20-3366

United States Court of Appeals
for the Second Circuit

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

Plaintiffs-Appellants,

against

(caption continued on inside cover)

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

BRIEF FOR CITY APPELLEES

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April 16, 2021

CITY OF NEW YORK, RENT GUIDELINES BOARD, DAVID REISS, CECILIA JOZA, ALEX SCHWARZ, GERMAN TEJEDA, MAY YU, PATTI STONE, J. SCOTT WALSH, LEAH GOODRIDGE, and SHEILA GARCIA, in their official capacities as chair and members, respectively, of the Rent Guidelines Board, and RUTHANNE VISNAUSKAS, in her official capacity as Commissioner of New York State Homes and Community Renewal, Division of Housing and Community Renewal,

Defendants-Appellees,

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

Intervenors.

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PRELIMINARY STATEMENT

For more than half a century, the Rent Stabilization Law (RSL) has worked to maintain a fair and stable rental market in New York City by preventing the rent profiteering and dislocation that the City's exceedingly tight housing market would otherwise allow. The RSL, as repeatedly amended in response to changing conditions, regulates rent increases and limits when tenancies may be terminated or not renewed. Today, it protects more than two million of the City's residents. Over the years, the RSL has survived numerous lawsuits asserting that it takes private property or lacks a rational basis. And the U.S. Supreme Court has rejected similar challenges to other rent-regulation measures.

Plaintiffs here bring yet another such challenge, seeking to invalidate the entire RSL and its implementing regulations on their face. But their allegations no more support a facial challenge than the failed assertions in past cases did. Plaintiffs identify no intervening change, either in the governing law or the RSL itself, that would make their facial challenge viable. The U.S. District Court for the Eastern District of New York (Komitee, J.) therefore dismissed their suit for failure to state a claim. This Court should affirm.

ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly dismiss Plaintiffs' facial challenge to the RSL as a physical taking for failure to state a claim?

2. Did the district court correctly dismiss Plaintiffs' facial challenge to the RSL as a regulatory taking for failure to state a claim?

3. Did the district court correctly dismiss Plaintiffs' facial challenge to the RSL as denying due process of law for failure to state a claim?

STATEMENT OF THE CASE

The majority of New Yorkers are renters. *See* U.S. Census Bureau, *New York City Housing Vacancy Survey* Series VIIB Table 82, https://perma.cc/T5V9-C4FU (captured Apr. 16, 2021). And, given the sky-high cost of real estate in many parts of the City, a substantial portion of those residents will be renters for as long as they live there. *Id.* The City's highly desirable location, exceptional population density, high construction costs, and limited space due to natural geographic boundaries all contribute not just to high real-estate prices, but also to an exceedingly tight market for rental housing. Thus, for most of the last century, rent regulation has been important feature of life in the City.

Since 1969, the predominant form of rent regulation and tenancy protection has been the Rent Stabilization Law. Currently, about 966,000 apartment units in the City, comprising 44 percent of the rental market, are subject to the RSL's protections (Joint Appendix (JA) 161). Those units are home to more than two million New Yorkers—a quarter of the City's residents. *See* U.S. Census Bureau, *New York City Housing Vacancy Survey* Series VIIA Table 84, https://perma.cc/5MPT-A8YY (captured Apr. 16, 2021). The median income of the residents of rent-stabilized units is lower than the City's overall median income (JA170), and the residents of rent-stabilized units are more likely to be rent-burdened, under the Federal Government's definition, than the City's overall population (JA164).

In this lawsuit, a coalition of landlords and organizations advocating for landlords' interests seek to strike down the entirety of the RSL on facial constitutional grounds. They raise no as-applied challenge of any stripe.

A. Statutory and regulatory background

The RSL aims to forestall rent profiteering and improve housing stability. By regulating evictions and the pace of rent increases, the

RSL protects tenants from dislocation and limits the disruption to neighborhoods and communities that would result from dramatic changes in rental rates and rapid turnover of tenants year to year. *See* N.Y.C. Admin. Code § 26-501; *Fed. Home Loan Mortgage Corp. v. N.Y.S. Div. of Hous. & Cmty. Renewal*, 87 N.Y.2d 325, 332 (1995).

The RSL consists of state and local legislation that is supplemented by regulations, known as the Rent Stabilization Code (RSC), promulgated by the State Division of Housing and Community Renewal (DHCR), 9 N.Y.C.R.R. §§ 2520.1-2531.9. Plaintiffs challenge those regulations along with the RSL (*see* JA26). The RSL's protections have been triggered anew every three years by declarations of need issued by the New York City Council—most recently in 2018—in recognition that the tight housing market continues. The Rent Guidelines Board (RGB), an official body with members representing the interests of landlords, tenants, and the general public, annually determines permissible rent increases. As described below, this complex regulatory regime has evolved over time in response to changing conditions and policy priorities. *See Fed. Home Loan Mortgage Corp.*, 87 N.Y.2d at 332.

1. The history of ongoing refinement of rent regulation in New York City

New York has a long experience with rent regulation. The State enacted its first rent-regulation statute in 1946 in response to the housing shortage following World War II and the end of federal wartime rent regulation. *See La Guardia v. Cavanaugh*, 53 N.Y.2d 67, 71 (1981), *superseded by statute*, N.Y.C. Admin Code § 26-504(b). In 1962, the Legislature gave New York City the authority to enact its own rent regulations. *Id.* Under this authority, the City enacted a form of rent regulation, known as "rent control," in 1962. *See* N.Y.C. Admin. Code §§ 26-401-26-415. Rent control, which governs just one percent of housing units in the City today (JA42), is not at issue in this appeal.

The New York City Council introduced the prevailing scheme of rent regulation with the Rent Stabilization Law of 1969 (codified as amended at N.Y.C. Admin. Code §§ 26-501-26-520). The City Council did so after finding that many landlords "were demanding exorbitant and unconscionable rent increases" that led to "severe hardship to tenants of such accommodations and were uprooting long-time city residents from their communities." N.Y.C. Admin. Code § 26-501. The

City Council concluded that such practices "will produce serious threats to the public health, safety, and general welfare." *Id.*

In 1971, the State Legislature enacted the first of a series of measures to adjust the RSL's benefits and burdens, adopting a form of "decontrol" that permanently removed vacated apartments from rent stabilization. *KSLM-Columbus Apartments, Inc., v. N.Y.S. Div. of Hous. & Cmty. Renewal*, 6 A.D.3d 28, 32 (1st Dep't 2004).[1] The result was "ever-increasing rents" for tenants in deregulated units, without the anticipated increase in construction of new housing. *La Guardia*, 53 N.Y.2d at 74. Three years later, deeming the experiment a failure, the Legislature reaffirmed its commitment to rent stabilization. *See* Emergency Tenant Protection Act of 1974 (ETPA), 1974 N.Y. Laws ch. 576 (codified at N.Y. Unconsol. Law Ch. 249-B, §§ 1-14 (Consol. 2021)); *Roberts v. Tishman Speyer Props., L.P.*, 62 A.D.3d 71, 76 n.4 (1st Dep't 2009). Under the ETPA, rent stabilization generally applies to rental units in buildings with six or more units built before 1974. *See* N.Y.

[1] In doing so, the Legislature eliminated the City's authority to make substantive changes to rental regulations. Thus, amendments to the City's Administrative Code on this subject have since been made by the Legislature, not the City Council. *La Guardia*, 53 N.Y.2d at 74.

Unconsol. Law Ch. 249-B, § 5. It also applies to newer buildings whose owners opt into the system for a period in return for tax incentives. *See, e.g.*, N.Y. Real Prop. Tax Law § 421-a(2)(f).

Since 1974, the Legislature has revised the provisions of the ETPA and the New York City Administrative Code that jointly codify the RSL. The Legislature's modifications have at times made the program friendlier to landlords and at times more protective of tenants. In 1993, the Legislature introduced certain further forms of decontrol, allowing units with rents above a certain amount to be permanently removed from rent stabilization in certain instances (either when the unit became vacant after the legal rent reached a certain amount, known as "luxury" or "vacancy" decontrol, or when the unit was occupied by tenants with household incomes exceeding a certain threshold, known as "high income" decontrol). The Legislature also allowed additional rent increases that would compensate owners for improvements to individual apartment units (known as "IAIs"). 1993 N.Y. Laws ch. 253, §§ 4-10, 19-21. In 1997, the Legislature also allowed landlords to further increase rents when certain apartments were vacated. 1997 N.Y. Laws ch. 116, §§ 19-20. And in 2003, the Legislature

allowed landlords to increase rents to maximum regulated levels even if the prior rent had been below that level. 2003 N.Y. Laws ch. 82, § 3.

More recently, the Legislature has on several occasions amended the RSL to increase protections for tenants. For example, it revisited the RSL in 2015, restricting certain opportunities for rent increases and unit decontrol and revising the amounts that landlords could recover through additional rent increases for major capital improvements (or "MCIs"). 2015 N.Y. Laws ch. 20, Part A.

