20-3366

United States Court of Appeals for the Second Circuit

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

Plaintiffs-Appellants,

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, SHEILA GARCIA, RUTHANNE VISNAUSKAS,

Defendants-Appellees,

(*caption continues inside front cover*)

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR APPELLEE RUTHANNE VISNAUSKAS

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Dated: April 16, 2021

(*caption continues from front cover*)

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

Intervenors.

TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Constitutional Provisions

Laws

Session Laws

Laws **Page(s)**

Session Laws (cont'd)

Statutes

New York City Administrative Code

Laws **Page(s)**

Regulations

Legislative Materials

Miscellaneous Authorities

Miscellaneous Authorities **Page(s)**

Miscellaneous Authorities **Page(s)**

PRELIMINARY STATEMENT

Plaintiffs—owners of New York City residential apartment buildings, and trade associations of such owners—brought this facial challenge to the constitutionality of New York's Rent Stabilization Law (RSL), a comprehensive scheme that the State and City of New York have employed for over half a century to limit the tenant dislocation and neighborhood disruption that would otherwise result from the City's notoriously volatile rental market. The RSL aims to address these problems by regulating tenancies and the rate of rent increases for apartment units subject to its terms. It is administered and enforced at the state level by the New York State Division of Housing and Community Renewal (DHCR), and at the city level principally by the New York City Department of Housing Preservation and Development (HPD). The RSL currently covers nearly one million rental housing units in New York City and provides critical housing protections to nearly 2.5 million City residents, especially low-income, elderly, and disabled tenants.

Over the decades, the Legislature has repeatedly amended the RSL, adjusting and readjusting the rights of tenants and property owners to prevent the worst forms of rent profiteering, while also ensuring that

property owners have the ability to earn a reasonable return. On at least five occasions, this Court has considered constitutional challenges to these prior iterations of the RSL; every time, it has rejected claims that the law constituted an unconstitutional taking of property or violated the substantive due process rights of property owners.

In 2019, the New York Legislature again amended the RSL when it enacted the Housing Stability and Tenant Protection Act (HSTPA), Ch. 36, 2019 N.Y. Laws 154. Among other things, the HSTPA was designed to strengthen tenant protections and curb practices that property owners had been using to rapidly raise rents, force tenants out of regulated units, and remove regulated units from the RSL's coverage—significantly diminishing the City's stock of affordable housing.

Following HSTPA's enactment, plaintiffs brought this lawsuit against the Commissioner of DHCR and various city entities and officers seeking to invalidate the RSL in its entirety.[1] Although the complaint

[1] This brief is submitted solely on behalf of defendant RuthAnne Visnauskas, who was named as a defendant in this case in her official capacity as Commissioner of DHCR, along with several city defendants. As to Commissioner Visnauskas, the complaint sought purely prospective relief not barred by sovereign immunity. The City defendants are separately represented.

contains some allegations about HSTPA, its primary focus is on provisions of the RSL that have been in place since well before the 2019 amendments. The United States District Court for the Eastern District of New York (Komitee, J.), relying on this Court's consistent precedents, held that this latest iteration of the RSL is facially constitutional.

This Court should affirm. This Court's case law has already rejected the argument that the RSL constitutes a physical taking when owners voluntarily accede to tenants' occupation of regulated units and retain substantial rights over their property. This Court has also previously rejected facial attacks on the RSL under the fact-intensive regulatory-takings inquiry, and here too plaintiffs have failed to demonstrate that the RSL is unconstitutional in all of its applications, as required for a finding of facial invalidity. Finally, plaintiffs' substantive due process claim is meritless because the RSL is rationally related to at least one legitimate government purpose: the prevention of tenant dislocation and preservation of neighborhood stability. Plaintiffs' contrary arguments simply challenge complex policy judgments that should be left to the sound discretion of the Legislature.

ISSUES PRESENTED

1. Whether the RSL, a complex and wide-ranging scheme that regulates the rights of landlords and tenants in nearly one million rental housing units in New York City, effects an uncompensated taking.

2. Whether the RSL, which serves to prevent tenant dislocation and preserve neighborhood stability, constitutes rational economic regulation that comports with principles of substantive due process.

STATEMENT OF THE CASE

A. The Development and Evolution of the Rent Stabilization Law (RSL)

The Rent Stabilization Law has been a feature of New York City's rental housing market since the 1970s, and has antecedents dating back decades earlier. It now provides critical housing protections for nearly one million rental housing units, housing nearly 2.5 million tenants across the City. Over the decades, the Legislature has repeatedly amended the scheme—sometimes strengthening protections for tenants or owners and sometimes relaxing its restrictions—but has consistently and repeatedly reaffirmed the RSL's central role in the State's response to the highly

complex problems facing New York City's notoriously volatile housing market.

1. Following World War II, the State and City of New York experiment with different forms of rent regulation in response to the City's housing crisis

Antecedents to the State's modern rent stabilization regime date back to at least World War II, when labor shortages and other wartime forces precipitated an acute housing crisis in New York City.[2] *See* DHCR, *Rent Regulations After 50 Years: An Overview of New York State's Rent Regulated Housing* 3 (1993). In response, the State Legislature enacted the Emergency Housing Rent Control Act of 1946, which authorized the imposition of rent ceilings throughout the State. *See* Ch. 274, 1946 N.Y. Laws 723 (reproduced at N.Y. Unconsol. Law § 8581 et seq. (McKinney)). In enacting the regime, the Legislature acknowledged the existence of a housing "emergency" requiring the "intervention of . . . government in

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[2] Earlier forms of rent regulation were enacted by New York City in the 1920s in response to an acute housing shortage following World War I. *See Report of the New York State Temporary Commission on Rental Housing* I-42 to I-46 (Mar. 1980) ("*Rental Hous. Comm'n*"); Guy McPherson, Note, *It's the End of the World As We Know It (and I Feel Fine): Rent Regulation in New York City and the Unanswered Questions of Market and Society*, 72 Fordham L. Rev. 1125, 1131-33 (2004).

order to prevent speculative, unwarranted and abnormal increases in rents." N.Y. Unconsol. Law § 8581(1) (McKinney). The Legislature stated that a "transition from regulation to a normal market" was the ultimate objective of state policy, but it cautioned that such a transition would have to "be administered with due regard" to the continued shortage of affordable housing. *Id.* Over the ensuing decade, the State repeatedly reenacted the rent-control regime.[3]

In 1962, as the housing crisis eased, the Legislature gave New York City and certain other municipalities the authority to enact their own rent regulation laws. *See* Local Emergency Housing Rent Control Act, ch. 21, § 1, 1962 N.Y. Laws 53, 53-56; *see also* DHCR, *Rent Regulation After 50 Years*, *supra*, at 4. Under this authority, the City enacted the framework for its modern rent control regime. *See* N.Y. City Admin. Code § 26-401 et seq. Rent control—which is not at issue in this litigation but remains in effect today—directly sets rental rates for a relatively small number of covered units in New York City. *See Black v. State of New York*, 13 F. Supp. 2d 538, 540 (S.D.N.Y. 1998).

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[3] *See Rental Hous. Comm'n*, *supra*, at I-56 to I-61.

Under the same enabling statute, the New York City Council introduced the prevailing scheme of rent stabilization with the Rent Stabilization Law of 1969 (codified as amended at N.Y. City Admin. Code § 26-501 et seq.). Rather than fix rental rates, rent stabilization limited the amount by which property owners could increase rents each year. It also imposed new restrictions on evictions. As the New York Court of Appeals has recognized, rent stabilization places "a less onerous burden on the property owner" than rent control. *See Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 210 (1989).

In 1971, the State Legislature, in an "experiment with free-market controls," deregulated newly vacated apartments that had been subject to the City's rent-stabilization scheme. *Matter of KSLM-Columbus Apartments, Inc. v. New York State Div. of Hous. & Cmty. Renewal*, 6 A.D.3d 28, 32 (1st Dep't 2004) (quotation marks omitted), *modified on other grounds*, 5 N.Y.3d 303 (2005); *see* Ch. 371, § 6, 1971 N.Y. Laws 1159, 1161-62. The result was "ever-increasing rents," without the anticipated increase in construction of new housing. *La Guardia v. Cavanaugh*, 53 N.Y.2d 67, 74 (1981).

2. In 1974, the State Legislature enacts the RSL and establishes the prevailing system of rent stabilization in New York City

Three years after the failed experiment in deregulation, and facing a persistent and acute housing crisis in New York City, the Legislature adopted a state rent stabilization scheme with the Emergency Tenant Protection Act of 1974 (ETPA), ch. 576, § 4, 1974 N.Y. Laws 1510, 1512-33. In enacting the ETPA, the Legislature found that "a substantial number of persons" living in unregulated accommodations were "being charged excessive and unwarranted rents and rent increases." ETPA § 2, 1974 N.Y. Laws at 1512-13 (codified as amended at RSL § 26-501). Government regulation was therefore necessary to prevent rent "profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare." *Id.*

The ETPA was substantially similar to the City's 1969 rent stabilization law and extended the basic framework of rent stabilization to some additional counties in the State. *See La Guardia*, 53 N.Y.2d at 74-76. (*See also* Joint Appendix (J.A.) 42-44.) Specifically, the ETPA allowed certain municipalities, including New York City, to issue a "declaration of emergency" if the vacancy rate for certain housing

accommodations was "not in excess of five percent." ETPA § 3, 1974 N.Y. Laws at 1513 (reproduced as amended at N.Y. Unconsol. Laws § 8623 (McKinney)). The ETPA generally applied to rental housing accommodations constructed before 1974 that contained six or more units and were not subject to rent control. (J.A. 43.) Property owners of newer buildings may also opt into rent stabilization for tax benefits. *See* N.Y. Real Prop. Tax Law § 421-a.

