

# STRONGER THAN EVER: NEW YORK’S RENT STABILIZATION SYSTEM SURVIVES ANOTHER LEGAL CHALLENGE

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*The fate of New York’s rent stabilization laws (RSL) directly concerns millions of New York City residents who take shelter in the protection of the RSL from the hardships and unfair business practices that accompany an unregulated housing market during a housing crisis. After the New York State Legislature made these tenant protections stronger than ever before in 2019, affected landlords responded by petitioning the courts to dismantle the entire rent regulation regime. A federal district court in the Eastern District of New York rejected the landlords’ broad constitutional challenge in Community Housing Improvement Project v. City of New York, but landlords have vowed to continue the legal fight, leaving the RSL in a state of limbo.*

*This Note analyzes pressing arguments landlords have made in their challenges to the RSL and the district court’s reasons for rejecting them. Specifically, this Note addresses the claims that the amended RSL, on its face, effectuates a regulatory taking of property and constitutes a violation of due process. This Note argues that the district court’s decision in Community Housing Improvement Project was correct and must be upheld in subsequent appeals. However, this Note also addresses potential legal and policy issues raised by the 2019 RSL and suggests amendments aimed at better ensuring landlords a reasonable return on investment and more efficiently directing the RSL’s protections toward those who truly need them.*

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#### INTRODUCTION

New York City landlords and tenants' rights advocates, who are diametrically opposed foes,<sup>1</sup> have long battled vigorously for the ears of Albany lawmakers on the subject of rent regulation reform.<sup>2</sup> In 2018, tenant

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1. LIN-MANUEL MIRANDA, *The Room Where It Happens*, on HAMILTON: AN AMERICAN MUSICAL (Atl. Recording Corp. 2015).

2. See, e.g., Vivian Wang, *Inside the Stealth Campaign for 'Responsible Rent Reform,'* N.Y. TIMES (June 10, 2019), <https://www.nytimes.com/2019/06/10/nyregion/rent-laws->

advocates were emboldened when Democrats, “who promise[d] a progressive agenda,” took control of the New York State Senate for the first time since 2010.<sup>3</sup> On June 14, 2019, New York Governor Andrew Cuomo signed into law the Housing Stability and Tenant Protection Act of 2019<sup>4</sup> (HSTPA), imposing “the strongest tenant protections in history.”<sup>5</sup> Badly wounded, landlord associations have attempted to shift the battle to the courtroom.<sup>6</sup>

On July 15, 2019, New York City landlord associations filed a complaint in the Eastern District of New York.<sup>7</sup> The ensuing lawsuit, *Community Housing Improvement Program v. City of New York*,<sup>8</sup> challenged the facial constitutionality of the HSTPA and the entirety of New York’s rent stabilization apparatus.<sup>9</sup>

Separately, on November 14, 2019, a group of individual landlords filed a complaint challenging New York’s rent stabilization laws (RSL) in the Eastern District of New York,<sup>10</sup> in *74 Pinehurst LLC v. State of New York*.<sup>11</sup> Besides raising arguments similar to those made in *Community Housing Improvement Program*, *74 Pinehurst LLC* discusses “as-applied

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landlords-strategy.html [https://perma.cc/PG9J-8X4L] (reporting that the real estate industry has channeled vast amounts of money and effort into creating a grass-roots-like campaign against progressive rent reform proposals); Vivian Wang & Luis Ferré-Sadurní, *Rent Laws: Dozens Arrested at State Capitol as Debate Escalates*, N.Y. TIMES (June 4, 2019), https://www.nytimes.com/2019/06/04/nyregion/rent-laws-nyc.html [https://perma.cc/Z5V2-CJX4] (describing a scene of hundreds of tenant activists descending on the New York State Capitol to pressure the New York State Legislature to pass stronger tenant protection rent laws).

3. See Jimmy Vielkind, *Democrats Take Control of New York State Senate for First Time Since 2010*, WALL ST. J. (Nov. 7, 2018, 7:10 AM), https://www.wsj.com/articles/democrats-take-control-of-new-york-state-senate-for-first-time-since-2010-1541592631

[https://perma.cc/47WL-Q8EF]. Democratic Senate Leader Andrea Stewart-Cousins declared that “[t]he voters of New York State have spoken . . . and we will finally give New Yorkers the progressive leadership they have been demanding.” *Id.*

4. 2019 N.Y. Laws 36.

5. See Press Release, N.Y. State Senate, Senate Passes Strongest Tenant Protections in State History (June 14, 2019), https://www.nysenate.gov/newsroom/press-releases/senate-passes-strongest-tenant-protections-state-history [https://perma.cc/BG5Q-737L] (statement of Senate Majority Leader Andrea Stewart-Cousins, commending the New York State Senate for passing the HSTPA).

6. See Bobby Allyn, *New York Landlords Call Rent Control Laws an ‘Illegal Taking’ in New Federal Lawsuit*, NPR (July 17, 2019, 7:28 PM), https://www.npr.org/2019/07/17/742875001/new-york-landlords-call-rent-control-laws-an-illegal-taking-in-new-federal-lawsu [https://perma.cc/M74B-JNDC]; Luis Ferré-Sadurní, *Landlords Strike Back, Suing to Dismantle Rent Regulation System*, N.Y. TIMES (July 16, 2019), https://www.nytimes.com/2019/07/16/nyregion/ny-rent-regulation-lawsuit.html [https://perma.cc/S4NZ-EHMK].

7. Complaint, Cmty. Hous. Improvement Program v. City of New York, 492 F. Supp. 3d 33 (E.D.N.Y. 2020) (No. 1:19-cv-04087), *appeal docketed*, No. 20-3366 (2d Cir. Oct. 2, 2020).

8. 492 F. Supp. 3d 33 (E.D.N.Y. 2020), *appeal docketed*, No. 20-3366 (2d Cir. Oct. 2, 2020).

9. See Complaint, *supra* note 7, at 1.

10. See Complaint for Declaratory Relief, Injunctive Relief, and Just Compensation, *74 Pinehurst LLC v. State of New York*, No. 1:19-cv-6447, 2020 U.S. Dist. LEXIS 217232 (E.D.N.Y. Nov. 19, 2020) [hereinafter *Pinehurst* Complaint].

11. No. 19-cv-6447, 2020 U.S. Dist. LEXIS 217232 (E.D.N.Y. Nov. 19, 2020).

constitutional challenges” based on the regulations’ effects on individual owners’ properties.<sup>12</sup>

On September 30, 2020, U.S. District Judge Eric R. Komitee delivered an opinion in *Community Housing Improvement Program v. City of New York*,<sup>13</sup> addressing both lawsuits’ overlapping arguments.<sup>14</sup> The court dismissed the *Community Housing Improvement Program* complaint (“the *Community Housing Complaint*”) in its entirety and dismissed all claims brought in the *74 Pinehurst LLC Complaint* (“the *Pinehurst Complaint*”), except “as-applied regulatory-takings claims brought by certain Pinehurst Plaintiffs.”<sup>15</sup> The court reasoned that it would be inappropriate for a lower court to ignore precedent supporting the RSL’s constitutionality, “even if the 2019 amendments go beyond prior regulations.”<sup>16</sup> The plaintiff landlord associations quickly appealed the decision on October 2, 2020, believing that they would prevail at the appellate level.<sup>17</sup>

The ongoing legal challenge presents an existential threat to the RSL, which regulates nearly one million New York City apartments housing approximately two million people.<sup>18</sup> Nonetheless, as the district court’s dismissal suggests, landlords find themselves fighting against the current because “[t]he odds are against a party seeking to prevail on a facial challenge” to a rent regulation statute.<sup>19</sup> In fact, all previous litigation

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12. See *Pinehurst Complaint*, *supra* note 10, at 1.

13. 492 F. Supp. 3d 33 (E.D.N.Y. 2020), *appeal docketed*, No. 20-3366 (2d Cir. Oct. 2, 2020).

14. See *id.* at 38. The moniker *Community Housing Improvement Program v. City of New York* is used for both the district court decision and the individual lawsuit brought by *Community Housing Improvement Program*, which the district court decision addresses.

15. See *id.* In the simplest terms, facial challenges argue that a measure is unconstitutional per se—or unconstitutional regardless of the factual circumstances involved in a particular plaintiff’s claim. See, e.g., Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994); Roger Pilon, Foreword, *Facial v. As-Applied Challenges: Does It Matter?*, 2008–2009 CATO SUP. CT. REV. vii, ix (2009). In contrast, as-applied challenges argue that “a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff’s particular circumstances.” *Tex. Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 518 n.16 (Tex. 1995); see also Dorf, *supra*, at 236 (contrasting as-applied and facial constitutional challenges).

16. See *Cnty. Hous. Improvement Program*, 492 F. Supp. 3d at 38.

17. Georgia Kromrei, *That Was Fast: RSA and CHIP Appeal Rent Law Decision*, REAL DEAL (Oct. 2, 2020, 5:30 PM), <https://therealdeal.com/2020/10/02/that-was-fast-rsa-and-chip-appeal-rent-law-decision> [<https://perma.cc/6YMS-2QEA>] (quoting a spokesperson for the landlord associations as claiming: “we have always anticipated that we would be pursuing our claims on appeal and that the appeals process would lead to our eventual success”).

18. See Memorandum of Law in Support of Commissioner Ruthanne Visnauskas’s Motion to Dismiss the Complaint at 3, *Cnty. Hous. Improvement Program*, 492 F. Supp. 3d 33 (No. 1:19-cv-04087) [hereinafter *Memo for the Defendant*] (citing SELECTED INITIAL FINDINGS OF THE 2017 NEW YORK CITY HOUSING AND VACANCY SURVEY 11 (2018), [https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2017\\_hvs\\_findings.pdf](https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2017_hvs_findings.pdf) [<https://perma.cc/FL54-WZU3>]).

19. See Shelby D. Green et al., *Landlord-Tenant Revolution Redux New York’s “Rad” Landlord-Tenant Law Revisions*, PROB. & PROP., Mar./Apr. 2020, at 34, 38; see also Ferré-Sadurní, *supra* note 6 (noting that the “Supreme Court has ultimately upheld rent regulations” and, although landlords hope that a conservative majority Supreme Court will reverse this trend, “reaching the Supreme Court could take years and chances are slim”).

challenging the constitutionality of the RSL has failed, both at the federal and state levels.<sup>20</sup> Thus, this Note explores the question: Has New York's RSL finally pushed the boundaries too far?<sup>21</sup>

Part I of this Note explains New York's RSL and examines its history with a particular focus on the effects of the 2019 amendments enacted by the HSTPA. It then introduces the lawsuits initiated by landlords in *Community Housing Improvement Program* to challenge the constitutionality of the RSL.<sup>22</sup> Finally, Part I provides the relevant constitutional background for the alleged facial constitutional violations.

Part II presents the legal arguments at the forefront of the *Community Housing Improvement Program* litigation and analyzes them through case law and scholarly policy opinions. The primary legal controversies this Note addresses are whether the RSL *as amended* facially effectuates a regulatory taking in violation of the Fifth Amendment or violates due process as guaranteed by the Fourteenth Amendment.<sup>23</sup>

Part III argues that the district court's decision to dismiss the plaintiffs' broad facial regulatory takings and due process challenges in *Community Housing Improvement Program* was correct and should be upheld on appeal. The argument is grounded in precedent that has made clear that the issue of rent control should be fought in the legislature, not in the courtroom. However, it also acknowledges that the amended RSL pushes boundaries that, if abused, may have a detrimental effect on both renters and owners and could result in successful as-applied regulatory takings challenges. Therefore, this Note proposes that: (1) regulated rent increases be tied to a predetermined formula to better ensure property owners a reasonable return on investment and incentivize necessary maintenance of the housing stock<sup>24</sup> and (2) the RSL include means testing as a tenant qualification for obtaining and maintaining occupancy in stabilized units to better achieve the legislative goal of providing affordable housing to New York's low- and middle-income renters.<sup>25</sup>

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20. See, e.g., *Harmon v. Markus*, 412 F. App'x 420, 422 (2d Cir. 2011), *cert. denied sub nom. Harmon v. Kimmel*, 566 U.S. 962 (2012); *Cnty. Hous. Improvement Program*, 492 F. Supp. 3d at 38 ("No precedent binding on this Court has ever found any provision of a rent-stabilization statute to violate the Constitution . . ."); *Rent Stabilization Ass'n v. Higgins*, 630 N.E.2d 626, 632 (N.Y. 1993).

21. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

22. Unless otherwise specified, when this Note refers to *Community Housing Improvement Program*, it is referencing the September 30, 2020, decision rendered by the federal district court for the Eastern District of New York addressing both lawsuits challenging the RSL.

23. Other challenges brought by plaintiffs in *Community Housing Improvement Program* include facial physical takings claims, as-applied physical and regulatory takings claims, and a Contracts Clause claim. See *Cnty. Hous. Improvement Program*, 492 F. Supp. 3d at 43–44, 49–51, 52–54 (dismissing all of the aforementioned claims levied against the RSL with the exception of certain as-applied regulatory takings challenges).

24. See *infra* Part III.A.2.

25. See *infra* Part III.B.2.

## I. THE RSL: A CONTENTIOUS HISTORY TAKES A RADICAL SHIFT

The RSL is a longstanding but frequently changing New York City rent regulation regime that has often been the subject of bitter political and legal battles.<sup>26</sup> Part I.A briefly describes the RSL's scope, purpose, and components. Part I.B discusses major events in the RSL's history, including periods of increased and decreased regulatory power. Part I.C narrows the focus to the RSL, as amended by the 2019 HSTPA, and details the amendments at issue in the constitutional challenge to the RSL. Part I.D then briefly introduces the district court's decision to dismiss the landlords' legal challenge in *Community Housing Improvement Program* and the landlords' plan to appeal. Lastly, Part I.E provides necessary constitutional background for the relevant claims raised in *Community Housing Improvement Program*.

## A. What Is the RSL?

In 1974, the New York State Legislature determined that a housing emergency existed in areas of New York.<sup>27</sup> It enacted the RSL as a necessary measure to “prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices.”<sup>28</sup>

The RSL is comprised of a variety of laws and regulations that have been codified throughout New York's legal system.<sup>29</sup> Collectively, they regulate rent increases, entitle tenants to certain services, require landlords to renew tenant leases at the tenant's will, and restrict the grounds for which a tenant can be evicted.<sup>30</sup>

Generally, the RSL covers New York City buildings<sup>31</sup> that contain six or more dwelling units that were built between February 1, 1947, and January 1, 1974, and are not cooperatives (“co-ops”) or condominiums (“condos”).<sup>32</sup>

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26. See, e.g., *supra* note 2 and accompanying text; *infra* note 79 and accompanying text.

27. See Emergency Tenant Protection Act of 1974, N.Y. UNCONSOL. LAW § 8622 (McKinney 2019). In 2018, New York City determined that the housing emergency continues to exist, allowing the RSL to remain in effect. See N.Y.C. ADMIN. CODE § 26-502.

28. *Id.*

29. See N.Y.C. ADMIN. CODE §§ 26-501 to 26-520; N.Y. UNCONSOL. LAW §§ 8621–8634; N.Y. COMP. CODES R. & REGS. tit. 9, §§ 2520–2531; see also Memo for the Defendant, *supra* note 18, at 3 n.1 (providing a detailed description of where the RSL is codified).

