No. 22-1095

IN THE

Supreme Court of the United States

COMMUNITY HOUSING IMPROVEMENT PROGRAM, et al.,

Petitioners,

v.

CITY OF 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 THE REAL ESTATE BOARD OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Real Estate Board of New York ("REBNY") submits this brief as *amicus curiae* in support of the petitioners.

Founded in 1896, REBNY is the oldest real estate trade association in New York, and one of its most preeminent. REBNY's membership is comprised of more than 15,000 commercial, residential and institutional property owners, developers, managers, investors, financial institutions, insurance companies, pension funds, utilities, attorneys, architects, contractors, marketing professionals, and many other individuals and companies professionally involved in the New York real estate industry.

For more than a century, REBNY has been the collective voice of its diverse members in matters of importance to the New York real estate industry, and the rent regulatory system impacts many of its members. REBNY works to advance sound public policy in these matters in order to improve and expand New York's economy, encourage the development, preservation, and renovation of residential

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[1] Pursuant to Rule 37.2(a) of the Rules of this Court, counsel for *amicus curiae* timely provided notice of intent to file this brief to all parties. Moreover, as provided in Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, made any monetary contribution toward the funding of its preparation and submission.

property, and facilitate effective property management.

To that end, REBNY publishes studies of the residential housing conditions and trends within New York, interacts with local and state governmental entities on these issues, and sponsors seminars to help members navigate the complex rent regulatory system in New York. REBNY frequently is granted leave by New York state and federal courts to impart its insight and experience as *amicus curiae* in cases of major significance to the real estate industry, like the one at bar.[2]

REBNY has a strong interest in the outcome of this action because its members, many of whom own, manage, and/or finance rent regulated multi-family housing, are directly impacted by the unconstitutional infringements described in petitioners' lawsuit. The Rent Stabilization Law [N.Y.C. Admin. Code §§ 26-502–26-520] and its implementing regulations [19 NYCRR Parts 2520–2530] (collectively, the "RSL") adversely affect REBNY members in a myriad of ways, not the least of which include (a) causing a subset of rental property owners to lose their rights to exclude, use, and change the use of their properties simply by electing to enter into a

[2] REBNY has participated as *amicus curiae* in recent rent regulation cases of note, such as, *Flynn v. Red Apple 670 Pacific Street, LLC,* 200 A.D.3d 607 (1st Dep't 2021); *50 Murray St. Acquisition, LLC v. Kuzmich,* No. 19-554 (U.S.S.Ct., 2019); *Altman v. 285 West Fourth LLC,* 31 N.Y.3d 178 (2018); and *Roberts v. Tishman Speyer Props., L.P.,* 13 N.Y.3d 270 (2009).

lease with a tenant, and (b) compelling these owners to bear the public burden of providing below-market housing at rent levels based, in part, on tenant ability to pay, that are insufficient to recoup mandated costs to maintain, repair, and improve housing. Recent amendments to the RSL have increased these burdens by, *inter alia,* eliminating pre-existing processes to exit the rent regulatory system, further restricting ways to recover possession of apartments for owner use, and making the RSL permanent by eliminating sunset provisions that existed in the law since its inception. Numerous expansions to the RSL, including proposals to impose similar restrictions and rent caps on market-rate housing and commercial tenancies are currently being considered by New York's legislature.

This brief seeks to bring the urgency of these issues to the Court's attention. The increasing burdens that the RSL places on a select group of private property owners of rental housing are materially more extreme than those that courts deemed within constitutional parameters in the past, amounting to an unconstitutional taking without just compensation that requires a remedy by this Court.

SUMMARY OF THE ARGUMENT

Enacted in 1969, the RSL was intended to be a temporary measure to address post-World War II housing shortages and inflation. *8200 Realty Corp. v. Lindsay,* 27 N.Y.2d 124,136 (1970). Its coverage was generally limited to New York City rental apartment buildings with six units or more, constructed

after February 1, 1947. The Legislature sought to make it a "less onerous form of rent control . . . as a means of encouraging future construction of housing accommodations . . ." *Id.* at 137. The Legislature recognized that a basic means of alleviating housing pressures on tenants is to increase housing supply. However, since then, the RSL has served to expand and prolong the housing crisis that it was supposed to alleviate. The RSL no longer tries to advance availability of housing. The RSL, now, only increases competition for below-market housing—the most intractable segment of the housing market—by shifting the economic burdens of providing such housing directly upon the backs of owners of RSL-covered properties.

