20-3366

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

(*Caption continued on inside cover*)

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

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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—against—

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

Defendants-Appellees,

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

Intervenors.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Plaintiffs-Appellants state that nongovernmental corporate entities Community Housing Improvement Program, Rent Stabilization Association of N.Y.C., Inc., Mycak Associates LLC, Vermyck LLC, M&G Mycak LLC, Cindy Realty LLC, Danielle Realty LLC, and Forest Realty, LLC have no parent corporation and no publicly held corporation owns 10% or more of the stock of any of these entities.

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JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction over this action pursuant to the Supremacy Clause of the United States Constitution, Art. VI, Clause 2, and 28 U.S.C. §§1331 and 1343(a)(3). The District Court issued a decision granting Defendants-Appellees' ("Defendants") motions to dismiss on September 30, 2020, and entered final judgment in favor of Defendants on the same day. Plaintiffs-Appellants ("Plaintiffs") timely filed a notice of appeal on October 2, 2020. This Court has appellate jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in concluding that Plaintiffs failed to plausibly allege that the RSL effects a physical taking.
2. Whether the District Court erred in concluding that Plaintiffs failed to plausibly allege that the RSL effects a regulatory taking.
3. Whether the District Court erred in concluding that Plaintiffs failed to plausibly allege that the RSL violates due process.

STATEMENT OF THE CASE

This action challenges the constitutionality of the New York Rent Stabilization Law ("RSL"), which has been described by state legislators as the most stringent rent regulation scheme "in history." JA-50 ¶65.

The RSL governs nearly one million apartments in New York City. These apartments are not designated for low- or middle-income families, but rather are available to any tenant lucky enough to find one—the residential equivalent of a winning lottery ticket. The RSL transfers from the property owner to the tenant a *de facto* ownership interest in that property.

The tenant is entitled to lease renewals in perpetuity, with rent increases capped at levels that fail to cover owners' cost increases—because the rate-setting board is required to take account of factors related to the tenants' ability to pay. The tenant can be ousted only for failing to pay rent, materially breaching a lease, or engaging in unlawful or harmful conduct. And the tenant's property right to perpetual renewals can be transferred to "successors," such as family members, caregivers, or roommates. A property owner's right to deny lease renewals in order to recover the property for herself is severely limited: it is available for only one stabilized unit per building, and then only if that unit is to be used as the owner's primary residence and upon showing immediate and compelling need.

Moreover, owners are barred from converting their property to rentals used for commercial purposes; cannot demolish the building and replace it with a new structure without overcoming substantial barriers,

including significant payments to existing tenants; cannot refuse to renew leases in order to leave the building vacant, unless it is already in disrepair and uninhabitable; and cannot convert the building to a condominium or cooperative unless a majority of the tenants agree.

Formerly, the RSL contained mechanisms for de-regulating units, for example, where a tenant's income reached high levels. It also permitted conversions to condominium or cooperative without majority consent of tenants. The legislature removed those mechanisms in 2019, in its words "to serve the public interest" by preventing "the loss of vital and irreplaceable affordable housing."

The RSL's very substantial intrusion on owners' property rights takes private property for public use without just compensation, in violation of the Takings Clause of the Fifth Amendment, because it "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Palazzolo v. Rhode Island,* 533 U.S. 606, 617-18 (2001). That is true for three independent reasons.

First, the RSL effects a physical taking of regulated owners' property by depriving owners of multiple fundamental property rights: the right to determine who may occupy the property and who is excluded, the right to occupy the property themselves, and the right to determine the use of the property.

Second, the RSL imposes upon owners of regulated property a burden that "in all fairness and justice, should be borne by the public as a whole" by requiring rent adjustments to be based not only on objectively determined increases in operating costs, but also on RSL tenants' ability to pay. *Id.* As New York's highest court put it, "[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." *In re Santiago-Monteverde,* 24 N.Y.3d 283, 290 (2014). And Justices Scalia and O'Connor determined that a law setting maximum rent levels based on tenant hardship effects a taking. *See Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988) (concurring in part and dissenting in part).

Third, the RSL effects a regulatory taking under the applicable multi-factor balancing test. The law (1) authorizes a physical invasion of owners' property and deprives owners of multiple property rights to use and dispose of the property; (2) does not address a noxious use; (3) does not create a reciprocity of advantage for the owners burdened by the regulations; and (4) imposes a substantial economic burden on property owners—a burden that interferes with owners' investment-backed expectations.

Finally, the RSL is arbitrary and irrational in violation of the Fourteenth Amendment's Due Process Clause, because its "means" (the assignment of property benefits to random New Yorkers) is not related in any rational way to a legitimate government interest. Because the RSL's benefits are not targeted to low-income tenants and incentivize tenants to remain in and strategically "bequeath" regulated units, it decreases, rather than increases, the housing supply in New York City and does not further any interest in providing housing to low- or middle-income New Yorkers.

A. The Rent Stabilization Law

Plaintiffs' complaint (the "Complaint") explains the relevant provisions, history, and application of the RSL. JA-41-53; 92-113; 126-32 ¶¶40-69, 202-272, 308-331. Plaintiffs do not repeat that entire discussion here, but rather identify the key features of the RSL scheme.[1]

[1] The RSL, first enacted in 1969, has been amended on multiple occasions, culminating in the recent amendments in the Housing Stability and Tenant Protection Act in June 2019 (the "HSTPA" or "2019 Amendments"). The RSL is 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),

The RSL permits a city to find a "public emergency requiring the regulation of residential rents" if the city's vacancy rate is 5% or less. N.Y. UNCONSOL. LAW tit. 23 §8623.a (McKinney). The statute requires a city to make that determination based on the "supply" and "condition" of housing accommodations within the city, and "the need for regulating and controlling residential rents within such city." *Id.*

Without identifying or applying any standard other than the 5% vacancy threshold (which authorizes the City to declare an emergency if that determination is warranted by other articulated factors), New York City has reflexively declared an emergency every three years for the past 50 years. JA-80-88 ¶¶167-192.[2]

Upon declaration of emergency, the RSL severely restricts property owners' rights to use, occupy, and dispose of rent-stabilized property.

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which is found in Chapter 249-B of the Unconsolidated Laws (also published in N.Y. UNCONSOL. LAW tit. 23 §§8621 et seq. (McKinney)). These laws are referred to, collectively, as the RSL.

[2] The RSL applies to buildings constructed before January 1, 1974, and containing more than five apartments—Plaintiffs are owners (and associations comprised of owners) of such buildings. JA-34-36 ¶¶16-24. Buildings can be subject to the RSL for other reasons not at issue here, including those constructed under certain tax-benefit programs.

The RSL mandates renewal of a rent-stabilized tenant's lease except in circumstances solely within the tenant's control, such as the tenant's failure to pay rent or use of a unit for an illegal purpose. 9 NYCRR §§2524.3. When a new lease term begins, the RSL forbids the property owner from increasing rent beyond the percentage set by the Rent Guidelines Board ("RGB"). By the RGB's own estimates, over the last 20 years, property owners' operating costs have increased at twice the rate of RGB-allowed rent increases. *See* JA-119-20 ¶291-92.

The RSL, as amended in 2019 by the HSTPA, also deprives owners of the right to refuse a lease renewal in order to occupy a stabilized unit for their own use. Under the new law, an owner can recover possession of one tenant-occupied unit in their own building for such purposes. JA-98 ¶223. Even then, the owner must prove an "immediate and compelling necessity for the unit," a standard that has proven exceedingly difficult to satisfy in practice. JA-98; 104 ¶¶223 & 241-43. And if the tenant has lived in the unit for 15 years or more, recovering possession of that unit requires the owner to find the tenant an equivalent accommodation at the same stabilized rent in a nearby neighborhood, a near-impossible feat. JA-98-102 ¶¶224-35

The RSL imposes additional restrictions on the owners' use of their property. For instance, owners cannot recover regulated units where the

tenant or her spouse is sixty-two years of age or older or has physical or psychological impairments. JA-103 ¶238-39. Owners cannot withdraw their buildings from the rental market to rent those buildings for non-residential purposes, nor can they withdraw their property entirely from the rental market, unless the cost of making it habitable exceeds its value or they seek to use the building for their own (non-rental) business. JA-106-09 ¶¶248-56. An owner who wishes to demolish a property must pay to relocate regulated tenants. *Id.*

The 2019 HSTPA made permanent a property's rent-stabilized status, repealing the law's "sunset" provision and the few avenues through which a property owner might remove a stabilized unit from the RSL's restrictions. JA-50-52 ¶68. It repealed Luxury Decontrol, which excluded a vacant unit from stabilization if the rent exceeded a specified amount ($2,000 in 1993, $2,500 in 2011, and $2,700 in 2015). JA-44 ¶50. The HSTPA also repealed High-Income Decontrol, which excluded an occupied unit from stabilization if the rent exceeded the Luxury Decontrol amount and the tenants earned $250,000 (later reduced to $200,000) annually. JA-44 ¶51.