30. *Fact Sheet #1: Rent Stabilization and Rent Control*, N.Y. STATE HOMES & CMTY. RENEWAL OFF. OF RENT ADMIN. 1 (2020), <https://hcr.ny.gov/system/files/documents/2020/11/fact-sheet-01-09-2020.pdf> [<https://perma.cc/8SVH-TKPY>]. Landlords can refuse to renew a tenant's lease in a stabilized unit if that tenant is not using the unit as a primary residence. See N.Y. COMP. CODES R. & REGS. tit. 9, § 2524.4(c).

31. The HSTPA expands the RSL's coverage—which previously applied only to New York City and the counties of Nassau, Westchester, and Rockland—to New York City and “all counties within the state of New York,” but this Note is just concerned with New York City. See 2019 N.Y. Laws 36, pt. G, § 3.

32. See N.Y.C. ADMIN. CODE § 26-504 (specifying the applicability of the RSL); *Fact Sheet #1: Rent Stabilization and Rent Control*, *supra* note 30, at 1 (“Rent stabilization generally covers buildings built after 1947 and before 1974 . . . .”); *Rent Stabilized Building Lists*, N.Y.C. RENT GUIDELINES BD., <https://rentguidelinesboard.cityofnewyork.us/resources/rent-stabilized-building-lists> [<https://perma.cc/RRD9-PX8W>] (last visited Sept. 17,

However, many apartments, despite fitting the above description, have become deregulated,<sup>33</sup> through either luxury or high-income decontrol.<sup>34</sup> Additionally, newly constructed buildings that receive 421-a or J-51 tax exemptions may be stabilized even if the rent exceeds the luxury decontrol threshold.<sup>35</sup>

According to the New York City Rent Guidelines Board (RGB), a city agency, the main tenets of the RSL are to “preserve the basic *affordability* of rental housing” and to promote “*habitability and security of tenure*” among regulated tenants.<sup>36</sup> The issue of “*fair returns* for affected owners” is also an important consideration.<sup>37</sup> The RGB is tasked with establishing annual guidelines for rent adjustments of stabilized units.<sup>38</sup> These guidelines impose a percentage cap on allowable rent increases for leases of one and two years.<sup>39</sup> In determining the allowable rent increases for New York City’s

2021) (explaining that, in general, rent-stabilized buildings were built before 1974, contain six or more units, and are neither co-ops nor condos). A condo is a private residence in a multiunit building that includes ownership of commonly used property. *See* Lester Davis, *Condo vs. Co-Op: Know the Differences Before Buying One*, WASH. POST (Jan. 31, 2018, 6:00 AM), [https://www.washingtonpost.com/realestate/condo-vs-co-op-know-the-differences-before-buying-one/2018/01/30/804e7bd6-faf5-11e7-ad8c-ecbb62019393\\_story.html](https://www.washingtonpost.com/realestate/condo-vs-co-op-know-the-differences-before-buying-one/2018/01/30/804e7bd6-faf5-11e7-ad8c-ecbb62019393_story.html) [<https://perma.cc/9SNH-VUNJ>] (“Co-ops are collectively owned and managed by their residents, who own shares in a nonprofit corporation.”). For more information on the RSL as it applies to condo and co-op conversions, see *Co-ops & Condos FAQ*, N.Y.C. RENT GUIDELINES BD., <https://rentguidelinesboard.cityofnewyork.us/resources/faqs/co-ops-condos> [<https://perma.cc/A4AZ-LMHG>] (last visited Sept. 17, 2021).

33. “Deregulation occurs by action of the owner when an apartment under either rent control or rent stabilization legally meets the criteria for leaving regulation. When an apartment is deregulated, the rent may be set at ‘market rate.’” *Glossary of Rent Regulation Terms*, N.Y.C. RENT GUIDELINES BD., <https://rentguidelinesboard.cityofnewyork.us/resources/glossary-of-rent-regulation-terms/> [<https://perma.cc/F6K4-DCBF>] (last visited Sept. 17, 2021).

34. *See* N.Y.C. RENT GUIDELINES BD., CHANGES TO THE RENT STABILIZED HOUSING STOCK IN NYC IN 2019, at 7–8 (2020), <https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/05/2020-Changes.pdf> [<https://perma.cc/6ZRR-FZ29>] (finding that 168,170 units were deregulated due to “High-Rent Vacancy Deregulation” and 6615 units were deregulated due to “High-Rent High-Income Deregulation”). This Note, following the terminology used by the parties to *Community Housing Improvement Program*, refers to “high-rent vacancy deregulation” as “luxury decontrol” and “high-rent high-income deregulation” as “high income decontrol.” *See* Complaint, *supra* note 7, at 19; Memo for the Defendant, *supra* note 18, at 9. For more information on luxury and high-income decontrol, *see infra* Parts I.B.3, I.C.2.

35. *See Rent Stabilized Building Lists*, *supra* note 32 (“Buildings which are listed as ‘421.a’ or ‘j-51’ are stabilized because they took advantage of the 421-a or J-51 tax exemption program. These buildings remain rent-stabilized for the length of the tax exemption, and thereafter may be deregulated if the buildings were not stabilized prior to the participation in the tax exemption program.”).

36. *See* TIMOTHY L. COLLINS, AN INTRODUCTION TO THE NEW YORK CITY RENT GUIDELINES BOARD AND THE RENT STABILIZATION SYSTEM 55 (rev. ed. 2020), <https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/01/intro2020.pdf> [<https://perma.cc/PT7B-R3G5>].

37. *See id.* at 55–56.

38. *See* N.Y.C. ADMIN. CODE § 26-510(b).

39. *See id.*; COLLINS, *supra* note 36, at 82. Under certain conditions, regulated rent may exceed RGB-sanctioned increases. *See, e.g.*, N.Y.C. ADMIN. CODE § 26-511(c)(6), (c)(13) (providing exceptions where a landlord undertakes individual apartment improvements and

stabilized apartments, the RGB considers a multitude of factors, including economic conditions of the rental real estate industry, cost of living statistics, and any other relevant data made available to the RGB.<sup>40</sup>

The New York State Division of Housing and Community Renewal (DHCR) is the executive agency responsible for overseeing nearly all aspects of the state's low- and moderate-income affordable housing.<sup>41</sup> The DHCR is charged with administering the RSL.<sup>42</sup> The DHCR's responsibilities include: promulgating regulations governing the RSL, codified as the Rent Stabilization Code ("the Code"); administering various filings and registrations; and adjudicating claims brought by landlords and tenants pursuant to the Code.<sup>43</sup>

### B. A Brief History of the RSL

Under President Franklin D. Roosevelt, the U.S. Congress passed the Emergency Price Control Act of 1942<sup>44</sup> (EPCA). The EPCA instituted a nationwide price regulation system affecting various industries, including housing, to "prevent wartime profiteering."<sup>45</sup> In 1947, the EPCA expired and was replaced by the Housing and Rent Act of 1947.<sup>46</sup> The new law kept rent control in place for all buildings built before February 1, 1947, but removed control for new construction.<sup>47</sup> The federal government used rent control measures to set ceilings on rent that landlords may charge tenants.

On July 1, 1953, Congress removed all federal rent control mechanisms, while allowing states to implement their own rent control laws.<sup>48</sup> By 1961, New York City was the only location in the United States that still maintained

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major capital improvements). For an explanation of individual apartment improvements and major capital improvements rent regulation provisions, see *infra* Part I.C.2.

40. See N.Y.C. ADMIN. CODE § 26-510(b); see also COLLINS, *supra* note 36, at 82–104 (providing a more in-depth explanation of the duties of the RGB and the factors used to determine the annual rent guideline increases).

41. See *Division of Housing and Community Renewal*, N.Y. STATE HOMES & CMY. RENEWAL, <https://hcr.ny.gov/division-housing-and-community-renewal> [https://perma.cc/6XB8-7V6L] (last visited Sept. 17, 2021).

42. See COLLINS, *supra* note 36, at 74–75.

43. See *id.*

44. Pub. L. No. 77-421, 56 Stat. 23 (repealed 1947).

45. Guy McPherson, Note, *It's the End of the World as We Know It (And I Feel Fine): Rent Regulation in New York City and the Unanswered Questions of Market and Society*, 72 FORDHAM L. REV. 1125, 1133 (2004); see also N.Y. STATE DIV. OF HOUS. & CMY. RENEWAL OFF. OF RENT ADMIN., RENT REGULATION AFTER 50 YEARS: AN OVERVIEW OF NEW YORK STATE'S RENT REGULATED HOUSING 1993, at 3 (1993) [hereinafter RENT REGULATION AFTER 50 YEARS], <http://www.tenant.net/Oversight/50yrRentReg/50yr.html> [https://perma.cc/TDY7-CRD9].

46. Pub. L. No. 80-129, 61 Stat. 193 (codified as amended at 12 U.S.C. §§ 1738, 1744).

47. See McPherson, *supra* note 45, at 1134.

48. See *id.* at 1134–35.

a rent control system.<sup>49</sup> Throughout the 1960s, New York City implemented measures that gradually eroded its rent control system.<sup>50</sup>

### 1. The Creation of the RSL

By 1969, the country was experiencing a severe economic downturn due to rising inflation caused by the Vietnam War.<sup>51</sup> In New York City, housing production slumped, and the vacancy rate “fell drastically” from 3.2 percent in 1965 to 1.23 percent in 1968.<sup>52</sup>

New York City enacted the Rent Stabilization Law of 1969<sup>53</sup> in response to rapidly rising rents in unregulated apartments and a shortage of affordable housing.<sup>54</sup> The law regulated buildings with six or more units constructed after February 1, 1947.<sup>55</sup> Unlike rent control, the Rent Stabilization Law of 1969 regulated rent through leases rather than statutes.<sup>56</sup> It obligated landlords of stabilized units to renew leases to their tenants and provided that the RGB set allowable rent increases for the following year.<sup>57</sup>

### 2. Deregulation and the Emergency Tenant Protection Act of 1974

In 1971, the New York State Legislature “passed several laws designed to deregulate” all rent-regulated housing.<sup>58</sup> This included vacancy decontrol measures, which deregulated rent controlled and stabilized units that were voluntarily vacated after July 1, 1971.<sup>59</sup> The Urstadt Law<sup>60</sup> further undermined New York City’s rent regulation regime by prohibiting any

49. *Id.* at 1135. The number of units subject to rent control in New York State dropped from 2.5 million in 1950 to 1.8 million in 1961. *See* RENT REGULATION AFTER 50 YEARS, *supra* note 45, at 3–4. In New York, rent control is a rent regulation system which is entirely separate from the later-enacted RSL and generally applies to tenants of buildings built before February 1, 1947, where the tenant has continuously occupied the unit prior to July 1, 1971. *See Rent Control FAQ*, N.Y.C. RENT GUIDELINES BD., <https://rentguidelinesboard.cityofnewyork.us/resources/faqs/rent-control/#difference> [<https://perma.cc/79CU-H38S>] (last visited Sept. 17, 2021). Rent control is also administered by the DHCR and restricts a landlord’s ability to evict tenants and raise rents. *See Fact Sheet #1: Rent Stabilization and Rent Control*, *supra* note 30, at 2–3. New York’s rent control system is not at issue in this Note.

50. *See* RENT REGULATION AFTER 50 YEARS, *supra* note 45, at 4–7. Presently, there are only approximately 22,000 rent-controlled apartments remaining. *See Rent Control FAQ*, *supra* note 49.

51. *See* RENT REGULATION AFTER 50 YEARS, *supra* note 45, at 4–7.

52. *See id.*

53. N.Y.C. ADMIN. CODE § 26-503.

54. *See* COLLINS, *supra* note 36, at 26–27.

55. *See supra* note 32 and accompanying text.

56. *See* McPherson, *supra* note 45, at 1136.

57. *See supra* Part I.A (explaining the RSL).

58. RENT REGULATION AFTER 50 YEARS, *supra* note 45, at 4–7; *see also* 1971 N.Y. Laws 371.

59. *See* 1971 N.Y. Laws 371; RENT REGULATION AFTER 50 YEARS, *supra* note 45, at 4–7.

60. 1971 N.Y. Laws 372. This law is commonly referred to as the “Urstadt Law” after the then-State Housing Commissioner Charles Urstadt. *See* McPherson, *supra* note 45, at 1126 n.9; RENT REGULATION AFTER 50 YEARS, *supra* note 45, at 4–7.

municipality from passing rent regulations that were stronger than state regulations.<sup>61</sup>

Between 1971 and 1973, rapid deregulation of controlled and stabilized apartments, coupled with soaring inflation rates, resulted in huge rent increases.<sup>62</sup> Responding to this housing crisis, Governor Nelson Rockefeller assembled a committee led by Assemblyman Andrew Stein to investigate and evaluate the impact of vacancy decontrol.<sup>63</sup> The committee issued a scathing rebuke (“the Stein Report”) to the state’s vacancy decontrol measures, finding that they had “[n]o beneficial side effects,” resulted in large rent increases, inflicted tenant hardship, and did not lead to major capital investments or new construction.<sup>64</sup> Ultimately, the Stein Report recommended that “vacancy decontrol should be repealed.”<sup>65</sup>

In June 1974, the New York legislature passed the Emergency Tenant Protection Act of 1974<sup>66</sup> (ETPA). The ETPA allowed local governments to declare a housing emergency and implement rent regulation where the vacancy rate was lower than 5 percent.<sup>67</sup> New York City immediately declared a housing emergency<sup>68</sup> and re-regulated units that had been deregulated by vacancy decontrol.<sup>69</sup>

### 3. Deregulation Returns

In 1993, New York enacted the Rent Regulation Reform Act,<sup>70</sup> which introduced deregulation measures to the RSL.<sup>71</sup> Luxury decontrol was one such measure. It allowed owners to “permanently deregulate apartments that had a legal regulated monthly rent of \$2,000 or higher when they became vacant.”<sup>72</sup> The \$2000 threshold was raised to \$2500 in 2011<sup>73</sup> and raised again to \$2700 in 2015.<sup>74</sup> The threshold was to be adjusted each subsequent

61. See 1971 N.Y. Laws 372; McPherson, *supra* note 45, at 1137–38.

62. See RENT REGULATION AFTER 50 YEARS, *supra* note 45, at 4–7 (noting that from July 1971 through December 1973, approximately 300,000 rent-controlled units and 88,000 rent-stabilized apartments were deregulated).

63. See COLLINS, *supra* note 36, at 28–29.

64. TEMP. STATE COMM’N ON LIVING COSTS AND THE ECON., 1974 STEIN REPORT ON VACANCY DECONTROL 3–4, 21 (1974) (finding that, on average, vacancy decontrol led to a 52-percent rent increase in formerly rent-controlled apartments and a 19-percent increase in rent-stabilized apartments in New York City).

65. *Id.* at 21.

66. N.Y. UNCONSOL. LAW §§ 8621–8634 (McKinney 2019).

67. See *id.* § 8623.

68. See N.Y.C. ADMIN. CODE § 26-501.

69. See RENT REGULATION AFTER 50 YEARS, *supra* note 45, at 4–7. The Rent Stabilization Law of 1969 also stabilized buildings constructed between March 11, 1969, and December 31, 1973. See *id.*

70. 1993 N.Y. Laws 253.