As amended, the City's 1969 rent stabilization law, the ETPA, and various other statutes provide the basic framework for the City's current rent stabilization system, which are collectively referred to as the Rent Stabilization Law (RSL).[4] DHCR has also promulgated regulations implementing the RSL, which are codified in the Rent Stabilization Code (RSC).[5]

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[4] The RSL is codified at the New York City Administrative Code (RSL), §§ 26-501 to 26-520. The ETPA, which principally governs rent stabilization outside of New York City, is reproduced in the Unconsolidated Laws of New York, tit. 23, ch. 5, §§ 8621-8634 (McKinney).

[5] The RSC is printed at chapter eight, subchapter B, of title nine of the Compilation of Codes, Rules and Regulations of the State of New York, 9 N.Y.C.R.R. pts. 2520-31.

Since its enactment, the RSL has aimed to ensure a fair and stable rental housing market in two basic ways. *First*, the law controls the pace of rent increases in regulated apartments, while also ensuring that landlords are able to earn a reasonable rate of return. *See* RSL §§ 26-511, 26-512. To determine permissible rent adjustments in New York City, the Rent Guidelines Board (RGB)—a nine-person body composed of representatives of property owners, tenants, and the public—annually determines the permissible percentage of rent increases for lease renewals. *See id.* § 26-510(a)-(b). The Board must consider the economic conditions property owners face, such as tax rates and maintenance costs, as well as conditions facing renters, such as vacancy rates and the cost of living. *See id.* § 26-510(b).

To account for the unique financial circumstances of individual property owners, the RSL historically has permitted landlords to seek additional rent increases if they make renovations to individual apartments, called individual apartment improvements (IAIs), or if they undertake major capital improvements (MCIs) in buildings in which stabilized units are located. *See* ETPA § 6, 1974 N.Y. Laws at 1517-18 (codified as amended at RSL § 26-511(c)(6), (13)). In addition, property

owners who believe that the standard rent increases fail to afford them a reasonable income may apply to DHCR for a hardship exemption permitting larger increases. Such an exemption can be established where the property owner demonstrates that (1) the standard rent increase does not allow them to maintain the same average annual net income, or (2) their annual gross rental income does not exceed their annual operating expenses by five percent of gross rent. *See* RSL § 26-511(c)(6), (6-a); RSC § 2522.4(b)-(c).

Second, to ensure the effectiveness of limits on rent increases, while preserving landlords' substantial authority to control the use of their property, the RSL imposes certain restrictions on the eviction of current tenants. In particular, the RSL obligates landlords to offer most existing tenants the opportunity to enter into a renewal lease when the existing lease expires. *See* RSL § 26-511(c)(9); RSC § 2523.5(a). But landlords may refuse to renew a lease if the apartment is not the tenant's primary residence. *See* RSC § 2524.4(c). When a tenant vacates a regulated apartment, landlords may choose their next tenant—subject to a limited

exemption for succession rights[6]—and perform background checks on all prospective tenants. *See* N.Y. Real Prop. Law §§ 227-f(1), 238-a(1)(b). To ensure the landlord has knowledge of all the tenants regularly occupying the premises, an owner may request identification of all persons living in regulated units on an annual basis. *See* RSC §§ 2520.6(o), 2523.5(e).

Like other landlords, owners of rent stabilized units can also wield substantial eviction powers. Landlords of regulated units may evict tenants for nonpayment of rent, committing a nuisance, using the apartment for illegal purposes, and unreasonably refusing the owner access to the apartment, among other grounds. *See* RSC § 2524.3. After providing notice, the landlord may commence a summary proceeding to evict a tenant. *See* N.Y. Real Prop. Acts. & Proceedings Law §§ 711, 731-733; RSC § 2524.2; *see also Matter of Brusco v. Braun*, 84 N.Y.2d 674, 681 (1994) (noting that eviction procedures provide owners with an "expeditious" process for recovering property). Like other property owners, owners of buildings with regulated units can also sell their properties.

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[6] Certain family members of rent-stabilized tenants, as well as certain individuals who can prove a close, familial-like relationship to the current tenant, may have the right to succeed to rental of the unit upon the original tenant's departure. *See* RSC §§ 2520.6(o), 2523.5(b)(1).

State law authorizes rent stabilization only so long as New York City's housing market remains in a state of emergency, meaning that the rental vacancy rate remains at or below five percent and other conditions are satisfied. *See* N.Y. Unconsol. Law § 8623(a) (McKinney). The City Council has reassessed the need for continued rent regulation roughly every three years, most recently in 2018, and has continuously found a vacancy rate below five percent. *See* RSL § 26-502; N.Y. Unconsol. Law § 8603 (McKinney). (J.A. 160.)

3. Over the ensuing decades, the Legislature repeatedly amends the RSL, periodically tightening and relaxing its restrictions

Since 1974, the Legislature has repeatedly reenacted the RSL to preserve its core elements: regulations on the rate of rent increases and limitations on evictions. Over time, however, the Legislature has amended the law in response to changing political and economic forces, sometimes providing stronger protections for tenants or owners, and sometimes relaxing the RSL's requirements.

In 1993, for example, the Legislature enacted the Rent Regulation Reform Act (RRRA), ch. 253, 1993 N.Y. Laws 2667, which benefited property owners by creating two paths to remove units from regulation.

See Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d 270, 280 (2009). Specifically, the RRRA permitted the deregulation of units where the legal rent exceeded a certain threshold (initially $2,000) and either (i) the unit became vacant, or (ii) the tenants' combined annual income exceeded a specific threshold (initially $250,000) in the two immediately preceding years. *See* RRRA § 2, 1993 N.Y. Laws at 2667. In subsequent years, the Legislature expanded the scope of this so-called "luxury decontrol" by, among other things, lowering the income threshold triggering deregulation. *See Roberts*, 13 N.Y.3d at 281.

In 2003, the Legislature again benefited property owners by granting landlords the ability to increase rents to the maximum legal rent upon lease renewal or vacancy, even if they previously charged a lower, "preferential" rent. *See* Ch. 82, 2003 N.Y. Laws 2605, 2607. Coupled with luxury decontrol measures, preferential rent increases significantly expedited the time within which landlords could deregulate units.[7]

In 2011, the Legislature again amended the RSL, this time to provide stronger protections for tenants. *See* Rent Act of 2011, ch. 97, pt.

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[7] *See* McPherson, *supra*, at 1144-45.

B, 2011 N.Y. Laws 752, 767-88. Among other things, the 2011 amendments reduced the amount by which certain property owners could increase rents based on the cost of IAIs, from 1/40th of the cost of the improvements to 1/60th. *See id.* § 15, 2011 N.Y. Laws at 772. The 2011 amendments also (i) increased the rent threshold for luxury decontrol from $2,000 to $2,500, *id.* § 36, 2011 N.Y. Laws at 781-82, and increased the income threshold for high-income/high-rent deregulation from $175,000 to $200,000, *see id.* §§ 30-32, 2011 N.Y. Laws at 774-78. In 2015, the Legislature further increased the rent thresholds for luxury deregulation and limited the amount by which owners could increase rents based on MCIs. *See* Rent Act of 2015, ch. 20, pt. A, §§ 10-16, 29, 2015 N.Y. Laws 34, 39-42, 48-49.

4. In 2019, the Legislature enacts the Housing Stability and Tenant Protection Act to further strengthen the RSL's tenant protections

In 2019, the Legislature conducted a comprehensive investigation into the state of the rental housing market in New York, holding at least eight public hearings across the State and collecting testimony from tenants, property owners, non-governmental organizations, and other experts. The Legislature's investigation culminated in the enactment of

the Housing Stability and Tenant Protection Act (HSTPA), ch. 36, 2019 N.Y. Laws 154.

Based on the testimony and evidence presented, the Legislature determined that the RSL was a vital aspect of the State's efforts to combat the persistent shortage of affordable housing in New York City and other parts of the State. Accordingly, the HSTPA eliminated the requirement that the Legislature periodically reenact the RSL and permanently codified the provisions of the RSL for New York City and elsewhere—subject to the finding of a continuing housing emergency in each participating municipality. *See* HSTPA § 1-a, 2019 N.Y. Laws at 155-56. The HSTPA also authorized any city, town, or village in the State to opt in to rent stabilization if certain criteria are satisfied. *See id.*

Like previous amendments, the HSTPA preserves the RSL's core purposes and structure—limiting the rate of rent increases and regulating evictions. But it again adjusts the rights and obligations of tenants and property owners to ensure that the overall system promotes a fair and stable housing market. For example, in response to evidence that many property owners were abusing MCI and IAI provisions to increase rents dramatically and displace tenants, the HSTPA limited the annual

increases landlords can charge based on such improvements.[8] Under the 2019 amendments, landlords of larger buildings are now required to amortize the reimbursement costs for MCIs for at least 12.5 years—up from 9 years—and the total amount a landlord can increase a tenant's annual rent based on an MCI is capped at 2%—down from a prior cap of 6%. *See* RSL § 26-511(c)(6); HSTPA § 9, 2019 N.Y. Laws at 181. With respect to IAIs, the RSL now caps the aggregate amount that an owner

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[8] Evidence presented to the Legislature established that, for over 100 units examined, IAIs drove rents up by an average of 107%, while MCIs increased rents by an average of 4.3%. *See Rent Regulation and Tenant Protection Legislation: Hearing Before the S. Standing Comm. on Hous., Constr. & Cmty. Dev.*, 2019 Leg., 242d Sess. 49-50 (N.Y. May 16, 2019) (statement of Benjamin Dulchin, Exec. Director, Ass'n for Neighborhood & Hous. Dev.); *Rent-Regulated Housing: Hearing Before the Assemb. Standing Comm. on Hous.*, 2019 Leg., 242d Sess. 35 (N.Y. May 2, 2019) (statement of Lucy Joffe, Assistant Comm'r of Policy, HPD).