The enactment of the Housing Stability and Tenant Protection Act of 2019 ("HSPTA") (L. 2019, ch. 36), extensively amended the RSL to place even greater burdens on private owners of rental housing subject to the law. The RSL, now, expands rent regulation beyond New York City, enabling municipalities statewide to declare a "housing emergency" and regulate rental properties that were never before rent regulated. The amended RSL further restricts an owner's ability to recover its property at the end of a tenant's lease, change the use of its property, determine who could occupy the property, or recoup costs for housing maintenance, operations, improvements, and government-mandated additions. Rent increases, which had previously been available when an apartment became vacant, are eliminated, with little recourse to offset core expenses such as

property taxes, insurance, utilities, labor and management.

In over fifty years of its existence, and despite the ever-increasing restrictions and rent limitations, the RSL has utterly failed to target persons most in need of affordable housing, contributing to the income inequities that predominate the State's economy.[3] The RSL, which is not income-restricted, compels private property owners to provide highly regulated housing at below-market rents to higher-income persons who are not rent-burdened (*i.e.* persons who spend 30% or less of their monthly income on rent). This, in turn, incentivizes existing tenants to remain in occupancy indefinitely, regardless of any actual need for below-market housing. Consequently, opportunities for new entrants to this housing are reduced, which, in turn, cause lawmakers to enact more regulation and impose greater limits on rent increases. In effect, a never-ending vicious circle ensues benefiting neither low-income tenants nor property owners, but perpetuating New York's housing crisis.

To be clear, the objections to the RSL are not limited to the specific items discussed herein. One would need far more pages than allowed in order to recount the ever-increasing hardships faced by property owners in the rent-regulated housing market in

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[3] Whereas since 1993, the RSL had created an exemption for high income earners from RSL protection (former RSL §§ 26-504.1), the 2019 amendments eliminated that exemption (HSTPA, Part D, § 4), thus exacerbating the problems.

New York. Rather, these are examples of some of the most egregious infringements caused by this unconstitutional scheme that greatly warrants this Court's review. Additional decisions by the Second Circuit [*74 Pinehurst LLC v. New York*, 59 F.4th 557 (2d Cir. 2023)] and the Ninth Circuit [*Kagan v. City of Los Angeles,* 2022 U.S. App LEXIS 31241] in companion cases also seeking *certiorari* (Nos. 22-1130 and 22-739, respectively), demonstrate that substantial issues in this Court's takings jurisprudence are arising nation-wide, have broad impact upon rental housing markets, and require guidance by this Court.

REBNY urges the Court to grant the petition in order to review the lower courts' application of this Court's takings jurisprudence to the RSL.

ARGUMENT

I. Protection of Private Property Rights From Government Overreach in the Name of the "Public Good" is a Central Tenet of the Constitution

The Federalist Papers No. 10 at 78 (James Madison) (Clinton Rossiter ed., 1961), describes private property rights as "the first object of government." The Constitution's Takings Clause accordingly embodies these values. *See* Nedelsky, Jennifer, *Private Property and the Limits of American Constitutionalism: the Madisonian Framework and Its Legacy* at 9 (1990).

Indeed, this Court has emphasized that "[t]he fundamental maxims of a free government" require "that the rights of personal liberty and private property should be held sacred." *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829). It has held that "the right to own and hold property is necessary to the exercise and preservation of freedom." *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection,* 560 U.S. 702, 734 (2010) (Kennedy, J., concurring).

Petitioners' takings claim squarely implicates these foundational concerns in a manner warranting this Court's review. While the importance of protecting private property rights is indisputable, this Court has not determined whether the ever-increasing infringements upon regulated rental housing ownership is irreconcilable with physical takings precedent from this Court, such as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Cedar Point Nursery v. Hassid,* 141 S.Ct. 2063 (2021). *Loretto* and *Cedar Point* hold that government-authorized physical invasions of property, whether by things or people, qualify as a *per se,* physical taking of property. *See Cedar Point,* 141 S.Ct at 2072.

