21-0467(L)

21-0558 (CON)

United States Court of Appeals

for the

Second Circuit

74 PINEHURST LLC, 141 WADSWORTH LLC, 177 WADSWORTH LLC, DINO PANAGOULIAS, DIMOS PANAGOULIAS, VASILIKI PANAGOULIAS, EIGHTY MULBERRY REALTY CORPORATION,

Plaintiffs-Appellants,

(For Continuation of Caption See Inside Cover)

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

BRIEF FOR INTERVENORS-DEFENDANTS-APPELLEES

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– v. –

STATE OF NEW YORK, NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL, RUTHANNE VISNAUSKAS, individually and in her official capacity as Commissioner of New York State Division of Housing and Community Renewal, CITY OF NEW YORK, NEW YORK CITY RENT GUIDELINES BOARD, DAVID REISS, in his official capacity as Chair of the Rent Guidelines Board, CECILIA JOZA, in her official capacity as a Member of the Rent Guidelines Board, ALEX SCHWARTZ, in his official capacity as a Member of the Rent Guidelines Board, GERMAN TEJEDA, in his official capacity as a Member of the Rent Guidelines Board, MAY YU, in her official capacity as a Member of the Rent Guidelines Board, PATTI STONE, in her official capacity as a Member of the Rent Guidelines Board, J. SCOTT WALSH, in his official capacity as a Member of the Rent Guidelines Board, LEAH GOODRIDGE, in her official capacity as a Member of the Rent Guidelines Board, SHEILA GARCIA, in her official capacity as a Member of the Rent Guidelines Board,

Defendants-Appellees,

NEW YORK TENANTS AND NEIGHBORS (T&N), COMMUNITY VOICES HEARD, COALITION FOR THE HOMELESS,

Intervenors-Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Intervenors state that nongovernmental corporate entities N.Y. Tenants and Neighbors, Community Voices Heard, and Coalition for the Homeless have no parent corporation and no publicly held corporation owns 10% or more of the stock of any of these entities.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

PRELIMINARY STATEMENT

New York's carefully constructed, interlocking statutory and regulatory rent-stabilization framework (collectively, the "Rent Stabilization Laws" or "RSL") is the fruit of a century of practical experience and fifty years of legislative development and refinement. The RSL, which applies only where municipalities experiencing a housing emergency opt into its protections, currently regulates more than one million apartments statewide, including nearly half the rental stock in New York City (the "City") alone.

Plaintiffs-Appellants ("Appellants")—four corporate landlords of four buildings and three individuals together owning or managing one building, all in New York City—ask the Court to eviscerate the entire intricate design of the RSL statewide. They seek a declaration that the RSL on its face and as applied to some Appellants violates the Takings and Due Process Clauses, an injunction prohibiting enforcement of any of the RSL's statutes and regulations on any building anywhere, and damages. The District Court correctly dismissed their claims.

Reversing the District Court's carefully reasoned opinion would not only be legally indefensible but would fundamentally reshape New York's economic and social fabric, replacing the economic policy choices of five decades of democratically elected state and local governments with those of a few current landlords. It would provide an enormous, unjustified windfall to landlords who bought regulated

buildings at a discount, fully aware of their regulated status. This windfall would come at the expense of former landlords, whose own investment-backed expectations were bounded by the RSL, and the millions of tenants whose housing choices have likewise been predicated on the regulatory scheme. It would put millions of tenants in danger of losing their places in our communities and would put our communities in danger of losing millions of their members. Appellants' radical claims are foreclosed by clear, binding precedent.

First, Appellants contend that their facial taking claims can succeed upon a showing that the RSL may apply unconstitutionally in some circumstances. But as the District Court recognized, a facial "challenger must establish that no set of circumstances exists under which the [challenged law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). This Court has repeatedly dismissed facial claims against the RSL for failing to meet this high bar. *Rent Stabilization Ass'n of the City of N.Y. v. Dinkins*, 5 F.3d 591, 595 (2d Cir. 1993); *W. 95 Hous. Corp. v. N.Y.C. Dep't of Hous. Pres. & Dev.*, 31 F. App'x 19, 21 (2d Cir. 2002).

Appellants place great weight on their assertion (at 2) that the 2019 amendments so "fundamentally" changed the nature of the regulatory scheme as to render inapplicable the many decisions repeatedly upholding the RSL. However, the District Court correctly held that "[t]he incremental effect of the 2019 amendments," which largely rolled back prior experimental amendments to the RSL, "is not so

qualitatively different from what came before as to permit a different outcome." SPA-16.[1] As explained below, the 2019 amendments primarily restored the statutory scheme to its 1993 status by prohibiting landlords from deregulating individual apartments by finding higher-income tenants or forcing tenants out of their homes once the rent hit a certain threshold, both of which previously incentivized landlords to evict their tenants.

Second, Appellants claim that the RSL effects a physical taking on its face and as applied to the properties of Appellants 74 Pinehurst LLC ("74 Pinehurst"); 141 Wadsworth LLC ("141 Wadsworth"); Eighty Mulberry Realty Corp. ("Eighty Mulberry"); and Dino, Dimos, and Vasiliki Panagoulias (the "Panagouliases").[2] The District Court correctly disagreed. Because only compelled physical occupation effects a physical taking, and because landlords voluntarily rent out their units, these rent regulations are not physical takings. *See Yee v. City of Escondido*, 503 U.S. 519, 527–29 (1992). For this reason, this Court has rejected physical taking claims against the RSL at least four times. *Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal* ("*FHL*"), 83 F.3d 45, 47–48 (2d Cir. 1996); *Harmon v.*

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[1] Citations to "SPA-__" refer to the Special Appendix attached to Appellants' Brief (cited as "Br."), ECF No. 103, at 76–122 (Apr. 30, 2021). Citations to "JA-__" refer to the Joint Appendix filed in two volumes at ECF Nos. 101 and 102 (Apr. 30, 2021).

[2] Appellants Dimos and Vasiliki Panagoulias own their property. JA-33 ¶ 13. Their son, Dino, manages it. *Id.* Appellant 177 Wadsworth LLC ("177 Wadsworth") does not assert as-applied taking claims. JA-104; JA-111.

Markus, 412 F. App'x 420, 422 (2d Cir. 2011); *W. 95 Hous.*, 31 F. App'x at 21; *Greystone Hotel Co. v. City of New York*, 1999 U.S. App. LEXIS 14960, at *3–4 (2d Cir. 1999) (summary order). The 2019 amendments do not change the fact that landlords voluntarily rent their units. Nor do they change the fact that landlords also retain statutory means to end unwanted tenancies.

Third, Appellants claim that the RSL effects a regulatory taking on its face and as applied to some of Appellants' properties.[3] To succeed, they must show that the RSL (1) has a substantial economic impact on regulated buildings, (2) interferes with the distinct investment-backed expectations of regulated owners, and (3) has the character of a taking. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Because this "essentially ad hoc" standard must be applied property-by-property, *id.* at 124, 130–31; *accord Dinkins*, 5 F.3d at 596, it is not susceptible to facial analysis.

As the District Court found, attempting to apply the *Penn Central* factors to Appellants' claims reveals the claims' fatal defects. Appellants have not plausibly alleged sufficient economic impact on a facial basis because of the inherent variation of the RSL's economic impact on regulated buildings. For Appellants 74 Pinehurst

[3] Only 74 Pinehurst and 141 Wadsworth assert as-applied claims for regulatory takings. The remaining Appellants either did not assert as-applied claims (177 Wadsworth) or voluntarily dismissed them (Eighty Mulberry and the Panagouliases), JA-301–02; JA-312–13.

and 141 Wadsworth, the Complaint does not plausibly allege sufficient economic impact. Its vague allegations of diminution in value are insufficient under this Court's precedent. Nor have Appellants alleged facial or as-applied interference with investment-backed expectations, because they concede that many current owners, including Appellants 74 Pinehurst and 141 Wadsworth, purchased their buildings decades after the RSL went into effect. *See Murr v. Wisconsin*, 137 S. Ct 1933, 1949 (2017). The RSL also has the character of a land-use regulation—not a taking. The RSL's benefits and burdens are widely shared. That Appellants must bear some of that burden "to secure the advantage of living and doing business in a civilized community" does not change this fact. *Sadowsky v. City of New York*, 732 F.2d 312, 318–19 (2d Cir. 1984) (quotation marks omitted). It is no surprise that this Court has repeatedly held that the RSL has the character of a land-use regulation, not a taking. *FHL*, 83 F.3d at 48; *W. 95 Hous.*, 31 F. App'x at 21. The District Court correctly held that the 2019 amendments did not transform the RSL's character into a taking.

Finally, Appellants incorrectly claim that the RSL violates substantive due process. They argue that the RSL is subject to strict scrutiny, but as the District Court correctly held, a land-use regulation like the RSL is subject only to rational-basis review, which the RSL easily satisfies. The RSL is rationally related to numerous legitimate state interests, such as protecting consumer welfare, reducing the

costs of dislocation, and preserving neighborhood stability. Appellants' effort to challenge the RSL's efficacy has no place in rational-basis review.

For all these reasons, Appellants' claims were properly dismissed.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in dismissing Appellants' claims that the RSL effects a physical taking on its face and as applied to the properties of Appellants 74 Pinehurst, 141 Wadsworth, Eighty Mulberry, and the Panagouliases.

2. Whether the District Court erred in dismissing Appellants' claims that the RSL effects a regulatory taking on its face and as applied to the properties of Appellants 74 Pinehurst and 141 Wadsworth.

