20-3366-cv

United States Court of Appeals

for the

Second Circuit

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

(For Continuation of Caption See Inside Cover)

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

BRIEF FOR AMICI CURIAE MET COUNCIL INC., STUYVESANT TOWN/PETER COOPER VILLAGE TENANTS ASSOCIATION, P.A.L.A.N.T.E. HARLEM, WEST SIDE DEMOCRATS, PARK WEST VILLAGE TENANTS ASSOCIATION, HOUSING RIGHTS INITIATIVE, STELLAR TENANTS FOR AFFORDABLE HOUSING, 50 WEST 93RD STREET TENANTS ASSOCIATION AND THE CENTRAL PARK GARDENS TENANTS ASSOCIATION IN SUPPORT OF APPELLEES AND INTERVENORS

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-v.-

CITY OF NEW YORK, RENT GUIDELINES BOARD, DAVID REISS, CECILIA JOZA, ALEX SCHWARZ, GERMAN TEJEDA, MAY YU, PATTI STONE, J. SCOTT WALSH, LEAH GOODRIDGE, SHEILA GARCIA, RUTHANNE VISNAUSKAS, Defendants-Appellees, N.Y. TENANTS AND NEIGHBORS (T&N), COMMUNITY VOICES HEARD (CVH), COALITION FOR THE HOMELESS, Intervenors.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amici, MET COUNCIL, INC., STUYVESANT TOWN/PETER COOPER VILLAGE TENANTS ASSOCIATION, P.A.L.A.N.T.E. HARLEM, WEST SIDE DEMOCRATS, PARK WEST VILLAGE TENANTS ASSOCIATION, HOUSING RIGHTS INITIATIVE, STELLAR TENANTS FOR AFFORDABLE HOUSING, 50 WEST 93RD STREET TENANTSASSOCIATION AND THE CENTRAL PARK GARDENS TENANTS ASSOCIATION are membership organizations and tenant advocacy groups with no corporate parents or subsidiaries.

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I. INTRODUCTION

Amici submit this brief to address several profound misrepresentations by Appellants and their supporting *amici* with respect to the purpose, impact and history of New York's rent and eviction protections.[1] *Amici* will demonstrate that a comprehensive and firmly grounded view of New York's rental markets plainly establishes the constitutional legitimacy of this type of market intervention. Appellants' "rational basis" challenge is unsound as a matter of public policy because it relies on a misleading analytical framework and cherry picking academic research. It is unsound as a matter of law because disputes over the efficacy of public policies are a matter for legislative as opposed to judicial determination.

Amici recognize that this Court has been given ample background on the history and scope of New York's rent stabilization system including the New York City Rent Stabilization Law of 1969 ("RSL"), the New York State Emergency Tenant Protection Act of 1974 ("ETPA") and the Housing Stability and Tenant Protection Act of 2019 ("HSTPA") (all generally referenced as "RSL" within).

[1] No counsel for a party authored this amicus brief in whole or in part and no person other than the listed amici, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. All parties consented to filing this brief.

II. INTERESTS OF AMICI

Amici Curiae include Metropolitan Council on Housing ("Met Council"), the Stuyvesant Town / Peter Cooper Village Tenants' Association ("ST/PCVTA"), P.A.'L.A.N.T.E. Harlem (People Against Landlord Abuse and Tenant Exploitation) ("P.A.'L.A.N.T.E."), West Side Democrats ("WSD"), the Park West Village Tenants Association ("PWVTA"), the Housing Rights Initiative ("HRI"), Stellar Tenants for Affordable Housing ("STAH"); the 50 West 93rd Street Tenants Association ("50 West 93rd Street TA") and The Central Park Gardens Tenants Association ("CPGTA"). All *Amici* are advocates for tenants and tenant rights.

Leave has been granted to present this brief pursuant to Order of this Court dated November 30, 2021. (See Case 20-3366, Document 271, 11/30/2021).

III. ARGUMENT

Appellants argue that the District Court erred in finding no physical or regulatory taking and no violation of due process in New York's rent stabilization system. As amply set forth in the respective briefs submitted by the state and city as well as Intervenor-Tenants, each of Appellants' claims ignore decades of well

settled judicial doctrine.

In this matter, judicial navigation of the chronic tension between property interests and popular sovereignty stands to impact the lives of nearly a million tenant households. Granting the relief Appellants seek would usher in catastrophic destabilizing conditions, cause mass displacement and trigger a rapid increase in already severe rent burdens for hundreds of thousands of tenant households throughout the City. Such a social cost is difficult to justify when Appellants have failed to present any financial accounting of their real profits and losses.

