No. 23-___

IN THE

Supreme Court of the United States

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

Petitioners,

v.

STATE OF NEW YORK, RUTHANNE VISNAUSKAS, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF NEW YORK STATE HOMES AND COMMUNITY RENEWAL, DHCR,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

New York's Emergency Tenant Protection Act applies to properties constructed prior to 1974 with 6 or more units. It requires findings of less than a 5% occupancy rate in the appliable municipality. It anticipated that a "sunset Clause" could take effect removing the community from ETPA if there were more than 5% vacancies in a community. The law protected tenants in various ways. The Housing Stability and Tenant Protection Act (HSTPA), (June 2019) removed statutory protections by repealing vacancy decontrol, limiting Maor Capital Improvements (MCI) and Individual Apartment Improvements (IAI) expenditures; removing the benefit of preferential rents; extending rights of tenants' roommates; repealing deregulation of tenants exceeding a threshold of the tenant's income exceeding $200,000.00 for two years prior, or removing a vacancy increase when the unit becoming vacant; and preventing cooperative or condominium conversions on reasonable terms. The HSTPA limited the owner's control of renting to tenants by limiting the ability to consider a refusal based on prior rent history.

The questions presented are whether the changes made by the HSTPA effect physical takings, and as applied takings, and violate both the Due Process and Contract Clauses of the Constitution. The case fits squarely with the partial dissent in *74 Pinehurst LLC v. New York*, No. 19 Civ. 6447, 2024 WL 674658 (U.S. Feb. 20, 2024) and should be reviewed in that context.

PARTIES TO THE PROCEEDING

Petitioners herein, Building and Realty Institute of Westchester and Putnam Counties, Inc., Apartment Owners Advisory Council, Cooperative and Condominium Council, Stepping Stones Associates, L.P., Lisa DeRosa, as Principal of Stepping Stones Associates, L.P., Jefferson House Associates, L.P., Shub Karman, Inc., DiLaRe, Inc., Property, Management Associates, Nilsen Management Co., Inc. were appellants in the Second Circuit.

The following plaintiffs have been negatively impacted by HSTPA:

> Stepping Stones Associates, L.P. and Lisa DeRosa are forced to offer renewal leases permanently and significantly below market rents substantially diminishing the property's value and making it more difficult to maintain. Conversions are virtually impossible on reasonable terms. The percentages of rents below market value range from 42.75% to 80.58%.
>
> Jefferson House Associates is compelled to offer leases at reduced rents of one half to two thirds of market value. This plaintiff cannot recover the costs of repairs and improvements and units are left vacant when tenants vacate. For example, $12,074.90 was spent on renovations which is limited by HSTPA in terms of the return. The value of the property is substantially diminished.
>
> Shub Karman is required to re-rent at lower than market rent permanently; losing $12,000 (1 unit) and $7,000 (2d unit) due to HSTPA limitations and imposed court delays. A two

bedroom non ETPA or HSTPA apartment recently rented for $1,721. monthly while an ETPA mirror image of that unit is now renting for $1,227, more than 35% less than market rent with no hope of an increase. The value is diminished.

DiLaRe, Inc., a 22 unit building, with all units subject to ETPA and HSTPA, with rents from $931.22 for a unit with a market rent of $1,525 to a maximum of $1,479 per unit. It now has a 12.6% plus loss from market rents which is now virtually permanent and growing under HSTPA due to the impossibility of raising rent on vacancies. The building's value is diminished.

Sheridan Gardens LLC has 58 apartments in two buildings with over one-third renovated. These renovations were done expecting rents to rise pursuant to IAls benefitting the landlord and incoming tenants. The landlord recently installed new windows benefitting all the tenants. This expenditure of over $200,000 would have resulted in a 15% increase under ETPA. Now, although expecting that increase, the landlord is limited to 2% per year, which hardly covers the financing costs without the basic cost being reimbursed. This is an interference with investment-backed expectations. Improvements will no longer happen. Examples of lower than reasonable rents in the building are rents at $662; $661; $732; $920, $930, $783 in one building and $766; $500; $616; $807; $664; $698; $848 in the other building. Almost 25% of the apartments have abnormally low rents now made perma-

> nent. The lower than reasonable rents are an interference with basic investment-backed expectations which hamstrings the ability to maintain a building and eliminates the ability to receive compensation for building improvements.

See also Pet. App. 133a for complete analysis.

The State of New York, *et al.* were appellees in the Second Circuit.

Community Voices Heard (CVH) appeared in the Second Circuit as intervenors supporting appellees.

RULE 29.6 STATEMENT

Building and Realty Institute of Westchester and Putnam Counties, Inc., Apartment Owners Advisory Council, Cooperative and Condominium Council, Stepping Stones Associates, L.P., Lisa DeRosa, as Principal of Stepping Stones Associates, L.P., Jefferson House Associates, L.P., Shub Karman, Inc., DiLaRe, Inc., Property Management Associates, Nilsen Management Co., Inc. have no parent corporation and no publicly held corporation owns 10% or more of the stock of any of these entities.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition under Rule 14.l(b)(iii):

> *G-Max Management. Inc., et al., v. New York, et al.,*
>
> U.S. Court of Appeals for the Second Circuit, Judgment entered on March 12, 2024

G-Max Management. Inc., et al., v. State of New York, et al. U.S. District Court for the Southern District of New York, Judgment entered on September 14, 2021

Although not directly related to this case, petitioners are aware of recent cases challenging the constitutionality of New York's Rent Stabilization Law in which decisions have been rendered by the Second Circuit. Those actions are:

335-7 LLC v. City of New York, No. 20 Civ. 1053, 524 F. Supp. 3d 316 (S.D.N.Y. 2021), *affd* No. 21-823, 2023 WL 2291511 (2d Cir. Mar. **1,** 2023); *74 Pinehurst LLC v. State, of New York*, No. 19 Civ. 6447, 492 F. Supp. 3d 33 (E.D.N.Y. 2020), No. 21-467, *affd*, 59 F.4th 557 (2dCir.2023), *cert. denied*, ___ S. Ct. ___, 24 WL 674658 (2024); *Community Housing Improvement Program, et al. v. City of New York*, 59 F.4th 557 (2d Cir.) *cert. denied*, 144 S. Ct.164 (2023).

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully ask this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App. 1a) is available at 2024 WL 1061142. The opinion of the District Court (Pet.App. 17a) dismissing Petitioners' claims is available at 2021 WL 4198332.

JURISDICTION

The judgment of the Court of Appeals was entered on March 12, 2024 App., *infra*, 31a-32a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment, which applies to the States through the Fourteenth Amendment, provides "Nor shall private property be taken for public use, without just compensation."

The Due Process of the Constitution is violated as the HSTPA is an irrational, arbitrary, and an irrelevant means to address its stated policy ends.

The Contract clause of the Constitution is violated as the HSTPA interferes with existing contracts and it does not advance its alleged purposes.

The Housing Stability and Tenant Protection Act of 2019 are reprinted at Pet.App. 240a

INTRODUCTION

The core questions presented in this case are whether the HSTPA violates the Fifth Amendment as applied to the states by the Fourteenth Amendment to the Constitution as well as the Due Process Clause and the Contract Clause. The issues are whether the HSTPA strips landlords' Constitutional rights by eliminating owners' rights to select tenants. They cannot, among other things, ask/inquire about the history of prior tenancies. They are required to accept them. This is a Taking prohibited under the Constitution.

The Second Circuit held that *Cedar Point Nursery v. Hassid,* 594 U.S. 139 and *Horne v. Department of Agriculture,* 576 U.S. 350 (2015) did not apply as they did not concern rental housing. The court relied on *Community Housing,* 59 F.4th but *Community Housing* is not relevant as unlike the case in *Yee v. City of Escondido,* 503 U.S. 519 (1992) it challenged all the rental housing laws including the ETPA. The split in the circuit courts needs to be addressed as Justice Thomas' indicated in referencing *74 Pinehurst LLC v. New York,* 2024 WL 674658, at 1 (U.S. Feb. 20, 2024) and *Heights Apartments, LLC v. Walz,* 30 F4th 720 (CA8 2022)

STATEMENT

A. The HSTPA

The HSTPA amends the ETPA and places the burden of providing affordable housing *solely* on the owners of pre-1974 rental housing without the requisite evidence of a shortage. It burdens the plaintiffs herein. rather than society at large. It violates the Constitution under the 14th Amendment and

the Takings Clause both as a physical and an as-applied due process claim and a claim under both the Due Process and the Contract Clause of the Constitution.

The Second Circuit held that *Cedar Point Nursery v. Hassid,* 141 S. Ct. 2063 (2021) did not apply because it held tenants like employees are invited onto the premises. *Cedar Point* makes it clear that an appropriation of an owner's fundamental property right is a *per se* physical taking. Under the HSTPA the owners do not control the selection of or "invite" tenants as they are required to accept them. *Lucas v. South Carolia Coastal Council,* 505 U.S.1015 (1992 did not preclude the claim because the owner did not pursue other procedures nor should the landlord have to sell or abandon the property.

In *Pennell v. City of San Jose,* 485 U.S. 1 (1988), Justices Scalia and O'Connor in dissenting opinions concluded that the legislation by limiting rents for "hardship" tenants *Id.* at 22 forced that group of owners to "bear public burdens [that] * * * should be borne by the public as a whole" and that such a requirement violates the Takings Clause. *Id.* at 19. The HSTPA flies in the face of that basic premise. The Second Circuit dismissed Justice Scalia's opinion as a dissent but *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978), and *Kelo v. City. Of New London,* 545 U.S. 469 (2005), allow for the possibility of such claims. This Court should grant review to affirm this essential limitation on government authority to affect a regulatory taking.

There is no basis for restricting the owners' right to exclude, occupy, change the use of, dispose of their property, or seek a fair return of their investments in improvements in the following manner:

First, the HSTPA requires owners to renew tenants' leases in perpetuity, absent circumstances entirely within the tenant's control. Under HSTPA an owner cannot refuse to renew the lease unless the tenant (1) fails to pay rent, (2) materially violates the lease, (3) creates a nuisance, or (4) uses the apartment for an unlawful purpose.

Second, the HSTPA owners must lease to strangers who are successors of the existing tenant. A successor tenant has the right to have other "successor" tenants move in with successor rights that are in perpetuity without any evidence of the financial need and fail to reduce any shortage.

Third, the HSTPA prevents owners from refusing to renew a lease to regain possession of an apartment for personal use. Only one tenant-occupied unit may be recovered by owners and only when that unit will constitute the owner's primary residence and the owner proves an "immediate and compelling necessity." If the tenant has occupied the unit for fifteen years or more, is 62 years or older, or is physically or mentally impaired, the owner must find that tenant equivalent·accommodation nearby at the same stabilized rent. Buildings held in the name of a corporate entity have no personal use allowance at all.

Fourth, the HSTPA restricts owners' ability to withdraw their buildings from residential rental use, leave the property vacant, or demolish it. Nor can HSTPA property be converted to commercial rentals or withdrawn entirely from the residential market unless the cost to make it habitable exceeds its value or the owners will use the building solely for their own business. Owners who wish to demolish their property must relocate regulated tenants to comparable rent stabilized housing or pay them a stipend for six years.

App., *infra,* 176a-178a. These requirements have forced outlandish payments to hold-out tenants standing in the way of major redevelopments. App., *infra,* 129a-130a.

Fifth, HSTPA prevents owners from converting apartments to cooperatives or condominiums. Under ETPA a non-eviction plan required the consent of fifteen per cent of the tenants. This protected existing tenants, HSTPA requires consent of a majority even though tenants' perpetual renewal rights are not affected.

Sixth, the HSTPA limits rents by altering the return on Major Capital Improvement and Individual Apartment Increases. Essentially there is no return on such expenses.

Seventh, the elimination of high rent/high income decontrol and the elimination of vacancy increases are physical takings.

B. Proceedings Below

Petitioners filed suit in the District Court for the Southern District of New York challenging the HSTPA as an uncompensated taking of private property. Petitioners alleged that the HSTPA effects a physical taking by eliminating owners' rights to exclude from, use, and dispose of their property. They alleged it effects regulatory taking without any minimum income requirements for tenants to qualify.

The District Court granted respondents' motion to dismiss the complaint. The Second Circuit affirmed. It rejected petitioners' physical Takings claims because it believed "no provision of the HSTPA effects, facially, a physical occupation of regulated properties." The Court reasoned that because owners "voluntarily

invited third parties to use their properties" regulations concerning such properties are 'readily distinguishable' from those compelling invasions of properties closed to the public." (quoting *Cedar Point,* 141 S. Ct. at 2077). In its view the government's "broad power" to regulate landlord-tenant relationships is not "restrict[ed]–much less upend[ed]" – by this Court's takings rulings. App., *infra,* 19a, 21a (quoting *Yee v. City of Escondido,* 503 U.S. 519, 528 (1992). It concluded that the successorship provisions did not effect a physical taking because they deprive owners "only of the ability to decide *who* their incoming tenants are."

The Second Circuit also rejected petitioners' claims of a regulatory taking by forcing building owners to subsidize the HSTPA's tenants without demonstrating a need. The Court reasoned that "a majority of the Supreme Court has yet to adopt Justice Scalia's reasoning articulating that takings principle in *Pennell. Ibid.* That Court also rejected the Due Process and Contract Clause claims.

REASONS FOR GRANTING THE PETITION

I. WHETHER THE HSTPA EFFECTS A *PER SE* PHYSICAL TAKING IS A QUESTION THAT REQUIRES REVIEW BY THIS COURT

The Second Circuit held that the physical takings protections that this Court recognized in *Cedar Point* do not apply to rental buildings because the owner invites the tenants "in" just as *Cedar Point's* employees. That reasoning should not apply to tenants under the HSTPA which provide owners no control over who, when, for how long, and under what terms tenants are

offered leases with the special benefits of the new law. The tenants are not "invited in". The owner cannot seek past tenant/landlord records or proceedings.

The Takings Clause protects "every sort of interest ... in a physical thing," including to "possess, use, and dispose" of rental property. *United States v. General Motors Corp.,* 323 U.S. 373, 378 (1945). The Court of Appeals ignored *Height's Apartments, LLC v. Walz,* 30F.4th 720, 733 (8th Cir. 2022).

A. This Court's Precedents Confirm That HSTPA Effects A Physical Taking

The HSTPA restrictions on an owner's use and control of its property without compensation are physical takings. HSTPA's totality of restrictions on owners' rights is unconstitutional both "facially" and "as applied." *See Colony Cove Properties, LLC v. City of Carson, Cal.*, 888 F.3d 445 (9th Cir. 2018) The Second Circuit failed to recognize that the idea that the Supreme Court applies the "no set of circumstances test" to every facial challenge has been dispelled by *Doe v. City of Albuquerque,* 667 F.3d 1111, 1124-26 (10th Cir. 2012).

1. Restrictions on an owner's ability to reclaim an apartment under the N.Y. Real Prop. Law Sec. 232-c for its own use or to change the use of its property

A property owner's "right to exclude" – the right to decide who may enter the property and who may not – is "one of the most treasured rights of property ownership." *Cedar Point Nursery v. Hassid,* 141 S. Ct. 2063, 2072 (2021) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982)). It is "universally held to be a fundamental element of the property right," and is "one of the most essential sticks

in the bundle of rights that are commonly characterized as property." *Ibid.* (quoting *Kaiser Aetna v. United States,* 444 U.S. 164, 176, 179-80 (1979)).

Cedar Point, infra. at 2074 reviewed a California regulation requiring agricultural employers to allow union organizers on to their property for certain periods effected a *per se* physical taking requiring just compensation because it "appropriates a right to physically invade the growers' property." By permitting a tenant to remain on a permanent basis New York's HSTPA confers a more extensive right to invade.

First, the HSTPA restricts an owner's ability to exclude third parties to reclaim an apartment for its own use or that of family members. An individual owner may recover possession of a single unit – and only if the owner will use the apartment as its primary residence and proves "an immediate and compelling necessity." N.Y. Unconsol. Laws§ 26-511(c)(9)(b). If the tenant has occupied the unit for fifteen years or more, is 62 years or older, or has a physical or psychological impairment, the owner cannot recover possession unless it somehow finds a nearby unit for the tenant at an equivalent stabilized rent. *Ibid.* And if the owner is a corporate entity, the owner cannot recover the apartment at all. App., *infra,* 165a-166a.

When these restrictions prevent an owner from reclaiming an apartment for personal use they appropriate a right to invade the property. This taking is much more substantial than in *Cedar Point* as HSTPA takes from the owner and gives the tenant the right to possess and to determine who may enter the apartment. That constitutes a *per se* physical taking. In *Cedar Point* the employees were invited by the

company. The selection of tenants under the HSTPA is not controlled by the owner.

Second, HSTPA bars an owner from refusing to renew a lease, and exclude the tenant from the apartment, because the owner wishes to change the property to non-residential uses. 9 NYCRR § 2524.5(a)(l)(i). The owner also may not refuse to renew in order to demolish the building unless it finds the tenant an equivalent HSTPA-regulated apartment and pays the tenant's moving costs. 9 NYCRR § 2524.5(a)(2)(ii)(b). An owner may not refuse to renew because it wishes to leave the property vacant unless it can prove that the cost of making the building habitable exceeds its value. 9 NYCRR § 2524.5(a)(l)(ii).

These restrictions force the owner to allow the tenant to remain in possession of the property, appropriating for the benefit of the tenant not just a right of access, as in *Cedar Point,* but the rights of possession and to determine who may enter the property. These effect *per se* physical takings.

The Second Circuit distinguished *Cedar Point* based on *Prune-Yard Shopping Center v. Robbins,* 447 U.S. 74 (1980). *Prune-Yard* rejected a regulatory claim that was grounded in a state court decision holding that the California Constitution protected the public's right to engage in leafleting at a shopping center. In *Cedar Point,* California relied on *Prune-Yard* for the proposition that "limited rights of access to private property should be evaluated as regulatory rather than *per se* takings." 141 S. Ct. at 2076. This Court rejected that contention, observing that "the Prune-Yard Mall was open to the public, welcoming some 25,000 patrons a day" and distinguishing it from a regulation granting a right to invade property closed to the public. *Cedar Point, infra* at 2077. The Second

Circuit found that the HSTPA does not grant a right to invade "property closed to the public," because tenants are invited by the owners and because regulations concerning such properties are 'readily distinguishable' from those compelling invasions of properties closed to the public." App. *infra,* 18a-19a.

Unlike Prune-Yard Mall, a residential rental property is not "a business generally open to the public." Owners are *required* by the legislation to accept tenants and their invitees, but not all members of the public. The Second Circuit opined that *Cedar Point* did not "concern a statute that regulates the landlord-tenant relationship" and did not "restrict – much less upend – the State's longstanding authority to regulate that relationship." App., *infra,* 21a (footnote omitted). Nothing in the Takings Clause or this Court's jurisprudence excludes rental properties from the Clause's protections. The Court argued that tenants are invited in by the owner. Given that the owner does not control tenant selection permitting that view to become the law would permit the Taking without compensation as well as violating the Due Process and Contract clauses of the Constitution.

The Second Circuit misconstrued *Yee v. City of Escondido,* 503 U.S. 519 (1992). App., *infra,* 21a-22a. *Yee* confirms that the HSTPA effect physical takings. *Yee* reviewed a statute that prohibited the owner of a mobile home park from terminating a tenancy when a home was sold during the term of the lease. 503 U.S. at 524-26. The Court did not find a physical taking occurs when "the government authorizes a compelled physical invasion of property" 503 U.S. at 527 because the state law provided that "a park owner who wishes to change the use of his land may evict his tenants albeit with six- or twelve-months' notice." *Id.* at 527-

28 and "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 503 U.S. at 528. *Yee* distinguished the situation where the statute "compel[led] a landowner over objection to rent his property" as under the HSTPA. HSTPA bars the owner from changing the use of the property, leaving it vacant, or demolishing it or taking it back for its own use. It is "compel[ling] a landowner over objection to rent [the] property" which is a physical taking under *Yee* and *FCC v. Florida Power Corp.,* 480 U.S. 245, 251-52 n.6 (1987).

Because the HSTPA "sets forth several grounds on which a landlord may terminate a tenancy" – such as "failing to pay rent, creating a nuisance, violating provisions of the lease, or using the property for illegal purposes," the Court of Appeals in referencing *Yee* said that the HSTPA does not effect a physical taking. App., *infra,* 19a. That interpretation is too narrow to withstand proper judicial scrutiny.

Yee did not state that any restriction of an owner's right to exclude is permissible so long as there is some theoretically available avenue for the owner to regain control of the property. It permitted the owner to change the use of the property and made it clear that forcing the owner to continue renting the property after the expiration of the lease term would be a physical taking. Under the HSTPA the owner must continue accepting residential tenants and restricts the owner from reclaiming property for personal use, converting it to commercial or other purposes, leaving the property vacant or demolishing it and "compel[s] a landowner over objection to rent his property," and thereby effects a physical taking. Invading an owner's

property by forcing HSTPA owners to accept successor tenants that they did not choose after the expiration of the lease and renewal leases in perpetuity so long as the tenant does not violate the law affect *per se* physical takings. The "successor" rights may be invoked by a member of the tenant's family who has lived in the apartment as a primary residence for two years (one year if the family member is a senior citizen or is disabled). 9 NYCRR § 2523.5(b)(l). Appropriating a right to invade and possess the property for a third party not chosen by the owner is a physical taking as set forth in *Cedar Point.*

The HTSPA requires owners to give incumbent tenants the option of renewing their leases unless the tenant has violated the lease or the law or ceased to use the apartment as a primary residence. 9 NYCRR § 2524.3. Forcing an owner to accept the continued occupation of its property by someone whom the owner had little or no ability to reject in the first place is more invasive than the case presented in *Cedar Point.* Reading *Yee* as rejecting the contention that a physical taking occurs when an owner has decided to rent a property and the government limits the owner's ability to determine who may occupy its property creates a conflict with *Cedar Point* and *Horne. Cedar Point* explains the essence of the right to exclude as based on the permission given the tenant in the first place which under the HSTPA is given by the statute and not the landlord.

In *Horne v. Department of Agriculture,* 576 U.S. 350 (2015), the Court rejected the argument that a property owner's decision to participate in a particular market could absolve the government of takings liability. See *id.* at 365 (discussing *Loretto).* If it is a physical taking to compel a property owner to rent

initially to a person it did not select, then it is also a taking to compel it to accept a second tenant or the continued occupancy by someone it would reject. See also *301, 712, 2103 & 3151 LLC v. City of Minneapolis,* 27 F.4th 1377, 1383 (8th Cir. 2022) analyzing *Cedar Point, Horne,* and *Yee* and concluding that "an ordinance that would require landlords to rent to individuals they would otherwise reject might be a physical invasion taking."

The HSTPA prohibits an owner from converting a building unless the owner obtains the agreement of 51 % of the tenants. N.Y. Gen. Bus. Law§ 352-eeee(l)(b). That is so even though the conversion does not in any way affect the tenants' rights to renewal and other protections conferred by the HSTPA.

The Takings Clause protects all interests in property including the right "to dispose * * * of it." *General Motors,* 323 U.S. at 378; see also *Phillips v. Washington Legal Found.,* 524 U.S. 156, 167 (1998).

A property owner may dispose of its ownership of a residential apartment building in various ways: by selling the building and underlying property or converting the building to a condominium or cooperative. *Pakdel v. City and County of San Francisco,* 141 S. Ct. 2226, 2228 (2021). In *Pakdel,* the Supreme Court remanded the case to the Ninth Circuit to review the claim of whether the Lifetime Lease Requirement effects an extraction, a physical taking, [or[a private taking required the standard that the "law is unconstitutional in all of its applications" and that there is "no set of circumstances under which the [HSTPA] would be valid." (A-180). In overturning a requirement that hotels provide guest information to police without a warrant that court held that facial challenges may be brought even if they are

not unconstitutional in all applications. *City of Los Angeles* at 2449-2450.

a. Petitioners Properly Allege Facial Takings

The Second Circuit held that petitioners bear the burden on their facial physical takings challenge to show that the HSTPA "is unconstitutional in all its applications." App., *infra,* 12a (quoting *Washington State Grange v. Washington State Rep. Party,* 552 U.S. 442, 449 (2008)); *see also United States v. Salerno,* 481 U.S. 739, 745 (1987). It held that under that "high bar," even if the HSTPA effects a physical taking in some of its applications, it is not facially unconstitutional. App, *infra,* 12a-15a. The fact is that *Salerno* was overturned by *Doe v. City of Albuquerque,* 667 F.3d 1111, 1124-26 (10th Cir. 2012); *City of Chicago v. Morales,* 527 U.S. 41,55 n.22 (1999); *United States v. Stevens,* 559 U.S. 460, 472. The court's conclusion rested principally on the application of an erroneous substantive standard. The lower court also misapplied this Court's decisions regarding facial claims. It explained that, in determining whether a law is facially unconstitutional, a court is to consider "only applications of the statute in which it actually authorizes or prohibits conduct." *City of Los Angeles v. Patel,* 576 U.S. 409, 418 (2015). The Court of Appeals agreed that this is the proper standard understanding that it means a law's facial constitutionality is assessed by looking at "those to whom the law actually applies not those for whom it has no plausible application – that is, those for whom the law is 'irrelevant.'" App., *infra,* 13a (quoting *Patel* at 418-19). The Court failed to apply that standard to provisions of the HSTPA that dispossess building owners of the right to exclude.

Under *Patel,* petitioners have adequately alleged that the challenged HSTPA provisions on their face affect physical takings. The HSTPA effects a physical taking when, after a lease has expired, it bars a property owner from exercising its right to exclude and other property rights to regain the property for its own use; no longer rent out the property; change the use of the property; demolish the property; or prohibit the owner from converting the property for sale as a condominium or cooperative. This Court's precedents establish that every time the HSTPA applies to prevent the property owner from taking those actions it operates as "a restriction" on the owner's control of its property it effects a physical taking. *Patel* at 418. Petitioners have therefore properly alleged that these HSTPA provisions are invalid on a facial basis.

The Second Circuit's holding that *Cedar Point* does not apply to rental apartment regulations appropriating the owner's right to exclude conflicts with the Eighth Circuit's ruling in *Heights Apartments, LLC v. Walz,* 30 F.4th 720, 732-33 (8th Cir. 2022) which applied *Cedar Point* to uphold a physical taking claim based upon an order imposing a moratorium on residential evictions during the COVID-19 pandemic. The Court of Appeals held that the executive order "turned every lease in Minnesota into an indefinite lease, terminable only at the option of the tenant." 30 F.4th at 732-33. That restriction deprived the property owner of its "right to exclude existing tenants" and "gave rise to a plausible *per se* physical takings claim under *Cedar Point Nursery." Ibid.* The within matter should be reviewed to resolve that conflict.

San Francisco imposed significant restrictions on owners' ability to reclaim units for personal use. S.F. Admin. Code § 37.9(a)(8). It also requires an owner

seeking to convert buildings to condominiums to offer tenants a lifetime lease. S.F. Subdivision Code § 1396.4. In *Pakdel, supra,* the Court rejected the claim based on the owner's rejection of the tenant's offer to purchase but recognized that a lifetime lease intruded on the owners' right to exclude and directed the lower courts to assess the plaintiffs' physical taking claim under *Cedar Point.* 141 S. Ct. at 2229 n.l. On remand the District Court in *Pakdel v. City and County of San Francisco, et al.,* U.S. District Court, N.D. California, Case No. 17-cv-03638-RS, Oct. 25, 2022 again denied the relief because the plaintiff had voluntarily rented the unit, applied to convert it to a condominium, sold it to the tenant under the ordinance after rejecting the tenant's million dollar plus offer. It did not abrogate the original decision finding that a physical taking could have been upheld based solely on the lifetime lease issue.

b. Petitioners Properly Allege an As Applied Takings Claim

The complaint sets forth an "As Applied" taking claim. The Petitioners' detailed information demonstrates that HSTPA, as applied to each of them, caused them damage. (Appd'x). There is no evidence that the law facilitates affordable housing. The no income requirement actually restricts the availability of this housing. These factors abrogate the need argument. Referencing a vacancy rate of less than 3% without surveys and findings of a shortage renders the decision flawed. (A-72-28, 1188-97). It failed to note that IAls can only be made with the tenant's consent unless the apartment is vacant (and then the expenditures and reimbursements are limited) and the DHCR can reject MCIs. *Knick v. Twp of Scott,* 139 S. Ct. 2162, 2170 (2019) cited by the Court is not contrary to plaintiffs'

position. As indicated there are no avenues here and no procedures for a variance. The Court cited *Concrete Pipe & Producs. Of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.,* 508, 602, 645 (1945) and relied upon *Pinehurst* to confirm that lost profit alone is not a taking. Appellants have alleged more than lost profits.

II. THE APPELLANTS HAVE SET FORTH SUFFICIENT FACTS TO WARRANT A FINDING THAT THERE IS A REGULATORY TAKING

Four members of the Court in *Kelo* lamented the majority's decision there to allow the condemnation of private property for "public use" whenever "the legislature deems [the new use] more beneficial to the public," because that ruling "abandon[ed the long-held, basic limitation on government power" that a legislature may not promulgate a "law that takes property from A. and gives it to B." 545 U.S. at 494 (O'Connor, J., Rehnquist, C.J., Scalia and Thomas, JJ., dissenting) (quoting *Calder v. Bull,* 3 Dall. 386, 388 (1798) (Chase, J.). The effect of that ruling, the dissent explained, "is to wash out any distinction between private and public use of property." *Ibid.*

As the New York Court of Appeals candidly recognized, "the rent-stabilization laws do not provide a benefit paid for by the government," but "they do provide a benefit *conferred* by the government" through "a unique regulatory scheme applied to private owners of real property." *Santiago-Monteverde,* 24 N.Y.3d at 291.

Pennell can fill in gaps in constitutional protections left by the decision in *Penn Central:* whether the challenged regulation forces some owners to pay for

programs, like tackling housing affordability or tenant hardship, the cost of which would otherwise have to be spread more broadly among taxpayers. This is problematic and requires this Court's review of the placement of the burden of rectifying a societal problem on property owners without standards for a tenant's need to qualify for assistance.

Kelo v. City of New London, supra, accepted by the Court, is relevant. The preconditions for such a "Takings" claim are a property interest, taken under color of state law without just compensation. The Court cited *Frooks v. Town of Cortlandt,* 997 F. Supp. 438, 452 (S.D.N.Y. 1998) (citing *HBP Assoc. v. Marsh,* 893 F. Supp. 271, 277 (S.D.N.Y. 1995) and *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 577 (1972) but they are not controlling either on the facts or the law. The Complaint sets forth a facial challenge. Consideration given to HSTPA's restrictive effect, the essence of the "as applied" claim is the same as the "facial" claim. The combined effects of HSTPA's constraints result in permanent "physical occupation" of the Appellants' regulated apartments depriving them of the use and enjoyment they had of their property prior to HSTPA. HSTPA's totality of restrictions on owners' rights demonstrates its unconstitutionality "facially" and "as applied." See *Colony Cove Properties, supra.* As to the contention that in order to be unconstitutional there can be "no set of circumstances" under which HSTPA would be valid *Doe v. City of Albuquerque, supra,* 1124-26 held that: "The idea that the Supreme Court applies the 'no set of circumstances" test to every facial challenge is simply a fiction.' A facial challenge is a challenge to the terms of the statute, not hypothetical applications. *Salerno's* language is understood not as setting forth a "test" for facial challenges, but rather as describing the

result of a facial challenge when a statute fails to satisfy the appropriate constitutional standard. Where it fails the relevant constitutional test (such as strict scrutiny, the *Ward* test, or reasonableness review), it can no longer be constitutionally applied to anyone and there is "no set of circumstances" in which the statute would be valid.

Applying this analysis to a "facial" challenge if it does not meet constitutional scrutiny, the standard is that it is "wholly invalid and cannot be applied to anyone." See *McConnell v. Federal Election Comm'n,* 540 U.S. 93, 124 S. Ct. 619, 157 L.Ed.2d 491 (2003), holding the Bipartisan Campaign Reform Act of 2002 (BCRA), § 203, facially constitutional, did not foreclose subsequent "as-applied" challenges. It is self-evident that when the owner cannot convert to a cooperative corporation because of the 51 % rule, when capital improvement increases are limited, or the retention of roommates is permanent the investment is no longer profitable and fails constitutional scrutiny. The solution to sell under duress at a loss and/or a diminution of value is in derogation of investment-backed expectations. The Court's opinion that unsatisfactory tenants can be evicted is insufficient as these evictions are extremely rare. Other restrictions such as the permanency of a preferential rent, the continued occupation by roommates at ETPA rent, and the loss of high income/high rent decontrol or vacancy increases permanently limit an owner's increased income options.

Relying heavily on *Yee v. City of Escondido,* 503 U.S. 519 (1992) the Court incorrectly found that the provisions and circumstances of HSTPA do not constitute a physical taking. By requiring landlords to continue the occupation of the premises under preferential rents the law has granted an "exclusivity

of occupation" and a deprivation of the owner's right to use and exclude from the property. The Court acknowledged the distinction that under *Yee* the owner could evict tenants if it wanted to change the use but ignored the fact that it is not permitted under HSTPA. The contention that the law amounts to a physical encroachment is not negated by the footnote that plaintiffs are not alleging an "encroachment." That was clarified as HSTPA's restrictions are the "equivalent" of a physical encroachment. The reasoning in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S. Ct. 3164 (1982) wherein it was permanent as to the facts presented is applicable. The standard of exclusivity and absolute deprivation of the owner's right to use and exclude others are met in this instance as unlike *Yee* not only existing tenants benefit but new tenants are also relieved of the MCI and IAI increases. The owner can never recoup expenses for which the law contemplated would be fair, would not burden tenants, would improve property, and meet an owner's investment-backed expectations. The provisions restricting an owner's right to evict an ETPA tenant for his/her own use is extended to a roommate's roommate and is a taking as it extends the law in perpetuity for non-lessees. That does not fulfill any of the legitimate ETPA or HSTPA objectives.

Elmsford Apartment Assoc., LLC v. Cuomo, 469 F. Supp. 3d 148, 162 (S.D.N.Y. 2020) also cited in the decision (A-179) can be distinguished as referring to a temporary emergency situation. HSTPA is not supported by either finding. In *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 98 S. Ct. 271 (1978) the Supreme Court struck down Minnesota's Private Pension Benefits Protection Act because it "superimposed" pension obligations upon the company conspicuously

beyond those that it had voluntarily agreed to undertake in violation of the Contracts Clause. Factors determining whether the law "fulfills a legitimate; government purpose" were that "the relief was appropriately tailored to the emergency that it was designed to meet," "the imposed conditions were reasonable," and "the legislation was limited to the duration of the emergency." *Id.* at 240. Because HSTPA was ostensibly passed pursuant to a housing emergency declared decades earlier without determining a housing shortage thereafter it could not have fulfilled the legitimate government purpose as required and specifically required by ETPA. It is the totality of the changes that constitutes a Taking notwithstanding the alleged escapes.

That there is no requirement that units be provided to low-income families (or other perceived goals) demonstrates that the legislation is not tied to the stated purpose. That the owner may exit the market at a discounted price flies in the face of the claim that the owner can still receive its reasonable expectations. The change in the percentage required to convert to a condominium or cooperative from 15% of purchasers to 51% is itself a "taking." The argument that this did not create forced occupancies is flawed as it will now be virtually impossible for even a non-eviction conversion to take place, an *ipso- facto* taking. This requirement is not based on findings of necessity to "protect" ETPA tenants which was already in place under non-eviction plans.

Yee, supra, noted that the property owner could, with notice, evict a tenant; change the use of the property; construct a commercial or multi-family building – choices not available under HSTPA. HSTPA's restrictions on alternative uses for ETPA

buildings are proof of substantial interference with rights that constitute a "taking" as well as a violation of due process. Given the other restrictions on the Appellants' use of their property, the elimination of the ability to "exclude" or effectively to convert, the "exit" strategies of ETPA are now foreclosed.

In discussing the reliance on *Yee, supra* the Court referred to the fact that "when the owners invite tenants to physically occupy their apartments laws like the HSTPA simply govern the property owners' voluntary use of their property as rental housing." (A-182). It is disingenuous to refer to this situation as such because the fact that owners accepted certain conditions when they purchased or leased the premises does not mean that they anticipated or agreed to the removal of the anticipated termination of the statute or that new laws would violate their rights.

Although *Loretto, supra* recognized a "taking" by a physical occupation, Justice Marshall made clear that a "non-possessory government activity" could be unconstitutional. The permanent leasing to a tenant; permanent succession rights to tenant's roommates especially in perpetuity; lack of ability to gain possession of more than one apartment and then only for immediate and compelling reasons and only from a tenant under 65 or who is not disabled (with restrictions) and for whom other residences are found; the inability to have appropriate information for a new tenant, by being prohibited in seeking information as to prior nonpayment litigations, among other things, together constitute a "taking." (A-70- 72, if 86(a)-(aa)). It is of note that in *Yee, supra,* the Court denied the motion for summary judgment on the facial due process claim – not a motion to dismiss as in this matter.

The Court outlined that the *Penn Central* inquiry as to a taking was to consider the economic impact of the regulation on the claimant, "the extent [the legislation] ... interfered with investment-backed expectations, the character of the governmental action" and whether the disproportionate impact should be compensated. *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979). This was not done. The Court claimed that the owners had not shown that they suffered an adverse economic impact. On the contrary, each of the plaintiffs outlined the loss of income as a result of various clauses of the HSTPA and the fact that the various means of securing increases in rents have been eliminated. (Appx.). This action does not seek to overturn the ETPA.

In analyzing the facial claim the Court relied on *Cedar Point Nursery v. Hassid,* 141 S. Ct. 2063 (2021)(A- 179, 180) to show that a *per se* claim rests on the fact that a physical invasion of the owner's land was required and denied the within claim because the tenants were "invited" onto the property it did not grant a right to invade. (A-202, 203). HSTPA changes to ETPA did grant a right to invade by among other things prohibiting the landlord from reviewing prior court eviction actions for prospective tenants and permit roommates of roommates to remain as ETPA tenants even if the original tenant dies or is no longer in the apartment. These "succession" rights which confer life estates on roommates of roommates are a "taking."

The solution that the owner can sell at a reduced price and exit the market is a "taking." *Loretto* rejected the argument that such a sale was not a Taking and that applies herein. The long line of cases regarding the Takings clause cited by all parties is viewed under

Cedar Point, supra. The Court misconstrued *Cedar Point* which found that the "right to exclude" is a fundamental property right that appears in the cases concerned with the Takings Clause. It held the regulations permitted the right to invade the growers' property and therefore was a *per se* physical taking even though not permanent or continuous. The restrictions under HSTPA previously set forth constitute a physical taking because they require the continued occupation by tenants under new and severe rules that bind owners in perpetuity. The *Cedar Point* decision went on to explain that government authorized invasions of property, even planes overhead (technically not "physical") by any means are physical takings because the "government has appropriated a right of access." The Legislature has ... by its restrictions on the use and the granting to tenants of additional rights granted tenants a permanent right of access.

In overturning a requirement that hotels provide guest information to police without a warrant that Court held that facial challenges may be brought even if they are not unconstitutional in all applications. *City of Los Angeles* at 2449-2450.

Horne v. Department of Agriculture, 576 U.S. 350 (2015), relied upon by the Court (A-186-187) concerned a Department of Agriculture fine for the failure to transfer grapes to a government program. The Court analogized the argument that the growers could grow other crops to the failed argument in *Loretto* that the landlord could sell its property and avoid its invasion. The argument that landlords could avoid the consequences of HSTPA by selling the property should also fail as any such sale would be at a significant discount and loss. Despite the allegations of the loss in income and thus value the Court found that the

Appellants have not claimed that they are "unable to sell the property" and that many provisions were in limited fashion so the "as-applied challenge" could not go forward. The Court ignored the totality of the changes and that they devalued the property when viewed together also resulting in an "as-applied" physical taking.

The question of whether the Complaint alleges a physical taking involving entry on the property such as to create an "easement" can also be answered in the affirmative. The fact that the legislation permits a lease renewal tenant to permanently receive the benefits of a preferential rent and not pay the prior legal regulated rent is a Taking. When the tenant renews or moves out the rent cannot be raised to the legal regulated rent, or the landlord can leave the unit vacant is a Hobson's choice and is in effect a forced entry and a taking.

Harris v. Israel, 142 N.Y.S.3d 497 (App. Div. 2021) was relied on by the Court to distinguish the within matter because Appellants have not relied upon "settled expectations" such as a judgment. This ignores the fact that the Appellants did rely on settled expectations that ETPA would in time be ended; that any changes that relied upon a shortage of housing would be based on the mandated vacancy rate requirements; and the statute then in effect would remain basically as is until the law was ended. The HSTPA has made the ETPA permanent.

Although the *Penn Central* factors govern most regulatory takings challenges, the Supreme Court has also identified two types of regulatory actions that are treated as *per se* takings for Fifth Amendment

purposes and therefore require no case-specific weighing of the *Penn Central* factors. A categorical taking occurs (1) where a regulation "compel[s] the property owner to suffer a physical 'invasion' of his property"; or (2) "where regulation denies all economically beneficial or productive use of land." *Lucas, supra.* In assessing a Takings claim, the relevant question is not whether governmental action has affected a party's interests in some way but, rather, the extent to which the challenged governmental action has upset the claimant's investment-backed economic expectations by altering its rights as to a constitutionally protected property interest. *1256 Hertel Ave. Assocs., supra.* HSTPA has "upset" the Appellants investment-backed economic expectations by altering, minimizing, and effectively destroying them.

Because the three inquiries reflected in *Loretto, Lucas,* and *Penn Central* all aim to identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property, each of them focuses upon the severity of the burden that government imposes upon property rights.

The Fifth Amendment (U.S. Const. Amend. V) provides in pertinent part that "private property [shall not] be taken for public use, without just compensation" and is applied to the states through the Fourteenth Amendment. See *Chicago, B & R. Co. v. Chicago,* 166 U.S. 226, 241 (1897) (private property taken by the state for public use without compensation violates the due process clause of the Fourteenth Amendment). HSTPA, through its myriad of restrictions is a taking without compensation violating the Constitution.

The "taking" by HSTPA conveys to tenants the attributes of fee ownership, including perpetual rent

regulation, the inability to recover apartments for personal use without meeting very strict requirements, the virtual inability to convert to cooperative ownership, and the permanent inability to get to "market." This also constitutes a taking by physical occupation and HSTPA is thus a *per se* taking under the *Loretto* standard and is "qualitatively more intrusive than perhaps any other category of property regulation." *Loretto.* The Fifth Amendment proscribes taking without just compensation. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 297, n.40 (1981). HSTPA does not provide for any compensation to landlords subject to HSTPA's draconian requirements. HSTPA denies the "economically viable use of the property." Statistics as well as the Rent Guidelines determinations show this.

III. APPELLANTS DUE PROCESS CLAIMS ARE VALID

The Appellants alleged that HSTPA is also a violation of the due process clause because it is irrational, arbitrary, and demonstrably an irrelevant means to address its stated policy ends. Under the Fifth and Fourteenth Amendments to the Constitution individuals may not be deprived of their property without due process of law which under the Takings Clause "shall not be taken for public use without just compensation. *Tyler v. Hennepin County, Minnesota,* et al., 598 U.S.(__) May 25, 2023)

HSTPA's rationale is to provide affordable housing to low-income families but there is no such requirement for the covered housing. It eliminated the high income and the high rent threshold which would make apartments available to lower income tenants at the expense of the affluent. Permanent preferential rents for existing tenants and continued control of high-

income/high-rent units will keep more wealthy tenants in place lowering vacancies. There is no link between the restrictions on coop/condo conversions and affordable housing nor is there any basis for the removal of the sunset provisions which action will perpetuate the due process violations. The Court denied the due process claims under *Washington v. Glucksberg,* 521 U.S. 702, 728 (1997) saying "it must be rationally related to government interests." As previously set forth, HSTPA is not related to the stated government interests because the housing shortage will increase as landlords keep units vacant, well-off tenants are no longer taken out of controls, and major capital improvements are no longer undertaken. There is no requirement that the covered housing be rented to low-income families and no link between the restrictions on condo/coop conversions and the availability of affordable housing.