They also indicate that a physical occupation is a taking whether it is for one year or a hundred years. Thus, that a property owner may have known that its rental property was subject to some regulation when it acquired it, does not excuse an eventual taking when government regulation prohibits the property owner from exercising fundamental rights after

the lease expires. "[A] physical appropriation is a taking whether it is permanent or temporary. The duration of the appropriation . . . bears only on the amount of compensation." (internal citations omitted). *Id.* at 2074.

Further, in *Yee v. City of Escondido,* 112 S. Ct. 1522 (1992), involving a mobile home rent control ordinance, the Court did not dilute physical takings standards in the context of government-compelled tenancies or foreclose a claim that such tenancies are a physical taking. The Court assured that compensation is required if the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. *See Armstrong v. United States,* 364 US 40, 49 (1960): "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar 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." *See also, Pennell v. City of San Jose,* 485 U.S. 1, 19 (1988).

The Second Circuit, below, did not meaningfully address the gravity of the RSL's expansion in light of this Court's precedents. REBNY submits that this case, with the companion cases of *74 Pinehurst v. New York*, and *Kagan v. City of Los Angeles, supra,* present the ideal vehicle to do just that.

II. The Second Circuit's Decision Holding that the Rent Stabilization Law Does Not Effect a Physical Taking Warrants Review by this Court

The petition shows how the RSL authorizes the perpetual physical occupation of private property, vitiating the fundamental right of owners to exclude third parties or to reclaim or otherwise use their own property, at a severe economic hardship, with no rational relationship to a valid state interest.

The Second Circuit's decision effectively gave government *carte blanche* to impose perpetual physical invasions in a landlord-tenant context. Indeed, in recent legislative sessions, many bills have been introduced that go even further than the RSL challenged in this case. None proposes measures that would meaningfully make housing more available or more affordable. Instead, they include moratoriums on all evictions for numerous months of the year (NYS Senate Bill S1403, intro 1/11/23)[4], requiring property owners who demolish a building to submit a certain percentage of residential units to rent regulation in any new structure (NYS Senate Bill S1944-A, intro 1/17/23)[5], and establishing commercial rent control for retail leases (NYS Assembly Bill A2459, intro 1/26/23).[6]. Another bill would eliminate

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[4] https://legislation.nysenate.gov/pdf/bills/2023/s1403

[5] https://legiscan.com/NY/text/S01944/id/2809824/New_York-2023-S01944-Amended.html

[6] https://legislation.nysenate.gov/pdf/bills/2023/a2459

all rent increases for major capital improvements (NYS Senate Bill S1406, intro 1/11/23).[7] Yet, another bill would, *inter alia,* enable tenants to more easily transfer their tenancy rights to family members, thereby preventing owners' right to recover possession of their property when the tenant vacates, and forcing the owner to enter into a new lease with an individual unknown or never approved by the owner (NYS Senate Bill S2980-C, intro 1/26/23).[8] A "Good Cause" bill (NYS Senate Bill 2892B, intro 1/30/19)[9], bars private property owners from recovering possession of any rental apartment at the end of any lease without "good cause" and imposes rent increase caps and other restrictions on market-rate housing.

These potential expansions of rent regulation are severe and becoming easier to accomplish when state legislatures are emboldened by decisions like the Second Circuit's conclusion that, because rental property owners voluntarily invite tenants onto their properties by offering them a lease in the first instance, the government has effectively unlimited authority to impose restrictions on owners' ability to regain control of their property. 59 F.4th at 551. The Second Circuit based that conclusion largely on this Court's decision in *Yee, supra,* which rejected a physical takings claim in the context of rental property.

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[7] https://trackbill.com/bill/new-york-senate-bill-1406-eliminates-rent-increase-for-major-capital-improvements/2307666/

[8] https://www.nysenate.gov/legislation/bills/2023/S2980.

[9] https://legislation.nysenate.gov/pdf/bills/2019/s2892b

However, the Second Circuit overlooked the strong admonition included in *Yee,* where this Court observed, "a different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *See also, Seawall Associates v. City of New York,* 74 N.Y.2d 92 (1989) (declared unconstitutional a law that prohibited owners of single-room occupancy properties from changing their use and obligated them to restore the properties to habitable condition and lease them at controlled rents for an indefinite period).