More critically, Appellants and their supporting *amici* suffer from an inexcusable myopia. Their arguments rest upon an unarticulated major premise that in the absence of rent regulations New York's housing market presents an even playing field. Based on that faulty assumption, they claim rent regulation forces owners to somehow "subsidize" tenants. In fact, the net effect of the full regulatory environment Appellants operate in is to vastly increase the value of the structures they own while at the same time providing limited rent and tenure protections to maintain stable communities.

Outside of rent and eviction protections, New York's real estate market has been dramatically affected - distorted, constrained and supplemented - by public

intervention and unique market pressures for well over a century.[2] Stripped of rent and eviction protections, the market *status quo* is far from neutral.[3]

Nothing compels this Court to scrutinize one form of economic intervention while ignoring the totality of circumstances and other interventions which may weigh in the mind of legislators responsible for fashioning remedial measures to protect public health, safety and welfare.

Almost every legislative act shifts the benefits and burdens of life in a democratic society. In New York's complex urban and suburban housing markets, zoning, landmarks preservation laws, building codes, tax policies, public investment in transportation and infrastructure, the preservation of green spaces and the promotion of educational and cultural institutions, all dramatically alter the value, supply and demand for residential housing. On balance, property owners benefit tremendously from the entire spectrum of these public, taxpayer supported, inputs. Without countervailing forms of market intervention, rent stabilized tenants would be deprived of a sure-footed place in that market. Rent and eviction

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[2] *An Introduction to the NYC Rent Guidelines Board and the Rent Stabilization System*, pp. 15-29 (revised and updated 2018) located online at: https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/01/historyoftheboard.pdf

[3] A primary criticism of the long discredited case of *Lochner v. New York,* 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905) and its progeny is that it rested on the fallacy of status quo neutrality. See Cass Sunstein, *Lochner's Legacy*, 87 Col. L. Rev. 873, 882 (1986) (We may ... understand *Lochner* as a case that failed because it selected, as the baseline for constitutional analysis, a system that was state-created, hardly neutral, and without prepolitical status.")

protections are thus fundamentally about tempering power and privilege with reason and accountability – values which lie within the very marrow of our constitutional order.

A. Appellants' Lack any Meaningful Metric to Establish a Taking

A good general measure of how the costs and benefits of public intervention ultimately net out may be found in changing property values over time. Conspicuously absent from the Appellants' claims and arguments is any measure of appreciating values of New York's regulated rental buildings - as well as how such changes may have affected the value of specific buildings owned by individual plaintiffs. How have the values of multi-family properties in New York City changed in comparison with multi-family properties in unregulated cities with normal vacancy rates since New York's rent regulations went into effect nearly 80 years ago?

Without such an analysis it is almost impossible to untangle both the benefits and costs of the full regulatory environment in which the Appellants operate. The best net measure of such impacts - historic appreciation in property values - is critically omitted. The few available reviews of such appreciation, however, demonstrate massive gains.[4]

[4] A survey of real estate transactions for rental buildings (excluding co-ops, condominiums and buildings with fewer than six units which are outside of the rent stabilized universe) in New York City covering the period

Appellants do reference some general differentials in value between regulated vs. unregulated multi-family buildings. (JA-121, Complaint ¶297). But these are both false and constitutionally irrelevant comparisons.

Unregulated buildings tend to be newer and naturally higher priced. The vast majority of rent stabilized buildings were built prior to1947.[5]

More importantly, unregulated rents (which undoubtedly raise property values) reflect a market driven by chronic scarcity and relentless demand. As previously emphasized, both supply and demand are distorted by a host of public policies and compromises meant to address environmental impacts, congestion and other quality of life concerns as well as special cultural and educational commitments. Appellants implicitly insist that landlords reap the full benefit of these restraints on supply and enhancements to demand. Nothing in the Constitution compels such privileged treatment nor such analytical myopia.

Beyond these conceptual flaws, the more narrowly targeted arguments

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from 1976 through 1993, at a time when rent regulations were more stringent that they were after 1993, disclosed that median sales prices increased over 400% while the national inflation rate increased at less than half that rate. See *Sales Price Data, Rent Stabilized Housing in New York City: A Summary of Rent Guidelines Board Research*, 1993, p. 112. https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/93book.pdf. A more recent review of median sales prices found that "the median sale price of a rent stabilized building in New York City has increased over 600% over the past 15 years." Report by Housing Justice for All, *Major Capital Improvements*, March 2020 p. 11 (calculated using median sales price data from New York City's Rent Guidelines Board's annual research reports available at https://rentguidelinesboard.cityofnewyork.us/research/).

[5] See Select Findings of the 2017 Housing and Vacancy Survey, Table 3, showing that of a total of 966,442 rent stabilized units 692,687 (71.7%) were constructed prior to 1947. https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2017_hvs_findings.pdf

Appellants make are riddled with misleading facts, internal contradictions, bad law and "straw man" distractions.