The HSTPA also effectively precludes the conversion of a stabilized building into a cooperative or condominium: A conversion may proceed only if a majority of tenants commit in writing to purchase a unit, which

almost certainly would never happen because the RSL guarantees tenants subsidized, below-market rents in perpetuity. JA-51-52 ¶68(d).

B. The Parties

Plaintiffs Community Housing Improvement Program ("CHIP") and Rent Stabilization Association of N.Y.C., Inc. ("RSA") are not-for-profit trade associations whose members include more than 25,000 managing agents and property owners of both rent-stabilized and non-rent-stabilized properties in New York. JA-34-35 ¶¶16-17.

Plaintiffs Constance Nugent-Miller, Mycak Associates LLC, Vermyck, LLC, M&G Mycak LLC, Cindy Realty LLC, and Danielle Realty LLC, are individual owners of New York City residential apartment buildings subject to the RSL. JA-35-36 ¶¶18-24.

The RSL is authorized by State law—the Emergency Tenant Protection Act of 1974—which enables New York City to declare an "emergency" requiring the continued regulation of residential rents through the RSL. 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 rent stabilization regime in the City of New York. JA-36-37 ¶29.

The New York City RGB is the government agency that determines the adjustment, if any, to stabilized rents upon lease renewal or vacancy. David Reiss is a member and chair of the RGB, and the Board's other members are Cecilia Joza, Alex Schwarz, German Tejada, May Yu, Patti Stone, J. Scott Walsh, Leah Goodridge, and Sheila Garcia. JA-36 ¶¶26-28.

N.Y. Tenants and Neighbors (T&N), and Community Voices Heard (CVH) are tenant groups that have intervened as defendants. Coalition for the Homeless is an advocacy group that has likewise intervened.

C. Plaintiffs' Allegations

Plaintiffs filed this action on July 15, 2019, asserting a facial constitutional challenge to the RSL on three grounds: the RSL (1) effects a physical taking, (2) effects a regulatory taking, and (3) violates substantive due process.

The Complaint sets forth detailed allegations explaining that the RSL was originally predicated upon a housing "emergency" created by soldiers returning from World War II, and subsequently on an "acute shortage of housing accommodations" that is not attributed to any particular cause. JA-56 ¶¶77-78. The "emergency" justifying the continued existence of the RSL is tied (arbitrarily) to a vacancy rate of 5% or less, and its proponents credit the scheme for providing housing to low-income

New Yorkers, reducing homelessness, and maintaining cultural, racial, and socio-economic diversity in the City. JA-56-57 ¶79.

But data show that the RSL does not target its benefits to tenants in need of a rent subsidy or prevent high-income tenants from taking advantage of them (JA-58-64 ¶84-109), or promote diversity (JA-64-65 ¶¶110-13), or increase the stock of affordable housing (JA-65-73 ¶¶114-41). In fact, it does the opposite, by depressing the vacancy rate (*id.*), deterring the development of additional housing (JA-66-70 ¶¶118-30), creating higher rents in the unregulated market (JA-75 ¶151), and reducing property tax revenue for the City (JA-75 ¶153)—revenue that might be used for alternative government programs that actually address affordable housing, like direct subsidies to low-income tenants, tax abatements, or construction projects (JA-76-80 ¶¶156-66).

The Complaint further alleges that the RSL eviscerates property owners' right to exclude individuals from their property—often complete strangers to the owners who have been afforded tenancy through "succeeding" to a former tenant's rights. JA-92-95 ¶¶202-212. Owners have no meaningful avenues for relief from this physical occupation: the few exceptions to an owners' obligation to renew the leases of regulated tenants, such as recovery of units for personal use, removal of property from

the rental market, conversion of buildings to other uses, demolition, and eviction are so limited as to be illusory. JA-95-97 ¶¶214-20.

The Complaint also alleges that the RSL provides a public assistance benefit that is paid for by a subset of private property owners in New York, for whom annual rent increases (if any) permitted by the RGB fail to keep pace with increased operating costs. JA-119 ¶¶290-91; Chart 1 (illustrating cost increases from 1999-2018 as compared with allowable rent increases).

The RSL's web of restrictions severely diminishes the value of stabilized properties: An analysis of properties sold in 2016 shows that properties with predominantly stabilized units were worth half as much as those with predominantly non-regulated units. JA-121 ¶297. In fact, the data show a linear relationship between per-square foot value of a building based on the percent of the building's units that are rent-stabilized. JA-121-22 ¶298 & Chart 2. At the extremes, the data show that buildings where rent-stabilized units account for almost 100% of the units can expect a price per square foot ($200-300/square foot) that is two-thirds less than the price per square foot of buildings where rent-stabilized units account for 0-20% of the units ($800-900/square foot). *Id.*

The New York City Department of Finance's own assessment of property values confirms the reduced value of stabilized properties. JA-

122-24 ¶¶299-301. As just one example, the Finance Department's Assessment Guidelines for assessing property values acknowledge that stabilized properties in Manhattan are worth half that of unregulated properties. JA-123-24 ¶301. (As a result, the New York Department of Finance estimates that in Manhattan, the property tax receipts from non-regulated units can be as much as 60-90% higher than regulated units built before 1973. JA-118 ¶284.)

And these diminutions in value *preceded* the 2019 HSTPA, which further reduced the value of stabilized properties by, *inter alia*, effectively preventing deregulation and reclamation stabilized units by owners, and by removing the few avenues to secure a rent increase greater than the minimal increase permitted by the RGB.

Plaintiffs seek only declaratory and injunctive relief; they do not assert a claim for damages. JA-66-67 at 119-20.

D. The District Court's Decision

Defendants and Intervenors moved to dismiss the Complaint for failure to state a claim.

On September 30, 2020, the District Court issued an opinion granting the motions.[3] The court first observed that "[n]o precedent binding on

[3] The opinion below also resolved motions to dismiss in another case, *74 Pinehurst LLC, et al. v. State of New York*, Case No. 1:19-cv-6447-EK.

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." JA-512 (quotation omitted).

The court dismissed Plaintiffs' physical takings claims principally on the ground that, because Plaintiffs "continue to possess the property (in that they retain title), and they can dispose of it (by selling)," Plaintiffs could not establish a physical taking. JA-524.

In dismissing Plaintiffs' regulatory takings claim, the District Court focused primarily on the facial nature of the challenge. It stated that "[s]imply to apply these 'ad hoc' factors to the instant *facial* challenge is to recognize why the RSL is not generally susceptible to such review." JA-530. The court recognized that the "character of the taking" applied similarly to all RSL properties. JA-532. But it went on to state that, "at best, Plaintiffs can make vague allegations about the average diminution

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That action remains pending below because the District Court denied the *74 Pinehurst* defendants' motion to dismiss an as-applied takings claim. The *74 Pinehurst* plaintiffs moved for entry of final judgment as to the other claims in that action, and on November 19, 2020, the district court denied the *74 Pinehurst* plaintiffs' motion. ECF No. 96 in Case No. 1:19-cv-6447. (The sovereign immunity issue addressed by the district court is relevant only to the *74 Pinehurst* action.)

in value across regulated properties" (JA-530-31) and that "Plaintiffs cannot make broadly applicable allegations about the investment-backed expectations of landlords state- or city-wide" (JA-532).

With respect to Plaintiffs' due process claim, the District Court acknowledged Plaintiffs' arguments that the RSL does nothing to increase the housing supply, and instead contributes to deteriorating housing stock and increased rental prices across swaths of New York apartments. JA-544. But it stated that it was "engaged in rational-basis review here, not strict scrutiny," and therefore, "the Court is bound to defer to legislative judgments, even if economists would disagree." *Id.*

SUMMARY OF THE ARGUMENT

The Complaint's allegations support four independent claims that the RSL violates the federal Constitution. The District Court therefore erred in granting dismissal.

To begin with, the RSL effects a physical taking. The Supreme Court has made clear that when the government compels the non-consensual occupation of private property it has engaged in a *per se* taking. That is because a property owner's right to exclude others is "one of the

most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

The RSL largely eliminates owners' right to exclude. It requires owners to renew the leases of tenants, and a class of tenants' "successors," in perpetuity. The RSL also restricts the ability of owners to change the use of their property, demolish an existing structure to—for example—construct a larger building with more apartments, occupy the property themselves, withdraw their property from the rental market, or dispose of it altogether. That very substantial interference with the owner's physical control of her property constitutes a *per se* taking.

Yee v. City of Escondido, 503 U.S. 519 (1992), confirms that conclusion. *Yee* involved a physical takings challenge to a law that set maximum rent levels in mobile home parks and also prohibited owners from terminating tenancies where the initial tenant transferred her rights to another individual. The Court held that the law did not effect a physical taking because a property owner "who wishes to change the use of his land may evict his tenants albeit with 6 or 12 months' notice"—and that "[a] different case would be presented" if a law compelled the owner to

continue renting the property. *Id.* at 527-28. The RSL presents that "different case," because it makes it virtually impossible for an owner to change the property's use. Indeed, the HSTPA was enacted expressly to "ensure that rent stabilized apartments remain rent stabilized," and to "protect [the] regulated housing stock." JA-50 ¶¶65-66.

