No. 22-1095

IN THE

Supreme Court of the United States

COMMUNITY HOUSING IMPROVEMENT PROGRAM, ET AL.,

Petitioners,

v.

CITY OF NEW YORK, NEW YORK, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE BUILDING AND REALTY INSTITUTE OF WESTCHESTER & PUTNAM COUNTIES, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* THE BUILDING AND REALTY INSTITUTE OF WESTCHESTER & PUTNAM COUNTIES, INC.

The Building and Realty Institute of Westchester & Putnam Counties, Inc ("BRI") represents property owners in Westchester and the lower Hudson Region.[1] The Petition herein arises from the Court of Appeals for the Second Circuit's dismissal of the Petitioners' challenge to the New York State's Rent Stabilization Law ("RSL") which rejected various constitutional challenges to the RSL. This Court's resolution of the questions presented regarding the constitutional issues raised herein will impact not only the City of New York through the RSL, but all of New York State which is now subject to the N.Y. Emergency Tenant Protection Act ("ETPA"). The ETPA regulates housing in almost exactly the same statutory framework as the RSL but is available and governs communities outside of New York City. In Westchester County alone, based on New York's Homes and Community Renewal registration, there are 25,029 rent stabilized housing units and 82 permanently exempt units, totaling 25,111 residential units subject to regulation under the ETPA.[2]

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all of the parties received notice of the BRI's intention to file a brief in support of the Petition for Certiorari at least 10 days prior to the deadline to file the brief. The Petitioner, City and State Respondents consented.

[2] The New York State Division of Housing and Community Renewal (NYSDHCR) Annual Survey of 1,955 buildings. It is noted that there are buildings not counted such as those owned

The BRI is one of New York State's largest building, realty and construction industry membership organizations. Formed in 1946, the BRI is recognized as a "spokesperson" on behalf of the realty industry in New York State and serves as a resource to its members. The BRI's 1700 members include owners of apartment rental buildings, cooperatives and condominiums, property managers and managing agents, and suppliers and professional service firms involved in the building and construction industry. Services provided by the BRI include advice and consulting in Rent Guidelines Board (RGB) hearings, interfacing with the New York State Homes and Community Renewal ("NYSHCR"), zoning and planning review, legislative advocacy, and legal consultation. The Apartment Owners Advisory Council (AOAC), a constituent of the BRI, represents approximately 16,000 apartment units, and owners of hundreds of multifamily properties and buildings. Many of the members are family businesses owning only a few buildings or even only one. The AOAC's members have been and continue to be deeply and detrimentally impacted by regulation of their property.

The interest of the BRI in this case arises from its longstanding concern for the multifamily property owners required by the ETPA to provide income-based subsidies, in the form of regulation and limitation of rents of their apartments, for decades. The governmental regulation of rents and other statutory limitations imposed on owners of multifamily housing through the ETPA now more than ever significantly encumber them given the passage in 2019 of the amendments to the ETPA known as the N.Y. Housing

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by the same multifamily property owner for a period of less than 3 years.

Stability and Tenant Protection Act ("HSTPA"). The original rent controls were first imposed during the Second World War as temporary measures to insulate tenants from exposure to unusually high rents arising out of national crisis. By the 1974 ETPA, the New York State legislature passed another form of "rent control" which was stated to be a pathway to market rate housing while protecting against "rent gouging." The ETPA as amended presents a form of permanent rent control though with no ability to restore the apartment to the rental market or the rents to the market rates, with significant additional rent limitations, and the inability of the owner to remove a tenant whose lease expired or ended.

The ETPA allowed a community to "opt in" to its provisions only if the vacancy rate of multifamily (over 6 units) housing in the community was shown to be under 5% by survey. New York City opted in and every 3 years acts to confirm the under 5% vacancy rate. In Westchester County, 21 communities opted into the ETPA, the majority in the 1970s. The most recent community to opt in was the Village of Ossining which did so in 2018 and thereafter limited its application to buildings with over 20 units. In no case has any community conducted a survey after the initial adoption of ETPA to determine the existence of a less than 5% vacancy rate, underscoring the perpetual nature of the ETPA's strictures on BRI's constituents.