There was also evidence that some property owners were fraudulently invoking the MCI and IAI provisions or overstating the value of improvements. *See Rent Regulation and Tenant Protection Legislation: Hearing Before the S. Standing Comm. on Hous., Constr. & Cmty. Dev.*, *supra*, at 40, 43 (statement of Michael Barbosa, Assistant Att'y Gen., N.Y. State Office of the Att'y Gen.).

can recover from rent increases at $15,000—the average cost of an IAI—which can be recovered over 15 years.[9] *See* RSL § 26-511(c)(13).

The HSTPA also placed new restrictions on property owners' ability to displace tenants by reclaiming regulated units for their own use. Prior to the 2019 amendments, owners could deregulate multiple units at once if they asserted an intention to use the units as a residence for themselves or their family members. (J.A. 97-98.) The evidence presented to the Legislature established that property owners were increasingly abusing this authority to deregulate an increasing number of units, sometimes converting multifamily buildings into single-family mansions.[10] The 2019 amendments preserve landlords' ability to reclaim units for personal use, but limit each landlord to reclaiming a single unit upon a showing of an "immediate and compelling necessity." *See* RSL § 26-511(c)(9)(b).

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[9] *See* N.Y. State Assembly Debate on Assembly Bill A8281, 242d Sess., at 30, 50 (June 14, 2019) ("June 14, 2019, Assemb. Tr.") (statement of Assemb. Steven Cymbrowitz).

[10] *See Rent Regulation and Tenant Protection Legislation: Hearing Before the S. Standing Comm. on Hous., Constr. & Cmty. Dev.*, *supra*, at 135-36 (testimony of Adam Meyers, Deputy Director, Preserving Affordable Hous. Program, Brooklyn Legal Servs. Corp.).

To prevent the rapid and escalating loss of regulated units—and widespread tenant harassment to obtain vacancies permitting deregulation—the HSTPA also eliminated RSL provisions authorizing luxury decontrol.[11] *See* HSTPA, pt. D, § 5, 2019 N.Y. Laws at 158 (repealing RSL §§ 26-504.1, 26-504.2, 26-504.3). And it enacted a number of tenant-protective changes designed to prevent tenant dislocation, including a prohibition on property owners increasing rents from preferential to legal rates upon lease renewal (but allowing such increases upon vacancy), and new provisions regulating the conversion of regulated buildings to cooperatives or condominiums, among other changes. *See* RSL § 26-511(c)(14) (preferential rents); N.Y. Gen. Bus. Law § 352-eeee (conversions). (*See also* J.A. 51-53.)

Certain units subject to the RSL by virtue of owners' participation in tax benefit programs remain "subject to the deregulation provisions of

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[11] *See Rent-Regulated Housing: Hearing Before the Assemb. Standing Comm. on Hous.*, *supra*, at 31 (statement of Elyzabeth Gaumer, Assistant Comm'r of Research & Evaluation, HPD) (noting that vacancy decontrol resulted in the deregulation of more than 150,000 units); *id.* at 23, 25-26 (statement of Lucy Joffee) (explaining that certain landlords were engaging in speculation and tenant harassment to secure vacancies permitting deregulation).

rent stabilization as provided by law prior to" HSTPA's enactment. Ch. 39, pt. Q, § 10, 2019 N.Y. Laws 220, 241. In addition, any housing unit that was lawfully deregulated before June 14, 2019, remains deregulated after HSTPA.[12] *See id.*

B. The RSL's Central Role in Addressing New York City's Intractable Shortage of Affordable Housing

Although the RSL has helped stabilize the rental housing market, New York City continues to face an acute shortage of affordable rental housing for a variety of reasons—including exceptional population density, high construction costs, stagnating wages, and limited space.[13] As of 2017—the most recent year for which the U.S. Census Bureau conducted its triennial Housing and Vacancy Survey for New York City—over half of rental households in the City were considered "rent burdened," meaning they paid more than a third of their income towards

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[12] These provisions are located in a supplemental statute enacted by the Legislature on June 24, 2019, to make certain clarifications and technical corrections to the HSTPA. *See* Ch. 39, 2019 N.Y. Laws at 220-21.

[13] *See, e.g.*, N.Y. City Hous., *Our Current Affordable Housing Crisis* (last visited Apr. 15, 2021) (internet). (For internet sources, URLs are provided in the Table of Authorities.)

rent. Approximately one in three renter households in the City paid 50% or more of their household's income for rent in 2011, 2014, and 2017.[14]

Nearly 2.5 million New York City tenants reside in rent-stabilized apartments.[15] Although there is no income limit for tenants in regulated units, the RSL overwhelmingly benefits low-income tenants. Approximately 86% percent of tenants in rent stabilized units—or more than 830,000 households—are low, moderate, or middle income, and the vast majority are low-income renters.[16] Indeed, in 2016, the median annual income for rent stabilized households was $44,560—as compared to a median annual income of $67,000 for New York City households in

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[14] *See* Elyzabeth Gaumer, *Selected Initial Findings of the 2017 New York City Housing and Vacancy Survey* 6, 25, HPD (Feb. 9, 2018) (internet); *Rent-Regulated Housing: Hearing Before the Assemb. Standing Comm. on Hous.*, *supra*, at 30 (statement of Elyzabeth Gaumer).

[15] *See Rent Regulation and Tenant Protection Legislation: Hearing Before the S. Standing Comm. on Hous., Constr. & Cmty. Dev.*, *supra*, at 35 (statement of Michael Barbosa); C.R. Waickman et al., *Sociodemographics of Rent Stabilized Tenants* 2, HPD (2018) (internet) (estimating that over 2.4 million New York City residents live in rent stabilized units).

[16] *See Rent-Regulated Housing: Hearing Before the Assemb. Standing Comm. on Hous.*, *supra*, at 31 (statement of Elyzabeth Gaumer).

unregulated rental units.[17] Rent regulated apartments (including the relatively small number of rent controlled units) currently house more low-income New Yorkers than all public and subsidized housing combined.[18]

Despite the urgent need for affordable housing in New York City, the supply of rent-stabilized units has decreased dramatically over the past decades, dropping from a high of approximately 1,600,000 units in the 1970s to about 966,000 units in 2017.[19] (*See* J.A. 161.)

Although many owners have chosen to deregulate units, property owners continue to earn a reasonable return on properties subject to the RSL. From 1990 to 2018, New York City landlords' net operating income for rent-stabilized units—i.e., the amount remaining after operating and maintenance expenses—increased 48.7% after adjusting for inflation, meaning that revenues have consistently outpaced the costs of expenses

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[17] *See Selected Initial Findings of the 2017 New York City Housing and Vacancy Survey*, *supra*, at 4; Waickman et al., *supra*, at 4.

[18] *See* Oksana Mironova, *5 Myths About Rent Regulation*, Cmty. Serv. Soc'y (Jan. 15, 2019) (internet); *see also* Waickman et al., *supra*, at 1.

[19] *See* Oksana Mironova, *A Guide to Rent Regulation in New York City* 5, Cmty. Serv. Soc'y (2019) (internet).

by a significant margin.[20] As of 2018, revenue exceeded operating costs in nearly all rent stabilized buildings, and apartments in rent stabilized buildings generated an average of $535 per unit in monthly net operating income.[21] And following HSTPA's enactment, the market for buildings with rent stabilized units has remained active, suggesting that buildings with rent stabilized units continue to reflect a relatively secure investment.[22]

C. Plaintiffs' Challenge to the RSL's Constitutionality

Plaintiffs are owners of New York City residential apartment buildings with units subject to the RSL, as well as two trade associations whose members include property owners of rent stabilized apartments. On July 15, 2019, they commenced this 42 U.S.C. § 1983 action in the United States District Court for the Eastern District of New York naming as defendants the RGB, the RGB's individual members, and DHCR

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[20] *See* N.Y. City Rent Guidelines Bd., *Housing NYC: Rents, Markets & Trends 2020*, at 35, 37 (rev. Jan. 26, 2021) (internet).

[21] *See id.* at 33, 122.

[22] *See* Will Parker & Konrad Putzier, *Buyers Return After Rent-Control Slams New York Apartment Values*, Wall St. J. (Feb. 4, 2020) (internet).

Commissioner RuthAnne Visnauskas. (J.A. 26-37.) Two tenant advocacy groups—New York Tenants & Neighbors and Community Voices Heard—and the Coalition for the Homeless intervened as defendants. (J.A. 14.)