The Legislature further increased protection for tenants by enacting the Housing Stability and Tenant Protection Act of 2019 (HSTPA). 2019 N.Y. Laws ch. 36, *available at* https://perma.cc/TH4B-5WNQ. The HSTPA was a "response to an ongoing housing shortage crisis, as evidenced by an extremely low vacancy rate" that caused tenants to "struggle to secure safe, affordable housing" and municipalities to "struggle to protect their regulated housing stock." Sponsor's Mem., 2019 N.Y. Laws ch. 36. The HSTPA modified the RSL in several ways, including by repealing or limiting changes the

Legislature had made from 1993 to 2003 to loosen the RSL's protections. *See* 2019 N.Y. Laws ch. 36, Parts B, D, E, & K.[2]

Among other things, the HSTPA reformed the ability of landlords to charge additional amounts beyond the base legal rent because of MCIs and IAIs. *See* 2019 N.Y. Laws ch. 36, Part K. The HSTPA also repealed vacancy decontrol and high-income decontrol, which, as noted above, had removed units from regulation when the rent or tenant's income reached a specified level; it also repealed the vacancy and longevity increases, which had allowed a landlord to raise rents above the otherwise allowable annual amounts upon vacancy or if a tenant had remained in place for a long period. *See id.*, Parts B & D. The amendments also limited landlords to recovering only one rent-stabilized unit per building for personal use, and only on a showing of necessity (with additional restrictions if the affected tenant is a senior citizen or disabled). *See id.*, Part I.

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[2] Several other provisions of the HSTPA that Plaintiffs reference, including changes to the co-op/condominium conversion process and reforms to eviction proceedings, are not part of the RSL, but are generally applicable provisions of New York real property and corporate law. *See* 2019 N.Y. Laws ch. 36, Parts M & N. Plaintiffs' complaint does not identify these provisions as within the scope of the RSL (*see* JA26, 144-45).

These changes responded to evidence that the repealed measures had frequently been abused to raise rents or remove tenants improperly. For example, the Legislature received testimony that landlords used MCIs and IAIs to drive up rents on rent-stabilized apartments, including by inflating the cost of improvements and conducting improvements that were unnecessary, both to collect greater rents and to drive units' rents toward the then-existing decontrol threshold.[3] It also testimony that vacancy decontrol had caused the City to lose more than 100,000 units from rent stabilization and given landlords an incentive to attempt to improperly raise rents, and that high-income decontrol could incentivize landlords to seek out high-income tenants, and that decontrol does not replace a high-income tenant with a low-income one, but instead removes the units from rent stabilization entirely.[4] And it heard that landlords had used the

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[3] May 16, 2019 *Hearing before N.Y. Senate Standing Committee on Housing, Construction and Community Development* 40 (testimony of Michael Barbosa) & 346 (testimony of Emily Mock), https://perma.cc/AWH8-DL8A (captured Apr. 15, 2021).

[4] May 16, 2019 *Hearing before N.Y. Senate Standing Committee on Housing, Construction and Community Development* 141-42 (testimony of Legal Services NYC); May 22 *Hearing before N.Y. Senate Standing Committee on Housing, Construction and Community Development* 19-25 (testimony of Louise Carroll and Elyzabeth Gaumer), https://perma.cc/MX3M-HMF2, (captured Apr. 15, 2021); May

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existing personal-use provision to clear entire buildings of rent-stabilized units.[5]

2. The New York City Council's periodic determinations that the RSL remains necessary

The RSL applies in New York City if the City Council finds a continuing need for statutory protection "on the basis of the supply of housing accommodations …, the condition of such accommodations[,] and the need for regulating and controlling residential rents." N.Y. Unconsol. Law Ch. 249-B, § 3. "A declaration of emergency may be made as to all housing accommodations if the vacancy rate for the housing accommodations … is not in excess of five percent." *Id.*

Since 1974, New York City's vacancy rate has never risen above five percent, and the City Council has declared an emergency in housing every three years (JA46). The City Council most recently found

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23, 2019 *Hearing before N.Y. Senate Standing Committee on Housing, Construction and Community Development* 110 (statement of Senator Kavanagh), https://perma.cc/33QM-F3LY (captured Apr. 15, 2021); May 2, 2019 *Hearing before N.Y. Assembly Standing Committee on Housing* 163-65 (panel testimony of Sateesh Nori and Thomas J. Waters).

[5] May 16, 2019 *Hearing before N.Y. Senate Standing Committee on Housing, Construction and Community Development* 136 (Testimony of Adam Meyers), https://perma.cc/AWH8-DL8A (captured Apr. 15, 2021).

an emergency in 2018, after the 2017 Housing Vacancy Survey by the U.S. Census Bureau found an estimated rental vacancy rate in New York City of 3.63 percent (JA162).

Before making the 2018 determination, the City Council heard testimony and received submissions from city housing officials, tenants organizations, and landlords and their advocates (include some of the plaintiffs here) (JA176-435). A city housing official told the City Council that the U.S. Census's 2017 Housing Vacancy Survey data showed that "half of renter households are rent burdened[,] [o]ne-third are severely burdened[, and] [m]edian rents are not affordable to the typical New York household" (JA205). A housing advocate informed the City Council that "[f]or the average NYC resident – the vast majority of our households – there are a shrinking number of low-cost units, new market-rate construction units are out of reach, and the rent burden is worsening" (JA297).

Other witnesses agreed. Another city housing official explained that "growth in supply alone is not enough to address the housing shortage, which affects all New Yorkers, but acutely falls on those households that are able to afford only the lowest cost units. The

pressure of market demand and lack of supply places everyday New Yorkers at risk of sharp rent increases, harassment, and displacement" (JA300). And Legal Services NYC testified that "[w]ithout an extension of Rent Stabilization protections, thousands of low income and working families would almost immediately be forced into the City's shelter system." (JA306).

3. The RSL's provisions regulating the rate of rent increases and the removal of tenants

The RSL does not set rents, but instead regulates the percentage by which landlords may periodically increase the rent on regulated apartment units. It also regulates the grounds on which landlords can evict existing tenants or decline to offer tenants renewal leases. N.Y.C. Admin. Code §§ 26-510(b), 26-511(c)(9).

Under the RSL, the RGB is responsible for determining the maximum permissible rent increase annually. *Id.* § 26-510(b). The RGB comprises nine members, who represent landlords, tenants, and the general public. *Id.* § 26-510(a). In determining the annual rent increase, the RGB must consider the economic condition of the residential real-estate industry, including tax rates, maintenance costs, the housing

supply and vacancy rates, as well as the cost of living and housing affordability. *Id.* § 26-510(b). As noted, under the HSTPA, landlords may offer lower preferential rents below the maximum legal rent, but if they do so the preferential rent becomes the base rent for any permissible increase in a renewal lease. *Id.* § 26-511(c)(14).

As discussed, landlords may raise rents to a certain extent beyond the otherwise allowed amount to recoup the costs of improvements (IAIs or MCIs). *Id.* §§ 26-511(c)(6)(b) & (13). The HSTPA reformed those provisions by, among other things, limiting the additional amounts recoverable annually and making the additional permissible amounts time-limited. *See* 2019 N.Y. Laws ch. 36, Part K. If a landlord believes that the permitted rental increase would create a hardship, it may petition DHCR for an exemption. 9 N.Y.C.R.R. §§ 2522.4(b)-(c).

The RSL also regulates evictions and non-renewals. The law does not require a landlord to offer a vacant rent-stabilized unit for rent or dictate who the landlord selects as a tenant. And landlords may evict a tenant for cause, such as nonpayment of rent or misconduct. *Id.* § 2524.3. But the RSL generally requires a landlord to offer an existing tenant in a rent-stabilized apartment the opportunity to enter into a

new lease when the existing lease expires. *Id.* § 2523.5(a). In certain instances, a landlord is required to offer a renewal lease to certain family members of an existing tenant who also reside in the unit. *Id.* § 2523.5(b)(1). A landlord may require that a tenant disclose any co-residents and whether they qualify as family members who may obtain succession rights. *Id.* § 2523.5(e).

Despite these protections, a landlord may refuse to offer a renewal lease if the tenant does not use the unit as their primary residence, or if an individual (noncorporate) landlord has a compelling necessity to use a rent-stabilized unit as his or her primary residence or the primary residence of an immediate family member. *Id.* §§ 2524.4(a)-(c). The HSTPA, as noted, added a restriction on the number of units recoverable per building and introduced the requirement to show a compelling necessity. *See* 2019 N.Y. Laws, ch. 36, Part I. A landlord may also refuse to renew a lease by demonstrating to DHCR either that it intends to use the unit for a business it owns and operates or that redressing substantial building-code violations would be financially impracticable. *See* 9 N.Y.C.R.R. § 2524.5(a)(1). And a landlord may obtain DHCR's authorization not to offer renewal leases in order to

demolish or rehabilitate a building by submitting proof of financial ability and an approved demolition plan. *Id.* §§ 2524.5(a)(2)-(3).

Even with the RSL, landlords of buildings with rent-stabilized units saw rising net operating income for 13 consecutive years before 2017. NYC Rent Guidelines Board, *Housing NYC: Rents, Markets & Trends* 2020 41, https://perma.cc/7NLH-3SG7 (captured Apr. 16, 2021). In several of those years, landlords' net operating income increased by more than five percent in one year. *Id.* And landlords' net operating income, income, and rents charged all increased by more than 40 percent between 1990 and 2019, after adjusting inflation. *Id.* at 35-36.