IV. HSTPA VIOLATES THE CONTRACT CLAUSE OF THE CONSTITUTION

The Court denied the claim that the HSTPA violated the Constitution's Contract Clause (U.S. Const. art. I, § 10, cl. 1) providing that "[no] State shall ... pass any ... Law impairing the Obligation of Contract." This is well described in *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 186 (1992) and whether the change impaired the contractual relationship substantially and serves a significant and legitimate public purpose" quoting *U.S. Tr. - Co. v. New Jersey,* 431 U.S. 1, 22 (1977). See also *Kraebel v. N.Y.C. Dept. of Haus. Pres.* & *Dev.,* 959 F.2d 395, 403 (2d Cir. 1992). This does not reflect the fact that existing leases are governed by the ETPA. HSTPA changes those existing terms including mandatory renewals and current preferential rents. The HSTPA in this manner impairs the existing

contractual relationship and as set forth previously does not in reality serve a public purpose. Regarding the latter this Court should take note that current news reports indicate that the housing shortages have increased since the passage of the HSTPA possibly because apartments are being left vacant and high-income families remain in apartments that could be offered to those in need.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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May 15, 2024

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

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

PRESENT:

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

21-2526

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

COMMUNITY VOICES HEARD (CVH),

Intervenor-Defendant-Appellee.

21-2448

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

Plaintiffs-Appellants,

66 EAST 190 LLC,

Plaintiff,

v.

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

Defendants-Appellees,

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

Intervenors-Defendants-Appellees,

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

Defendants.

DOROTHY M. FINGER, *Finger & Finger,* White Plains, NY (Kenneth J. Finger, *on the brief)* for *Plaintiffs-Appellants Building and Realty Institute of Westchester and Putnam County, et al.*

RANDY M. MASTRO, *King & Spaulding LLP,* New York, NY (Akiva Shapiro and William J. Moccia of *Gibson, Dunn & Crutcher LLP,* New York, NY, *on the brief),* for *Plaintiffs-Appellants G-Max Management, Inc., et al.*

ESTER MURDUKHAYEVA, *Assistant Deputy Solicitor General* (Barbara D. Underwood, *Solicitor General, on the briefs;* Steven C. Wu, *Deputy Solicitor General, on the brief in 21-2448;* Stephen J. Yanni, *Assistant Solicitor General, on the brief in 21-2526), for* Letitia James, *Attorney General of the State of New York,* New York, NY, for *Defendants-Appellees State of New York, et al.*

MICHAEL DUKE, *Selendy Gay PLLC,* New York, NY (Caitlin J. Halligan, Sean P. Baldwin, Babak Ghafarzade, Sophie Lipman, Samuel Breidbart, *Selendy Gay PLLC,* New York, NY; Judith Goldner, *Attorney in Charge,* Edward Josephson, *Supervising Attorney,* The Legal Aid Society, Civil Law Reform Unit, New York, NY, *on the briefs;* Ekaterina Stynes of Paul, Weiss, Rifkind, Wharton & Garrison LLP, *on the brief in* 21-2526) for *Intervenors-Defendants-Appellees Community Voices Heard* and N.Y. *Tenants and Neighbors.*

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

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

Plaintiffs-Appellants Building and Realty Institute of Westchester and Putnam Counties, Inc., et al.

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

In an opinion and order dated September 14, 2021, the district court granted the Defendants' and Defendants-Intervenors' motions to dismiss all of Appellants' claims for failure to state a claim and lack of jurisdiction. *See Bldg. & Realty Institute of Westchester & Putnam Cntys., Inc. v. New York ("BRI"),* Nos. 19-CV-11285 (KMK) and 20-CV-634 (KMK), 2021 WL 4198332 (S.D.N.Y. Sept. 14, 2021) *("BRI").* The district court addressed the motions filed in both cases in a single opinion "[b]ecause of the overlapping claims and issues." *Id.* at *1. For the same reason, we address both Appellants' appeals in this single order.

In affirming the district court's judgment, we note that a majority of the issues before us are controlled by our recent decisions in *Community Housing Improvement Program v. City of New York,* 59 F.4th 540 (2d Cir.), *cert. denied,* 144 S. Ct. 164 (2023), and *74 Pinehurst LLC v. New York,* 59 F.4th 557 (2d Cir. 2023), *cert. denied,* --- S. Ct. ---, 2024 WL 674658 (2024), which analyzed substantially similar claims against the

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

HSTPA amendments to the RSL. We write primarily for the parties and assume their familiarity with the facts, procedural history, and issues on appeal, which we reference only as necessary to explain our decision to affirm.

* * *

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

I. Physical Taking Claims

a. *Facial Challenge*

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

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V; *see also id.* amend. XIV, § 1. When the government effects a physical appropriation of property, a *per se*

taking has occurred. *See Cedar Point Nursery v. Hassid,* 594 U.S. 139, 147-49 (2021). A successful facial challenge "must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987). "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido,* 503 U.S. 519, 527 (1992).

In *Community Housing,* this Court held that "no provision of the RSL effects, facially, a physical occupation of the Landlords' properties." 59 F.4th at 551. Relying on *Yee,* we made clear that "when, as here, 'a landowner decides to rent his land to tenants' the States 'have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.'" *Id.* (quoting *Yee,* 503 U.S. at 528-29); *see also Fed. Home Loan Mortg. Corp. v. New York State Div. of Hous. & Cmty. Renewal,* 83 F.3d 45, 47-48 (2d Cir. 1996) (explaining that "where a property owner offers property for rental housing, the Supreme Court has held that government regulation of the rental relationship does not constitute a physical taking"). Neither the co-op and condo conversion amendments, nor the limitations on owner reclamation of units, "involve unconditional requirements imposed by the legislature," but rather are provisions that must be adhered to "when certain conditions are met." *Community Housing,* 59 F.4th at 552.

Appellants' reliance on *Cedar Point Nursery* and *Home v. Department of Agriculture,* 576 U.S. 350 (2015), is misplaced because neither case is relevant given neither "concerns a statute that regulates the landlord-tenant relationship." *Community Housing,* 59 F.4th at 553. Instead, *Community Housing* is directly

on point and dictates our decision that Appellants have not plausibly alleged a facial physical taking.

b. *As-Applied Challenge*

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

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

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

II. Regulatory Taking Claims

a. *Facial Challenge*

Community Housing also controls our analysis of Appellants' facial regulatory taking claims.[2] A facial regulatory taking is effected when legislation goes "too far" in restricting the use of property. *Home,* 576 U.S. at 360 (quoting *Pa. Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922)). In assessing whether a restriction is in fact a regulatory taking, we employ a flexible "ad hoc, factual inquir[y]," looking to important factors such as (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 124 - (1978).

In finding that a facial regulatory taking challenge to the RSL failed in *Community Housing,* we looked to the *Penn Central* factors. There, we concluded that the plaintiffs had "not plausibly alleged that every owner of a rent-stabilized property has suffered an adverse economic impact," *Community Housing,* 59 F.4th at 554, that they had "failed to establish that the RSL interferes with *every* property owner's investment-backed expectations," *id.,* and that the character of the

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[2] BRI also alleges that the district court erred in dismissing their claims that the RSL effects a *per se* categorical taking. This claim is completely devoid of merit. A *per se* categorical taking occurs when the "prooperty owner . . . suffer[s] a physical 'invasion' of his property" or where "regulation denies all economically beneficial or produictive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The district court correctly found that Appellants "do not allege facts to support that they have been deprived of *all* economical[ly] viable use of their property" and dismissed this claim. *BRI,* 2021 WL 4198332, at *21.

government action sought to promote general welfare and public interest through a "comprehensive regulatory regime that governs nearly one million units," *id.* at 555.

Our holding and reasoning in *Community Housing* apply just as strongly here. Appellants have not shown that, for all affected property holders, the economic impacts are universally negative and that investment-backed expectations were subverted. Thus, Appellants' facial regulatory taking claims must fall.

b. *As-Applied Challenge*

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

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

the underlying restrictions," and "conversions are no longer feasible" with the "51% tenant-approval requirement." G-Max Appellant Br. at 42-43.

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

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

We can also look to *Pinehurst* in assessing the investment-backed expectations prong of the *Penn Central* test. Because the RSL has been adjusted and changed many times since it was initially enacted in

1969, we stated in *Pinehurst* that any reasonable investor "would have anticipated their rental properties would be subject to regulations, and that those regulations in the RSL could change yet again." 59 F.4th at 567. Given the history of the RSL, Appellants' claim that that they could never have "expected *this* change" is not plausible. G-Max Appellant Br. at 36. This factor weighs against Appellants' as-applied regulatory takings claim.

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

III. Contract Clause Claim

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

The Constitution provides that: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const., art. I, § 10, cl. 1. To state a claim for a violation of the Contract Clause, a plaintiff must show that a state law has "operated as a substantial impairment of a contractual relationship." *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 186 (1992) (quoting *Allied Structural Steel Co. v. Spannaus,* 438

U.S. 234, 244 (1978)). Significantly, though, a law "is out of [the clause's] true meaning, if the law is made to operate on future contracts only." *Ogden v. Saunders,* 25 U.S. 213, 327 (1827).

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

In its complaint, BRI simply contends that one of the Plaintiffs "has been forced to offer renewal leases." BRI App'x at 27. While it is theoretically possible that those leases, upon which Appellants do not elaborate in the complaint, had renewal clauses in them from the start—and thus could potentially implicate the Contract Clause—we cannot find that BRI has stated a claim based on an assumption from an already conclusory statement when "a complaint [does not] suffice if it tenders naked assertion[s] devoid of further factual

enhancement." *Ashcroft v. Iqbal, 56* U.S. 662, 678 (2009) (second alteration in original) (internal quotation marks omitted). The district court correctly dismissed Appellants' Contract Clause claims.

IV. Due Process Claims

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

While Appellants state that the taking is not "the source of the due process violation," G-Max Appellant. Br. at 53, their due process claims are that the "landlord owners . . . [are] deprived of their property without due process." G-Max App'x at 91; *see also* BRI App'x at 42 (claiming that "Plaintiffs are being deprived of their property rights"). Appellants allege no factual differences in their due process and Takings Clause claims, and, as we held in *Community Housing,* "the Due Process Clause cannot 'do the work of the Takings Clause' because 'where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" *Community Housing,* 59 F.4th at 556 (quoting *Stop the Beach Renourishment, Inc. v. Fla. Dept of Envtl. Prot.,* 560 U.S. 702, 720-21 (2010)).

Regardless, even if Appellants could bring a due process claim, it would fail on the merits. Appellants allege that the regulations do not achieve the purposes

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

V. Sovereign Immunity

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

Except where Congress has abrogated, a state's immunity, or where a state has waived its immunity, the Eleventh Amendment "render[s] states and their agencies immune from suits brought by private parties in federal court." *In re Charter Oak Assocs.,* 361 F.3d 760, 765 (2d Cir. 2004). Appellants argue that it

was an error for the "district court [to hold that] sovereign immunity bars [their] federal takings claim against the State of New York." G-Max Appellant Br. at 58. Notably, the district court's determination is aligned with our conclusion in *Pinehurst,* and we are thus controlled by that decision. There, we held that "sovereign immunity trumps the Takings Clause where, as here, the state provides its own remedy for an alleged violation." *Pinehurst,* 59 F.4th at 570. Therefore, we must reject Appellants' arguments that the State of New York is not protected by sovereign immunity against a Takings Clause claim.

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

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

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 19-CV-11285 (KMK)

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

Plaintiffs,

v.

STATE OF NEW YORK, *et al.,*

Defendants,

and

COMMUNITY VOICES HEARD,

Defendant-Intervenor.

No. 20-CV-634 (KMK)

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

Plaintiffs,

v.

STATE OF NEW YORK, *et al.,*

Defendants,

NEW YORK TENANTS & NEIGHBORS, AND COMMUNITY VOICES HEARD,

Defendant-Intervenors.

OPINION AND ORDER

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KENNETH M. KARAS, United States District Judge:

On December 10,2019, a group of ten Plaintiffs who are landlords and organizations in Westchester County, New York filed a Complaint against the State of New York ("New York" or the "State"), Ruthanne Visnauskas in her official capacity as Commissioner of the New York State Division of Housing and Community Renewal ("Visnauskas"), and the Division of Homes and Community Renewal ("DHCR") (collectively, "BRI Defendants"), alleging that recent amendments to the Emergency Tenant Protection Act of 1974 (the "ETPA") violate their constitutional rights (the "BRI Action").

(See BRI Compl. (Dkt. No. 1, Case No. 19-CV-11285).)[1] Specifically, BRI Plaintiffs allege violations of the Fifth and Fourteenth Amendments and the Contract Clause, U.S. CONST. art. I, § X, cl. 1; *id.* amends. V, XIV. *(Id.* at 92-96)[2] BRI Plaintiffs request that this Court declare the Housing and Stability Tenant Protection Act (the "HSTPA") as unconstitutional and seek an injunction against its enforcement. (BRI Compl. at 95-98.)[3] The BRI Defendants move this Court to dismiss the BRI Complaint brought by BRI Plaintiffs for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). (BRI Defendants' Motion To Dismiss (Dkt. No. 60).) Community Voices Heard ("CVH") filed a parallel Motion To Dismiss the BRI Complaint against the BRI Defendants for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). (CVH Motion To Dismiss (together the "BRI Motions") Did. No. 62).)[4]

The BRI Action is one of five federal actions that real estate groups have filed in the United States District Courts for the Southern and Eastern Districts of New York, seeking to challenge the long-standing system of

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

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

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

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

rent stabilization authorized under New York State law.[5] This opinion, however, concerns two cases: the BRI Action and *G-Max Management, Inc. et al. v. State Of New York et al.* (20-CV-634). *G-Max* is a related case filed on January 23, 2020, brought by a group of 13 Plaintiffs who are "small landlord owners" (the "G-Max Plaintiffs"). The G-Max Plaintiffs filed the G-Max Complaint against the State of New York, Visnauskas, Letitia James in her official capacity as Attorney General of New York ("James"), Woody Pascal in his official capacity as Deputy Commissioner of the New York State Division of Housing and Community Renewal ("Pascal"), and New York City (collectively, "G-Max Defendants"), alleging violations of the Fifth and Fourteenth Amendments; the Contract Clause, U.S. CONST. art. I, § X, cl. 1; *id.* amends. V, XIV; the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601 *et seq.;* and various provisions of the New York State Constitution (the "G-Max Action"). *(See* G-Max Compl. (Did. No. 1, Case No. 20-CV-634).)[6] G-Max City Defendant moves this Court to dismiss the G-Max Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (G-Max City Defendants' Motion To Dismiss (Dkt. No. 67).) G-Max State Defendants move this Court to dismiss the G-Max Complaint against the G-Max Plaintiffs for lack of jurisdiction pursuant to

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

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

Federal Rule of Civil Procedure 12(b)(1). (G-Max State Defendants' Motion To Dismiss (Dkt. No. 70).) CVH and New York Tenants & Neighbors ("T&N") filed a parallel Motion To Dismiss the G-Max Complaint against the G-Max Defendants for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). (CVH Motion To Dismiss (together the "G-Max Motions") Did. No. 72).)[7] Because of the overlapping claims and issues of law in the two cases, the Court addresses the motions filed in both cases in this Opinion and Order.[8]

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

I. Background

A. Factual Background

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

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

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

owned buildings, built between February 1, 1947 and March 10, 1969 for buildings with six or more units. N.Y.C. Admin. Code § 26-504(a). Cited in the RSL legislative findings, the conditions of rent environment in New York City were described as "exactions of unjust, unreasonable and oppressive rents and rental agreements . . . profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare . . . ." N.Y. UNCONSOL. LAW § 26-501 (McKinney). Essentially, RSL place limits on the amount of rent that can be charged, limit the percentage and frequency of rent increases, and entitle tenants to certain protections such as lease renewal, eviction prevention under many circumstances, and the ability to file complaints against landlords. *Id. §§* 26-501 *et seq.* RSL created a system of rent regulation that covers nearly one million apartments, which house over two million people, or about one in three residents in the City. Timothy L. Collins, *An Introduction to the New York City Rent Guidelines Board and the Rent Stabilization System* (rev. ed. Jan. 2020), https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/01/intro2020.pdf.

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

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

In June 2019, the New York State Senate again amended the State's RSL and enacted the HSTPA. As amended, the HSTPA expands previous incarnations of the New York rent stabilization statutes in various ways — it places additional limits on rent increases, deregulation of units, and eviction of tenants in breach of lease agreements, among other changes. *See generally* HSTPA. Most significantly, the HSTPA limits a landlord to use one housing unit only if there is a showing of "immediate and compelling necessity" for his or her own personal use and occupancy as his or her primary residence or for the use by an immediate family member. HSTPA, Part I. The HSTPA repealed the luxury decontrol provisions, which allowed landlords to decontrol units once the rent or the tenant's income reached a certain threshold. *Id.* at Part D, § 5; *see also* N.Y. UNCONSOL. LAW §§ 26-504.1, 26-504.2, 26-504.3 (repealed 2019). In addition, the HSTPA eliminated the vacancy and

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

The HSTPA removed the geographic limitation of the ETPA so that now all municipalities in the State, including Westchester County, can opt-in to rent stabilization. *Id.* at Part G, § 3. Specifically, under the HSTPA, any locality in the State can participate in rent stabilization if "a declaration of emergency" regarding available apartments is made in the subject locality pursuant to the ETPA. *Id. §* 5. In 2019, when New York reauthorized and amended RSL through the HSTPA, it declared that a "severe disruption of the

rental housing market ha[d] occurred" that "threaten[ed] to be exacerbated" because previous incarnations of the law allowed for the removal of vacant units from rent stabilization in certain circumstances. HSTPA, Part D, § 1. As such, the HSTPA was adopted to limit "profiteering" and curtail "the loss of vital and irreplaceable affordable housing for working persons and families." *Id.*

The BRI Plaintiffs present four legal claims through ten causes of actions. *(See* BRI Compl. at 91-92.) Through these causes of action, BRI Plaintiffs assert claims pursuant to 42 U.S.C. § 1983 and the U.S. Constitution. *(Id.)* First, BRI Plaintiffs allege that the HSTPA deprives property owners of substantive due process in violation of the Fourteenth Amendment. *(Id.* at 92-94.) Next, BRI Plaintiffs' second and third claims allege that the HSTPA effects a physical and a regulatory taking of property in violation of the Fifth Amendment, and the Fourteenth Amendment as applied to the states. *(Id.* at 95-96.) Finally, though not identified explicitly as a claim in the BRI Complaint, BRI Plaintiffs allege that the HSTPA violates the Contract Clause, Article I, § 10 of the U.S. Constitution, because the HSTPA locks in existing preferential rents for the duration of the current tenancy and impairs the existing lease contract agreements. *(Id.* at 96.) As such, the Court will treat the Contract Clause as its own claim. *(Id.)* BRI Plaintiffs request that this Court declare the HSTPA as facially unconstitutional and seek an injunction against its enforcement. *(Id.* at 97-98)[9]

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

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

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

B. Procedural Background

BRI Plaintiffs filed the Complaint on December 10, 2019, and G-Max Plaintiffs commenced the G-Max Action on January 23, 2020. (BRI Compl.; G-Max Compl.) On May 8, 2020, CVH filed the BRI Motion To Intervene and accompanying Memorandum of Law in Support of the Motion To Intervene. (Not. of Mot.; CVH Mem. of Law in Supp. of BRI Mot. To Intervene (Dkt. Nos. 39-41, Case. No. 19-CV-11285).) On the same day, CVH and T&N filed the G-Max Motion To Intervene and accompanying Memorandum of Law in Support of the Motion To Intervene. (Not. of Mot.; CVH G-Max

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

Mem. in Supp. of G-Max Mot. To Intervene (Dkt. Nos. 58-60, Case No. 20-CV-364).) On May 22, 2020, BRI and G-Max Plaintiffs filed their Opposition papers to the Motions To Intervene in the BRI and G-Max Actions. (Dkt. Nos. 42-44, Case No. 19-CV-11285; Dkt. No. 61, Case No. 20-CV-364.) The Court held Oral Argument on the Motions To Intervene in both Actions and an additional Motion To Add a Party, filed by 300 Apartment Associates, Inc. in the BRI Action on July 8, 2020. *(See* Dkt. (minute entries for July 8, 2020, Case No. 19-CV-11285, Case No. 20-CV-364).) The Court reserved its ruling on all of the Motions. *(Id.)* On September 23, 2020, the Court issued two Opinions and Orders regarding the pending Motions To Intervene. The Court granted CVH's Motion to Intervene and denied 300 Apartment Associates' Motion To Intervene in the BRI Action. (Dkt. Nos. 86-87, Case No. 19-CV-11285.) However, the Court granted 300 Apartment Associates the ability to file memoranda as amicus curiae in the case going forward. (Dkt. No. 87, Case No. 19-CV-11285.) The Court also granted CVH and T&N's Motions to Intervene in the G-Max Action. (Dkt. No. 92, Case No. 20-CV-634.)

Pursuant to the briefing schedule set by the Court, on June 19, 2020, BRI and G-Max Defendants filed Motions To Dismiss, CVH filed its own Motion To Dismiss in the BRI Action, and CVH and T&N filed their own Motion To Dismiss in the G-Max Action on June 19, 2020. (Dkt. Nos. 60, 62, Case No. 19-CV-11285; Dkt. Nos. 67, 70, 72, Case No. 20-CV-634). On the same day, BRI and CVH filed Memoranda of Law in Support of the Motions to Dismiss. (BRI State Defs.' Mem. in Support of Mot. To Dismiss ("BRI State Defs.' Mem.") (Dkt. No. 61, Case No. 19-CV-11285); CVH Mem. in Support of Mot. To Dismiss ("BRI CVH Mem.") (Dkt. No. 63, Case No. 19-CV-11285).) On August 13,

2020, BRI Plaintiffs filed their Opposition. (Pls.' Mem. of Law in Opp'n to Mot. To Defendants' and CVH's Mots. To Dismiss ("BRI Pls.' Mem.") (Dkt. No. 81, Case No. 19-CV-11285).) On September 4, 2020, BRI Defendants and CVH filed Replies. (Reply Mem. of Law in Support of Defs.' Mot. To Dismiss ("BRI State Defs.' Reply"); Reply In Further Support of CVH's Mot. To Dismiss ("BRI CVH Reply") (Dkt Nos. 84-85, Case No. 19-CV-11285).)

Also on June 19, 2020, G-Max Defendants and CVH and T&N filed Memoranda of Law in Support of the Motions to Dismiss. (G-Max State Defs.' Mem. in Support of Mot. To Dismiss ("G-Max State Defs.' Mem."); G-Max City Defs.' Mem. in Support of Mot. To Dismiss ("G-Max City Defs." Mem.") (Dkt. Nos. 68, 71, Case No. 20-CV-634); CVH and T&N Mem. in Support of Mot. To Dismiss ("G-Max CVH Mem.") (Dkt. No. 73, Case No. 20-CV-634).) On July 30, 2020, G-Max Plaintiffs filed their Opposition. (G-Max Plaintiffs' Omnibus Mem. of Law in Opp'n to Defendants' and CVH and T&N's Mots. To Dismiss ("G-Max Pls.' Mem.") (Dkt. No. 86, Case No. 20-CV-634).) On September 11, 2020, G-Max Defendants and CVH and T&N filed Replies. (City Defs.' Reply Mem. of Law In Further Support of Mot. To Dismiss ("G-Max City Defs.' Reply"); State Defs.' Reply Mem. of Law In Further Support of Mot. To Dismiss ("G-Max State Defs.' Reply"); CVH's Reply In Further Support of CVH and T&N's Mots. To Dismiss ("G-Max CVH Reply") (Dkt Nos. 89-91, Case No. 20-CV-634).)

Since filing their Motions and supporting papers for the pending Motions To Dismiss, the Parties have submitted numerous letters alerting the Court to new authority addressing the legal questions in this case.

(See Dkt. Nos. 88-100, Case No. 19-CV-11285; Dkt. Nos. 93-101, 104-06, Case No. 20-CV-634.)

II. Discussion

A. Standard of Review

"The standards of review under Rules 12(b)(1) and 12(b)(6) . . . are substantively identical." *Neroni v. Coccoma,* No. 13-CV-1340, 2014 WL 2532482, at *4 (N.D.N.Y. June 5, 2014) (quotation marks omitted) (citing *Lerner v. Fleet Bank, N.A.,* 318 F.3d 113, 128 (2d Cir. 2003)), *aff'd,* 591 F. App'x 28 (2d Cir. 2015). "In deciding both types of motions, the Court must accept all factual allegations in the complaint as true, and draw inferences from those allegations in the light most favorable to the plaintiff." *Gonzalez v. Option One Mortg. Corp.,* No. 12-CV-1470, 2014 WL 2475893, at *2 (D. Conn. June 3, 2014) (quotation marks omitted)). However, "[o]n a Rule 12(b)(1) motion, . . . the party who invokes the Court's jurisdiction bears the burden of proof to demonstrate that subject matter jurisdiction exists, whereas the movant bears the burden of proof on a motion to dismiss under Rule 12(b)(6)." *Id.* (citing *Lerner,* 318 F.3d at 128); *see also Sobel v. Prudenti,* 25 F. Supp. 3d 340, 352 (E.D.N.Y. 2014) ("In contrast to the standard for a motion to dismiss for failure to state a claim under Rule 12(b)(6), a plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." (quotation marks omitted)). This allocation of the burden of proof is the "only substantive difference" between the standards of review under these two rules. *Fagan v. US. Dist. Ct. for S. Dist. of N.Y.,* 644 F. Supp. 2d 441, 447, n.7 (S.D.N.Y. 2009).

1. Rule 12(b)(1)

"A federal court has subject matter jurisdiction over a cause of action only when it has authority to adjudicate the cause pressed in the complaint." *Bryant v. Steele,* 25 F. Supp. 3d 233, 241 (E.D.N.Y. 2014) (quotation marks omitted) (quoting *Arar v. Ashcroft,* 532 F.3d 157, 168 (2d Cir. 2008), *vacated and superseded on reh'g on other grounds,* 585 F.3d 559 (2d Cir. 2009) (en bane)). "Determining the existence of subject matter jurisdiction is a threshold inquiry[,] and a claim is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Morrison v. Nat'l Austl. Bank Ltd.,* 547 F.3d 167, 170 (2d Cir. 2008) (quotation marks omitted), *aff'd,* 561 U.S. 247 (2010); *see also United States v. Bond,* 762 F.3d 255, 263 (2d Cir. 2014) (describing subject matter jurisdiction as a "threshold question"). "In adjudicating a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the court may consider matters outside the pleadings." *JTE Enters., Inc. v. Cuomo,* 2 F. Supp. 3d 333, 338 (E.D.N.Y. 2014).

2. Rule 12(b)(6)

The Supreme Court has held that although a complaint "does not need detailed factual allegations" to survive a motion to dismiss, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (citation, quotation marks, and alterations omitted). Indeed, Rule 8 of the Federal Rules of Civil Procedure "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). "Nor does a complaint

suffice if it tenders naked assertions devoid of further factual enhancement." *Id.* (quotation marks and alteration omitted). Rather, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555. Although "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," *id* at 563, and a plaintiff need allege "only enough facts to state a claim to relief that is plausible on its face," *id.* at 570, if a plaintiff has not "nudged [his or her] claim[] across the line from conceivable to plausible, the[] complaint must be dismissed," *id; see also Iqbal,* 556 U.S. at 679 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.' (second alteration in original) (citation omitted) (quoting FED. R. cry. P. 8(a)(2))); *id.* at 678-79 ("Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

In considering a motion to dismiss, the Court "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus,* 551 U.S. 89, 94 (2007) (per curiam); *see also Nielsen v. Rabin,* 746 F.3d 58, 62 (2d Cir. 2014) (same). Further, "[f]or the purpose of resolving [a] motion to dismiss, the Court . . . draw[s] all reasonable inferences in favor of the plaintiff." *Daniel v. T & M Prot. Res., Inc.,* 992 F. Supp. 2d 302,

304 n.1 (S.D.N.Y. 2014) (citing *Koch v. Christie's Intl PLC,* 699 F.3d 141, 145 (2d Cir. 2012)).

B. Sovereign Immunity

Before evaluating Plaintiffs' constitutional claims, the Court must first address Defendants' assertions of sovereign immunity as it implicates whether subject-matter jurisdiction exists. *See Dube v. State Univ. of N.Y.,* 900 F.2d 587, 594 (2d Cir. 1990); *see also* FED. R. Civ. P. 12(h)(3). BRI Defendants argue that the Eleventh Amendment mandates dismissal of this action against the State and DHCR. (BRI State Defs.' Mem. of Law at 37-38.) The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States." U.S. CONST. amend. XI. Claims against the State or its agencies and instrumentalities are barred regardless of the relief sought. *See Alabama v. Pugh,* 438 U.S. 781, 782 (1978) (per curiam) (barring a suit seeking injunctive relief from a state); *Clissuras v. City Univ. of N.Y.,* 359 F.3d 79, 81 (2d Cir. 2004) (noting that immunity extends to arms of the state). "The Eleventh Amendment effectively places suits by private parties against states outside the ambit of Article III of the Constitution." *In re Charter Oak Assocs.,* 361 F.3d 760, 765 (2d Cir. 2004) (citing *Seminole Tribe of Fla. v. Florida, 517* U.S. 44, 54 (1996)). The two well-established exceptions to this are a valid Congressional abrogation of sovereign immunity or waiver by the state. *See Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 99 (1984); *see also Gollomp v. Spitzer,* 568 F.3d 355, 366 (2d Cir. 2009).

New York has not waived its Eleventh Amendment immunity to suit in federal court, and Congress did not abrogate the states' immunity in enacting 42 U.S.C. §

1983. *See Rodriguez v. New York,* No. 17-CV-4126, 2017 WL 8777374, at *2 (S.D.N.Y. Nov. 28, 2017) (citing *Trotman v. Palisades Interstate Park Comm'n,* 557 F.2d 35, 40 (2d Cir. 1977); *Lane v. N.Y. State Office of Mental Health,* No. 11-CV-1941, 2012 WL 94619, at *2 (S.D.N.Y. Jan. 11, 2012) (holding that Congress, through § 1983, did not "abrogate[] the state's immunity"); *Bryant v. N.Y. State Dep't of Corr. Servs. Albany,* 146 F. Supp. 2d 422, 425 (S.D.N.Y. 2001) (noting it is "beyond dispute" that New York and its agencies have not consented to being sued in federal court).[11] As such, a claim that is barred by a state's sovereign immunity must be dismissed pursuant to the Eleventh Amendment for lack of subject matter jurisdiction. *See Virginia Office for Prot. & Advocacy v. Stewart,* 563 U.S. 247, 253 (2011) (noting that "the Eleventh Amendment . . . confirm[s] the structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article III's jurisdictional grant"); *Seminole Tribe, 517 U.S.* at 54 ("For over a century [the Supreme Court has] reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" (quoting *Hans v. Louisiana,* 134 U.S. 1, 15 (1890))).

Eleventh Amendment immunity extends not only to a State when sued as a defendant in its own name, but

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

also to "state agents and state instrumentalities" when "the state is the real, substantial party in interest." *Regents of the Univ. of Cal. v. Doe,* 519 U.S. 425, 429 (1997); *see also Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.,* 466 F.3d 232, 236 (2d Cir. 2006) ("The immunity recognized by the Eleventh Amendment extends beyond the states themselves to state agents and state instrumentalities that are, effectively, arms of a state." (quotation marks omitted)); *Roberts v. New York,* 911 F. Supp. 2d 149, 159-60 (N.D.N.Y. 2012) ("Regardless of the type of relief sought, the Eleventh Amendment bars this Court from assuming jurisdiction over plaintiffs' claims asserted against the State of New York and its agencies."). In both the BRI and G-Max Actions, there are a number of state agencies. In particular, DHCR, Visnauskas, James, and Pascal are instrumentalities or agents of New York. *See Cmty. Hous. Improvement Program v. City of New York ("CHIP"),* 492 F. Supp. 3d 33, 39 n.3 (E.D.N.Y. 2020) ("The DHCR is the New York State agency charged with overseeing and administering the RSL."). Courts have repeatedly applied sovereign immunity to dismiss actions against the State and DHCR. *See, e.g., Schiavone v. N.Y.S. Office of Rent Admin.,* No. 18-CV-130, 2018 WL 5777029, at *3-4 (S.D.N.Y. Nov. 2, 2018); *Morring v. Cuomo,* No. 13-CV-2279, 2013 WL 4004933, at *1 (S.D.N.Y. Aug. 5, 2013); *Manko v. Ruchelsman,* No. 12-CV-4100, 2012 WL 4034038, at *3 (E.D.N.Y. Sept. 10, 2012); *Helgason v. Certain State of N.Y.. Emps. (Unknown and Known),* No. 10-CV-5116, 2011 WL 4089913, at *7-8 (S.D.N.Y. June 24, 2011), *report and recommendation adopted sub nom. Helgason v. Doe,* 2011 WL 4089943 (S.D.N.Y. Sept. 13, 2011); *Morris v. Katz,* No. 11-CV-3556, 2011 WL 3918965, at *5 (E.D.N.Y. Sept. 4, 2011); *Sierotowicz v. State of N.Y.*

Div. of Hous. & Cmty. Renewal, No. 04-CV-3886, 2005 WL 1397950, at *1-2 (E.D.N.Y. June 14, 2005).

Actions for damages against state officials in their official capacities are essentially actions against the state and will be barred by the Eleventh Amendment unless (1) Congress has abrogated immunity; (2) the state has consented to suit; or (3) the *Ex parte Young* doctrine applies. *See Ex parte Young,* 209 U.S. 123 (1908); *see also Will v. Mich. Dept. of State Police,* 491 U.S. 58, 71 (1989); *In re Deposit Ins. Agency,* 482 F.3d 612, 617 (2d Cir. 2007). The Eleventh Amendment bars actions against state officials sued in their official capacities where, as here, the state is a real party in interest. *See Edelman v. Jordan,* 415 U.S. 651, 663, 669 (1974) (holding that suits against state employees in their official capacities are barred by the Eleventh Amendment); *Ward v. Thomas,* 207 F.3d 114, 119 (2d Cir. 2000) (rejecting federal suit against state officials under the Eleventh Amendment); *Farid v. Smith,* 850 F.2d 917, 921 (2d Cir. 1988) ("The [E]leventh [A]mendment also bars suits against state officials and state agencies if the state is the real party in interest . . . ."); *Muhammad v. Rabinowitz,* 11-CV-2428, 2012 WL 1155098, at *6 (S.D.N.Y. Apr. 6, 2012) (dismissing claims for damages against state employees in their official capacity as being barred by the Eleventh Amendment); *Crockett v. Pataki,* 97CV-3539, 1998 WL 614134, at *5 (S.D.N.Y. Sept. 14, 1998) (dismissing claims against governor and housing commissioner sued in their official capacities); *Sassower v. Mangano,* 927 F. Supp. 113, 121 (S.D.N.Y. 1996) (dismissing claims for damages against state officials sued in their official capacities). Where claims are brought against an official in their official capacity, the state is considered the real party in interest, and therefore the same sovereign immunity principles apply as if the

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

In both Actions, the issues presented before this Court involve the third exception. Under the *Ex parte Young* doctrine, a suit may proceed against state officials, notwithstanding the Eleventh Amendment, when a plaintiff, "(a) alleges an ongoing violation of federal law and (b) seeks relief properly characterized

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

However, the Eleventh Amendment bars BRI Plaintiffs' substantive Due Process and Contract Clause claims against the State and DHCR. The Eleventh Amendment also bars G-Max Plaintiffs' Due Process, Equal Protection, and Contract Clause claims against New York State. In fact, G-Max Plaintiffs do not even discuss the Eleventh Amendment as applied to their substantive due process and equal protection claims. Instead, G-Max Plaintiffs spend only a page of their lengthy brief addressing sovereign immunity but only as it relates

to their takings claims. *(See* G-Max Pls.' Mem. at 74.) BRI Plaintiffs similarly barely address the issue of sovereign immunity, citing cases from BRI Defendants' briefs but offering no analysis. *(See* BRI Pls.' Mem. at 66-67.) Simply put, federal courts lack jurisdiction over § 1983 claims that are barred by Eleventh Amendment immunity. *See Dube,* 900 F.2d at 594 (concluding that "federal causes of action . . . brought under [§] 1983, in the absence of consent, . . . against the State or one of its agencies or departments are proscribed by the Eleventh Amendment" (quotation marks and alterations omitted)); *Morales v. New York,* 22 F. Supp. 3d 256, 268 (S.D.N.Y. 2014) (holding that sovereign immunity mandates dismissal under Rule 12(b)(1)); *see also Morabito v. New York,* 803 F. App'x 463, 465 (2d Cir. 2020) (summary order) (affirming the district court's holding that the Eleventh Amendment barred a § 1983 suit against New York, a state agency, and a state official in his official capacity), *as amended* (Feb. 27, 2020), *cert. denied,* 141 S. Ct. 244 (2020), *reh'g denied,* 141 S. Ct. 886 (2020). Indeed, courts routinely dismiss, on sovereign immunity grounds, due process, equal protection, and Contract Clause claims against the state, state agencies, and agents sued in their official capacities. *See, e.g., Adeleke v. United States,* 355 F.3d 144, 151-53 (2d Cir. 2004) (affirming dismissal of due process damages claim on the basis of sovereign immunity); *JTE Enters.,* 2 F. Supp. 3d at 340-41 (dismissing due process claim as barred by sovereign immunity); *Taedger v. New York,* No. 12-CV-549, 2013 WL 5652488, at *7 (N.D.N.Y. Oct. 15, 2013) (dismissing equal protection claim on sovereign immunity grounds against New York state, state agency, and agency official); *accord Boda v. United States,* 698 F.2d 1174, 1176 (11th Cir. 1983) (ruling that a claim alleging a violation of constitutional due process rights was

barred by the doctrine of sovereign immunity); *Smith v. Fla. Dep't of Corr.,* No. 08-CV-1213, 2009 WL 10670364, at *1 (M.D. Fla. Oct. 16, 2009) (dismissing substantive due process claims as barred by sovereign immunity); *see also Zynger v. Dep't of Homeland Sec.,* 370 F. App'x 253, 255 (2d Cir. 2010) (summary order) (finding that the plaintiff waived a possible challenge to the district court's dismissal of due process claims against the federal government, its agencies, and an agent in his official capacity); *335-7 LLC v. City of New York,* — F. Supp. 3d —, 2021 WL 860153, at *4 n.2 (S.D.N.Y. Mar. 8, 2021) (noting that plaintiffs agreed to dismissal of due process claim and conceded that their damages claim against the state defendant was barred by sovereign immunity); *CHIP,* 492 F. Supp. 3d at 40 (explaining that the parties agreed that sovereign immunity barred plaintiffs due process and Contract Clause claims).

Next, the Court must determine whether sovereign immunity bars claims under the Takings Clause. G-Max Plaintiffs argue that "the Supreme Court has rejected the notion that sovereign immunity limits the compensation remedy." (G-Max Pls.' Mem. at 74.) But neither the Supreme Court nor the Second Circuit has conclusively addressed the issue. *See CHIP,* 492 F. Supp. 3d at 40 ("Despite the fact that the Eleventh Amendment and Takings Clause date back so long, neither the Supreme Court nor the Second Circuit has decisively resolved the conflict.") In *CHIP,* the court noted that "[t]he overwhelming weight of authority among the circuits" is that "sovereign immunity trumps the Takings Clause — at least where . . . the state provides a remedy of its own for an alleged violation."

492 F. Supp. 3d at 40.[12] The court pointed to a recent decision in which the Second Circuit affirmed the district court's ruling that "the Eleventh Amendment . . . bar[s] a takings claim." *Id.* However, as noted in *CHIP,* this decision was a non-precedential summary order "that did not analyze the question in detail." *Id.* (citing *Morabito,* 803 F. App'x at 464-65 (affirming dismissal of Takings Clause claim against New York, a state agency, and state official in his official capacity because the Eleventh Amendment "generally bars suits in federal courts by private individuals against non-consenting states"), *aff'g* No. 17-CV-6853, 2018 WL 3023380

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

(W.D.N.Y. June 18, 2018)). Other district courts within the Second Circuit have held that the Eleventh Amendment applies to Takings Clause claims. *See, e.g., MPHJ Tech. Invs., LLC v. Sorrell,* 108 F. Supp. 3d 231, 242 n.8 (D. Vt. 2015) (ruling that "to the extent [Plaintiff] is seeking damages under the Takings Clause, its claim against the Attorney General in his official capacity is barred by the Eleventh Amendment"); *Gebman v. New York,* No. 07-CV-1226, 2008 WL 2433693, at *4 (N.D.N.Y. June 12, 2008) (holding that Eleventh Amendment barred the plaintiff's § 1983 due process and regulatory takings claims against the State). This Court agrees with this line of authority and therefore rejects BRI and G-Max Plaintiffs' position that their Takings Clause claims survive Eleventh Amendment state sovereign immunity. Therefore, for the reasons further articulated in *CHIP,* claims under the Takings Clause are dismissed on sovereign immunity grounds against the State, the DHCR by BRI Plaintiffs, Visnauskas as to both BRI and G-Max Plaintiffs, and James and Pascal as to G-Max Plaintiffs (to the extent BRI and G-Max Plaintiffs seek monetary relief from these Defendants in their official capacities). *See CHIP,* 492 F. Supp. 3d at 40-43.

C. Standing

1. Legal Requirements

The Court next addresses the issue of standing. Article III of the Constitution restricts federal judicial power to the resolution of cases and controversies. U.S. CONST. art. III, § 2. "That case-or-controversy requirement is satisfied only where a plaintiff has standing." *Sprint Commc 'ns Co., L.P. v. APCC Servs., Inc.,* 554 U.S. 269, 273 (2008). The Supreme Court has explained that constitutional standing requires a plaintiff to establish at minimum three elements—that the

plaintiff suffered an "injury in fact," which means an "invasion of a legally protected interest," the existence of "a causal connection between the injury and the conduct complained of," and "a likelihood that the 'injury will be redressed by a favorable decision.'" *Fulton v. Goord,* 591 F.3d 37, 41 (2d Cir. 2009) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)). A "legally protected interest" is one that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan,* 504 U.S. at 560 (quotation marks omitted). As a threshold matter, standing is a jurisdictional predicate that cannot be waived. *See Arbaugh v. Y&H Corp.,* 546 U.S. 500, 514 (2006); *accord Leopard Marine & Trading, Ltd. v. Easy Street Ltd.,* 896 F.3d 174, 188 (2d Cir. 2018).