B. Appellants Misrepresent the Nature, Purpose and Impact of the RSL

The RSL, Appellants claim, now mandates that "apartments must now forever remain rent stabilized" and that a tenant now has "the right to renew his or her lease in perpetuity." (JA at 27, Complaint ¶4). A few pages later Appellants contradict this claim and admit that the RSL rests upon a periodic review of vacancy rates and a continuing finding of a persisting housing emergency when vacancy rate is less than five percent. (JA at 29, Complaint ¶8).

Resting on loose speculation Appellants further claim that "the RSL…does not alleviate – but rather exacerbates – a housing shortage, increases rents for non-regulated properties…" and otherwise fails to promote neighborhood stability. (Brief for Appellants [App. Br.] 19) Moreover, Appellants condemn the law for not promoting affordable housing for "low and middle-income families" (App. Br. 19) just two pages after claiming the law effects a regulatory taking because it requires the City's Rent Guidelines Board to "consider factors related to the tenants' ability to pay in setting maximum rent levels."[6] (App. Br. 17)

[6] In setting rents, consideration of tenants' ability to pay fits well within the RGB's obligation to simulate normal rents in the absence of a competitive market with a normal vacancy rate. See *An Introduction to the Rent Guidelines Board and the Rent Stabilization System* pp 56-58 at mainfeaturesofrs.pdf (cityofnewyork.us)

Perhaps the most important metric for assessing the costs and benefits of the RSL in Appellants' view is their profit levels (though on this record, real profits remain conspicuously concealed). Legislators may, of course, consider broader measures of utility.

More importantly, a law need not "be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical* 348 U.S. 483, 487 (1955)

As noted in *Sensational Smiles, LLC v. Mullen*, 793 F3d 281, 286-287 (2d Cir 2015):

> ...because the legislature need not articulate any reason for enacting its economic regulations, 'it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.' [citing] *FCC v. Beach Communications,* 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993).

FCC v. Beach Communications reiterates the longstanding standard that if a reasonable legislator could have supported legislation it will not be disturbed by the courts ("...a legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data.") 508 U.S. 307, 315.

While many may fail to grasp the purpose of this exceptional level of deference to legislative choices in economic matters, the reasons are simple, sound and ultimately rest upon a respect for democracy.

The preeminence of legislative authority in the sphere of economic policy rests in part on the fact that legislators are popularly elected and are therefore accountable to the public. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730 ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."). It also reflects judicial recognition that judges typically lack both the fact-gathering capabilities and the technical expertise that Congress and state legislatures possess (or can gain access to) in their formulation of public policy. See, e.g., *American Commercial Lines, Inc. v. Louisville & Nashville R.R.*, 392 U.S. 571, 590 (1968) ("The courts are ill-qualified indeed to make the kind of basic judgments about economic policy sought by the railroads here.").

Nevertheless, in this matter Appellants vigorously seek to have this Court second guess a series of legislative policy choices. *Amici* therefore respectfully turn to Plaintiffs' criticisms and will demonstrate that many are wholly unfounded and that a reasonable legislator might easily reject all of them.

The Appellants' claims that the RSL works counter to its stated purposes by

exacerbating the housing shortage and by not targeting low-income tenants are largely a straw man arguments.

The RSL is foremost a mechanism to prevent landlords from taking undue advantage of the housing shortage – not primarily to produce new housing. Notably, however, all of the Plaintiffs' claims that rent regulations significantly depress new construction are belied by the simple fact that New York City's two greatest housing booms occurred during periods when strict rent regulations were in effect for pre-existing apartments – in the 1920's and from 1947 through the early 1960's.[7]

The last housing boom came to an end not with a strengthening of rent laws but with a tightening of zoning restrictions.[8] By 1968 – despite twenty five years of exempting new buildings from rent regulations - vacancy rates fell to 1.23%, their lowest recorded point in the 20th century.[9] Indeed repeated studies have established that land use restrictions (zoning in particular) are the most impactful determinants

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[7] Intro to RGB, *Supra*, note 2, at Chart 1, p. 21. https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/01/chart1.pdf

[8] See discussion of the 1961 Zoning Resolution in New York Preservation Archive Project at http://www.nypap.org/preservation-history/1961-new-york-city-zoning-resolution/ ("In the City's business districts, it accommodated a new type of high-rise office building with large, open floors of a consistent size. Elsewhere in the City, the 1961 resolution dramatically reduced achievable residential densities, largely at the edges of the City." After a 'mad rush' during a one year delay in implementation developers filed 150,659 applications to construct multiple-dwelling units before the new zoning would come into effect.")