B. Plaintiffs' facial challenge to the RSL under the Takings and Due Process Clauses

Seven of the Plaintiffs in this lawsuit are owners of New York City residential buildings that include rent-stabilized units (JA35-36). They allege that the RSL has injured them by requiring them to offer renewal leases to tenants at below-market rents and that RSL has diminished the value of their buildings "substantially" (JA40-41).[6] The other

[6] Plaintiff Constance Nugent-Miller additionally alleges that she has been unable to recover a particular rent-stabilized unit for her personal use (JA100-01). Plaintiffs

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Plaintiffs are trade associations of managing agents and owners of rental properties in New York (JA34-35).

Plaintiffs sued the City of New York, the RGB, its chair and members, and the Commissioner of New York State Homes and Community Renewal (now the parent organization of DHCR), seeking a declaration that the entirety of the RSL is facially unconstitutional (JA22-151). Plaintiffs allege that the RSL causes a physical taking and a regulatory taking of private property and violates landlords' right to substantive due process (*id.*). Several tenant-advocacy organizations intervened in support of the RSL. EDNY ECF Sept. 23, 2019 Order.

The district court granted the defendants' and intervenors' motions to dismiss Plaintiffs' claims in their entirety (SPA1-40).[7] In rejecting Plaintiffs' physical-taking claim, the court noted that Plaintiffs "retain the first and third strands" in the so-called bundle of property

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Mycak Associates LLC, Vermyck LLC, and M&G Mycak LLC allege that they expect not to renovate and re-let certain rent-stabilized units once vacated, due to the restrictions around the recovery of the cost of improving apartment units (JA130-31). And Plaintiffs Cindy Realty LLC, Danielle Realty LLC, and Forest Realty LLC allege that they have had to rent two units to successors of their original tenants (JA94).

[7] The opinion also addressed the claims of another group of plaintiffs that brought a separate lawsuit also challenging the RSL (SPA2). That lawsuit is currently also on appeal to this Court. *See 74 Pinehurst, LLC v. State of N.Y.*, No. 21-467.

rights: the rights to possess (retain title) and dispose of (sell) the property (SPA15). The district court noted that this Court has rejected physical-taking challenges to the RSL multiple times; the court held that the "incremental effect of the 2019 amendments" was "not so qualitatively different from what came before as to permit a different outcome" (SPA16).

The court rejected Plaintiffs' regulatory-taking claim because the application of the "ad hoc," property-specific factors that govern most such challenges made it "virtually impossible" to show that the RSL is facially unconstitutional (SPA21-24). The district court also acknowledged that this Court has repeatedly rejected regulatory-takings challenges to the RSL (SPA17-18).

Finally, the court rejected Plaintiffs' due-process claim (SPA33-36). The court acknowledged that it must review the RSL for a rational basis and had to defer to legislative judgments (SPA35). And it recognized that the RSL was intended to allow the City's residents to remain in their homes, a goal that the Supreme Court has acknowledged is legitimate (SPA35-36).

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

Reviewing de novo, *Stadnick v. Lima*, 861 F.3d 31, 35 (2d Cir. 2017), the Court should affirm the judgment of the district court granting the City's motion to dismiss for failure to state a claim. As to each of their claims, Plaintiffs have not met their exceedingly heavy burden on a facial challenge of showing that the RSL is unconstitutional in all of its applications.

Plaintiffs fail to state a facial physical-taking claim against the RSL. This challenge requires them to demonstrate that the RSL effects a permanent physical occupation of landlords' properties. The Supreme Court, however, has rejected challenges to rent regulation under this theory. As the Court has explained, owners who open their properties to tenants cannot claim that the presence of tenants constitutes a physical occupation, even if a rent regulation restricts owners' ability to choose the tenants or requires owners to accept below-market rents. Following this precedent, this Court has repeatedly held that the RSL does not work a physical taking.

There is no basis for a different result here. As before, the current version of the RSL permits landlords to remove tenants who fail to pay

rent or violate the terms of their leases; to retake apartment units for personal use; and to remove their property from the rental market. Plaintiffs object to the limitations the RSL places on landlords' ability to avail themselves of these options. But their assertions about how these restrictions may operate in practice do not establish that the RSL is unconstitutional in all applications. They thus provide no basis for the facial challenge that Plaintiffs press here.

Plaintiffs likewise fail to state a facial regulatory-taking claim. As the Supreme Court and this Court have recognized, a facial challenge is infeasible under the ad hoc, fact-intensive test for regulatory takings, which cannot meaningfully be applied as to all properties and all landlords across the City.

Indeed, Plaintiffs' generalized assertions fail to allege a taking. The RSL does not have a uniform economic impact on all landlords and properties. Plaintiffs do not establish that the statute prevents all landlords from making a profit or that it substantially diminishes the value of their properties. The RSL has informed landlords' expectations for many decades, and property owners operating in this highly regulated rental market must expect that the State Legislature will

continue to adjust the statute's requirements in response to changing conditions. The character of the RSL also does not support a taking, in that the law regulates the landlord-tenant relationship for the common good. Moreover, Plaintiffs' alternative regulatory-taking theory, mentioned nowhere in their complaint, is unsupported by precedent.

Finally, Plaintiffs fail to state a facial due-process claim against the RSL. The law is rationally related to the State's and City's interest in protecting tenants, particularly low-income tenants, from excessive rents and housing displacement—goals that the Supreme Court has recognized as legitimate. By limiting the rate of annual rent increases and the circumstances in which landlords may evict or refuse to renew the leases of existing tenants, the RSL rationally advances those interests. And the Legislature rationally modified or repealed certain provisions of the RSL in 2019 after receiving evidence that those measures were subject to abuse: the provisions enabled landlords to increase rents beyond regulated levels or incentivized them to replace existing tenants with tenants that they could charge more.

Moreover, the City Council rationally voted to extend the RSL's protections in 2018. The City Council heard testimony that the RSL

continues to serve an important role in protecting low-income New Yorkers from burdensome rent increases, harassment, and displacement in a rental market that remains exceedingly tight. Plaintiffs' objections to these legislative judgments would have this Court privilege the views of certain economists over the decisions of elected legislatures. But the law does not permit such rule by "experts."

ARGUMENT

POINT I

PLAINTIFFS FAILED TO PLAUSIBLY ALLEGE THAT THE RSL EFFECTS A PHYSICAL TAKING

The district court correctly dismissed Plaintiffs' facial physical-taking challenge to the entirety of the RSL (SPA14-17). A facial challenge requires the challenger to show that there is "no set of circumstances" under which the RSL is constitutional. *Copeland v. Vance*, 893 F.3d 101, 110 (2d Cir. 2018). Plaintiffs cannot make this showing. Indeed, their claims fail under settled law: the Supreme Court has repeatedly stated that regulation of the landlord-tenant relationship does not cause a physical taking, and this Court has on multiple occasions held that this principle forecloses a facial challenge to the RSL. Plaintiffs are simply incorrect that the RSL, on its face,

works a permanent physical occupation of the property that they have chosen to open to use by tenants. At bottom, Plaintiffs' objection is not to the presence of tenants, but to the RSL's regulation of the landlord-tenant relationship. That objection does not support a claim of a physical taking.

A. Plaintiffs' claim fails under settled law.

1. Relying on Supreme Court precedent, this Court has repeatedly rejected physical-taking claims against the RSL.

As the district court recognized, the RSL does not cause a physical taking under established precedent (SPA14-17). To prove a physical taking, a challenger must show a "permanent physical occupation" of property, *Loretto v. Teleprompter v. Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982), that deprives the owner of the "entire bundle of property rights"—to "possess, use and dispose of" property, *Horne v. Department of Agriculture*, 576 U.S. 351, 361 (2015) (cleaned up).[8]. The Supreme Court has repeatedly confirmed that laws that regulate the landlord-tenant relationship do not cause such a deprivation. *See*

[8] This brief uses (cleaned up) to indicate that internal quotation marks, alterations, and citations have been omitted from quotations.

Pennell v. City of San Jose, 485 U.S. 1, 12 n.6 (1988); *Loretto*, 458 U.S. at 440-41. The Court has explained that "the invitation" from landlord to tenant distinguishes these cases from cases about unwanted physical occupations. *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252-53 (1987).

The Supreme Court applied this distinction to a rent regulation in *Yee v. City of Escondido*, 503 U.S. 519 (1992). The plaintiffs in *Yee*, the owners of mobile-home parks, challenged a municipal ordinance regulating the rent that such parks could charge tenants. The ordinance operated against the backdrop of a state statute that "limit[ed] the bases upon which a park owner may terminate a mobile home owner's tenancy" and prohibited a landowner from disapproving of a new purchaser of a mobile home or requiring the home's removal upon purchase. *Id.* at 524. The park owners argued that the combination of laws made "the mobile home owner … effectively a perpetual tenant of the park" and "that what has been transferred from park owner to mobile home owner is no less than a right of physical occupation of the park owner's land." *Id.* at 527. They thus challenged the ordinance as a per se physical taking. *Id.* at 526-27.