Under current standing jurisprudence, an organization may assert two distinct types of standing: (1) organizational standing, and (2) associational standing. Under the organizational standing theory, "an association may have standing in its own right to seek judicial relief to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth* v. *Seldin,* 422 U.S. 490, 511 (1975). In contrast, under the associational standing theory, "an association has standing to bring suit on behalf of its members." *Hunt v. Wash. St. Apple Advert. Comm 'n,* 432 U.S. 333, 343 (1977). "[The Supreme] Court has recognized that an association may have standing to assert the claims of its members even where it has suffered no injury from the challenged activity." *Id.* at 342. The Supreme Court, however, has held that "an organization seeking to recover damages on behalf of its members lacked standing because 'whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof.'" *Bano v. Union Carbide*

Corp., 361 F.3d 696, 714 (2d Cir. 2004) (quoting *Warth,* 422 U.S. at 515-16). To establish organizational standing, an organizational plaintiff "must meet the same standing test that applies to individuals." *Irish Lesbian & Gay Org. v. Giuliani,* 143 F.3d 638, 649 (2d Cir. 1998) (citation, quotation marks, and alterations omitted). The Supreme Court has held that an organization establishes an injury-in-fact if it can show that it was "perceptibly impaired" by defendants' actions. *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379 (1982). Consequently, the Second Circuit has repeatedly held that "only a 'perceptible impairment' of an organization's activities is necessary for there to be an 'injury in fact.'" *Nnebe v. Daus,* 644 F.3d 147, 157 (2d Cir. 2011) (quoting *Ragin v. Harry Macklowe Real Est. Co.,* 6 F.3d 898, 905 (2d Cir. 1993)); *N.Y. C.L. Union v. N.Y.C. Transit Auth.,* 684 F.3d 286, 294 (2d Cir. 2011); *N.Y. State Citizens' Coal. for Children v. Velez,* 629 F. App'x. 92, 94 (2d Cir. 2015). However, the Second Circuit has restricted organizational standing under § 1983 by interpreting the rights it secures "to be personal to those purportedly injured." *Nnebe,* 644 F.3d at 156 (quoting *League of Women Voters of Nassau Cnty. v. Nassau Cnty. Bd. of Supervisors,* 737 F.2d 155, 160 (2d Cir. 1984)). Accordingly, BRI Plaintiffs bear the burden of showing that (1) a distinct and palpable injury-in-fact exists to themselves as organizations; (2) the injury-in-fact is fairly traceable to the challenged action; and (3) a favorable decision would redress its injuries. *Id.*

2. BRI Plaintiffs

BRI Defendants challenge the standing of several plaintiffs — Property Management Associates ("Property Management"), Nilsen Management Co., Inc. ("Nilsen Management"), Apartment Owners Advisory Council

("AOAC"), Cooperative and Condominium Council ("CCAC"), and Lisa DeRosa ("DeRosa"). (BRI State Defs.' Mem. at 37-40.) The Court will first discuss Property Management and Nilsen Management, both of which serve as "managing agents" for apartment buildings or multi-family homes in Westchester County that contain rent-regulated units. (BRI Compl. ¶¶ 8(g), 8(h), 24, 31.) The Court agrees with BRI Defendants that the BRI Complaint fails to allege that as managing agents Property Management and Nilsen Management sufficiently allege injuries as required for standing. (BRI State Defs.' Mem. at 38-39; BRI Compl. ¶¶ 8(g),(h).) Property Management alleges it is unable to recoup building and apartment renovations because of changes to IAIs and MCIs. *(Id.* ¶ 31.) Nilsen Management complains of rent disparities between actual rent and market rent for the eight building that the company manages. *(Id.* ¶ 24.) But Property Management and Nilsen Management have neither alleged facts that trace these purported injuries to the BRI Defendants nor established how their role as managing agents could confer standing upon them. And neither Property Management nor Nilsen Management represents that either owns any rent-regulated properties that would result in any possible cognizable injuries. Instead, the BRI Complaint refers to "another Owner-Landlord, with buildings operated by Property Management" and Nilsen Management "manag[ing] 8 buildings in Yonkers." *(Id. ¶¶* 24, 31.) As the Supreme Court has explained, an organization, like Property Management and Nilsen Management, may establish an injury-in-fact if it demonstrates that it was "perceptibly impaired" by BRI Defendants actions. *Havens Realty Corp.,* 455 U.S. at 379; *cf. W.R. Huff Asset Management Co. v. Deloitte,* 549 F.3d 100, 109 (2d Cir. 2008) ("There are, indeed, a few well-recognized, prudential exceptions

to the 'injury-in-fact' requirement. These exceptions permit third-party standing where the plaintiff can demonstrate (1) a close relationship to the injured party and (2) a barrier to the injured party's ability to assert its own interests."). Property Management and Nilsen Management have not offered any such plausible demonstrations of perceptible impairment based on their roles as managing agents for rent regulated properties. Their vague assertions regarding alleged injuries without more are insufficient facts upon which the Court could find that standing. Thus, the claims by Property Management and Nilsen Management are dismissed for lack of standing.

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

precedent, the Second Circuit has repeatedly held that "where an organization diverts its resources away from its current activities, it has suffered an injury . . . independently sufficient to confer organizational standing." *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay,* 868 F.3d 104, 111 (2d Cir. 2017); *see also Olsen v. Stark Homes, Inc.,* 759 F.3d 140, 158 (2d Cir. 2014) (finding standing for a not-for-profit corporation that expended resources investigating and advocating for plaintiffs because such activities diverted resources from its other advocacy and counseling activities); *Nnebe,* 644 F.3d at 157 (finding standing for an organization that used resources to assist its members who faced adverse action by providing counseling, explaining the rules, and assisting members in obtaining attorneys); *Ragin,* 6 F.3d at 905 (finding standing where an organization devoted significant resources to identify and counteract the defendants' actions).

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

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

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

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

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

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

3. G-Max

In the G-Max action, the City challenges G-Max Plaintiffs' standing to bring any claims against it. The City argues that G-Max Plaintiffs lack standing to sue because the City does not enforce the HSTPA and therefore has not caused G-Max Plaintiffs' any alleged injuries — a necessary predicate of standing. (G-Max City Defs.' Mem. at 9-12.) As the City explains, it has two roles in the enforcement of RSL. First, the ETPA "authorizes local legislative bodies to declare the existence of a housing emergency whenever the vacancy rate falls below five percent, after which

housing becomes subject to the ETPA." *(Id* at 10 (citing ETPA § 3).) Under the Local Emergency Housing Rent Control Act ("LEHRCA"), the City must make a new determination of emergency at least every three years following a survey of the supply of housing accommodations. N.Y. UNCONSOL. LAW § 8603 (McKinney 2020). Second, the City's RGB annually establishes guidelines for rent adjustments. N.Y.C. Admin. Code § 26-510(a). Aside from these two actions, the enforcement of RSL is left to the State. *Rent Stabilization Ass'n v. Higgins,* 630 N.E.2d 626, 628 (N.Y. 1993) ("The legislature in 1983 designated DHCR 'the sole administrative agency to administer the regulation of residential rents' under the rent control and rent stabilization statutes . . . ." (quoting Omnibus Housing Act, L. 1983, ch. 403, § 3)). To achieve standing, G-Max Plaintiffs would need to challenge the City Council's declaration of a housing emergency or the RGB's rent adjustment. Instead, G-Max Plaintiffs allege that the HSTPA, a *state* statute, is unconstitutional and also violates the FHA. (G-Max Compl. ¶¶ 273-80.) But the City does not enforce the HSTPA and thus could not possibly cause any injuries alleged by G-Max Plaintiffs. G-Max Plaintiffs need to establish a "causal connection between the injury and the conduct complained of [and] the injury has to be fairly traceable to the challenged action of the defendant," which G-Max Plaintiffs have not established here. *Lujan,* 504 U.S. at 560 (quotation marks and alterations omitted). For example, G-Max Plaintiffs challenge the HSTPA recoupment rate and period for MCIs and IAIs. (G-Max Compl. ¶¶ 11-12.) But this injury is potentially attributable to the State, not the City. To obtain a rent adjustment based on MCI or IAI, a landlord must apply to the DHCR, a *state* agency, which determines whether to grant the adjustment. *See* N.Y.C. Admin. Code § 26-511.1 (the

DHCR shall promulgate rules and regulations to establish a schedule of reasonable costs of MCIs and a notice and documentation procedure for IAIs). As noted above, the City plays no role in determining the recoupment rate of MCIs or IAIs.

G-Max Plaintiffs also challenge the repeal of the high-income regulatory provisions of the HSTPA. (G-Max Compl. ¶¶ 72-73, 198, 243.) But this repeal in the HSTPA is a result of a change in *state* law. *See* HSTPA, Part D, § 5. G-Max Plaintiffs describe the HSTPA as "irrational and arbitrary," *id.* ¶ 252, and that the law unfairly "singles out" G-Max Plaintiffs, *id.* ¶¶ 257, 262. G-Max Plaintiffs further argue that the City concedes it has "roles in enforcing" the underlying rent stabilization laws that the HSTPA amends. (G-Max Pls.' Mem. at 75.) Specifically, G-Max Plaintiffs note the fact that the City's role is to periodically renew the emergency declaration and to set rent-increase levels through the RGB. *(Id.; see also* G-Max Compl. ¶¶ 74(c), 229.) But fatal to G-Max Plaintiffs' claims is that the City has not caused any of their alleged injuries. G-Max Plaintiffs do not challenge the RGB's rent adjustments, nor the City Council's declaration of a housing emergency. Instead, G-Max Plaintiffs challenge the HSTPA itself. (G-Max Compl. ¶¶ 213-80.) Because G-Max Plaintiffs allegations against the City are in essence challenges to a state law and the resulting state actions, thus they have failed to allege any injuries that are fairly traceable to the City's conduct. *Lujan,* 504 U.S. at 560-61 ("[T]here must be a causal connection between the injury and the conduct complaint of—the injury has to be fairly traceable to the challenged action of the defendant . . . ." (quotation marks and alterations omitted)). Accordingly, all claims against the City are dismissed in their entirety for lack of standing.

G-Max Plaintiffs bring an FHA claim against all G-Max Defendants except the State. (G-Max Compl. ¶¶ 5, 21, 273-80.) This claim is wanting as G-Max Plaintiffs do not have standing to sue for violations of the FHA. The purpose of the FHA is to "eliminate all traces of discrimination within the housing field." *Cabrera v. Jakabovitz,* 24 F.3d 372, 390 (2d Cir. 1994) (quotation marks omitted). To effect this purpose, the FHA makes it unlawful to "No discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). The FHA extends "only to plaintiffs whose interests fall within the zone of interests protected by the law invoked." *Bank of Am.,* 137 S. Ct. at 1302 (quotation marks omitted). Thus, under the FHA, only an "aggrieved person" may bring a claim under the FHA. An "aggrieved person" is someone who "claims to have been injured by a discriminatory housing practice" or who believes that they "will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i). To carry its burden of establishing standing, an FHA plaintiff "must allege specific, concrete facts demonstrating that the challenged practices harm [the plaintiff], and that [the plaintiff] personally would benefit in a tangible way from the court's intervention." *Palmieri v. Town of Babylon,* No. 01-CV-1399, 2006 WL 1155162, at *12 (E.D.N.Y. Jan. 6, 2006) (citing *Warth,* 422 U.S. at 508), *aff'd,* 277 F. App'x 72 (2d Cir. 2008).

G-Max Plaintiffs have not alleged sufficient facts to plausibly establish that they are "aggrieved person[s]" under the FHA. G-Max Plaintiffs are comprised of limited liability companies, a corporation, and two

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

But even more problematic to G-Max Plaintiffs' FHA claim is that they fail to allege the necessary causal link between the HSTPA and the alleged pattern of racially segregated housing in New York. Under the FHA, there is a "robust causality requirement," which "protects defendants from being held liable for racial disparities they did not create." *Winfield v. City of New York,* No. 15-CV-5236, 2018 WL 1631336, at *2 (S.D.N.Y. Mar. 29, 2018) (quoting *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.,* 576 U.S. 519, 542 (2015)). G-Max Plaintiffs have offered no such causal link between the HSTPA and the purported racial segregation caused by G-Max Defendants. (G-Max Compl. ¶¶ 5, 208-12, 273-80.) Further, G-Max Plaintiffs complain of economic harm

and argue that this is sufficient to confer standing. But G-Max Plaintiffs do not actually allege that the economic harm *to them* is a result of the purported violations of the FHA. *(Id. ¶¶* 130-31, 135, 140, 143-44, 154; G-Max Pls.' Mem. 71.) Instead, the G-Max Complaint alleges that the HSTPA has a disparate, adverse impact on racial and ethnic minority renters, thereby perpetuating residential segregation in New York which violates the FHA. *(Id. ¶¶* 5, 208-12, 273-80.) G-Max Plaintiffs can only establish standing from economic harm that is the result of any FHA violation for which G-Max Plaintiffs would otherwise have standing. Because G-Max Plaintiffs have not met the "injury in fact" prong which is one of the "irreducible constitutional minimum[s] of standing," the FHA claim against all G-Max Defendants is dismissed. *Lujan,* 504 U.S. at 560.

D. Physical Takings Under the Fourteenth and Fifth Amendments

1. Applicable Law

BRI and G-Max Plaintiffs bring facial and as-applied Takings Clause claims. The Takings Clause of the Fifth Amendment provides that no "private property [shall] be taken for public use, without just compensation." U.S. CONST. amend. V. The Takings Clause applies to the states through the Fourteenth Amendment. *See Kelo v. City of New London,* 545 U.S. 469, 472 n.1 (2005). To state a takings claim under § 1983, BRI and G-Max Plaintiffs must show "(1) a property interest (2) that has been taken under color of state law (3) without just compensation." *Frooks v. Town of Cortlandt,* 997 F. Supp. 438, 452 (S.D.N.Y. 1998) (citing *HBP Assoc. v. Marsh,* 893 F. Supp. 271, 277 (S.D.N.Y. 1995)). A plaintiff's property interest must stem from some "legitimate claim of entitlement"

and not just an "abstract need or desire" or "unilateral expectation." *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 577 (1972). The law recognizes two types of takings: physical takings and regulatory takings. *See Buffalo Teachers Fed'n v. Tobe,* 464 F.3d 362, 374 (2d. Cir. 2006).

A physical taking only occurs when the government "requires the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido,* 503 U.S. 519, 527 (1992) (emphasis omitted); *accord Southview Assocs., Ltd. v. Bongartz,* 980 F.2d 84, 94 (2d Cir. 1992); *Elmsford Apartment Assocs., LLC v. Cuomo,* 469 F. Supp. 3d 148, 162 (S.D.N.Y. 2020); *Greystone Hotel Co. v. City of New York,* 13 F. Supp. 2d 524, 527 (S.D.N.Y. 1998). The Second Circuit has explained that a physical taking happens when "government has committed or authorized a permanent *physical* occupation of property." *Southview Assocs.,* 980 F.2d at 92-93 (emphasis added). The *"absolute* exclusivity of the occupation, and *absolute* deprivation of the owner's right to use and exclude others from the property . . . [are] hallmarks of a physical taking." *Id.* at 93 (emphasis in original) (citing *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 435 n.12 (1982)). Recently, in *Cedar Point Nursery v. Hassid,* 141 S. Ct. 2063 (2021) the Supreme Court reiterated that there are "heightened concerns associated with [t]he permanence and absolute exclusivity of a physical occupation' in contrast to 'temporary limitations on the right to exclude,' and . . . [n]ot every physical invasion is a taking.' 141 S. Ct. at 2074-75 (alterations in original) (quoting *Loretto,* 458 U.S. at 435 n.12). The Supreme Court has explained that there are different circumstances under which a physical taking may occur, such as "condemnations" of property, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency,* 535 U.S. 302,

322 (2002), seizure of property through eminent domain, *Kelo,* 545 U.S. at 489, or physical occupation of property, *Loretto,* 458 U.S. at 427. Physical appropriations are the "clearest sort of taking." *Palazzolo v. Rhode Island,* 533 U.S. 606, 617 (2001). Such *per se* takings are assessed by the rule: "[t]he government must pay for what it takes." *Cedar Point,* 141 S. Ct. at 2071 (quoting *Tahoe Sierra,* 535 U.S. at 322).

"A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles v. Patel,* 576 U.S. 409, 415 (2015); *see also Bucklew v. Precythe,* 139 S. Ct. 1112, 1127 (2019) ("A facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications."). This is the "most difficult challenge to mount successfully," because the challengers "must establish that no set of circumstances exists under which the [HSTPA] would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987). The "uphill battle" of a facial claim is "made especially steep" when those seeking relief "have not claimed . . . that [government action] makes it commercially impracticable" for the plaintiffs to continue business use of their property. *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 495-96 (1987).

2. Analysis

a. Physical Taking — Facial Challenge

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

[14] BRI Plaintiffs explain that "the essence of the [BRI] Complaint is a facial challenge" to the HSTPA. (BRI Pls.' Mem. at 68). But BRI Plaintiffs by their own admission state that they "do not allege a physical encroachment." *(Id.* at 15.) BRI Plaintiffs misstate the law regarding physical takings, describing these

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

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challenges as applicable "when the degree of the regulation is such that it removes an opportunity for a reasonable return on investment." *Id.* This describes the analysis for *regulatory* takings. For example, BRI Plaintiffs cite *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), but that case is generally regarded as the first case to address the concept of regulatory takings — in which the Supreme Court held that government *regulation* will not be considered a taking unless the regulation "goes too far." *Id.* at 415. BRI Plaintiffs confuse the two types of takings in other portions of their Memorandum of Law. *(See* BRI Pls.' Mem. at 13-15, 22 (BRI Defendants cite *regulatory* takings cases such as *Tahoe-Sierra, Eastern Enterprises. v. Apfel,* 524 U.S. 498 (1998), *Dolan v. City of Tigard,* 512 U.S. 374 (1994), *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), and *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978).) As such, these arguments will be addressed in the regulatory takings analysis *infra.*

conversion altogether . . . , the HSTPA forces owners to remain in the rental business on a going-forward basis." *(Id.;* G-Max Compl. ¶¶ 104-11.) G-Max Plaintiffs claim that this "compel[s] owners to remain in the rental market against their will." *(Id.)* Finally, G-Max Plaintiffs dispute G-Max Defendants' argument that the various exit options available to property owners foreclose a physical takings claim. *(Id.* at 47; G-Max CVH Mem. at 11-12; G-Max State Defs.' Mem. at 18.)

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

Consistent with *Yee,* courts have repeatedly recognized that when owners invite tenants to physically occupy their apartments, laws like the HSTPA (and RSL before it) simply govern the property owners' voluntary use of their property as rental housing. *See 335-7 LLC,* 2021 WL 860153 at *8 ("In accordance with *Yee,* courts in this Circuit have long upheld the RSL against facial physical taking challenges because landlords have

voluntarily offered their property for rent and, by the express terms of the RSL, landlords can evict unsatisfactory tenants, reclaim or convert units, or exit the market"); *see also Fed. Home Loan Mortg. Corp. v. NY. State Div. of Hous. & Cmty. Renewal ("FHLMC"),* 83 F.3d 45,47-48 (2d Cir. 1996) (noting that "where a property owner offers property for rental housing, the Supreme Court has held that government regulation of the rental relationship does not constitute a physical taking"); *Southview Assocs.,* 980 F.2d at 94-95 (finding no physical taking where the government limited the development of property because property owners had not lost the right to possess, use, and dispose of the property); *Greystone Hotel,* 13 F. Supp. 2d at 527 (holding that the challenged RSL provision regulates the terms on which property owners can rent rooms, the amounts it can charge, and the services it must provide, but does not amount to a physical occupation of the property); *Higgins,* 630 N.E. 2d at 632-33 (concluding that it is not a physical taking to require an owner who has voluntarily acquiesced in the use of its property for rental housing to rent to family members succeeding the tenant); *Seawall Assocs. v. City of New York,* 542 N.E.2d 1059,1065 (N.Y. 1989) (holding that "[i]t is the forced occupation . . . , not the identities of the new tenants or the terms of the leases, which deprives the owners of their possessory interests and results in physical takings").

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

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

It is true that in *Yee,* the Supreme Court acknowledged that the day would come in which a statute, on

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

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

b. Physical Taking — As-Applied Challenge

BRI and G-Max Plaintiffs also bring as-applied physical takings claims.[15] To be clear, BRI and G-Max

[15] The Court notes that not once in the 98-page BRI Complaint do BRI Plaintiffs mention an "as-applied" taking challenge to the HSTPA. *(See generally* BRI Compl.) The Court believes that given the extremely high burden to mount a successful facial challenge for a physical or regulatory taking that BRI Plaintiffs styled claims as "as-applied" given the less stringent standard. However, the BRI Complaint is devoid of analysis as to its application to

Plaintiffs do not allege condemnation, seizure by eminent domain, or physical encroachment of any property. Instead, BRI Plaintiffs argue that the HSTPA constitutes a physical taking because it "deprives property owners of their basic ownership rights to either choose, include or exclude those that it selects from their property and to possess, use, and dispose of their property or concomitantly, to use, rent and own their property without improper, illegal and unconstitutional government interference and restriction." (BRI Compl. ¶ 99.) As BRI Plaintiffs describe it: the HSTPA "dramatically limit[s] the ability of property owners to dispose of their own property . . . [which] effects an unconstitutional physical taking . . . *(Id.* ¶ 124.) BRI Plaintiff do not object to the physical presence of tenants, instead they object to the financial terms of the tenants' occupation. *(See id.* ¶ 105 (alleging the HSTPA effects a physical taking because it "has eliminated almost every avenue that allowed a transition from regulation to free market"). G-Max Plaintiffs, with the exception of Plaintiffs Ordway and Guerrieri, lodge a similar complaint — that the HSTPA deprives owners of "their fundamental rights to possess, use, admit or exclude others, and dispose of their property, thereby effecting an unconstitutional physical taking . . . ." (G-Max Compl. ¶ 7; G-Max Pls.' Mem. at 44-51.) G-Max Plaintiffs focus on certain provisions of the HSTPA, specifically the (1) limitations on converting rental units into condominiums or cooperatives, (2) restrictions on recovery of a unit for personal use,

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the various landlords involved in the BRI Action. Instead, BRI Plaintiffs repeatedly assert that the HSTPA is unconstitutional in all circumstances — which is a facial, not as-applied, challenge. (BRI Compl. at 95-97.) As such, the Court construes BRI Plaintiffs takings challenge as a facial one and dismisses it for the same reasons as it dismisses the G-Max Plaintiffs' claim.

and (3) changes to the eviction process. (G-Max Compl. ¶¶ 82,103,122.)

Takings are rooted in the disruption of an owner's "bundle of property rights" which include the rights to "possess, use[,] and dispose of property. *Horne v. Dep't of Agric.,* 576 U.S. 350,361-62 (2015) (quoting *Loretto,* 458 U.S. at 435) (quotation marks omitted). Previous examples of actionable takings include installation of physical items on buildings, *Loretto,* 458 U.S. at 438, the seizure of control over private property, *Horne,* 576 U.S. at 361-62, and takings through eminent domain, *Kelo,* 545 U.S. at 489. Like the plaintiffs in *CHIP,* BRI Plaintiffs maintain the first and third strands in *Home's* bundle of property rights as they continue to possess the properties and can dispose of them through sale. 492 F. Supp. 3d at 43. BRI Plaintiffs principally argue that BRI Defendants limit their use of property through enactment of the HSTPA — and to some extent interfere with their ability to dispose of the property — which is sufficient to constitute a physical taking. (BRI Pls.' Mem. at 23-27.)

BRI Plaintiffs' allegations fall short of plausibly alleging an as-applied physical taking. As the Supreme Court has explained to find a physical taking the state must "not simply take a single 'strand' from the 'bundle' of property rights" but instead "chop[] through the bundle, taking a slice of every strand." *Loretto,* 458 U.S. at 435. A regulation which involves no physical invasion, such as the HSTPA, cannot form the basis of a *physical* takings claim. BRI Plaintiffs' claim fails, because under binding case law of *Loretto, Horne, Yee,* and others, no physical taking ever actually occurred. As articulated in *CHIP, "[n]o* precedent binding on this Court has ever found any provision of a rent-stabilization statute to violate the Constitution." 492 F. Supp.

3d at 38.[16] Importantly, the "fact of a taking is fairly obvious in physical takings cases." *Buffalo Teachers,* 464 F.3d at 374; *see also Loretto,* 458 U.S. at 421 (finding a physical taking where New York law provided that a landlord must permit a cable television company to install equipment on the owner's property); *Horne,* 576 U.S. at 361 (holding that the government's formal demand that plaintiffs turn over a percentage of their raisin crop is a "clear physical taking").[17] This is in contrast to a regulatory taking where the government "merely . . . bans certain private uses" of property. *Tahoe-Sierra,* 535 U.S. at 322-23. BRI Plaintiffs do not allege that they have been deprived of title to their property, or that they are unable to sell the property if they choose. Instead, BRI Plaintiffs complain of several burdensome aspects of the HSTPA in Westchester

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

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

County. (BRI Compl. ¶ 100; *see also* BRI Pls.' Mem. at 15.) For example, BRI Plaintiffs point to the fact that owners are generally required to tender renewal leases to tenants in rent stabilized apartments. (*Id.* ¶ 100(b).) BRI Plaintiffs also highlight that the HSTPA grants succession rights to certain family members who have lived with the tenant of record in a rent stabilized apartment for a certain period of time before the tenant dies or moves out. *(Id.* ¶ 100(d); BRI Pls.' Mem. at 25-26, 44.) *See* N.Y. COMP. CODES R. & REGS. ("N.Y.C.R.R.") tit. 9, § 2523.5 (2021). However, these renewal leases and familial succession rights are not creations of the HSTPA. As BRI Defendants note, these aspects have been "part of New York's rent stabilization regime for decades" and repeatedly upheld by courts. (BRI State Defs.' Mem. at 16.) *See, e.g., Golub v. Frank,* 483 N.E.2d 126 (N.Y. 1985) (explaining that RSL "provide[] that no tenant shall be denied a renewal lease except upon grounds specifically recognized by law"); *Lesser v. Park 65 Realty Corp.,* 527 N.Y.S.2d 787, 789 (App. Div. 1988) (noting that "[t]he family succession provisions . . were enacted in response to the harsh consequences resulting from displacement from one's home upon the death or departure of a named tenant with whom a family member, not named in the lease, resided"). These longstanding and pre-existing provisions of the rent stabilization laws in New York cannot form the basis of BRI Plaintiffs' as-applied physical takings challenge to the HSTPA when these provisions predated its enactment.

BRI Plaintiffs also allege that the HSTPA forces owners to accept "the intrusion of strangers" or "prevents [them] from excluding strangers from the property" or mandates them to rent units "often to strangers who claim 'succession' rights." (BRI Compl. ¶¶ 33, 104, 107.) But this characterization is flawed, as

an individual who lives in a rent stabilized apartment must prove he or she is a family member (or in an intimate relationship with the tenant of record) who has resided in the apartment for a period of two years or one year in the case of elderly or disabled persons. N.Y.C.R.R. tit. 9, § 2523.5. Such persons, either family or a person in an intimate relationship with the tenant, are a far cry from the "strangers" BRI Plaintiffs describe as foisted upon them infringing on their property rights. As noted above, the Supreme Court has held that once a property owner "decides to rent his land to tenants, the government may . . . require the landowner to accept tenants he does not like." *Yee,* 503 U.S. at 529; *see also Higgins,* 630 N.E.2d at 633 (rejecting physical takings challenge to succession rights in rent-stabilized units because "the challenged regulations may require the owner-lessor to accept a new occupant but not a new use of its rent-regulated property"). As Judge Edgardo Ramos succinctly explained in *335-7 LLC,* even if the successor were indeed a "stranger[]," that feature of the law "is not a physical taking as long as it only forces new tenants, not a new use." 2021 WL 860153, at *9.[18,19]

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

[19] BRI Plaintiffs also describe the various changes in the HSTPA as "commandeer[ing] a[n] . . . easement." (BRI Compl. ¶¶ 100-01.) This assertion is meritless. An easement is a "nonpossessory right to *enter* and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." *Marvin M Brandt Revocable Tr. v. United States,* 572 U.S. 93, 105 (2014) (emphasis added) (citing

BRI Plaintiffs further claim that the ETPA grants tenants a "life estate." (BRI Compl. ¶¶ 43, 100(d).) G-Max Plaintiffs assert a similar claim — that the HSTPA's amendments to the eviction process essentially authorize a permanent physical occupation of their property. (G-Max Compl. ¶¶ 121-26.) But the Second Circuit has already rejected this argument because owners of rent-stabilized apartment offer their properties for rent and retain statutory rights to recover them. *Harmon,* 412 F. App'x at 422 (noting that landlords did not dispute retention of statutory rights such as recovery of property for personal use or demolition, or the ability to evict an unsatisfactory tenant, among others); *see also FHLMC,* 83 F.3d at 47-48 (finding no physical taking where the law regulated the terms under which the owner may use the property as previously planned); *Greystone Hotel,* 13 F. Supp. 2d at 527 (finding no physical taking in a forced conversion from renting to transients to leasing to permanent tenants). For example, owners of rent stabilized apartments can "recover possession of a housing accommodation because of immediate and compelling necessity . . . ." N.Y. UNCONSOL. LAW § 26-408(b)(1) (McKinney 2021). The lone change to this part of the rent stabilization law through the HSTPA is that a landlord can only recover possession for use "as his or her primary residence" or use for the same purpose for his or her immediate family. HSTPA, Part I, §1. But this modification still does not *eliminate* the owner's property rights — instead, it lawfully limits them. *See CHIP,* 492 F. Supp. 3d at 44 (dismissing physical

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Restatement (Third) of Property: Servitudes § 1.2(1) (1998)). No allegation in the BRI Complaint plausibly demonstrates that the HSTPA effects a physical taking involving *entry* on to property and thus is not an easement. (BRI Compl. ¶¶ 100-01.)

taking claim because "while significant to investment value, personal use, unit deregulation, and eviction rights, is not so qualitatively different from what came before as to permit a different outcome."); *335-7 LLC,* 2021 WL 860153, at *9-10 (concluding that the HSTPA did not constitute a physical taking even though it restricted conversion, eviction, and vacancy as the same was true in all of the cases where RSL have been upheld); *Greystone Hotel,* 13 F. Supp. 2d at 527 ("The challenged provisions regulate the terms on which [a property owner] can rent its rooms, the amounts it can charge, and the services it must provide. That is not a physical occupation . . . ."); *see also FHLMC,* 83 F.3d at 47-48 (holding that where property owners offer property for rental housing, governmental regulation of the rental relationship does not constitute a physical taking).

Contrary to BRI and G-Max Plaintiffs' assertions, owners retain many important statutory rights, even after passage of the HSTPA. (BRI Pls.' Mem. 16-17; G-Max Pls.' Mem. 9-10.) Aside from the ability to recover housing units for an "immediate and compelling necessity," landlords can evict tenants who fail to pay rent, who violate another substantial obligation of the lease agreement, commit a nuisance, or use the apartment for unlawful purposes. N.Y.C.R.R. tit. 9, § 2524.3. Landlords can recover property to demolish it, withdraw units for use as an owner-owned and operated business, or may withdraw the units from the rental market if the cost to repair dangerous living conditions "would substantially equal or exceed" the building's value. *Id. §* 2524.5. In *Yee,* the Supreme Court held that the ordinance at issue did not constitute a physical taking despite "limit[ing] the bases upon which a park owner may terminate a mobile home owner's tenancy." *Yee,* 503 U.S. at 524, 528. As explained in *335-7 LLC,* the

Supreme Court in *Yee* reasoned that there was no physical taking because "[t]he mobile park owners had voluntarily made their property available to tenants and nothing in the law's terms required them to continue to do so." 2021 WL 860153, at *8. The Supreme Court held that the law "merely regulate[d] petitioners' use of their land by regulating the relationship between landlord and tenant," which was consistent with longstanding precedent "that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." 503 U.S. at 528-29 (emphasis omitted) (collecting cases). The New York Court of Appeals has similarly held that RSL do not effect a facial physical taking because the "right to evict an unsatisfactory tenant or convert rent-regulated property to other uses remains unaffected." *Higgins,* 630 N.E.2d at 632.

Furthermore, under the HSTPA, landlords can convert rent regulated apartments to condominiums or cooperatives with purchase agreements from 51% of tenants. N.Y. GEN. BUS. LAW § 352-eee.[20] BRI and G-Max Plaintiffs concede that landlords can use these avenues to stop being landlords and end physical occupation of these properties as rent regulated units. *(See, e.g.,* BRI Compl. ¶¶ 100(b), 100(h) (noting that under the HSTPA property owners can refuse to renew leases in "narrow circumstances," but also alleging that condo conversions have been "virtually eliminated");

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

¶ 109 (alleging that the HSTPA "significantly limits the owner's right not to renew" a lease and also "substantially eliminates" the ability to remove a tenant); ¶ [1]11 (asserting that "non-renewal of a lease is permitted in certain limited circumstances where an owner seeks to occupy a unit or demolish a building"); G-Max Compl. ¶ 126 ("making it harder for property owners to evict tenants"); ¶ 175 ("demanding renewal leases in perpetuity"); ¶ 227 ("effects of rent-regulation []such as perpetual renewal and succession rights").) As BRI Defendants highlight, BRI Plaintiffs do not plausibly plead an individual owner would need to occupy more than one apartment, or why a corporate owner would need occupy a residential apartment — or more importantly how the lack of their ability to do so amounts to a physical taking. (BRI State Defs.' Mem. at 18.) Instead, the HSTPA prohibits an owner from refusing to renew rent-regulated leases in order to occupy more than one unit for him or herself or allowing a family member to do so, absent an immediate and compelling necessity. N.Y. UNCONSOL. LAW § 26-408(b)(1). G-Max Plaintiffs challenge the same restrictions regarding a property owner's personal use of property. But like BRI Plaintiffs, G-Max Plaintiffs acknowledge that at least some landlords may recover units for their own use through different avenues in the HSTPA. (G-Max Compl. ¶¶ 8, 122.) These concessions are fatal to the physical taking claims because this type of regulation of the landlord-tenant relationship is permissible. *See Loretto,* 458 U.S. at 440 (affirming that states hold "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying

compensation for all economic injuries that such regulation entails").[21]

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

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

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

G-Max Plaintiffs Ordway and Guerrieri offer a more thorough as-applied analysis as to their physical taking claim. In particular, Ordway and Guerrieri assert that they cannot recover a third unit in their building for personal use to combine two floors into a single residence. (G-Max Compl. ¶¶ 168-76.) Prior to the enactment of the HSTPA, Ordway and Guerrieri initiated holdover proceedings in housing court to remove the current tenant in the unit they wished to occupy. *(Id. ¶¶* 172-73.) These Plaintiffs argue that because of the HSTPA, they have lost their "fundamental right to occupy their own private property." *(Id.* ¶ 175.) Even assuming that there is an unwanted tenant in one of their rental units, Ordway and Guerrieri have failed to allege how HSTPA bars recovery of their unit. As discussed *supra,* under the HSTPA, a property owner may recover a unit because of "immediate and compelling necessity." HSTPA, Part I, §1. While the HSTPA limits recovery to one unit for personal use, Ordway and Guerrieri's other units were recovered voluntarily. (G-Max Compl. ¶ 171.) The voluntary recovery of the other rental units means that under HSTPA there is no bar to recovering a unit based on "immediate and compelling necessity" — indeed to date, they have not exercised their rights to

do so under this provision. HSTPA, Part I, §1. Thus, Plaintiffs Ordway and Guerrieri cannot claim that the HSTPA results in their inability to occupy their own private property when their property right of disposal, i.e. an exit option, is available to them. In particular, the return of Ordway and Guerrieri's adult son could serve as the immediate and compelling necessity as to why they need to recoup the unit for personal use, a remedy available to them under the HSTPA. (G-Max Compl. ¶ 174.) Aside from this option, Ordway and Guerrieri have other disposal options, as they could evict the tenant, upon request, if they provide a similar accommodation. N.Y. Admin. Code § 26-511(c)(9). In *Harmon,* the Second Circuit affirmed the dismissal of a physical takings challenge to RSL because landlords retained the right to recover possession of a unit for immediate and compelling necessity, as is the case here. 412 F. App'x at 422.[22,23] The right to recover a unit under the "immediate and compelling necessity" provision remains substantially unchanged by the HSTPA. *See* HSTPA, Part I, § 1 ("The landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his or her own personal use and occupancy as his or her primary residence or for the use and occupancy

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

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

of his or her immediate family as their primary residence . . . .").

A recent decision from the First Department is instructive here. *See Harris v. Israel,* 142 N.Y.S.3d 497 (App. Div. 2021). In *Harris,* the court was tasked with determining whether the HSTPA applied to a holdover proceeding which had been pending for one year before the HSTPA's enactment. *Id.* at 498. Specifically, the court considered the same amended provision challenged by Ordway and Guerrieri, which governs an owner's right to refuse to renew a rent-stabilized lease on the ground that the owner seeks to recover the unit for her or her own personal use and occupancy as a primary residence. *Id.* The Appellate Division concluded that the amended provision was applicable to this proceeding. *Id.* However, while *Harris* was pending before the First Department, the Court of Appeals in *Regina Metropolitan Co. v. New York State Division of Housing and Community Renewal,* 154 N.E.3d 972 (N.Y. 2020), held that the HSTPA's rent overcharges could not apply retroactively without violating due process. *Id.* at 976-77. Consequently in *Harris,* the court reversed and reinstated the judgment of possession, applying *Regina Metro's* reasoning "that an owner's increased liability and the disruption of relied-upon repose are impairments to his or her substantive rights" to preclude "any retroactive application of HSTPA" given that "petitioner had spent several years reclaiming all other units at the property and was ultimately awarded a judgment of possession before [the] HSTPA's enactment." *Harris,* 142 N.Y.S.3d at 499. To put it more directly, *Harris* turned on "settled expectations" following a favorable *judgment*. *Id.* However, by their own admission, Ordway and Guerrieri have not obtained any judgment of possession. (G-Max Compl. ¶ 172 (noting that Ordway and Guerrieri "commenced owner-occupancy

holdover proceedings . . .".).) Having only "commenced" an owner-occupancy holder proceeding by serving one "notice of non-renewal" which is not a judgment of possession, Ordway and Guerrieri have no "settled expectations" regarding their property. (*Id.*); *see Harris,* 142 N.Y.S.3d at 499.[24] The court in *Harris* ultimately determined that Part I of the HSTPA "impair[s] rights owners possessed in the past, increasing their liability for past conduct and imposing new duties with respect to transactions already completed." *Id.* (alteration in original). But Ordway and Guerrieri have merely just begun proceedings to repossess their unit.[25]

The Supreme Court has explained that a plaintiff alleging a taking must show that the state regulatory entity has rendered a final decision on the matter and that the plaintiff has sought just compensation by means of an available state procedure. *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186 (1985), *overruled in part by Knick v. Township of Scott,* 139 S. Ct. 2162 (2019). Prior to the Supreme Court's decision in *Knick,* the law in the

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

[25] G-Max Plaintiffs further argue that *Regina Metro* and *Harris* should extend to the HSTPA's Part K regarding MCIs. (G-Max Pls.' Suppl. Letter, March 16, 2021; Dkt. No. 98.) But *Regina Metro* reaffirmed that "a statute that affects only 'the propriety of prospective relief' . . . has no potentially problematic retroactive effect even when the liability arises from past conduct." 154 N.E.3d at 988 (quoting *Landgraf v. USI Film Prods.,* 511 U.S. 244, 273 (1994)). The MCI changes in the HSTPA make it so that "increases shall be collectible prospectively" and thus result in not impermissibly retroactive legislation. N.Y.C. Admin. Code § 26-511.1(8).

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

Applying this principle here, Ordway and Guerrieri have not plausibly pled that the HSTPA inflicts an "*absolute* deprivation" of the right to their property, because they can recover the unit under the HSTPA. *Southview Assocs.,* 980 F.2d at 95 (finding no physical taking because "no absolute, exclusive physical occupation exist[ed]"); HSTPA, Part I, §1. Here, there has not been a final decision taking Ordway and Guerrieri's property. Instead, Ordway and Guerrieri's allegations merely establish personal use restrictions that govern the terms of an existing landlord-tenant relationship, which does not make plausible their takings claim. *See Dawson v. Higgins,* 610 N.Y.S.2d 200, 209 (App. Div. 1994) (upholding constitutionality of personal-use restrictions for rent-controlled apartments); *see also*

Higgins, 630 N.E.2d at 632 ("That a rent-regulated tenancy might itself be of indefinite duration—as has long been the case under rent control and rent stabilization—does not, without more, render it a permanent physical occupation of property."). Thus, the as-applied physical takings challenge as to Plaintiffs Ordway and Guerrieri fails.

E. Regulatory Takings Under the Fourteenth and Fifth Amendments

1. Applicable Law

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

mining of gold, *United States v. Cent. Eureka Mining Co.,* 357 U.S. 155, 168 (1958), and regulations that prohibit certain conduct on private property, *Andrus v. Allard,* 444 U.S. 51, 65-66 (1979).

Anything short of a complete elimination of value or a total loss is a non-categorical taking, which is analyzed under the framework articulated in *Penn Central.* 438 U.S. at 124. The *Penn Central* analysis of a non-categorical taking "requires an intensive ad hoc inquiry into the circumstances of each particular case." *Buffalo Teachers,* 464 F.3d at 375. In applying *Penn Central,* courts must "weigh three factors to determine whether the interference with property rises to the level of a taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Id.* (quotation marks omitted). The inquiry turns on whether "justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979) (quotation marks omitted). Notably, the Supreme Court cautioned that "[g]overnment action that physically appropriates property is no less a physical taking because it arises from a regulation." *Cedar Point,* 141 S. Ct. at 2072. The key inquiry is "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Id.* (citing *Tahoe-Sierra,* 535 U.S. at 321-323).

2. Analysis

a. Regulatory Taking – Facial Challenge

As noted, *a per se* regulatory taking exists when the government completely deprives an owner of all economically beneficial uses of one's property. *See Lingle,* 544 U.S. at 538. Such a categorical taking involves "the extraordinary circumstance when *no* productive or economically beneficial use of [property] is permitted." *Tahoe-Sierra,* 535 U.S. at 330 (quoting *Lucas,* 505 U.S. at 1017 (emphasis in original)). BRI and G-Max Plaintiffs do not allege facts to support that they have been deprived of *all* economical viable use of their property by the "mere enactment of the regulation[]" – here, the HSTPA. *Tahoe-Sierra,* 535 U.S. at 318. Instead, BRI and G-Max Plaintiffs only plead that the HSTPA decreases the value of their properties. (BRI Compl. ¶¶ 22-23, 33, 54, 69, 79, 81-82, 126(a), 128, 135(a)) (claims that the HSTPA results in decreased, diminution, or reduction in BRI Plaintiffs' property values); (G-Max Compl. ¶¶ 4-5, 9, 11, 91, 119, 127, 148, 154, 161, 176, 180, 185, 190, 195, 198-99, 202, 205, 227) (claims that the HSTPA drastically devalues or impairs the values of G-Max Plaintiffs' properties).)

As the court in *CHIP* noted, "[r]ent regulations have now been the subject of almost a hundred years of case law, going back to Justice Holmes. That case law supports a broad conception of government power to regulate rents, including in ways that may diminish — even significantly — the value of landlords' property." 492 F. Supp. 3d at 38. Importantly, "every regulatory-taking challenge to the RSL has been rejected by the Second Circuit." *Id.* at 44 (citing W. *95 Hous. Corp. v. NY.. C. Dep't of Hous. Pres. & Dev.,* 31 F. App'x 19, 21 (2d Cir. 2002) (summary order) (upholding that New York's rent stabilization laws are not subject to facial

challenge as a regulatory taking)); *see Rent Stabilization Ass'n of the City of N.Y. v. Dinkins,* 5 F.3d 591, 595 (2d Cir. 1993) ("[T]he hardship provisions [of RSL], standing alone, obviously cannot effect a taking because they do not limit a landlord's rent in the first instance." (emphasis in original)); *see also Greystone Hotel,* 13 F. Supp. 2d at 528-29 (declining to find regulatory taking claim where plaintiffs conceded that the unregulated portion of the building retained value); *FHLMC,* 83 F.3d at 48 (finding no regulatory taking where property owners could still rent their apartments and collect the regulated rents). Judge Ramos succinctly applied this vast case law to the HSTPA:

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

335-7 LLC, 2021 WL 860153, at *11. The Court will follow the weight of authority that rejects facial regulatory takings claims such as those alleged in these cases. *See id.; see also Harmon v. Markus,* 2010 WL 11530596, at *3 (S.D.N.Y. Mar. 1, 2021) (noting that it is "well-settled law that a facial taking challenge to rent stabilization laws will not lie as of right"). Further, the Supreme Court has noted that it is "particularly important in takings cases to adhere to [its] admonition that 'the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary.' *Pennell v. City of San Jose,* 485 U.S. 1, 10 (1988) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n., Inc.,* 452 U.S.