[9] Intro to RGB, *supra*, note 2, at Table 1, page 4 https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/table1.pdf

of housing scarcity and high costs.[10] Where new construction is strictly regulated, affordable single family homes and multi-family housing are rendered increasingly scarce.[11] Both purchase prices and rents become less affordable.[12]

Under the right combination of circumstances housing will be built - with or without rent regulations. Indeed, in a real estate industry-supported study, examining, in part, the effects of moderate rent regulations [like the RSL] on new housing construction, economist Anthony Downs found that "repeated studies of temperate rent controls in the United States provide no persuasive evidence that such controls significantly reduce new construction here."[13]

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[10] See generally, Beyer, Scott, *The Verdict is In: Land Use Regulations Increase Housing Costs,* Forbes, September 30, 2016, https://www.forbes.com/sites/scottbeyer/2016/09/30/the-verdict-is-in-land-use-regulations-increase-housing-costs/#4d43ef04162a

[11] See White House publication, HOUSING DEVELOPMENT TOOLKIT, December, 2016, observing at page 2-3:

> Over the past three decades, local barriers to housing development have intensified, particularly in the high-growth metropolitan areas increasingly fueling the national economy. The accumulation of such barriers – including zoning, other land use regulations, and lengthy development approval processes – has reduced the ability of many housing markets to respond to growing demand. The growing severity of undersupplied housing markets is jeopardizing housing affordability for working families…
>
> Barriers to housing development are exacerbating the housing affordability crisis, particularly in regions with high job growth and few rental vacancies.

[12] See generally Glaeser and Gyourko, *The Impact of Building Restrictions on Housing Affordability*, Federal Reserve Board of New York, Economic Policy Review, June 2003, p. 21-39, finding that "zoning, and other land use controls, are more responsible for high prices where we see them.... Measures of zoning strictness are highly correlated with high prices." Id. at 21. See also Glaeser, Gyourko & Saks, *Why is Manhattan So Expensive: Regulation and the Rise in House Prices*, NBER Working Paper N. 10124, Issued in November 2003:

> Home building is a highly competitive industry with almost no natural barriers to entry, yet prices in Manhattan currently appear to be more than twice their supply costs. We argue that land use restrictions are the natural explanation of this gap.

[13] Anthony Downs, Residential Rent Controls: An Evaluation, 4. (Washington, D.C.: Urban Land Institute, 1988.)

Appellants further argue that the mechanisms for relocating tenants from development sites are too time consuming and costly and therefore discourage development. (JA 107-109). Omitted is the fact that developers naturally pay less for buildings with occupied rent regulated apartments. Such discounts, if reasonably negotiated, more than compensate for buyout payments or the relocation stipends prescribed by the RSL. Buildings with market rate apartments are priced at a premium and this may pose an equal or greater disincentive to buy, demolish and rebuild. This side of the development analysis is left unexplored.

Appellants and supporting *amici* repeatedly describe New York's rent laws as a kind of off-budget public assistance program (JA 137-139; App Br. At 63; CATO Amicus Br. At 15) that is intended to subsidize low income tenants. These are highly misleading claims. Each and every revision of the legislative findings in support of the RSL, the ETPA and the HSTPA references the housing shortage in broad terms and the undue bargaining advantages the shortage bestows on landlords – leverage which, in the absence of legal protections, results in exceptional hardships and affordability issues for tenants.

While low income tenants may be hardest hit by the shortage, the primary mischief targeted by the rent laws is countering market advantages held by landlords. Variously referenced in the legislative findings are "abnormal" markets,

"unjust, unreasonable and oppressive rents", "profiteering, speculation and other disruptive practices" and "speculative and profiteering practices" and "the loss of vital and irreplaceable affordable housing for working persons and families". (See e.g. RSL §26-501; ETPA §2 and HSTPA Part D).

The entire structure and stated purposes of the RSL demonstrates that the goal of the law is not to force owners to subsidize lower income tenants but rather to prevent landlords from exploiting the housing shortage.

Notably, a large number of lower income tenants do benefit from the RSL's protections. According to the Community Service Society "365,000 low-income households live in rent regulated apartments in New York City, twice the number who live in public and subsidized housing combined."[14] The Landlord-peddled myth of the high income tenant as the face of rent regulation is, in fact, belied by the fact that the median income of all rent-stabilized tenants is only $44,560.00.[15]

Plaintiffs further argue that the RSL leads to higher rents in unregulated units. App. Br. At 63. According to the City's most recent (2017) Housing and Vacancy Survey, the vacancy rate in New York City's unregulated rental sector is 6.07% – nearly three times the 2.06% vacancy rate reported for rent stabilized

[14] *A Guide to Rent Regulation in NYC*, Oksana Mironova CSS, Jan. 2019, p. 4 https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/Rent_Reg_Explainer_V6.pdf .