The Court rejected the claim because the park owners had "voluntarily rented their land to mobile home owners." *Id.* at 527. As the Court observed, "[p]ut bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government." *Id.* at 528. Because the tenants had been invited, "[o]n their face, the state and local laws at issue here merely regulate petitioners' use of their land by regulating the relationship between landlord and tenant." *Id.* The Court reaffirmed that "[w]hen a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge, or require the landowner to accept tenants he does not like, without automatically having to pay compensation." *Id.* at 529 (cleaned up). Such regulations are analyzed as regulatory, not physical, takings. *Id.*

Thus, *Yee* recognizes a straightforward principle that forecloses Plaintiffs' claim here: owners who make their property available for rental cannot then claim that the presence of tenants constitutes an uninvited permanent physical invasion. That is true regardless of

whether the law restricts the owner's ability to choose the tenants or requires the owner to accept below-market rents.

As the district correctly noted (SPA15-16), this Court has repeatedly applied the reasoning of *Yee* to hold that the RSL does not cause a physical taking of landlords' properties. This Court cited *Yee* in rejecting a physical-taking challenge to the RSL decades ago, observing that "where a property owner offers property for rental housing, the Supreme Court has held that government regulation of the rental relationship does not constitute a physical taking." *Fed. Home Loan Mortgage Corp. v. N.Y.S. Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 47-48 (2d Cir. 1996). The Court concluded that the RSL does not force landlords to open their property to tenants; it merely "regulates the terms under which the owner may use the property as previously planned"—that is, for rental. *Id.* at 48. In the years since, this Court has confirmed on multiple occasions that the RSL does not cause a physical taking, on its face or as applied. *See Harmon v. Markus*, 412 F. App'x 420, 422 (2d Cir. 2011); *Greystone Hotel Co. v. City of N.Y.*, No. 98-9116, 1999 U.S. App. LEXIS 14960, *3-*4 (2d Cir. 1999).

2. Plaintiffs' challenge misconstrues Supreme Court precedent.

Plaintiffs' challenge rests on a misreading of Supreme Court precedent. First, Plaintiffs and their amici attempt to stretch *Loretto* to cover the RSL (Brief for Appellants (App. Br.) 27-30; N.Y.S. Ass'n of Realtors Br. 17-21, Nat'l Ass'n of Realtors Br. 5-11). In particular, they emphasize *Loretto*'s language about "a stranger's inva[sion]" constituting a taking (*see* App. Br. 27-28). But tenants are not "strangers" in the sense intended by *Loretto*. *See Fla. Power Corp.*, 480 U.S. at 252-53. Indeed, the Court's holding there was "very narrow," finding a physical taking where a statute permitted a third party to enter and permanently occupy a portion of property over the objection of, and with no contractual relationship to, the property owner. *Loretto*, 458 U.S. at 441.

The decision thus did not involve a statute governing the relationship between two contracting parties, such as a landlord and tenant. On the contrary, the Court noted that it "has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord tenant relationship in particular without paying compensation for all economic injuries that such regulation

entails." *Id.* at 440. And it did not "question" the "substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property." *Id.* at 441.

Second, Plaintiffs mistakenly attempt to distinguish *Yee* on its facts (App. Br. 29-30). Under the RSL, as in *Yee*, landlords are free to choose to invite tenants onto their properties. The laws apply only once a landlord-tenant relationship is created, restricting the ability of a landlord to *terminate* the tenancy that it had agreed to, and allowing a successor to renew a tenancy in certain instances. *Compare Yee*, 503 U.S. at 524, *with* 9 N.Y.C.R.R. § 2523.5. The RSL goes no further in creating a "perpetual tenancy" than the laws at issue in *Yee*.

Finally, Plaintiffs and several of their amici mistakenly claim that that *Horne v. Department of Agriculture*, 576 U.S. 351 (2015), has abrogated this Court's decisions upholding the RSL against physical-taking challenges (App. Br. 32-33; N.Y.S. Ass'n of Realtors Br. 24-26, Nat'l Ass'n of Realtors Br. 11). They latch onto statements in this Court's decisions concerning a landlord "acquiescing" to being part of the rental market. *See Fed. Home Loan Mortgage Corp.*, 83 F.3d at 48; *Harmon*, 12 F. App'x at 422. In their view, *Horne* precludes

consideration of a landlord's choice to enter the residential rental market (App. Br. 33).

The discussion of landlords' acquiescence in this Court's decisions, however, reflected the Supreme Court's central insight in *Yee* that a landlord cannot assert that a tenant's presence constitutes a compelled physical occupation when the landlord has voluntarily chosen to open its property to tenants. *See Yee*, 503 U.S. at 531. And there is not the slightest indication that the Supreme Court intended to disturb this central tenet of *Yee*. Indeed, far from making new law on this front, *Horne* relied on a footnote from *Loretto*, *see Horne*, 576 U.S. at 364-65, that *Yee* had previously considered and found to support its holding, because in the landlord-tenant relationship "there has simply been no compelled physical occupation," *Yee*, 503 U.S. at 532.

Horne and *Yee* thus were making different points about this footnote. *Horne* concerned a classic physical taking of property—direct appropriation by the government. *See* 576 U.S. at 361. The cited discussion reiterates that the requirement to pay compensation for such an appropriation cannot be evaded by recasting it as a condition of the property owner's entry into a market. *Yee*, in contrast, recognized the

reality that a landlord who puts a unit out for let is opening the door to tenants, such that the tenants' presence is not a compelled occupation over the landlord's objection. *Horne* does not address, much less disturb, that reasoning.

B. Plaintiffs' allegations do not support a facial challenge to the RSL.

Plaintiffs attempt to fit the RSL into *Yee*'s dicta 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 (App. Br. 22-25). This Court has repeatedly held, however, the RSL is not that hypothetical "different case." From the face of the current version of the RSL, as with the earlier versions the Court has previously considered, it is evident that landlords have the ability to evict unsatisfactory tenants, recover individual units for personal use, and exit the rental market over the objections of their tenants in many circumstances, all of which confirm that a facial challenge against the RSL does not lie.

1. The RSL allows landlords to evict unsatisfactory tenants.

The RSL does not on its face compel unwanted occupancy of landlords' property, as plaintiffs contend (App. Br. 22-24). A landlord is not required to offer a vacant apartment for rent. And once a tenancy is formed, landlords may evict a tenant for cause, such as nonpayment of rent or misconduct. 9 N.Y.C.R.R. §§ 2524.1, 2524.3. This Court thus has correctly observed that landlords of rent-stabilized units retain the right "to evict an unsatisfactory tenant." *Harmon*, 412 F. App'x at 422 (cleaned up).

Plaintiffs' principal objection appears to be that landlords do not have unfettered ability to refuse to offer renewal leases to satisfactory tenants or in some cases to successor tenants (App. Br. 22-24).[9] But the Supreme Court has rejected the contention that a rent regulation "amounts to compelled physical occupation because it deprives [landlords] of the ability to choose their incoming tenants." *Yee*, 503 U.S. at 530-31. Given the existence of legal provisions quite apart from

[9] Plaintiffs also refer to the HSTPA's modification of New York's post-eviction procedures (App. Br. 23 n.5), but this is a change to landlord-tenant law generally, not to the RSL, *see* 2019 N.Y. Laws ch. 36, Part M, and therefore beyond the scope of Plaintiff's challenge to the RSL (*see* JA26, 144-45).

the RSL that regulate the ability to pick tenants, such as antidiscrimination laws, landlords have no inherent nonfinancial interest in choosing among qualified applicants. *See id.* at 531 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964)). And landlords should be financially indifferent between a satisfactory existing tenant and a new tenant who will pay the same regulated rent.

The same is true as to the familial co-residents of tenants who are, in certain circumstances, entitled to renewal leases. *See* 9 N.Y.C.R.R. § 2523.5(b)(1). *Yee* upheld a rent regulation under which landlords were prohibited from refusing to renew leases of the buyers of mobile homes—a far broader right to transfer a tenancy than what the RSC's successorship provision grants tenants in New York City. *See Yee*, 503 U.S. at 524. In *Yee*, tenants could freely sell their tenancies to any willing buyer, there was no limit on the number of times tenancies could be resold, and the tenants retained the profit made from selling their protected leases. Br. for Pet'rs 22-24, *Yee v. City of Escondido*, 503 U.S. 519 (1992) (No. 90-1947).

In contrast, the RSC's successorship provision is limited to certain family members who have resided in the rent-stabilized unit for two

years (or one year in the case of a senior citizen or disabled person). 9 N.Y.C.R.R. § 2523.5(b)(1). Any ability to succeed to a rent-stabilized tenancy is thus contingent on both a familial relationship and prior residency, a far cry from the freely sellable tenancies that the Supreme Court found unobjectionable in *Yee*. Thus, applying *Yee*, the New York Court of Appeals upheld the RSC's successorship provision against a claim that they created a "perpetual tenancy" of the sort that Plaintiffs allege here, reasoning that the RSL permits landlords to remove unsatisfactory tenants and change the use of their property, as discussed below. *Rent Stabilization Assn'n v. Higgins*, 83 N.Y.2d 156, 172 (1993).[10]

2. The RSL does not prevent individual owners from occupying a unit for personal use.

Contrary to Plaintiffs' contention (App. Br. 24-25), the RSL does not on its face preclude owners from occupying a unit for personal use. The RSL permits a landlord to put a unit to personal use when a tenant

[10] As a concurrence in *Higgins* noted, perhaps a landlord could bring an as-applied challenge if in a particular case the successorship provision created a perpetual tenancy. *See* 83 N.Y.2d at 176 (Bellacosa, J. concurring). But Plaintiffs do not bring such a challenge here, and indeed plead only two examples of the successorship provision requiring them to offer a renewal lease to a new tenant (JA94).

vacates voluntarily. And the RSL allows an individual (noncorporate) landlord with a compelling necessity to use a rent-stabilized unit as their own primary residence or the primary residence of an immediate family member to refuse to renew the lease for one rent-stabilized unit per building (with additional restrictions if the tenant is a senior citizen or disabled). 9 N.Y.C.R.R § 2524.4(a).