The complaint alleges that the RSL facially violates the Takings Clause of the Fifth Amendment of the Federal Constitution by constituting a physical and regulatory taking. The complaint also alleges that the RSL is irrational and violates property owners' substantive due process rights under the Fourteenth Amendment. (J.A. 141-144.) Although plaintiffs argue that the 2019 amendments heighten the unconstitutional effects of the RSL, the major thrust of their attack is on the RSL overall, including provisions that have been in place for decades. Indeed, plaintiffs' counsel has acknowledged that "this case was not inspired by the 2019 amendments. The claim was in process before the 2019 amendments were enacted." (J.A. 467.) Plaintiffs seek a declaration that the RSL is facially unconstitutional and an injunction permanently enjoining the State and City from enforcing it. (J.A. 144-145.)

The district court consolidated this case with a related challenge to the RSL for oral argument. It subsequently granted defendants' motions

to dismiss the complaint in this action.[23] (Special Appendix (S.A.) 2-4.) Relying on a long and uninterrupted line of precedents from this Court, the district court concluded that the RSL does not constitute a physical taking because the law does not deprive plaintiffs of the "'entire bundle of property rights'" in regulated units; among other things, "they continue to possess the property . . . and they can dispose of it (by selling)." (S.A. 15 (quoting *Horne v. Department of Agric.*, 576 U.S. 350, 361-62 (2015)).) The court acknowledged that the 2019 amendments effected a "significant" change to the RSL's provisions, but concluded that their

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[23] The claims in the related case were partially dismissed in the same order dismissing the complaint in this action. (S.A. 2-4.) The surviving claims were later dismissed voluntarily, and the action is currently on appeal to this Court. *See 74 Pinehurst LLC v. State of New York,* Nos. 21-467(L), 21-558(CON) (2d Cir.).

Three other challenges to the RSL asserting similar constitutional claims have been filed in the United States District Court for the Southern District of New York. On March 8, 2021, Judge Ramos dismissed a complaint alleging takings and other constitutional claims, *see 335-7 LLC v. City of New York*, No. 20-cv-1053, 2021 WL 860153 (S.D.N.Y. Mar. 8, 2021), and an appeal has been filed from that decision, *see* No. 21-823 (2d Cir.). Two similar actions remain pending before Judge Karas. *See G-Max Mgmt., Inc. v. State of New York*, No. 20-cv-634 (S.D.N.Y).; *Building & Realty Inst. of Westchester & Putnam Counties v. State of New York*, No. 19-cv-11285 (S.D.N.Y.).

"incremental effect" was "not so qualitatively different from what came before as to permit a different outcome." (S.A. 16.)

With respect to plaintiffs' regulatory takings claim, the district court again followed this Court's precedents, which have rejected "every regulatory-takings challenge to the RSL." (S.A. 17.) The district court found that plaintiffs' purely facial claims failed to allege a taking under the fact-intensive inquiry mandated by *Penn Central*. In particular, plaintiffs' "vague allegations about the average diminution in value across regulated properties" were insufficient to demonstrate that the RSL has a negative economic effect on all property owners—a showing required to prevail on a purely facial claim. (S.A. 21.) Likewise, the court found that "[p]laintiffs cannot make broadly applicable allegations about the investment-backed expectations of landlords" because "the nature of each landlord's . . . expectations depends on when they invested in the property and what they expected at that time." (S.A. 22-23.)

The district court also rejected plaintiffs' substantive due process claim. (S.A. 33.) Applying the deferential standard applicable to economic legislation, the court found that the RSL comports with due process because it is rationally related to at least one legitimate governmental

purpose: "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." (S.A. 35.)

SUMMARY OF ARGUMENT

For over half a century, the RSL has represented a central part of the Legislature's efforts to address the complex and volatile conditions that have long plagued New York City's rental housing market. For the nearly one million apartments currently subject to rent stabilization, the RSL principally regulates the rate of annual rent increases and the circumstances in which landlords may evict tenants. Over the years, the Legislature has repeatedly amended the RSL, sometimes tightening and sometimes relaxing its restrictions. But throughout, the RSL has reflected the Legislature's concerted policy judgment about how best to calibrate the rights of landlords and tenants to prevent the worst forms of rent profiteering, while also ensuring that landlords have the ability to earn a reasonable return.

Reviewing constitutional challenges to previous iterations of the RSL, this Court has repeatedly held that the RSL is a rational economic regulation that neither violates the Takings Clause nor the Due Process

Clause of the Federal Constitution. The district court correctly reached the same conclusion here.

The current version of the RSL, like all prior iterations, does not effect a physical or regulatory taking. Plaintiffs' physical takings argument defies this Court's precedents, which have consistently held that the RSL is an economic regulation governing the relationship between landlords and tenants, and does not authorize the kind of occupation or confiscation of property that gives rise to a physical taking. Plaintiffs' contrary arguments simply ignore this Court's precedents.

The RSL also does not constitute a regulatory taking as a facial matter. This Court's prior case law establishes an exceedingly high bar for plaintiffs to prevail in facial challenges under the requisite fact-intensive *Penn Central* analysis, and plaintiffs have not met it. As plaintiffs acknowledge, the RSL's effects vary significantly across the nearly one million units subject to regulation; these units are found in different buildings and neighborhoods; and they are owned by landlords who entered the market at different times and have different expectations and capabilities. That variation prevents plaintiffs from demonstrating that there is "no set of circumstances" in which the RSL can be

constitutionally applied. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). There also is no merit to plaintiffs' alternative contention that this Court should analyze their regulatory takings claim under the purpose-based standard articulated in Justice Scalia's dissent in *Pennell v. City of San Jose*, 485 U.S. 1 (1988). The Supreme Court has never adopted that approach, which is both unworkable and at odds with longstanding takings precedent.

Plaintiffs' substantive due process claim is also meritless. The RSL comports with due process principles because it is rationally related to at least one legitimate government objective, i.e., preventing tenant dislocation and preserving neighborhood stability. Plaintiffs' contrary arguments would require this Court to second-guess the considered judgment of the Legislature with respect to complex questions of economic and social policy affecting New York City's unique rental market.

ARGUMENT

POINT I

THE RSL DOES NOT VIOLATE THE TAKINGS CLAUSE

Plaintiffs ask this Court to invalidate in its entirety a regulatory scheme that has been in place since 1974 and has antecedents dating back even further. The current RSL provides protection to nearly 2.5 million tenants in New York City who live in approximately one million rental housing units, which are located in a diverse array of neighborhoods and buildings, and are managed by tens of thousands of different owners. For regulated units, the RSL principally regulates the extent to which landlords can increase rents each year and the circumstances in which they can evict current tenants. In regulating the conditions of tenancy, the RSL seeks to address the complex and ever-evolving challenges posed by New York City's volatile rental housing market and its intractable shortage of affordable housing.

Plaintiffs argue that the RSL violates the Takings Clause of the Federal Constitution, which provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. As the Supreme Court has explained, the Takings Clause is violated

when there is a "physical" taking, such that the government physically appropriates ownership of private property, *see, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or when there is a "regulatory" taking, such that the government enacts or enforces laws, regulations, or rules that "go[] too far" in depriving owners of the ability to exploit private property.[24] *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Plaintiffs assert that the RSL constitutes both a physical and a regulatory taking. Because they bring only facial claims, they must establish that "*no set of circumstances* exists under which the [RSL] would be valid" under either takings analysis. *See Rent Stabilization Ass'n of City of N.Y. v. Dinkins*, 5 F.3d 591, 595 (2d Cir. 1993) (quotation marks omitted); *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1117 (2019) ("A facial challenge is really just a claim that the law or policy at issue is

[24] The Supreme Court also has recognized a narrow, per se rule for regulations that "completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). Plaintiffs do not allege such a taking here.

unconstitutional in all its applications."). The district court correctly concluded that plaintiffs have failed on both counts.

A. The RSL Does Not Constitute a Physical Taking.

1. Longstanding precedents of the Supreme Court and this Court foreclose plaintiffs' physical takings claim.

Physical takings are "relatively rare" and "easily identified." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002) (quotation marks omitted). "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of property," *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005), such as when the government requires farmers to forfeit a portion of their crop, *see Horne*, 570 U.S. 350, or physically occupies a private warehouse, *see United States v. General Motors Corp.*, 323 U.S. 373 (1945).

In *Yee v. City of Escondido*, the Supreme Court held that rent regulations like the RSL do not fit this paradigm because, "[p]ut bluntly, no government has required any physical invasion of [the owner's] property." 503 U.S. 519, 528 (1992). In *Yee*, the Court considered a takings challenge by mobile home park owners to rent regulations that, among other things, limited owners' right to evict tenants and convert their

property for other uses. *See id.* at 524-27. The Court found that such restrictions do not constitute physical appropriations but "merely regulate petitioners' *use* of their land by regulating the relationship between landlord and tenant." *Id.* at 528. As the Court made clear, once "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." *Id.* at 528-29 (quotation marks omitted) (collecting cases).

Relying on *Yee*, this Court has repeatedly held that the RSL "does not constitute a physical taking" because it merely regulates "the rental relationship" between landlords and tenants and forces no unwanted use on landlords. *See Federal Home Loan Mortg. Corp. v. New York State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 48 (2d Cir. 1996) (*FHLMC*). In *FHLMC*, for example, this Court rejected a challenge to the RSL's application to apartment units that previously had been deregulated. *See id.* at 46-47. As this Court explained, the owner "purchased an occupied building and acquiesced in its continued use as rental housing." *Id.* at 48. Applying the RSL thus did "not subject the property to a use which its

owner neither planned nor desired," and merely "regulate[d] the terms under which the owner [could] use the property as previously planned." *Id.* (quotation and alteration marks omitted).

