# 20-3366-cv

IN THE

## United States Court of Appeals

FOR THE SECOND CIRCUIT

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

*Plaintiffs-Appellants,*

*v.*

CITY OF NEW YORK, RENT GUIDELINES BOARD, DAVID REISS, CECILIA JOZA, ALEX SCHWARZ, GERMAN TEJEDA, MAY YU, PATTI STONE, J. SCOTT WALSH, LEAH GOODRIDGE, SHEILA GARCIA, RUTHANNE VISNAUSKAS,

*Defendants-Appellees,*

*(Caption Continued on the Reverse)*

*On Appeal from the United States District Court*
*for the Eastern District of New York*

# BRIEF FOR *AMICI CURIAE* NATIONAL APARTMENT ASSOCIATION AND NATIONAL MULTIFAMILY HOUSING COUNCIL IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT

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N.Y. TENANTS AND NEIGHBORS (T&N), COMMUNITY VOICES HEARD (CVH), COALITION FOR THE HOMELESS,

*Intervenors.*

## CORPORATE DISCLOSURE STATEMENT OF *AMICI CURIAE*

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *Amici Curiae* certify that they are not publicly held corporations, do not have any parent corporations, and have not issued any shares of stock.

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## IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Pursuant to Federal Rule of Appellate Procedure 29, *Amici Curiae* National Apartment Association ("NAA") and National Multifamily Housing Council ("NMHC," and together with NAA, "*Amici*") respectfully submit this brief in support of Plaintiffs-Appellants and reversal of the District Court.

NAA is a leading national advocate for quality rental housing. NAA is a federation of more than 170 state and local affiliated associations, representing more than 85,000 members responsible for more than 10 million rental units throughout the United States. NAA has members in all 50 states. NAA is the largest broad-based organization dedicated solely to rental housing. In addition to providing professional industry support and education services, NAA and its affiliated state and local associations advocate for fair governmental treatment of multifamily residential businesses nationwide.

NMHC is a Washington, DC-based, national nonprofit trade association that represents the leadership of the rental apartment industry. Its members engage in all aspects of the industry, including ownership, development, management and finance, helping to create thriving communities by providing apartment homes for

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* state that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or other individual contributed money intended to fund the preparation or submission of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *Amici* file this brief with the consent of all parties.

40 million Americans, and contributing $3.4 trillion annually to the economy. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information and promotes the desirability of apartment living. Over one-third of American households rent, and over 20 million U.S. households live in an apartment home (buildings with five or more units).

NAA and NMHC have a stake in this case, not only as advocates for their members subject to the challenged amendments to New York's Rent Stabilization Laws ("RSL"), the Housing Stability and Tenant Protection Act of 2019 ("HSTPA"), but also because increasing the supply of quality rental housing nationwide is central to their missions. Because of their national perspective on rental housing markets and regulation, NAA and NMHC can provide unique and important insights for the Court in addressing and analyzing the counterproductive nature of rent control for both owners and renters, and the unconstitutionality of the HSTPA in particular.

## INTRODUCTION

*Amici* are national nonprofit organizations supporting the interests of rental multifamily housing businesses. *Amici* have long studied – and their members have directly felt – the economic impact of rent regulation regimes around the country. While rent regulations have been enacted with the stated intention of providing

affordable housing to low-income renters, the consensus of leading economists from across the political spectrum is that, in practice, rent regulations are not only inefficient, but counterproductive. As Justice Scalia observed, the real reason they are adopted, rather than other measures like direct subsidies to tenants (akin to food stamps, but for housing), is one that is plainly unconstitutional: because the public subsidy conferred upon renters who are lucky enough to obtain it is paid for by a subset of private property owners, not by the government itself nor by the public at large.

New York's RSL is a prime example of these problems. But the HSTPA goes far beyond the prior RSL, both in its counterproductive economic impact and in the value it extracts from property owners without any form of compensation. Among other things, the HSTPA, while making rent stabilization a "permanent" emergency measure, suppresses the rents of all covered units even after vacancy, eliminates allowances for increased rents to offset needed capital improvements, and eliminates the mechanisms for deregulation of certain vacant units and units with high-income occupants. In so doing, the HSTPA upends both landlords' reasonable investment expectations and the health of the rental housing market generally.

