatically reduced the market value of regulated properties, in some cases by over 50%, as reflected in the city's own data. Even the City's own tax assessment guidelines concede that unregulated properties are typically worth 20% to 40% more than regulated properties, and in Manhattan regulated properties on average are worth less than half as much as unregulated properties.

275. And that data does not take account of the effects of the 2019 Amendments, which do not only impose the regulatory restrictions just discussed, but also impose new restrictions on rent levels that will further reduce the value of properties subject to the RSL.

276. Despite permissible rental increases over the last five-year period of only 0–1.5% on one year leases, the 2019 Amendments eliminated rental increases designed to help owners modestly alleviate the disparity with market rates, including:

(a) "statutory vacancy increases," which allowed an owner to increase rent up to 20% upon the vacancy of the apartment. *See,* Chapter 36 of the Laws of 2019, Part B, §§ 1-7.

(b) "longevity increases," which permitted an owner to further increase rents upon the vacancy of a long-term tenant who had resided in the unit for at least eight years. *See* Chapter 36 of the Laws of 2019, Part B, §§ 1-7.

277. The 2019 Amendments also dramatically limited owners' ability to increase rents to compensate for major capital improvements and individual apartment improvements. The rent increases now permitted under the law are in many instances insufficient to recover even the costs of the improvements.

278. For units offered at rents below the legally permitted levels (termed "Preferential Rents"), owners had been permitted to increase rents to the legal limits upon lease renewal or vacancy. The 2019 Amendments now prohibit rent increases at lease renewal in an amount greater than those set by the RGB.

279. Combined with the physical occupation of their property imposed on property owners, and given the lack of both any reciprocity of advantage for property owners and any justification in preventing a noxious use of the property, the adverse economic impact on building values and rent levels demonstrates that the RSL effects in a regulatory taking.

A. ***The Legal Framework for Regulatory Takings***

280. The "ad hoc, factual inquiries" necessary to determine if government regulation amounts to a taking of private property that requires compensation are guided by "several factors that have particular significance" under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and other decisions.

281. Factors relevant to the regulatory takings inquiry include:

(a) "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with investment-backed expectations" (*Penn Central*, 438 U.S. at 124). Judicial decisions assess the economic impact of regulation on the property owner by looking to the extent in the diminution of value caused by the regulation, including "the change in the fair market value of the subject property" (*Arctic King Fisheries, Inc. v. United States*, 59 Fed. Cl. 360, 374 (Fed. Cl. 2004)); "the value that has been taken" compared "with the value that remains" (*Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)); whether the owner can obtain a "'reasonable return' on its investment" (*Penn Central*, 438 U.S. at 136); "the owner's opportunity to recoup its investment or better" (*Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (Fed.Cir.1986)); the decrease in the property's profitability (*Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1188 (Fed. Cir. 2004)); or some combination of these analyses.

(b) Whether the regulation creates an "'average reciprocity of advantage,'" such that burdens and reciprocal benefits are shared among those affected by the regulation. *Pennsylvania Coal*, 260 U.S. at 415. This factor reflects the core principle of the Takings Clause that the Fifth Amendment bars the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *See Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting) (regulations may reduce individual property values without effecting a taking provided "the burden is shared

relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the [regulation] will be benefitted by another"); *Pennell v. City of San Jose*, 485 U.S. 1, 22 (Scalia & O'Connor, JJ, concurring in part and dissenting in part) (San Jose's rent regulation ordinance created an "'off budget'" "welfare program privately funded" by landlords and was therefore a taking); *Cienega Gardens v. United States*, 331 F.3d 1319, 1338 (Fed. Cir. 2003) (finding a taking where "Congress acted for a public purpose (to benefit a certain group of people in need of low-cost housing)" but "the expense was placed disproportionately on a few private property owners"); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1132 (en banc) (Bea, J., dissenting) (ordinance worked a regulatory taking where it imposed "a high burden on a few private property owners instead of apportioning the burden more broadly among the tax base").

(c) "[T]he character of the government action," including that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good" (*Penn Central*, 438 U.S. at 124) (internal citation omitted))—a test that is satisfied when government intrudes substantially on a property owner's rights to use, possess, dispose, and exclude, *e.g.*, *Kaiser Aetna*, *supra*.

(d) Whether the regulation prohibits a noxious use of the property, such as a nuisance (*Penn Central*, 438 U.S. at 125–127; *id.* at 144–146 (Rehnquist,

J., dissenting); *Keystone Bituminous Coal*, 480 U.S. at 492.

282. It is no barrier to a regulatory takings claim (or, indeed, to any takings claim) that some owners of New York City rental properties purchased the property or leased units to tenants after the RSL went into effect. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 626–27 (2001) (rejecting proposition that a landowner who "purchased or took title with notice of the limitation" cannot allege that the limitation is a taking, because improper enactments "do not become less so through passage of time," otherwise government "would be allowed, in effect, to put an expiration date on the Takings Clause"); *id.* at 637 (Scalia, J., dissenting) ("the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial to constitute a taking"); *see also Horne v. Dep't of Ag.*, 135 S.Ct. 2419, 2430 (2015) (rejecting argument that plaintiff forfeited his physical takings claim by participating in challenged government program).

B. ***Even Before the 2019 Amendments, The RSL Resulted in a Substantial Diminution in Value of Regulated Properties and Deprived Owners of a Reasonable Market Return on Investment***

283. By requiring rents to remain at below market averages for an indefinite period, and imposing its other regulatory restrictions, the RSL significantly reduced the value of regulated properties and deprived building owners of a reasonable market

return on their investment, even prior to the 2019 Amendments.

284. **Reduced Rents in Rent Stabilized Units.** Given that the goal of rent stabilization is to reduce the rents paid by tenants (at the expense of property owners), it is not surprising that rents in rent stabilized units are significantly below the rents for non-regulated units. The Wall Street Journal recently reported that median regulated rents in Manhattan were 53% below the median market rates in the Borough. The New York Department of Finance estimates that in Manhattan, the income from non-regulated units can be as much as 60-90% higher than regulated units for units built before 1973.

285. One member of plaintiff CHIP reports that for certain apartment units, the rental rates he is permitted to charge his rent stabilized tenants are 70-80% lower than the rates he charges for comparable market-rate apartments in the same building.

286. According to multiple estimates, the median rent for rent stabilized properties across New York is approximately 25% less than the rent charged for non regulated units.

287. Over the past six years, the disparity between stabilized rental rates and market rental rates have only increased because the RGB has restricted stabilized units to de minimis annual rental increases of 0% to 1.5%. This disparity will only continue to grow because the legislature has removed all options for increasing legal rents other than the RGB-authorized increases.

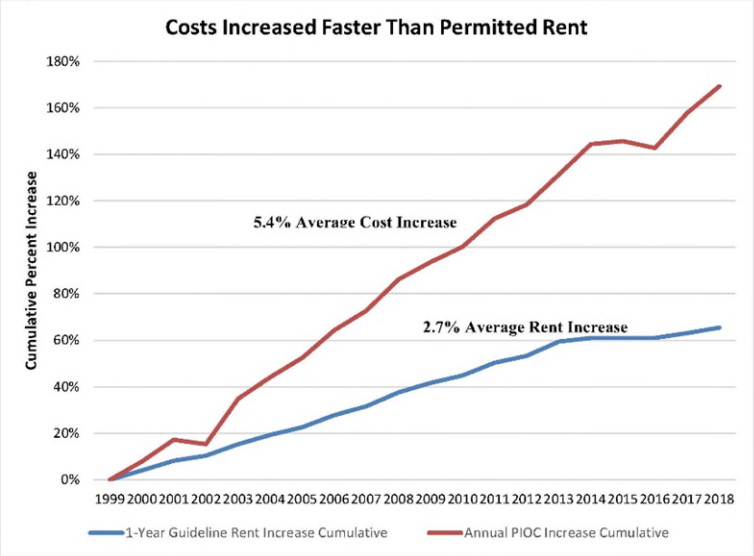
288. According to the 2017 HVS survey, for the period from 2014 to 2017, the median monthly contract rent for rent stabilized units averaged an annual increase of 0.85% (for a total increase of 2.6% over that three-year period), while rents for market-rate units increased 3.22% (for a total of 10% over that three-year period).

289. The RGB rent increases have not even kept pace with the RGB's own estimate of owners' operating expenses.

290. The RGB separately estimates the increase of owners' costs through its Price Index of Operating Costs (PIOC). The PIOC consists of seven cost components, including taxes, labor costs, fuel, utilities, maintenance, administrative costs and insurance costs. The RGB has changed the components used over time to reflect changes in owner expenditure patterns.

291. While the RGB estimates that owner costs have increased 5.4% on average over the last 20 years (thus cumulatively increasing by 169% during that period), the RGB's approved rent guideline increases have increased at only half that rate—2.7% per year over that period, resulting in a cumulative increase of only 66%. That disparity between price and cost increases is reflected on Chart 1.

