UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X Case No. 20-cv-01053(ER)

335-7 LLC, FGP 309 LLC, 226 LLC, 431 HOLDING LLC, and 699 VENTURE CORP.,

Plaintiffs,

vs.

CITY OF NEW YORK, NEW YORK CITY RENT GUIDELINES BOARD, and RUTHANNE VISNAUSKAS (in her official capacity as commissioner of the New York State Division of Homes and Community Renewal),

Defendants.

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BRIEF OF MET COUNCIL ON HOUSING, STUYVESANT TOWN/PETER COOPER VILLAGE TENANTS ASSOCIATION, P.A.L.A.N.T.E. HARLEM, COMMUNITY FREE 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, AS AMICI CURIAE IN SUPPORT OF DEFENDANTS' AND INTERVENOR'S MOTION TO DISMISS

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I. INTRODUCTION

Amici submit this brief to address issues not raised or fully addressed in prior submissions.[1] *Amici* will focus on several rather profound misrepresentations by Plaintiffs with respect to the purpose and impact of New York's rent and eviction protections. *Amici* will demonstrate that a more complete and firmly grounded view of New York's rental markets clearly establishes the rationality and the constitutional legitimacy of this type of statutory market intervention.

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). *Amici*, therefore, respectfully refer the Court to the various memoranda of law submitted by New York State and City Defendants and Intervenor-Tenants for the statutory and regulatory background.

II. INTERESTS OF AMICI

Amici Curiae include Metropolitan Council on Housing ("Met Council"), the Stuyvesant Town / Peter Cooper Village Tenants' Association ("ST/PCV TA"), P.A.'L.A.N.T.E. Harlem (People Against Landlord Abuse and Tenant Exploitation) ("P.A.'L.A.N.T.E."), Community

[1] *Amici* have sought leave to appear in *74 Pinehurst LLC et al v. State of New York et al.* (Case No. 1:19-cv-06447), in the Eastern District of New York – a case which raises several similar constitutional challenges to New York's rent stabilization system. As of this writing, no decision has been rendered on *Amici's* pending motion.

Free Democrats ("CFD"), the Park West Village Tenants Association ("PWV TA"), 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 ("CPG TA").

Met Council is a citywide tenants union which has been working to preserve affordable housing since 1959 by organizing tenant associations, disseminating information about tenants' rights through a telephone hotline, broadcasting a weekly radio program, distributing a monthly newspaper, continually updating an informational website, participating in public hearings before various government agencies, and appearing as intervenor or amicus in numerous lawsuits involving the rights of its members and low- and moderate-income tenants generally.

ST/PCV TA is a membership organization composed of tenants residing in Stuyvesant Town and Peter Cooper Village, a community of more than 11,000 rental apartments on the east side of Manhattan – home to about 28,000 residents. Formed in 1971 ST/PCV TA's mission is to preserve affordability, help maintain quality of life, inform tenants of issues pertaining to housing, and to take action with government agencies to make sure owner actions are legal.

P.A.'L.A.N.T.E. organizes and empowers city residents to hold negligent landlords and property managers accountable for unsafe living conditions through community advocacy, outreach and organizing effective tenant associations. P.A.'L.A.N.T.E.'s goal is to end tenant exploitation in order to enable low-income community residents to remain in their homes and to ensure that those homes are safe and affordable.

CFD is a membership-based political and advocacy organization that has served the Upper West Side of Manhattan for over 50 years. Over the years, CFD's work in protecting tenants in affordable housing has included organizing tenants in NYCHA housing and Mitchell-

Lama apartments, establishing a neighborhood drop-in legal services clinic and bringing members to lobby in Albany for greater tenant protections.

PWV TA is a voluntary, non-profit, membership organization whose purpose includes protecting the rights and welfare of tenants in Park West Village and to expand tenant rights, strengthen rent regulations and preserve affordable housing programs.

HRI is a not for profit housing advocacy organization which uses a data driven approach to identify and investigate fraud in the residential real estate market and which supports tenant mobilization and legal actions to address such abuses.

STAH is a group of tenants who live in several buildings owned or managed by Stellar Management. They rely on rent stabilization and the HSTPA protections that reduce owner incentives to oust tenants and to buy buildings solely as an investment to quickly sell.

The 50 West 93rd Street TA is an organization of tenants who live in 50 West 93rd Street in Manhattan and advocate for tenant protections.

The CPG TA is an association of tenants residing in 50 West 97th Street, New York, New York which advocates for tenants and increased tenant protection for all tenants, regulated and unregulated.

III. ARGUMENT

Plaintiffs assert that New York's rent stabilization system effects an unconstitutional physical and regulatory taking of their property.[2] As amply set forth in the respective

[2] *Amici* note that Plaintiffs' procedural due process claims have been rendered moot by *Regina Metro. Co. v. N.Y. State Div. of Hous. & Cmty. Renewal*, Nos. 1–4, 2020 WL 1557900, at *4

memoranda of law submitted in support of the motions to dismiss by the state and city Defendants as well as Intervenor-Tenants, each of Plaintiffs' claims ignore decades of well settled judicial doctrine.