3. Whether the District Court erred in dismissing Appellants' claim that the RSL violates substantive due process.

STATEMENT OF THE CASE

A. New York's Rent Stabilization Laws

New Yorkers have long benefited from federal, state, and local regulation of rents and evictions. More than a century ago, the State enacted temporary tenant protections in the City and surrounding counties in response to a potentially "calamitous" housing emergency wherein "landlords took advantage of the situation to exact, under threats of eviction, whatever exorbitant rents the necessities of the occasion would bring forth." *People ex rel. Durham Realty Corp. v. La Fetra*, 130 N.E. 601, 603–04 (N.Y. 1921). During World War II, the federal government regulated rents in the metropolitan area.[4] Because the "severe housing shortage" continued beyond the war, the State "enacted laws providing for rent control and, later, rent stabilization." *Rent Stabilization Ass'n of N.Y.C., Inc. v. Higgins*, 630 N.E.2d 626, 628 (N.Y. 1993).[5]

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[4] *See Rent Regulation for Housing in the New York City Defense-Rental Area*, 8 Fed. Reg. 13914 (Oct. 12, 1943) (applying to the City and Nassau and Suffolk Counties).

[5] Although not directly at issue in this case, other jurisdictions within this Circuit permit or have proposed similar tenant protections. *See* Conn. Gen. Stat. § 7-148b (permitting any municipality to establish a fair rent commission to protect tenants against excessive rent increases); Shaun McGann, Conn. Gen. Assembly, Office of Legislative Research, *Tenant Protections Against Excessive Rent Increases* 2 (2020), https://bit.ly/2UNnEX9 (listing twenty-one Connecticut municipalities that have done so); Maleeha Syed, *BTV Says Yes to 'Just Cause' Evictions*, Burlington Free Press (Mar. 2, 2021), *available at* https://bit.ly/3fd7opW (describing amendment of Burlington's town charter to seek authority from Vermont to require just cause for evictions).

The City enacted the first RSL in 1969. JA-37 ¶ 32. The State intervened in 1971 with a short-lived, unsuccessful experiment in deregulating apartments upon vacancy, then expanded the RSL in 1974 with the Emergency Tenant Protection Act ("ETPA"). *See* JA-38 ¶ 34. The ETPA "is not a rent and eviction regulating law," but rather "an enabling act" permitting the expansion (in the City) and adoption (originally only in Westchester, Nassau, and Rockland Counties) of rent stabilization through the municipal declaration of a housing emergency as to "all or any class or classes of housing accommodations" with a vacancy rate below five percent. *La Guardia v. Cavanaugh*, 423 N.E.2d 9, 12–13 (N.Y. 1981); *see generally* JA-38 ¶ 35; 23 N.Y. Unconsol. Laws § 8623. The City and at least thirty-nine other municipalities have done so.[6]

The RSL generally applies to buildings built before 1974 that contain six or more apartment units. *See* JA-38 ¶ 36; N.Y.C. Admin. Code § 26-504(a)(1); 23 N.Y. Unconsol. Laws § 8625(a)(5). In the City, owners of newer or smaller buildings may also opt into rent stabilization in exchange for tax benefits. *E.g.*, N.Y. Real Prop. Tax Law §§ 421-a, 421-g. The RSL establishes a nine-member rent guidelines

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[6] *See* 23 N.Y.C. Admin. Code § 26-501 (City's declaration of emergency through April 2022); DHCR Office Rent Admin., *Fact Sheet #8: Emergency Tenant Protection Act (ETPA) of 1974 Chapter 576 Laws of 1974 as Last Amended*, at 2 (rev. Sept. 2019), https://hcr.ny.gov/system/files/documents/2020/11/fact-sheet-08-09-2019.pdf (listing thirty-nine municipalities that have opted into the RSL).

board ("RGB") for the City and for each county containing a municipality that opts into rent stabilization. N.Y.C. Admin. Code § 26-510(a) (City); 23 N.Y. Unconsol. Laws § 8624 (counties). Each RGB establishes annual guidelines for legal rent adjustments for regulated properties, considering the economic condition of the housing market, overhead costs of renting, housing supply, data on cost of living, and any other available information. N.Y.C. Admin. Code § 26-510(b); 23 N.Y. Unconsol. Laws § 8624(b). Landlords may charge rents up to the RGB-set maximum, may raise rents due to improvements, may apply for hardship exemptions if they are unable to maintain a consistent average rental income or if their gross rental income does not exceed their annual operating expenses by at least five percent of the gross rent, and must grant tenants the opportunity to renew their leases. N.Y.C. Admin. Code § 26-511(c)(6)–(6-a); 23 N.Y. Unconsol. Laws § 8626(d)(4)–(5).

At no point has the RSL required landlords to offer vacant apartments for rent or prohibited them from terminating a tenancy through statutorily permitted means. Landlords may perform background checks on prospective tenants, N.Y. Real Prop. Law § 238-a(1)(b), and evict tenants for certain unsatisfactory behavior, 9 NYCRR §§ 2504.2, 2524.3. Without the approval of the Division of Housing and Community Renewal ("DHCR")—the agency that has administered the RSL since 1983, *Higgins*, 630 N.E.2d at 628–29—a landlord who is a natural person may recover a single apartment for the personal use of the landlord or her immediate family with a

showing of immediate and compelling necessity. N.Y.C. Admin. Code § 26-511(c)(9)(b); 23 N.Y. Unconsol. Laws § 8630(a). Any landlord may, with DHCR approval and on the condition of paying relocation expenses, withdraw a unit from the rental market for business use, rehabilitation, demolition, or gut renovation. 9 NYCRR § 2504.4(b), (f); *id.* § 2524.5; *Peckham v. Calogero*, 54 A.D.3d 27, 32 (1st Dept 2009).

Since the RSL's enactment, the State has continually and carefully adjusted the law to respond to changing conditions in local housing markets. *See generally La Guardia*, 423 N.E.2d at 11–12. DHCR expanded the law's protections to tenants' successors in the 1980s. *Higgins*, 630 N.E.2d at 628–29. In 1993, statutory mechanisms were introduced for deregulating high-rent apartments that either housed high-income tenants or became vacant. *See generally Roberts v. Tishman Speyer Props.*, 918 N.E.2d 900, 902 (N.Y. 2009). These mechanisms were more limited than the blanket "vacancy decontrol laws" in place from 1971 to 1974. *Cf. La Guardia*, 423 N.E.2d at 12. Over the ensuing decades, the State continued adjusting the permissible rent increases for improvements, the thresholds for deregulation of a rental unit, the bases for converting units to non-rental use, and the percentage of tenants who must agree to any conversion of a regulated building to condominium or cooperative ownership. The RSL's core pillars—limiting rent increases and grounds for eviction—have remained in place.

In 2019, the State amended various provisions of the RSL, the rent-control laws, and other landlord-tenant laws (the "2019 Amendments"). L. 2019, Ch. 36.[7] The legislature found that "the serious public emergency which led to the enactment of the existing laws regulating residential rents and evictions continues to exist." *Id.* Part D § 1. The 2019 Amendments repealed past amendments to the RSL or made marginal adjustments. As relevant here, the 2019 Amendments repealed the requirement that the State legislature vote to extend the RSL's enabling statute every three years, permitted municipalities statewide to adopt rent stabilization, repealed some bases for rent increases and adjusted others, repealed the mechanisms for deregulating high-rent units that had been introduced in 1993, and limited the grounds for converting units or buildings to non-rental purposes. The 2019 Amendments do not require landlords to rent vacant apartments, prohibit them from evicting certain unsatisfactory tenants, or bar them from converting rental properties to other uses.

Currently, the RSL protects more than a million apartments statewide. Approximately 966,000 apartments in the City—forty-four percent of its rental stock—were subject to the RSL as of 2017. JA-41 ¶ 44. Westchester, Nassau, and Rockland Counties contained more than 36,000 additional rent-stabilized apartments as of

[7] *Available at* https://legislation.nysenate.gov/pdf/bills/2019/s6458.

2018.[8] The City-wide vacancy rate in 2017 was below five percent, JA-41 ¶ 45, as were the 2018 rental vacancy rates in Nassau County, Rockland County, Westchester County, and New York State as a whole.[9] The median household income for rent-stabilized households in the City in 2016 ($44,560) was only two-thirds that of households in private non-regulated units ($67,000).[10] Eighty-six percent of the City's rent-stabilized units—more than 830,000 apartments—house low-, moderate-, or middle-income tenants, and the vast majority are low-income.[11]

B. Proceedings Below

The Complaint was filed five months after the enactment of the 2019 Amendments, but it attacks the RSL as a whole—every statute and regulation it comprises—as facially violative of the Takings and Due Process Clauses, as well as unconstitutional as applied to some Appellants. At bottom, the Complaint alleges that the RSL (1) compels the physical occupation of regulated properties through mandatory lease

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[8] *See* DHCR Office of Rent Admin., *2019 Annual Report* 20 (2019), *available at* https://on.ny.gov/3rldA1I.

[9] U.S. Census Bureau, Selected Housing Characteristics Table DP04, American Community Survey 2018, *available at* https://bit.ly/3lUhaP5.

[10] Elyzabeth Gaumer, N.Y.C. Dep't of Hous. Pres. & Dev., *Selected Initial Findings of the 2017 New York City Housing and Vacancy Survey* 4 (2018), *available at* https://bit.ly/3yeOrcU.

[11] N.Y. State Assembly Standing Comm. on Hous., Public Hearing: Rent-Regulated Housing 31:2–7 (May 2, 2019) (testimony of Elyzabeth Gaumer), *available at* https://bit.ly/3fdf5wk.

renewal offers and eviction restrictions, (2) imposes on regulated landlords significant costs that interfere with their investment-backed expectations, and (3) unconstitutionally interferes with fundamental property rights because it purportedly exacerbates the issues it seeks to resolve and is not rationally related to any legitimate government interest.[12] JA-102–21. As remedies, the Complaint seeks the nullification of the RSL—both the enabling statutes and implementing regulations—as well as compensation for alleged takings of Appellants' properties. JA-121–22.

