APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 21-2526

BUILDING AND REALTY INSTITUTE OF WESTCHESTER AND PUTNAM COUNTIES, INC., APARTMENT OWNERS ADVISORY COUNCIL, COOPERATIVE AND CONDOMINIUM COUNCIL, STEPPING STONES ASSOCIATES, L.P., LISA DEROSA, as Principal of Stepping Stones, L.P., JEFFERSON HOUSE ASSOCIATES, L.P., SHUB KARMAN, INC., DILARE, INC., PROPERTY MANAGEMENT ASSOCIATES, NILSEN MANAGEMENT CO., INC.,

Plaintiffs-Appellants,

v.

STATE OF NEW YORK, RUTHANNE VISNAUSKAS, in her official capacity as Commissioner of New York State Homes and Community Renewal, DIVISION OF HOMES AND COMMUNITY RENEWAL,

Defendants-Appellees,

COMMUNITY VOICES HEARD (CVH),

Intervenor-Defendant-Appellee.

Filed March 12, 2024
Document No. 144

No. 21-2448

G-MAX MANAGEMENT, INC., 1139 LONGFELLOW, LLC, GREEN VALLEY REALTY, LLC, 4250 VAN CORTLANDT PARK EAST ASSOCIATES, LLC, 181 W. TREMONT ASSOCIATES, LLC, 2114 HAVILAND ASSOCIATES, LLC, SILJAY HOLDING LLC, 125 HOLDING LLC, JANE ORDWAY, DEXTER GUERRIERI, BROOKLYN 637-240 LLC, 447-9 16TH LLC,

Plaintiffs-Appellants,

66 EAST 190 LLC,

Plaintiff,

v.

STATE OF NEW YORK, LETITIA JAMES, in her official capacity as Attorney General of the State of New York, RUTHANNE VISNAUSKAS, in her official capacity as Commissioner of New York State Division of Housing and Community Renewal, WOODY PASCAL, in his official capacity as Deputy Commissioner of the New York State Division of Housing and Community Renewal,

Defendants-Appellees,

N.Y. TENANTS AND NEIGHBORS (T&N), COMMUNITY VOICES HEARD (CVH),

Intervenors-Defendants-Appellees,

COUNTY OF WESTCHESTER, CITY OF YONKERS, CITY OF NEW YORK,

Defendants.

Filed March 12, 2024
Document No. 153

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of March, two thousand twenty-four.

PRESENT:

GUIDO CALABRESI,
DENNY CHIN,
EUNICE C. LEE,
Circuit Judges.

* * *

[Counsel block omitted]

Appeal from a September 14, 2021 judgment of the United States District Court for the Southern District of New York (Karas, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiffs-Appellants Building and Realty Institute of Westchester and Putnam Counties, Inc., et al. ("BRI") and G-Max Management, Inc., et al. ("GMax") (collectively, "Appellants") appeal from the district court's judgment dismissing their challenge to the New York Rent Stabilization Laws ("RSL"). On appeal, Appellants argue that the 2019 amendment to the RSL, known as the Housing Stability and Tenant Protection Act ("HSTPA"), violates the Fifth and Fourteenth Amendments of the Constitution, as it effects a taking of their property and violates their substantive due process rights. Appellants also allege a violation of the Contracts Clause of the Constitution.[1]

In an opinion and order dated September 14, 2021, the district court granted the Defendants' and Defendants-Intervenors' motions to dismiss all of Appellants' claims for failure to state a claim and lack of jurisdiction. *See Bldg. & Realty Institute of Westchester & Putnam Cntys., Inc. v. New York* ("*BRI*"), Nos. 19-CV-11285 (KMK) and 20-CV-634 (KMK), 2021 WL 4198332 (S.D.N.Y. Sept. 14, 2021) ("*BRI*"). The district court addressed the motions filed

[1] Appellants made various other claims at the district court which they do not raise on appeal and are therefore not addressed by this Court.

in both cases in a single opinion "[b]ecause of the overlapping claims and issues." *Id.* at *1. For the same reason, we address both Appellants' appeals in this single order.

In affirming the district court's judgment, we note that a majority of the issues before us are controlled by our recent decisions in *Community Housing Improvement Program v. City of New York*, 59 F.4th 540 (2d Cir.), *cert. denied*, 144 S. Ct. 164 (2023), and *74 Pinehurst LLC v. New York*, 59 F.4th 557 (2d Cir. 2023), *cert. denied*, --- S. Ct. ---, 2024 WL 674658 (2024), which analyzed substantially similar claims against the HSTPA amendments to the RSL. We write primarily for the parties and assume their familiarity with the facts, procedural history, and issues on appeal, which we reference only as necessary to explain our decision to affirm.

* * *

We review *de novo* a district court's grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim, "accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). Likewise, we review a district court's grant of a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction *de novo* where, as in this case, the motion was granted "based solely on the complaint and the attached exhibits" and where "the question we address on review is exclusively a question of law." *SM Kids, LLC v. Google LLC*, 963 F.3d 206, 210–11 (2d Cir. 2020).

I. Physical Taking Claims

a. *Facial Challenge*

Appellants argue that, facially, the RSL effects a *physical* taking by granting tenants a "collective veto right over conversions"—thereby denying landowners the right to dispose of their property and exit the rental market; and by limiting owner reclamations for personal use. G-Max Appellant Br. at 44. For the reasons outlined below, we disagree.

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V; *see also id.* amend. XIV, § 1. When the government effects a physical appropriation of property, a *per se* taking has occurred. *See Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147–49 (2021). A successful facial challenge "must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992).

In *Community Housing*, this Court held that "no provision of the RSL effects, facially, a physical occupation of the Landlords' properties." 59 F.4th at 551. Relying on *Yee*, we made clear that "when, as here, 'a landowner decides to rent his land to tenants' the States 'have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such

regulation entails.'" *Id*. (quoting *Yee*, 503 U.S. at 528–29); *see also Fed. Home Loan Mortg. Corp. v. New York State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 47–48 (2d Cir. 1996) (explaining that "where a property owner offers property for rental housing, the Supreme Court has held that government regulation of the rental relationship does not constitute a physical taking"). Neither the co-op and condo conversion amendments, nor the limitations on owner reclamation of units, "involve unconditional requirements imposed by the legislature," but rather are provisions that must be adhered to "when certain conditions are met." *Community Housing*, 59 F.4th at 552.

Appellants' reliance on *Cedar Point Nursery* and *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), is misplaced because neither case is relevant given neither "concerns a statute that regulates the landlord-tenant relationship." *Community Housing*, 59 F.4th at 553. Instead, *Community Housing* is directly on point and dictates our decision that Appellants have not plausibly alleged a facial physical taking.

b. *As-Applied Challenge*

Appellants next argue that, as applied to them, the HSTPA amendments to the RSL effect a physical taking. Specifically, with respect to two landlords, they argue that "the HSTPA precluded [them] from changing the use of their property despite their having served a lawful non-renewal notice over a year earlier." GMax Appellant Br. at 50. *Pinehurst* analyzed as-applied physical takings claims under the RSL and controls our decision to affirm here.

Pinehurst held that nothing in the RSL "compel[s] landlords to refrain in perpetuity from terminating a tenancy. Instead, the statute sets forth several bases on which a landlord may terminate a tenant's lease, such as for failing to pay rent, creating a nuisance, violating the lease, or using the property for illegal purposes." *Pinehurst*, 59 F.4th at 563 (internal quotation marks and citation omitted). While Appellants make the conclusory assertion that a taking has been effected because, under the RSL, tenants purportedly can "continue demanding renewal leases in perpetuity" even after being served non-renewal notices, G-Max Appellant Br. at 51, their argument falls for the same reason given in *Pinehurst*: they "have [not] alleged that they have exhausted all the mechanisms contemplated by the RSL that would allow a landlord to evict current tenants." 59 F.4th at 564.

Because Appellants have not demonstrated that they have attempted to use all available methods to either exit the rental market or evict tenants, save serving a non-renewal notice, *Pinehurst* demands that the as-applied physical takings challenge must fail.

II. Regulatory Taking Claims

a. *Facial Challenge*

Community Housing also controls our analysis of Appellants' facial regulatory taking claims.[2] A facial

[2] BRI also alleges that the district court erred in dismissing their claims that the RSL effects a *per se* categorical taking. This claim is completely devoid of merit. A *per se* categorical taking occurs when the "property owner . . . suffer[s] a physical 'invasion' of his property" or where "regulation denies all

regulatory taking is effected when legislation goes "too far" in restricting the use of property. *Horne*, 576 U.S. at 360 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). In assessing whether a restriction is in fact a regulatory taking, we employ a flexible "ad hoc, factual inquir[y]," looking to important factors such as (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

In finding that a facial regulatory taking challenge to the RSL failed in *Community Housing*, we looked to the *Penn Central* factors. There, we concluded that the plaintiffs had "not plausibly alleged that every owner of a rent-stabilized property has suffered an adverse economic impact," *Community Housing*, 59 F.4th at 554, that they had "failed to establish that the RSL interferes with *every* property owner's investment-backed expectations," *id.*, and that the character of the government action sought to promote general welfare and public interest through a "comprehensive regulatory regime that governs nearly one million units," *id.* at 555.

Our holding and reasoning in *Community Housing* apply just as strongly here. Appellants have

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economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The district court correctly found that Appellants "do not allege facts to support that they have been deprived of all economical[ly] viable use of their property" and dismissed this claim. *BRI*, 2021 WL 4198332, at *21.

not shown that, for all affected property holders, the economic impacts are universally negative and that investment-backed expectations were subverted. Thus, Appellants' facial regulatory taking claims must fall.

b. *As-Applied Challenge*

In dismissing Appellants' as-applied regulatory taking claims, the district court concluded that they were "not ripe because the property owners have not tried to take advantage of available hardship exemptions." *BRI*, 2021 WL 4198332, at *25. Similarly, with regard to Appellants' assertions that they have been unable to convert their buildings to condominiums or cooperatives, the district court noted that they had not "tried to obtain the requisite tenant agreements for conversions." *Id.* We agree with the district court.

While it is true that "a claim for a violation of the Takings Clause [becomes ripe] as soon as a government takes [] property for public use without paying for it," *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019), a claim may be unripe where "avenues still remain for the government to clarify or change its decision, including where the plaintiff has an opportunity to seek a variance," *Pinehurst*, 59 F.4th at 565 (internal quotation marks omitted). Here, Appellants have not alleged that they have availed themselves of any opportunities to seek a variance for their properties. Instead, they argue that seeking a variance is unnecessary for their claims to be ripe because "hardship increases are one-offs that do not remedy the underlying restrictions," and "conversions

are no longer feasible" with the "51% tenant-approval requirement." G-Max Appellant Br. at 42–43.

These arguments are substantially similar to those we rejected in *Pinehurst*, where we held that "[s]peculation of this sort is insufficient" to circumvent the requirement that parties pursue available administrative relief. 59 F.4th at 565. Appellants' allegations that the remedies available to them are not feasible amount to conclusory speculation. *Pinehurst* confirmed that the district court was correct in finding that, for any as-applied regulatory takings claims to be ripe, Appellants must show they availed themselves of the remedies which were available, and we follow suit.

While we agree that Appellants' as-applied challenges are not ripe, we briefly address the merits of their claims and apply the *Penn Central* factors. While Appellants alleged specific facts in their complaints tending to show a negative economic impact due to the HSPTA, the "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 645 (1993). Indeed, in *Pinehurst* we confirmed that "[w]e have repeatedly rejected the notion that loss of profit . . . alone could constitute a taking." 59 F.4th at 566 (internal quotation marks omitted). As such, even the HSTPA's "aggregate effect," G-Max Appellant Br. at 33, on Appellants' properties do not show that the economic impact of the regulation weighs in favor of it being deemed a regulatory taking.

We can also look to *Pinehurst* in assessing the investment-backed expectations prong of the *Penn Central* test. Because the RSL has been adjusted and changed many times since it was initially enacted in 1969, we stated in *Pinehurst* that any reasonable investor "would have anticipated their rental properties would be subject to regulations, and that those regulations in the RSL could change yet again." 59 F.4th at 567. Given the history of the RSL, Appellants' claim that that they could never have "expected *this* change" is not plausible. G-Max Appellant Br. at 36. This factor weighs against Appellants' as-applied regulatory takings claim.

The character of the governmental action at issue also weighs strongly against Appellants' claims. As we discussed in *Community Housing*, the RSL is concerned with "broad public interests" and "the legislature has determined that [it] is necessary to prevent 'serious threats to the public health, safety and general welfare.'" 59 F.4th at 555 (quoting N.Y.C. Admin. Code § 26-501). Upon balancing the *Penn Central* factors, both *Community Housing* and *Pinehurst* demand that, even if Appellants' claims were ripe, their as-applied regulatory taking claims fail on the merits.

III. Contract Clause Claim

BRI additionally argues that the HSTPA amendment to the RSL violates the Constitution's Contract Clause because it "interferes with existing contracts and it does not advance its alleged purposes." BRI Appellant Br. at 13. We disagree.

The Constitution provides that: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const., art. I, § 10, cl. 1. To state a claim for a violation of the Contract Clause, a plaintiff must show that a state law has "operated as a substantial impairment of a contractual relationship." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). Significantly, though, a law "is out of [the clause's] true meaning, if the law is made to operate on future contracts only." *Ogden v. Saunders*, 25 U.S. 213, 327 (1827).

In dismissing Appellants' claims, the district court reasoned that their claims were based on "future, rather than existing, contracts." *BRI*, 2021 WL 4198332, at *32. On appeal, BRI contends that this reasoning was faulty in that it did not reflect the fact that landlords are now required to renew leases at permanent preferential rates, which means that the law was affecting an existing, not future, contractual relationship. It is true that under New York state law, "[w]here the original lease includes an option to renew, the exercise of it by the tenant does not create a new lease; rather it is a prolongation of the original agreement." *Dime Sav. Bank of N.Y., FSB v. Montague St. Realty Assocs.*, 90 N.Y.2d 539, 543 (1997). However, where the original lease does not include a renewal option, a "lease extension [is] a new agreement rather than a continuation of the old agreement." *Id.* BRI has provided no facts for a court to infer that it held existing contracts affected by the HSTPA, i.e., whether it (1) held a pre-2019 lease (2) with a renewal option that was (3) renewed after 2019 and affected by the HSTPA.

In its complaint, BRI simply contends that one of the Plaintiffs "has been forced to offer renewal leases." BRI App'x at 27. While it is theoretically possible that those leases, upon which Appellants do not elaborate in the complaint, had renewal clauses in them from the start—and thus could potentially implicate the Contract Clause—we cannot find that BRI has stated a claim based on an assumption from an already conclusory statement when "a complaint [does not] suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (second alteration in original) (internal quotation marks omitted). The district court correctly dismissed Appellants' Contract Clause claims.

IV. Due Process Claims

The district court also dismissed Appellants' claims that the RSL violated the Due Process Clause of the Fourteenth Amendment, concluding that Appellants were impermissibly dressing their Takings Clause claim up as a substantive due process claim, and that, even if considered on the merits, the RSL would withstand rational basis review. We agree with the district court.

While Appellants state that the taking is not "the source of the due process violation," G-Max Appellant. Br. at 53, their due process claims are that the "landlord owners . . . [are] deprived of their property without due process." GMax App'x at 91; *see also* BRI App'x at 42 (claiming that "Plaintiffs are being deprived of their property rights"). Appellants allege no factual differences in their due process and Takings Clause claims, and, as we held in *Community*

Housing, "the Due Process Clause cannot 'do the work of the Takings Clause' because 'where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" *Community Housing*, 59 F.4th at 556 (quoting *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 720–21 (2010)).

Regardless, even if Appellants could bring a due process claim, it would fail on the merits. Appellants allege that the regulations do not achieve the purposes for which they were passed: "to preserve affordable housing in New York." GMax App'x at 26. Appellants' complaints argue that, paradoxically, the regulations will, in the long term, increase the unaffordability of housing in New York. *See, e.g.*, BRI App'x at 53–54 (citing to economists' studies questioning the efficacy of rent-stabilization efforts). However, for the regulation to succeed under rational basis review, it must simply be "rationally related to legitimate government interests." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). The legislature enacted the challenged regulations for the purpose of "permit[ting] low- and moderate-income people to reside in New York City" and "[i]t is beyond dispute that neighborhood continuity and stability are valid bases for enacting a law." *Community Housing*, 59 F.4th at 557. Appellants' assertions amount to policy and efficacy disagreements with the legislature, and "rational basis review is not a mechanism for judges to second guess legislative judgment even when, as here, they may conflict in part with the opinions of some

experts." *Id.* Accordingly, Appellants' due process challenges fail on their merits as well.

V. Sovereign Immunity

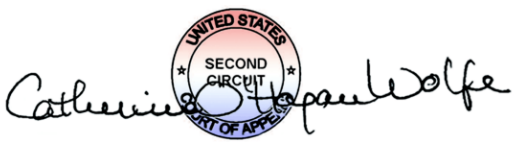
Lastly, Appellants challenge the district court finding that it lacked jurisdiction to hear the Takings Clause claim against the State of New York because the State is protected by Eleventh Amendment state sovereign immunity. For the reasons below, we agree with the district court.

Except where Congress has abrogated a state's immunity, or where a state has waived its immunity, the Eleventh Amendment "render[s] states and their agencies immune from suits brought by private parties in federal court." *In re Charter Oak Assocs.*, 361 F.3d 760, 765 (2d Cir. 2004). Appellants argue that it was an error for the "district court [to hold that] sovereign immunity bars [their] federal takings claim against the State of New York." G-Max Appellant Br. at 58. Notably, the district court's determination is aligned with our conclusion in *Pinehurst*, and we are thus controlled by that decision. There, we held that "sovereign immunity trumps the Takings Clause where, as here, the state provides its own remedy for an alleged violation." *Pinehurst*, 59 F.4th at 570. Therefore, we must reject Appellants' arguments that the State of New York is not protected by sovereign immunity against a Takings Clause claim.

* * *

We have considered Appellants' remaining arguments and find them to be without merit. For the reasons set forth above, the judgment of the district court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



Appendix B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 19-CV-11285 (KMK)

BUILDING AND REALTY INSTITUTE OF WESTCHESTER AND PUTNAM COUNTIES, INC., *et al.*,

Plaintiffs,

v.

STATE OF NEW YORK, *et al.*,

Defendants,

and

COMMUNITY VOICES HEARD,

Defendant-Intervenor.

Filed September 14, 2021
Document No. 101

No. 20-CV-634 (KMK)

G-MAX MANAGEMENT, INC., *et al.*,

Plaintiffs,

v.

STATE OF NEW YORK, *et al.*,

Defendants,

NEW YORK TENANTS & NEIGHBORS, and COMMUNITY VOICES HEARD,

Defendant-Intervenors.

Filed September 14, 2021
Document No. 107

OPINION AND ORDER

* * *

[Counsel block omitted]

KENNETH M. KARAS, United States District Judge:

On December 10, 2019, a group of ten Plaintiffs who are landlords and organizations in Westchester County, New York filed a Complaint against the State of New York ("New York" or the "State"), Ruthanne Visnauskas in her official capacity as Commissioner of the New York State Division of Housing and Community Renewal ("Visnauskas"), and the Division of Homes and Community Renewal ("DHCR") (collectively, "BRI Defendants"), alleging that recent amendments to the Emergency Tenant Protection Act of 1974 (the "ETPA") violate their constitutional rights (the "BRI Action"). (*See* BRI Compl. (Dkt. No. 1, Case No. 19-CV-11285).)[1] Specifically, BRI Plaintiffs allege violations of the Fifth and Fourteenth Amendments and the Contract Clause, U.S. CONST. art. I, § X, cl. 1;

[1] BRI Plaintiffs are: Building and Realty Institute of Westchester and Putnam Counties, Inc.; Apartment Owners Advisory Council; Cooperative and Condominium Council; Stepping Stones Associates, L.P.; Lisa DeRosa as Principal of Stepping Stones, L.P.; Jefferson House Associates, L.P.; Shub Karman, Inc.; DiLaRe, Inc.; Property Management Associates; and Nilsen Management Co., Inc.

id. amends. V, XIV. (*Id.* at 92–96.)[2] BRI Plaintiffs request that this Court declare the Housing and Stability Tenant Protection Act (the "HSTPA") as unconstitutional and seek an injunction against its enforcement. (BRI Compl. at 95–98.)[3] The BRI Defendants move this Court to dismiss the BRI Complaint brought by BRI Plaintiffs for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). (BRI Defendants' Motion To Dismiss (Dkt. No. 60).) Community Voices Heard ("CVH") filed a parallel Motion To Dismiss the BRI Complaint against the BRI Defendants for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). (CVH Motion To Dismiss (together the "BRI Motions") Dkt. No. 62).)[4]

The BRI Action is one of five federal actions that real estate groups have filed in the United States District Courts for the Southern and Eastern Districts of New York, seeking to challenge the long-standing system of rent stabilization authorized under New York State law.[5] This opinion, however, concerns two

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[2] The BRI Plaintiffs do not continue the use of numerical paragraphs on pages 91 to 98 of the BRI Complaint. As such, facts from this portion will be cited by page number.

[3] 2019 N.Y. SESS. LAWS Ch. 36 (McKinney), hereinafter "HSTPA." The HSTPA is also commonly referred to as the "2019 amendments," but the Court will use "HSTPA" for clarity.

[4] CVH filed a Motion To Intervene in the BRI Action, which the Court granted. (Dkt. No. 86.)

[5] *See also 335-7 LLC v. City of New York*, No. 20-CV-1053 (S.D.N.Y.); *Community Housing Improvement Program v. City of New York*, No. 19-CV-4087 (E.D.N.Y.); and *74 Pinehurst LLC v. State of New York*, No. 19-CV-6447 (E.D.N.Y.).

cases: the BRI Action and *G-Max Management, Inc. et al. v. State Of New York et al.* (20-CV-634). *G-Max* is a related case filed on January 23, 2020, brought by a group of 13 Plaintiffs who are "small landlord owners" (the "G-Max Plaintiffs"). The G-Max Plaintiffs filed the G-Max Complaint against the State of New York, Visnauskas, Letitia James in her official capacity as Attorney General of New York ("James"), Woody Pascal in his official capacity as Deputy Commissioner of the New York State Division of Housing and Community Renewal ("Pascal"), and New York City (collectively, "G-Max Defendants"), alleging violations of the Fifth and Fourteenth Amendments; the Contract Clause, U.S. CONST. art. I, § X, cl. 1; *id.* amends. V, XIV; the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601 *et seq.*; and various provisions of the New York State Constitution (the "G-Max Action"). (*See* G-Max Compl. (Dkt. No. 1, Case No. 20-CV-634).)[6] G-Max City Defendant moves this Court to dismiss the G-Max Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (G-Max City Defendants' Motion To Dismiss (Dkt. No. 67).) G-Max State Defendants move this Court to dismiss the G-Max Complaint against the G-Max Plaintiffs for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). (G-Max State Defendants' Motion To Dismiss (Dkt. No. 70).) CVH and New York Tenants & Neighbors ("T&N") filed a parallel Motion

[6] G-Max Plaintiffs include the following: G-Max Management, Inc.; 1139 Longfellow, LLC; Green Valley Realty, LLC; 4250 Van Cortlandt Park East Associates, LLC; 181 W. Tremont Associates, LLC; 2114 Haviland Associates, LLC; Siljay Holding LLC; 125 Holding LLC; Jane Ordway; Dexter Guerrieri; Brooklyn 637-240 LLC; and 447-9 16th LLC.

To Dismiss the G-Max Complaint against the G-Max Defendants for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). (CVH Motion To Dismiss (together the "G-Max Motions") Dkt. No. 72).)[7] Because of the overlapping claims and issues of law in the two cases, the Court addresses the motions filed in both cases in this Opinion and Order.[8]

For the reasons stated herein, the BRI and G-Max Defendants and Intervenors CVH and T&N Motions To Dismiss are granted without prejudice.

I. Background

A. Factual Background

In 1969, the City of New York (the "City") enacted the first rent-stabilization laws with the Rent Stabilization Act of 1969 (collectively, "RSL.") RSL were "a means to control a perceived penchant toward unreasonably high rent increases on the part of landlords." *Gramercy Spire Tenants' Ass'n v. Harris*, 446 F. Supp. 814, 825 (S.D.N.Y. 1977). At the time, the New York City Council "found that many owners of non-rent-controlled buildings were demanding exorbitant and unconscionable rent increases" and these increases were "causing severe hardship to tenants of such accommodations and . . . uprooting long-time city residents from their communities." *Id.* (citation and quotation marks omitted). RSL apply to privately owned buildings, built between February 1, 1947 and March 10, 1969 for buildings with six or

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[7] CVH and T&N filed a Motion To Intervene in the G-Max Action, which the Court granted. (Dkt. No. 92.)

[8] The Court does not, however, consolidate the cases.

more units. N.Y.C. Admin. Code § 26-504(a). Cited in the RSL legislative findings, the conditions of rent environment in New York City were described as "exactions of unjust, unreasonable and oppressive rents and rental agreements . . . profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare . . . ." N.Y. UNCONSOL. LAW § 26-501 (McKinney). Essentially, RSL place limits on the amount of rent that can be charged, limit the percentage and frequency of rent increases, and entitle tenants to certain protections such as lease renewal, eviction prevention under many circumstances, and the ability to file complaints against landlords. *Id.* §§ 26-501 *et seq.* RSL created a system of rent regulation that covers nearly one million apartments, which house over two million people, or about one in three residents in the City. Timothy L. Collins, *An Introduction to the New York City Rent Guidelines Board and the Rent Stabilization System* (rev. ed. Jan. 2020), https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/01/intro2020.pdf.

In 1974, the ETPA was passed, which extended rent stabilization to any Westchester, Rockland, or Nassau County municipality with a rental vacancy rate of five percent or less that opted in. N.Y. UNCONSOL. LAW §§ 8621 *et seq.*; *see also Massagli v. Bastys*, 532 N.Y.S.2d 638, 641 (Sup. Ct. 1988) (describing applicability of ETPA to Westchester, Rockland, and Nassau counties prior to its amendment in 2019); HSTPA, Part G, § 3. The ETPA has been described as "a form of local option legislation, which authorized the City of New York

(and other specified localities) to declare the existence of a public emergency requiring the regulation of residential rents." *Gramercy Spire*, 446 F. Supp. at 819. The ETPA covers roughly 25,000 rent-stabilized apartments in the 21 municipalities in Westchester County. (BRI Compl. ¶ 1, at 98.) Once the existence of a public emergency is declared, the ETPA places limits on the rents that property owners can charge tenants. The ETPA also created a Rent Guidelines Board ("RGB") to regulate how much the rents of ETPA units could be increased for one- and two-year periods. Under the ETPA, landlords are generally obligated to offer one- or two-year renewal leases to each tenant prior to expiration of the current lease. Further, landlords are required to make rent adjustments in their rent-regulated apartments in accordance with standards set forth in the ETPA, in addition to complying with local building and housing laws. N.Y. UNCONSOL. LAW § 8624 (McKinney 2019). RSL and regulations have since been renewed and modified several times.

In June 2019, the New York State Senate again amended the State's RSL and enacted the HSTPA. As amended, the HSTPA expands previous incarnations of the New York rent stabilization statutes in various ways—it places additional limits on rent increases, deregulation of units, and eviction of tenants in breach of lease agreements, among other changes. *See generally* HSTPA. Most significantly, the HSTPA limits a landlord to use one housing unit only if there is a showing of "immediate and compelling necessity" for his or her own personal use and occupancy as his or her primary residence or for the use by an immediate family member. HSTPA, Part I. The

HSTPA repealed the luxury decontrol provisions, which allowed landlords to decontrol units once the rent or the tenant's income reached a certain threshold. *Id.* at Part D, § 5; *see also* N.Y. UNCONSOL. LAW §§ 26-504.1, 26-504.2, 26-504.3 (repealed 2019). In addition, the HSTPA eliminated the vacancy and longevity rental increases. *Id.* at Part B, §§ 1, 2; *see also* N.Y. UNCONSOL. LAW § 26-511(c)(5-a) (repealed 2019); *id.* § 8630(a-1) (repealed 2019). The HSTPA changed it so that preferential rent operates as the legal rent for the life of the tenancy—i.e., the rent cannot be raised upon lease renewal. *Id.* at Part E. Further, the HSTPA reduced the value of capital improvements called "individual apartment improvements" ("IAI") and "major capital improvements" ("MCI") that landlords could cover through rent increases. *Id.* at Part K, §§ 1, 2, 4, 11. IAI spending is now capped at $15,000 over a 15-year period, and no more than three IAIs can be charged to tenants during that time. *Id.* § 1. The HSTPA provided that the maximum collectible rent increases will now be no more than the average of the five most recent RGB annual rent increases for one-year renewal leases. *Id.* at Part H, § 1. The HSTPA increased the percentage of tenant consent needed to convert a building to cooperative or condominium use from at least 15% of tenants for approval to a threshold of 51%. *Id.* at Part N. The HSTPA also prohibited conversion plans under which tenants who decline to buy their units are evicted. *Id.* The HSTPA extended the period during which state housing courts may stay the eviction of breaching tenants from six months to one year. *Id.* at Part M, § 21.

The HSTPA removed the geographic limitation of the ETPA so that now all municipalities in the State, including Westchester County, can opt-in to rent stabilization. *Id.* at Part G, § 3. Specifically, under the HSTPA, any locality in the State can participate in rent stabilization if "a declaration of emergency" regarding available apartments is made in the subject locality pursuant to the ETPA. *Id.* § 5. In 2019, when New York reauthorized and amended RSL through the HSTPA, it declared that a "severe disruption of the rental housing market ha[d] occurred" that "threaten[ed] to be exacerbated" because previous incarnations of the law allowed for the removal of vacant units from rent stabilization in certain circumstances. HSTPA, Part D, § 1. As such, the HSTPA was adopted to limit "profiteering" and curtail "the loss of vital and irreplaceable affordable housing for working persons and families." *Id.*

The BRI Plaintiffs present four legal claims through ten causes of actions. (*See* BRI Compl. at 91–92.) Through these causes of action, BRI Plaintiffs assert claims pursuant to 42 U.S.C. § 1983 and the U.S. Constitution. (*Id.*) First, BRI Plaintiffs allege that the HSTPA deprives property owners of substantive due process in violation of the Fourteenth Amendment. (*Id.* at 92–94.) Next, BRI Plaintiffs' second and third claims allege that the HSTPA effects a physical and a regulatory taking of property in violation of the Fifth Amendment, and the Fourteenth Amendment as applied to the states. (*Id.* at 95–96.) Finally, though not identified explicitly as a claim in the BRI Complaint, BRI Plaintiffs allege that the HSTPA violates the Contract Clause, Article I, § 10 of the U.S. Constitution, because the HSTPA locks in

existing preferential rents for the duration of the current tenancy and impairs the existing lease contract agreements. (*Id.* at 96.) As such, the Court will treat the Contract Clause as its own claim. (*Id.*) BRI Plaintiffs request that this Court declare the HSTPA as facially unconstitutional and seek an injunction against its enforcement. (*Id.* at 97–98.)[9]

G-Max Plaintiffs allege that the HSTPA "violate[s] the Takings, Due Process, and Equal Protection Clauses of the U.S. and New York State Constitutions, and the Contract Clause of the U.S. Constitution, both facially and as applied." (G-Max Pls.' Mem. of Law in Opp'n to Mot. ("G-Max Pls.' Mem.") 2 (Dkt. No. 61, Case No. 20-CV-634); G-Max Compl. ¶¶ 213–72.) The G-Max Plaintiffs also allege that the HSTPA violates the FHA due to its disparate impacts. (G-Max Compl. ¶¶ 273–80.)[10]

BRI and G-Max Plaintiffs assert that these actions are distinguishable from a series of similar cases because the other plaintiffs seek to strike down RSL as a whole, while G-Max and BRI Plaintiffs challenge only the constitutionality of the HSTPA, and not RSL broadly as they existed prior to the HSTPA. (*See generally* BRI Compl.; G-Max Compl.)

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[9] The New York State Office of the Attorney General (the "NYAG") represents all Defendants in the BRI Action. (*See generally* Dkt., Case No. 19-CV-11285.)

[10] In the G-Max Action, the NYAG represents the State of New York, Visnauskas, and Pascal. (*See generally* Dkt., Case No. 20-CV-634.) The New York City Law Department represents the City of New York. (*See generally id.*) Similarly, the BRI Plaintiffs are "organizations and landlords in Westchester County."

B. Procedural Background

BRI Plaintiffs filed the Complaint on December 10, 2019, and G-Max Plaintiffs commenced the G-Max Action on January 23, 2020. (BRI Compl.; G-Max Compl.) On May 8, 2020, CVH filed the BRI Motion To Intervene and accompanying Memorandum of Law in Support of the Motion To Intervene. (Not. of Mot.; CVH Mem. of Law in Supp. of BRI Mot. To Intervene (Dkt. Nos. 39–41, Case. No. 19-CV-11285).) On the same day, CVH and T&N filed the G-Max Motion To Intervene and accompanying Memorandum of Law in Support of the Motion To Intervene. (Not. of Mot.; CVH G-Max Mem. in Supp. of G-Max Mot. To Intervene (Dkt. Nos. 58–60, Case No. 20-CV-364).) On May 22, 2020, BRI and G-Max Plaintiffs filed their Opposition papers to the Motions To Intervene in the BRI and G-Max Actions. (Dkt. Nos. 42–44, Case No. 19-CV-11285; Dkt. No. 61, Case No. 20-CV-364.) The Court held Oral Argument on the Motions To Intervene in both Actions and an additional Motion To Add a Party, filed by 300 Apartment Associates, Inc. in the BRI Action on July 8, 2020. (*See* Dkt. (minute entries for July 8, 2020, Case No. 19-CV-11285, Case No. 20-CV-364).) The Court reserved its ruling on all of the Motions. (*Id.*) On September 23, 2020, the Court issued two Opinions and Orders regarding the pending Motions To Intervene. The Court granted CVH's Motion to Intervene and denied 300 Apartment Associates' Motion To Intervene in the BRI Action. (Dkt. Nos. 86–87, Case No. 19-CV-11285.) However, the Court granted 300 Apartment Associates the ability to file memoranda as amicus curiae in the case going forward. (Dkt. No. 87, Case No. 19-CV-11285.) The Court also granted CVH and T&N's Motions to

Intervene in the G-Max Action. (Dkt. No. 92, Case No. 20-CV-634.)

Pursuant to the briefing schedule set by the Court, on June 19, 2020, BRI and G-Max Defendants filed Motions To Dismiss, CVH filed its own Motion To Dismiss in the BRI Action, and CVH and T&N filed their own Motion To Dismiss in the G-Max Action on June 19, 2020. (Dkt. Nos. 60, 62, Case No. 19-CV-11285; Dkt. Nos. 67, 70, 72, Case No. 20-CV-634). On the same day, BRI and CVH filed Memoranda of Law in Support of the Motions to Dismiss. (BRI State Defs.' Mem. in Support of Mot. To Dismiss ("BRI State Defs.' Mem.") (Dkt. No. 61, Case No. 19-CV-11285); CVH Mem. in Support of Mot. To Dismiss ("BRI CVH Mem.") (Dkt. No. 63, Case No. 19-CV-11285).) On August 13, 2020, BRI Plaintiffs filed their Opposition. (Pls.' Mem. of Law in Opp'n to Mot. To Defendants' and CVH's Mots. To Dismiss ("BRI Pls.' Mem.") (Dkt. No. 81, Case No. 19-CV-11285).) On September 4, 2020, BRI Defendants and CVH filed Replies. (Reply Mem. of Law in Support of Defs.' Mot. To Dismiss ("BRI State Defs.' Reply"); Reply In Further Support of CVH's Mot. To Dismiss ("BRI CVH Reply") (Dkt Nos. 84–85, Case No. 19-CV-11285).)

Also on June 19, 2020, G-Max Defendants and CVH and T&N filed Memoranda of Law in Support of the Motions to Dismiss. (G-Max State Defs.' Mem. in Support of Mot. To Dismiss ("G-Max State Defs.' Mem."); G-Max City Defs.' Mem. in Support of Mot. To Dismiss ("G-Max City Defs." Mem.") (Dkt. Nos. 68, 71, Case No. 20-CV-634); CVH and T&N Mem. in Support of Mot. To Dismiss ("G-Max CVH Mem.") (Dkt. No. 73, Case No. 20-CV-634).) On July 30, 2020, G-Max

Plaintiffs filed their Opposition. (G-Max Plaintiffs' Omnibus Mem. of Law in Opp'n to Defendants' and CVH and T&N's Mots. To Dismiss ("G-Max Pls.' Mem.") (Dkt. No. 86, Case No. 20-CV-634).) On September 11, 2020, G-Max Defendants and CVH and T&N filed Replies. (City Defs.' Reply Mem. of Law In Further Support of Mot. To Dismiss ("G-Max City Defs.' Reply"); State Defs.' Reply Mem. of Law In Further Support of Mot. To Dismiss ("G-Max State Defs.' Reply"); CVH's Reply In Further Support of CVH and T&N's Mots. To Dismiss ("G-Max CVH Reply") (Dkt Nos. 89–91, Case No. 20-CV-634).)

Since filing their Motions and supporting papers for the pending Motions To Dismiss, the Parties have submitted numerous letters alerting the Court to new authority addressing the legal questions in this case. (*See* Dkt. Nos. 88–100, Case No. 19-CV-11285; Dkt. Nos. 93–101, 104–06, Case No. 20-CV-634.)

II. Discussion

A. Standard of Review

"The standards of review under Rules 12(b)(1) and 12(b)(6) . . . are substantively identical." *Neroni v. Coccoma*, No. 13-CV-1340, 2014 WL 2532482, at *4 (N.D.N.Y. June 5, 2014) (quotation marks omitted) (citing *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 128 (2d Cir. 2003)), *aff'd*, 591 F. App'x 28 (2d Cir. 2015). "In deciding both types of motions, the Court must accept all factual allegations in the complaint as true, and draw inferences from those allegations in the light most favorable to the plaintiff." *Gonzalez v. Option One Mortg. Corp.*, No. 12-CV-1470, 2014 WL 2475893, at *2 (D. Conn. June 3, 2014) (quotation marks

omitted)). However, "[o]n a Rule 12(b)(1) motion, . . . the party who invokes the Court's jurisdiction bears the burden of proof to demonstrate that subject matter jurisdiction exists, whereas the movant bears the burden of proof on a motion to dismiss under Rule 12(b)(6)." *Id.* (citing *Lerner*, 318 F.3d at 128); *see also Sobel v. Prudenti*, 25 F. Supp. 3d 340, 352 (E.D.N.Y. 2014) ("In contrast to the standard for a motion to dismiss for failure to state a claim under Rule 12(b)(6), a plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." (quotation marks omitted)). This allocation of the burden of proof is the "only substantive difference" between the standards of review under these two rules. *Fagan v. U.S. Dist. Ct. for S. Dist. of N.Y.*, 644 F. Supp. 2d 441, 447, n.7 (S.D.N.Y. 2009).

1. Rule 12(b)(1)

"A federal court has subject matter jurisdiction over a cause of action only when it has authority to adjudicate the cause pressed in the complaint." *Bryant v. Steele*, 25 F. Supp. 3d 233, 241 (E.D.N.Y. 2014) (quotation marks omitted) (quoting *Arar v. Ashcroft*, 532 F.3d 157, 168 (2d Cir. 2008), v*acated and superseded on reh'g on other grounds*, 585 F.3d 559 (2d Cir. 2009) (en banc)). "Determining the existence of subject matter jurisdiction is a threshold inquiry[,] and a claim is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (quotation marks omitted), *aff'd*, 561 U.S. 247 (2010); *see also*

United States v. Bond, 762 F.3d 255, 263 (2d Cir. 2014) (describing subject matter jurisdiction as a "threshold question"). "In adjudicating a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the court may consider matters outside the pleadings." *JTE Enters., Inc. v. Cuomo*, 2 F. Supp. 3d 333, 338 (E.D.N.Y. 2014).

2. Rule 12(b)(6)

The Supreme Court has held that although a complaint "does not need detailed factual allegations" to survive a motion to dismiss, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation, quotation marks, and alterations omitted). Indeed, Rule 8 of the Federal Rules of Civil Procedure "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id.* (quotation marks and alteration omitted). Rather, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Although "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," *id.* at 563, and a plaintiff need allege "only enough facts to state a claim to relief that is plausible on its face," *id.* at 570, if a plaintiff has not "nudged [his or her] claim[] across the line from conceivable to plausible,

the[] complaint must be dismissed," *id.*; *see also Iqbal*, 556 U.S. at 679 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" (second alteration in original) (citation omitted) (quoting FED. R. CIV. P. 8(a)(2))); *id.* at 678–79 ("Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

In considering a motion to dismiss, the Court "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *see also Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) (same). Further, "[f]or the purpose of resolving [a] motion to dismiss, the Court . . . draw[s] all reasonable inferences in favor of the plaintiff." *Daniel v. T & M Prot. Res., Inc.*, 992 F. Supp. 2d 302, 304 n.1 (S.D.N.Y. 2014) (citing *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012)).

B. Sovereign Immunity

Before evaluating Plaintiffs' constitutional claims, the Court must first address Defendants' assertions of sovereign immunity as it implicates whether subject-matter jurisdiction exists. *See Dube v. State Univ. of N.Y.*, 900 F.2d 587, 594 (2d Cir. 1990); *see also* FED. R. CIV. P. 12(h)(3). BRI Defendants argue

that the Eleventh Amendment mandates dismissal of this action against the State and DHCR. (BRI State Defs.' Mem. of Law at 37–38.) The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States." U.S. CONST. amend. XI. Claims against the State or its agencies and instrumentalities are barred regardless of the relief sought. *See Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam) (barring a suit seeking injunctive relief from a state); *Clissuras v. City Univ. of N.Y.*, 359 F.3d 79, 81 (2d Cir. 2004) (noting that immunity extends to arms of the state). "The Eleventh Amendment effectively places suits by private parties against states outside the ambit of Article III of the Constitution." *In re Charter Oak Assocs.*, 361 F.3d 760, 765 (2d Cir. 2004) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996)). The two well-established exceptions to this are a valid Congressional abrogation of sovereign immunity or waiver by the state. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984); *see also Gollomp v. Spitzer*, 568 F.3d 355, 366 (2d Cir. 2009).

New York has not waived its Eleventh Amendment immunity to suit in federal court, and Congress did not abrogate the states' immunity in enacting 42 U.S.C. § 1983. *See Rodriguez v. New York*, No. 17-CV-4126, 2017 WL 8777374, at *2 (S.D.N.Y. Nov. 28, 2017) (citing *Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 40 (2d Cir. 1977); *Lane v. N.Y. State Office of Mental Health*, No. 11-CV-1941, 2012 WL 94619, at *2 (S.D.N.Y. Jan. 11, 2012) (holding that Congress, through § 1983, did not

"abrogate[] the state's immunity"); *Bryant v. N.Y. State Dep't of Corr. Servs. Albany*, 146 F. Supp. 2d 422, 425 (S.D.N.Y. 2001) (noting it is "beyond dispute" that New York and its agencies have not consented to being sued in federal court).[11] As such, a claim that is barred by a state's sovereign immunity must be dismissed pursuant to the Eleventh Amendment for lack of subject matter jurisdiction. *See Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011) (noting that "the Eleventh Amendment . . . confirm[s] the structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article III's jurisdictional grant"); *Seminole Tribe*, 517 U.S. at 54 ("For over a century [the Supreme Court has] reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890))).

Eleventh Amendment immunity extends not only to a State when sued as a defendant in its own name, but also to "state agents and state instrumentalities" when "the state is the real, substantial party in interest." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997); *see also Woods v. Rondout Valley Cent.*

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[11] Section 1983 actions may be brought against state actors to enforce rights created by federal statutes as well as by the Constitution. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279 (2002). To state a § 1983 claim, Plaintiffs must allege that Defendants "acted under color of state law" and that as a result Plaintiffs "suffered a denial of . . . federal statutory rights, or . . . constitutional rights or privileges." *Annis v. County of Westchester*, 136 F.3d 239, 245 (2d Cir. 1998).