[15] See 2017 HVS select findings reporting 2016 incomes at C(5): https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2017_hvs_findings.pdf

apartments.[16] (Higher rent apartments, even stabilized apartments, naturally and consistently have higher vacancy rates.) The higher vacancy rate in the unregulated sector strongly suggests rents in that sector are at maximum market levels (and indeed, in 2017 the median unregulated apartment was renting for $1,700.00 while the median stabilized rent was $1,269.00).[17] There is no convincing evidence that deregulation of a million apartments in the same housing market (sending rents higher for previously regulated units and forcing displaced tenants to shop more vigorously for alternatives) would actually cause rents in the unregulated stock to fall. Indeed, it is far more likely that the spike in demand for alternatives would have the opposite effect and rents would rise – as happened after deregulation in Boston.[18]

Appellants further argue that the RSL deprives them of a reasonable market return on their investment (App. Br. 51-53; JA 117-118, Complaint at ¶¶283-286). Nothing in the Constitution guarantees a reasonable market rate of return on rent regulated property. See *Fed. Home Loan Mtge. Corp. v. N.Y. State Division of*

[16] 2019 Housing Supply Report, NYC Rent Guidelines Board, p. 5; https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2019-HSR.pdf

[17] Id. at p.10.

[18] See *Massachusetts Rent Control Repeal Fallout from the 1990's a Lesson for Today*, Curbed, Boston, November 14, 2019. https://boston.curbed.com/2019/11/14/20962932/massachusetts-rent-control-debate-tenants ("...a 1998 survey of Cambridge showed that, far from reducing rents in general, the repeal of rent control drove leasing costs up for both formerly controlled apartments and un-controlled ones as well—40 percent higher in the case of the former and 13 percent in the latter.")

Housing and Community Renewal, 83 F.3d 45, 48 (2d Cir. 1996) citing *Bowles v. Willingham*, 321 U.S. 503, 517, 64 S. Ct. 641, 648, 88 L. Ed. 892 (1944) (reduction of value of property as result of regulation does not constitute taking).[19]

Still, owners of rent stabilized properties have achieved more than reasonable rents under the RSL. In fact, during various periods within the pre-HSTPA regulatory environment landlords actually achieved rent increases well in excess of those that might have occurred in a normal competitive market with higher vacancy rates. By way of comparison, in the four year period coinciding in part with the Great Recession, the national median asking rent in the first quarter of 2009 ($723) actually exceeded the median asking rent four years later -- in the first quarter of 2013 ($718).[20] That is, rents were essentially flat due to falling or stagnant incomes (which is why consideration of tenant incomes may be weighed as a market factor - as distinct from a welfare factor - when setting rents). During this same period the NYC Rent Guidelines Board recorded a 17% increase in landlord income per stabilized dwelling unit (rising from $1,142 to $1,337).[21]

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[19] The debate between Appellants and Defendants and Intervenors over whether property values should be based on buildings or units (App. Brief at p. 50, FN 16) is indicative of the kind of complex factual and conceptual disputes that are left to legislatures. Appellants cherry pick choice statutes to argue that the RSL treats apartments as separate units of property. *Ibid.* The RSL, however, begins with buildings. Building constructed before 1974 are generally subject to rent stabilization,. Buildings with certain tax abatements are subject to rent stabilization. Rent Guidelines Board rent increases are based upon building operating costs and other factors.

[20] U.S. Census Bureau, Housing Vacancies and Homeownership, Table 11A - http://www.census.gov/housing/hvs/data/histtabs.html

[21] NYC Rent Guidelines Board Explanatory Statement - Order #51, Table 7, page 20, https://www1.nyc.gov/assets/rentguidelinesboard/pdf/guidelines/aptES51.pdf

Such windfalls were not limited to the recession. According to the NYC Rent Guidelines Board's 2021 Income and Expense report, average net operating income for rent stabilized buildings rose 52.1% (after adjusting for inflation) between 1990 through 2019 (the first through the last year for which reliable data is available).[22] Indeed, in the pre HSTPA regulatory environment owners and investors often recognized rent stabilized buildings as one of the better real estate values in the city.[23]

This massive increase in net operating income was partly the result of deregulation of some 300,000 units (many unlawfully), along with excessive (and often fraudulent) special rent increases for major capital improvements and individual apartment improvements. Large scale efforts were underway to both legally and illegally evict tenants and then take advantage of the state's high rent vacancy deregulation laws.[24]

This deregulation regime along with excessive annual rent guideline increases produced unprecedented rent burdens for tenants. As of 2017 a typical rent stabilized household devoted 36% of its income to rent according to the City's

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[22] 2021 Income and Expense Study, NYC Rent Guidelines Board, p. 11. LINK AT 2009 (cityofnewyork.us)

[23] See e.g. *Why Investors and Landlords Still Find Rent-Regulation Attractive*, Lauren Elkies Schram, Crains, July 15, 2015.