The District Court granted Appellees' motions to dismiss all of Appellants' claims except for two as-applied claims for regulatory takings. Appellants voluntarily dismissed those two claims and took this appeal.

[12] The Complaint also asserts a Contracts Clause claim, which the District Court dismissed, JA-115–16, and Appellants do not raise on appeal, *see* Br. 4. By failing to argue that the District Court erred in dismissing their Contracts Clause claim, Appellants have waived any such argument. *E.g.*, *Zhang v. Gonzales*, 426 F.3d 540, 542 n.1 (2d Cir. 2005).

SUMMARY OF THE ARGUMENT

The District Court applied the proper legal standards and correctly dismissed the Complaint. Its judgment should be affirmed.

To prevail on their facial claims, Appellants "must establish that no set of circumstances exists under which the [RSL] would be valid." *Salerno*, 481 U.S. at 745. This Court has repeatedly applied this high bar to facial claims under the Takings and Due Process Clauses and has rejected facial taking claims against the RSL for failing to meet it. *E.g.*, *Dinkins*, 5 F.3d at 595; *W. 95 Hous.*, 31 F. App'x at 21. Appellants' effort (at 24–25, 53) to apply a more lenient standard that would invalidate a statute that lacks a "plainly legitimate sweep" or is unconstitutional in a "large fraction of cases" is foreclosed by binding precedent and, in any event, fails because those standards apply only in the unique context of speech and abortion regulation.

Appellants' claims that the RSL effects a physical taking on its face and as applied fail because the RSL does not compel the physical occupation of any regulated property. *See Yee*, 503 U.S. at 528. Appellants do not dispute that they and all regulated owners invited tenants to occupy their properties, and Appellants cannot show that the RSL destroys any owner's bundle of property rights. Even during a tenancy, owners have the right to possess and dispose of their properties, as well as to use them for their core purpose: as rentals. Many rent-stabilized tenants end their tenancies voluntarily, and the RSL continues to provide numerous avenues for

owners to stop renting properties if they wish to do so. *See Harmon*, 412 F. App'x at 422.

Appellants' claims that the RSL effects a regulatory taking on its face and as applied fail. Appellants do not adequately allege any of the three *Penn Central* factors: substantial economic impact, interference with distinct investment-backed expectations, and character of the government action. *First*, some regulated properties obtain higher rents and sales prices than unregulated ones, and Appellants' vague allegations of average economic harms cannot save their claims. *Second*, because investment-backed expectations are made at the time of purchase, Appellants' recognition that countless owners, including the Appellants asserting regulatory-taking claims, chose to purchase regulated buildings defeats this factor. *See Murr*, 137 S. Ct. at 1949. *Third*, this Court has repeatedly held that the RSL has the character of a land-use restriction, *W. 95 Hous.*, 31 F. App'x at 21; *FHL*, 83 F.3d at 48; *Dinkins*, 5 F.3d at 594–95, and the District Court correctly found that the 2019 Amendments did not transform the RSL's character.

Finally, the District Court properly dismissed Appellants' due-process claim under rational-basis review. Appellants' argument that the RSL should be subjected to heightened scrutiny is foreclosed by a century of jurisprudence on land-use restrictions. The RSL satisfies rational-basis review because it serves numerous legitimate interests, including the reduction of dislocation costs and the protection of

consumer welfare and neighborhood continuity and stability. Appellants' efforts to second guess the RSL's efficacy and the legitimacy of these goals are factually mistaken and legally impermissible.

This Court should affirm the judgment below.

ARGUMENT

I. Appellants Misstate The Applicable Standard For A Facial Challenge

Appellants argue (at 24–25, 53) that their facial taking claims may succeed if they can show that the RSL "lacks any plainly legitimate sweep" or effects a taking "in a large fraction of cases." They are wrong. "A facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications." *Buck-lew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). "Facial challenges are generally disfavored" because they often rest on speculation and risk short-circuiting the democratic process. *Dickerson v. Napolitano*, 604 F.3d 732, 741 (2d Cir. 2010). To succeed, "the challenger must establish that *no set of circumstances* exists under which the [challenged law] would be valid." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 265 (2d Cir. 2015) (quoting *Salerno*, 481 U.S. at 745). This rule applies with full force to claims under the Takings Clause. *E.g.*, *Dinkins*, 5 F.3d at 595, 597; *Kittay v. Giuliani*, 252 F.3d 645, 647 (2d Cir. 2001). The District Court thus correctly held that, to prevail, Appellants "must demonstrate that 'no set of circumstances exists under which [the RSL] would be valid.'" SPA-19 (quoting *Salerno*, 481 U.S. at 745) (alteration in original).[13]

[13] Appellants' statement (at 25 n.5) that "the District Court correctly declined to apply [the *Salerno*] test" appears to be a mistake. The District Court, as noted, applied *Salerno*'s "no set of circumstances" test.

Appellants' arguments to the contrary are unavailing. They rely (at 25, 53) on *United States v. Stevens*, 559 U.S. 460 (2010), and *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012), for Appellants' proposed "plainly legitimate sweep" standard. But *Stevens* applied a standard unique to First Amendment overbreadth claims,[14] and the Supreme Court expressly noted that it "need not and [did] not address" the facial standard that applies in "a typical case." 559 U.S. at 472. Appellants do not assert any First Amendment claim, so *Stevens* does not help them.[15]

Decastro, on the other hand, supports applying the "no set of circumstances" standard here—not Appellants' lower standard. In that case, a criminal defendant raised a Second Amendment challenge to a restriction on transporting firearms across state lines. 682 F.3d at 163. Although this Court noted the "plainly legitimate sweep" standard in passing, *id.* at 168, it applied the "no set of circumstances" test, *see id.* at 163 ("A defendant who fails to demonstrate that a challenged law is unconstitutional as applied to him has necessarily failed to state a facial challenge, which requires him to establish that no set of circumstances exists under which the

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[14] "In the First Amendment context … a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, n.6 (2008)).

[15] In any event, Appellants' claims would fail even the relaxed *Stevens* standard. As detailed in Parts II–IV below, the Complaint does not adequately allege that "a substantial number of [the RSL's] applications are unconstitutional," as *Stevens* requires, 559 U.S. at 473 (quoting *Wash. State Grange*, 552 U.S. at 449 n.6).

statute would be valid." (cleaned up)); *id.* at 168 (because the defendant had failed to show the statute was unconstitutional as applied to him, "his facial challenge to the statute must also fail"). The same test applies here.

Appellants also misplace reliance (at 53) on *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), for their proposed "large fraction of [ ] cases" standard. Like *Stevens*, *Casey* involved a unique constitutional standard, holding that states may not unduly interfere with or impose a substantial obstacle to women's effective right to abortion before fetal viability. *Id.* at 846. Because the husband-notification requirement at issue in *Casey* would impose a substantial obstacle to a woman's choice to have an abortion "in a large fraction of the cases in which [the requirement was] relevant," it was "an undue burden, and therefore invalid." *Id.* at 895. Appellants do not cite a single case applying this standard for reviewing abortion regulations to a facial taking claim.

As this Court has repeatedly held, a facial claim under the Takings Clause—including against the RSL—must be dismissed unless the pleadings plausibly allege that no set of circumstances exists under which the challenged law would be valid. *E.g.*, *Cranley v. Nat'l Life Ins. Co. of Vt.*, 318 F.3d 105, 110 (2d Cir. 2003); *Kittay*, 252 F.3d at 647; *Dinkins*, 5 F.3d at 595, 597. This test applies here.

II. The RSL Does Not Effect A Physical Taking On Its Face Or As Applied To Any Appellants

The District Court correctly dismissed Appellants' claims that the RSL effects a physical taking on its face and as applied. SPA-14–17. "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee*, 503 U.S. at 527. Appellants do not, and cannot, allege that the RSL requires that they, much less all landlords, offer their properties for rent. To the contrary, all landlords *invite* tenants to occupy their properties, and the RSL provides numerous avenues for owners wishing to remove their buildings from the rental market to cease being landlords. The District Court's order should be affirmed.

A. Appellants Do Not Plausibly Allege A Facial Physical Taking

As the District Court properly held, Appellants' facial claim fails because this Court "has rejected physical-takings claims against the RSL on multiple occasions," and the "incremental effect of the 2019 amendments . . . is not so qualitatively different from what came before as to permit a different outcome." SPA-16 (citing *Harmon*, 412 F. App'x at 420; *Greystone Hotel*, 1999 U.S. App. LEXIS 14960 at *3–4; *FHL*, 83 F.3d at 47–48). Because the RSL does not compel any owner to offer its property for rent and preserves numerous means of withdrawing a property from the rental market, Appellants' facial claim was correctly dismissed.

1. The RSL Does Not Compel Physical Occupation

No landlord is compelled by the RSL to offer a vacant unit for rent. Appellants cannot, and do not, contest that they, like all regulated landlords, voluntarily invited tenants onto their properties in the first place. Where, as here, "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," *FHL*, 83 F.3d at 47–48, because "no government has required any physical invasion," *Yee*, 503 U.S. at 528 ("Petitioners' tenants were invited by petitioners, not forced upon them by the government.").