Amici submit that Plaintiffs' various takings claims are really thinly veiled attempts to resurrect substantive due process arguments in the context of takings jurisprudence. *Amici* are particularly concerned that those who are vitally interested in the outcome of this litigation may become distracted by doctrinal tangles and lose sight of the central constitutional values and issues at stake. This Court, like all courts, is called upon to account for its exercise of power through published justification of its decisions. 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. *Amici* hope and trust this memorandum will assist the Court by bringing clarity to both the rent stabilization system and the general constitutional principles which sustain it.

Granting the relief Plaintiffs seek would usher in catastrophic destabilizing conditions, cause mass displacement and trigger a rapid increase in already severe rent burdens for the thousands of tenants represented by *Amici* as well as hundreds of thousands of tenant households throughout the City.

Plaintiffs' complaint suffers from an inexcusable myopia. Reading the complaint one might conclude that the only matter of any constitutional consequence is landlord profit margins and the right to remove tenants from their homes. Most misleading is an unarticulated major premise that the only impact of government intervention in New York's housing markets is to

(N.Y. Apr. 2, 2020) which effectively ended retroactive application of the HSTPA's revisions to rent overcharge penalties. Hence, we do not address those claims here.

diminish the economic interests of property owners and privilege or "subsidize" tenants. In fact, the net effect of the full regulatory environment Plaintiffs operate in is to vastly increase the value of the structures they own and, in the absence of rent and tenure protections, place tenants in a state of extreme vulnerability.

In the pages that follow *Amici* will fully support the above critique of the Plaintiffs' complaint and link their analysis to the appropriate tests to assess the constitutionality of the RSL.

A. *Plaintiffs' Economic Arguments Are Both Irrelevant and Wrong*

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. Based on extensive experience as tenants and tenant advocates, *Amici* emphatically believe that the RSL and related tenant protections are fully warranted and laudable exercises of state police powers. Arguments and points in support of those beliefs are touched upon below. But this Court need not agree nor even sympathize with the tenants. Because he RSL is foremost a system which regulates economic relations between tenants and owners, at the most fundamental level, this Court need only ask whether reasonable people might disagree on whether the RSL is one of many possible 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 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).

The Plaintiffs in this matter are clearly unhappy with New York's tenant protection laws and seek to enlist judicial power to abolish them. *Amici* can assure this Court that these protections help provide reasonable rents, stable neighborhoods and secure vitally needed protections against arbitrary lease terminations and evictions. *Amici* will also demonstrate through reliable data that the erosion of tenant protection laws over the last three decades has exacerbated the housing crisis, sending rent burdens and homelessness to record levels and prompting the recent legislative reforms now being challenged.

Among many factual and legal errors made by Plaintiffs, one fundamental conceptual error emerges – an omission which should be kept in mind when weighing all points and arguments: Plaintiffs implicitly assume that the abolition of rent and eviction protections (their ultimate objective) will leave a neutral and fair market – an even playing field. That is not true. 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.[3] Stripped of rent and eviction protections, the market *status quo* is far from neutral.[4]

Almost every legislative act shifts the benefits and burdens of life in a democratic society. As Justice Holmes famously observed in the first U.S. Supreme Court case to recognize a regulatory taking: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

In New York's complex urban and suburban housing markets, zoning, landmarks preservation laws, building codes, public investment in 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. Property owners are both burdened and benefitted by the entire spectrum of these public inputs. Of course, these inputs exist in many residential markets. In New York's unique housing market, however, the depth and impact is particularly amplified.

Plaintiffs' Complaint Lacks 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 – not over a few months but over the many decades of changing regulations. Conspicuously absent from the Plaintiffs' claims and

[3] *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/wpcontent/uploads/2020/01/historyoftheboard.pdf

[4] A primary criticism of *Lochner v. New York* and its progeny (discussed *infra* at III[B]) is that it rested on the fallacy of status quo neutrality. See Cass Sunstein, *Lochner's Legacy*, 87 Col. L. Rev. 873, 882 (1986) 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.")

arguments is any general 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 since the outset of regulation under the RSL. 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 1969?

Without such an analysis, it is almost impossible to untangle both the benefits and costs of the full regulatory environment in which the Plaintiffs operate. The best net measure of such impacts - historic appreciation in property values - is critically omitted. (The few available general reviews of such appreciation, however, demonstrate massive gains.)[5]

Plaintiffs do speculatively compare the value of their properties prior to the adoption of the HSTPA in 2019 and following its adoption (Complaint ¶22-25) but these imprecise comparisons may just as easily be used to establish that the RSL, as amended by the HSTPA, is more effectively fulfilling the legislative goal of curbing abnormal rents, speculation and profiteering.[6] Without the context of appreciated values over time, it is impossible to fairly

[5] Little research in rising property values of rent regulated buildings appears to have been undertaken, but 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 from 1976 through 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/).

[6] Referenced in the various legislative findings are "abnormal" markets, "unjust, unreasonable and oppressive rents", "profiteering, speculation and other disruptive practices" and "speculative

measure the impact of New York's full regulatory environment on property values against what a relatively normal market with higher vacancy rates would provide. (While citywide vacancy rates in New York have ranged from 1% to 4% since 1969, nationally rental vacancy rates have ranged from 6-10% over the same period.)[7]

Nor, as is amply pointed out in the various memoranda in support of dismissal by the Defendants and Defendant-Intervenors, are Plaintiffs guaranteed a particular level of property appreciation or return on value. 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. Plaintiffs 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 Plaintiffs make are riddled with misleading facts, bad law and "straw man" distractions.