Plaintiffs claim that these provisions are unduly restrictive (App. Br. 24-25), but only one Plaintiff claims experience with attempting to use the personal-occupancy provision, and as alleged, she was unable to use it because of rulings of the housing court (*see* JA100-01). Plaintiffs do not explain how her particular experience identifies a flaw in the statute itself, rather than the effect of the housing court's application the law in her case. And because she wanted to recover just one unit, the HSTPA's restriction of the personal-recovery provision to one unit per building would not affect that claim (*see id.*).

The other Plaintiffs are corporations, which have no personal residences or family members. Plaintiffs complain that corporate landlords cannot recover units for their shareholders' personal use (App. Br. 24-25, JA98-99), but this restriction is merely a consequence

of the well-established rule that corporations are separate legal entities from their shareholders. *Franklin St. Realty Corp. v. N.Y.C. Envtl. Bd.*, 34 N.Y.3d 600, 604 (2019). If a corporate (or individual) landlord wants a rent-stabilized unit for its business use, however, it may recover a unit (as discussed below). None of the corporate Plaintiffs alleges that it has made an effort to do so.

3. The RSL allows landlords to exit the rental market in various ways.

The RSL does not on its face deprive landlords of the ability to exit the rental market (App. Br. 25-26). A landlord may decline to rent a regulated unit for residential purposes once it has been voluntarily vacated by the tenant. The RSL also ensures landlords' ability to exit the market by refusing to renew a tenancy in a variety of circumstances, such as to use a unit for non-rental business or to demolish or rehabilitate a building. 9 N.Y.C.R.R. § 2524.5. As this Court has noted, landlords have, among other rights, the right "to recover possession of housing accommodations for the immediate purpose of demolishing them." *Harmon*, 412 F. App'x at 422 (cleaned up).

Plaintiffs argue that the provisions governing these opportunities are unduly restrictive (App. Br. 25-26). To be sure, each of the options requires certain steps, including petitioning the DHCR for approval. *See* 9 N.Y.C.R.R. § 2524.5. But the statute and regulations unquestionably make multiple options available, and Plaintiffs do not allege that they have even petitioned DHCR for approval under any of them.

Yee again points the way. The plaintiffs there likewise claimed that they were "not in fact free to change the use of their land" because the procedure for approval was "kind of a gauntlet." 504 U.S. at 528 (cleaned up). Foreshadowing claims made here, the *Yee* plaintiffs asserted that the process for pursuing a change in use was "slow, uncertain, and expensive," hinging on discretionary approvals from governing bodies and payment of substantial compensation to existing tenants. Reply Br. for Pet'rs 16 n.16, *Yee v. City of Escondido*, 503 U.S. 519 (1992) (No. 90-1947). The Court dispatched the argument, holding that because the plaintiffs did "not claim to have run that gauntlet," the Court was required to "confine [itself] to the face of the statute." *Yee*, 504 U.S. at 529. Here, too, Plaintiffs press only facial claims, so the

availability of multiple options on the face of the statute and regulations is dispositive.

Further, Plaintiffs' argument mischaracterizes the relevant regulations. For example, Plaintiffs contend they must want to use "the entire building" to take advantage of the provision for withdrawing units from the rental market for a different business use (App. Br. 25). But the regulation refers to withdrawing "any *or* all housing accommodations" from the rental market and the landlord's need to use "all *or* part of the housing accommodations … for his or her own use." 9 N.Y.C.R.R. § 2524.5(a)(1)(i) (emphasis added). Plaintiffs thus have read into the regulation a restriction that is not apparent on its face.

Likewise, Plaintiffs assert that landlords must find tenants housing at the same or lower rent when demolishing a building (App. Br. 26). But that assertion simplifies a more complex regulatory provision; under the RSC, the landlord or DHCR has three options, one of which involves locating a tenant to another unit with the same or lower rent, 9 N.Y.C.R.R. § 2524.5(a)(2)(ii)(b)(1), a second that includes locating tenants to more expensive housing, in which case the DHCR "may" require the landlord to pay the difference, *id.*

§ 2524.5(a)(2)(ii)(b)(2), and the third involves paying a stipend instead of relocation, *id.* § 2524.5(a)(2)(ii)(b)(3). Plaintiffs do not allege facts concerning how the DHCR has applied these provisions to them or similar landlords.

Moreover, the impact of the various statutory and regulatory requirements would not be uniform as to all landlords, but would depend on multiple real-world facts that cannot be assessed on the face of the challenged provisions and are likely to vary substantially across the class of units covered. Those facts include, but are not limited to, the nature and condition of the relevant building; the circumstances of its existing tenants, if any; and the building's rental profile relative to the surrounding market. Thus, any putative taking is neither apparent from the face of the statute, *Yee*, 503 U.S. at 528, nor ripe for adjudication because it is not final, *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186 (1985), *overruled on other grounds by Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019). Indeed, none of the Plaintiffs allege any plan to exit the rental

market, beyond one Plaintiff's desire to occupy one unit, discussed above.[11]

C. Plaintiffs' efforts to recast the standard for facial challenges are unfounded.

Plaintiffs attempt to avoid their heavy burden in mounting a facial challenge by arguing that the stringent "no set of circumstances" standard has been cast aside in favor of a more lenient test. They are mistaken.

First, there is no merit to Plaintiffs' suggestion that *City of Los Angeles v. Patel*, 576 U.S. 409 (2015), relaxed the standard for a facial challenge (App. Br. 34-35). Both this Court and the Supreme Court have used the no-set-of-circumstances formulation for facial challenges, or similar language, since *Patel*. *See Bucklew v. Precythe*, 139 S. Ct.

[11] Plaintiffs also refer to the HSTPA's revision to the co-op/condominium conversion process (App. Br. 26). But that reform applies to all rental units in New York City, not only to rent-stabilized ones. *See* 2019 N.Y. Laws ch. 36, Part N. And Plaintiffs do not allege having any plans to convert their properties to co-ops or condos absent this legislation. In any event, the amendment has no bearing on the physical-taking question, as its consequence is, fundamentally, to affect how lucrative a sale of the property might be. Even if a co-op or condo conversion were proven impractical, a landlord would remain free to sell its property to a single buyer.

1112, 1127 (2019); *Copeland*, 893 F.3d at 110. And indeed, *Patel* itself used an equivalent formulation. 576 U.S. at 418.

Plaintiffs quote the decision's statement that "when assessing whether a statute meets this [facial] standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct." *Patel*, 576 U.S. at 418 (App. Br. 35). This statement reflects that the analysis of a facial challenge must focus on "actual applications of the statute" where it prohibits conduct that would otherwise be lawful, or authorizes conduct that would otherwise be prohibited. *Patel*, 576 U.S. at 419. Plaintiffs argue that this analysis makes it irrelevant to their facial challenge that some owners may be content to remain landlords. But the existence of those owners is not why Plaintiffs' facial challenge fails. Rather, it fails because the RSL offers options to owners who do want to change the use of their property.

Second, Plaintiffs are wrong in claiming that the RSL would be facially unconstitutional if it lacked "any plainly legitimate sweep" (App. Br. 35). That standard has not been adopted outside the First

Amendment context. *United States v. Stevens*, 559 U.S. 460, 472 (2010). It has no place here.

D. Plaintiffs' allegations do not support their sweeping challenge to the entirety of the RSL.

If it otherwise had any merit (and it does not), Plaintiffs' facial challenge should also be rejected because the relief that they seek—a sweeping declaration that the entire statutory and regulatory scheme is facially unconstitutional—is wildly incommensurate with their objections to specific provisions of the RSL and RSC.

Federal courts presume severability, *see Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508, (2010), so if any one provision of the RSL were held to effect a taking, it should be severed, and the remainder of the law should remain intact. The HSTPA contains express severability clauses, *see* 2019 N.Y. Laws ch. 36, Part G, § 6, and there is a "particularly strong" preference for severance when a legislature has included a severability clause, *Evergreen Ass'n v. City of N.Y.*, 740 F.3d 233, 243 (2d Cir. 2014) (cleaned up).

Moreover, many of the restrictions that Plaintiffs highlight—such as the conditions applied to exiting the rental market and the

successorship provision—come from the RSC, the DHCR's implementing regulations (*see* JA93 (citing to 9 N.Y.C.R.R. § 2523.5(b)(1)); JA106-09 (citing to 9 N.Y.C.R.R. §2524.5)). A finding that one or more of those regulations effected a taking would provide no basis to invalidate the statute itself.