As explained below, these deep economic flaws render the HSTPA unconstitutional on multiple grounds. First, the HSTPA effects a regulatory taking of landlords' property rights for the benefit of rent subsidized tenants. The Supreme

Court has held that the regulatory taking analysis is flexible and fact-based, and takes into account factors such as the economic impact of the regulation and the extent to which the regulation has interfered with the property owners' investment-based expectations. At an absolute minimum, the landlords in this case have met their pleading burden under this standard. The District Court, in dismissing the case, boiled down these complex, fact-specific considerations to the sole question of what law was in place at the time a given landlord purchased its property. This was unquestionably inconsistent with the Supreme Court's guidance on these issues, and had that guidance been faithfully applied, Plaintiffs-Appellants at a minimum should have had an opportunity to pursue their claims to trial.

Plaintiffs-Appellants also credibly alleged that the HSTPA effects a physical taking. In fact, multiple aspects of the HSTPA effect physical takings far beyond those the Supreme Court has recognized as unconstitutional in cases such as *Loretto v. Teleprompter Manhattan Catv Corp.* and *Nollan v. California Coastal Commission*, which dealt with intrusions far less invasive and far more transient than those produced by the HSTPA.

Finally, Plaintiffs-Appellants credibly alleged that the HSTPA deprives regulated landlords of their property without due process of law. The New York Court of Appeals, in *Regina Metropolitan Co., LLC v. New York State Division of Housing and Community Renewal*, has already recognized that certain aspects of the

HSTPA violate due process. Other aspects of the HSTPA, too, have no rational justification whatsoever, or are in no way rationally related to their purported goals. Making permanent a previously temporary regulatory scheme, for instance, in no way supports a transition back to a market system – an express purpose of the RSL.

In sum, a careful analysis shows the HSTPA to violate both the Takings Clause and the Due Process Clause of the U.S. Constitution – or at a minimum compels the conclusion that Plaintiffs-Appellants should be allowed to prove that it does. The District Court's decision should therefore be reversed.

## ARGUMENT

### I. The HSTPA Effects a Regulatory Taking.

The guiding principle when engaging in takings analysis is that the Takings Clause bars "Government from forcing some people alone to bear public burdens which, in all fairness should be borne by the public as a whole."[2] Although there are several theories under which a taking may be demonstrated, the one most applicable to New York's enactment of the HSTPA derives from the multi-factor test established by the Supreme Court in *Penn Central Transportation Co. v. City of New York*.[3]

The *Penn Central* inquiry is a flexible "fairness" test, under which a

[2] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
[3] 438 U.S. 104 (1978).

regulatory taking will be found "if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole."[4] Building upon the "several factors that have particular significance,"[5] the Supreme Court has explicated that the complex of factors includes: (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.[6]

A. The HSTPA Goes Well Beyond the Prior RSL in Unconstitutionally Forcing Property Owners to Subsidize Affordable Housing.

Because *Penn Central* explicitly recognizes that the economic impact of the regulation is a central component of the regulatory taking analysis, in order to understand why the HSTPA effects a regulatory taking even if prior iterations of the RSL did not, it is helpful to appreciate the economic effects of rent regulations generally, and then consider how drastically the HSTPA changed those economic effects from what they had been under the prior RSL.

[4] *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 523, 112 S. Ct. 1522 (1992).
[5] *Penn Central*, 438 U.S. at 124.
[6] *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (citing *Palozzo v. Rhode Island*, 533 U.S. 606 (2001)).

1. The RSL, Like All Rent Regulation, Requires Landlords to Subsidize Tenants and Has Additional Adverse Economic Consequences.

Rarely do economists from across the political spectrum agree on public policy – but rent regulation is one of the few subjects that bridges the divide. According to a poll of economists by the American Economic Review, a resounding 93% agreed that "a ceiling on rents reduces the quantity and quality of housing available."[7] Rent regulatory measures like the RSL are counterproductive to their intended goals in a number of ways and, in practice, usually do more harm than good.

Although rent regulations are often justified as a means to address affordable housing shortages, they actually exacerbate the issue by *decreasing* the housing supply and making apartment housing *less* affordable.[8] Price controls on rents negatively impact the housing market by discouraging the construction of new

[7] R.M. Alston, J.R. Kearl, and M.B. Vaughan, *Is There a Consensus Among Economists in the 1990s?*, AMERICAN ECONOMIC REVIEW, Vol. 82, No. 2 (May 1992); *see* Paul Krugman, *Reckonings; A Rent Affair*, N.Y. TIMES (June 7, 2000).