Sch. Dist. Bd. of Educ., 466 F.3d 232, 236 (2d Cir. 2006) ("The immunity recognized by the Eleventh Amendment extends beyond the states themselves to state agents and state instrumentalities that are, effectively, arms of a state." (quotation marks omitted)); *Roberts v. New York*, 911 F. Supp. 2d 149, 159–60 (N.D.N.Y. 2012) ("Regardless of the type of relief sought, the Eleventh Amendment bars this Court from assuming jurisdiction over plaintiffs' claims asserted against the State of New York and its agencies."). In both the BRI and G-Max Actions, there are a number of state agencies. In particular, DHCR, Visnauskas, James, and Pascal are instrumentalities or agents of New York. *See Cmty. Hous. Improvement Program v. City of New York* ("*CHIP*"), 492 F. Supp. 3d 33, 39 n.3 (E.D.N.Y. 2020) ("The DHCR is the New York State agency charged with overseeing and administering the RSL."). Courts have repeatedly applied sovereign immunity to dismiss actions against the State and DHCR. *See, e.g.*, *Schiavone v. N.Y.S. Office of Rent Admin.*, No. 18-CV-130, 2018 WL 5777029, at *3–4 (S.D.N.Y. Nov. 2, 2018); *Morring v. Cuomo*, No. 13-CV-2279, 2013 WL 4004933, at *1 (S.D.N.Y. Aug. 5, 2013); *Manko v. Ruchelsman*, No. 12-CV-4100, 2012 WL 4034038, at *3 (E.D.N.Y. Sept. 10, 2012); *Helgason v. Certain State of N.Y. Emps. (Unknown and Known)*, No. 10-CV-5116, 2011 WL 4089913, at *7–8 (S.D.N.Y. June 24, 2011), *report and recommendation adopted sub nom. Helgason v. Doe*, 2011 WL 4089943 (S.D.N.Y. Sept. 13, 2011); *Morris v. Katz*, No. 11-CV-3556, 2011 WL 3918965, at *5 (E.D.N.Y. Sept. 4, 2011); *Sierotowicz v. State of N.Y. Div. of Hous. & Cmty. Renewal*, No. 04-CV-3886, 2005 WL 1397950, at *1–2 (E.D.N.Y. June 14, 2005).

Actions for damages against state officials in their official capacities are essentially actions against the state and will be barred by the Eleventh Amendment unless (1) Congress has abrogated immunity; (2) the state has consented to suit; or (3) the *Ex parte Young* doctrine applies. *See Ex parte Young*, 209 U.S. 123 (1908); *see also Will v. Mich. Dep't. of State Police*, 491 U.S. 58, 71 (1989); *In re Deposit Ins. Agency*, 482 F.3d 612, 617 (2d Cir. 2007). The Eleventh Amendment bars actions against state officials sued in their official capacities where, as here, the state is a real party in interest. *See Edelman v. Jordan*, 415 U.S. 651, 663, 669 (1974) (holding that suits against state employees in their official capacities are barred by the Eleventh Amendment); *Ward v. Thomas*, 207 F.3d 114, 119 (2d Cir. 2000) (rejecting federal suit against state officials under the Eleventh Amendment); *Farid v. Smith*, 850 F.2d 917, 921 (2d Cir. 1988) ("The [E]leventh [A]mendment also bars suits against state officials and state agencies if the state is the real party in interest . . . ."); *Muhammad v. Rabinowitz*, 11-CV-2428, 2012 WL 1155098, at *6 (S.D.N.Y. Apr. 6, 2012) (dismissing claims for damages against state employees in their official capacity as being barred by the Eleventh Amendment); *Crockett v. Pataki*, 97-CV-3539, 1998 WL 614134, at *5 (S.D.N.Y. Sept. 14, 1998) (dismissing claims against governor and housing commissioner sued in their official capacities); *Sassower v. Mangano*, 927 F. Supp. 113, 121 (S.D.N.Y. 1996) (dismissing claims for damages against state officials sued in their official capacities). Where claims are brought against an official in their official capacity, the state is considered the real party in interest, and therefore the same sovereign immunity

principles apply as if the claim was brought directly against the state. *See Spiteri v. Russo*, No. 12-CV-2780, 2013 WL 4806960, at *16 (E.D.N.Y. Sept. 7, 2013), *aff'd sub nom. Spiteri v. Camacho*, 622 F. App'x 9 (2d Cir. 2015); *see also KM Enterprises, Inc. v. McDonald*, 518 F. App'x 12, 13–14 (2d Cir. 2013) (finding that a suit against a state agent in her official capacity effectively rendered the suit against the State of New York and was thus covered under sovereign immunity); *Gollomp*, 568 F.3d at 369 ("Eleventh Amendment sovereign immunity 'is not a mercurial area of law, but has been definitively settled by the Supreme Court since 1890 with respect to actions against the state itself, and 1945 with respect to actions against state agencies or state officials named in their official capacity.'" (quotation marks omitted)); *Huminski v. Corsones*, 386 F.3d 116, 133 (2d Cir. 2004) ("[S]tate officials cannot be sued in their official capacities for retrospective relief under [§] 1983."); *Anghel v. N.Y. Dep't of Health*, No. 12-CV-3484, 2013 WL 2338153, at *9 (E.D.N.Y. May 29, 2013) ("A suit for damages against a state official in his or her official capacity 'is deemed to be a suit against the state, and the official is entitled to invoke the Eleventh Amendment immunity belonging to the state.'" (quoting *Ying Jing Gan v. City of New York*, 996 F.2d 522, 529 (2d Cir. 1993))), *aff'd*, 589 F. App'x 28 (2d Cir. 2015); *Pietri v. N.Y. Off. of Ct. Admin.*, 936 F. Supp. 2d 120, 128 (E.D.N.Y. 2013) ("The Eleventh Amendment also bars suits against state officials in their official capacities for money damages.").

In both Actions, the issues presented before this Court involve the third exception. Under the *Ex parte Young* doctrine, a suit may proceed against state

officials, notwithstanding the Eleventh Amendment, when a plaintiff, "(a) alleges an ongoing violation of federal law and (b) seeks relief properly characterized as prospective." *See In re Deposit Ins. Agency*, 482 F.3d at 618 (quotation marks and citations omitted); *see also Santiago v. N.Y. State Dep't of Corr. Serv.*, 945 F.2d 25, 32 (2d Cir. 1991) (holding that prospective relief claims cannot be brought directly against the state, or a state agency, but only against state officials in their official capacities). While Eleventh Amendment immunity precludes claims against State Defendants, the claims by BRI and G-Max Plaintiffs against Visnauskas, and by the G-Max Plaintiffs against Pascal and James—state officials—are permissible under the doctrine of *Ex parte Young*. Under this doctrine, the Eleventh Amendment does not bar suits for declaratory and injunctive relief against state officials acting in their official capacities in alleged violation of federal rights. *See Quern v. Jordan*, 440 U.S. 332, 337 (1979); Edelman, 415 U.S. at 677. Consequently, the claims against Visnauskas, James, and Pascal in their official capacities are analyzed below on their merits. *See Nassau & Suffolk Cnty. Taxi Owners Ass'n, Inc. v. State*, 336 F. Supp. 3d 50, 67 (E.D.N.Y. 2018) ("[T]he doctrine of *Ex parte Young* permits a suit to proceed in federal court []against a state official in his or her official capacity, notwithstanding the Eleventh Amendment." (quoting *Kisembo v. NYS Off. of Child. & Fam. Servs.*, 285 F. Supp. 3d 509, 520 (N.D.N.Y. 2018))).

However, the Eleventh Amendment bars BRI Plaintiffs' substantive Due Process and Contract Clause claims against the State and DHCR. The Eleventh Amendment also bars G-Max Plaintiffs' Due

Process, Equal Protection, and Contract Clause claims against New York State. In fact, G-Max Plaintiffs do not even discuss the Eleventh Amendment as applied to their substantive due process and equal protection claims. Instead, G-Max Plaintiffs spend only a page of their lengthy brief addressing sovereign immunity but only as it relates to their takings claims. (*See* G-Max Pls.' Mem. at 74.) BRI Plaintiffs similarly barely address the issue of sovereign immunity, citing cases from BRI Defendants' briefs but offering no analysis. (*See* BRI Pls.' Mem. at 66–67.) Simply put, federal courts lack jurisdiction over § 1983 claims that are barred by Eleventh Amendment immunity. *See Dube*, 900 F.2d at 594 (concluding that "federal causes of action . . . brought under [§] 1983, in the absence of consent, . . . against the State or one of its agencies or departments are proscribed by the Eleventh Amendment" (quotation marks and alterations omitted)); *Morales v. New York*, 22 F. Supp. 3d 256, 268 (S.D.N.Y. 2014) (holding that sovereign immunity mandates dismissal under Rule 12(b)(1)); *see also Morabito v. New York*, 803 F. App'x 463, 465 (2d Cir. 2020) (summary order) (affirming the district court's holding that the Eleventh Amendment barred a § 1983 suit against New York, a state agency, and a state official in his official capacity), *as amended* (Feb. 27, 2020), *cert. denied*, 141 S. Ct. 244 (2020), *reh'g denied*, 141 S. Ct. 886 (2020). Indeed, courts routinely dismiss, on sovereign immunity grounds, due process, equal protection, and Contract Clause claims against the state, state agencies, and agents sued in their official capacities. *See, e.g., Adeleke v. United States*, 355 F.3d 144, 151–53 (2d Cir. 2004) (affirming dismissal of due process damages claim on the basis of

sovereign immunity); *JTE Enters.*, 2 F. Supp. 3d at 340–41 (dismissing due process claim as barred by sovereign immunity); *Taedger v. New York*, No. 12-CV-549, 2013 WL 5652488, at *7 (N.D.N.Y. Oct. 15, 2013) (dismissing equal protection claim on sovereign immunity grounds against New York state, state agency, and agency official); *accord Boda v. United States*, 698 F.2d 1174, 1176 (11th Cir. 1983) (ruling that a claim alleging a violation of constitutional due process rights was barred by the doctrine of sovereign immunity); *Smith v. Fla. Dep't of Corr.*, No. 08-CV-1213, 2009 WL 10670364, at *1 (M.D. Fla. Oct. 16, 2009) (dismissing substantive due process claims as barred by sovereign immunity); *see also Zynger v. Dep't of Homeland Sec.*, 370 F. App'x 253, 255 (2d Cir. 2010) (summary order) (finding that the plaintiff waived a possible challenge to the district court's dismissal of due process claims against the federal government, its agencies, and an agent in his official capacity); *335-7 LLC v. City of New York*, — F. Supp. 3d —, 2021 WL 860153, at *4 n.2 (S.D.N.Y. Mar. 8, 2021) (noting that plaintiffs agreed to dismissal of due process claim and conceded that their damages claim against the state defendant was barred by sovereign immunity); *CHIP*, 492 F. Supp. 3d at 40 (explaining that the parties agreed that sovereign immunity barred plaintiffs due process and Contract Clause claims).

Next, the Court must determine whether sovereign immunity bars claims under the Takings Clause. G-Max Plaintiffs argue that "the Supreme Court has rejected the notion that sovereign immunity limits the compensation remedy." (G-Max Pls.' Mem. at 74.) But neither the Supreme Court nor the Second

Circuit has conclusively addressed the issue. *See CHIP*, 492 F. Supp. 3d at 40 ("Despite the fact that the Eleventh Amendment and Takings Clause date back so long, neither the Supreme Court nor the Second Circuit has decisively resolved the conflict.") In *CHIP*, the court noted that "[t]he overwhelming weight of authority among the circuits" is that "sovereign immunity trumps the Takings Clause—at least where . . . the state provides a remedy of its own for an alleged violation." 492 F. Supp. 3d at 40.[12] The court pointed to a recent decision in which the Second

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[12] *See also Bay Point Props., Inc. v. Miss. Transp. Comm'n*, 937 F.3d 454, 456–57 (5th Cir. 2019) (holding that the takings claim against the state agency must be dismissed based on Eleventh Amendment immunity); *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1213–14 (10th Cir. 2019) (same); *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014) (concluding that "the Eleventh Amendment bars Fifth Amendment taking claims against States in federal court when the State's courts remain open to adjudicate such claims" (italics omitted)); *Jachetta v. United States*, 653 F.3d 898, 909–10 (9th Cir. 2011) (same); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 955 (9th Cir. 2008) (determining that the "Takings Clause, which is . . . self-executing . . . can comfortably co-exist with the Eleventh Amendment immunity of the States from similar actions in federal court"); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 528 (6th Cir. 2004) (holding that "because [the state] enjoys sovereign immunity in the federal courts from [the plaintiff's] federal takings claim, the district court was correct to dismiss the . . . complaint for want of jurisdiction"), *overruled on other grounds San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005); *Robinson v. Ga. Dep't of Transp.*, 966 F.2d 637, 638, 640–41 (11th Cir. 1992) (holding Eleventh Amendment barred plaintiffs' claim "for violation of the Fifth and Fourteenth Amendments for a taking of their property"); *Garrett v. State of Illinois*, 612 F.2d 1038, 1040 (7th Cir. 1980) (ruling that a takings claim filed in federal court against the state barred by Eleventh Amendment).

Circuit affirmed the district court's ruling that "the Eleventh Amendment . . .bar[s] a takings claim." *Id.* However, as noted in *CHIP*, this decision was a non-precedential summary order "that did not analyze the question in detail." *Id.* (citing *Morabito*, 803 F. App'x at 464–65 (affirming dismissal of Takings Clause claim against New York, a state agency, and state official in his official capacity because the Eleventh Amendment "generally bars suits in federal courts by private individuals against non-consenting states"), *aff'g* No. 17-CV-6853, 2018 WL 3023380 (W.D.N.Y. June 18, 2018)). Other district courts within the Second Circuit have held that the Eleventh Amendment applies to Takings Clause claims. *See, e.g., MPHJ Tech. Invs., LLC v. Sorrell*, 108 F. Supp. 3d 231, 242 n.8 (D. Vt. 2015) (ruling that "to the extent [Plaintiff] is seeking damages under the Takings Clause, its claim against the Attorney General in his official capacity is barred by the Eleventh Amendment"); *Gebman v. New York*, No. 07-CV-1226, 2008 WL 2433693, at *4 (N.D.N.Y. June 12, 2008) (holding that Eleventh Amendment barred the plaintiff's § 1983 due process and regulatory takings claims against the State). This Court agrees with this line of authority and therefore rejects BRI and G-Max Plaintiffs' position that their Takings Clause claims survive Eleventh Amendment state sovereign immunity. Therefore, for the reasons further articulated in *CHIP*, claims under the Takings Clause are dismissed on sovereign immunity grounds against the State, the DHCR by BRI Plaintiffs, Visnauskas as to both BRI and G-Max Plaintiffs, and James and Pascal as to G-Max Plaintiffs (to the extent BRI and G-Max Plaintiffs seek monetary relief from these

Defendants in their official capacities). *See CHIP*, 492 F. Supp. 3d at 40–43.

C. Standing

1. Legal Requirements

The Court next addresses the issue of standing. Article III of the Constitution restricts federal judicial power to the resolution of cases and controversies. U.S. CONST. art. III, § 2. "That case-or-controversy requirement is satisfied only where a plaintiff has standing." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008). The Supreme Court has explained that constitutional standing requires a plaintiff to establish at minimum three elements—that the plaintiff suffered an "injury in fact," which means an "invasion of a legally protected interest," the existence of "a causal connection between the injury and the conduct complained of," and "a likelihood that the 'injury will be redressed by a favorable decision.'" *Fulton v. Goord*, 591 F.3d 37, 41 (2d Cir. 2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). A "legally protected interest" is one that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quotation marks omitted). As a threshold matter, standing is a jurisdictional predicate that cannot be waived. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *accord Leopard Marine & Trading, Ltd. v. Easy Street Ltd.*, 896 F.3d 174, 188 (2d Cir. 2018).

Under current standing jurisprudence, an organization may assert two distinct types of standing: (1) organizational standing, and

(2) associational standing. Under the organizational standing theory, "an association may have standing in its own right to seek judicial relief to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). In contrast, under the associational standing theory, "an association has standing to bring suit on behalf of its members." *Hunt v. Wash. St. Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). "[The Supreme] Court has recognized that an association may have standing to assert the claims of its members even where it has suffered no injury from the challenged activity." *Id.* at 342. The Supreme Court, however, has held that "an organization seeking to recover damages on behalf of its members lacked standing because 'whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof.'" *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) (quoting *Warth*, 422 U.S. at 515–16). To establish organizational standing, an organizational plaintiff "must meet the same standing test that applies to individuals." *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998) (citation, quotation marks, and alterations omitted). The Supreme Court has held that an organization establishes an injury-in-fact if it can show that it was "perceptibly impaired" by defendants' actions. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Consequently, the Second Circuit has repeatedly held that "only a 'perceptible impairment' of an organization's activities is necessary for there to be an 'injury in fact.'" *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011) (quoting

Ragin v. Harry Macklowe Real Est. Co., 6 F.3d 898, 905 (2d Cir. 1993)); *N.Y. C.L. Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2011); *N.Y. State Citizens' Coal. for Children v. Velez*, 629 F. App'x. 92, 94 (2d Cir. 2015). However, the Second Circuit has restricted organizational standing under § 1983 by interpreting the rights it secures "to be personal to those purportedly injured." *Nnebe*, 644 F.3d at 156 (quoting *League of Women Voters of Nassau Cnty. v. Nassau Cnty. Bd. of Supervisors*, 737 F.2d 155, 160 (2d Cir. 1984)). Accordingly, BRI Plaintiffs bear the burden of showing that (1) a distinct and palpable injury-in-fact exists to themselves as organizations; (2) the injury-in-fact is fairly traceable to the challenged action; and (3) a favorable decision would redress its injuries. *Id.*

2. BRI Plaintiffs

BRI Defendants challenge the standing of several plaintiffs—Property Management Associates ("Property Management"), Nilsen Management Co., Inc. ("Nilsen Management"), Apartment Owners Advisory Council ("AOAC"), Cooperative and Condominium Council ("CCAC"), and Lisa DeRosa ("DeRosa"). (BRI State Defs.' Mem. at 37–40.) The Court will first discuss Property Management and Nilsen Management, both of which serve as "managing agents" for apartment buildings or multi-family homes in Westchester County that contain rent-regulated units. (BRI Compl. ¶¶ 8(g), 8(h), 24, 31.) The Court agrees with BRI Defendants that the BRI Complaint fails to allege that as managing agents Property Management and Nilsen Management sufficiently allege injuries as required for standing.

(BRI State Defs.' Mem. at 38–39; BRI Compl. ¶¶ 8(g), (h).) Property Management alleges it is unable to recoup building and apartment renovations because of changes to IAIs and MCIs. (*Id.* ¶ 31.) Nilsen Management complains of rent disparities between actual rent and market rent for the eight building that the company manages. (*Id.* ¶ 24.) But Property Management and Nilsen Management have neither alleged facts that trace these purported injuries to the BRI Defendants nor established how their role as managing agents could confer standing upon them. And neither Property Management nor Nilsen Management represents that either owns any rent-regulated properties that would result in any possible cognizable injuries. Instead, the BRI Complaint refers to "another Owner-Landlord, with buildings operated by Property Management" and Nilsen Management "manag[ing] 8 buildings in Yonkers." (*Id.* ¶¶ 24, 31.) As the Supreme Court has explained, an organization, like Property Management and Nilsen Management, may establish an injury-in-fact if it demonstrates that it was "perceptibly impaired" by BRI Defendants actions. *Havens Realty Corp.*, 455 U.S. at 379; *cf. W.R. Huff Asset Management Co. v. Deloitte*, 549 F.3d 100, 109 (2d Cir. 2008) ("There are, indeed, a few well-recognized, prudential exceptions to the 'injury-in-fact' requirement. These exceptions permit third-party standing where the plaintiff can demonstrate (1) a close relationship to the injured party and (2) a barrier to the injured party's ability to assert its own interests."). Property Management and Nilsen Management have not offered any such plausible demonstrations of perceptible impairment based on their roles as managing agents for rent regulated

properties. Their vague assertions regarding alleged injuries without more are insufficient facts upon which the Court could find that standing. Thus, the claims by Property Management and Nilsen Management are dismissed for lack of standing.

Next, the Court turns to whether AOAC and CCAC have standing. "[A]n organization[] is fully able to bring suit on its own behalf 'for injuries it has sustained,'" *Int'l Action Ctr. v. City of New York*, 522 F. Supp. 2d 679, 693 (S.D.N.Y. 2007) (quoting *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 174 (2d Cir. 2005)), "so long as those injuries—or threats of injury—are 'both "real and immediate," [and] not "conjectural or hypothetical,"'" *id.* (alteration in original) (quoting *Bordell v. Gen. Electric Co.*, 922 F.2d 1057, 1060 (2d Cir. 1991)). The Supreme Court has held that a "concrete and demonstrable injury to [an] organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests" and may be sufficient to confer standing. *Havens Realty Corp.*, 455 U.S. at 379. Importantly, the Supreme Court has held that an organization establishes an injury-in-fact if it establishes that it "spent money to combat" activity that harms its organization's core activities. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017). In line with this Supreme Court precedent, the Second Circuit has repeatedly held that "where an organization diverts its resources away from its current activities, it has suffered an injury . . . independently sufficient to confer organizational standing." *Centro de la Comunidad Hispana de Locust*

Valley v. Town of Oyster Bay, 868 F.3d 104, 111 (2d Cir. 2017); *see also Olsen v. Stark Homes, Inc.*, 759 F.3d 140, 158 (2d Cir. 2014) (finding standing for a not-for-profit corporation that expended resources investigating and advocating for plaintiffs because such activities diverted resources from its other advocacy and counseling activities); *Nnebe*, 644 F.3d at 157 (finding standing for an organization that used resources to assist its members who faced adverse action by providing counseling, explaining the rules, and assisting members in obtaining attorneys); *Ragin*, 6 F.3d at 905 (finding standing where an organization devoted significant resources to identify and counteract the defendants' actions).

AOAC is described as an entity that "provides its members with a variety of services, including advice relating to regulatory compliance and assistance to members who are facing legal challenges." (*Id.* ¶ 6.) AOAC "advocates on behalf of its members at the local, City, County[,] and State levels and provides regular updates on issues of importance to property owners." (*Id.*) Similarly, CCAC "is a component entity of the BRI" that represents more than 150 cooperatives and condominiums in Westchester County. The BRI Complaint describes the CCAC as serving the same role as AOAC of advising its members on various matters and advocating on their behalf before the different levels of government. (*Id.* ¶ 7.) Plaintiffs AOAC and CCAC allege that they have standing because they "have been forced to devote substantial time and resources to counsel their members about how to administer their properties under the [HSTPA], [and] how to abide by the maze of new requirements governing the owners[‘] properties . . . ."

(*Id.* ¶ 17.) Further, Plaintiffs AOAC and CCAC allege that they have participated in the RGB process, advised and advocated for their members related to the HSTPA, expended time, money, and resources in helping members to address the implementation of the HSTPA, and noted that their members are regulated by and have suffered injuries because of the HSTPA. (*Id.* ¶¶ 6–7, 17–21.) The injuries alleged by AOAC and CCAC are not "conjectural or hypothetical," and instead the Court finds that these injuries of expending time, money, and resources to help their clients address the passage of the HSTPA are both "real and immediate." *Bordell*, 922 F.2d at 1060. As such, AOAC and CCAC have alleged sufficient facts of an injury-in-fact with "a causal connection between the injury and the conduct complained of"—the enactment of the HSTPA. *Fulton*, 591 F.3d at 41. Finally, AOAC and CCAC satisfy the last requirement of standing—redressability. AOAC and CCAC's injuries would be redressed if the Court were to invalidate the HSTPA. Consequently, the Court finds that AOAC and CCAC satisfy the requirements of standing.

Lastly, the Court evaluates whether DeRosa has standing to sue. The general rule in New York is that individual partners cannot sue on a partnership claim in their individual capacity. *See Leonard P'ship v. Town of Chenango*, 779 F. Supp. 223, 233 (N.D.N.Y. 1991) (noting "under New York law, an individual partner may not assert the claim of the partnership"); *Shea v. Hambro America Inc.*, 606 N.Y.S.2d 198, 199 (App. Div. 1994) ("[I]t is settled that a partnership cause of action belongs only to the partnership itself or to the partners jointly, and . . . an individual

member of the partnership may only sue and recover on a partnership obligation on the partnership's behalf."); *Stevens v. St. Joseph's Hosp.*, 381 N.Y.S.2d 927, 928 (App. Div. 1976) (same).[13] The BRI Complaint alleges that DeRosa is a "principal" of Stepping Stones, L.P., a limited partnership that owns an apartment building in White Plains. (BRI Compl. ¶ 8(a).) As to her injuries, the BRI Complaint only asserts, without explanation or specific factual allegations, that DeRosa "has standing to sue in her own right as principal of Stepping Stones." (*Id.* ¶ 22.; BRI Pls.' Mem. at 67–68.) DeRosa has neither filed a derivative suit nor alleged that she has suffered a distinct injury that can be remedied by this Court. (BRI Compl. ¶¶ 8(a), 22.) To assert a claim derivatively on behalf of Stepping Stones, DeRosa would need to name Stepping Stones as a defendant in this matter, which she has not done. *See Lenz v. Associated Inns & Rests. Co. of Am.*, 833 F. Supp. 362, 378 (S.D.N.Y. 1993) ("[I]n a derivative action brought by a limited partner, the limited partnership is an indispensable party."). Further, DeRosa would be required to plead that she unsuccessfully demanded that Stepping Stones file suit in its own name, or that such a demand would be futile. *See Plymouth Cnty. Ret. Ass'n v. Schroeder*, 576 F. Supp. 2d 360, 368–69 (E.D.N.Y. 2008) ("[T]he plaintiff must state with particularity 'any effort . . . to obtain the desired

[13] Moreover, the Second Circuit has held that corporate shareholders "generally lack standing to assert claims in their own name based on injury to the [entity] and must instead bring such claims derivatively." *CILP Assocs., L.P. v. PriceWaterhouse Coopers LLP*, 735 F.3d 114, 122 (2d Cir. 2013).

action from the directors or comparable authority and, if necessary, from the shareholders or members; and the reasons for not obtaining the action or not making the effort.'" (citing Fed R. Civ. P. 23.1(b)(3))). Nor is standing saved by the vague claim that the "value of Stepping Stones Associates' property has been substantially diminished by the HSTPA," as this does not sufficiently allege any injury to DeRosa separate from the partnership to which she belongs. (BRI Compl. ¶ 22.) *See Russell Pub. Grp., Ltd. v. Brown Printing Co.*, No. 13-CV-5193, 2014 WL 1329144, at *4 (S.D.N.Y. Apr. 3, 2014) (holding that plaintiff cannot bring claims in her individual capacity because all alleged injuries are to the corporation or were indirectly caused by harm to the corporation and plaintiff suffered no "distinct" injury). "[I]t is the burden of the party who [is seeking standing to sue to] . . . clearly . . . allege facts demonstrating that [s]he is a proper party to invoke judicial resolution of the dispute." *Thompson v. County of Franklin*, 15 F.3d 245, 249 (2d Cir. 1994) (citation and quotation marks omitted). Because DeRosa has failed to "clearly allege facts" demonstrating that she, not Stepping Stones, is the proper party to sue and further does not allege that she personally sustained any injuries by BRI Defendants, her claims in the BRI Action are dismissed due to lack of standing.

3. G-Max

In the G-Max action, the City challenges G-Max Plaintiffs' standing to bring any claims against it. The City argues that G-Max Plaintiffs lack standing to sue because the City does not enforce the HSTPA and therefore has not caused G-Max Plaintiffs' any alleged

injuries—a necessary predicate of standing. (G-Max City Defs.' Mem. at 9–12.) As the City explains, it has two roles in the enforcement of RSL. First, the ETPA "authorizes local legislative bodies to declare the existence of a housing emergency whenever the vacancy rate falls below five percent, after which housing becomes subject to the ETPA." (*Id.* at 10 (citing ETPA § 3).) Under the Local Emergency Housing Rent Control Act ("LEHRCA"), the City must make a new determination of emergency at least every three years following a survey of the supply of housing accommodations. N.Y. UNCONSOL. LAW § 8603 (McKinney 2020). Second, the City's RGB annually establishes guidelines for rent adjustments. N.Y.C. Admin. Code § 26-510(a). Aside from these two actions, the enforcement of RSL is left to the State. *Rent Stabilization Ass'n v. Higgins*, 630 N.E.2d 626, 628 (N.Y. 1993) ("The legislature in 1983 designated DHCR 'the sole administrative agency to administer the regulation of residential rents' under the rent control and rent stabilization statutes . . . ." (quoting Omnibus Housing Act, L. 1983, ch. 403, § 3)). To achieve standing, G-Max Plaintiffs would need to challenge the City Council's declaration of a housing emergency or the RGB's rent adjustment. Instead, G-Max Plaintiffs allege that the HSTPA, a *state* statute, is unconstitutional and also violates the FHA. (G-Max Compl. ¶¶ 273–80.) But the City does not enforce the HSTPA and thus could not possibly cause any injuries alleged by G-Max Plaintiffs. G-Max Plaintiffs need to establish a "causal connection between the injury and the conduct complained of [and] the injury has to be fairly traceable to the challenged action of the defendant," which G-Max Plaintiffs have not

established here. *Lujan*, 504 U.S. at 560 (quotation marks and alterations omitted). For example, G-Max Plaintiffs challenge the HSTPA recoupment rate and period for MCIs and IAIs. (G-Max Compl. ¶¶ 11–12.) But this injury is potentially attributable to the State, not the City. To obtain a rent adjustment based on MCI or IAI, a landlord must apply to the DHCR, a *state* agency, which determines whether to grant the adjustment. *See* N.Y.C. Admin. Code § 26-511.1 (the DHCR shall promulgate rules and regulations to establish a schedule of reasonable costs of MCIs and a notice and documentation procedure for IAIs). As noted above, the City plays no role in determining the recoupment rate of MCIs or IAIs.

G-Max Plaintiffs also challenge the repeal of the high-income regulatory provisions of the HSTPA. (G-Max Compl. ¶¶ 72–73, 198, 243.) But this repeal in the HSTPA is a result of a change in state law. *See* HSTPA, Part D, § 5. G-Max Plaintiffs describe the HSTPA as "irrational and arbitrary," *id.* ¶ 252, and that the law unfairly "singles out" G-Max Plaintiffs, *id.* ¶¶ 257, 262. G-Max Plaintiffs further argue that the City concedes it has "roles in enforcing" the underlying rent stabilization laws that the HSTPA amends. (G-Max Pls.' Mem. at 75.) Specifically, G-Max Plaintiffs note the fact that the City's role is to periodically renew the emergency declaration and to set rent-increase levels through the RGB. (*Id.*; *see also* G-Max Compl. ¶¶ 74(c), 229.) But fatal to G-Max Plaintiffs' claims is that the City has not caused any of their alleged injuries. G-Max Plaintiffs do not challenge the RGB's rent adjustments, nor the City Council's declaration of a housing emergency. Instead, G-Max Plaintiffs challenge the HSTPA itself. (G-Max

Compl. ¶¶ 213–80.) Because G-Max Plaintiffs allegations against the City are in essence challenges to a state law and the resulting state actions, thus they have failed to allege any injuries that are fairly traceable to the City's conduct. *Lujan*, 504 U.S. at 560–61 ("[T]here must be a causal connection between the injury and the conduct complaint of—the injury has to be fairly traceable to the challenged action of the defendant . . . ." (quotation marks and alterations omitted)). Accordingly, all claims against the City are dismissed in their entirety for lack of standing.

G-Max Plaintiffs bring an FHA claim against all G-Max Defendants except the State. (G-Max Compl. ¶¶ 5, 21, 273–80.) This claim is wanting as G-Max Plaintiffs do not have standing to sue for violations of the FHA. The purpose of the FHA is to "eliminate all traces of discrimination within the housing field." *Cabrera v. Jakabovitz*, 24 F.3d 372, 390 (2d Cir. 1994) (quotation marks omitted). To effect this purpose, the FHA makes it unlawful to "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). The FHA extends "only to plaintiffs whose interests fall within the zone of interests protected by the law invoked." *Bank of Am.*, 137 S. Ct. at 1302 (quotation marks omitted). Thus, under the FHA, only an "aggrieved person" may bring a claim under the FHA. An "aggrieved person" is someone who "claims to have been injured by a discriminatory housing practice" or who believes that they "will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i). To

carry its burden of establishing standing, an FHA plaintiff "must allege specific, concrete facts demonstrating that the challenged practices harm [the plaintiff], and that [the plaintiff] personally would benefit in a tangible way from the court's intervention." *Palmieri v. Town of Babylon*, No. 01-CV-1399, 2006 WL 1155162, at *12 (E.D.N.Y. Jan. 6, 2006) (citing *Warth*, 422 U.S. at 508), *aff'd*, 277 F. App'x 72 (2d Cir. 2008).

G-Max Plaintiffs have not alleged sufficient facts to plausibly establish that they are "aggrieved person[s]" under the FHA. G-Max Plaintiffs are comprised of limited liability companies, a corporation, and two individuals who want to take over a rental unit from the only rent stabilized tenant in their building. (G-Max Compl. ¶¶ 22–33.) G-Max Plaintiffs allege that the HSTPA disproportionately benefits white renters. (*Id.* ¶¶ 208–12.). First, this conclusory allegation is far from the type of "specific, concrete" allegation that plausibly states a cognizable harm or that G-Max Plaintiffs would benefit in a tangible way from a favorable result in this case. *See Palmeri*, 2006 WL 1155162, at *2. For example, there are no specific allegations that these entities have been "deprived benefits from interracial associations when discriminatory rental practices kept minorities out of their apartment complex" protected by the FHA. *Bank of Am.*, 137 S. Ct. at 1303. Second, individual Plaintiffs Ordway and Guerrieri do not have standing because they no longer wish to rent one of their rent stabilized unit to *anyone*—regardless of their race, color, religion, sex, familial status, or national origin, which as such does not implicate the FHA protections. (G-Max Compl. ¶¶ 168–76.)

But even more problematic to G-Max Plaintiffs' FHA claim is that they fail to allege the necessary causal link between the HSTPA and the alleged pattern of racially segregated housing in New York. Under the FHA, there is a "robust causality requirement," which "protects defendants from being held liable for racial disparities they did not create." *Winfield v. City of New York*, No. 15-CV-5236, 2018 WL 1631336, at *2 (S.D.N.Y. Mar. 29, 2018) (quoting *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 542 (2015)). G-Max Plaintiffs have offered no such causal link between the HSTPA and the purported racial segregation caused by G-Max Defendants. (G-Max Compl. ¶¶ 5, 208–12, 273–80.) Further, G-Max Plaintiffs complain of economic harm and argue that this is sufficient to confer standing. But G-Max Plaintiffs do not actually allege that the economic harm to them is a result of the purported violations of the FHA. (*Id.* ¶¶ 130–31, 135, 140, 143–44, 154; G-Max Pls.' Mem. 71.) Instead, the G-Max Complaint alleges that the HSTPA has a disparate, adverse impact on racial and ethnic minority renters, thereby perpetuating residential segregation in New York which violates the FHA. (*Id.* ¶¶ 5, 208–12, 273–80.) G-Max Plaintiffs can only establish standing from economic harm that is the result of any FHA violation for which G-Max Plaintiffs would otherwise have standing. Because G-Max Plaintiffs have not met the "injury in fact" prong which is one of the "irreducible constitutional minimum[s] of standing," the FHA claim against all G-Max Defendants is dismissed. *Lujan*, 504 U.S. at 560.

D. Physical Takings Under the Fourteenth and Fifth Amendments

1. Applicable Law

BRI and G-Max Plaintiffs bring facial and as-applied Takings Clause claims. The Takings Clause of the Fifth Amendment provides that no "private property [shall] be taken for public use, without just compensation." U.S. CONST. amend. V. The Takings Clause applies to the states through the Fourteenth Amendment. *See Kelo v. City of New London*, 545 U.S. 469, 472 n.1 (2005). To state a takings claim under § 1983, BRI and G-Max Plaintiffs must show "(1) a property interest (2) that has been taken under color of state law (3) without just compensation." *Frooks v. Town of Cortlandt*, 997 F. Supp. 438, 452 (S.D.N.Y. 1998) (citing *HBP Assoc. v. Marsh*, 893 F. Supp. 271, 277 (S.D.N.Y. 1995)). A plaintiff's property interest must stem from some "legitimate claim of entitlement" and not just an "abstract need or desire" or "unilateral expectation." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). The law recognizes two types of takings: physical takings and regulatory takings. *See Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 374 (2d. Cir. 2006).

A physical taking only occurs when the government "requires the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (emphasis omitted); *accord Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 94 (2d Cir. 1992); *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 162 (S.D.N.Y. 2020); *Greystone Hotel Co. v. City of New York*, 13 F. Supp. 2d 524, 527 (S.D.N.Y. 1998). The

Second Circuit has explained that a physical taking happens when "government has committed or authorized a permanent *physical* occupation of property." *Southview Assocs.*, 980 F.2d at 92–93 (emphasis added). The "*absolute* exclusivity of the occupation, and *absolute* deprivation of the owner's right to use and exclude others from the property . . . [are] hallmarks of a physical taking." *Id.* at 93 (emphasis in original) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982)). Recently, in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) the Supreme Court reiterated that there are "heightened concerns associated with '[t]he permanence and absolute exclusivity of a physical occupation' in contrast to 'temporary limitations on the right to exclude,' and . . . '[n]ot every physical invasion is a taking.'" 141 S. Ct. at 2074–75 (alterations in original) (quoting *Loretto*, 458 U.S. at 435 n.12). The Supreme Court has explained that there are different circumstances under which a physical taking may occur, such as "condemnations" of property, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002), seizure of property through eminent domain, *Kelo*, 545 U.S. at 489, or physical occupation of property, *Loretto*, 458 U.S. at 427. Physical appropriations are the "clearest sort of taking." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). Such *per se* takings are assessed by the rule: "[t]he government must pay for what it takes." *Cedar Point*, 141 S. Ct. at 2071 (quoting *Tahoe Sierra*, 535 U.S. at 322).

"A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015); *see also*

Bucklew v. Precythe, 139 S. Ct. 1112, 1127 (2019) ("A facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications."). This is the "most difficult challenge to mount successfully," because the challengers "must establish that no set of circumstances exists under which the [HSTPA] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The "uphill battle" of a facial claim is "made especially steep" when those seeking relief "have not claimed . . . that [government action] makes it commercially impracticable" for the plaintiffs to continue business use of their property. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495–96 (1987).

2. Analysis

a. Physical Taking – Facial Challenge

G-Max Plaintiffs bring a facial physical takings claim.[14] Specifically G-Max Plaintiffs argue that the

[14] BRI Plaintiffs explain that "the essence of the [BRI] Complaint is a facial challenge" to the HSTPA. (BRI Pls.' Mem. at 68). But BRI Plaintiffs by their own admission state that they "do not allege a physical encroachment." (*Id.* at 15.) BRI Plaintiffs misstate the law regarding physical takings, describing these challenges as applicable "when the degree of the regulation is such that it removes an opportunity for a reasonable return on investment." *Id.* This describes the analysis for *regulatory* takings. For example, BRI Plaintiffs cite *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), but that case is generally regarded as the first case to address the concept of regulatory takings—in which the Supreme Court held that government *regulation* will not be considered a taking unless the regulation "goes too far." *Id.* at 415. BRI Plaintiffs confuse the two types of takings in other portions of their Memorandum of Law. (*See* BRI Pls.' Mem. at 13–15, 22 (BRI Defendants cite *regulatory* takings cases such as *Tahoe-Sierra, Eastern Enterprises. v. Apfel*, 524 U.S. 498 (1998),

condominium and cooperative conversion amendments grant tenants "a collective veto right over such conversions, thereby denying owners the right to dispose of their property and exit the rental business via a conversion." (G-Max Pls.' Mem. at 44; G-Max Compl. ¶ 218.) G-Max Plaintiffs also claim that this elevates possession rights of the tenant over those of a lawful property owner through "drastic restrictions on owners' ability to reclaim units for personal use and occupancy." (G-Max Compl. ¶¶ 82, 102–09, 218–19.) G-Max Plaintiffs take issue with the elimination of a "sunset provision" under which previous versions of the RSL would have expired without legislative action. (*Id.* ¶ 218.) G-Max Plaintiffs further contend that by "compelling owners to remain in the rental business absent tenant consent, the co-op/condo conversation go far beyond 'regulat[ing] an existing landlord-tenant relationship.'" (G-Max Pls.' Mem. at 45.) G-Max Plaintiffs explain that "[b]y blocking the eventual non-renewal of existing tenancies . . . while simultaneously allowing current tenants to block conversion altogether . . . , the HSTPA forces owners to remain in the rental business on a going-forward basis." (*Id.*; G-Max Compl. ¶¶ 104–11.) G-Max Plaintiffs claim that this "compel[s] owners to remain in the rental market against their will." (*Id.*) Finally, G-Max Plaintiffs dispute G-Max Defendants' argument that the various

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Dolan v. City of Tigard, 512 U.S. 374 (1994), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).) As such, these arguments will be addressed in the regulatory takings analysis *infra*.

exit options available to property owners foreclose a physical takings claim. (*Id.* at 47; G-Max CVH Mem. at 11–12; G-Max State Defs.' Mem. at 18.)

In *Yee*, the Supreme Court considered a Takings Clause challenge to a local rent control ordinance, in which mobile home park owners claimed that the law amounted to a physical taking because it had the effect of depriving them of all use and occupancy of their property. 503 U.S. at 524–25. Specifically, the plaintiffs complained that the ordinance granted tenants the right to permanently occupy and use such property. *Id.* at 525. The Supreme Court disagreed and ruled that the ordinance did not amount to a physical taking of the mobile home park owner's property because the property owners *voluntarily* rented their land. *Id.* at 527–28. "Put bluntly, no government has required any physical invasion of petitioners' property." *Id.* at 528. Instead, "[the] tenants were invited by [the property owners], not forced upon them by the government." *Id.* (citing *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252–53 n.6 (1987)).

Consistent with *Yee*, courts have repeatedly recognized that when owners invite tenants to physically occupy their apartments, laws like the HSTPA (and RSL before it) simply govern the property owners' voluntary use of their property as rental housing. *See 335-7 LLC*, 2021 WL 860153 at *8 ("In accordance with *Yee*, courts in this Circuit have long upheld the RSL against facial physical taking challenges because landlords have voluntarily offered their property for rent and, by the express terms of the RSL, landlords can evict unsatisfactory tenants, reclaim or convert units, or exit the market."); *see also*

Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal ("*FHLMC*"), 83 F.3d 45, 47–48 (2d Cir. 1996) (noting that "where a property owner offers property for rental housing, the Supreme Court has held that government regulation of the rental relationship does not constitute a physical taking"); *Southview Assocs.*, 980 F.2d at 94–95 (finding no physical taking where the government limited the development of property because property owners had not lost the right to possess, use, and dispose of the property); *Greystone Hotel*, 13 F. Supp. 2d at 527 (holding that the challenged RSL provision regulates the terms on which property owners can rent rooms, the amounts it can charge, and the services it must provide, but does not amount to a physical occupation of the property); *Higgins*, 630 N.E. 2d at 632–33 (concluding that it is not a physical taking to require an owner who has voluntarily acquiesced in the use of its property for rental housing to rent to family members succeeding the tenant); *Seawall Assocs. v. City of New York*, 542 N.E.2d 1059, 1065 (N.Y. 1989) (holding 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").

Here, the Court finds no physical taking because the HSTPA does not compel physical occupation. The HSTPA merely changes the percentage required to convert buildings into condominiums or cooperatives from 15% of tenants to 51%. *See* HSTPA, Part N, § 1. Prior to the enactment of the HSTPA, RSL allowed tenants who did not purchase to remain in their homes. N.Y. GEN. BUS. LAW § 352-eeee(2)(c)(ii) (McKinney 2021) (proving that "[n]o eviction

proceedings will be commenced at any time against non-purchasing tenants for failure to purchase"). However, the HSTPA did not create forced occupancies or authorize "physical invasion" of G-Max Plaintiffs' properties, thus moving their allegations outside the zone of a taking because such amendments do not compel landlords to use their properties for new and unexpected use. *Yee*, 503 U.S. at 528. As G-Max Plaintiffs acknowledge, the State has previously adjusted the tenant-approval threshold for cooperative and condominium conversions under General Business Law § 352-eeee. In the 1970s, the threshold for conversion was 35%, and prior to the HSTPA it was 15%. (G-Max Compl. ¶¶ 107, 112.) In other words, while the HSTPA may have added certain hurdles to the conversion of rental properties, the HSTPA does not on its face require G-Max Plaintiffs to rent their properties; that was a choice of their own making, thus defeating their Takings Claim. *See CHIP*, 492 F. Supp. 3d at 44 (concluding that the "[p]laintiffs' argument fails . . . because . . . no physical taking has occurred in the first place"); *see also 335-7 LLC*, 2021 WL 860153, at *8 ("[C]ourts in this Circuit have long upheld the RSL against facial physical taking challenges because landlords have voluntarily offered their property for rent and, by the express terms of the RSL, landlords can evict unsatisfactory tenants, reclaim or convert units, or exit the market."); *Higgins*, 630 N.E.2d at 633 ("Because the challenged regulations may require the owner-lessor to accept a new occupant but not a new use of its rent-regulated property, we conclude that appellants have failed to establish their claim that,

facially, a permanent physical occupation of appellants' property has been effected.").