The District Court properly noted that Appellants may still freely possess and dispose of their properties and continue to use them for the very purpose for which they bought them: to rent out to tenants. SPA-15. Appellants do not allege that all regulated landlords—or even the Appellants—wish to change the use of their properties to stop renting to tenants. Appellants might prefer different, richer tenants paying higher rents, but the Takings Clause does not prohibit the government from requiring a landlord "to accept tenants he does not like." *Yee*, 503 U.S. at 529 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (rejecting taking challenge to public accommodations provision of the Civil Rights Act of 1964)).

For these reasons, this Court has repeatedly held that "the RSL regulates land use rather than effecting a physical occupation." SPA-15 (quoting *W. 95 Hous.*, 31 F. App'x at 21); *accord FHL*, 83 F.3d at 48 (holding that the RSL merely "regulates the terms under which the owner may use the property as previously planned"); *Harmon*, 412 F. App'x at 422 (same); *Greystone Hotel*, 1999 U.S. App. LEXIS 14960, at *3 (holding that the RSL "neither force[s] [a landlord] to allow guests onto its property in the first instance nor compel[s] [the landlord] to stay in the rental business").[16]

Appellants' efforts to "reverse this tide" of caselaw fail. *FHL*, 83 F.3d at 47.[17] They argue (at 34 n.6, 41–42) that *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), undermines this Court's prior decisions upholding the RSL. That is not correct. The law at issue in *Horne* required raisin farmers to "physically set aside" a percentage of their crop in certain years "for the account of the Government, free of charge." *Id.* at 354. Relying on a footnote from *Loretto v. Teleprompter*

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[16] Appellants urge the Court (at 40) to ignore *West 95 Housing*, *Harmon*, and *Greystone Hotel* on the ground that they are unpublished summary orders. The Court is not precluded from "consider[ing] summary orders for their persuasive value" and "often draw[s] guidance from them in later cases." *Brault v. Soc. Sec. Admin.*, 683 F.3d 443, 450 n.5 (2d Cir. 2012).

[17] While amicus Cato Institute relies on Richard A. Epstein's work, *Takings: Private Property and the Power of Eminent Domain,* ECF No. 129, at 5, *FHL* explained that this and other scholarship could not overcome longstanding Supreme Court precedent that rent regulations do not effect a physical taking, 83 F.3d at 47.

Manhattan CATV Corp., 458 U.S. 419 (1982), stating that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation," *Horne* held that the challenged law constituted a "clear physical taking." *Horne*, 576 U.S. at 361, 365 (citing *Loretto*, 458 U.S. at 439 n.17). *Yee*, considering the same *Loretto* footnote, rejected an identical claim "because there ha[d] simply been no compelled physical occupation giving rise to a right to compensation that [the landlords] could have forfeited." 503 U.S. at 532. Appellants' argument therefore also "fails at its base," because no landlord was compelled to accept tenants to begin with. *Id.* The District Court properly held that "because under cases like *Loretto*, *Horne*, *Yee*, and others, no physical taking has occurred in the first place," *Horne* "does not save [Appellants'] physical-takings claim." SPA-17.[18]

Appellants also misplace reliance (at 39–40) on Supreme Court cases involving clear physical invasions that are inapposite here. *Loretto*, for example, concerned a "very narrow" application of the "traditional rule" for a physical taking that "involved a direct physical attachment" by government order of materials onto private property. 458 U.S. at 438, 441. *Loretto* expressly noted that its holding did not

[18] Another district court recently rejected a similar argument, concluding that "unlike the law in *Horne*, the RSL does not transfer possession or disposal rights from landlords." *335-7 LLC v. City of New York*, No. 20 Civ. 1053 (ER), 2021 WL 860153, at *9 (S.D.N.Y. Mar. 8, 2021).

affect states' "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. The other cases cited by Appellants similarly involved plain physical encroachments. *See Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("[T]he imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina."); *United States v. Causby*, 328 U.S. 256, 265 (1946) ("The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself."); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987) ("To say that the appropriation of a public easement across private premises does not constitute the taking of a property interest but rather … a mere restriction on its use … is to use words in a manner that deprives them of all their ordinary meaning." (cleaned up)). That is not the case here, where the RSL does not compel landlords to invite tenants onto their property.

Appellants wrongly assert (at 25–28) that the RSL's renewal and successorship provisions, as well as the eviction procedures applicable to all rental housing,[19]

[19] Appellants' contention (at 47) that the procedure for evicting tenants results in the provision of "rent-free housing" ignores the reality that tenants may remain in their units for up to a year only if they deposit rent with the court "at the rate for which the applicant was liable as rent … plus such additional amount, if any, as the court may determine to be the difference between such rent and the reasonable rent." *See*

"strip owners of the right to exclude others from their property" and cause a physical taking. As *Yee* makes clear, however, a landlord that voluntarily invites tenant occupation cannot assert a viable physical-taking claim against state regulation of the landlord-tenant relationship where, as here, the challenged law contains numerous means of terminating a tenancy. 503 U.S. at 528–29. Accordingly, this Court has repeatedly upheld the constitutionality of the RSL, notwithstanding these provisions. *E.g.*, *W. 95 Hous.*, 31 F. App'x at 21; *Harmon*, 412 F. App'x at 422.[20]

N.Y. Real Prop. Acts. Law § 753(2). In any event, the argument that a law grants a tenant "the right to occupy the land indefinitely at a submarket rent" has no bearing on the physical-taking analysis, which is concerned solely with "compelled physical invasion." *Yee*, 503 U.S. at 527.

[20] The Supreme Court's recent decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), is not to the contrary. There, the government granted uninvited labor organizers a "right to take access" to private farms for three hours per day, 120 days per year. *Id.* at 2069. But where, as here, a landlord has voluntarily invited tenants onto the property, the government does not physically take the property by regulating the landlord-tenant relationship. *Yee*, 503 U.S. at 528–29. As *Cedar Point* recognized, "limitations on how a business generally open to the public may treat individuals on the premises," including limitations on the business's right to exclude those individuals, "are readily distinguishable from regulations granting a right to invade property closed to the public." *Id.* at 2077. As a result, the Supreme Court has repeatedly observed that "limiting a property owner's right to exclude ... from an already publicly accessible" property is not a physical taking. *Horne*, 576 U.S. 350, 364 (2015); *accord PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82–84 (1980) (holding that state restriction on commercial shopping center's right to exclude individuals did not amount to a taking). Because Appellants' "tenants were invited by [Appellants], not forced upon them by the government," Appellants cannot assert a physical-taking claim. *Yee*, 503 U.S. at 528.

Appellants also lament (at 29–32) the changes in the 2019 Amendments to the RSL's deregulation provisions—which did not exist before 1993—and to the ability to evict tenants from regulated units for the owner's personal or family use. But none of these changes results in the RSL compelling landlords to rent their properties at the outset, and the RSL still contains numerous means for a landlord to stop renting its property, as discussed below. As the District Court properly concluded, the 2019 Amendments did not transform the effect of the RSL from regulating land use to appropriating property. SPA-15–16.

Finally, Appellants emphasize (at 22–24) that a physical taking may occur even if the challenged invasion is not technically permanent and that the RSL requires them to rent to "strangers." Both points are irrelevant. The RSL does not effect a physical taking because it does not *compel* physical occupation, regardless of whether the occupation can be considered permanent. And as the Supreme Court has held, depriving landlords of their ability to choose their incoming tenants "has nothing to do with whether [a law] causes a *physical* taking," *Yee*, 503 U.S. at 503. Even if it did, qualifying successors are not strangers—the RSL requires their cohabitation with the original tenant for a period of time and "permit[s] the owner to request, when offering a renewal lease, the names of all co-occupants." *Higgins*, 630 N.E.2d at 633.

2. The RSL Provides Various Means To End Tenancies

Appellants contend (at 21) that the RSL "requires [ ] owners to continue renting [their] apartments to current tenants in perpetuity," but no Appellant alleges that it wants to cease renting to tenants; rather they want to stop renting units at regulated rates to recover a windfall by renting those same units at market rates. In any event, as Appellants concede (at 33–36), the RSL on its face contains numerous means by which a landlord may stop being a landlord. Owners may, among other things:

1. elect not to offer a regulated unit for rent upon vacancy;[21]
2. evict a tenant who fails to pay rent, violates the lease agreement, commits a nuisance, or uses the apartment for unlawful purposes, 9 NYCRR §§ 2504.2, 2524.3;
3. decline to renew a lease if the tenant does not occupy the unit as her primary residence, *id.* §§ 2504.4(d), 2524.4(c);
4. decline to renew a lease to repossess a unit if the owner or an immediate family member has an immediate and compelling need to occupy it, N.Y.C. Admin. Code § 26-511(b)(9); 23 N.Y. Unconsol. Law § 8630(a);
5. withdraw a unit from the rental market for the owner's own commercial use, 9 NYCRR § 2524.5(a)(1)(i);

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[21] Appellants ignore the significant proportion of rent-stabilized tenancies that end naturally. The City's Independent Budget Office found that the average annual tenant turnover rate for rent-stabilized apartments from 2010 to 2015 was twelve percent City-wide and up to thirty-two percent in some neighborhoods. Sarah Stefanski, N.Y.C. Indep. Budget Office, *Which New York City Neighborhoods Saw the Most—and Fewest—Tenants Move from Rent-Stabilized Apartments in 2010-2015?* (Apr. 11, 2017), *available at* https://bit.ly/31U8oYl. The study analyzed more than 925,000 apartments, *id.*, meaning that an average of more than 111,000 rent-stabilized tenancies turned over annually across the City.