Following *FHLMC*, this Court and the New York Court of Appeals have rejected physical takings challenges to the RSL on at least five occasions, notwithstanding repeated amendments and changes to the law.[25] Most recently, in *Harmon v. Markus*, this Court affirmed the dismissal of a complaint challenging many of the same RSL provisions at

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[25] *See West 95 Hous. Corp. v. New York City Dep't of Hous. Pres. & Dev.*, 31 F. App'x 19, 21 (2d Cir. 2002) (concluding that the RSL "regulates land use rather than effecting a physical occupation"); *Greystone Hotel Co. v. City of New York*, No. 98-9116, 1999 U.S. App. LEXIS 14960, at *3 (2d Cir. June 23, 1999) (concluding "there is no per se physical invasion in this case because the statutes in question neither force Greystone to allow guests onto its property in the first instance nor compel Greystone to stay in the rental business"); *see also Federal Home Loan Mortg. Corp. v. New York State Div. of Hous. & Cmty. Renewal*, 87 N.Y.2d 325, 335 (1995) (concluding that "no unconstitutional physical taking has been effectuated"); *Rent Stabilization Ass'n of N.Y. City v. Higgins*, 83 N.Y.2d 156, 171-73 (1993) (concluding that RSL provisions requiring lease renewals and succession rights did not give rise to a physical taking, in part, because they did not impose a "new use" on owners' property).

While Local Rule 32.1.1 would ordinarily proscribe citation to *West 95 Housing Corp.* and *Greystone Hotel Co.* because they are unpublished summary orders predating 2007, we discuss them here because they were relied on by the district court (S.A. 15-17, 19) and discussed by plaintiffs in their brief (Br. for Pls.-Appellants 31-32, 58).

issue in this litigation. *See* 412 F. App'x 420, 422 (2d Cir. 2011). As in *FHLMC*, the owners in *Harmon* "acquired their property . . . with full knowledge that it was subject to the RSL." *Id.* They also retained substantial rights to control the use of their property, including the ability to recover possession of units for personal use, demolish a building, and evict unsatisfactory tenants. *See id.* As in prior cases, the Court found that the State's "regulation of the rental relationship does not constitute a physical taking." *Id.* (quotation marks omitted).

As the district court concluded below (S.A. 15-16), these precedents foreclose plaintiffs' claim that the current version of the RSL constitutes a physical taking. Nearly all of the provisions to which plaintiffs object—i.e., mandatory lease renewal, tenant succession rights, limitations on reclaiming units for personal and commercial use, and limitations on deregulation (Br. for Pls.-Appellants (Br.) 22-27)—are longstanding features of the RSL that merely regulate owners' use of their properties, and that were present in the same or similar form when this Court rejected previous physical takings challenges. *See* Br. for Pls.-Appellants, *Harmon*, 412 F. App'x 420 (No. 10-1126), 2011 WL 494370, at *14-15 (objecting to RSL provisions concerning mandatory lease renewals,

mandatory succession rights, restrictions on reclaiming units for alternative uses, and restrictions on deregulating units). And while the 2019 amendments impose some additional restrictions on landlords, plaintiffs make almost no attempt to explain why the "incremental effect" of those amendments is "so qualitatively different from what came before as to permit a different outcome" in this case. (S.A. 16.)

Indeed, the only change enacted by HSTPA that plaintiffs emphasize is the restriction on landlords' ability to reclaim more than one unit for personal use. (*See* Br. 24.) But as the complaint acknowledges (J.A. 97-98), even before the 2019 amendments landlords could reclaim one or more units only if the landlord sought to use the property for his own personal use or the use of the landlord's immediate family. *See* HTSPA, pt. I, § 2, 2019 N.Y. Laws at 168-69 (blackline of HTSPA changes). Plaintiffs do not explain why the new restriction—put in place to prevent documented abuses of the reclamation power (see *supra* at 18)—alters the takings analysis. The new amendments do not involve any physical encroachment by the State on landlords' properties; do not on their face totally deprive landlords of the ability to personally use a unit; and do not deprive owners of the ability to change the use of the property in other

ways, such as through demolition, *see* RSC § 2524.5(a)(2); conversion to business use, *see id.* § 2524.5(a)(1)(i); eviction, *see id.* § 2524.3; or sale. To the extent the amendments impose an actual restriction on any particular landlord, that grievance must be addressed in an as-applied challenge. *See Dinkins*, 5 F.3d at 595.

Plaintiffs also note (Br. 26) that the HSTPA requires 51% of tenants—up from 15% under prior law—to enter purchase agreements before regulated buildings can be converted to cooperatives or condominiums. But they fail explain why the new majority requirement is so different as to alter the takings analysis, nor have they pointed to any landlord who could have converted a building under prior law but can no longer do so. (*See* J.A. 109-110.)

Recognizing that this Court's precedents pose a substantial barrier to their claims, plaintiffs argue that this Court should ignore its prior case law because most—but not all—of those decisions were decided as summary orders, and because a subsequent Supreme Court decision, *Horne*, has purportedly undercut their logic. (*See* Br. 32-33.) Plaintiffs are wrong on both counts.

First, the fact that most of this Court's decisions rejecting physical takings challenges to the RSL were decided as summary orders cuts in exactly the wrong direction for plaintiffs. (*See* Br. 32.) Summary orders are appropriate where case law on a topic is settled. *See, e.g., United States v. Sirai*, 533 F.3d 99, 100 (2d Cir. 2008). Therefore, the Court's repeated reliance on summary orders underscores the clarity of the precedents foreclosing plaintiffs' claims, and does not suggest any uncertainty in the law.

Second, plaintiffs read too much into *Horne*. In that case, the Supreme Court held that a statute requiring raisin growers to set aside a portion of their crop for the government was a per se taking. *See* 576 U.S. at 354-55, 362. In so holding, the Court rejected an argument that the reserve requirement was not a taking because "raisin growers voluntarily choose to participate in the raisin market." *See id.* at 365. Plaintiffs contend (Br. 32-33) that *Horne* undermines this Court's conclusion in *FHLMC* that the RSL is not a physical taking because property owners voluntarily participate in the rental market. *See* 83 F.3d at 48. But plaintiffs overlook fundamental differences between the regulations at issue in *FHLMC* and *Horne*. In the rental housing context, the

RSL does not result in a "compelled physical occupation" because property owners willingly accept tenants' presence in apartments when they choose to become landlords. *See Yee*, 503 U.S. at 531-32; *see also id.* at 527 ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land."). The RSL also results in no physical confiscation of property because landlords remain free to collect rents—subject to certain regulations on the amount of annual increase.[26] The RSL's rent regulation thus sharply contrasts with the regulation at issue in *Horne*, where the government physically appropriated a portion of farmers' crops without the promise of compensation.

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[26] *See FCC v. Florida Power Corp.*, 480 U.S. 245 252 (1987) (statute authorizing FCC to "review the rents charged by public utility landlords who have voluntarily entered into leases with cable company tenants renting space on utility poles" is not a physical taking, because "statutes regulating the economic relations of landlords and tenants are not *per se* takings"); *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 374 (2d Cir. 2006) (explaining that there is no physical taking "when the government acts in a regulatory capacity, such as when it . . . limits the rent a landlord may charge tenants").

2. Putting precedent aside, plaintiffs have not alleged a physical taking.

Even if this Court were to consider the question anew, there would be no basis to depart from its prior holding that the RSL does not amount to a physical taking. On its face, the RSL does not compel property owners to open their properties to tenants or keep the properties open to tenants. Rather, it imposes conditions on the use of property that owners have voluntarily held out for rental—precisely the kind of land use regulation that falls outside the ambit of the physical takings paradigm. *See Yee*, 503 U.S. at 528-29.

Plaintiffs contend that the "combined effect" of the RSL's restrictions approximates that of a physical taking because it effectively requires landlords to remain in the rental market. (Br. 28.) But plaintiffs' one-sided depiction of the RSL overlooks the substantial rights landlords retain to change the use of their property and exit the rental market. Among other things, landlords can remove an entire building from the RSL by establishing that they wish to use the property for a business of their own, *see* RSC § 2524.5(a)(1)(i)-(ii); they can remove a regulated building from the rental market when they seek to demolish the building, subject to certain findings by DHCR, *see id.* § 2524.5(a)(2); they can

remove the building from regulation when they rehabilitate at least 75% of building-wide and individual housing accommodations in buildings found to be in substandard or seriously deteriorated condition, *see id.* § 2520.11(e); they can convert the building to a condominium or cooperative if they obtain purchase agreements from 51 percent of residents, *see* N.Y. Gen. Bus. Law § 352-eeee(b); and, as explained above, they can recover a unit for personal use when they establish an "immediate and compelling" need, *see* RSL § 26-511(c)(9)(b). And of course, landlords may sell their property whenever they wish. Although the RSL imposes some restrictions on landlords evoking these powers, on this facial challenge plaintiffs have not alleged that the limitations are so restrictive as to effectively compel all affected landlords to remain in the rental housing market against their wishes.