It is true that in *Yee*, the Supreme Court acknowledged that the day would come in which a statute, on its face or as applied, would "compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Yee*, 503 U.S. at 528. Indeed, G-Max Plaintiffs assert that property conversions are "no longer feasible" under the HSTPA, but offer no specific allegations to support that they have attempted such conversions. (G-Max Compl. ¶¶ 149, 163, 181, 186, 191, 196.) In any event, even if G-Max Plaintiffs were unable to obtain the required number of purchase agreements for conversion, they may still use the property as a rental, thus defeating their facial claim. *See Elmsford*, 469 F. Supp. 3d at 162–64 (noting that the "Supreme Court has ruled that a state does not commit a physical taking when it restricts the circumstances in which tenants may be evicted"); *335-7 LLC*, 2021 WL 860153, at *8–10 (rejecting a physical takings claim). In addition, whether this amendment renders conversion a "near-impossibility" as G-Max Plaintiffs allege is a question more aptly suited for a regulatory takings analysis as it is essentially asking whether the regulation goes "too far." *1256 Hertel Ave. Assocs. v. Calloway*, 761 F.3d 252, 263 (2d Cir. 2014).

Therefore, the Court finds that G-Max Plaintiffs' facial takings claim should be dismissed.

b. Physical Taking – As-Applied Challenge

BRI and G-Max Plaintiffs also bring as-applied physical takings claims.[15] To be clear, BRI and G-Max Plaintiffs do not allege condemnation, seizure by eminent domain, or physical encroachment of any property. Instead, BRI Plaintiffs argue that the HSTPA constitutes a physical taking because it "deprives property owners of their basic ownership rights to either choose, include or exclude those that it selects from their property and to possess, use, and dispose of their property or concomitantly, to use, rent and own their property without improper, illegal and unconstitutional government interference and restriction." (BRI Compl. ¶ 99.) As BRI Plaintiffs describe it: the HSTPA "dramatically limit[s] the ability of property owners to dispose of their own property . . . [which] effects an unconstitutional physical taking . . . ." (*Id.* ¶ 124.) BRI Plaintiff do not object to the physical presence of tenants, instead they

[15] The Court notes that not once in the 98-page BRI Complaint do BRI Plaintiffs mention an "as-applied" taking challenge to the HSTPA. (*See generally* BRI Compl.) The Court believes that given the extremely high burden to mount a successful facial challenge for a physical or regulatory taking that BRI Plaintiffs styled claims as "as-applied" given the less stringent standard. However, the BRI Complaint is devoid of analysis as to its application to the various landlords involved in the BRI Action. Instead, BRI Plaintiffs repeatedly assert that the HSTPA is unconstitutional in all circumstances—which is a facial, not as-applied, challenge. (BRI Compl. at 95–97.) As such, the Court construes BRI Plaintiffs takings challenge as a facial one and dismisses it for the same reasons as it dismisses the G-Max Plaintiffs' claim.

object to the financial terms of the tenants' occupation. (*See id.* ¶ 105 (alleging the HSTPA effects a physical taking because it "has eliminated almost every avenue that allowed a transition from regulation to free market"). G-Max Plaintiffs, with the exception of Plaintiffs Ordway and Guerrieri, lodge a similar complaint—that the HSTPA deprives owners of "their fundamental rights to possess, use, admit or exclude others, and dispose of their property, thereby effecting an unconstitutional physical taking . . . ." (G-Max Compl. ¶ 7; G-Max Pls.' Mem. at 44–51.) G-Max Plaintiffs focus on certain provisions of the HSTPA, specifically the (1) limitations on converting rental units into condominiums or cooperatives, (2) restrictions on recovery of a unit for personal use, and (3) changes to the eviction process. (G-Max Compl. ¶¶ 82, 103, 122.)

Takings are rooted in the disruption of an owner's "bundle of property rights" which include the rights to "possess, use[,] and dispose of" property. *Horne v. Dep't of Agric.*, 576 U.S. 350, 361–62 (2015) (quoting Loretto, 458 U.S. at 435) (quotation marks omitted). Previous examples of actionable takings include installation of physical items on buildings, *Loretto*, 458 U.S. at 438, the seizure of control over private property, *Horne*, 576 U.S. at 361–62, and takings through eminent domain, *Kelo*, 545 U.S. at 489. Like the plaintiffs in *CHIP*, BRI Plaintiffs maintain the first and third strands in *Horne*'s bundle of property rights as they continue to possess the properties and can dispose of them through sale. 492 F. Supp. 3d at 43. BRI Plaintiffs principally argue that BRI Defendants limit their use of property through enactment of the HSTPA—and to some extent

interfere with their ability to dispose of the property—which is sufficient to constitute a physical taking. (BRI Pls.' Mem. at 23–27.)

BRI Plaintiffs' allegations fall short of plausibly alleging an as-applied physical taking. As the Supreme Court has explained to find a physical taking the state must "not simply take a single 'strand' from the 'bundle' of property rights" but instead "chop[] through the bundle, taking a slice of every strand." *Loretto*, 458 U.S. at 435. A regulation which involves no physical invasion, such as the HSTPA, cannot form the basis of a *physical* takings claim. BRI Plaintiffs' claim fails, because under binding case law of *Loretto*, *Horne*, *Yee*, and others, no physical taking ever actually occurred. As articulated in *CHIP*, "[n]o precedent binding on this Court has ever found any provision of a rent-stabilization statute to violate the Constitution." 492 F. Supp. 3d at 38.[16] Importantly, the "fact of a taking is fairly obvious in physical takings cases." *Buffalo Teachers*, 464 F.3d at 374; *see also Loretto*, 458 U.S. at 421 (finding a physical taking where New York law provided that a landlord must permit a cable television company to install

[16] Indeed, the Second Circuit has rejected physical takings claims against rent stabilization laws, like the HSTPA. *See Harmon v. Markus*, 412 F. App'x 420 (2d Cir. 2011) (summary order); *FHLMC*, 83 F.3d at 47–48. Furthermore, even if the HSTPA goes beyond prior versions of the rent stabilization laws in New York, "it is not for a lower court to reverse this tide." *FHLMC*, 83 F.3d at 47; *see also 335-7 LLC*, 2021 WL 860153, at *10 (holding that plaintiffs had not sufficiently alleged an as-applied physical takings challenge because "these limitations [do not] lock[] [the] [p]laintiffs out of screening their tenants or leaving the rental market.").

equipment on the owner's property); *Horne*, 576 U.S. at 361 (holding that the government's formal demand that plaintiffs turn over a percentage of their raisin crop is a "clear physical taking").[17] This is in contrast to a regulatory taking where the government "merely . . . bans certain private uses" of property. *Tahoe-Sierra*, 535 U.S. at 322–23. BRI Plaintiffs do not allege that they have been deprived of title to their property, or that they are unable to sell the property if they choose. Instead, BRI Plaintiffs complain of several burdensome aspects of the HSTPA in Westchester County. (BRI Compl. ¶ 100; *see also* BRI Pls.' Mem. at 15.) For example, BRI Plaintiffs point to the fact that owners are generally required to tender renewal leases to tenants in rent stabilized apartments. (*Id.* ¶ 100(b).) BRI Plaintiffs also highlight that the HSTPA grants succession rights to certain family members who have lived with the tenant of record in a rent stabilized apartment for a certain period of time before the tenant dies or moves out. (*Id.* ¶ 100(d); BRI Pls.' Mem. at 25–26, 44.) *See* N.Y. COMP. CODES R. & REGS. ("N.Y.C.R.R.") tit. 9, § 2523.5 (2021). However, these renewal leases and familial succession rights are not creations of the HSTPA. As BRI Defendants note,

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[17] BRI Plaintiffs cite *Loretto* and note that the Supreme Court found a taking where there was minimal intrusion by the use of the property for cable equipment. (BRI Pls.' Mem. at 23.) *Loretto* is distinguishable. In *Loretto*, the key part of the Supreme Court's analysis was that the cable equipment installed at appellant's building under a New York state law was a *physical intrusion* that resulted in a *permanent physical occupation*—very different from the rent regulations, like the HSTPA, that allegedly impact property owners' rights according to BRI and G-Max Plaintiffs. *Loretto*, 458 U.S. at 426.

these aspects have been "part of New York's rent stabilization regime for decades" and repeatedly upheld by courts. (BRI State Defs.' Mem. at 16.) *See, e.g., Golub v. Frank*, 483 N.E.2d 126 (N.Y. 1985) (explaining that RSL "provide[] that no tenant shall be denied a renewal lease except upon grounds specifically recognized by law"); *Lesser v. Park 65 Realty Corp.*, 527 N.Y.S.2d 787, 789 (App. Div. 1988) (noting that "[t]he family succession provisions . . . were enacted in response to the harsh consequences resulting from displacement from one's home upon the death or departure of a named tenant with whom a family member, not named in the lease, resided"). These longstanding and pre-existing provisions of the rent stabilization laws in New York cannot form the basis of BRI Plaintiffs' as-applied physical takings challenge to the HSTPA when these provisions predated its enactment.

BRI Plaintiffs also allege that the HSTPA forces owners to accept "the intrusion of strangers" or "prevents [them] from excluding strangers from the property" or mandates them to rent units "often to strangers who claim 'succession' rights." (BRI Compl. ¶¶ 33, 104, 107.) But this characterization is flawed, as an individual who lives in a rent stabilized apartment must prove he or she is a family member (or in an intimate relationship with the tenant of record) who has resided in the apartment for a period of two years or one year in the case of elderly or disabled persons. N.Y.C.R.R. tit. 9, § 2523.5. Such persons, either family or a person in an intimate relationship with the tenant, are a far cry from the "strangers" BRI Plaintiffs describe as foisted upon them infringing on their property rights. As noted

above, the Supreme Court has held that once a property owner "decides to rent his land to tenants, the government may . . . require the landowner to accept tenants he does not like." *Yee*, 503 U.S. at 529; *see also Higgins*, 630 N.E.2d at 633 (rejecting physical takings challenge to succession rights in rent-stabilized units because "the challenged regulations may require the owner-lessor to accept a new occupant but not a new use of its rent-regulated property"). As Judge Edgardo Ramos succinctly explained in *335-7 LLC*, even if the successor were indeed a "stranger[]," that feature of the law "is not a physical taking as long as it only forces new tenants, not a new use." 2021 WL 860153, at *9.[18, 19]

BRI Plaintiffs further claim that the ETPA grants tenants a "life estate." (BRI Compl. ¶¶ 43, 100(d).) G-Max Plaintiffs assert a similar claim—that the HSTPA's amendments to the eviction process

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[18] The Court notes that these challenged succession rules pre-date the HSTPA, and have been previously upheld by courts; therefore, such challenges to these rules cannot form the basis of a physical taking claim here. *See Harmon v. Markus*, No. 08-CV-5511, 2010 WL 11530596, at *1 (S.D.N.Y. Mar. 1, 2010), *aff'd* 412 F. App'x 420 (2d Cir. 2011).

[19] BRI Plaintiffs also describe the various changes in the HSTPA as "commandeer[ing] a[n] . . . easement." (BRI Compl. ¶¶ 100–01.) This assertion is meritless. An easement is a "nonpossessory right to *enter* and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 105 (2014) (emphasis added) (citing Restatement (Third) of Property: Servitudes § 1.2(1) (1998)). No allegation in the BRI Complaint plausibly demonstrates that the HSTPA effects a physical taking involving *entry* on to property and thus is not an easement. (BRI Compl. ¶¶ 100–01.)

essentially authorize a permanent physical occupation of their property. (G-Max Compl. ¶¶ 121–26.) But the Second Circuit has already rejected this argument because owners of rent-stabilized apartment offer their properties for rent and retain statutory rights to recover them. *Harmon*, 412 F. App'x at 422 (noting that landlords did not dispute retention of statutory rights such as recovery of property for personal use or demolition, or the ability to evict an unsatisfactory tenant, among others); *see also FHLMC*, 83 F.3d at 47–48 (finding no physical taking where the law regulated the terms under which the owner may use the property as previously planned); *Greystone Hotel*, 13 F. Supp. 2d at 527 (finding no physical taking in a forced conversion from renting to transients to leasing to permanent tenants). For example, owners of rent stabilized apartments can "recover possession of a housing accommodation because of immediate and compelling necessity . . . ." N.Y. UNCONSOL. LAW § 26-408(b)(1) (McKinney 2021). The lone change to this part of the rent stabilization law through the HSTPA is that a landlord can only recover possession for use "as his or her primary residence" or use for the same purpose for his or her immediate family. HSTPA, Part I, §1. But this modification still does not eliminate the owner's property rights—instead, it lawfully limits them. *See CHIP*, 492 F. Supp. 3d at 44 (dismissing physical taking claim because "while significant to investment value, personal use, unit deregulation, and eviction rights, is not so qualitatively different from what came before as to permit a different outcome."); *335-7 LLC*, 2021 WL 860153, at *9–10 (concluding that the HSTPA did not constitute a physical taking even though it restricted conversion,

eviction, and vacancy as the same was true in all of the cases where RSL have been upheld); *Greystone Hotel*, 13 F. Supp. 2d at 527 ("The challenged provisions regulate the terms on which [a property owner] can rent its rooms, the amounts it can charge, and the services it must provide. That is not a physical occupation . . . ."); *see also FHLMC*, 83 F.3d at 47–48 (holding that where property owners offer property for rental housing, governmental regulation of the rental relationship does not constitute a physical taking).

Contrary to BRI and G-Max Plaintiffs' assertions, owners retain many important statutory rights, even after passage of the HSTPA. (BRI Pls.' Mem. 16–17; G-Max Pls.' Mem. 9–10.) Aside from the ability to recover housing units for an "immediate and compelling necessity," landlords can evict tenants who fail to pay rent, who violate another substantial obligation of the lease agreement, commit a nuisance, or use the apartment for unlawful purposes. N.Y.C.R.R. tit. 9, § 2524.3. Landlords can recover property to demolish it, withdraw units for use as an owner-owned and operated business, or may withdraw the units from the rental market if the cost to repair dangerous living conditions "would substantially equal or exceed" the building's value. *Id.* § 2524.5. In Yee, the Supreme Court held that the ordinance at issue did not constitute a physical taking despite "limit[ing] the bases upon which a park owner may terminate a mobile home owner's tenancy." *Yee*, 503 U.S. at 524, 528. As explained in *335-7 LLC*, the Supreme Court in *Yee* reasoned that there was no physical taking because "[t]he mobile park owners had voluntarily made their property available to tenants and nothing in the law's terms required them to

continue to do so." 2021 WL 860153, at *8. The Supreme Court held that the law "merely regulate[d] petitioners' use of their land by regulating the relationship between landlord and tenant," which was consistent with longstanding precedent "that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." 503 U.S. at 528–29 (emphasis omitted) (collecting cases). The New York Court of Appeals has similarly held that RSL do not effect a facial physical taking because the "right to evict an unsatisfactory tenant or convert rent-regulated property to other uses remains unaffected." *Higgins*, 630 N.E.2d at 632.

Furthermore, under the HSTPA, landlords can convert rent regulated apartments to condominiums or cooperatives with purchase agreements from 51% of tenants. N.Y. GEN. BUS. LAW § 352-eee.[20] BRI and G-Max Plaintiffs concede that landlords can use these avenues to stop being landlords and end physical occupation of these properties as rent regulated units. (*See, e.g.*, BRI Compl. ¶¶ 100(b), 100(h) (noting that under the HSTPA property owners can refuse to renew leases in "narrow circumstances," but also alleging that condo conversions have been "virtually eliminated"); ¶ 109 (alleging that the HSTPA "significantly limits the owner's right not to renew" a

[20] The Court also notes that BRI and G-Max Plaintiffs' conversion challenges are speculative and not ripe as neither involve allegations that they have tried to actually obtain the 51% tenant agreements for conversion. (BRI Compl. ¶¶ 85(x)–(y), 120; G-Max Compl. ¶¶ 113, 149, 163, 181, 186, 191, 196.)

lease and also "substantially eliminates" the ability to remove a tenant); ¶ 111 (asserting that "non-renewal of a lease is permitted in certain limited circumstances where an owner seeks to occupy a unit or demolish a building"); G-Max Compl. ¶ 126 ("making it harder for property owners to evict tenants"); ¶ 175 ("demanding renewal leases in perpetuity"); ¶ 227 ("effects of rent-regulation []such as perpetual renewal and succession rights").) As BRI Defendants highlight, BRI Plaintiffs do not plausibly plead an individual owner would need to occupy more than one apartment, or why a corporate owner would need occupy a residential apartment—or more importantly how the lack of their ability to do so amounts to a physical taking. (BRI State Defs.' Mem. at 18.) Instead, the HSTPA prohibits an owner from refusing to renew rent-regulated leases in order to occupy more than one unit for him or herself or allowing a family member to do so, absent an immediate and compelling necessity. N.Y. UNCONSOL. LAW § 26-408(b)(1). G-Max Plaintiffs challenge the same restrictions regarding a property owner's personal use of property. But like BRI Plaintiffs, G-Max Plaintiffs acknowledge that at least some landlords may recover units for their own use through different avenues in the HSTPA. (G-Max Compl. ¶¶ 8, 122.) These concessions are fatal to the physical taking claims because this type of regulation of the landlord-tenant relationship is permissible. *See Loretto*, 458 U.S. at 440 (affirming that states hold "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").[21]

G-Max Plaintiffs, like BRI Plaintiffs, argue that the limited manner in which they may use their property under the HSTPA effectuates a taking. But the case law is clear: property owners who offer their properties for rent do not suffer from a taking based on laws that regulate the rental of that property. *See Higgins*, 630 N.E.2d at 633 (finding no physical taking where the property owner decided to rent to tenants); *see also Harmon*, 412 F. App'x at 422 (noting that "where . . . a property owner offers property for rental housing, the Supreme Court has held that governmental regulation of the rental relationship does not constitute a physical taking" (quoting *FHLMC*, 83 F.3d at 47–48)). Because "the government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land" the Court finds that BRI and G-Max Plaintiffs fail to allege a physical taking by the HSTPA. *See Yee*, 503 U.S. at 527 (second emphasis added) (finding no physical taking where petitioners voluntarily rented property and no physical invasion of the property had occurred); *335-7 LLC*, 2021 WL 860153, at *10 ("Although [the] [p]laintiffs complain that the RSL

[21] BRI Plaintiffs also allege that the HSTPA limits their right and ability to refuse to rent to prospective tenants. (BRI Compl. ¶¶ 110, 116). But these allegations ignore the many protections afforded to landlords by the HSTPA and prior incarnations of the law to investigate potential tenants. For example, property owners may perform credit checks and background checks precisely so that landlords maintain some control over to whom to offer leases. N.Y. REAL PROP. LAW § 238-a (McKinney 2021).

constitutes a physical taking by restricting their reversionary interests because conversion, eviction and vacancy are up to the tenant, not the owner, the same was true in all of the cases where the RSL has been upheld."); *CHIP*, 492 F. Supp. 3d at 43 ("The restrictions on [the landlords'] right to use the property as they see fit may be significant, but that is insufficient under the standards set forth by the Supreme Court and Second Circuit to make out a physical taking."); *Elmsford*, 469 F. Supp. 3d at 162–63 ("Government action that does not entail a physical occupation, but merely affects the use and value of private property, does not result in a physical taking of property.").

G-Max Plaintiffs Ordway and Guerrieri offer a more thorough as-applied analysis as to their physical taking claim. In particular, Ordway and Guerrieri assert that they cannot recover a third unit in their building for personal use to combine two floors into a single residence. (G-Max Compl. ¶¶ 168–76.) Prior to the enactment of the HSTPA, Ordway and Guerrieri initiated holdover proceedings in housing court to remove the current tenant in the unit they wished to occupy. (*Id.* ¶¶ 172–73.) These Plaintiffs argue that because of the HSTPA, they have lost their "fundamental right to occupy their own private property." (*Id.* ¶ 175.) Even assuming that there is an unwanted tenant in one of their rental units, Ordway and Guerrieri have failed to allege how HSTPA bars recovery of their unit. As discussed *supra*, under the HSTPA, a property owner may recover a unit because of "immediate and compelling necessity." HSTPA, Part I, §1. While the HSTPA limits recovery to one unit for personal use, Ordway and Guerrieri's other

units were recovered voluntarily. (G-Max Compl. ¶ 171.) The voluntary recovery of the other rental units means that under HSTPA there is no bar to recovering a unit based on "immediate and compelling necessity"—indeed to date, they have not exercised their rights to do so under this provision. HSTPA, Part I, §1. Thus, Plaintiffs Ordway and Guerrieri cannot claim that the HSTPA results in their inability to occupy their own private property when their property right of disposal, i.e. an exit option, is available to them. In particular, the return of Ordway and Guerrieri's adult son could serve as the immediate and compelling necessity as to why they need to recoup the unit for personal use, a remedy available to them under the HSTPA. (G-Max Compl. ¶ 174.) Aside from this option, Ordway and Guerrieri have other disposal options, as they could evict the tenant, upon request, if they provide a similar accommodation. N.Y. Admin. Code § 26-511(c)(9). In *Harmon*, the Second Circuit affirmed the dismissal of a physical takings challenge to RSL because landlords retained the right to recover possession of a unit for immediate and compelling necessity, as is the case here. 412 F. App'x at 422.[22,23]

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[22] While summary orders do not have precedential effect, the Court is not at liberty to disregard or contradict "a Second Circuit ruling squarely on point merely because it was rendered in a summary order" and rather should view such reasoning as "valuable appellate guidance." *United States v. Tejada*, 824 F. Supp. 2d 473, 475 (S.D.N.Y. 2010).

[23] It is also notable that while the "immediate and compelling necessity" standard is new for rent stabilized units, it has long been the standard for recovery for rent controlled units. *See* N.Y.C. Admin. Code 26-408; N.Y.C.R.R. tit. 9, § 2104.5(a)(1) (2021).

The right to recover a unit under the "immediate and compelling necessity" provision remains substantially unchanged by the HSTPA. *See* HSTPA, Part I, § 1 ("The landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his or her own personal use and occupancy as his or her primary residence or for the use and occupancy of his or her immediate family as their primary residence . . . .").

A recent decision from the First Department is instructive here. *See Harris v. Israel*, 142 N.Y.S.3d 497 (App. Div. 2021). In *Harris*, the court was tasked with determining whether the HSTPA applied to a holdover proceeding which had been pending for one year before the HSTPA's enactment. *Id.* at 498. Specifically, the court considered the same amended provision challenged by Ordway and Guerrieri, which governs an owner's right to refuse to renew a rent-stabilized lease on the ground that the owner seeks to recover the unit for her or her own personal use and occupancy as a primary residence. *Id.* The Appellate Division concluded that the amended provision was applicable to this proceeding. *Id.* However, while *Harris* was pending before the First Department, the Court of Appeals in *Regina Metropolitan Co. v. New York State Division of Housing and Community Renewal*, 154 N.E.3d 972 (N.Y. 2020), held that the HSTPA's rent overcharges could not apply retroactively without violating due process. *Id.* at 976–77. Consequently in *Harris*, the court reversed and reinstated the judgment of possession, applying *Regina Metro*'s reasoning "that an owner's increased liability and the disruption of relied-upon repose are impairments to his or her substantive rights" to preclude "any

retroactive application of HSTPA" given that "petitioner had spent several years reclaiming all other units at the property and was ultimately awarded a judgment of possession before [the] HSTPA's enactment." *Harris*, 142 N.Y.S.3d at 499. To put it more directly, *Harris* turned on "settled expectations" following a favorable *judgment*. *Id.* However, by their own admission, Ordway and Guerrieri have not obtained any judgment of possession. (G-Max Compl. ¶ 172 (noting that Ordway and Guerrieri "commenced owner-occupancy holdover proceedings . . . .").) Having only "commenced" an owner-occupancy holder proceeding by serving one "notice of non-renewal" which is not a judgment of possession, Ordway and Guerrieri have no "settled expectations" regarding their property. (*Id.*); *see Harris*, 142 N.Y.S.3d at 499.[24] The court in *Harris* ultimately determined that Part I of the HSTPA "impair[s] rights owners possessed in the past, increasing their liability for past conduct and imposing new duties with respect to transactions already completed." *Id.* (alteration in original). But Ordway and Guerrieri have merely just begun proceedings to repossess their unit.[25]

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[24] The Complaint is silent as to the status of Plaintiffs Ordway and Guerrieri's holdover proceedings in Brooklyn housing court to remove the tenant, which may render this claim moot if ultimately successful. (G-Max Compl. ¶¶ 172–73.)

[25] G-Max Plaintiffs further argue that *Regina Metro* and *Harris* should extend to the HSTPA's Part K regarding MCIs. (G-Max Pls.' Suppl. Letter, March 16, 2021; Dkt. No. 98.) But *Regina Metro* reaffirmed that "a statute that affects only 'the propriety of prospective relief' . . . has no potentially problematic retroactive effect even when the liability arises from past

The Supreme Court has explained that a plaintiff alleging a taking must show that the state regulatory entity has rendered a final decision on the matter and that the plaintiff has sought just compensation by means of an available state procedure. *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985), *overruled in part by Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). Prior to the Supreme Court's decision in *Knick*, the law in the Second Circuit had been that a taking is not without just compensation under § 1983 unless a plaintiff has exhausted all state remedies that may provide just compensation. 139 S. Ct. at 2169 (citing *Williamson Cnty.*, 473 U.S. at 195). However, the Supreme Court in Knick overruled the state-exhaustion requirement as an "unjustifiable burden on takings plaintiffs." *Id.* at 2167. This means that "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it." *Id.* at 2170. However, the Supreme Court reversed *Williamson County* only to the extent of finding that a property owner need not seek compensation from the State before raising a takings claim, but left undisturbed the "question [of] the validity of th[e] finality requirement." *Id.* at 2169; *see also Sagaponack Realty, LLC v. Village of Sagaponack*, 778 F. App'x 63, 64 (2d Cir. 2019) (explaining that "*Knick* leaves undisturbed

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conduct." 154 N.E.3d at 988 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994)). The MCI changes in the HSTPA make it so that "increases shall be collectible prospectively" and thus result in not impermissibly retroactive legislation. N.Y.C. Admin. Code § 26-511.1(8).

Williamson's requirement that a state regulatory agency must render a final decision on a matter before a taking claim can proceed").

Applying this principle here, Ordway and Guerrieri have not plausibly pled that the HSTPA inflicts an "*absolute* deprivation" of the right to their property, because they can recover the unit under the HSTPA. *Southview Assocs.*, 980 F.2d at 95 (finding no physical taking because "no absolute, exclusive physical occupation exist[ed]"); HSTPA, Part I, §1. Here, there has not been a final decision taking Ordway and Guerrieri's property. Instead, Ordway and Guerrieri's allegations merely establish personal use restrictions that govern the terms of an existing landlord-tenant relationship, which does not make plausible their takings claim. *See Dawson v. Higgins*, 610 N.Y.S.2d 200, 209 (App. Div. 1994) (upholding constitutionality of personal-use restrictions for rent-controlled apartments); *see also Higgins*, 630 N.E.2d at 632 ("That a rent-regulated tenancy might itself be of indefinite duration—as has long been the case under rent control and rent stabilization—does not, without more, render it a permanent physical occupation of property."). Thus, the as-applied physical takings challenge as to Plaintiffs Ordway and Guerrieri fails.

E. Regulatory Takings Under the Fourteenth and Fifth Amendments

1. Applicable Law

A regulatory taking occurs when the government acts in a regulatory capacity and such state regulation "goes too far" and "effects a taking." *Buffalo Teachers*,

464 F.3d at 374 (citation omitted). Courts view regulatory takings as either categorical or non-categorical. *See Sherman v. Town of Chester*, 752 F.3d 554, 564 (2d Cir. 2014). A categorical taking occurs in "the extraordinary circumstance when no productive or economically beneficial use of land is permitted." *Id.* (emphasis omitted) (quoting *Tahoe-Sierra*, 535 U.S. at 330); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (holding that government regulation of private property may be "so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment"); *Lucas*, 505 U.S. at 1019 (holding that the categorial rule applies when a regulation completely deprives an owner of "all economically beneficial use" of his or her property" (emphasis omitted)). Categorical takings occur only in a "narrow" set of circumstances. *Lingle*, 544 U.S. at 538. The regulatory takings framework applies in a myriad of circumstances, including use restrictions such as zoning ordinances, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–88 (1926), orders barring the mining of gold, *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958), and regulations that prohibit certain conduct on private property, *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979).

Anything short of a complete elimination of value or a total loss is a non-categorical taking, which is analyzed under the framework articulated in *Penn Central*. 438 U.S. at 124. The *Penn Central* analysis of a non-categorical taking "requires an intensive ad hoc inquiry into the circumstances of each particular case." *Buffalo Teachers*, 464 F.3d at 375. In applying *Penn Central*, courts must "weigh three factors to

determine whether the interference with property rises to the level of a taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Id.* (quotation marks omitted). The inquiry turns on whether "justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (quotation marks omitted). Notably, the Supreme Court cautioned that "[g]overnment action that physically appropriates property is no less a physical taking because it arises from a regulation." *Cedar Point*, 141 S. Ct. at 2072. The key inquiry is "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Id.* (citing *Tahoe-Sierra*, 535 U.S. at 321–323).

2. Analysis

a. Regulatory Taking—Facial Challenge

As noted, a *per se* regulatory taking exists when the government completely deprives an owner of all economically beneficial uses of one's property. *See Lingle*, 544 U.S. at 538. Such a categorical taking involves "the extraordinary circumstance when *no* productive or economically beneficial use of [property] is permitted." *Tahoe-Sierra*, 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1017 (emphasis in original)). BRI and G-Max Plaintiffs do not allege facts to support

that they have been deprived of *all* economical viable use of their property by the "mere enactment of the regulation[]"—here, the HSTPA. *Tahoe-Sierra*, 535 U.S. at 318. Instead, BRI and G-Max Plaintiffs only plead that the HSTPA decreases the value of their properties. (BRI Compl. ¶¶ 22–23, 33, 54, 69, 79, 81–82, 126(a), 128, 135(a)) (claims that the HSTPA results in decreased, diminution, or reduction in BRI Plaintiffs' property values); (G-Max Compl. ¶¶ 4–5, 9, 11, 91, 119, 127, 148, 154, 161, 176, 180, 185, 190, 195, 198–99, 202, 205, 227) (claims that the HSTPA drastically devalues or impairs the values of G-Max Plaintiffs' properties).)

As the court in *CHIP* noted, "[r]ent regulations have now been the subject of almost a hundred years of case law, going back to Justice Holmes. That case law supports a broad conception of government power to regulate rents, including in ways that may diminish — even significantly — the value of landlords' property." 492 F. Supp. 3d at 38. Importantly, "every regulatory-taking challenge to the RSL has been rejected by the Second Circuit." *Id.* at 44 (citing *W. 95 Hous. Corp. v. N.Y.C. Dep't of Hous. Pres. & Dev.*, 31 F. App'x 19, 21 (2d Cir. 2002) (summary order) (upholding that New York's rent stabilization laws are not subject to facial challenge as a regulatory taking)); *see Rent Stabilization Ass'n of the City of N.Y. v. Dinkins*, 5 F.3d 591, 595 (2d Cir. 1993) ("[T]he hardship provisions [of RSL], standing alone, obviously cannot effect a taking because they do not limit a landlord's rent in the first instance." (emphasis in original)); *see also Greystone Hotel*, 13 F. Supp. 2d at 528–29 (declining to find regulatory taking claim where plaintiffs conceded that the unregulated

portion of the building retained value); *FHLMC*, 83 F.3d at 48 (finding no regulatory taking where property owners could still rent their apartments and collect the regulated rents). Judge Ramos succinctly applied this vast case law to the HSTPA:

> [e]ven following the [HSTPA], the RSL does not strip landlords of all economic enjoyment of their rent-stabilized properties because they still collect rent from their tenants and, to the extent their rental income does not exceed their operating costs, they may seek hardship exemptions. They may also convert or sell their buildings.

335-7 LLC, 2021 WL 860153, at *11. The Court will follow the weight of authority that rejects facial regulatory takings claims such as those alleged in these cases. *See id.*; *see also Harmon v. Markus*, 2010 WL 11530596, at *3 (S.D.N.Y. Mar. 1, 2021) (noting that it is "well-settled law that a facial taking challenge to rent stabilization laws will not lie as of right"). Further, the Supreme Court has noted that it is "particularly important in takings cases to adhere to [its] admonition that 'the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary.'" *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 294–95 (1981)). The need for individualized analysis of such claims is why facial attacks face an uphill battle because "whether a taking has occurred depends . . . on a variety of financial and other information unique to each landlord." *Dinkins*, 5 F.3d at 597.

Because the Court concludes that the HSTPA is not a per se regulatory taking, BRI and G-Max Plaintiffs claims will be analyzed as a non-categorical taking under the framework articulated in *Penn Central*. *See Tahoe-Sierra*, 535 U.S. at 330 (explaining that a plaintiff must show no productive or economically beneficial use of his or her property to sustain a categorical regulatory takings claim); *cf. Greystone Hotel*, 13 F. Supp. 2d at 528 (concluding at summary judgment that failure to offer facts showing that plaintiff was denied economically viable use of its property forfeited a regulatory takings claim).[26] In applying the *Penn Central* factors, it is the Court's responsibility to "determin[e] when 'justice and fairness' require that economic injuries caused by

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[26] The Supreme Court's recent decision in *Cedar Point* is illustrative of what constitutes a *per se* regulatory taking and why BRI and G-Max Plaintiffs have failed to allege any. In *Cedar Point*, the Supreme Court held that a California regulation granting labor organizers a "right to take access" to private farms for three hours per day, 120 days per year, constituted a per se physical taking. 141 S. Ct. at 2069, 2080. The Supreme Court reasoned that because "the regulation grant[ed] a formal entitlement to physically invade the growers' land" and that did not arise from any "traditional background principle of property law" and was "not germane to any benefit provided to agricultural employers or any risk posed to the public," it "amount[ed] to simple appropriation of private property." *Id.* at 2080. Here, no such appropriation exists. Unlike the circumstances in *Cedar Point*, the HSTPA does not "grant[] a right to invade property closed to the public." *Id.* at 2077. Instead, BRI and G-Max Plaintiffs' "tenants were invited by [them], not forced upon them by the government." *Yee*, 503 U.S. at 528. This is in stark contrast to *Cedar Point* where the regulation at issue resulted in a *physical invasion* of property, which is entirely absent in both Actions here.

public action be compensated by the government, rather than disproportionality concentrated on a few persons." *Penn Cent.*, 438 U.S. at 124.[27]

b. Regulatory Taking—As-Applied Challenge

As discussed previously, a regulatory taking occurs when governmental regulation of private property "goes too far" and is "tantamount to a direct appropriation or ouster." *Lingle*, 544 U.S. at 537. In evaluating a regulatory takings claim, it is important to note that government regulation "involves the adjustment of rights for the public good, and that [g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 538 (citation and quotation marks omitted). Indeed, the Supreme Court has consistently recognized that "[s]tates have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Loretto*, 458 U.S. at 440; *see also Fla. Power*, 480 U.S. at 252 (noting that "statutes regulating the economic relations of landlords and tenants are not *per se* takings"). "When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge . . . ." *Yee*, 503 U.S. at 529 (citing *Pennell*, 485

[27] G-Max Plaintiffs argue that they have stated a facial regulatory takings claim. (*See* G-Max Pls.' Mem. at 33–36.) But the weight of the authority dictates otherwise as described above. Thus, the Court dismisses G-Max Plaintiffs facial regulatory takings claim.

U.S. at 12 n.6). Such forms of regulation are analyzed by engaging in the "essentially ad hoc, factual inquiries" necessary to determine whether a regulatory taking has occurred. *Kaiser Aetna*, 444 U.S. at 175. There are limits, however, to the power of the government to regulate property. In the words of Justice Holmes, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pa. Coal Co.*, 260 U.S. at 415. Mere profit loss, however, does not establish that a regulation has gone too far. *See Sadowsky v. City of New York*, 732 F.2d 312, 317 (2d Cir. 1984) ("[R]egarding economic impact, it is clear that prohibition of the most profitable or beneficial use of a property will not necessitate a finding that a taking has occurred."); *see also Penn Cent.*, 438 U.S. at 130 (noting that "the submission that [the plaintiffs] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable").

The Court must first evaluate the economic impact of the regulations on BRI and G-Max Plaintiffs. *Penn Cent.*, 438 U.S. at 124.[28] Put differently, the

[28] As previously noted, BRI Plaintiffs assert that the BRI Complaint is at bottom a facial challenge, but that the BRI Complaint should be construed as raising an as-applied challenge because the two are "the same" given the "HSTPA's restrictive effect upon each of the [BRI] Plaintiffs and their members." (BRI Pls.' Mem. at 68.) To that end, BRI Plaintiffs offer sweeping assertions that "[t]he broad draconian measures of the HSTPA amount to a [t]aking without the necessary demonstration of an as-applied challenge as the cumulative effects satisfying the law in that regard." (*Id.* at 9.) BRI Plaintiffs offer no legal support

Court needs to determine whether the HSTPA "amounts to a physical invasion or instead merely affects property interests through some public program adjusting benefits and burdens of economic life to promote the common good." *Jado Assocs., LLC v. Suffolk Cnty. Sewer Dist. No. 4-Smithtown Galleria*, No. 12-CV-3011, 2014 WL 2944086, at *6 (E.D.N.Y. June 30, 2014) (quoting *Lingle*, 544 U.S. at 539).[29] The

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that an as-applied regulatory takings challenge can be determined by evaluating the "cumulative effects" of the HSTPA. (*Id.*) Nevertheless, the Court will analyze BRI Plaintiffs' under-developed arguments as to their alleged as-applied challenge.

[29] BRI Plaintiffs claim that there are "several tests" to evaluate a regulatory taking and argue that the appropriate test for a regulatory taking is the "diminution of value" that "focuses on the impact of the regulation on the landowner." (BRI Pls.' Mem. at 28.) BRI Plaintiffs contend that "if the landowner's use is restricted such that the value of his property is drastically diminished, a taking exists no matter how great the benefit to the public." (*Id.* at 28–29; BRI Compl. ¶¶ 85(a)–(aa).) BRI Plaintiffs state that some courts "adhere to a lesser standard, finding takings where the existing use is substantially minimized." (*Id.*) The Court disagrees with this characterization of the case law. For example, BRI Plaintiffs cite to *Penn Central* for the notion that there is no set formula to trigger compensation for economic injury caused by public action. While that may be true, it does not support the assertion that courts find takings where existing use of property is substantially minimized by government regulation as they put forward.

In *Penn Central*, the Supreme Court held that owners could not establish a taking by showing that they had been denied the right to use superadjacent airspace; in fact, the Supreme Court reached a conclusion that was the opposite of what BRI Plaintiffs urge—that minimized use of property did *not* constitute a taking. *Penn Cent.*, 438 U.S. at 130, 138 ("[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that

changes by the HSTPA do not impose a physical occupation, but instead adjust the economic relationship between owners and tenants. *See FHLMC*, 83 F.3d at 48 (finding that the law "regulates the terms under which the owner may use the property" but does not "deprive [plaintiffs] of economically viable use of the property"); *Dinkins*, 805 F. Supp. at 163 ("A 'reasonable return' is not protected by law in this [C]ircuit."); *Harmon*, 412 Fed. App'x at 422 (affirming the dismissal of a taking claim because the "law does not subject the property to a use which its owner neither planned nor desired. Rather, it regulates the terms under which the owner may use

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they heretofore had believed was available for development is quite simply untenable."). BRI Plaintiffs also cite to cases regarding physical takings, total regulatory takings, and land-use exactions, (*see* BRI Compl. ¶ 101), which have no bearing on the as-applied regulatory taking claim here since each involves a distinct legal theory, *Lingle*, 544 U.S. at 546–48 (citing *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374). Instead, those cases deal with instances in which the government demanded an easement or other cession of property rights as a condition of granting a development permit or allowing certain land use. *Id.* The HSTPA does not impose on BRI Plaintiffs any such land-use exaction and thus the Court finds reliance on such cases unavailing.

Further, BRI Plaintiffs cite *Sherman v. Town of Chester*, 752 F.3d 566 (2d Cir. 2014) to support the contention that a regulatory taking occurs when government "effectively prevent[s] [plaintiff] from making any economic use of his property." (BRI Pls.' Mem. at 31.) But the BRI Complaint does not allege that BRI Plaintiffs have been deprived of all economic use of their property. Indeed, BRI Plaintiffs' allegations do not challenge any particular application of the HSTPA to any of the BRI Plaintiffs and instead make generalized assertions about the HSTPA's constitutionality, which is a facial, not as-applied challenge. (*See generally* BRI Compl.)

the property . . . ." (quoting *FHLMC*, 83 F.3d at 48)); *Greystone Hotel*, 13 F. Supp. 2d at 528 (holding that there was no taking where the plaintiff failed to show deprivation of "economically viable use of its property" and further held that plaintiff is "not guaranteed a 'reasonable return' on its investment"); *Higgins*, 630 N.E.2d at 633–34 (holding that because the regulations "do not affect the owner's right to receive the regulated rents" the plaintiffs "have not met their burden of showing the requisite deprivation of economically beneficial use of their property"). BRI and G-Max Plaintiffs do not allege that the HSTPA deprives them of all of their properties' economic value; instead, both assert that the rents they are able to charge are insufficient. (BRI Compl. ¶¶ 22–23, 33, 46, 76, 79, 102, 107; G-Max Compl. ¶¶ 12, 59, 71, 85–93, 128–67.)[30] For example, BRI Plaintiffs allege that the HSTPA "reduced the market value of regulated properties in some cases by over 50%." (BRI Compl. ¶ 128.) In a similar vein, G-Max Plaintiffs argue that "[a]ll [G-Max] Plaintiffs have been harmed . . . [by] the HSTPA's provisions, which independently and cumulatively deprive [them] of their private property without compensation." (G-Max Compl. ¶ 127.) The G-

[30] BRI Plaintiffs complain that the rent increases authorized each year for rent-stabilized units in Westchester County are insufficient. (*See* BRI Compl. ¶¶ 78, 80.) However, rent increases are not determined by any of the BRI Defendants and instead are determined by the Westchester RGB, which is not a party in the BRI Action. (*Id.* ¶¶ 34, 78, 80.) BRI Plaintiffs have thus not plausibly alleged that the HSTPA is unconstitutional on the grounds that property owners are unsatisfied with the rent increased approved by the RGB in Westchester County, and this falls short of establishing a regulatory taking. (*Id.* ¶ 80.)

Max Complaint purports to detail specific examples of the HSTPA's "direct harmful impacts on each individual [G-Max] Plaintiff." (*See id.* ¶¶ 128–96; G-Max Pls.' Mem. at 11–18.) But the Second Circuit has held that the owner of rent regulated property "is not guaranteed [a] 'reasonable return' on investment." *FHLMC*, 83 F. 3d at 48. Indeed, courts in the Second Circuit have concluded that a property owner has "no constitutional right to what it could have received in an unregulated market." *Greystone Hotel*, 13 F. Supp. 2d at 528 (citing *FHLMC*, 83 F. 3d at 48). Stated otherwise, a "mere diminution in the value of property, 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); Andrus, 444 U.S. at 66 ("When [the Supreme Court] review[s] [a] regulation, a reduction in the value of property is not necessarily equated with a taking."); *FHLMC*, 83 F.3d at 48 (denying regulatory taking claim because "[a]lthough [plaintiff] will not profit as much as it would under a market-based system, it may still rent apartments and collect the regulated rents"); *Dinkins*, 805 F. Supp. at 163 (explaining that "the Second Circuit does not consider the denial of a 'reasonable return' as necessarily preventing an owner's economically viable use of his land" that constitutes a per se regulatory taking); *see also Kabrovski v. City of Rochester*, 149 F. Supp. 3d 413, 425 (W.D.N.Y. 2015) (noting that a taking "does not occur merely because a property owner is prevented from making the most financially beneficial use of a property"); *Donovan Realty, LLC v. Davis*, No. 07-CV-905, 2009 WL 1473479, at *5 n.3 (N.D.N.Y. May 27, 2009) (describing that the "mere

diminution in value or inability to exploit property to the fullest economic extent" is insufficient to support takings claim); *Sterngass v. Town of Woodbury*, 433 F. Supp. 2d 351, 356 (S.D.N.Y. 2006) (holding that there is no taking where a zoning change prevented a property owner from "develop[ing] the land to its highest and best use"), *aff'd*, 251 F. App'x 21 (2d Cir. 2007) (summary order). Other courts have declined to find regulatory takings where the property values were reduced well beyond what the HSTPA allegedly does here. *See, e.g., Village of Euclid*, 272 U.S. at 384 (approximately 75%); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (92.5%); *Pulte Home Corp. v. Montgomery County*, 909 F.3d 685, 696 (4th Cir. 2018) (83%); *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (81%); Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1348 (Fed. Cir. 2004) (92%); *William C. Haas & Co., Inc. v. City & County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (roughly 95%).