6. withdraw a building from the rental market because of a safety hazard that would cost more than the building's worth to repair, *id.* § 2524.5(a)(1)(ii);

7. demolish or gut renovate a building (with payment of relocation expenses), *id.* §§ 2504.4(f), 2524.5(a)(2), (3); *Peckham*, 54 A.D.3d at 32; and

8. convert regulated apartments to condos or co-ops with purchase agreements from at least fifty-one percent of tenants, 2019 Amendments Part N (codified at N.Y. Gen. Bus. L. § 352-eeee).

In *Harmon,* this Court rejected a physical-taking claim against the RSL in light of these very same exit options. 412 F. App'x at 422. The Court explained that the RSL did not compel landlords to submit to physical occupation because they retained "statutory rights, among others, (1) to recover possession of housing accommodations because of immediate and compelling necessity for their own personal use and occupancy, (2) to recover possession of housing accommodations for the immediate purpose of demolishing them, … and (3) to evict an unsatisfactory tenant." *Id*. (cleaned up); *accord Higgins*, 630 N.E.2d at 632 (rejecting argument that the RSL "created perpetual tenancies" because owners can "evict an unsatisfactory tenant or convert rent-regulated property to other uses").

Appellants do not dispute that the RSL on its face contains these rights. Rather, they argue (at 34) that they are "illusory."[22] But *Yee* rejected an identical

[22] Appellants principally challenge (at 33–34) the costs associated with exercising these exit options, but as discussed below in Section III.B, the costs associated with

argument that changing the use of the land to exit rent regulation "was in practice a kind of gauntlet" because the difficulty of running such a gauntlet in any particular case has no bearing on a facial claim. 503 U.S. at 528 (quotation marks omitted). And although Appellants assert (at 29) that the law at issue in *Yee* permitted landlords to "evict their tenants with 6 to 12 months' notice," they ignore that the way to evict tenants in *Yee* was "to change the use of [the] land," which those landlords argued was such a "gauntlet" that they were "not in fact free" to do so. *Yee*, 503 U.S. at 528. As such, contrary to Appellants' assertions (at 32), the RSL does not present the "different case" *Yee* contemplated. Quite the opposite: *Yee* forecloses Appellants' claim. *See Conn. Ass'n of Health Care Facilities, Inc. v. Bremby*, 519 F. App'x 44, 45–46 (2d Cir. 2013) (rejecting as foreclosed by *Yee* a nursing home's claim that state law made it practically impossible to discharge Medicaid patients).

B. Appellants Do Not Plausibly Allege Any As-Applied Physical Takings

The District Court properly held that Appellants' as-applied physical-taking challenges "fail for the same reasons" as their facial claim. SPA-17. Appellants do not allege that the government forced any of them to open their properties for rent

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the regulation comprise one factor considered under the regulatory taking framework. They are irrelevant to the existence of a physical taking. *See Yee*, 503 U.S. at 527 (holding that "the right to occupy the land indefinitely at a submarket rent" has no bearing on the physical-taking analysis, which concerns only compelled physical invasion).

in the first place. None allege that the RSL precludes them from evicting a tenant to exit the rental business altogether. Appellants instead contend (at 36–37) that there are specific tenants to whom they no longer wish to rent. But *Yee* made clear that landowners' inability to "decide who their tenants will be" does not render a rent regulation unconstitutional. 503 U.S. at 526, 531.

Appellants also challenge (at 30–31) the RSL's restrictions on their ability to repossess units for personal residential use, but these complaints likewise ring hollow. Appellant Dino Panagoulias, who does not allege he currently wishes to reclaim any unit but cannot, purportedly sought permission to evict a tenant to reclaim the unit for personal use *over eight years ago* but was denied because he could not show that he intended in good faith to occupy the unit as a primary residence. *See* JA-52 ¶ 63; Br. 30 ("Before the 2019 Amendments, the RSL permitted owners to reclaim multiple apartments—up to and including all rent-stabilized apartments in a building—so long as they or their immediate family members intended in good faith to occupy the units as primary residences"). Non-party Maria Panagoulias purportedly "has considered occupying a rent-stabilized unit in her family's building," JA-52 ¶ 64, but has not actually attempted to do so (nor, tellingly, has she claimed even to consider occupying any of the four unregulated units in the building). These stale, speculative allegations do not plausibly allege a compelled physical occupation.

Appellants Eighty Mulberry, 74 Pinehurst, and 141 Wadsworth complain (at 38) that because only natural persons can reclaim a unit for personal use, they are categorically barred from reclaiming any units. But no person is obligated to own property through a corporation. In any event, no corporate Appellant has alleged that any shareholders or members wish to reclaim a unit for personal use or that the company wishes to recover a unit for any other permitted use. *See supra* Part II.A.2 (discussing exit options); *Pennell*, 485 U.S. at 10 ("[T]he constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary."). Appellants' as-applied physical-taking claims fail.

III. The RSL Does Not Effect A Regulatory Taking On Its Face or As Applied

The District Court properly dismissed Appellants' facial regulatory-taking claim and the as-applied claims of 74 Pinehurst and 141 Wadsworth because the Complaint fails to carry "the heavy burden necessary to establish a regulatory taking." *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 375 (2d Cir. 2006).[23] Far from satisfying the "intensive *ad hoc* inquiry" required under Supreme Court precedent, *id.*, Appellants do not adequately allege any of the "familiar" *Penn Central* factors: (1) the severity of the challenged law's economic impact, (2) its interference with

[23] The remaining Appellants either did not assert as-applied claims or voluntarily dismissed them. *Supra* note 3.

distinct investment-backed expectations, and (3) its character, *1256 Hertel Ave. Assocs., LLC v. Calloway*, 761 F.3d 252, 264 (2d Cir. 2014).

A. The District Court Applied The Correct Standard For Evaluating Appellants' Facial Claim

The District Court correctly held that to prevail on their facial regulatory-taking claim, Appellants "must demonstrate that 'no set of circumstances exists under which [the RSL] would be valid.'" SPA-19 (quoting *Salerno*, 481 U.S. at 745). *See generally supra* Part I.

Appellants' straw-man argument (at 51–52) that facial regulatory-taking claims are not "categorically barred" rests on a misreading of the District Court's reasoned opinion. The District Court never held that regulatory-taking claims were categorically barred. Nor did the District Court merely rely, as Appellants contend (at 52), on *West 95 Housing*'s observation that the difficulty of conducting the requisite ad hoc assessment to determine whether a regulation effects a taking "suggests that a widely applicable rent control regulation such as the RSL is not susceptible to facial constitutional analysis under the Takings Clause," 31 F. App'x at 21. Instead, the District Court reached the same conclusion based on its own independent assessment under *Penn Central*: "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." SPA-21.

Appellants further suggest (at 52) that regulatory-taking claims face an "uphill battle" only at summary judgment. But this Court has previously reasoned that "facial challenges to land use regulations face an uphill battle" on a motion to dismiss. *Kittay*, 252 F.3d at 647 (quotation marks omitted). The District Court applied the correct legal standard.

B. The Complaint Fails To Plausibly Allege Substantial Economic Impact On A Facial Basis Or As Applied

1. The RSL Does Not Have A Substantial Economic Impact On All Regulated Owners

The District Court held that the Complaint's "vague allegations about the average diminution in value across regulated properties" cannot establish the requisite economic impact "on an owner-by-owner basis" because any such impact "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." SPA-21. This ruling was correct for several reasons.

First, the Complaint is bereft of non-conclusory allegations that the RSL has a substantial economic impact on every regulated property, as would be required to prevail on a facial claim. *E.g.*, *Dinkins*, 5 F.3d at 595. *Dinkins* held that a facial taking challenge to the RSL could not lie where the complaint alleged that, at most, "many" owners were "deprived of a constitutionally adequate return by the across-the-board limitations in the [RSL] placed on annual rent increases" and that some of

those owners were "unable to remedy the [purportedly] confiscatory results of the [RSL's] basic provisions" through the RSL's hardship exemptions. *Id.* The Complaint contains the same fatal defects. Appellants allege that stabilized rents are lower than those of unregulated properties, JA-107 ¶ 216, but the Complaint cites a study finding that nearly one-fifth of all regulated units in the City charge higher rents than those of comparable unregulated units, JA-99 ¶ 184.[24] Appellants' allegation that "few applications" for statutory hardship exemptions have been filed and some have been granted admits that the exemption exists on the face of the law and has been applied to alleviate some owners' hardships. JA-88 ¶ 157. As in *Dinkins*, because the Complaint "implicitly concedes, as it must, that the [RSL] has not abridged the constitutional rights of those landlords who *do* obtain an adequate return from the annual rent increases," Appellants cannot assert a facial claim. 5 F.3d at 595.

Similarly, although Appellants allege that building values have diminished, they admit (at 54) that "the effects of the RSL may vary in their details from one

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[24] *See* Citizens Budget Comm'n, *Rent Regulation: Beyond the Rhetoric* 11 (2010), https://cbcny.org/sites/default/files/REPORT_RentReg_06022010.pdf ("For about 19 percent of the regulated households, there is no effective discount because the actual rent is higher than that predicted based on housing characteristics in the unregulated sector, and for another 11 percent the discount is less than 10 percent of the predicted unregulated rent."). The Court may take judicial notice of materials incorporated by reference in the Complaint. *Tongue v. Sanofi*, 816 F.3d 199, 209 (2d Cir. 2016).

owner to the next." Appellants do not allege, because they cannot, that the RSL effects a regulatory taking of every rent stabilized building. They instead rely on patently overbroad statements, averages, and generalizations about programs that on their face will affect different landlords differently. *See, e.g.*, JA-64 ¶ 94 (average losses of value); JA-66 ¶ 101 (average increases in operating costs); JA-67 ¶ 102 (the HSTPA prevents landlords "in many instances" from "cover[ing] their operating costs"); JA-69 ¶ 108 ("Many property owners … undertook significant capital improvements …."); JA-85 ¶ 148 (the RSL "in many instances effectively render[s] unavailable" the many ways landlords can recover units from tenants). These generalizations and averages do not suffice for a facial challenge.