71. See Memo for the Defendant, *supra* note 18, at 8; McPherson, *supra* note 45, at 1140.

72. Memo for the Defendant, *supra* note 18, at 8 (citing 1993 N.Y. Laws 253); see McPherson, *supra* note 45, at 1140 (explaining luxury decontrol).

73. See Memo for the Defendant, *supra* note 18, at 8 (citing 2011 N.Y. Laws 97).

74. See *id.* (citing 2015 N.Y. Laws 20).

year by the same rate as the RGB one-year rent renewal increase percentage.<sup>75</sup>

Another measure—high-income decontrol—permitted “owners to permanently deregulate occupied apartments with rents of \$2,000 or more and tenants whose household annual income exceeded \$250,000 in each of the prior two years.”<sup>76</sup> The income requirement was reduced to \$175,000 in 1997,<sup>77</sup> and then raised to \$200,000 alongside an increase in the rental threshold to \$2500 in 2011.<sup>78</sup>

Incredibly contentious debate over the RSL in the state legislature preceded the Rent Regulation Reform Act of 1997,<sup>79</sup> which reduced the income requirement for high-income decontrol, allowed owners to increase rent up to 20 percent upon vacancy of the unit (known as a “vacancy bonus”), restricted tenant succession rights, and imposed several other landlord-friendly measures that allowed rents to increase quickly.<sup>80</sup>

The Rent Act of 2011<sup>81</sup> and the Rent Act of 2015<sup>82</sup> began a moderate shift away from the statutory gains previously won by landlord advocates.<sup>83</sup> Besides the aforementioned adjustments to luxury and high-income decontrol, amendments to the RSL included limits on the allowable frequency and percentage of vacancy increases and small reforms to major capital improvements (MCIs) and individualized apartment improvements (IAIs).<sup>84</sup> With the 2015 RSL regime set to expire in four years, the stage was set for a renewed fight in 2019.<sup>85</sup>

### C. *The Housing Stability and Tenant Protection Act of 2019*

The HSTPA sought to protect affordable housing primarily by eliminating avenues for landlords to remove their units from RSL regulation and by curtailing landlords’ ability to increase rents above the RGB’s allowable rent

75. *See id.* (citing 2015 N.Y. Laws 20).

76. *Id.* (citing 1993 N.Y. Laws 253) (explaining high-income decontrol).

77. *See id.* (citing 1997 N.Y. Laws 116).

78. *See id.* (citing 2011 N.Y. Laws 97).

79. 1997 N.Y. Laws 116; *see* McPherson, *supra* note 45, at 1140–41 (“Senator Bruno called for the complete abolition of rent regulation in New York State. Senator Bruno’s statement ‘transformed an insider’s game—fought with campaign contributions, backroom lobbying and arcane legislative maneuvers—into a media spectacle, a holy war.’” (quoting James Dao & Richard Pérez-Peña, *Rent War Redux: As Dust Settles, A Tortuous Inside Story Emerges*, N.Y. TIMES (June 29, 1997), <https://www.nytimes.com/1997/06/29/nyregion/rent-war-redux-as-dust-settles-a-tortuous-inside-story-emerges.html> [https://perma.cc/G429-WVFM])); *see also* Craig Gurian, *Let Them Rent Cake: George Pataki, Market Ideology, and the Attempt to Dismantle Rent Regulation in New York*, 31 FORDHAM URB. L.J. 339, 339–40, 351–54 (2004) (describing the bitter political fight over rent regulations in New York City leading up to the 1997 amendments to New York’s RSL).

80. *See* COLLINS, *supra* note 36, at 34–36.

81. 2011 N.Y. Laws 97.

82. 2015 N.Y. Laws 20.

83. *See* COLLINS, *supra* note 36, at 36–37.

84. *See id.*; 2011 N.Y. Laws 97; 2015 N.Y. Laws 20. For an explanation of MCI and IAI rent regulation provisions, *see infra* Part I.C.2.

85. *See* COLLINS, *supra* note 36, at 37.

increases. In doing so, the 2019 amendments to the RSL radically shifted the law in favor of tenant advocates.

### 1. The Buildup to Change

In 2018, the New York City Council paved the way for changes to the RSL regime, which was set to expire in June 2019,<sup>86</sup> by reaffirming the existence of an ongoing housing crisis in New York City.<sup>87</sup> Before the vote, New York City Council Speaker Corey Johnson voiced his support for extending the emergency finding and aligned himself with tenant advocates committed to strengthening the RSL to “protect” affordable housing.<sup>88</sup>

Advocates of stronger rent stabilization decried the RSL provisions that undermined the laws’ effectiveness, encouraged tenant harassment, and incubated rampant fraud.<sup>89</sup> As of 2019, nearly 175,000 stabilized units had been lost to luxury and high-rent decontrol provisions in the RSL.<sup>90</sup> Advocates zealously pushed for strong reforms to maintain affordable housing.<sup>91</sup> Conversely, landlord associations warned that proposed changes to the RSL were untenable and would result in a steep decline in the quality of the city’s housing stock.<sup>92</sup>

On June 14, 2019, the newly Democrat-controlled state legislature followed through on its progressive platform and enacted “the strongest tenant protections in history.”<sup>93</sup> Tenant advocates celebrated the HSTPA as “a much-needed adjustment in the balance of the fortunes of those needing accessible housing,” while property owners and investors regarded the law as “concernedly ‘radical’” and an infringement on property rights.<sup>94</sup>

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86. See 2015 N.Y. Laws 20, pt. A, § 1.

87. See N.Y.C. ADMIN. CODE § 26-502.

88. See N.Y.C. COUNCIL, TRANSCRIPT OF THE MINUTES OF THE CITY COUNCIL STATED MEETING 44 (Mar. 22, 2018) (transcribing New York City Council Speaker Corey Johnson’s proclamation that “the easiest way to protect affordable housing is to preserve the affordable housing that we have and to strengthen the rent laws”).

89. See OKSANA MIRONOVA & JEFF JONES, CLOSING THE LOOPHOLES 1–10 (2019), [https://smhttp-ssl-58547.nexcesscdn.net/nyess/images/uploads/pubs/rent\\_loopholes\\_FINAL\\_for\\_web.pdf](https://smhttp-ssl-58547.nexcesscdn.net/nyess/images/uploads/pubs/rent_loopholes_FINAL_for_web.pdf) [<https://perma.cc/NJ78-PRFQ>] (demonstrating how the then-current RSL could be manipulated, legally and illegally, to hike rents and rapidly deregulate apartments); Justin R. La Mort, *The Theft of Affordable Housing: How Rent-Stabilized Apartments Are Disappearing from Fraudulent Individual Apartment Improvements and What Can Be Done to Save Them*, 40 N.Y.U. REV. L. & SOC. CHANGE 351, 360–64 (2016) (arguing that the then-current RSL’s individual apartment improvement provision was facilitating fraud and leading to rampant deregulation of stabilized units).

90. See *supra* note 34 and accompanying text.

91. See, e.g., MIRONOVA & JONES, *supra* note 89, at 10; Wang & Ferré-Sadurní, *supra* note 2 (reporting on tenants zealously protesting at the New York State Capitol in an attempt to spur action for stronger rent reform).

92. See *Testimony of the Real Estate Board of New York Before the Rent Guidelines Board Regarding Lease Renewal Guidelines for 2019*, REAL EST. BD. OF N.Y. (Apr. 25, 2019), [https://www.rebny.com/content/rebny/en/newsroom/testimony/2019\\_Testimony/Rent-Guidelines-Board\\_Lease-Renewal-Guidelines-2019.html](https://www.rebny.com/content/rebny/en/newsroom/testimony/2019_Testimony/Rent-Guidelines-Board_Lease-Renewal-Guidelines-2019.html) [<https://perma.cc/E475-XDLA>].

93. Press Release, *supra* note 5.

94. Green et al., *supra* note 19, at 34.

## 2. The New Amendments to the RSL

Several HSTPA provisions spurred New York City landlords to pursue legal action against the entire RSL regime.<sup>95</sup> First, the HSTPA eliminated luxury and high-income decontrol.<sup>96</sup> Owners could no longer deregulate a unit when it reached a certain rent threshold, regardless of the tenant's income.<sup>97</sup> Tenants praised the move for removing measures that led over 170,000 stabilized units to be eliminated and incentivized landlords to engineer rent hikes and harass tenants.<sup>98</sup> Landlords viewed the move as inconsistent with the goal of providing affordable housing to vulnerable renters because repealing luxury and high-income decontrol benefits wealthy tenants living in stabilized apartments.<sup>99</sup>

Second, the HSTPA eliminated vacancy and longevity increases.<sup>100</sup> The HSTPA prohibits the RGB from creating any statutory rent increases for vacancies and prolonged tenant occupancy.<sup>101</sup> Previously, landlords could increase a unit's rent by 20 percent during vacancies and apply an additional 0.6 percent per year "longevity bonus" on rent for units that have not been vacant for eight or more years.<sup>102</sup> Tenants supported the change as eliminating a financial incentive to harass and evict tenants.<sup>103</sup> Landlords agreed that it removed the incentive to evict because they could no longer justify the cost of expensive eviction proceedings, which would lead to more problematic tenants and fewer vacancies.<sup>104</sup>

Third, the HSTPA capped and further restricted rent increases for IAIs<sup>105</sup> and MCIs.<sup>106</sup> The RSL's IAI provision allows landlords to pass on the cost of individual apartment improvements to the tenant.<sup>107</sup> Before the 2019 amendments, "[o]wners could increase the monthly rent by 1/40th of the cost of the improvement in buildings with 35 or fewer apartments and 1/60th in buildings with 36 or more apartments."<sup>108</sup> The HSTPA reduced allowable

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95. See Complaint, *supra* note 7, at 1–2. For a list of HSTPA provisions at issue in the lawsuit, see *id.* at 25–28.

96. 2019 N.Y. Laws 36, pt. D, § 5 (repealing N.Y.C. ADMIN. CODE §§ 26-504.2, 26-504.3).

97. See *id.*

98. See Gerald Lebovits et al., *New York's Housing Stability and Tenant Protection Act of 2019: What Lawyers Must Know*, 29 J. AFFORDABLE HOUS. & CMTY. DEV. L. 75, 95 (2020).

99. See *id.* at 96 ("[A]bolishing luxury deregulation permits the possibility of a tenant with \$1M annual income living in a \$10,000/month rent-stabilized apartment").

100. 2019 N.Y. Laws 36, pt. C, § 1 (amending N.Y.C. ADMIN. CODE § 26-510(j)).

101. N.Y.C. ADMIN. CODE § 26-510(j).

102. Lebovits et al., *supra* note 98, at 95.

103. See *id.*

104. See *id.*

105. 2019 N.Y. Laws 36, pt. K, §§ 1, 2 (amending N.Y.C. ADMIN. CODE § 26-511(c)(13)). The abbreviation "IAI" stands for "individual apartment improvements." See *supra* note 84 and accompanying text.

106. 2019 N.Y. Laws 36, pt. K, §§ 4, 11 (amending N.Y.C. ADMIN. CODE § 26-511(c)(6)). The abbreviation "MCI" stands for "major capital improvements." See *supra* note 84 and accompanying text.

107. See N.Y.C. ADMIN. CODE § 26-511(c)(13).

108. Lebovits et al., *supra* note 98, at 99.

rent increases to 1/168th (for buildings with thirty-five or fewer units) and 1/180th (for buildings with thirty-six or more units) of the cost of the improvement.<sup>109</sup> Further, the HSTPA permits “no more than three separate IAIs, with a total aggregate cost of no more than \$15,000.00, within a 15-year period.”<sup>110</sup> IAIs were formerly uncapped.<sup>111</sup> Tenants supported the change, arguing that landlords exploited the former IAI provisions to increase rent and deregulate apartments through unnecessary cosmetic improvements and fraud.<sup>112</sup> Landlords warned that the change removed incentives for landlords to maintain their properties and would lead to dilapidated buildings and warehousing of vacant units.<sup>113</sup>

The RSL’s MCI provision allows landlords to pass on the costs of major building improvements to their tenants.<sup>114</sup> Before, owners could recoup their MCI costs over an eight-year amortization period (for buildings with thirty-five or fewer units) or a nine-year amortization period (for buildings with thirty-six or more units), with annual rent increases capped at 6 percent.<sup>115</sup> The HSTPA increased the amortization period to twelve and twelve-and-a-half years, respectively, and caps the annual rent increase at 2 percent.<sup>116</sup> As with IAIs, landlords complain that the RSL’s regulated method for recovering MCI costs is insufficient.<sup>117</sup> The HSTPA also made the rent increases associated with IAIs and MCIs temporary and required their removal from the rent after thirty years.<sup>118</sup>

Fourth, the HSTPA further limited landlords’ ability to convert regulated rental units to co-op or condo ownership.<sup>119</sup> The RSL allows owners to remove apartments from regulation through condo and co-op conversion.<sup>120</sup>

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109. See N.Y.C. ADMIN. CODE § 26-511(c)(13).

110. Lebovits et al., *supra* note 98, at 100.

111. See *id.* at 99.

112. See *id.* at 100. Tenant advocates argue that the RSL’s IAI regime incentivizes fraud due to inadequate oversight of reported IAI expenses coupled with the potential for sizeable rent increases. *Id.*; see also La Mort, *supra* note 89, at 361–62.

113. See Lebovits et al., *supra* note 98, at 101; Josh Barbanel, *New York Landlords Slow Apartment Upgrades, Blame New Rent Law*, WALL ST. J. (Dec. 19, 2019, 7:00 AM), <https://www.wsj.com/articles/new-york-landlords-slow-apartment-upgrades-blame-new-rent-law-11576756800> [<https://perma.cc/TJ72-SA7Q>]. Warehousing occurs when a landlord decides not to relet a vacant apartment. See Alanna Schubach, *Why Do Some NYC Landlords Leave Apartments Empty?*, BRICK UNDERGROUND (Aug. 30, 2017, 11:39 AM), <https://www.brickunderground.com/rent/why-landlords-leave-apartments-empty> [<https://perma.cc/B9R3-GS3D>]. Landlords have threatened to leave vacant apartments empty because the amended IAI provision prevents them from recovering the cost of repairs required to re-rent them. See Austin Havens-Bowen, *New Bill Aims to Fine Landlords Who Warehouse Rent-Stabilized Apartments*, BRICK UNDERGROUND (Mar. 13, 2020, 10:00 AM), <https://www.brickunderground.com/rent/new-bill-to-fine-landlords-who-warehouse-rent-stabilized-apartments-nyc> [<https://perma.cc/DQG9-LJLX>].

114. See N.Y.C. ADMIN. CODE § 26-511(c)(6). Common examples of MCIs include the installation of a new boiler or plumbing system. See Lebovits et al., *supra* note 98, at 99.

115. See Lebovits et al., *supra* note 98, at 99.

116. See N.Y.C. ADMIN. CODE § 26-511(c)(6).

117. Lebovits et al., *supra* note 98, at 101.

118. See N.Y.C. ADMIN. CODE § 26-511(c)(6), (c)(13).

119. 2019 N.Y. Laws 36, pt. N, § 1 (amending N.Y. GEN. BUS. LAW § 352-eeee).