Second, the Court is to evaluate whether the HSTPA interferes with investment-backed expectations to the point of constituting a taking. BRI and G-Max Plaintiffs claim that the HSTPA interferes with the investment-backed expectations by changing the reimbursement rate and recoupment period for MCIs and IAIs. (BRI Compl. ¶¶ 12, 56, 126(b); G-Max Compl. ¶¶ 2, 11–12, 85, 86–88.) BRI Plaintiffs broadly suggest that in looking at the "varied factors impacted by the HSTPA, the *Lingle* criteria for a regulatory taking fits, i.e., there is a substantial, and in fact, monumental impact and interference with investment backed expectations" and in attacking the "permanency" of the ETPA, which they argue

"essentially forever preclud[es] the right to exclude from one's property," that the HSTPA effects a regulatory taking. (BRI Pls.' Mem. at 33.)[31] G-Max Plaintiffs claim that the effect of the HSTPA's "drastic infringements on fundamental property rights is to strip rent-regulated properties of economic value and eliminate any chance that owners had of realizing a reasonable return or profit on their investments." (G-Max Compl. ¶ 91.) But both the BRI and G-Max Complaints fail to allege that these changes made their properties entirely unprofitable by decreasing the percentage of IAI costs that owners can compel tenants to pay, or by increasing the minimum amortization period for MCIs. The "mere diminution in the value of property," regardless of how serious, "is insufficient to demonstrate a taking." *Concrete Pipe & Prods.*, 508 U.S. at 645. BRI and G-Max Plaintiffs' allegations that their properties have materially lost value or are less profitable do not render the HSTPA a regulatory taking. *See Andrus*, 444 U.S. at 66 ("[L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim."). Judge Ramos recently considered and rejected this very argument in *335-7 LLC* and explained that given the range of expectations among property owners, landlords cannot possibly allege that RSL frustrate the reasonable investment-backed expectations of every

[31] It is worth noting again that BRI Plaintiffs have made clear throughout this case that HSTPA, not the ETPA, is the sole law being challenge in the instant BRI Action. Thus, the Court does not consider BRI Plaintiffs arguments against the ETPA. (BRI Compl. ¶ 1.)

landlord it affects. *CHIP*, 492 F. Supp. 3d at 47. Further, the HSTPA only takes effect whenever the local legislative body of a city, town, or village determines the existence of a public emergency pursuant to the ETPA—demonstrating that the law is indeed not permanent. HSTPA, Part A. Thus, the Court is not persuaded by BRI Plaintiffs' arguments on this point. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Furthermore, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests. Park Ave. *Tower Assocs. v. City of New York*, 746 F.2d 135, 139–40 (2d Cir. 1984) (explaining that a takings claim based on loss profits is undermined further by the legion of cases that have upheld regulations which severely diminished the value of commercial property); *CHIP*, 492 F. Supp. 3d at 51 ("[B]y the time these [p]laintiffs invested, the RSL had been amended multiple times, and a reasonable investor would have understood it could change again. Under the Second Circuit's case law, it would not have been reasonable, at that point, to expect that the regulated rate would track a given figure, or that the criteria for decontrol and rate increases would remain static."); *335-7 LLC*, 2021 WL 860153, at *12 ("[The] [p]laintiffs also cannot argue that the [HSTPA] interfered with their reasonable investment-backed expectations. Rent regulation has existed in some form in the City for over seventy years, and rent stabilization in particular has existed for over fifty years. Plaintiffs knowingly entered a highly regulated industry."). The Constitution does not demand that property owners be

able to pass on to their tenants every penny of every expense and certainly not that they will be able to do so within a certain time frame. As explained during the legislative debate for the HSTPA, the changes to MCIs and IAIs were intended to "help the tenants . . . stay" in their units, as "some of the individual apartment improvements [were being] made not to improve the apartments as such, but simply to raise the rent." Assembly Bill A08281, Chamber Tr. at 35, 73 (New York 2019), https://www2.assembly.state.ny.us/write/upload/transcripts/2019/6-14-19.html. Further, the challenges to the HSTPA that adjust the recoupment rate for MCIs and IAIs follow two recent changes to these very processes. In both 2011 and 2015, the New York State Legislature ("the State Legislature") lengthened the recoupment rate and amortization period for IAIs and MCIs.

The 2011 amendment changed the formula for IAIs so that a landlord could increase rent by 1/60 the cost of improvement in buildings with more than 35 units, changed from 1/40. 2011 N.Y. SESS. LAWS ch. 97 (McKinney). In 2015, the amendment lengthened the amortization period for MCIs from 84 months to 96 months for buildings with 35 or fewer units, and to 108 months for buildings with more than 35 units. 2015 N.Y. SESS. LAWS ch. 20 (McKinney). While BRI and G-Max Plaintiffs may be unhappy that full recovery of all reasonable MCIs and IAIs costs are now on a longer schedule, the Second Circuit has held that loss of a reasonable return does not amount to a regulatory taking. *Park Ave. Tower*, 746 F. 2d at 138 ("[T]he inability of [landlords] to receive a reasonable return on their investment by itself does not, as a matter of law, amount to an unconstitutional taking . . . .")

Finally, under *Penn Central* the Court looks to the "character of the governmental action." *Penn Cent.*, 438 U.S. at 124. Like the rent-control law upheld by the Supreme Court in *Bowles v. Willingham*, 321 U.S. 503 (1944), the HSTPA does not "*require* any person to . . . offer any accommodations for rent." *Id.* at 517 (emphasis added). Instead, the HSTPA imposes "negative restriction[s]" on permitted uses, which are "uncharacteristic of a regulatory taking." *Buffalo Teachers*, 464 F.3d at 375; *see also Elmsford*, 469 F. Supp. 3d at 168 (finding eviction moratorium did not have the character of a taking). As discussed above, the HSTPA does not result in the physical occupation of property, but instead simply adjusts the economic relationship between owners and tenants. *FHLMC*, 83 F.3d at 48 (affirming the denial of a regulatory taking claim because plaintiff failed to demonstrate deprivation of economically viable use of the property); *Dinkins*, 805 F. Supp. at 163 (noting that the Second Circuit does not consider the denial of a reasonable return, for rent regulation, as necessarily preventing an owner's economical viable use of his land); *Greystone Hotel*, 13 F. Supp. 2d at 528–29 (finding no regulatory taking where plaintiff failed to offer facts showing that it was denied economically viable use of its property even if such use was not the plaintiff's preferred one); *Higgins*, 630 N.E. 2d at 633–34 (rejecting regulatory taking claim where the regulations did not affect the owner's right to receive the regulated rents). The HSTPA builds upon a long-standing regime of rent-stabilization that has repeatedly been upheld by courts in previous regulatory takings challenges. *335-7 LLC*, 2021 WL 860153, at *12 (rejecting a regulatory taking by

reasoning that the Second Circuit has rejected the notion that loss profits, much less loss of a reasonable return, alone could constitute a taking); *CHIP*, 492 F. Supp. 3d at 51 (finding that because plaintiffs made their investments in rent-stabilized property against a backdrop of New York law that suggested RSL could change, plaintiffs could thus not allege that the HSTPA violated their reasonable investment-backed expectations).

"Legislation designed to promote the general welfare commonly burdens some more than others." *Penn Cent.*, 438 U.S. at 133. To the extent BRI and G-Max Plaintiffs attack the efficacy and the wisdom of the HSTPA, (BRI Compl. ¶¶ 5, 75, 87, 94, 244; G-Max Compl. ¶¶ 65–101, 114, 246), the case law is clear that the relevant inquiry for the courts is whether a law "arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones" or reflects "land-use control as part of some comprehensive plan," *Penn Cent.*, 438 U.S. at 132. The HSTPA applies to about one million rental units in New York City and 25,000 rental units in the 21 municipalities in Westchester County. (BRI Compl. ¶ 1, at 98; G-Max Comp. ¶ 60.) The alleged burdens of the HSTPA are thus shared among many more property owners than the law upheld in *Penn Central*. As G-Max Defendants point out, landlords receive corresponding benefits because the HSTPA facilitates housing for those who otherwise could not afford it, specifically in some instances to New Yorkers who provide vital but undercompensated services, and some who would experience homelessness without it. (G-Max CVH Mem. at 24.) This in turn creates a more diverse community, and owners of unregulated

properties (or regulated ones with market values below regulated rents) can charge more because of the increased demand for real estate these community benefits allow. (*Id.*) The Supreme Court has noted that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *See Loretto*, 458 U.S. at 426. The HSTPA is the State Legislature's response to an ongoing housing emergency in New York and, as such, is a "public program adjusting the benefits and burdens of economic life to promote the common good." *1256 Hertel Ave.*, 761 F.3d at 264 (citation omitted).

Putting the merits aside however, BRI and G-Max Plaintiffs claims are not ripe for judicial review. "Ripeness is a doctrine rooted in both Article III's case or controversy requirement and prudential limitations on the exercise of judicial authority." *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005). The ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977); *see also Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003) ("Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an

administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." (citation and quotation marks omitted)); *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 455 (S.D.N.Y. 2012) ("Article III of the Constitution limits the jurisdiction of the federal courts to cases or controversies of sufficient immediacy and reality and not hypothetical or abstract disputes." (citation and quotation marks omitted)), *vacated in part on other grounds*, 755 F.3d 87 (2d Cir. 2014).

As discussed above, "*Knick* leaves undisturbed" the requirement in *Williamson* that "a state regulatory agency must render a final decision on a matter before a taking claim can proceed." *Sagaponack Realty*, 778 F. App'x at 64. BRI and G-Max as-applied regulatory taking claims are not ripe because the property owners have not tried to take advantage of available hardship exemptions. N.Y.C. Admin. Code §§ 26-511(c)(6), (6-a), 26-405(g); N.Y. UNCONSOL. LAW §§ 8626(d)(4), (5), 8584(4). Indeed, a taking claim "depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering . . . waivers allowed by law." *Palazzolo*, 533 U.S. at 620–21; *see also Thomas v. Town of Mamakating*, 792 F. App'x 24, 27 (2d Cir. 2019) (summary order) (explaining that judicial review is "condition[ed] . . . on a property owner submitting at least one meaningful application for a variance" (quoting *Murphy*, 402 F.3d at 348)). For example, several G-Max Plaintiffs complain of mounting taxes, water bills, electric bills, insurance premiums, and the cost of regular maintenance and

repairs. (G-Max Compl. ¶¶ 129, 134, 147, 160, 165.) BRI and G-Max Plaintiffs may apply to the DHCR for a hardship exemption if their rental incomes do not exceed their expenses by at least a statutorily defined percentage. N.Y.C. Admin. Code § 26-511(c)(6). However, G-Max Plaintiffs do not allege that they sought and have been denied hardship exemptions to address any shortfalls in their ability to pay their debts, thus fatally undermining this claim. *See Hodel*, 452 U.S. at 296–97 (denying relief where plaintiffs could have sought variance or waiver from the challenged provisions for use of their property); *Greystone Hotel*, 13 F. Supp. 2d at 528–29 (denying regulatory takings challenge as premature because the plaintiff had not applied for a hardship exemption); *Harmon*, 2010 WL 11530596, *3 (finding regulatory taking not ripe where the plaintiffs failed to apply for a hardship exception). BRI and G-Max Plaintiffs also complain of not being able to convert building to condominiums or cooperative buildings. But these allegations also suffer from the same ripeness defect, as none of the BRI and G-Max Plaintiffs has tried to obtain the requisite tenant agreements for conversions to condominiums or cooperative buildings. (BRI Compl. ¶¶ 100(h), 124, at 95; G-Max Compl. ¶¶ 149, 163, 181, 186, 191, 196.)

Accordingly, because BRI and G-Max Plaintiffs have not shown that the HSTPA inflicts "any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking" these claims are dismissed. *Keystone*, 480 U.S. at 493.

F. Substantive Due Process Under the Fourteenth Amendment

1. Applicable Law

BRI and G-Max Plaintiffs assert substantive due process claims. To assert a substantive due process claim, plaintiff must show that (1) "a constitutionally cognizable property interest is at stake;" and (2) [D]efendants' "alleged acts against [the property] were arbitrary, conscience-shocking, or oppressive in the constitutional sense, not merely incorrect or ill-advised." *Ferran v. Town of Nassau*, 471 F.3d 363, 369–70 (2d Cir. 2006) (citations and quotation marks omitted).

To uphold the legislative choice in the face of a substantive due process challenge, a court need only find some "reasonably conceivable state of facts that could provide a rational basis" for the legislative action. *Beatie v. City of New York*, 123 F.3d 707, 712 (2d Cir. 1997) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). To pass constitutional muster, the legislation under review merely must "find some footing" in the realities of the subject addressed by the law. *Heller*, 509 U.S. at 321. Thus, the Second Circuit has recognized that "it may be seen that today it is very difficult to overcome the strong presumption of rationality that attaches to a statute." *Beatie*, 123 F. 3d at 712. To succeed on such a claim, BRI and G-Max Plaintiffs must "convince the [C]ourt that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). However, the Court "will not strike down a law as irrational simply

because it may not succeed in bringing about the result it seeks to accomplish," because "the problem could have been better addressed some other way," or because "the statute's classifications lack razor-sharp precision." *Beatie*, 123 F. 3d at 712. Thus, if public "officials responsible for the enforcement guidelines reasonably might have conceived that the policies would serve legitimate interests, those guidelines must be sustained." *All Aire Conditioning, Inc. v. City of New York*, 979 F. Supp. 1010, 1018 (S.D.N.Y. 1997).

The Due Process Clause "protects individual liberty against certain government actions." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (quotation mark omitted). The Due Process Clause offers heightened protection against government interference with certain fundamental rights and liberty interests. *Reno v. Flores*, 507 U.S. 292, 301–02 (1993). These fundamental rights are "specific freedoms protected by the Bill of Rights" and those liberties which have been designated by the Supreme Court in a long line of cases. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing cases in which the Supreme Court recognized various fundamental rights such as the right to marry or to have an abortion). However, economic regulations, such a rent-stabilization, are not subject to the same heightened scrutiny as fundamental rights. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines or infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."); *see*

also Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 461 (2d Cir. 1996) ("Where the claimed right is not fundamental, the government regulation need only be reasonably related to a legitimate state objective.").

2. Analysis

BRI and G-Max Plaintiffs assert that the HSTPA violates rent regulated property owners' substantive due process rights in violation of both the U.S. and New York Constitutions. (BRI Compl. ¶¶ 40–70, 84–97, at 92–94; G-Max Compl. ¶¶ 239–54.)[32,33] Specifically, BRI Plaintiffs argue that the HSTPA violates due process because it is not "rationally related to achieve any of the ends that have been used to justify the extreme measures taken under this law" and that it "fails to[] achieve the ends that it is claimed to serve." (BRI Compl. ¶¶ 42–44, 50.) To support their claim, BRI Plaintiffs cite studies by economists that the HSTPA does not achieve the purposes for which it allegedly was passed. (*Id.* ¶¶ 59, 146.) G-Max Plaintiffs make similar allegations, such as that the HSTPA "does not substantially advance legitimate state interests" and "does not accomplish its stated

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[32] Because "[d]ue process . . . rights under the New York state and United States constitutions are coextensive with one another," these claims are analyzed together. *Johns v. Home Depot U.S.A., Inc.*, 221 F.R.D. 400, 408 n.3 (S.D.N.Y. 2004).

[33] G-Max Plaintiffs point to a New York Court of Appeals case that struck down the provisions of Part F of the HSTPA that would have applied new overcharge calculations retroactively, extended the limitations period for past overcharge claims, and retroactively imposed treble damages. *Regina Metro.*, 154 N.E.3d at 1001–03. Because this issue has already be adjudicated, G-Max Plaintiffs' challenge to these provisions is denied as moot.

objective." (G-Max Compl. ¶ 242.) G-Max Plaintiffs also argue that the HSTPA "contravenes its purported intent—supposedly, to preserve affordable housing in New York" but "in fact, [it] do[es] the opposite." (*Id.* ¶ 5.) While the specifics of their allegations somewhat differ, BRI and G-Max Plaintiffs both allege broadly that the HSTPA is "arbitrary and irrational" on its face. (BRI Compl. ¶¶ 2–3, 41, 69, 91, 95, 97, at 93–94; G-Max Compl. ¶¶ 1, 5, 20, 69, 101–02, 243, 252, 278.)[34]

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[34] Both BRI and G-Max Plaintiffs challenge various aspects of the HSTPA as violating due process. BRI Plaintiffs challenge the changes in MCIs and IAIs recoupment, the high rent and high-income regulation, the vacancy and longevity "bonus," the 5% vacancy threshold, limitations on preferential rents, and eligibility for rent regulation. (BRI Pls.' Mem. at 53–57; BRI Compl. ¶¶ 5, 8–9, 41, 48–49, 59, 81, 91–93, 120.) G-Max Plaintiffs challenge the following aspects of the HSTPA under the due process clause:

> (1) its repeal of the income cap for rent-regulated apartments with rents above a certain threshold . . . (2) its repeal of provisions that allowed units to be removed from rent stabilization or control once the rent crossed a statutory high-rent threshold and the unit became vacant; (3) its repeal of provisions permitting larger rent increases for a new tenant after a vacancy; (4) its modification of the preferential rent provisions such that owners who voluntarily agreed to a further-reduced rent in the past (even before the HSTPA took effect) cannot even charge the government-approved legal regulated rent upon renewal; (5) its lowering of the rent increase cap for MCIs from 6% to just 2% in rent-stabilized apartments in New York City, from 15% to 2% in rent-controlled apartments in New York City, and from 15% to 2% in other counties when landlords make MCIs (and its elimination of such increases after 30 years); (6) its retroactive application of these MCI rent increase caps

First, as a threshold matter, BRI and G-Max Plaintiffs cannot invoke the substantive due process doctrine to circumvent the requirements of takings claim. In *Stop the Beach Renourishment, Inc. v. Florida. Department of Environmental Protection*, 560 U.S. 702 (2010) (plurality opinion), the Supreme Court explained that plaintiffs cannot use substantive due process "to do the work of the Takings Clause" in circumstances in which "a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior." *Id.* at 721; *see also Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) ("Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" (quoting *Graham v. Connor*,

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> to rent increases attributable to MCIs that were approved within the seven years *prior* to the amendment taking effect; (7) its outright elimination of MCIs for buildings with 35% or fewer rent-regulated units; (8) its cap of $15,000 over 15 years on recoverable IAI spending—spread across a maximum of just three IAIs . . . (9) its restrictions on evicting tenants who do not pay their rent, potentially extending their tenancies for up to a year; (10) its curtailment of owners' rights to reclaim possession of their units for personal use and occupancy . . . (11) its retroactive expansion of the limitations, record-retention, and lookback periods for rent overcharge claims; and (12) its imposition of substantial new restrictions on co-op/condo conversions . . . .

(G-Max Compl. ¶ 243 (emphasis in original).)

490 U.S. 386, 395 (1989))); *Gounden v. City of New York*, No. 10-CV-3438, 2011 WL 13176048, at *4 (E.D.N.Y. Apr. 22, 2011) (finding that the Fifth Amendment, an explicit textual source, guides the analysis for plaintiff's taking claim rather than substantive due process). Undaunted by contrary authority, BRI Plaintiffs contend that "a reading of the case law reveals" that they may bring a substantive due process claim that "arise[s] out of the same facts as their takings claim." (BRI Pls.' Mem. at 47.) In support of this assertion, BRI Plaintiffs rely on Justice Kennedy's concurrence in *Lingle* and his concurrence in *Stop the Beach*, pointing to the notion that "a regulation might be so arbitrary or irrational as to violate due process." (*Id.* (citing *Lingle*, 544 U.S. at 548–49 (Kennedy, J., concurring); *Stop the Beach*, 560 U.S. at 737 (Kennedy, J., concurring)).) But a concurrence is not binding precedent. *See Maryland v. Wilson*, 519 U.S. 408, 412–13 (1997) (observing that statement in a concurrence does not "constitute[ ] binding precedent"). Given the lack of authority for the claim, the Court rejects it and dismisses the due process claims. *Stop the Beach*, 560 U.S. at 721.

However, even when considered on the merits, the Court concludes that the due process claims fail under rational basis review.[35] BRI Plaintiffs argue that their

[35] BRI Plaintiffs dispute the standard of review for their due process claim. BRI Plaintiffs first argue that strict scrutiny should apply to their due process claim but only a page later in their brief state that such a claim "requires that [the] economic legislation be supported by a legitimate legislative purpose furthered by a *rational* means." (BRI Pls.' Mem. at 50–51 (emphasis added and citation omitted); BRI Compl. ¶ 5, at 92 (stating that the HSTPA "warrants strict scrutiny" and should be

due process rights are violated due to "the lack of surveys and findings of an emergency for decades." (BRI Pls.' Mem. at 49.) BRI Plaintiffs point to "the amount of housing construction in Westchester in the last decades," asserting that this is "more than adequate housing." (*Id.*) BRI Plaintiffs further contend that the HSTPA "impinges on substantive property rights, not merely economic regulation, but basic restriction on a person's ability to use his or her own property without arbitrary and unconscionable government restriction." (*Id.* at 51.) BRI Plaintiffs

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struck down because it is not "narrowly tailored" to serve a compelling government interest).) For the purposes of resolving the instant Motions, the Court construes this to mean that BRI Plaintiffs contend that the HSTPA should be analyzed under a strict scrutiny standard. And in the event the Court disagrees with that standard, BRI Plaintiffs argue that the HSTPA does not even pass muster under rational basis review. However, the HSTPA does not involve suspect classifications, nor does it impinge on any fundamental rights. *See Pennell*, 485 U.S. at 13–14 (holding that the Supreme Court "will not overturn a statute that does not burden a suspect class or a fundamental interest unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational" (alteration omitted)). Further, BRI Plaintiffs offer no authority or basis to establish that there is a fundamental right to rent apartments without government regulation. (*See generally* BRI Pls.' Mem.) Given the lack of support offered by BRI Plaintiffs and the case law holding otherwise, the Court concludes that HSTPA is subject to a rational basis standard. *See Sidberry v. Koch*, 539 F. Supp. 413, 419 (S.D.N.Y. 1982) ("[H]ousing is not a fundamental right, and classifications affecting housing are subject only to the 'rational relationship' test."). G-Max Plaintiffs do not advocate for "heightened" or "strict" scrutiny of their due process claim. (G-Max Pls.' Mem. at 53 n.45.)

lodge conclusory allegations to challenge the lack of underlying data to support the State Legislature's concern about housing emergencies while offering no analysis as to why the HSTPA does not pass rational basis review to warrant discovery. (*Id.* at 51–52.)

G-Max offers similar arguments about the purported goals of the HSTPA and questions the law's efficacy at addressing such issues surrounding affordable housing. (G-Max Pls.' Mem. at 52–63.) Specifically, G-Max Plaintiffs highlight that instead the HSTPA

> authorizes tenants to remain entrenched in rent-regulated units no matter how high the rent or how high their incomes[,] ([G-Max] Compl. ¶ 245); how the repeal of the sunset provisions severs any purported link between the HSTPA and the "emergency" it is purportedly designed to address[,] (*id.* ¶ 246); how it amends the co-op/condo conversion rules for *unregulated* properties, even though the conversion of such buildings has no conceivable nexus to affordable housing[,] (*id.* ¶ 114); and how certain provisions are given impermissibly retroactive effect[,] (*id.* ¶¶ 82, 85, 88–89). Indeed, the [G-Max] Complaint explains that, through its far-reaching web of now-permanent restrictions on ownership rights, the HSTPA will *necessarily* exacerbate the emergency it is supposedly intended to address. *See id.* ¶¶ 64, 73, 75–76, 245.

(*Id.* at 53.) But the Second Circuit has held that "[l]egislative acts that do not interfere with fundamental rights or single out suspect

classifications carry with them a strong presumption of constitutionality and must be upheld if rationally related to a legitimate state interest." *Beatie*, 123 F.3d at 711 (quotation marks omitted). A regulation "may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315; *see also Lingle*, 544 U.S. at 544–45 (noting that the "reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established," and that such deference is preferable to "choos[ing] between the views of two opposing economists"); *Beatie*, 123 F.3d at 713 (holding that "a lack of direct empirical support for the [legislature's] assumption" could not "rebut the presumption that the statute has a rational basis"). 2019 N.Y. SESS. LAWS ch. 36, N.Y. Comm (McKinney)

The State Legislature had a rational basis to pass the HSTPA to achieve its goals related to the State's housing crisis. Specifically, the State Legislature found 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." N.Y. Comm. Report, S. 6458 ("Committee Report"), 242nd Sess. (2019). In direct response to such a concern, the State Legislature limited landlords' ability to deregulate units so that tenants would not be displaced and curtailed landlords' ability to increase rents. The HSTPA also addressed the issues of housing instability and tenant hardship, both of which are recognized as a legitimate state goal. *See Pennell*, 485 U.S. at 14 n.8 ("The consideration of tenant hardship also serves the additional purpose . . . of reducing the

costs of dislocation that might otherwise result if landlords were to charge rents to tenants that they could not afford."); *CHIP*, 492 F. Supp. 3d at 52 (upholding RSL where the housing shortage was only one of multiple justifications offered for the regulation, and concluding that a statute must be upheld so long as any one justification is valid). The State's interest in stabilizing rent, limiting a landlord's ability to charge more than the regulated rent, preventing deregulation of rent-stabilized apartments, and restricting the ability of landlords to remove tenants in certain circumstances are rationally related to the goal of maintaining stable rents and keeping tenants in their homes. *Pennell*, 485 U.S. at 13 (noting that the Supreme Court "ha[s] long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare" and this includes "protecting tenants from burdensome rent increases"); *see also Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992) ("[T]he State has a legitimate interest in local neighborhood preservation, continuity, and stability."). Rent stabilization laws, like the HSTPA, serve the aim of keeping tenants in their homes. *See Higgins*, 630 N.E.2d at 634 (finding a "close causal nexus" between the RSL and preventing homelessness); *CHIP*, 492 F. Supp. 3d at 52 (rejecting Due Process challenge to the HSTPA given the multiple justifications for the law, such as alleviating New York City's housing shortage).[36] As the Supreme

[36] Plaintiffs in *335-7 LLC* also raised a due process claim but agreed to dismissal and conceded that their damages claim against the State was barred by sovereign immunity. As such,

Court long ago articulated in *Pennell*, the goal of "preventing excessive and unreasonable rent increases caused by the growing shortage of and increasing demand for housing . . . is a legitimate exercise of . . . police powers." 485 U.S. at 12 (quotation marks omitted).

Importantly, one of the broadest aims of the HSTPA is to make housing more affordable. HSTPA, Part D, § 1 ("The situation has permitted speculative and profiteering practices and has brought about the loss of vital and irreplaceable affordable housing for working persons and families. The legislature therefore declares that in order to prevent uncertainty, potential hardship[,] and dislocation of tenants living in housing accommodations subject to government regulations as to rentals and continued occupancy as well as those not subject to such regulation, the provisions of this act are necessary to protect the public health, safety[,] and general welfare."). Even dating back to 1969 when the first RSL were passed, the City Council at the time found that landlords were "demanding exorbitant and unconscionable rent increases," which caused "severe hardship to tenants." N.Y.C. Admin. Code § 26-501. Limiting landlords' ability to charge more than the regulated rent, placing caps on the amount chargeable for credit checks and late fees, preventing deregulation of units, and changing the percentage needed to covert buildings into condominiums and cooperatives are related to the overall goal of

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the district court dismissed both claims. 2021 WL 860153, at *4 n.2.

preventing excessive and unreasonable rent increases rampant throughout New York State and serve the aim of making housing more affordable. The New York State Senate sought to lock in preferential rents to close the loophole that permitted owners to increase rents by a greater percentage than that approved by the local RGBs, and to prevent sharp rent increases that could force tenants to be displaced from their apartments. *See* Committee Report. ("[The HSTPA was] enacted in response to an ongoing housing shortage crisis, as evidenced by an extremely low vacancy rate. Under tight rental markets, tenants struggle to secure safe, affordable housing, and landlords have little incentive to keep tenants in place long term by offering consistently low rent increases.").[37] The New York State Senate explained in its justification of the HSTPA that the City and the municipalities in Nassau, Westchester, and Rockland struggle to protect their regulated housing stock, which is critical in "maintain[ing] affordable housing for millions of low and middle income tenants." *Id.* The New York State Senate went on to describe that the rent regulations in the HSTPA make it so that

[37] It is noteworthy that versions of Part E of the HSTPA, which prohibits an owner from adjusting the amount of preferential rent upon the renewal of a lease, have been introduced almost every year at other Legislative Sessions before the New York State Senate dating back to 2009. *See* Senate Bill S2845, 2019-2020 Legislative Session (showing previous versions of Part E introduced in Legislative Sessions in 2009-2010, 2011-2012, 2013-2014, 2015-2016, and 2017-2018), https://www.nysenate.gov/legislation/bills/2019/s2845/amendment/original. Thus, BRI and G-Max Plaintiffs cannot plausibly claim to be surprised that the HSTPA interfered with their reasonable expectations regarding regulation of rent stabilized units.

"residents can afford to live there without the threat of eviction, the fear of rapid and unaffordable rent increases, or rent burden." *Id.* These aims are "rationally related to a legitimate government interest." *Beatie*, 123 F.3d at 711; *see also Pennell*, 485 U.S. at 13 (applying rational basis review to a rent regulation and highlighting that the Supreme Court has "long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare").

While BRI and G-Max Plaintiffs wish to cast doubt on the wisdom of the HSTPA, "it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary to sit as superlegislature to weigh the wisdom of legislation." *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 124 (1978) (quotation marks omitted). Given the clear connection between the State Legislature's purpose and the enactment of the HSTPA, Plaintiffs' allegations regarding the efficacy of the law do not diminish that it aims to serve the permissible goal, even if imperfectly, to address housing issues in the State. (*See* BRI Compl. ¶¶ 44–70; G-Max Compl. ¶¶ 75–78.) The Supreme Court has "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). It is long settled that "States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs . . . ." *Id.* at 730. BRI and G-Max

Plaintiffs' substantive due process claims therefore fail to state a claim and are consequently dismissed.

G. Equal Protection

1. Applicable Law

G-Max Plaintiffs also bring equal protection claims. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which . . . den[ies] to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. This is "essentially a direction that all persons similarly situated be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *see also Sound Aircraft Servs., Inc. v. Town of East Hampton*, 192 F.3d 329, 335 (2d Cir. 1999) ("At its core, equal protection prohibits the government from treating similarly situated persons differently."). To state an equal protection claim, G-Max Plaintiffs must "plausibly allege that [they have] been intentionally treated differently from others similarly situated and no rational basis exists for that different treatment." *Progressive Credit Union v. City of New York*, 889 F.3d 40, 49 (2d Cir. 2018) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). The Constitution guarantees the "right to be free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322 (1980). Where a challenged policy neither disadvantages a suspect class nor interferes with a fundamental right, the claim will survive constitutional scrutiny if the policy is rationally related to a legitimate state purpose or interest. *San*

Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

2. Analysis

G-Max Plaintiffs allege an equal protection violation. (G-Max Compl. ¶¶ 255–64.)[38] Specifically, G-Max Plaintiffs claim that the HSTPA "singles out building owners whose properties happen to include rent-regulated units . . . for oppressive treatment that . . . bears no rational relationship to the goal of providing affordable housing." (*Id.* ¶¶ 257, 262.) G-Max Plaintiffs do not contend that the HSTPA disadvantages a suspect class or interferes with a fundamental right; instead they argue that the law is not rationally related to a legitimate state interest. (G-Max Pls.' Mem. at 63–64.) Rational basis review is the proper standard to analyze equal protection challenges to rent stabilization laws. *See Black v. State of New York*, 13 F. Supp. 2d 538, 542 (S.D.N.Y. 1998) ("The rational relationship standard is the appropriate standard for testing the validity under the Equal Protection Clause of laws regulating housing rental rates."); *see also Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (applying rational relationship standard to statute that mandated timely determination of eviction proceedings).[39] Under this standard, a

[38] G-Max Plaintiffs bring an equal protection violation under both the federal and State constitutions, which are analyzed under the same standard. *See Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006) ("[W]e have held that our Equal Protection Clause 'is no broader in coverage than the Federal provision.'").

[39] G-Max Plaintiffs do not dispute that rational basis review applies to their equal protection claim. (G-Max Compl. ¶¶ 257, 262.)

challenged statute is given a strong presumption of validity and then tested to determine if the classification it creates is rationally related to a legitimate state interest. *City of Cleburne*, 473 U.S. at 440; *Beach Commc'ns*, 508 U.S. at 314–15. "[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Beach Commc'ns*, 508 U.S. at 313. Indeed, following this principle, courts have upheld prior iterations of RSL in New York against equal protection challenges. *See Black*, 13 F. Supp. 2d at 542 (dismissing equal protection challenge to RSL's succession provisions because "prevention of the loss of housing by apartment inhabitants" is "a legitimate goal of the state and city legislatures"); *see also Pennell*, 485 U.S. at 14 (rejecting equal protection claim to a provision of a San Jose rent control law because the ordinance was designed to serve the legitimate purpose of protecting tenants and could hardly be viewed as irrational).

There is no doubt that the HSTPA passes the rational basis test. As noted above, the goals of the HSTPA are rationally related to a legitimate state interest in the stability of the New York housing market and other aims as explained in the analysis of G-Max Plaintiffs' substantive due process claim. Accordingly, G-Max Plaintiffs equal protection claims also fail as a matter of law.

H. Contract Clause Under Article I, § 10

1. Applicable Law

Article I, § 10 provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST., art. I, § 10, cl. 1. To state a

claim for violation of the Contract Clause, a complaint must allege sufficient facts to demonstrate that state law has "operated as a substantial impairment of a contractual relationship." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992) (citations omitted). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Id.* Even if a state law constitutes a substantial impairment, however, it will survive a Contract Clause challenge if it serves "a significant and legitimate public purpose" and "the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983) (alterations in original) (quoting *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 22 (1977)).

To determine whether a Contract Clause violation exists, the threshold question is "'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Id.* at 411. As the severity of impairment increases, so too does the level of scrutiny to which the legislation is subjected. *Id.* As a measure of contractual expectations, one factor to be considered in determining the extent of the impairment is "whether the industry the complaining party has entered has been regulated in the past." *Kraebel v. N.Y.C. Dept. of Hous. Pres. & Dev.*, 959 F.2d 395, 403 (2d Cir. 1992) (citation omitted). The next question is whether the state has "a significant and legitimate public purpose behind the regulation."

Energy Rsrvs., 459 U.S. at 411. Lastly, the Court must consider "whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *Id.* at 412 (brackets in original) (citations and quotations omitted).

2. Analysis

BRI and G-Max Plaintiffs challenge the HSTPA's change to preferential rents as a violation of the Contract Clause. U.S. CONST., art. I, § 10, cl. 1. (*See* BRI Compl. ¶¶ 121–23; G-Max Compl. ¶¶ 265–72.) BRI Plaintiffs also argue that the HSTPA "diminishes the ability of a landlord to maintain the housing, perform capital repairs, do individual apartment improvements, and eliminates the availability of housing for those in the most need due to the purported 'goal.'" (BRI Pls.' Mem. at 60.) Similarly, G-Max Plaintiffs allege that the HSTPA has impaired existing contractual relationships based on other provisions aside from preferential rents, which include limits on MCIs and IAIs that were already under contract, limiting the amount recoverable in a summary proceeding, "destroying the benefit of the bargain for owners who contracted with the City to offer affordable housing units under the Article XI program," and a change to the percentage required for cooperative and condominium conversions. (G-Max Compl. ¶ 268.)[40] G-Max Plaintiffs make facial and as-

[40] The G-Max Complaint alleges the HSTPA "destroy[s] the benefit of the bargain for owners who contracted with the City to offer affordable housing units under the Article XI program." (G-Max Compl. ¶ 268(d).) But none of the G-Max Plaintiffs claims

applied challenges under the Contract Clause. (*Id.* ¶ 267.) BRI Plaintiffs argue that the HSTPA violates the Contract Clause as it "impairs the existing lease (contract) agreements." (BRI Compl. at 96.) G-Max Plaintiffs lodge a similar complaint, alleging that the HSTPA causes the "substantial impairment of existing contracts," rendering the law "invalid." (G-Max Compl. ¶ 5.) Specifically, G-Max Plaintiffs allege that the HSTPA "has undermined the bargains embodied in these contracts, interfered with the contracting parties' reasonable expectations, and prevented landlord owners, including [G-Max] Plaintiffs, from safeguarding their rights." (*Id.* ¶ 269.)[41] BRI and G-Max Plaintiffs also challenge the

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that it opted into rent stabilization under Article XI. G-Max Plaintiffs also argue that the HSTPA renders cooperative and condominium conversions impossible for owners who had already entered into contracts to finance such conversions under the prior regime. (G-Max Compl. ¶ 268(e).) But G-Max Plaintiffs have not alleged that they entered into such conversion contracts that have been impacted by the HSTPA. Thus, G-Max Plaintiffs lack standing to assert these claims and such claims are consequently dismissed. *See* U.S. CONST., art. III, § 2.

[41] G-Max Plaintiffs describe the HSTPA as causing a substantial impairment of existing contracts. (G-Max Compl. ¶ 5.) G-Max Plaintiffs also state that "[t]he only real winners here will be wealthy white tenants who, according to U.S. Census Bureau data, already disproportionality benefit from rent regulation, and who are now poised to receive a massive windfall at the expense of minority renters who will be frozen out of historically majority-white neighborhoods." (*Id.*) But as G-Max State Defendants point out, according to the most recent 2014 New York City Housing and Vacancy Survey, renter occupied housing units by rent regulation status show that 64.4% of rent-stabilized tenants are racial minorities, and only 35.6% are white. *See Series IA: Renter Occupied Housing Units by Rent*

provision which provides that the rent under a renewal lease "shall be no more than the rent charged to and paid by the tenant prior to that renewal, as adjusted by the most recent applicable [Rent Guidelines Board-approved] increases and any other increases authorized by law." *See* HSTPA, Part E § 1. The change is essentially that this provision applies to all rent regulated rents, including preferential rents.

BRI and G-Max Plaintiffs have not plausibly stated a Contract Clause violation because their claims are based on future, rather than existing, contracts. (BRI Pls.' Mem. at 62–64; G-Max Pls.' Mem. at 65–66.) The law has been well settled for almost 200 years that the Contract Clause does not "limit the ability of the government to regulate the terms of *future* contracts." *Traher v. Republic First Bancorp, Inc.*, 432 F. Supp. 3d 533, 539 (E.D. Pa. 2020) (emphasis in original) (citing *Ogden v. Saunders*, 25 U.S. 213 (1827)). Recently, in *CHIP*, the court evaluated similar claims by plaintiffs that the HSTPA revised the duration of their expiring leases as "unavailing." 492 F. Supp. 3d at 53. The court explained that as applied to future renewals "[a] contract . . . cannot be impaired by a law in effect at the time the contract was made." *Id.* (alterations in original) (quoting *Harmon*, 412 F. App'x at 423). The court explained that future leases will be subject to the HSTPA from the onset. *Id.* (citing *2 Tudor City Place*

Regulation, U.S. CENSUS BUREAU Table 4 (2014), https://www.census.gov/data/tables/time-series/demo/nychvs/series-1a.html. Thus, repeal of the HSTPA would harm the existing minority tenants who live in rent regulated housing. (G-Max State Defs.' Mem. at 49 n.13.)

Assocs. v. 2 Tudor City Tenants Corp., 924 F.2d 1247, 1254 (2d Cir. 1991) ("Laws and statutes in existence at the time a contract is executed are considered a part of the contract, as though they were expressly incorporated therein.")); *see also Bricklayers Union Loc. 21 v. Edgar*, 922 F. Supp. 100, 105 (N.D. Ill. 1996) (holding that "claims regarding future contracts do not state a claim since the Contract Clause does not apply to laws with prospective effect."). The court in *CHIP* ultimately rejected the plaintiffs' Contract Clause claim regarding their expiring, preferential leases on these grounds. 492 F. Supp. 3d at 53. BRI and G-Max Plaintiffs do not allege that Part E of the HSTPA has been applied retroactively to any lease renewals between Plaintiffs and their tenants. Still, even if BRI and G-Max Plaintiffs had made such allegations, precedent bars such challenges to the HSTPA under the Contract Clause to enjoin the law's enforcement against future contracts. *See Elmsford*, 469 F. Supp. 3d at 170 ("[T]he Contracts Clause also permits states to modify and abrogate existing contract terms long since agreed to and performed by the parties."); *see also Fraternal Ord. of Police v. District of Columbia*, 502 F. Supp. 3d 45, 59–60 (D.D.C. 2020) ("As to any future contracts, it is well established that that Contract Clause only concerns itself with laws that retroactively impair current contract rights."), *appeal docketed*, No. 21-7059 (2d Cir. June 7, 2021); *Powers v. New Orleans City*, No. 13-CV-5993, 2014 WL 1366023, at *4 (E.D. La. Apr. 7, 2014) ("[T]he Contract Clause applies only to substantial impairment of existing contracts and not prospective interference with a generalized right to enter into future contracts."), *aff'd sub nom. Powers v. United States*,

783 F.3d 570 (5th Cir. 2015); *Robertson v. Kulongoski*, 359 F. Supp. 2d 1094, 1100 (D. Or. 2004) ("The Contract Clause does not prohibit legislation that operates prospectively."), *aff'd*, 466 F.3d 1114 (9th Cir. 2006). The HSTPA allows owners to increase preferential rents annually by the same percentages as any other regulated rents, as well as to account for MCIs, IAIs, and otherwise as authorized by law. *See* HSTPA, Part E, § 1. BRI Plaintiffs assert that the HSTPA "forever extend[s]" the preferential rent in current leases. (BRI Pls.' Mem. at 63.)[42] However, this is not accurate. Tenants must sign new leases to continue their occupancy, and landlords can increase rents in those new leases by the amount set by the RGB or decline to renew the leases in certain circumstances such as to recover for personal use based on an immediate and compelling necessity, among other exit options. HSTPA, Part E; N.Y.C. Admin. Code § 26-511(c)(9)(b); N.Y.C.R.R. tit. 9 §§ 2524.5(a)(2), 520.11(e), 2522.4(b) and (c). For G-Max Plaintiffs in particular, while they have identified a contractual relationship, they have not alleged that it was impaired by the HSTPA. Plaintiff G-Max cites a preferential rent for a two-year lease that commenced February 1, 2018, and expired on February 1, 2020 and Plaintiff Longfellow entered into a two-year lease also with preferential rent that started May 1, 2018 and ended July 1, 2020. (*See* G-Max Compl. ¶¶ 131, 135.) However, both these leases took effect *prior* to the enactment of the HSTPA (on

[42] G-Max Plaintiffs do not dispute that the Contract Clause applies only to impairments of existing contracts at the time the HSTPA was enacted. (*See* G-Max Pls.' Mem. at 65 n.58.)

June 14, 2019); thus, the law did not impair these contracts at all. These G-Max Plaintiffs would have collected the same rent for the duration of these contracts had the HSTPA not been enacted.

Moreover, prior versions of RSL barred uncontrolled increases of preferential rents until 2003, so this change was not outside of the realm of reasonable expectations of the property owners. With the passage of the HSTPA, the terms of the amendments have been incorporated into all rent-stabilized lease renewals since its enactment on June 14, 2019, and thus BRI and G-Max Plaintiffs fail to state a Contract Clause claim with respect to such leases. *See Traher*, 432 F. Supp. 3d at 539 ("[T]he Supreme Court limited the reach of the Contracts Clause by holding that it did not limit the ability of the government to regulate the terms of *future* contracts." (citing *Ogden*, 25 U.S. 213)). BRI and G-Max Plaintiffs allege that these preferential rents will be charged in perpetuity or are locked into place going forward. (BRI Compl. ¶ 45; G-Max Compl. ¶¶ 131, 135, 138.) But such assertions are incorrect as rents may be revoked when the current tenant vacates a rent-regulated apartment. *See* HSTPA, Part E, § 1.