[8] *See* Rebecca Diamond, Tim McQuade, and Franklin Qian, *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, AMERICAN ECONOMIC REVIEW, Vol. 109, No. 9 (Sept. 2019); Rebecca Diamond, *What Does Economic Evidence Tell Us About the Effects of Rent Control?* BROOKINGS (Oct. 18, 2018); Lisa Sturtevant, *The Impacts of Rent Control: A Research Review and Synthesis*, NMHC RESEARCH FOUNDATION (May 2018), **https://www.nmhc.org/globalassets/knowledge-library/rent-control-literature-review-final2.pdf**.

housing and expediting the deterioration and loss of existing housing.[9] Developers and property owners respond to economic incentives as any other businesses would, and in rent regulation they see a policy that cuts deeply into the profitability of rental properties. Developers are thus discouraged from building new apartments which may become subject to such regulations, and, more importantly in the context of New York's RSL, property owners are discouraged from investing in the quality and maintenance of their rent regulated properties, causing decay to existing housing stock.[10] It takes only a rudimentary understanding of economics to foresee that fewer new rental units, combined with the degradation of existing rent-regulated units, will significantly increase the price of existing unregulated units. This harms both the general population of potential renters, who cannot access regulated units

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[9] *See* Jim Costello, *Rent Control Is Pushing Up U.S. Apartment Cap Rates*, REAL CAPITAL ANALYTICS (Sept. 10, 2019), **https://www.rcanalytics.com/rent-control-apartment-pricing/**; Lisa Sturtevant, *The Impacts of Rent Control: A Research Review and Synthesis*, NMHC RESEARCH FOUNDATION (May 2018), **https://www.nmhc.org/globalassets/knowledge-library/rent-control-literature-review-final2.pdf**; Paul Krugman, *Reckonings; A Rent Affair*, N.Y. TIMES (June 7, 2000); Peter D. Salinas, *Rent Control's Last Gasp*, THE MANHATTAN INSTITUTE (Winter 1997), **https://www.city-journal.org/html/rent-control%E2%80%99s-last-gasp-11951.html**.

[10] *See* Michael Hendrix, *Issues 2020: Rent Control Does Not Make Housing More Affordable*, THE MANHATTAN INSTITUTE (Jan. 8, 2020), **https://www.manhattan-institute.org/issues-2020-rent-control-does-not-make-housing-more-affordable;** Lisa Sturtevant, *The Impacts of Rent Control: A Research Review and Synthesis*, NMHC RESEARCH FOUNDATION (May 2018), **https://www.nmhc.org/globalassets/knowledge-library/rent-control-literature-review-final2.pdf**; Paul Krugman, *Reckonings; A Rent Affair*, N.Y. TIMES (June 7, 2000).

and may be priced out of the unregulated rental market, and landlords, who not only bear the direct costs of the rental subsidies but also bear the indirect costs, since a smaller housing market means fewer opportunities for income.[11]

Nevertheless, rent regulation like the RSL remains politically popular because it hides some of these costs and shifts others from the public to private landlords. Justice Scalia explained the problem in dissent in *Pennell v. San Jose*: "The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities – a problem caused by the society at large – has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps)."[12] Yet, ineffective rent control measures such as the RSL persist because they do not require the same level of public funding as the traditional, more effective measures to which Justice Scalia

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[11] Economists generally agree that rent regulation schemes have other negative consequences as well. As property decays, property values decline, and since fewer new units are created, municipal governments end up collecting less in property taxes than they otherwise would. And rent-regulated tenants sometimes suffer significant nonmonetary harms, such as staying in units that are too small (or too large) for their families, or in decaying units, out of fear of losing a significant subsidy. *See* Rebecca Diamond, *What Does Economic Evidence Tell Us About the Effects of Rent Control?* BROOKINGS (Oct. 18, 2018); Lisa Sturtevant, *The Impacts of Rent Control: A Research Review and Synthesis*, NMHC RESEARCH FOUNDATION (May 2018), **https://www.nmhc.org/globalassets/knowledge-library/rent-control-literature-review-final2.pdf**.