120. See N.Y. GEN. BUS. LAW § 352-eeee.

However, it limits the availability of this conversion process by eliminating eviction plan conversions and raising the requirement that owners obtain purchase agreements from 15 percent of tenants to 51 percent of tenants in noneviction conversion plans.<sup>121</sup> Tenants praised these changes as removing a tool for landlords to convert affordable housing into apartments that most New Yorkers cannot afford.<sup>122</sup> Landlords believed that raising the conversion threshold to 51 percent in order to convert their building to a co-op or condo effectively transfers the decision to tenants, which improperly violates their right to dispose of property and reduces the building's value.<sup>123</sup>

Fifth, the HSTPA eliminated preferential rent increases.<sup>124</sup> Under the RSL, landlords may charge a tenant less than the legal rent; this is known as preferential rent.<sup>125</sup> Before the 2019 amendments, landlords could reserve the right to charge the legal rent upon the expiration of a lease charging the preferential rent.<sup>126</sup> The HSTPA made preferential rent permanent while the tenant remains in the apartment and only allows owners to charge the legal rent upon vacancy.<sup>127</sup> Tenants supported the change because it prevents landlords from abruptly and significantly raising renewal rents, which can price current tenants out.<sup>128</sup> Landlords characterized the change as unfair and harmful to owners' expected return on investment.<sup>129</sup>

Sixth, the HSTPA reduced the personal use exemption.<sup>130</sup> The RSL provides landlords with the means to recover a rented apartment for personal use under certain circumstances.<sup>131</sup> Before the 2019 amendments, owners could recover a rented unit upon a showing that either they or their immediate family member sought to occupy the apartment for personal use as a primary residence.<sup>132</sup> The HSTPA constricted the personal use exemption by limiting recovery to one unit per building for use as a primary residence and only

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121. *See id.* § 352-eeee(1)(c); Lebovits et al., *supra* note 98, at 97. Under eviction plan conversions, stabilized renters who do not purchase their units pursuant to the conversion plan can be evicted. *See* N.Y. GEN. BUS. LAW § 352-eeee(1)(c). Under noneviction plan conversions, stabilized renters who do not purchase their units may continue to occupy their apartments indefinitely as rent-stabilized tenants. *See Co-ops & Condos FAQ, supra* note 32.

122. *See* Lebovits et al., *supra* note 98, at 97.

123. *See* Complaint, *supra* note 7, at 26–27.

124. 2019 N.Y. Laws 36, pt. E, § 2 (amending N.Y.C. ADMIN. CODE § 26-511(c)(14)).

125. *See* Lebovits et al., *supra* note 98, at 98. Generally, landlords will give a preferential rent when they cannot find a tenant willing to lease at the legal rent. *See id.*

126. *See id.*

127. *See* N.Y.C. ADMIN. CODE § 26-511(c)(14); Lebovits et al., *supra* note 98, at 98 (“All rent increases for lease renewals must be based on the preferential rent.”).

128. *See* Lebovits et al., *supra* note 98, at 98; MIRONOVA & JONES, *supra* note 89, at 4–5 (using real examples to demonstrate how under the previous RSL regime, preferential rent could be used in conjunction with other RSL provisions to push out tenants and quickly deregulate units through luxury decontrol).

129. *See* Complaint, *supra* note 7, at 102–03.

130. *See* 2019 N.Y. Laws 36, pt. I, § 2 (amending N.Y.C. ADMIN. CODE § 26-511(c)(9)(b)).

131. N.Y.C. ADMIN. CODE § 26-511(c)(9)(b).

132. *See* 2019 N.Y. Laws 36, pt. I, § 2; Complaint, *supra* note 7, at 79. Courts interpreted the personal use exemption to require a showing of good faith by the landlord wishing to recover a regulated unit. *See, e.g., Pennella v. Joy*, 433 N.Y.S.2d 494, 495 (App. Div. 1980) (rejecting landlord's attempt to recover a regulated unit for personal use because the landlord's request lacked “good faith”).

upon a showing of “immediate and compelling necessity.”<sup>133</sup> Landlords decried the change as a clear restriction on their right to possess and use their private property.<sup>134</sup>

Seventh, the HSTPA extended the RSL’s post-breach relief provisions.<sup>135</sup> In some cases, the RSL protects tenants even after a landlord has evicted a tenant through judicial proceedings.<sup>136</sup> Before the 2019 amendments, if the landlord won an eviction proceeding against a holdover tenant,<sup>137</sup> the tenant had ten days to cure the breach, and the court could stay the eviction warrant for up to six months.<sup>138</sup> The HSTPA extended the cure period for holdover breaches to thirty days and allowed judges to stay an eviction warrant for up to one year for both holdover and nonpayment evictions.<sup>139</sup> Judges may grant stays of eviction after determining that eviction would cause the tenant or the tenant’s family “extreme hardship.”<sup>140</sup> Landlords contended that they should not be responsible for alleviating the hardship of particular tenants and that the post-breach relief provisions “contribute[] to the confiscatory and irrational nature” of the RSL.<sup>141</sup>

Lastly, the HSTPA permanently codified the RSL by eliminating the sunset provision.<sup>142</sup> The sunset provision has been a staple of all previous versions of the RSL.<sup>143</sup> Now, the HSTPA will remain the governing law until there is “political consensus [for amending the RSL] among the [New York State] Senate, Assembly, and Governor.”<sup>144</sup>

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133. N.Y.C. ADMIN. CODE § 26-511(c)(9)(b).

134. See Complaint, *supra* note 7, at 79–80.

135. See 2019 N.Y. Laws 36, pt. M, § 21 (amending N.Y. REAL PROP. ACTS LAW § 753 (Consol. 2020)).

136. See N.Y. REAL PROP. ACTS LAW § 753 (Consol. 2020).

137. A holdover tenant is a tenant who is being evicted for reasons other than the nonpayment of rent. See THE ASS’N OF THE BAR OF THE CITY OF N.Y. & THE CIV. CT. OF N.Y., A TENANT’S GUIDE TO THE NEW YORK CITY HOUSING COURT 5 (2006) [hereinafter A TENANT’S GUIDE TO HOUSING COURT], <https://www.nycbar.org/pdf/report/tenantsguide.pdf> [<https://perma.cc/JF93-M45N>].

138. See Lebovits et al., *supra* note 98, at 117.

139. See N.Y. REAL PROP. ACTS LAW § 753(1). Nonpayment evictions are caused by a tenant’s failure to pay rent. See A TENANT’S GUIDE TO HOUSING COURT, *supra* note 137, at 2. Holdover evictions are evictions for reasons other than nonpayment of the rent. See *id.* at 5.

140. See N.Y. REAL PROP. ACTS LAW § 753(1), (4). Judges may consider factors such as health, a child’s enrollment in school, and “other extenuating life circumstances affecting the ability of the [tenant] or the [tenant’s] family to relocate and maintain quality of life.” *Id.* § 753(1).

141. See Plaintiffs’ Supplemental Memorandum of Law in Opposition to Defendants’ and Intervenors’ Motion to Dismiss at 3, Cmty. Hous. Improvement Program v. City of New York, 492 F. Supp. 3d 33 (E.D.N.Y. 2020) (No. 1:19-cv-04087), *appeal docketed*, No. 20-3366 (2d Cir. Oct. 2, 2020) [hereinafter Memo for the Plaintiff].

142. See 2019 N.Y. Laws 36, pt. A. The sunset provision is “a date by which the Legislature must renew the rent laws to prevent their expiration.” Lebovits et al., *supra* note 98, at 93.

143. See Lebovits et al., *supra* note 98, at 93.

144. *Id.* However, the City Council will still have to determine that a housing emergency exists every three years for the RSL to remain in effect. *Id.* at 94.

#### D. Landlords Turn to the Courts

On June 15, 2019, New York City real estate associations representing landlord interests filed a lawsuit “intended to dismantle the entire rent-regulation system, which dictates the rents of about 2.4 million tenants.”<sup>145</sup> The plaintiffs insisted that the RSL has always been unconstitutional but the HSTPA amendments leave “no doubt that the RSL’s irrationality and arbitrariness, and its web of restrictions override core rights of property owners and impose unconstitutional burdens on property owners.”<sup>146</sup> They claim that the RSL on its face violates the Fifth Amendment’s Takings Clause, as both a physical and regulatory uncompensated taking, and the Fourteenth Amendment’s Due Process Clause.<sup>147</sup>

On November 14, 2019, a group of individual landlords (“the Pinehurst Plaintiffs”) separately filed a legal challenge to the RSL in federal court.<sup>148</sup> Besides the claims already noted above, the lawsuit made as-applied physical and regulatory takings claims and asserted that the RSL violates the Contracts Clause.<sup>149</sup>

On September 30, 2020, the district court dismissed all the facial challenges to the RSL raised by both plaintiff groups.<sup>150</sup> Anticipating this result at the district court level, landlords quickly appealed the decision.<sup>151</sup> Landlord interest groups anticipate that a conservative, property-rights-friendly U.S. Supreme Court will grant certiorari.<sup>152</sup>

145. See Ferré-Sadurní, *supra* note 6. The plaintiffs listed in the complaint include two New York real estate trade associations, the Rent Stabilization Association of N.Y.C. (RSA) and the Community Housing Improvement Program (CHIP), and individual landlords of rent-stabilized buildings. See Complaint, *supra* note 7, at 9–11. The defendants are the City of New York, the RGB, and individual members of the DHCR and RGB. See *id.* at 11–12.

146. Complaint, *supra* note 7, at 1–2.

147. See *id.* at 1; see also Kathryn Brenzel, *What You Need to Know About Landlords’ Challenge to New York’s Rent Law*, REAL DEAL (July 16, 2019, 5:55 PM), <https://therealdeal.com/2019/07/16/what-you-need-to-know-about-landlords-challenge-to-new-yorks-rent-law/> [<https://perma.cc/96Z6-VSAW>].

148. See *Pinehurst* Complaint, *supra* note 10, at 1.

149. See *id.* at 2–4. This Note primarily focuses on the landlords’ facial regulatory takings and due process challenges to the RSL’s constitutionality, rather than the facial physical takings, as-applied takings, and Contract Clause challenges.

150. See *Cnty. Hous. Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 38 (E.D.N.Y. 2020), *appeal docketed*, No. 20-3366 (2d Cir. Oct. 2, 2020). The court refused to dismiss the *Pinehurst* Plaintiffs’ as-applied challenges “at this stage.” *Id.*

151. See Kromrei, *supra* note 17.

152. See Ryan Deffenbaugh, *Landlords Take Rent-Control Fight to Federal Court*, CRAIN’S N.Y. BUS. (July 16, 2019, 9:35 AM), <https://www.crainsnewyork.com/real-estate/landlords-take-rent-control-fight-federal-court> [<https://perma.cc/KV86-JUB3>] (noting that the Supreme Court is more conservative than it was in 2012, when it refused to hear *Harmon v. Markus*, 412 F. App’x. 420, 422 (2d Cir. 2011), *cert. denied sub nom. Harmon v. Kimmel*, 566 U.S. 962 (2012), a similar case challenging the RSL); see also Real Deal, *Inside Real Estate’s Legal Challenge to the Rent Law*, YOUTUBE (June 16, 2020), <https://www.youtube.com/watch?v=vKxOuCTGJD0> [<https://perma.cc/GN6B-XA6K>] (interviewing landlord plaintiffs’ attorney, Andrew Pincus, who anticipates that the case will need to be heard by all three levels of the federal judiciary to be resolved). Since the lawsuit began, the Supreme Court has grown more conservative with the appointment of Justice

*E. Constitutional Amendments at Issue in Community Housing Improvement Program*

In *Community Housing Improvement Program*, landlords adamantly challenged the constitutionality of the RSL.<sup>153</sup> This Note examines the plaintiffs' contention that the RSL violates the Fifth Amendment as an uncompensated regulatory taking of private property, and the Fourteenth Amendment as a violation of due process.<sup>154</sup>

1. Fifth Amendment Regulatory Takings

The Fifth Amendment guarantees that "private property [shall not] be taken for public use, without just compensation."<sup>155</sup> Traditionally, the government violates this right by authorizing a "physical occupation of property (or actually tak[ing] title)."<sup>156</sup> Where the government "requires the landowner to submit to the physical occupation of his land," it can be said that the government has physically taken the land.<sup>157</sup>

In *Pennsylvania Coal Co. v. Mahon*,<sup>158</sup> the Supreme Court determined that the Fifth Amendment's Takings Clause also required the government to compensate citizens whose property was subjected to such onerous regulation that it was effectively taken from them.<sup>159</sup> Justice Oliver Wendell Holmes, Jr. explained, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."<sup>160</sup> Such a taking is known as a regulatory taking. To determine if a legislative measure amounts to a regulatory taking, one must first identify the line of demarcation dividing the valid use of a state's power<sup>161</sup> from invalid regulations that "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>162</sup>

In *Penn Central Transportation Co. v. New York City*,<sup>163</sup> the Court failed to deliver this clear line; instead, it developed an "ad hoc, factual inquir[y]" for evaluating regulatory takings claims.<sup>164</sup> The framework includes analysis

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Barrett. See Kathryn Brenzel, *Supreme Court Shift Could Favor Rent Law Challengers*, REAL DEAL (Oct. 28, 2020, 8:00 AM), <https://therealdeal.com/2020/10/28/supreme-court-shift-could-favor-rent-law-challengers> [<https://perma.cc/BJ92-UXNV>].

153. See generally Complaint, *supra* note 7.

154. See *id.* at 2–5, 6–9.

155. U.S. CONST. amend. V.

156. *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992).

157. *Id.* at 527. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court concluded that a law compelling owners of residential buildings to allow cable companies to install and attach cable boxes to their buildings to provide tenants with access to cable television was an unconstitutional taking, without regard to the public interest served by the regulation or the size of the area actually being occupied. 458 U.S. 419, 426, 436–37 (1982).

158. 260 U.S. 393 (1922).

159. See *id.* at 415; see also *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537–38 (2005).

160. *Mahon*, 260 U.S. at 415.

161. See *id.* at 413 ("Government 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.").

162. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

163. 438 U.S. 104 (1978).

164. *Id.* at 124.

of the “character of the governmental action,” the “economic impact” on the regulated property’s value, and the interference with owners’ reasonable investment-backed expectations (“the *Penn Central* test”).<sup>165</sup> In *Penn Central*, the Court found that a regulation designating Grand Central as a state landmark and prohibiting the owners from using the property in ways that too greatly diminished its historical and aesthetic value was not a regulatory taking on its face.<sup>166</sup> The owners retained the right to use and possess Grand Central, and the regulation neither too greatly diminished the overall economic value of the property nor impeded investment-backed expectations.<sup>167</sup>

## 2. Fourteenth Amendment Due Process

The Fourteenth Amendment guarantees that “[n]o State shall . . . deprive any person of life, liberty, or *property*, without *due process* of law.”<sup>168</sup> The Due Process Clause has been interpreted to protect individuals against both procedural<sup>169</sup> and, more controversially, substantive<sup>170</sup> violations of their rights.<sup>171</sup> Generally, when economic and land use regulations that do not disturb fundamental rights are challenged on due process grounds, such regulations are subject only to rational basis review, which assesses whether the measures are rationally related to a legitimate state interest.<sup>172</sup>

In assessing a due process challenge to a San Jose rent control ordinance in *Pennell v. City of San Jose*,<sup>173</sup> the Court stated that “[p]rice control is ‘unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant

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165. *Id.* In the past, the Court evaluated whether the regulation “substantially advance[d] legitimate state interests.” See *Agins v. City of Tiburon*, 477 U.S. 255, 260 (1980). In 2005, the Court explicitly abandoned this test as part of its takings analysis. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005).