Plaintiffs Misrepresent the Nature, Purpose and Impact of the RSL

At various points in their Complaint Plaintiffs claim that the RSL does not rest on a genuine housing emergency, that it is now permanent and perpetual, that it fails to ameliorate the

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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).

[7] Compare NYC rental vacancy rates at 1.23% to 4.01% (currently 3.63%) https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/table1.pdf to national rates at 6.4% to 8.8% since 1997 (currently 6.6%) https://www.census.gov/housing/hvs/files/currenthvspress.pdf.

housing shortage by keeping vacancy rates low, that it fails to protect low income tenants and that is not rationally related to "any conceivable public purpose". (Complaint ¶184, 184-201).

Plaintiffs 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. (Complaint ¶188-189).

For reasons set forth below, Plaintiffs' claim that the RSL is the cause of low vacancy rates is unfounded. And Plaintiffs' various claims that the RSL fails to serve a public purpose, is nothing short of outrageous.

More importantly, from a constitutional perspective, these claims are irrelevant.

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. Plaintiffs' efforts to frame their claim as a taking cannot escape this standard.[8]

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."). Finally, where review of state legislation is concerned, a deferential standard furthers principles of federalism by ensuring that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Nevertheless, in this matter Plaintiffs vigorously seek to have this Court second guess a series of legislative policy choices. *Amici* therefore respectfully turn to Plaintiffs' criticisms and

[8] As amply addressed by the Defendants and Defendant-Intervenors, rent regulation is a form of regulation of economic relationships – not a physical taking, not a land use exaction, not a public utility rate regulation and not a "Confiscatory Taking".

will demonstrate that many are wholly unfounded and that a reasonable legislator might easily reject all of them.

The "clear purpose" of the RSL, Plaintiffs claim, is to "subsidize tenants" (Complaint ¶51). They further claim that it works counter to its stated purposes by exacerbating the housing shortage and by not targeting low-income tenants (Complaint ¶184-201).

The RSL is not and never has been a mechanism for housing production (other programs address that goal). It is foremost a mechanism to prevent landlords from taking undue advantage of the housing shortage. 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.[9]

The last housing boom came to an end not with a strengthening of rent laws but with a tightening of zoning restrictions.[10] 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.[8] Indeed repeated studies have established that land use restrictions (zoning in particular) are the most impactful determinants of housing scarcity and high costs. Where new

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

[10] 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.")

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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[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 highgrowth 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.

Nor, notably, does all new construction contribute to alleviating the shortage of affordable housing. Large portions of newly constructed co-ops and condominiums remain empty for much longer periods than more affordable rental units.[14]

Plaintiffs further describe New York's rent laws as a kind of subsidy system. (Complaint at ¶51, 184). This is a highly misleading claim. 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 the 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 low income tenants but rather to prevent landlords from exploiting the housing shortage.

Even when so-called "luxury deregulation" was permitted, high income tenants residing in low rent apartments were fully protected under the law. It was only if their rents exceeded the deregulation thresholds (which varied from $2,000 to $2,774.76 per month) that high income

[14] See e.g. "Why Manhattan Skyscrapers Are Empty: Approximately half of the luxury-condo units that have come onto the market in the past five years are still unsold." The Atlantic, January 16, 2020.

deregulation was permitted. Why were high income tenants in high rent apartments subjected to deregulation while even higher income tenants in low rent apartments retained protections? The answer is that within the higher strata of rents, vacancy rates were relatively high and housing options were more plentiful.[15]

The fact that high income households remaining in lower rent apartments (where the shortage was most pronounced) continued to be fully protected actually reinforced that the purpose of the law was to mitigate the effects of the shortage on rent levels – and not to construct a general welfare system for tenants at the expense of landlords. That is, the purpose was to secure the kind of "fair rents" that might exist in the absence of the shortage and not to generate "forced subsidies".[16]

The repeal of high rent / high income deregulation under the HSTPA furthers this purpose since such "fair rents" survive vacatur of high rent / high income tenants.

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."[17] The Landlord-peddled myth of the high income tenant as the face of rent

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[15] See e.g. select findings of the RGB 2017 Housing and Vacancy Survey: https://rentguidelinesboard.cityofnewyork.us/wpcontent/uploads/2019/08/2017_hvs_findings.pdf ("Availability of vacant rental units with asking rents in the $800-$999 range was 2.09 percent in 2017. The vacancy rate for units with asking rents of $1,000-$1,499 was 2.52 percent. For units with an asking rent level of $1,500-$1,999 the rate was 4.11 percent … Above $2,500 asking rent, the vacancy rate went from 7.51 percent to 8.74 percent, the highest vacancy rate for a rent level in the City.")

[16] See generally, Collins, Timothy "'Fair Rents' or 'Forced Subsidies' under Rent Regulation Finding a Regulatory Taking where Legal Fictions Collide." 59 Albany L. Rev. 1293 (1996).