Further, any as-applied Contract Clause claims against BRI and G-Max Defendants fails because the HSTPA does not substantially impair new leases due to the fact that no reasonable expectations have been disrupted. It is "well established that [New York] City's rent control laws do not unconstitutionally impair contract rights." *Brontel, Ltd. v. City of New York*, 571 F. Supp. 1065, 1072 (S.D.N.Y. 1983) (citing *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170,

198 (1921)); *Tonwal Realties, Inc. v. Beame*, 406 F. Supp. 363, 365 (S.D.N.Y. 1976) (same); *Israel v. City Rent & Rehab. Admin. of N.Y.*, 285 F. Supp. 908, 910 (S.D.N.Y. 1968) (holding that the constitutionality of rent control statute is well settled and does not violate the impairment of contract rights); *see also Troy Ltd. v. Renna*, 727 F.2d 287, 298–99 (3d Cir. 1984) (holding that the rental housing law did not violate the Contract Clause because courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure and noting that it was doubtful that any impairment of a contractual relationship had occurred); *Kargman v. Sullivan*, 582 F.2d 131, 134–35 (1st Cir. 1978) (finding no Control Clause violation for Boston's rent control law).

A law only violates the Contract Clause when it "operate[s] as a substantial impairment of a contractual relationship" and is not "drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." *Sveen v. Melin*, 138 S. Ct. 1815, 1821–22 (2018) (citation and quotation marks omitted). In the justification for the stand-alone bill regarding preferential rents that is incorporated into the HSTPA, the State Senate explained that the 2003 amendment permitting rent increases to the regulated maximum

> put hundreds of thousands of tenants at risk of sudden and unexpected substantial rent increases. All too many . . . have been unable to pay the higher rents and been forced to leave their homes. Countless tenants have also been discouraged from raising concerns

> about conditions in their apartments and/or buildings because of fears this could lead to the termination of their preferential rents.

Committee Report; *see also* Assembly Bill A08281, Chamber Tr. at 74, 76 (stating that, because "the landlords have the right today to go back to the legal rent . . . no tenant is going to want to ever make any demands of the landlord" and that landlords were "jacking up the rents to displace longtime residents"). In reviewing a Contract Clause claim challenging an economic or social regulation, like the HSTPA, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Rsrvs.*, 459 U.S. at 413 (citation omitted). Courts should not "second-guess the [legislature's] determinations that these are the most appropriate ways of dealing with the problem." *Keystone*, 480 U.S. at 506 (rejecting Contract Clause claim); *cf. W. 95 Hous. Corp. v. N.Y.C. Dep't of Hous. Pres. & Dev.*, 01-CV-1345, 2001 WL 664628, at *10 (S.D.N.Y. June 12, 2001) (explaining in the context of an equal protection claim that the court need not-and should-not decide whether the legislature's decision to pass RSL was correct), *aff'd*, 31 F. App'x 19 (2d Cir. 2002). Under prior RSL, owners were able to increase preferential rents by a greater percentage than the amount approved by the Rent Stabilization Board, as long as it did not exceed the maximum legal rent. *See* HSTPA, Part E, § 1 (modifying N.Y.C. Admin. Code § 26-511(c)(14)). By limiting such increases to the approved percentage, the HSTPA merely restores the law as it existed prior to 2003. *See Rosenshein v. Heyman*, 854 N.Y.S.2d 835, 835–36 (App. Div. 2007) (noting that RSL were amended in 2003 to allow

owners to revoke preferential rents upon renewal). The State Senate in its enactment of the HSTPA sought to remedy the issue of preferential rents, and this Court must defer to the legislative judgment regarding the necessity and reasonableness of taking this measure. *See U.S. Tr. Co.*, 431 U.S. at 22–23 ("As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."). It is not for this Court to "weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952); *see also Pa. Coal*, 260 U.S. at 413 ("The greatest weight is given to the judgement of the legislature[.]").[43]

The Court finds that BRI and G-Max Plaintiffs have not pled sufficient facts to demonstrate that the impairment by the HSTPA is substantial. BRI and G-Max Plaintiffs are "involved in a heavily-regulated industry—rental of residential property in New York City—and cannot claim surprise that [their contractual] relationships with certain tenants are affected by governmental action." *Kraebel*, 959 F.2d at 403; *see also Energy Rsrvs.*, 459 U.S. at 413–14 (holding that the regulation did not substantially impair a contract because "supervision of the industry was extensive and intrusive"); *All. of Auto. Mfrs., Inc. v. Currey*, 984 F. Supp. 2d 32, 54 (D. Conn. 2013)

[43] BRI Plaintiffs assert that "the [S]tate, through its legislation, does become the 'silent' party [to a contract] herein." (BRI Pls.' Mem. at 61.) While perhaps rhetorically pleasing, the assertion lacks factual and legal support.

("Where, as here, the industry has been heavily regulated, and regulation of contracts is therefore foreseeable, a party's ability to prevail on its Contracts Clause challenge is greatly diminished."). The HSTPA has not substantially impaired any contracts because no reasonable expectations regarding rent-stabilized housing have been disrupted.[44] When BRI and G-Max Plaintiffs "purchased into an enterprise already regulated in the particular [manner] to which [they] now object[], [they] purchased subject to further legislation upon the same topic." *Veix v. Sixth Ward Bldg. & Loan Ass'n of Newark*, 310 U.S. 32, 38 (1940). Accordingly, BRI and G-Max Plaintiffs' Contract Clause claims are dismissed.

III. Conclusion

For the foregoing reasons, BRI Defendants, G-Max Defendants, CVH, and T&N Motions To Dismiss are granted in their entirety. The Clerk of Court is respectfully directed to terminate the pending Motions, (Dkt. Nos. 60, 62, Case No. 19-CV-11285; Dkt. Nos. 67, 70, 72, Case No. 20-CV-364.) Because this is the first adjudication of BRI and G-Max Plaintiffs claims on the merits, the dismissal is without prejudice and with leave to amend the BRI and G-Max Complaints within 30 days of the date of this Order.

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[44] BRI Plaintiffs argue that they are "not complaining about the rent regulations, per se, but about the fact that the HSTPA just "goes too far." (BRI Pls.' Mem. at 60.) But this terminology is used in a takings, not Contract Clause, analysis. Further, BRI Plaintiffs offer no legal support for this argument, and, as such, the Court does not address it.

SO ORDERED.

Dated: September 14, 2021

White Plains, New York

KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 20-cv-634 (KMK)

G-MAX MANAGEMENT, INC., 1139 LONGFELLOW, LLC, GREEN VALLEY REALTY, LLC, 66 EAST 190 LLC, 4250 VAN CORTLANDT PARK EAST ASSOCIATES, LLC, 181 W. TREMONT ASSOCIATES, LLC, 2114 HAVILAND ASSOCIATES, LLC, SILJAY HOLDING LLC, 125 HOLDING LLC, JANE ORDWAY, DEXTER GUERRIERI, BROOKLYN 637-240 LLC, and 447-9 16TH LLC,

Plaintiffs,

-against-

STATE OF NEW YORK, LETITIA JAMES, in her official capacity as Attorney General of the State of New York, RUTHANNE VISNAUSKAS, in her official capacity as Commissioner of the New York State Division of Housing and Community Renewal, WOODY PASCAL, in his official capacity as Deputy Commissioner of the New York State Division of Housing and Community Renewal, CITY OF NEW YORK, COUNTY OF WESTCHESTER, and CITY OF YONKERS,

Defendants.

Filed January 23, 2020
Document No. 1

COMPLAINT
JURY TRIAL DEMANDED

Plaintiffs G-Max Management, Inc., 1139 Longfellow, LLC, Green Valley Realty, LLC, 66 East 190 LLC, 4250 Van Cortlandt Park East Associates, LLC, 181 W. Tremont Associates, LLC, 2114 Haviland Associates, LLC, Siljay Holding LLC, 125 Holding LLC, Jane Ordway, Dexter Guerrieri, Brooklyn 637-240 LLC, and 447-9 16th LLC (collectively, "Plaintiffs"), by and through their attorneys, Gibson, Dunn & Crutcher LLP, allege for their complaint against defendants the State of New York (the "State"), Letitia James, in her official capacity as Attorney General of the State of New York (the "AG"), RuthAnne Visnauskas, in her official 634 capacity as Commissioner of the New York State Division of Housing and Community Renewal ("DHCR"), Woody Pascal, in his official capacity as Deputy Commissioner of DHCR, the City of New York (the "City"), the County of Westchester ("Westchester"), and the City of Yonkers ("Yonkers") (collectively, "Defendants"), as follows:

NATURE OF THE ACTION

1. This case challenges the constitutionality of New York State's new rent-regulation law—the Housing Stability and Tenant Protection Act of 2019 (Chapter 36 of the Laws of 2019) (the "HSTPA"). This new statutory regime, unprecedented in both scope and substance, has transformed the prior, nominally "temporary" rent control and stabilization system—under which owners agreed to purchase and renovate regulated properties with the reasonable expectation (tied to express statutory language) that over time

they would be able to raise the rents at statutorily mandated amounts and eventually take properties off rent regulation—into a draconian regime that permanently re-purposes vast swaths of private property without compensation in the name of "affordable housing." The new law will, moreover, inevitably and irrationally *decrease* the availability of affordable housing and degrade the quality of the existing rent-regulated housing stock in New York, rendering it economically infeasible for property owners to maintain such rental properties or develop new low-income rental housing.

2. The HSTPA is unconstitutional in so many material ways that it cannot be saved and should instead be stricken in its entirety. For example, this new statute:

- Repeals the income cap, transforming a law ostensibly aimed at providing affordable housing to low-income New Yorkers into one that will allow affluent tenants (and their family members, as broadly defined) to benefit indefinitely from the regime;
- Repeals provisions that allowed units to be removed from rent regulation once the rent crossed a statutory high-rent threshold and the unit became vacant;
- Repeals provisions permitting larger rent increases for a new tenant after a vacancy;
- Lowers the rent increase cap for necessary Major Capital Improvements ("MCIs")—such as the installation of a new roof, new elevators, or new boilers—from 6% to 2% in

rent-stabilized apartments in New York City, from 15% to 2% in rent-controlled apartments in New York City, and from 15% to 2% in other counties when landlords make MCIs; eliminates such increases after 30 years; and retroactively imposes these MCI rent increase caps on increases attributable to MCIs that were approved within the 7 years prior to the amendment taking effect;

- Imposes a cap of $15,000 over 15 years on property owners' recoverable costs for Individual Apartment Improvements ("IAIs")—such as new kitchen appliances, renovated bathrooms, new flooring, new air conditioners, or a security alarm—limits owners to just three IAIs over that period (with the $15,000 cap applied cumulatively), drastically lowers the size of the monthly rent increases available to recover those costs, and eliminates the increases after 30 years—which together with the MCI restrictions will have the effect of decreasing the quality of rent-regulated housing;
- Eliminates sunset provisions that had previously required the State Legislature to affirmatively declare an ongoing "emergency" every few years in order to extend the rent-regulation regime;
- Divests local rent guidelines boards of the ability to authorize vacancy increases on their own (or to authorize any increases based on a unit's current rent level or the

amount of time since the owner's last authorized rent increase); and

- Imposes onerous restrictions on evicting tenants who do not pay their rent, potentially extending their tenancies for up to a year without just compensation to property owners.

3. Moreover, the new statute's severe restrictions on cooperative and condominium conversions in New York City—requiring 51% of all current tenants to enter into purchase agreements for their apartments, even for buildings that are not rent-regulated (whereas under the prior version of the statute, a non-eviction plan could be declared effective once the property owner secured purchase agreements for 15% of the apartments, either from the current tenants or from *bona fide* outside purchasers who intended to occupy the unit once it became vacant)—gives tenants what amounts to a collective veto to block co-op/condo conversion plans going forward, thereby precluding property owners from exiting the rental business absent majority tenant approval and effectively converting tenants into shareholders (even though they, in fact, own none of the equity in the buildings). This is a marked and unconstitutional deprivation of property owners' rights to dispose of their properties and a drastic elimination of a potentially profitable means of doing so, including with respect to the Plaintiffs here who contemplated the conversion of their buildings.

4. The collective consequence of the HSTPA will be to, *inter alia*: (1) strip rent-regulated properties of economic value; (2) erode the quality of New York's

housing stock because it will be prohibitively expensive to maintain current buildings, as property owners will be unable to recoup expenses for renovations and capital improvements; (3) reduce the quantity of available housing stock as deteriorated units are taken off the market; (4) exacerbate any housing shortage because tenants will be further disincentivized from giving up their apartments and moving as market conditions shift, because units will be permanently rent-regulated at absurdly reduced rents, and because it will be too expensive for developers to build new units because of all of the market distortions caused by rent regulation; and (5) drive down construction and renovation work, because developers and property owners are disincentivized, hurting those employed in the construction industry.

5. These changes, and the many others discussed below, form an omnibus package of amendments that—individually and collectively—are facially invalid on multiple constitutional grounds under both the Federal and State Constitutions, including because they have so stripped owners of being able to derive value from their properties that this amounts to an unconstitutional "taking" without just compensation and because their numerous irrationalities render the HSTPA defective under the due process and equal protection clauses under any level of constitutional scrutiny. This new legislation directly contravenes its purported intent—supposedly, to preserve affordable housing in New York. It will, in fact, do the opposite. By extending rent regulation even to vacant high-rent apartments, making it cost-prohibitive for owners to maintain or

improve their properties, and disincentivizing tenants to move in response to market forces, this law will reduce the availability of affordable housing and leave rent-regulated properties in an ever-increasing state of disrepair or abandonment. The HSTPA's substantial impairment of existing contracts also renders it invalid under the contracts clause. The only real winners here will be the wealthy white tenants who, according to U.S. Census Bureau data, already disproportionately benefit from rent regulation, and who are now poised to receive a massive windfall at the expense of minority renters who will be frozen out of historically majority-white neighborhoods. By exacerbating the law's disparate impact, the HSTPA perpetuates residential racial segregation in New York and negatively impacts the diversity of New York rental housing, harming owners, tenants, and the community as a whole, in violation of the federal Fair Housing Act, 42 U.S.C. §§ 3601 *et seq*. (the "FHA"). The HSTPA should therefore be stricken in its entirety; in the alternative, and at the very least, its most offensive provisions must be stricken.

6. The HSTPA constitutes an unconstitutional taking—both facially and as applied to the small landlord owners who are Plaintiffs here—for at least two independent reasons.

7. *First*, it deprives owners—including Plaintiffs—of their fundamental rights to possess, use, admit or exclude others, and dispose of their property, thereby effecting an unconstitutional physical taking of private property without any (let alone just) compensation. Among other things, by virtue of the amendment to the co-op/condo conversion rules,

property owners are now quite literally forced to secure majority tenant consent in order to dispose of their property and exit the rental business via a conversion. That is, the right to dispose (and control the use) of their property is transferred to their tenants, who are effectively elevated to the status of equity stakeholders in the subject properties. And by removing the sunset provision on this conversion restriction, the State Legislature has now *permanently* abrogated one of the core ownership rights in the bundle associated with property ownership, inexplicably transferring that right to non-owners.

8. Similarly, by severely restricting property owners' ability to reclaim possession of their rent-regulated units even for *personal use*, the HSTPA has cut at the very core of owners' rights to control the possession and use of their own property. Indeed, each owner may now recover only one such unit, even if that owner demonstrates an "immediate and compelling necessity" (itself a hefty burden) to recover additional units.

9. *Second*, the HSTPA constitutes a regulatory taking because it has devalued and rendered unprofitable landlord owners' properties, interfered with their reasonable investment-backed expectations in those properties, and deprived them of core property rights to such a degree and in such a manner that it is the equivalent of a government appropriation, again without just compensation. In doing so, the new law forces a subset of private property owners to bear the economic burdens (without a corresponding benefit) of what is

essentially a government-sponsored affordable housing initiative that, in fairness and justice, should be funded, if at all, by the public as a whole.

10. In Justice Holmes' formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). The HSTPA "goes too far and effects a regulatory taking" based on an array of factors, including the statute's "economic effect on the landowner[s], the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Id.* (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

11. Owners, including Plaintiffs, purchased and invested in their properties with the reasonable investment-backed expectation that they would be able to recoup their investments and profitably run their buildings based on, *inter alia*, a certain percentage of units coming off rent regulation over time, certain specific formerly permitted increases in rent, reasonable recoupment of MCI investments through permanently increased rents at the previously permitted rent increase levels, the ability to convert buildings to cooperatives and condominiums under the previously applicable rules, and the like. Given that owners already had to compensate for the market-distorting effects of rent-regulation (such as perpetual renewal and succession rights) under the pre-amendment regime, the imposition of these draconian restraints on owners'

rights obliterates what little recourse owners had left and makes it impossible for them to realize any sort of reasonable return or profit on their investments, which in turn compromises the underlying asset resale value of their properties and destroys their reasonable investment-backed expectations of profitability and appreciating asset value.

12. The HSTPA accomplishes this by, *inter alia*, limiting owners' ability to remove rental units from rent-regulation by repealing the high-rent deregulatory provisions; limiting owners' ability to raise rents upon a vacancy; curtailing owners' ability to raise rents to recover the costs of MCIs and IAIs, including those renovations required simply to keep a unit in the rental market at all following a lengthy tenancy; applying the new limitations on owners' ability to raise rents to recover the costs of MCIs retroactively to MCI investments approved since 2012; prohibiting owners from renewing leases at the legal regulated rent after having previously offered a lower "preferential" rent; effectively destroying owners' ability to dispose of or otherwise recover their investments in rent-regulated buildings via a conversion (especially given the economic incentives for regulated tenants not to purchase their units); depriving owners of the ability to select their incoming tenants or obtain adequate security to protect their legitimate property interests; and even denying owners the right to reclaim occupancy for their own personal use. These devastating effects are amplified for small owners. The character of this governmental action—which eviscerates owners' fundamental rights to dispose of, exclude others from, and personally use and possess their own property (and does so in

perpetuity), and which in the case of the co-op/condo conversion restrictions applies even to fully market-rate buildings—confirms that this "regulation" is in fact an unconstitutional regulatory taking of private property.

13. These effects are not by accident: public statements by public officials who sponsored the legislation reveal that this law was openly and notoriously intended to transfer property from owners to tenants.

14. On June 18, 2019, State Senator Julia Salazar—one of the law's sponsors—admitted in the course of discussing the new law with the press that "I don't believe that housing should be for profit." In that same interview, Senator Salazar went on to express her view that property "doesn't truly belong to us even [when] we have the monetary resources to purchase it and, to put it really bluntly, to take it away from someone else or from the collective, if it isn't owned by someone else or wasn't lost by someone else."

15. These are not one-off statements by a rogue legislator. To the contrary, in their joint statement announcing the bill's passage, Senate Majority Leader Andrea Stewart-Cousins and Assembly Speaker Carl Heastie expressed their official view that "[f]or too long, power has been tilted in favor of landlords." Tellingly, they did not use the phrase "tilted *too far* in favor of landlords." Instead, they question landlords, who are lawful private property owners, having the "power" of lawful ownership rights at all. The leaders of the New York State Legislature thus sought to take this "power" from landlords and transfer it to tenants. This is confirmed by provisions such as the co-op/condo

conversion amendment, which as noted above effectively confers an equity right (in the form of a 51% collective veto over conversion plans) upon nonowner tenants. Thus, the HSTPA is not targeted at curing abusive practices at the margins but, rather, at wholly undermining our constitutionally-enshrined system of private property ownership rights.

16. Moreover, the leaders' joint statement concedes that these new infringements on private ownership rights are the most stringent "in history." In other words, they acknowledge that the law now at issue is wholly unlike anything that has previously been tested in the courts.

17. The State is thus using the veneer of "regulation" to convert private property into a permanent stock of affordable housing, rather than funding the creation of such housing stock out of the public fisc, and it is doing so without providing any form of compensation to the private property owners whose property is being commandeered for this purpose.

18. Before the HSTPA's enactment, New York's rent regulations had insulated generations of tenants from the natural effects of market changes by artificially limiting the legal rent that property owners could charge in buildings covered by the laws, including approximately half of New York City's rental units. These regulations required landlords to continuously extend lease renewals to (or otherwise extend the tenancies of) rent-regulated tenants and their "family members" (as that term is broadly defined), and thus severely restricted them in their ability to control their property and earn reasonable

returns on their investments. However, recognizing the temporary, "emergency" nature of rent regulation, the State Legislature had built in pathways for eventual deregulation of affected properties. For instance, under the pre-HSTPA version of the law, certain rent-regulated apartments could be deregulated once the monthly rent reached a certain threshold amount, either upon vacancy or if the tenant's income exceeded $200,000. These provisions were consistent with the ultimate goal of rent regulation, which has expressly and at all times been one of eventual *deregulation*.

19. In a dramatic shift, however, the HSTPA has now stripped away these and other key provisions, codifying a harsh regime that forever traps approximately 1,000,000 rental units—all privately owned—under the strictures of rent regulation, forcing private property owners to effectively surrender their property rights and foot the bill for the State's affordable housing initiative. Having excised crucial deregulatory provisions such as the high-rent/high-income threshold—thereby enabling wealthy tenants making over $200,000 to retain essentially permanent tenancy rights at the expense of those most in need of affordable housing, not to mention the rights of property owners—the State Legislature has divorced the law from both common sense and constitutional doctrine.

20. And, of course, all of this social engineering targeting landlords for political benefit comes at the expense of private property owners, whose economic interests in their rental properties will be obliterated under a regulatory scheme that effectively locks

properties into rent regulation permanently. These property owners are being unfairly targeted, vilified without basis in fact, and forced to bear the financial burden of an irrational government policy that should be paid for—if at all—by taxpayers, not private property owners. The Legislature's efforts to effectuate an explicit expropriation of property at the behest of advocacy groups—as reflected in this latest iteration of now "permanent" rent regulation—cannot be countenanced as a matter of constitutional law.

21. The landlord-owner Plaintiffs here, each of whom owns one or more multifamily residential buildings in New York, therefore bring this action challenging the HSTPA as unconstitutional under multiple provisions of both the United States and New York State Constitutions. They seek declarations that the HSTPA is unconstitutional—both facially and as applied to them and their properties—and unlawful under the FHA; a permanent injunction enjoining Defendants and their successors from enforcing the HSTPA, or, in the alternative, certain challenged provisions of the HSTPA; and, to the extent the takings challenge is resolved on an as-applied basis without injunctive relief, an award of just compensation.

PARTIES

22. Plaintiff G-Max Management, Inc. ("G-Max") is a corporation organized under the laws of the State of New York. G-Max owns an eight-unit residential apartment building located at 1137 Longfellow Avenue in the Bronx, New York. All eight units in G-Max's building are rent-stabilized pursuant to New

York City's Rent Stabilization Law (the "RSL"). G-Max has owned the property since 2002.

23. Plaintiff 1139 Longfellow, LLC ("Longfellow") is a limited liability corporation organized under the laws of the State of New York. Longfellow owns an eight-unit residential apartment building located at 1139 Longfellow Avenue in the Bronx, New York. All eight units in Longfellow's building are rent-stabilized pursuant to the RSL. Longfellow has owned the property since 2012.

24. Plaintiff Green Valley Realty, LLC ("Green Valley") is a limited liability corporation organized under the laws of the State of New York. Green Valley owns a twenty-unit residential apartment building located at 26 West 131st Street in New York, New York. All twenty units in Green Valley's building are rent-stabilized pursuant to the RSL. Green Valley has owned the property since 2005.

25. Plaintiff 66 East 190 LLC ("East") is a limited liability corporation organized under the laws of the State of New York. East owns a nineteen-unit residential apartment building located at 66 East 190th Street in the Bronx, New York. All nineteen units in East's building are rent-stabilized pursuant to the RSL. East has owned the property since 2011.

26. Plaintiff 4250 Van Cortlandt Park East Associates, LLC ("Van Cortlandt") is a limited liability corporation organized under the laws of the State of New York. Van Cortlandt owns a 53-unit residential apartment building located at 4250 Van Cortlandt Park East in the Bronx, New York. All 53 units in Van Cortlandt's building are rent-stabilized pursuant to

the RSL. Van Cortlandt has owned the property since 1995.

27. Plaintiff 181 W. Tremont Associates, LLC ("Tremont") is a limited liability corporation organized under the laws of the State of New York. Tremont owns a 37-unit residential apartment building located at 181 W. Tremont Avenue in the Bronx, New York. All 37 units in Tremont's building are rent-stabilized pursuant to the RSL. Tremont has owned the property since 1995.

28. Plaintiff 2114 Haviland Associates, LLC ("Haviland") is a limited liability corporation organized under the laws of the State of New York. Haviland owns a 32-unit residential apartment building located at 2114 Haviland Avenue in the Bronx, New York. All 32 units in Haviland's building are rent-stabilized pursuant to the RSL. Haviland has owned the property since 1995.

29. Plaintiff Siljay Holding LLC ("Siljay") is a limited liability corporation organized under the laws of the State of New York. Siljay owns a 59-unit residential apartment building located at 2105 Burr Avenue in the Bronx, New York. Fifty-seven of the 59 units in Siljay's building are rent-stabilized pursuant to the RSL, and the other two are rent-controlled pursuant to New York City's City Rent and Rehabilitation Law (the "City Rent Control Law"). Siljay has owned the property since 1995.

30. Plaintiff 125 Holding LLC ("Holding") is a limited liability corporation organized under the laws of the State of New York. Holding owns a ninety-unit residential apartment building located at 125 Elliott

Avenue in Yonkers, New York. Eighty-nine of the ninety units in Holding's building are rent-stabilized pursuant to the Emergency Tenant Protection Act (the "ETPA"), and the other is rent-controlled pursuant to the Emergency Housing Rent Control Law of 1946 (the "State Rent Control Law"). Holding has owned the property since 1995.

31. Plaintiffs Jane Ordway ("Ordway") and Dexter Guerrieri ("Guerrieri") are residents of Brooklyn, New York. Ms. Ordway and Mr. Guerrieri are owners as tenants-in-common of, and live in, an eight-unit residential apartment building located at 12 Remsen Street in Brooklyn, New York. Ms. Ordway and Mr. Guerrieri have owned the building as tenants-in-common since 2018, and from 2013 through 2018 they owned it indirectly through a limited liability company. Three of the units in the building are rent-stabilized pursuant to the RSL (although two of those three are occupied by Ms. Ordway and Mr. Guerrieri and thus are no longer operated as rentals).

32. Plaintiff Brooklyn 637-240 LLC ("Brooklyn") is a limited liability corporation organized under the laws of the State of New York. Brooklyn owns eight-unit residential apartment buildings located at 637 Henry Street and 240 President Street in Brooklyn, New York. Three of the eight units at 637 Henry Street are rent-stabilized pursuant to the RSL, and another is rent-controlled pursuant to the City Rent Control Law. Two of the eight units at 240 President Street are rent-stabilized pursuant to the RSL, and another is rent-controlled pursuant to the City Rent Control Law. Brooklyn has owned these two properties since 2012.

33. Plaintiff 447-9 16th LLC ("Sixteenth") is a limited liability corporation organized under the laws of the State of New York. Sixteenth owns eight-unit residential apartment buildings located at 447 16th Street and 449 16th Street in Brooklyn, New York. Five of the eight units at 447 16th Street are rent-stabilized pursuant to the RSL. Four of the eight units at 449 16th Street are rent-stabilized pursuant to the RSL. Sixteenth has owned these two properties since 2012.

34. Defendant State of New York is a sovereign state.

35. Defendant Letitia James is the Attorney General of the State of New York and is responsible for the administration and enforcement of certain statutory provisions that have been amended by the HSTPA, including Section 352-eeee of the General Business Law. The AG maintains Executive Offices at The Capitol, Albany, New York 12224, and at 28 Liberty Street, New York, New York 10005. The AG is named in her official capacity.

36. Defendant RuthAnne Visnauskas is the Commissioner of DHCR and is responsible for the administration and enforcement of the RSL, ETPA, City Rent Control Law, and State Rent Control Law. DHCR has main offices located in the County of New York at 641 Lexington Avenue, New York, New York 10022, and at 25 Beaver Street, New York, New York 10004. Ms. Visnauskas is named in her official capacity.

37. Defendant Woody Pascal is a Deputy Commissioner of DHCR. In that role, Mr. Pascal runs

DHCR's Office of Rent Administration. Mr. Pascal is named in his official capacity.

38. Defendant City of New York is a municipal corporation organized and existing under the laws of, and located within, the State of New York.

39. Defendant County of Westchester is a municipal corporation organized and existing under the laws of, and located within, the State of New York.

40. Defendant City of Yonkers is a municipal corporation organized and existing under the laws of, and located within, the State of New York. Yonkers is located within the County of Westchester.

JURISDICTION AND VENUE

41. This action is brought under 42 U.S.C. § 1983, and the inherent authority of federal courts to protect rights safeguarded by the Constitution and laws of the United States, in particular:

a) the takings clause of the Fifth Amendment, incorporated against the States by the Fourteenth Amendment;

b) the due process clause of the Fourteenth Amendment;

c) the equal protection clause of the Fourteenth Amendment;

d) the contracts clause, U.S. Const. art. I, § 10, cl. 1; and

e) the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq*.

42. Additionally, this action raises related claims arising under the New York State Constitution, in particular:

a) the takings clause of Article I, § 7;

b) the due process clause of Article I, § 6; and

c) the equal protection clause of Article I, § 11.

43. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, 1367, and 2201, and 42 U.S.C. § 3613.

44. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. § 1391, because a substantial part of the events and omissions giving rise to the claims alleged herein have occurred, and will continue to occur, in this district, and because a substantial part of the property that is the subject of this action is situated in this district.

FACTUAL ALLEGATIONS

I. Rent Regulation Arises as a Post-War Emergency Measure in New York

45. In 1942, during World War II, the United States Congress enacted the Emergency Price Control Act, which established an expansive price control regime that extended to residential rental buildings.

46. In anticipation of the withdrawal of federal rent control following the war, the State of New York passed the Emergency Housing Rent Control Law of 1946 (codified as amended at 23 N.Y. Unconsol. Law § 8581 *et seq*.) (the "State Rent Control Law").

47. In 1962, the State passed the Local Emergency Rent Control Act (codified as amended at 23 N.Y.

Unconsol. Law § 8601 *et seq*.), which enabled the City of New York to itself create and administer a rent control program.

48. Pursuant to this local enabling statute, the New York City Council enacted the City Rent and Rehabilitation Law (codified as amended at N.Y.C. Admin. Code § 26-401 *et seq*.) (the "City Rent Control Law").

49. Rent control generally does not apply to post-1947 housing.

50. In 1969, citing "a serious public emergency" in housing, the City Council enacted the Rent Stabilization Law (codified as amended at N.Y.C. Admin. Code § 26-501 *et seq*.) (the "RSL") to supplement the existing rent control regime.

51. At the time of its enactment, the RSL applied only to certain rental housing completed prior to 1969 and not otherwise governed by rent control.

52. Five years later, in 1974, the State supplemented and modified the RSL with the Emergency Tenant Protection Act (codified as amended at 23 N.Y. Unconsol. Law § 8621 *et seq*.) (the "ETPA").

53. Among other things, the ETPA brought buildings that had been constructed between 1969 and 1973 within the ambit of rent stabilization, restored apartments that had previously been decontrolled or destabilized (on account of vacancy) to New York City's rent-stabilization regime, and expanded rent regulation to Westchester, Nassau, and Rockland Counties.

54. Within Westchester, Nassau County, and Rockland County, the ETPA only applies within municipalities that have affirmatively opted into the rent-stabilization regime by declaring their own housing emergencies (which are contingent upon vacancy rates remaining at or below 5%).

55. Yonkers, which is located in Westchester County, adopted the ETPA by declaring a housing emergency in 1974.

56. Rent stabilization does not apply to buildings constructed from 1974 onward, except for certain buildings that are regulated in connection with certain tax abatement programs.

57. DHCR has promulgated regulations pursuant to the various rent control and rent stabilization statutes. These regulations are codified in Chapters VII (rent control) and VIII (rent stabilization) of Subtitle S of Title 9 of the New York Codes, Rules and Regulations. *See* 9 NYCRR § 2050.1 *et seq.* (rent control); 9 NYCRR § 2500.1 *et seq.* (rent stabilization).

58. In addition to capping the rent that landlords are permitted to collect on their controlled or stabilized units, the pre-HSTPA rent-regulation regime mandated that landlords offer renewal leases (or otherwise extend rent-controlled tenancies) except in certain limited circumstances and extended these renewal rights to a broadly defined group of "family member" successors, creating *de facto* inheritance rights on behalf of rent-regulated tenants.

59. Under the RSL and the ETPA, local rent guidelines boards for the City and each of the participating New York counties are responsible for

establishing annual maximum rent increase levels for rent-stabilized units located within their respective jurisdictions. In recent years, these *de minimis* authorized rent increases have consistently failed to keep pace with the ever-increasing costs of maintaining owners' aging rent-regulated properties. Therefore, in order to cover costs, keep their buildings profitable, and have any chance of realizing a reasonable return on their investments, owners have been entirely dependent on certain key statutory provisions that allowed them to increase rents beyond the artificially low levels set by the rent guidelines boards—for instance, provisions permitting larger increases between tenancies or after an owner incurred costs improving the property.

60. Approximately one-half of New York City's rental units, or about 1,000,000 apartment units, are subject to rent regulation. To trigger and justify the continuation of rent regulation under New York law, every three years the City Council has declared a housing emergency, based on a citywide vacancy rate below 5% on all units. Recently, vacancy rates for all rental units were 3.12% in 2011, 3.45% in 2014, and 3.63% in 2017.

61. When it passed the RSL in 1969, the New York City Council declared "that a serious public emergency continues to exist in the housing of a considerable number of persons . . . [and] . . . the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for such emergency."

62. The City Council has periodically renewed this finding in the years since, most recently in 2018.

63. The central government interest that rent regulation purports to further is the provision of affordable housing. But, in reality, regulation has only decreased the availability of affordable housing by effectively taking vast swaths of the housing stock offline (because people are massively disincentivized from moving), by making it too expensive to build new affordable rentals because of all of the market distortions caused by rent regulation, and by endowing wealthy New Yorkers with a perpetual right to an apartment from the stock of low-rent housing.

64. The vacancy statistics bear this out. Although New York City's overall vacancy rate in 2017 was 3.63% (below the 5% threshold allowing the City to renew its "emergency" declaration), the vacancy rate for private non-regulated units was 6.07% (above the 5% threshold), while the vacancy rate for rent-stabilized units was a mere 2.06%.

II. The HSTPA Transforms Rent Regulation into a Sweeping and Effectively Permanent Regime that Will Irrationally Decrease and Degrade Affordable Housing

65. New York Governor Andrew Cuomo signed the HSTPA (A.8281/S.6458) into law on June 14, 2019.

66. The HSTPA, broken into Parts A through O, amends multiple statutes governing residential rental properties and the landlord-tenant relationship, including, *inter alia*, the various State and City rent control and stabilization statutes discussed above, the General Obligations Law, the General Business Law

(the "GBL"), the Judiciary Law, the Real Property Law (the "RPL"), the Real Property Actions and Proceedings Law (the "RPAPL"), and the CPLR.

67. On June 24, 2019, the Governor signed into law Chapter 39 of the Laws of 2019. Part Q of that law consisted of certain further amendments and modifications to the HSTPA and the various other statutes the HSTPA had amended (the "Chapter Amendments"). Unless otherwise specified, references herein to the HSTPA include both the initial June 14, 2019 law and the Chapter Amendments, and any references to HSTPA provisions that were themselves further modified by the Chapter Amendments should be read to include those further modifications as well.

68. Viewed in its totality, the HSTPA obliterates property owners' contractual rights to enforce leases, effectively transforms tenants into permanent occupants, and in doing so constitutes an unconstitutional taking, among its numerous other constitutional infirmities.

69. Parts A through K of the HSTPA significantly alter—and tighten—the rent-regulation statutes in a manner than irrationally divests property owners of their core rights, including the rights to control the use and possession of their property.

70. To this day, the various rent-regulation statutes continue to expressly state that the ultimate objective of State and City policy is to *deregulate* the rental market and thereby return to a state of free-market bargaining. *See* 23 N.Y. Unconsol. Law §§ 8581, 8602, 8622; N.Y.C. Admin. Code §§ 26-401, 26-501.

71. Nevertheless, the new amendments severely *limit* deregulation and rent increases—while also repealing (in Part A) the sunset provisions that had previously required the Legislature to periodically revisit the supposed need for rent regulation, and enabling (in Part G) the statewide expansion of rent stabilization.

72. Among other things, the HSTPA (in Part D §§ 2-7 (as clarified by Chapter Amendments §§ 5-6), Part E, and Chapter Amendments §§ 7-9) eliminates high-rent vacancy and high-rent/high-income deregulation by repealing provisions that allowed units to be deregulated once the monthly rent crossed a statutory high-rent threshold (previously $2,775 in New York City and Nassau County, $2,830 in Westchester, and $2,734 in Rockland County) and either the unit became vacant or the tenant's income equaled or exceeded $200,000 in the preceding two years.

73. According to lawmakers, these deregulatory provisions had led to the deregulation of more than 300,000 units since they were enacted in 1994. Their repeal highlights that the HSTPA has nothing at all to do with a purported housing "emergency," given that the vacancy rate for New York City apartments renting above $2,500 per month is 8.74%.

74. Other changes to the rent-regulation regime include:

a) Repealing (in Part B) provisions that had allowed a property owner to raise rents as much as 20 percent each time a unit became vacant (thereby mitigating at least some of

the burden these owners were forced to bear, and doing so in a way that had *no* impact on existing tenants);

b) Repealing (in Part B) related provisions that had allowed vacancy rents to be raised by additional amounts based on the duration of the previous tenancy (similarly mitigating owners' burdens without any corresponding impact on existing tenancies);

c) Prohibiting (in Part C) the rent guidelines boards from authorizing vacancy increases on their own, or from authorizing any increases based on a unit's current rent level or the amount of time since the owner's last authorized rent increase;

d) Making "preferential rents" the base rent for lease renewal increases, and thereby prohibiting owners who had voluntarily offered tenants a "preferential rent" (*i.e.*, a rent *below* the legal regulated rent) from raising the rent to the full legal rent upon renewal (Part E (as clarified by Chapter Amendments §§ 11-12))—that is, forcing property owners who voluntarily offered a lower rent at one point in time to continue offering that same discount until vacancy (irrespective of the terms of the parties' lease), even where the owner agreed to the preferential rent *before* the HSTPA took effect, and even though the legal regulated rent is obviously one that the government has already deemed to be reasonable; and

e) Further limiting (in Part H) annual rent increases for rent-controlled units by capping them at the average of the previous five years of increases authorized for rent-stabilized apartments, and prohibiting owners of rent-controlled units in New York City from adjusting rents to account for fuel costs.

75. The absurdity of these provisions is apparent on their face: by artificially suppressing rents and simultaneously ensuring that apartments will remain under rent-regulation regardless of how high the rent eventually climbs (and no matter how high the tenant's *income* climbs), the HSTPA will massively disincentivize tenants from vacating their apartments (even once they no longer need rent regulation), thereby perpetuating the very vacancy "emergency" that the rent-regulation regime was ostensibly designed to address in the first place, and in doing so will ensure that the "emergency" (and thus the purported justification for continued regulation) will remain intact, thus perpetuating even more regulation.

76. That is, the "emergency" is now self-perpetuating, such that what began as a temporary wartime measure will now effectively divest property owners of their core ownership rights *in perpetuity*—just as if the government had confiscated the property outright.

77. Indeed, the Legislature has *conceded* that this was its goal, as its findings in support of the HSTPA (Part D § 1) fault the vacancy deregulation provisions

for causing "the loss of vital and irreplaceable affordable housing for working persons and families."

78. That is, the State apparently views rent-regulated housing as something that belongs to the public at large, rather than something that belongs to its lawful private owners—and it views deregulation as a "loss" to the public, rather than as a restoration of private ownership rights.

79. The Sponsor's Memo purporting to justify the HSTPA in the State Senate was equally explicit on this point, stating that localities "struggle to protect *their* regulated housing stock."

80. This same view is captured in the June 14, 2019 press release issued by the State Senate Majority. For instance, Senator Zellnor Myrie describes how "our communities have *lost* hundreds of thousands of rent regulated units." Senator Joseph Addabbo, Jr. frames the issue in terms of "ensuring an adequate supply of affordable housing." And Senator Jose Serrano declares that "[p]reserving existing affordable housing is a key component of tackling the affordability crisis."

81. Senator Brian Kavanagh, the chairman of the New York State Senate Committee on Housing, Construction and Community Development and another co-sponsor of the bill, expressed this same sentiment in a media interview following the law's enactment: "[W]hat has happened over the course of many years is all of the efforts in government to increase the supply of affordable housing have been offset by loss of affordable housing and the rent-stabilized stock because of deregulation and some of

the other loopholes. By closing those loopholes, we allow government and other people concerned about affordability to make real gains, and not just be treading water, as we have been for a number of years. . . . Changing the rent laws is not intended to create new affordable housing. *It is intended to maintain the affordable housing we have* and what it does is it ends a very rapid loss of affordable housing, which has happened over the course of many years. We've had hundreds of thousands of units deregulated. *And so it doesn't create new housing, but it prevents loss of housing, which is a net gain for everybody*."

82. Further illustrating this flagrant disregard for basic property rights, the HSTPA even tightens the circumstances under which property owners can reclaim their rent-regulated units *for their own personal use*, even going so far as to limit owners to one such reclamation (even upon a showing of "immediate and compelling necessity"), and even if the landlord already commenced steps to effect the reclamation *prior to the statute's effective date* (Part I). For owners whose units are governed by the RSL, the "immediate and compelling necessity" standard is itself a newly imposed limitation on their ownership rights, as is a new duration-of-tenancy exception that precludes owners of rent-stabilized units from utilizing the personal use exception at all if the existing tenant has rented the unit for fifteen years or more (unless the owner can provide that tenant with equivalent rent-stabilized housing nearby), in both instances again without any exception for owners—including Plaintiffs Jane Ordway and Dexter

Guerrieri—who took steps to lawfully reclaim their units prior to the HSTPA's effective date (Part I § 2).

83. The legislators made no secret of what they were doing. As Senator Peter Harckham explained during the June 14, 2019 vote on the law's passage: "[T]he first rule of affordable housing is protect the stock that you have. And that's what this regulation and that's what these laws will do. We've got to protect what we have. *It's a heck of a lot cheaper to protect housing stock than to build new stock*."

84. The State is thus using the pretext of "regulation" to convert private property into a permanent stock of government-sponsored affordable housing, rather than funding the creation of such housing with public funds, and it is doing so without providing any form of compensation to the private property owners whose property is being commandeered for this purpose.

85. The HSTPA also imposes changes (in Part K) that will limit major capital and individual apartment improvements, including some that will impact property owners' ability to recoup costs *already incurred* under the pre-amendment regime. Among other things, the HSTPA:

a) Limits rent increases for major capital improvements ("MCIs") (Part K §§ 4-11; Chapter Amendments §§ 21-28) by (1) lowering the rent increase cap from 6% to 2% in rent-stabilized apartments in New York City, from 15% to 2% in rent-controlled apartments in New York City, and from 15% to 2% in other counties when landlords

make MCIs; (2) applying this same 2% cap going forward on MCI rent increases attributable to MCIs that were approved within the *prior* seven years; (3) lengthening the MCI formula's amortization period; (4) eliminating MCI increases after 30 years instead of allowing them to remain in effect permanently (and with no exception to account for periodic vacancies during the 30-year period); (5) significantly tightening the rules governing what spending may qualify for MCI increases and requiring that 25% of MCIs be inspected and audited; and (6) arbitrarily eliminating MCIs altogether for buildings with 35% or fewer rent-regulated units; and

b) Limits rent increases for individual apartment improvements ("IAIs") (Part K §§ 1-3; Chapter Amendments §§ 18-20, 36) by (1) capping the amount of recoverable IAI spending at $15,000 per apartment, spread across a maximum of just three IAIs, over a 15-year period (with no exception for apartments requiring substantial work—such as plumbing renovations and new kitchen and bathroom fixtures—following a lengthy tenancy), (2) drastically lowering the size of the monthly rent increases available to recover those costs (from one-fortieth or one-sixtieth of the total cost, depending on the size of the building, to just one-one hundred sixty-eighth or one-one hundred eightieth—that is, to approximately *0.595% or 0.556%*), and

(3) making IAI increases temporary for 30 years rather than permanent (again without accounting for periodic vacancies).

86. These restrictions on MCIs and IAIs, which apply even to improvements required to ensure compliance with applicable housing and building codes, will result in the severe deterioration of the existing rent-regulated housing stock and a return to the bad old days in which the rent-regulation laws were so backwards and constricting that it was economically infeasible for property owners to invest in the upkeep and modernization of their properties.