CHART 1: RGB-Permitted Rent Cumulatively Increased at Half the Rate of Owners' Costs



292. Using that PIOC data, the RGB also tracks what it terms "the commensurate rent adjustment," which it describes as "a single measure to determine how much rents would have to change for net operating income (NOI) in rent stabilized buildings to remain constant." It also creates an index based on that commensurate adjustment that is adjusted for inflation. That inflation-adjusted index shows that rents should have increased on average 5.6% per year from 1999 through 2018 in order for owner net operating income to remain constant. Instead, RGB has approved rent increases of only 2.7% on average during that period. Thus, RGB's own estimates confirm that owners' net operating income is being reduced each year. In fact, particularly for units with long-term tenants, the cumulative impact of the RGB extremely low

increases could eliminate the owner's net operating income entirely.

293. The RGB's recent rent freezes, and its approval of rent increases that are far below owners' costs, result in a consistent subsidy from owners to tenants. Mayor De Blasio has publicly stated that he instructed the RGB to take that approach. He has been reported as explaining that the two-year rent freeze, unprecedented in four decades of City rent regulation, "happened under this administration because I instructed the Rent Guidelines Board—I name the members—and I instructed them not to follow the biases of the past . . ."

294. By requiring property owners to forego 25% to 80% of the market-rate rental income, the RSL forces property owners to directly subsidize New York's "public assistance program."

295. **Reduced Value of Properties.** Not surprisingly, the reduced rental income, combined with the forced physical occupation and deprivation of the ability to use one's own building, results in a dramatic reduction in the value of rent stabilized buildings.

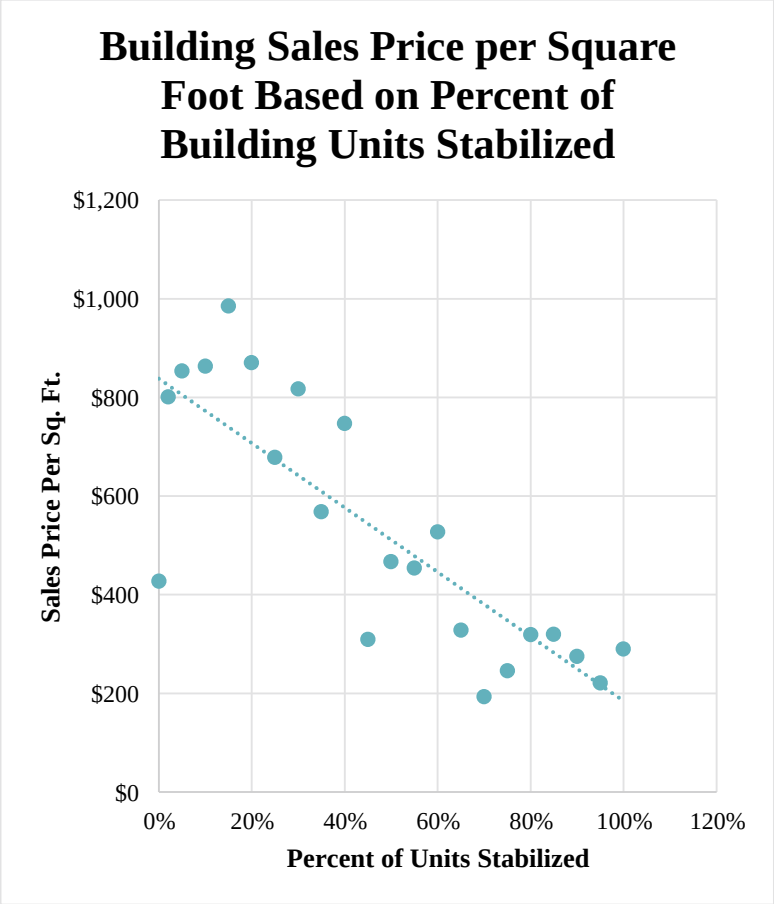
296. Based on an analysis of data originating from the New York Department of Finance, the value of buildings with predominantly non-stabilized units is approximately double, or more, the value of a buildings with predominantly rent stabilized unit.

297. For example, using market value data for properties that sold in 2016 shows that properties with 25% or less rent stabilized units sold for twice the square foot price of buildings with 75% or more

rent stabilized units. Put differently, properties with predominantly rent stabilized units were worth half as much as properties with predominantly non-regulated units.

298. In fact, the data demonstrates a linear relationship in the per-square foot value of a building based on the percent of the building units that are rent stabilized, as reflected in Chart 2 below. In other words, the sales price per square foot of a building reduces in direct relationship to the amount of square feet that are regulated by the RSL. As Chart 2 reflects, at the extremes, buildings where rent stabilized units account for almost 100% of the units can expect a price per square foot ($200-300/square foot) of two-thirds less than the price per square foot of buildings where rent stabilized units account for almost 0-20% of the units ($800-900/square foot).

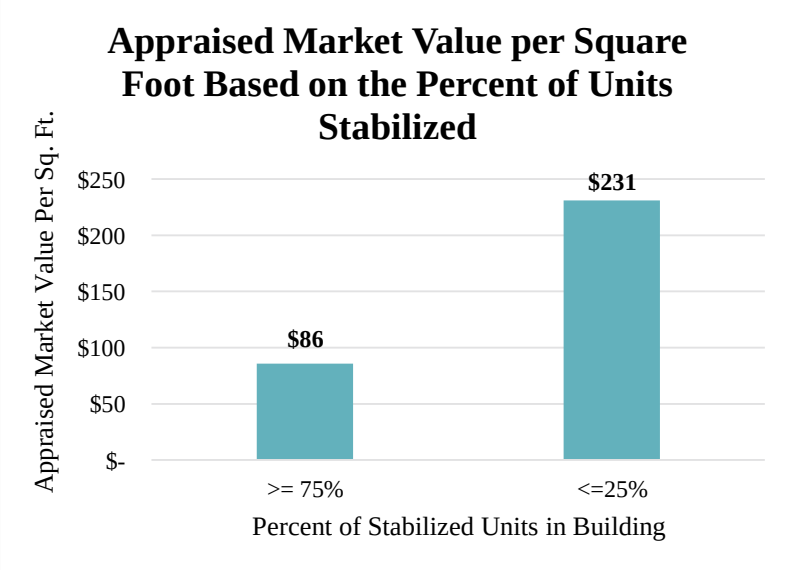
CHART 2: Sales Price per Square Foot Depending on Percent of Building Stabilized (2016 Sales Data)



299. The reduced value of the regulated units is further confirmed by the New York City's Department of Finance assessed values of properties. For example, in 2019, the market value of a building with 25% or fewer regulated units had a per square foot

market value ($233/sq. ft.) of more than double the value of buildings in which 75% or more of the units were regulated ($97/sq. ft.). When properties that are eligible for a full tax exemption are removed from the database, the disparity becomes even greater. Then, properties with 25% or fewer stabilized units have a value assessed by the City that is more than 2.5 times greater than the buildings with 75% or more of the units regulated, as reflected on Chart 3.

Chart 3: Appraised Market Value Per Square Foot (Exempt Properties Removed)

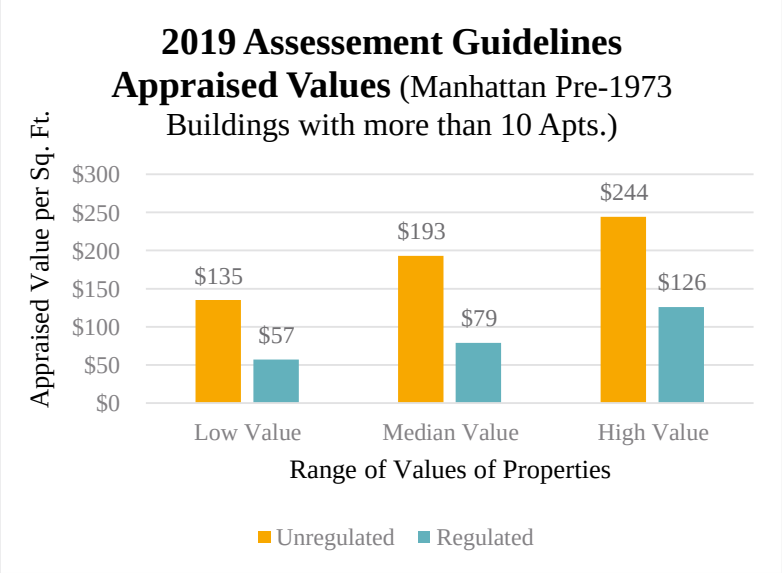


300. The New York City's Department of Finance's 2019 "Assessment Guidelines for Properties Values Based on the Income Approach" is itself an admission by the City that rent stabilized units have a lower value than comparable unregulated units. Those guidelines include a range of values per square

foot for various properties including both regulated and unregulated residential properties. Consistently, those valuations confirm that regulated properties have a significantly lower value than non-regulated properties.

301. For example, for rental properties built post-1973 in Manhattan, the Assessment Guidelines concede that unregulated properties have a value that is 11% to 45% greater than their regulated counterparts. For rental properties in Manhattan built pre-1973, the guidelines admit that the value of regulated properties are half that of their unregulated property peers, as reflected in Chart 4. In other words, by designating a property in Manhattan for rent stabilization, Defendants take at least half the value of that property from its owner.