166. 438 U.S. at 108–10, 135–38.

167. See *id.* at 130–31.

168. U.S. CONST. amend. XIV (emphasis added).

169. “‘Procedural due process’ concerns the procedures that the government must follow before it deprives an individual of life, liberty, or property.” Nathan S. Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/701> [<https://perma.cc/8YXQ-ZFHL>] (last visited Sept. 17, 2021).

170. Substantive due process concerns the idea that some rights are too important to be infringed by the government, regardless of the process given. See *id.*

171. See *id.*; see also Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 257–60 (2016) (providing both criticism of substantive due process by prominent legal scholars and a defense of the concept).

172. See, e.g., *Duke Power Co. v. Carolina Env’t Study Grp., Inc.*, 438 U.S. 59, 82–83 (1978); *Nebbia v. New York*, 291 U.S. 502, 537 (1934); *In re Chateaugay Corp.*, 53 F.3d 478, 486–87 (2d Cir. 1995); Karl Manheim, *Tenant Eviction Protection and The Takings Clause*, 1989 WIS. L. REV. 925, 945–46. For a brief summary of the development of the Supreme Court’s economic substantive due process jurisprudence, see *The Rise and Fall of Economic Substantive Due Process*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/the-rise-and-fall-of-economic-substantive-due-process-overview> [<https://perma.cc/PXJ9-J5TA>] (last visited Sept. 17, 2021).

173. 485 U.S. 1 (1988).

to the policy the legislature is free to adopt . . . .”<sup>174</sup> The case demonstrates that due process challenges to rent regulations generally face a high burden.<sup>175</sup>

The next part discusses the regulatory takings and due process challenges levied against the RSL by the plaintiff landlords and the district court’s reasoning for dismissing the claims in *Community Housing Improvement Program*. These arguments are further examined and supported through works of other scholars and public figures.

## II. EXAMINING THE CONSTITUTIONALITY OF THE RSL

Although unsuccessful at the district court level,<sup>176</sup> landlords have vowed to continue the fight to cut the RSL down at its roots.<sup>177</sup> This part examines the arguments offered by the landlords and the court’s reasoning for dismissal in *Community Housing Improvement Program* as it pertains to (1) the facial regulatory takings claim and (2) the due process claim.

### A. Does the RSL Effect a Regulatory Taking?

Even in the heyday of economic substantive due process,<sup>178</sup> Justice Holmes proclaimed that “[h]ousing is a necessary of life” and “a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation.”<sup>179</sup> He further explained, however, that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>180</sup>

The *Penn Central* test governs whether the RSL goes “too far.”<sup>181</sup> It requires evaluating: (1) the character of the RSL’s regulation, (2) its economic effect on the value of regulated property, and (3) its interference with investment-backed expectations.<sup>182</sup> Additionally, the Court has described unconstitutional takings as government action that “forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>183</sup>

174. *See id.* at 11 (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 769–70 (1968)).

175. *See id.* at 11–13.

176. *See Cmty. Hous. Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 38 (E.D.N.Y. 2020), *appeal docketed*, No. 20-3366 (2d Cir. Oct. 2, 2020).

177. *See Kromrei*, *supra* note 17.

178. *See The Rise and Fall of Economic Substantive Due Process*, *supra* note 172 (discussing the history of the Court’s changing attitude toward states’ police power to interfere with individuals’ economic rights and the apparent incorporation of laissez-faire economics into the Court’s due process jurisprudence during the late 1800s and early 1900s).

179. *Block v. Hirsh*, 256 U.S. 135, 156 (1921).

180. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

181. *See supra* Part I.E.1 (discussing regulatory takings analysis).

182. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

183. *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Seawall Assocs. v. City of New York*, 542 N.E.2d 1059, 1065 (N.Y. 1989).

### 1. Landlords Claim Concerning the Burden of the RSL

First, in challenging the RSL as an unconstitutional regulatory taking, landlords cast the RSL as a public assistance benefit impermissibly borne by landlords.<sup>184</sup> Although this is not a new argument,<sup>185</sup> it has been reinvigorated through a New York Court of Appeals decision to exempt debtors' interests in their rent-stabilized leases from their bankruptcy estates as a "local public assistance benefit" pursuant to New York debtor and creditor law.<sup>186</sup> Landlords would further add that it is an ineffective public assistance benefit at that.<sup>187</sup>

Second, the *Community Housing* Complaint asserts that the character of the RSL is "precisely the type of physical invasion that weighs in favor of finding a regulatory taking."<sup>188</sup> Landlords claim the RSL is effectively a physical invasion of property because it strips regulated property owners of their "right to possess, use and dispose" of their apartments,<sup>189</sup> as well as the "right to exclude others."<sup>190</sup> In effect, landlords argue the RSL is physical in character because it works to transfer property rights from owners to their tenants.<sup>191</sup>

Third, the *Community Housing* Complaint attempts to demonstrate an overwhelming economic impact effectuated by the RSL on owners of, and

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184. Complaint, *supra* note 7, at 112–14; see *Armstrong*, 364 U.S. at 49.

185. See Timothy L. Collins, "Fair Rents" or "Forced Subsidies" Under Rent Regulation: Finding a Regulatory Taking Where Legal Fictions Collide, 59 ALB. L. REV. 1293, 1318 (1996).

186. See *In re Santiago-Monteverde*, 22 N.E.3d 1012, 1014–15 (N.Y. 2014) (answering the following certified question in the affirmative: "Whether a debtor-tenant possesses a property interest in the protected value of her rent-stabilized lease that may be exempted from her bankruptcy estate pursuant to New York State Debtor and Creditor Law Section 282(2) as a local public assistance benefit").

187. See *infra* Part II.B.1 (explaining landlords' argument that the RSL does not help low-income New Yorkers).

188. Complaint, *supra* note 7, at 114; see *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (determining that regulation that "can be characterized as a physical invasion" of property is more likely to be found a regulatory taking under the *Penn Central* test).

189. See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945) (describing individual property rights over physical things as the "right to possess, use and dispose" of those things); Complaint, *supra* note 7, at 5–6.

190. See *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (characterizing the right to exclude others as "one of the most essential" property rights). More recently, the Supreme Court has reaffirmed the importance of the property right to exclude others by striking down a California regulation allowing union organizers access to growers' property as a physical taking. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072–74 (2021).

191. See Complaint, *supra* note 7, at 70–71. In the plaintiffs' facial physical takings challenge, they claim that the RSL effectuates a physical taking of property by giving tenants full discretion to renew their leases, allowing judges to stay lawful evictions, limiting landlords' ability to retake property for personal use, and restricting landlords' ability to remove units from the rental market or convert them into co-ops or condos. See *id.* at 63–88. While this Note does not seek to address the *Community Housing Improvement Program* physical takings claim in depth, it is relevant to the assessment of the character of the RSL under the *Penn Central* test. See *supra* note 188 and accompanying text.

investors in, rent-stabilized property.<sup>192</sup> Landlords point to the discrepancy in rental rates between free-market and rent-stabilized apartments.<sup>193</sup> According to the 2017 New York City Housing and Vacancy Survey (HVS), the median contract rent for regulated units was \$1269 per month, a 2.6 percent increase from 2014.<sup>194</sup> In comparison, the median rent for unregulated units was \$1700, a 10 percent increase from 2014.<sup>195</sup> Additionally, the RGB estimates that while “owner costs have increased 5.4% [annually] on average over the last 20 years . . . the RGB’s approved rent guideline increases have increased . . . 2.7% per year [on average] over that period.”<sup>196</sup> Further, the RGB’s 2020 net commensurate rent adjustment<sup>197</sup> is between 2.5 and 3.5 percent for one-year leases and between 3.3 and 6.75 percent for two-year leases.<sup>198</sup> However, the new 2021 RGB rent guidelines institute a rent freeze for one-year leases and only a 1 percent increase for the second year of a two-year lease.<sup>199</sup> Landlords argue they cannot be made to rely solely on RGB increases for a reasonable return on investment, as the 2019 HSTPA intends.<sup>200</sup>

Further, the *Community Housing* Complaint alleges that the RSL greatly diminishes the value of stabilized units compared to those on the free market.<sup>201</sup> Even before the HSTPA was enacted, property assessments by the New York City Department of Finance showed that “the market value of a building with 25% or fewer regulated units had a per square foot market value (\$233/sq. ft.) of more than double the value of buildings in which 75%

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192. See Complaint, *supra* note 7, at 92–112.

193. See *id.* at 93.

194. SELECTED INITIAL FINDINGS OF THE 2017 NEW YORK CITY HOUSING AND VACANCY SURVEY, *supra* note 18, at 21. The HVS is the only survey that provides data specifically for rent-stabilized tenants. See RENT GUIDELINES BD., 2020 INCOME AND EXPENSE STUDY 17 (2020), <https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/04/2020-IE.pdf> [<https://perma.cc/ZRU9-8DYL>].

195. SELECTED INITIAL FINDINGS OF THE 2017 NEW YORK CITY HOUSING AND VACANCY SURVEY, *supra* note 18, at 21; see also Complaint, *supra* note 7, at 93 (claiming that the RSL has led one landlord to charge 70- to 80-percent-lower rent for regulated apartments than for comparable nonregulated apartments in the same building).

196. Complaint, *supra* note 7, at 94.

197. The commensurate rent adjustment, “[i]n its simplest form, . . . is the amount of rent change needed to maintain owners’ current dollar [net operating income] for their rent-stabilized apartments at a constant level.” N.Y.C. RENT GUIDELINES BD., 2020 PRICE INDEX OF OPERATING COSTS 10 (2020), <https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/04/2020-PIOC.pdf> [<https://perma.cc/44PG-ZYDP>].

198. See *id.* The RGB calculates multiple commensurate rent adjustment rates using different formulas. See MATTHEW MURPHY & MARK WILLIS, NYU FURMAN CTR., THE CHALLENGES OF BALANCING RENT STABILITY, FAIR RETURN, AND PREDICTABILITY UNDER NEW YORK’S RENT STABILIZATION SYSTEM 5 (2019) (explaining the differences between the five separate commensurate rent adjustment formulas).

199. See Kelly Mena, *New York City Passes Rent Freeze for Stabilized Apartments*, CNN (June 18, 2020, 1:03 PM), <https://www.cnn.com/2020/06/18/politics/new-york-rent-freeze/index.html> [<https://perma.cc/J47R-ZQKT>] (discussing rent relief efforts taken in response to the effects of the COVID-19 pandemic).

200. Complaint, *supra* note 7, at 89.

201. *Id.* at 95–99.

or more of the units were regulated (\$97/sq. ft.).”<sup>202</sup> After the HSTPA’s enactment, the sales values of buildings with rent-regulated apartments plummeted.<sup>203</sup> According to various brokers and investors, the value of buildings with regulated apartments has fallen “about 25% on average.”<sup>204</sup> In response, landlords have greatly reduced spending on apartment renovations.<sup>205</sup> Frank Ricci, executive vice president of the Rent Stabilization Association (RSA), claims the RSL “remove[s] incentive[s] to do upgrades beyond the minimum,” and others in the industry warn of decay of the housing stock.<sup>206</sup>

Fourth, landlords contend that the RSL substantially interferes with reasonable investment-backed expectations.<sup>207</sup> The ETPA’s legislative finding provides that “the transition from regulation to a normal market of free bargaining between landlord and tenant [is] . . . the ultimate objective of state policy.”<sup>208</sup> Property owners argue that they should be able to rely on this representation when investing, yet the 2019 HSTPA imposes more regulation, not less.<sup>209</sup>

The *Community Housing* Complaint asserts that the 2019 HSTPA “dramatically exacerbate[s] the regulatory takings effected by the RSL.”<sup>210</sup> Landlords argue that the repeal of statutory vacancy and longevity rent increases effectively eliminates their ability to increase the rent above RGB guidelines, which consistently trail the annual increase in owners’ operation costs, preventing a fair return on investment.<sup>211</sup> Landlords also argue that the elimination of luxury and high-rent decontrol destroys investment-backed expectations that a unit may eventually be removed from rent stabilization

202. *Id.* at 97.

203. See Josh Barbanel, *Sales of New York City Rent-Regulated Buildings Plummet After New Law*, WALL ST. J. (Feb. 26, 2020, 4:56 PM), <https://www.wsj.com/articles/sales-of-new-york-city-rent-regulated-buildings-plummet-after-new-law-11582754189> [<https://perma.cc/RYZ9-U9WN>] (“The value of sales for buildings with at least one rent-regulated apartment dropped by more than \$4.1 billion in the second half of 2019 compared with the same period the year before.”).

204. Will Parker & Konrad Putzier, *Buyers Return After Rent-Control Slams New York Apartment Values*, WALL ST. J. (Feb. 4, 2020, 7:00 AM), <https://www.wsj.com/articles/buyers-return-after-rent-control-slams-new-york-apartment-values-11580817601> [<https://perma.cc/G33P-MNQ4>] (reporting that buyers have returned to take advantage of a large drop in value in rent-stabilized buildings as current owners struggle to make loan payments).

205. See Barbanel, *supra* note 113 (reporting a 44-percent decrease in renovation projects for rent regulated buildings).

206. See *id.* But see David Hershey-Webb, *The Intended Consequences of the HSTPA*, N.Y.L.J. (Dec. 10, 2019, 12:12 PM), <https://www.law.com/newyorklawjournal/2019/12/10/the-intended-consequences-of-the-hstpa/> [<https://perma.cc/VG5J-VCQC>] (noting that no previous predictions of widespread dilapidated housing due to rent regulation have come to pass and claiming that “the real estate industry is starting to sound like the proverbial boy who cried wolf”).

207. Complaint, *supra* note 7, at 99–100.

208. N.Y. UNCONSOL. LAW § 8622 (McKinney 2019).

209. Complaint, *supra* note 7, at 99–100.

210. *Id.* at 101.

211. See *supra* notes 196–200 and accompanying text; *supra* Part I.C.2 (discussing the effects of the HSTPA amendments on landlords’ property interests).

and released into the free market.<sup>212</sup> Further, landlords contend they cannot collect reasonable returns on MCIs and IAIs under the new regulations.<sup>213</sup> According to permit application records, “[t]he median interior renovation project costs \$60,000,” dwarfing the HSTPA’s allowable recovery cap of \$15,000 for IAIs.<sup>214</sup> Landlords argue that even for improvements under \$15,000, “[o]nce the taxes associated with additional rent revenue is considered,” landlords are unlikely to even recover the cost of investment.<sup>215</sup> Plaintiffs also claim that the HSTPA’s formula for recovery of MCI expenses makes it difficult for landlords to recoup their investments, much less earn a reasonable return.<sup>216</sup>

Overall, landlords claim that the RSL, on its face: (1) is physical in character, (2) drastically reduces the economic value of stabilized units, and (3) destroys reasonable investment-backed expectations, thus satisfying the regulatory takings test under *Penn Central*.