[17] *A Guide to Rent Regulation in NYC,* Oksana Mironova CSS, Jan. 2019, p. 4 https://smhttp-ssl58547.nexcesscdn.net/ncss/images/uploads/pubs/Rent_Reg_Explainer_V6.pdf .

regulation is, in fact, belied by the fact that the median income of all rent-stabilized tenants is only $44,560.00.[18]

Plaintiffs also claim that the RSL has a deleterious impact on the community by lowering property tax revenues. (Complaint at ¶177-178). Plaintiffs cite a 2010 study that suggests a $283 million dollar loss of property tax revenues under the RSL - losses projected to rise to two billion under the 2019 Amendments (Complaint ¶178).

This point is highly misleading. Since property taxes make up about 18% of rent rolls[19] rents would have to rise five to six times the projected losses of tax revenues to eliminate the loss. In the case of the $283 million dollar projected loss, gross rents from regulated apartments would have to rise over one billion dollars to avoid the loss. That means tenants will have a billion dollars less in disposable income to spend on local goods and services, depriving those businesses of sales (and eliminating the income taxes such sales might generate) and limiting local sales taxes along with meals and other consumer related taxes. None of these revenue losses are accounted for in Plaintiffs' estimates and projections.

Plaintiffs repeatedly argue that the RSL deprives them of a reasonable market return on their investment (Complaint at ¶37, 124, 160). 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 Housing and Community Renewal*, 83 F.3d 45 (2d Cir. 1996) citing *Bowles v. Willingham*, 321 U.S. 503, 517, 64 S. Ct. 641, 648, 88 L. Ed. 892 (1944) (reduction of

[18] See RGB 2017 Housing and Vacancy Survey select findings reporting 2016 incomes at C(5) https://rentguidelinesboard.cityofnewyork.us/wpcontent/uploads/2019/08/2017_hvs_findings.pdf

[19] NYC RGB 2019 Price Index of Operating Costs, p. 5 (noting that price Index component of the PIOC is based entirely on real estate taxes and accounts for nearly 30% of the overall price index") Since operating costs (measured by the price index) are approximately 60% of rent rolls (see infra, note 24) taxes as a component of overall rent rolls are about 18% of rent rolls (.30 x .60 = .18).

value of property as result of regulation does not constitute taking); *Park Ave. Tower Assocs. v. City of New York*, 746 F.2d 135, 139-40 (2d Cir. 1984), *cert. denied*, 470 U.S. 1087, 105 S. Ct. 1854, 85 L. Ed. 2d 151 (1985) (regulation may not preclude property owner "from realizing any profit whatsoever" but owner is not guaranteed "reasonable return" on investment); *Rent Stabilization Ass'n v. Dinkins*, 805 F. Supp. 159, 163 (S.D.N.Y. 1992) (rent regulation does not constitute regulatory taking simply because it denies owners reasonable return on property), *aff'd* 5 F.3d 591 (2d Cir. 1993); *See also, Greystone Hotel Co. V. City of New York*, 13 F. Supp.2d 524, 528 (S.D.N.Y. 1998) (A property owner has "no constitutional right to what it could have received in an unregulated market").

Still, the Plaintiffs 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 last 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 the recession. During this same period, the NYC Rent Guidelines Board recorded a 17% increase in income per stabilized dwelling unit (rising from $1,142 to $1,337).[21]

[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 2019 Income and Expense report, average net operating income for rent stabilized buildings rose 53.1% (after adjusting for inflation) between 1990 through 2017 (the first through the last year for which reliable data is available).[24] 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.[22]

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.[23]

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 triennial Housing and Vacancy Survey – one of the highest average rent burdens on record.[24] 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

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

[23] See e.g. https://ag.ny.gov/press-release/2019/attorney-general-james-sues-new-york-city-propertymanager-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).

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

total household income - having risen from only 40% in 2002.[25] 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.[26]

Plaintiffs further and falsely argue that rents have not kept pace with operating costs. (Complaint at ¶119) They claim operating costs have increased 166% over the past 20 years while rents have only increased 66%. Id.

Not only is their math highly questionable, but their conceptual analysis amounts to a gross obfuscation. It assumes a unitary relationship between operating costs and rent rolls – like assuming an equal distribution of calories by volume in a cake with frosting.

Operating costs in typical rent stabilized buildings make up only about 60% of gross revenues.[27] The remainder (about 40%) is net operating income.[28] 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

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[25] 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

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

[27] RGB 2019 Income & Expense Study, Net Operating Income After Inflation, page 10,
https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2019-IE.pdf

[28] *Id.*

Rent Guidelines Board average operating costs rose 166% (from $340 to $904 per unit)[29] between 1990 and 2017. Over the same period the CPI rose less than 90%.[30]

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. As noted, over that same period (1990-2017) the RGB reported that owner net operating income actually rose 53.1% in real, inflation adjusted terms.[31] In short, owners of rent stabilized buildings have done very well – substantially exceeding the kind of increases in net operating income that a truly competitive housing market likely would have produced over the long term.

Much of the excessive increase in rent rolls can be attributed to high rent / high income deregulation. That development can be credited to the social engineering skills of the city's real estate lobby.[35] 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."[32] 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.

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[29] RGB Explanatory Statement to Order #51 at Table 7 (audit adjusted figures)

[30] From US Inflation Calculator: https://www.usinflationcalculator.com/ utilizing 1990 as the base year and 2017 as the end year.