Finally, Plaintiffs' challenge cannot affect the application of the RSL to landlords that voluntarily opted into the rent regulation in exchange for tax incentives. *See, e.g.*, N.Y. Real Prop. Tax Law § 421-a(2)(f). As to those landlords, the RSL's regulation of the landlord-tenant relationship cannot amount to a compelled physical occupation, and Plaintiffs' suit cannot invalidate restrictions that those landlords opted into.

POINT II

PLAINTIFFS FAILED TO PLAUSIBLY ALLEGE THAT THE RSL EFFECTS A REGULATORY TAKING

The district court also correctly dismissed plaintiffs' facial challenge to the RSL for effecting a regulatory taking (SPA17-24). A regulation may cause a taking of private property only if it is "so

onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

As an initial matter, the Supreme Court has stated that a facial regulatory challenge must allege that the challenged regulation has stripped a property of *all* economic value. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987) (noting that "the test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land." (cleaned up)).

Plaintiffs here do not allege that RSL makes their properties valueless or unprofitable. And this Court has repeatedly held that regulatory-takings challenges must fail where the landlord cannot allege that the RSL deprives the property of all economic value. *Fed. Home Loan Mortgage*, 83 F.3d at 48 (rejecting regulatory taking claim); *Greystone Hotel*, 1999 U.S. App. LEXIS 146960, at *4. Thus, Plaintiffs' facial challenge fails at the outset because it does not fall within the narrow range of cases susceptible to a facial regulatory-taking claim.

Even if Plaintiffs' claim did not fail on this basis, it would fail to state a claim under the fact-intensive *Penn Central* factors: (1) the "economic impact of the regulation," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) the "character of the governmental action." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). And their alternative, per se taking theory—proposed to avoid either showing a total economic loss or satisfying the fact-intensive *Penn Central* test—fares no better. There is no basis in logic or precedent for Plaintiffs' assertion that the RSL works a taking by authorizing consideration of the cost of living when determining what constitutes a reasonable rent.

A. Plaintiffs do not state a facial regulatory-taking challenge under the *Penn Central* test.

This Court has already held on multiple occasions that a facial challenge to the RSL under the *Penn Central* test is infeasible. In *Rent Stabilization Association v. Dinkins*, this Court construed a regulatory-taking claim against the RSL as an as-applied challenge because a facial challenge would have required the Court "to engage in an *ad hoc* factual inquiry for *each* landlord who alleges that he has suffered a

taking." 5 F.3d 591, 596 (2d Cir. 1993). The Court made a similar point in a later regulatory-taking challenge to the application of the RSL to a subset of rent-stabilized units. In a summary order affirming rejection of the challenge, the Court noted that "the plaintiffs have not pled facts that would support such a complex factual assessment of the economic effects of the RSL on all [affected] property owners." *W. 95 Hous. Corp. v. N.Y.C. Dep't of Hous. Pres. & Dev.*, 31 F. App'x 19, 21 (2d Cir. 2002) (cleaned up). The Court emphasized that "the difficulty of such an assessment suggests that a widely applicable rent control regulation such as the RSL is not susceptible to facial constitutional analysis under the Takings Clause." *Id.*

Plaintiffs' generalized allegations here are no more amenable to a facial challenge than the allegations in these earlier cases. Neither the RSL's economic impact, nor any interference with reasonable investment-backed expectations, is sufficient to demonstrate a taking, and the character of the governmental action here weighs decidedly against finding a taking as well.[12]

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[12] Contrary to Plaintiffs' arguments, neither whether the regulation addresses a "noxious use" of property nor whether there is "reciprocity of advantage" is part of

(cont'd on next page)

1. The economic impact of the RSL does not support a taking.

Plaintiffs' allegations about the economic impact of the RSL are insufficient to demonstrate a taking. Plaintiffs do not allege that they can identify the RSL's effect on all regulated properties; at best, they allege that unregulated properties "typically" are worth more than ones with rent-stabilized units and that rent increases are "in many instances" insufficient (JA114). But these allegations do not allow a court to assess the economic impact of the RSL as to *each* landlord with rent-stabilized apartment units.

Moreover, the RSL permits the RGB to set permissible annual rent increases above the current legal rent (*see* JA48). The economic impact of rent increases for any landlord thus depends on the number of rent-regulated units the landlord owns and the existing rent for each one. Further, the complaint alleges that in as many as one-third of all units subject to the RSL, landlords charge rents *below* the maximum

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the *Penn Central* test, which perhaps is why Plaintiffs cite the dissent in *Penn Central* and cases pre-dating it (App. Br. 48-49 & 53-55). And the Supreme Court has concluded that "noxious use" was an early formulation of the "substantially advances legitimate state interests" test, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1023-24 (1992), an element of taking jurisprudence that the Court has since unanimously rejected, *Lingle*, 544 U.S. at 540.

permitted legal rate (JA127), while other landlords may obtain "hardship exemptions" from DHCR to charge rents above the amounts authorized by the RGB (JA132-37). Landlords receiving these below- or above-market rents are not necessarily affected by the maximum rent rates set by the RGB in the same way as landlords who charge rent at the legal limit, again demonstrating why a facial challenge is not feasible here.

Similarly, the RSL's economic impact varies depending on how many units in a building are subject to its protections. Some landlords' buildings are entirely rent-stabilized, while others contain a mixture of rent-stabilized and "free market" units (JA35-36). The economic impact of the RSL must be judged against the value of the "parcel as a whole," *Penn Cent.*, 438 U.S. at 131, which requires consideration of the number of regulated and unregulated units in each building. The impact of the RSL on a building comprising mainly free-market units will be substantially different than on a building with mainly regulated units.

Plaintiffs argue that the "parcels" at issue are just the rent-stabilized units (App. Br. 50-51 & n.15). They ignore the Supreme Court's rejection of the idea that the regulated part of a property is the

appropriate "denominator" for the takings analysis. *Penn Cent.*, 438 U.S. at 130-31; *see Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993). Indeed, the Court recently reaffirmed this principle. *See Murr v. Wisconsin,* 137 S. Ct. 1933, 1944 (2017). Identifying the appropriate parcel entails an analysis of each property, considering such factors as "the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land." *Id.* at 1945. This particularized inquiry is yet another reason that Plaintiffs cannot validly mount a facial challenge to the RSL.

Even if Plaintiffs' generalized allegations about the RSL's effect on property values and rents were true for all landlords, they would be insufficient to demonstrate a taking. Plaintiffs allege that buildings with predominately unregulated units are worth double the value of buildings with predominately stabilized units (JA121). But it is "long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prods.*, 508 U.S. at 645. Indeed, regulations that reduce the value of a property from 75 to 90 percent have been held not to effect a taking. *Id.*

(upholding required payment equaling 46 percent of shareholder equity, and citing cases upholding diminutions of value of 75 percent or greater); *Pulte Home Corp. v. Montgomery County*, 909 F.3d 685, 696 (4th Cir. 2018) (holding an assumed 83 percent diminution does not establish a taking); *MHC Fin. L.P. v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (81 percent diminution in value of the plaintiff's mobile-home park was not sufficient to show a taking).

Plaintiffs also allege that the median rent charged on rent-stabilized units is 25 percent lower than rents on other apartments (JA118). Again, even ignoring the irrelevance of that generalized statistic for a facial challenge, settled law holds that a loss of profits or failure to reap an anticipated "reasonable return" is likewise insufficient to establish a regulatory taking. *Park Ave. Tower Assocs. v. City of N.Y.*, 746 F.2d 135, 139 (2d Cir. 1984).

In any case, landlords of buildings with rent-stabilized units saw rising net operating income for 13 consecutive years before 2017. See NYC Rent Guidelines Board, *Housing NYC: Rents, Markets & Trends* 2020 41, https://perma.cc/7NLH-3SG7 (captured Apr. 16, 2021). In several of those years, landlords' net operating income grew by more

than five percent a year. *Id.* And landlords' net operating income, income, and rents charged all increased by more than 40 percent between 1990 and 2019, after adjusting inflation. *Id.* at 35-36. These statistics demonstrate that the RSL, on its face, does not prevent landlords from earning increasing income over time. And as this Court noted, a facial challenge to the RSL cannot succeed where some landlords "do obtain an adequate return from the annual rent increases." *Dinkins*, 5 F.3d at 595. And for those landlords that struggle to make an adequate return, there is the possibility of applying for the hardship provision. 9 N.Y.C.R.R. §§ 2522.4(b)-(c).

2. The RSL does not interfere with reasonable investment-backed expectations.

The second *Penn Central* factor, the extent of interference with reasonable investment-backed expectations, 438 U.S. at 124, also does not support Plaintiffs' facial claim. Nothing in the RSL "interfere[s] with what must be regarded as [Plaintiffs'] primary expectation concerning the use of" their properties: they expected to be in the residential rental business when they bought their properties, and the

RSL does not interfere with that expectation. *Id.* at 136. Instead, the RSL merely regulates the business that the Plaintiffs bought into.