## 2. The Inapplicability of Facial Challenges to Regulatory Takings

The district court’s dismissal of the landlords’ facial regulatory takings challenge pointed squarely to the inapplicability of such broad challenges to the RSL.<sup>217</sup> The decision cites *United States v. Salerno*,<sup>218</sup> where the Supreme Court declared that “[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”<sup>219</sup> In particular, precedent asserts that regulatory takings challenges are especially ill-suited for facial analysis because of the ad hoc and fact-intensive nature of the *Penn Central* test.<sup>220</sup>

212. See Complaint, *supra* note 7, at 103.

213. See *id.* at 103–07 (claiming that even before the 2019 Amendments, the MCI and IAI regulations imposed a heavy financial burden, but now even recovery of the investment is unlikely); *supra* Part I.C.2 (discussing the MCI and IAI amendments).

214. Barbanell, *supra* note 113.

215. Complaint, *supra* note 7, at 105.

216. See *id.* at 106–07; *supra* Part I.C.2.

217. See *Cnty. Hous. Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 44–45 (E.D.N.Y. 2020), *appeal docketed*, No. 20-3366 (2d Cir. Oct. 2, 2020) (submitting that while the legislature could someday “apply the proverbial straw that breaks the camel’s back” and push the RSL into a regulatory taking, “it is unlikely that the straw in question will be identified in the context of a facial challenge.”).

218. 481 U.S. 739 (1987).

219. *Id.* at 745; see *Cnty. Hous. Improvement Program*, 492 F. Supp. 3d at 45. *But see* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 941–42 (2011) (using empirical data to challenge the assertion that facial challenges are especially difficult to win).

220. See *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988) (“Given the ‘essentially ad hoc, factual inquiry’ involved in the takings analysis, we have found it particularly important in takings cases to adhere to our admonition that ‘the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary.’” (citation omitted) (first quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); and then quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 294–95 (1981)); *W. 95 Hous. Corp. v. N.Y.C. Dep’t of Hous. Pres. & Dev.*, 31 F. App’x. 19, 21 (2d Cir. 2002) (“[T]he difficulty of such an assessment suggests that a widely applicable rent control

In addition, the district court noted that it is bound by prior Second Circuit decisions specifically rejecting regulatory takings challenges to the RSL.<sup>221</sup> For example, in *Federal Home Loan Mortgage Corp. v. New York State Division of Housing and Community Renewal*,<sup>222</sup> the Second Circuit found that the RSL did not deprive the plaintiff of “economically viable use of the property” even if the plaintiff “will not profit as much as it would under a market-based system.”<sup>223</sup> The district court also noted that the Second Circuit has disparaged previous attempts to challenge the RSL under a facial takings claim.<sup>224</sup>

The district court applied the *Penn Central* factors to demonstrate the inapplicability of the landlords’ facial regulatory takings challenge to the RSL.<sup>225</sup> First, the court determined that economic impact “obviously needs to be calculated on an owner-by-owner basis.”<sup>226</sup> Accordingly, the court determined the landlords’ claim necessarily failed because it offered only vague allegations about the average diminution in value to regulated property in general.<sup>227</sup> Second, the court determined that reasonable investment-backed expectations vary depending on the regulatory scheme in place at the time of investment.<sup>228</sup> Therefore, the court determined that the landlords’ claim inappropriately asked it to assess the impact of the RSL on investment-backed expectations at large, regardless of when an individual owner entered the market or what that owner’s specific expectations were.<sup>229</sup> Third, having already rejected the landlords’ arguments regarding economic diminution and investment-backed expectations, the court determined the plaintiffs could not prevail on claims that relied solely on the character of the

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regulation such as the RSL is not susceptible to a facial constitutional analysis under the Takings Clause.”); *Rent Stabilization Ass’n v. Dinkins*, 5 F.3d 591, 596 (2d Cir. 1993) (finding that to determine whether an RSL provision effectuated a regulatory taking, the court must “engage in an *ad hoc* factual inquiry for *each* landlord who alleges that he has suffered a taking” rather than assess the law in the abstract); David Zhou, Comment, *Rethinking the Facial Takings Claim*, 120 YALE L.J. 967, 970–71 (2011). *But see* *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 (9th Cir. 2010) (“We assume, without deciding, that a facial challenge can be made under *Penn Central*.”), *cert denied*, 563 U.S. 988 (2011).

221. *Cnty. Hous. Improvement Program*, 492 F. Supp. 3d at 38, 44 (“[E]very regulatory-takings challenge to the RSL has been rejected by the Second Circuit.”).

222. 83 F.3d 45 (2d Cir. 1996).

223. *Id.* at 48 (determining the plaintiff’s property had economic value under the RSL because “it may still rent apartments and collect regulated rents”).

224. *See Cnty. Hous. Improvement Program*, 492 F. Supp. 3d at 45 (first citing *W. 95 Hous. Corp.*, 31 F. App’x at 21; and then citing *Rent Stabilization Ass’n*, 5 F.3d at 596).

225. *See id.* at 46–47.

226. *Id.* at 46.

227. *See id.*

228. *See Cnty. Hous. Improvement Program*, 492 F. Supp. 3d at 46–47 (citing various Second Circuit opinions in support of this proposition); *see also* *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring) (“[T]he regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.”). *But see id.* at 637 (Scalia, J., concurring) (rejecting the notion that existing restrictions, other than those forming “background principles” of state property law, have any bearing on an assessment of investment-backed expectations in a takings challenge).

229. *See Cnty. Hous. Improvement Program*, 492 F. Supp. 3d at 47.

regulation prong of the *Penn Central* test.<sup>230</sup> Therefore, the district court dismissed the landlords' regulatory takings claim.<sup>231</sup>

*B. Does the RSL Violate Due Process of Law?*

The Court previously held that due process challenges to rent regulation statutes are subject to rational basis review.<sup>232</sup> Therefore, a successful due process challenge to a rent regulation must show that the measure is either arbitrary, discriminatory, or not rationally related to a legitimate legislative purpose.<sup>233</sup>

1. Landlords' Belief Regarding the RSL's Means and Ends

In *Community Housing Improvement Program*, landlords attacked the RSL as a violation of due process by invoking the standard set in *Pennell*, claiming the RSL is an "irrational, arbitrary and demonstrably irrelevant means to address its stated policy ends."<sup>234</sup> In fact, they argue that not only is the RSL not rationally related to the stated goals of the legislature, but it often works against them.<sup>235</sup> Landlords take particular issue with the notion that the RSL is rationally related to: (1) providing low-income New Yorkers with affordable housing, (2) promoting socioeconomic diversity, and (3) increasing the supply of affordable housing.<sup>236</sup> Further, they have characterized property as a fundamental right and implored the court to employ a stricter standard of review.<sup>237</sup>

First, landlords asserted that the RSL is not rationally related to achieving the goal of providing low-income New Yorkers with affordable housing.<sup>238</sup> The RSL contains no mechanism to match low-income renters with rent-stabilized units.<sup>239</sup> Apartments under the RSL are offered to the public at large without regard to the financial status of the renter.<sup>240</sup> Landlords

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230. *See id.* Additionally, the court dismissed the landlords' facial physical takings challenge to the RSL, effectively deciding that the RSL's character is not that of a physical invasion of property. *See id.* at 43; *see also* *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992) (rejecting a physical takings challenge to a rent control ordinance on the basis that the "laws at issue . . . merely regulate petitioners' use of their land by regulating the relationship between landlord and tenant" and do not compel owners to suffer a physical invasion).

231. *Cnty. Hous. Improvement Program*, 492 F. Supp. 3d at 47.

232. *See Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988).

233. *See, e.g., id.*; *see also* *Manheim*, *supra* note 172, at 945-46.

234. *Complaint, supra* note 7, at 28; *see also Pennell*, 485 U.S. at 11.

235. *Cnty. Hous. Improvement Program*, 492 F. Supp. 3d at 51.

236. *See id.* at 51-52.

237. *See Complaint, supra* note 7, at 29 ("Defendants must demonstrate that the RSL is narrowly tailored to achieving a compelling governmental purpose.")

238. *See Cnty. Hous. Improvement Program*, 492 F. Supp. 3d at 51-52; *Complaint, supra* note 7, at 33 (quoting Matthew Murphy, former Deputy Commissioner of Policy and Strategy at the New York City Department of Housing, Preservation, and Development, as claiming that the RSL is a "critical resource" in providing lower-income households the choice to live in New York City).

239. *See Complaint, supra* note 7, at 33.

240. *See id.*

argue that the lack of targeting effectively turns the RSL housing stock into a lottery where winners are chosen at random.<sup>241</sup>

The *Community Housing Complaint* lists numerous instances of wealthy tenants with luxurious vacation homes refusing to part with rent-stabilized units despite clearly not needing the RSL's protection from the free market.<sup>242</sup> *The Wall Street Journal* reported that, in practice, affluent residents are the biggest beneficiaries of rent regulation in New York.<sup>243</sup> Further, landlords argue that the RSL does not serve significantly more low-income renters than the free market.<sup>244</sup> The NYU Furman Center published data for 2011 showing that 65.8 percent of rent-stabilized tenants are considered low-income, while 53.8 percent of tenants living in market-rate units are considered low-income.<sup>245</sup>

Landlords point to the HSTPA's elimination of luxury and high-rent decontrol as evidence of the contradiction between the RSL and its policy goal of providing affordable housing to low-income tenants or protecting the tenancies of vulnerable tenants.<sup>246</sup> They argue that the only people benefitting from these amendments are wealthy New Yorkers who now will not lose the protection of the RSL no matter how high their income or rent grows.<sup>247</sup>

Second, landlords assert that the RSL is not rationally related to achieving the goal of ensuring socioeconomic or racial diversity in New York City communities.<sup>248</sup> They insist the disconnect is based on many of the same

241. *See id.*; *see also* McPherson, *supra* note 45, at 1127 (criticizing the RSL for indiscriminately providing benefits without regard to tenants' needs, creating a "culture of 'rental envy'" for those not fortunate enough to obtain a regulated apartment).

242. *See* Complaint, *supra* note 7, at 34–35 (listing examples of wealthy tenants residing in rent-stabilized apartments).

243. *See* Josh Barbanel, *Wealthy, Older Tenants in Manhattan Get Biggest Boost from Rent Regulations*, WALL ST. J. (June 12, 2019, 3:46 PM), <https://www.wsj.com/articles/wealthy-older-tenants-in-manhattan-get-biggest-boost-from-rent-regulations-11560344400> [<https://perma.cc/KJY4-UW85>] (reporting that the biggest discounts between regulated and market rent occur in high-income neighborhoods and are captured by high-income residents, providing "a policy conundrum" for state lawmakers who favor strengthening the RSL); *see also* CITIZENS BUDGET COMM'N, RENT REGULATION: BEYOND THE RHETORIC 11 (2010), [https://cbcny.org/sites/default/files/REPORT\\_RentReg\\_06022010.pdf](https://cbcny.org/sites/default/files/REPORT_RentReg_06022010.pdf) [<https://perma.cc/S3AX-P8YA>] ("The greatest percentage discounts [created by the RSL] are for those with incomes below \$20,000 annually and for those with incomes between \$125,000 and \$175,000.").

244. *See* Complaint, *supra* note 7, at 36.

245. NYU FURMAN CTR., PROFILE OF RENT-STABILIZED UNITS AND TENANTS IN NEW YORK CITY 4 (2014), [https://furmancenter.org/files/FurmanCenter\\_FactBrief\\_RentStabilization\\_June2014.pdf](https://furmancenter.org/files/FurmanCenter_FactBrief_RentStabilization_June2014.pdf) [<https://perma.cc/V6HY-96AE>]. The report defines low-income households as those "earning no more than 80 percent of the Area Median Income." *Id.* at 1 n.2. The plaintiffs point to the NYU Furman Center in support of their argument that the RSL is not rationally related to providing low-income New Yorkers with affordable housing. *See* Complaint, *supra* note 7, at 36. *But see* Memo for the Defendant, *supra* note 18, at 26 ("Even taking Plaintiffs' allegations at face value, they concede that a substantial portion, if not a majority, of rent-stabilized housing is occupied by low- to middle-income residents.").

246. *See* Complaint, *supra* note 7, at 35; *supra* note 99 and accompanying text.

247. *See* Complaint, *supra* note 7, at 35; *supra* note 99 and accompanying text.

248. *See* Complaint, *supra* note 7, at 39–40.

reasons as those explaining why the RSL does not provide affordable housing for low-income New Yorkers, namely that the RSL is not targeted at serving minority groups or promoting diversity.<sup>249</sup> In fact, the *Wall Street Journal* reported that “[w]hite renters in rent-protected apartments benefited more than any other race group.”<sup>250</sup> Further, the *Community Housing Complaint* lists several scholarly works asserting that rent regulation in general is “an ineffective tool for economic and racial integration.”<sup>251</sup>

Third, landlords assert that the RSL is not rationally related to achieving the goal of increasing the supply of affordable housing.<sup>252</sup> They claim the RSL perpetuates the housing crisis because it does not increase the vacancy rate.<sup>253</sup>

The RSL exerts price control over regulated properties, which landlords argue reduces the incentive for owners to fully develop and maintain their existing properties or invest in building new housing.<sup>254</sup> Landlords petitioned the court to heed the warnings of the majority of economists asserting that rent regulation does “substantially more harm than good.”<sup>255</sup> Nobel Prize-winning economist Paul Krugman, in evaluating San Francisco’s rent regulations, noted that 93 percent of the American Economic Association’s members agreed that rent ceilings reduced the quality and quantity of housing.<sup>256</sup> Krugman added that “[a]lmost every freshman-level textbook” explains that rent regulation thwarts the growth of the housing supply.<sup>257</sup> Noted legal scholar Richard Epstein warns that all rent control statutes decrease owners’ returns on investment, which leads to reduced investment in new and existing properties and thereby exacerbates a housing shortage.<sup>258</sup>

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249. *See Cmty. Hous. Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 51–52 (E.D.N.Y. 2020), *appeal docketed*, No. 20-3366 (2d Cir. Oct. 2, 2020).

250. Barbanel, *supra* note 243 (finding that white renters of stabilized units received a 36-percent discount from market rates, on average, while Black and Hispanic renters received a 16-percent and 17-percent discount, respectively).

251. *See Complaint*, *supra* note 7, at 40.

252. *See Cmty. Hous. Improvement Program*, 492 F. Supp. 3d at 51–52; N.Y.C. COUNCIL, *supra* note 88, at 44–45 (emphasizing the New York City Council’s view of the RSL as important for creating and maintaining affordable housing in New York City).

253. *See Cmty. Hous. Improvement Program*, 492 F. Supp. 3d at 51–52; *Complaint*, *supra* note 7, at 40. The state may not declare a housing emergency if the vacancy rate exceeds 5 percent, ending the primary basis for the RSL. Emergency Tenant Protection Act, N.Y. UNCONSOL. LAW § 8623(b) (McKinney 2019).

254. *See Complaint*, *supra* note 7, at 40–41.

255. *Cmty. Hous. Improvement Program*, 492 F. Supp. 3d at 51.

256. *See id.* at 52 (quoting Paul Krugman, Opinion, *Reckonings: A Rent Affair*, N.Y. TIMES (June 7, 2000), <https://www.nytimes.com/2000/06/07/opinion/reckonings-a-rent-affair.html> [<https://perma.cc/57A8-3E2L>]).