The RSL amply presents that "different case." Rather than assessing the full deleterious impact of the RSL's restrictions as a whole, the Second Circuit reviewed each restriction in isolation, and ignored their real world and long-term effect. Thus, the Second Circuit theorized that there might be some possible bases on which an owner could terminate a lease (59 F.4th at 552-53), and concluded that the law therefore, could not effect a physical taking.

We respectfully submit that the Second Circuit's conclusion ignores the RSL's mounting infringements on private property rights and warrants review by this Court because it does not properly apply this Court's takings precedents, such as *Loretto* and *Cedar Point Nursery*, which nowhere suggest that the government's physical appropriation of private property is rendered non-actionable so long as it is couched as a regulation of the landlord-tenant relationship. To the contrary, this Court's most recent

takings precedent makes clear that government-mandated physical intrusions on private property, and the appropriation (even temporarily) of the owner's critical right to exclude, can "go too far" and violate the Takings Clause.

This Court should clarify that these fundamental protections must apply to private property owners of rental housing, and that the Constitution does not carve out rent regulation from the Fifth Amendment's ambit.

III. The Rent Stabilization Law Restricts Owners' Ability to Recoup Costs of Providing and Improving Rental Housing in an Unconstitutional Manner

Maintenance costs are significantly higher for the upkeep and preservation of RSL buildings, many of which were constructed before 1947.[10] According to the NYC 2021 Housing and Vacancy Survey ("2021 HVS")[11], 32% of occupied units in buildings built before 1947 reported one to two defective housing conditions and 15% had three or more. Among those built from 1947 to 1973, 30% reported one to two problems and 14% reported three or more. These older buildings also require periodic major overhauls to operating systems such as gas, electricity,

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[10] Table 3: Rental Housing Inventory, by Rent Regulation Status, New York City 2017, at 11: https://www.nyc.gov/assets/hpd/downloads/pdfs/about/2017-hvs-initial-findings.pdf

[11] https://www.nyc.gov/assets/hpd/downloads/pdfs/services/2021-nychvs-selected-initial-findings.pdf

and plumbing, and upgrades to boilers, elevators, windows, facades, and roofs.

Rental revenue must pay for such necessary maintenance and capital improvement costs, plus core expenses like taxes, insurance, heat, utilities, labor, and management. What remains is: (1) repayment of mortgage or finance costs and (2) reasonable return on capital.

The NYC Rent Guidelines Board ("RGB"), which sets the annual allowable rent adjustments for RSL apartments, imposes strict limits on rent levels. Because the RSL takes into account tenants' ability to pay, the necessary balance between rental stream and the necessary costs to operate, maintain and preserve rental housing is disrupted to the point of rendering ownership of regulated rental housing "a local public assistance benefit" for the benefit of tenants. *In re Santiago-Monteverde*, 24 N.Y.3d 283, 290 (2014).

Evidencing the imbalance, on May 2, 2023, the RGB proposed a preliminary range for annual rent adjustments at 2% and 5% for one-year leases and 4% to 7% for two-year leases.[12] However, this is well below the current rate of inflation for the NYC area (6.2%), and below the level that RGB staff deems necessary for owners to keep up with rising operating costs, which is called the "commensurate

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[12] https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2023/05/2023-05-02-Prelim-Vote-Transcript.pdf

adjustment."[13] This year, the commensurate adjustment ranged between 5.3% and 16%.[14] The discrepancy between the eventual rent adjustments that the RGB enacts and the actual costs of operating and maintaining RSL buildings, likely results in a loss for the property owner.

The RGB has promulgated inadequate rent adjustments for more than a decade. Murphy, Matthew and Mark A. Willis, "The Economic Challenge for the Rent Guidelines Board: Preserving Affordable Rent Stabilized Housing for the Long Run," at 5 (NYU Furman Center 4/20/22).[15] The RGB justifies the gap on considerations of "tenant affordability." RSL § 26-510(b)(2) (among the codified criteria that the RSL requires the RGB to consider in setting annual guidelines is "relevant data from the current and projected cost of living indices for the affected area"). But this factor has outweighed all others to the point that studies show that a majority of rent-stabilized buildings are in danger of deterioration due to the inability of the property owner to cover essential costs by regulated rental streams, which is made worse by the RSL amendments that eliminated or

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[13] "The Challenges of Balancing Rent Stability, Fair Return, and Predictability Under New York's Rent Stabilization System," NYU Furman Center, Fact Brief at 3 (May 2019), https://furmancenter.org/files/Rent_Stabilization-5-24-19.pdf

[14] https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2023/04/2023-PIOC-Presentation.pdf

[15] https://furmancenter.org/files/publications/Economic_Challenge_for_the_Rent_Guidelines_Board.pdf

limited previously available means to reasonably increase rents upon vacancy and completion of apartment improvements.