Second, the RSL effects a regulatory taking because it requires the RGB to consider factors related to the tenants' ability to pay in setting maximum rent levels. That singles out RSL owners "alone to bear [a] public burden[] which, in all fairness and justice, should be borne by the public as a whole" (*Palazzolo,* 533 U.S. at 617-18).

Justices Scalia and O'Connor reached that conclusion in *Pennell*. They explained that "traditional land use regulation" is permissible "because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy." 485 U.S. at 19-20. By contrast, setting rates based on tenants' ability to pay "meet[s] a quite different social problem: the existence of some renters who are too poor to afford even reasonably priced housing"—and "*that* problem is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes." *Id.* at 21.

Third, the RSL also effects a regulatory taking under the multi-factor test recognized by the Supreme Court in a number of cases, including *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). Each relevant factor weighs in favor of finding a taking: the government action (1) compels an unconsented physical intrusion on the property and eliminates other property rights; (2) does not address a noxious or inappropriate use; (3) provides no reciprocal advantage to RSL property owners; (4) significantly reduces the value of RSL-regulated properties; and (5) interferes with owners' investment-backed expectations.

The District Court concluded that the regulatory takings claims could not be asserted on a facial basis. But the Supreme Court has upheld facial regulatory takings claims, and here the majority of the factors (nature of the intrusion, lack of noxious use, absence of a reciprocal advantage) apply across the board. While the precise amount of diminution in value may vary among the properties, the Complaint alleges that all properties have suffered a diminution in value that is sufficient to establish a taking, given that the other factors weigh heavily in favor of a taking.

Finally, the RSL violates due process. Even under rational basis review, the means employed in the RSL are not rationally related to a

legitimate government interest. Regulated apartments are rented to tenants without regard to income or wealth and therefore the RSL does not promote housing for low- and middle-income families. And the RSL prevents construction of additional apartments on regulated properties and does not alleviate—but rather exacerbates—a housing shortage, increases rents for non-regulated properties and thus does not prevent unjustifiably high rents, and any claimed enhancement of "neighborhood stability" rings hollow in light of tenants' ability to pass along their rights to successors.

STANDARD OF REVIEW

This Court reviews *de novo* the District Court's dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), accepting all well-pleaded factual allegations as true and drawing all inferences in favor of Plaintiffs. *Palin v. N.Y. Times Co.,* 940 F.3d 804, 809 (2d Cir. 2019). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)).

ARGUMENT

I. The Complaint Plausibly Alleges That The RSL Effects A Physical Taking.

A government-authorized physical, non-consensual occupation of private property, even if minor, constitutes a compensable taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982); *see also Cablevision Systems Corp. v. FCC*, 570 F.3d 83, 98 (2d Cir. 2009) ("required acquiescence" by property owner to invasion by "interloper with a government license" is the "touchstone" of physical taking) (quoting *FCC v. Florida Power Corp.*, 480 U.S. 245, 252-53 (1987)).

The *Loretto* Court held that a New York City law authorizing the installation of cable wiring and equipment on apartment buildings without the consent of the building owners constituted a *per se* physical taking. 458 U.S. 421-23. Though the intrusion in *Loretto* was minor, and the law that authorized it served a "legitimate public purpose," the Court found a physical taking because the law "effectively destro[yed]" owners' rights "to possess, use, and dispose of" their property—including by denying owners the "power to exclude the occupier from possession and use of the space." *Id.* at 427, 435.

Loretto involved a permanent occupation of the property, but the Supreme Court has made clear that that a government regulation can

effect a physical taking even though it does not authorize a permanent occupation. In *United States v. Causby*, 328 U.S. 256, 262 (1946), the Court held that plane flights at low altitudes effected a physical taking even though the owner remained in possession of the property and "enjoyment and use of the land are not completely destroyed." Similarly, easements granting a right of public access to private property constitute a physical taking, because they deprive the property owner of "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." *Kaiser Aetna*, 444 U.S. at 176; *accord*, *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987).[4]

The physical intrusion authorized by the RSL constitutes a *per se* physical taking under these precedents.

[4] The Supreme Court recently granted certiorari in *Cedar Point Nursery v. Hassid*, No. 20-107 (cert. granted Nov. 13, 2020), to review the Ninth Circuit's holding that an access easement cannot constitute a *per se* physical taking. The court of appeals determined that the *per se* rule applies only if the property is continuously occupied by the government-authorized intruder.

A. The RSL Dramatically Limits Property Owners' Rights To Exclude Others, To Use Their Property Themselves, To Determine The Use Of Their Property, And To Dispose Of The Property.

The RSL's limitation of property rights is far more substantial and invasive than many of the government-authorized intrusions held to constitute physical takings. Put simply, once a tenant enters a term lease, he or she can stay for a lifetime—and the tenancy can be passed on to successors who are strangers to the owner, even after the tenant's death. The RSL thus effectively precludes property owners from controlling who occupies their property. It also effectively bars them from occupying the property themselves, and from changing the use of their property, and significantly limits the owner's ability to dispose of the property. That very significant interference with the owner's physical control of his or her property constitutes a *per se* taking.

First, the RSL effectively eliminates an owner's right to determine who may occupy the property after it is first rented. Owners are almost always obligated to offer renewal leases to regulated tenants. An owner may terminate a regulated tenancy only in the narrowest of circumstances: when the tenant fails to pay rent, violates a material term of a lease agreement, creates a nuisance, or uses the apartment for unlawful purposes. Even if one of these termination events occurs, an owner is still

precluded from regaining control of the unit if another person occupying the apartment—even an individual not on the lease—wishes to remain in the unit (in those instances, the remaining party is entitled to a new lease in their own name). JA-48-49; 90; 92 ¶¶61; 197; 202-203; pages 7-18, 11-12, *supra*.[5]

Moreover, complete strangers to the property owner can "succeed" to an RSL tenant's right to occupy the property if the tenant vacates the property. Successors may include "any member" of the "tenant's family" who has lived in the apartment for at least two years (one year in the case of senior citizens or disabled persons), a group that extends well beyond the tenant's immediate family to grandparents, grandchildren, and in-laws. NYCRR §§2523.5(b)(1), 2520.6(o). The RSL also grants successorship rights to "[a]ny other person residing with the tenant as a primary or principal residence" so long as there is "emotional and financial interdependence" between the tenant and the person—determined according to a pliable standard involving eight non-exclusive factors. *Id.* §2520.6(o)(2); *see also* JA-92-93 ¶¶204-07; pages 7-8, 11-12, *supra*.

[5] Moreover, pursuant to the HSTPA, even an evictable tenant may now remain in their unit up to one year after a court determines that the tenant breached the lease—a finding that often comes months after the violation. JA-96 ¶218.

Once a successor takes over a regulated unit, she may pass on the renewal right to any other successor—such that an unlimited number of persons with no relationship to the original tenant (and who are strangers to the owner) enjoy the right to occupy a rent-stabilized apartment once it has been rented. *See* JA-93-94 ¶¶207-09.[6]

Second, the RSL prevents an owner from possessing and using her own property. An owner's right to refuse to renew a lease to reclaim a unit for personal use is limited to only a *single* unit, regardless of the number of apartments in a building. Even that right is severely limited. It can only be invoked if the unit will be used as the owner's a primary residence, and if the owner proves that he or she has an "immediate and compelling necessity"—a demanding standard. And, if the unit is occupied by a tenant who has lived in the unit for at least 15 years, the owner must find equivalent or superior housing for the tenant in a nearby neighborhood at the same stabilized price. Moreover, if two or more individuals own a building, only one owner can recover the single unit. And persons who own regulated apartments through business entities—

[6] Compounding this interference with the owner's right to exclude, the original tenant and each successor tenant has the right to sublet the apartment to third parties for two out of any four years. *See* N.Y.C. Admin. Code §26-511(c)(12)(f); JA-94 ¶¶210-11.

which is the case for a most apartments—are categorically ineligible to recover units for personal use. JA-97-99; 102-04 ¶¶221-26 & 237-44. These restrictions effectively prohibit an owner from gaining possession of her own property.

Third, owners lack practical options to remove their property from RSL regulation—once an apartment is rented, it almost always will remain subject to the RSL in perpetuity. Indeed, a stated "goal" of the recently-enacted HSTPA was to "protect [the government's] regulated housing stock," to "help prevent the loss of thousands of units of affordable housing by making it harder to deregulate rent-stabilized units," and to "ensure that rent stabilized apartments remain rent stabilized." JA-50 ¶¶65, 66.