[12] 485 U.S. 1, 20-21, (1988) (Scalia, J. concurring in part and dissenting in part).

referred. This reveals the true nature of the RSL – a public subsidy forced onto the backs of a limited group of private property owners.

As Justice Scalia further explained, "[t]he politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget,' with relative invisibility and thus relative immunity from normal democratic processes."[13] New York has conceded the "public subsidy" nature of the RSL through the HSTPA, which itself states that the justification for the wholesale repeal of the decontrol provisions, among other enactments, includes "the loss of vital and irreplaceable affordable housing for working persons and families."[14] Moreover, the New York Court of Appeals held in *In re Santiago-Monteverde*, that, under New York's Debtor and Creditor Law, any rent-regulated tenancy must be considered a "local public assistance benefit."[15] The Court of Appeals unequivocally noted that, while the RSL provides "a benefit *conferred* by the government," it does not "provide a benefit *paid for* by the government[.]"[16] As explained further below, this stands in stark contrast to New York's acceptance and distribution of federal funds to private owners in the unregulated rental market as a means of subsidizing the housing costs of low-income

[13] *Id.* at 22.
[14] Housing Stability and Tenant Protection Act of 2019, L 2019, ch 36, Part D, § 1.
[15] 24 N.Y.3d 283, 289 (2014).
[16] *Id.* at 291 (emphasis in original).

families, the elderly, and the disabled.

2. The HSTPA Dramatically Increases the RSL's Adverse Economic Consequences, Upsetting Settled Expectations.

The problems described above existed under the prior RSL framework, but they are radically exacerbated under the HSTPA. Put simply, the HSTPA includes provisions that sweepingly reset landlords' economic incentives and expectations.

As an example, the HSTPA contains multiple provisions which, cumulatively, have the practical effect of providing most existing tenants and, now, vacant units with permanent extensions of rental rates frozen in the past. The RSL already effectively allowed current tenants to renew their leases indefinitely and granted tenants succession rights to their rent-regulated units.[17] But those tenants' "deals" are now rendered permanent even after the tenants or their successors vacate, as possibilities for increasing rents on vacancy have been stripped away (with the exception of trivial renewal increases).[18] Similarly, landlords were already prohibited from evicting tenants in most circumstances.[19] But under the HSTPA, landlords' rights in eviction and other proceedings are significantly curtailed,[20] and courts are empowered to grant tenants a 12-month stay of any eviction[21] – thus

[17] *See* Admin. Code of the City of N.Y. § 26-511(c)(9); 9 NYCRR §§ 2520.6, 2523.5(b)(1).
[18] *See* HSTPA, L 2019, ch 36, Parts B, C.
[19] *See* Admin. Code of the City of N.Y. § 26-408(a); 9 NYCRR §§ 2524.3.
[20] *See* HSTPA, L 2019, ch 36, Part M, §§ 6, 8, 10, 13, 24.
[21] HSTPA, L 2019, ch 36, Part M, § 21.

potentially forcing landlords to grant the economic equivalent of free tenancies under ever more circumstances, including the economic equivalent of a free 12-month extension even beyond the judicially confirmed termination of tenants' leases. Moreover, the RSL previously had allowed property owners to exit the residential rental market in certain ways, such as converting their buildings to use as their own residence, which was a critical "offramp" for regulated properties that could operate only at a loss.[22] These options are now all but prohibited.[23] All together, these provisions have the cumulative effect of denying landlords virtually any way out of the tenancies and the rental rates that existed when the HSTPA was passed – a clear reset of landlords' economic expectations.

A different aspect of the HSTPA drives this point home. The RSL had long provided mechanisms for owners to deregulate certain units, particularly when price controls were not furthering the goals of the RSL regime. For decades prior to the enactment of the HSTPA, the legislature permitted vacancy deregulation of units commanding monthly rents that low-income individuals could not afford, as well as decontrol of units whose tenants' household incomes exceeded a high-income threshold.[24] But the HSTPA repealed the RSL's luxury-vacancy and high-income

[22] *See* Admin. Code of the City of N.Y. § 26-511(b)(9).
[23] *See* HSTPA, L 2019, ch 36, Parts I, N.
[24] *See* Admin. Code of the City of N.Y. §§ 26-504.1 (Repealed), 26-504.2 (Repealed), 26-504.3 (Repealed).

decontrol provisions.[25] Landlords should have been able to rely on the reasonable expectation that decontrol would be permitted when regulation no longer served its own purposes. However, the HSTPA completely eliminated these avenues for deregulation.