264, 294-95 (1981)). The need for individualized analysis of such claims is why facial attacks face an uphill battle because "whether a taking has occurred depends . . . on a variety of financial and other information unique to each landlord." *Dinkins,* 5 F.3d at 597.

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

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

applying the *Penn Central* factors, it is the Court's responsibility to "determin[e] when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than disproportionality concentrated on a few persons." *Penn Cent.,* 438 U.S. at 124.[27]

b. Regulatory Taking — As-Applied Challenge

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

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physical invasion of property, which is entirely absent in both Actions here.

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

government may place ceilings on the rents the landowner can charge . . .” *Yee,* 503 U.S. at 529 (citing *Pennell,* 485 U.S. at 12 n.6). Such forms of regulation are analyzed by engaging in the “essentially ad hoc, factual inquiries” necessary to determine whether a regulatory taking has occurred. *Kaiser Aetna,* 444 U.S. at 175. There are limits, however, to the power of the government to regulate property. In the words of Justice Holmes, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pa. Coal Co.,* 260 U.S. at 415. Mere profit loss, however, does not establish that a regulation has gone too far. *See Sadowsky v. City of New York,* 732 F.2d 312, 317 (2d Cir. 1984) (“[R]egarding economic impact, it is clear that prohibition of the most profitable or beneficial use of a property will not necessitate a finding that a taking has occurred.”); *see also Penn Cent.,* 438 U.S. at 130 (noting that “the submission that [the plaintiffs] may establish a ‘taking’ simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable”).

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

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

needs to determine whether the HSTPA "amounts to a physical invasion or instead merely affects property interests through some public program adjusting benefits and burdens of economic life to promote the common good." *Jado Assocs., LLC v. Suffolk Cnty. Sewer Dist. No. 4-Smithtown Galleria,* No. 12-CV3011, 2014 WL 2944086, at *6 (E.D.N.Y. June 30, 2014) (quoting *Lingle,* 544 U.S. at 539).[29] The changes by the

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

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

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

HSTPA do not impose a physical occupation, but instead adjust the economic relationship between owners and tenants. *See FHLMC,* 83 F.3d at 48 (finding that the law "regulates the terms under which the owner may use the property" but does not "deprive [plaintiffs] of economically viable use of the property"); *Dinkins,* 805 F. Supp. at 163 ("A 'reasonable return' is not protected by law in this [C]ircuit."); *Harmon,* 412 Fed. App'x at 422 (affirming the dismissal of a taking claim because the "law does not subject the property to a use which its owner neither planned nor desired. Rather, it regulates the terms under which the owner may use the property . . . ." (quoting *FHLMC,* 83 F.3d at 48)); *Greystone Hotel,* 13 F. Supp. 2d at 528 (holding that there was no taking where the plaintiff failed to show deprivation of "economically viable use of its property" and further held that plaintiff is "not guaranteed a 'reasonable return' on its investment");

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

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

Higgins, 630 N.E.2d at 633-34 (holding that because the regulations "do not affect the owner's right to receive the regulated rents" the plaintiffs "have not met their burden of showing the requisite deprivation of economically beneficial use of their property"). BRI and G-Max Plaintiffs do not allege that the HSTPA deprives them of all of their properties' economic value; instead, both assert that the rents they are able to charge are insufficient. (BRI Compl. ¶¶ 22-23, 33, 46, 76, 79, 102, 107; G-Max Compl. ¶¶ 12, 59, 71, 85—93, 128-67)[30] For example, BRI Plaintiffs allege that the HSTPA "reduced the market value of regulated properties in some cases by over 50%." (BRI Compl. ¶ 128.) In a similar vein, G-Max Plaintiffs argue that "[a]ll [G-Max] Plaintiffs have been harmed . . . [by] the HSTPA's provisions, which independently and cumulatively deprive [them] of their private property without compensation." (G-Max Compl. ¶ 127.) The G-Max Complaint purports to detail specific examples of the HSTPA's "direct harmful impacts on each individual [G-Max] Plaintiff." *(See id.* u128-96; G-Max Pls.' Mem. at 11-18.) But the Second Circuit has held that the owner of rent regulated property "is not guaranteed [a] 'reasonable return' on investment." *FHLMC,* 83 F. 3d at 48. Indeed, courts in the Second Circuit have concluded that a property owner has "no constitutional

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

right to what it could have received in an unregulated market." *Greystone Hotel,* 13 F. Supp. 2d at 528 (citing *FHLMC,* 83 F. 3d at 48). Stated otherwise, a "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.,* 508 U.S. 602, 645 (1993); *Andrus,* 444 U.S. at 66 ("When [the Supreme Court] review[s] [a] regulation, a reduction in the value of property is not necessarily equated with a taking."); *FHLMC,* 83 F.3d at 48 (denying regulatory taking claim because "[a]lthough [plaintiff] will not profit as much as it would under a market-based system, it may still rent apartments and collect the regulated rents"); *Dinkins,* 805 F. Supp. at 163 (explaining that "the Second Circuit does not consider the denial of a 'reasonable return' as necessarily preventing an owner's economically viable use of his land" that constitutes a per se regulatory taking); *see also Kabrovski v. City of Rochester,* 149 F. Supp. 3d 413, 425 (W.D.N.Y. 2015) (noting that a taking "does not occur merely because a property owner is prevented from making the most financially beneficial use of a property"); *Donovan Realty, LLC v. Davis,* No. 07-CV-905, 2009 WL 1473479, at *5 n.3 (N.D.N.Y. May 27, 2009) (describing that the "mere diminution in value or inability to exploit property to the fullest economic extent" is insufficient to support takings claim); *Sterngass v. Town of Woodbury,* 433 F. Supp. 2d 351, 356 (S.D.N.Y. 2006) (holding that there is no taking where a zoning change prevented a property owner from "develop[ing] the land to its highest and best use"), *aff'd,* 251 F. App'x 21 (2d Cir. 2007) (summary order). Other courts have declined to find regulatory takings where the property values were reduced well beyond what the HSTPA allegedly does here. *See, e.g., Village of Euclid,* 272 U.S. at 384

(approximately 75%); *Hadacheck v. Sebastian,* 239 U.S. 394, 405 (1915) (92.5%); *Pulte Home Corp. v. Montgomery County,* 909 F.3d 685, 696 (4th Cir. 2018) (83%); *MHC Fin. Ltd. P 'ship v. City of San Rafael,* 714 F.3d 1118, 1127 (9th Cir. 2013) (81%); *Appolo Fuels, Inc. v. United States,* 381 F.3d 1338, 1348 (Fed. Cir. 2004) (92%); *William C. Haas & Co., Inc. v. City & County of San Francisco,* 605 F.2d 1117, 1120 (9th Cir. 1979) (roughly 95%).

Second, the Court is to evaluate whether the HSTPA interferes with investment-backed expectations to the point of constituting a taking. BRI and G-Max Plaintiffs claim that the HSTPA interferes with the investment-backed expectations by changing the reimbursement rate and recoupment period for MCIs and IAIs. (BRI Compl. ¶¶ 12, 56, 126(b); G-Max Compl. ¶¶ 2, 11-12, 85, 86-88.) BRI Plaintiffs broadly suggest that in looking at the "varied factors impacted by the HSTPA, the *Lingle* criteria for a regulatory taking fits, i.e., there is a substantial, and in fact, monumental impact and interference with investment backed expectations" and in attacking the "permanency" of the ETPA, which they argue "essentially forever preclud[es] the right to exclude from one's property," that the HSTPA effects a regulatory taking. (BRI Pls.' Mem. at 33)[31] G-Max Plaintiffs claim that the effect of the HSTPA's "drastic infringements on fundamental property rights is to strip rent-regulated properties of economic value and eliminate any chance that owners had of realizing a reasonable return or profit on their investments." (G-Max Compl. ¶ 91.) But both the BRI

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

and G-Max Complaints fail to allege that these changes made their properties entirely unprofitable by decreasing the percentage of IAI costs that owners can compel tenants to pay, or by increasing the minimum amortization period for MCIs. The "mere diminution in the value of property," regardless of how serious, "is insufficient to demonstrate a taking." *Concrete Pipe & Prods.,* 508 U.S. at 645. BRI and G-Max Plaintiffs' allegations that their properties have materially lost value or are less profitable do not render the HSTPA a regulatory taking. *See Andrus,* 444 U.S. at 66 ("[L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim."). Judge Ramos recently considered and rejected this very argument in *335-7 LLC* and explained that given the range of expectations among property owners, landlords cannot possibly allege that RSL frustrate the reasonable investment-backed expectations of every landlord it affects. *CHIP,* 492 F. Supp. 3d at 47. Further, the HSTPA only takes effect whenever the local legislative body of a city, town, or village determines the existence of a public emergency pursuant to the ETPA – demonstrating that the law is indeed not permanent. HSTPA, Part A. Thus, the Court is not persuaded by BRI Plaintiffs' arguments on this point. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Furthermore, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests. *Park Ave. Tower Assocs. v. City of New York,* 746 F.2d 135, 139-40 (2d Cir. 1984) (explaining that a takings claim based on loss profits is undermined further by the legion of cases that have upheld regulations which severely diminished the value of commercial property);

CHIP, 492 F. Supp. 3d at 51 ("[B]y the time these [p]laintiffs invested, the RSL had been amended multiple times, and a reasonable investor would have understood it could change again. Under the Second Circuit's case law, it would not have been reasonable, at that point, to expect that the regulated rate would track a given figure, or that the criteria for decontrol and rate increases would remain static."); *335-7 LLC,* 2021 WL 860153, at *12 ("[The] [p]laintiffs also cannot argue that the [HSTPA] interfered with their reasonable investment-backed expectations. Rent regulation has existed in some form in the City for over seventy years, and rent stabilization in particular has existed for over fifty years. Plaintiffs knowingly entered a highly regulated industry."). The Constitution does not demand that property owners be able to pass on to their tenants every penny of every expense and certainly not that they will be able to do so within a certain time frame. As explained during the legislative debate for the HSTPA, the changes to MCIs and IAIs were intended to "help the tenants . . . stay" in their units, as "some of the individual apartment improvements [were being] made not to improve the apartments as such, but simply to raise the rent." Assembly Bill A08281, Chamber Tr. at 35, 73 (New York 2019), https://www2.assembly.state.ny.us/write/upload/transcripts/2019/6-14-19.html. Further, the challenges to the HSTPA that adjust the recoupment rate for MCIs and IAIs follow two recent changes to these very processes. In both 2011 and 2015, the New York State Legislature ("the State Legislature") lengthened the recoupment rate and amortization period for IAIs and MCIs. The 2011 amendment changed the formula for IAIs so that a landlord could increase rent by 1/60 the cost of improvement in buildings with more than 35 units, changed from 1/40. 2011 N.Y. SESS. LAWS ch.

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

Finally, under *Penn Central* the Court looks to the "character of the governmental action." *Penn Cent.,* 438 U.S. at 124. Like the rent-control law upheld by the Supreme Court in *Bowles v. Willingham,* 321 U.S. 503 (1944), the HSTPA does not *"require* any person to . . offer any accommodations for rent." *Id.* at 517 (emphasis added). Instead, the HSTPA imposes "negative restriction[s]" on permitted uses, which are "uncharacteristic of a regulatory taking." *Buffalo Teachers,* 464 F.3d at 375; *see also Elmsford,* 469 F. Supp. 3d at 168 (finding eviction moratorium did not have the character of a taking). As discussed above, the HSTPA does not result in the physical occupation of property, but instead simply adjusts the economic relationship between owners and tenants. *FHLMC,* 83 F.3d at 48 (affirming the denial of a regulatory taking claim because plaintiff failed to demonstrate deprivation of economically viable use of the property); *Dinkins,* 805 F. Supp. at 163 (noting that the Second Circuit does not consider the denial of a reasonable return, for rent regulation, as necessarily preventing an owner's economical viable use of his land); *Greystone Hotel,* 13 F. Supp. 2d at 528-29 (finding no regulatory taking

where plaintiff failed to offer facts showing that it was denied economically viable use of its property even if such use was not the plaintiffs preferred one); *Higgins,* 630 N.E. 2d at 633-34 (rejecting regulatory taking claim where the regulations did not affect the owner's right to receive the regulated rents). The HSTPA builds upon a long-standing regime of rent-stabilization that has repeatedly been upheld by courts in previous regulatory takings challenges. *335-7 LLC,* 2021 WL 860153, at *12 (rejecting a regulatory taking by reasoning that the Second Circuit has rejected the notion that loss profits, much less loss of a reasonable return, alone could constitute a taking); *CHIP,* 492 F. Supp. 3d at 51 (finding that because plaintiffs made their investments in rent-stabilized property against a backdrop of New York law that suggested RSL could change, plaintiffs could thus not allege that the HSTPA violated their reasonable investment-backed expectations).

"Legislation designed to promote the general welfare commonly burdens some more than others." *Penn Cent.,* 438 U.S. at 133. To the extent BRI and G-Max Plaintiffs attack the efficacy and the wisdom of the HSTPA, (BRI Compl. ¶¶ 5, 75, 87, 94, 244; G-Max Compl. 65-101, 114, 246), the case law is clear that the relevant inquiry for the courts is whether a law "arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones" or reflects "land-use control as part of some comprehensive plan," *Penn Cent.,* 438 U.S. at 132. The HSTPA applies to about one million rental units in New York City and 25,000 rental units in the 21 municipalities in Westchester County. (BRI Compl. ¶ 1, at 98; G-Max Comp. ¶ 60.) The alleged burdens of the HSTPA are thus shared among many more property owners than the law upheld in *Penn Central.*

As G-Max Defendants point out, landlords receive corresponding benefits because the HSTPA facilitates housing for those who otherwise could not afford it, specifically in some instances to New Yorkers who provide vital but undercompensated services, and some who would experience homelessness without it. (G-Max CVH Mem. at 24.) This in turn creates a more diverse community, and owners of unregulated properties (or regulated ones with market values below regulated rents) can charge more because of the increased demand for real estate these community benefits allow. *(Id.)* The Supreme Court has noted that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *See Loretto,* 458 U.S. at 426. The HSTPA is the State Legislature's response to an ongoing housing emergency in New York and, as such, is a "public program adjusting the benefits and burdens of economic life to promote the common good." *1256 Hertel Ave.,* 761 F.3d at 264 (citation omitted).

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

08 (2003) ("Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." (citation and quotation marks omitted)); *Authors Guild, Inc. v. HathiTrust,* 902 F. Supp. 2d 445, 455 (S.D.N.Y. 2012) ("Article III of the Constitution limits the jurisdiction of the federal courts to cases or controversies of sufficient immediacy and reality and not hypothetical or abstract disputes." (citation and quotation marks omitted)), *vacated in part on other grounds,* 755 F.3d 87 (2d Cir. 2014).

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

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

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

F. Substantive Due Process Under the Fourteenth Amendment

1. Applicable Law

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

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

lack razor-sharp precision." *Beatie,* 123 F. 3d at 712. Thus, if public "officials responsible for the enforcement guidelines reasonably might have conceived that the policies would serve legitimate interests, those guidelines must be sustained." *All Aire Conditioning, Inc. v. City of New York,* 979 F. Supp. 1010, 1018 (S.D.N.Y. 1997).

The Due Process Clause "protects individual liberty against certain government actions." *Collins v. City of Harker Heights,* 503 U.S. 115, 125 (1992) (quotation mark omitted). The Due Process Clause offers heightened protection against government interference with certain fundamental rights and liberty interests. *Reno v. Flores,* 507 U.S. 292, 301-02 (1993). These fundamental rights are "specific freedoms protected by the Bill of Rights" and those liberties which have been designated by the Supreme Court in a long line of cases. *See Washington v. Glucksberg,* 521 U.S. 702, 720 (1997) (citing cases in which the Supreme Court recognized various fundamental rights such as the right to marry or to have an abortion). However, economic regulations, such a rent-stabilization, are not subject to the same heightened scrutiny as fundamental rights. *See F.C.C. v. Beach Commc 'ns, Inc.,* 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines or infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."); *see also Immediato v. Rye Neck Sch. Dist.,* 73 F.3d 454, 461 (2d Cir. 1996) ("Where the claimed right is not fundamental, the government regulation need only be reasonably related to a legitimate state objective.").

2. Analysis

BRI and G-Max Plaintiffs assert that the HSTPA violates rent regulated property owners' substantive due process rights in violation of both the U.S. and New York Constitutions. (BRI Compl. ¶¶ 40-70, 84-97, at 92-94; G-Max Compl. ¶¶ 239-54)[32,33] Specifically, BRI Plaintiffs argue that the HSTPA violates due process because it is not "rationally related to achieve any of the ends that have been used to justify the extreme measures taken under this law" and that it "fails to[] achieve the ends that it is claimed to serve." (BRI Compl. ¶¶ 42-44, 50.) To support their claim, BRI Plaintiffs cite studies by economists that the HSTPA does not achieve the purposes for which it allegedly was passed. *(Id. ¶¶* 59, 146.) G-Max Plaintiffs make similar allegations, such as that the HSTPA "does not substantially advance legitimate state interests" and "does not accomplish its stated objective." (G-Max Compl. ¶ 242.) G-Max Plaintiffs also argue that the HSTPA "contravenes its purported intent—supposedly, to preserve affordable housing in New York" but "in fact, [it] do[es] the opposite." *(Id.* ¶ 5.) While the specifics of their allegations somewhat differ, BRI and G-Max Plaintiffs both allege broadly that the HSTPA is "arbitrary and irrational" on its face. (BRI Compl. ¶¶

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

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

2-3, 41, 69, 91, 95, 97, at 93-94; G-Max Compl. ¶¶ 1, 5, 20, 69, 101-02, 243, 252, 278)[34]

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

> (1) its repeal of the income cap for rent-regulated apartments with rents above a certain threshold . . . (2) its repeal of provisions that allowed units to be removed from rent stabilization or control once the rent crossed a statutory high-rent threshold and the unit became vacant; (3) its repeal of provisions permitting larger rent increases for a new tenant after a vacancy; (4) its modification of the preferential rent provisions such that owners who voluntarily agreed to a further-reduced rent in the past (even before the HSTPA took effect) cannot even charge the government-approved legal regulated rent upon renewal; (5) its lowering of the rent increase cap for MCIs from 6% to just 2% in rent-stabilized apartments in New York City, from 15% to 2% in rent-controlled apartments in New York City, and from 15% to 2% in other counties when landlords make MCIs (and its elimination of such increases after 30 years); (6) its retroactive application of these MCI rent increase caps to rent increases attributable to MCIs that were approved within the seven years *prior* to the amendment taking effect; (7) its outright elimination of MCIs for buildings with 35% or fewer rent-regulated units; (8) its cap of $15,000 over 15 years on recoverable IAI spending—spread across a maximum of just three IAIs . (9) its restrictions on evicting tenants who do not pay their rent, potentially extending their tenancies for up to a year; (10) its curtailment of owners' rights to reclaim possession of their units for personal use and occupancy . . .

First, as a threshold matter, BRI and G-Max Plaintiffs cannot invoke the substantive due process doctrine to circumvent the requirements of takings claim. In *Stop the Beach Renourishment, Inc. v. Florida. Department of Environmental Protection,* 560 U.S. 702 (2010) (plurality opinion), the Supreme Court explained that plaintiffs cannot use substantive due process "to do the work of the Takings Clause" in circumstances in which "a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior." *Id.* at 721; *see also Albright v. Oliver,* 510 U.S. 266, 273 (1994) (plurality opinion) ("Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" (quoting *Graham v. Connor,* 490 U.S. 386, 395 (1989))); *Gounden v. City of New York,* No. 10-CV-3438, 2011 WL 13176048, at *4 (E.D.N.Y. Apr. 22, 2011) (finding that the Fifth Amendment, an explicit textual source, guides the analysis for plaintiff's taking claim rather than substantive due process). Undaunted by contrary authority, BRI Plaintiffs contend that "a reading of the case law reveals" that they may bring a substantive due process claim that "arise[s] out of the same facts as their takings claim." (BRI Pls.' Mem. at 47.) In support of this assertion, BRI Plaintiffs rely on Justice Kennedy's concurrence in *Lingle* and his concurrence

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> (11) its retroactive expansion of the limitations, record-retention, and lookback periods for rent overcharge claims; and (12) its imposition of substantial new restrictions on co-op/condo conversions . . . .

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

in *Stop the Beach,* pointing to the notion that "a regulation might be so arbitrary or irrational as to violate due process." *(Id.* (citing *Lingle,* 544 U.S. at 548-49 (Kennedy, J., concurring); *Stop the Beach,* 560 U.S. at 737 (Kennedy, J., concurring)).) But a concurrence is not binding precedent. *See Maryland v. Wilson,* 519 U.S. 408, 412-13 (1997) (observing that statement in a concurrence does not "constitute[ ] binding precedent"). Given the lack of authority for the claim, the Court rejects it and dismisses the due process claims. *Stop the Beach,* 560 U.S. at 721.

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

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[35] BRI Plaintiffs dispute the standard of review for their due process claim. BRI Plaintiffs first argue that strict scrutiny should apply to their due process claim but only a page later in their brief state that such a claim "requires that [the] economic legislation be supported by a legitimate legislative purpose furthered by a *rational* means." (BRI Pls.' Mem. at 50-51 (emphasis added and citation omitted); BRI Compl. ¶ 5, at 92 (stating that the HSTPA "warrants strict scrutiny" and should be struck down because it is not "narrowly tailored" to serve a compelling government interest).) For the purposes of resolving the instant Motions, the Court construes this to mean that BRI Plaintiffs contend that the HSTPA should be analyzed under a strict scrutiny standard. And in the event the Court disagrees with that standard, BRI Plaintiffs argue that the HSTPA does not even pass muster under rational basis review. However, the HSTPA does not involve suspect classifications, nor does it impinge on any fundamental rights. *See Pennell,* 485 U.S. at 13-14 (holding that the Supreme Court "will not overturn a statute that does not burden a suspect class or a fundamental interest unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational" (alteration omitted)). Further, BRI Plaintiffs offer no authority or basis to establish that there is a fundamental

due process rights are violated due to "the lack of surveys and findings of an emergency for decades." (BRI Pls.' Mem. at 49.) BRI Plaintiffs point to "the amount of housing construction in Westchester in the last decades," asserting that this is "more than adequate housing." *(Id.)* BRI Plaintiffs further contend that the HSTPA "impinges on substantive property rights, not merely economic regulation, but basic restriction on a person's ability to use his or her own property without arbitrary and unconscionable government restriction." *(Id.* at 51.) BRI Plaintiffs lodge conclusory allegations to challenge the lack of underlying data to support the State Legislature's concern about housing emergencies while offering no analysis as to why the HSTPA does not pass rational basis review to warrant discovery. *(Id.* at 51-52.)

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

> authorizes tenants to remain entrenched in rent-regulated units no matter how high the rent or how high their incomes[,] ([G-Max] Compl. ¶ 245); how the repeal of the sunset

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right to rent apartments without government regulation. *(See generally* BRI Pls.' Mem.) Given the lack of support offered by BRI Plaintiffs and the case law holding otherwise, the Court concludes that HSTPA is subject to a rational basis standard. *See Sidberry v. Koch,* 539 F. Supp. 413,419 (S.D.N.Y. 1982) ("[H]ousing is not a fundamental right, and classifications affecting housing are subject only to the 'rational relationship' test."). G-Max Plaintiffs do not advocate for "heightened" or "strict" scrutiny of their due process claim. (G-Max Pls.' Mem. at 53 n.45.)

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

(*Id.* at 53.) But the Second Circuit has held that "[l]egislative acts that do not interfere with fundamental rights or single out suspect classifications carry with them a strong presumption of constitutionality and must be upheld if rationally related to a legitimate state interest." *Beatie,* 123 F.3d at 711 (quotation marks omitted). A regulation "may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns,* 508 U.S. at 315; *see also Lingle,* 544 U.S. at 544-45 (noting that the "reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established," and that such deference is preferable to "choos[ing] between the views of two opposing economists"); *Beatie,* 123 F.3d at 713 (holding that "a lack of direct empirical support for the [legislature's] assumption" could not "rebut the presumption that the statute has a rational basis"). 2019 N.Y. SESS. LAWS ch. 36, N.Y. Comm (McKinney)

The State Legislature had a rational basis to pass the HSTPA to achieve its goals related to the State's housing crisis. Specifically, the State Legislature found that "tenants struggle[d] to secure safe, affordable housing, and landlords ha[d] little incentive to keep tenants in place long term by offering consistently low rent increases." N.Y. Comm. Report, S. 6458 ("Committee Report"), 242nd Sess. (2019). In direct response to such a concern, the State Legislature limited landlords' ability to deregulate units so that tenants would not be displaced and curtailed landlords' ability to increase rents. The HSTPA also addressed the issues of housing instability and tenant hardship, both of which are recognized as a legitimate state goal. *See Pennell,* 485 U.S. at 14 n.8 ("The consideration of tenant hardship also serves the additional purpose . . . of reducing the costs of dislocation that might otherwise result if landlords were to charge rents to tenants that they could not afford."); *CHIP,* 492 F. Supp. 3d at 52 (upholding RSL where the housing shortage was only one of multiple justifications offered for the regulation, and concluding that a statute must be upheld so long as any one justification is valid). The State's interest in stabilizing rent, limiting a landlord's ability to charge more than the regulated rent, preventing deregulation of rent-stabilized apartments, and restricting the ability of landlords to remove tenants in certain circumstances are rationally related to the goal of maintaining stable rents and keeping tenants in their homes. *Pennell,* 485 U.S. at 13 (noting that the Supreme Court "ha[s] long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare" and this includes "protecting tenants from burdensome rent increases"); *see also Nordlinger v. Hahn,* 505 U.S. 1, 12 (1992) ("[T]he State has a legitimate interest in local

neighborhood preservation, continuity, and stability."). Rent stabilization laws, like the HSTPA, serve the aim of keeping tenants in their homes. *See Higgins,* 630 N.E.2d at 634 (finding a "close causal nexus" between the RSL and preventing homelessness); *CHIP,* 492 F. Supp. 3d at 52 (rejecting Due Process challenge to the HSTPA given the multiple justifications for the law, such as alleviating New York City's housing shortage).[36] As the Supreme Court long ago articulated in *Pennell,* the goal of "preventing excessive and unreasonable rent increases caused by the growing shortage of and increasing demand for housing . . . is a legitimate exercise of . . . police powers." 485 U.S. at 12 (quotation marks omitted).

Importantly, one of the broadest aims of the HSTPA is to make housing more affordable. HSTPA, Part D, §1 ("The situation has permitted speculative and profiteering practices and has brought about the loss of vital and irreplaceable affordable housing for working persons and families. The legislature therefore declares that in order to prevent uncertainty, potential hardship[,] and dislocation of tenants living in housing accommodations subject to government regulations as to rentals and continued occupancy as well as those not subject to such regulation, the provisions of this act are necessary to protect the public health, safety[,] and general welfare."). Even dating back to 1969 when the first RSL were passed, the City Council at the time found that landlords were "demanding exorbitant and unconscionable rent increases," which caused "severe hardship to tenants." N.Y.C. Admin. Code § 26-501.

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[36] Plaintiffs in *335-7 LLC* also raised a due process claim but agreed to dismissal and conceded that their damages claim against the State was barred by sovereign immunity. As such, the district court dismissed both claims. 2021 WL 860153, at *4 n.2.

Limiting landlords' ability to charge more than the regulated rent, placing caps on the amount chargeable for credit checks and late fees, preventing deregulation of units, and changing the percentage needed to covert buildings into condominiums and cooperatives are related to the overall goal of preventing excessive and unreasonable rent increases rampant throughout New York State and serve the aim of making housing more affordable. The New York State Senate sought to lock in preferential rents to close the loophole that permitted owners to increase rents by a greater percentage than that approved by the local RGBs, and to prevent sharp rent increases that could force tenants to be displaced from their apartments. *See* Committee Report. ("[The HSTPA was] enacted in response to an ongoing housing shortage crisis, as evidenced by an extremely low vacancy rate. Under tight rental markets, tenants struggle to secure safe, affordable housing, and landlords have little incentive to keep tenants in place long term by offering consistently low rent increases.").[37] The New York State Senate explained in its justification of the HSTPA that the City and the municipalities in Nassau, Westchester, and Rockland struggle to protect

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

their regulated housing stock, which is critical in "maintain[ing] affordable housing for millions of low and middle income tenants." *Id.* The New York State Senate went on to describe that the rent regulations in the HSTPA make it so that "residents can afford to live there without the threat of eviction, the fear of rapid and unaffordable rent increases, or rent burden." *Id.* These aims are "rationally related to a legitimate government interest." *Beatie,* 123 F.3d at 711; *see also Pennell,* 485 U.S. at 13 (applying rational basis review to a rent regulation and highlighting that the Supreme Court has "long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare").

While BRI and G-Max Plaintiffs wish to cast doubt on the wisdom of the HSTPA, "it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary to sit as superlegislature to weigh the wisdom of legislation." *Exxon Corp. v. Governor of Md.,* 437 U.S. 117, 124 (1978) (quotation marks omitted). Given the clear connection between the State Legislature's purpose and the enactment of the HSTPA, Plaintiffs' allegations regarding the efficacy of the law do not diminish that it aims to serve the permissible goal, even if imperfectly, to address housing issues in the State. *(See* BRI Compl. ¶¶ 44-70; G-Max Compl. ¶¶ 75-78.) The Supreme Court has "emphatically refuse[d] to go back to the time when courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Ferguson v. Skrupa,* 372 U.S. 726, 731-32 (1963) (quotation marks omitted). It is long settled that "States have power to legislate against what are found to be injurious practices in their internal commercial and business

affairs . . . .” *Id.* at 730. BRI and G-Max Plaintiffs’ substantive due process claims therefore fail to state a claim and are consequently dismissed.

G. Equal Protection

1. Applicable Law

G-Max Plaintiffs also bring equal protection claims. The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall make or enforce any law which . . . den[ies] to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. This is “essentially a direction that all persons similarly situated be treated alike.” *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985); *see also Sound Aircraft Servs., Inc. v. Town of East Hampton,* 192 F.3d 329, 335 (2d Cir. 1999) (“At its core, equal protection prohibits the government from treating similarly situated persons differently.”). To state an equal protection claim, G-Max Plaintiffs must “plausibly allege that [they have] been intentionally treated differently from others similarly situated and no rational basis exists for that different treatment.” *Progressive Credit Union v. City of New York,* 889 F.3d 40, 49 (2d Cir. 2018) (citing *Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000)). The Constitution guarantees the “right to be free from invidious discrimination in statutory classifications and other governmental activity.” *Harris v. McRae,* 448 U.S. 297, 322 (1980). Where a challenged policy neither disadvantages a suspect class nor interferes with a fundamental right, the claim will survive constitutional scrutiny if the policy is rationally related to a legitimate state purpose or interest. *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 17 (1973).

2. Analysis

G-Max Plaintiffs allege an equal protection violation. (G-Max Compl. ¶¶ 255-64.)[38] Specifically, G-Max Plaintiffs claim that the HSTPA "singles out building owners whose properties happen to include rent-regulated units . . . for oppressive treatment that . . . bears no rational relationship to the goal of providing affordable housing." *(Id.* ¶¶ 257, 262.) G-Max Plaintiffs do not contend that the HSTPA disadvantages a suspect class or interferes with a fundamental right; instead they argue that the law is not rationally related to a legitimate state interest. (G-Max Pls.' Mem. at 63-64.) Rational basis review is the proper standard to analyze equal protection challenges to rent stabilization laws. *See Black v. State of New York,* 13 F. Supp. 2d 538, 542 (S.D.N.Y. 1998) ("The rational relationship standard is the appropriate standard for testing the validity under the Equal Protection Clause of laws regulating housing rental rates."); *see also Lindsey v. Normet,* 405 U.S. 56, 74 (1972) (applying rational relationship standard to statute that mandated timely determination of eviction proceedings).[39] Under this standard, a challenged statute is given a strong presumption of validity and then tested to determine if the classification it creates is rationally related to a legitimate state interest. *City of Cleburne,* 473 U.S. at 440; *Beach Commc'ns,* 508 U.S. at 314-15. "[E]qual protection is not a license for courts to judge the

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

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

wisdom, fairness, or logic of legislative choices." *Beach Commc'ns,* 508 U.S. at 313. Indeed, following this principle, courts have upheld prior iterations of RSL in New York against equal protection challenges. *See Black,* 13 F. Supp. 2d at 542 (dismissing equal protection challenge to RSL's succession provisions because "prevention of the loss of housing by apartment inhabitants" is "a legitimate goal of the state and city legislatures"); *see also Pennell,* 485 U.S. at 14 (rejecting equal protection claim to a provision of a San Jose rent control law because the ordinance was designed to serve the legitimate purpose of protecting tenants and could hardly be viewed as irrational).

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

H. Contract Clause Under Article I, § 10

1. Applicable Law

Article I, § 10 provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST., art. I, § 10, cl. 1. To state a claim for violation of the Contract Clause, a complaint must allege sufficient facts to demonstrate that state law has "operated as a substantial impairment of a contractual relationship." *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 186 (1992) (citations omitted). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether

the impairment is substantial." *Id.* Even if a state law constitutes a substantial impairment, however, it will survive a Contract Clause challenge if it serves "a significant and legitimate public purpose" and "the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co.,* 459 U.S. 400, 411-12 (1983) (alterations in original) (quoting *U.S. Tr. Co. v. New Jersey,* 431 U.S. 1, 22 (1977)).

To determine whether a Contract Clause violation exists, the threshold question is "'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Id.* at 411. As the severity of impairment increases, so too does the level of scrutiny to which the legislation is subjected. *Id.* As a measure of contractual expectations, one factor to be considered in determining the extent of the impairment is "whether the industry the complaining party has entered has been regulated in the past." *Kraebel v. N.Y.C. Dept. of Hous. Pres. & Dev.,* 959 F.2d 395, 403 (2d Cir. 1992) (citation omitted). The next question is whether the state has "a significant and legitimate public purpose behind the regulation." *Energy Rsrvs.,* 459 U.S. at 411. Lastly, the Court must consider "whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *Id.* at 412 (brackets in original) (citations and quotations omitted).

2. Analysis

BRI and G-Max Plaintiffs challenge the HSTPA's change to preferential rents as a violation of the

Contract Clause. U.S. CONST., art. I, § 10, cl. 1. *(See* BRI Compl. IN 121-23; G-Max Compl. ¶¶ 265-72.) BRI Plaintiffs also argue that the HSTPA "diminishes the ability of a landlord to maintain the housing, perform capital repairs, do individual apartment improvements, and eliminates the availability of housing for those in the most need due to the purported 'goal.'" (BRI Pls.' Mem. at 60.) Similarly, G-Max Plaintiffs allege that the HSTPA has impaired existing contractual relationships based on other provisions aside from preferential rents, which include limits on MCIs and IAIs that were already under contract, limiting the amount recoverable in a summary proceeding, "destroying the benefit of the bargain for owners who contracted with the City to offer affordable housing units under the Article XI program," and a change to the percentage required for cooperative and condominium conversions. (G-Max Compl. ¶ 268.)[40] G-Max Plaintiffs make facial and as-applied challenges under the Contract Clause. *(Id.* ¶ 267.) BRI Plaintiffs argue that the HSTPA violates the Contract Clause as it "impairs the existing lease (contract) agreements." (BRI Compl. at 96.) G-Max Plaintiffs lodge a similar complaint, alleging that the HSTPA causes the "substantial impairment

[40] The G-Max Complaint alleges the HSTPA "destroy[s] the benefit of the bargain for owners who contracted with the City to offer affordable housing units under the Article XI program." (G-Max Compl. ¶ 268(d).) But none of the G-Max Plaintiffs claims that it opted into rent stabilization under Article XI. G-Max Plaintiffs also argue that the HSTPA renders cooperative and condominium conversions impossible for owners who had already entered into contracts to finance such conversions under the prior regime. (G-Max Compl. ¶ 268(e).) But G-Max Plaintiffs have not alleged that they entered into such conversion contracts that have been impacted by the HSTPA. Thus, G-Max Plaintiffs lack standing to assert these claims and such claims are consequently dismissed. *See* U.S. CONST., art. III, § 2.

of existing contracts," rendering the law "invalid." (G-Max Compl. ¶ 5.) Specifically, G-Max Plaintiffs allege that the HSTPA "has undermined the bargains embodied in these contracts, interfered with the contracting parties' reasonable expectations, and prevented landlord owners, including [G-Max] Plaintiffs, from safeguarding their rights." (*Id.* ¶ 269.)[41] BRI and G-Max Plaintiffs also challenge the provision which provides that the rent under a renewal lease "shall be no more than the rent charged to and paid by the tenant prior to that renewal, as adjusted by the most recent applicable [Rent Guidelines Board-approved] increases and any other increases authorized by law." *See* HSTPA, Part E § 1. The change is essentially that this provision applies to all rent regulated rents, including preferential rents.

BRI and G-Max Plaintiffs have not plausibly stated a Contract Clause violation because their claims are based on future, rather than existing, contracts. (BRI Pls.' Mem. at 62-64; G-Max Pls.' Mem. at 65-66.) The

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[41] G-Max Plaintiffs describe the HSTPA as causing a substantial impairment of existing contracts. (G-Max Compl. ¶ *5.)* G-Max Plaintiffs also state that "[t]he only real winners here will be wealthy white tenants who, according to U.S. Census Bureau data, already disproportionality benefit from rent regulation, and who are now poised to receive a massive windfall at the expense of minority renters who will be frozen out of historically majority-white neighborhoods." *(Id.)* But as G-Max State Defendants point out, according to the most recent 2014 New York City Housing and Vacancy Survey, renter occupied housing units by rent regulation status show that 64.4% of rent-stabilized tenants are racial minorities, and only 35.6% are white. *See Series IA: Renter Occupied Housing Units by Rent Regulation,* U.S. CENSUS BUREAU Table 4 (2014), https://www.census.gov/data/tables/time-series/demo/nychvs/series-1a.html. Thus, repeal of the HSTPA would harm the existing minority tenants who live in rent regulated housing. (G-Max State Defs.' Mem. at 49 n.13.)

law has been well settled for almost 200 years that the Contract Clause does not "limit the ability of the government to regulate the terms *of future* contracts." *Traher v. Republic First Bancorp, Inc.,* 432 F. Supp. 3d 533, 539 (E.D. Pa. 2020) (emphasis in original) (citing *Ogden v. Saunders,* 25 U.S. 213 (1827)). Recently, in *CHIP,* the court evaluated similar claims by plaintiffs that the HSTPA revised the duration of their expiring leases as "unavailing." 492 F. Supp. 3d at 53. The court explained that as applied to future renewals "[a] contract . . . cannot be impaired by a law in effect at the time the contract was made." *Id.* (alterations in original) (quoting *Harmon,* 412 F. App'x at 423). The court explained that future leases will be subject to the HSTPA from the onset. *Id.* (citing *2 Tudor City Place Assocs. v. 2 Tudor City Tenants Corp.,* 924 F.2d 1247, 1254 (2d Cir. 1991) ("Laws and statutes in existence at the time a contract is executed are considered a part of the contract, as though they were expressly incorporated therein.")); *see also Bricklayers Union Loc. 21 v. Edgar,* 922 F. Supp. 100, 105 (N.D. Ill. 1996) (holding that "claims regarding future contracts do not state a claim since the Contract Clause does not apply to laws with prospective effect."). The court in *CHIP* ultimately rejected the plaintiffs' Contract Clause claim regarding their expiring, preferential leases on these grounds. 492 F. Supp. 3d at 53. BRI and G-Max Plaintiffs do not allege that Part E of the HSTPA has been applied retroactively to any lease renewals between Plaintiffs and their tenants. Still, even if BRI and G-Max Plaintiffs had made such allegations, precedent bars such challenges to the HSTPA under the Contract Clause to enjoin the law's enforcement against future contracts. *See Elmsford,* 469 F. Supp. 3d at 170 ("[T]he Contracts Clause also permits states to modify and abrogate existing contract terms long since

agreed to and performed by the parties."); *see also Fraternal Ord. of Police v. District of Columbia,* 502 F. Supp. 3d 45, 59-60 (D.D.C. 2020) ("As to any future contracts, it is well established that that Contract Clause only concerns itself with laws that retroactively impair current contract rights."), *appeal docketed,* No. 21-7059 (2d Cir. June 7, 2021); *Powers v. New Orleans City,* No. 13-CV-5993, 2014 WL 1366023, at *4 (E.D. La. Apr. 7, 2014) ("[T]he Contract Clause applies only to substantial impairment of existing contracts and not prospective interference with a generalized right to enter into future contracts."), *aff'd sub nom. Powers v. United States,* 783 F.3d 570 (5th Cir. 2015); *Robertson v. Kulongoski,* 359 F. Supp. 2d 1094, 1100 (D. Or. 2004) ("The Contract Clause does not prohibit legislation that operates prospectively."), *aff'd,* 466 F.3d 1114 (9th Cir. 2006). The HSTPA allows owners to increase preferential rents annually by the same percentages as any other regulated rents, as well as to account for MCIs, IAIs, and otherwise as authorized by law. *See* HSTPA, Part E, § 1. BRI Plaintiffs assert that the HSTPA "forever extend[s]" the preferential rent in current leases. (BRI Pls.' Mem. at 63.)[42] However, this is not accurate. Tenants must sign new leases to continue their occupancy, and landlords can increase rents in those new leases by the amount set by the RGB or decline to renew the leases in certain circumstances such as to recover for personal use based on an immediate and compelling necessity, among other exit options. HSTPA, Part E; N.Y.C. Admin. Code § 26-511(c)(9)(b); N.Y.C.R.R. tit. 9 §§ 2524.5(a)(2), 520.11(e), 2522.4(b) and (c). For G-Max Plaintiffs in

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

particular, while they have identified a contractual relationship, they have not alleged that it was impaired by the HSTPA. Plaintiff G-Max cites a preferential rent for a two-year lease that commenced February 1, 2018, and expired on February 1, 2020 and Plaintiff Longfellow entered into a two-year lease also with preferential rent that started May 1, 2018 and ended July 1, 2020. *(See* G-Max Compl. ¶¶ 131, 135.) However, both these leases took effect *prior* to the enactment of the HSTPA (on June 14, 2019); thus, the law did not impair these contracts at all. These G-Max Plaintiffs would have collected the same rent for the duration of these contracts had the HSTPA not been enacted.

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

Further, any as-applied Contract Clause claims against BRI and G-Max Defendants fails because the

HSTPA does not substantially impair new leases due to the fact that no reasonable expectations have been disrupted. It is "well established that [New York] City's rent control laws do not unconstitutionally impair contract rights." *Brontel, Ltd. v. City ofNew York,* 571 F. Supp. 1065, 1072 (S.D.N.Y. 1983) (citing *Marcus Brown Holding Co. v. Feldman,* 256 U.S. 170, 198 (1921)); *Tonwal Realties, Inc. v. Beame,* 406 F. Supp. 363, 365 (S.D.N.Y. 1976) (same); *Israel v. City Rent & Rehab. Admin. of N.Y.,* 285 F. Supp. 908, 910 (S.D.N.Y. 1968) (holding that the constitutionality of rent control statute is well settled and does not violate the impairment of contract rights); *see also Troy Ltd. v. Renna,* 727 F.2d 287, 298-99 (3d Cir. 1984) (holding that the rental housing law did not violate the Contract Clause because courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure and noting that it was doubtful that any impairment of a contractual relationship had occurred); *Kargman v. Sullivan,* 582 F.2d 131, 134-35 (1st Cir. 1978) (finding no Control Clause violation for Boston's rent control law).