87. Indeed, given the severe restriction on property owners' ability to recoup the costs associated with necessary IAIs and the absence of any exception for substantial renovations upon vacancy (compounded by the elimination of vacancy and longevity rent increases), many owners—including Plaintiffs Tremont and Holding—will be unable to restore the units to rentable condition and instead will be left with no viable option but to leave the units vacant. Thus, by rendering it impossible for landlords to pursue improvements or shift properties off rent regulation, the HSTPA creates a perpetual stasis that effectively compels owners to leave their properties in their current state.

88. Moreover, by imposing the same 2% cap going forward on MCI rent increases attributable to MCIs that were approved within the prior seven years, the HSTPA retroactively caps rent increases for property owners who already spent significant sums of money on capital improvements in reliance on their ability to recoup those investments through higher rents.

89. Such property owners invested significant sums of money on capital improvements with the reasonable understanding and expectation that they would be able to raise rents going forward in the amounts permitted under then-existing law to recoup a portion of those costs.

90. Adding insult to injury, the HSTPA combines its sweeping curtailment of authorized rent increases with a retroactive expansion (in Part F) of the limitations, record-retention, and lookback periods for rent overcharge claims. Those expansions expressly apply to "any" overcharge claim, and courts are now permitted to look back *indefinitely* in evaluating such claims, with no exception for owners who purchased a building years after the alleged overcharge first occurred and who relied in good faith on the existing statutory scheme in conducting due diligence and obtaining records (such as supporting documentation for IAI increases) from the prior owner. These new owners are now exposed to overcharge penalties and damages even though they acted in accordance with all applicable legal requirements.

91. The aggregate effect of these drastic infringements on fundamental property rights is to strip rent-regulated properties of economic value and eliminate any chance that owners had of realizing a reasonable return or profit on their investments. Under the pre-amendment regime, owners were already forced to cope with artificially suppressed rent levels. Now, the HSTPA has sealed their fate by depriving them of essential revenue needed to defray the high cost of maintaining their aging properties—costs that include property taxes, heating and

electricity, maintenance, salaries and benefits, investments in apartment and building upkeep required by local law, and other necessary expenses.

92. As a recent *Crain's* article explained, the impact of this devaluation and its largescale negative effects on salability are reflected in a 14% drop in the stock price of New York Community Bancorp that occurred in October 2019, with an "abrupt stop" in the bank's loan growth indicating that "its customers have stopped buying apartment buildings" in light of the new law.

93. The market distortions created by the HSTPA will reduce the overall size of the housing market (regulated or otherwise), compounding the adverse effects of rent-regulation while forcing the market prices of nonregulated units to spike even higher.

94. As explained by Joseph Strasburg, president of the Rent Stabilization Association: "Most of these lawmakers were not alive in the 1970s and 1980s to see what legislation like this did to the city's housing. Buildings will fall into disrepair, owners will not have the funds to make necessary repairs to these aging buildings, and thousands of local [construction] jobs will be lost."

95. This is not just conjecture, as evidenced by the experiences of the Plaintiff owners detailed herein. But Plaintiffs are not the only owners who have been so affected. In October, CBS2 reported on a Bronx apartment "that was down to the sticks." The apartment, located within a building constructed in the early 1900s, had recently become vacant and was due for its first renovation in over a decade. But the

owner, non-party Oscar Perez, was left with no choice but to stop work and leave the apartment vacant, as he could no longer afford the renovation following the elimination of vacancy increases and the reduction in IAI increases. Indeed, Mr. Perez had already spent $45,000 on the renovations prior to the HSTPA's enactment—three times the $15,000 maximum the HSTPA now allows over *fifteen years*. In fact, based on a review of permit applications, which typically do not even include the costs of flooring and appliances, the *Wall Street Journal* reported in December 2019 that the median interior renovation project in New York City costs *$60,000*.

96. Mr. Perez also told CBS2 that, in another vacant unit, he had found mold behind a wall that would cost $5,000 (one third of his total fifteen-year allotment) to repair. As a result, two of Mr. Perez's twenty units (*i.e.*, 10% of the building) now lie vacant because, in his words, "I just don't have the money to finish it." Mr. Perez told the reporter that the HSTPA is "a knife through the heart of landlords, private building owners who need the money to exist, to pay their real estate tax, to pay their employees and to buy things from the local suppliers."

97. CBS2 also interviewed non-party Stephanie Kirnon, whose net rental income was $17,000 in 2018—half the amount required just to fix her roof. Ms. Kirnon told CBS2 that HSTPA is "making it difficult to do other improvements."

98. The *Wall Street Journal*'s December 2019 report found that, from July through November of that year, the number of apartment renovations in New York City dropped 44% from the prior year, while

spending on such renovations decreased by $71 million. Tellingly, the number of apartment renovations in other older but unregulated buildings in the City remained unchanged from the previous year. Overall work in rent-regulated properties also declined during the same period, with the number of work permits decreasing by 24% (compared to just 5% in unregulated older buildings) and spending down $84 million.

99. The HSTPA also works to impair the contracts that property owners have made with the City to temporarily offer affordable housing in exchange for tax benefits. For example, the Housing Preservation Program, created by Article XI of the New York Private Housing Finance Law, encourages owners to offer affordable housing, both in new constructions and existing buildings, when they otherwise would not be required to do so. Owners agree to place a certain number of a building's units into rent regulation, to cap rents and rent increases at set levels for regulated units, and to actively rent out all regulated units. In return, the City provides these owners with complete or partial exemptions from real estate taxes for up to forty years. Programs such as Article XI have been a major source of affordable housing units and are central to the City's housing plan. Indeed, tens of thousands of low- to middle-income New Yorkers live in affordable rental units due to Article XI agreements.

100. When owners entered into Article XI agreements, they had the reasonable expectation that they could raise rents for their units in accordance with contractually agreed-upon increases, and

deregulate them at the expiration of contractually specified periods of time. Now, however, the HSTPA will punish these owners by disallowing increases at the levels permitted under the bargain struck between Plaintiffs and the City (which were already far below market rents and market increases), on which Plaintiffs reasonably relied in voluntarily putting units into rent regulation; by forcing their properties into permanent regulation; and by forcing owners to lease units to tenants at rents that make both the individual units and the projects as a whole unprofitable or drive their profitability far below what owners reasonably expected. The HSTPA provides no exemption for Article XI agreements from its sweeping changes, in contrast to the exemption granted to properties constructed under the similar 421-a program.

101. In short, the new legislation will drastically exacerbate the preexisting arbitrariness, irrationality, wretched unfairness, and backwards, upside-down effects of rent regulation.

III. The HSTPA's Restrictions on Co-Op/Condo Conversions, Which Are Not Limited to Rent-Controlled or Rent-Stabilized Units, Are Unconstitutional

102. Not content with these sweeping expansions of New York's rent-regulation regime, the HSTPA also makes broad, irrational changes to other State laws that govern rental properties and the landlord-tenant relationship. These changes apply generally outside the context of rent-controlled or rent-stabilized properties and have no rational relationship to the

HSTPA's purported goal of increasing or preserving affordable housing in New York.

103. Among other things, via an amendment to GBL § 352-eeee, the HSTPA (in Part N) imposes substantial and unjustifiable restrictions on property owners' ability to convert their rental properties into cooperatives or condominiums within New York City.

104. The amendment eliminates the option of "eviction plans," pursuant to which tenants who did not agree to purchase their units would have to vacate those units once three years elapsed from the plan's effective date.

105. Thus, the only conversion option even ostensibly available to property owners going forward is the so-called "non-eviction plan," which ensures that the tenants in occupancy when the plan is accepted by the AG will be able to remain in their apartments notwithstanding the conversion.

106. At the same time, however, the law amends the requirements for non-eviction plans in such a manner as to make them effectively impossible—and mathematically impossible without majority tenant approval.

107. Under the prior version of the statute, a non-eviction plan could be declared effective once the property owner secured purchase agreements for 15% of the apartments, either from the current tenants or from *bona fide* outside purchasers who intended to occupy the units as they became vacant.

108. As amended, non-eviction plans now require purchase agreements for *51%* of the apartments, *all* from current tenants.

109. That is, even though they do not hold any equity in the units they occupy, tenants now have *de facto* blocking rights that effectively transfer the right to control the use of the property—one of the core rights in the proverbial "bundle of sticks"—from the property owner to the tenants.

110. Put differently, tenants now have the collective ability to effectively force their residential property owners (and their successors, assuming anyone would want to purchase a building subject to this draconian limitation on disposal rights) to continue operating their buildings as rental properties in perpetuity.

111. The law confers this right on tenants even though, under a non-eviction plan, those tenants are free to remain in their apartments, as renters, regardless of whether the conversion takes place or not.

112. In practice, this supposed "amendment" is nothing short of an outright, permanent moratorium on co-op and condo conversions going forward. Any one-off exceptions will turn on unusual factual scenarios and will only serve to highlight the near-impossibility of obtaining the requisite tenant purchase commitments for Plaintiffs and others who are similarly situated. And this is clearly by design, given that the new 51% threshold far exceeds even the 35% threshold that was briefly in effect during the

1970s, which had devastating effects on the conversion market.

113. Additionally, Plaintiffs Tremont, Siljay, Brooklyn, and Sixteenth had all contemplated the future conversion of their buildings to co-ops or condos, and believed the buildings to be suitable for conversion. In light of the new restrictions imposed by the HSTPA, such conversions are no longer possible.

114. The conversion rules, moreover, apply to both regulated and non-regulated buildings, even though there is absolutely no connection between the conversion of nonregulated buildings and the purported government interests served by the HSTPA, and no rational basis for this severe new restriction on the conversion of non-regulated buildings.

115. At the same time, the infringement on an owner's ability to dispose of his property via a conversion is felt even more severely in the cases of owners, such as Plaintiffs, whose apartments are subject to rent regulation. The tenants in such units have absolutely no economic incentive to trade their below-market rentals (with perpetual succession rights) for direct ownership and its concomitant costs, and the *de facto* ban will be even more severe.

116. Given that the existing tenants could not have been evicted anyway under a noneviction plan, this amendment further demonstrates that the HSTPA is focused not on protecting current tenants (or even just tenants of rent-regulated apartments), but rather on divesting property owners of their rights *going forward* in order to create—by regulation

instead of government spending—a permanent State-sponsored housing stock.

117. Indeed, lest there be any doubt that this amendment is meant to effect a permanent deprivation of property rights, HSTPA Part A § 4 repeals the sunset provision that had previously applied to GBL § 352-eeee.

118. Combined with other provisions of the HSTPA, the new draconian conversion rules operate to create perpetual tenancies at the expense of owners' fundamental property rights (including their right to dispose of their property and exit the rental business) and their reasonable investment-backed expectations.

119. For owners (such as Plaintiffs) whose properties are subject to rent control or stabilization, this divestment of the right to dispose of property compounds the devaluation effected through the HSTPA's amendments to the rent-regulation regime. Among other things, this blatant transfer of property rights from owners to tenants necessarily impairs the salable value of the buildings, because any future owners would have to purchase those properties subject to both the HSTPA's enhanced version of self-perpetuating rent regulation *and* this new permanent encumbrance on disposition.

IV. Changes to the Landlord-Tenant Laws Amplify the HSTPA's Unconstitutionality

120. The HSTPA also makes significant changes (in Part M and Chapter Amendments §§ 31-34) to the laws governing the landlord-tenant relationship. As with the new restrictions on co-op/condo conversions,

these amendments govern both rent-regulated and free-market apartments.

121. The HSTPA amends the RPL in a manner that materially impacts and hampers landlord rights (Part M §§ 2-10), including, *inter alia*:

a) Expanding the rebuttable presumption of retaliatory eviction, and providing that offering a renewal lease with an "unreasonable" rent increase constitutes an adverse act that can form the basis for a retaliation claim (Part M § 2);

b) Creating a duty to mitigate damages if a tenant breaks a lease, with the burden of proof *on the landlord* as to compliance (Part M § 4);

c) Prohibiting landlords from declining to rent their units to a potential tenant on the grounds that the potential tenant was involved in a past or pending landlord-tenant action or summary proceeding, with a rebuttable presumption of a violation if the landlord utilized a tenant screening agency or inspected court records (Part M § 5);

d) Requiring landlords to send written notice by certified mail if they do not receive rent within five days of the stated payment date, with failure to do so constituting an affirmative defense in an eviction proceeding (Part M § 9); and

e) Permitting evictions to be stayed for up to a year (Part M § 21).

122. The HSTPA also modifies the RPAPL to make eviction much more difficult and to limit the ability to recover unpaid rents (Part M §§ 11-24), including, *inter alia*:

a) Limiting the amount recoverable in a summary proceeding to the base rent charged "in consideration for the use and occupation of a dwelling" and excluding fees, charges, or penalties (meaning that items such as amenity fees, parking fees, and late fees can only be recovered in a plenary action), notwithstanding any contrary language in the lease (Part M § 11);

b) Increasing the notice period for rent demands to fourteen days (Part M § 12);

c) Providing that a tenant can cure the non-payment and moot a special proceeding by making payment at any time before the petition is heard (Part M § 13);

d) Substantially extending the timeline for summary proceedings by, *inter alia*, facilitating expanded adjournments, while simultaneously limiting the courts' ability to order rent deposits and eliminating default judgment as a remedy for non-compliance with a rent deposit order (Part M § 17); and

e) Requiring the court to vacate an eviction warrant if the tenant pays the full amount of unpaid rent at any time prior to the warrant's execution, unless the *landlord* can establish that the tenant withheld the rent in bad faith, and in all instances limiting

> eviction to persons specifically named in the warrant, irrespective of whether unnamed occupants were living in the unit unlawfully (Part M §19).

123. Taken together (and together with the rest of the HSTPA), the Part M amendments further divest property owners of their lawful rights to control the use and possession of their property—or even to enforce the terms of their lease agreements.

124. For instance, the *per se* ban on consideration of a prospective tenant's history of landlord-tenant disputes—regardless of the basis therefore—effectively injects into the law a presumption that property owners are *required* to let their properties to anyone who applies, even if the applicant has a long history of defaulting on rental payments or violating material lease terms regarding use of the premises—a flagrant curtailment of property owners' right to exclude.

125. The effects of this categorical prohibition will be especially severe for smaller landlords, such as Plaintiffs, who may not be able to afford to forgo timely rental payments or expend the resources necessary to pursue rent collection and/or eviction proceedings.

126. This, combined with the other amendments making it harder for property owners to evict tenants and/or collect unpaid rent (and even limiting the size of security deposits, Part M § 25), is just one more instance of the State stripping fundamental ownership rights from property owners and transferring them to rental tenants—exactly what the legislative leaders admit they were trying to do.

V. Plaintiffs Are Suffering Under the HSTPA's Unconstitutional Restrictions

127. All Plaintiffs have been harmed in the manner described above by virtue of the HSTPA's provisions, which independently and cumulatively deprive Plaintiffs of their private property without compensation and violate their rights under the due process, equal protection, and contracts clauses. Each Plaintiff's property has been drastically devalued by being subjected to the aggregate effect of the unprecedented restrictions and encumbrances imposed by the HSTPA, including but not limited to the specific provisions highlighted in the ensuing subsections.

A. Plaintiff G-Max Management, Inc.

128. As discussed above, Plaintiff G-Max is the owner of 1137 Longfellow Avenue in the Bronx. This residential apartment building contains eight units, all of which are rent-stabilized. G-Max has owned 1137 Longfellow Avenue since 2002. G-Max itself was sold to its current sole shareholder in 2010.

129. The HSTPA has shattered G-Max's reasonable investment-backed expectations by eliminating the few mechanisms that had previously allowed it to withstand the already-depressed rents imposed by the RSL and keep up with the ever-increasing costs of maintaining the property. Two apartments became vacant after the amendments took effect in June, and an increase on those vacancy rents would have helped G-Max defray these rising costs. Instead, G-Max has been forced to defer

payment on its water bill in order to reallocate necessary funds elsewhere.

130. The effects of the new law were particularly damaging in the case of one vacancy that arose after a tenant of eight-plus years skipped out on the rent altogether. Not only did G-Max lose over $10,000 in rental income to which it was contractually entitled, but it was then unable to recoup a portion of that loss in the form of a vacancy and longevity increase. Worse still, by virtue of the HSTPA's new limitation on security deposits and its outright ban on considering an applicant's history of landlord-tenant disputes, G-Max cannot even take proactive measures to protect itself against the exact same thing happening next time around.

131. G-Max also entered into a preferential rent for a two-year lease that commenced February 1, 2018, less than eighteen months before the HSTPA's enactment. Without warning, that rent has now been locked into place going forward until the tenant (and any family member successors) decides to vacate her apartment.

132. Additionally, although 1137 Longfellow Avenue would have been suitable for conversion into cooperatives or condominiums, the HSTPA's new restrictions render such a conversion impossible.

B. Plaintiff 1139 Longfellow, LLC

133. As discussed above, Plaintiff Longfellow is the owner of 1139 Longfellow Avenue in the Bronx. This residential apartment building contains eight units, all of which are rent-stabilized. Longfellow has owned 1139 Longfellow Avenue since 2012.

134. The HSTPA has shattered Longfellow's reasonable investment-backed expectations by eliminating the few mechanisms that had previously allowed it to withstand the already-depressed rents imposed by the RSL and keep up with the ever-increasing costs of maintaining the property. One of the apartments in the building became vacant in December 2019, and an increase on the vacancy rent would have helped Longfellow defray these rising costs. Instead, Longfellow has been forced to defer payment on its water bill in order to reallocate necessary funds elsewhere.

135. Longfellow also entered into a preferential rent for a two-year lease that commenced May 1, 2018, just over a year before the HSTPA's enactment. Without warning, that rent has now been locked into place going forward until the tenant (and any family member successors) decides to vacate his apartment.

136. Additionally, although 1139 Longfellow Avenue would have been suitable for conversion into cooperatives or condominiums, the HSTPA's new restrictions render such a conversion impossible.

C. Plaintiff Green Valley Realty, LLC

137. As discussed above, Plaintiff Green Valley is the owner of 26 West 131st Street in Manhattan. That residential apartment building contains twenty units, all of which are rent-stabilized. Green Valley has owned 26 West 131st Street since 2005.

138. The HSTPA has derailed Green Valley's reasonable investment-backed expectations. For instance, all of the tenants are currently paying preferential rents. Green Valley began offering these

reduced rents when the market was depressed and could not support the full legal regulated rent. Although Green Valley could have revoked the preferential rents in the years since, it did not do so and instead left them in place over time. But now, without warning, the HSTPA has locked those rents into place for the duration of the tenancies, effectively punishing Green Valley for *not* having increased the rents the moment the market recovered.

139. Moreover, three apartments in the building have already become vacant since the HSTPA passed in June. With vacancy increases no longer permitted, Green Valley is deprived of an opportunity to offset a portion of the losses it is forced to absorb on account of the existing preferential rents.

140. Compounding matters further, Green Valley spent $26,000 to replace all twenty apartment entrance doors—which had not been replaced since 1970—with new fireproof doors in December 2018. At the time of the HSTPA's passage, Green Valley was in the midst of taking steps to apply for an MCI increase to recoup a portion of that cost. Although Green Valley still intends to submit that application, its recovery will be now be subject to the HSTPA's limitations on MCI increases—even though the improvements had already been completed six months earlier, when the former law was still in effect. Green Valley invested valuable resources in this building-wide improvement in reliance on that old regime, only to see its expectations subverted after the fact. Indeed, given the retroactive application of the new 2% cap on MCI increases, Green Valley's expectations would have

been subverted even if its application for the increase had been approved prior to June 14, 2019.

141. Additionally, although 26 West 131st Street would have been suitable for conversion into cooperatives or condominiums, the HSTPA's new restrictions render such a conversion impossible.

D. Plaintiff 66 East 190 LLC

142. As discussed above, Plaintiff East is the owner of 66 East 190th Street in the Bronx. That residential apartment building contains nineteen units, all of which are rent-stabilized. East has owned 66 East 190th Street since 2011.

143. The HSTPA has derailed East's reasonable investment-backed expectations. The nineteen apartments at 66 East 190th Street are all two-bedrooms, and yet the majority of them rent at less than $1,190/month. The current tenancies average 16 years in duration. East reasonably expected that, as these long-term tenants vacate over time, it would be able to recoup at least some of the forgone rents in the form of vacancy and longevity increases. Those increases also would have helped East cover the ever-increasing costs of items such as taxes, water, electricity, and insurance, not to mention the costs of maintaining this century-old building through repairs such as brick work, roof repairs, and electrical work, just to name a few.

144. Moreover, given the length of the tenancies in question, East has only limited opportunities to make large-scale improvements to the units without disturbing current tenants. East thus intended to invest sums well in excess of $15,000 on improving

these apartments as they become vacant—improvements that will be especially important if the next group of incoming tenants continues the trend of residing in the building for an extended period.

145. By rendering it economically infeasible for East to undertake meaningful levels of investment, the HSTPA has effectively frozen the building in its current state, forcing East to continue bearing the cost of below-market stabilized tenancies without any hope of even partial relief upon a vacancy, and without the ability to make improvements that would benefit owner and tenants alike.

E. Plaintiff 4250 Van Cortlandt Park East Associates, LLC

146. As discussed above, Plaintiff Van Cortlandt is the owner of 4250 Van Cortlandt Park East in the Bronx. That residential apartment building contains 53 units, all of which are rent-stabilized. Van Cortlandt has owned 4250 Van Cortlandt Park East since 1995.

147. The HSTPA has shattered Van Cortlandt's reasonable investment-backed expectations by eliminating the few mechanisms that had previously allowed it to withstand the already-depressed rents imposed by the RSL and the City Rent Control Law and keep up with the ever-increasing costs of maintaining the property. For example, taxes, water bills, electric bills, and insurance premiums continue to rise, and the building requires regular maintenance and repairs. Two apartments have become vacant since the HSTPA took effect in June (and a third unit was already vacant at that time), and an increase on

the vacancy rents would have helped Van Cortlandt defray these rising costs.

148. Moreover, the two newly vacant apartments were both due for full renovations, as the previous tenants had resided in them since 1975 and 1980. Prior to the HSTPA's passage, Van Cortlandt would have undertaken these renovations and benefitted from a higher (but still below-market) rent upon commencement of the next tenancy—improving the next tenant's quality of life in the near-term, the building's profitability in the mid-term, and the underlying value of the building in the long-term. However, because of the HSTPA's restrictions on IAI increases (both renovations would have cost well over $15,000), combined with the unavailability of vacancy and longevity increases and the need to allocate necessary resources elsewhere, Van Cortlandt was forced instead just to install a new kitchen in one of the units and then put it back on the market in otherwise the same condition in which it has existed for the past 40-plus years. The second apartment has yet to be renovated at all but will similarly receive just the minimum amount of work required to make it rentable, rather than the full renovation it really warrants following a four-decade occupancy.

149. Additionally, Van Cortlandt had contemplated the future conversion of 4250 Van Cortlandt Park East into cooperatives or condominiums, and believed the building to be suitable for conversion. However, such a conversion is no longer feasible under the HSTPA, given that Van Cortlandt would need to convince 51% of its tenants to enter into purchase agreements for their apartments.

F. Plaintiff 181 W. Tremont Associates, LLC

150. As discussed above, Plaintiff Tremont is the owner of 181 West Tremont Avenue in the Bronx. That residential apartment building contains 37 units, all of which are rent-stabilized. Tremont has owned 181 West Tremont Avenue since 1995.

151. The HSTPA has derailed Tremont's reasonable investment-backed expectations. The majority of the apartments at 181 West Tremont Avenue rent at less than $960/month, with the current tenancies averaging 16 years in duration. Tremont reasonably expected that, as these long-term tenants eventually vacate, it would be able to recoup at least some of the costs of the forgone rents in the form of vacancy and longevity increases. Those increases also would have helped Tremont cover the ever-increasing costs of items such as taxes, water, electricity, and insurance, not to mention the costs of maintaining this 1920s building through repairs such as brick work, roof repairs, and electrical work, just to name a few.

152. Moreover, given the length of the tenancies in question, Tremont has only limited opportunities to make large-scale improvements to the units without disturbing the current tenants. Tremont thus intended to invest sums well in excess of $15,000 on improving these apartments as they become vacant—improvements that will be especially important if the next group of incoming tenants continues the trend of residing in the building for an extended period.

153. By rendering it economically infeasible for Tremont to undertake meaningful levels of investment, the HSTPA has effectively frozen the

building in its current state, forcing Tremont to continue bearing the cost of below-market rent-regulated tenancies without any hope of even partial relief upon a vacancy, and without the ability to make improvements that would benefit owner and tenants alike.

154. Indeed, one of the units at 181 West Tremont Avenue has already become vacant since the HSTPA passed in June. This one-bedroom apartment, renting at $969/month, had been occupied for over 10 years and was due for a full renovation. Under the old law, Tremont would have spent approximately $20,000 on these much-needed improvements and would have benefitted from a higher (but still below-market) rent upon commencement of the next tenancy—improving the next tenant's quality of life in the near-term, the building's profitability in the mid-term, and the underlying value of the building in the long-term. However, because of the HSTPA's restrictions on IAI increases, combined with the unavailability of vacancy and longevity increases and the need to allocate necessary resources elsewhere, such renovations are now cost-prohibitive, and the unit will remain vacant and off the market as a result.

G. Plaintiff 2114 Haviland Associates, LLC

155. As discussed above, Plaintiff Haviland is the owner of 2114 Haviland Avenue in the Bronx. That residential apartment building contains 32 units, all of which are rent-stabilized. Haviland has owned 2114 Haviland Avenue since 1995.

156. The HSTPA has derailed Haviland's reasonable investment-backed expectations. The

majority of the apartments at 2114 Haviland Avenue rent at less than $1,075/month, with the current tenancies averaging 10 years in duration. Haviland reasonably expected that, as these long-term tenants vacate over time, it would be able to recoup at least some of the forgone rents in the form of vacancy and longevity increases. Those increases also would have helped Haviland cover the ever-increasing costs of items such as taxes, water, electricity, and insurance, not to mention the cost of maintaining this 1920s building through repairs such as brick work, roof repairs, and electrical work.

157. Moreover, given the length of the tenancies in question, Haviland has only limited opportunities to make large-scale improvements to the units without disturbing current tenants. Haviland thus intended to invest sums well in excess of $15,000 on improving these apartments as they become vacant—improvements that will be especially important if the next group of incoming tenants continues the trend of residing in the building for an extended period.

158. By rendering it economically infeasible for Haviland to undertake meaningful levels of investment, the HSTPA has effectively frozen the building in its current state, forcing Haviland to continue bearing the cost of below-market stabilized tenancies without any hope of even partial relief upon a vacancy, and without the ability to make improvements that would benefit owner and tenants alike.

H. Plaintiff Siljay Holding LLC

159. As discussed above, Plaintiff Siljay is the owner of 2105 Burr Avenue in the Bronx. That residential apartment building contains 59 units, 57 of which are rent-stabilized and two of which are rent-controlled. Siljay has owned 2105 Burr Avenue since 1995.

160. The HSTPA has shattered Siljay's reasonable investment-backed expectations by eliminating the few mechanisms that had previously allowed it to withstand the already-depressed rents imposed by the RSL and the City Rent Control Law and keep up with the ever-increasing costs of maintaining the property, which carries a mortgage balance of nearly $2.8 million. For example, taxes, water bills, electric bills, and insurance premiums continue to rise, and this 1920s building requires regular maintenance such as brick work, roof repairs, and electrical work. Meanwhile, four rent-stabilized apartments have become vacant since the amendments took effect in June (and a fifth unit was already vacant at that time), and an increase on the vacancy rents would have helped Siljay defray these rising costs, especially now that the two rent-controlled units are subject to the HSTPA's reduced cap on annual rent increases and the prohibition on rent adjustments to account for rising fuel costs.

161. Moreover, four of the vacant apartments called for renovations that would have cost anywhere from $15,000 to $25,000 to complete. One of the prior tenancies had spanned nearly two decades. Prior to the HSTPA's passage, Siljay would have undertaken these renovations and benefitted from a higher (but

still below-market) rent upon commencement of the next tenancy—improving the next tenant's quality of life in the near-term, the building's profitability in the mid-term, and the underlying value of the building in the long-term. However, because of the HSTPA's restrictions on IAI increases, combined with the unavailability of vacancy and longevity increases and the need to allocate necessary resources elsewhere, Siljay was forced instead to do partial (or no) renovations on these vacant units and put them right back on the market.

162. For instance, one of the vacant units was due for a full renovation that would have cost approximately $20,000. Siljay instead spent just $2,500 to complete a partial renovation of that unit, replacing a couple appliances, sheetrocking one of the rooms, and doing some electrical repairs. A second vacant apartment warranted—and previously would have received—approximately $15,000 in work in advance of the incoming tenancy. That renovation was bypassed altogether, and after a simple paint job the unit was re-rented without any improvements whatsoever. Even for the vacant apartment that had previously been occupied continuously since 2001, which was due for (and but-for the HSTPA would have received) a full $25,000 renovation, Siljay instead spent approximately $15,000 to do the minimum amount needed to make the apartment livable for the next tenant.

163. Additionally, Siljay had contemplated the future conversion of 2105 Burr Avenue into cooperatives or condominiums, and believed the building to be suitable for conversion. However, such

a conversion is no longer feasible under the HSTPA, given that Siljay would need to convince 51% of its tenants to enter into purchase agreements for their apartments.

I. Plaintiff 125 Holding LLC

164. As discussed above, Plaintiff Holding is the owner of 125 Elliott Avenue in Yonkers. That residential apartment building contains ninety units, 89 of which are rent-stabilized (including one formerly rent-controlled unit that recently became vacant) and one of which is rent-controlled. Holding has owned 125 Elliott Avenue since 1995.

165. The HSTPA has shattered Holding's reasonable investment-backed expectations by eliminating the few mechanisms that had previously allowed it to withstand the already-depressed rents imposed by the ETPA and the State Rent Control Law and keep up with the ever-increasing costs of maintaining the property, which carries a mortgage balance of nearly $1.5 million. For example, taxes, water bills, electric bills, and insurance premiums continue to rise, and the building requires regular maintenance and repairs.

166. Indeed, four of the units at 125 Elliott Avenue have already become vacant since the HSTPA passed in June, including one in which the prior family of tenants had resided for 40 years. This large two-bedroom apartment, renting at $768/month, was due for a full renovation, including sheetrocking, flooring, a new bathroom, and a new kitchen. Under the old law, Holding would have spent upwards of $25,000 on these much-needed improvements and would have

benefitted from a higher (but still below-market) rent upon commencement of the next tenancy—improving the next tenant's quality of life in the near-term, the building's profitability in the mid-term, and the underlying value of the building in the long-term. However, because of the HSTPA's restrictions on IAI increases, combined with the unavailability of vacancy and longevity increases and the need to allocate necessary resources elsewhere, such renovations are now cost-prohibitive, and the unit will remain vacant and off the market as a result.

167. Another of the vacant apartments at 125 Elliott Avenue was in need of upwards of $15,000 in renovations. In light of these same cost constraints, however, Holding was unable to complete that work and instead had to re-rent the unit (without even the benefit of a vacancy increase) in essentially the same condition as when the prior tenant moved out.

J. Plaintiffs Jane Ordway and Dexter Guerrieri

168. As discussed above, Ms. Ordway and Mr. Guerrieri are owners as tenants-in-common of 12 Remsen Street in Brooklyn. This residential apartment building contains eight units, three of which are currently rent-stabilized (although, as explained below, two of those three units are occupied by Ms. Ordway and Mr. Guerrieri and thus are no longer operated as rentals).

169. Ms. Ordway and Mr. Guerrieri have owned 12 Remsen Street directly, as tenants-in-common, since 2018. Prior to that, from 2013 through 2018, they owned the building indirectly through a limited liability company they controlled.

170. At the time of the initial purchase in 2013, six of the eight units in the building were rent-stabilized, including the single unit occupying the second floor and the two units (a garden unit and a street-facing studio) on the first floor. The building as a whole was in a state of disrepair, both physically and administratively. Ms. Ordway and Mr. Guerrieri therefore devoted considerable time and resources to turning it around. Among other things, they replaced the boiler, patched the roof, and installed a second water heater. They also made apartment-level improvements, such as new kitchens, floors, and bathrooms, as units became vacant. Although they filed for IAI increases to recover the costs of the vacancy-stage improvements, they never sought MCI increases that would have been passed on to existing tenants. Instead, they relied on bank financing to absorb those costs themselves. And they cleaned up the building's recordkeeping, identifying tenants who had been overcharged by the prior owner, refunding those overages, and reducing the affected tenants' rents accordingly.

171. In 2016, Ms. Ordway and Mr. Guerrieri decided to move into 12 Remsen Street. The tenant on the second floor had passed away and his roommate voluntarily moved out, and the tenant in the street-facing studio on the first floor voluntarily moved out as well. Ms. Ordway and Mr. Guerrieri were therefore able to move into those units in 2017, with the second floor serving as a living area and the first-floor studio serving as a bedroom. Relying on the RSL provision allowing owners to recover their units for personal use and occupancy upon expiration of the existing lease (N.Y.C. Admin. Code § 26-511(c)(9)(b)), Ms. Ordway

and Mr. Guerrieri intended to recover the garden unit on the first floor so that they could consolidate the two floors into a home where they could reside long-term. They chose the first two floors of the building for a number of reasons, including because it would minimize the number of stairs they need to climb as they get older—Ms. Ordway is 63, and Mr. Guerrieri is 64—and because they could utilize the garden area on the first floor while also allowing their dogs to spend time outside without having to be taken off the property.

172. The lease for the rent-stabilized garden unit was set to expire on August 15, 2018. Confident that the current occupant—a successful businessman and professional athlete who also holds an adjunct professorship at NYU—could easily afford an apartment elsewhere, Ms. Ordway and Mr. Guerrieri served him with a lawful notice of non-renewal on May 11, 2018. The tenant, however, refused to move out. Given that there was no genuine dispute that they satisfied all of the criteria to reclaim the unit for personal use, Ms. Ordway and Mr. Guerrieri commenced owner-occupancy holdover proceedings in Brooklyn housing court on September 17, 2018. Because they could not complete their consolidation efforts until the holdover proceedings were resolved, the units were never combined, and thus at the end of each night Ms. Ordway and Mr. Guerrieri have to walk through the common area of the building to access their bedroom.

173. By June 2019, the holdover proceedings had progressed beyond the halfway mark, with trial likely to commence before the end of 2019. But then, just as

Ms. Ordway and Mr. Guerrieri were about to lawfully reclaim occupancy of their own private property, the HSTPA forced an abrupt end to the proceedings and derailed three years of long-term planning. By introducing a new duration-of-tenancy exception to the RSL's personal use and occupancy provision (which covered the tenant in question) and imposing an onerous new "immediate and compelling necessity" standard—and in neither case providing an exception for owners who were already midway through the reclamation process—the HSTPA effectively nullified the lawful notice of non-renewal that Ms. Ordway and Mr. Guerrieri had served thirteen months previously and stopped their consolidation efforts in their tracks.

174. This outcome is problematic for Ms. Ordway and Mr. Guerrieri on multiple fronts: their prior home has been renovated and subdivided into separate rental units, so they cannot move back and instead must continue living in two non-consolidated apartments separated by a public hallway. And it yields a near-term dilemma because their son is due to graduate college in May 2020, and Ms. Ordway and Mr. Guerrieri had intended to let him live with them temporarily while he gets himself situated in his first year out of school, an arrangement that will now be significantly more complicated given the unexpected shortage of functional living space.

175. The HSTPA has thus deprived Ms. Ordway and Mr. Guerrieri of their fundamental right to occupy their own private property, subjecting them to the whims of an affluent tenant who can now (together with his successors) continue demanding renewal leases in perpetuity—even though he was served with

a lawful notice of non-renewal more than a full year *before* the HSTPA changed the rules of the game. Ms. Ordway and Mr. Guerrieri have quite literally been excluded from their own property, simply because their preexisting holdover proceedings happened not to have been fully resolved before June 14, 2019.

176. Adding insult to injury, because the unit in question was the last rent-regulated, non-owner-occupied apartment within an otherwise-free-market property, the HSTPA has also compromised the underlying asset value of the building—a building Ms. Ordway and Mr. Guerrieri have expended significant time and energy working to improve, and in which they had hoped to retire. This, in turn, negatively affected the terms of Ms. Ordway and Mr. Guerrieri's recent refinancing and thus adversely impacts their ability to fund necessary capital improvements going forward.

K. Plaintiff Brooklyn 637-240 LLC

1. 637 Henry Street

177. As discussed above, Plaintiff Brooklyn is the owner of 637 Henry Street in Brooklyn. That residential apartment building contains eight units, three of which are rent-stabilized and one of which is rent-controlled.

178. Brooklyn has owned 637 Henry Street since 2012. At that time, six of the eight units were rent-stabilized and two were rent-controlled. Brooklyn purchased the building with the reasonable expectation that, over time, these regulated units would shift toward deregulation and eventually

return to the free market, consistent with the stated intent of the rent-regulation statutes.

179. For seven years, the system worked precisely as it was designed to: Brooklyn invested significant sums into improving the quality of the building, including by renovating individual apartments as vacancies arose. Incoming tenants benefitted from this modernization (which in some instances included full gut-renovations of apartments that were essentially unlivable and unmarketable in their current condition), while Brooklyn was compensated with lawful increases in the regulated rents—increases that would be borne by those incoming tenants but that had absolutely no impact on existing tenants. Such IAI increases, along with other lawful increases permitted under the pre-HSTPA regime, gradually resulted in apartments at 637 Henry Street exceeding the then-operative threshold for high-rent vacancy decontrol.

180. Now, however, the HSTPA has entirely subverted Brooklyn's reasonable expectations by trapping the four remaining rent-regulated units under a perpetual system of government control and below-market rents, significantly impairing the value of Brooklyn's property. And Brooklyn, no longer able to recoup its improvement costs in the form of reasonable IAI increases or to otherwise offset those costs via vacancy or longevity bonuses, will have to forgo making improvements that would have benefitted incoming tenants. As the units continue to deteriorate over time, Brooklyn will eventually have no choice but to take them off the market altogether.

181. Additionally, Brooklyn had contemplated the future conversion of 637 Henry Street into cooperatives or condominiums, and believed the building to be suitable for conversion. However, such a conversion is no longer feasible under the HSTPA, given that Brooklyn would need to convince 51% of its tenants to enter into purchase agreements for their apartments.

2. 240 President Street

182. As discussed above, Plaintiff Brooklyn is also the owner of 240 President Street in Brooklyn. That residential apartment building contains eight units, two of which are rent-stabilized and one of which is rent-controlled.

183. Brooklyn has owned 240 President Street since 2012. At that time, six of the eight units were rent-stabilized and two were rent-controlled. Brooklyn purchased the building with the reasonable expectation that, over time, these regulated units would shift toward deregulation and eventually return to the free market, consistent with the stated intent of the rent-regulation statutes.

184. For seven years, the system worked precisely as it was designed to: Brooklyn invested significant sums into improving the quality of the building, including by renovating individual apartments as vacancies arose. Incoming tenants thereby benefitted from this modernization (which in some instances included full gut-renovations of apartments that were essentially unlivable and unmarketable in their current condition), while Brooklyn was compensated with lawful increases in the regulated rents—

increases that would be borne by those incoming tenants but that had absolutely no impact on existing tenants. Such IAI increases, along with other lawful increases permitted under the pre-HSTPA regime, gradually resulted in apartments at 240 President Street exceeding the then-operative threshold for high-rent vacancy decontrol.

185. Now, however, the HSTPA has entirely subverted Brooklyn's reasonable expectations by trapping the three remaining rent-regulated units under a perpetual system of government control and below-market rents, significantly impairing the value of Brooklyn's property. And Brooklyn, no longer able to recoup its improvement costs in the form of reasonable IAI increases or to otherwise offset those costs via vacancy or longevity bonuses, will have to forgo making improvements that would have benefitted incoming tenants. As the units continue to deteriorate over time, Brooklyn will eventually have no choice but to take them off the market altogether.

186. Additionally, Brooklyn had contemplated the future conversion of 240 President Street into cooperatives or condominiums, and believed the building to be suitable for conversion. However, such a conversion is no longer feasible under the HSTPA, given that Brooklyn would need to convince 51% of its tenants to enter into purchase agreements for their apartments.

L. Plaintiff 447-9 16th LLC

1. 447 16th Street

187. As discussed above, Plaintiff Sixteenth is the owner of 447 16th Street in Brooklyn. That residential

apartment building contains eight units, five of which are rent-stabilized.

188. Sixteenth has owned 447 16th Street since 2012. At that time, all eight units were rent-stabilized. Sixteenth purchased the building with the reasonable expectation that, over time, these units would shift toward deregulation and eventually return to the free market, consistent with the stated intent of the rent-regulation statutes.

189. For seven years, the system worked precisely as it was designed to: Sixteenth invested significant sums into improving the quality of the building, including by renovating individual apartments as vacancies arose. Incoming tenants thereby benefitted from this modernization (which in some instances included full gut-renovations of apartments that were essentially unlivable and unmarketable in their current condition), while Sixteenth was compensated with lawful increases in the regulated rents—increases that would be borne by those incoming tenants but that had absolutely no impact on existing tenants. Such IAI increases, along with other lawful increases permitted under the pre-HSTPA regime, gradually resulted in apartments at 447 16th Street exceeding the then-operative threshold for high-rent vacancy decontrol.

190. Now, however, the HSTPA has entirely subverted Sixteenth's reasonable expectations by trapping the five remaining rent-regulated units under a perpetual system of government control and below-market rents, significantly impairing the value of Sixteenth's property. And Sixteenth, no longer able to recoup its improvement costs in the form of

reasonable IAI increases or to otherwise offset those costs via vacancy or longevity bonuses, will have to forgo making improvements that would have benefitted incoming tenants. As the units continue to deteriorate over time, Sixteenth will eventually have no choice but to take them off the market altogether.

191. Additionally, Sixteenth had contemplated the future conversion of 447 16th Street into cooperatives or condominiums, and believed the building to be suitable for conversion. However, such a conversion is no longer feasible under the HSTPA, given that Sixteenth would need to convince 51% of its tenants to enter into purchase agreements for their apartments.

2. 449 16th Street

192. As discussed above, Plaintiff Sixteenth is also the owner of 449 16th Street in Brooklyn. That residential apartment building contains eight units, four of which are rent-stabilized.

193. Sixteenth has owned 449 16th Street since 2012. At that time, seven of the eight units were rent-stabilized. The eighth was a free-market unit. Sixteenth purchased the building with the reasonable expectation that, over time, the remaining regulated units would shift toward deregulation and eventually return to the free market, consistent with the stated intent of the rent-regulation statutes.

194. For seven years, the system worked precisely as it was designed to: Sixteenth invested significant sums into improving the quality of the building, including by renovating individual apartments as vacancies arose. Incoming tenants thereby benefitted

from this modernization (which in some instances included full gut-renovations of apartments that were essentially unlivable and unmarketable in their current condition), while Sixteenth was compensated with lawful increases in the regulated rents—increases that would be borne by those incoming tenants but that had absolutely no impact on existing tenants. Such IAI increases, along with other lawful increases permitted under the pre-HSTPA regime, gradually resulted in apartments at 449 16th Street exceeding the then-operative threshold for high-rent vacancy decontrol.

195. Now, however, the HSTPA has entirely subverted Sixteenth's reasonable expectations by trapping the four remaining rent-regulated units under a perpetual system of government control and below-market rents, significantly impairing the value of Sixteenth's property. And Sixteenth, no longer able to recoup its improvement costs in the form of reasonable IAI increases or to otherwise offset those costs via vacancy or longevity bonuses, will have to forgo making improvements that would have benefitted incoming tenants. As the units continue to deteriorate over time, Sixteenth will eventually have no choice but to take them off the market altogether.

196. Additionally, Sixteenth had contemplated the future conversion of 449 16th Street into cooperatives or condominiums, and believed the building to be suitable for conversion. However, such a conversion is no longer feasible under the HSTPA, given that Sixteenth would need to convince 51% of its tenants to enter into purchase agreements for their apartments.

VI. The Pre-Existing "Hardship" Provisions in the Rent-Regulation Statutes Provide No Relief from, and Instead Are Further Undermined by, the HSTPA

197. The "hardship" provisions in the various rent-control and rent-stabilization statutes cannot cure the takings alleged herein, as those exceptions do not provide *any* relief from the facial requirements of the HSTPA— requirements that indisputably apply with full force to Plaintiffs' properties.