Second, even if Appellants' generalizations sufficed (they do not), the economic impacts they allege are not substantial enough or of the kind necessary to support a taking claim. The Complaint's conclusory allegations that the RSL diminished the value of rent-stabilized buildings by up to 70 percent, *see* JA-107 ¶ 216,[25] ignore that landlords that purchased their properties under the RSL benefitted from this alleged diminution and, in any event, are insufficient under Supreme Court precedent that has "long established that mere diminution in the value of property,

[25] The Complaint alleges diminution of approximately 50 percent before 2019 and up to 40 percent of the resulting value afterward. JA-107 ¶ 216.

however serious, is insufficient to demonstrate a taking," *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993).

Also insufficient is the Complaint's allegation that the RSL prevents landlords from obtaining "a reasonable rate of return" on their investment. JA-108 ¶ 217. As noted, any landlord that purchased its building under the RSL would have benefitted from the purportedly depressed purchase price alleged by Appellants. And the RSL's hardship exemptions from the rent limits are available to ensure landlords obtain reasonable returns. *See generally Dinkins*, 5 F.3d at 595. In any event, "the inability of [owners] to receive a reasonable return on their investment by itself does not, as a matter of law, amount to an unconstitutional taking." *Park Ave. Tower Assocs. v. City of New York*, 746 F.2d 135, 138 (2d Cir. 1984). This is especially true here, where "[a]lthough [an owner may] not profit as much as it would under a market-based system, it may still rent apartments and collect the regulated rents." *FHL*, 83 F.3d at 48.

Third, contrary to Appellants' argument (at 51), the Complaint's allegation that the RSL "reduce[d] the value of rent-stabilized apartments" by "making it virtually impossible to leave the rental business" does not hold water. JA-64 ¶ 93. As detailed in Part II.A.2, above, an owner that wishes to change its building to non-rental use has many means of doing so.

Because Appellants "have not pled facts that would support [the] 'complex factual assessment' of the economic effects of the RSL" on all affected owners, their facial claim fails. *W. 95 Hous.*, 31 F. App'x at 21 (quoting *Yee*, 503 U.S. at 523).

2. Neither 74 Pinehurst Nor 141 Wadsworth Has Suffered A Substantial Economic Impact

The Complaint also fails to allege sufficient economic impact on 74 Pinehurst or 141 Wadsworth. The Complaint alleges that 74 Pinehurst's and 141 Wadsworth's properties—purchased in 2008 and 2003, respectively, years after the RSL's enactment, JA-33 ¶¶ 14–15—decreased "by 20 to 40 percent" after the 2019 Amendments.[26] JA-65 ¶ 97; JA-112 ¶ 234. This vague allegation cannot save Appellants from "the legion of cases that have upheld regulations which severely diminished the value of commercial property." *Park Ave. Tower*, 746 F.2d at 139–40 (collecting cases rejecting taking claims despite diminutions in value of 75 to 90 percent); *accord Pulite Home Corp. v. Montgomery County*, 909 F.3d 685, 696 (4th Cir. 2018) (83 percent); *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (81 percent); *see also Concrete Pipe*, 508 U.S. at 645 ("[M]ere diminution in the value of property, however serious, is insufficient to demonstrate a taking.").

[26] The Complaint's general comparison of average values per square foot for rent-stabilized and unregulated buildings before 2019, JA-64 ¶ 94, says nothing about the RSL's impact on the specific buildings owned by 74 Pinehurst or 141 Wadsworth.

Contrary to Appellants' arguments (at 44–45), sufficient economic impact is not shown by the Complaint's further allegations of "below-market rates," JA-68 ¶ 106; "locking in [of] preferential rents for the life of a tenancy," JA-73 ¶ 116; or potential "jeopardiz[ing]" of 74 Pinehurst's and 141 Wadsworth's "ability … to re-finance their mortgages in the future," JA-69 ¶ 107. This Court has repeatedly held that the relevant metric for economic impact "is not whether the regulation allows operation of the property as 'a profitable enterprise' for the owners, but whether others 'might be interested in purchasing all or part of the land' for permitted uses." *Park Ave. Tower*, 746 F.2d at 139 (quoting *Pompa Constr. Corp. v. Saratoga Springs*, 706 F.2d 418, 424 (2d Cir. 1983)).

Appellants' allegations about below-market and preferential rents concern their ongoing revenues and potential profits, but Appellants nowhere allege any specific impact on profit or revenue for any building. They do not allege that they have sought hardship exemptions or that the RSL has rendered their buildings completely unmarketable for permitted uses.[27] And Appellants' bare speculation about potential

[27] Appellants' failure to seek available hardship exemptions under the RSL renders their claims unripe. *Pakdel v. City and County of San Francisco* recently reaffirmed that "a plaintiff's failure to properly pursue administrative procedures may render a claim unripe *if* avenues still remain for the government to clarify or change its decision," including where the plaintiff has "an opportunity to seek a variance." 141 S. Ct. 2226, 2231 (2021). The claims in *Pakdel* were ripe because the plaintiffs had sought an exemption and there was "no question about the city's position" denying

disqualification for future mortgages does not support their claim. *See, e.g.*, *Lynch v. City of New York*, 952 F.3d 67, 78 (2d Cir. 2020) ("An allegation merely that something possibly happened does not qualify as a well-pleaded factual allegation, whose veracity the court should assume." (cleaned up)). The Complaint is devoid of specific allegations showing the requisite economic impact on 74 Pinehurst's and 141 Wadsworth's properties.

C. The Complaint Fails To Plausibly Allege Interference With Distinct And Reasonable Investment-Backed Expectations On A Facial Basis Or As Applied

1. The RSL Does Not Interfere With Investment-Backed Expectations Of All Regulated Owners

The District Court correctly concluded that the Complaint does not and "cannot allege that the RSL frustrates the reasonable investment-backed expectations of every landlord it affects" given that "the nature of each landlord's investment-backed expectations depends on when they invested in the property," "what they expected at that time," and "the state of the law when the property was purchased, among other things." SPA-22–23.

"The purpose of the investment-backed expectation requirement is to limit recovery to owners who could demonstrate that they bought their property in reliance

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it. *Id.* at 2230. Appellants have not sought exemptions. They merely speculate that the hardship provisions offer economic relief "in theory" but practically "result in few applications … being granted." JA-85–88 ¶¶ 149–57. Their claims are unripe.

on a state of affairs that did not include the challenged regulatory regime." *Allen v. Cuomo*, 100 F.3d 253, 262 (2d Cir. 1996) (quotation marks omitted). Accordingly, "the critical time for considering investment-backed expectations is the time a property is acquired, not the time the challenged regulation is enacted." *Meriden Tr. & Safe Deposit Co. v. F.D.I.C.*, 62 F.3d 449, 454 (2d Cir. 1995).

The RSL was first enacted in 1969 and has ever since circumscribed landlords' ability to raise rents, decline to renew leases, and evict tenants. *E.g.*, JA-37 ¶ 32. Throughout the ensuing five decades, the state legislature tinkered with the RSL's bases for rent increases, non-renewal, and eviction, *e.g.*, JA-38–39 ¶¶ 35–38; *Higgins*, 630 N.E.2d at 628–29, but always maintained these core protections.

The Complaint makes clear that Appellants and others chose to invest in the City's heavily regulated rental market by acquiring multi-unit residential buildings already subject to the RSL. *E.g.*, JA-33 ¶¶ 13–16 (alleging that several Appellants purchased their buildings in 1974, 2003, 2007, and 2008). As the Complaint recognizes, moreover, many buildings in the City were already subject to rent and eviction regulations for decades before the enactment of the RSL in 1969. *See* JA-36–37 ¶¶ 30–32. Each of these owners "acquired their property … with full knowledge that it was subject to the RSL." *Harmon*, 412 F. App'x at 422. The Complaint does not allege that any Appellant—much less all owners—purchased its multi-unit residential apartment building with the expectation of converting it to non-rental use.

To the contrary, the Complaint's entire discussion of alleged interference with investment-backed expectations focuses solely on the RSL's restrictions on increasing rents and evicting tenants.[28] *See* JA-65–85 ¶¶ 98–148. Appellants thus concede that the RSL does not interfere with their "primary expectation" for using their apartment buildings: renting them to tenants. *Penn Cent.*, 438 U.S. at 136. Because owners' "continued use for present activities is viable" under the RSL, the law cannot be deemed to interfere with investment-backed expectations. *Rector, Wardens, & Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 357 (2d Cir. 1990).

Appellants take issue (at 51) with the 2019 Amendments' elimination of mechanisms to deregulate rental units, *see* JA-69–71 ¶¶ 108–10; limitations on the amounts of permissible rent increases for improvements, *see* JA-77–81 ¶¶ 127–38; and locking in of preferential rents, *see* JA-45 ¶ 48(e). But these allegations cannot cure Appellants' admission that numerous owners chose to purchase regulated buildings. "Those who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 227 (1986) (quotation marks

[28] Although the Complaint discusses the RSL's restrictions on converting apartment buildings to non-rental use, JA-59–64 ¶¶ 81–92, Appellants do not allege that any owners invested in their buildings reasonably expecting to do so.

omitted). As the New York Court of Appeals has "repeatedly made clear," "no party doing business in a regulated environment like the New York City rental market can expect the RSL to remain static" prospectively. *Regina Metro Co. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 154 N.E.3d 972, 991 (N.Y. 2020). This Court has likewise held that given the "heavily-regulated" nature of the City's rental market, a landlord "cannot claim surprise that [its] relationships with certain tenants are affected by governmental action." *Kraebel v. N.Y.C. Dep't of Hous. Pres. & Dev.*, 959 F.2d 395, 403 (2d Cir. 1992).