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

> put hundreds of thousands of tenants at risk of sudden and unexpected substantial rent

> increases. All too many . . . have been unable to pay the higher rents and been forced to leave their homes. Countless tenants have also been discouraged from raising concerns about conditions in their apartments and/or buildings because of fears this could lead to the termination of their preferential rents.

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

835-36 (App. Div. 2007) (noting that RSL were amended in 2003 to allow owners to revoke preferential rents upon renewal). The State Senate in its enactment of the HSTPA sought to remedy the issue of preferential rents, and this Court must defer to the legislative judgment regarding the necessity and reasonableness of taking this measure. *See U.S. Tr. Co.,* 431 U.S. at 22-23 ("As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."). It is not for this Court to "weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423 (1952); *see also Pa. Coal,* 260 U.S. at 413 ("The greatest weight is given to the judgement of the legislature[.]").[43]

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

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

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

III. Conclusion

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

SO ORDERED.

Dated: September 14, 2021
White Plains, New York

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

/s/ Kenneth M. Karas
KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-

BUILDING AND REALTY INSTITUTE OF WESTCHESTER AND PUTNAM COUNTIES, INC., APARTMENT OWNERS ADVISORY COUNCIL, COOPERATIVE AND CONDOMINIUM COUNCIL, STEPPING STONES ASSOCIATES, L.P., LISA DEROSA AS PRINCIPAL OF STEPPING STONES ASSOCIATES, L.P., JEFFERSON HOUSE ASSOCIATES, LP; SHUB KARMAN, INC., DiLaRe, INC., PROPERTY MANAGEMENT ASSOCIATES and NILSEN MANAGEMENT CO., INC.,

Plaintiffs,

v.

STATE OF NEW YORK, RUTHANNE VISNAUSKAS, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF NEW YORK STATE HOMES AND COMMUNITY RENEWAL, DIVISION OF HOMES AND COMMUNITY RENEWAL,

Defendants.

VERIFIED COMPLAINT

Plaintiffs Building And Realty Institute of Westchester And Putnam Counties, Inc., Apartment Owners Advisory Council, Cooperative And Condominium Council, Stepping Stones Associates, L.P., Lisa DeRosa, As Principal of Stepping Stones Associates, L.P., Shub Karman, Inc., Jefferson House Associates, LP; DiLaRe, Inc., Property Management Associates and Nilsen Management Co., Inc. (collectively referred to herein as the "Plaintiffs"), by their undersigned attorneys,

Finger & Finger, A Professional Corporation, for their Verified Complaint allege as follows:

NATURE OF THE ACTION

1. This action challenges the constitutionality of the 2019 New York Housing Stability and Tenant Protection Law (sometimes referred to herein as the HSTPA) as the successor and amendment to the predecessor Emergency Tenant Protection Act (ETPA) that covers approximately 25,000 rental apartments in Westchester County as well as approximately 500,000 other residences in the County whether apartment dwellings, cooperative apartments, single family condominium units or even single family dwellings in Westchester.

2. The 2019 Housing Stability and Tenant Protection Act (HSTPA) violates the United States Constitution and the New York State Constitution. It is an arbitrary exercise of governmental power and is arbitrary and irrational and in violation of the Fourteenth Amendment's Due Process Clause as well as the Constitutional right prohibiting governmental interference with private contracts;; it effects a physical as well as regulatory taking of property in violation of the Constitution's Takings Clause; The HSTPA is therefore unconstitutional.

3. The rent laws, as codified in several places, including Section 4 of chapter 576 of the laws of 1974 (constituting the ETPA), and are found in N.Y. UNCONSOL. LAW TIT. 23 §§ 8621 et seq. (McKinney). The HSTPA was passed on June 14, 2019 and signed by the Governor and effective on or about June 14 and after some corrections, on June 25, 2019. The majority of the provisions of the law were effective immediately, but some are effective at various time until October, 2019. The ETPA was first effective in 1974 and built upon (and provided an alternative to) the rent control

laws then in existence. The ETPA has been amended on multiple occasions, culminating in these most recent amendments, the HSTPA, which was enacted in June 2019. The HSTPA violates multiple provisions of the federal and state Constitutions. There can be no doubt that the HSTPA's irrationality and arbitrariness, and its web of restrictions overrides fundamental rights of property owners and impose unconstitutional burdens on property owners of pre-1974 buildings with six or more units (the "ETPA" threshold).

4. The HSTPA's harmful effects are not limited to the group of multi-family rent regulated property owners that are subject to its requirements. To the contrary, the law affects all property owners, including cooperatives, condominiums and single family residences.

PARTIES

5. Plaintiff Building and Realty Institute of Westchester and Putnam Counties, Inc. ("BRI") is a not-for-profit trade association composed of over 1500 members, consisting of managing agents and property owners of both rent stabilized and non-rent stabilized properties in New York, over 300 cooperatives and condominium associations; builders, developers and remodelers. Among its basic functions, BRI advocates on behalf of its members before the Westchester County legislature; local city, town and village councils, the New York State Legislature, and State agencies, and is also affiliated with the New York State Builders Association. It advocates on behalf of its members before the Westchester County Rent Guidelines Board and defendant State Division of Housing and Community Renewal, now known as Homes and Community Renewal, on an array of housing policy issues, including the issue of rent regulation. BRI also fills an informational and educational role, providing updates in the form of

a monthly newsletter, Impact, 2 radio shows, seminars, and e-mails to its members relating to the requirements of State, County and local laws and regulations which impact upon the ownership and management of apartment buildings and housing in the County. In addition to a staff, BRI provides other services to its members—and sometimes to non-members—to assist in their efforts to comply with statutory and regulatory requirements, including, but not limited to, annual rent registrations with the State Division of Homes and Community Renewal. advocating on such diverse issues as lead paint, property taxes, water rates, and rent regulation. AOAC provides its members with a variety of services, including advice relating to regulatory compliance and assistance to members who are facing legal challenges. AOAC advocates on behalf of its members at the local, City, County and State levels and provides regular updates on issues of importance to property owners.

7. Plaintiff Cooperative and Condominium Council ('CCAC") is a component entity of the BRI, representing more than 150 cooperatives and condominiums in Westchester County. The BRI, and therefore, the CCAC, founded in 1946 has been a key participant in local, County and State housing policy for over 50 years, educating, advising and advocating on such diverse issues as lead paint, property taxes, water rates, and rent regulation. CCAC provides its members with a variety of services, including advice relating to regulatory compliance and assistance to members who are facing legal challenges. CCAC advocates on behalf of its members at the local, City, County and State levels and provides regular updates on issues of importance to property owners.

8. The following, some of whom are Plaintiffs herein, are all residents of Westchester County and have been deprived of their constitutional rights and have been subject to a governmental taking as set forth below:

a. Stepping Stones Associates, LP (‘ SS”) is a resident of White Plains, County of Westchester, New York. SS owns a 248 unit residential apartment building located in White Plains, New York. Many of the unit are subject to ETPA and now also to the HSTPA. The property was built by and has been in the owner’s family since 1974, and has owned it since. Lisa DeRosa, another plaintiff is a principal of Stepping Stones.

Plains, New York. Many of the unit are subject to ETPA and now also to the HSTPA. The property was built by and has been in the owner’s family since 1974, and has owned it since. Lisa DeRosa, another plaintiff is a principal of Stepping Stones.

b. Jefferson House Associates is a family owned real estate business also, founded by David Bogdanoff who was one of the first and premier developers of affordable housing in Westchester County. This Ossining building has approximately 240 apartments and virtually all are subject to HSTPA unless the landlord agrees to considerable restrictions and opts out of ETPA.

c. Shub Karman, Inc. is a small building with only 7 ETPA units.

d. Jeffrey Park III Ltd. LLC is a large apartment complex with over 200 units in Yonkers, many of which are still subject to ETPA and HSTPA

e. Broadlake Co. LP is a large apartment building in White Plains with many units subject to ETPA and HSTPA.

f. DiLaRe, Inc. is a family owned apartment building in Yonkers with 22 apartments, all of which are subject to ETPA and the HSTPA.

g. Nilsen Management Co., Inc. is the managing agent for 8 buildings in Yonkers, all of which have ETPA and HSTPA restricted apartments, and which therefor have a total rent roll that is over 8% under the market rent roll.

h. Property Management Associates which is the managing agent for a number of multi family rent regulated buildings in Westchester.

10. Defendant State of New York Homes and Community Renewal is the government entity given the responsibility by the state of New York to determine the existence of a housing emergency and to establish and implement rent stabilization.

11. The State of New York is a public corporation which through its legislature and governor voted on, approved and signed the HSTPA that is being challenged herein.

12. The Defendant Ruthann Visnauskas is the Commissioner of the New York State Division of Housing and Community Renewal ("DHCR") now known as Homes and Community Renewal ("HCR"). HCR (through its Office of Rent Administration-ORA) oversees the administration of the two rent regulatory systems—rent stabilization and rent control—in the State of New York. That administration includes but is not limited to the system for the annual registration of all ETPA apartments, the processing of major capital

improvement rent increase applications by owners, the processing of overcharge, service and other complaints by tenants, administrative hearings arising from challenges by owners and tenants to the determinations of such applications and complaints, and the promulgation of regulations, policy statements, fact sheets and operational bulletins, writing, promulgating, supplementing and interpreting the State rent regulation statutes.

JURISDICTION

13. This Court has personal jurisdiction over each Defendant in New York and in this judicial district because they each regularly transact business in this judicial district.

14. This Complaint alleges that Defendants have violated Plaintiffs' rights protected by the United States Constitution. Accordingly, this Court has subject-matter jurisdiction under the Supremacy Clause of the United States Constitution, Art. VI, Clause 2, and 28 U.S.C. §§ 1331 and 1343(a)(3). Plaintiffs seek declaratory and equitable relief under 28 U.S.C. § 2201 and 42 U.S.C. § 1983, and the award of attorneys' fees pursuant to 42 U.S.C. § 1988(b).

VENUE

15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because a substantial part of the events giving rise to the claims alleged herein have occurred, and will continue to occur, in this district, and because the properties that are the subject of this action are located in this district in Westchester County.

STANDING

16. AOAC, CCAC and the BRI each have organizational standing to bring this claim. They each (i) have

suffered and continue to suffer an imminent injury in fact to their organizations which are distinct and palpable; (ii) those injuries are fairly traceable to the HSTPA ; and (iii) a favorable decision would redress their injuries. *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay,* 868 F.3d 104, 109 (2d Cir. 2017).

17. As a result of the HSTPA, the AOAC, CCAC and BRI have been forced to devote substantial time and resources to counsel their members about how to administer their properties under the law, how to abide by the maze of new requirements governing the owners properties subject to the HSTPA and how to react to the HSTPA's requirements.

18. The AOAC and the BRI have participated in the Rent Guidelines Board process.

19. Both BRI and AOAC as well as the CCAC have counseled their members regarding advocacy related to the HSTPA and BRI Executive Director Albert A. Annunziata testified at an Assembly Housing Committee hearing concerning the proposed modifications to the ETPA. Multiple submissions to the legislature were made and many members of the BRI and AOAC participated. The confusion, engendered by the HSTPA is substantial and there still are many questions about the new legislation which impinges and impacts on the constitutional rights of all landlords and cooperatives.

20. The time and money AOAC and the BRI and CCAC have spent helping their members address the HSTPA has prevented them from spending those same resources assisting their members with other matters. This includes time and money that could be spent working on state, county and local legislative and regulatory issues, providing seminars for their members,

and researching and advocating for housing policies that benefit both owners and tenants. This expenditure of time and resources constitutes an organizational injury. See *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379 (1982) (equal housing non-profit would have organizational standing to challenge discriminatory policies that forced it to expend time and resources investigating instances of discrimination and providing counseling to victims); *Nnebe v. Daus,* 644 F.3d 147, 156-57 (2d Cir. 2011) (counseling just a few suspended taxi drivers a year would grant association of taxi workers organizational standing to challenge New York City's taxi driver suspension policy). Here, the BRI, AOAC and CCAC have been forced to take action and spend resources advising their members on compliance with the HSTPA and have even had their chief counsel appear for three radio sessions explaining the law and answering listeners call in questions. This burden has been particularly great given the significance of those changes to the ETPA and novel legal questions that arise from these changes and among other things, these organizations have held numerous seminars attended by members explaining the HSTPA, answering questions and attempting to navigate through the morass of intended and unintended consequences of this Act. These organizational injuries would be remedied by the relief sought in this action.

21. These organizations each have standing to challenge the HSTPA because their members are directly regulated by, and suffer injury as a result of the HSTPA, as demonstrated by their members who have appeared as Plaintiffs in this action. Those members, along with other AOAC, CCAC and BRI members own property subject to the ETPA have been and continue to be subjected to an invasion of a legally protected interest that is concrete and particularized,

actual or imminent and not conjectural or hypothetical, and that will be redressed by the injunctive and declaratory relief sought in this suit without the need for participation of all the affected individual members as plaintiffs. See *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560-561 (1992); *Hunt v. Wash. Apple Advert. Comm'n,* 432 U.S. 333, 343 (1977); *Friends of the Earth v. Laidlaw Envtl. Servs.,* 528 U.S. 167, 181 (2000).

Multi Family Rent Regulated Monetary Losses To Westchester Multi Family Rent Regulated Landlords As A Result Of The HSTPA Takings and Lack of Due Process

22. Plaintiff Stepping Stones, either directly or through its managing agent or principal(s) is a member of BRI, and has been since the 1970s and its then principal, John DeRosa, Sr., since 1946. John DeRosa, and now his daughter Lisa DeRosa, and Stepping Stones joined BRI in order to take advantage of the educational benefits, advocacy, and support that BRI offers to property owners in Westchester County. Like other BRI members, Stepping Stones Associates owns a residential apartment building with units subject to the HSTPA, and has been injured as a direct result of the HSTPA. Among other things, Stepping Stones Associates has been forced to offer renewal leases to stabilized tenants at rental rates far below the market. The value of Stepping Stones Associates' property has been substantially diminished by the HSTPA. Lisa DeRosa has standing to sue in her own right as a principal of Stepping Stones. Examples of the inequities in rents that are being charged and now cannot be increased due to the elimination of the vacancy increase as well as the IAI limitations are set forth as follows:

SOLITAIRE SEVEN ASSOCIATES
7 Lake Street, White Plains, New York

Existing Rent		Market Rent	Existing Rent as a % of Market Rent
$1,376.09	1	2,025.00	67%
955.19	1	1,625.00	58%
1,467.85	1	1,875.00	74%
864.77	1	1,625.00	53%
1,163.00	1	1,625.00	71%

NORTH LAKE ASSOCIATES
15 Lake Street, White Plains, New York

Apt.#	Type of Apt.	Existing Rent	Market Rent	Existing Rent as a % of Market Rent
1-A	Studio	976.01	1,550.00	62.97%
1-E	One BR +	1,535.00	1,850.00	82.97%
1-F	One BR +	855.09	1,850.00	46.22%
1-J	One BR +	1,235.29	1,850.00	66.77%
3-D	Large 11 BR	1,099.42	1,950.00	56.38%
5-F	One BR +	1,139.55	1,850.00	61.60%

Stepping Stones Associates
125 Lake Street, White Plains

11-AN	2 BR 1 BA	1,111.06	2,100.00	52.91%
11-CN	One BR	893.82	1,725.00	51.82%
11-KS	One BR	772.30	1,725.00	44.77%
11-LS	Studio	994.72	1,525.00	65.23%
11-MS	One BR	939.70	1,725.00	54.48%
11-NN	2 BR 1 BA	1,404.32	2,100.00	66.87%
12-AS	2 BR 1 BA	1,448.59	2,100.00	68.98%
12-CS	One BR	1,020.21	1,725.00	59.14%
12-GS	2 BR 2 BA	1,087.31	2,100.00	51.78%
4-DN	One BR	1,234.12	1,725.00	71.54%
4-GN	2 BR 2 BA	1,134.37	2,100.00	54.02%
4-KN	One BR	1,390.00	1,725.00	80.58%
4-KS	One BR	1,062.46	1,725.00	61.59%
5-AS	2 BR 1 BA	1,414.54	2,100.00	67.36%
5-BS	2 BR 2 BA	1,694.84	2,400.00	70.62%
5-CN	One BR	1,272.35	1,725.00	73.76%

5-CS	One BR	1,247.27	1,725.00	72.31%
5-GS	2 BR 2 BA	1,025.97	2,400.00	42.75%
5-NN	2 BR 1 BA	1,310.41	2,100.00	62.40%
6-GS	2 BR 2 BA	1,575.30	2,400.00	65.64%
7-HS	2 BR 1 BA	1,292.49	2,100.00	61.55%
7-NS	2 BR 1 BA	1,125.89	2,100.00	53.61%
8-BS	2 BR 2 BA	1,837.92	2,400.00	76.58%
9-FN	One BR	1,208.63	1,725.00	70.07%
9-KN	One BR	879.99	1,725.00	51.01%
9-LN	Studio	1,072.36	1,525.00	70.32%
9-NS	2 BR 1 BA	1,181.47	2,100.00	56.26%

23. Plaintiff Jefferson Houses LLC is a limited liability companies owned and controlled by the Bogdanoff family, now Suzanne Bogdanoff, who have been members of AOAC, and BRI for over 30 years and were the prime and virtually only developer of affordable housing when that was in its infancy. The Bogdanoff family joined AOAC, and BRI in order to take advantage of the educational benefits, advocacy and support that these trade associations offer to property owners in Westchester County. Bogdanoff owns residential apartment buildings with units subject to the HSTPA, and has been injured as a direct result of the HSTPA, and as a matter of fact has been compelled to "opt out" of Ossining ETPA to its detriment to avoid the disastrous effects of the HSTPA.[1] Among other things, Bogdanoff has been forced to offer leases to tenants in stabilized units at levels far below market rates and has only limited ability to recover the costs of repair and improvements. For several units, limits on rent increases and recoverable repair costs make continued

[1] The Village of Ossining passed ETPA in 2018 and in 2019 provided a mechanism for opting out of ETPA provided it, among other things, agreed to permanently delineate 20% of its apartments as "affordable," and also to file an agreement that would be recorded and burden the property for eternity.

rental of those units prohibitive. Once the current tenants vacate, those units may not be re-rented and instead may be left vacant, exactly what the legislation was not intended to foster. The value of Bogdanff's property has been substantially diminished as a result of the HSTPA. Bogdanoff has standing to sue in her own right. Examples of the rental inequities in Jefferson House are as follows:

JEFFERSON HOUSE ASSOCIATES (240 Units)

Examples of

ETPA RENT	#UNITS	MARKET RENT RANGE
$ 850.00	1	$1204-$1625
875.00	1	1204-1625
1,050.00	10	1204-1625
1,075.00	5	1204-1625
1.100.00	17	1204-1625
1,110.00	1	1204-1625
1,125.00	5	1204-1625
1,150.00	6	1204-1625
1,175.00	1	1204-1625
1,300.00 00*	1	1400-1625

*$12,074.90 spent on renovations which are limited in terms of return.

24. Plaintiff Nilsen Management Co., Inc. manages 8 buildings in Yonkers, all with ETPA tenants and ranging in size from 10 units to 79 units. Examples of the disparity between actual rent and mat rent is as follows:

Building	Apartment	Apartment Size	Current Rent	Market Rent*	Difference	Rent a % of Market Rent
201 North Broadway						
	2N	7 rooms	$1,057.00	$2,390.00	$1,333.00	44.23%
190 Palisade Ave						
	3F	3 rooms	$715.00	$1,350.00	$635.00	52.96%
	4A	4 rooms	$1,014.21	$1,750.00	$735.79	57.95%
	4F	3 rooms	$1,037.38	$1,350.00	$312.62	76.84%
	6C	3 rooms	$707.55	$1,350.00	$642.45	52.41%
383 Warburton Ave						
	1A	3 rooms	$993.99	$1,350.00	$356.01	73.63%
	2F	3 rooms	$960.00	$1,350.00	$390.00	71.11%
	4D	3 rooms	$631.00	$1,350.00	$719.00	46.74%
	35G	5 rooms	$1,289.00	$2,200.00	$911.00	58.59%
110 Morris Street						
	4B10	4 rooms	$1,188.02	$1,750.00	$561.98	67.89%
	3B 24	4 rooms	$877.59	$1,750.00	$872.41	50.15%
	5C 28	5 rooms	$1,485.52	$1,880.00	$394.48	
227 Palisade Ave						
	1E	3 rooms	$1,024.00	$1,450.00	$426.00	70.62%
	2B	3 rooms	$676.83	$1,450.00	$773.17	46.68%
	2J	3 rooms	$646.00	$1,450.00	$804.00	44.55%
7 Highland Place						
	2A	5 rooms	$976.89	$2,350.00	$1,373.11	41.57%
	2D	4 rooms	$1,283.14	$2,000.00	$716.86	64.16%
	2F	5 rooms	$1,238.66	$2,350.00	$1,111.34	52.71%
	2G	3 rooms	$1,275.00	$1,450.00	$175.00	87.93%
	2H	4 rooms	$1,329.04	$2,000.00	$670.96	66.45%
	3A	5 rooms	$1,074.41	$2,350.00	$1,275.59	45.72%
	3C	3 rooms	$1,091.60	$1,450.00	$358.40	75.28%
	4H	4 rooms	$1,418.41	$2,000.00	$581.59	70.92%
	5H	4 rooms	$928.57	$2,000.00	$1,071.43	46.43%
	6H	4 rooms	$1,230.26	$2,000.00	$769.74	61.51%
265 North Broadway						
	1K	5 rooms	$1,386.09	$2,200.00	$813.91	63.00%
	2B	4 rooms	$1,650.00	$2,000.00	$350.00	82.50%
	2C	5 rooms	$1,457.49	$2,200.00	$742.51	66.25%
	2D	5 rooms	$734.92	$2,200.00	$1,465.08	33.41%
	2G	5 rooms	$911.22	$2,200.00	$1,288.78	41.42%
	2H	5 rooms	$1,803.16	$2,200.00	$396.84	81.96%
	2K	5 rooms	$1,190.50	$2,200.00	$1,009.50	54.11%
	3G	5 rooms	$1,280.47	$2,200.00	$919.53	58.20%
	4B	3 rooms	1055.67	$1,500.00	$444.33	70.38%
	5J	3 rooms	$796.20	$1,500.00	$703.80	53.08%
	7E	3 rooms	$753.11	$1,500.00	$746.89	50.21%
	7H	5 rooms	$947.60	$2,200.00	$1,252.40	43.07%
	7K	5 rooms	$1,455.88	$2,200.00	$744.12	66.18%

Building & Apt.# 227 Palisade	ETPA RENT	MARKET RENT	DISPARITY	RENT AS A % OF MARKET RENT
2A	976.	2,350.	1,373.	41.54%
2D	1,283.	2,000.	716.	64.15%
2F	1,238.	2,350.	1,111.	53.69%
2H	1,329.	2.000.	670.	66.45%
3A	1,074.	2,350.	1,275.	45.74%
3C	1,091.	1,450.	358.	75.31%
4H	1,418.	2,000.	581.	70.95%
5H	938.	2,000.	1,071.	53.55%
6H	1,230.	2,000.	769.	61.55%

25. Plaintiff Shub Karman has a building with ETPA units. One 2 bedroom apartment was recently rented for $1,721 per month, however the mirror image of that unit is now renting for $1,227, approximately $500 less than market rent with no hope of an increase. In addition, due to the court delays that are now increased, this landlord lost approximately $12,000, and a second large loss from a tenant who "played" the Order to Show Cause system, causing the landlord to lose $7000 last year. These are practical consequences of the delays inherent with the HSTPA changes to the Real Property Law.

26. Plaintiff DiLaRe, Inc. is the owner of a 22 unit building, all subject to ETPA and HSTPA, has rents that vary from $931.22 for an apartment with a market rent of $1,525 (with loss differential of $593.) to a maximum of $1,479. The total % loss between current rent and market rents is 12.6%, with it being now virtually impossible to raise the rent on vacancies due to HSTPA making the lost rent permanent and growing. Another Landlord (Emerick Gross Real Estate, LP) in White Plains, has provided examples of the disparity between the actual rents and market rents: The Market rents are $1750 to $1850 for studios;

$1900 to $2100 for one bedroom apartments and $2250 to $2500 for 2 bedroom apartments. Examples of substantially lower actual rents are: $818, 920, 1011, 1029, 1081 and 1570 for the studios; $1302, 1336, 1421, 1540 and 1631 for the one bedroom apartments and $1252 and 1365 for 2 bedroom apartments, all of which are substantially under the market rent for each and now impossible to ever reach the market rate with no vacancy increases allowed.

27. Sheridan Gardens LLC has 58 apartments in two buildings in which over a third have been renovated. These renovations were done with the ability to raise the rents pursuant to IAIs and thereby benefit both the landlord and the incoming tenants, who came into a virtually "new" apartment. In addition, the Landlord recently installed new windows throughout the building which was both an upgrade and maintenance of the whole building – to all residents benefits. This expenditure of over $200,000 would have resulted in a 15% increase for all new windows- that everyone benefits from. Now, although expecting that increase, the landlord is limited to 2% per year, which barely covers the financing costs of the windows, without even considering the basic cost. This is an interference with the basic investment back expectations and moreover, hamstrings a landlord who wants to not only keep his building up to prime standards, but maintaining the building as a first class residence. That will not happen in the future with a limited 2% a year increase that is ultimately reduced back to zero. Examples of the lower than reasonable rents in the building are rents at $662; $661; $732; $920; $930; $783. and $ 661 in one building and $766; $500; $616; $807; $664; 698; and $848. In the other building. That means that almost 25% of the apartments have abnormally low

rents that will now be set in stone, and be permanent with no real hope of raising them.

28. Other examples of the disparity between actual rent and market rent abound. In Jeffrey Park, a large apartment complex in Yonkers, 2 examples are (1) Studio – tenant vacated after moving in in 1971. The Apartment needed over $10,000 in renovations which would have allowed $166.66. Now, not only is there a limitation, but with the lack of a vacancy increase or real IAI, the rent will remain very close to the $518.48 where it was at, not the market rate of $1,200, an amount less than 50% of the market rent. Another apartment in the same complex show the even greater disparity with a 2 bedroom apartment where the tenant vacated after living thee 20 years. That apartment needs substantial work totaling approximately $16,000 that would have resulted in this 2 bedroom with full second bath being rented at approximately $1,500 with the renovation costs being reimbursed at the old rate and the market being at $2,400. However, with another vacancy, this apartment could have anticipated a rental more in line with its value. Finally, in a White Plains building owned by the same principals, a 2 bedroom and 2 bath apartment, occupied since 1974, The renovation cost was approximately $22,000 resulting, with the vacancy increase, with a rent of approximately $1,600, still below the market of $2,400, but certainly better than the rent of approximately $1,200, about one half of the market rent.

29. In another White Plains multi family building, the market calls for rents as follows:

RENT	MARKET RENT
APT 1D-STUDIO-$1,570	$1,750-$1,850
APT 1F- BED-$1,336	1,900-2,100
APT 1i-studio-$1421.67 (just renovated for $15,000)	1,750-1,850
APT 1K-studio-$920.43	1,750-1,850
APT 1M-studio-$1029.01	1,750-1,850
APT 2D-1 BED-$1631.24	1,900-2,100
APT2F-2 BED-$1,365.87 ****	2,250-2,500
APT 2H-1BED-$1302.25	1,900-2,100
APT 4C-1 BED-$1,540.21	1.900-2,100
Apt 4G-studio-$1,011.05	1,750-1,850
APT 4i-studio-$818.90	1,750-1,850
APT 4M-STUDIO-$1081.79	1,750-1,850
APT 5L- 2 BED-$1,252.51	2,250 -2,500

30. One example in Drake Manor in New Rochelle is a 2 bedroom; 2 bathroom apartment with water views and a terrace that just rented for approximately $1000 when prior to June 14th it would have rented for about double that amount.

31. Another Owner-Landlord, with buildings operated by Property Management Associates, is a family owned multi-family regulated housing business, is the DeFeo family. Among other expenditures are the following, in approximate numbers for the cost:

Balcony Restoration:	$350,000.
New windows:	60,000.
New Elevator:	90,000.
New Sidewalks:	30,000. (second location)
New roof, windows and glass sliders:	$110,000.
New roof at a second location:	$120,000.

This Landlord has made extensive building and apartment renovations with the reasonable expectation of receiving the MCIs that were formerly granted, i.e., the full IAI and the MCIs up to 15% year reimbursed. It has now advised that with the lack of appropriate reimbursement, there will not be any more apartment renovations and only "old" apartments will re-rented; and no more efficiency upgrades, such as new heat and water boilers, a blow to energy efficiency.

32. With all these landlords, there are multiple losers:

a. the Landlord owners of these rent regulated multi family buildings who are losing their reasonable monetary and investment expectations and return as well as reasonable rents and reasonable reimbursement for the building expenditures;

b. The new Tenants who will have lost the ability to rent newly renovated apartments;

c. The existing tenants whose buildings will deteriorate and not receive the capital improvements that are necessary in the 21s^{t} Century, leading to a repeat of the situation as it existed in the Bronx in the 1970s and now exists with the New York City Housing Authority;

d. The local municipalities which will lose tax revenues due to the lower assessed value of these

deteriorating and aging buildings and will have to give larger refunds of taxes;

e. The single family homeowners in a community and small business owners who will have to make up the lost tax revenues;

f. The local contractors, many of whom are minorities, who will lose the work as to the IAIs and the MCIs;

g. Society, which will lose the upgrades to the buildings that will benefit the environment.

33. Many of the Plaintiffs above named have been members of AOAC, and BRI for over 30 years. All own residential apartment buildings with units subject to the HSTPA and have been injured as a direct result of the HSTPA. Among other things, each has been forced to rent units at levels far below market rates, often to strangers who claim "succession" rights to occupy stabilized units decades after the original tenant took occupancy. They have limited or no ability to oust these strangers from their property. The value of each of these properties have been substantially diminished as a result of the HSTPA. They each have standing to sue in their own right.

BACKGROUND

HISTORY OF THE NEW YORK TENANT PROTECTION LAWS

34. There are two different systems that operate in Westchester County to regulate the relationship between property owners and tenants, regardless of the tenant's income or wealth: rent control and rent stabilization under the ETPA and as amended in 2019 by the HSTPA. In 1974, New York State passed the Emergency Tenant Protection Act, referring to apartment housing of 6 or more units that were constructed prior to

January 1, 1974.[2] The Court of Appeals thus, in *Manocherian,* recognized the value of the vacancy and other rent increases. ETPA did not replace the old Rent Control laws, but actually supplemented them, leaving 2 sets of rent regulatory statutes applicable to apartment housing in Westchester County. The ETPA placed limits on the rents that property owners could charge individuals living in apartment buildings that contained six or more units. This law also created the Rent Guidelines Board ("RGB") to regulate whether and by how much the rents of ETPA units may be increased yearly for one and 2 year periods. The RGB, however, is not the subject of the instant litigation. In 1971, the state legislature enacted vacancy decontrol measures, pursuant to which apartments that were previously subject to rent stabilization and rent control became deregulated once they became vacant. This permitted property owners to charge new tenants market rate rents for their units and served the purpose of assuring mobility and availability in housing. In January 1974, the Temporary State Commission on Living Costs and the Economy of the State of New York issued a Report on Housing and Rents. In the introduction to the report, the Chairman of the Commission explained that its recommendations were "based on an awareness of the effects of inflation and on the belief that no one sector should be asked to bear all the costs." That is exactly what the HSTPA has not done – it has caused one segment of society to 'bear all the

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[2] The New York State Court of Appeals, in *Manocherian v. Lenox Hill Hospital,* 84 NY2d 385 (1994) stated that "Unlike rent control, which places stricter price controls on owners and leaves many dwellings only marginally profitable, the State, in enacting rent stabilization, seeks to insure more balanced terms under which owners may apply for regulated rent increases and to protect primary occupants." at 389 (emphasis added).

costs' and not be able to recoup them. Although that report recommended abrogation of vacancy decontrol, it recognized that any return to rent stabilization should not dis-incentivize the very increase in supply of quality housing needed to address vacancy and affordability issues. The report explained that its recommendations were intended to allow "the minimum impact required by today's inflation to be passed on to the tenant population without either endangering the proper delivery of services, or inhibiting long term growth and renovation of our valuable housing stock." The Report explained that "increased costs must be reflected in the rent, otherwise essential services will be curtailed," and that "[t]he importance of permitting increased rents for essential capital improvements cannot be overemphasized. This is exactly what the HSTPA has not done – in fact it reversed and/or ignored the intent as expressed in the statute and provided that increased costs are not reflected in the rent;[3] and in fact the rent increases over a 4 year period as shown in the footnote below have been 1/2 of the increase in expenses for a 3 year period.

35. Under the Rent Regulation Reform Act of 1993, the state began vacancy deregulation for high-rent apartments (termed "Luxury Decontrol"). By 2018, a Westchester unit with a legal regulated monthly rent of $2,830.21 could be deregulated on vacancy. The Rent Regulation Reform Act of 1993 adopted a high-income deregulation provision where units that were occupied

[3] In the last three surveys submitted to the RGB by Westchester landlords, the expenses have risen 10% yet the last 4 RGB increases have been a combined 4.75% for one year leases and 7.75% for 2 years leases (bearing in mind that there is only one increase every 2 years, thereby halving the increase to under 4% for the 4 year period.

with tenants whose household income exceeded $250,000 (later reduced to $200,000) for 2 years and whose rents exceeded the Luxury Decontrol threshold would also be subject to decontrol. There were very limited examples of both in Westchester, but they did give a landlord the incentive to modernize its apartments even if the actual rent did not meet the market rent or the legal regulated rent, particularly given the flexibility of preferential rents. Nevertheless, the HSTPA has eliminated these monetary benefits.

36. ETPA establishes that a municipality may determine that there exists a "public emergency requiring the regulation of residential rents" if the vacancy rate in the municipality is 5% or less. N.Y. UNCONSOL. LAW § 8623.a (McKinney). The statute requires that "[a]ny such determination shall be made by the local legislative body of such city . . . on the basis of the supply of housing accommodations within such city . . , the condition of such accommodations and the need for regulating and controlling residential rents within such city. . ." Id. The applicability of the HSTPA in Westchester County depends on the local municipalities making such an emergency determination. Id. § 8622. Twenty one such communities made such a declaration, the most recent being in 2018 in Ossining, and the majority in the 1970s into 1980 (except for Ossining, the City of Rye and Croton on Hudson the latest being December 23, 1980). However, upon information and belief none of these communities has ever repeated the initial emergency declaration or conducted a good faith, or in fact any study of vacancies and vacancy rates in the local community. The Ossining survey was fraught with defects and in fact eliminated many vacant apartments from the survey and since the initial adoption of ETPA, within six months, eliminated all buildings of 20 or less units

and enabled larger buildings to "opt out" of ETPA if they provide 20% "affordable" units in the specific buildings.

37. The Tenant Protection statutory scheme imposes a substantive obligation on the local community to go beyond merely declaring an emergency when vacancy rates are less than 5%, but rather to formulate a rational basis for determining whether that vacancy rate warrants the initial as well as the continued declaration of a public emergency; or whether the existence of such emergency triggers "the [continued] need for regulating and controlling residential rents," or whether there are specific classes of housing accommodations that should not be subject to the emergency and can be eliminated from the survey and the count of units in the municipality, and finally whether the regulation of rents serves to abate the emergency.

38. Defendants and the Westchester local communities that have adopted ETPA attempt to justify the HSTPA by reference to a claimed "housing emergency." But the nature of that asserted "emergency"—i.e., the aspect of the housing market that supposedly gives rise to a state of emergency—has shifted significantly over the 45 years the ETPA has been in effect. When the ETPA was first enacted in New York in 1974—the initial declaration of a housing emergency in Westchester County carried the same rationale as rent control: to address the "emergency created by war, the effects of war and the aftermath of hostilities" and, language was set forth indicating that the ultimate goal as to get to a market rent situation.[4] Thus, while

[4] As stated, the ETPA provides: "that the transition from regulation to a normal market of free bargaining between landlord and tenant, while the ultimate objective of state policy,

the legislative intent is to go to a "market of free bargaining between landlord and tenant...," the HSTPA does exactly the opposite. Moreover, the requirement that there be a continued "public emergency requiring the regulation of residential rents within any city, town or village by the local legislative body of such city, town or village" has been honored in its breach rather than its compliance. In 1974 the legislature shifted the basis of the housing emergency to an "acute shortage of housing accommodations." N.Y. UNCONSOL. LAW § 8622 (McKinney). In the ETPA, the legislature permitted the declaration of a housing emergency only when the vacancy rate fell below a specific minimum. Section 8623(a) delegated to the local municipalities the authority to declare a housing emergency when "the vacancy rate for the housing accommodations within such municipality is not in excess of five percent." The legislature gave no basis for its decision to select 5% as the vacancy rate that could trigger an emergency nor is there any rationale for 5% rather than 2% or 3.5%. Nor has it ever revisited whether that threshold is appropriate given the changes in the economy, job market, and housing market since 1974.

39. The local municipalities must rationally apply existing facts and data to make each determination and have not done so either in a rational basis or in fact at all since 1980. Since the various communities first adopted ETPA virtually none of them have voted to conduct a survey of vacancies so as to declare the continuation of a "public emergency" thereby permitting

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must take place with due regard for such emergency; and that the policy herein expressed shall be subject to determination of the existence of a public emergency requiring the regulation of residential rents within any city, town or village by the local legislative body of such city, town or village."

the system of ETPA housing to continue indefinitely and now permanently due to the 2019 Housing Stability and Tenant Protection Law.[5]

FOR A FIRST CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

THE 2019 HSTPA VIOLATES DUE PROCESS. AND IS AN UNCONSTITUTIONAL TAKING IN THAT IN THAT IT DOES NOT MEET ITS STATUTORY GOALS.

40. The Plaintiffs Repeat each and every allegation heretofore made herein with the full force and effect as if set forth at length herein.

41. The HSTPA violates Due Process because, among other things, it is an irrational, arbitrary and demonstrably irrelevant means to address its stated policy ends. Under the Fifth and Fourteenth Amendments to the Constitution, individuals may not be deprived of their property without due process of law. When, as here, Plaintiffs are being deprived of their property rights without any rational relationship between that deprivation and a legitimate government interest, the deprivation violates the Fifth and Fourteenth Amendments to the United States Constitution. Moreover, given the fundamental nature of the right to

[5] The exception is the Village of Ossining which had a survey conducted that was flawed in that it did not count vacant apartments that were being renovated for re-rental and other vacant apartments where the surveyers could not get access to the building, among other deficiencies of the study. In Croton and Port Chester, which adopted ETPA at a later date than the other 18 communities that adopted ETPA in the late 1970s or early 1980s, they both used ETPA to punish one landlord in each community for raising rents a larger amount than the community deemed reasonable and therefore adopted ETPA for that one building in each community.

property—a right that is expressly articulated in the Constitution itself—Defendants must demonstrate that the 2019 Housing Stability and Tenant Protection Act is narrowly tailored to achieving a compelling governmental purpose. Defendants cannot satisfy that standard and thus, the legislation must be declared unconstitutional.

42. Specifically, the HSTPA is not rationally related to achieve any of the ends that have been used to justify the extreme measures taken under this law. The HSTPA has been justified as a means to provide affordable housing to low- income families. But this law's operative provisions are wholly disconnected from that goal. There is no requirement that HSTPA units can be rented only to low-income families. The only financial qualification for the application of the HSTPA the provision permitting decontrol of a unit if the owner earns an income over $200,000 and the rent was above the Luxury Decontrol threshold—was removed from the HSTPA. There are numerous reports of stabilized units leased by families least in need of assistance. The data confirms that the HSTPA has not been targeted at all—let alone effectively or narrowly targeted—to families with low income and in need of affordable housing.

43. The HSTPA has also been justified by the alleged and stated need to increase the vacancy rate, and thereby remedy a purported "housing emergency." Even if there were evidence that any housing emergency still existed (but Defendants have failed to generate any record in support of the "emergency" finding, as discussed herein, nor has any survey been undertaken in the last 38 years for 18 of the 21 ETPA communities), the HSTPA not only fails to increase the vacancy rate but in fact lowers it. Existing tenants

have even greater incentive than before to remain in units that are no longer appropriate to their needs. For example, previously, a tenant with a preferential rent might have the incentive to move to a more appropriate residence rather than risk a higher rent back to the legal regulated rent on the lease renewal. Now there is no such incentive. The HSTPA is not rationally related to achieve the goal of providing more suitable housing for those who most need it. There will clearly be less vacancies as there is virtually no incentive for anyone to leave a life estate in an apartment with a rent that almost cannot be raised more than the minimal guideline increases that have not, since 2014, been over 2% for a one year renewal or 3% for a 2 year renewal (which is a one time increase for the 2 year period). Once again the purported goals of the ETPA and the HSTPA are not met and violate the constitutional protections to property owners.

There Are Alternatives Such As Subsidies And Tax Credits To The 2019 Housing Stability And Tenant Protection Act That Are Available To Meet The Goals Claimed To Underlie The HSTPA.

44. There are other available alternatives that would help provide affordable housing to low-income families or help to increase the supply of housing generally. But those alternatives would require support from all New York taxpayers, and therefore lack the appeal of imposing the fmancial burden entirely on a small group of property owners, which underpins the HSTPA. As a result, the Defendants continue to use the landlords of multi family housing to justify the HSTPA which is not rationally related to, and fails to, achieve the ends that it is claimed to serve.

45. As stated, the HSTPA is not rationally related to the goal of ameliorating a lack of affordable housing

for low-income individuals and families and in fact does the opposite. ETPA units are not awarded based on financial need. There is no part of the HSTPA that targets relief to low-income populations. There is no means testing, no financial qualification, no affordable housing requirement and no other requirement that HSTPA apartments be rented to persons or families at particular levels of area median income (AMI). Indeed, given that the HSTPA requires owners to perpetually renew the lease of their tenants, it severely limits the ability to remove tenants, and now does not allow investigation into payment history/eviction proceedings of prospective tenants whether it be for a rental tenancy or a cooperative interview. Data and studies confirm that the ETPA, now strengthened by the HSTPA is not benefiting low-income households, but are randomly benefitting those who have the good fortune to inherit or live in a rent regulated apartment.

46. A study as to New York City rent stabilized housing found that in 2010, there were an estimated 22,642 ETPA households in New York City that had incomes of more than $199,000, and 2,300 ETPA households with incomes of more than $500,000. According to 2017 HVS data, there were 37,177 ETPA units occupied by households with incomes of at least $200,000 and 6,034 with incomes of at least $500,000. It has also been reported that ETPA households that earn more than $200,000 and live in below market-rate units pay a total of $271 million less annually than the average cost of an unregulated unit of the same size in a similarly priced neighborhood, an average savings of $13,764 per household per year. The situation in Westchester, while less in numbers of apartments and households is proportionately the same in substance.