By providing subsidized housing to certain tenants without any relationship to their actual financial status and without reimbursement of the required rent subsidy to the property owners providing the housing, the BRI's membership suffers severe and ongoing prejudice as a result of the unconstitutional

limitations imposed on multifamily real property owners. Affordable housing is the ostensible goal of rent regulation (or rent control), but the ETPA's methods accomplish the opposite result. Numerous learned and scholarly articles and studies have set forth the fallacy of rent control as a method of securing affordable housing.[3]

The BRI maintains a significant interest on behalf of its members and the counties outside New York City, as an *amicus curiae*¸ to offer its perspective on the constitutionality of municipal rent control ordinances such as the ETPA and HSTPA. These and other like statutory schemes have eroded the nation's rental housing stock in the name of "affordable housing" or the public "well-being". What are touted as attempts to provide adequate, affordable housing have actually amounted to unreimbursed subsidies to certain tenants without reimbursement and without an ability to recover possession of the premises and which therefore result in an unlawful government intrusion into private commercial relationships between multifamily property owners.

The BRI submits this brief to emphasize to this Court the catastrophic failure of attempts at subsidizing tenancies via the ETPA and HSTPA and the

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[3] William Tucker, *How Rent Control Drives Out Affordable Housing*, Cato Policy Analysis No. 274 (May 21, 1997); Henry Hazlitt, *Economics in One Lesson* (July 21, 2016), stating among other things that "Rent control…encourages wasteful use of space;" does not "encourage the construction of new housing;" erodes "city revenues;" Peter A. Tatian, *Is Rent Control Good Policy?*, Urban Wire (Jan. 2, 2013), stating that "there seems to be little one can say in favor of rent control." *See* various studies such as JurEcon Inc., *Rent Control: The Economic Effects* (1984) (deterioration of housing stock).

impact that the case at bar may have on communities outside New York City. Without the Court's intervention such attempts at unlawfully subsidizing tenancies, infringing on property rights, and unlawfully taking property, will be exacerbated by proposals such as the so called "Good Cause Eviction." This case provides this Court an opportunity to consider the manner in which rent control ordinances inherently fail to meet their stated objectives and exacerbate, rather than alleviate, a scarcity of reasonably priced, sufficiently maintained rental housing available to a community's residents.

While the pending matter is based on the Rent Stabilization Law and therefore New York City, a decision in this case will by its nature impact the Emergency Tenant Protection Act and thus the constituents of the BRI and the counties outside New York City. Therefore, the BRI respectfully submits that its submission as *amicus curiae* will provide invaluable perspective to the Court.

SUMMARY OF THE ARGUMENT

The Supreme Court should grant review and reverse the Second Circuit's Decision because the RSL and the ETPA constitute both a *per se* Physical Taking as well as a Regulatory Taking.

The Petitioners herein filed suit in 2019 asserting that the Rent Stabilization Law constitutes a "taking" of their properties in violation of the United States Constitution.[4] The District Court granted the Respondents' motion to dismiss and the Second Circuit affirmed. *Community Housing Improvement Program*

[4] *Community Housing Improvement Program v. City of New York*, 1:19-cv-04087-EK-RLM, E.D.N.Y.

v. City of New York, 492 F.Supp. 33 (E.D.N.Y. 2020), *aff'd*, 59 F.4th 540 (2d Cir. 2023). The Petitioners writ for *certiorari* raises two main contentions. The first alleges an unconstitutional physical taking because the RSL (and by extension thereof the ETPA), restricts the property owners' right to exclude. The Petitioners' second main contention is that the RSL and the ETPA constitute a regulatory taking by setting maximum rent levels based on the tenant's purported ability to pay.

The instant *Amicus Curiae* represents thousands of owners of ETPA regulated units in the suburban areas surrounding New York City.[5] Although the RSL is applicable only in New York City, the ETPA, as amended by the HSTPA, is applicable in Westchester and all other counties of New York State. Petitioner's first contention that these statutory schemes effect unconstitutional takings rests on the same constitutional challenge and applies equally outside New York City under the ETPA. The BRI seeks to appear as *amicus curiae* because the questions of law presented on *certiorari* herein will bear on whether BRI's members will continue to bear the unconstitutional burdens thrust upon them and are thus of great importance.