Thus, the RSL prohibits owners from converting regulated residential units to commercial rentals: a building may be withdrawn from RSL regulation only if the owner proves 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 any part of the land or structure." NYCRR §2524.5 (emphasis added). In other words, the RSL is inapplicable only if the owner will use the entire building for his or her own purposes. Moreover, owners *cannot*:

- demolish their buildings without finding every regulated tenant suitable housing (*i.e.*, in the same area at the same or lower rent) and paying relocation expenses and $5,000 stipend (JA-107-09 ¶¶253-55);[7] or
- refuse to renew a lease in order to withdraw their units from the rental market and leave them vacant, unless the cost of making the building habitable exceeds the building's value. JA-106-07 ¶¶250-51.

Finally, prior to 2019, an owner could convert an RSL-regulated building to a co-operative or condominium upon obtaining purchase agreements from 15% of the tenants or from other purchasers agreeing to live in the building. But the RSL now requires consent of 51% of tenants—granting tenants a veto right over conversion of the building—even though they could continue to rent and would retain the RSL's protections if the building were converted. JA-109-10 ¶¶257-59.

B. The RSL's Restriction Of Property Owners' Rights Constitutes A Physical Taking.

Taken together, the above-described provisions of the RSL effectively eviscerate owners' right to control who occupies their property,

[7] If the rent at the new location is greater, the owner must pay the difference for six years. JA-107-08 ¶254.

their own ability to use the property, or determine the use of the property—all of which are key "sticks" in the property owner's bundle of rights. The District Court's contrary conclusion rested on an erroneous reading of the governing Supreme Court decisions and this Court's precedents.

1. Supreme Court Precedent Confirms That The RSL Effects A Physical Taking.

The Supreme Court has held that "the right to exclude, so universally held to be a fundamental element of the property right, falls within the category of interests that the Government cannot take without compensation." *Kaiser Aetna*, 444 U.S. at 179-80; *see also* Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730 at 752 (1998) ("property means the right to exclude others from valued resources, no more and no less.").

The RSL eliminates property owners' right to exclude in multiple ways: existing tenants virtually always must be offered the opportunity to renew their leases; the tenancy right may be transferred to successors who are strangers to the owner; and tenants have the right to sub-lease the property to individuals who are strangers to the owner. Importantly, a property owner "suffers a special kind of injury when a *stranger* in-

vades and occupies the owner's property. Such an invasion is qualitatively more severe than a regulation of the *use* of property, since the owner may have no control over the timing, extent, or nature of the invasion." *Loretto*, 458 U.S. at 420 (emphasis in original).

But the RSL's elimination of owners' rights goes beyond its eviscertation of the right to exclude. The law drastically limits a property owner's ability to gain possession of that property; to change the use of the property to commercial rental; to convert the building to a condominium or cooperative; or to demolish an existing structure—even if the property owner plans to replace it with a structure containing more apartments.

The combined effect of the RSL on owners' rights to exclude others from, occupy, use, and convert their property is much more substantial than that of regulations the Supreme Court has held to effect a physical taking. In *Causby*, for example, the Court found a physical taking because periodic plane overflights limited the owner's "use and enjoyment" of the property. 328 U.S. at 262. Other cases have found physical takings based on easements giving the public a right of access to the property.

In those cases, the interference with owners' rights was episodic and limited. Under the RSL, the owners' right to exclude is effectively eliminated for the entire period that the tenant and any successors occupy the property, and the right to determine the use of the property is

dramatically limited in perpetuity. That multifaceted limitation of a number of the key "sticks" in the owner's "bundle of rights" plainly effects a physical taking.

The Supreme Court's decision in *Yee* confirms that conclusion. *Yee* addressed a physical takings challenge to statutes that set maximum rent levels for mobile home parks and, in addition, prohibited the park owner from terminating a tenancy in the event that the mobile home was sold during the term of the lease. 503 U.S. at 524-26.

The Court explained that a physical taking occurs when "the government authorizes a compelled physical invasion of property." 503 U.S. at 527. It concluded that the challenged statutes did not impose the requisite government coercion, because "[a]t least on the face of the regulatory scheme, neither the city nor the State compels [mobile park owners], once they have rented their property to tenants, to continue to do so. To the contrary, the [state law] provides that a park owner who wishes to change the use of his land may evict his tenants albeit with 6 or 12 months' notice." *Id.* at 527-28.

Importantly, the Court stated that "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner

over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 503 U.S. at 528.[8]

The RSL presents that "different case." By compelling owners to continually offer renewal leases to regulated tenants and their successors in perpetuity, and preventing owners from changing the use of their properties (in the name of "protecting" the City's regulated housing stock), the RSL engages in the very government compulsion identified by the *Yee* Court.

2. The District Court Erred In Concluding That Plaintiffs Retain Sufficient Rights To Preclude A Physical Takings Claim

The District Court's rejection of Plaintiffs' physical takings claims rested on its observation that although "the restrictions on their right to use the property as they see fit may be significant," Plaintiffs "continue to possess the property (in that they retain title), and they can dispose of it (by selling)." JA-524.

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[8] The Supreme Court drew the same distinction in *Florida Power*, 480 U.S. at 251-52, n.6. There, the Court considered a takings challenge to a law allowing the FCC to change the rates that utility companies could charge cable television systems for using utility poles as the physical medium for stringing television cable. The Court rejected the takings claim based on the fact that the pole leases in question were voluntarily entered, but made clear that its decision did not apply where the utility company was precluded from terminating a pole lease. *Id.*

The Supreme Court has repeatedly found physical takings even though the property owner retained title and the ability to sell the property—which makes clear that the District Court's analysis is wrong. That was true in *Causby*, 328 U.S. at 262 (the airplane overflight case), and in *Kaiser Aetna*, 444 U.S. at 176, where the government required public access to a pond that remained privately owned. And in *Loretto*, the Supreme Court found a physical taking "even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale." 458 U.S. at 436; *see also Seawall Assocs. v. City of New York,* 542 N.E.2d 1059, 1065 (N.Y. 1989) ("minimal authority retained by the owners over their own properties" did not preclude a takings claim). The District Court thus erred in holding that the RSL's dramatic evisceration of key property rights could be ignored because property owners' retain title and the ability to sell.

The District Court also erred in pointing to precedent from this Court to justify its rejection of Plaintiffs' physical takings claims. JA-524-25 (citing *W. 95 Hous. Corp. v. N.Y.C. Dep't of Hous. Pres. & Dev.,* 31 F. App'x 19, 21 (2d Cir. 2002); *Harmon v. Markus,* 412 F. App'x 420 (2d Cir. 2011); *Greystone Hotel Co. v. City of New York,* 98-9116, 1999 U.S. App. LEXIS 14960 (2d Cir. June 23, 1999); *Federal Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal,* 83 F.3d 45 (2d Cir. 1996)).

To begin with, three of these decisions are summary orders that lack precedential effect under this Court's Rule 32.1.1(a). *W. 95 Hous. Corp., supra*; *Harmon, supra*; *Greystone Hotel Co., supra*.

The remaining ruling—*Federal Home Loan*, *supra*—lacks force because it has been undermined by intervening Supreme Court precedent. The *Federal Home Loan* Court relied upon the concept of acquiescence—that the owner knowingly and voluntarily chose to participate in a regulated housing market—to reject the physical takings claim asserted in that case. *See* 83 F.3d at 48 ("FMLMC purchased an occupied building and acquiesced in its continued use as rental housing"). That reasoning was expressly rejected in the Supreme Court's subsequent decision in *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), which held that acquiescence is *not* a defense to a physical takings claim.

In *Horne,* raisin growers challenged an order that required them to remit part of their 2002 crop to the government without any guarantee of just compensation. The government asserted as a defense that the growers "voluntarily choose to participate in the raisin market." 576 U.S. at 365. Relying on *Loretto*, 458 U.S. at 439 & n.17, *Horne* held that the plaintiffs' voluntary participation in the market could not excuse or absolve the government of liability for a taking. 576 U.S. at 365. The Court stated: "In *Loretto*, we rejected the argument that the New York law was

not a taking because the landlord could avoid the requirement by ceasing to be a landlord. We held instead that a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Id.* (citation omitted). *Horne* thus confirms that a participant who knowingly enters a regulated market neither acquiesces to an unconstitutional taking nor waives a takings claim.[9]

That conclusion is particularly applicable when, as here, the government has placed very substantial limitations on the property owner's right to devote the property to a different use. The property owner in *Federal Home Loan* does not appear to have argued that the RSL's limitations on changing the use of the property distinguished the RSL from

[9] *Horne* also rejected the notion—advanced by the government there—that a physical taking had not occurred because the farmers could simply use their property for another purpose, such as growing a different crop. The Court made clear that the government cannot immunize itself from a physical takings claim by imposing the challenged regulation as a precondition to participating in a market and then claiming that the market participant's claim should be rejected because she entered the market with knowledge of the challenged regulation. 576 U.S. at 365. The unpublished decision in *Harmon* rested on that argument subsequently rejected by the *Horne* Court. *See* 412 F. App'x at 422 ("the Harmons concede that they acquired their property in 2005 with full knowledge that it was subject to the RSL [and thus] they have 'acquiesced in its continued use as rental housing.'" (citing *Federal Home Loan,* 83 F.3d at 48)).

the statutes considered by the Supreme Court in *Yee*. As discussed above, *Yee* recognized its holding would not apply to a law limiting the owner's right to change the property's use—such as those in the RSL.