257. *See id.* (quoting Krugman, *supra* note 256).

258. Richard Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 767 (1988) [hereinafter Epstein, *Rent Control*]; *see also* Richard Epstein, *The Rent Is Too Damn Low*, HOOVER INST. (June 17, 2019), <https://www.hoover.org/research/rent-too-damn-low> [<https://perma.cc/JX5T-AG3N>] [hereinafter Epstein, *The Rent Is Too Damn Low*] (labeling the 2019 HSTPA as a misguided and unconstitutional rent measure).

Notably, plaintiffs claim that in a self-conducted study of one hundred Manhattan properties chosen at random—half “heavily stabilized”<sup>259</sup> and half containing no stabilized units—the regulated properties were underbuilt by 18 percent on average compared to their zoning capacity, while the unregulated properties exceeded their zoning capacity by an average of 22 percent.<sup>260</sup> They allege that if the fifty regulated properties were built to the same capacity as the unregulated properties, the housing market would be infused with “over 600 units of 700 square feet apiece.”<sup>261</sup> In effect, landlords argue that the RSL can be empirically shown to discourage the very development and investment necessary to alleviate the housing shortage and increase the affordable housing supply.<sup>262</sup>

Landlords insist that the 2019 HSTPA serves only to expand the disconnect between the RSL and its goal of increasing the supply of affordable housing and ending the housing crisis.<sup>263</sup> In particular, they point out that the elimination of luxury and high-income decontrol strips landlords’ ability to remove units from a counterproductive system.<sup>264</sup> Likewise, landlords argue that the elimination of statutory vacancy and longevity increases further reduces an owner’s return on investment, which leads to reduced investment in existing and new properties.<sup>265</sup>

In addition, landlords argue that the HSTPA’s limitations on the recovery of IAs and MCIs will reduce owners’ returns on investment and discourage landlords from properly maintaining their properties.<sup>266</sup> They insist this will result in a drastic reduction in the quality of New York’s housing stock—to the point that units become uninhabitable and are pulled from the market, thereby ultimately decreasing the quantity of affordable housing.<sup>267</sup>

Landlords also challenge New York City’s declaration of a housing emergency (which triggers the RSL) as a violation of due process, claiming the 5 percent vacancy rate threshold<sup>268</sup> and the declaration itself are arbitrary.<sup>269</sup> First, landlords argue that the 5-percent vacancy rate threshold

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259. Complaint, *supra* note 7, at 43 (defining the term “heavily stabilized,” for purposes of the study, as a building where 75 percent or more of the units are stabilized).

260. *Id.* Properties can exceed their zoning capacity through “grants of special exceptions, acquisition of air rights, or grandfathered buildings built under different zoning rules.” *Id.*

261. *Id.*

262. *See id.* at 42–44; *see also* Krugman, *supra* note 256 (explaining how the principles of supply and demand dictate that rent regulation will not create more affordable housing).

263. *See* Complaint, *supra* note 7, at 45–48.

264. *See id.* at 45; *see also* Cmty. Hous. Improvement Program v. City of New York, 492 F. Supp. 3d 33, 51–52 (E.D.N.Y. 2020), *appeal docketed*, No. 20-3366 (2d Cir. Oct. 2, 2020).

265. *See* Complaint, *supra* note 7, at 45; *see also* Epstein, *Rent Control*, *supra* note 258, at 767 (explaining that reductions in landlords’ returns on investment lead to reductions in new investments, which exacerbate housing shortages).

266. *See* Complaint, *supra* note 7, at 45–48; *supra* Parts I.C.2, II.A.1 (explaining the HSTPA amendments to IAs and MCIs and discussing landlords’ fears that the HSTPA changes to IAs and MCIs do not allow for a reasonable return on investment).

267. *See* Complaint, *supra* note 7, at 45–48; *supra* notes 113, 206 and accompanying text.

268. A local government may declare that a housing emergency exists when the housing vacancy rate is 5 percent or lower. *See* Emergency Tenant Protection Act, N.Y. UNCONSOL. LAW § 8623(b).

269. *See* Cmty. Hous. Improvement Program, 492 F. Supp. 3d at 51.

set by the ETPA, under which a local government may declare a housing emergency, is arbitrary because the legislature did not explain why it picked that specific percentage.<sup>270</sup> Further, the 5-percent threshold has not been adjusted or justified since it was adopted in 1974.<sup>271</sup>

Second, landlords complain that the New York City Council reflexively votes to affirm the existence of a housing emergency every three years without any meaningful discussion as to whether a housing emergency actually exists.<sup>272</sup>

Overall, landlords are adamant that the RSL is demonstrably not rationally related to achieving its policy goals.<sup>273</sup> They further allege that the existence of the RSL is based on an arbitrary declaration of a housing emergency.<sup>274</sup> Thus, landlords petitioned the court to strike down the RSL as a violation of due process.<sup>275</sup>

## 2. The Highly Deferential Nature of Rational Basis Review

Faced with scathing rebukes to rent regulation by economists and empirical evidence suggesting the RSL is detached from its policy goals,<sup>276</sup> the district court rejected plaintiffs' due process claim.<sup>277</sup> The court made clear that they are "engaged in rational-basis review . . . not strict scrutiny."<sup>278</sup> Therefore, absent a showing of arbitrariness, irrationality, or complete irrelevance to legitimate legislative goals, "the [c]ourt is bound to defer to legislative judgments, even if economists would disagree."<sup>279</sup>

In *Lingle v. Chevron U.S.A. Inc.*,<sup>280</sup> the Court rejected a lower court decision to strike down a rent control measure on the grounds that it did not "substantially advance any legitimate state interest."<sup>281</sup> The opinion admonished the lower court for attempting to substitute its judgment for that of the legislature and reaffirmed that courts are discouraged from applying heightened scrutiny to substantive due process challenges to economic

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270. See Complaint, *supra* note 7, at 31.

271. See *id.*

272. See *id.* at 4–5; N.Y.C. COUNCIL, *supra* note 88, at 44–45. (stating that there is an "affordability crisis" in New York City's housing market that warrants extending the emergency declaration but not discussing the reasons the crisis exists).

273. See *Cnty. Hous. Improvement Program*, 492 F. Supp. 3d at 51–52.

274. See *id.* at 51.

275. See *id.*

276. See *supra* Part II.B.1.

277. See *Cnty. Hous. Improvement Program*, 492 F. Supp. 3d at 51–52.

278. See *id.* at 52 (citing *Pennell v. City of San Jose*, 485 U.S. 1, 11–12 (1988)). The court rejected the landlords' plea to hold the RSL to the standard of being "narrowly tailored to achieving a compelling governmental purpose." Complaint, *supra* note 7, at 29; see *supra* note 237 and accompanying text.

279. *Cnty. Hous. Improvement Program*, 492 F. Supp. 3d at 52; see also *Pennell*, 485 U.S. at 11–12; *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (rejecting a due process claim against an economic regulation under rational basis review and holding that "[e]ven if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment").

280. 544 U.S. 528 (2005).

281. *Id.* at 536.

regulations.<sup>282</sup> In the case at hand, the court followed *Lingle*'s holding and took a highly deferential approach to the RSL.<sup>283</sup>

Further, the court noted that even if the RSL is not rationally related to alleviating the housing emergency, the regulation can still be held valid if it is rationally related to one of its other legislative purposes.<sup>284</sup> Here, the court found that the RSL is definitively rationally related to its goal of allowing low-income New Yorkers to remain in their settled residences.<sup>285</sup>

The court also noted the landlords' argument that the housing emergency declaration was an arbitrary use of legislative power but did not directly address the claim.<sup>286</sup> This argument was likely rejected by the court similarly opting to defer such decisions to the legislature. Overall, the court's decision largely hinged on the deference afforded to legislatures under rational basis review.<sup>287</sup>

### III. LANDLORDS' FAILURE TO STRIKE DOWN THE NEW RSL

This part argues that the district court decision in *Community Housing Improvement Program* to reject the landlords' broad attempt to strike down the entirety of the RSL as a regulatory taking or as a violation of due process was correct and must be upheld in subsequent appellate proceedings. In addition, this part advocates for the following policy additions to the RSL: (1) pre-determined formulas to set annual regulated rent increases and (2) means testing to determine renter eligibility for residence in a regulated apartment.

#### A. *The RSL Does Not Effect a Regulatory Taking*

Facial challenges alleging that the RSL, a widely applicable measure, is a regulatory taking are simply not conducive to the fact-intensive nature of the *Penn Central* test.<sup>288</sup> However, the HSTPA-amended RSL goes further than any of its predecessors in restricting landlords' property rights and interfering with their ability to make a reasonable return on their investment.<sup>289</sup> While the district court correctly dismissed the landlords' facial claims, the RSL should be amended to change the RGB's rent guideline increase calculation

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282. *See id.* at 543–45.

283. *See Cmty. Hous. Improvement Program*, 492 F. Supp. 3d at 52 (citing *Lingle*, 544 U.S. at 544–45, in support of its decision to reject landlords' due process challenge).

284. *See id.* (first citing *Preseault v. I.C.C.*, 494 U.S. 1, 18 (1990); then citing *Thomas v. Sullivan*, 922 F.2d 132, 136 (2d Cir. 1990)).

285. *See id.* It is a stated goal of the RSL to provide tenants with stability in their residency and ameliorate the risk of tenants being priced out of their apartments due to the ongoing housing shortage. *See* N.Y.C. ADMIN. CODE § 26-501 (finding the RSL necessary to prevent the “uprooting [of] long-time city residents from their communities”); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 484 (N.Y. 1994) (finding that the main purpose of the RSL is to “ameliorate the dislocations and risk of widespread lack of suitable dwellings”).

286. *See Cmty. Hous. Improvement Program*, 492 F. Supp. 3d at 51.

287. *See id.* at 51–52.

288. *See supra* Part II.A.2.

289. *See supra* Parts I.C.2, II.A.1.

procedure to better achieve the RGB's stated concern of providing "fair returns for affected owners."<sup>290</sup>

### 1. The RSL's Susceptibility to Facial Regulatory Takings Challenges

The district court correctly rejected the landlords' argument that the 2019 RSL, on its face, effectuates a regulatory taking of property.<sup>291</sup> In *Salerno*, the Court warned that a facial challenge to a legislative act is "the most difficult challenge to mount successfully."<sup>292</sup> While this general proposition may be overstated,<sup>293</sup> there is not much debate over the immense difficulty of asserting facial regulatory takings claims.<sup>294</sup>

Confronted with abundant precedent displaying contempt for such challenges, landlords cited to the recent *City of Los Angeles v. Patel*<sup>295</sup> decision, where the Court, noting the difficulty inherent in facial challenges, stated it has "never held that [facial challenges] cannot be brought under any otherwise enforceable provision of the Constitution."<sup>296</sup> Reliance on *Patel* does nothing to save the landlords' claim from the same treatment given to other facial regulatory takings challenges to the RSL.<sup>297</sup> First, *Patel* addressed the applicability of facial challenges brought under the Fourth Amendment, not facial regulatory takings claims.<sup>298</sup> Second, while landlords may not be precluded from merely bringing facial challenges, *Patel* does not speak to the chances of success on the merits of such a claim.<sup>299</sup> In fact, the district court aptly demonstrated the inapplicability of the landlords' claims by applying the *Penn Central* test to show that they could not survive on the merits.<sup>300</sup> Third, landlords insist that *Patel* rejects the notion that facial challenges to the RSL "must establish that no set of circumstances exists under which [the RSL] would be valid."<sup>301</sup> Accordingly, the standard would limit the test to circumstances where the RSL is a restriction for regulated property owners.<sup>302</sup> Regardless of the control group, the RSL cannot be said to take all regulated landlords' property without assessing the diminution in

290. COLLINS, *supra* note 36, at 55–56.

291. *See supra* Part II.A.2.

292. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

293. *See Fallon, supra* note 219, at 917 ("[T]he assumption that facial challenges are and ought to be rare . . . is false as an empirical matter and highly dubious as a normative proposition.").

294. *See supra* note 220 and accompanying text.

295. 576 U.S. 409 (2015).

296. *Id.* at 415; *see Memo for the Plaintiff, supra* note 141, at 7–9.

297. *See supra* notes 221–24 and accompanying text.

298. *See Patel*, 576 U.S. at 412.

299. *Cf. Fallon, supra* note 219, at 964 (acknowledging that while facial challenges should not be categorically disfavored, "there are often good reasons why facial challenges should not succeed in particular cases").

300. *See supra* Part II.A.2 (applying the *Penn Central* test to the regulatory takings claim).

301. *See Memo for the Plaintiff, supra* note 141, at 8 (quoting *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 595 (2d Cir. 1993)).

302. *See Memo for the Plaintiff, supra* note 141, at 8.

value of an individual's property and the reasonable investment-backed expectations of the individual property owner.<sup>303</sup>

In their appeals, landlords may take some solace in the lukewarm assertion offered by the Ninth Circuit in *Guggenheim v. City of Goleta*<sup>304</sup>: “[w]e assume, without deciding, that a facial challenge can be made under *Penn Central*.”<sup>305</sup> But they should not. Ultimately, the court in *Guggenheim* found that the mobile home rent control ordinance at issue did not cause a facial regulatory taking.<sup>306</sup> More importantly, while the court purports to be assessing the claim as a facial regulatory takings challenge,<sup>307</sup> the court is actually conducting an as-applied analysis.<sup>308</sup> Ultimately, facial regulatory challenges seeking to strike down broad regulatory schemes like the RSL are “vestige[s] of the pre-*Lingle* takings jurisprudence.”<sup>309</sup>

Furthermore, landlords inaccurately paint themselves as forced bankrollers of a public welfare housing program.<sup>310</sup> This characterization is unavailing to their regulatory takings claim. The RSL merely regulates land use and the landlord-tenant relationship.<sup>311</sup> The New York Court of Appeals decision to portray the RSL as a “local public assistance benefit” in *In re Santiago-Monteverde* should be narrowly applied.<sup>312</sup> The court was merely answering a narrow certified question: “Whether a debtor-tenant possesses a property interest in the protected value of her rent-stabilized lease that may be exempted from her bankruptcy estate pursuant to New York State Debtor and Creditor Law Section 282(2) as a ‘local public assistance benefit.’”<sup>313</sup> Therefore, the decision should be limited in scope.

Ultimately, the district court was correct in its decision to dismiss the landlords’ facial regulatory takings claims because the claims could not be adequately assessed under the *Penn Central* test. Appellate courts should affirm this decision and make clear that future regulatory takings challenges to the RSL must be narrowly pleaded as-applied.

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303. *See supra* Part II.A.2.

304. 638 F.3d 1111 (9th Cir. 2010).

305. *Id.* at 1118.

306. *See id.* at 1113–16.

307. *See id.* at 1119.

308. *See id.* at 1118–22 (discussing the reasonableness of the individual plaintiff’s specific investment-backed expectation that the rent control ordinance would eventually be terminated).

309. Zhou, *supra* note 220, at 977. Before *Lingle*, a plaintiff could allege a regulatory taking by demonstrating that a “land-use regulation did not ‘substantially advance’ a legitimate government interest.” *Id.* (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005)). This type of challenge was much more conducive to a facial analysis because it did not require plaintiff-specific facts. *See id.*

310. *See supra* notes 184–87 and accompanying text.