[24] See e.g. https://ag.ny.gov/press-release/2019/attorney-general-james-sues-new-york-city-property-manager-illegally-deregulating See also Report by Housing Justice for All, *Major Capital Improvements*, March 2020, *supra* note 4 (arguing that MCI based rent increases have been excessive and unwarranted).

triennial Housing and Vacancy Survey – one of the highest average rent burdens on record.[25] Poor and lower income families had entered a full blown housing nightmare. According to an analysis by the Community Service Society a typical family of three earning $38,000 per year carried rent burdens in 2017 in excess of half of their total household income - having risen from only 40% in 2002.[26] By 2019 over 60,000 people, including families with children, occupied the city's homeless shelters every night – more than double the amount in 2001.[27]

Plaintiffs further and falsely argue that rents have not kept pace with operating costs. (App. Br. At 7; JA-119-20 ¶291-92.)

This is a gross obfuscation. If the RGB based rent increases on the percentage increase in operating costs alone, net operating incomes would have nearly doubled in inflation adjusted value over the past three decades. Operating costs in a typical rent stabilized building make up only about 60% of gross revenues.[28] The remainder (about 40%) is net operating income.[29] To cover

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[25] 2019 Income and Affordability Study, NYC Rent Guidelines Board p. 9; https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2019-IA.pdf

[26] Rents, Incomes, and Rent Burdens in Stabilized and Unregulated Housing, Oksana Mironova, CSS May 2019, Figure 6, (Burdens in Stabilized and Unregulated Housing, page 20, search, October 1992, p.71: among low-income, stabilized households increased from 40 percent in 2002 to 52 percent in 2017" Id at p. 10). https://smhttp-ssl 58547.nexcesscdn.net/nycss/images/uploads/pubs/ Where_Have_All_the Affordable_Rentals_Gone_-_web.pdf

[27] RGB 2019 Income and Affordability Study, p. 17 https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2019-IA.pdf

[28] RGB 2021 Income & Expense Study, Net Operating Income After Inflation, page 10, LINK AT 2009 (cityofnewyork.us)

[29] *Id.*

changes in operating costs on a dollar-for-dollar basis, rents would only have to increase at about 60% the rate of increase for operating costs. To keep owners "whole" from year to year, net operating income (again 40% on average) would have to be increased by the general cost of living indices. If operating costs are rising faster than the rate of inflation, using operating cost changes alone as a basis for increasing rents would greatly inflate net operating incomes. Indeed, according to data collected by the NYC Rent Guidelines Board average operating costs rose 195% (from $340 to $1,002 per unit)[30] between 1990 and 2019. Over the same period the consumer price index rose only about half as much - less than 96%.[31]

As noted, over that same period (1990-2019) the RGB reported that owner net operating income actually rose 52.1% in real, inflation adjusted terms.[32] In short, owners of rent stabilized buildings have done very well – substantially exceeding the kind of increases in net operating income that a fully competitive unregulated housing market might have achieved over the same period.

Some of the excessive increase in rent rolls can be attributed to high rent / high income deregulation. That development can be credited to the social

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[30] RGB Explanatory Statement to Order #52 at Table 7 (audit adjusted figures) 2020 Apt ES (Final Approved) - (# Legal 10913416) (cityofnewyork.us)

[31] From US Inflation Calculator: https://www.usinflationcalculator.com/ utilizing 1990 as the base year and 2019 as the end year.

[32] RGB 2021 Income & Expense Study, Net Operating Income After Inflation, page 11, LINK AT 2009 (cityofnewyork.us)

engineering skills of the city's real estate lobby.[33] In the early 1990's, after conventional criticism of rent and eviction protections failed to produce regulatory rollbacks, the industry began to reconceptualize rent regulation as a poorly structured system of "subsidies."[34] The claim was that rent regulation had nothing to do with securing fair rents in an overheated market but rather forced landlords to "subsidize" their tenants.

The argument produced two somewhat contradictory corollaries. First, they argued that rent regulations were only intended to protect lower income tenants and that more affluent tenants shouldn't receive such "benefits" or "subsidies." Second, they argued that rent regulations were poorly targeted and an inefficient way to protect poor tenants, and that lower income tenants would be better served by direct government subsidies.[35] Both arguments are resurrected in Appellants' complaint and brief. (JA 60 and 77, Complaint at ¶92-95 and ¶158; App. Br. At 11 and 60)

The major premise of both criticisms – that rent regulation should be seen as a subsidy program primarily designed to protect lower income tenants – is simply wrong.

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[33] See Collins, Timothy "'Fair Rents' or 'Forced Subsidies' under Rent Regulation Finding a Regulatory Taking where Legal Fictions Collide." Albany L. Rev. 1293 (1996)

[34] *Id.* at 1316 - 1319.

[35] *Id* at 1311-1312.