[31] RGB 2019 Income & Expense Study, Net Operating Income After Inflation, page 11. https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2019-IE.pdf

[35] See Collins, Timothy, *Fair Rents* note 16, *supra*

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

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 low income tenants would be better served by direct government subsidies.[33]

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.

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.[34]

Trimming the system back to target only lower income tenants may sound wonderfully efficient and reasonably altruistic, but it ignores the billion ton elephant that occupies the center

[33] *Id* at 1311-1312.

[34] *Id.* at 1318

of the city's rental market. As previously noted, building restrictions like zoning, landmarks and other regulations along with a commitment 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, well below the 5% emergency threshold, while national vacancy rates hovered closer to 9% during most of this lengthy period of partial deregulation.[35]

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 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.

As amply covered in Defendants' and Intervenors' briefs, under the HSTPA high rent vacancy deregulation was repealed. (HSTPA, Part D). High income deregulation was 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).

[35] See note 7, *supra*.

And the ability of landlords to escape reasonable rent limits through co-op or condominium conversion was tightened. (HSTPA Part N; General Business Law ("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, evictions across the city were down 18.3 percent according to data compiled by city Marshals.[36]

Plaintiffs' Selective Use of Economic Studies

In 2009, former Chairman of the Federal Reserve Alan Greenspan famously testified before Congress that he had been mistaken in relying upon classical *laissez faire* economic models in believing that the financial markets would self regulate.[37] Economists' views of rent regulation are evolving as well. In a recent speech before the Jersey City, New Jersey City Council, Professor J.W. Mason of John Jay College of the City University of New York observed:

> Among economists, rent regulation seems be in [a] similar situation as the minimum wage was 20 years ago. At that time, most economists took it for granted that raising the minimum wage would reduce employment. Textbooks said that it was simple supply and demand — if you raise the price of something, people will buy less of it. But as more state and local governments raised minimum wages, it turned out to be very hard to find any negative effect on employment. This was confirmed by more and more

[36] 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/stayinghome-nyc-evictions-down-nearly-20-after-pro-tenant-laws-enacted/

[37] www.nytimes.com/2008/10/24/business/economy/24panel.html

> careful empirical studies. Today, it is clear that minimum wages do *not* reduce employment. And as economists have worked to understand why not, this has improved our theories of the labor market.
>
> Rent regulation may be going through a similar evolution today. You may still see textbooks saying that as a price control, rent regulation will reduce the supply of housing. But as the share of Americans renting their homes has increased, more and more jurisdictions are considering or implementing rent regulation. This has brought new attention from economists, and as with the minimum wage, we are finding that the simple supply-and-demand story doesn't capture what happens in the real world.[38]

As a result of the growing recognition by economists of the value of rent regulation, combined with housing crises throughout the country, as of 2019, there are approximately 200 cities in the US with some type of rent regulation. *Id.*

Plaintiffs' cites to various academic studies do not support their claims. Two of the studies cited by Plaintiffs rebut their claims. As Professor Mason observes, both the 2007 study by David Sims (Complaint at ¶208) and the 2018 study by Diamond, McQuade and Qian (Complaint at ¶208) found no little or no effect on the construction of new housing. *Ibid.* Prof. Mason also found that "A 2007 study by Gilderbloom and Ye of more recent rent control laws here in New Jersey finds evidence that rent controls actually increase the supply of rental housing, by incentivizing landlords to subdivide larger rental units."[39] A 2015 study by Ambrosius, Gilderbloom reached the same conclusion.[40]

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[38] https://jwmason.org/slackwire/considerations-on-rent-control/

[39] John I. Gilderbloom & Lin Ye (2007) Thirty Years of Rent Control: A Survey of New Jersey Cities, Journal of Urban Affairs, Vol. 29, pp. 207-220.

[40] Joshua D. Ambrosius, John I. Gilderbloom, William J. Steele, Wesley L. Meares & Dennis Keating (2015) Forty years of rent control: Reexamining New Jersey's moderate local policies after the Great Recession, Cities, Journal of Urban Affairs, Vol. 49, pp. 121-133.

A number of the studies confirm that deregulation results in higher rents and that rent regulations benefit long-term tenants which is consistent with its purpose to preserve neighborhood stability.[41]

Turning again to the Diamond, McMcQuade and Qian study, Prof. Mason notes the findings that rent regulations did result in an increase in loss of rental housing through condominium conversions. Prof. Mason concludes that the purposes of rent regulation would be furthered by provisions that discourage conversions to non-rental housing and eliminating vacancy decontrol. The New York State Legislature, recognizing the important of such measures, adopted such provisions as part of the HSTPA (Part N).

Notably, New York's only experiment with comprehensive deregulation was rolled back after four years based upon skyrocketing rents and widespread evictions (1970-1974).[42]

In sum (and at best), Plaintiffs' multiple criticisms of city and state rent and eviction protections amount to little more than a series of disputed policy criticisms. *Amici* submit that these criticisms rest upon false histories of the purpose and effect of New York's rent regulation along with a highly questionable economic review. In the final analysis, this Court is presented

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[41] 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.")