47. Requiring a relatively small group of private property owners of pre 1974 multi family apartment houses, (it is noted that in some of the communities subject to ETPA and the HSTPA there are only 1 or 2 buildings subject to ETPA, an obvious effort single out individual landlords and property owners) to subsidize housing costs for individuals with no demonstrated need for rental assistance is not only grossly inequitable, but also diverts valuable local community and State resources away from programs that could actually help address the vacancy rates and provide low-income individuals with housing assistance and also violates applicable constitutional protections. Viable measures currently in place in New York and also employed elsewhere, such as housing vouchers or tax abatements, are rationally related to the challenges that the HSTPA purports to ameliorate but does not address. These alternatives not only come closer to furthering the stated goals of the HSTPA but also distribute the costs and benefits in an equitable manner. Unlike the HSTPA, they do not impose the burden of a costly "public assistance benefit" on the property rights of individual owners, but rather equally distribute the costs for these programs among society as a whole. And also, unlike the HSTPA, they actually target and help individuals who demonstrate a need for rental assistance.

a. One alternative to the HSTPA is the use of direct housing subsidies. These are already provided in the form of housing vouchers under the federal Section 8 program, which targets low-income individuals for housing assistance. Section 8 provides subsidies for individuals to use toward housing based on income and family size. There are thousands of households in Westchester, Rockland and Nassau Counties that benefit from this program. These vouchers can be

general, enabling the tenant to select any apartment, or "project-based," in which the voucher must be used for a certain property. Under the Section 8 program, the agency issuing the voucher ensures that the rent for the rental unit selected is reasonable for the area, and recipients of housing vouchers are expected to pay 30% of their income toward rent and utilities, or a minimum rent payment of up to $50, whichever is greater. Allowing individuals to choose where they use their housing vouchers enables lower-income families to move out of high-poverty neighborhoods and would increase diversity in the various ETPA communities.

b. Other examples of subsidy programs that might be expanded to address housing costs are the SCRIE and DRIE programs offered by the local communities that have opted to adopt them, although many ETPA communities have not adopted either program or if they have, not to the $50,000 maximum. The Senior Citizen Rent Increase Exemption (SCRIE) freezes rent for seniors who are in rent-regulated units, are the head of the household, make less than $50,000, and pay more than one-third of their income to rent. The amount that the senior tenant is exempted from paying is returned to the owner as a property tax abatement credit. The Disability Rent Increase Exemption (DRIE) exists for disabled individuals and also provides owners with tax credits. There is no reason these programs cannot be extended to any elderly or disabled people who meet the income qualifications, not just those who live in ETPA units. Clearly, programs already exist that are rationally related to accomplishing the goal of providing affordable housing without effecting an uncompensated taking from other private individuals.

c. Also, subsidies could be provided through a program providing assistance for home purchases,

which would direct financial assistance to those who need it and would also promote home ownership. This would be particularly valuable for the suburban counties. In Chicago and elsewhere, residents can receive down payment assistance even if they purchased a house before, so long as their income falls below a certain level. Unlike the HSTPA, which reduces housing stock and perpetuates permanent renting, a down payment assistance program available only to low-income residents would make housing more affordable to New Yorkers.

d. Another alternative to the HSTPA is a State renter's tax credit. New York State already provides a tax credit of up to $500 to New York City renters whose household income do not exceed $200,000. Rather than fund low-income housing through ETPA tenancies and compelling property owners to bear the burden, this tax credit program could be increased and better targeted at those lower-income tenants who spend more than 30% of their income on rent. It is a natural benefit for the many local communities in Westchester subject to ETPA and the HSTPA.

e. Another answer to a shortage of high-quality affordable housing is more affordable and/or low rent housing. There are many well-tested ways for states, cities and local municipalities to increase the supply of housing. For example, communities require a 'set aside" of 10% or even 20% (such as in the Village of Ossining of multi family dwellings of more than 20 units in order to opt out of ETPA) of affordable housing in either new construction or perhaps existing housing (as in Ossining). Another alternative is to promote partnerships between the local government and the private sector, which would both address the vacancy issues and could also be targeted to low-income

tenants. Direct government subsidies or innovative financing programs can also encourage new construction to be provided to would-be tenants. In Denver, Colorado, for example, the city instituted a Revolving Affordable Housing Loan Fund in order to bridge the gap for developers between the federal government's 4% Low-Income Housing Tax Credit and the amount of financing needed to make certain low-income housing projects feasible. As developers pay back their loans, money goes back into the fund to pay for future affordable housing projects. New York City has developed similar financing programs, including the Extremely Low and Low Income Affordability (ELLA) program and the HPD "Mix and Match" program. Each of those programs are much more focused than is HSTPA on providing benefits to low- and middle-income tenants. The ELLA program targets development of housing for those with incomes between 30% and 50% of the area median income, and the Mix and Match program targets development of housing serving households with 60% to 130% of area median income. Local communities in Westchester and the other suburban counties could do the same.

48. In a recent proposal, Alex Roberts of the Community Housing Program, proposed direct subsidies by the communities for affordable housing apartments. This suggestion by a local affordable housing advocate and developer should be taken seriously and implemented to avoid the deleterious consequences of the HSTPA. Mr. Roberts proposals provide that

> Instead of asking developers to build new apartments at $400,000 each for low income tenants—at a required subsidy of $300,000 per unit--we may produce three times the number of units by simply paying existing

landlords a lump sum to set aside apartments for low income tenants at affordable rents for a period of 30 years. I call it the" Vacant Apartment Acquisition Program (VAAP). Government could offer multifamily landlords in New Rochelle a lump sum payment in return for lowering the rent a few hundred dollars to make it affordable, and restrict the apartment to a low-income household.

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The next step would be for the city to determine interest among landlords in New Rochelle through a Request for Proposals. The RFP would list the requirements, including (1) rent for studios, one, two and three bedroom apartments to be reduced to affordable levels for households with income at or below 60% AMI, (adjusted annually by HUD for inflation), (2) marketing/renting and qualifying of tenants by a nonprofit agency under contract with the town, (3) a 30-year term for the program, and 4) execution of of a deed restriction and lien with recapture obligation for the subsidy amount, which cannot be redeemed for at least 10 years, and then redemption allowed from year 10 to year 30, with the recapture obligation declining by 5% per year. Owners and landlords of two-family and multi-family buildings would then look at the difference between what they are charging for rent and the "affordable rent" and then make an offer to the town as to how much they would be willing to take as an up-front payment under the terms. In this way, there will be competition in the market for the

> subsidies, rather than placing an arbitrary payment on units that will be of varying quality, location and rents.
>
> In a second proposal, Mr. Roberts also suggests that the community adopt a "vacant apartment program." With public subsidies of up to $600,000 per unit needed to build affordable apartments, Roberts has a plan to make existing apartments affordable by providing upfront subsidies to local landlords. His plan builds on local affordable housing programs that require a certain number of affordable apartments in multi-family projects, but also allow developers to opt out of building the affordable units by paying fees to the municipality. Under Roberts' plan, a municipality would work with landlords with apartment vacancies in their buildings. The landlord would agree to keep the rent at levels available to tenants earning up to 60 percent of the average median income, which in Westchester is $50,500 for a single person, and $83,750 for a family of six. Local landlords would guarantee a unit remains affordable for 20 years to 30 years. In exchange, the landlord would receive an upfront payment of about $60,000, which Roberts said would cover for the reduced rent over the term of the deal.

49. In addition, zoning changes would enable developers to build more housing. There are some innovative programs that establish zones for the construction of

affordable housing near public transportation.[6] Many local communities in Westchester have adopted or considered this TOD zoning (see footnote), which is zoning calculated to encourage building near public transportation.

50. The HSTPA's predecessor, the ETPA, has been applied continuously for 45 years but the evidence is overwhelming that the HSTPA is not rationally related to achieving any of the objectives or purposes spelled out therein. The HSTPA on its face therefore violates the federal Constitution's guarantee of Due Process:

a. The HSTPA does not in any way achieve its goal of providing housing to low-income populations. There is no fmancial qualification standard at all for retaining or obtaining an apartment. The HSTPA is in no way rationally related to providing affordable housing for low-income individuals or families. Even with the vacancy increases the rent was still more affordable than newly constructed non regulated apartments.

b. For similar reasons, the HSTPA is not rationally related to promoting socio- economic or racial diversity. Nothing in the law directs HSTPA units to individuals

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[6] Transit Oriented Development (TOD), a commonly used planning strategy, strives to create mixed-use residential and commercial buildings near active train stations to promote walkability, use of public transit and reduced reliance on personal automobiles. Examples are found in virtually any community near a train station including Bronxville, Mt. Kisco, Pelham, Scarsdale and others. There is no density increase- zoning dimensional requirements changed to make redevelopment possible. Unit counts of 40 units per acre existed both before and after TOD zoning overlay changes. Incentives for mixed-use, below market-rate housing, and payments into a neighborhood stabilization fund.

and families who would increase diversity. In fact it is believed that the New York system of rent control of various iterations actually reduces diversity.

c. The HSTPA is not rationally related to increasing the supply of housing in New York. When one reviews the amount of housing construction in Westchester since all the ETPA communities but 3 have adopted ETPA, the result is that there is a glut of housing, well over the 5% threshold.

d. The HSTPA further limits the availability of apartments due to its elimination of a vacancy increases, limitation on IAIs, elimination of high rent / income decontrol, thereby removing the incentive of landlords to work with tenants to vacate apartments and thereafter renovate said apartments to bring them up to date in terms of kitchens and bathrooms, among other things, and further, to provide updated housing for larger and new families by giving older residents incentive to move out. That is now eliminated. When an apartment now becomes vacant, the landlord has no incentive to upgrade the apartment to 2019 standards or in any meaningful fashion, leaving new tenants with old apartments, old kitchens, old appliances, old bathrooms, etc. and smaller apartments as well as less choice.

51. As noted above, the Housing Stability and Tenant Protection Act of 2019 removes eliminates various avenues for income enhancement that, prior to 2019, existed where voted on by the RGB. In fact within the last decade the Westchester County Rent Guidelines Board on more than one occasion provided a low rent increase for those apartments with extremely low rents (2009/2010; 2011/2012; 2013/2014). That is now history.

52. Regarding the new IAI restrictions, when tenants depart after years of occupancy, units often may need $50,000 or more in repairs and restorations to prepare that unit for the market. Under the Housing Stability and Tenant Protection Act of 2019, only $15,000 of those repairs could be passed along to tenants, temporarily. Further, on a $15,000 investment, only $83 per month would be recoverable for buildings over 35 units, and after taxes, the amount recovered is closer to $62 per month. If that investment is funded with a loan to be repaid at 4% annually, the property owner will fail to recover even the full net present value of the $15,000 investment. As a result of those combined effects, building owners will either choose to re-let with minimal (if any or no) improvements, resulting in the not so gradual deterioration of the building, or they will simply choose not to re-let the unit at all. Under either scenario, either the quality of the housing stock, or the supply of that stock (or both) will be further restricted as a result of the amendments and new tenants will be denied a renovated apartment with new appliances and fixtures. For example, one AOAC, CCAC and BRI member owns low rent units (a studio that rents for less than $600 per month) with the market rate being almost 3 times that.

53. Another landlord has an MCI situation in which all of the work was completed and submitted to and received by DHCR before the new law took effect. He then received a letter from DHCR requesting that he recast the MCI in the foam of the HSTPA, thereby losing the IAI increase for an amount much larger than $15,000 he spent, which was formerly not limited to the 30 year period. That apartment has been occupied by the same tenant for more than four decades. The unit needs substantial repairs before it can be re-rented, and in light of the Housing Stability

and Tenant Protection Act of 2019, (1) the member can recoup only $15,000 of the costs of those repairs and (2) the unit will remain ETPA post-vacancy. The economics have made the decision. The member will turn off the lights and leave the unit vacant. These are but examples and not isolated, but all to frequent.

54, In addition to the limit on recovery of IAI expenditures, the Housing Stability and Tenant Protection Act of 2019 also dramatically limits the recovery of expenditures on Major Capital Improvements (MCIs), by increasing the amortization period for recovering those investments, (ii) capping the total period for recovering those investments to 30 years (after which they must be disentangled from other increases and removed from the rent), and (iii) limiting any rent increase needed to pay for such MCI to 2% per year (e.g., $30 on a $1,500/month lease). The collective limitations on MCIs will prevent owners from recovering the cost of many significant MCIs. For example, if an owner of a 30-unit building with an average rent per unit of $1,300 per month invested $200,000 in an MCI financed at 6% interest, the present value to the owner of the permissible rent increases per unit would be less than the present value of the MCI investment. As a result, many owners will choose not to reinvest through MCIs in their buildings and this will inevitably lead to the deterioration of the buildings.

55. Absent investments in MCIs, building maintenance will be limited to only necessary repairs, resulting in dilapidated housing units and eventually the likely withdrawal of housing units from the housing stock. Buildings will deteriorate thus reducing the availability of affordable housing stock in the suburbs.

56. Despite a stated goal of increasing quality housing stock the Housing Stability and Tenant Protection Act of 2019 (and in particular the caps on the IAIs and MCIs) will result in a deterioration of the quality and quantity of the housing. Landlords cannot afford to renovate apartments, even on vacancy, now that the vacancy increase as well as the IAI increase has been eliminated. Moreover, with the substantial reduction in MCI reimbursement, multi family owners of HSTPA housing, as stated, will not be able to install major capital improvements such as new boilers/ burners/roofs/sidewalks; windows and other areas of housing improvement that would have been done with the prior MCI, granting up to 15% a year reimbursement. The reduction to and limitation of 2% a year reimbursement does not even pay for the financing of the MCI. The lack of renovation of the housing stock will lead to an elimination of units from available capacity. Both outcomes demonstrate that the HSTPA is not rationally related to achieving their desired ends and therefore constitutionally defective.

57. Studies of the New York City and Westchester, Nassau and Rockland rental markets have consistently shown that rent regulation decreases residential mobility. Put another way, tenants fortunate enough to obtain ETPA units stay in them, regardless of the suitability of the unit for the tenant in terms of need, size, location, and affordability relative to tenant wealth.

58. In New York City, the Citizens Budget Committee reached a conclusion in 2010 regarding the misallocation of housing space in New York City resulting from rent regulation. It found that households in ETPA units tend not to move to smaller units when the number of members in the household declines. And the CBC observed a corresponding mismatch effect in the

unregulated sector: households in the unregulated sector likely consume less space than they would absent rent regulation, due to reduced supply and higher market rents. The situation in Westchester is similar. For all of these reasons, the HSTPA cannot be justified as rationally related to the goal of increasing the apartment vacancy rate so that more apartments are available to individuals and families seeking to move to Westchester apartments, nor for any of the other alleged rationale for the passage of the law. Rather, the HSTPA's effect is to increase the affordable housing shortage in virtually every municipality where it has been adopted and in doing so at the expense not only of prospective tenants looking for affordable housing but at the expense of the Landlords.

59. There are many articles by noted Economists as well as studies showing that the ETPA as well as the HSTPA does not achieve the purposes for which they allegedly were passed by the New York State legislature and incorporated in the HSTPA. For example,

a. A study from a group of Stanford University researchers shows that San Francisco's rent-stabilization efforts failed. Effects such as these drove down the supply of rental housing and, therefore, drove up rents across the city — by 5.1 percent.

The California law would cap the rise in rents statewide to inflation plus 5 percent annually. Oregon would set the cap at inflation plus 7 percent.

Mr. Sanders would restrict rent increases nationally to 3 percent or 1.5 times inflation, whichever is greater. To many struggling to afford housing in super-expensive parts of New York, San Francisco or the District, these plans no doubt sound great. Yet these

cities already have rent-stabilization policies, and they have not worked.

Washington Post Editorial 9/21/19.

b. Indeed, it is difficult to think of another policy where conservative economist Thomas Sowell, who once observed that "the goals of rent control and its actual consequences are at opposite poles," can agree with liberal economist Paul Krugman. As Krugman, a *New York Times* columnist, explained in 2000, introductory economics teaches that artificially compressing rents results in a shortage of rentable properties. The lower fixed price increases the demand for rental housing while reducing the quantity of it offered for rent.

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The truth about housing affordability is that high rental prices communicate that the supply of rentable property in the market is scarce relative to demand. The urgent message emanating from many desirable U.S. cities is that too few rentable units have been produced over long periods. But crude rent controls will worsen this shortage. And more flexible rent regulation amounts to just suppressing this price message for a lucky few tenants in the short tetra, in ways likely to worsen affordability more broadly.

Rent control can't overcome the structural challenges to affordability that high-cost cities face, and a rent-control revival diverts attention from pro-development reforms that matter. Policymakers who care about housing affordability should leave rent control where it belongs: in the past.

Vanessa Brown Calder is a policy analyst at the Cato Institute. Ryan Bourne occupies the R. Evan Scharf

Chair for the Public Understanding of Economics at the Cato Institute.

c. New research examining how rent control affects tenants and housing markets offers insight into how rent control affects markets.. While rent control appears to help current tenants in the short run, in the long run it decreases affordability, fuels gentrification, and creates negative spillovers on the surrounding neighborhood.

Rebecca Diamond, Assoc. Prof. of Economics, Stanford Graduate School of Business, 10/18/18.

60. Substantial research regarding the New York housing market as well as the effects of rent controls consistently shows that the rent regulation windfall is not targeted to low-income residents, but rather is dispensed quite randomly. The same is true for Westchester and the suburban areas. In a 1987 study in the Journal of Urban Economics, Peter Linneman concluded, using data from the 1981 New York City Housing and Vacancy Survey ("HVS"), that both the City's rent control and rent stabilization programs were targeted haphazardly, with benefits distributed quite randomly, leading Linneman to conclude that "the targeting of these benefits was poor." See Peter Linneman, The Effect of Rent Control on the Distribution of Income among New York City Renters, 22 J. of Urban Economics 14-34 (1987). A 2000 study by Dirk Early (using data from 1996) concluded not only that rent control and rent stabilization in New York City were poorly targeted, but also that the city's laws induced property owners to change the way they recruited tenants, giving preference to older and smaller households. See Dirk Early, Rent Control, Rental Housing Supply, and the Distribution of Tenant

Benefits, 48 Journal of Urban Economics 185-204 (2000).

61. Data from 2010 published by New York University's Furman Center confirm that the percentage of low-income households living in ETPA and controlled units (65.8%) is only 12% higher than the percentage of low-income households living in market-rate units (53.1%). And outside of core Manhattan, there is only an 8% difference, meaning that both market-rate and ETPA units serve low income households in similar proportions. See https://cbcny.org/sites/default/files/REPORT_Rent Reg_06022010.pdf. Also in 2010, the Citizens Budget Commission ("CBC") published an analysis of rent-regulated units in New York City using 2008 data, and reached the same conclusion as the preceding studies: the subsidy associated with rent regulation in New York City is poorly targeted. See Rent Regulation: Beyond the rhetoric, see Citizens Budget Committee (2010) available at https://cbcny.org/research/rent-regulation-beyond-rhetoric. The CBC found that Overall the average discount is about 31 percent or $5,500 annually. However, the discounts vary by income group. The greatest percentage discounts are for those with incomes below $20,000 annually and also for those with incomes between $125,000 and $175,000. The same basic statistics can be said to be valid when applied to the suburban counties to which EPTA is applicable. These New York City specific studies are corroborated by research in other U.S. cities as well. In a 2007 study involving the effects of the end of rent regulation in Boston, David Sims concluded that low-income families were not well-served by rent regulation, with 26% of rent- controlled units occupied by tenants with incomes in the bottom quartile of the population, while 30% of rent-controlled units were occupied by tenants in the top half of the income

distribution. See David P. Sims, Out of Control: What Can We Learn from the End of Massachusetts Rent Control?, 61 J. of Urban Economics 129-51 (2007). Margery Turner reached a similar conclusion regarding the Washington DC rental market. She determined that rent regulation did not benefit low-income renters efficiently and favored long-term renters (regardless of income level) over frequent movers. Margery A. Turner, Housing Market Impacts of Rent Control: The Washington, D.C. Experience, Urban Institute Report 90-1 (1990).

62. In a New York City study, using 2017 HVS data (the most recent HVS data available) to compare the characteristics of tenants in stabilized and destabilized units to the characteristics of the population of severely cost-burdened renters in New York City. This examination produced several conclusions:

a. First, tenants in ETPA units have much higher incomes than the population of severely cost burdened renters. While almost 90% of severely cost-burdened renters have incomes less than $35,000, only 37.7% of ETPA tenants have incomes below $35,000. Thus the HSTPA does a particularly poor job at connecting the lowest-income renters (incomes below $35,000) with affordable housing.

b. Second, ETPA units also do not do a significantly better job of serving lower-income tenants than do unregulated units. For example, 12% of residents of unregulated units have incomes between $20,000 and $34,999 compared to 16.5% of stabilized tenants. The HSTPA similarly fails to target lower or moderate-income tenants at a rate substantially greater than unregulated units. 78% of ETPA units are rented by households with incomes under $100,000, but so are 64% of unregulated units.

c. Third, the HSTPA distributes a significant portion of its benefits to higher-income renters. For example, over one third (34.2%) of ETPA units (and half of post-1947 ETPA units) in Manhattan are occupied by tenants with incomes of $100,000 or more. Twenty-two percent of all ETPA units, over 200,000 units, are rented to households with a family income of $100,000 or more. The proportions are deemed to be comparable in Westchester.

d. Fourth, the HSTPA does not target the households most likely to face cost burdens due to rent. Married couples without children constitute the household type least likely to face a severe rental-cost burden—yet they are overrepresented among ETPA renters. Underrepresented among ETPA renters are single-parent households. Indeed, the average regulated tenant is only 34 years old, three years older than the average market-rate tenant. It has been pointed out for years in Westchester before the Rent Guidelines Board at the yearly hearings that the end result of continued controls, now exacerbated, result in less available apartments for young families since the emphasis is to protect those who have been in their apartments for many years and are benefit from the continuation of lower rents and extremely limited increases. The HSTPA, now formally and forever locking in controls for rentals at substantially lower than market rentals (particularly in Westchester), will even worsen the situation making many less apartments available for young families, while protecting those with higher income and less need for bigger apartments.

2019 Housing Stability and Tenant Protection Act is Not a Rational Means of Ensuring Socio-Economic or Racial Diversity

63. For many of the same reasons that rent regulation does not effectively target low-income households in need of affordable housing, it is not reasonably related to the goal of promoting socio-economic or racial diversity. The HSTPA is not targeted to assist underserved groups and, in fact, has instead been shown to increase gentrification and will, as with ETPA, reduce the availability of apartments for families as well as low income tenants. For example, a Wall Street Journal analysis explained that white renters in rent-protected apartments benefited more than any other racial group, with a discount of 36% from market rates, compared with 16% for black renters and 17% for Hispanic renters. In a 2002 study of rent regulation in New Jersey, Harvard researcher Edward Glaeser concluded that regulation was associated with an increase in economic segregation in municipalities. See Edward L. Glaeser, Does Rent Control Reduce Segregation? Harvard Institute of Economic Research Discussion Paper No. 1985 (2002). Regulation was similarly found to be an ineffective tool for economic and racial integration in California and Massachusetts. See Ned Levine, et al., Who benefits from rent control? Effects on tenants in Santa Monica, California, 56 J. of the American Planning Association 140-52 (1990); David P. Sims, Rent Control Rationing and Community Composition: Evidence from Massachusetts, 11 B.E. J. of Economic Analysis & Policy 1-30 (2011). There are a multitude of articles showing that the elimination of rent regulation benefits a community The HSTPA does a poor job of targeting the racial or ethnic groups most in need. ETPA units serve disproportionately high shares of white renters compared to the race and

ethnicity of severely cost burdened renters. For example, although only 27% of severely cost-burdened renters are white, 35% of ETPA units are occupied by white tenants.

The 2019 Housing Stability and Tenant Protection Act is Not a Rational Means of Increasing the Vacancy Rate or Making More Housing Units Available

64. The Housing Stability and Tenant Protection Act of 2019 also increases the adverse effect on supply in two ways. First, by eliminating opportunities for rent increases at times of vacancy or upon decontrol of units, (since there is no more decontrol) the law makes continued operation and leasing of such units less attractive and precludes the additional income needed to fund creation of new units. Second, by capping the ability to recover investments for individual apartment improvements and major capital improvements, it deters the re-development necessary both to the return of units to market after vacancy and to the maintenance, repair and renovation of the housing stock. The HSTPA also incentivizes tenants to stay in units longer, even if the units are no longer appropriately sized for the tenants' needs. The result is reduced turn-over and availability of apartments in Westchester County, exaggerating the very impact—low vacancy rates and less availability of affordable units for families and newly marrieds that the law was purportedly intended to address.

2019 Housing Stability and Tenant Protection Act Deters Development.

65. The negative impact of rent controls on the supply and availability of affordable housing can be observed in the suburban Westchester housing market—the HSTPA aggravates the very problems it

is claimed to address by inhibiting re-development of existing properties as well as inhibiting the creation of new rental units and reducing the economic incentive to maintain existing units and buildings. The ETPA as modified and strengthened by the HSTPA plays a key role in inhibiting development and both reduces earnings from buildings that could be reinvested into further development as well as continued maintenance of those buildings, and also tightly restricts an owners' ability to demolish and rebuild their own buildings to provide additional capacity.

66. Using data from the New York City Department of City Planning, one report estimates that "[t]here is 1.8 billion square feet of unused development rights in residential zones alone. Built to their maximum envelope, these properties could accommodate more than a million units of housing." A similar situation exists in Westchester. Despite the available zoning capacity, data demonstrates that buildings subject to ETPA regulation are not developed to capacity. On average, the unregulated properties were developed to a level 22% greater than the zoned capacity. If the heavily ETPA properties were developed to the same extent as the unregulated peer group, the result would be additional living space. This disparity of development between regulated and unregulated properties evidences that the HSTPA significantly adds to and contributes to the underdevelopment of properties and the reduction of housing, stock, creating the very purported scarcity of units that is then used to justify continuing ETPA's existence.

67. The underdevelopment of ETPA regulated properties is a direct result of the restrictions imposed and worsened by the HSTPA. As discussed, *infra,* mandatory lease renewals, succession rights, elimination of

vacancy increases, restrictions on the amount of money an owner can spend and recoup on individual apartment improvements and major capital improvements as well as limitations on an owner's ability to recover units under the HSTPA create massive barriers to redeveloping a building and increasing the housing stock. ETPA tenants—imbued by the HSTPA with a de facto and now virtually permanent property right in the ETPA unit—can simply refuse to leave and the Owner has effectively no right to reclaim possession. As one report from New York University's Furman Center observed, "most incremental residential development will, by necessity, require the demolition of existing buildings and new construction on assembled sites. However, under state law, rent-regulated tenants have certain rights which make it very difficult and costly for the owners of buildings to gain vacant possession of their properties for redevelopment." Stories of hold-out tenants and large property owner buy-outs are commonplace.

The 2019 Housing Stability and Tenant Protection Act Leads to Higher Rents in Unregulated Units.

68. The shortage of available rental housing caused by the HSTPA produces higher rents in the unregulated market. See Dirk W. Early, Rent Control, Rental Housing Supply, and the Distribution of Tenant Benefits, Journal of Urban Economics 48(2).. Other researchers have found a more profound impact on market rents. A 1993 study by Steven B. Caudill, concluded that rents in uncontrolled units in New York City were between 22% and 25% higher than they would be in the absence of New York's rent regulatory scheme. See Steven B. Caudill 1993. Estimating the Costs of Partial-Coverage Rent Controls: A Stochastic Frontier Approach. Review of Economics and Statistics

75(4): 727-731. Again, the situation in the suburban counties, including Westchester, is no different and note is taken of the various economic experts referenced *infra*.

The 2019 Housing Stability and Tenant Protection Act Reduces Property Taxes from Multi-Family Dwellings and has a Negative Impact on the Taxpayers of the Local Communities That Have Adopted ETPA

69. The irrational and arbitrary relationship, which supports the lack of constitutional basis for the HSTPA and the "housing emergency" it is claimed to address is further evidenced by the law's negative impacts in Westchester County, including higher rents in the unregulated market and reduced tax revenues for the various municipalities. This is an unintended result of these laws because the HSTPA serves to lower the value of the various multi-family properties, thereby reducing the assessed valuations and thereafter the tax revenues attributable thereto. This result will ultimately result in not only lower tax revenues from multi-family buildings, but higher taxes on single family dwellings in the various municipalities that have ETPA and the HSTPA because the lost revenue will have to be made up by other real estate owners. Moreover, the lower assessments will result in more tax assessment reduction proceedings ("certioraris") which will impact negatively on the local communities faced with lower tax revenues and greater tax refunds.

70. Additionally, less MCIs and IAIs will result in less renovation and construction work and a drop in economic activity. This will affect, in many ETPA Westchester communities, a minority population that makes up a significant portion of the local contractors, who will now be denied the work derived from the IAIs as well as the MCIs, that given the lack of adequate

reimbursement, will not go forward. This is one of the many 'unintended consequences' of this ill conceived and devastatingly detrimental legislation.

FOR A SECOND CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

The 2019 HSTPA Impacts Detrimentally and Limits a Property Owner's Reasonable Return on its Investments Which Constitutes an Unconstitutional Taking

71. The Plaintiffs Repeat each and every allegation heretofore made herein with the full force and effect as if set forth at length herein.

72. Due to the HSTPA, multi family rent regulated landlords who are now prevented from modernizing, repairing, maintaining their buildings and the apartments therein are also prevented from realizing a reasonable return on their investments, all of which is without due process. As the United States Supreme Court said in *Loretto v. Teleprompter Manhattan CATV Corp.,* 485 US 4419, 102 S.Ct. 3164,

> 'The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance. So., to, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the economic good....'

73. This is exactly the Plaintiffs' complaint herein, i.e., that the government has taken the Defendants' property and has clearly interfered with the invest-

ment backed expectations by multi family property owners who purchased properties with the intention of increasing the rent roll, mainly through vacancies and IA's, or high rent or high income decontrol and now are virtually precluded from raising those rents. Moreover, the public good cannot be promoted when the natural consequence of the HSTPA will be the deterioration of multi family buildings and the lack of renovation and deterioration of the apartments therein. The HSTPA is counter-productive.

74. As was held in the case of *Lincoln Plaza Associates v. Barbarisi,* 60 Misc. 2d 905 (NYC Civ. Ct., 1969),

> The constitutional protection granted to the owner of real property does not include, necessarily, the right to demolish the property; the constitution merely mandates that a landlord earn a reasonable return. (emphasis added)

75. A recent publication by a well known New York real estate firm, on November 11, 2019, set forth the devastating impact of the HSTPA on the market for multi family rent regulated housing:

> With the value-add multifamily business in NYC all but eliminated by the Housing Stability and Tenant Protection Act of 2019, many investors are looking for new avenues to invest in NY. *** Our esteemed panel of experts will dive into these questions and more as we continue to explore the fallout from the rent law changes and search for opportunity in this new landscape.(emphasis added)

Andrew Dansker, First Vice President of Finance, Dansker Capital Group at Marcus & Millichap

76. The HSTPA mandates that owners offer below-market rents to tenants for indefinite and virtually permanent periods of time and with no sunset date in the law, making it permanent.

77. A permanent "emergency" is a violation of the law and the constitution. Previous to the HSTPA, an owner of ETPA units might increase the rent to existing tenants for any particular one- or two-year lease period by the amount set by the Rent Guidelines Board and upon a vacancy with the utilization of a vacancy increase of 20% in the case of a one year lease or a slightly lesser percentage for a 2 year lease, depending on the most recent guideline. In addition, there was also the possibility of a bonus for having to have kept a long term tenant with a point six (.6%) percent bonus for each year a tenant resided in a unit over 8 years. This enabled landlords, for new tenants (not existing tenants) to increase the rent to more closely approach a market rent, and also renovate an apartment using an IAI, thereby utilizing a vacancy increase to make up for the minimal RGB increases, while still protecting existing tenants, whose rents could only be increased by the RGB rate. Moreover, the existing ETPA also allowed a landlord to protect its asset by modernizing vacant apartments and receiving an increase of 1/40th of the monetary expenditure per month for the upgraded and modernized apartment, while still keeping rents within affordable limits. This individual apartment improvement (IAD increase served multiple purposes: provide new tenants with upgraded apartments with new appliances and fixtures; allowed landlords to raise the rent roll of their buildings and

the rent of individual apartments to get close to "fair market rents," and increase the return on as well as the value of their investment. These multiple purposes were served with the result of maintaining what frequently were 100 year old buildings; the ability to maintain and improve old housing stock at a reasonable level. The HSTPA prevents that. One recent example was broadcast by Verizon FIOS-1 on October 14, 2019, citing the example of a landlord who was in the process of renovating an apartment who stopped that renovation because he could not get reimbursed for the cost of the renovation. This same landlord was also going to renovate another apartment that was rife with mold, but because of the HSTPA could only clear up the health condition and not renovate that apartment either – leaving both vacant and thereby resulting in exactly what the HSTPA was intended to prevent, second class unrenovated old housing. This example is repeated on a multitude of occasions due to the inability to secure adequate compensation for the apartment improvements or major capital improvements, which now do not even pay for the cost of the repairs, not even considering the cost of financing the repairs and/or improvements.

78. The Westchester County RGB determined in 2018 and again in June of 2019 that property owners would be permitted to increase rents by 2 and 3% and then 1.75 and 2.75 % respectively for one-year and two-year leases. For the six-year period from 2014 through 2019, the one-year rent increases have been an average of 1.6% and the 2 year rent increase have been an average of 2.4% over that period. It must be noted that with a 2 year increase, that is one increase for the stated amount at the start of the lease period for 2 years and there is no other increase during the 2 year period. As stated *infra* these increases did not

keep up with the 10% increase in expenses, and the increases were only half the increase in expenses. The compounded effect of those sub-cost permitted rent increases over the last 20-year period has been to increase stabilized rents by a total of which is approximately a third to a half of the increase in costs. The loss of the vacancy increase has exacerbated the financial woes suffered by every HSTPA afflicted landlord. Under the HSTPA the vacancy increases are eliminated, thereby depriving property owners of a fair return on their investment and the ability to control the income from as well as the disposition of their properties, a taking under the constitutions "takings" clause as well as a violation of due process in denying the owners their constitutional right to own and dispose of their own properties as well as earn reasonable income therefrom.

79. By requiring rents to remain at below-market averages for an indefinite period in making ETPA permanent and in imposing its other regulatory restrictions, the HSTPA significantly reduced the value of regulated properties and deprived building owners of a reasonable market return on their investment. Given that the goal of the HSTPA was to reduce the rents paid by tenants (at the expense of property owners- note Andrea Stewart Cousins statement) it is not surprising that rents in HSTPA units are significantly below the rents for non-regulated units. The Wall Street Journal reported that median regulated rents in Manhattan were 53% below the median market rates in the Borough. The New York Department of Finance estimates that in Manhattan, the income from non-regulated units can be as much as 60-90% higher than regulated units for units built before 1974. The same lower rents are true in Westchester and extrapolating the examples given herein, the regu-

lated units rent is even less than in Manhattan. One member of plaintiff AOAC reports that for certain apartment units, the rental rates he is permitted to charge his ETPA tenants are 70-80% lower than the rates charged for comparable inarket-rate apartments in the same building.

80. Over the past six years, the disparity between stabilized rental rates and market rental rates have only increased because the RGB has restricted stabilized units to *de minimis* annual rental increases promulgated by the RGB, i.e., an average of 1.3% a year between 2015 and 2020, less even than the cost of living and less than the percentage rise of expenses as shown by the HCR surveys from landlords of over 50% of the units subject to ETPA in Westchester, which increase in expenses over the last 3 years in Westchester has been 10%. The reality is that the increase in expenses over the last 5 years has outpaced the increases in income shown by the surveys. This disparity will only continue to grow because the legislature has removed all options for increasing legal rents other than the RGB authorized increases. For the years 2016 to 2020 RGB increases have been an average of 1.6% a year for one year renewals and 1.33 from 2014 through 2020 for one year renewals and 2.33% for every other year for the period from 2015 to 2020 (2015, 2017) for 2 year renewals or 2% a year from 2014 through 2019 (2014, 2016, 2018) for 2 year renewals. However, expenses in the period between 2016 and 2018 increased 9% or an average of 3% per year – between almost 100% higher each year for 1 year renewals and 50% higher for 2 year renewals. Thus, HCR's own numbers from the yearly surveys confirm that owners' net operating income is being reduced each year. In fact, particularly for units with longterm tenants, the cumulative impact of the RGB

extremely low increases could eliminate the owner's net operating income entirely now that the HSTPA eliminates virtually all other sources of income. This is the essence of a "taking" in violation of the Constitution.

81. Based on an analysis of data originating from the New York Department of Finance, the value of buildings with predominantly non-stabilized units is approximately double, or more, the value of a buildings with predominantly ETPA units. For example, using market value data for properties that sold in 2016 shows that properties with 25% or less rent stabilized units sold for twice the square foot price of buildings with 75% or more rent stabilized units. Put differently, properties with predominantly rent stabilized units were worth half as much as properties with predominantly non-regulated units. In fact, the data demonstrates a linear relationship in the per-square foot value of a building based on the percent of the building units that are subject to the HSTPA. In other words, the sales price per square foot of a building is reduced in direct relationship to the amount of square feet that are regulated by the HSTPA. Buildings where HSTPA units account for almost 100% of the units can expect a price per square foot of two-thirds less than the price per square foot of buildings where rent stabilized units account for almost 0-20% of the units. The reduced value of the regulated units is further confirmed by the New York City's Department of Finance assessed values of properties, which computations are comparable for Westchester County. For example, in 2019, the market value of a building with 25% or fewer regulated units had a per square foot market value ($233/sq. ft.) or more than double the value of buildings in which 75% or more of the units were regulated ($97/sq. ft.) When properties that are eligible for a full tax exemption are removed from the

database, the disparity becomes even greater. Then, properties with 25% or fewer stabilized units have a value assessed by the City that is more than 2.5 times greater than the buildings with 75% or more of the units regulated. The statistics in Westchester County can be presumed to be similar.

82. New York City's Department of Finance's 2019 "Assessment Guidelines for Properties Values Based on the Income Approach" is itself an admission by the City that rent stabilized units have a lower value than comparable unregulated units. Westchester is no different. Those guidelines include a range of values per square foot for various properties including both regulated and unregulated residential properties. For example, for rental properties built post-1973 in Manhattan, the Assessment Guidelines concede that unregulated properties have a value that is 11% to 45% greater than their regulated counterparts. For rental properties in Manhattan built pre-1973, the guidelines admit that the value of regulated properties are half that of their unregulated property peers. In other words, by designating a property for ETPA, Defendants take at least half the value of that property from its owner. Thus, even prior to the Housing Stability and Tenant Protection Act of 2019, half to two-thirds of the value of buildings with a significant percentage of ETPA units was eliminated and the HSTPA has made that even worse. The HSTPA has virtually taken away an owners' ability to increase rents to pay for needed improvements, maintenance, upkeep, capital improvements and repairs and have in most cases eliminated an owners' ability to remove units from the ETPA coverage and virtually destroyed the value of these buildings (See Danker, *supra.)*.

83. The perpetual renewal of a nominally temporary remedy itself interferes with the reasonable expectations of owners. Indeed, the ETPA declares that "the ultimate objective of state policy" is "the transition from regulation to a normal market of free bargaining between landlord and tenant," *supra*. Having defined the ETPA to be a temporary measure, the HSTPA now makes it permanent. Defendants should be estopped from challenging the reasonableness of owners in relying upon those very representations. The HSTPA has virtually eliminated a real estate investor's reasonable investment-backed expectations by, among other things, compounding the limitations on the various economic rights of property owners. By limiting permissible rental rate increases to very small amounts each year for the past six years, the Defendants have further prevented owners from achieving the growth in rents that would be reasonably expected by any investor. By eliminating the availability of such vacancy rent increases, the HSTPA denies owners any meaningful ability to partially offset the sub-market-rate rents and to recover for those costs of vacancies.

FOR A THIRD CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

The HSTPA Violates Due Process In That It Does Not meet Statutory Goals as it Negatively Affects Cooperatives, Condominiums, Single Family Homes

84. The Plaintiffs Repeat each and every allegation heretofore made herein with the full force and effect as if set forth at length herein.

85. Among other things, the 2019 Housing Stability and Tenant Protection Act also detrimentally affects not only ETPA landlords, but others, including

cooperatives, condominiums and single family house owners and it affects all landlord groups in that it:

a) Limits the amount of security or advance payment that a landlord can collect to one month and issues now exist as to one payment leases such as for vacation homes;[7]

b) Abolishes the common law rule and now requires landlords to take "good faith" steps to re-rent if tenant vacates during lease term;

c) Prohibits collecting more than $20 per applicant by a landlord for an application and then only for credit check;

d) Imposes multiple inspection periods for security deposit and return;

e) Limits the amount of late fees to $50 or 5% of rent, whichever is less, no matter what the amount of rent, therefore, if the rent is $7500 a month, the late charge cannot exceed $50.00;

f) Cannot review prior court eviction actions for prospective tenants thereby leaving landlords open to renting an EPTA apartment to a serial non payer or problem tenant and also prohibiting cooperatives froin similarly investigating to assure proper due diligence in financial verification of prospective shareholders;

g) Prohibits suing in an eviction proceeding for 'additional rent,' such as outstanding legal fees, late fees, repair fees, air conditioning charges, unpaid coop

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[7] For example, if a vacation rental is prepaid for the season, that now appears to be illegal; a cooperative is willing to take a chance on an applicant and asks for a year's maintenance in escrow to assure compliance with the payment of maintenance, that is now forbidden and therefore will lead to more applicant rejections.

assessments. sublet fees, etc. thereby removing the ability of a landlord (and cooperative of condominium or hoine owner) from effectively having a timely enforcement mechanism for collection of these items;

h) Prohibits legal fees to be awarded on a defaulted non payment eviction proceeding causing the landlord or cooperative to bear the legal fee burden;

i) Extends the time for the bringing of an eviction proceeding by requiring 5 day notice if rent not paid on time; and an additional 14 day notice rather than the traditional 3 day notice of non payment; and finally by delaying the Marshal's notice from 72 hours to 14 days. Duplication of notices adds nothing but time and cost to the lessor;

j) Extends the time a judge can grant a tenant to vacate for up to a year; and extends timing for bringing eviction action from 5 to 12 days to 10 to 17 days.

k) Requires notices from 30 to 90 days if Landlord does not intend to renew the lease or increase the rent more than 5%;

l) Provides 14 day delay of trial if tenant requests an adjournment rather than the former requirement of trial within 10 days;

m) Eliminates increases in preferential rent on lease renewals;

n) Seemingly prohibits Landlords from terminating month to month tenancies.

o) Eliminates vacancy and longevity increases, limiting return on investment and less income to run buildings;

p) Limits Individual Apartment Increases for renovation work on an apartment to $15,000 total expenditure

over 15 years for no more than 3 renovations and must be removed after 30 years together with RGB increases; (will lead to less apartment renovation or upkeep), thereby leading to less improvements to apartments with new tenants having to take older kitchens / bathrooms / balance of apartments;

q) Limits Major Capital Improvement increases to 2% of the tenant's rent and must be removed after 30 years together with RGB increases, thus leading to a deterioration of the housing stock because of less MCIs due to inability to be paid back for cost of MCIs;

r) Prohibits the Rent Guidelines Board from granting vacancy increases or low rent increases;

s) Extends overcharge period to 6 years and allows HCR to go back any period to determine correct rent, thereby requiring Landlords to keep records virtually forever;

t) Eliminated "safe harbor" for overcharge complaint thereby making treble damages compulsory without allowing Landlords to rectify mistake and pay back overcharge before finding issued;

u) Eliminates high rent decontrol;

v) Eliminates high income decontrol;

w) Limits income thereby reducing the return on investments as well as funds available for maintenance, upkeep and repair of apartments and buildings;

x) Eliminates eviction plans for conversion to cooperative or condominium ownership of rental properties;

y) Raises bar to effectively prohibit conversion plans for conversion to cooperative ownership for non eviction plans, raising number of assenting renters to 51% from 15% of renters or purchasers;

z) Written receipt must be supplied by landlord if payment by any method other than personal check, therefore, direct deposit payments must generate written receipt;

aa) Made the Emergency Tenant Protection Act, as modified by the HSTPA of 2019 virtually permanent regardless of the fact that the concept of the ETPA was to work towards market rate housing, a goal that can never be obtained given the HSTPA.

86. The HSTPA therefor, as an apparent unintended consequence has negatively affected the Cooperative industry in New York by imposing on its many financial limitations that can only serve to destroy the very housing market, i.e., affordable ownership housing, that the Legislature should be supporting. Even the one proposed law to limit the damage is very narrowly tailored and does not deal with many of the difficulties that the HSTPA causes cooperatives.

FOR A FOURTH CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

THE FAILURE TO REVISIT THE 5% THRESHOLD AS WELL AS THE DECLARATION OF EMERGENCY IN THE ETPA BURDENED WESTCHESTER COMMUNITIES IS A VIOLATION OF DUE PROCESS

The 5% Vacancy Threshold is Long Outdated

87. The Plaintiffs Repeat each and every allegation heretofore made herein with the full force and effect as if set forth at length herein.