198. These hardship provisions allow DHCR to provide owners with individualized rent increases if certain statutory criteria are satisfied. *See* N.Y.C. Admin. Code §§ 26-405(g), 26-511(c)(6)-(6-a); 23 N.Y. Unconsol. Law §§ 8584(4), 8626(d)(4)-(5). But the takings here are not tied to a simple loss of rental income. Instead, they involve wide-ranging divestments of core property rights paired with regulatory restrictions that so devalue the subject properties as to mirror outright governmental appropriations. DHCR has absolutely *no* discretion to waive or modify the HSTPA's application to a given property, and thus no discretion to cure the takings alleged herein. Even in the rare instance where DHCR grants a hardship application, a modest increase in the rent does nothing to override tenants' newly conferred veto rights over co-op/condo conversion plans, to restore owners' rights to reclaim units for personal use and occupancy, or to free units from the strictures of rent-regulation once the rent exceeds the prior threshold for vacancy or high-income decontrol. Indeed, some of the burdens imposed by the HSTPA—such as the co-op/condo conversion restrictions and the

amendments to the eviction and rental application procedures—are not even contained in the rent-regulation statutes that house the hardship provisions.

199. Moreover, because all of the hardship provisions predate the passage of the HSTPA, pre-amendment property values already necessarily accounted for the possibility of one-off rent increases under those provisions. The onerous new encumbrances and concomitant devaluations detailed herein are therefore grafted on top of, and cannot be offset by, these preexisting hardship provisions.

200. If anything, the HSTPA *blunts* the force of those provisions. For instance, the alternative hardship provisions in the RSL and ETPA are keyed to profit margins and yet exclude capital repairs (and income taxes) from the calculation of operating expense, meaning that the value of any rent increase secured under those provisions will be diminished by the owner's capital improvement costs, which must be recouped separately via MCI increases. However, by significantly limiting MCI increases (even retroactively), the HSTPA has rendered the alternative hardship provisions' purported protections even more illusory than they already were. Similarly, these alternative hardship provisions impute rental value to apartments "unoccupied at the owner's choice." As detailed above, however, the repeal of vacancy and longevity increases and the new restrictions on IAIs effectively leave owners with no choice but to leave units vacant, a "choice" that would count against them for purposes of an alternative hardship application.

201. In any event, even looking just at rental income and assuming that an owner were to receive the maximum relief available under the hardship provisions, that owner would still suffer an unconstitutional taking. That is because the hardship provisions, which are subject to various caps and restrictions on how often an owner can apply for an increase, are not available at all until the situation becomes so dire that the taking has already occurred.

202. By way of illustration, the RSL's "comparative hardship" provision (N.Y.C. Admin. Code § 26-511(c)(6)) essentially guarantees annual net income at *1968-1970* levels, with no adjustment for inflation, no exception for buildings that were not profitable during the benchmark period, and exclusive of debt service, financing costs, or management fees—and the owner must operate at those levels for three years before the purported "remedy" is even available. Of course, an owner's reasonable investment-backed expectations are destroyed, and his or her building is substantially devalued, well before net income drops to 1960s levels over three years.

203. The ETPA's comparative hardship provision (23 N.Y. Unconsol. Law § 8626(d)(4)) is keyed to the average ratio between operating expenses and gross rents over the proceeding five years—again without regard for whether the building was profitable during that period, and again exclusive of debt service, financing costs, or management fees—and only applies once the owner can affirmatively "establish[] a hardship."

204. Both rent-stabilization statutes' alternative hardship provisions (N.Y.C. Admin. Code § 26-

511(c)(6-a); 23 N.Y. Unconsol. Law § 8626(d)(5)) are equally infirm, as they only become available if gross margins dip below *5%*, exclusive of capital improvement costs and income taxes.

205. The hardship provisions in the two rent-control statutes (N.Y.C. Admin. Code § 26-405(g); 23 N.Y. Unconsol. Law § 8584(4)) purport to guarantee a net annual return—exclusive of mortgage interest—equal to 7.5% (outside the City) or 8.5% (in the City) of the valuation of the subject property, but they do *not* override the general cap on rent increases for rent-controlled apartments. Thus, by virtue of the amendments in Part H of the HSTPA (discussed above), hardship increases for rent-controlled units are now capped by the five-year average of rent guidelines board increases (with any shortfall deferred to future years)—a circular outcome given that the overwhelming majority of rent-regulated units (including in the buildings owned by Plaintiffs Siljay, Holding, and Brooklyn at issue here) are stabilized, not controlled, and thus the majority of the units will already have been subject to those below-market increases at the time the building became distressed. The only exception to the cap, within New York City, allows buildings operating at a net loss to be brought back to zero—but owners reasonably expect to do more than just break even. Worse still, by impairing the underlying asset value of the buildings, the HSTPA has reduced the very metric used to calculate the size of this purported hardship increase, which would only affect rents for the tiny minority of rent-controlled units anyway.

206. With their buildings now trapped in a perpetual regulatory scheme that deprives them of core property rights, it is of little comfort to owners that they can periodically ask the government for the equivalent of a handout *after* that taking has already occurred.

207. Thus, the preexisting hardship provisions provide, at best, a modest and much-too-late increase in rental income that does nothing at all to address the underlying encumbrances imposed on Plaintiffs' property via the newly enacted HSTPA.

VII. The HSTPA Disparately and Adversely Impacts Racial and Ethnic Minority Renters and Perpetuates Residential Segregation in New York

208. As detailed in a June 12, 2019 *Wall Street Journal* article, wealthy, white Manhattan residents have enjoyed disproportionate benefits under New York's rent-control and rent-stabilization laws, even pre-HSTPA.

209. Citing statistics from the 2017 New York City Housing and Vacancy Survey, the article explains that "[w]hite renters in rent-protected apartments benefited more than any other race group, . . . with a discount of 36% from market rates, compared with 16% for black renters and 17% for Hispanic renters."

210. These disparate impacts, by effectively freezing tenants in place, perpetuate residential racial segregation among New York City communities, as the decreased incentives for turnover in the housing market limit the opportunities for members of different racial and ethnic groups to compete for housing in heavily regulated communities—and

especially in the wealthy, majority-white neighborhoods where the market-distorting effects of rent regulation are at their zenith.

211. For the reasons discussed above, these unlawful effects will only worsen under the HSTPA, which permanently locks into place, and exacerbates, a system that disproportionately benefits wealthier white tenants more than it benefits members of any other racial or ethnic group. Indeed, the repeal of the income cap effectively guarantees that those very same tenants and their families can now retain their rent-regulated apartments in perpetuity.

212. As members of minority groups are denied the opportunity to compete in the rental market for those apartments in which white renters will now be effectively permanently ensconced, all citizens—owners and tenants alike—will be denied the benefits of more racially diverse buildings and neighborhoods.

FIRST CAUSE OF ACTION

Taking Without Just Compensation – Fifth Amendment; 42 U.S.C. § 1983
(Against All Defendants)

213. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein.

214. The takings clause of the Fifth Amendment to the United States Constitution, incorporated against the States by the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation."

215. Acting under color of state law, Defendants have caused, and will continue to cause, landlord

owners (including Plaintiffs) to be deprived of their right to possess, use, and dispose of their property, and have taken their private property for a claimed public use without just compensation in violation of the federal takings clause, both facially and as applied to Plaintiffs.

216. The HSTPA constitutes a taking for at least two independent reasons, based on at least two separate legal theories.

217. *First*, the HSTPA deprives owners of their fundamental rights to possess, use, admit or exclude others, and dispose of their property. Accordingly, Defendants have effected an unconstitutional physical taking of private property without any (let alone just) compensation.

218. Among other things, by virtue of the amendment to the co-op/condo conversion rules, property owners are now quite literally forced to secure majority tenant consent in order to dispose of their property and exit the rental business via a conversion. That is, the right to dispose (and control the use) of their property is transferred to their tenants, who are effectively elevated to the status of equity stakeholders in the subject properties. And by removing the sunset provision on this conversion restriction, Defendants have now *permanently* abrogated one of the core ownership rights in the bundle associated with property ownership, inexplicably transferring that right to non-owners.

219. Similarly, by severely restricting property owners' ability to reclaim possession of their rent-regulated units even for *personal use*, Defendants

have cut at the very core of owners' rights to control the possession and use of their own property.

220. The HSTPA thereby permanently abrogates or substantially impairs Plaintiffs' basic rights to possess, use, and dispose of their buildings in the manner set forth above. Such a permanent abrogation of at least one of the overall bundle of property rights constitutes a taking, without regard to its comparative value in relation to the whole.

221. Because the government has effected a physical taking, it has a categorical duty to provide just compensation to Plaintiffs, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof, no matter how large or small of a portion of the whole is taken, and no matter how large or small the economic impact.

222. *Second*, the HSTPA "goes too far and effects a regulatory taking" based on an array of case-specific factors, including, but not limited to, the statute's "economic effect on the landowner[s], the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action," that together establish that justice and fairness require that the economic injuries caused by the HSTPA be compensated by the government, rather than remain disproportionately borne by the owners of rent-regulated buildings (and, in the case of the co-op/condo conversion restrictions and the changes to the landlord-tenant laws, owners of even market-rate buildings) without just compensation. *Palazzolo*, 533 U.S. at 617 (citing *Penn Central*, 438 U.S. at 124).

223. The regulatory takings analysis eschews any set formula, requires careful examination and weighing of all relevant circumstances in context, and depends largely on the particular impacts of the statute at issue.

224. Through the HSTPA, Defendants have imposed unduly harsh economic impacts on Plaintiffs' use of their properties. These impacts include dramatically devaluing Plaintiffs' properties; rendering their investments in the properties unprofitable; rendering the ongoing business of renting out the rent-regulated units in Plaintiffs' properties unprofitable; making it commercially impracticable and economically unviable to continue to rent out certain rent-regulated units; and interfering with Plaintiff's legitimate property interests in the ways set forth above.

225. Defendants have also interfered with Plaintiffs' reasonable investment-backed expectations in those properties. This interference is to such a degree that Defendants' actions are the functional equivalent of a government appropriation, again without just compensation.

226. Owners have purchased and invested in properties with reasonable investment-backed expectations that they would be able to recoup and profit to a reasonable degree from their investments, and run their buildings profitability, based on, *inter alia*, a certain percentage of units coming off rent regulation over time, certain specific formerly permitted increases in rent, reasonable recoupment of MCI investments through permanently increased rents at the previously permitted rent increase levels,

the ability to convert buildings to cooperatives and condominiums under the previously applicable rules, and the like. Indeed, as the express terms of the rent-regulation statutes make clear, this trend toward deregulation was the fundamental bargain struck between owners and the government upon which owners relied in purchasing buildings with rent-regulated units.

227. Given that owners already had to compensate for the market-distorting effects of rent-regulation (such as perpetual renewal and succession rights) under the pre-amendment regime, the imposition of these draconian new restraints on owners' rights obliterates what little recourse owners had left and makes it impossible for them to realize any sort of reasonable return or profit on their investments, which in turn compromises the underlying asset resale value of their properties and destroys their reasonable investment-backed expectations of profitability and appreciating asset value.

228. The HSTPA accomplishes this devaluation by, *inter alia*, limiting owners' ability to remove rental units from rent regulation by repealing the high-rent deregulatory provisions; limiting owners' ability to raise rents upon a vacancy; curtailing owners' ability to raise rents to recover the costs of MCIs and IAIs, including those IAIs required simply to keep a unit in the rental market at all following a lengthy tenancy; applying the new limitations on owners' ability to raise rents to recover the costs of MCIs retroactively to MCI investments approved since 2012; prohibiting owners from renewing leases at the legal regulated

rent after having previously offered a lower "preferential" rent; effectively destroying owners' ability to dispose of or otherwise recover their investments in rent-regulated buildings via a conversion (especially given the economic incentives for regulated tenants not to purchase their units); depriving owners of the ability to select their incoming tenants or obtain adequate security to protect their legitimate property interests; and even denying owners the right to reclaim occupancy for their own personal use.

229. Indeed, by repealing the various deregulatory provisions and severely curtailing lawful rent increases—and by repealing the sunset provisions that had previously required the Legislature to periodically revisit the supposed need for rent regulation—the HSTPA has created a self-perpetuating regulatory regime that will disincentivize tenants from vacating their apartments and thereby exacerbate the purported housing "emergency" that supposedly justified regulation in the first place. In doing so, the HSTPA effectively guarantees that owners' private property will remain subject to rent-regulation in perpetuity.

230. Defendants have thereby forced certain private property owners to bear the cost

(without a corresponding benefit) of what is essentially a government-sponsored affordable housing initiative that, in fairness and justice, should be funded, if at all, by the public as a whole. The character of this governmental action—which eviscerates owners' fundamental rights to dispose of, exclude others from, and personally use and possess

their own property (and does so in perpetuity), and which in the case of the co-op/condo conversion restrictions applies even to fully market-rate buildings—confirms that this "regulation" is in fact an unconstitutional regulatory taking of private property.

231. In the absence of declaratory and injunctive relief, landlord owners (including Plaintiffs) will continue to be irreparably harmed and subjected to the deprivation of rights guaranteed to them by the U.S. Constitution.

232. In the alternative, Plaintiffs are entitled to just compensation.

SECOND CAUSE OF ACTION

Taking Without Just Compensation – N.Y. Const. art. I, § 7 (Against All Defendants Except the State, the AG, Visnauskas, and Pascal)

233. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein.

234. The takings clause of Article I, § 7 of the New York State Constitution provides that "[p]rivate property shall not be taken for public use without just compensation."

235. Acting under color of state law, Defendants have caused, and will continue to cause, landlord owners (including Plaintiffs) to be deprived of their right to possess, use, and dispose of their property, and have taken their private property for a claimed public use without just compensation in violation of the State takings clause, both facially and as applied to Plaintiffs.

236. The HSTPA constitutes a taking at least for the two independent reasons, based on at least two separate legal theories, set forth above, and also because it does not substantially advance a closely and legitimately connected government interest. As detailed above, the means employed by the HSTPA directly undermine, rather than advance, the law's purported goal of increasing or preserving affordable housing in New York and will perpetuate, rather than alleviate, the purported vacancy "emergency."

237. In the absence of declaratory and injunctive relief, landlord owners (including Plaintiffs) will continue to be irreparably harmed and subjected to the deprivation of rights guaranteed to them by the New York State Constitution. 238. In the alternative, Plaintiffs are entitled to just compensation.

THIRD CAUSE OF ACTION

Substantive Due Process –
Fourteenth Amendment; 42 U.S.C. § 1983
(Against All Defendants Except the State)

239. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein.

240. The due process clause of the Fourteenth Amendment to the United States Constitution provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

241. Owners, including Plaintiffs, have a legitimate property interest, grounded in state law, in the buildings they own.

242. The HSTPA infringes upon the property rights of owners, including Plaintiffs, in an arbitrary

manner, without any conceivable rational basis, and is impermissibly retroactive. In addition, the HSTPA does not substantially advance legitimate state interests, and does not accomplish its stated objective, for the reasons alleged above.

243. Indeed, the law is irrational and arbitrary on its face, as evidenced by, *inter alia*, (1) its repeal of the income cap for rent-regulated apartments with rents above a certain threshold, which transforms a law ostensibly aimed at providing affordable housing to low-income New Yorkers into one that will allow *high*-income tenants (and their family members, as broadly defined) to benefit indefinitely from the regime; (2) its repeal of provisions that allowed units to be removed from rent stabilization or control once the rent crossed a statutory high-rent threshold and the unit became vacant; (3) its repeal of provisions permitting larger rent increases for a new tenant after a vacancy; (4) its modification of the preferential rent provisions such that owners who voluntarily agreed to a further-reduced rent in the past (even before the HSTPA took effect) cannot even charge the government-approved legal regulated rent upon renewal; (5) its lowering of the rent increase cap for MCIs from 6% to just 2% in rent-stabilized apartments in New York City, from 15% to 2% in rent-controlled apartments in New York City, and from 15% to 2% in other counties when landlords make MCIs (and its elimination of such increases after 30 years); (6) its retroactive application of these MCI rent increase caps to rent increases attributable to MCIs that were approved within the seven years *prior* to the amendment taking effect; (7) its outright elimination of MCIs for buildings with 35% or fewer rent-regulated units; (8) its cap of

$15,000 over 15 years on recoverable IAI spending—spread across a maximum of just three IAIs and with no exception for property owners whose units are not in a rentable state following a prolonged tenancy—combined with a drastic reduction in the size of the monthly rent increases available to recover those costs (and the outright elimination of such increases after 30 years); (9) its restrictions on evicting tenants who do not pay their rent, potentially extending their tenancies for up to a year; (10) its curtailment of owners' rights to reclaim possession of their units for personal use and occupancy (even if the owners took steps to lawfully reclaim their units prior to the HSTPA's effective date); (11) its retroactive expansion of the limitations, record-retention, and lookback periods for rent overcharge claims; and (12) its imposition of substantial new restrictions on co-op/condo conversions, conferring blocking rights on existing tenants even when the conversion would *not* cause those tenants to be evicted (and even when the building in question is not rent-regulated).

244. These changes freeze the existing stock of rent-regulated apartments in place and disincentivize tenants from giving up their apartments and moving in and out of apartments, neighborhoods, and the City as market conditions shift, because units will be permanently rent-regulated at rents far below market price, and because it will be too expensive for developers to build new units, decreasing the availability of affordable housing.

245. Indeed, by virtue of the repeals of the high-rent vacancy and high-income provisions, renewal rights to a rent-regulated apartment will remain

vested no matter how high the rent gets or how wealthy the tenant becomes. When tacked onto the preexisting features of the rent-regulation regime (such as the rights of co-tenants/family members who take over rent-regulated apartments from a deceased tenant), this effectively creates renewal rights in perpetuity, which in turn will necessarily exacerbate—not alleviate—the purported housing "emergency."

246. Moreover, by repealing the sunset provisions that had previously required the Legislature to periodically reassess the purported wisdom and efficacy of the rent-regulation regime in light of changed circumstances over time, the HSTPA cements the disconnect between the now-permanent law and the purported "emergency" it was ostensibly designed to address, thereby exacerbating the due process violation.

247. Acting under color of state law, Defendants have caused, and will continue to cause, landlord owners (including Plaintiffs) to be deprived of their property without due process in violation of their substantive due process rights under the Fourteenth Amendment, both facially and as applied to Plaintiffs.

248. In the absence of declaratory and injunctive relief, landlord owners (including Plaintiffs) will continue to be irreparably harmed and to be subjected to this deprivation of rights guaranteed to them by the United States Constitution.

FOURTH CAUSE OF ACTION

Substantive Due Process – N.Y. Const. art. I, § 6
(Against All Defendants Except the State, the AG, Visnauskas, and Pascal)

249. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein.

250. The due process clause of Article I, § 6 of the New York State Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law."

251. Owners, including Plaintiffs, have a legitimate property interest, grounded in state law, in the buildings they own.

252. The HSTPA infringes upon the property rights of owners, including Plaintiffs, in an irrational and arbitrary manner, without any conceivable rational basis, and is impermissibly retroactive, as set forth above.

253. Acting under color of state law, Defendants have caused, and will continue to cause, landlord owners (including Plaintiffs) to be deprived of their property without due process, in violation of their substantive due process rights under Article I, § 6 of the New York State Constitution, both facially and as applied to Plaintiffs.

254. In the absence of declaratory and injunctive relief, landlord owners (including Plaintiffs) will continue to be irreparably harmed and to be subjected to this deprivation of rights guaranteed to them by the New York State Constitution.

FIFTH CAUSE OF ACTION

Equal Protection –
Fourteenth Amendment; 42 U.S.C. § 1983
(Against All Defendants Except the State)

255. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein.

256. The equal protection clause of the Fourteenth Amendment to the United States Constitution provides: "[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

257. The HSTPA singles out building owners whose properties happen to include rent-regulated units (and single-unit owners in converted co-ops/condos who purchased a unit subject to a regulated tenancy), including Plaintiffs, for oppressive treatment that, as detailed above, bears no rational relationship to the goal of providing affordable housing (and yet has now been made permanent).

258. Acting under color of state law, Defendants have caused, and will continue to cause, landlord owners (including Plaintiffs) to be deprived of their right to equal protection guaranteed by the Fourteenth Amendment, both facially and as applied to Plaintiffs.

259. In the absence of declaratory and injunctive relief, landlord owners (including Plaintiffs) will continue to be irreparably harmed and to be subjected to this deprivation of rights guaranteed to them by the United States Constitution.

SIXTH CAUSE OF ACTION

Equal Protection Clause – N.Y. Const. art. I, § 11
(Against All Defendants Except the State, the AG, Visnauskas, and Pascal)

260. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein.

261. The equal protection clause of Article I, § 11 of the New York State Constitution provides that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof."

262. The HSTPA singles out building owners whose properties happen to include rent-regulated units (and single-unit owners in converted co-ops/condos who purchased a unit subject to a regulated tenancy), including Plaintiffs, for oppressive treatment that, as detailed above, bears no rational relationship to the goal of providing affordable housing (and yet has now been made permanent).

263. Acting under color of state law, Defendants have caused, and will continue to cause, landlord owners (including Plaintiffs) to be deprived of their right to equal protection guaranteed by the New York State Constitution, both facially and as applied to Plaintiffs.

264. In the absence of declaratory and injunctive relief, landlord owners (including Plaintiffs) will continue to be irreparably harmed and to be subjected to this deprivation of rights guaranteed to them by the New York State Constitution.

SEVENTH CAUSE OF ACTION

Contracts Clause – Article I, § 10; 42 U.S.C. § 1983
(Against All Defendants Except the State)

265. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein.

266. The contracts clause of Article I, § 10 of the United States Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."

267. Acting under color of state law, Defendants have caused, and will continue to cause, landlord owners (including Plaintiffs) to be deprived of their rights guaranteed by the contracts clause, both facially and as applied to Plaintiffs.

268. Specifically, the HSTPA has substantially impaired existing contractual relationships, including but not limited to by:

a) making existing preferential rents the base rent for lease renewal increases, irrespective of the express lease provisions that granted the preferential rents (*i.e.*, even when the lease expressly provided a preferential rent for a specified lease term);

b) limiting rent increases for MCIs and IAIs that were already under contract;

c) limiting the amount recoverable in a summary proceeding to the base rent and excluding fees, charges, or penalties, even when a lease expressly provides to the contrary;

d) destroying the benefit of the bargain for owners who contracted with the City to offer affordable housing units under the Article XI program and whose units have now been trapped under a permanent rent-regulation regime as a result; and

e) rendering co-op/condo conversions impossible for owners who had already entered into contracts to finance such conversions under the prior regime.

269. By virtue of the amendments detailed above, the HSTPA has undermined the bargains embodied in these contracts, interfered with the contracting parties' reasonable expectations, and prevented landlord owners, including Plaintiffs, from safeguarding their rights.

270. As discussed above, the HSTPA is untethered to any conceivable public purpose, let alone a significant or legitimate purpose of the sort required to withstand constitutional scrutiny under the contracts clause.

271. Moreover, even if a legitimate public purpose existed, the HSTPA's provisions impairing private contracts represent a wholly unreasonable—and, indeed, counterproductive—means of achieving any such purpose.

272. In the absence of declaratory and injunctive relief, landlord owners (including Plaintiffs) will continue to be irreparably harmed and to be subjected to this deprivation of rights guaranteed to them by the Constitution.

EIGHTH CAUSE OF ACTION

Disparate Impact –
Fair Housing Act, 42 U.S.C. §§ 3601 *et seq*.
(Against All Defendants Except the State)

273. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein.

274. The FHA makes it unlawful to "make unavailable or deny[] a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a).

275. As discussed above, rent-regulation has historically prevented the rental housing market from responding to market forces and has given preferential rental rates to those already living in rent-regulated housing units, thereby perpetuating housing segregation in New York.

276. For example, because white renters enjoy a disproportionate discount on market rates compared to black and Hispanic renters, white renters are strongly incentivized to stay in housing units that otherwise would change hands and draw a more racially and ethnically diverse group of tenants.

277. The HSTPA exacerbates these effects and thereby violates the FHA. For instance, the repeal of the income cap *expands* the disproportionate advantages conferred upon affluent white tenants, allowing and incentivizing those tenants (and their family member successors) to remain in their rent-regulated apartments indefinitely. In doing so, the HSTPA reduces housing opportunities for members of

other racial and ethnic groups who want to compete in the rental market for those apartments.

278. In these ways, the HSTPA not only fails at its purported goal of promoting affordable housing, but also disparately and adversely impacts racial and ethnic minority renters, perpetuates residential segregation in New York, and causes Plaintiffs significant harm by restricting their ability to make available residential housing that would be more integrated but for the new law's unprecedented and irrational expansion of the rent-regulation laws.

279. Acting under color of state law, Defendants have caused, and will continue to cause, Plaintiffs to be subjected to this deprivation of rights guaranteed to them by federal law.

280. In the absence of declaratory and injunctive relief, Plaintiffs will continue to be irreparably harmed by this deprivation of their rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in Plaintiffs' favor and grant the following relief:

1) A declaration that the HSTPA is facially unconstitutional in its entirety because it violates:

a) The takings clause of the Fifth Amendment to the U.S. Constitution, as incorporated against the States by the Fourteenth Amendment;

b) The takings clause of Article I, § 7 of the New York State Constitution;

c) The due process clause of the Fourteenth Amendment to the U.S. Constitution;

d) The due process clause of Article I, § 6 of the New York State Constitution;

e) The equal protection clause of the Fourteenth Amendment to the U.S. Constitution;

f) The equal protection clause of Article I, § 11 of the New York State Constitution; and

g) The contracts clause of Article I, § 10 of the U.S. Constitution;

2) A permanent injunction enjoining Defendants from enforcing the HSTPA as violative of each of the above-listed constitutional provisions;

3) In the alternative to Prayers (1) and (2):

a) A declaration that each of the provisions of the HSTPA specifically challenged herein violates each of the above-listed constitutional provisions, and is therefore facially unconstitutional in its own right, including (but not limited to):

- The restrictions on cooperative and condominium conversions;
- The repeal of high-rent/high-income decontrol for rent-regulated units;
- The repeal of high-rent vacancy decontrol for rent-regulated units;
- The repeal of vacancy and longevity increases;

- The restrictions on rent increases for Major Capital Improvements, including the retroactive application of the reduced cap on such increases;
- The restrictions on rent increases for Individual Apartment Improvements;
- The restrictions on owners' rights to reclaim rent-regulated units for their own personal use and occupancy;
- The prohibition on increasing preferential rents to the full legal regulated rent upon lease renewal; and
- The imposition of onerous restrictions on evicting tenants who do not pay their rent;

b) A permanent injunction enjoining Defendants from enforcing each of the provisions of the HSTPA specifically challenged herein as violative of each of the above-listed constitutional provisions;

4) A declaration that the HSTPA is unconstitutional as applied to each Plaintiff because it violates each of the constitutional provisions listed in Prayer (1) above;

5) A permanent injunction enjoining Defendants from enforcing the HSTPA as against Plaintiffs' properties as violative of each of the above-listed constitutional provisions;

6) With respect to Plaintiffs' claims arising under the takings clauses of the Fifth Amendment to the U.S. Constitution and Article I, § 7 of the New

York State Constitution, in the alternative to Prayer 5, an award of just compensation in amounts to be determined at trial, such amount being sufficient to make Plaintiffs whole by putting them in as good a position pecuniarily as if their property had not been taken;

7) In the alternative to Prayers (4) through (6):

   a) A declaration that each of the provisions of the HSTPA specifically challenged herein violates each of the constitutional provisions listed in Prayer (1) above as applied to each Plaintiff;

   b) A permanent injunction enjoining Defendants from enforcing each of the provisions of the HSTPA specifically challenged herein as applied to each Plaintiff;

   c) With respect to Plaintiffs' claims arising under the takings clauses of the Fifth Amendment to the U.S. Constitution and Article I, § 7 of the New York State Constitution, in the alternative to Prayer 7(b), an award of just compensation in amounts to be determined at trial, such amount being sufficient to make Plaintiffs whole by putting them in as good a position pecuniarily as if their property had not been taken by each of the provisions of the HSTPA specifically challenged herein;

8) A declaration that the HSTPA is facially unlawful because it violates the FHA;

9) A permanent injunction enjoining Defendants from enforcing the HSTPA as violative of the FHA;

10) An award of fees, costs, expenses, and disbursements, including attorneys' fees and costs to which Plaintiffs are entitled pursuant to 42 U.S.C. §§ 1988 and 3613; and

11) Such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38, Plaintiffs demand a trial by jury in this action of all issues so triable.

Dated: New York, New York
January 23, 2020

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Appendix D

Relevant Provisions of New York Statutes and Regulations

N.Y. Gen. Bus. L. § 352-eeee. Conversions to cooperative or condominium ownership in the city of New York

1. As used in this section, the following words and terms shall have the following meanings:

(a) "Plan". Every offering statement or prospectus submitted to the department of law pursuant to section three hundred fifty-two-e of this article for the conversion of a building or group of buildings or development from residential rental status to cooperative or condominium ownership or other form of cooperative interest in realty, other than an offering statement or prospectus for such conversion pursuant to article two, eight or eleven of the private housing finance law.

(b) "Non-eviction plan". A plan which may not be declared effective until written purchase agreements have been executed and delivered for at least fifty-one percent of all dwelling units in the building or group of buildings or development by bona fide tenants who were in occupancy on the date a letter was issued by the attorney general accepting the plan for filing; provided, however, that for a building containing five or fewer units, and where the sponsor of the offering plan offers the unit that they or their immediate family member has occupied for at least two years, the plan may not be effective until written purchase agreements have been executed and delivered for at

least fifteen percent of all dwelling units in the building subscribed for by bona fide tenants in occupancy or bona fide purchasers who represent that they intend that they or one or more members of their immediate family occupy the dwelling unit when it becomes vacant. The purchase agreement shall be executed and delivered pursuant to an offering made in good faith without fraud and discriminatory repurchase agreements or other discriminatory inducements.

(c) "Eviction plan". A plan which, submitted prior to the effective date of the chapter of the laws of two thousand nineteen that amended this section, pursuant to the provisions of this section, can result in the eviction of a non-purchasing tenant by reason of the tenant failing to purchase pursuant thereto, and which may not be declared effective until at least fifty-one percent of the bona fide tenants in occupancy of all dwelling units in the building or group of buildings or development on the date the offering statement or prospectus was accepted for filing by the attorney general (excluding, for the purposes of determining the number of bona fide tenants in occupancy on such date, eligible senior citizens and eligible disabled persons) shall have executed and delivered written agreements to purchase under the plan pursuant to an offering made in good faith without fraud and with no discriminatory repurchase agreements or other discriminatory inducements.

* * *

N.Y. Unconsol. L. § 26-504. Application

This law shall apply to:

a. Class A multiple dwellings not owned as a cooperative or as a condominium, except as provided in section three hundred fifty-two-eeee of the general business law, containing six or more dwelling units which:

(1) were completed after February first, nineteen hundred forty-seven, except dwelling units (a) owned or leased by, or financed by loans from, a public agency or public benefit corporation, (b) subject to rent regulation under the private housing finance law or any other state law, (c) aided by government insurance under any provision of the national housing act, to the extent this chapter or any regulation or order issued thereunder is inconsistent therewith, or (d) located in a building for which a certificate of occupancy is obtained after March tenth, nineteen hundred sixty-nine; or (e) any class A multiple dwelling which on June first, nineteen hundred sixty-eight was and still is commonly regarded as a hotel, transient hotel or residential hotel, and which customarily provides hotel service such as maid service, furnishing and laundering of linen, telephone and bell boy service, secretarial or desk service and use and upkeep of furniture and fixtures, or (f) not occupied by the tenant, not including subtenants or occupants, as his or her primary residence, as determined by a court of competent jurisdiction, provided, however that no action or proceeding shall be commenced seeking to recover possession on the ground that a housing accommodation is not occupied by the tenant as his or her primary residence unless the owner or lessor shall

have given thirty days notice to the tenant of his or her intention to commence such action or proceeding on such grounds. For the purposes of determining primary residency, a tenant who is a victim of domestic violence, as defined in section four hundred fifty-nine-a of the social services law, who has left the unit because of such violence, and who asserts an intent to return to the housing accommodation shall be deemed to be occupying the unit as his or her primary residence. For the purposes of this subparagraph where a housing accommodation is rented to a not-for-profit hospital for residential use, affiliated subtenants authorized to use such accommodations by such hospital shall be deemed to be tenants, or (g) became vacant on or after June thirtieth, nineteen hundred seventy-one, or become vacant, provided however, that this exemption shall not apply or become effective with respect to housing accommodations which the commissioner determines or finds became vacant because the landlord or any person acting on his or her behalf, with intent to cause the tenant to vacate, engaged in any course of conduct (including but not limited to, interruption or discontinuance of essential services) which interfered with or disturbed or was intended to interfere with or disturb the comfort, repose, peace or quiet of the tenant in his or her use or occupancy of the housing accommodations and provided further that any housing accommodations exempted by this paragraph shall be subject to this law to the extent provided in subdivision b of this section; or (2) were decontrolled by the city rent agency pursuant to section 26-414 of this title; or (3) are exempt from control by virtue of item one, two, six or seven of subparagraph (i) of

paragraph two of subdivision e of section 26-403 of this title; and

b. Other housing accommodations in class A or class B multiple dwellings made subject to this law pursuant to the emergency tenant protection act of nineteen seventy-four.

* * *

N.Y. Unconsol. L. § 26-510. Rent guidelines board

a. There shall be a rent guidelines board to consist of nine members, appointed by the mayor. Two members shall be representative of tenants, two shall be representative of owners of property, and five shall be public members each of whom shall have had at least five years experience in either finance, economics or housing. One public member shall be designated by the mayor to serve as chairman and shall hold no other public office. No member, officer or employee of any municipal rent regulation agency or the state division of housing and community renewal and no person who owns or manages real estate covered by this law or who is an officer of any owner or tenant organization shall serve on a rent guidelines board. One public member, one member representative of tenants and one member representative of owners shall serve for a term ending two years from January first next succeeding the date of their appointment; one public member, one member representative of tenants and one member representative of owners shall serve for terms ending three years from the January first next succeeding the date of their appointment and two public members shall serve for terms ending four years from January first next succeeding the dates of their appointment. The chairman shall serve at the pleasure of the mayor. Thereafter, all members shall continue in office until their successors have been appointed and qualified. The mayor shall fill any vacancy which may occur by reason of death, resignation or otherwise in a manner consistent with the original appointment. A member may be removed by the mayor for cause, but not without an opportunity to be heard in person or by

counsel, in his or her defense, upon not less than ten days notice.

b. The rent guidelines board shall establish annual guidelines for rent adjustments, and in determining whether rents for housing accommodations subject to the emergency tenant protection act of nineteen seventy-four or this law shall be adjusted 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) overall supply of housing accommodations and overall 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. Not later than July first of each year, the rent guidelines board shall file with the city clerk its findings for the preceding calendar year, and shall accompany such findings with a statement of the maximum rate or rates of rent adjustment, if any, for one or more classes of accommodations subject to this law, authorized for leases or other rental agreements commencing on the next succeeding October first or within the twelve months thereafter. Such findings and statement shall be published in the City Record. The rent guidelines board shall not establish annual guidelines for rent adjustments based on the current rental cost of a unit or on the amount of time that has elapsed since another rent increase was authorized pursuant to this title.

c. Such members shall be compensated on a per diem basis of one hundred dollars per day for no more than twenty-five days a year except that the chairman shall be compensated at one hundred twenty-five dollars a day for no more than fifty days a year. The chairman shall be chief administrative officer of the rent guidelines board and among his or her powers and duties he or she shall have the authority to employ, assign and supervise the employees of the rent guidelines board and enter into contracts for consultant services. The department of housing preservation and development shall cooperate with the rent guidelines board and may assign personnel and perform such services in connection with the duties of the rent guidelines board as may reasonably be required by the chairman.

d. Any housing accommodation covered by this law owned by a member in good standing of an association registered with the department of housing preservation and development pursuant to section 26-511 of this chapter which becomes vacant for any reason, other than harassment of the prior tenant, may be offered for rental at any price notwithstanding any guideline level established by the guidelines board for renewal leases, provided the offering price does not exceed the rental then authorized by the guidelines board for such dwelling unit plus five percent for a new lease not exceeding two years and a further five percent for a new lease having a minimum term of three years, until July first, nineteen hundred seventy, at which time the guidelines board shall determine what the rental for a vacancy shall be.

* * *

h. The rent guidelines board prior to the annual adjustment of the level of fair rents provided for under subdivision b of this section for dwelling units and hotel dwelling units covered by this law, shall hold a public hearing or hearings for the purpose of collecting information relating to all factors set forth in subdivision b of this section. Notice of the date, time, location and summary of subject matter for the public hearing or hearings shall be published in the City Record daily for a period of not less than eight days and at least once in one or more newspapers of general circulation at least eight days immediately preceding each hearing date, at the expense of the city of New York, and the hearing shall be open for testimony from any individual, group, association or representative thereof who wants to testify.

i. Maximum rates of rent adjustment shall not be established more than once annually for any housing accommodation within the board's jurisdiction. Once established, no such rate shall, within the one-year period, be adjusted by any surcharge, supplementary adjustment or other modification.

j. Notwithstanding any other provision of this law, the adjustment for vacancy leases covered by the provisions of this law shall be determined exclusively pursuant to this section. The rent guidelines board shall no longer promulgate adjustments for vacancy leases unless otherwise authorized by this chapter.

N.Y. Unconsol. L. § 26-511. Real estate industry stabilization association

* * *

c. A code shall not be adopted hereunder unless it appears to the division of housing and community renewal that such code

(1) provides safeguards against unreasonably high rent increases and, in general, protects tenants and the public interest, and does not impose any industry wide schedule of rents or minimum rentals;

(2) requires owners not to exceed the level of lawful rents as provided by this law;

* * *

(6) provides criteria whereby the commissioner may act upon applications by owners for increases in excess of the level of fair rent increase established under this law provided, however, that such criteria shall provide (a) as to hardship applications, for a finding that the level of fair rent increase is not sufficient to enable the owner to maintain approximately the same average annual net income (which shall be computed without regard to debt service, financing costs or management fees) for the three year period ending on or within six months of the date of an application pursuant to such criteria as compared with annual net income, which prevailed on the average over the period nineteen hundred sixty-eight through nineteen hundred seventy, or for the first three years of operation if the building was completed since nineteen hundred sixty-eight or for the first three fiscal years after a transfer of title to a

new owner provided the new owner can establish to the satisfaction of the commissioner that he or she acquired title to the building as a result of a bona fide sale of the entire building and that the new owner is unable to obtain requisite records for the fiscal years nineteen hundred sixty-eight through nineteen hundred seventy despite diligent efforts to obtain same from predecessors in title and further provided that the new owner can provide financial data covering a minimum of six years under his or her continuous and uninterrupted operation of the building to meet the three year to three year comparative test periods herein provided; and (b) as to completed buildingwide major capital improvements, for a finding that such improvements are deemed depreciable under the Internal Revenue Code and that the cost is to be amortized over a twelve-year period for a building with thirty-five or fewer housing accommodations, or a twelve and one-half-year period for a building with more than thirty-five housing accommodations, for any determination issued by the division of housing and community renewal after the effective date of the the chapter of the laws of two thousand nineteen that amended this paragraph and shall be removed from the legal regulated rent thirty years from the date the increase became effective inclusive of any increases granted by the applicable rent guidelines board. Temporary major capital improvement increases shall be collectible prospectively on the first day of the first month beginning sixty days from the date of mailing notice of approval to the tenant. Such notice shall disclose the total monthly increase in rent and the first month in which the tenant would be required to pay the

temporary increase. An approval for a temporary major capital improvement increase shall not include retroactive payments. The collection of any increase shall not exceed two percent in any year from the effective date of the order granting the increase over the rent set forth in the schedule of gross rents, with collectability of any dollar excess above said sum to be spread forward in similar increments and added to the rent as established or set in future years. Upon vacancy, the landlord may add any remaining balance of the temporary major capital improvement increase to the legal regulated rent. Where an application for a temporary major capital improvement increase has been filed, a tenant shall have sixty days from the date of mailing of a notice of a proceeding in which to answer or reply. The state division of housing and community renewal shall provide any responding tenant with the reasons for the division's approval or denial of such application. Notwithstanding any other provision of the law, for any renewal lease commencing on or after June 14, 2019, the collection of any rent increases due to any major capital improvements approved on or after June 16, 2012 and before June 16, 2019 shall not exceed two percent in any year for any tenant in occupancy on the date the major capital improvement was approved or based upon cash purchase price exclusive of interest or service charges. Notwithstanding anything to the contrary contained herein, no hardship increase granted pursuant to this paragraph shall, when added to the annual gross rents, as determined by the commissioner, exceed the sum of, (i) the annual operating expenses, (ii) an allowance for management services as determined by the commissioner,

(iii) actual annual mortgage debt service (interest and amortization) on its indebtedness to a lending institution, an insurance company, a retirement fund or welfare fund which is operated under the supervision of the banking or insurance laws of the state of New York or the United States, and (iv) eight and one-half percent of that portion of the fair market value of the property which exceeds the unpaid principal amount of the mortgage indebtedness referred to in subparagraph (iii) of this paragraph. Fair market value for the purposes of this paragraph shall be six times the annual gross rent. The collection of any increase in the stabilized rent for any apartment pursuant to this paragraph shall not exceed six percent in any year from the effective date of the order granting the increase over the rent set forth in the schedule of gross rents, with collectability of any dollar excess above said sum to be spread forward in similar increments and added to the stabilized rent as established or set in future years;

* * *

(9) provides that an owner shall not refuse to renew a lease except:

* * *

(b) where he or she seeks to recover possession of one dwelling unit because of immediate and compelling necessity for his or her own personal use and occupancy as his or her primary residence or for the use and occupancy of a member of his or her immediate family as his or her primary residence, provided however, that this subparagraph shall permit recovery of only

one dwelling unit and shall not apply where a tenant or the spouse of a tenant lawfully occupying the dwelling unit is sixty-two years of age or older, has been a tenant in a dwelling unit in that building for fifteen years or more, or has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent the tenant from engaging in any substantial gainful employment, unless such owner offers to provide and if requested, provides an equivalent or superior housing accommodation at the same or lower stabilized rent in a closely proximate area. The provisions of this subparagraph shall only permit one of the individual owners of any building to recover possession of one dwelling unit for his or her own personal use and/or for that of his or her immediate family. A dwelling unit recovered by an owner pursuant to this subparagraph shall not for a period of three years be rented, leased, subleased or assigned to any person other than a person for whose benefit recovery of the dwelling unit is permitted pursuant to this subparagraph or to the tenant in occupancy at the time of recovery under the same terms as the original lease; provided, however, that a tenant required to surrender a dwelling unit under this subparagraph shall have a cause of action in any court of competent jurisdiction for damages, declaratory, and injunctive relief against a

landlord or purchaser of the premises who makes a fraudulent statement regarding a proposed use of the housing accommodation. In any action or proceeding brought pursuant to this subparagraph a prevailing tenant shall be entitled to recovery of actual damages, and reasonable attorneys' fees. This subparagraph shall not be deemed to establish or eliminate any claim that the former tenant of the dwelling unit may otherwise have against the owner. Any such rental, lease, sublease or assignment during such period to any other person may be subject to a penalty of a forfeiture of the right to any increases in residential rents in such building for a period of three years; or

* * *

(14) where the amount of rent charged to and paid by the tenant is less than the legal regulated rent for the housing accommodation, the amount of rent for such housing accommodation which may be charged upon vacancy thereof, may, at the option of the owner, be based upon such previously established legal regulated rent, as adjusted by the most recent applicable guidelines increases and any other increases authorized by law. For any tenant who is subject to a lease on or after the effective date of a chapter of the laws of two thousand nineteen which amended this paragraph, or is or was entitled to receive a renewal or vacancy lease on or after such date, upon renewal of such lease, the amount of rent for such housing accommodation that may be charged and paid shall be no more than the rent charged to and paid by the tenant prior to that renewal, as adjusted

by the most recent applicable guidelines increases and any other increases authorized by law. Provided, however, that for buildings that are subject to this statute by virtue of a regulatory agreement with a local government agency and which buildings receive federal project based rental assistance administered by the United States department of housing and urban development or a state or local section eight administering agency, where the rent set by the federal, state or local governmental agency is less than the legal regulated rent for the housing accommodation, the amount of rent for such housing accommodation which may be charged with the approval of such federal, state or local governmental agency upon renewal or upon vacancy thereof, may be based upon such previously established legal regulated rent, as adjusted by the most recent applicable guidelines increases and other increases authorized by law; and further provided that such vacancy shall not be caused by the failure of the owner or an agent of the owner, to maintain the housing accommodation in compliance with the warranty of habitability set forth in subdivision one of section two hundred thirty-five-b of the real property law.