Contrary to plaintiffs' suggestion (Br. 27-28), landlords also retain substantial rights to control who occupies their property, notwithstanding the general requirement that landlords renew the leases of existing tenants and their successors. Among other things, landlords can select their own tenants upon vacancy; refuse to renew leases to tenants who do not use regulated units as their primary residence, *see* RSC

§ 2524.4(c); and expeditiously evict tenants on a variety of grounds; *see id.* §§ 2524.3-2524.5; *see also Troy Ltd. v. Renna*, 727 F.2d 287, 291-92, 301 (3d Cir. 1984) (regulation guaranteeing certain elderly tenants and their spouses the right to remain in units for forty years was not a physical taking where tenancy could terminate by virtue of changing income levels or upon eviction on thirteen designated grounds).

Given the substantial rights landlords retain to control who occupies their property, there is no merit to plaintiffs' and amici's contention that the RSL effectively destroys landlords' exclusion rights. (*See* Br. 27-28; Br. of Cato Inst. as Amicus Curiae in Supp. of Pls.-Appellants 1-13.) In any event, the Supreme Court has never suggested that regulations like the RSL must be treated as per se takings, even when they severely restrict the right to exclude. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (evaluating as a regulatory taking a statute authorizing disclosure of trade secrets as a condition of market participation); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82-83 (1980) (evaluating as a regulatory taking a state law precluding shopping center from excluding protestors). Because owners possess many powers to control the use and occupants of their property, this case

remains governed by the principle that laws restricting rents and evictions do not effect a physical taking because the "tenants were invited by [the landlords], not forced upon them by the government."[27] *See Yee*, 503 U.S. at 528.

B. The RSL Does Not Constitute a Regulatory Taking as a Facial Matter.

Plaintiffs separately bring a facial challenge to the RSL as a regulatory taking, but that claim is also meritless. As the district court aptly summarized, "every regulatory-takings challenge to the RSL has been rejected by the Second Circuit."[28] (S.A. 17.) Plaintiffs have not demonstrated that a different outcome is warranted here.

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[27] *See also Florida Power Corp.*, 480 U.S. at 252-53 ("The line which separates these cases from *Loretto* is the unambiguous distinction between commercial lessee and an interloper with a government license."); *Bowles v. Willingham*, 321 U.S. 503, 517 (1944) (finding no taking where a rent control statute did not "require any person . . . to offer any accommodations for rent" (quotation marks omitted)).

[28] *See FHLMC*, 93 F.3d at 48; *W. 95 Hous. Corp.*, 31 F. App'x at 21; *Greystone Hotel Co.*, 1999 U.S. App. LEXIS 14960, at *7-8; *see also Dinkins*, 5 F.3d at 595-97 (construing facial attacks as as-applied challenges and dismissing for lack of standing).

1. None of the *Penn Central* factors establishes a regulatory taking.

Regulatory takings analysis is designed, in large part, to protect "the government's well-established power to adjust rights for the public good." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (quotation and alteration marks omitted). As the Supreme Court has long recognized, the "'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'" *Id.* (quoting *Mahon*, 260 U.S. at 413). In recognition of the important governmental interests at stake, the Court has developed a flexible, "ad hoc, factual inquir[y]" focusing on three factors: (1) the "economic impact of the regulation on the claimant," (2) the extent to which the regulation interferes with distinct, investment-backed expectations, and (3) the "character of the governmental action." *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

Facial regulatory takings claims, like plaintiffs' claims here, "face an uphill battle" because the *Penn Central* factors are ill suited to facial analysis. *See Tahoe-Sierra Pres. Council*, 535 U.S. at 320 (quotation marks omitted). The *Penn Central* inquiry requires a particularized, fact intensive analysis "informed by the specifics of the case." *Murr*, 137 S.

Ct. at 1943; *see also Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 32 (2012) ("[M]ost takings claims turn on situation-specific factual inquiries."). The Supreme Court has thus repeatedly admonished that, in the takings context, "the constitutionality of statutes ought not be decided except in an actual factual setting."[29] *Pennell*, 485 U.S. at 10 (quotation marks omitted).

As this Court has recognized, the RSL is particularly unsusceptible to facial analysis. Because the RSL's effects vary substantially across property type, size, and owner, among other things, it is nearly impossible for courts to "engage in an *ad hoc* factual inquiry for *each* landlord who alleges that he has suffered a taking."[30] *See Dinkins*, 5 F.3d at 596. Plaintiffs have not carried their heavy burden here.

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[29] Plaintiffs are unaided by their contention that a facial analysis need focus only on owners "whose ability to change the use of their property is restricted by the RSL." (Br. 35; *see also* Br. 55-56.) Even as to that subset of owners, plaintiffs have failed to establish that the effects of the RSL are sufficiently severe in every instance. See *infra* at 46-54.

[30] *See also West 95 Hous. Corp.*, 31 F. App'x at 21 (concluding that "a widely applicable rent control regulation such as the RSL is not susceptible to facial constitutional analysis under the Takings Clause" because the analysis "'entails complex factual assessments of the purposes and economic effects of government actions'" (quoting *Yee*, 503 U.S. at 523)).

a. The RSL does not interfere with any reasonable, investment-backed expectations, which must be assessed on a case-by-case basis in any event.

As an initial matter, plaintiffs cannot establish that the RSL has meaningfully interfered with the reasonable, investment-backed expectations of every owner it affects. Courts consider the reasonableness of owners' expectations to ensure that compensation is limited to 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) (quotation marks omitted). No such reliance can be established for New York City landlords as a whole. The RSL has been in place for nearly 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. *See Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 369 (2020) ("[N]o party doing business in a regulated environment like the New York City rental market can expect the RSL to remain static."). And even if some landlords did have legitimate reliance interests in a particular set

of RSL provisions, those interests would vary significantly because different landlords purchased their properties at different times. Given the range of potential expectations, the district court correctly concluded that "Plaintiffs cannot allege that the RSL frustrates the reasonable investment-backed expectations of every landlord it affects."[31] (S.A. 23.)

None of the changes effected by the HSTPA alters this analysis. Many of the most significant amendments to the RSL had been debated by the Legislature and anticipated by owners for years.[32] Other

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[31] *See also Guggenheim v. City of Goleta*, 638 F.3d 1111, 1121 (9th Cir. 2010) ("The Guggenheims bought a trailer park burdened by rent control, and had no concrete reason to believe they would get something much more valuable, because of hoped-for legal changes, than what they had."); *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1091 (9th Cir. 2015) (property owner who purchased mobile home park subsequently subject to rent control had no investment backed expectation in the absence of rent control because "one cannot reasonably expect that property to be free of government regulation such as zoning, tax assessments, or, as here, rent control").

[32] *See, e.g.*, June 14, 2019, Assemb. Tr. at 23 (statement of Assemb. Michael Fitzpatrick) ("[W]e knew this day was coming, certainly after last year's election, and we're taking up a number of bills that we have debated over many, many years and put it all in one package."); *id*. at 137 (statement of Assemb. Linda Rosenthal) ("I first introduced the bill to repeal vacancy decontrol and reform rent control ten years ago."); Ralph Blumenthal, *Is This the Time to Buy a Coop Apartment?*, N.Y. Times, (Apr. 11, 1982) (internet) (noting the New York Attorney General's proposal to require approval of 51% of tenants before a regulated building can be converted to a cooperative or condominium).

changes—such as the elimination of luxury decontrol and preferential rent increases—merely restored the RSL to the form it had when at least some current landlords acquired their properties.[33] Such changes can hardly be said to upset reasonable expectations. *See West Va. CWP Fund v. Stacy*, 671 F.3d 378, 387 (4th Cir. 2011) (legislation did not upend reasonable investment-backed expectations where challenged scheme had "been amended frequently over the years," and efforts to revert to prior incantations of the regime had "been introduced repeatedly").

Plaintiffs miss the mark when they argue that the context in which owners acquire their property is irrelevant because owners cannot "acquiesce" to a taking. (Br. 51.) To be sure, the cases plaintiffs cite (Br. 51-52) recognize that an owner does not forfeit the right to challenge a taking simply by acquiring property subject to regulation. But that narrow rule does not render irrelevant the regulatory milieu in place

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[33] The preferential rent provision repealed by HSTPA was first introduced in 2003, while the repealed luxury decontrol provisions were enacted in 1993. See *supra* at 13-14. Proposals to eliminate both provisions have been considered for years. *See* Andrew Cuomo, *My Affordable Housing Agenda: Gov. Cuomo Lays Out His Plan to Keep Rents in Line With What New Yorkers Can Pay*, N.Y. Daily News (June 6, 2015) (internet) (advocating the elimination of vacancy decontrol and preferential rent increases).

when an owner acquired property. The Supreme Court has repeatedly emphasized the importance of context when evaluating the reasonableness of owner's expectations for *Penn Central* purposes. *See, e.g.*, *Arkansas Game & Fish Comm'n*, 568 U.S. at 38 (explaining that the reasonableness of owner expectations is "often informed by the law in force" at that the time of acquisition). Here, owners chose to enter New York City's rental housing market, which has been subject to an ever-evolving scheme of rent regulation since at least World War II. When owners voluntarily enter such a market, they cannot claim that their reasonable expectations have been defeated when the "legislative scheme is buttressed by subsequent amendments to achieve the legislative end."[34] *Concrete Pipe & Prods. of. Cal., Inc. v. Construction Laborers Pension Tr. Fund*, 508 U.S. 602, 645 (1993) (quotation marks omitted) (collecting cases).