88. 82% of the ETPA apartments in Westchester are in the cities of Yonkers (40%, adopted 10/15/78); Mt. Vernon (19%, adopted 9/27/78); New Rochelle (14%, adopted 12/27/79) and White Plains (9%, adopted 10/6/80). The other 18% are in various other communities where

the existence of a housing emergency is more than questionable, particularly in light of the new construction (see Mamaroneck and Harrison below). Since that time there have been no surveys since ETPA was initially adopted. This is an outright constitutional violation, particularly in light of the fact that there has been substantial construction of multi family apartment units completed in the interim, with more planned for the near future. Specifically, in;

a. Yonkers, 1165 apartments units have been constructed with 590 additional under construction, resulting in 1765 new apartment units;

b. New Rochelle; 1000 apartment units have been constructed;

c. White Plains: 825 apartment units have been completed, 430 more are under construction and 800 planned, resulting in 2059 new apartment units.

d. Mamaroneck; 227 new housing units completed;

e. Harrison: 36 new housing units completed;

f. Hastings on Hudson: 66 new housing units completed.

89 The addition of the apartment units in each of these communities should, at a minimum, have resulted in a new study to determine whether in fact, in light of the amount of new housing, there is an emergency that requires the continued existence of the HSTPA. To not conduct surveys in almost 40 years in light of the expanded residential opportunities is a violation of the due process rights of every landlord in these ETPA / HSTPA communities. Most significantly, particularly in light of the above, no municipality has revised or reviewed or revisited the 5% threshold on a regular basis to determine whether in fact a housing

emergency or "acute shortage of housing" still exists, and thus satisfying and confirming the initial rationale for the emergency declaration, nor is there any rationale for continuing to use the 5% threshold. Therefore, the underlying basis for the legislation cannot be said to still exist in most of the municipalities that adopted and opted into the ETPA approximately 40 years ago[8] and now are also bound by the HSTPA; a violation of the constitutional rights of all subject to these out of date laws where no vacancy surveys have been done in the approximately 40 years. Therefore, without legal rationale and I not revisiting or revising the 5% threshold, the local communities continuation of the ETPA through the HSTPA as well as the grounds renders the HSTPA unconstitutional.

90. Under the ETPA, a municipality that has declared a housing emergency may declare that the regulation of rents do es or does not serve to abate the emergency, and also may remove one or more (or all) classes of accommodations from rent regulation. Yet, neither any municipality in the suburbs of New York City, nor any of the Defendants have exercised that authority to determine whether rent regulation serves to abate any purported emergency nor have any of the municipalities, except as set forth hereinabove as to Ossining, conducted a survey in decades, to determine whether the 5% vacancy rate still exists in the individual communities. The failure of the suburban

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[8] As stated, except for Ossining (in 2018 and 2019) which adopted ETPA for buildings over 20 units and provided an "opt-out" if a 20% affordable housing set aside was agreed to, and Croton and Port Chester, both of which adopted ETPA as to one building, the balance of the 18 Westchester communities adopted ETPA no later than 1981.

communities to conduct a survey since the initial adoption of the ETPA violates the due process rights of every Landlord/Owner since it is patently clear that with all the new construction, particularly in the cities, the vacancy rate rises well above the statutory 5% requirement.[9] Defendants' failure and refusal to exercise that statutory authority further deprives the Plaintiffs of their substantive right to Due Process.

91. The HSTPA applies in Westchester, Rockland and Nassau Counties as well as in New York City. The continuation of ETPA without a review of the 5% threshold in the various communities in Westchester on its face violates Due Process and is arbitrary and irrational and a violation of law and lawful procedure as well as the constitutional rights of property owner.

92. The governing statute permits the local communities in Westchester to declare a housing emergency when there is a vacancy rate of 5% or less—but provides that [a]ny such determination" is to be made not just "on the basis of the supply of housing accommodations . . .," but also "the condition of such accommodations and the need for regulating and controlling residential rents . . . ."N.Y. UNCONSOL. LAW § 8623.a (McKinney).

93. The various communities in Westchester have continued the ETPA and now the HSTPA without any meaningful support for or analysis of whether a housing emergency still exists or whether only a

[9] Ossining is the only exception having voted in ETPA in the last year, using a faulty survey of vacancies that eliminated from consideration all vacant apartments that were being renovated, or painted or improved for new tenancies. Moreover, several vacant apartments were not counted in buildings where the surveyors could not get access.

particular class of housing is experiencing an emergency; or whether an emergency would be ameliorated by "regulating and controlling residential rents." This violates the various constitutional protections.

94. The various communities have not, since the initial declaration of an "emergency" established any rational basis or surveys for determining that a housing emergency still exists—the finding required by the statute. In fact, Defendants have failed to even identify the variables that should be used to determine whether an emergency still exists (let alone the threshold at which those variables might be indicative of an emergency). That renders the promulgation of the HSTPA arbitrary and violative of Due Process.

95. The HSTPA applies in 21 Westchester communities as a result of the initial declaration by each community of a housing emergency within that community without thereafter ever doing a survey to see if the 5% threshold has been met or kept. This violates Due Process and is arbitrary and irrational.

96. The ETPA provides that a municipality that has declared a housing emergency may at any time declare that the emergency is wholly or partially abated, or that the regulation of rents does not serve to abate the emergency, and in that way may remove one or more (or all) classes of accommodations from rent regulation. The New York statute permits the declaration of an emergency only if the vacancy rate is at or below 5%. Put another way, the mere fact that there was or is a 5% (or lower) vacancy rate does not by itself provide a justification for declaring a housing emergency, but is instead a precondition to making a determination of whether such an emergency exists and there is "the need for regulating and controlling residential rents." UNCONSOL. LAW § 8623.a (McKinney). Even

when the vacancy rate in a local community is shown to be less than 5%, the community must separately consider and decide whether a housing emergency still exists. Virtually none of the 21 communities that have adopted ETPA have conducted a survey since initially adopting ETPA to assure that there is still a 5% vacancy rate in the community,[10] nor have any of them adopted a resolution since the initial adoption of ETPA with a determination that a "housing emergency" still exists. This again violates due process and is arbitrary and capricious. In fact, after 45 years-plus of ETPA, the local communities continue to ignore the requirement that there be less than 5% vacancies. This is a violation of the standards established under the Due Process clause of the Constitution.

97. Defendants have not established any rational basis for determining that a housing emergency still exists in any of the 20 communities (excluding Ossining) in decades—the finding required by the statute. In fact, Defendants have failed even to identify the variables that should be used to determine whether an emergency exists (let alone the threshold at which those variables might be indicative of an emergency). Every community with ETPA has, for decades, failed to offer either a rational explanation or justification for the continuation of ETPA and now the promulgation by the state of the HSTPA. They have failed to identify any thresholds constituting an "emergency," failed to articulate the criteria or bases for their lack of a

[10] The Village of Ossining initially adopted ETPA in 2018 with a questionable survey that eliminated many vacant apartments from consideration. Thereafter, in February 2019, it exempted all housing of 20 or less units and provided that a landlord with more than those number of units could opt out of ETPA if it agreed to provide 20% of its units for lower income tenants.

determination and further surveys, and failed to explain, or even consider, whether the continued and expanded rent regulation under the HSTPA that follows from their lack of a determinations actually addresses the perceived housing emergency. As a result, the determinations on which the continuation of the ETPA system as well as the promulgation of the HSTPA rests are arbitrary and irrational and a violation of the Due Process and property rights of Plaintiffs and their members.

98. Moreover, even if one assumes that the vacancy rate is less than 5% it does not justify the conclusion that a housing emergency still exists in each and every community that has since 1974 adopted ETPA. The Communities that have adopted ETPA appear to incorrectly believe that so long as the vacancy rate is below 5%, an emergency exists regardless of other circumstances. This is wrong. Communities such as Yonkers, White Plains and New Rochelle, among others, have had a resurgence of building with thousands of new housing units coming on board. These units should be considered as to the 5% vacancy claim and certainly, if there is another survey, the 5% vacancy rate would be significantly higher than 5%. The arbitrary 5% vacancy-rate threshold established by statute as authorizing a municipality to consider declaring a housing emergency determination only emphasizes the need for careful consideration by every municipal government and governing body —separate and apart from the vacancy rate itself—whether a housing emergency actually exists.[11] But the lack of

[11] Emergency Tenant Protection Act, Chap. 576, Laws of 1974 The local governing body of a city, town or village having declared an emergency pursuant to subdivision a of this section may at any time, on the basis of the supply of housing accommodations

any record compiled in connection with the continued emergency finding provides no basis whatsoever for any of the local communities to continue ETPA and the HSTPA without further review and analysis of whether there is an emergency. While perhaps politically popular, the rote renewal and permanency of the ETPA by the HSTPA on the basis of such an outdated "emergency finding" without further surveys to determine whether there is still a 5% vacancy, violates Due Process.

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within such city, town or village, the condition of such accommodations and the need for continued regulation and control of residential rents within such municipality, declare that the emergency is either wholly or partially abated or that the regulation of rents pursuant to this act does not serve to abate such emergency and thereby remove one or more classes of accommodations from regulation under this act. The emergency must be declared at an end once the vacancy rate described in subdivision a of this section exceeds five percent.

* * *

c. No resolution declaring the existence or end of an emergency, as authorized by subdivisions a and b of this section, may be adopted except after public hearing held on not less than ten days public notice, as the local legislative body may reasonably provide.

FOR A FIFTH CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

THE 2019 HOUSING STABILITY AND TENANT PROTECTION ACT EFFECTS A *PHYSICAL* TAKING OF THE PROPERTIES STILL AND CONTINUING TO BE SUBJECT TO ETPA REGULATION, INCLUDING NOT HAVING THE RIGHT TO EXCLUDE OR CHOOSE

98. The Plaintiffs Repeat each and every allegation heretofore made herein with the full force and effect as if set forth at length herein.

99. The HSTPA deprives property owners of their basic ownership right to either choose, include or exclude those that it selects from their property and to possess, use, and dispose of their property or concomitantly, to use, rent and own their property without improper, illegal and unconstitutional government interference and restriction. That physical taking without compensation renders the HSTPA on its face a per se violation of the federal Constitution's Takings Clause.

100. The HSTPA accomplishes this taking through a web of regulations that effects a physical taking of rental properties just as clearly as if New York State commandeered a leasehold interest or easement in HSTPA regulated apartments outright. Some of the restrictions, in addition to those set forth *infra,* that are newly imposed or added to the farmer limitations are as follows:

a. The government mandates the now PERMANENT, continued, indefinite occupation of rental properties by tenants – the ETPA no longer "sunsets" every 4 or so years, HSTPA never sunsets.

b. HSTPA owners cannot refuse to renew leases except in extremely few and far between narrow circumstances.

c. Owners cannot increase rent by more than 5% or refuse to renew a lease without a 30, 60 or 90 days' notice, as the case may be.

d. The elimination of this right to exclude is not limited to the original tenant—the tenant may give his or her right to the unit to another person, the so called 'succession' right, and the property owner must allow that "successor" to renew his or her lease on government-dictated terms. The law thus confers a life estate with inheritance rights once an apartment is rented in an ETPA covered unit.

e. The Housing Stability and Tenant Protection Act of 2019 further limits a property owner's ability to evict a tenant, including a stay of eviction for up to one year, multiple redundant notices, lengthy court proceedings, virtually automatic adjournments of court proceedings to tenants, etc. The HSTPA and its restrictions are permanent, forever and never to be eliminated.

f. The HSTPA effectively denies property owners the right to possess and use their own property. Although the law appears to give owners the right to recover possession for personal use, that provision is hedged with restrictions: the unit must be used as a primary residence, recovery of possession is not available to owners who hold property through a corporate form, and extends to only one owner even if the property is owned by multiple owners and limits the ability to obtain the premises from tenants who have been in occupancy less than 15 years (reduced from the former 20 years) and with other restrictions. The

HSTPA added a one-unit limitation and imposes other new restrictions, replacing the previous "good faith" requirement with a showing of "immediate and compelling necessity" (a demanding standard), and precluding the recovery of possession for personal use if the tenant has lived in the building for 15 years, unless the owner offers equivalent housing accommodation at the same ETPA rent in the same or nearby building. Moreover, in, for example a building of 250 units, an owner is prohibited from reclaiming more than one apartment, even though it would have a negligible impact on the building. When the government decrees that a tenant's rights take precedence over the owner's own use and occupancy of a unit or building, the government has effectively seized that property to the same extent as if it had taken over the building as a government housing facility, again an unconstitutional taking and one without compensation. Furthermore, an owner is also limited in recovering an apartment "where a tenant or the spouse of a tenant lawfully occupying the dwelling unit is sixty-two years of age or older, or has an impairment which results from anatomical, physiological or psychological conditions" which prevents "substantial gainful employment." It does not matter whether the owner also is 62 or older, or has an impairment, or is even decades older than the tenant—the tenant still receives priority over the property owner. When the tenant is over 62 or disabled, the owner must "offer[] to provide and if requested, provide[] an equivalent or superior housing accommodation at the same or lower stabilized rent in a closely proximate area" in order to regain his property for his own use." This is an absolute restriction on the Owner's right to the use of its real property giving the Tenant a veto power over the landlord.

g. Decisions in the analogous rent control context highlight how great a burden the "immediate and compelling necessity" test imposes on property owners. For example, in *Boland v. Beebe,* 62 N.Y.S.2d 8, 12 (Syracuse Municipal Court, 1946), the court found that "the landlord and her family are seriously overcrowded," with several children and their spouses living in one flat, and found that access to the rented unit was a "necessity," but deemed it not to be an immediate compelling necessity. Similarly, in *Cupo v. McGoldrick,* 278 A.D. 108 (N.Y. App. Div. 1951), a property owner with an enlarged heart attempted to move from the fourth floor of her walk-up to the ground floor. Despite sworn testimony from the property owner's doctor that the fourth-floor apartment would "become increasingly dangerous to her health," the court affirmed a finding of no "immediate and compelling" necessity after the tenant claimed that he once saw the property owner "climbing the stairs unnecessarily." *Id.* at 109-10. Thus, under the HSTPA not only would an owner have no ability to obtain for her own use a second (or alternative) unit in his or her own building, if he or she had not already lived in that building, the owner would likely be unable to even meet the showing of "immediate and compelling" necessity to obtain the use of a single unit in his or her own building. Even in the rare circumstance in which the owner is able to demonstrate an immediate and compelling necessity, the unit cannot be obtained if it is occupied by a tenured, elderly or infirm tenant. Thus the owner is still limited in his rights to use that property. The owner is then forbidden for three years from "rent[ing], leas[ing], subleas[ing] or assign[ing]" the unit "to any [other] person" except for "the tenant in occupancy at the time of recovery under the same terms as the original lease." In other words, the owner cannot even

sublease the property during that three-year period, a right that his tenants would enjoy if they occupied the property. These multiple restrictions on an owner's ability to regain possession of units for the owner's personal use separately and together deny owners the right to occupy, possess and use their own property and effect an uncompensated physical taking of the property and constitute constitutional infirmities that render HSTPA unconstitutional

h. Prior to the HSTPA property owners could convert buildings into cooperatives or condominiums using either eviction or non-eviction plans and as stated this has been virtually eliminated.

101. Through the HSTPA, Defendants are violating this fundamental principle, depriving Westchester County multi-family property owners of their fundamental property rights, including their right to choose and/or exclude others from their property, and to possess, use and dispose of that property and achieve a reasonable return on their investment. A government-sanctioned physical invasion of private property is a *per se* taking requiring compensation. The category *of per se* takings is not limited to physical seizure of property by the government; it also encompasses access easements of indefinite duration (*Dolan v. City of Tigard,* 512 U.S. 374 (1994)), and even flyovers that appropriate airspace if it renders the "taken" areas uninhabitable (*United States v. Causby,* 328 U.S. 256 (1946)). The Supreme Court has held specifically that granting a "permanent and continuous right to pass to and fro'" over private property is a "permanent physical occupation." *Nollan v. Cal. Coastal Comm 'n,* 483 U.S. 825, 831-32 (1987). As described herein, multiple provisions of the HSTPA subject property owners to such physical invasions due to the fact that the

landlord of multi family dwellings subject to the EPTA and the HSTPA are the only group that bears the burden of this legislation and restrictions attendant thereto. In *Dolan,* Chief Justice Rehnquist, in writing for the Court, held that the City's conditioning of a permit to redevelop a site upon the dedication of a portion of the site to the establishment of a drainage system and an additional strip of land for a bicycle pathway violated the Takings Clause. The same exists herein with the legislature more than conditioning and basically restricting not only the economic return, but the ability to freely use and/or dispose of one's own property.

102. The HSTPA imposes unconstitutional conditions on building owners' use of their property. In order to rent out a pre-1974, six-unit-plus building covered by the HSTPA, a building owner must acquiesce in a set of rules that impose on the owner the indefinite physical occupation of rented units by tenants and their successors at below-market rents with any increases controlled by government regulation. An owner of a pre-1974 six unit plus building cannot participate in the rental market without acquiescing in that regulatory system, which (as discussed in detail herein) effects a per se taking. And once a property is placed into that rental market, the owner's ability to make a reasonable return on investment with this now permanent restrictive legislation is virtually eliminated.

103. While government cannot condition an owner's ability to rent its property on the elimination of the owner's rights to include or exclude others from its property, and to possess, use and dispose of that property, the HSTPA has done just that. See *Loretto,* 458 U.S. at 439 n.17 (holding that New York law

effected a taking because "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation"); Thus, the adoption of the HSTPA violates the constitutional rights of every multi family ETPA restricted property owner subject to the terms and restrictions included therein.

104. Practically each individual provision of the HSTPA constitute a per se taking.

a. First, the HSTPA mandates the continued occupation of rental properties by tenants, and owners cannot refuse to renew leases to those tenants except under the narrowest of circumstances. Not only do owners have no way to remove the original tenant in the property, but they must suffer the intrusion of strangers—sub-lessors and successors of the tenant—the selection and admission of whom the owner is given no right to oppose. The "right to exclude others" from "one's property" is "'one of the most essential sticks in the bundle of rights' that characterize property, yet the HSTPA restricts just that. *Dolan,* 512 U.S. at 393 (quoting *Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979)). That the HSTPA deprives property owners of that "essential stick" demonstrates that the law effects a per se taking of the owner's property.

b. Second, the HSTPA completes the physical occupation of the Plaintiffs' property by taking from the property owners the right to possess, use, and dispose of property. "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' To the extent that the government permanently occupies physical property, it effectively destroys each of these rights." *Loretto,* 458 U.S. at 435 (quoting *United States v. Gen. Motors Corp.,* 323 U.S. 373, 378 (1945)). The HSTPA not only denies property

owners the fundamental right to exclude others, but also denies them the rights of use, possession, and disposal, leaving property owners with only the shell of ownership.

c. Third, the HSTPA also dramatically limits the property owner's ability to dispose of his or her own property. Tenants may not be denied a lease renewal even if the owner wants to repurpose the building to non-housing rental purposes. See 9 NYCRR § 2504. If an owner wanted to cease offering the property for rent entirely—if the owner effectively wanted to go out of business and not use the property for any purpose the owner can only, with restrictions, demolish the property and cannot convert it to another use.

105. In passing the Housing Stability and Tenant Protection Act of 2019, New York has eliminated almost every avenue that allowed a transition from regulation to free market,[12] eliminated any sunset period for the law, and imposed obligations on owners that extend more than thirty years into the future. The HSTPA is of "indefrnite duration." Unlike other rent control ordinances that merely fix a cap on the rents that can be charged, the HSTPA imposes a physical occupation on the property owner, denying the owner all the significant elements of its constitutionally protected bundle of property rights. Thus, "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto,* 458 U.S. at 435. In so doing, the HSTPA constitutes a per se

[12] The basic ETPA "purpose" clause provides that the ultimate goal is to arrive at a free market rental structure, now a virtual impossibility.

taking, for which the property owner receives no compensation at all.

106. "[T]he 'right to exclude,' so universally held to be a fundamental eleinent of the property right, falls within th[e] category of interests that the Government cannot take without compensation." *Kaiser Aetna,* 444 U.S. at 179-80 (holding that a government order that the owner of a marina open it to the general public imposed "an actual physical invasion of the privately owned marina"). This right is denied property owners of ETPA rental housing in Westchester County in that, simply, they have to rent and continue to rent to those who are living in an apartment and moreover, have the absolute right to renew their leases every 1 and 2 years. The HSTPA requires property owners to provide tenants the option to renew their lease at RGB prescribed rates.

107. By requiring the owner to renew the lease of the existing lessee (and their successors under the law – not even the persons that the landlord/owner first rented to), the law deprives the owner of his or her fundamental right to exclude others from his or her own property. This imposition of a right for the tenant and successor, to renew his or her lease into the indefinite future, and fixing the terms of the offer for renewal, is a physical taking for which the Fifth Amendment requires just compensation. Yet owners receive no compensation for the forced housing of individuals not of their choosing at below market rents. That elimination of the right to exclude is not limited to the original tenant. There are a host of legal requirements that allow the tenant to give to another person the tenant's rights to the unit. These "succession" rights prevent owners from excluding strangers from the property, because they are forced to

continue permitting the new "successor" tenant to renew his or her lease at below market rates. The original tenant, for example, retains the right to give the ETPA unit and the right to lease renewal to "any member of such tenant's family . . . who has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years, or where such person is a 'senior citizen,' or a 'disabled person' . . . . for a period of no less than one year, immediately prior to the permanent vacating of the housing accommodation by the tenant, or from the inception of the tenancy or commencement of the relationship, if for less than such periods, shall be entitled to be named as a tenant on the renewal lease.".[13] Family members who resided with the tenant for 2 years immediately preceding the death or permanent departure of the tenant scan receive this benefit and "[a]ny other person residing with the tenant or permanent tenant in the housing accommodation as a primary or principal residence, respectively, who can prove emotional and financial commitment, and

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[13] (1) Unless otherwise prohibited by occupancy restrictions based upon income limitations pursuant to federal, state or local law, regulations or other requirements of governmental agencies, if an offer is made to the tenant pursuant to the provisions of subdivision (a) of this section and such tenant has permanently vacated the housing accommodation, any member of such tenant's family, as defined in section 2520.6(o) of this Title, who has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years, or where such person is a "senior citizen," or a "disabled person" as defined in paragraph (4) of this subdivision, for a period of no less than one year, immediately prior to the permanent vacating of the housing accommodation by the tenant, or from the inception of the tenancy or commencement of the relationship, if for less than such periods, shall be entitled to be named as a tenant on the renewal lease.

interdependence between such person and the tenant or permanent tenant" or for 1 year for a disabled person or senior citizen.

108. By denying the property owner the right to exclude a tenant upon the expiration of the tenant's lease, by denying the property owner the right to exclude successor tenants the HSTPA has fundamentally constricted to the point of nonexistence the property owner's "right to exclude." This deprivation is even greater than an access easement (as in *Dolan)* where individuals are permitted to pass periodically. Under the HSTPA, individuals (many not of the owner's choosing) are permitted to take up permanent residency on a property, go to and fro as they wish, and for all practical purposes treat the property as their own, bequeathing to family members, or even selling their interest in the property back to its rightful owner. As the Supreme Court has noted, "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. . . To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury." *Loretto,* 458 at 436.

109. The HSTPA both significantly limits the owner's right not to renew a tenant's lease and also substantially eliminates the owner's ability to remove a tenant. Even before the HSTPA, the property owner could only evict a tenant for failing to pay rent, creating a nuisance, or for violating the lease or the law—conduct that is solely within the tenant's control. As a result of the Housing Stability and Tenant Protection Act of 2019, the property owner's ability to evict a tenant is even more significantly constrained. For example, this law also permits a stay of execution of eviction for a period of one year if the tenant can

demonstrate an inability to obtain other housing or to prevent hardship, such as a child in school. Thus, even tenants who are breaking the law or failing to pay the rent on time may be entitled to a year of tenancy upon a showing of "hardship." Further, the following additional restraints have been placed on Landlords seeking to evict tenants: increasing the 3 day notice period to 14 days; increasing the 72 hour notice period by a Marshall after a judgment has been awarded and a warrant served from 72 hours to 14 days; increasing the return date time from 5 to 12 days to 10 to 17 days; giving tenants the right to adjourn a trial automatically to 14 days from requiring a trial within 10 days; requiring an additional notice to a tenant that the tenant is late in payment of rent- service after 5 days by certified mail only, etc.

110. Not only does the Housing Stability and Tenant Protection Act of 2019 make it more difficult to evict a tenant, but it also makes it more difficult to select tenants in the first place. For example, the HSTPA precludes property owners from refusing to lease to a tenant due to the tenant's past or pending landlord/tenant action(s), seals records of evictions, and precludes the sale of data regarding judicial proceedings related to residential tenancy. By precluding owners from refusing to offer leases to tenants with prior rental violations, the HSTPA turns tenants with bad rental backgrounds into "protected classes," and precludes owners from excluding such tenants from their units. Through these revisions, the HSTPA dramatically reduces the ability of owners to exercise their right to exclude through due diligence. It also increases the exposure for rent overcharges to 6 years from 4, and allows HCR to consider the proper rent with no time limit backwards. Further, under the HSTPA even investigating as to prior court histories

as to tenants is illegal. Also under HSTPA units that were rented to charitable organizations to house vulnerable individuals or those who were homeless or at risk of becoming homeless (which units had previously been exempted from rent stabilization) will become subject to stabilization, and the individuals living in those units are deemed to be tenants under the HSTPA. By extending the lease renewal protections to such tenants, the Amendments further impair owners' ability to select the tenants who live in their buildings and may even require lease renewals to those tenants of these entities. This precludes the entities themselves from choosing their occupants who may require supervision and similar assistance, clearly another unintended consequence since these agencies frequently only want or accept short term tenants.

111. The principal permissible reasons for tenant eviction all remain within the tenant's control, such as the tenant's non-payment of rent, the tenant's violation of a substantial obligation of his tenancy, the tenant's committing a nuisance, or the tenant's use of the unit for an illegal purpose.. Although non- renewal of a lease is permitted in certain limited circumstances where the owner seeks to occupy a unit or demolish a building, those exceptions are limited to the point of impracticability by the HSTPA.

112. The lease renewal obligation extends not only to the tenant or tenants but also to "successors," such as the tenant's family members or any person residing with the tenant as a primary residence who can prove emotional or financial commitment and interdependence with the tenant. And the tenant's right to renew the lease persists even if the tenant subleases the apartment for up to two years in any four-year period, and even if the sublease extends beyond the term of

the tenant's lease. With regard to succession "rights" that rest only with the tenant. Some examples in one small building are three (3) apartments where the tenant's daughter is succeeding; the tenant's granddaughter is succeeding and the tenant's son is succeeding. That is only one building among all the hundreds of buildings in Westchester where there are succession rights that constitute a substantial limitation on landlords.

113. The HSTPA substantially limits an owner's ability to dispose of its own property. For example, owners may not demolish their own buildings without finding each and every tenant suitable housing and paying for all relocation expenses.

114. By denying the property owner the right to exclude a tenant upon the expiration of the tenant's lease, by denying the property owner the right to exclude successor tenants the HSTPA has fundamentally constricted to the point of nonexistence the property owner's "right to exclude," a fundamental stick in the bundle of the tenant's property ownership rights. This deprivation is even greater than an access easement (as in *Dolan)* where individuals are permitted to pass periodically. Under the HSTPA, individuals (many not of the owner's choosing) are permitted to take up permanent residency on a property, go to and fro as they wish, and for all practical purposes treat the property as their own, bequeathing to family members, or even selling their interest in the property back to its rightful owner. As the Supreme Court has noted, "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. . . To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury." *Loretto,* 458 at 436.H

115. The HSTPA both significantly limits the owner's right not to renew a tenant's lease and also substantially eliminates the owner's ability to remove a tenant. Even before the HSTPA, the property owner could only evict a tenant for failing to pay rent, creating a nuisance, or for violating the lease or the law—conduct that is solely within the tenant's control. As a result of the Housing Stability and Tenant Protection Act of 2019, the property owner's ability to evict a tenant is even more significantly constrained. For example, this law also permits a stay of execution of eviction for a period of one year if the tenant can demonstrate an inability to obtain other housing or to prevent hardship, such as a child in school. Thus, even tenants who are breaking the law or failing to pay the rent on time may be entitled to a year of tenancy upon a showing of "hardship." Further, the following additional restraints have been placed on Landlords seeking to evict tenants: increasing the 3 day notice period to 14 days; increasing the 72 hour notice period by a Marshall after a judgment has been awarded and a warrant served from 72 hours to 14 days; increasing the return date time from 5 to 12 days to 10 to 17 days; giving tenants the right to adjourn a trial automatically to 14 days from requiring a trial within 10 days; requiring an additional notice to a tenant that the tenant is late in payment of rent- service after 5 days by certified mail only, etc.

116. Not only does the Housing Stability and Tenant Protection Act of 2019 make it more difficult to evict a tenant, but it also makes it more difficult to select tenants in the first place. For example, the HSTPA precludes property owners from refusing to lease to a tenant due to the tenant's past or pending landlord/ tenant action(s), seals records of evictions, and precludes the sale of data regarding judicial pro-

ceedings related to residential tenancy. By precluding owners from refusing to offer leases to tenants with prior rental violations, the HSTPA turns tenants with bad rental backgrounds into "protected classes," and precludes owners from excluding such tenants from their units. Through these revisions, the HSTPA dramatically reduces the ability of owners to exercise their right to exclude through due diligence. It also increases the exposure for rent overcharges to 6 years from 4, and allows HCR to consider the proper rent with no time limit backwards. Further, under the HSTPA even investigating as to prior court histories as to tenants is illegal. Also under HSTPA units that were rented to charitable organizations to house vulnerable individuals or those who were homeless or at risk of becoming homeless (which units had previously been exempted from rent stabilization) will become subject to stabilization, and the individuals living in those units are deemed to be tenants under the HSTPA. By extending the lease renewal protections to such tenants, the Amendments further impair owners' ability to select the tenants who live in their buildings and may even require lease renewals to those tenants of these entities. This precludes the entities themselves from choosing their occupants who may require supervision and similar assistance, clearly another unintended consequence since these agencies frequently only want or accept short term tenants.

FOR A SIXTH CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

The 2019 Housing Stability and Tenant Protection Act Took Away Many of The Few Property Rights Remaining With Multi Family Rent Regnlated Property Owners Without Due Process that Had Still Remained Under ETPA And Interfered With The Contracts (Leases) Entered Into By The Landlords and Tenants.

117. The Plaintiffs Repeat each and every allegation heretofore made herein with the full force and effect as if set forth at length herein.

118. On June 14, 2019, the New York State legislature passed what the New York Senate Majority Leader Andrea Stewart-Cousins in a Joint Statement with the Assembly Leader Hastie said:

> "These reforms give New Yorkers the strongest tenant protections in history. For too long, power has been tilted in favor of landlords and these measures finally restore equity and extends protections to tenants across the state. These reforms will pass both legislative houses and we are hopeful that the Governor will sign them into law. It is the right thing to do."
>
> "None of these historic new tenant protections would be possible without the fact that New York finally has a united Democratic Legislature. Our appreciation also goes to the tenant advocacy groups and activists that fought so hard to make this possible."

119. It is clear from this statement that the legislature intended to impose society's burdens on landlords. Legislators alleged that the purpose of

preserving those ETPA units was to subsidize the cost of housing for New Yorkers, particularly for low- and moderate-income New Yorkers. The justification offered in support of the HSTPA emphasized the need to "protect their regulated housing stock, which provides and maintains affordable housing for millions of low and middle income tenants." Without statistical or rational support, Westchester County was dragged along with legislation that has no benefit to the many communities and no rationale for its adoption. In fact, several of the Assembly people from Westchester recognized the harmful nature of the legislation and voted against it.

120. In furtherance of its goal of precluding owners from using their properties for any purpose other than ETPA housing and in enforcing the substantial limitations of the HSTPA, and in denying landlords their constitutional rights, and in further taking their properties without just compensation, the legislature adopted many significantly damaging and ruinous ETPA amendments in HSTPA, including the following: The personal Use Exemption Dramatically Reduced; the elimination of property owners' ability to recover possession of more than one unit within their own property for their own personal use and occupancy. . Even the right to recover one unit for use as the owner's primary residence is permitted only if the owner can show an "immediate and compelling necessity" for that one unit. Thus, the ability of a landlord to use and/or live in his / her / their own property has been substantially diminished without any compensation. Other limitations in the HSTPA are as follows: Luxury Decontrol Eliminated; High Income Decontrol Eliminated; cooperative and Condominium Conversion Dramatically Limited.

121. Also eliminated was the Property Owner's ability to restore legal regulated rent on a lease renewal. Preferential Rents were those rents where a landlord reduced the rent temporarily due to market conditions. Under the case law as well as statutory law, the Landlord was entitled to restore the rent on a lease renewal as well as on a vacancy, to the legal regulated rent. This is and was a contract and agreement between the parties that allowed the restoration of all or a portion of the reduced rent to the legal regulated rent.

122. Under the HSTPA, the reduced rent cannot now be restored on a lease renewal, an action that interferes with the contract (Lease) the Landlord and Tenant had entered into when the lease was signed. This arguably is an interference with an existing contract, another violation of the U.S. Constitution which protects the right to contract. Under the HSTPA, the Landlord is not allowed to restore the rent by raising the preferential rents to return to legal regulated rent on a lease renewal -- Prior to the HSTPA if a Landlord reduced the rent for a tenant to a lower preferential rent, the landlord could restore the rent up to and including the Legal Regulated Rent upon a lease renewal. That has been eliminated and once the rent is reduced, it permanently stays reduced for that tenant and his/her/their successors. This is a further constitutional violation.

123. Article I, Section 10, c1.1 of the United States Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." While the right of contract is subject to the State's police power, as set forth herein, the issue is whether or not the HSTPA is addressed to a legitimate end, incorporating the purposes of the statute, and with measures that are reasonable and appropriate to that

end. When no survey has been undertaken in almost 40 years in virtually every ETPA community, and there has been no survey, and no review of whether or not an "emergency" exists, that does not survive the constitutional test. The legislation cannot be addressed to a legitimate end when there is no conformity or compliance with the legislative goals.

124. Property owners may not simply withdraw their buildings from the rental market. Under the Housing Stability and Tenant Protection Act of 2019, property owners now are very significantly constrained from converting rental buildings into cooperatives and condominiums. By dramatically limiting the ability of property owners to dispose of their own property, the HSTPA effects an unconstitutional physical taking of the property. That the owner must determine to utilize his property in a different fashion is virtually eliminated which demonstrates how complete a physical taking is effected by the HSTPA.

FOR AN SEVENTH CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

The 2019 Housing Stability And Tenant Protection Act On Its Face Effects An Uncompensated Regulatory Taking Of Private Property.

125. The Plaintiffs Repeat each and every allegation heretofore made herein with the full force and effect as if set forth at length herein.

126. Each of the factors relevant to the Constitution's Takings Clause weighs strongly in favor of finding a regulatory taking.

a. The HSTPA has a significant adverse economic effect on property values. A study assessing the Impact of the law prior to the Housing Stability and Tenant

Protection Act of 2019 found that buildings with predominantly ETPA units have 50% of the value of buildings with predominantly market-rate units. Property assessment guidelines indicate that unregulated properties have a significantly greater value than regulated properties. The will further increase the economic burden on regulated properties, because it, among other things, imposes restrictions on recovering the cost of improvements and by its express terms prevents owners from recovering anything close to the real cost of those improvements—even improvements that are required by law to, for example, comply with building and housing codes. Recovery for improvements to individual apartments, as stated, is very limited.

b. For the same reasons, the HSTPA interferes substantially with investment-backed expectations. The HSTPA has imposed significant limitations on property owners' ability to recover the reasonable expenses associated with maintaining apartment units. And the *de minimus* rent increases permitted by the Rent Guidelines Board each year—below the Board's own calculation of the increase required to equal the growth in property owners' operating costs and expenses, and including recent years of rate freezes—contribute to that interference. (It is noted that Ossining Village, in 2018, in their first Rent Guidelines Board determination, imposed a 0% increase for one year lease renewals and .5% for two year lease renewals although for the rest of Westchester's ETPA communities the guideline increase was 1.75 and 2.75% for 1 and 2 year renewals respectively). While the Individual Apartment Improvements are limited as set forth above, similarly the Major Capital Improvements are also limited to the extent that recouping the costs are virtually impossible, with increases limited to 2% of the rent and have to be

removed after 30 years, together with the Rent Guideline increases included therein.

c. The HSTPA does not provide any reciprocal benefits to property owners or compensation for their loss. This law is nothing but a taking without just compensation. Regulations that impose restrictions on property—such as zoning—may be upheld because the restricted property also benefits from the restrictions on neighboring property but with the HSTPA there is no such reciprocity. HSTPA properties receive no tax breaks or other government assistance. They are subject to the same expenses as properties with market-rate rentals.

d. The New York Court of Appeals has authoritatively determined that "a tenant's rights under an ETPA lease are a local public assistance benefit." *Santiago-Monteverde v. Periera,* 22 N.E.3d 1012, 1015 (N.Y. 2014). It stated that "[w]hile the rent-stabilization Act does not provide a benefit paid for by the government, they do provide a benefit conferred by the government through regulation aimed at a population that the government deems in need of protection." *Id.* at 1016. The government "has created a public assistance benefit through a unique regulatory scheme applied to private owners of real property." Id. at 1017 (emphasis added). Yet it is the landlords who are bearing the total cost of the HSTPA.

127. As the United States Supreme Court has explained, the purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). The HSTPA is thus a public assistance benefit program paid for by a limited and discrete group of property owners, who

themselves receive no benefit at all from the stabilization program, which weighs heavily in favor of finding a taking without just compensation

128. The HSTPA effects not only a *per se* unlawful physical taking by depriving owners of their rights to use, possess, dispose of, and exclude others from their property; or in fact to choose those tenants they see as suitable (it is also noted that the Landlord can no longer consider the poor payment records of a prospective tenant that culminated in various court eviction proceedings), it also constitutes a regulatory taking of rental properties subject to the ETPA. The HSTPA's regulatory burdens have dramatically reduced the market value of regulated properties, in some cases by over 50%. Even the City of New York's own tax assessment guidelines concede that unregulated properties are typically worth 20% to 40% more than regulated properties, and in Manhattan regulated properties on average are worth less than half as much as unregulated properties. The same is true in Westchester as the plethora of certiorari proceedings proves.

129. Despite permissible rental increases over the last five-year period of a very limited amount on both one and 2 year leases (1.75; 2.00; 1.00, 0. and 1.75% for a one year lease and 2.75, 3, 1.5, .5 and 2.75% for 2 years leases), the Housing Stability and Tenant Protection Act of 2019 eliminated vacancy, low rent, high rent, IAI, preferential lease renewal and MCI increases designed to help owners modestly alleviate the disparity with market rates, including, as stated heretofore, vacancy and longevity as well as IAI increases.

FOR A EIGHTH CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

Plaintiffs Bring These Claims Under The Fifth And Fourteenth Amendments To The United States Constitution And Under 42 U.S.C. § 1983 And 28 U.S.C. § 1331, And Seek Attorneys' Fees Pursuant To 42 U.S.C. § 1988(B).

130. The Plaintiffs Repeat each and every allegation heretofore made herein with the full force and effect as if set forth at length herein.

131. Plaintiffs seek declaratory and injunctive relief; they do not in this suit seek damages or compensation for Defendants' violation of their constitutional rights. See 28 U.S.C. § 2201(a) (district court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought"); Fed. R Civ. Proc. 57 ("[t]he existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate"). Declaratory and injunctive relief against future enforcement of the HSTPA will not only halt the deprivation of the constitutional rights of property owners, but will result in increased development of rental properties, better housing for a larger universe of renters, the amelioration of a constrained housing market, significant increasing availability of housing, the amelioration of a constrained housing market, significant increasing availability of housing, more mobility of tenants and will force New York State and local municipal Westchester County governments to adopt fairer and more efficient means of providing housing to those most in need.

THE LEGAL FRAMEWORK AS TO REGULATORY TAKINGS

132. In *Manocherian, supra,* the Court of Appeals held:

> We held that a "burden-shifting regulation" will constitute a taking "(1) if it denies an owner economically viable use of his [or her] property, *or* (2) if it does not substantially advance legitimate State interests" *(id.,* at 107, citing *Nollan v California Coastal Commn.,* 483 US 825, 834, *supra; see also, Agins v Tiburon,* 447 US 255, 260). Failure to measure up to either criterion can invalidate a governmental incursion or encumbrance on private property rights *(see, Seawall Assocs. v City ofNew York supra; Lucas v South Carolina Coastal Council,* 505 US ___, ___, 112 S Ct 2886, 2894; *Nollan v California Coastal Commn., supra; Keystone Bituminous Coal Assn. v DeBenedictis,* 480 US 470, 485, 495; *Armstrong v United States,* 364 US 40, *supra).* We are governed by this framework and discern no analytical basis or precedential authority to drop below this floor of constitutional protection for property owners or to alter well-established substantive and procedural rubrics and guidance in this complex field. In particular, we are satisfied that even if the economic impact aspect of this test *(see, Hodel v Irving,* 481 US 704, 714) were not to be satisfied, that feature alone could not defeat the owners' interests and claims in a controversy such as this, without consideration and fulfillment of the substantial State

> interest and close causal nexus prong of the governing test, even as to regulatory takings.
>
> *Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 392, 643 N.E.2d 479 (1994)

133. A review of the facts set forth hereinabove reveals that this "burden shifting" law both denies the owners "economically viable use of [their...] properties and (not only "or") does not substantially advance legitimate state interests, as set forth above.

134. Further on in the *Manocherian* opinon, the Court stated that :

> While the typical taking occurs when the government acts to physically intrude upon private property, governmental regulations which limit owners' rights to possess, use or dispose of property may also amount to a "taking" of the affected property *(see, e.g., Agins v Tiburon,* 447 US 255, *supra; Nectow v Cambridge,* 277 US 183, 188; *Seawall Assocs. v City of New York,* 74 NY2d 92, 101, *cent denied sub nom. Wilkerson v Seawall Assocs.,* 493 US 976, *supra).* We held in *Seawall* that the challenged local law effected a regulatory taking and was unconstitutional because the burdens imposed on owners did not substantially advance the stated public aim of alleviating homelessness. The combined effect on the instant case of these principles gains inexorable moinentum from the twin temples of the Supremacy Clause flowing from pertinent United States Supreme Court precedents and the stare decisis import of our own decisions. *Id.*

* * *

> We conclude that the peripheral and generalized State interests offered as justification for the regulatory mandates of chapter 940 [the law challenged in *Manocherian*] fail to sustain the legislation, as constitutionally required for such State action. They are not closely or legitimately connected to the long-established and recognized goals of the RSL and ETPA, which seek to ameliorate the emergency housing shortage. The regime of this statute, in significant functional respects, contradicts an essential tenet of housing protection, at the root of rent-controlled and rent-stabilized enactments. An overarching goal of the RSL and ETPA is to afford some measure of security to occupants so they do not lose their scarce dwelling space due to unilateral, oppressive activities from more powerful entities in the societal equation, whether they be landlords or employers or both. The insupportable contradiction in this statute is cogently demonstrated by its unabashed transfer to the corporate employer of greater eviction rights over its affiliated and disaffiliated employee subtenants than the owner is allowed to retain.