Chart 4: Assessment Guidelines for Regulated and Unregulated Properties



302. Thus, even prior to the 2019 Amendments, the RSL eliminates half to two-thirds of the value of buildings with a significant percentage of rent stabilized units.

303. **Interference with Reasonable Investment-Backed Expectations.** Although nominally established as a temporary measure to address an emergency caused by World War II, the New York City Council has (with little basis) determined there to be an emergency every three years for 50 years. Over the past decade, even prior to the 2019 Amendments, modifications made to the law have chipped away at owners' ability to increase rents to pay for needed improvements and have limited owners' ability to remove units from the RSL system.

304. In the first instance, the perpetual renewal of a nominally temporary remedy itself interferes with the reasonable expectations of owners. Indeed, the ETPA declares that "the ultimate objective of state policy" is "the transition from regulation to a normal market of free bargaining between landlord and tenant." N.Y. UNCONSOL. LAW § 8622 (McKinney). Having defined the RSL to be a temporary measure, Defendants should be estopped from challenging the reasonableness of owners in relying upon those very representations.

305. Modifications to the RSL in the past ten years have further interfered with the reasonable investment-backed expectations of property owners. For example, the Rent Act of 2011 limited the frequency of vacancy increases to one per calendar year, reduced the amount that could be recovered for IAIs from 1/40th of the cost per month (2.5%) to 1/60th of the cost (1.6%), raised the threshold for high-rent vacancy decontrol to $2,500 (from $2000), and raised the income level for high-income deregulation to $200,000 (from $175,000). The Rent Act of 2015 further increased the high-rent vacancy deregulation threshold to $2,700 and indexed that level to the one-year guidelines passed by the RGB (thereby keeping the threshold nearly perpetually out of reach), and lengthened the MCI amortization period from 7 years, to 8 years and 9 years respectively for buildings with 35 units or less, and those with more than 35 units.

306. By limiting permissible rental rate increases to very small amounts each year for the past six years, the Defendants have further prevented owners from achieving the growth in rents that would

be reasonably expected by any investor. Over the past six years, the maximum rent increase for one-year leases has varied between 0% and 1.5% per year, as reflected below.

Year	Maximum Increase for One-Year Lease	Maximum Increase for Two-Year Lease
2019	1.5%	2.5%
2018	1.5%	2.5%
2017	1.25%	2%
2016	0%	2%
2015	0%	2%
2014	1%	2.75%

307. Thus, even prior to the 2019 Amendments, dramatic limitations on permissible rental increases and the modifications to the RSL have taken, piece-by-piece, various economic rights of property owners, thereby interfering with owners' reasonable investment-backed expectations.

C. ***The 2019 Amendments Expanded the Regulatory Taking by Eliminating Rent Increases Beyond the RGB-Permitted Rates, Effectively Preventing the Recovery of Investments for Improvements, and Essentially Eliminating Rent Increases for Units Offering Preferential Rents***

308. The 2019 Amendments dramatically exacerbate the regulatory takings effected by the RSL. Those Amendments eliminate any avenue for

increasing rents beyond those levels set by the RGB, through the elimination of the Statutory Vacancy Increase and the Longevity Increase, and through the limitation on rent increases in units with preferential rents. The Amendments go further and preclude the RGB from making any adjustments for vacancy leases beyond those permitted by the RSL code. They further reduce the market value of stabilized units by removing any potential for decontrol through Luxury Decontrol or High-Income Decontrol, and by effectively eliminating the ability to convert buildings into cooperative or condominium owned buildings. In addition, by dramatically reducing (if not eliminating) the ability to recover for IAI and MCI investments, the 2019 Amendments further reduce the value of stabilized units and interfere with owner's investment-backed expectations.

309. **Vacancy and Longevity Increases Eliminated.** By eliminating statutory vacancy increases and longevity increases, the 2019 Amendments eliminated two methods of obtaining any rental increases beyond the annual increases permitted by the RGB. Vacancy increases have been a long-standing component of rent stabilization, permitted by the RGB even before they were required by statute. Those increases served to partially offset the effect of below-market rental rates and below-cost rent increase levels established by the RGB, while minimizing the impact to existing tenants.

310. Further, given the lengthened duration of tenants under the RSL (as explained above), the longevity rent increase was important to partially offset the compounded effect of below-market rate rent

increases over a period of years. Elimination of the vacancy and longevity increases cannot be justified as a tenant protection measure because the unit is vacant. Rather, the elimination of those increases serves to further subsidize tenants (regardless of their financial need) at the expense of owners (despite the historic recognition that such vacancy and longevity increases were needed to help defray the impact of below-market—and below-cost—rent increases).

311. Those rate increases also served to partially compensate owners for the costs associated with vacancy turnovers, including the lost rent during the vacancy period, the cost of apartment painting and other costs (which are not recoverable under IAI increases), plus the costs of brokerage and other costs associated with marketing the unit. By eliminating the availability of such rate increases, the 2019 Amendments deny owners any meaningful ability to partially offset the sub-market-rate rents and to recover for those costs of vacancies.

312. **Preferential Rent Increase Elimination.** In certain circumstances, owners may choose not to charge tenants the maximum amount permitted under the rent regulations (termed "Preferential Rents"). Under the law prior to the 2019 Amendments, owners retained the right to increase preferential rents by more than the RGB-adopted rate, up to the legally permissible rent upon the renewal or vacancy of any tenant lease. *See* Admin. Code of the City of New York § 26-511(c)(14). Preferential rents are estimated to account for almost a third of all rent stabilized units.

313. The 2019 Amendments eliminated the right of owners to increase such rents beyond the inadequate RGB-rate upon renewal of the lease. Rather, even for leases where the lease amount is below the legal regulated rent, the amount that may be charged upon renewal of the lease cannot exceed the rent charged prior to renewal, adjusted by the most recent applicable guidelines increase. *See* Chapter 36 of the Laws of 2019, Part E.

314. That the 2019 Amendments locks in place rents that are below the regulated rental rate demonstrates that the intent of the Amendments is not to preclude price gouging. The preferential rents are below the regulated rates, and therefore Defendants cannot assert that those rents are excessive. Rather, by requiring property owners with preferential rents to limit rental increases to the modest 0–1.5% annual rate, Defendants make clear that the purpose of the RSL is simply to subsidize tenants at the expense of owners.

315. Eliminating owners' ability to increase preferential rents not only deprives owners of the ability to keep up with increases in operating expenses, but also further reduces the value of buildings containing such units.

316. **Elimination of Luxury Decontrol and High-Income Decontrol.** By eliminating Luxury Decontrol and High-Income Decontrol, the 2019 Amendments further reduced the value of buildings with rent stabilized units. Even where the rent from a unit may be limited under rent stabilization, if the units were near the decontrol thresholds, the value that purchasers would assign to a building was based

on the expectation of returning the units to market-rate. With the elimination of Luxury Decontrol and High-Income Decontrol, any such increased valuation has been eliminated.

317. **Limit on Rent Increases from IAIs and MCIs.** Even before the adoption of the 2019 Amendments, owners who were making individual apartment improvements (IAIs) were limited in the rent increases they could charge to pay for those improvements. For buildings with 35 or fewer housing accommodations, the owner could only increase monthly rent by one-fortieth (or 2.5%) of the cost of the improvement, and for buildings with more than 35 units, the owner could only increase rent by one-sixtieth (or 1.6%) of the improvement cost. *See* Admin. Code of the City of New York § 26-511(c)(13). Owners who were making major capital improvements (MCIs) to their building were limited to increasing rates at an amortization period of 8 and 9 years respectively for buildings with 35 or fewer units and for buildings with more than 35 units. *See* Admin. Code of the City of New York § 26-511(c)(6).

318. Those limits on recovery for MCIs and IAIs, which did not permit recovery for any of the financing costs incurred to fund the improvements, already significantly limited the amount that property owners could recover for improvements made.

319. ***IAIs.*** The 2019 Amendments further restrict owners from recovering the costs of, let alone a reasonable return on, most IAIs. The law limits IAIs to the aggregate cost of $15,000 that can be spent on no more than three IAIs over a 15 year period. The law makes no exception to those amounts based on the

size of the apartment, the condition of the apartment, or the length of the tenant's occupancy.

320. To recover those expenses, owners may only make a temporary increase in the regulated rent in the amount of one-one hundred sixty-eighth (0.6%) of the cost of the improvement (excluding finance charges) for buildings with 35 or fewer units, and one-one hundred eightieth (0.55%) for buildings with more than 35 units. Ch. 36 of the Laws of 2019, Park K, § 2. This results in spreading the improvement cost over 14 to 15 years. Any rent increase resulting from such IAI must be removed from the rent within 30 years. *Id.*

321. Where a unit has been leased to the same tenant for a number of years (as often occurs with stabilized units), substantial work is often required before the unit can be returned to the market. Improvements covered by IAIs may include replacement of lead-paint covered windows, walls, ceilings, doors, door frames and sills. IAIs may also be needed to replace flooring, wiring and plumbing. Units may require kitchen renovations, bathroom revocations or new appliances. In such cases, the cost of IAIs can significantly exceed $15,000, potentially costing $50,000 to $70,000 or more.