New York's rent regulation system began in 1943 with federal rent controls as an effort to prevent wartime profiteering and was expanded in 1969 (adding "rent stabilization") to deal with sharp rent increases in the city's "post-war" housing stock. The system was meant to secure fair rents for a broad class of tenants in a market driven by chronic shortages and throughout most of its existence drew no distinctions between wealthy or poor tenants or high and low income units. The goal was never to make every rent affordable. The goal was to end "profiteering" and "rent-gouging" by landlords who demonstrated no restraint in exploiting an abnormally tight housing market.

Beginning in 1993 New York's real estate lobby made major gains in their efforts to repurpose the system with high rent vacancy deregulation as well as high income deregulation. They then seized upon the high income exemptions they engineered as proof that the system was a "subsidy" system.[36]

Trimming the system back to serve only lower income tenants (as Appellants suggest in their complaint (JA76-77; Complaint ¶156-161) may sound wonderfully efficient and reasonably altruistic, but it ignores the billion ton elephant that occupies the center of the city's rental market. As previously noted, building restrictions like zoning, landmarks and other regulations along with a commitment

[36] *Id.* at 1318

to preserve green spaces (all laudable and understandable limits on growth designed to make the city more livable) massively suppress housing supply and vastly add to the value of existing structures, placing pressure on rents and resale values and creating windfalls for landlords.

Citywide vacancy rates remained low – at 3.63% as of the last mandated survey, well below the 5% emergency threshold, while national vacancy rates for major metropolitan areas hovered around 7 to 10% during most of this lengthy period of partial deregulation.[37] Recent changes in vacancy rates as a result of Covid 19 related moves are not yet authoritatively measured in a comprehensive vacancy survey and may represent only a transient change as former residents return to the city in the wake of the pandemic. That required survey (See Local Emergency Housing Rent Control Act §1[3]) was last completed in 2017 and is expected to be completed in the coming year.

If the amelioration of the effects of this shortage on rents was the primary purpose of the rent laws, removing protections from high rent units for over twenty five years allowed landlords to intentionally obscure that purpose. Hundreds of thousands of units left the system, rents skyrocketed and angry voters finally

[37] See NYC RGB Housing Supply Report 2020 at page 5. 2009 (cityofnewyork.us): For national rates see Housing Vacancies and Homeownership (CPS/HVS) - Annual Statistics: 2013 (Including Historical Data by State and MSA) - People and Households - U.S. Census Bureau tables 6, 6a and 6b.

pushed back by making rent law reform a legislative priority. In short, democracy struck back.

The HSTPA restored the original purpose of the law: to secure fair rents in an otherwise skewed and abnormal housing market – for all tenants regardless of incomes or rent levels.

High income and high rent vacancy deregulation were repealed. (HSTPA, Part D). Major capital improvement and individual apartment improvement rent increases were significantly cut back. (HSTPA, Part K) Vacancy allowances were eliminated. (HSTPA, Part B). Incentives for pushing tenants out – through both lawful and illegal means -- were thus dramatically reduced. Penalties for rent overcharges were increased. (HSTPA, Part F). And the ability of landlords to escape reasonable rent limits through co-op or condominium conversion was tightened. (HSTPA Part N; GBL § 352-eeee).

One of the more immediate consequences of these reforms has been a sharp drop in frivolous lawsuits and unnecessary evictions. The perverse incentives to evict tenants prior to the HSTPA which made the City's housing courts one of the busiest in the country have been curtailed. From June 14, 2019 (the date the HSTPA was enacted) through the end of 2019 (a pre-pandemic measure), evictions across the city were down 18.3 percent according to data compiled by city

Marshals.[38]

C. *The Level of Scrutiny to be Applied in Cases of this Type*

The central question before this Court is whether and to what extent the regulatory choices made by city and state legislators fall within legislative vs. judicial authority. To answer that question the Court need not agree nor even sympathize with the tenants. The Court need only to ask whether reasonable people might disagree with whether the RSL is one of many possible rational legislative answers to New York's housing emergency.

As Justice O'Connor wrote in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833 (1992), "It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other." 505 U.S. 833, 851 (1992) citing *Ferguson v. Skrupa*, 372 U. S. 726 [1963]; *Williamson v. Lee Optical of Okla., Inc.*, 348 U. S. 483 [1955]). Chief Justice Roberts concluded his majority opinion in *Natl. Fedn. of Ind. Bus. v Sebelius*, 567 US 519, 588 (2012), by observing that it is not for the courts to assess the wisdom of economic regulation:

> The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does

[38] Staying Home: NYC Evictions Down Nearly 20% after Pro-Tenant Laws Enacted; AM New York, Gabe Herman, January 2020 (Summarizing City Marshals eviction dataset). https://www.amny.com/real-estate/staying-home-nyc-evictions-down-nearly-20-after-pro-tenant-laws-enacted/

> not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.