[42] *1980 Report of the New York State Temporary Commission on Rental Housing* at I-84 ("In 1973. Mayor elect Beame charged that as a result of the State's mandated vacancy decontrol law many of the City's poor, moderate and middle income families had been placed in an intolerable position by not only being forced to pay exorbitant rents but in also losing the assurance they previously had against the possibility of unconscionable future rent increases, and he further asserted that many City residents were being driven out of the City as a result of vacancy decontrol.")

with a bald attempt to impose the industry's self-serving agenda on a democratically elected and accountable legislature. As touched upon above and discussed in greater depth below, Plaintiffs' arguments pit an outsized view of property rights against a longstanding and venerable understanding of democratic rights.

B. *The Historical / Constitutional Contexts*

Amici respectfully submit that many of the points raised by Plaintiffs seem directed at scoring public relations points rather than presenting a grounded analysis of prevailing law. As this Court well knows, popular but poorly informed references are often made to the Constitution and the wisdom of the Framers on both sides of political disputes - often in support of incompatible views and conclusions. It may therefore be helpful to briefly consider the broader constitutional history which has shaped and informed property rights – particularly in the area of price regulation. While much of what follows will be familiar to the Court and may otherwise be viewed as an academic digression, *Amici* respectfully request the Court's patience with this brief revisit to the fundamentals.

This review will also help place in context the importance and relevance of *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) a relatively recent, unanimous (inclusive of one concurring opinion) and definitive statement by the United States Supreme Court on the issue of rent regulation and regulatory takings law - a decision which also addresses the well recognized danger of substituting judicial policy judgments for the choices of legislative bodies.

Inherent tensions between the power of property and the reach of popular sovereignty have existed since the nation's founding. In describing the sources of faction and instability in the early American republic, James Madison famously observed in Federalist #10:

> The latent causes of faction are ... sewn in the nature of man...
> [T]he most common and durable source of factions has been the

> various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.

The direct regulation of prices was not unknown to Madison who authored the first draft of the Bill of Rights. Included in that draft was language proscribing deprivations of property without "due process" and "takings" without "just compensation" - language which was included and ratified as part of the Fifth Amendment.[43] Madison's draft was presented on June 8, 1789, during the first session of Congress at Federal Hall in New York City.

Members of that Congress were known to have stayed at local inns and to have patronized nearby taverns (the most famous of which was Fraunces Tavern in lower Manhattan). The rates to be charged guests for "strong or spiritous liquors" at these accommodations were regulated by law. (See, Tavern Act, Chap. 48 of the Laws of 1788; passed March 1, 1788 limiting charges to "ten shillings" for the sale of "strong or spiritous liquors".) Rates for accommodations at taverns and inns across the country were often subject to state or local limits, sometimes administered through local magistrates - including the inns and taverns in Madison's home state of Virginia.[44]

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[43] In Madison's original draft these protections were written as, "No person shall be … deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation."

[44] See Magistrate Manual: Introduction to the Magistrate System of Virginia, p.1-3. Found at: http://courts.state.va.us/courtadmin/aoc/mag/resources/magman/chapter01.pdf

Typically rate regulations applied where the product or service being marketed was "affected by a public interest" as in where sellers exercised an undue degree of market power (as innkeepers did, particularly in remote areas where travelers may have had few alternative accommodations). In the decades following the adoption of the Fifth Amendment other entities with monopolistic power arose - entities like railroad companies and grain elevator operators which provided services where alternatives were virtually non-existent.

With the ratification of the 14th Amendment in 1868, the Constitution's prohibition against deprivations of property without due process of law extended beyond a restriction on federal authority to restrict state power as well.

When faced with monopolistic price gouging by the owners of grain storage elevators, Illinois farmers organized by the Granger movement lobbied for and achieved statutory protections in the form of rate regulations in 1871. In rejecting a "due process" challenge by owners of the storage elevators, the United States Supreme Court sustained those protections in *Munn v. Illinois*, 94 U.S. 113 (1877). Recognizing the general power of states to protect the health, safety and welfare of its citizens, the Court observed:

> Under these powers, the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise, it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen,

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During the colonial period and for many years following independence, the Governor and his council appointed the justice of the peace. His duties were quite extensive and varied, ranging from the trial of criminal cases to the supervision of building of warehouses and courthouses, the licensing of ferries, the regulation of the legal and medical professions, as well as the prices charged by innkeepers. In many respects, the justice of the peace was the local governing authority. (emphasis added)

> bakers, millers, wharfingers, innkeepers, &c., [sic] and, in so doing, to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property.

94 U.S.at 125.

Tenants and homeowners residing in 21st century New York, face a similar kind of monopolistic market power. It may be more subtle and complex than the pressures faced by travelers seeking accommodations at local inns in the late 18th century or Midwestern wheat farmers seeking to store and ship grain in the mid 19th century, but it is no less real. As previously discussed New York's housing markets are governed by innumerable land use regulations which strictly limit the supply and the affordability of new housing units.

These land use restrictions undoubtedly serve several important public purposes, including the preservation of green spaces and the containment of growth commensurate with the capacity of existing infrastructure. Nonetheless, where new construction is strictly regulated, affordable single family homes and multi-family housing are rendered increasingly scarce. Both purchase prices and rents become less affordable.

The added market power achieved by owners of existing structures is not, therefore, simply a product of natural scarcity, improvements or amenities. It is also the product of a political process which creates and maintains scarcity and, with that, artificially inflates rents. When coupled with sustained demand from the population pressures of the greater New York metropolitan area, it is a housing market that, in short, suffers from a degree of monopolistic control by landlords.