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[34] *See also, e.g.*, *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1345 (Fed. Cir. 2018) ("[W]hat is relevant and important in judging reasonable expectations is the regulatory environment at the time of the acquisition of the property" (quotation marks omitted).); *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 634 (9th Cir. 2020) (same).

b. The RSL's economic effects vary dramatically across nearly one million units.

Plaintiffs have also failed to establish that the RSL imposes a substantial, negative "economic impact" on every owner. (*See* Br. 49-50.) To establish economic harm, plaintiffs principally rely on data purporting to show the average economic effects of the RSL, such as the average diminution in rent in stabilized units and the average decline in value for properties with regulated units. (*See* Br. 49-50.) But as plaintiffs themselves acknowledge, "the precise amount of diminution in value may vary among properties." (Br. 18; *see also* Br. 49, 56.) This acknowledged variation makes it impossible for plaintiffs to establish that the RSL cannot be applied constitutionally in any circumstance. As this Court has recognized, "we would have to determine the landlord's particular return based on a host of individualized financial data, and we would have to investigate the reasons for any failure to obtain an adequate return, because the Constitution certainly cannot be read to guarantee a profit to an inefficient or incompetent landlord." *Dinkins*, 5 F.3d at 596. (S.A. 21.)

Plaintiffs are wrong when they contend that it is sufficient that the "Complaint alleges that all properties have suffered a diminution in value." (*See* Br. 18.) Even the most extreme effects alleged in the complaint—i.e.,

a 50% reduction in property value or an 80% reduction in rent as compared to unregulated units (*see* J.A. 113)—fall well within the range that courts have found insufficient to establish a regulatory taking. *See 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%); *see also Concrete Pipe & Prods. of Cal.,* 508 U.S. at 645 (explaining that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking"). Moreover, individual landlords can apply for an exemption to raise rents above the standard increases if they can demonstrate a particular hardship, *see* RSL § 26-511(c)(6), (6-a); RSC § 2522.4(b)-(c), and no economic effects on landlords—individually or as a whole—can be calculated without factoring in any rent increases permitted through that process. Because owners "may still rent apartments and collect the regulated rents," the economic effects do not give rise to a taking, even if landlords "will not profit as much as [they] would under a market-based system." *FHLMC*, 83 F.3d at 48.

c. The public character of the RSL is inconsistent with a taking.

Contrary to plaintiffs' arguments, the nature of the governmental action here does not support the claim of a regulatory taking. In analyzing this factor, courts 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). In *Penn Central*, for example, the Supreme Court found that a New York City ordinance restricting renovations on landmark properties did not give rise to a taking, in part, because the law was part of a "'comprehensive plan' to preserve structures of historic or aesthetic interest" and applied to over 400 sites. 438 U.S. at 132. In so holding, the Court relied on the "judgment of the New York City Council that 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." *See id.* at 134.

Like the statute at issue in *Penn Central*, the RSL is a part of a comprehensive regulatory regime that governs nearly one million units, and the Legislature has repeatedly determined it is necessary to prevent "serious threats to the public health, safety, and general welfare." RSL

§ 26-501. The fact that the RSL may have a more severe effect on some landlords than others does not make it a taking.[35] (*See* Br. 47-48.) "Legislation designed to promote the general welfare commonly burdens some more than others." *Penn Central*, 438 U.S. at 133. Nor does the RSL become a taking because it benefits some tenants more than others; legislation that promotes the public interest will often also benefit some individuals more than others. In *Penn Central*, for example, close neighbors of buildings subject to the historic preservation law likely benefited more from the law's restrictions than more distant neighbors. Nonetheless, the Court found that the law was justified and not a taking based on the Legislature's determination that the law benefited the community at large. *See id.* at 131, 133-35; *see also 335-7 LLC v. City of New York*, No. 20-cv-1053, 2021 WL 860153, at *13 (S.D.N.Y. Mar. 8, 2021) (holding that the "character" of the RSL "also weighs in favor of dismissal").

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[35] Plaintiffs derive no support from the New York Court of Appeals' decision in *Matter of Santiago-Monteverde*, which characterized the RSL as akin to a "public assistance benefit." *See* 24 N.Y.3d 283, 290 (2014). In that case, the court determined that a bankruptcy debtor's interest in her rent-stabilized lease should be exempted from her bankruptcy estate, not whether the RSL was improperly shifting wealth from landlords to tenants. *See id.* at 287.

Plaintiffs and amici err when they contend that this factor supports a taking because the RSL authorizes something like a physical invasion of property. (*See* Br. 47; Br. for Amicus Curiae Inst. for Justice in Supp. of Pls.-Appellants 5-11.) For reasons explained above (see *supra* at 32-43), this Court and others have repeatedly rejected any suggestion that the RSL authorizes a physical occupation.

d. Plaintiffs' other arguments are meritless.

Recognizing that the three traditional *Penn Central* factors do not support a regulatory taking, plaintiffs emphasize (*see* Br. 48-49, 53-54) two other considerations, but neither alters the outcome in this case in any event.

Plaintiffs first assert that the RSL is a regulatory taking because it does not regulate a "noxious" use of property. (Br. 48-49.) But this argument is premised on an illogical premise. Although it is true that regulations of noxious uses are generally not considered takings, no court has ever held that *only* regulations of noxious uses can survive a takings challenge.

In any event, the Supreme Court has rejected the idea that regulations on noxious uses should be treated any differently from other land use regulations for purposes of a facial regulatory takings analysis.

In *Penn Central*, the Court examined the same "noxious use" cases that plaintiffs cite here (Br. 48) and explained that they "are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property." 438 U.S. at 133 n.30. Here—as in the noxious use cases—the RSL's restrictions, which apply to nearly one million units, impose limited restrictions on certain uses of property to prevent "serious threats to the public health, safety, and general welfare" that would otherwise result from unregulated rent practices. *See* RSL § 26-501.

Plaintiffs next contend that the RSL is a taking because it provides no "reciprocity of advantage" to property owners. (Br. 53-54.) But the Legislature has found to the contrary, concluding that the RSL provides significant state- and citywide benefits—including to landlords—by preventing tenant dislocation and preserving neighborhood stability. See *supra* at 15-20. Moreover, plaintiffs' arguments ignore the many times that the Legislature has amended the RSL to benefit property owners. See *supra* at 13-14. Although the value any particular landlord derives

from these benefits may be difficult to quantify, that difficulty does not render the RSL a taking. *See Keystone Bituminous Coal Ass'n*, 480 U.S. at 491 n.21 ("The 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.").

2. Justice Scalia's *Pennell* dissent cannot salvage plaintiffs' claims.

Plaintiffs alternatively argue (Br. 37-43) that this Court should evaluate their regulatory takings claim under the standard articulated in Justice Scalia's partial dissent in *Pennell*, which argued that a taking occurs whenever a government enacts price regulation that is designed to ameliorate a social ill that the regulated property owner has not created. *See* 485 U.S. at 20-24 (Scalia, J., concurring in part and dissenting in part). In *Pennell*, the Supreme Court reviewed a takings challenge to a rent control ordinance that permitted housing authorities to consider tenant hardship when determining whether to approve a rent increase proposed by a landlord. *See id.* at 5. The Court declined to resolve the claim on the merits, concluding that it was premature to resolve the takings challenge given the absence of evidence that tenant hardship had

ever been relied upon to deny a rent increase. *See id.* at 9-10. Writing in dissent, Justice Scalia would have held that the tenant hardship provision constituted a taking because it was designed to alleviate individual renters' poverty, and "*that* problem is no more caused or exploited by landlords than it is by" the rest of society. *See id.* at 21. Plaintiffs contend (Br. 42-43) that the RSL amounts to a taking under this test because, in determining permissible rent increases, the RGB may consider the cost of living for tenants, in addition to other factors, *see* RSL § 26-510(b)(2).

But Justice Scalia's dissent cannot provide support for plaintiff's argument. As this court has recognized, "Justice Scalia's [*Pennell*] dissent was just that; a majority of the Supreme Court has yet to adopt Justice Scalia's reasoning," which "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." *Garelick v. Sullivan*, 987 F.2d 913, 918 (2d Cir. 1993). Indeed, the Supreme Court has since rejected an essential premise of Justice Scalia's dissent—i.e., that takings analysis may consider the nature of the government's purpose in enacting the regulation. *See Lingle*, 544 U.S. at

543-44. Respondents in *Lingle*, relying on Justice Scalia's dissent in *Pennell*, argued that *Penn Central* balancing is not "necessary when, at the threshold, the property taken is not the source of the condition sought to be corrected." Br. for Resp't, *Lingle*, 544 U.S. 528 (No. 04-163), 2005 WL 103793, at *19-20. The Court rejected that argument, explaining that a test that focuses on legislative purpose is unworkable because it "tells us nothing about the actual burden imposed on property rights, or how that burden is allocated," and therefore "cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation." *Lingle*, 544 U.S. at 543-44.