Far from interfering with settled expectations, the RSL, and rent regulation more generally, have informed property owners' economic expectations for many decades. *See Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 38 (2012) ("[A] property owner's distinct investment-backed expectations [are] a matter often informed by the law in force in the state in which the property is located."). The City Council first enacted the RSL in 1969, building on a series of earlier efforts to regulate rents in the City that stretch back to World War II. *See La Guardia v. Cavanaugh*, 53 N.Y.2d 67, 71 (1981), *superseded by statute*, N.Y.C. Admin Code § 26-504(b). Anyone acquiring a rental property would have been well aware that the property would be subject to the RSL's restrictions. *See Concrete Pipe & Prods.*, 508 U.S. at 645 (noting that at the time plaintiff purchased the encumbered company, "pension plans had long been subject to federal regulation").

When measuring a plaintiff's reasonable investment-backed expectations, "the critical time" is "the time the property is acquired." *Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449, 454 (2d Cir.

1995); *see also Sadowsky v. City of N.Y.*, 732 F.2d 312, 318 (2d Cir. 1984). Since the RSL has been amended repeatedly (*see supra* 5-11), expectations may vary somewhat among property owners depending on when they purchased their property. But that question cannot be resolved in a facial challenge. Judging any landlord's reasonable expectations requires, among other things, knowing when that landlord acquired the property with rent-stabilized units and the state of the law at that time.

Plaintiffs try to avoid this requirement by citing to *Palazzolo v. Rhode Island*, 533 U.S. 606, 629-30 (2001) (App. Br. 51-52). But that case addressed whether a taking claim was categorically barred just because a property owner took title after the challenged restriction took effect. Whether a claim can be brought at all against a preexisting restriction is a different question from whether the restriction informed the economic expectations of those who purchased property after its enactment. Moreover, *Palazzolo* dealt with the unusual circumstance of a transfer of title that occurred in the midst of a landowner's attempt to obtain administrative finality under the regulation, a requirement for an as-applied taking. *See Guggenheim v. City of Goleta*, 638 F.3d 1111,

1118-19 (9th Cir. 2010). But Plaintiffs bring a facial challenge here, and do not allege that they have exhausted any available administrative proceedings. *Palazzolo* provides no basis here to ignore when landlords acquired their rent-stabilized units in judging their reasonable investment-backed expectations.

Plaintiffs also argue that landlords could not have expected rent regulation to exist indefinitely because the RSL was meant as an emergency measure (App. Br. 52). But they acknowledge that the New York City Council has regularly renewed the law for decades (JA141-42). Perhaps a few property owners purchased before it became clear that the housing shortage would not imminently abate. But surely most did not. And in any case, a reasonable investment-backed expectation "must be more than a unilateral expectation or an abstract need." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984).

The 2019 enactment of the HSTPA did not unreasonably interfere with previous expectations. "Those who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Concrete Pipe & Prods.*, 508 U.S. at 645 (1993) (cleaned up). It would not have been reasonable for

property owners who purchased buildings with rent-stabilized units in the last few decades to expect the RSL to remain static, given that the Legislature has modified it repeatedly. Reasonable owners would have understood that the RSL has long been "the object[] of legislative concern," and that the statute would be amended if it "fell short of achieving" its goals. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226-27 (1986). Moreover, many of the HSTPA's changes, such as those eliminating certain forms of decontrol and the longevity and vacancy bonuses, did not break new ground, but simply restored the framework that was upheld by both this Court and the New York Court of Appeals in 1993. *See* 2019 N.Y. Laws ch. 36, Parts B & D; *Dinkins*, 5 F.3d 591; *Higgins*, 83 N.Y.2d 156.

3. The character of the RSL does not suggest that it effects a taking.

Finally, the character of the RSL, *Penn Cent. Transp. Co.*, 438 U.S. at 124, confirms that the RSL does not work a regulatory taking. Under this factor, Plaintiffs and their amici rely on their contention that the RSL authorizes a physical invasion of property (App. Br. 46-48, Institute for Justice Br. 11-15). But this argument fails along with

Plaintiffs' physical-taking claim. For the reasons discussed above, the RSL regulates the landlord-tenant relationship and does not compel a physical occupation of landlords' property.

But in any case, Plaintiffs and amici misstate the relevant factor, which asks if the action authorizes a physical invasion "for the government's own use." *Connolly*, 475 U.S. at 225. The RSL does not authorize the government to use rent-stabilized apartments; instead, the law "adjusts the benefits and burdens of economic life to promote the common good" by regulating the landlord-tenant relationship. *Id.* Its protections extend to millions of New Yorkers, particularly low-income residents. This factor thus militates against finding a taking. *See Penn Cent. Transp. Co.*, 438 U.S. at 124.

B. Plaintiffs' objection to the use of affordability data is both unpleaded and unsupported.

Plaintiffs' and their amici's alternative argument in support of their regulatory-taking claim, concerning the RGB's consideration of housing affordability and tenant income in its decisions setting maximum annual rent increases (App. Br. 37-43, Nat'l Ass'n of Realtors Br. 12-18), lacks support from both Plaintiffs' own allegations and from

Supreme Court precedent. This argument cannot save Plaintiffs' challenge from the infirmities described above.

Plaintiffs did not allege that the use of affordability and income data effected a regulatory taking. The complaint does not explain how consideration of this information affected the RGB's decisions or even whether it did so each year. It also does not explain how one could distinguish the effect of the affordability data from that of the real-estate-industry factors that they approve of. Under the statute, these and other factors all may guide the RGB's annual rent guidelines. *See* N.Y.C. Admin. Code § 26-510(b).[13]

Pleading deficiencies aside, Plaintiffs' theory lacks support from precedent. Plaintiffs cite no decision from the Supreme Court or this Court holding that the use of affordability data causes a per se

[13] On appeal, Plaintiffs argue that the effect of the affordability data can be seen mechanically in a comparison of the difference between the average annual increase in rent and the RGB's calculated "commensurate rent adjustment" (App. Br. 41-42). But plaintiffs misdescribe the "commensurate rent adjustment," which is specific to rent-stabilized units, and so does not capture landlords' total net operating income, which would include market-rate units and other inputs. NYC Rent Guidelines Board, *Housing NYC: Rents, Markets & Trends 2020* 20-22, https://perma.cc/7NLH-3SG7 (captured Apr. 16, 2021). Actual average net operating income has increased by more than the commensurate adjustment in several years in the recent past due to all of these sources of income. *Id.* at 41. The "commensurate" rent adjustment cannot solve Plaintiffs' lack of facts concerning the impact of affordability data on the RGB's process because it does not capture the full picture of landlord income.

regulatory taking. On the contrary, the Supreme Court has repeatedly emphasized that regulatory-taking claims are analyzed through the multi-factor *Penn Central* test. *See, e.g.*, *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335-37 (2002).

The only support that Plaintiffs cite is a two-Justice dissent in *Pennell v. City of San Jose*, 485 U.S. 1, 21-22 (1988) (Scalia, J., dissenting) (App. Br. 38-41).[14] But even if the dissent had been a majority opinion, it would not help Plaintiffs here. The dissent endorsed the general concept of rent regulation, and found fault with the ordinance at issue only in that it allowed a showing of hardship to an individual tenant to reduce the permissible rent "below what would otherwise be a 'reasonable rent.'" *Pennell*, 485 U.S. at 21 (Scalia, J., dissenting). And in any case, that dissent rested this objection on the idea that a law "effects a taking if [it] does not substantially advance legitimate state interests." *Id.* at 18 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). But a unanimous Supreme Court, in an opinion

[14] Contrary to Plaintiffs' suggestion (App. Br. 42), the New York Court of Appeals' determination that RSL is a "public assistance program" under a specific Bankruptcy Code provision, *see In re Santiago-Monteverde*, 24 N.Y.3d 283 (2014), has no bearing on whether the RSL is a regulatory taking, and Plaintiffs cite to no case holding that it does.

written by one of the *Pennell* dissenters, later held that the "substantially advances" test has no place in takings law. *Lingle*, 544 U.S. at 540.

The *Pennell* dissent's debunked theory has no relevance to the RSL in any case. The RGB does not tie permissible rent increases to individual tenants' circumstances. Instead, it uses a variety of data, including about cost of living and affordability, to answer the question of what a "reasonable rent" is in the first instance. Plaintiffs try to distinguish these data from "objective" considerations, by which they mean factors related to the real-estate industry (App. Br. 40-41). But the data that Plaintiffs endorse and those they reject are equally "objective." All of the information that the RGB uses is meant to determine what a reasonable annual rental increase would be, according to its statutory instruction. The *Pennell* dissent does not undermine that effort.

POINT III

PLAINTIFFS FAILED TO PLAUSIBLY ALLEGE THAT THE RSL VIOLATES DUE PROCESS

Finally, the district court correctly dismissed Plaintiffs' facial due-process challenge (SPA33-36). Plaintiffs cannot plausibly allege that the RSL or the 2018 City Council emergency declaration lacks a rational relationship to any legitimate state interest, as they must to state a claim that these enactments unconstitutionally deprived them of due process of law. *See Pennell*, 485 U.S. at 11.