322. With a $15,000 cap on any rent increase from IAIs, owners would be unable to fully recover the costs of those more expensive IAIs. Thus, owners must choose between limiting the IAI to only $15,000—thereby suffering a slow deterioration of the value of the unit—or investing the full cost of the IAI, thereby suffering a more immediate loss (and a literal taking

of the owner's property in the form of expenditures that can never be recovered).

323. In fact, based on the permitted rental rate increases under the 2019 Amendments, an owner would likely never fully recover any IAI investment. The net present value of the after tax rent increases will almost always be less than the net present value of the IAI investment. For example, if an owner of a building spent $15,000 replacing cabinets and appliances upon the vacancy of a tenant, the owner could increase its rent at most by $83/month ($15,000/180). Because the value of a $1 rent increase in 30 years is worth less than $1 currently, the cash flows from that rent increase would have to be adjusted to present value. The net present value of the return from the increased rent will typically be less than the amount the owner invested in making the repairs. Once the taxes associated with the additional rent revenue is considered, the investment will almost always result in a loss.

324. As noted previously with respect to Plaintiffs Mycak Associates LLC, Vermyck LLC, and M&G Mycak LLC, owners faced with such repair costs would likely choose to make no such repairs (resulting in gradual deterioration of the building) and potentially leave the unit empty. These Plaintiffs, which own several rent stabilized units occupied for decades by the same tenants, expect that the units will require costly repairs after the departure of the current tenants. Because the IAI limit will prevent them from ever recouping the money required to rehabilitate and re lease these stabilized units, they plan not to rehabilitate the units after the departure of the current

tenants. Instead, the owners will leave the units vacant—the only economically rational scenario in this circumstance.

325. If the owner made the IAI investment (in order to preserve the value of the owner's property), the RSL would result in the owner's compelled loss of money to subsidize the tenant's use of the property.

326. **MCIs.** For MCIs, the 2019 Amendments made a similar change. The Amendments extended the amortization period for reimbursement of major capital improvements to twelve years for buildings with 35 or fewer units and twelve and one-half years for buildings with more than 35 units. Chap. 36 of the Laws of 2019, Part K, §§ 4, 11. It also capped the period during which such increased rents could be charged to 30 years. And it precludes owners from increasing rents on any existing tenant by more than 2% in any year to recover the MCI, which is one-third of the 6% increase previously permitted.

327. As with IAI rental increases, the amended amortization schedule when combined with the 30-year period of collectability means that most owners are unlikely to generate positive returns—much less investment-backed expectations—in making such MCI investments. Indeed, for those units where the two-percent cap on rent increases is lower than the permissible rent increase under the amortization method, in most (if not all) cases it will not be possible for owners to fully recover their investment. Few, if any, property owners would expect that they would be unable to recover through rents the costs of all future improvements to their own property.

328. Following the 2019 Amendments, the impact of the regulatory takings has become far more severe along every relevant metric. Although rent rates were already 25% to 80% lower than market rates and increasing half as fast as operating expenses, the 2019 Amendments eliminate most avenues for rents to increase beyond that permitted by the RGB. Absent any meaningful ability to raise rents beyond the near-static levels permitted by the RGB, owners will face a steady decline of income production from their properties.

329. While the decreased rent revenues and other RSL obligations had already eliminated up to 50% or more from the value of buildings with a significant number of RSL units, the elimination of any options to decontrol units, and the steady reduction of income, will cut those values significantly further.

330. Some owners have already experienced that loss. One member of CHIP and RSA had nearly finalized a recapitalization of a portfolio of rent stabilized properties. Prior to the passage of the 2019 Amendments, that portfolio was valued in excess of $300 million. Shortly after the passage of the 2019 Amendments, the institution participating in the recapitalization informed the owner that it would have to re-price the transaction. The re-priced transaction reduced the value of the portfolio by about $50 million, or nearly 15 percent of the value of the buildings.

331. On information and belief, surveys of other owners of portfolios of stabilized units reflect that such owners are reducing the booked value of those assets by 20-30 percent.

D. ***The Hardship Exceptions in the RSL Do Not Alleviate any Takings***

332. The "hardship exception" purports to allow property owners to petition the Division of Housing and Community Renewal (DHCR) to charge a higher rent to tenants than that set by the Board. N.Y. UNCONSOL. LAW § 26-511 (McKinney). However, because the requirements for demonstrating a "hardship" are so onerous (and disconnected from true hardship), and because the DHCR typically takes years to adjudicate hardship applications, most property owners do not use the mechanism.

333. Data from 2011 through 2015 show that the highest number of property owners filing hardship applications in any given year was four (2011), and that no applications were filed in 2015. Yet, during that same period, the RGB reports that 5–6% of rent stabilized buildings were distressed (meaning that they reported operating and maintenance costs that exceeded their gross revenue). The existence of those distressed buildings confirm that the lack of hardship applications was not due to the lack of hardship suffered by property owners.

334. One former Director of the RSA confirmed the futility of the hardship exception process. During his career, he had submitted approximately two-dozen hardship applications. All of them were either denied, or never acted upon. Notably, the RSL does not set any timeline for resolution of hardship applications, allowing the DHCR to simply take no action on such applications. Further, limits on the expenses that would be considered under the hardship

application would undermine the claim, making proof of hardship practically implausible.

335. There are two statutory means of receiving a hardship exception, including (1) demonstrating an inability to obtain historic net income; or (2) demonstrating an inability to obtain income greater than the building operating expenses. As discussed below, each of these exceptions are either practically implausible, or by their very construction, provide inadequate compensation to the property owner.

336. **Historic Income Test.** An individual can receive a hardship exemption because "the level of fair rent increase is not sufficient to enable the owner to maintain approximately the same average annual net income (which shall be computed without regard to debt service, financing costs or management fees)" as in the past. The owner must either provide, for comparison (1) for buildings constructed before 1968, records demonstrating annual net income from 1968–1970; (2) for buildings constructed after 1968, records of annual net income from the first three years of operation; or (3) for buildings that have transferred title, records of annual net income for the first three years of operation under the new owner, provided that (a) title was acquired through a bona fide sale of the entire building, (b) the new owner cannot obtain records from 1968–1970 "despite diligent efforts to obtain same from predecessors in title," and (c) the new owner can provide six years of financial data under his or her "continuous and uninterrupted operation of the building." N.Y. UNCONSOL. LAW § 26-511(6) (McKinney).

337. This historic income hardship application is so impractical that it is rarely used by property owners. *First*, the historic income test evaluates the hardship data over a three-year period, meaning that the owner would have had to suffer the hardship for three years, but still own the building.

338. *Second*, the historic income test requires a comparison of income from a period that is typically fifty years earlier, and requires the submission of detailed records to confirm that income. For most owners, producing records of building income from fifty years earlier is alone too great a hurdle to permit the historic income test to be meaningful.

339. *Third*, the statute on its face does not permit applicants to include debt service or financing costs. Those building owners that might have experienced diminished income are also likely to have taken on additional debt or financing costs. By excluding those components from the analysis, the historic income test excludes a critical factor giving rise to the hardship.

340. *Fourth*, the statute does not require the cost comparison to be adjusted for inflation. Given the inflation for the period from 1968 to present, an owner could suffer a hardship and yet still reflect an income that exceeds the 1968 income. An owner generating annual net income of $2,000 in 2019 would be far worse off than an owner with income of $1,000 in 1968, but would still not be entitled to a hardship exemption. In fact, the same owner would need to earn annual income of well over $10,000 in 2019 dollars to be in the same position as 1968.

341. *Fifth*, the statute permits a hardship finding only if the operating income in absolute dollars is less than the income from base period (typically 1969). But there is no evaluation of whether the net operating income in the base year was profitable. Indeed, given that many properties in the base year were transitioning from rent control, the assumption that the base period was profitable is ill-founded.

342. In any event, most investors reasonably expect net operating income to increase year over year, not to stay flat or even decline in real terms (once inflation is included). By relying on an arbitrary benchmark (performance in 1969-1970), failing to account for inflation, and failing to account for financing costs, even if hardship applications were not administratively futile (which they are), the standard set in the RSL for such an award makes them incapable of remedying owners' deprivation of their reasonable investment backed expectations.

343. **Alternative Hardship Exception.** There is an alternative hardship exception under Section 26-511 (6-a) of the New York City Administrative Code. To receive a hardship exemption under this provision, owners are required to demonstrate that gross rent income does not exceed operating expenses by at least five percent of gross rent:

> [O]wners of buildings acquired by the same owner or a related entity owned by the same principals three years prior to the date of application may apply to the division for increases in excess of the level of applicable guideline increases established under this law based on a finding by the commissioner that

> such guideline increases are not sufficient to enable the owner to maintain an annual gross rent income for such building which exceeds the annual operating expenses of such building by a sum equal to at least five percent of such gross rent.