As to the protected rights related to ownership of multifamily housing in light of the ETPA, the

[5] The HSTPA opened New York to the establishment of the ETPA outside NYC, Westchester, Rockland and Nassau Counties. Since then the City of Kingston, among others, adopted the ETPA and through its Rent Guidelines Board established a guideline lowering the rents by 15%. That rent reduction was temporarily stayed by the Court in *In the Matter of the Application of Hudson Valley Property Owners Association Inc. v. The City of Kingston New York,* Index No. EF2022-2130 (Appeal filed May 5, 2023).

members of the BRI maintain a significant interest as it is ultimately their rights that will be determined in this case. Due to the nature of the Petition herein and the conflict of legal authority, it is anticipated that this Court's ruling in this matter will substantially impact not only the individual Petitioners in this matter, but thousands of multifamily property owner members of the BRI and tens of thousands of apartments. Further, in light of recent case law from this Court and other circuits, such as *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) and *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), the Second Circuit's opinion is contrary to this Court's precedent and to other circuits. Thus, the only forum for resolution of these momentous issues is this Court.

ARGUMENT

The Emergency Tenant Protection Act

On May 29, 1974, the Emergency Tenant Protection Act of 1974 (the "ETPA") became law in the State of New York and provides, in part:

Sec. 8623:

> a... A declaration of emergency may be made as to any class of housing accommodations if the vacancy rate for the housing accommodations in such class within such municipality is not in excess of five percent ….
>
> b. … The emergency must be declared at an end once the vacancy rate described in subdivision a of this section exceeds five percent.

A. The ETPA is a Physical Taking in Violation of the Constitution.

The RSL and ETPA restrict multifamily property owners in their most basic fundamental rights, *i.e.*, including the right to exclude, "universally held to be a fundamental element of the property right, which falls within [the] category of interests that the Government cannot take without compensation." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *see also*, *Tyler v. Hennepin Cnty*., 598 U.S. (----) May 25, 2023). The ETPA eliminates property owners' right to exclude through, among other things, its required lease renewal provisions that endow tenants' relatives and/or caregivers with the same perpetual lease renewal rights as the tenant. Furthermore, the amendments to the ETPA exacerbate the existing physical taking by further limiting the ability of property owners to obtain possession of their property, further limiting rent increases, and eliminating the ability of a property owner to convert a building to a cooperative or condominium without tenant consent and limit the ability of a property owner to demolish a building. Both individually and collectively, these restrictions strip property owners of fundamental property rights guaranteed by the Constitution.

The Second Circuit erroneously determined that the limitations and restrictions imposed by the ETPA did not constitute an unconstitutional physical taking since, in substance, the multifamily property owners "invited" the tenants onto their properties. *Community Housing Improvement Program v. City of New York*, 59 F.4th 540, 551 (2d Cir. 2023). By so reasoning, the Second Circuit virtually eliminates the "takings clause" limitations on the government's regulation of multifamily rental apartments and thereby

relegating the rights of real property owners to a lesser status than the rights of all other property owners. This flatly undermines the "purpose of the Takings Clause … to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001). In the event that this Court does not reverse the Second Circuit's ruling, as set forth above, New York State and the local communities will enact legislation which further permanently impedes property owners right to exclude, such as the "Good Cause Eviction" legislation.[6]

The Second Circuit's ruling that the Petitioners did not suffer a physical taking because a property owner can purportedly refuse to renew a lease under certain very limited circumstances was ill founded. The ETPA preventing a multifamily property owner from regaining property for his/her own use constitutes a taking on a facial basis. The Second Circuit's opinion that the property owner's limited ability to refuse to renew a lease defeats the claim of a facial taking is incorrect because the referenced right to refuse is so limited as to be non-existent. The right to refuse is itself dependent on action by the tenant and thus illusory and non-existent. Further, under *City of Los Angeles,*

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[6] New York State Senate Bill Number: S305

Sponsor: Salazar

Title of Bill: An act to amend the real property law, in relation to prohibiting eviction without good cause.

Purpose: The purpose of this legislation is to prohibit the eviction of residential tenants or the non-renewal of residential leases without good cause.

Calif. v. Patel, 576 U.S. 409, 135 S. Ct. 2443, 192 L.Ed.2d 435 [2015], rather than inquiring as to whether "every" situation to which the statute could possibly apply, the Court should have looked to those that "actually…prohibits" the owner from retaining the property. Thus, the ETPA and RSL amount to a physical "taking and the Petitioner's application for certiorari should be granted.