That market power is clearly evidenced by the low vacancy rate of 3.63% reported in the most recent (2017) Housing and Vacancy Survey. Such low vacancy rental markets produce "speculative, unwarranted and abnormal increases in rents" – the very mischief targeted in the Legislative Findings of the RSL.

Plaintiffs complain that the RSL intrudes in various ways into their prerogatives as property owners. This incorrectly assumes that the market *status quo* is neutral. It is the same critical error the United States Supreme Court made in the now infamous case of *Lochner v. New York*, 198 U.S. 45 (1905). [45]

As this Court is no doubt aware, during what became known as the "Lochner Era" federal courts struck down nearly two hundred state and federal laws as violative of free market principles – mainly laws establishing minimum wages and setting limits on work hours. The courts rested this exercise of extraordinary judicial power on the notion that embedded within the Constitution is a right of contract which is largely immune from governmental regulation.

The continuation of that *laissez faire* jurisprudence ultimately led to a threat by President Franklin Roosevelt to expand the number of Supreme Court justices to fifteen, a figure which would provide for the appointment of six new and younger justices - presumably more sympathetic to the Roosevelt administration's New Deal policies. But the threat was poorly received and the change turned out to be unnecessary.

In 1935, Elsie Parrish, a chambermaid at the Cascadian Hotel in Wenatchee, Washington demanded $216.19 in back pay from her employer under the state's minimum wage law. Her employer offered only $17.00.[46] Parrish's claim was upheld in Washington state courts, but the

[45] See generally Cass Sunstein, *Lochner's Legacy* referenced at note 3, *supra*.

[46] See Garraty, *Quarrels That Have Shaped the Constitution* (1987), page 267.

West Coast Hotel Company continued to pursue its "due process" challenge by filing a petition for *certiorari* with the United States Supreme Court. The court unexpectedly agreed to hear the case.

Few legal scholars at the time believed Parrish had a chance. The court had stricken a similar minimum wage law just the year earlier in *Morehead v. New York ex rel. Tipaldo* 298 U.S. 587 (1936). But in *West Coast Hotel v. Parrish,* 300 US 379 (1937) the Court effectively held that courts had no business second guessing choices made by legislatures in economic affairs.

West Coast Hotel v. Parrish is one of the most important decisions in American history, comparable to *Brown v. Board of Education* in its broad impact on the lives of ordinary Americans. Together with two other Supreme Court decisions that year, it became known as the Constitutional Revolution of 1937.[47] The liberty secured by the Constitution according to Chief Justice Hughes who authored the majority opinion, "is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people." 300 U.S. at 391. Citing *Nebbia v. New York*, 291 U.S. 502 (1934), the Chief Justice emphasized that such determinations are best left to legislative judgment:

> In *Nebbia* dealing with the New York statute providing for minimum prices for milk, the general subject of the regulation of the use of private property and of the making of private contracts received an exhaustive examination and we again declared that if such laws 'have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied'; that 'with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and

[47] See e.g. Gilman, *The Constitution Besieged: The Rise and Fall of Lochner Era Police Powers Jurisprudence*, 1993, note 5, at 201 (noting that constitutional principles underlying the Lochner era were usurped by "'constitutional revolution of 1937'").

> unauthorized to deal'; that 'times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.' 300 US 379, 397-398 (1937).

In a remarkable passage, Chief Justice Hughes, went on to observe:

> There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power, and are thus relatively defenseless against the denial of a living wage, is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages, the taxpayers are called upon to pay...The community is not bound to provide what is, in effect, a subsidy for unconscionable employers.

300 U.S. at 399.

Here the Court recognized that legislative bodies may take notice of the fact that the economic *status quo* may not be neutral; that competition may not be taking place on an even playing field; and that the cost of providing the minimal necessities of life should not be cast upon taxpayers in ways that effectively subsidize those who exploit privileged market positions. The very same logic applies in overheated housing markets where landlords are permitted to exploit chronic scarcity and taxpayers are called upon to shoulder the resulting burden of housing subsidies and homeless shelters.

The Importance of Lingle v. Chevron

West Coast Hotel v. Parrish may have marked the end of the "Lochner Era" but not the end of efforts by 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).[48]

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

[48] Menell, *The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship*, 34 Ecology L.Q. 713 (2007) n. 8.

> 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 [in a takings claim]. 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 rested its disavowal of *Lochner* and its progeny on *West Coast Hotel v. Parrish*. It is remarkable that the determined efforts of a chambermaid from the small town of Wenatchee, Washington in 1935 upended a troubling and harmful constitutional doctrine and continued to inform the nation's highest court decades later about the appropriate lines to be drawn between popular sovereignty and the power of private property. There should be no mistaking that the Plaintiffs in this matter are attempting to substantially distort those established lines.

As is set forth in the foregoing history, over the past several decades, the United States Supreme Court has repeatedly held that, when federal or state economic legislation is challenged under the Due Process Clause of the Fifth or Fourteenth Amendment, courts must apply a highly deferential standard under which the law will be sustained if a reasonable legislator could believe that it will serve a legitimate public purpose. And as clarified by *Lingle* that same deferential standard applies to takings claims raised against rent regulation laws.