Notably, repealing the high-income decontrol provisions also underscores the HSTPA's arbitrary and irrational nature. By allowing tenants to remain in their rent-regulated units regardless of their income, the HSTPA entirely divorces the regime from its stated purpose of providing affordable housing to those who need it most. Instead, the RSL now provides subsidies to those tenants who happened to be lucky enough to occupy units when the HSTPA was enacted – who are now incentivized to retain occupancy of those units for as long as they possibly can – at the expense of both other potential renters who have a greater need for such subsidies, and the landlords, who are forced to pay for subsidies which produce no discernable benefits to society at large.

Other provisions of the HSTPA also fundamentally reset landlords' economic expectations. When the New York State legislature adopted the Emergency Tenant Protection Act in 1974, only five years after first enacting the RSL, it recognized the importance of permitting increased rents for essential capital improvements, resulting in its authorization of rent increases to account for individual apartment

[25] HSTPA, L 2019, ch 36, Part D, § 5.

improvements ("IAIs") and major capital improvements ("MCIs").[26] It was reasonable for property owners to rely on the expectation that some form of capital improvement offset would remain a feature of the RSL, as the legislature would not want the stock of rent stabilized housing to simply decay over time, which is exactly what would happen if increased costs could not be reflected in the rent. Yet, counter to that reasonable expectation, the HSTPA all but eliminates owners' ability to recover the costs of IAIs and MCIs.[27]

In addition to these provisions, the HSTPA – for the first time in the RSL's half century of existence – enshrined as permanent landlords' subsidies of their tenants by permanently extending the terms of the RSL, which previously included a sunset provision requiring reauthorization over discrete periods of years.[28]

In short, the HSTPA dramatically reset landlords' economic expectations, well beyond the already problematic baseline of the previous RSL regime.

The District Court should have viewed the HSTPA for what it is – a set of public subsidies, the cost of which in all fairness "should be borne by the public as a whole,"[29] but which instead "unfairly single[s] out the property owner to bear."[30] The District Court thus should have weighed the "character of the governmental

[26] *See* Emergency Tenant Protect Act of 1974, L 1974, ch 576, § 6(d)(1), (3).
[27] *See* HSTPA, L 2019, ch 36, Part K.
[28] *See* HSTPA, L 2019, ch 36, Part A.
[29] *Armstrong*, 364 U.S. at 49.
[30] *Yee*, 503 U.S. at 523.

action" and "economic impact of the regulation" factors as heavily favoring a finding of regulatory taking. Or as Justice Holmes aptly stated nearly a century ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[31]

B. The District Court's Premature and Mechanical Analysis of Investment-Backed Expectations Disregards the Flexibility of the *Penn Central* Test.

"A central dynamic" of the Supreme Court's regulatory takings jurisprudence under *Penn Central* "is its flexibility."[32] The Court has made clear that there is no "set formula" for determining when a regulatory taking has occurred, and that the analysis involves "essentially ad hoc, factual inquiries."[33] In other words, *per se* rules of law are inappropriate in this evaluation – but critically, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[34] Yet here, in dismissing the constitutional challenge to the HSTPA as an uncompensated regulatory taking, the court below applied a mechanical, black-letter framework to the second *Penn Central* factor, the extent to which the regulation has

[31] *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).
[32] *Murr v. Wisconsin*, 137 S. Ct. at 1943.
[33] *Penn Central*, 438 U.S. at 124; *Yee*, 503 U.S. at 529 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).
[34] *Yee*, 503 U.S. at 529 (quoting *Pa. Coal*, 260 U.S. at 415).

interfered with distinct investment-backed expectations, which this Court should view as error.