Under rational-basis review, the enactments "carry with them a strong presumption of constitutionality." *Beatie v. City of N.Y.*, 123 F.3d 707, 711 (2d Cir. 1997). A plaintiff must "negate every conceivable basis which might support" the challenged legislation, "whether or not the basis has a foundation in the record"; instead, "any reasonably conceivable state of facts … could provide a rational basis." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (cleaned up). And legislative choices even "may be based on rational speculation unsupported by evidence or empirical data." *Id.* (cleaned up). The challenged enactments easily meet this most deferential standard of review.

A. The RSL is rationally related to a legitimate government interest.

The stated goal of the RSL is to prevent unreasonable or oppressive rents and rental agreements and to prevent housing dislocation that results from such rents and agreements. N.Y. Unconsol. Law Ch. 249-B, § 2; N.Y.C. Admin. Code § 26-501; *accord Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 395-96 (N.Y. 1994) ("The central, underlying purpose of the RSL is to ameliorate the dislocations and risk of widespread lack of suitable dwelling."). The Supreme Court has held that these goals are legitimate state interests, recognizing that governments have a "legitimate interest in local neighborhood preservation, continuity, and stability." *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1991); *see also Pennell*, 485 U.S. at 14 & n.8 ("Particularly during a housing shortage, the social costs of the dislocation of low-income tenants can be severe.").

The State Legislature could have rationally concluded that the RSL is related to these goals. Indeed, Plaintiffs' own allegations suggest that the RSL is effective at reducing dislocation by alleging that rent-stabilized units turn over less frequently than unregulated units (*see* JA73). This connection between the RSL and the recognized interest of

promoting housing stability is more than sufficient to overcome Plaintiffs' facial due-process claim.

Even without Plaintiffs' admissions, the relationship of the RSL's provisions to these goals is clear. The RSL provides a mechanism for establishing the maximum legal annual rent increase, while generally requiring a landlord to offer a renewal lease to a satisfactory tenant and, in some circumstances, co-residents. *See* N.Y.C. Admin. Code §§ 26-510 & 26-512; 9 N.Y.C.R.R. § 2522. 2523.5. These provisions are targeted precisely at preventing unreasonable rent increases and resulting housing instability. And while not required as a matter of due process, the RSL also takes into account the interests of landlords by factoring their costs into the annual rent-increase process, by allowing for further increases for certain additional investments, and by allowing landlords to petition the DHCR for hardship determinations. *See, e.g.*, N.Y.C. Admin. Code §§ 26-510 & 26-512; 9 N.Y.C.R.R. § 2522.4(b)-(c). The scheme thus balances the legislative goal of protecting tenants against the reasonable interests of landlords. It is thus much like the rent regulation in *Pennell*, where the Supreme Court upheld as "a rational attempt to accommodate the conflicting interests of protecting

tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment." *Pennell*, 485 U.S. at 13.

And despite Plaintiffs' and their amici's claim that the law is a poor fit for other goals, such as securing housing for low-income residents (*see* App. Br. 61-65, Nat'l Assoc. of Home Builders Br. 19-29, Institute for Justice Br. 20-23, Real Estate Board of N.Y. Br. 14-17), Plaintiffs' own allegations suggest otherwise. Plaintiffs allege that studies have shown that 37.7 percent of rent-stabilized tenants have incomes below $35,000, and that 78 percent of rent-stabilized units are rented by households with incomes under $100,000 (JA62-63). The population in rent-stabilized units is thus less well-off than that of the City as a whole, and thus especially benefits from stable, regulated rents and tenancies.

The Legislature could have also rationally concluded that the HSTPA's amendments would advance the RSL's overall goals. For example, given testimony that landlords could abuse the then-existing IAI and MCI provisions to raise rents by claiming inflated costs or labeling unnecessary items as "improvements," the Legislature could

have concluded that reforming those provisions was a way of serving the RSL's goal of preventing unreasonable rent increases.[15] Given the testimony that vacancy decontrol had given landlords an incentive to attempt to improperly raise rents, and that high-income decontrol could incentivize landlords to seek out high-income tenants, without making units available to low-income ones, the Legislature could have concluded that the decontrol provisions were not serving the RSL's overall goals.[16] Likewise, given the testimony that the threat of an increase from a preferential rent to the maximum legal rent in some renewal tenancies was used to intimidate tenants or force them out, and that the vacancy increase gave landlords an incentive to encourage tenants to move out, the Legislature could have rationally concluded

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[15] May 16, 2019 *Hearing before N.Y. Senate Standing Committee on Housing, Construction and Community Development* 40 (testimony of Michael Barbosa) & 346 (testimony of Emily Mock), https://perma.cc/AWH8-DL8A (captured Apr. 15, 2021).

[16] May 16, 2019 *Hearing before N.Y. Senate Standing Committee on Housing, Construction and Community Development* 141-42 (testimony of Legal Services NYC); May 22 *Hearing before N.Y. Senate Standing Committee on Housing, Construction and Community Development* 19-25 (testimony of Louise Carroll and Elyzabeth Gaumer), https://perma.cc/MX3M-HMF2, (captured Apr. 15, 2021); May 23, 2019 *Hearing before N.Y. Senate Standing Committee on Housing, Construction and Community Development* 110 (statement of Senator Kavanagh), https://perma.cc/33QM-F3LY (captured Apr. 15, 2021); May 2, 2019 163-65 *Hearing before N.Y. Assembly Standing Committee on Housing* (panel testimony of Sateesh Nori and Thomas J. Waters).

that eliminating those provisions served the RSL's goal of preventing dislocation and uncertainty in housing.[17]

Plaintiffs and their amici cite to a litany of economists arguing that rent regulation (in most instances, not specifically the RSL) has a variety of counterintuitive negative effects (App. Br. 61, Nat'l Ass'n of Home Builders Br. 13-29, Nat'l Assoc. of Realtors Br. 18-26). But they are arguing for rule by "expert" opinion over the judgment of democratically elected legislatures. The New York Legislature and the New York City Council surely were aware of the arguments against rent regulation—especially since two of the plaintiffs here submitted material in opposition to the HSTPA and the 2018 emergency declaration (JA149-50, 154-55). The elected officials of New York were entitled to disagree with the views of economists that Plaintiffs and their amici favor.

It is not the place of the Judiciary to overrule those determinations; on the contrary, for decades it has been "absolutely

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[17] May 16, 2019 *Hearing before N.Y. Senate Standing Committee on Housing, Construction and Community Development* 40 (testimony of Michael Barbosa) & 143 (testimony of Legal Services NYC).

clear that the Due Process Clause does not empower the judiciary to sit as a superlegislature to weigh the wisdom of legislation." *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 124 (1978) (cleaned up). And evaluating whether different public-policy choices have sufficient support among economists is exactly the "heightened scrutiny" that the Supreme Court has "long eschewed" for economic matters. *Lingle,* 544 U.S. at 545.[18]

B. The City Council's 2018 emergency declaration rationally advanced a legitimate government interest.

Plaintiffs and their amici perfunctorily repeat the allegation that the City Council's 2018 emergency declaration violates due process (App. Br. 60-61, New Civil Liberties Alliance Br. 11). Plaintiffs object that this declaration was based on an "undefined standard" (App. Br. 60). But the ETPA expressly identifies factors to consider: the housing supply, the conditions of available housing, and the need for rent regulation. N.Y. Unconsol. Law Ch. 249-B, § 3(a). The record before the

[18] Plaintiffs' and their amici's argument that property rights are fundamental and any law impacting them must be reviewed under strict scrutiny (App. Br. 59, New Civil Liberties Alliance Br. 3-6) is contrary to the Supreme Court's repeated application of rational-basis review to economic and property regulations. *See, e.g, Pennell*, 485 U.S. at 11.

City Council amply demonstrates that the Council considered these factors, and that the Council rationally could have concluded that extending the RSL would advance the City's legitimate interests.

Before determining whether the City was experiencing a housing emergency, the City Council heard testimony that "half of renter households are rent burdened[,] one-third are severely burdened[, and m]edian rents are not affordable to the typical New York household" (JA205). It was told how "[f]or the average NYC resident … there are a shrinking number of low-cost units, new market-rate construction units are out of reach, and the rent burden is worsening" (JA297). It learned that "[t]he pressure of market demand and lack of supply places everyday New Yorkers at risk of sharp rent increases, harassment, and displacement" (JA300). And it heard that rent stabilization "offers tenants protection against unlawful evictions at the "whim of landlords," ensuring that "tenants are able to remain in their homes," "children retain the home they've lived in all their lives," and families aren't evicted "simply because a landlord is litigious" (JA306-07). Thus, "[w]ithout an extension of Rent Stabilization protections, thousands of

low income and working families would almost immediately be forced into the City's shelter system" (JA306).

Based on this testimony, the City Council could readily have concluded that rent stabilization provides protections for millions of New Yorkers from eviction or lease non-renewal, thus keeping residents out of homeless shelters. And it could have concluded that many households were too rent-burdened to handle a sudden increase in rent that would have come from the end of the RSL, and that the overall rental market could not accommodate a sudden influx of tenants displaced from rent-stabilized units. Based on those concerns, the City Council could have determined that a housing emergency continued, and that it would be sound policy to maintain the RSL as a bulwark against it. With the above in mind and acting as the duly elected legislature for the City of New York, it did just that.

CONCLUSION

The judgment appealed from should be affirmed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 13,316 words, not including the table of contents, table of authorities, this certificate, and the cover.

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