C. Plaintiffs Properly Assert A Facial Challenge.

Defendants and Intervenors argued below that Plaintiffs could not challenge the RSL on a facial basis for two reasons. They contended that a facial challenge cannot be based on a takings claim and that a facial challenge requires that "no set of circumstances exist" under which the RSL could be constitutionally applied (*e.g.*, ECF No. 76-1 at 7), relying on dicta from *United States v. Salerno,* 481 U.S. 739, 745 (1987). Both assertions are meritless.

The Supreme Court has squarely rejected the argument that facial challenges are limited to a subset of constitutional rights. Rather, a facial challenge may be based on any constitutional right. *City of Los Angeles v. Patel,* 576 U.S. 409, 415 (2015) ("the Court has never held that [facial] claims cannot be brought under any otherwise enforceable provision of the Constitution.").

Certainly takings claims do not have second-class status. *Cf. Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). They accordingly may be asserted on a facial basis.

Neither does a facial challenge to the RSL require proof that every owner is unconstitutionally burdened by the law. Rather, "[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." *Patel*, 576 U.S. at 418. Applied here, the focus of the physical takings inquiry is the impact on property owners whose ability to change the use of their property is restricted by the RSL. For that group of property owners, the RSL effects a physical taking for the reasons discussed above.

Separately, the Supreme Court has recognized that "[t]o succeed in a typical facial attack, [a plaintiff] would have to establish that no set of circumstances exists under which [the statute] would be valid, *or* that the statute lacks any plainly legitimate sweep." *United States v. Stevens,* 559 U.S. 460, 472 (2010) (emphasis omitted)). The latter standard therefore provides a separate basis for rejecting the *Salerno* standard. And here, as applied to property owners whose ability to change the use of their property is limited by the RSL, the RSL plainly lacks a legitimate sweep.

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

"[T]he purpose of the Takings Clause" is "to prevent 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." *Palazzolo,* 533 U.S. at 617-18.

For over a century, courts have grappled with giving effect to that constitutional guarantee—how to distinguish between the lawful regulation of private property and the unlawful taking of private property. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), Justice Holmes explained that a taking occurs when government restriction of property rights "goes too far."

That can occur, first, when a government regulation forces a property owner to bear a burden that should be borne by the public at large—as Justice Scalia explained in the dissent in *Pennell*, *supra*. Second, courts find a taking when an "ad hoc, factual inquir[y]" into the nature and impact of a challenged property regulation determines that regulation has gone too far. *Penn Central*, 438 U.S. at 124 (1978). The RSL constitutes a taking under both of these independent inquiries.

A. The RSL Improperly Imposes On A Select Group A Public Burden That Should be Borne by Society As A Whole.

The Supreme Court explained in *Murr v. Wisconsin* that the analysis of regulatory takings claims requires consideration of two competing interests: "the individual's right to retain the interests and exercise the freedoms at the core of private property ownership" on the one hand, and the government's power to "adjust rights for the public good" on the other. 137 S. Ct. 1933, 1943 (2017). "In all instances, the [regulatory takings] analysis must be driven by the purpose of the Takings Clause, which is to prevent 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.'" *Id.* (quoting *Palazzolo*, 533 U.S. at 617-18).

The Supreme Court in *Pennell* considered whether a San Jose rent regulation ordinance failed this test. The law specified a number of factors to be considered in determining whether a proposed rent increase was permissible. Six of the factors were objective and "related either to the landlord's costs of providing an adequate rental unit, or to the condition of the rental market"; a seventh factor permitted consideration of "the hardship to the tenant." 485 U.S. at 9, 21.

The parties challenging the law argued that consideration of the six factors produced "a rent that is 'reasonable' by reference to what [they]

contend[ed] was the only legitimate purpose of rent control: the elimination of 'excessive' rents caused by San Jose's housing shortage." *Id.* at 9. They asserted that using the "hardship to the tenant" factor to reduce the permissible rent below the amount established by the other six factors constituted a taking. Relying on the hardship factor was impermissible, they contended, "because it [would] not serve the purpose of eliminating excessive rents—that objective [had] already been accomplished by considering the first six factors—instead it serves only the purpose of providing assistance to 'hardship tenants'" which would "force[] private individuals to shoulder the 'public' burden of subsidizing their poor tenants' housing." *Id.*

The *Pennell* majority declined to address this issue, stating that there was "no evidence that the 'tenant hardship clause' has in fact ever been relied upon . . . to reduce a rent below" the amount determined on the basis of the other factors. *Id.* at 9-10.

But Justices Scalia and O'Connor dissented. In their view, the provision permitting consideration of tenant hardship effected a taking. Pointing to the principle that the Takings Clause bars government from forcing some individuals to "bear public burdens [that] . . . should be borne by the public as a whole," they stated:

> Traditional land-use regulation . . . does not violate this principle [of preventing some alone from bearing the public burden] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since 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. *Id*. at 19-20.

They concluded that the hardship provision "is invoked to meet a quite different social problem: the existence of some renters who are too poor to afford even reasonably priced housing"—and "*that* problem is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes." *Id*. at 21. The provision effected a taking because "the city is not 'regulating' rents in the relevant sense of preventing rents that are excessive; rather, it is using the occasion of rent regulation . . . to establish a welfare program privately funded by those landlords who happen to have 'hardship' tenants." *Id*. at 22.[10]

[10] In *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003), applied the same rationale to a law preventing owners of low-income apartments from pre-paying federally subsidized mortgages to constitute a taking, which it held to effect a taking. The court stated that, "[u]nquestionably, Congress acted for a public purpose (to benefit a certain group of people in need of low-cost housing), but just as clearly, the expense was placed disproportionately on a few private property owners." *Id*. at 1338-

Here, Plaintiffs plausibly allege that the RSL effects a taking because it forces a small set of private landowners to bear that very same public burden.

The RSL provides that the RGB, in setting the maximum permissible rent increase in New York City, "shall" consider:

> (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.[11]

The RSL thus mirrors the ordinance challenged in *Pennell*: paragraph (1) requires consideration of the "objective" factors relating to landlords' costs and the state of the housing market, while paragraph (2)

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39. "Congress' objective in passing [the challenged laws]—preserving low-income housing—and method—forcing some owners to keep accepting below-market rents—is the kind of expense-shifting to a few persons that amounts to a taking. This is especially clear where, as here, the alternative was for all taxpayers to shoulder the burden." *Id*.

[11] Section 26-510(b)(1)-(3).

requires consideration of wholly unrelated factors such as the general cost of living. Indeed, the RGB produces an annual "Income and Affordability Study," which it describes the paragraph (2) factors as follows:

> Section 26-510(b) of the Rent Stabilization Law requires the Rent Guidelines Board (RGB) to consider "relevant data from the current and projected cost of living indices" and permits consideration of other measures of housing affordability in its deliberations. To assist the Board in meeting this obligation, the RGB research staff produces an annual Income and Affordability Study, which reports on housing affordability and tenant income in the New York City (NYC) rental market.[12]

Thus the RGB itself makes clear that it interprets the law to require consideration of tenant income and "affordability" in setting maximum rent increases.

And that is exactly what has happened. As the Complaint explains, the RGB tracks "'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" and creates an index based on that adjustment that is adjusted for inflation. JA-120 ¶292. "That inflation-adjusted index shows that rents

[12] NYC Rent Guidelines Board, *2020 Income and Affordability Study* 12 (Apr. 30, 2020), https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/04/2020-IA.pdf.

should have increased on average 5.6% per year from 1999 through 2018 in order for owner net operating income to remain constant. Instead, [the] RGB has approved rent increases of only 2.7% on average during that period." *Id*.

It is therefore crystal clear that the RGB has significantly reduced the increases required by the paragraph (1) "objective" factors in order to prevent tenant hardship.

Indeed, the New York Court of Appeals has recognized that tenants' rights under the RSL are a "local public assistance benefit"—"[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." *In re Santiago-Monteverde,* 24 N.Y. 3d at 290; decision on certified question accepted and incorporated, 780 F.3d 126 (2d Cir. 2015).

The RSL thus effects a taking for the reasons set forth in the *Pennell* dissent. As in *Pennell*, "[o]nce [the RSL's paragraph (1) factors] have been applied . . . so that [property owners are] receiving [] a reasonable return, [they] can no longer be regarded as a 'cause' of exorbitantly priced housing, nor [are they] reaping distinctively high profits from the housing shortage." 485 U.S. at 21. The application of paragraph (2) is designed to address a different problem—"the existence of some renters who are

too poor to afford even reasonably priced housing." *Id.* Because that problem "is not caused or exploited by landlords," the burden of addressing it may not be imposed on a select group of property owners:

> The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that 'public burdens . . . should be borne by the public as a whole,' this is the only manner that our Constitution permits.