First, the District Court found that the facial challenge to the RSL failed, in part, because "Plaintiffs cannot make broadly applicable allegations about the investment-backed expectations of landlords state- or city-wide. Different landlords bought at different times, and their 'reliance,' such as it was, would have been on different incarnations of the RSL."[35] Second, the lower court denied dismissal of the as-applied challenges of some Plaintiffs-Appellants, specifically those who "bought their properties at the dawn of the rent-stabilized era – either before the RSL was first enacted . . . or not long thereafter," while dismissing the as-applied challenges of all other Plaintiffs-Appellants, because "by the time these Plaintiffs invested, the RSL had been amended multiple times, and a reasonable investor would have understood it could change again."[36]

In both of these instances, the court disregarded the type of holistic, flexible analysis that the *Penn Central* line of cases demands. Instead, the court improperly reduced the second *Penn Central* factor to a mechanistic "yes/no" toggle based on the sole factor of when a given property owner purchased its property. But the investment-backed expectations factor should not depend exclusively on what form

[35] *Cmty. Hous. Improvement Program v. City of N.Y.*, No. 19-cv-4087(EK)(RLM), 2020 U.S. Dist. LEXIS 181189, at *24 (E.D.N.Y. Sep. 30, 2020).
[36] *Id.* at *32-33.

of the law in question existed at the time of purchase. Put differently, the date a landlord purchased her property is not the only proxy for what her reasonable investment expectations may have been.

To the contrary, Plaintiffs-Appellants were entitled to try to prove their allegations regarding just how drastically and fundamentally the HSTPA altered their economic expectations, regardless of the version of the RSL that had been in place when they first invested. Regardless of when any of Plaintiffs-Appellants purchased their properties, they still were entitled to rely on certain general and reasonable expectations regarding the RSL framework and regarding the New York real estate market – expectations that were completely upended by the HSTPA.

For example, as noted above, the HSTPA dramatically reduces owners' ability to recover the costs of IAIs and MCIs, repeals the luxury-vacancy and high-income deregulation provisions, and significantly limits landlords' ability to exit the residential rental market altogether.[37] Owners, even those who purchased their properties relatively recently, should have been able to rely on the reasonable economic expectations of the contrary, and now superseded, provisions of the RSL – provisions which effectively allowed property owners the ability to turn a profit or, if they could not, to exit the market. At a minimum, Plaintiffs-Appellants should have been permitted to make this case.

[37] *See* HSTPA, L 2019, ch 36, Parts D, I, K, N.

The District Court's expectations analysis, which erroneously focused solely on whether some form of law existed at the time of purchase or whether that law had ever been amended, lacked the kind of nuanced and qualitative evaluation that a regulatory taking determination is supposed to involve. The court should have concluded that the extent to which the HSTPA has interfered with distinct investment-backed expectations weighs in favor of a regulatory taking finding, at least sufficiently to survive a motion to dismiss.

### C. The HSTPA Unconstitutionally Fails to Compensate Property Owners for the Regulatory Taking It Effects.

A taking of private property for public use violates the Constitution when it is done "without just compensation." Here, there is no debate that New York has not even attempted to compensate property owners for the taking effected by the HSTPA.

Many other traditional housing assistance programs, in New York and elsewhere, compensate property owners for voluntarily accepting the burdens placed on them, often through vouchers or valuable tax benefits.[38] At the federal level, the Department of Housing and Urban Development's housing choice voucher program provides funds that states, including New York, use to subsidize private housing for

[38] *See, e.g.*, N.Y. Real Prop. Tax Law §§ 421-a, 421-g; Admin. Code of the City of N.Y. § 11-243.

very low-income families, the elderly, and the disabled.[39] New York City and State act inconsistently, at best, by compensating some owners for voluntarily submitting otherwise unregulated properties to rent stabilization, sometimes exacting federal funds in order to do so, while simultaneously forcing rent regulation upon another group of owners without granting any compensation whatsoever. This inconsistency compels the conclusion that the regulatory taking effected by the HSTPA fails to pass constitutional muster.

## II. The RSL Also Effects an Unconstitutional Physical Taking Without Compensation.

It is well established that a "physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution."[40] A taking occurs even when the portion of the property occupied is relatively small,[41] and even when the physical occupation is not continuous.[42] Here,

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[39] *See Housing Choice Vouchers Fact Sheet*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, **https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet** (last visited Jan. 20, 2021).

[40] *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 421, 102 S. Ct. 3164 (1982); *see Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010) ("Thus, it is a taking when a state regulation forces a property owner to submit to a permanent physical occupation.").

[41] *See Loretto*, 458 U.S. at 421.