The question of the physical taking is a significant issue that the *amicus curiae* believes warrants the granting of the within Petition as it will affect the communities in which the members of the BRI reside, operate, and own property. Their rights are directly affected by the determination of the Second Circuit.

The Second Circuit relied on *Yee v. City of Escondido*, 503 U.S. 519 (1992) but incorrectly found that the provisions and circumstances of the RSL do not constitute a physical taking. By requiring owners to continue to permit the occupation of their property with reduced rents, or even at all, the law has granted an "exclusivity of occupation" to a third party thus a depriving the owner's right to use and exclude from the property. The Second Circuit acknowledged the distinction that under *Yee, supra*, the owner could evict tenants if it wanted to change the use but ignored the fact that the ETPA severely hinders property owners' right to evict. The standard of exclusivity and absolute deprivation of the owner's right to use and exclude others are met in this instance because, unlike *Yee*, the existing tenants, required successor tenants, and future tenants all benefit from the subsidized and capped rent.

In *Seawall Assocs. v. City of New York*, 542 N.E. 2d 1059, 1065 (N.Y.1989) the Court held that "[i]t is the forced occupation …, not the identities of the new

tenants or the terms of the leases, which deprives the owners of their possessory interests and results in physical takings." The Second Circuit's analysis, resting on its definition of "forced entry," failed to take note of *Seawall's* critical reasoning: the prohibitions were facially invalid and constituted both a facial and regulatory taking. *Seawall* also rejected the provision to purchase exemptions as an unconstitutional law cannot be remedied by such "escape" mechanisms which are not a remedy but an excuse. As in *Seawall*, the owners and members of the BRI, as well as Petitioners have been forced "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" as described in *Armstrong v. United States*, 364 U.S. 40, 80 S. Ct. 1563, 1568-69 (1960).

The Second Circuit similarly misconstrued or misapplied the holding of the Court in *Cedar Point Nursery v. Hassid*, wherein the Court reiterated that the "right to exclude" is a fundamental property right. 210 L. Ed. 2d 369, 141 S. Ct. 2063 (2021). In *Hassid*, the Court concluded that the regulations in question permitted the government to invade the growers' property and therefore was a *per se* physical taking even though not permanent or continuous. *Id*., 141 S. Ct. at 2075 ("[W]e have recognized that physical invasions constitute takings even if they are intermittent as opposed to continuous…. The fact that a right to take access is exercised only from time to time does not make it any less a physical taking.").

All of the restrictions under ETPA previously set forth constitute a similar physical taking because they require the owner to suffer the continued occupation by tenants under severe rules that bind owners in perpetuity, even a greater imposition than that in

Cedar Point Nursery v. Hassid or the authority relied upon therein.[7] The Second Circuit's decision that a multifamily property owner waived the right to exclude because the very initial rental, albeit at a reduced and regulated rent, was error.

Similarly, in the case of *Heights Apartments, LLC v. Walz*, the Eighth Circuit Court of Appeals held there was a physical taking stating:

> …Heights contends the ownership of property subject to a lease involves a number of incidents and rights, which include not only the landlord's right to receive rent but also the "right to exclude" others from the real estate. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. ____, 141 S. Ct. 2485, 2489 (2021) (per curiam).
>
> The right to exclude is not a creature of statute and is instead fundamental and inherent in the ownership of real property. See *Cedar Point Nursery v. Hassid*, 594 U.S. ____, 141 S. Ct. 2063, 2072 (2021) (stating the "right to exclude is 'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'") (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979)).

30 F.4th 720 (8th Cir. 2022).

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[7] In *United States v. Causby*, cited by the *Hassid* Court, the Court held that overflights of private property effected a taking, even though they occurred on only 4% of takeoffs and 7% of landings at the nearby airport. 328 U.S. 256, 263, 66 S. Ct. 1062, 1067, 90 L. Ed. 1206 (1946).

Given the looming possibility of "good cause eviction" legislation[8], the review of the Second Circuit in this case is even more necessary. The Second Circuit's opinion in the case at bar is directly in conflict with the Eighth Circuit's opinion in *Heights*. Therefore, there is a conflict between Circuits strongly mitigating in favor, if not requiring, the granting of the instant Petition.