The RSL is causing widespread disinvestment in multifamily housing, decreasing NYC's tax base, and diminishing the quality and safety of rental housing. *See,* NYU Furman Center, Policy Report, "Housing Stability and Tenant Protection Act: An Initial Analysis of Short-Term Trends," July 2021.[16] *See also,* Seltzer, Lee, "Financial Constraints and Maintenance Investments: Evidence from Apartments," Federal Reserve Bank of New York, Dec. 2021, rev. Feb. 2023 (reducing financial resources for NYC RSL buildings, increase housing code violations, reduce housing maintenance, diminish housing quality, reduce property values).[17]

The RSL severely limits recovery for individual apartment improvements ("IAI") performed after an apartment is vacated, such as replacing outdated and energy inefficient appliances, upgrades to degrading electrical lines and plumbing, and other restorative work. The maximum amount recoverable is only $15,000 over a 15-year period, even if the owner's actual cost is substantially more than that amount. The same $15,000 cap applies in equal measure to a studio apartment and a twelve-room duplex, despite the obvious disparity in the work

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[16] https://furmancenter.org/files/Rent_Reform_7_1_A_remediated.pdf

[17] https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr1000.pdf

entailed in the two units. The same $15,000 cap applies whether the apartment was last upgraded five or 20 years ago, despite the markedly different scope of requisite upgrades needed based on the longevity of the tenancy.[18]

According to an analysis by the *Wall Street Journal* of NYC Department of Buildings records, the median interior renovation project costs $60,000. Barbanel, J., "New York Landlords Slow Apartment Upgrades, Blame New Rent," *Wall Street Journal*, Dec. 19, 2019.[19] Yet, the maximum rent increase that an owner can receive for IAIs is $83.33 for buildings with more than 35 apartments, which is eliminated after 15 years.[20] This sum bears no relationship to the actual cost to upgrade a long-occupied or large apartment for re-rental, resulting in apartments simply lying dormant after vacancy because the owner cannot afford to make the necessary improvements with such restrictive caps. This burden is further exacerbated by the total elimination of any vacancy allowance, which had previously existed in the RSL for decades.[21]

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[18] https://hcr.ny.gov/system/files/documents/2023/04/fact-sheet-26-04-2023.pdf

[19] https://www.wsj.com/articles/new-york-landlords-slow-apartment-upgrades-blame-new-rent-law-11576756800

[20] RSL § 511(c)(13). Prior to the 2019 amendments, IAI rent increases became a permanent part of the base rent.

[21] Initial Impacts of the HSTPA (2021): https://furmancenter.org/research/publication/housing-stability-and-tenant-protection-act-an-initial-analysis-of-short-te

The RSL also places significant restrictions on major capital improvement ("MCI") rent increases for building-wide upgrades to major systems and structures. The recoupment period for such work, previously a maximum of nine years, was lengthened to up to 12.5 years. The increases have a 2% annual cap, when previously, the cap was 6% in New York City and 15% in the rest of the state. Whereas before, the increases became a part of the base rent, MCI rent increases must now be removed after 30 years. The 2% cap was made effective to MCI orders issued by the government, granted as far back as June 2012. Thus, capital expenditures made by the owner predicated upon the law in effect prior to the amendments to the RSL, with reasonable investment-backed expectations of a certain return, have been eviscerated. The retroactive application of provisions regarding rent overcharges was struck down as violative of due process by the New York Court of Appeals in *Regina Metro Co. v. New York State Div. of Hous. & Community Renewal,* 35 N.Y.3d 332 (2020). Yet, the New York legislature has let the MCI retroactivity stand.