More succinctly (and perhaps cynically) Justice Scalia once observed, "…a law can be both economic folly and constitutional." *CTS Corp. v. Dynamics Corp*., 481 U.S. 69, 96-97 (1987) (Scalia, J. concurring).

In the context of economic regulations, this deference reflects a post-*Lochner* judicial respect for democratic ordering. See *Sensational Smiles,* 793 F3d 281, 287 (2d Cir 2015) (describing *Lochner* as "the paradigm of disfavored judicial review of economic regulations")

D. *The Importance of Lingle v. Chevron*

The *Lochner* era of judicial overreach may have come to an end, but not the efforts of propertied interests to restore the privileged position they once held in our constitutional order. Promoters of the so-called "Property Rights Movement" including the Cato Institute, the Pacific Legal Foundation and the Defenders of Property Rights all joined in an effort which would have effectively resurrected *Lochner* in the regulatory takings context in the case of *Lingle v Chevron U.S.A. Inc.*, 544 US 528, 535-536 (2005).[39]

[39] Menell, *The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship*, 34 Ecology L.Q. 713 (2007); n. 8. Notably, some of the same organizations also appear in this appeal as *amici* on behalf of the Appellants.

Concerned about the effects of market concentration on retail gasoline prices, in 1997 the Hawaii state legislature passed Act 257 which capped the rent oil companies could charge dealers leasing company-owned service stations. Chevron, one of the largest oil companies in Hawaii, brought suit seeking a declaration that the rent cap effected an unconstitutional taking of its property. Following remand from the Ninth Circuit, a one day bench trial was held where both Chevron and the state of Hawaii called economists as expert witnesses to testify.

The District Court's entertainment of evidence from the two economists and its elaborate statement of its own economic conclusions provoked a sharp rebuke from the Supreme Court.

Relying on a developing body of law beginning with *Agins v. City of Tiburon*, 447 U.S. 255 (1980) the lower court held that Hawaii's rent cap effected an uncompensated taking because, in the court's estimation, the law failed to "substantially advance" Hawaii's asserted interest in controlling retail gas prices.

The Supreme Court was called upon to "decide whether the substantially advances formula announced in *Agins* is an appropriate test for determining whether a regulation effects a Fifth Amendment taking." *Lingle* 544 US 528, 532 (2005).

Holding that the "substantially advances" test was "doctrinally untenable" the Court went on to observe:

> Although the instant case is only the tip of the proverbial iceberg, it foreshadows the hazards of placing courts in this role. To resolve Chevron's takings claim, the District Court was required to choose between the views of two opposing economists as to whether Hawaii's rent control statute would help to prevent concentration and supracompetitive prices in the State's retail gasoline market. Finding one expert to be 'more persuasive' than the other, the court concluded that the Hawaii Legislature's chosen regulatory strategy would not actually achieve its objectives. See 198 F. Supp. 2d, at 1187-1193. The court determined that there was no evidence that, oil companies had charged, or would charge, excessive rents. See id., at 1191. Based on this and other findings, the District Court enjoined further enforcement of Act 257's rent cap provision against Chevron. We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation. See, e.g., *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-125, 57 L. Ed. 2d 91, 98 S. Ct. 2207 (1978); *Ferguson v. Skrupa,* 372 U.S. 726, 730-732, 10 L. Ed. 2d 93, 83 S. Ct. 1028 (1963). The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here. 544 US at 544-545.

The U.S. Supreme Court in *Ferguson v. Skrupa* (referenced above in *Lingle*) flatly proclaimed that "[t]he doctrine that prevailed in *Lochner* ... and like cases -- that due process authorizes courts to hold laws unconstitutional when they believe

the legislature has acted unwisely -- has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." 372 US 726, 730 (1963).

Ferguson, in turn, rested its disavowal of *Lochner* and its progeny on *West Coast Hotel v. Parrish*. *300 U.S. 379 (1937)*. That case upended a troubling and harmful constitutional doctrine and cogently established appropriate lines to be drawn between popular sovereignty and the power of private property. There should be no mistaking that the Appellants in this matter are attempting to substantially distort those established lines.

IV. CONCLUSION

In sum, Plaintiffs have misrepresented the intent and impact of the RSL and they have failed to set forth any constitutional cause of action sufficient to abolish it or limit its reach. For all of the foregoing reasons the decision of the District Court should be affirmed.

Dated: New York, NY
December 30, 2021

Respectfully submitted,

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STATEMENT OF COMPLIANCE

1. This brief complies with the type-volume limitation of Local Rules 29.1 (c) & 32.1 (1)(4)(A) because this brief contains 6,437 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt Times New Roman.

/s/ *Timothy L. Collins*
December 30, 2021

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Timothy L. Collins*
December 30, 2021