B. The ETPA Constitutes a Regulatory Taking.

Scholarly studies, commentators and empirical data from rent controlled communities have uniformly stated the pernicious effects of rent control on a community's rental housing and the well-being of the community and its citizens. The Bureaus of Competition, Consumer Protection and Economics of the Federal Trade Commission, for example, when asked to comment on the proposed District of Columbia Rental Housing Act of 1985, stated their view bluntly:

> Enactment of any rent control bill would be harmful to the D.C. economy and would not help the poor and the elderly get decent, affordable rental housing. The long term effect of rent control is to destroy the stock of rental units through deterioration, abandonment and lack of replenishment.[9]

The proper standard for a regulatory taking was set forth by Justices Scalia and O'Connor in their dissent

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[8] See The New York Senate, *Good Cause Eviction*, https://www.nysenate.gov/issues/good-cause-eviction (last visited June 5, 2023)

[9] Michael Hendrix, *Issues 2020: Rent Control Does Not Make Housing More Affordable*, Manhattan Institute (Jan. 8, 2020); Howard Husock, *Medicine to Kill the Patient: Rent Control is the Last Thing Upstate New York needs*, City Journal (Dec. 12, 2019).

in *Pennell v. City of San Jose*, 485 U.S. 1, 108 S. Ct. 849 (1988) wherein they stated that the government should not force individuals to "bear public burdens [that] … should be borne by the public as a whole." The Second Circuit dismissed the Scalia / O'Connor argument in a footnote pointing out that it was not adopted by the Supreme Court.

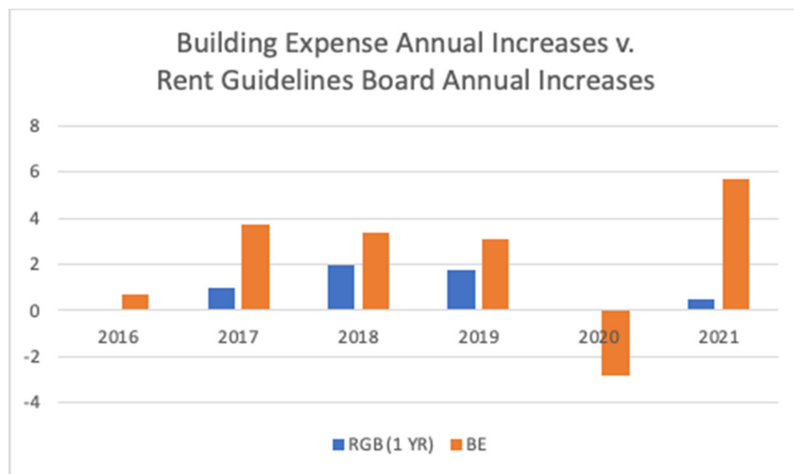
The RSL, in New York City requires the Rent Guidelines Board (which is the entity that sets the maximum rent increases for 1 and 2 year required lease renewals), to consider affordability, in that it must consider the "relevant data from the current and projected cost of living indices for the affected area."

The ETPA provides, outside New York City, as to the duties of the Rent Guidelines Boards, that:

Sec. 8624(b):

> b. A county rent guidelines board shall establish annually guidelines… for rent adjustments [and] shall consider among other things
>
> (1) the economic condition of the residential real estate industry in the affected area including such factors as the prevailing and projected (i) real estate taxes and sewer and water rates, (ii) gross operating maintenance costs (including insurance rates, governmental fees, cost of fuel and labor costs), (iii) costs and availability of financing (including effective rates of interest), (iv) over-all supply of housing accommodations and over-all vacancy rates, (2) relevant data from the current and projected cost of living indices for the affected area, (3) such other data as may be made available to it….