135. Further, the "ad hoc, factual inquiries" necessary to determine if government regulation amounts to a taking of private property that requires compensation are guided by "several factors that have particular significance" under *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1978), *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), and other decisions. Factors relevant to the regulatory takings inquiry include, among others:

(a) "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with investment-backed expectations" *(Penn Central,* 438 U.S. at 124). Judicial decisions assess the economic impact of regulation on the property owner by looking to the extent in the diminution of value caused by the regulation, including "the change in the fair market value of the subject property" *(Arctic King Fisheries, Inc. v. United States,* 59 Fed. Cl. 360, 374 (Fed. Cl. 2004)); "the value that has been taken" compared "with the value that remains" *(Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 497 (1987)); whether the owner can obtain a 'reasonable return' on its investment" *(Penn Central,* 438 U.S. at 136); "the owner's opportunity to recoup its investment or better" *(Florida Rock Indus., Inc. v. United States,* 791 F.2d 893, 905 (Fed.Cir.1986)); the decrease in the property's profitability *(Rose Acre Farms, Inc. v. United States,* 373 F.3d 1177, 1188 (Fed. Cir. 2004)); or some combination of these analyses. Virtually every one of these cases supports the contentions herein that the HSTPA was a taking, since it clearly impacted negatively on the market value of all multi-family housing in Westchester's ETPA communities; adversely affected the investment expectations of those who invested in multi-family stabilized housing and basically prevents a reasonable return on the investment of multi family housing as well as limited the economic return on pre-existing financial expenditures, whether the capital investment in housing or the expense of an

MCI or an IAI to "temporary" or retroactive for 7 years as to MCIs lowering the yearly increase from to 2% and then only in multi family buildings where more than 35% of the apartments are subject to ETPA.

(b) Whether the regulation creates an "'average reciprocity of advantage,' such that burdens and reciprocal benefits are shared among those affected by the regulation. *Pennsylvania Coal,* 260 U.S. at 415. This factor reflects the core principle of the Takings Clause that the Fifth Amendment bars the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). See *Penn Central,* 438 U.S. at 147 (Rehnquist, J., dissenting) (regulations may reduce individual property values without effecting a taking provided "the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the [regulation] will be benefitted by another"); *Pennell v. City of San Jose,* 485 U.S. 1, 22 *(Scalia & 0'Connor,* JJ, concurring in part and dissenting in part) (San Jose's rent regulation ordinance created an "'off budget' "welfare program privately funded" by landlords and was therefore a taking); *Cienega Gardens v. United States,* 331 F.3d 1319, 1338 (Fed. Cir. 2003) (finding a taking where "Congress acted for a public purpose (to benefit a certain group of people in need of low-cost housing)" but "the expense was placed disproportionately on a few private property owners"); *Guggenheim v.*

City of Goleta, 638 F.3d 1111, 1132 (en banc) (Bea, J., dissenting) (ordinance worked a regulatory taking where it imposed "a high burden on a few private property owners instead of apportioning the burden more broadly among the tax base").

(c) "[T]he character of the government action," including that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good" *(Penn Central,* 438 U.S. at 124) (internal citation omitted))—a test that is satisfied when government intrudes substantially on a property owner's rights to use, possess, dispose, and exclude, e.g., *Kaiser Aetna, supra.*

136. The character of the HSTPA as a public assistance benefit funded solely by (some) building owners, and the absence of any reciprocity of advantage to those owners, further establishes that it is a regulatory taking. Accordingly, the HSTPA violates the basic Takings Clause principle that government may not force some property owners "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a *whole." Armstrong v. United States,* 364 U.S. 40, 49 (1960); see, e.g., *Pennell,* 485 U.S. at 22 (Scalia & O'Connor, JJ, concurring in part and dissenting in part) (condemning a rent regulation ordinance as an "'off budget' "welfare program privately funded" by landlords and thus a taking). The HSTPA is exactly that – a public burden imposed on multi family property owners. All of these factors, and others

set forth herein support the contention that the HSTPA constitutes a taking prohibited by the constitution.

A NINTH CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

An Order Enjoining The 2019 Housing Stability And Tenant Protection Act As A Violation Of Due Process And Declaring It To Be A Taking Of Private Property Would Improve, Not Harm, Westchester's Rental Housing Market

137. The Plaintiffs Repeat each and every allegation heretofore made herein with the full force and effect as if set forth at length herein.

138. For the reasons set forth herein the HSTPA will cause and is causing irreparable harm to the Plaintiffs.

139. For the reasons set forth herein, the irreparable harm cannot be rectified or cured by monetary damages.

140. There is no adequate remedy at law.

141. The Plaintiffs have a likelihood of success on the merits.

142. The Plaintiffs have a prima facie right to the relief requested herein and a balance of the equities, particularly in light of the constitutional infirmities herein, favors the Plaintiffs.

143. The Plaintiffs are seeking to maintain the status quo as it existed prior to the passage of the HSTPA.

144. What the HSTPA does is impose on the landlords of Westchester a "public assistance benefit" and require the Plaintiffs herein as well as all other landlord under the HSTPA to provide what govern-

ment should be providing, and to provide it without just compensation or due process. The housing issues sought to be addressed are both public policy and public housing issues, which should be dealt with by governmental action and funding. However, the HSTPA imposes the full burden, both financial and otherwise, on landlords alone- clearly discriminatory and a violation of due process. It is not only unfair, but unconstitutional, to require one segment of society to bear the full burden of society's obligation to provide adequate, low cost and reasonable housing to the populace. What HSTPA does is require that landlords pay for and provide, and give up compensation for a 'public assistance" benefit, both an unconstitutional taking as well as a violation of the due process rights of all landlords subject to the ETPA. As the Court stated in *Manocherian*

> We conclude that chapter 940 fails the test of substantially advancing a legitimate State interest warranting the indeterminate and unjustifiable burden draped disproportionately on the particular owners' shoulders. That law, in the unusual development and circumstances of this case, must meet the constitutional safeguards on its own merits, not as an augmentation or complement to some generalized State interest found elsewhere in organic law or other statutes. Indeed, in significant respects, the particular statute contradicts two key goals of the RSL, to wit, occupant protection and eventual market redemption. These incongruities flow out of the transferral of power from a landlord to the employer of the actual occupants, and by the removal of the affected apartments entirely and permanently from marketplace

> availability or potentiality for other publicly interested or vying occupants at rent-stabilized rates. (emphasis added)

145. Therefore, the holding in *Manocherian* although applicable in a case involving a primary residence subleasing issue, held that the statute did not advance legitimate state interest and effected an unconstitutional state regulatory taking, exactly the situation herein.

146. This elimination of rent controls has not been a negative for the communities that have done so. Cambridge imposed rent controls from 1971 to 1994. Following rent de-control, Henry O. Pollakowski,[14] a Housing Economist at the MIT Center for Real Estate, published an economic study of the impact of the return to market rents. He found that there was a "housing investment boom" after the return to market rate rents, and that "investment in previously rent-controlled buildings . . . increased by approximately 20 percent over what would have been the case in the absence of decontrol. Dr. Pollakowski concluded that post-regulation Cambridge experienced "a tremendous boom in housing investment, leading to major gains in housing quality. This research thus provides a concrete example of complete rent deregulation leading to housing investment that would otherwise not have occurred. Given the need for better maintenance and increased renovation of New York City and Westchester's aging housing stock, such an increase

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[14] Henry O. Pollakowski, Manhattan Institute Center for Civic Innovation, Civic Report No. 36 (May 2003), Rent Control and Housing Investment: Evidence from Deregulation in Cambridge, Massachusetts, available at https://www.manhattan-institute.org/pdfcr_36.pdf.

represents a considerable potential boon to the areas' residents.

A TENTH CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

The Unintended Consequences Of The 2019 Housing Stability And Tenant Protection Act Incorporates Cooperatives In The Provisions Of The Act Contrary To The Intent Thereof In Violation of Due Process.

147. The Plaintiffs Repeat each and every allegation heretofore made herein with the full force and effect as if set forth at length herein.

148. The HSTPA not only covers the 'normal' landlord-tenant situation, but is so broad, and unconstitutionally so, that it covers cooperative housing entities, clearly not a purpose intended in either the original ETPA legislation of the 'purposes' clauses of the HSTPA. Therefore, Section M of the HSTPA must be corrected to exclude co-ops because, among other things, cooperatives involve ownership and the leases there are appurtenant to the issuance of stock certificates and, in effect, ownership of the residential unit. Although all coop units have a lease, that is to enable the shareholder to have exclusive rights to reside in the unit, not as a true "tenant," but as an owner. Therefore, in reviewing many of the limitations set forth in the HSTPA, they are clearly not intended in accordance with the HSTPA statutory scheme to be applicable to cooperative apartment units. The following are areas that must be addressed and eliminated and constitute a 'taking' of a shareholder's interest in the cooperative corporation:

a) Security deposits are limited to one month's maintenance (rent). While that may be appropriate in rental situations it is not as to cooperatives. It is not

unusual for a cooperative to require more than one month's maintenance to be held in escrow relative to a prospective purchaser with questionable or borderline finances who applies to purchase or rent a coop apartment. This prohibition will cause less approvals for retired seniors and young families.

b) Landlords (also cooperatives who are lessors) are now prevented from doing their due diligence in investigating whether a prospective purchaser or renter was a litigious tenant or had multiple collection actions brought against them. The prohibition in the HSTPA is that a landlord (lessor) cannot obtain a report as to court actions involving a prospective 'tenant', or shareholder, thereby placing the cooperative at risk in taking a non 'cooperative' shareholder with a history of litigation, or non payment, or breach of lease issues such as noise, drugs, etc. This would limit the cooperatives ability to protect against litigation expenses; loss of income; danger to the quality of life of residents of the building, etc.

c) There is a limitation of $20 on the charge to prospective shareholders and residents as to credit checks. Once again, if a cooperative is to do appropriate due diligence as to prospective shareholders or sub-lessors, it has to do not only a $20 credit check, but financial investigations of bank accounts, other financial accounts, employment verifications and other investigations. This cannot be done for $20 and will just impose a financial burden on every cooperative to pay for this without recompense.

d) The HSTPA prohibits a landlord from collecting "additional rent," such as charges for repairs, air conditioning, special assessments, administrative charges and legal fees as part of a summary non payment proceeding. A separate legal action must be brought to

collect same, thereby causing the cooperative unnecessary legal fees and expenses, resulting in the maintenance having to be raised to shareholders to pay for these additional legal actions to collect validly invoiced and due monies.

e) Also limited by the HSTPA are late fees, to 5% of the maintenance or $50 whichever is less. While this may be reasonable with low cost housing, it is not reasonable when a shareholder does not pay the maintenance on time and the administrative charges to collect exceed the $50 maximum fee. Similarly limited is the ability of the cooperative to collect legal fees and costs in a non payment court proceeding. Legal expenses are substantial, now that multiple notices are required as well as the charges for court appearances. If the shareholder defaults and does not come to court, the court is nom prohibited from awarding legal fees to the cooperative, causing the other shareholders tc bear the brunt of defaulting shareholders legal collection costs.

f) The HSTPA, for various reasons, unduly extends the court proceedings against a shareholder or resident who breaches the obligations under the proprietary lease or occupancy agreement by, among other things: i) requiring multiple notices before a legal action can be brought, with a new 5 day notice that rent is overdue – query – what happens with successive months once a legal proceeding is brought; ii) extending the time for the former 3 day notice to 14 days; iii) extending the time for a court action from 5 to 12 days to 10 to 17 days; iv) extending the Marshal's notice time after a Judgment of Eviction from 72 hours to 14 days; v) gives the tenant (in this case shareholder – with no guaranty that maintenance will be timely paid during the extension period) up to 1 year for

matters of 'extreme hardship' – which includes having a child in school; vi) non payment proceeding must be dismissed if shareholder (tenant) pays amount sued on prior to the court hearing [the court hearing may well be at a time when the amount sued for is stale and months are now-due but not required to be paid, thereby causing serial non payment proceedings at a substantial legal cost to the cooperative]; vi) if a landlord intends to raise the rent by 5% or more or not renew the lease, then the landlord is obligated to give the tenant 30 to 90 days written notice and the failure to do so will result in an extension of the tenancy under the current lease terms until notice is given and the notice period has expired and even extends the cure period for another 30 days when a prior cure notice was served, a successful trial ensued and the Judgment was granted. Therefore a cooperative must apparently have to provide a 90-day notice when maintenance is increased.

149. By reason of the foregoing, Section M of the HSTPA violates the constitutional rights of cooperatives and shareholders and should be struck in light of the failure to comply with due process as well as not provide consistency with the statutory purpose allegedly underlying the HSTPA.

Causes of Action by Plaintiff Against Defendants:

FOR A FIRST CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

The 2019 HSTPA Violates Due Process. And Is An Unconstitutional Taking In That In That It Does Not Meet Its Statutory Goals.

FOR A SECOND CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

The 2019 HSTPA Impacts Detrimentally And Limits A Property Owner's Reasonable Return On Its Investments Which Constitutes An Unconstitutional Taking

FOR A THIRD CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

The HSTPA Violates Due Process In That It Does Not Meet Statutory Goals As It Negatively Affects Cooperatives, Condominiums, Single Family Homes

FOR A FOURTH CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

The Failure To Revisit The 5% Threshhold As Well As The Declaration Of Emergency In The Westchester Communities Burdened by the ETPA Is A Violation Of Due Process

FOR A FIFTH CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

The 2019 Housing Stability And Tenant Protection Act Effects A *Physical* Taking Of The Properties Still And Continuing To Be Subject To ETPA Regulation, Including Not Having The Right To Exclude Or Choose

FOR A SIXTH CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

The 2019 Housing Stability And Tenant Protection Act Took Away Many Of The Few Property Rights Remaining With Multi Family Rent Regulated Property Owners Without Due Process That Had Still Remained Under Etpa And Interfered With The Contracts (Leases) Entered Into By The Landlords And Tenants.

FOR AN SEVENTH CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

The 2019 Housing Stability And Tenant Protection Act On Its Face Effects An Uncompensated Regulatory Taking Of Private Property.

FOR A EIGHTH CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

Plaintiffs Bring These Claims Under The Fifth And Fourteenth Amendments To The United States Constitution And Under 42 U.S.C. § 1983 And 28 U.S.C. § 1331, And Seek Attorneys' Fees Pursuant To 42 U.S.C. § 1988(M.

A NINTH CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

An Order Enjoining The 2019 Housing Stability And Tenant Protection Act As A Violation Of Due Process And Declaring It To Be A Taking Of Private Property Would Improve, Not Harm, Westchester's Rental Housing Market

A TENTH CAUSE OF ACTION BY PLAINTIFFS AGAINST DEFENDANTS

The Unintended Consequences Of The 2019 Housing Stability And Tenant Protection Act Incorporates Cooperatives In The Provisions Of The Act Contrary To The Intent Thereof In Violation Of Due Process.

AS TO EACH OF THE ABOVE CAUSES OF ACTION, THE FOLLOWING CLAIMS FOR RELIEF

Claim I (Against All Defendants):
Due Process (U.S. Const. Amend. XIV; 42 U.S.C. § 1983)

A. Plaintiffs incorporate by reference the preceding allegations of this complaint.

B. A. Defendants, acting under color of New York law by the passage of the HSTPA have caused, and will continue to cause Plaintiffs to be deprived of their property without due process of law in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution:

1. The HSTPA is irrational. It fails to serve any of the goals that it purports to seek to achieve. Among other things, the HSTPA does not target affordable housing to those in need; is not a rational means of ensuring socio-economic or racial diversity; is not a rational means of increasing the vacancy rate; has a deleterious impact on the community at large; and alternatives to the HSTPA are available that are more narrowly tailored to the goals claimed to underlie the HSTPA and denies the Plaintiffs reasonable investment based expectations and investment return. The HSTPA serves no legitimate government purpose.

2. Separately, without any rational basis or an adequately developed record for not conducting vacancy surveys since the initial inception of the adoption of the ETPA in each of the 21 Westchester communities where it the ETPA was adopted and thereupon the Defendants adopting the HSTPA; in not determining that a serious public emergency requiring rent regulation exists in the 21 communities in Westchester that have opted into ETPA and are now subject to the HSTPA—or even defining what, precisely, the emergency

entails—and moreover those communities have never conducted another survey to determine whether the emergency still continues to exist in those communities. The 21 communities while statutorily empowered to make the emergency determination if the vacancy rate is at or below a 5% threshold (which is itself a violation of due process in being arbitrary and methodologically unsound), have not taken into account the condition of rental accommodations and the purported and unproven need for regulating and controlling residential rents nor conducted any further vacancy studies since the one that formed the predicate for opting into ETPA, a violation of due process.

3. Defendants alleged rationale for what constitutes the "serious public emergency" has shifted over time. Defendants have variously justified the need for rent regulation by citing the unique problems in a 70 year old post-war housing market, low vacancy rates, lack of affordable housing options, the need to address and insure socio-economic housing concerns, the purported need to balance prior years alleged pro landlord legislation, to obtain cultural diversity and to combat homelessness. However, data has shown overwhelmingly that the HSTPA is not a rational means of addressing any of these ends, a violation of due process.

4. The twenty-one (21) Westchester communities that have opted into ETPA without considering or reviewing whether there is still an emergency.

5. The 21 Westchester communities continuing declaration of an emergency and legislating the HSTPA without a rational basis for doing so and without conducting another survey to determine whether or not there is still a 5% vacancy factor deprives Plaintiffs and the organizational Plaintiffs' members of fundamental property rights without the

benefit of Due Process required by the Constitution. Defendants' actions are arbitrary and are not rationally related to any legitimate government purpose.

B. The HSTPA's destruction of building owners' fundamental property rights warrants strict scrutiny. Defendants cannot demonstrate that a compelling state interest is furthered by the HSTPA, nor can they demonstrate that the HSTPA is narrowly tailored to address any compelling state interest.

C. The HSTPA's deprivation of the building owner's right to a reasonable return on investments and/or return on the anticipated investment backed expectations.

D. The HSTPA illegally includes cooperatives without a state interest to do so and without complying with due process in including cooperatives;

E. Absent injunctive and declaratory relief, Plaintiffs will suffer irreparable harm caused by the deprivation of their constitutional rights.

F. Wherefore, the Plaintiffs demand injunctive relief permanently staying the application of the HSTPA.

Claim II (Against All Defendants):
Physical Taking (U.S. Const. Amends. V and XIV; 42 U.S.C. §1983)

Plaintiffs incorporate by reference the preceding allegations of this complaint.

A. The Defendants, acting under color of New York law, have caused, and will continue to cause, Plaintiffs to be deprived of their right to possess, use and dispose of their real property without just compensation in violation of the Takings Clause of the Constitution;

1. Through the HSTPA, and prior acts, and the various 21 communities refusal to conduct surveys of the vacancy rates and/or declaration of emergency, which continues the application of the ETPA by the HSTPA in Westchester County, the Defendants deprive Plaintiffs of fundamental rights associated with property ownership, including the rights to possess, use and dispose of the property as well as the right to select and exclude their tenants. Specifically, among other things, the HSTPA deprives owners of ETPA rent regulated buildings in Westchester County and the 21 communities that have opted into ETPA of the actual or practical ability to control who rents and lives in those buildings, to evict tenants outside of certain limited circumstances, or to dispose or convert their building(s) to cooperative and/or condominium ownership.

2. Owing to the permanency of the ETPA and the mandatory lease renewal provisions of the HSTPA the tenants subject thereto and their successors are able to occupy Plaintiffs' property for periods of indefinite duration, transferring de facto property rights of possession, use, and disposition from Plaintiffs to tenants without just compensation—thus effecting *aper se* physical taking

3. Those same provisions set forth above result in owners losing physical possession and economic control of their property operates as an unconstitutional taking and unconstitutional conditions on the use of private property.

4. The HSTPA violates the 'Contract Clause' of the U.S. Constitution and thereby unconstitutionally, for the aforesaid reasons, impairs the existing lease (contract) agreements.

5. Absent declaratory or injunctive relief, Plaintiffs will suffer irreparable harm caused by the deprivation of their Constitutional rights.

B. By reason of the foregoing demand is made that the Court issue a declaration that the HSTPA is violative of the constitutional rights of the Plaintiffs and therefore null and void and an injunction prohibiting the enforcement of any of the provisions of the HSTPA..

Claim III (Against All Defendants):
Regulatory Taking (U.S. Const. Amends. V and XIV; 42 U.S.C. § 1983)

Plaintiffs incorporate by reference the preceding allegations of this complaint.

A. Defendants, acting under color of New York law, have caused, and will continue to cause, Plaintiffs to be deprived of their real property without just compensation in violation of the Takings Clause of the Constitution:

1. Through the HSTPA, Chapter 36 of the Laws of 2019, and the 21 communities subject to ETPA refusal to regularly review and conduct vacancy studies of vacant units in their communities so as to justify the continuation of the effectuation and the continued adoption of each of their respective emergency declarations which continue application of the ETPA and the HSTPA in the 21 communities and Westchester County, and in including cooperative housing entities the Defendants have effectuated a regulatory taking of Plaintiffs' property without just compensation. Specifically, the HSTPA imposes significant regulatory restrictions and in addition requires Plaintiffs to rent their property at rates often far below market-based rates, while denying the Plaintiffs the right to choose

their own tenants as well as placing limits on rent increases and the recovery of investments in improvements as well as a reasonable return on investments and investment expectations.

2. The HSTPA, among other things, deprives property owners of a reasonable return on their investment, devalue their properties, and upset their investment-backed expectations. The character of Defendants' actions—providing for a public welfare program at the expense of a subset of private property owners and imposing a physical occupation on rent stabilized units—together with the extensive and negative economic impact of the HSTPA, renders them facially unconstitutional as a regulatory taking.

3. Absent declaratory or injunctive relief, Plaintiffs will suffer irreparable harm caused by the deprivation of their Constitutional rights.

B. By reason of the foregoing demand is made that the Court issue a declaration that the 2019 Housing Stability and Tenant Protection Act is violative of the constitutional rights of the Plaintiffs and therefore null and void.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court:

1. Declare the 2019 Housing Stability and Tenant Protection Act to be an unlawful violation of Due Process;

2. Declare that the 2019 Housing Stability and Tenant Protection Act unlawfully interferes with the constitutionally protected right to contract;

3. Enjoin the application and enforcement of the 2019 Housing Stability and Tenant Protection Act as a violation of Due Process;

4. Declare the 2019 Housing Stability and Tenant Protection Act as effecting a physical taking of private property for public use that requires the payment of just compensation;

5. Enjoin the application and enforcement of the 2019 Housing Stability and Tenant Protection Act as an unlawful physical taking of private property;

6. Declare that the 2019 Housing Stability and Tenant Protection Act effects a regulatory taking of private property for public use that requires the payment of just compensation;

7. Enjoin the application and enforcement of the 2019 Housing Stability and Tenant Protection Act as an unlawful regulatory taking of private property;

8. Eliminate Section M of the HSTPA as it applies to cooperative housing developments;

9.. Award Plaintiffs their reasonable fees, costs, expenses and disbursements, including attorneys' fees, associated with this action; and

10. Grant Plaintiffs such other relief as may be just and proper in the Premises.

Dated: October 30, 2019

By: /s/ Kenneth J. Finger
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APPENDIX D

Relevant Provisions of
New York Statutes and Regulations

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

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

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

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

immediate family occupy the dwelling unit when it becomes vacant. The purchase agreement shall be executed and delivered pursuant to an offering made in good faith without fraud and discriminatory repurchase agreements or other discriminatory inducements.

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

* * *

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

This law shall apply to:

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

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

residency, a tenant who is a victim of domestic violence, as defined in section four hundred fifty-nine-a of the social services law, who has left the unit because of such violence, and who asserts an intent to return to the housing accommodation shall be deemed to be occupying the unit as his or her primary residence. For the purposes of this subparagraph where a housing accommodation is rented to a not-for-profit hospital for residential use, affiliated subtenants authorized to use such accommodations by such hospital shall be deemed to be tenants, or (g) became vacant on or after June thirtieth, nineteen hundred seventy-one, or become vacant, provided however, that this exemption shall not apply or become effective with respect to housing accommodations which the commissioner determines or finds became vacant because the landlord or any person acting on his or her behalf, with intent to cause the tenant to vacate, engaged in any course of conduct (including but not limited to, interruption or discontinuance of essential services) which interfered with or disturbed or was intended to interfere with or disturb the comfort, repose, peace or quiet of the tenant in his or her use or occupancy of the housing accommodations and provided further that any housing accommodations exempted by this paragraph shall be subject to this law to the extent provided in subdivision b of this section; or (2) were decontrolled by the city rent agency pursuant to section 26-414 of this title; or (3) are exempt from control by virtue of item one, two, six or seven of subparagraph (i) of paragraph two of subdivision e of section 26-403 of this title; and

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

* * *

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

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

b. The rent guidelines board shall establish annual guidelines for rent adjustments, and in determining whether rents for housing accommodations subject to the emergency tenant protection act of nineteen seventy-four or this law shall be adjusted shall consider, among other things (1) the economic condition of the residential real estate industry in the affected area including such factors as the prevailing and projected (i) real estate taxes and sewer and water rates, (ii) gross operating maintenance costs (including insurance rates, governmental fees, cost of fuel and labor costs), (iii) costs and availability of financing (including effective rates of interest), (iv) overall supply of housing accommodations and overall vacancy rates, (2) relevant data from the current and projected cost of living indices for the affected area, (3) such other data as may be made available to it. Not later than July first of each year, the rent guidelines board shall file with the city clerk its findings for the preceding calendar year, and shall accompany such findings with a statement of the maximum rate or rates of rent adjustment, if any, for one or more classes of accommodations subject to this law, authorized for leases or other rental agreements commencing on the next succeeding October first or within the twelve months thereafter. Such findings and statement shall be published in the City Record. The rent guidelines board shall not establish annual guidelines for rent adjustments based on the current rental cost of a unit or on the amount of time that has elapsed since another rent increase was authorized pursuant to this title.

c. Such members shall be compensated on a per diem basis of one hundred dollars per day for no more than twenty-five days a year except that the chairman shall be compensated at one hundred twenty-five dollars a day for no more than fifty days a year. The chairman

shall be chief administrative officer of the rent guidelines board and among his or her powers and duties he or she shall have the authority to employ, assign and supervise the employees of the rent guidelines board and enter into contracts for consultant services. The department of housing preservation and development shall cooperate with the rent guidelines board and may assign personnel and perform such services in connection with the duties of the rent guidelines board as may reasonably be required by the chairman.

d. Any housing accommodation covered by this law owned by a member in good standing of an association registered with the department of housing preservation and development pursuant to section 26511 of this chapter which becomes vacant for any reason, other than harassment of the prior tenant, may be offered for rental at any price notwithstanding any guideline level established by the guidelines board for renewal leases, provided the offering price does not exceed the rental then authorized by the guidelines board for such dwelling unit plus five percent for a new lease not exceeding two years and a further five percent for a new lease having a minimum term of three years, until July first, nineteen hundred seventy, at which time the guidelines board shall determine what the rental for a vacancy shall be.

* * *

h. The rent guidelines board prior to the annual adjustment of the level of fair rents provided for under subdivision b of this section for dwelling units and hotel dwelling units covered by this law, shall hold a public hearing or hearings for the purpose of collecting information relating to all factors set forth in subdivision b of this section. Notice of the date, time, location and summary of subject matter for the public

hearing or hearings shall be published in the City Record daily for a period of not less than eight days and at least once in one or more newspapers of general circulation at least eight days immediately preceding each hearing date, at the expense of the city of New York, and the hearing shall be open for testimony from any individual, group, association or representative thereof who wants to testify.

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

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

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

* * *

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

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

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

* * *

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

sale of the entire building and that the new owner is unable to obtain requisite records for the fiscal years nineteen hundred sixty-eight through nineteen hundred seventy despite diligent efforts to obtain same from predecessors in title and further provided that the new owner can provide financial data covering a minimum of six years under his or her continuous and uninterrupted operation of the building to meet the three year to three year comparative test periods herein provided; and (b) as to completed buildingwide major capital improvements, for a finding that such improvements are deemed depreciable under the Internal Revenue Code and that the cost is to be amortized over a twelve-year period for a building with thirty-five or fewer housing accommodations, or a twelve and one-half-year period for a building with more than thirty-five housing accommodations, for any determination issued by the division of housing and community renewal after the effective date of the the chapter of the laws of two thousand nineteen that amended this paragraph and shall be removed from the legal regulated rent thirty years from the date the increase became effective inclusive of any increases granted by the applicable rent guidelines board. Temporary major capital improvement increases shall be collectible prospectively on the first day of the first month beginning sixty days from the date of mailing notice of approval to the tenant. Such notice shall disclose the total monthly increase in rent and the first month in which the tenant would be required to pay the temporary increase. An approval for a temporary major capital improvement increase shall not include retroactive payments. The collection of any increase shall not exceed two percent in any year from the effective date of the order granting the increase over the rent set forth in the schedule of gross rents, with collectability of any dollar excess above

said sum to be spread forward in similar increments and added to the rent as established or set in future years. Upon vacancy, the landlord may add any remaining balance of the temporary major capital improvement increase to the legal regulated rent. Where an application for a temporary major capital improvement increase has been filed, a tenant shall have sixty days from the date of mailing of a notice of a proceeding in which to answer or reply. The state division of housing and community renewal shall provide any responding tenant with the reasons for the division's approval or denial of such application. Notwithstanding any other provision of the law, for any renewal lease commencing on or after June 14, 2019, the collection of any rent increases due to any major capital improvements approved on or after June 16, 2012 and before June 16, 2019 shall not exceed two percent in any year for any tenant in occupancy on the date the major capital improvement was approved or based upon cash purchase price exclusive of interest or service charges. Notwithstanding anything to the contrary contained herein, no hardship increase granted pursuant to this paragraph shall, when added to the annual gross rents, as determined by the commissioner, exceed the sum of, (i) the annual operating expenses, (ii) an allowance for management services as determined by the commissioner, (iii) actual annual mortgage debt service (interest and amortization) on its indebtedness to a lending institution, an insurance company, a retirement fund or welfare fund which is operated under the supervision of the banking or insurance laws of the state of New York or the United States, and (iv) eight and one-half percent of that portion of the fair market value of the property which exceeds the unpaid principal amount of the mortgage indebtedness referred to in subparagraph (iii) of this paragraph.

Fair market value for the purposes of this paragraph shall be six times the annual gross rent. The collection of any increase in the stabilized rent for any apartment pursuant to this paragraph shall not exceed six percent in any year from the effective date of the order granting the increase over the rent set forth in the schedule of gross rents, with collectability of any dollar excess above said sum to be spread forward in similar increments and added to the stabilized rent as established or set in future years;

* * *

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

* * *

(b) where he or she seeks to recover possession of one dwelling unit because of immediate and compelling necessity for his or her own personal use and occupancy as his or her primary residence or for the use and occupancy of a member of his or her immediate family as his or her primary residence, provided however, that this subparagraph shall permit recovery of only one dwelling unit and shall not apply where a tenant or the spouse of a tenant lawfully occupying the dwelling unit is sixty-two years of age or older, has been a tenant in a dwelling unit in that building for fifteen years or more, or has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent the tenant from engaging in any substantial gainful employment, unless such owner

offers to provide and if requested, provides an equivalent or superior housing accommodation at the same or lower stabilized rent in a closely proximate area. The provisions of this subparagraph shall only permit one of the individual owners of any building to recover possession of one dwelling unit for his or her own personal use and/or for that of his or her immediate family. A dwelling unit recovered by an owner pursuant to this subparagraph shall not for a period of three years be rented, leased, subleased or assigned to any person other than a person for whose benefit recovery of the dwelling unit is permitted pursuant to this subparagraph or to the tenant in occupancy at the time of recovery under the same terms as the original lease; provided, however, that a tenant required to surrender a dwelling unit under this subparagraph shall have a cause of action in any court of competent jurisdiction for damages, declaratory, and injunctive relief against a landlord or purchaser of the premises who makes a fraudulent statement regarding a proposed use of the housing accommodation. In any action or proceeding brought pursuant to this subparagraph a prevailing tenant shall be entitled to recovery of actual damages, and reasonable attorneys' fees. This subparagraph shall not be deemed to establish or eliminate any claim that the former tenant of the dwelling unit may otherwise have against the owner. Any such rental, lease, sublease or assignment during such period to any other person may be subject to a penalty of a forfeiture of the right to any increases in residential rents in such building for a period of three years; or

* * *

(14) where the amount of rent charged to and paid by the tenant is less than the legal regulated rent for the housing accommodation, the amount of rent for such housing accommodation which may be charged upon vacancy thereof, may, at the option of the owner, be based upon such previously established legal regulated rent, as adjusted by the most recent applicable guidelines increases and any other increases authorized by law. For any tenant who is subject to a lease on or after the effective date of a chapter of the laws of two thousand nineteen which amended this paragraph, or is or was entitled to receive a renewal or vacancy lease on or after such date, upon renewal of such lease, the amount of rent for such housing accommodation that may be charged and paid shall be no more than the rent charged to and paid by the tenant prior to that renewal, as adjusted by the most recent applicable guidelines increases and any other increases authorized by law. Provided, however, that for buildings that are subject to this statute by virtue of a regulatory agreement with a local government agency and which buildings receive federal project based rental assistance administered by the United States department of housing and urban development or a state or local section eight administering agency, where the rent set by the federal, state or local governmental agency is less than the legal regulated rent for the housing accommodation, the amount of rent for such housing accommodation which may be charged with the approval of such federal, state or local governmental agency upon renewal or upon vacancy thereof, may be based upon such previously established legal regulated rent, as adjusted by the most recent applicable guidelines increases and other increases authorized by law; and further provided that such vacancy shall not be caused by the failure of the owner or an agent of the owner, to

maintain the housing accommodation in compliance with the warranty of habitability set forth in subdivision one of section two hundred thirty-five-b of the real property law.

* * *

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

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

* * *

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

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

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

* * *

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

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

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

* * *

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

* * *

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

(o) *Family member.*

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

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

(i) longevity of the relationship;

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

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

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

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

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

(vii) regularly performing family functions, such as caring for each other or each other's extended family members, and/or relying upon each other for daily family services;

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

* * *

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

(1) specification by an occupant of an address other than such housing accommodation as a place of

residence on any tax return, motor vehicle registration, driver's license or other document filed with a public agency;

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

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

(4) subletting of the housing accommodation.

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

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

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

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

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

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

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

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

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

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

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

(e) The tenant has unreasonably refused the owner access to the housing accommodation for the purpose of making necessary repairs or improvements required by law or authorized by the DHCR, or for the purpose of inspection or showing the housing accommodation to a prospective purchaser, mortgagee or prospective mortgagee, or other person having a legitimate interest therein; provided, however, that in the latter event such refusal shall not be a ground for removal or eviction unless the tenant shall have been given at least five days' notice of the inspection or showing, to be arranged at the mutual convenience of the tenant and owner so as to enable the tenant to be present at the inspection or showing, and that such inspection or showing of the housing accommodation is not contrary to the provisions of the tenant's lease or rental agreement. If the notice of inspection or showing is served by mail, then the tenant shall be allowed five additional days to comply, for a total of 10 days because of service by mail, before such tenant's refusal to allow

the owner access shall become a ground for removal or eviction.

(f) The tenant has refused, following notice pursuant to section 2523.5 of this Title, to renew an expiring lease in the manner prescribed in such notice at the legal regulated rent authorized under this Code and the RSL, and otherwise upon the same terms and conditions as the expiring lease. This subdivision does not apply to permanent hotel tenants, nor may a proceeding be commenced based on this ground prior to the expiration of the existing lease term.

(g) For housing accommodations in hotels, the tenant has refused, after at least 20 days' written notice, and an additional five days if the written notice is served by mail, to move to a substantially similar housing accommodation in the same building at the same legal regulated rent where there is a rehabilitation as set forth in section 2524.5(a)(3) of this Part, provided:

(1) that the owner has an approved plan to reconstruct, renovate or improve said housing accommodation or the building in which it is located;

(2) that the move is reasonably necessary to permit such reconstruction, renovation or improvement;

(3) that the owner moves the tenant's belongings to the other housing accommodation at the owner's cost and expense; and

(4) that the owner offers the tenant the right of reoccupancy of the reconstructed, renovated or improved housing accommodation at the same legal regulated rent unless such rent is otherwise provided for pursuant to section 2524.5(a)(3) of this Part.

(h) In the event of a sublet, an owner may terminate the tenancy of the tenant if the tenant is found to have violated the provisions of section 2525.6 of this Title.

N.Y. Comp. Codes R. & Regs. tit. 9, § 2524.4. Grounds for refusal to renew lease, or in hotels, discontinuing a hotel tenancy, without order of the DHCR

The owner shall not be required to offer a renewal lease to a tenant, or in hotels, to continue a hotel tenancy, and may commence an action or proceeding to recover possession in a court of competent jurisdiction, upon the expiration of the existing lease term, if any, after serving the tenant with a notice as required pursuant to section 2524.2 of this Part, only on one or more of the following grounds:

(a) *Occupancy by owner or member of owner's immediate family.*

(1) An owner who seeks to recover possession of a housing accommodation because of immediate and compelling necessity for such owner's personal use and occupancy as his or her primary residence in the City of New York and/or for the use and occupancy of a member of his or her immediate family as his or her primary residence in the City of New York, except that tenants in a noneviction conversion plan pursuant to section 352-eeee of the General Business Law may not be evicted on this ground on or after the date the conversion plan is declared effective.

(2) The provisions of this subdivision shall not apply where a tenant or the spouse of a tenant lawfully occupying the dwelling unit is sixty-two years of age or older, or has been a tenant in a dwelling unit in that building for fifteen years or more, or has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by

medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent the tenant from engaging in any substantial gainful employment, unless the owner offers to provide and, if requested, provides an equivalent or superior housing accommodation at the same or lower regulated rent in a closely proximate area.

(3) An owner may recover only one rent stabilized or rent controlled housing accommodation, whether for his or her personal use and occupancy or that of his immediate family. The provisions of this subdivision shall only permit one of the individual owners of any building, whether such ownership is by joint tenancy, tenancy in common, or tenancy by the entirety to recover possession of one dwelling unit for personal use and occupancy.

(4) No action or proceeding to recover possession pursuant to this subdivision shall be commenced in a court of competent jurisdiction unless the owner shall have served the tenant with a termination notice in accordance with subdivisions (a), (b) and (c)(3) of section 2524.2 of this Part.

(5) The failure of the owner to utilize the housing accommodation for the purpose intended after the tenant vacates, or to continue in occupancy for a period of three years, may result in a forfeiture of the right to any increases in the legal regulated rent in the building in which such housing accommodation is contained for a period of three years, unless the owner offers and the tenant accepts re-occupancy of such housing accommodation on the same terms and conditions as existed at the time the tenant vacated, or the owner establishes to the satisfaction of the DHCR that circumstances changed after the tenant

vacated which prevented the owner from utilizing the housing accommodation for the purpose intended, and in such event, the housing accommodation may be rented at the appropriate guidelines without a vacancy allowance. This paragraph shall not eliminate or create any claim that the former tenant of the housing accommodation may or may not have against the owner.

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(c) *Primary residence.*

The housing accommodation is not occupied by the tenant, not including subtenants or occupants, as his or her primary residence, as determined by a court of competent jurisdiction; provided, however, that no action or proceeding shall be commenced seeking to recover possession on the ground that the housing accommodation is not occupied by the tenant as his or her primary residence unless the owner or lessor shall have given 30 days' notice to the tenant of his or her intention to commence such action or proceeding on such grounds. Such notice may be combined with the notice required by section 2524.2(c)(2) of this Title. A tenant who is a victim of domestic violence, as defined in section four hundred fifty-nine-a of the social

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housing accommodation and the housing accommodation to which the tenant is relocated, multiplied by 72 months, provided the tenant vacates on or before the vacate date required by the final order; or

(3) in addition to the tenant's moving expenses, pay the tenant a stipend which shall be the difference between the tenant's current rent and the average rent for vacant non-regulated apartments

as set forth in the New York City Housing and Vacancy Survey as of the date of the determination. This difference is to be multiplied by 72 months. The stipend shall be increased each year by a guideline beginning the first year after the vacancy survey is issued and continuing until a new vacancy survey is issued.

(c) Wherever a stipend would result in the tenant losing a subsidy or other governmental benefit which is income dependent, the tenant may elect to waive the stipend and have the owner at his or her own expense, relocate the tenant to a suitable housing accommodation at the same or lower legal regulated rent in a closely proximate area.

(d) In the event that the tenant dies prior to the issuance by the DHCR of a final order granting the owner's application, the owner shall not be required to pay such stipend to the estate of the deceased tenant.

(e) Where the administrator's or commissioner's order granting the owner's application is conditioned upon the owner's compliance with specified terms and conditions, if such terms and conditions have not been complied with, or if DHCR determines that the owner has not proceeded in good faith, the order may be modified or revoked.

(f) Noncompliance by an owner with any term or condition of the administrator's or commissioner's order granting the owner's application may result in DHCR initiating its own enforcement proceeding. The DHCR shall retain jurisdiction for this purpose until all of the terms and conditions in the administrator's or commissioner's order granting the owner's application have been met and the project described in the owner's application has been completed. Subsequent

owners shall be bound by the terms and conditions of DHCR's order. This clause shall not be deemed to eliminate any remedy or claim that a tenant of the dwelling unit may otherwise have against the owner nor eliminate any independent authority that DHCR may be able to exercise by law or regulation.

(g) An owner's failure to comply within a reasonable amount of time with any term or condition of the administrator's or commissioner's order granting the owner's application or an owner's failure to complete

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the project described in the owner's application may be found to be a violation of the RSL and the RSC and subject to any of the penalties and remedies described therein including but not limited to revocation of the administrator's or commissioner's order granting the owner's application and DHCR's continued jurisdiction under the RSL over the building or any subsequent construction. Any remedies and penalties prescribed by this Code shall apply to and be binding against subsequent owners.

(iii) Comparable housing accommodations and relocation. In the event a comparable housing accommodation is offered by the owner, a tenant may file an objection with the DHCR challenging the suitability of a housing accommodation offered by the owner for relocation within 10 days after the owner identifies the housing accommodation and makes it available for the tenant to inspect and consider the suitability thereof. Within 30 days thereafter, the DHCR shall inspect the housing accommodation, on notice to both parties, in order to determine whether the offered housing accommodation is suitable. Such determination will be made by the DHCR as promptly as practicable thereafter.

In the event that the DHCR determines that the housing accommodation is not suitable, the tenant shall be offered another housing accommodation, and shall have 10 days after it is made available by the owner for the tenant's inspection to consider its suitability. In the event that the DHCR determines that the housing

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accommodation is suitable, the tenant shall have 15 days thereafter within which to accept the housing accommodation. A tenant who refuses to accept relocation to any housing accommodation determined by the DHCR to be suitable shall lose the right to relocation by the owner, and to receive payment of moving expenses or any stipend. "Suitable housing accommodations" shall mean housing accommodations which are similar in size and features to the respective housing accommodations now occupied by the tenants. Such housing accommodations shall be freshly painted before the tenant takes occupancy, and shall be provided with substantially the same required services and equipment the tenants received in their prior housing accommodations. The building containing such housing accommodations shall be free from violations of law recorded by the City agency having jurisdiction, which constitute fire hazards or conditions dangerous or detrimental to life or health, or which affect the maintenance of required services. The DHCR will consider housing accommodations proposed for relocation which are not presently subject to rent regulation, provided the owner submits a contractual agreement that places the tenant in a substantially similar housing accommodation at no additional rent for a period of

six years, unless the tenant requests a shorter lease period in writing.

(3) Other grounds. The owner will eliminate inadequate, unsafe or unsanitary conditions and demolish or rehabilitate the dwelling unit pursuant to the provisions of article VIII, VIII-A, XIV, XV or XVIII of the PHFL, the Housing New York Program Act, or sections 8 and 17 of the U.S. Housing Act of 1937 (National Housing Act), on the condition that the owner:

(i) proves that it has a commitment for the required financing;

(ii) proves that any rehabilitation requires the temporary removal of the tenant; and

(iii) agrees to offer and will offer the tenants the right of first occupancy following any rehabilitation at an initial rent as determined pursuant to the applicable law and subject to any terms and conditions established pursuant to applicable law and regulations.

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