In any event, plaintiffs' claims would fail even if this Court applied the *Pennell* dissent's approach. That dissent acknowledged that rent regulation is generally constitutional; because "the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly." *Pennell*, 485 U.S. at 20. The dissent reasoned that the ordinance challenged in *Pennell* was problematic because it allowed housing authorities to deny rent increases due to the hardship of particular tenants, even though such individualized hardship was unlikely to be "attributable to the

particular landlords that the Ordinance singles out—namely, those who happen to have a 'hardship' tenant." *Id*. But the RSL provision on which plaintiffs rely (Br. 40-41)—RSL § 26-510(b)(2)—is fundamentally different, because it authorizes the RGB to consider the cost of living for a broad swath of tenants, not individual tenants. And because the cost of living for all tenants is directly affected by the decisions of property owners as a group—as the *Pennell* dissent acknowledged, *see* 485 U.S. at 20—the RSL does not improperly shift the costs of ameliorating the increased costs of housing to a blameless party.

POINT II

PLAINTIFFS' SUBSTANTIVE DUE PROCESS CLAIM IS ALSO MERITLESS

Plaintiffs separately contend that the RSL violates their substantive due process rights, but that claim is also meritless. Substantive due process analysis "requires only that economic legislation be supported by a legitimate legislative purpose furthered by a rational means." *In re Chateaugay Corp.*, 53 F.3d 478, 486-87 (2d Cir. 1995) (quotation marks omitted). Legislative action is thus entitled to a "strong presumption of constitutionality" and must be upheld so long as this Court can "find

some reasonably conceivable state of facts that could provide a rational basis for" the law.[36] *Beatie v. City of N.Y.*, 123 F.3d 707, 711-12 (2d Cir. 1997) (quotation marks omitted).

Applying this deferential standard, this Court has repeatedly rejected substantive due process challenges to the RSL.[37] No different outcome is warranted here. As the district court concluded, the Legislature has articulated at least one legitimate purpose in extending the RSL in 2019, namely, 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." (S.A. 35.) *See also*

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[36] There is no merit to the contention that strict scrutiny should apply to plaintiffs' due process claims. (*See* Br. 59; Br. of the New Civil Liberties All. as Amicus Curiae in Supp. of Pls.-Appellants 4-6.) The Supreme Court has "long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation." *Lingle*, 544 U.S. at 545.

[37] *See FHLMC*, 83 F.3d at 48 n.1 ("reject[ing] as unworthy of discussion FHLMC's void for vagueness argument based on the Due Process Clause"); *Harmon*, 412 F. App'x at 423 (rejecting due process challenge as duplicative of takings challenge); *Greystone Hotel Co.*, 1999 U.S. App. Lex. 14960, at *7-8 (finding that the RSL "'represents a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment'" (quoting *Pennell*, 485 U.S. at 13)).

RSL § 26-501 (explaining the RSL was intended to prevent the "uprooting [of] long-time city residents from their communities"). The Supreme Court has previously recognized that "local neighborhood preservation, continuity, and stability" are legitimate state interests. *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992). And the complaint itself acknowledges that the RSL is rationally related to this objective, as it alleges that the RSL was intended to—and actually does—accomplish this purpose by, among other things "reduc[ing] turn-over" by enabling "tenants to stay in units longer." (J.A. 66; *see* J.A. 73; Br. 61.) *See also Rent Stabilization Ass'n of N.Y. City v. Higgins*, 83 N.Y.2d 156, 178 (1993) (finding a "close causal nexus" between the RSL's tenant-protective provisions and the goal of neighborhood stability, because "[p]eople who would, absent the regulations, be threatened with eviction from their homes may now have the right to remain").

Plaintiffs assert that the RSL is an illegitimate method of accomplishing the Legislature's purpose because the law favors tenants over landlords, and especially "long-term tenants, who tend to be disproportionately older." (Br. 64-65). But the Due Process Clause is not violated by differential treatment, so long as the law in question has some

rational basis. *See Hodel v. Indiana*, 452 U.S. 314, 333 (1981). Moreover, the Supreme Court has already recognized that rent regulations, like the RSL, rationally serve "the protection of consumer welfare," even when the "primary purpose" of such regulation is "the protection of tenants." *Pennell*, 485 U.S. at 13.

Plaintiffs and amici also miss the mark when they contend that the RSL is illegitimate because it is ineffective at accomplishing other legislative purposes. (*See* Br. 61-64.[38]) Under modern due process analysis, it is enough that the RSL has one rational justification. *See Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 18 (1990) ("There is no requirement that a law serve more than one legitimate purpose."). And a law is not unconstitutional "simply because it may not succeed in bringing about the result it seeks to accomplish." *Beatie*, 123 F.3d at 712.

In any event, plaintiffs' arguments serve only to highlight why courts do not second-guess legislative judgments in complicated areas of social and economic policy. For example, plaintiffs point to economic

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[38] *See also* Br. of Amicus Curiae the Real Estate Bd. of N.Y. in Supp. of Pls.-Appellants 5-17; Br. of the Nat'l Ass'n of Home Builders as Amicus Curiae in Supp. of Pls.-Appellants 12-28.

analyses of rent regulations outside of New York to argue that the RSL is likely to reduce the City's housing supply. (*See* Br. 61-62 (discussing J.A. 65-73).) But the same arguments were made to the Legislature during the public hearings on the HSTPA.[39] The Legislature was also presented with contrary evidence showing that the City's housing supply has grown by 69,000 units between 2014 and 2017, notwithstanding the existence of the RSL. (*See* J.A. 161.) In reenacting the RSL, the Legislature determined that plaintiffs' supply-related concerns were either unpersuasive or insufficient to outweigh the other benefits of the RSL. Plaintiffs would have this Court second guess the policy judgment of New York's elected representatives.

Plaintiffs also contend that the RSL fails to efficiently "secure housing for low income residents" because regulated units are not means tested. (Br. 62.) But as explained above (see *supra* at 21-22), the evidence

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[39] *See Rent-Regulated Housing: Hearing Before the Assemb. Standing Comm. on Hous.*, *supra*, at 215 (statement of Paimaan Lodhi, Senior Vice Pres. for Policy & Planning, Real Estate Bd. of N.Y.) (claiming the proposed amendments would "eliminate necessary streams of revenue" and "lead to deteriorating conditions, discourage the creation of new stabilized housing units needed to alleviate the housing crisis and hurt the households most in need of help").

shows that rent stabilization overwhelmingly benefits low- and middle-income tenants, especially the disabled and the elderly.[40] Even the data cited in the complaint confirms that rent stabilization primarily serves low-income tenants. The complaint alleges, for example, that as of 2010, low-income households comprised 65.8% of regulated units in New York City, and 78% of stabilized units are rented by households with incomes under $100,000. (J.A. 61-63.) Plaintiffs thus improperly invite this Court to invalidate the entire rent stabilization scheme because they believe there are more effective ways to provide affordable housing, such as means testing. But it has long been established that a law does not violate due process "because the problem could have been better addressed in some other way." *Beatie*, 123 F.3d at 712.

Finally, plaintiffs argue (Br. 60-61) that the RSL is impermissibly vague because the Legislature did not sufficiently prescribe how each locality should determine the existence of a housing emergency that authorizes application of the RSL. That argument fails as a threshold matter for at least two reasons. First, the RSL is a non-penal regulatory

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[40] *See* New York State Senate Debate on Senate Bill S6458, 242d Sess., at 5490-91 (June 14, 2019) (statement of Sen. Brian Kavanagh).

regime to which the vagueness doctrine ordinarily does not apply. *See Ragin v. New York Times Co.*, 923 F.2d 995, 1002 (2d Cir. 1991) (questioning whether the vagueness doctrine "applies to civil actions"). Second, this Court has held that plaintiffs cannot bring purely facial vagueness challenges—like plaintiffs' here—when there is no allegation that the alleged lack of clarity violates any First Amendment or other individual right. *See Dickerson v. Napolitano*, 604 F.3d 732, 744-45 (2d Cir. 2010) (noting that vagueness challenges that do not implicate First Amendment or other individual rights must generally be brought on an as-applied basis)).

Even if plaintiffs could bring a facial vagueness challenge, they have fallen far short of demonstrating that the RSL "impermissibly delegates basic policy matters" to localities "for resolution on an ad hoc and subjective basis." *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The RSL delegates authority to localities to determine the existence of a housing emergency based on a number of standards. The locality must first determine that the vacancy rate for housing accommodations is below five percent. *See* N.Y. Unconsol. Law § 8623(a) (McKinney). If that threshold is satisfied, a municipality must also

evaluate "the condition of such accommodations and the need for continued regulation and control of residential rents." *Id.* Far from delegating "unfettered discretion," the Legislature provided a framework requiring localities to consider a series of objective factors.[41] *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1972). That framework easily passes constitutional muster.

[41] There also is no merit to amici's contention that the New York Court of Appeals' decision in *Matter of Regina Metropolitan* supports the RSL's unconstitutionality. (*See* Br. for Amici Curiae Nat'l Apartment Ass'n & Nat'l Multifamily Hous. Council in Supp. of Pls.-Appellants 21-22.) *Matter of Regina Metropolitan* held that certain procedural changes to rent overcharge claims enacted by other HSTPA provisions were impermissibly retroactive. *See* 35 N.Y.3d at 349. The court's decision has no bearing on unrelated HSTPA provisions that apply prospectively, much less longstanding provisions of the RSL that the Court of Appeals has long upheld against due process attack. *See*, *e.g.*, *Higgins*, 83 N.Y.2d at 174-75.

CONCLUSION

The judgment of the district court should be affirmed.

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April 16, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, William P. Ford, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 13,665 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ *William P. Ford*