Given these changes, the RSL has virtually no meaningful cost-recovery mechanisms, and deprives this subset of owners of their investment-backed expectations. It renders necessary capital infusions into aging buildings economically unfeasible. Lebovits, G., et al., "New York's Housing Stability and Tenant Protection Act of 2019: What Lawyers Must Know—Part II" (*NYSBA Journal*, Nov. 2019). As reported in the *Wall Street Journal*, *supra,* after

the passage of the HSTPA, "[l]andlords started 535 fewer renovation projects from July through November [2019] in rent-regulated buildings over the same period in 2018, a decline of 44% [and] [s]pending on renovations fell by $71 million."

As a result of these changes, owners of RSL-covered properties have seen their buildings' value decrease and the City's tax base in steady decline. A study of multi-family investment sales, citywide, comparing the 2018 3rd quarter recordings to the 2019 3rd quarter recordings, show a 59% drop in the sales of such properties. Unit sales dropped from 44,308 between January-November 2018 to 20,124 between January-November 2019. Brown, M., "Slowdown in NYC Multifamily Market Won't Let Up," *Globest.com*, December 17, 2019, https://www.globest.com/2019/12/17/slowdown-in-nyc-multifamily-market-wont-let-up/. Related City and State transfer tax revenues show similar reductions. Whereas taxes to the City in 2018-3Q were almost $71 million, in 2019-3Q, the City collected $28,875,000—a 59% reduction in City tax revenue.[22]

While after 2019 and through 2021, some of the downturn could be attributed to the effects of the Covid-19 pandemic, the rent regulated housing market has not recovered to date. The entrenchment of

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[22] https://www.bloomberg.com/news/articles/2019-07-17/nyc-apartment-building-sales-plummet-as-new-rent-law-poses-risk#xj4y7vzkg

the ever-increasing regulatory regime is a major factor.

Models analyzing the impact caused by the expansion of the RSL to various building typologies show that within five years, approximately a quarter of the rent-stabilized housing stock could be financially distressed, with owners unable to afford investment beyond basic maintenance, taxes, and utilities. The analysis also shows reductions in property tax revenue by up to $1 billion per year due to steep drops in real estate values.[23]

This economic analysis shows how the RSL is shifting the burden of providing below-market rental housing, a public function, on to a subset of private owners. While many of the constitutional precedents condone rent regulation predicated on the notion that these owners have voluntarily entered a highly regulated business subject to periodic amendments, that cannot mean that no matter how extreme the regulation or how draconian the interference with fundamental property rights is, owners lose all constitutional protection.

This Court most recently rejected a government's claim that a property owner who defaults on her real estate tax obligations also loses all rights to the value of her home, with the government retaining that value for its own coffers. In *Tyler v. Hennepin*

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[23] https://assets.ctfassets.net/6zi14rd5umxw/6lQ9O6vv1HGGHMn3bv6jVg/6171be8fb03014acdc2751e9126caafa/REBNY_April_2022_RGB_Testimony_Submission_FINAL_COMBINED.pdf

County, 598 U.S.___ (2023) (No. 22-166), this Court noted that the owner had "made a far greater contribution to the public fisc than she owed" causing the Takings Clause's bar against the government "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" to be breached. (*Citing, Armstrong,* 364 U.S., at 49). Here, too, a similar compulsion is created by the RSL's elimination of reasonable rent adjustments necessary to maintain rental buildings operational, safe, and habitable, for the sake of "tenant affordability." New York's rent regulatory system is forcing a subset of private property owners to bear public burdens that should be borne by the public at large.

IV. The Rent Stabilization Law Has Utterly Failed to Address the Most Intractable Segment of the Housing Market

When the New York City Council adopted the RSL in 1969, it found that there was an "acute shortage of dwellings which creates a special hardship to persons and families occupying rental housing." RSL § 26-501. *See*, Legislative declaration, Local Law No. 16 of 1969.

In 1974, New York enacted the Emergency Tenant Protection Act of 1974 (ETPA) (L. 1974, ch. 576), N.Y. Unconsol. Laws § 8621, et seq., which declared that "a serious public emergency continues to exist in the housing of a considerable number of persons in the state of New York" and while "the transition from regulation to a normal market of

free bargaining between landlord and tenant [is] the ultimate objective of state policy, [such transition] must take place with due regard for such emergency." N.Y. Unconsol. Law § 8622.