Appellants' bare contention (at 54) that the District Court "erred in differentiating between property owners based on when they purchased their properties" is unsupported by any case law and contravenes binding precedent. *E.g.*, *Meriden Tr.*, 62 F.3d at 454 (holding that "the critical time for considering investment-backed expectations is the time a property is acquired"). Appellants cannot show that the RSL on its face interferes with reasonable investment-backed expectations of every regulated landlord.

2. The RSL Does Not Interfere With Any Investment-Backed Expectations Of 74 Pinehurst Or 141 Wadsworth

The District Court correctly held that 74 Pinehurst and 141 Wadsworth failed to plausibly allege that the RSL interfered with any reasonable investment-backed

expectations they had.[29] SPA-31–33. "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) (quotation marks omitted), and is "informed by the law in force" at the time, *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 38 (2012). 74 Pinehurst and 141 Wadsworth purchased their buildings in the mid-2000s, more than three decades after the RSL was enacted. JA-33 ¶¶ 14–15. By that time, "the RSL had taken its basic shape," "become a fixture of New York law," and "been amended multiple times." SPA-31–32. Because "a reasonable investor would have understood it could change again," the District Court correctly held that Appellants' purported expectations "that the regulated rate would track a given figure, or that the criteria for decontrol and rate increases would remain static," were unreasonable. SPA-32.

Appellants rely (at 48–49) on *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), to argue incorrectly that the timing of an owner's purchase is irrelevant. In *Palazzolo*, shortly after the challenged regulation was promulgated, ownership of the disputed parcel was transferred by operation of law from a corporation to its sole

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[29] The District Court erroneously found that Eighty Mulberry and the Panagouliases sufficiently alleged interference with investment-backed expectations merely because they purchased their buildings before 1950 and in 1974, respectively. SPA-30. Because these Appellants subsequently abandoned these claims, they are not at issue in this appeal.

shareholders. 533 U.S. at 626. The Supreme Court rejected the state's categorical argument that "a successive title holder … is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Id.* But *Palazzolo* presented "no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law" informing reasonable investment-backed expectations. *Id.* at 629. In a separate concurrence, moreover, Justice O'Connor made clear that the holding for which she provided the necessary fifth vote "does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis." *Id.* at 633 (O'Connor, J., concurring). Instead, "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of [its] expectations." *Id.* The District Court properly credited Justice O'Connor's concurrence to find that the timing of purchase is "significant." SPA-31 n.16.[30]

Since *Palazzolo*, the Supreme Court and this Court have confirmed the significance of the timing of a challenged law's enactment relative to the acquisition of property. *Murr v. Wisconsin*, for example, rejected a regulatory-taking claim where

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[30] "When a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (cleaned up).

the owners could not have "reasonably expected" to use their property in a manner contrary to the "regulations which predated their acquisition" by eighteen years. *See* 137 S. Ct. at 1940–41, 1949 (regulation effective in 1976 and properties acquired in 1994 and 1995). *1256 Hertel Ave. Associates, LLC v. Calloway*—on which the District Court expressly relied (at SPA-33)—similarly held that a longstanding property regulation "qualifie[d] as part of 'those common, shared understandings of permissible limitations derived from a State's legal tradition.'" 761 F.3d at 266 n.10 (quoting *Palazzolo*, 533 U.S. at 630).

Appellants do not address *Murr* at all, and their attempt to differentiate *Calloway* (at 49–50) because of the duration and substance of the property regulation at issue in that case falls short. Appellants admit that the RSL "traces its roots to the 1920s" and that local, state, or federal rent and eviction restrictions have protected City tenants for most of the past century. JA-36–38 ¶¶ 30–35. The 100-year history of rent regulations is therefore comparable to the 150-year vintage of the law at issue in *Calloway*. The substance of the homestead exemption in *Calloway*, moreover, which had recently been changed from $10,000 to $50,000, *Calloway*, 761 F.3d at 255, is akin to the RSL's 2019 Amendments. In both cases, the longstanding laws had specific core protections which the amendments kept in place, and in both, the amendments amounted to mere "legislative tinkering" resulting in "predictabl[e] and necessar[y]" changes to the laws. *Id.* at 266–67.

The District Court correctly found that the Complaint fails to show, and indeed defeats, any suggestion that the RSL interfered with any reasonable investment-backed expectations of 74 Pinehurst and 141 Wadsworth.

D. As This Court Has Repeatedly Held, The RSL Has The Character Of A Land-Use Regulation, Not A Taking

The District Court did not determine the character of the RSL because it correctly held that Appellants could not "prevail without alleging the other two *Penn Central* factors at the facial level." SPA-24. Should this Court reach the question of the RSL's character, it should conclude, as it has before, that the RSL has the character of a land-use regulation, not a taking.

Where, as here, a regulation does not compel "a physical invasion" but "instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good,'" the regulation does not have the character of a taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (quoting *Penn Cent.*, 438 U.S. at 124). Accordingly, this Court has repeatedly held that the RSL does not have the character of a taking because it regulates land use, rather than compels physical occupation, and preserves on its face numerous means of ending tenancies. *E.g.*, *Harmon*, 412 F. App'x at 422; *FHL*, 83 F.3d at 48.

The 2019 Amendments did not transform the RSL's character. The Complaint alleges that the amendments limited or eliminated certain bases for increasing

rents and eliminated the deregulatory mechanisms for units that will remain in the rental market. JA 65–72. But "[l]egislative tinkering of this sort inevitably creates individual winners and losers, for one's man defense is another man's obstacle." *Calloway*, 761 F.3d at 265 (finding that statutory adjustment of homestead exemption from bankruptcy exposure did not have the character of a taking). Nothing in the RSL requires property owners to invite tenants in the first place, and the RSL still contains statutory rights for landlords to end tenancies under certain circumstances. Such a "land-use regulation" that is "coordinated" among multiple levels of government, *Murr*, 137 S. Ct. at 1949–50, and imposes only "negative restriction[s]," *Buffalo Teachers*, 464 F.3d at 375, is not characteristic of a taking.

Appellants argue that the RSL has the character of a taking in two ways: (1) it "is the functional equivalent of a physical seizure of private property," and (2) "it disproportionately imposes the costs of maintaining a public-welfare program on private property owners and lacks any corresponding 'reciprocity of advantage' to such owners." Br. 45 (quoting *Pa. Coal. Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

Appellants' first argument merely bootstraps their deficient physical-taking claim and fails for the reasons discussed above in Part II. Appellants' second argument relies on a mischaracterization of the law. The relevant groups for measuring reciprocity of advantage are not only those who are burdened by a challenged use restriction but also those who benefit directly or indirectly from it, such as employees

invited into a mine subject to safety regulations, *Mahon*, 260 U.S. at 415, or "the community" surrounding a restricted property, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491–92 (1987). "Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." *Keystone*, 480 U.S. at 491.

The RSL's burdens and benefits are widely shared. The RSL restricts landlords of more than a million apartments across the City and at least thirty-nine other municipalities statewide from imposing rent increases or ending tenancies except as permitted by law. *See supra* at 9 & note 6. Rent-stabilized tenants benefit from having stable, long-term housing and rents, and this stability undoubtedly has a positive ripple effect. Employers benefit because their rent-stabilized employees are less likely to suffer the distraction and disruption of forced moves due to rent shocks or eviction. Local neighborhoods, schools, businesses, civic organizations, and religious institutions benefit when residents are secure enough to set down roots in the community. To the extent the RSL causes unregulated rents to increase as Appellants contend (at 12–13), owners of those units benefit.

Appellants may complain that the RSL's numerous benefits do not approximate the costs Appellants claim to bear, but "[t]he Takings Clause has never been

read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received." *Keystone*, 480 U.S. at 491 n.21. Binding precedent dictates that the costs imposed on regulated landlords by the RSL "are properly treated as part of the burden of common citizenship." *Id.* at 491 (quotation marks omitted). *Penn Central* upheld a landmarks law affecting "31 historic districts and over 400 individual landmarks." 438 U.S. at 134. Although the *Penn Central* dissent argued that the law imposed substantial costs on relatively few owners "with no comparable reciprocal benefits," *id.* at 140 (Rehnquist, J. dissenting), the majority accepted the City's judgment that the law "benefit[ted] all New York citizens and all structures, both economically and by improving the quality of life of the city as a whole," *id.* at 134. The RSL applies to many more buildings than the landmarks law at issue in *Penn Central*.

Likewise, in *Sadowsky v. City of New York*, this Court found that a law preventing demolition or renovation of single-room occupancy dwellings with a recent history of tenant harassment or displacement did not have the character of a taking. 732 F.2d at 318. It reasoned that the plaintiff owners "share[d] with other owners the benefits and burdens of the city's exercise of its police power." *Id.* (quotation marks omitted). It did not matter that the burden at issue was purportedly "significant" because the plaintiffs bore the burden "to secure the advantage of living and

doing business in a civilized community." *Id.* at 319 (quotation marks omitted). So too here.

Appellants' remaining arguments are meritless. *First*, Appellants argue (at 51 n.9) that the RSL has the character of a taking because it does not "seek to remedy noxious use of property." But the Supreme Court has squarely held "that noxious-use logic cannot serve as a touchstone" for a regulatory-taking analysis because a court cannot objectively distinguish a law that "prevents harmful use" from one that "confers benefits." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026 (1992).