N.Y. UNCONSOL. LAW § 26-511(6-a) (McKinney).

344. This alternative hardship exception is just as illusory as the historic income test. *First*, the alternative hardship provision requires the owner to have held the property for three years (likely suffering a hardship during that entire period) before any application can be made.

345. *Second*, the law artificially limits what may be included as "operating expenses" in the hardship application. Only "the actual, reasonable, costs of fuel, labor, utilities, taxes, other than income or corporate franchise taxes, fees, permits, necessary contracted services and non-capital repairs, insurance, parts and supplies, management fees and other administrative costs and mortgage interest" may be counted toward annual operating expenses.

346. This formulation specifically excludes costly capital repairs. N.Y. UNCONSOL. LAW § 26-511 (McKinney). The exclusion of such capital repairs means that properties with a positive operating margin provide insufficient income to reimburse owners for improvements made to the building.

347. *Third*, a 5% margin on gross rents consistent with reasonable industry investment-backed expectations. Industry metrics indicate that property owners would typically expect to generate net

operating income substantially greater than 5%, as such income is necessary to finance capital improvements, pay taxes and return reasonable profits. After paying for the capital improvements and any income taxes, the 5% hardship margin leaves little, if any, return on the property owner's investment.

348. What little profit that might exist would be far below the expectations of investors in both real estate and other investments. Indeed, based on income and expense filings from other jurisdictions in New York, it is apparent that owners' average profit margin after interest and depreciation are significantly greater than even the 5% (which, as noted, is before payments of capital improvements).

349. In short, before an owner could meet the 5% margin required to show a hardship, the owner would have already suffered returns that are insufficient to fund capital improvements, that are well below the industry expected return on investment, and that would generate a profit (if any) that is significantly below industry expectations.

350. Further, owners are not able to file a hardship application with respect to a single apartment, or group of apartments, but may only file with respect to the whole building. Thus, while a number of apartments in a building may not even be covering their pro rata share of operating expenses, neither hardship exception would permit an increase to that unit or group of units.

E. ***The RSL Provides No Average Reciprocity of Advantage to Regulated Property Owners, But Is An Off-budget Welfare Program Funded Solely by Regulated Owners.***

351. The character of the RSL as a public assistance benefit funded solely by (some) building owners, and the absence of any reciprocity of advantage to those owners, further establishes that it is a regulatory taking.

352. As previously explained, the New York Court of Appeals has conclusively determined that "a tenant's rights under a rent-stabilized lease are a local public assistance benefit." *Santiago-Monteverde*, 24 N.Y.3d at 289. The Court explained that "[r]ent stabilization provides assistance to a specific segment of the population that could not afford to live in New York City without a rent regulatory scheme. And the regulatory framework provides benefits to a targeted group of tenants—it protects them from rent increases, requires owners to offer lease renewals and the right to continued occupancy, imposes strict eviction procedures, and grants succession rights for qualified family members." *Id.* at 290.

353. The Court observed that this benefit, while conferred by the government through regulation, is "not paid for by the government," but is instead "applied to private owners of real property." *Id.* at 291.

354. Accordingly, the RSL violates the basic Takings Clause principle that government may not force some property owners "alone to bear public burdens which, in all fairness and justice, should be borne

by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see*, *e.g.*, *Pennell*, 485 U.S. at 22 (Scalia & O'Connor, JJ, concurring in part and dissenting in part) (condemning a rent regulation ordinance as an "'off budget'" "welfare program privately funded" by landlords and thus a taking).

355. Owners of properties subject to RSL regulation do not receive any reciprocal benefits from the RSL program. Unlike zoning ordinances, which benefit all property owners subject to the zoning in an approximately equal way, RSL regulated property owners lose property value and/or profits but receive nothing in return. No benefit is conferred on RSL property owners because some other property also is subject to RSL. The RSL singles out one group of property owners to bear all the economic burdens of the public assistance scheme, and one group of tenants to receive all the benefits, and it provides no countervailing benefits—still less benefits that approximate and compensate for the burdens—to regulated property owners.

356. Even if there were general societal benefits from having an RSL-regulated property, such as a reduction in homelessness—which Plaintiffs dispute and studies refute—such societal benefits accrue to all residents and visitors to New York City, not just property owners subject to the RSL, and in no way approximate the losses borne solely by regulated owners. *See*, *e.g.*, *Pennell*, 485 U.S. at 22 (Scalia & O'Connor, JJ, concurring in part and dissenting in part) ("A legislative category of economically needy senior citizens is sound, proper and sustainable as a rational classification. But compelled subsidization by landlords or by

tenants who happen to live in an apartment building with senior citizens is an improper and unconstitutional method of solving the problem.") (quoting *Prop. Owners Ass'n. v. North Bergen*, 74 N.J. 327, 339 (1977)).

F. *The RSL Does Not Prevent a Nuisance or Noxious Use of the Property*

357. Unlike laws prohibiting a nuisance, the RSL is not designed to prescribe a noxious use of properties. The rental properties subject to the RSL are put to the same use as those not subject to the RSL.

G. *The RSL Has the Character of a Physical Invasion of Owners' Private Property of Indefinite Duration*

358. "[T]he character of the government action" in promulgating and enforcing the RSL involves the sort of "interference with property [that] can be characterized as a physical invasion by the government" for which a taking "may more readily be found." *Penn Central*, 438 U.S. at 124.

359. As described above, the RSL involves precisely the type of physical invasion that weighs in favor of finding a regulatory taking.

VI. AN ORDER ENJOINING THE RSL AS A VIOLATION OF DUE PROCESS AND DECLARING IT TO BE A TAKING OF PRIVATE PROPERTY WOULD IMPROVE, NOT HARM, NEW YORK CITY'S RENTAL HOUSING MARKET

360. The Court need not fear adverse consequences or market disruption from ending the facially unconstitutional RSL.

361. The example of Cambridge, Massachusetts is instructive. Cambridge imposed rent control from 1971 to 1994. Following rent de-control, Henry O. Pollakowski, a Housing Economist at the MIT Center for Real Estate, published an economic study of the impact of the return to market rents. He found that there was a "housing investment boom" after the return to market rate rents, and that "investment in previously rent-controlled buildings…increased by approximately 20 percent over what would have been the case in the absence of decontrol."

362. Dr. Pollakowski concluded that post-regulation Cambridge experienced "a tremendous boom in housing investment, leading to major gains in housing quality. This research thus provides a concrete example of complete rent deregulation leading to housing investment that would otherwise not have occurred. Given the need for better maintenance and increased renovation of New York's aging housing stock, such an increase represents a considerable potential boon to the city's residents."

363. In addition, there is ample evidence that removing the system of rent stabilization in New York

would have benefits beyond just increased housing investment.

364. Each year, the impact of pre-2019 Amendment rent stabilization causes the City of New York to lose **$283 million** of property tax revenue. That amount will grow significantly as a result of the 2019 Amendments. This is money that the city could spend targeting housing assistance to individuals who actually need it.[1]

365. Eliminating rent stabilization does not mean eliminating any housing assistance for individuals who need it. Instead, the elimination of a system that is inefficient, expensive, and untargeted would free up resources and money to provide housing assistance where it is actually needed. As noted above, there are many alternatives that actually target low-income affordable housing and vacancy issues. Those options include direct subsidies (through Section 8 or a similar program), indirect subsidies (through programs like SCRIE and DRIE), tax incentives, and increasing the supply of housing.

366. In addition, owners could still choose to voluntarily participate in rent regulation. Currently, new buildings, or buildings that are rehabilitated, can apply for a period of exemption or abatement of real estate taxes in exchange for submitting themselves to rent regulation. After this period of tax benefit is over,

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[1] Henry O. Pollakowski, Manhattan Institute Center for Civic Innovation, Civic Report No. 36 (May 2003), *Rent Control and Housing Investment: Evidence from Deregulation in Cambridge, Massachusetts*, available at https://www.manhattan-institute.org/pdf/cr_36.pdf.

owners can return to charging market rents, depending on whether they meet certain requirements. This enables building owners to receive benefits for participating in rent stabilization.

CLAIMS FOR RELIEF

Claim I (Against All Defendants): Due Process (U.S. Const. Amend. XIV; 42 U.S.C. § 1983)

367. Plaintiffs incorporate by reference the preceding allegations of this complaint.

368. Defendants, acting under color of New York law, have caused, and will continue to cause, Plaintiffs to be deprived of their property without due process of law in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution.

369. The Rent Stabilization Laws are irrational. They fail to serve any of the goals that they purport to seek to achieve. Among other things, the RSL does not target affordable housing to those in need; is not a rational means of ensuring socio-economic or racial diversity; is not a rational means of increasing the vacancy rate; has a deleterious impact on the community at large; and alternatives to the RSL are available that are more narrowly tailored to the goals claimed to underlie the RSL. It serves no legitimate government purpose.

370. Separately, without rational basis or an adequately developed record for determining that a serious public emergency requiring rent regulation in New York City continues to exist—or even defining what, precisely, the emergency entails—defendant

New York City has reflexively renewed the RSL every three years for the last forty-five years.