ETPA Section 4(a) stated that "[t]he existence of [a] public emergency requiring the regulation of residential rents" may be declared by the local municipality "if the vacancy rate for the housing accommodations in [the covered] class within such municipality is not in excess of five (5%) percent." Section 4(b) further specified that "[t]he emergency must be declared at an end once the vacancy rate . . . exceeds five (5%) percent." N.Y. Unconsol. Law § 8623(a).

Real estate professionals involved in the residential housing market report that New York City apartment vacancies have increased since 2020.[24] Rather than this being a reason to relieve regulatory constraints on housing, the NYS legislators introduced bills to simply remove the vacancy rate threshold altogether. *See* NYS Senate Bill S8855 and NYS Assembly Bill A10909 (intro. July/August 2020).[25]

However, the vacancy rate alone is not determinative of a public emergency warranting rent

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[24] Douglas Elliman 2020 Report: https://www.elliman.com/resources/siteresources/commonresources/static%20pages/images/corporate-resources/q4_2020/rental-12_2020.pdf

[25] https://legislation.nysenate.gov/pdf/bills/2019/S8855; https://legislation.nysenate.gov/pdf/bills/2019/A10909

regulation. ETPA Section 4(a) directed that "[a]ny such determination [of a public emergency] shall be made by the local legislative body . . . on the basis of [1] the supply of housing accommodations . . . , [2] the condition of such accommodations and [3] the need for regulating and controlling residential rents with such city, ..." N.Y. Unconsol. Law §8623(a).

Since this enactment almost half a century ago, the City of New York has *never* declared an overall citywide vacancy rate in excess of 5%, despite ever-increasing expansions to rent stabilization. In 2019, the New York Senate Majority Leader professed that the stated goal of additional regulatory constraints was to "protect" New York's "regulated housing stock," to "help prevent the loss of thousands of units of affordable housing by making it harder to deregulate rent-stabilized units," and to "ensure that rent-stabilized apartments remain rent-stabilized."[26]

However, the RSL's expansion has effectively granted New York's government control of privately-owned apartment buildings, making it virtually impossible for this subset of owners to change the use of the property or recover apartments for themselves, and has vitiated many of the rights that inhere in property ownership. Conversely, the expansion does not advance the stated goals or

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[26] https://www.nysenate.gov/newsroom/press-releases/andrea-stewart-cousins/senate-majority-passes-strongest-tenant-protections

justifications for such infringements, such as "alleviating the housing crisis."

According to the NYC 2021 Housing and Vacancy Survey ("2021 HVS"), the citywide rental vacancy rate was 4.54%. However, a deeper analysis of the data shows that vacancy rates differ greatly based on rent levels and whether the apartments are subject to rent regulation. The 2021 HVS reported only low vacancy rates for low-rent apartments—which would be the case in almost every market where there are more people wanting to buy a product (apartment, gasoline, smart phone, a gallon of milk) at a low price than there are people willing to sell the product at that price.

Conversely, the vacancy rates were much higher for higher-rent units due, in part, to increased supply. The vacancy rate for apartments that rent above $2,300 per month was 12.64%. Despite the availability of higher-rent housing, the RSL applies rent stabilization to this segment of the market in perpetuity. (As previously noted, the HSTPA repealed high rent and high-income deregulation.)

In complete disregard of the RSL's original intent as a transitional housing program that would lead to a market-based economy, Part A of the HSTPA did away with periodic legislative review of the stabilization regime to measure whether it was meeting the stated goals of the ETPA and warranted continuation. There is no longer a "sunset provision" for the RSL and there is pending legislation to do away with the 5% vacancy threshold. The Legislature has

made the RSL permanent, effectively giving up the notion of the housing emergency as temporary, and reaffirming the extreme and ever-growing governmental overreach in impairing constitutionally protected property rights. This materially distinguishes this case from prior precedents referenced by the Second Circuit.