Second, Appellants rely (at 45 n.8) on Justice Scalia's dissent in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), to suggest that any program that benefits the "general welfare … must be supported by all the public." Justice Scalia's *Pennell* dissent, which was not adopted by the *Pennell* majority, rested on his mistaken view that a law could effect a taking on its face by failing to "substantially advance legitimate state interests." *Id.* at 15 (Scalia, J., concurring in part and dissenting in part). But this Court rejected Justice Scalia's reasoning as "in tension (if not conflict) with well established Fifth Amendment doctrine granting government broad power to determine the proper subjects of and purposes for regulatory schemes." *Garelick v. Sullivan*, 987 F.2d 913, 918 (2d Cir. 1993). The Supreme Court subsequently made abundantly clear that it rejected the central premise of Justice Scalia's *Pennell*

dissent, holding that "the 'substantially advances' formula … is not a valid method of identifying regulatory takings." *Lingle*, 544 U.S. at 545.

Because Appellants do not come close to establishing that any *Penn Central* factor supports a taking claim for every landlord across New York—let alone for themselves—the District Court properly dismissed the facial and as-applied taking claims at issue in this appeal.

IV. Appellants' Substantive Due-Process Claim Should Be Dismissed

As the District Court properly determined, Appellants' due-process challenge to the RSL is subject to rational-basis review. SPA-35. The RSL easily clears this bar, and the District Court's dismissal of this claim should therefore be affirmed.

A. Rational-Basis Review Governs Appellants' Due-Process Claim, As The District Court Correctly Held

Appellants' unsupported argument (at 54–55) that laws affecting property rights receive heightened scrutiny under the Due Process Clause is meritless. Since 1926, the Supreme Court has directed lower courts to apply rational-basis review to regulations that limit what property owners may do with their land. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *accord Lingle*, 544 U.S. at 544–45. *Pennell* unanimously applied rational-basis review to the rent-regulation regime at issue. 485 U.S. at 11–13; *id*. at 15 (Scalia, J., concurring). *Lingle*, which also addressed a rent-regulation regime, made clear that the Supreme Court has "long eschewed … heightened scrutiny when addressing substantive due process

challenges to government regulation." 544 U.S. at 545. Neither Appellants nor their amici cite a single contrary case. As the District Court properly determined, rational-basis review applies to Appellants' due-process claim. SPA-35.

B. The RSL Easily Passes Rational-Basis Review

As the District Court properly concluded, the RSL satisfies rational-basis review. SPA-35–36. To surmount this low hurdle, a law must be "rationally related to a legitimate state interest." *Beatie v. City of New York*, 123 F.3d 707, 711 (2d Cir. 1997) (quotation marks omitted). As Appellants concede (at 56), "[t]here is no requirement that a law serve more than one legitimate purpose," *Preseault v. I.C.C.*, 494 U.S. 1, 18 (1990). A challenger must therefore "negative every conceivable basis which might support" the law at issue, "whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320–21 (1993) (quotation marks omitted). Indeed, "when reviewing challenged social legislation, a court must look for plausible reasons for legislative action, whether or not such reasons underlay the legislature's action." *Beatie*, 123 F.3d at 712 (quotation marks omitted); *accord Heller*, 509 U.S. at 320 (holding that the government "has no obligation to produce evidence to sustain the rationality" of its laws).

The RSL readily satisfies rational-basis review because it is rationally related to numerous legitimate state interests. The text of the RSL and its local readoption by the City identify, among its goals, the prevention of excessive rent increases and

the avoidance of tenant displacement. *See* 23 N.Y. Unconsol. Law § 8622 (citing the prevention of "speculative, unwarranted and abnormal increases in rents" and tenant "uncertainty, hardship and dislocation" as goals of the RSL); N.Y.C. Admin. Code §§ 26-501, 26-502 (finding that many City landlords were "demanding exorbitant and unconscionable rent increases," thereby causing "severe hardship to tenants"). The 2019 Amendments were enacted in furtherance of these same goals. *See* Sponsor's Mem.,[31] Bill Jacket, L. 2019, ch. 36 (finding that "tenants struggle[d] to secure safe, affordable housing, and landlords ha[d] little incentive to keep tenants in place long term by offering consistently low rent increases").

The Supreme Court has long held that preventing excessive rent increases and avoiding tenant displacement are legitimate state interests. *See Pennell*, 485 U.S. at 13 (recognizing "the protection of consumer welfare" to be "a legitimate and rational goal of price or rate regulation"); *id.* at 14 n.8 (recognizing "reducing the costs of dislocation that might otherwise result if landlords were to charge rents to tenants that they could not afford" to be a legitimate interest); *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992) (finding that state governments have a "legitimate interest in local neighborhood preservation, continuity, and stability"). The RSL directly addresses these interests, as New York's highest court has observed. *See, e.g., Higgins*, 630

[31] *Available at* https://www.nysenate.gov/legislation/bills/2019/s6458.

N.E.2d at 634 (finding a "close causal nexus" between the RSL and preventing eviction and the resulting "vulnerability to homelessness"). Stabilizing rents, limiting the reasons landlords can charge more than regulated rent, preventing deregulation, and limiting grounds for removing tenants are plainly rationally related to keeping rents stable and tenants in their homes. The District Court found just that, and accordingly dismissed Appellants' due-process claim. SPA-36.

Appellants scarcely address any of the numerous conceivable bases for the RSL. Instead, they argue (at 14, 56–58) that the RSL does not satisfy due process because (1) the RSL decreases vacancy rates in rent-stabilized units, purportedly causing "the statutory threshold for an 'emergency' warranting rent stabilization," and (2) neighborhood stability and continuity are not valid governmental ends. Appellants' arguments are baseless.

First, the lower vacancy rate for rent-stabilized units versus market-rate units shows that the RSL is actually—not just conceivably—related to keeping tenants in their homes, protecting consumer welfare, and preventing the costs of tenant dislocation. *See Pennell*, 485 U.S. at 13, 14 n.8; *Nordlinger*, 505 U.S. at 12. Appellants' attempt to weaponize this benefit turns the Due Process Clause on its head. They may believe that increasing the vacancy rate by subjecting rent-stabilized tenants to higher rents is a better way of addressing the housing emergency. But the legislature has disagreed, and its decision is dispositive: courts cannot "strike down a law as

irrational simply because it may not succeed in bringing about the result it seeks to accomplish" or "because the problem could have been addressed some other way." *Beatie*, 123 F.3d at 712.[32] No evidentiary record can salvage Appellants' claim; *Lingle* made clear that the battle of experts Appellants demand would be "remarkable, to say the least, given that [the Supreme Court] ha[s] long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation." 544 U.S. at 545; *see also Grand River Enters. Six Nations, Ltd. v. Boughton*, 988 F.3d 114, 123 (2d Cir. 2021) (affirming motion to dismiss substantive due-process claim because "[r]ational basis review is not a post-hoc test of the effectiveness of a legislative policy").[33]

Second, although Appellants argue that "neighborhood stability and continuity" are not legitimate goals because they are purportedly "premised on the view that

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[32] Appellants fundamentally misconstrue the RSL, stating (at 56) that it is designed to "solv[e] the vacancy-rate 'emergency.'" To the contrary, the RSL is designed to alleviate the *effects* of a housing emergency, including by preventing tenant "dislocation," which necessarily results in lower vacancy rates. N.Y. Unconsol. Laws § 8622. To the extent Appellants argue that the RSL is irrational because it depresses the vacancy rate below the statutory five-percent threshold, the RSL mandates the examination of the vacancy rate for "all … housing accommodations"—including rent-regulated housing accommodations. *Id.* § 8623(b).

[33] Appellants' out-of-circuit case, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), does not help them. There, the government "offered no rational basis for their challenged rule" and the court could not conceive of one despite "try[ing] as [it was] required to do." *Id.* at 227. The RSL is supported by numerous conceivable rational bases, including the ones offered by the government.

a neighborhood is harmed by the arrival of new residents," Br. 57–58, the Supreme Court has squarely held that state governments "ha[ve] a legitimate interest in local neighborhood preservation, continuity, and stability," *Nordlinger*, 505 U.S. at 12. In any event, Appellants are wrong to state that the RSL promotes neighborhood stability and continuity by excluding new residents. Rather, the RSL does so by preventing the "uncertainty, hardship and dislocation" of current residents, N.Y. Unconsol. Laws § 8622, and the "uprooting [of] long-time city residents from their communities," N.Y.C. Admin. Code § 26-501; *accord Nordlinger*, 505 U.S. at 12 (citing as an example of "local neighborhood preservation, continuity, and stability" the inhibition of "displacement of lower income families"). The District Court correctly held that the RSL is plainly related to this legitimate interest. SPA-36.

Put simply, the "Constitution is not intended to embody a particular economic theory … of laissez faire," much less "an economic theory which a large part of the country does not entertain." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). The Supreme Court has long "emphatically refuse[d] to go back to the time when courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Ferguson v. Skrupa*, 372 U.S. 726, 731–32 (1963) (quotation marks omitted). Appellants' substantive due-

process claim ignores these fundamentals of constitutional law and was properly dismissed. SPA-36.

CONCLUSION

The judgment of the District Court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Intervenors certifies pursuant to Federal Rule of Appellate Procedure 32(g) that this principal brief:

1. complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(e) and Local Rule 32.1(a)(4)(A) because it contains 13,595 words, including footnotes and excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(f); and

2. 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 in a proportionally spaced typeface using Microsoft Word for Microsoft Office 365 in 14-point Times New Roman.

Dated: July 30, 2021 /s/ *Caitlin J. Halligan*