371. Defendant New York City is statutorily empowered to make the emergency determination if the vacancy rate is at or below a 5% threshold (which is itself entirely arbitrary and methodologically unsound), taking into account the condition of rental accommodations and the need for regulating and controlling residential rents.

372. Defendants' rationale for what constitutes the "serious public emergency" has shifted over time. Defendants have variously justified the need for rent regulation by citing the unique problems in a post-war housing market, low vacancy rates, lack of affordable housing options, the need to ensure socioeconomic and cultural diversity and to combat homelessness. However, data has shown overwhelmingly that the RSL is not a rational means of addressing any of these ends.

373. Defendant New York City's continuing declaration of an emergency and renewal of the RSL without a rational basis for doing so deprives Plaintiffs and the organizational Plaintiffs' members of fundamental property rights without the benefit of Due Process required by the Constitution. Defendants' actions are arbitrary and are not rationally related to any legitimate government purpose.

374. In addition, the Rent Stabilization Laws' destruction of building owners' fundamental property rights warrants strict scrutiny. Defendants cannot demonstrate that a compelling state interest is furthered by the RSL, nor can they demonstrate that the

RSL is narrowly tailored to address any compelling state interest.

375. Absent injunctive and declaratory relief, Plaintiffs will suffer irreparable harm caused by the deprivation of their constitutional rights.

Claim II (Against All Defendants): Physical Taking (U.S. Const. Amends. V and XIV; 42 U.S.C. § 1983)

376. Plaintiffs incorporate by reference the preceding allegations of this complaint.

377. Defendants, acting under color of New York law, have caused, and will continue to cause, Plaintiffs to be deprived of their right to possess, use and dispose of their real property without just compensation in violation of the Takings Clause of the Constitution.

378. Through the Rent Stabilization Laws, including Chapter 36 of the Laws of 2019, and New York City's rote renewal of its emergency declaration which triggers application of the RSL in New York City, Defendants deprive Plaintiffs of fundamental rights among the "bundle" associated with property ownership, including the rights to possess, use and dispose of the property. Specifically, among other things, the RSL deprives owners of rent stabilized buildings in New York City of the actual or practical ability to control who rents and lives in those buildings, to evict tenants outside of certain limited circumstances, or to dispose of or demolish the building.

379. Owing to the mandatory lease renewal provisions of the Rent Stabilization Laws, rent

stabilized tenants and their successors are able to occupy Plaintiffs' property for periods of indefinite duration, transferring de facto property rights of possession, use, and disposition from Plaintiffs to tenants without just compensation—thus effecting a per se physical taking.

380. Those same provisions that result in owners losing physical possession and economic control of their property operate as an unconstitutional condition on the use of private property.

381. Absent declaratory or injunctive relief, Plaintiffs will suffer irreparable harm caused by the deprivation of their Constitutional rights.

Claim III (Against All Defendants): Regulatory Taking (U.S. Const. Amends. V and XIV; 42 U.S.C. § 1983)

382. Plaintiffs incorporate by reference the preceding allegations of this complaint.

383. Defendants, acting under color of New York law, have caused, and will continue to cause, Plaintiffs to be deprived of their real property without just compensation in violation of the Takings Clause of the Constitution.

384. Through the Rent Stabilization Laws, including Chapter 36 of the Laws of 2019, and New York City's rote renewal of its emergency declaration which triggers application of the RSL in New York City, Defendants effect a regulatory taking of Plaintiffs' property without just compensation. Specifically, the RSL imposes significant regulatory restrictions and in addition requires Plaintiffs to rent their property at

rates often far below market-based rates, while placing limits on rent increases and the recovery of investments in improvements.

385. The Rent Stabilization Laws, among other things, deprive property owners of a reasonable market return on their investment, devalue their properties, and upset their investment-backed expectations. The character of Defendants' actions—providing for a public welfare program at the expense of a subset of private property owners and imposing a physical occupation on rent stabilized units—together with the extensive and negative economic impact of the Rent Stabilization Laws, renders them facially unconstitutional as a regulatory taking.

386. Absent declaratory or injunctive relief, Plaintiffs will suffer irreparable harm caused by the deprivation of their constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court:

A. Declare the Rent Stabilization Laws to be an unlawful violation of Due Process;

B. Enjoin the application and enforcement of the Rent Stabilization Laws as a violation of Due Process;

C. Declare New York City's 2018 declaration of a housing emergency to be an unlawful violation of Due Process;

D. Enjoin New York City's 2018 declaration of a housing emergency as an unlawful violation of Due Process;

E. Declare that the Rent Stabilization Laws effect a physical taking of private property for public use that requires the payment of just compensation;

F. Enjoin the application and enforcement of the Rent Stabilization Laws as an unlawful physical taking of private property;

G. Declare that the Rent Stabilization Laws effect a regulatory taking of private property for public use that requires the payment of just compensation;

H. Enjoin the application and enforcement of the Rent Stabilization Laws as an unlawful regulatory taking of private property;

I. Award Plaintiffs their reasonable fees, costs, expenses and disbursements, including attorneys' fees, associated with this action; and

J. Grant Plaintiffs such other relief as may be just and proper.

Dated: July 15, 2019

By: /s/ *Reginald R. Goeke*

Andrew J. Pincus (*pro hac forthcoming*)
Timothy S. Bishop (*pro hac forthcoming*)
Reginald R. Goeke, Bar Number 2700367
Robert W. Hamburg, Bar Number 4889093

MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
Telephone: (212) 506-2500

Attorneys for Plaintiffs

APPENDIX F[1]

McKinney Unconsolidated Laws § 26-501

§ 26-501. Findings and declaration of emergency

Eff. until April 1, 2024, pursuant to McK. Unconsol. Laws § 26-520

The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York and will continue to exist after April first, nineteen hundred seventy-four; that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist an acute shortage of dwellings which creates a special hardship to persons and families occupying rental housing; that the legislation enacted in nineteen hundred seventy-one by the state of New York, removing controls on housing accommodations as they become vacant, has resulted in sharp increases in rent levels in many instances; that the

[1] The RSL is codified in several places, including N.Y. Unconsol. Laws tit. 23 § 26-501 et seq. (McKinney); the administrative code for the City of New York § 26-501 et seq.; section 4 of chapter 576 of the laws of 1974 (constituting the Emergency Tenant Protection Act of 1974), which is found in Chapter 249-B of the Unconsolidated Laws (also published in N.Y. Unconsol. Laws tit. 23 §§ 8621 et seq. (McKinney)); and the codes, rules, and regulations for the City of New York § 2520.1 et seq. Pertinent provisions from these sources are included here for reference.

existing and proposed cuts in federal assistance to housing programs threaten a virtual end to the creation of new housing, thus prolonging the present emergency; that unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; that to prevent such perils to health, safety and welfare, preventive action by the council continues to be imperative; that such action is necessary in order to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare; that the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for such emergency; and that the policy herein expressed is now administered locally within the city of New York by an agency of the city itself, pursuant to the authority conferred by chapter twenty-one of the laws of nineteen hundred sixty-two.

The council further finds that, prior to the adoption of local laws sixteen and fifty-one of nineteen hundred sixty-nine, many owners of housing accommodations in multiple dwellings, not subject to the provisions of the city rent and rehabilitation law1 enacted pursuant to said enabling authority either because they were constructed after nineteen hundred forty-seven or because they were decontrolled due to monthly rental of two hundred fifty dollars or more or for other reasons, were demanding exorbitant and unconscionable rent increases as a result of the aforesaid

emergency, which led to a continuing restriction of available housing as evidenced by the nineteen hundred sixty-eight vacancy survey by the United States bureau of the census; that prior to the enactment of said local laws, such increases were being exacted under stress of prevailing conditions of inflation and of an acute housing shortage resulting from a sharp decline in private residential construction brought about by a combination of local and national factors; that such increases and demands were causing severe hardship to tenants of such accommodations and were uprooting long-time city residents from their communities; that recent studies establish that the acute housing shortage continues to exist; that there has been a further decline in private residential construction due to existing and proposed cuts in federal assistance to housing programs; that unless such accommodations are subjected to reasonable rent and eviction limitations, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; and that such conditions constitute a grave emergency.

* * *

McKinney Unconsolidated Laws § 26-511

§ 26-511. Real estate industry stabilization association.