[42] *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987) ("[A] 'permanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be

the court below dismissed Plaintiffs-Appellants' claim that the HSTPA effects a physical taking, because the owners "continue to possess the property (in that they retain title), and they can dispose of it (by selling)."[43]

As a preliminary matter, the District Court's reasoning contradicts the Supreme Court's decision in *Loretto v. Teleprompter Manhattan Catv Corp.*, which held that a taking occurred where a law required landlords to permit the installation of television cables and equipment on building roofs, even though the owners otherwise retained title to the buildings. Here, more invasively, landlords lose possession through the HSTPA's evisceration of their right to exclude, which is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[44] The HSTPA effects this invasion in several ways, including, as noted above, by preventing owners from using buildings as their own residence; curtailing landlords' rights in eviction and other proceedings; and forcing owners to grant the economic equivalent of a free 12-month extension beyond the termination of tenants' leases. These intrusions vastly outweigh the easements found to be physical takings in *Loretto* and *Nollan v. California Coastal Commission* and support

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traversed, even though no particular individual is permitted to station himself permanently upon the premises."); *United States v. Causby*, 328 U.S. 256, 266-267 (1946) (aircraft flying at low-level over private land constituted a taking).

[43] *Cmty. Hous.*, 2020 U.S. Dist. LEXIS 181189, at *17.

[44] *Loretto*, 458 U.S. at 433 (quoting *Kaiser Aetna*, 444 U.S. at 176).

reversal. Because, as noted, the HSTPA offers landlords no compensation, its physical taking of their property is unconstitutional.

## III. The RSL Violates Due Process.

Within the last year, the New York Court of Appeals already ruled that certain retroactive provisions of the HSTPA were unconstitutional,[45] for reasons that should carry over to Plaintiffs-Appellants' due process challenge to the HSTPA here. At issue in *Regina Metropolitan Co., LLC v. New York State Division of Housing and Community Renewal* were the HSTPA's significant changes to rent overcharge claims and procedures under the RSL, which the statute expressly provided would apply to pending claims.[46] The court's concern was that "[r]etroactive application of the overcharge calculation amendments would create or considerably enlarge owners' financial liability for conduct that occurred, in some cases, many years or even decades before the HSTPA was enacted[.]"[47]

The Court of Appeals held, among other things, that retroactive application of the amendments at issue violated the requirements of constitutional due process.[48] Applying rational basis review, the court could find no indication within the statute

[45] *See generally Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332 (2020).
[46] *Id.* at 364.
[47] *Id.* at 349.
[48] *Id.* at 385-86.

that the legislature "considered the harsh and destabilizing effect on owners' settled expectations, much less had a rational justification for that result."[49]

The HSTPA provisions at issue in this appeal similarly fail even rational basis review. Although the legislature may have attempted to offer a legitimate underlying purpose, namely preserving affordable housing,[50] there is no indication that it contemplated the resulting adjustment of economic expectations and liabilities, including the transference of the cost of providing affordable housing onto certain private property owners. The statute contains no new legislative findings as to or, more importantly, any analysis of whether rent regulation would advance the stated purpose. Quite simply, this is a case where the means chosen are not rationally related to the desired end.

As explained above, there is consensus among economists that rent regulation measures do not work as intended. Instead of preserving affordable housing, rent

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[49] *Id*. at 383. While the Court of Appeals' analysis focused on due process concerns specific to HSTPA's retroactivity provisions, it also emphasized that there is no "'bifurcation' between the rational basis analyses for prospective and retroactive legislation" and held that the analysis of retroactive legislation "does not differ from the prohibition against arbitrary and irrational legislation that applies generally to enactments in the sphere of economic legislation." *Id*. at 375-76 (quotations omitted). Notably, the Court of Appeals also rejected any concerns regarding "the ghost of *Lochner v. New York*," 198 U.S. 45 (1905), observing that "[t]he modern rejection of *Lochner* has never been understood to require courts to abandon 'fundamental principles' of fairness – not even when reviewing economic legislation." *Id*. at 387.

[50] *See* HSTPA, L 2019, ch 36, Part D, § 1.

regulation produces the opposite effect, "reduc[ing] the quantity and quality of housing available."[51] In particular, price controls expedite the deterioration and loss of existing housing, as property owners are discouraged from investing in the quality and maintenance of their properties.[52] This is especially the case under the HSTPA, which substantially curtails owners' ability to recoup capital expenditures in the form of IAIs and MCIs, while simultaneously stripping any other means of bringing the rents of vacant units closer to market levels.[53] Disincentivizing reinvestment in regulated properties and promoting their decay cannot be rationally related to preserving affordable housing. At a minimum, further factual investigation is warranted, making the District Court's dismissal of this case at the pleading stage inappropriate.