Id. at 21-22. "The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget,' with relative invisibility and thus relative immunity from normal democratic processes. . . . Subsidies for these groups may well be a good idea, but the Takings Clause requires them to be funded through the process of taxing and spending, where both economic effects and competing priorities are more evident." *Id.* at 22-23.[13]

[13] Indeed, New York has funded various housing subsidies using public monies. For example, private housing for more than 100,000 tenants is already subsidized using Section 8 vouchers. JA-77 ¶158. New York City

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

Courts also determine whether a law effects a regulatory taking by engaging in "ad hoc, factual inquiries" focused on "several factors that have particular significance." *Penn Central,* 438 U.S. at 124. There is no set formula for determining whether a regulatory taking has occurred. As the Supreme Court stated in *Murr*, the analysis is "designed to allow careful examination and weighing of all the relevant circumstances" and "[a] central dynamic of the Court's regulatory takings jurisprudence" is "its flexibility." 137 S. Ct. at 1943.[14]

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subsidizes the rent for seniors and disabled individuals through the SCRIE and DRIE programs. JA-77-78 ¶160. And New York offers renter's tax credits to help finance housing for renters earning $200,000 or less. JA-78 ¶162. The existence of those publicly funded plans confirms that subsidized housing is a benefit that can and should be borne by the public as a whole and not by a discrete set of private property owners.

[14] A law that destroys all economically beneficial use of property constitutes a *per se* taking. *See Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1019 (1992); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005). But a complete loss of value is not needed to prevail on a regulatory takings claim—*Lingle* makes clear that such regulatory takings are a separate, third, category of claims. *Id*. at 539. "A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some 'reasonable' use of his property. '[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question

Factors that courts consider in regulatory takings cases include, but are not limited to: (1) the character of the government action; (2) whether the regulation addresses a noxious use; (3) whether there is a direct and substantial economic impact on regulated properties; (4) the degree to which the regulation interferes with the reasonably investment-backed expectations of property owners; and (5) whether the regulation provides a reciprocity of advantage. *See Penn Central,* 438 U.S. at 124; *Pennsylvania Coal*, 260 U.S. at 417.

These factors are not considered in isolation. Rather, they are viewed holistically—a stronger showing in one factor may compensate for a lesser showing in another. The inquiry "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights." *Lingle,* 544 U.S. at 539.

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whether it is a taking.'" *Penn Central*, 438 U.S. at 149-50 (Rehnquist, J., dissenting).

In other words, cases in which non-economic factors weigh heavily against finding a taking (*i.e.*, noxious use cases, zoning cases) may require a very substantial diminution of value. But when the non-economic factors militate strongly in favor of finding that a taking has occurred—such as where the regulation authorizes the physical occupation of private property in the absence of a noxious or inappropriate use—a lesser diminution in value suffices to establish a taking.

As discussed, the RSL authorizes the perpetual physical occupation of regulated units by tenants and their successors, and removes from owners all practical options to regain possession, control, and use of their property (*see supra.* at 22-26). The law effectively grants the regulated tenant and her successors a property interest in the regulated unit and takes from property owners many of the most important "sticks" in the bundle of property rights.

The RSL thus effects the "functional[] equivalent to the classic taking" (*Lingle,* 544 U.S. at 539) for which just compensation is required. A review of the factors that courts commonly consider in regulatory takings cases compels that conclusion.

1. Character Of The Government Action

The Supreme Court in *Penn Central* identified "the character of the governmental action" as the key factor in a regulatory takings analysis.

438 U.S. at 124; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 (1987) ("Many cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in takings analysis."). Here, that element weighs overwhelmingly in favor of finding a taking.

First, the RSL results in a physical invasion by saddling owners with non-removable tenants and substantially eliminating owners' rights to determine the use of their property and even to use it themselves. A regulatory taking "may more readily be found when the interference with property can be characterized as a physical invasion by the government." *Penn Central*, 438 U.S. at 124; *see also*, 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. What *Loretto* seems to have had in mind by a permanent occupation, with the benefit of later clarifying decisions, is governmental action that amounts to the imposition of an easement of indefinite duration[.] *Loretto* pushes us toward a broader understanding of the character factor in order to avoid trivializing it.").

Second, the RSL confers a "local public assistance benefit" on tenants that is "not paid for by the government" but by a small subset of New York City building owners. *See* pages 37-42, *supra*. That fact too weighs

heavily in favor of finding a taking. *See Cienega Gardens*, 331 F.3d at 1338-39 (finding a taking where law prevented the pre-payment of federally subsidized mortgages on low income apartments, holding that the "character of the government's action is that of a taking of a property interest, albeit temporarily, and not an example of government regulation under common law nuisance or other similar doctrines, which we would treat differently").

2. Noxious Use

Regulations that preclude a noxious use of property or address a public nuisance typically do not constitute takings. *See Penn Central*, 478 U.S. at 125-127; *id.* at 144-46 (Rehnquist, J. dissenting). Indeed, regulatory takings claims typically involve laws addressing noxious uses or uses inappropriate to the location (such as zoning laws)—and the fact that the laws involve the prohibition of noxious or out of place uses generally is the basis for rejecting the takings claim. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-89 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

The RSL, by contrast, does not address a safety issue, noxious interference with neighboring properties or the community at large, or a use inappropriate to the property's location. The weighty interests in pre-

serving the government's ability to exercise its police powers are therefore irrelevant. Rather, the absence of such a police power justification supports the conclusion that the RSL effects a taking.

3. Direct And Substantial Economic Impact

The economic impact of the regulation is a "relevant consideration[]." *Penn Central,* 478 U.S. at 124. No court has fixed a precise magnitude of economic impact required under the regulatory takings test because the test itself is inherently ad hoc.

The Complaint alleges that the RSL has a substantial economic impact on rent-stabilized properties across New York City. Rents charged in stabilized units are, on average, 25% lower than market rents and, in some cases, up to 70-80% lower. JA-118 ¶¶285-286. Allowable rent increases determined by the RGB are dramatically outpaced by increases in operating costs (as calculated by the government), resulting in substantial reductions in—and potential elimination of—net operating income. JA-118-20 ¶¶289-292.

Moreover, the law imposes draconian limits on property owners' ability to recoup the costs of improvements to individual units (Individual Apartment Improvements, or "IAIs") or building-wide (Major Capital Improvements, or "MCIs")—which puts property owners to the choice of making investments that they cannot recover or letting their properties

deteriorate, making them less valuable.[15] And the law effectively bars demolition of existing structures to construct larger, more valuable buildings. JA-67-70 ¶¶121-30.

Not surprisingly, rent-stabilized properties are worth 25% to 50% less than similar properties with market-rate units (and sometimes even more), and these diminished values result directly from the RSL. JA-120-23 ¶¶295-299. The 2019 HSTPA reduced those property values by another 15% or more. JA-132 ¶329.[16]

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[15] Even though the cost of updating kitchens, bathrooms, electrical systems, and other items in the pre-1974 buildings covered by the RSL often totals tens or hundreds of thousands of dollars, the new IAI restrictions caps the recoverable improvement cost to $15,000 per unit every fifteen years. They greatly delay the owner's ability to recoup even that inadequate amount, permitting the owner to raise rent by only 1/168th of the improvement cost (for buildings with 35 or fewer units) or 1/180th of the improvement cost (for buildings with more than 35 units). JA-129 ¶¶319-320. And even that slight increase must be removed after 30 years. *Id.*

Similarly, MCIs no longer make financial sense under the HSTPA, which caps the permissible rent increase for an MCI at 2% (one-third of the rent increase formerly allowed) and requires removal of that slight increase after 30 years. JA-131 ¶¶326-27.

[16] Defendants and Intervenors argued below that the Court should consider the value of the building as a whole (*i.e.*, including any non-regulated units) rather that looking at the value of the apartment units that are actually regulated. *E.g.*, ECF No. 90 at 11. This argument fails for several reasons. New York law generally, and the RSL specifically, treats apartments as separate units of property. *See* N.Y.C. Admin. Code §26-

Plaintiffs have thus plausibly alleged that the RSL inflicts a direct and substantial economic impact on regulated properties.

4. Interference With Investment-Backed Expectations

Courts also assess the impact of the regulation on investment-backed expectations. Importantly, such an impact is not required to establish a regulatory taking. The Supreme Court found a taking in *Hodel v. Irving*, 481 U.S. 704, 715 (1987), even though "[t]he extent to which any of [the property owners] had 'investment-backed expectations'" undermined by the challenged regulation was "dubious."