* * *

N.Y. Comp. Codes R. & Regs. tit. 9, § 2520.6. Definitions

(a) *Housing accommodation.* That part of any building or structure, occupied or intended to be occupied by one or more individuals as a residence, home, dwelling unit or apartment, and all services, privileges, furnishings, furniture and facilities supplied in connection with the occupation thereof. The term housing accommodation will also apply to any plot or parcel of land which had been regulated pursuant to the City of Rent Law prior to July 1, 1971, and which became subject to the RSL after June 30, 1974.

* * *

(c) *Rent.* Consideration, charge, fee or other thing of value, including any bonus, benefit or gratuity demanded or received for, or in connection with, the use or occupation of housing accommodations or the transfer of a lease for such housing accommodations. Rent shall not include surcharges authorized pursuant to section 2522.10 of this Title nor for the purposes of any summary eviction proceeding such fees, charges or penalties; however, any such excess payments even if denominated as fees, charges or penalties may be considered a violation under Part 2525 or an overcharge under Part 2526 of this Code.

(d) *Tenant.* Any person or persons named on a lease as lessee or lessees, or who is or are a party or parties to a rental agreement and obligated to pay rent for the use or occupancy of a housing accommodation or is entitled to occupy the housing accommodation as a tenant pursuant to any other provision of this Code.

(e) *Legal regulated rent.* The rent charged on the base date set forth in subdivision (f) of this section, plus any subsequent lawful increases and adjustments.

* * *

(g) *Vacancy lease.* The first lease or rental agreement for a housing accommodation that is entered into between an owner and a tenant.

(h) *Renewal lease.* Any extension of a tenant's lawful occupancy of a housing accommodation pursuant to section 2523.5 of this Title.

(i) *Owner.* A fee owner, lessor, sublessor, assignee, net lessee, or a proprietary lessee of a housing accommodation in a structure or premises owned by a cooperative corporation or association, or an owner of a condominium unit of the sponsor of such cooperative corporation or association or condominium development, or any other person or entity receiving or entitled to receive rent for the use or occupation of any housing accommodation, or an agent of any of the foregoing, but such agent shall only commence a proceeding pursuant to section 2524.5 of this Title, in the name of such foregoing principals. Any separate entity that is owned, in whole or in part, by an entity that is considered an owner pursuant to this subdivision, and which provides only utility services shall itself not be considered an owner pursuant to this subdivision. Except as is otherwise provided in sections 2522.3 and 2526.1(f) of this Title, a court-appointed receiver shall be considered an owner pursuant to this subdivision.

* * *

(*l*) *Occupant.* Any person occupying a housing accommodation as defined in and pursuant to section 235-f of the Real Property Law. Such person shall not be considered a tenant for the purposes of this Code.

* * *

(n) *Immediate family.* A spouse, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law or daughter-in-law of the owner.

(o) *Family member.*

(1) A spouse, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law or daughter-in-law of the tenant or permanent tenant.

(2) Any other person residing with the tenant or permanent tenant in the housing accommodation as a primary or principal residence, respectively, who can prove emotional and financial commitment, and interdependence between such person and the tenant or permanent tenant. Although no single factor shall be soley determinative, evidence which is to be considered in determining whether such emotional and financial commitment and interdependence existed, may include, without limitation, such factors as listed below. In no event would evidence of a sexual relationship between such persons be required or considered:

(i) longevity of the relationship;

(ii) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;

(iii) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.;

(iv) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.;

(v) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills naming each other as executor and/or beneficiary, granting each other a power of attorney and/or conferring upon each other authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;

(vi) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their words or actions;

(vii) regularly performing family functions, such as caring for each other or each other's

extended family members, and/or relying upon each other for daily family services;

(viii) engaging in any other pattern of behavior, agreement, or other action which evidences the intention of creating a long-term, emotionally committed relationship.

* * *

(u) *Primary residence.* Although no single factor shall be solely determinative, evidence which may be considered in determining whether a housing accommodation subject to this Code is occupied as a primary residence shall include, without limitation, such factors as listed below:

(1) specification by an occupant of an address other than such housing accommodation as a place of residence on any tax return, motor vehicle registration, driver's license or other document filed with a public agency;

(2) use by an occupant of an address other than such housing accommodation as a voting address;

(3) occupancy of the housing accommodation for an aggregate of less than 183 days in the most recent calendar year, except for temporary periods of relocation pursuant to section 2523.5(b)(2) of this Title; and

(4) subletting of the housing accommodation.

N.Y. Comp. Codes R. & Regs. tit. 9, § 2524.1. Restrictions on removal of tenant

(a) As long as the tenant continues to pay the rent to which the owner is entitled, no tenant shall be denied a renewal lease or be removed from any housing accommodation by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, except on one or more of the grounds specified in this Code.

(b) It shall be unlawful for any person to remove or attempt to remove any tenant from any housing accommodation or to refuse to renew the lease or rental agreement for the use of such housing accommodation, because such tenant has taken, or proposes to take any action authorized or required by the RSL or this Code, or any order of the DHCR.

(c) No tenant of any housing accommodation shall be removed or evicted unless and until such removal or eviction has been authorized by a court of competent jurisdiction on a ground authorized in this Part or under the Real Property Actions and Proceedings Law.

N.Y. Comp. Codes R. & Regs. tit. 9, § 2524.3. Proceedings for eviction--wrongful acts of tenant

Without the approval of the DHCR, an action or proceeding to recover possession of any housing accommodation may only be commenced after service of the notice required by section 2524.2 of this Part, upon one or more of the following grounds, wherein wrongful acts of the tenant are established as follows:

(a) The tenant is violating a substantial obligation of his or her tenancy other than the obligation to surrender possession of such housing accommodation, and has failed to cure such violation after written notice by the owner that the violations cease within 10 days; or the tenant has willfully violated such an obligation inflicting serious and substantial injury upon the owner within the three-month period immediately prior to the commencement of the proceeding. If the written notice by the owner that the violations cease within 10 days is served by mail, then five additional days, because of service by mail, shall be added, for a total of 15 days, before an action or proceeding to recover possession may be commenced after service of the notice required by section 2524.2 of this Part.

(b) The tenant is committing or permitting a nuisance in such housing accommodation or the building containing such housing accommodation; or is maliciously, or by reason of gross negligence, substantially damaging the housing accommodation; or the tenant engages in a persistent and continuing course of conduct evidencing an unwarrantable, unreasonable or unlawful use of the property to the

annoyance, inconvenience, discomfort or damage of others, the primary purpose of which is intended to harass the owner or other tenants or occupants of the same or an adjacent building or structure by interfering substantially with their comfort or safety. The lawful exercise by a tenant of any rights pursuant to any law or regulation relating to occupancy of a housing accommodation, including the RSL or this Code, shall not be deemed an act of harassment or other ground for eviction pursuant to this subdivision.

(c) Occupancy of the housing accommodation by the tenant is illegal because of the requirements of law and the owner is subject to civil or criminal penalties therefor, or such occupancy is in violation of contracts with governmental agencies.

(d) The tenant is using or permitting such housing accommodation to be used for immoral or illegal purpose.

(e) The tenant has unreasonably refused the owner access to the housing accommodation for the purpose of making necessary repairs or improvements required by law or authorized by the DHCR, or for the purpose of inspection or showing the housing accommodation to a prospective purchaser, mortgagee or prospective mortgagee, or other person having a legitimate interest therein; provided, however, that in the latter event such refusal shall not be a ground for removal or eviction unless the tenant shall have been given at least five days' notice of the inspection or showing, to be arranged at the mutual convenience of the tenant and owner so as to enable the tenant to be present at the inspection or showing, and that such inspection or showing of the housing accommodation

is not contrary to the provisions of the tenant's lease or rental agreement. If the notice of inspection or showing is served by mail, then the tenant shall be allowed five additional days to comply, for a total of 10 days because of service by mail, before such tenant's refusal to allow the owner access shall become a ground for removal or eviction.

(f) The tenant has refused, following notice pursuant to section 2523.5 of this Title, to renew an expiring lease in the manner prescribed in such notice at the legal regulated rent authorized under this Code and the RSL, and otherwise upon the same terms and conditions as the expiring lease. This subdivision does not apply to permanent hotel tenants, nor may a proceeding be commenced based on this ground prior to the expiration of the existing lease term.

(g) For housing accommodations in hotels, the tenant has refused, after at least 20 days' written notice, and an additional five days if the written notice is served by mail, to move to a substantially similar housing accommodation in the same building at the same legal regulated rent where there is a rehabilitation as set forth in section 2524.5(a)(3) of this Part, provided:

(1) that the owner has an approved plan to reconstruct, renovate or improve said housing accommodation or the building in which it is located;

(2) that the move is reasonably necessary to permit such reconstruction, renovation or improvement;

(3) that the owner moves the tenant's belongings to the other housing accommodation at the owner's cost and expense; and

(4) that the owner offers the tenant the right of reoccupancy of the reconstructed, renovated or improved housing accommodation at the same legal regulated rent unless such rent is otherwise provided for pursuant to section 2524.5(a)(3) of this Part.

(h) In the event of a sublet, an owner may terminate the tenancy of the tenant if the tenant is found to have violated the provisions of section 2525.6 of this Title.

N.Y. Comp. Codes R. & Regs. tit. 9, § 2524.4. Grounds for refusal to renew lease, or in hotels, discontinuing a hotel tenancy, without order of the DHCR

The owner shall not be required to offer a renewal lease to a tenant, or in hotels, to continue a hotel tenancy, and may commence an action or proceeding to recover possession in a court of competent jurisdiction, upon the expiration of the existing lease term, if any, after serving the tenant with a notice as required pursuant to section 2524.2 of this Part, only on one or more of the following grounds:

(a) *Occupancy by owner or member of owner's immediate family.*

(1) An owner who seeks to recover possession of a housing accommodation because of immediate and compelling necessity for such owner's personal use and occupancy as his or her primary residence in the City of New York and/or for the use and occupancy of a member of his or her immediate family as his or her primary residence in the City of New York, except that tenants in a noneviction conversion plan pursuant to section 352-eeee of the General Business Law may not be evicted on this ground on or after the date the conversion plan is declared effective.

(2) The provisions of this subdivision shall not apply where a tenant or the spouse of a tenant lawfully occupying the dwelling unit is sixty-two years of age or older, or has been a tenant in a dwelling unit in that building for fifteen years or more, or has an impairment which results from

anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent the tenant from engaging in any substantial gainful employment, unless the owner offers to provide and, if requested, provides an equivalent or superior housing accommodation at the same or lower regulated rent in a closely proximate area.

(3) An owner may recover only one rent stabilized or rent controlled housing accommodation, whether for his or her personal use and occupancy or that of his immediate family. The provisions of this subdivision shall only permit one of the individual owners of any building, whether such ownership is by joint tenancy, tenancy in common, or tenancy by the entirety to recover possession of one dwelling unit for personal use and occupancy.

(4) No action or proceeding to recover possession pursuant to this subdivision shall be commenced in a court of competent jurisdiction unless the owner shall have served the tenant with a termination notice in accordance with subdivisions (a), (b) and (c)(3) of section 2524.2 of this Part.

(5) The failure of the owner to utilize the housing accommodation for the purpose intended after the tenant vacates, or to continue in occupancy for a period of three years, may result in a forfeiture of the right to any increases in the

legal regulated rent in the building in which such housing accommodation is contained for a period of three years, unless the owner offers and the tenant accepts re-occupancy of such housing accommodation on the same terms and conditions as existed at the time the tenant vacated, or the owner establishes to the satisfaction of the DHCR that circumstances changed after the tenant vacated which prevented the owner from utilizing the housing accommodation for the purpose intended, and in such event, the housing accommodation may be rented at the appropriate guidelines without a vacancy allowance. This paragraph shall not eliminate or create any claim that the former tenant of the housing accommodation may or may not have against the owner.

* * *

(c) *Primary residence.*

The housing accommodation is not occupied by the tenant, not including subtenants or occupants, as his or her primary residence, as determined by a court of competent jurisdiction; provided, however, that no action or proceeding shall be commenced seeking to recover possession on the ground that the housing accommodation is not occupied by the tenant as his or her primary residence unless the owner or lessor shall have given 30 days' notice to the tenant of his or her intention to commence such action or proceeding on such grounds. Such notice may be combined with the notice required by section 2524.2(c)(2) of this Title. A tenant who is a victim of domestic violence, as defined in section four hundred fifty-nine-a of the social

services law, who has left the unit because of such violence, and who asserts an intent to return to the housing accommodation shall be deemed to be occupying the unit as his or her primary residence. In addition, a tenant who has left the housing accommodation and is paying a nominal rent pursuant to Part 2520.11(e)(6) of this Title shall be deemed to be occupying the unit as his or her primary residence. For the purposes of this paragraph, where a housing accommodation is rented to a not-for-profit for providing, as of and after the effective date of the chapter of the laws of two thousand nineteen that amended this paragraph, permanent housing to individuals who are or were homeless or at risk of homelessness, affiliated individuals authorized to use such accommodations by such not-for profit shall be deemed to be tenants.

N.Y. Comp. Codes R. & Regs. tit. 9, § 2524.5. Grounds for refusal to renew lease or discontinue hotel tenancy and evict which require approval of the DHCR

(a) The owner shall not be required to offer a renewal lease to a tenant or continue a hotel tenancy, and shall file on the prescribed form an application with the DHCR for authorization to commence an action or proceeding to recover possession in a court of competent jurisdiction after the expiration of the existing lease term, upon any one of the following grounds:

(1) Withdrawal from the rental market. The owner has established to the satisfaction of the DHCR after a hearing, that he or she seeks in good faith to withdraw any or all housing accommodations from both the housing and nonhousing rental market without any intent to rent or sell all or any part of the land or structure and:

(i) that he or she requires all or part of the housing accommodations or the land for his or her own use in connection with a business which he or she owns and operates; or

(ii) that substantial violations which constitute fire hazards or conditions dangerous or detrimental to the life or health of the tenants have been filed against the structure containing the housing accommodations by governmental agencies having jurisdiction over such matters, and that the cost of removing such violations would substantially equal or exceed the assessed valuation of the structure.

(2) Demolition.

(i) The owner seeks in good faith to demolish the building. As part of the application, the owner shall submit proof of its financial ability to complete such undertaking to the DHCR, and that the plans for the undertaking have been approved by the appropriate city agency. Demolition shall mean the removal of the entire building including the foundation.

(ii) Terms and conditions upon which orders issued pursuant to this paragraph authorizing refusal to offer renewal leases may be based:

(a) The DHCR shall require an owner to pay all reasonable moving expenses and a stipend pursuant to subclause (3) of clause (b) of this subparagraph. It shall afford the tenant a reasonable period of time within which to vacate the housing accommodation. If the tenant vacates the housing accommodation on or before the date provided in the DHCR's final order, such tenant shall be entitled to receive moving expenses and all stipend benefits pursuant to clause (b) of this subparagraph. In addition, if the tenant vacates the housing accommodation prior to the required vacate date, the owner may also pay a stipend to the tenant that is larger than the stipend designated in subclause (3) of clause (b) of this subparagraph. However, at no time shall an owner be required to pay a stipend in excess of this amount. If the tenant does not vacate the housing accommodation on or before the required vacate date, the

stipend shall be reduced by one sixth of the total stipend for each month the tenant remains in occupancy after such vacate date except if the eviction is stayed by the commencement of judicial review of DHCR's order including any appeals.

(b) The order granting the owner's demolition application shall provide that the owner must either:

(1) relocate the tenant to a suitable housing accommodation, as defined in subparagraph (iii) of this paragraph, at the same or lower legal regulated rent in a closely proximate area, or in a new residential building if constructed on the site, in which case suitable interim housing shall be provided at no additional cost to the tenant; plus in addition to reasonable moving expenses, payment of a $ 5,000 stipend, provided the tenant vacates on or before the vacate date required by the final order;

(2) where an owner provides relocation of the tenant to a suitable housing accommodation at a rent in excess of that for the subject housing accommodation, in addition to the tenant's reasonable moving expenses, the owner may be required to pay the tenant a stipend equal to the difference in rent, at the commencement of the occupancy by the tenant of the new housing accommodation, between the subject

housing accommodation and the housing accommodation to which the tenant is relocated, multiplied by 72 months, provided the tenant vacates on or before the vacate date required by the final order; or

(3) in addition to the tenant's moving expenses, pay the tenant a stipend which shall be the difference between the tenant's current rent and the average rent for vacant non-regulated apartments as set forth in the New York City Housing and Vacancy Survey as of the date of the determination. This difference is to be multiplied by 72 months. The stipend shall be increased each year by a guideline beginning the first year after the vacancy survey is issued and continuing until a new vacancy survey is issued.

(c) Wherever a stipend would result in the tenant losing a subsidy or other governmental benefit which is income dependent, the tenant may elect to waive the stipend and have the owner at his or her own expense, relocate the tenant to a suitable housing accommodation at the same or lower legal regulated rent in a closely proximate area.

(d) In the event that the tenant dies prior to the issuance by the DHCR of a final order granting the owner's application, the owner shall not be required to pay such stipend to the estate of the deceased tenant.

(e) Where the administrator's or commissioner's order granting the owner's application is conditioned upon the owner's compliance with specified terms and conditions, if such terms and conditions have not been complied with, or if DHCR determines that the owner has not proceeded in good faith, the order may be modified or revoked.

(f) Noncompliance by an owner with any term or condition of the administrator's or commissioner's order granting the owner's application may result in DHCR initiating its own enforcement proceeding. The DHCR shall retain jurisdiction for this purpose until all of the terms and conditions in the administrator's or commissioner's order granting the owner's application have been met and the project described in the owner's application has been completed. Subsequent owners shall be bound by the terms and conditions of DHCR's order. This clause shall not be deemed to eliminate any remedy or claim that a tenant of the dwelling unit may otherwise have against the owner nor eliminate any independent authority that DHCR may be able to exercise by law or regulation.

(g) An owner's failure to comply within a reasonable amount of time with any term or condition of the administrator's or commissioner's order granting the owner's application or an owner's failure to complete

the project described in the owner's application may be found to be a violation of the RSL and the RSC and subject to any of the penalties and remedies described therein including but not limited to revocation of the administrator's or commissioner's order granting the owner's application and DHCR's continued jurisdiction under the RSL over the building or any subsequent construction. Any remedies and penalties prescribed by this Code shall apply to and be binding against subsequent owners.

(iii) Comparable housing accommodations and relocation. In the event a comparable housing accommodation is offered by the owner, a tenant may file an objection with the DHCR challenging the suitability of a housing accommodation offered by the owner for relocation within 10 days after the owner identifies the housing accommodation and makes it available for the tenant to inspect and consider the suitability thereof. Within 30 days thereafter, the DHCR shall inspect the housing accommodation, on notice to both parties, in order to determine whether the offered housing accommodation is suitable. Such determination will be made by the DHCR as promptly as practicable thereafter. In the event that the DHCR determines that the housing accommodation is not suitable, the tenant shall be offered another housing accommodation, and shall have 10 days after it is made available by the owner for the tenant's inspection to consider its suitability. In the event that the DHCR determines that the housing

accommodation is suitable, the tenant shall have 15 days thereafter within which to accept the housing accommodation. A tenant who refuses to accept relocation to any housing accommodation determined by the DHCR to be suitable shall lose the right to relocation by the owner, and to receive payment of moving expenses or any stipend. "Suitable housing accommodations" shall mean housing accommodations which are similar in size and features to the respective housing accommodations now occupied by the tenants. Such housing accommodations shall be freshly painted before the tenant takes occupancy, and shall be provided with substantially the same required services and equipment the tenants received in their prior housing accommodations. The building containing such housing accommodations shall be free from violations of law recorded by the City agency having jurisdiction, which constitute fire hazards or conditions dangerous or detrimental to life or health, or which affect the maintenance of required services. The DHCR will consider housing accommodations proposed for relocation which are not presently subject to rent regulation, provided the owner submits a contractual agreement that places the tenant in a substantially similar housing accommodation at no additional rent for a period of six years, unless the tenant requests a shorter lease period in writing.

(3) Other grounds. The owner will eliminate inadequate, unsafe or unsanitary conditions and demolish or rehabilitate the dwelling unit pursuant to

the provisions of article VIII, VIII-A, XIV, XV or XVIII of the PHFL, the Housing New York Program Act, or sections 8 and 17 of the U.S. Housing Act of 1937 (National Housing Act), on the condition that the owner:

(i) proves that it has a commitment for the required financing;

(ii) proves that any rehabilitation requires the temporary removal of the tenant; and

(iii) agrees to offer and will offer the tenants the right of first occupancy following any rehabilitation at an initial rent as determined pursuant to the applicable law and subject to any terms and conditions established pursuant to applicable law and regulations.

* * *

N.Y.C. Admin. Code § 26-405 General powers and duties of the city rent agency.

* * *

(5) Where a maximum rent established pursuant to this chapter on or after January first, nineteen hundred seventy-two, is higher than the previously existing maximum rent, the landlord may not collect more than seven and one-half percentum increase from a tenant in occupancy on such date in any one year period, provided however, that where the period for which the rent is established exceeds one year, regardless of how the collection thereof is averaged over such period, the rent the landlord shall be entitled to receive during the first twelve months shall not be increased by more than seven and one-half percentum over the previous rent and additional annual rents shall not exceed seven and one-half percentum of the rent paid during the previous year. Notwithstanding any of the foregoing limitations in this paragraph five, maximum rent shall be increased if ordered by the agency pursuant to subparagraphs (d), (e), (f), (g), (h), (i), (k), (l), (m) or (n) of paragraph one of subdivision g of this section. Commencing January first, nineteen hundred eighty, rent adjustments pursuant to subparagraph (n) of paragraph one of subdivision g of this section shall be excluded from the maximum rent when computing the seven and one-half percentum increase authorized by this paragraph five. Where a housing accommodation is vacant on January first, nineteen hundred seventy-two, or becomes vacant thereafter by voluntary surrender of possession by the tenants, the maximum

rent established for such accommodations may be collected.

* * *

N.Y.C. Admin. Code § 26-405.1 Major capital improvements and individual apartment improvements in rent regulated units.

a. Notwithstanding any other provision of law to the contrary, the division of housing and community renewal, the "division", shall promulgate rules and regulations applicable to all rent regulated units that shall:

(1) establish a schedule of reasonable costs for major capital improvements, which shall set a ceiling for what can be recovered through a temporary major capital improvement increase, based on the type of improvement and its rate of depreciation;

(2) establish the criteria for eligibility of a temporary major capital improvement increase including the type of improvement, which shall be essential for the preservation, energy efficiency, functionality or infrastructure of the entire building, including heating, windows, plumbing and roofing, but shall not be for operational costs or unnecessary cosmetic improvements. Allowable improvements must additionally be depreciable pursuant to the Internal Revenue Service, other than for ordinary repairs, that directly or indirectly benefit all tenants; and no increase shall be approved for group work done in individual apartments that is otherwise not an improvement to an entire building. Only such costs that are actual, reasonable, and verifiable may be approved as a temporary major capital improvement increase;

(3) require that any temporary major capital improvement increase granted pursuant to these

provisions be reduced by an amount equal to (i) any governmental grant received by the landlord, where such grant compensates the landlord for any improvements required by a city, state or federal government, an agency or any granting governmental entity to be expended for improvements and (ii) any insurance payment received by the landlord where such insurance payment compensates the landlord for any part of the costs of the improvements;

(4) prohibit temporary major capital improvement increases for buildings with outstanding hazardous or immediately hazardous violations of the Uniform Fire Prevention and Building Code (Uniform Code), New York City Fire Code, or New York City Building and Housing Maintenance Codes, if applicable;

(5) prohibit individual apartment improvement increases for housing accommodations with outstanding hazardous or immediately hazardous violations of the Uniform Fire Prevention and Building Code (Uniform Code), New York City Fire Code, or New York City Building and Housing Maintenance Codes, if applicable;

(6) prohibit temporary major capital improvement increases for buildings with thirty-five per centum or fewer rent-regulated units;

(7) establish that temporary major capital improvement increases shall be fixed to the unit and shall cease thirty years from the date the increase became effective. Temporary major capital improvement increases shall be added to the legal regulated rent as a temporary increase and shall be removed from the legal regulated rent thirty years

from the date the increase became effective inclusive of any increases granted by the local rent guidelines board;

(8) establish that temporary major capital improvement increases shall be collectible prospectively on the first day of the first month beginning sixty days from the date of mailing notice of approval to the tenant. Such notice shall disclose the total monthly increase in rent and the first month in which the tenant would be required to pay the temporary increase. An approval for a temporary major capital improvement increase shall not include retroactive payments. The collection of any increase shall not exceed two percent in any year from the effective date of the order granting the increase over the rent set forth in the schedule of gross rents, with collectability of any dollar excess above said sum to be spread forward in similar increments and added to the rent as established or set in future years. Upon vacancy, the landlord may add any remaining balance of the temporary major capital improvement increase to the legal regulated rent. Notwithstanding any other provision of the law, for any renewal lease commencing on or after June 14, 2019, the collection of any rent increases due to any major capital improvements approved on or after June 16, 2012 and before June 16, 2019 shall not exceed two percent in any year for any tenant in occupancy on the date the major capital improvement was approved;

(9) ensure that the application procedure for temporary major capital improvement increases shall include an itemized list of work performed and a

description or explanation of the reason or purpose of such work;

(10) provide, that where an application for a major capital improvement rent increase has been filed, a tenant shall have sixty days from the date of mailing of a notice of a proceeding in which to answer or reply;

(11) establish a notification and documentation procedure for individual apartment improvements that requires an itemized list of work performed and a description or explanation of the reason or purpose of such work, inclusive of photographic evidence documenting the condition prior to and after the completion of the performed work. Provide for the centralized electronic retention of such documentation and any other supporting documentation to be made available in cases pertaining to the adjustment of legal regulated rents; and

(12) establish a form in the top six languages other than English spoken in the state according to the latest available data from the U.S. Bureau of Census for a temporary individual apartment improvement rent increase for a tenant in occupancy which shall be used by landlords to obtain written informed consent that shall include the estimated total cost of the improvement and the estimated monthly rent increase. Such form shall be completed and preserved in the centralized electronic retention system to be operational by June 14, 2020. Nothing herein shall relieve a landlord, lessor, or agent thereof of his or her duty to retain proper documentation of all improvements performed or any rent increases resulting from said improvements.

b. The division shall establish an annual inspection and audit process which shall review twenty-five percent of applications for a temporary major capital improvement increase that have been submitted and approved. Such process shall include individual inspections and document review to ensure that owners complied with all obligations and responsibilities under the law for temporary major capital improvement increases. Inspections shall include in-person confirmation that such improvements have been completed in such way as described in the application.

c. The division shall issue a notice to the landlord and all the tenants sixty days prior to the end of the temporary major capital improvement increase and shall include the initial approved increase and the total amount to be removed from the legal regulated rent inclusive of any increases granted by the applicable rent guidelines board.

N.Y.C. Admin. Code § 26-408 Evictions.

a. No tenant, so long as he or she continues to pay the rent to which the landlord is entitled, shall be removed from any housing accommodation which is subject to rent control under this chapter by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession notwithstanding the fact that the tenant has no lease or that his or her lease, or other rental agreement, has expired or otherwise terminated, notwithstanding any contract, lease agreement, or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto, except on one or more of the following grounds, or unless the landlord has obtained a certificate of eviction pursuant to subdivision b of this section:

(1) The tenant is violating a substantial obligation of his or her tenancy other than the obligation to surrender possession of such housing accommodation and has failed to cure such violation after written notice by the landlord that the violation cease within ten days, or within the three month period immediately prior to the commencement of the proceeding the tenant has wilfully violated such an obligation inflicting serious and substantial injury to the landlord; or

(2) The tenant is committing or permitting a nuisance in such housing accommodation; or is maliciously or by reason of gross negligence substantially damaging the housing accommodation; or his or her conduct is such as to interfere substantially with the comfort and safety of the

landlord or of other tenants or occupants of the same or other adjacent building or structure; or

(3) Occupancy of the housing accommodation by the tenant is illegal because of the requirements of law, and the landlord is subject to civil or criminal penalties therefor, or both, provided, however, that such occupancy shall not be considered illegal by reason of violations placed against the housing accommodations or the building in which same are located by any department or agency of the city having jurisdiction unless such department or agency has issued an order requiring the tenants to vacate said accommodation or building or unless such occupancy for such building or such violations relied on by the landlord result from an act, omission or situation caused or created by the tenant; or

(4) The tenant is using or permitting such housing accommodation to be used for an immoral or illegal purpose; or

(5) The tenant who had a written lease or other written rental agreement which terminated or shall terminate on or after May first, nineteen hundred fifty, has refused upon demand of the landlord to execute a written extension or renewal thereof for a further term of like duration not in excess of one year but otherwise on the same terms and conditions as the previous lease except in so far as such terms and conditions are inconsistent with this chapter; or

(6) The tenant has unreasonably refused the landlord access to the housing accommodation for the purpose of making necessary repairs or improvements required by law or for the purpose of inspection or of

showing the accommodation to a prospective purchaser, mortgagee or prospective mortgagee, or other person having a legitimate interest therein; provided, however, that in the latter event such refusal shall not be ground for removal or eviction if such inspection or showing of the accommodation is contrary to the provisions of the tenant's lease or other rental agreement.

(7) The eviction is sought by the owner of a dwelling unit or the shares allocated thereto where such dwelling unit is located in a structure owned as a cooperative or as a condominium and an offering prospectus for the conversion of such structure pursuant to an eviction plan shall have been submitted to the attorney general pursuant to section three hundred fifty-two-eeee of the general business law and accepted for filing by the attorney general, and been declared effective in accordance with such law, and any right of continued occupancy granted by such law to a non-purchasing tenant in occupancy of such dwelling unit shall have expired; provided that the owner of the dwelling unit or the shares allocated thereto seeks in good faith to recover possession of a dwelling unit for his or her own personal use and occupancy or for the use and occupancy of his or her immediate family.

b. No tenant shall be removed or evicted on grounds other than those stated in subdivision a of this section unless on application of the landlord the city rent agency shall issue an order granting a certificate of eviction in accordance with its rules and regulations designed to effectuate the purposes of this title, permitting the landlord to pursue his or her remedies

at law. The city rent agency shall issue such an order whenever it finds that:

(1) The landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his or her own personal use and occupancy as his or her primary residence or for the use and occupancy of his or her immediate family as their primary residence provided, however, that this subdivision shall permit recovery of only one housing accommodation and shall not apply where a member of the household lawfully occupying the housing accommodation is sixty-two years of age or older, has been a tenant in a housing accommodation in that building for fifteen years or more, or has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent the tenant from engaging in any substantial gainful employment; provided, further, that a tenant required to surrender a housing accommodation by virtue of the operation of subdivision g or h of this section shall have a cause of action in any court of competent jurisdiction for damages, declaratory, and injunctive relief against a landlord or purchaser of the premises who makes a fraudulent statement regarding a proposed use of the housing accommodation. In any action or proceeding brought pursuant to this paragraph a prevailing tenant shall be entitled to recovery of actual damages, and reasonable attorneys' fees; or

(2) The landlord seeks in good faith to recover possession of a housing accommodation for which the tenant's lease or other rental agreement has expired or otherwise terminated, and at the time of termination the occupants of the housing accommodation are subtenants or other persons who occupied under a rental agreement with the tenant, and no part of the accommodation is used by the tenant as his or her dwelling; or

(3) The landlord seeks in good faith to recover possession of a housing accommodation for the immediate purpose of substantially altering or remodeling it, provided that the landlord shall have secured such approval therefor as is required by law and the city rent agency determines that the issuance of the order granting the certificate of eviction is not inconsistent with the purpose of this chapter; or

(4) The landlord seeks in good faith to recover possession of housing accommodations for the immediate purpose of demolishing them, and the city rent agency determines that such demolition is to be effected for the purpose of constructing a new building, provided that:

(a) If the purpose of such demolition is to construct a new building containing housing accommodations, no certificate of eviction shall be granted under this paragraph unless such agency determines that such new building will contain at least twenty per centum more housing accommodations consisting of self-contained family units (as defined by regulations issued by such agency, with due regard for the shortage of housing accommodations suitable for family

occupancy and for the purposes of this chapter in relation thereto) than are contained in the structure to be demolished; except, however, that where as a result of conditions detrimental to life or health of the tenants, violations have been placed upon the structure containing the housing accommodations by any agency of the city having jurisdiction over such matters and the cost of removing such violations would be substantially equal to or would exceed the assessed valuation of the structure, the new building shall only be required to make provision for a greater number of housing accommodations consisting of self-contained family units (as so defined by regulation) than are contained in the structure to be demolished; and

(b) The city rent agency shall, by regulation, as a condition to the granting of certificates of eviction under this paragraph , require the relocation of the tenants in other suitable accommodations, provided that the city rent agency may, by regulation, authorize the granting of such certificates as to any tenants or classes of tenants without such requirement of relocation, where such exemption will not result in hardship to such tenants or classes of tenants and will not be inconsistent with the purposes of this chapter; and

(c) The city rent agency may, by regulation, in order to carry out the purposes of this chapter, impose additional conditions to the granting of certificates of eviction under this paragraph , including, but not limited to, the payment of

stipends to the tenants by the landlord in such amounts and subject to such variations and classifications as such agency may determine to be reasonably necessary; and

(d) No certificate of eviction shall be issued pursuant to this paragraph unless the landlord shall have secured such approval as is required by law for the construction sought to be effected, and the city rent agency determines that the issuance of such certificate is not inconsistent with the purpose of this chapter.

(5) Notwithstanding any provisions to the contrary contained in this subdivision or in subdivision d of section 26-410 of this chapter or in the local emergency housing rent control act:

(a) no application for a certificate of eviction under paragraph three or four of this subdivision and no application for a certificate of eviction under paragraph one of subdivision j or under subdivision c of this section for the purpose of withdrawing a housing accommodation from the housing market on the grounds that the continued operation of such housing accommodation would impose undue hardship upon the landlord, pending or made on or after the effective date hereof shall be granted by the city rent agency unless the city rent agency finds that there is no reasonable possibility that the landlord can make a net annual return of eight and one-half per centum of the assessed value of the subject property without recourse to the remedy provided in said paragraph three or four or said subdivision c or j and finds that neither the landlord nor his

or her immediate predecessor in interest has intentionally or willfully managed the property to impair the landlord's ability to earn such return; and

(b) the effectiveness of any certificate of eviction or of any order granting a certificate of eviction pursuant to paragraphs three and four of this subdivision shall be suspended, and no tenant may be evicted pursuant to any such certificate or order, unless the city rent agency:

(i) finds that there is no reasonable possibility that the landlord can make a net annual return of eight and one-half per centum of the assessed value of the subject property without recourse to the remedy provided in said paragraphs three and four and finds that neither the landlord nor his or her immediate predecessor in interest has intentionally or willfully managed the property to impair the landlord's ability to earn such return; and

(ii) issues an order reinstating the effectiveness of any certificate of eviction suspended pursuant to this paragraph. The pendency of any judicial proceeding or appeal shall in no way prevent the taking effect of the relief granted in this subparagraph.

(c) the provisions of this paragraph shall not apply to an application for a certificate of eviction from a housing accommodation when the landlord seeks in good faith to recover possession thereof for the immediate purpose of substantially

altering or remodelling it or for the immediate purpose of demolishing it for the purpose of constructing a new building when such altering or remodelling or the construction of such new building is to be aided by interest reduction payments under section two hundred thirty-six of the national housing act.

(6) Neither the provisions of subparagraph (a) of paragraph four of this subdivision, which require that the new building contain more than or equal to the number of housing accommodations that are contained in the structure to be demolished or substantially altered or remodeled nor the provisions of paragraph five of this subdivision shall apply with respect to any building in which there remains (A) three or fewer occupied apartments which constitute ten percent or less of the total dwelling units in the building or (B) one occupied apartment if the building contains ten or fewer apartments but only on the condition that the tenant is provided with the relocation, moving expense, stipend and any other benefits provided under the corresponding provisions of the rent stabilization law of nineteen hundred sixty-nine. In the event of a substantial alteration or remodeling of a building falling within the limitations of this paragraph, all of the relocation provisions available to an owner for demolition shall apply.

c. The city rent agency may from time to time, to effectuate the purposes of this chapter, adopt, promulgate, amend or rescind such rules, regulations or orders as it may deem necessary or proper for the control of evictions. Any such rules, regulations or orders may include, in addition to any other provisions

authorized by this subdivision, provisions restricting the filing of applications for, or the issuance of orders granting, certificates of eviction where such agency finds that a course of conduct has been engaged in which is proscribed by subdivision d of section 26-412 of this chapter. The agency shall also require, prior to the filing of plans with the department of buildings for a new building or alteration on the site of controlled housing accommodations and prior to the filing of an application for a permit for the demolition or removal of an existing multiple dwelling which contains controlled housing accommodations, that the applicant certify to and file with the agency such information and give such notice to tenants as it deems necessary to prevent evasion of the law and regulations governing evictions. It may also require that an order granting a certificate of eviction be obtained from it prior to the institution of any action or proceeding for the recovery of possession of any housing accommodation subject to rent control under this chapter upon the grounds specified in subdivision b of this section or where it finds that the requested removal or eviction is not inconsistent with the purposes of this chapter and would not be likely to result in circumvention or evasion thereof; provided, however, that no such order shall be required in any action or proceeding brought pursuant to the provisions of subdivision a of this section.

d. (1) The city rent agency, on its own initiative or on application of a tenant, may revoke or cancel an order granting a certificate of eviction at any time prior to the execution of a warrant in a summary proceeding to recover possession of real property by a court whenever it finds that:

(a) The certificate of eviction was obtained by fraud or illegality; or

(b) The landlord's intentions or circumstances have so changed that the premises, possession of which is sought, will not be used for the purpose specified in the certificate.

(2) The commencement of a proceeding by the city rent agency to revoke or cancel an order granting a certificate of eviction shall stay such order until the final determination of the proceeding regardless of whether the waiting period in the order has already expired. In the event the city rent agency cancels or revokes such an order, the court having jurisdiction of any summary proceeding instituted in such case shall take appropriate action to dismiss the application for removal of the tenant from the real property and to vacate and annul any final order or warrant granted or issued by the court in the matter.

e. Notwithstanding the preceding provisions of this section, the state, the city, or the New York city housing authority may recover possession of any housing accommodations operated by it where such action or proceeding is authorized by statute or regulations under which such accommodations are administered.

f. Any order of the city rent agency under this section granting a certificate of eviction shall be subject to judicial review only in the manner prescribed by subdivision eight of section one of the state enabling act and sections 26-410 and 26-411 of this chapter.

g. (1) Where after the city rent agency has granted a certificate of eviction authorizing the landlord to

pursue his or her remedies pursuant to law to acquire possession and a tenant voluntarily removes from a housing accommodation or has been removed therefrom by action or proceeding to evict from or recover possession of a housing accommodation upon the ground that the landlord seeks in good faith to recover possession of such accommodation:

(a) For his or her immediate and personal use, or for the immediate and personal use by a member or members of his or her immediate family, and such landlord or members of his or her immediate family shall fail to occupy such accommodation within thirty days after the tenant vacates, or such landlord shall lease or rent such space or permit occupancy thereof by a third person within a period of one year after such removal of the tenant; or

(b) For the immediate purpose of withdrawing such housing accommodation from the rental market and such landlord shall lease or sell the housing accommodation or the space previously occupied thereby, or permit use thereof in a manner other than contemplated in such eviction certificate within a period of one year after such removal of the tenant; or

(c) For the immediate purpose of altering or remodeling such housing accommodation, and the landlord shall fail to start the work of alteration or remodeling of such housing accommodation within ninety days after the removal, on the ground that he or she required possession for the purpose of effecting such alteration or remodeling, of the last tenant whose removal is necessary to

enable the landlord to effect such alteration or remodeling of such accommodation, or if after having commenced such work shall fail or neglect to prosecute the work with reasonable diligence; or

(d) For the immediate purpose of demolishing such housing accommodations and constructing a new building in accordance with approved plans, or reasonable amendment thereof, and the landlord has failed to complete the demolition within six months after the removal of the last tenant or, having demolished the premises, has failed or neglected to proceed with the new construction within ninety days after the completion of such demolition, or having commenced such construction work has failed or neglected to prosecute such work with reasonable diligence; or

(e) For some purpose other than those specified above for which the removal of the tenant was sought and the landlord has failed to use the vacated premises for such purpose; such landlord shall, unless for good cause shown, be liable to the tenant for three times the damages sustained on account of such removal plus reasonable attorney's fees and costs as determined by the court. In addition to any other damage, the cost of removal of property shall be a lawful measure of damage. The remedy herein provided for shall be in addition to those provided for in subdivision h of this section, paragraph (a) of subdivision ten of section one of the state

enabling act and subdivision a of section 26-413 of this chapter.

(2) The acts and omissions mentioned in subparagraphs (a), (b), (c), (d) and (e) of paragraph one of this subdivision, on the part of a landlord after issuance of a certificate of eviction, are hereby declared to be inconsistent with the purposes for which such certificate of eviction was issued.

h. Where after the city rent agency has granted a certificate of eviction authorizing the landlord to pursue his or her remedies pursuant to law to acquire possession for any purpose stated in subdivision b or j of this section or for some other stated purpose, and a tenant voluntarily removes from a housing accommodation or has been removed therefrom by action or proceeding to evict from or recover possession of a housing accommodation and the landlord or any successor landlord of the premises does not use the housing accommodation for the purpose specified in such certificate of eviction, the vacated accommodation or any replacement or subdivision thereof shall, unless the city rent agency approves such different purpose, be deemed a housing accommodation subject to control, notwithstanding any definition of that term in this chapter to the contrary. Such approval shall be granted whenever the city rent agency finds that the failure or omission to use the housing accommodation for the purpose specified in such certificate was not inconsistent with the purpose of this chapter and would not be likely to result in the circumvention or evasion thereof. The remedy herein provided for shall be in addition to those provided for in subdivision g of this section,

paragraph (a) of subdivision ten of section one of the state enabling act and subdivision a of section 26-413 of this chapter.

i. Any statutory tenant who vacates a housing accommodation without giving the landlord at least thirty days' written notice by registered or certified mail of his or her intention to vacate, shall be liable to the landlord for the loss of rent suffered by the landlord, but not exceeding one month's rent, except where the tenant has been removed or vacates pursuant to the provisions of this section. Such notice shall be postmarked on or before the last day of the rental period immediately prior to such thirty-day period.

j. (1) Nothing in this chapter shall be construed to require any person to offer any housing accommodations for rent, but housing accommodations already on the rental market may be withdrawn only after prior written approval of the city rent agency, if such withdrawal requires that a tenant be evicted from such accommodations.

(2) The city rent agency, in order to carry out the purposes of this chapter, may issue regulations providing for issuance of certificates of eviction in any case where the landlord seeks such approval in order to use the premises (including the building or land) (a) for the purpose of conducting a business, or (b) where the landlord is a hospital, convent, asylum, public institution, college, school or any institution operated exclusively for charitable, religious or educational purposes on a non profit basis and the landlord seeks such approval in order to use the premises (including the building or land) or any part thereof in connection

with the landlord's charitable, religious or educational purposes; such agency, if it grants approval, shall condition same upon compliance by the landlord with designated requirements which may consist of any conditions that such agency would have authority to prescribe by regulation under subparagraphs (b) and (c) of paragraph four of subdivision b of this section with respect to applications for certificates of eviction under such paragraph four provided, however, that such agency shall not condition any such approval granted to a hospital, convent, asylum, public institution, college, school, or any institution operated exclusively for charitable, religious or educational purposes upon compliance with requirements exceeding or less than those applicable to any private owner in similar circumstances. Nothing contained in this paragraph shall be construed as authorizing or requiring such agency to approve the withdrawal of any housing accommodations from the rental market by any landlord for the purpose of using the premises for any business other than one in existence and conducted by such landlord at the time such withdrawal is sought. No certificate of eviction shall be issued to a nonprofit school, college, hospital, or other charitable institution, including without limitation, any organization exempt from taxation under the Federal Internal Revenue Code, which seeks to recover possession of the housing accommodations or to withdraw such accommodations from the rental or non-rental housing market, for immediate and personal use and occupancy as housing accommodations by its employees, students or members of its staff.

k. The city rent agency by order issued pursuant to its regulations may waive the requirements of subdivision b of this section where (1) the housing accommodations were vacant at the time when landlord made application for such waiver, and (2) were vacated by reason of the last tenant's voluntary surrender thereof, and (3) the landlord, in good faith, intends to demolish or substantially rehabilitate the building in which the housing accommodations are located within a period approved by the city rent agency. The failure of the landlord to comply with the conditions established by the city rent agency for the granting of the application shall subject the housing accommodations to all the provisions of this chapter.