But the HSTPA goes well beyond the concerns that typically surface regarding the stated ends of rent regulation and its means. As explained above, for

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[51] R.M. Alston, J.R. Kearl, and M.B. Vaughan, *Is There a Consensus Among Economists in the 1990s?*, AMERICAN ECONOMIC REVIEW, Vol. 82, No. 2 (May 1992); *see* Paul Krugman, *Reckonings; A Rent Affair*, N.Y. TIMES (June 7, 2000).

[52] *See* Michael Hendrix, *Issues 2020: Rent Control Does Not Make Housing More Affordable*, THE MANHATTAN INSTITUTE (Jan. 8, 2020), **https://www.manhattan-institute.org/issues-2020-rent-control-does-not-make-housing-more-affordable**; Rebecca Diamond, *What Does Economic Evidence Tell Us About the Effects of Rent Control?* BROOKINGS (Oct. 18, 2018); Lisa Sturtevant, *The Impacts of Rent Control: A Research Review and Synthesis*, NMHC RESEARCH FOUNDATION (May 2018), **https://www.nmhc.org/globalassets/knowledge-library/rent-control-literature-review-final2.pdf**.

[53] *See* HSTPA, L 2019, ch 36, Parts B, C, K.

example, the HSTPA's repeal of the luxury-vacancy and high-income decontrol provisions[54] essentially serves as a legislative declaration of surrender, both acknowledging and ensuring that the RSL will serve only those tenants lucky enough to "get in" at the right time, not those tenants who would in actuality most benefit from affordable housing and who, therefore, the RSL is ostensibly intended to benefit.

Nor, to take another example, is the legislature's permanent extension of the RSL under the HSTPA,[55] including the process by which local governments declare a housing emergency to justify rent regulation, rationally related to any purpose offered to justify the regulatory burdens, legitimate or not. At its inception, the RSL was justified by an undefined "emergency" created by the effects of soldiers returning home from war, which evolved over time to a rationale founded on an amorphous and shifting emergency "housing crisis."[56] In order to "justify the justification," the New York City Council must, every three years, convene and formally "determine" that the emergency persists,[57] which it has done for the past fifty years, largely as a matter of ceremony. The HSTPA's perpetual extension of the RSL's regulatory burdens without any meaningful investigation or analysis of

[54] *See* HSTPA, L 2019, ch 36, Part D.
[55] *See* HSTPA, L 2019, ch 36, Part A.
[56] *See* ETPA, L 1974, ch 576, § 2; Admin. Code of the City of N.Y. § 26-501; HSTPA, L 2019, ch 36, Part D § 1.
[57] *See* ETPA, L 1974, ch 576, § 3.

whether the burdens are actually warranted, or whether the purported justification actually continues to exist, violates due process.

As *Regina Metro* demonstrates, and as this Court has held, "while rational basis review is indulgent and respectful, it is not meant to be 'toothless.'"[58] If saying the words "emergency housing crisis" is all that is required, then *any* regulation will pass rational basis review, no matter how burdensome, unfair, or unjust. Allowing the City Council to declare a continuing emergency every three years by rote, without requiring any meaningful investigation or analysis by the Council as to the factual basis for that declaration, is simply not rationally related to preserving affordable housing in actuality. It certainly will never advance the ultimate goal of transitioning from regulation back to a market economy for rental apartment housing.[59]

[58] *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012) (quoting *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981)).

[59] *See* ETPA, L 1974, ch 576, § 2 ("[T]he transition from regulation to a normal market of free bargaining between landlord and tenant, while the ultimate objective of state policy, must take place with due regard for such emergency[.]").

## CONCLUSION

The District Court should have denied the motions to dismiss and allowed Plaintiffs-Appellants the opportunity to pursue their claims that the HSTPA effects an unconstitutional taking without compensation and violates due process. Accordingly, *Amici* respectfully request that this Court reverse the lower court's ruling.

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RESPECTFULLY SUBMITTED,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations set forth in the Federal Rule of Appellate Procedure ("Rule") 29(a)(5) because it contains 5,961 words, excluding the parts exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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