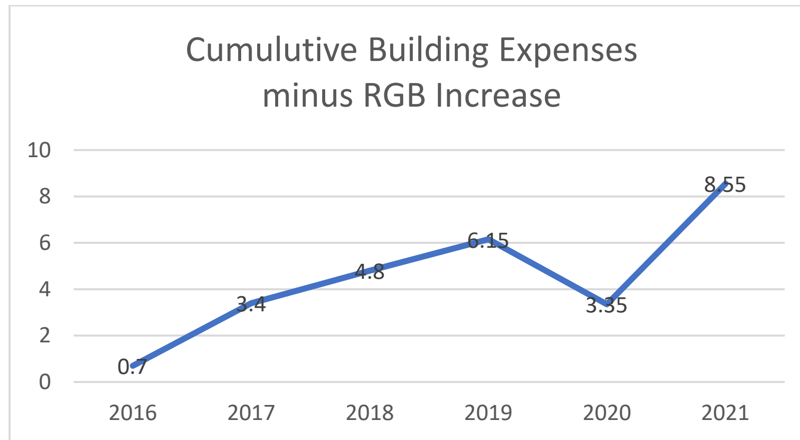
The RSL requires that the NYC Rent Guidelines Board improperly consider "housing affordability" in setting rent increases, or denying rent increases. This is similar to the process under the ETPA given that neither the limited rent increases, nor denial of increases, meet the expense data provided. According to the New York State Housing and Community Renewal the following are the Building Expenses and Rent Guideline Board percentage increase for each of the last six years.



Y axis = percentage increase over prior year

X axis = Year

The building expense increases exceed the Rent Guidelines Board approved rent increase in most years. The result is a significant disparity that is increasing over time.



Y axis = Cumulative Percentage Increase

X axis = Year

The Rent Guidelines Board considers the ability of the tenants to pay and determining that as a factor in setting the rent increases. In other words, the ETPA is an affordable housing subsidy for the tenants residing in apartments subject to the ETPA, though the State is not funding the subsidy. Rather the property owners unlucky enough to be subject to the ETPA bear the burden of this subsidy which would otherwise be spread among all taxpayers as it is with all other types of subsidies.

There are a number of areas that must be considered in determining the regulatory violation of the constitution as well as physical one. First, the reasonable and distinct investment-backed expectations of New York real property owners, like those of property owners everywhere, is to earn a fair return on their investment in the buildings they own. The legislature has chosen to use a system of rent subsidies paid for solely by property owners to address housing supply shortages and rent increases. However, the system chosen,

the ETPA, increases housing supply shortages by discouraging investment in the construction and the rehabilitation and maintenance of housing stock.

Even if the subsidizing of particular individual tenants is somehow deemed to serve a public interest, it is a public burden which in fairness and justice should be borne by the public. "Section 8" of the Housing and Community Development Act of 1974, codified as amended at 42 U.S.C. § 1437f, provides for governmental subsidies to be paid to owners of existing rental units whose tenants cannot pay a fair market rent because of financial hardship. Critically though it establishes that such subsidy constitutes a burden that must be shared by the public at large through general tax revenues. The RSL and ETPA prevent the proper sharing of the cost of the subsidy, particularly given the restrictions and limited rent guideline board increases allowed in the communities in which BRI members operate. The "taking" aspect of the claim is further evidenced by the Westchester County Rent Guidelines Board's denial of any rent increase in two recent years, the limitation on its ability to give increases, and the elimination of the vacancy increases.

The utilization of the Cost-of-Living leads to a consideration of wages, costs to tenants and ultimately an inconsistency between the Cost of Living and Operating Costs and guideline increases. (see Chart "infra"). If the Second Circuit determination is allowed to stand, then multifamily property owners will be even more negatively impacted by "Good Cause Eviction" and similar legislation given the imprimatur of the Second Circuit's positive view of the lack of regulatory impact and the dismissal of the fundamental "Takings" principle. In summary, the Regulatory

impact of the ETPA is unconstitutional in its applicability and this Court should review the Second Circuit's decision herein and set aside the concept that compels a small subset of the citizenry (multifamily property owners) to pay for the cost of society's obligation to provide adequate and affordable housing.

The entirety of New York State is presently subject to the ETPA. Since 2019 the City of Kingston enacted ETPA covering 64 buildings with approximately 1,200 rental units and the Rent Guidelines Board enacted a 15% rent reduction for tenants who signed one and two year leases. The New York State Legislature continues to consider "Good Cause Eviction" and the bill remains pending in the Senate (see footnote 6). Thus, it is readily apparent that the review by this Court of this issue to prevent further takings is necessary and appropriate.

CONCLUSION

The *Amicus Curiae* supports the Petition for a Writ of Certiorari.

Respectfully submitted,

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