As fully outlined in section III(A), a reasonable legislator could certainly believe that the RSL, ETPA and the HSTPA serve legitimate public purposes. That's all that is required to avoid judicial interposition into what is fundamentally a legislative function. And that standard has been more than met in this case.

C. *Plaintiffs Make No Plausible Claim that the RSL Effects a Physical or Regulatory Taking*

Defendants City and State of New York, along with Tenant-Intervenors have amply addressed the infirmities of Plaintiffs' physical takings claims.

The United States Supreme Court could not have been clearer on this point. In the landmark decision of (*Loretto v Teleprompter Manhattan Catv Corp.*, 458 US 419, 440 (1982) the majority wrote:

> …we do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently affirmed 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. See, *e. g., Heart of Atlanta Motel, Inc*. v. *United States*, 379 U.S. 241 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co*. v. *Saxl*, 328 U.S. 80 (1946) (fire regulation); *Bowles* v. *Willingham*, 321 U.S. 503 (1944) (rent control); *Home Building & Loan Assn*. v. *Blaisdell*, 290 U.S. 398 (1934) (mortgage moratorium); *Edgar A.*

Levy Leasing Co. v. *Siegel*, 258 U.S. 242 (1922) (emergency housing law); *Block* v. *Hirsh*, 256 U.S. 135 (1921) (rent control).

Nothing in the RSL foists new occupants into empty apartments. Plaintiffs have failed to set forth any constitutional right to dislocate occupants (including family members of tenants) of units they (or their predecessors in interest) voluntarily placed in the rental market.

Nor do Plaintiffs establish that such use is perpetual. Though they complain of the difficulties and limitations of removing occupants or units from regulation, they fail to establish that they have fully explored and pursued the many available options. As noted in *Yee v City of Escondido*, 503 US 519, 528 (1992), owners must present a specific claim of deprivation to establish an as applied claim: "Because petitioners do not claim to have run that gauntlet, however, this case provides no occasion to consider how the procedure has been applied to petitioners' property, and we accordingly confine ourselves to the face of the statute." 503 US 528.

The various tests employed by the Supreme Court to determine whether land-use regulation "goes too far," (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 [1922]), therefore should be treated as a compensable taking, reflect a common objective. Each test represents a means of identifying those regulatory measures that are analogous to the exercise of eminent domain - i.e., those regulatory measures whose burdens are unfairly concentrated on discrete property owners.

Plaintiffs do not contend that the RSL renders any parcel of land valueless, and indeed the profitability of rent regulated buildings in New York City is well established in the annual reports of the NYC Rent Guidelines Board.[49] Nor can Plaintiffs credibly claim that the RSL

[49] See NYC RGB Annual Income and Expense Research Reports at https://rentguidelinesboard.cityofnewyork.us/research/ (Demonstrating consistent and

forces “some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (quoting *Armstrong v. United States*, 364 U.S. 40, 49 [1960]). A prohibition against profiteering – i.e. the elimination of excessive rents driven up by a chronic housing shortage – is neither a public burden nor the transfer of a private right. The elimination of profiteering is more akin to the elimination of a nuisance.

Nor have Plaintiffs articulated a cognizable claim under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) concern with investment backed expectations. A recent case analyzing *Penn Central* in the context of a rent control law is highly instructive. In *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445 (9th Cir. 2018) the Ninth Circuit held that a rent control board’s decision to drop debt service as a factor in its adjustment of a rents for units in a mobile home park did not result in a regulatory taking, despite a jury finding that the change reduced the value of the property owner’s investment by three million dollars.

The Ninth Circuit engaged in a regulatory takings analysis, governed by the factors set out in *Penn Central* which instructs courts to evaluate: 1) the regulation’s economic impact; 2) the extent to which the regulation interferes with distinct investment-backed expectations; and 3) the character of the government action. This is the same approach applied in the Second Circuit. See e.g. *Sherman v Town of Chester*, 752 F3d 554, 565 (2d Cir 2014).

Citing prior 9th Circuit cases finding that a diminution in property value in excess of 75% did not amount to a taking, the court found that the denial of the plaintiff’s requested rent increase was not a legally sufficient economic impact. The plaintiff’s diminution in value “would only be 24.8%, far too small to establish a regulatory taking.” (Second Circuit cases apply an

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substantial net operating incomes since 1990 – the first year for which income and expense tax filings were available.)

even more restrictive view of economic impact. See, *Sadowsky v New York*, 732 F2d 312, 317318 (2d Cir 1984) finding that even where "severe economic hardship results", unless "all economically viable uses" of property are precluded, a taking will not be found under *Penn Central's* economic impact test.)

The *Colony Cove Props* plaintiff argued the change interfered with investment backed expectations because the City's implementation guidelines at the time plaintiff purchased the property included a debt service calculation in the rent increase. The 9th Circuit rejected this argument as the guidelines explicitly stated the current analysis would not create an entitlement to a specific rent increase. The 9th Circuit further concluded that the owner's reliance on the City continuing its past practice of calculating debt service in future rent increases did not create a reasonable investment-backed expectation.

The Ninth Circuit therefore found that no reasonable finder of fact could conclude the plaintiff successfully presented a regulatory takings claim and reversed the district court's judgment.

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 this court should grant Defendants' and Intervernors' motions for dismissal.

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Respectfully submitted,

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