Moreover, the RSL's interference with property owners' investment-backed expectations is not based on whether property was acquired before or after the RSL took effect. The Supreme Court has repeatedly rejected the contention that a property owner can "acquiesce" to an unlawful taking. "[A] regulation that otherwise would be unconstitutional

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504(a)(1) (defining *units* to which rent stabilization applies); N.Y. UNCONSOL. LAW tit. 23 §8625 (same). Moreover, the universe of apartments regulated by the RSL are themselves treated individually—regulated rent levels are set unit-by-unit, based upon the rental history of that unit. *See* N.Y. UNCONSOL. LAW tit. §§26-512(b), 8626; N.Y.C. Admin Code §26-513. Units within the same building can have different owners and be subject to separate tax treatment. *See* N.Y. Real Prop. Law §§339-g, 339-h, 339-y(1)(a). The proper "denominator" when considering diminution in value is the apartment, not the entire building.

absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title." *Palazzolo*, 533 U.S. at 629-30; *see also id.* at 637 (Scalia, J., concurring) ("[t]he 'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional." A "*Penn Central* taking . . . no less than a total taking, is not absolved by the transfer of title"); *Horne*, 576 U.S. at 365-67; *supra* at 31-34.

For that reason, all of the economic impacts just discussed also constitute interference with investment-backed expectations.

Moreover, when the RSL was first enacted, it stated that "the ultimate objective of state policy" is "the transition from regulation to a normal market of free bargaining between landlord and tenant." JA-124 ¶304; N.Y. UNCONSOL. LAW tit. §8622. Having promoted the RSL as a temporary means to return to free market conditions, Defendants cannot argue that property owners acted unreasonably in relying on that goal in forming their investment-backed expectations.

The 2019 HSTPA further interfered with owners' expectations by eliminating sunset provisions, statutory vacancy and longevity rent increases, eliminating preferential rent increases, eliminating Luxury and

High-Income Decontrols, and drastically limiting rent increases for IAIs and MCIs. JA-126-32 ¶¶308-331.

5. Reciprocity Of Advantage

Restrictions on the use of land that "secure[] an average reciprocity of advantage" are unlikely to constitute a taking. *Pennsylvania Coal,* 260 U.S. at 415. For example, zoning restrictions are typically a reasonable exercise of the government's police power because their "prohibition applies over a broad cross section of land and thereby secure[s] an average reciprocity of advantage" to those within the zoned area—restrictions on landowners apply across the board, providing benefits along with burdens. *Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting) (internal quote omitted).

Unlike zoning restrictions, the RSL singles out a discrete subset of property owners for very substantial burdens without conferring any reciprocal advantage. Owners of buildings subject to RSL restrictions must by themselves bear the entire cost of New York's rent subsidy program, yet they receive no benefits from the program—other than the amorphous generalized benefits that could possibly accrue to all citizens of New York, including those who do not bear the burden.

As then-Justice Rehnquist explained, "[t]he Fifth Amendment 'prevents the public from loading upon one individual more than his just

share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.'" *Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting) (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893)). Virtually all of the benefits of the RSL go to subsidized tenants; to the extent that there are some that might "accrue to all the citizens of New York City," "[t]here is no reason to believe that [owners] will enjoy a substantially greater share of those benefits" to reciprocate for bearing all of its burdens. *Id.*

Nor can indirect generalized societal benefits, such as decreasing homelessness, creating a more diverse neighborhood, or housing individuals who provide critical services to the public, provide the "average reciprocity of advantage" necessary to justify the substantial burdens imposed on Plaintiffs. As the Supreme Court recognized in *Pennsylvania Coal*, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." 260 U.S. at 416 (declining to consider generalized societal benefits as reciprocal advantage to mine owners, and instead looking to particularized benefits involving neighboring coal company).

This factor therefore strongly supports the conclusion that the RSL effects a regulatory taking.

C. Plaintiffs Properly Assert A Facial Challenge To The RSL.

The District Court rested its rejection of the regulatory takings claims on its determination that the RSL is not susceptible to facial challenge and that Plaintiffs have not plausibly alleged such a claim here. JA-526-33. That holding was wrong.

As explained above (at pages 34-35), the Supreme Court has made clear that facial challenges are not limited to some subset of constitutional claims, but are available for claims invoking all constitutional rights. Indeed, the Supreme Court has upheld a facial challenge on regulatory takings grounds. *See Hodel,* 452 U.S. at 295 (acknowledging that a facial claim will lie when "the 'mere enactment' of the [challenged statute] constitutes a taking."). In addition, a court evaluating such a claim does not focus on every individual subject to the challenged law, but only "the group for whom the law is a restriction." *City of L.A.*, 576 U.S. at 418.

Plaintiffs' facial claim is proper because the Complaint plausibly alleges that (1) the RSL is unconstitutional with respect to the set of owners that are prohibited from using their property as they wish (*i.e.*, the

group for whom the law is a restriction); and (2) with respect to these individuals, the RSL is unconstitutional "in a large fraction of cases" or "lacks a plainly legitimate sweep." *See* pages 34-35, *supra*.

The Complaint states that every property owner burdened by the RSL is being forced to bear a burden that "in all fairness and justice, should be borne by the public as a whole" (*Palazzolo,* 533 U.S. at 617-18)—coerced, permanent, physical occupation by tenants at below-market rents set a levels that do not even permit recovery of increased costs; and effective elimination of the rights to exclude, possess, use, enjoy, and dispose of their property—and have suffered a taking upon consideration of the ad hoc factors emanating from *Penn Central* and *Pennsylvania Coal*.

Moreover, the RSL affects each burdened property in the same way. The District Court did not dispute that the most significant regulatory taking factors meet that test: the nature of the taking (a physical occupation and other very substantial limits on property rights); the absence of any noxious use; and the lack of any reciprocity of advantage.

The District Court instead rested its critique of the facial challenge on its view that the different properties would suffer different reductions in value as a result of the RSL. JA-531. Although the precise financial impact that the RSL has on regulated properties may differ, the *existence*

of a financial impact does not. And as demonstrated above, the diminution in value attributable to the RSL need not be the same for each burdened property in order to sustain a facial regulatory takings claim; it need only be significant.[17]

That is what the Complaint alleges—a substantial reduction in value resulting from the RSL's regulatory burdens. JA-117-24 ¶¶283-302. Federal Rule of Civil Procedure 8(a) does not require Plaintiffs to include in the Complaint a description of the methodology they will use to prove that fact—allegation of the fact is sufficient. Plaintiffs are entitled to an opportunity to prove their claims.

The same argument applies with respect to the assessment of property owners' investment-backed expectations. As discussed, this factor largely parallels the diminution of value inquiry, because post-RSL purchasers must be assessed in the same way as pre-RSL purchasers. Because the Complaint alleges the relevant facts (JA-124-32 ¶¶303-31), here too Plaintiffs are entitled to an opportunity to prove them.

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[17] Precluding a facial challenge due to differences in precise economic impact would preclude all manner of facial regulatory takings challenges (something that no court has done) and lead to absurd results: a law could be unconstitutional as to one property suffering a 70% diminution in value, but not with respect to a neighboring suffering only a 60% diminution due to fewer regulated units.

Finally, the District Court erred in concluding that this Court's precedent bars a facial claim. *See* JA-526-27. None of the cases cited by the court holds facial regulatory takings claims impermissible.

In *Rent Stabilization Association v. Dinkins,* 5 F.3d 591, 594 (2d Cir. 1993), plaintiffs did not present a facial claim, explicitly stating that "the RSA's complaint alleges only 'as applied' objections to the law." The court did state in dicta that "a facial challenge must establish that no set of circumstances exists under which the [challenged a]ct would be valid"; but that was before the Supreme Court made clear in *City of Los Angeles*, 576 U.S. 409, that the relevant question is whether the law is constitutional as applied to those burdened by its terms. *See* page 35, *supra.*

Both *Greystone Hotel Co. v. City of New York,* 1999 U.S. App. LEXIS 14960 (2d Cir. 1999), and *Federal Home Loan*, 93 F. 3d 45, also involved only as applied claims. And *West 95 Housing Corp. v. New York City Department of Housing Preservation & Development*, 31 F. App'x 19, 21 (2d Cir. 2002), is a non-binding summary decision that merely "suggests" that the RSL is not susceptible to a facial challenge—its holding rested on the conclusion that the plaintiffs had failed to plead facts supporting the claim.

In short, nothing in this Court's prior decisions precludes Plaintiffs' facial challenge to the RSL. Because Plaintiffs have plausibly alleged

that those burdened by the RSL have suffered a regulatory taking, the District Court's dismissal order should be reversed.

III. Plaintiffs Have Plausibly Alleged A Due Process Claim

Property rights are, and were when the Bill of Rights was drafted and the Fourteenth Amendment adopted, fundamental rights. The RSL's impingement on property rights, therefore, should be reviewed under strict scrutiny—*i.e.*, whether the RSL is narrowly tailored to achieve a compelling state interest.[18] The RSL cannot meet this standard, and neither Defendants nor Intervenors argued as much below. Rather, they argued for, and the District Court applied, rational basis review.