Eff. until April 1, 2024, pursuant to McK. Unconsol. Laws § 26-520

* * *

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

* * *

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

* * *

(b) where he or she seeks to recover possession of one dwelling unit because of immediate and compelling necessity for his or her own personal use and occupancy as his or her primary residence or for the use and occupancy of a member of his or her immediate family as his or her primary residence, provided however, that this subparagraph shall permit recovery of only one dwelling unit and shall not apply where a tenant or the spouse of a tenant lawfully occupying the dwelling unit is sixty-two years of age or older, has been a tenant in a dwelling unit in that building for fifteen years or more, or has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent the tenant from engaging in any substantial gainful employment, unless such owner offers to provide and if requested, provides an equivalent or superior housing accommodation at the same or lower stabilized rent in a closely proximate area. The provisions of this subparagraph shall only permit one of the individual owners of any building to recover possession of one dwelling unit for his or her own personal use and/or for that of his or her immediate family. A dwelling unit recovered by an owner pursuant to this subparagraph shall not for a period of three years be rented, leased, subleased or assigned to

any person other than a person for whose benefit recovery of the dwelling unit is permitted pursuant to this subparagraph or to the tenant in occupancy at the time of recovery under the same terms as the original lease; provided, however, that a tenant required to surrender a dwelling unit under this subparagraph shall have a cause of action in any court of competent jurisdiction for damages, declaratory, and injunctive relief against a landlord or purchaser of the premises who makes a fraudulent statement regarding a proposed use of the housing accommodation. In any action or proceeding brought pursuant to this subparagraph a prevailing tenant shall be entitled to recovery of actual damages, and reasonable attorneys' fees. This subparagraph shall not be deemed to establish or eliminate any claim that the former tenant of the dwelling unit may otherwise have against the owner. Any such rental, lease, sublease or assignment during such period to any other person may be subject to a penalty of a forfeiture of the right to any increases in residential rents in such building for a period of three years * * *.

* * *

McKinney's General Business Law § 352-eeee

§ 352-eeee. Conversions to cooperative or condominium ownership in the city of New York

Effective: March 16, 2023

1. As used in this section, the following words and terms shall have the following meanings:

(b) "Non-eviction plan". A plan which may not be declared effective until written purchase agreements have been executed and delivered for at least fifty-one percent of all dwelling units in the building or group of buildings or development by bona fide tenants who were in occupancy on the date a letter was issued by the attorney general accepting the plan for filing; provided, however, that for a building containing five or fewer units, and where the sponsor of the offering plan offers the unit that they or their immediate family member has occupied for at least two years, the plan may not be effective until written purchase agreements have been executed and delivered for at least fifteen percent of all dwelling units in the building subscribed for by bona fide tenants in occupancy or bona fide purchasers who represent that they intend that they or one or more members of their immediate family occupy the dwelling unit when it becomes vacant. The purchase agreement shall be executed and delivered pursuant to an offering made in good faith without fraud and discriminatory repurchase agreements or other discriminatory inducements.

* * *

New York City, N.Y., Admin. Code § 26-510

§ 26-510. Rent guidelines board.

a. There shall be a rent guidelines board to consist of nine members, appointed by the mayor. Two members shall be representative of tenants, two shall be representative of owners of property, and five shall be public members each of whom shall have had at least

five years experience in either finance, economics or housing. One public member shall be designated by the mayor to serve as chairman and shall hold no other public office. No member, officer or employee of any municipal rent regulation agency or the state division of housing and community renewal and no person who owns or manages real estate covered by this law or who is an officer of any owner or tenant organization shall serve on a rent guidelines board. One public member, one member representative of tenants and one member representative of owners shall serve for a term ending two years from January first next succeeding the date of their appointment; one public member, one member representative of tenants and one member representative of owners shall serve for terms ending three years from the January first next succeeding the date of their appointment and two public members shall serve for terms ending four years from January first next succeeding the dates of their appointment. The chairman shall serve at the pleasure of the mayor. Thereafter, all members shall continue in office until their successors have been appointed and qualified. The mayor shall fill any vacancy which may occur by reason of death, resignation or otherwise in a manner consistent with the original appointment. A member may be removed by the mayor for cause, but not without an opportunity to be heard in person or by counsel, in his or her defense, upon not less than ten days notice.

b. The rent guidelines board shall establish annual guidelines for rent adjustments, and in determining whether rents for housing accommodations subject to the emergency tenant protection act of nineteen seventy-four or this law shall be adjusted shall

consider, among other things (1) the economic condition of the residential real estate industry in the affected area including such factors as the prevailing and projected (i) real estate taxes and sewer and water rates, (ii) gross operating maintenance costs (including insurance rates, governmental fees, cost of fuel and labor costs), (iii) costs and availability of financing (including effective rates of interest), (iv) over-all supply of housing accommodations and over-all vacancy rates, (2) relevant data from the current and projected cost of living indices for the affected area, (3) such other data as may be made available to it. Not later than July first of each year, the rent guidelines board shall file with the city clerk its findings for the preceding calendar year, and shall accompany such findings with a statement of the maximum rate or rates of rent adjustment, if any, for one or more classes of accommodations subject to this law, authorized for leases or other rental agreements commencing on the next succeeding October first or within the twelve months thereafter. Such findings and statement shall be published in the City Record. The rent guidelines board shall not establish annual guidelines for rent adjustments based on the current rental cost of a unit or on the amount of time that has elapsed since another rent increase was authorized pursuant to this title.

* * *

9 NYCRR 2520.6

Section 2520.6. Definitions

(o) Family member.

(1) A spouse, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law or daughter-in-law of the tenant or permanent tenant.

(2) Any other person residing with the tenant or permanent tenant in the housing accommodation as a primary or principal residence, respectively, who can prove emotional and financial commitment, and interdependence between such person and the tenant or permanent tenant. Although no single factor shall be soley determinative, evidence which is to be considered in determining whether such emotional and financial commitment and interdependence existed, may include, without limitation, such factors as listed below. In no event would evidence of a sexual relationship between such persons be required or considered:

(i) longevity of the relationship;

(ii) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;

(iii) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.;

(iv) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.;

(v) formalizing of legal obligations, intentions, and responsibilities to each other by such means as

executing wills naming each other as executor and/or beneficiary, granting each other a power of attorney and/or conferring upon each other authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;

(vi) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their words or actions;

(vii) regularly performing family functions, such as caring for each other or each other's extended family members, and/or relying upon each other for daily family services;

(viii) engaging in any other pattern of behavior, agreement, or other action which evidences the intention of creating a long-term, emotionally committed relationship.

* * *

9 NYCRR § 2523.5

Section 2523.5. Notice for renewal of lease and renewal procedure

* * *

(b) (1) Unless otherwise prohibited by occupancy restrictions based upon income limitations pursuant to federal, state or local law, regulations or other requirements of governmental agencies, if an offer is made to the tenant pursuant to the provisions of

subdivision (a) of this section and such tenant has permanently vacated the housing accommodation, any member of such tenant's family, as defined in section 2520.6(o) of this Title, who has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years, or where such person is a "senior citizen," or a "disabled person" as defined in paragraph (4) of this subdivision, for a period of no less than one year, immediately prior to the permanent vacating of the housing accommodation by the tenant, or from the inception of the tenancy or commencement of the relationship, if for less than such periods, shall be entitled to be named as a tenant on the renewal lease.

* * *

9 NYCRR § 2524.1

Section 2524.1. Restrictions on removal of tenant

(a) As long as the tenant continues to pay the rent to which the owner is entitled, no tenant shall be denied a renewal lease or be removed from any housing accommodation by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, except on one or more of the grounds specified in this Code.

(b) It shall be unlawful for any person to remove or attempt to remove any tenant from any housing accommodation or to refuse to renew the lease or rental agreement for the use of such housing accommodation, because such tenant has taken, or proposes to take any action authorized or required by the RSL or this Code, or any order of the DHCR.

(c) No tenant of any housing accommodation shall be removed or evicted unless and until such removal or eviction has been authorized by a court of competent jurisdiction on a ground authorized in this Part or under the Real Property Actions and Proceedings Law.

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9 NYCRR § 2524.3

Section 2524.3. Proceedings for eviction--wrongful acts of tenant

Without the approval of the DHCR, an action or proceeding to recover possession of any housing accommodation may only be commenced after service of the notice required by section 2524.2 of this Part, upon one or more of the following grounds, wherein wrongful acts of the tenant are established as follows:

(a) The tenant is violating a substantial obligation of his or her tenancy other than the obligation to surrender possession of such housing accommodation, and has failed to cure such violation after written notice by the owner that the violations cease within 10 days; or the tenant has willfully violated such an obligation inflicting serious and substantial injury upon the owner within the three-month period immediately prior to the commencement of the proceeding. If the written notice by the owner that the violations cease within 10 days is served by mail, then five additional days, because of service by mail, shall be added, for a total of 15 days, before an action or proceeding to recover possession may be commenced after service of the notice required by section 2524.2 of this Part.

(b) The tenant is committing or permitting a nuisance in such housing accommodation or the building containing such housing accommodation; or is maliciously, or by reason of gross negligence, substantially damaging the housing accommodation; or the tenant engages in a persistent and continuing course of conduct evidencing an unwarrantable, unreasonable or unlawful use of the property to the annoyance, inconvenience, discomfort or damage of others, the primary purpose of which is intended to harass the owner or other tenants or occupants of the same or an adjacent building or structure by interfering substantially with their comfort or safety. The lawful exercise by a tenant of any rights pursuant to any law or regulation relating to occupancy of a housing accommodation, including the RSL or this Code, shall not be deemed an act of harassment or other ground for eviction pursuant to this subdivision.

(c) Occupancy of the housing accommodation by the tenant is illegal because of the requirements of law and the owner is subject to civil or criminal penalties therefor, or such occupancy is in violation of contracts with governmental agencies.