V. The Rent Stabilization Law Does Not Benefit Tenants in Need

Housing is generally considered affordable when a household pays no more than 30% of its income in gross rent. U.S. Dep't of Housing & Urban Development ("HUD") benchmark: Basic Laws on Housing and Community Development, Subcommittee on Housing and Community Development, rev. Dec. 31, 1994, Section 3(a)(12). Because there is no income limitation for renting a rent stabilized apartment, the RSL is simply a tenant protection program, regardless of tenant need. Studies show that the wealthier benefit the most.[27]

The 2021 HVS found that while stabilized tenants overall had a median income of $47,000, 22% of households make $100,000 or more. The NYC Rent Guidelines Board 2022 Income and Affordability Study (4/4/23) concluded that the estimated gross

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[27] *See, e.g.,* Barbanel, Josh, "Wealth, Older Tenants in Manhattan Get Biggest Boost From Rent Regulations," *Wall Street Journal*, June 12, 2019: https://www.wsj.com/articles/wealthy-older-tenants-in-manhattan-get-biggest-boost-from-rent-regulations-11560344400

rent-to-income ratio for rent stabilized tenants in 2021, as a whole, fluctuated on the basis of whether the household was low-or high-income, and on the amount of the apartment's rent. Overall, 50% of renters in New York (regulated and market tenants combined) are rent burdened and will remain rent burdened as nothing in the RSL increase rental assistance to tenants in need.

Instead, the legislative approach to the "affordability" problem only exacerbates the problem. By failing to enact any income criteria, existing tenants in stabilized housing are the beneficiaries of below-market rents and perpetual lease renewals, regardless of their income level. Such tenants have no incentive to relocate when they enjoy rents below 30% of their household income, even when the apartment is no longer suitable for the household size. As found in Harvard's Joint Center for Housing Studies, 2017:

> Wages have stagnated for the poor, and the supply of housing affordable to the poorest renters has dwindled. Between 1990 and 2017, the national stock of rental housing grew by 10.9 million units, [but] [o]ver that same time, the number of units renting for less than $600 a month in inflation-adjusted dollars fell by 4 million. All net growth in rental housing in America, in other words, has been for higher-income tenants.

"Affordability" is, thus, a convenient political catch phrase used to justify a heavily regulated housing program supported on the backs of a subset

of private owners. Studies confirm that rent regulation may foster "affordability" in the short-run for current tenants, "but in the long-run decreases affordability, fuels gentrification, and creates negative externalities on the surrounding neighborhood." Diamond, R., "What Does Economic Evidence Tell Us About the Effects of Rent Control," *Brookings* (Oct. 18, 2018). From 1993 to 2019, the RSL had a luxury decontrol mechanism that permitted high rent apartments occupied by high-income individuals to be deregulated. The HSTPA eliminated even this most minimal tying of income to tenant protection.

As noted in the Diamond report, *supra*:

> These results highlight that forcing landlords to provide insurance to tenants against rent increases can ultimately be counterproductive. If society desires to provide social insurance against rent increases, it may be less distortionary to offer this subsidy in the form of a government subsidy or tax credit.

But instead of implementing publically funded remedies, the RSL removes virtually all incentive to improve the apartment upon vacancy, *supra,* which, in turn, enables tenants with means to have a second home, because if they cease primarily residing in the regulated apartment there is little risk of the owner pursuing a non-primary residence claim against them in order to recover the apartment. The result is tenants with no need for the below-market

apartment keeping it as a *pied a terre*. Whereas a professed purpose of the RSL is to protect New York City residents and families [RSL § 26-501], and the ETPA made primary residence a central pre-requisite for protection [ETPA § 8625(a)(11)], the Court may take judicial notice of New York's Housing Court docket, which shows that non-primary residence proceedings are rarely commenced since the enactment of the HSTPA. Once again, a reflection of a rent regulatory system protecting tenants that do not need protection at the expense of greater deprivation to private property rights.

The RSL is a regulatory system that professes an aim of "housing affordability," but has no income criteria. Instead of targeting households in actual need of below-market housing, the regulations make their plight worse. Rather than the government providing income-based, publicly funded housing vouchers, or tax exemptions to maintain adequate levels of maintenance and investment, New York lawmakers impose further and harsher restrictions on the private owners of the regulated housing, appropriating their property rights and shifting the public burden of providing low-income housing on to the individual private owner.

Given the gravity and scope of the intrusions, the evident wide-scale harm being committed, the serious long-term consequences, and the need of clarity in this most critical fundamental right, this Court's review of this case is essential.

CONCLUSION

For the reasons set forth herein, the Court should grant the certiorari petition in this case.

Respectfully submitted,

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