Even under Defendants' preferred rational basis standard, Plaintiffs have pleaded a due process claim by plausibly alleging that the RSL is arbitrary, capricious, and bears no rational relationship to the objectives it is supposed to achieve. When government action is "arbitrary and irrational," it fails even rational basis review. *Eastern Enter. v. Apel*, 524 U.S. 498, 537 (1998).

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[18] The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The Clause "specially protects those fundamental rights and liberties which are, objectively deeply rooted in this Nation's history and tradition." *Id.* That is true of rights in real property.

A. The City Council's Rote, Triennial Conclusion That A Housing "Emergency" Exists Exposes The RSL's Arbitrariness.

The RSL is premised on the continued existence of a housing "emergency," but nothing in the RSL explains what the emergency is, why it exists, or how it is measured. The "emergency" once referred to managing demand for housing as soldiers returned from service in World War II; only in 2019 was this vestige removed from the statute. JA-56-57 ¶¶77, 82.

Although a vacancy rate below 5% is a necessary precondition for any city to declare a housing emergency, the RSL makes clear that the vacancy triggers the City Council's obligation to consider the facts and then exercise its judgment—based on established criteria—whether an emergency actually exists. JA-45-46; 64 ¶¶54-55, 108. But neither the law nor the City Council has specified a standard.

A law whose application is premised on an undefined standard is the epitome of an arbitrary law. If any and all housing conditions can qualify as a "crisis" or "emergency," then the courts would lack any benchmark against which to measure the City Council's triennial determination, leaving the legislature free to deploy the RSL at its whim and leaving the protections of due process toothless. *See Windsor v. United States*,

699 F.3d 169, 180 (2d Cir. 2012) (while rational basis review is "indulgent and respectful, it is not meant to be 'toothless'").

This rote exercise of declaring an unexamined "emergency" every three years based on an unclear standard is inadequate to justify the RSL's substantial damage to property rights.

B. The RSL Works Counter To Its Stated Purposes

The RSL violates due process for the additional reason that the regulations it imposes are not rationally related to achieving its supposed goals. Indeed, economists agree almost uniformly that rent controls *reduce* the quality and quantity of housing. JA-66-67 ¶119. In other words, the RSL creates and perpetuates the very "emergency" it is meant to abate.

1. The RSL Does Not Alleviate Any Housing Shortage

The RSL does nothing to address a housing shortage; indeed, the Complaint plausibly alleges that the RSL *reduces* housing supply. JA-65-73 ¶¶114-141. Key features of the RSL—including mandatory lease renewals, succession rights, and limitations on an owner's ability to recover or stop letting units—lead to longer tenancies and to tenants remaining in units that have become too small, too large, or geographically distant from their jobs (and accordingly to fewer vacancies).

The law also prevents owners from redeveloping existing properties, despite zoning capacity to build more apartments. JA-65; 67-70 ¶¶115, 121-130. Indeed, lots occupied by rent-stabilized buildings are often under-developed by as much as 20% (or more) of their zoning capacity compared to market rate buildings, and Plaintiffs have alleged that, but for the barriers to redevelopment erected by the RSL, New Yorkers might well benefit from over 100,000 additional units. JA-68-69 ¶¶123-26.

2. The RSL Does Not Secure Housing For Low-Income Residents

The RSL does not contain any mechanism to target its benefits to low-income, homeless, or otherwise needy individuals.

Plaintiffs allege facts demonstrating that the RSL's subsidies are randomly distributed without regard for the income or wealth of the tenants. JA-58-64 ¶¶84-109. And the Complaint cites data showing that a substantial number of renters in rent-stabilized units earn more than $200,000 a year. *Id.*

Indeed, prior to 2019, the RSL included a High-Income Decontrol provision, which permitted removal of an apartment from the stabilization regime if the tenant's income exceeded $200,000 (and the rent exceeded $2,774). JA-51-52; 110-11 ¶¶68(d), 262. The HSTPA eliminated that provision. *Id.*

That the RSL results in the provision of low-rent housing for the wealthy demonstrates the utter irrationality of the scheme.

3. The RSL Does Not Address "Rent Profiteering"

Another proffered justification for the RSL's restrictions is to prevent "rent profiteering." *E.g.*, ECF No. 75-1 at 3 (State's Motion). That the RSL is not reasonably related to curbing "rent profiteering" is apparent from the fact that neither the RSL nor the DHCR is able to define "rent profiteering." Nor is there a credible argument that rents willingly paid for nearly a million units in New York City on the free market are unjust or oppressive.

In any event, there is no "free rent." The forced reduction of rent in the stabilized market causes a rent increase of 22-25% in uncontrolled units. JA-75 ¶152. Without the RSL, "lower rents in the uncontrolled market would provide tenants in regulated units with more options, and options that better suited their needs than the regulated units." JA-75 ¶151. The RSL thus subsidizes prices for the lucky few who live in a stabilized property—regardless of need—while increasing rents for everyone else.

The RSL is neither designed nor intended to address rent "profiteering." Numerous RSL provisions are wholly unrelated to rent levels. Others limit rent increases for units that offer "preferential" rents—

which, by definition, are below the supposedly "reasonable" rent thresholds set by the RGB. JA-127-28 ¶¶312-15. Defendants cannot suggest that the rates they themselves set are unreasonable—and the RSL still limits property owners' ability to raise rents to *those* levels when the tenant previously paid lower than the maximum permitted under the RSL. JA-53 ¶69(e).

4. The RSL's Purported Goal Of Promoting Neighborhood Stability Cannot Withstand Due Process Review

Defendants asserted below that the mandated lease renewal requirement that physically invades owners' property is a means of "avoiding disruptions to neighborhoods," "promoting stability," and "maintaining neighborhood cohesion." Their view is that the tenant, rather than the owner, is deemed the relevant "neighbor" whose "stability" is promoted—and that giving those tenants lifetime possessory interests in owners' property consequently will improve neighborhood cohesion more than if the owner lived in the unit or rented it to varying tenants over time. *E.g.*, ECF No. 75-1 at 3 (State's Motion). Aside from Defendants' *ipse dixit*, no evidence or reasoning suggests that a rent-stabilized tenant makes a better neighbor than a market-rate tenant or an owner.

The proffered justification of "neighborhood stability" also exposes the RSL's discriminatory effects. It discriminates in favor of long-term

tenants, who tend to be disproportionately older. The RSL also prefers tenants over owners, who are not only prevented from inhabiting their own property but must also subsidize the tenancy of the current tenant to "avoid disrupting" the neighborhood. JA-61; 99-105 ¶¶97, 227-46. And the successors of rent-stabilized tenants are given preference over New Yorkers who lack those connections to a rent-stabilized unit. JA-92-95 ¶¶202-13. Rent stabilization also encourages tenants to remain in properties that are no longer suited to their needs, thereby denying their unit to tenants for whom it is more appropriate in size or location. JA-73-75 ¶¶142-49.

CONCLUSION AND RELIEF REQUESTED

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

Dated: January 15, 2021

Respectfully submitted,

/s/ *Andrew J. Pincus*

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CERTIFICATE OF COMPLIANCE

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

(i) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 14,000 words, including footnotes and excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(a)(7)(B)(iii); and

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

Dated: January 15, 2021 /s/ *Andrew J. Pincus*

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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COMMUNITY HOUSING IMPROVEMENT PROGRAM, RENT STABILIZATION ASSOCIATION OF N.Y.C., INC., CONSTANCE NUGENT-MILLER, et al.,

Plaintiffs,

-against-

19-cv-4087(EK)(RLM)

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

Defendants.

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MEMORANDUM AND ORDER

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

Plaintiffs,

-against-

19-cv-6447(EK)(RLM)

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

Defendants.

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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]

[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

[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.

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 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 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.

[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 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.

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 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 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*,

[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 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.

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 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, 713 (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. at 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. 2167-68 (overruling *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172

[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).

(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 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

[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).

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 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*

[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").

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 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*, 93 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

[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)).

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 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]

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

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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 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).

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 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. *Meridien Tr. & Safe Deposit Co. v. FDIC*, 62 F.3d 449, 454 (2d Cir. 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

[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").

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 contend that the DHCR rejected

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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 Panagoluiases] 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

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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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 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

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

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enactment relative 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"); *1236 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.

permissible rates annually based on the rent set under the RSL in 1974); *id.* at ¶ 38 (luxury-decontrol introduced 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 1236 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,

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

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 — 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.

/s Eric Komitee
ERIC KOMITEE
United States District Judge

Dated: Brooklyn, New York
September 30, 2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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COMMUNITY HOUSING IMPROVEMENT PROGRAM, RENT STABILIZATION ASSOCIATION OF N.Y.C., INC., CONSTANCE NUGENT-MILLER, et al.,

Plaintiffs,

JUDGMENT
19-cv-4087(EK)(RLM)

-against-

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

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

Plaintiffs,

19-cv-6447(EK)(RLM)

-against-

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

Defendants.
---------- X

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