(d) The tenant is using or permitting such housing accommodation to be used for immoral or illegal purpose.

(e) The tenant has unreasonably refused the owner access to the housing accommodation for the purpose of making necessary repairs or improvements required by law or authorized by the DHCR, or for the purpose of inspection or showing the housing accommodation to a prospective purchaser, mortgagee or prospective mortgagee, or other person having a

legitimate interest therein; provided, however, that in the latter event such refusal shall not be a ground for removal or eviction unless the tenant shall have been given at least five days' notice of the inspection or showing, to be arranged at the mutual convenience of the tenant and owner so as to enable the tenant to be present at the inspection or showing, and that such inspection or showing of the housing accommodation is not contrary to the provisions of the tenant's lease or rental agreement. If the notice of inspection or showing is served by mail, then the tenant shall be allowed five additional days to comply, for a total of 10 days because of service by mail, before such tenant's refusal to allow the owner access shall become a ground for removal or eviction.

(f) The tenant has refused, following notice pursuant to section 2523.5 of this Title, to renew an expiring lease in the manner prescribed in such notice at the legal regulated rent authorized under this Code and the RSL, and otherwise upon the same terms and conditions as the expiring lease. This subdivision does not apply to permanent hotel tenants, nor may a proceeding be commenced based on this ground prior to the expiration of the existing lease term.

(g) For housing accommodations in hotels, the tenant has refused, after at least 20 days' written notice, and an additional five days if the written notice is served by mail, to move to a substantially similar housing accommodation in the same building at the same legal regulated rent where there is a rehabilitation as set forth in section 2524.5(a)(3) of this Part, provided:

(1) that the owner has an approved plan to reconstruct, renovate or improve said housing accommodation or the building in which it is located;

(2) that the move is reasonably necessary to permit such reconstruction, renovation or improvement;

(3) that the owner moves the tenant's belongings to the other housing accommodation at the owner's cost and expense; and

(4) that the owner offers the tenant the right of reoccupancy of the reconstructed, renovated or improved housing accommodation at the same legal regulated rent unless such rent is otherwise provided for pursuant to section 2524.5(a)(3) of this Part.

(h) In the event of a sublet, an owner may terminate the tenancy of the tenant if the tenant is found to have violated the provisions of section 2525.6 of this Title.

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9 NYCRR § 2524.5

Section 2524.5. Grounds for refusal to renew lease or discontinue hotel tenancy and evict which require approval of the DHCR

(a) The owner shall not be required to offer a renewal lease to a tenant or continue a hotel tenancy, and shall file on the prescribed form an application with the DHCR for authorization to commence an action or proceeding to recover possession in a court of competent jurisdiction after the expiration of the existing lease term, upon any one of the following grounds:

(1) Withdrawal from the rental market. The owner has established to the satisfaction of the DHCR after a hearing, that he or she seeks in good faith to withdraw any or all housing accommodations from both the housing and nonhousing rental market without any intent to rent or sell all or any part of the land or structure and:

(i) that he or she requires all or part of the housing accommodations or the land for his or her own use in connection with a business which he or she owns and operates; or

(ii) that substantial violations which constitute fire hazards or conditions dangerous or detrimental to the life or health of the tenants have been filed against the structure containing the housing accommodations by governmental agencies having jurisdiction over such matters, and that the cost of removing such violations would substantially equal or exceed the assessed valuation of the structure.

(2) Demolition.

(i) The owner seeks to demolish the building. Until the owner has submitted proof of its financial ability to complete such undertaking to the DHCR, and plans for the undertaking have been approved by the appropriate city agency, an order approving such application shall not be issued.

(ii) Terms and conditions upon which orders issued pursuant this paragraph authorizing refusal to offer renewal leases may be based:

(a) The DHCR shall require an owner to pay all reasonable moving expenses and afford the tenant a

reasonable period of time within which to vacate the housing accommodation. If the tenant vacates the housing accommodation on or before the date provided in the DHCR's final order, such tenant shall be entitled to receive all stipend benefits pursuant to clause *(b)* of this subparagraph. In addition, if the tenant vacates the housing accommodation prior to the required vacate date, the owner may also pay a stipend to the tenant that is larger than the stipend designated in a demolition stipend chart to be issued pursuant to an operational bulletin authorized by section 2527.11 of this Title. However, at no time shall an owner be required to pay a stipend in excess of the stipend set forth in such schedule. If the tenant does not vacate the housing accommodation on or before the required vacate date, the stipend shall be reduced by one sixth of the total stipend for each month the tenant remains in occupancy after such vacate date.

(b) The order granting the owner's demolition application shall provide that the owner must either:

(1) relocate the tenant to a suitable housing accommodation, as defined in subparagraph (iii) of this paragraph, at the same or lower legal regulated rent in a closely proximate area, or in a new residential building if constructed on the site, in which case suitable interim housing shall be provided at no additional cost to the tenant; plus in addition to reasonable moving expenses, payment of a $5,000 stipend, provided the tenant vacates on or before the vacate date required by the final order;

(2) where an owner provides relocation of the tenant to a suitable housing accommodation at a rent in excess of that for the subject housing accommodation,

in addition to the tenant's reasonable moving expenses, the owner may be required to pay the tenant a stipend equal to the difference in rent, at the commencement of the occupancy by the tenant of the new housing accommodation, between the subject housing accommodation and the housing accommodation to which the tenant is relocated, multiplied by 72 months, provided the tenant vacates on or before the vacate date required by the final order; or

(3) pay the tenant a stipend which shall be the difference between the tenant's current rent and an amount calculated using the demolition stipend chart, at a set sum per room per month multiplied by the actual number of rooms in the tenant's current housing accommodation, but no less than three rooms. This difference is to be multiplied by 72 months.

(c) Wherever a stipend would result in the tenant losing a subsidy or other governmental benefit which is income dependent, the tenant may elect to waive the stipend and have the owner at his or her own expense, relocate the tenant to a suitable housing accommodation at the same or lower legal regulated rent in a closely proximate area.

(d) In the event that the tenant dies prior to the issuance by the DHCR of a final order granting the owner's application, the owner shall not be required to pay such stipend to the estate of the deceased tenant.

(e) Where the order of the DHCR granting the owner's application is conditioned upon the owner's compliance with specified terms and conditions, if such terms and conditions have not been complied with, the order may be modified or revoked.

(f) Noncompliance by the owner with any term or condition of the administrator's or commissioner's order granting the owner's application shall be brought to the attention of the DHCR's compliance unit for appropriate action. The DHCR shall retain jurisdiction for this purpose until all moving expenses, stipends, and relocation requirements have been met.

(iii) Comparable housing accommodations and relocation. In the event a comparable housing accommodation is offered by the owner, a tenant may file an objection with the DHCR challenging the suitability of a housing accommodation offered by the owner for relocation within 10 days after the owner identifies the housing accommodation and makes it available for the tenant to inspect and consider the suitability thereof. Within 30 days thereafter, the DHCR shall inspect the housing accommodation, on notice to both parties, in order to determine whether the offered housing accommodation is suitable. Such determination will be made by the DHCR as promptly as practicable thereafter. In the event that the DHCR determines that the housing accommodation is not suitable, the tenant shall be offered another housing accommodation, and shall have 10 days after it is made available by the owner for the tenant's inspection to consider its suitability. In the event that the DHCR determines that the housing accommodation is suitable, the tenant shall have 15 days thereafter within which to accept the housing accommodation. A tenant who refuses to accept relocation to any housing accommodation determined by the DHCR to be suitable shall lose the right to relocation by the owner, and to receive payment of moving expenses or any stipend. *Suitable housing accommodations* shall mean housing

accommodations which are similar in size and features to the respective housing accommodations now occupied by the tenants. Such housing accommodations shall be freshly painted before the tenant takes occupancy, and shall be provided with substantially the same required services and equipment the tenants received in their prior housing accommodations. The building containing such housing accommodations shall be free from violations of law recorded by the city agency having jurisdiction, which constitute fire hazards or conditions dangerous or detrimental to life or health, or which affect the maintenance of required services. The DHCR will consider housing accommodations proposed for relocation which are not presently subject to rent regulation, provided the owner submits a contractual agreement that places the tenant in a substantially similar housing accommodation at no additional rent for a period of six years, unless the tenant requests a shorter lease period in writing.

(3) Other grounds. The owner will eliminate inadequate, unsafe or unsanitary conditions and demolish or rehabilitate the dwelling unit pursuant to the provisions of article VIII, VIII-A, XIV, XV or XVIII of the PHFL, the Housing New York Program Act, or sections 8 and 17 of the U.S. Housing Act of 1937 (National Housing Act), on the condition that the owner:

(i) proves that it has a commitment for the required financing;

(ii) proves that any rehabilitation requires the temporary removal of the tenant; and

(iii) agrees to offer and will offer the tenants the right of first occupancy following any rehabilitation at

an initial rent as determined pursuant to the applicable law and subject to any terms and conditions established pursuant to applicable law and regulations.