311. *See supra* note 230 and accompanying text.

312. *See* 22 N.E.3d 1012, 1015–16 (N.Y. 2014).

313. *Id.* at 1014–15.

## 2. Curbing the RGB's Discretion

While landlords failed to demonstrate that the HSTPA-amended RSL broadly takes property from all regulated property owners, their complaint raises serious issues<sup>314</sup> that may fare better if brought as-applied.<sup>315</sup> In addition, the alleged deprivation of a reasonable return on investment effectuated by the 2019 amendments could have consequences for the quantity and quality of the regulated housing stock.<sup>316</sup> This Note proposes that the RSL be amended to substitute the wide discretionary power of the RGB in setting annual rent increases with a pre-determined formula.<sup>317</sup> Such a change would depoliticize the rent guidelines process, defend against as-applied takings challenges, and protect the regulated housing stock by better safeguarding owners' reasonable returns on their investments.<sup>318</sup>

The RGB states that a main consideration of the RSL is producing "fair returns" for regulated landlords, consistent with owners' constitutional rights in their property.<sup>319</sup> Part of takings jurisprudence is the ambiguous idea that regulation should not deprive property owners of a reasonable return on investment.<sup>320</sup> Certainly, not every regulated landlord has been deprived of a reasonable return by the 2019 HSTPA's enactment, but it is entirely

314. See *supra* Part II.B.1 (alleging that the RSL, greatly expanded by the HSTPA, caused a significant reduction in the value of regulated properties and deprived owners of a reasonable return on investment).

315. See *Cnty. Hous. Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 49–50 (E.D.N.Y. 2020), *appeal docketed*, No. 20-3366 (2d Cir. Oct. 2, 2020) (denying a motion to dismiss certain as-applied regulatory takings claims made in the *Pinehurst* Complaint); see also *supra* note 15 and accompanying text (discussing the difference between facial and as-applied challenges).

316. See *supra* notes 206, 266–67 and accompanying text; see also MURPHY & WILLIS, *supra* note 198, at 9.

317. See MURPHY & WILLIS, *supra* note 198, at 2–4, 7 (noting that the RGB has an unusual amount of discretion in setting annual rent increases when compared to other jurisdictions with rent regulation systems).

318. See *id.* at 9 (finding that the RGB's annual rent increase decisions "are critical to both affordability and the long-term quality" of the regulated housing stock); Vicki Been et al., *Laboratories of Regulation: Understanding the Diversity of Rent Regulation Laws*, 46 FORDHAM URB. L.J. 1041, 1059 (2019) (noting that jurisdictions that endow boards with vast discretionary authority to set rent increases "may be vulnerable to political or other pressures").

319. See COLLINS, *supra* note 36, at 55.

320. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978) (deciding that the regulation at issue was not a regulatory taking, in part, because owners were able to make a "reasonable return" on [their] investment"); *Prop. Owners Ass'n of N. Bergen v. Twp. of N. Bergen*, 378 A.2d 25, 29 (N.J. 1977) ("[R]ent regulation must permit a just and reasonable return." (quoting *Hutton Park Gardens v. W. Orange Town Council*, 350 A.2d 1, 15 (N.J. 1975))); Complaint, *supra* note 7, at 90 (listing various factors courts have found relevant to the investment-backed expectations analysis); Epstein, *Rent Control*, *supra* note 258, at 751. *But see* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) ("[D]eprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking."); *Park Ave. Tower Assocs. v. New York*, 746 F.2d 135, 138 (2d Cir. 1984) ("[W]e hold . . . that the inability of [affected property owners] to receive a reasonable return on their investment by itself does not, as a matter of law, amount to an unconstitutional taking . . ."); *Manheim*, *supra* note 172, at 961 (noting the Supreme Court's refusal to "be made an insurer of [property owners'] anticipated gains").

possible that some individual landlords have suffered this loss.<sup>321</sup> However, landlords bringing as-applied regulatory takings challenges still face a “heavy burden” under the *Penn Central* test.<sup>322</sup>

Even absent a constitutional threat, the New York State Legislature should consider the potential impact of the HSTPA amendments on landlords’ ability to earn reasonable returns, at least as it relates to the quantity and quality of the regulated housing stock. The 2019 HSTPA, especially through its amendments limiting recovery for IAs and MCIs and eliminating vacancy and preferential rent increases, constrains landlords’ ability to make reasonable returns on their investments.<sup>323</sup> New York landlords and real estate investors warn that such burdensome regulation will lead to a decline in housing quality and, worse, dilapidated housing and an increase in owners warehousing apartments.<sup>324</sup>

Curbing the RGB’s discretion to determine annual rent increases will alleviate concerns over potential, successful as-applied regulatory takings challenges and the degradation of the regulated housing stock.<sup>325</sup> Although required to consider a number of factors, the RGB wields broad discretion in establishing annual allowable rent increases for RSL regulated properties.<sup>326</sup> The 2019 HSTPA amendments either eliminate or greatly reduce a landlord’s ability to raise the rent beyond the RGB annual rent guidelines, exponentially increasing the weight of the RGB’s discretionary authority on landlords’ ability to make a reasonable return on investment.<sup>327</sup> Concerningly, the RGB’s increase of annual rent guidelines often lags well behind the RGB’s own calculation of landlords’ cost of operation increases, shrinking their net operating income.<sup>328</sup> Although the RGB calculates the commensurate rent adjustment rate,<sup>329</sup> it is free to decide how much weight to give the results.<sup>330</sup>

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321. *See* Cmty. Hous. Improvement Program v. City of New York, 492 F. Supp. 3d 33, 44–45 (E.D.N.Y. 2020), *appeal docketed*, No. 20-3366 (2d Cir. Oct. 2, 2020) (commenting that the RSL may well effect a regulatory taking but that such a taking is unlikely to be revealed through a facial challenge).

322. *Id.* at 38–39 (quoting *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 493 (1987)); *see also* *Loretto*, 458 U.S. at 436; *cf. Penn Cent. Transp. Co.*, 438 U.S. at 131 (first citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (finding that a 75-percent diminution in property value was not a taking); and then *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (finding that an 87.5-percent diminution in property value was not a taking)).

323. *See supra* Parts I.C.2, II.A.1 (discussing the HSTPA amendments and their effects on landlords’ property interests).

324. *See supra* notes 113, 206 and accompanying text (discussing the HSTPA’s potential effects on the regulated housing stock); *see also* MURPHY & WILLIS, *supra* note 198, at 9.

325. *See supra* note 318 and accompanying text.

326. *See* N.Y.C. ADMIN. CODE § 26-510(b); MURPHY & WILLIS, *supra* note 198, at 2–3.

327. *See supra* Parts I.C.2, II.A.1 (describing the HSTPA amendments and their effects on landlords’ property interests).

328. *See supra* notes 196–200 and accompanying text. “Net Operating Income (NOI) is the gross revenue a property produces minus operating costs, not including any debt service.” MURPHY & WILLIS, *supra* note 198, at 3.

329. *See supra* notes 197–98 (describing the commensurate rent formula).

330. *See* MURPHY & WILLIS, *supra* note 198, at 4.

Further, the setting of the annual rent guidelines is highly vulnerable to undue political pressure due to the RGB's vast discretion.<sup>331</sup> New York City Mayor Bill de Blasio, who openly favors a "socialistic" planned housing market,<sup>332</sup> has been open about his influence over RGB decisions.<sup>333</sup> In 2017, after the RGB implemented its second rent freeze in as many years, Mayor de Blasio boasted, "[t]hat's never been done in history before . . . . That happened under this administration because I instructed the [RGB]—I name the members—and I instructed them to not follow the biases of the past."<sup>334</sup> It is not difficult to imagine why landlords would be skeptical of the RGB's supposed concern for their fair returns and fearful about the increased control of the RGB over their ability to obtain a reasonable return on their investment.<sup>335</sup>

To address this issue, the New York State Legislature should curb the discretion accorded to the RGB and adopt a pre-determined formula to set the rent increases for regulated properties.<sup>336</sup> Additionally, owner operating costs should be based on "regional consumer price indexes produced by the U.S. Bureau of Labor Statistics."<sup>337</sup> However, there should be a maximum cap on the annual increase, regardless of the calculation, and room for discretion to account for unforeseen circumstances.<sup>338</sup> Such a procedure would greatly depoliticize the annual task of setting regulated rent increases and better guard against as-applied regulatory takings challenges by providing a more reasonable return on investment. It should also help to prevent the decline of the regulated housing stock by more closely and consistently tying allowable rent increases to increases in owner operating costs.<sup>339</sup>

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331. See Sally Goldenberg, *De Blasio Touts Rent Freeze He "Instructed" Board to Embrace*, POLITICO (Mar. 15, 2017, 7:55 PM), <https://www.politico.com/states/new-york/city-hall/story/2017/03/de-blasio-touts-rent-freeze-he-instructed-board-to-embrace-110423> [<https://perma.cc/9BLU-JWY5>]. Relevantly, the RGB is composed of nine members, all appointed by the mayor. See Been et al., *supra* note 318, at 1060.

332. Chris Smith, *In Conversation: Bill de Blasio*, N.Y. MAG. (Sept. 4, 2017), <https://nymag.com/intelligencer/2017/09/bill-de-blasio-in-conversation.html> [<https://perma.cc/UC2F-GQVD>] (documenting Mayor Bill de Blasio decrying the elevated status of private property rights in America which prevents the implementation of a planned housing economy and his sympathy for the "socialistic impulse" of the New York City community).

333. See Goldenberg, *supra* note 331.

334. *Id.*

335. See Complaint, *supra* note 7, at 87–88.

336. New York's reliance on discretionary board authority in setting rent increases is the minority position; most jurisdictions with rent regulation schemes rely on a pre-determined formula. See MURPHY & WILLIS, *supra* note 198, at 7. This Note will not venture to prescribe an exact formula, but the formula will have to be one that is mutually agreeable to both tenant and landlord advocates.

337. See *id.* The RGB produces its own "Price Index of Operating Costs (PIOC)," instead of relying on a third-party index to calculate regulated owner operating costs. *Id.* at 4, 7.

338. The COVID-19 global pandemic may be considered an unforeseen circumstance.

339. This Note acknowledges that a pre-determined formula will not entirely address the alleged issue that amendments to the RSL's IAI and MCI provisions prevent landlords from recovering the costs of necessary renovations. See *supra* Parts I.C.2, II.A.1 (discussing IAI and MCI effects on landlords' property interests); see also Epstein, *The Rent Is Too Damn*

### B. *The RSL Does Not Violate Due Process of Law*

Due process challenges to broad economic regulations, such as the RSL, that are aimed at promoting public welfare may be discarded upon the government's showing of some legitimate rational basis for the measure, a highly deferential standard.<sup>340</sup> In finding that such a regulation passes rational basis review, a court does not pass judgment on the merits of a legislature's policy decision or even endorse it as an adequate means to achieving the legislature's goals.<sup>341</sup> Therefore, while the district court correctly dismissed the landlords' due process claim, the constitutional challenge exposed fundamental flaws in the RSL's ability to direct its benefits toward those who need its protection most.<sup>342</sup> The introduction of means testing to the RSL can help better target the RSL to helping low- and middle-income New Yorkers.

#### 1. The RSL Survives Rational Basis Review

The district court correctly rejected the landlords' attempt to strike down the RSL as a constitutional violation of due process.<sup>343</sup> In *Lochner v. New York*,<sup>344</sup> Justice Holmes famously dissented, proclaiming that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."<sup>345</sup> In doing so, he rejected the notion that the U.S. Constitution "embod[ies] a particular economic theory"<sup>346</sup> and set the foundation for the Court's modern substantive due process jurisprudence, which affords a legislature a high level of deference in adjusting economic burdens.<sup>347</sup> The decision in *Community Housing Improvement Project* echoes Justice Holmes's dissent by refusing to supplant the rational judgment of New York's democratically elected legislature with the economic theories of Paul

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*Low*, *supra* note 258 (claiming that the costs of renovation projects cannot be recovered under the new provisions and positing that the new law goes too far and constitutes a taking).

340. *See supra* notes 278–79 and accompanying text.

341. *See, e.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544 (2005); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955); *In re Chateaugay Corp.*, 53 F.3d 478, 486–87 (2d Cir. 1995).

342. *See supra* Part II.B.1 (discussing landlords' claim that the RSL fails to adequately provide low-income renters with affordable housing).

343. *See supra* Part II.B.2.

344. 198 U.S. 45 (1905). The Court struck down an economic regulation limiting working hours for bakers as a violation of due process. *See generally id.*

345. *Id.* at 75 (Holmes, J., dissenting). Herbert Spencer's Social Statics is an endorsement of social Darwinism and laissez-faire economics. *See* Jeffrey Rosen, *Supreme Court History: Capitalism and Conflict*, THIRTEEN (Dec. 2006), <https://www.thirteen.org/wnet/supremecourt/capitalism/history2.htm> [<https://perma.cc/9XFW-48CL>]. Justice Holmes's statement was intended as criticism of the majority's willingness to allow partiality for a particular economic theory, such as Herbert Spencer's, to override the will of the democratic majority. *See id.*; *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting).

346. *Lochner*, 198 U.S. at 75–76 (Holmes, J. dissenting).

347. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses 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.").

Krugman and Professor Richard Epstein as they relate to rent regulation's ability to alleviate the effects of a housing emergency.<sup>348</sup>

The RSL is a highly politically contentious measure, with fervent supporters and detractors.<sup>349</sup> The fact that reasonable minds could disagree over the merits of the RSL is evidence that the RSL is not hopelessly disconnected from its policy objectives.<sup>350</sup> At its core, the RSL is charged with “prevent[ing] exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices” during a housing emergency.<sup>351</sup> The RSL's regulation of rent increases and tenant evictions is surely aimed at achieving these ends. Additionally, the RSL does ensure that some housing remains affordable for New Yorkers through rent regulation, and 65.8 percent of those protected by the RSL are low-income tenants.<sup>352</sup>

Furthermore, the landlords' characterization of the 2019 HSTPA amendments as furthering the RSL's drift from the legislature's policy goals is unavailing.<sup>353</sup> Amendments eliminating luxury and high-income decontrol, vacancy increases, and restricting IAs and MCIs were direct responses to rapid deregulation and the threat of the permanent loss of affordable housing enabled by the prior RSL regime.<sup>354</sup>

While it is possible that there are objectively better policy options geared toward providing affordable housing in the midst of a housing shortage with less interference to property interests, it is too far to label the RSL as devoid of any rational connection to its policy goals. Thus, the landlords' due process claim must fail in subsequent attempts to revive the argument at the appellate level.

## 2. Targeting Low- and Middle-Income Renters Through Means Testing

The RSL has been touted as a vital tool in providing lower income tenants the opportunity to afford living in New York City.<sup>355</sup> However, landlords correctly note that the 2019 RSL contains no mechanism to direct the RSL's

348. *See supra* Part II.B.1 (describing Paul Krugman's and Richard Epstein's criticism of rent regulation statutes).

349. *See* RENT REGULATION AFTER 50 YEARS, *supra* note 45, at 1; *supra* notes 2, 79 and accompanying text.

350. *See Lochner*, 198 U.S. at 76 (Holmes, J., dissenting) (suggesting that where reasonable minds differ as to the soundness of an economic regulation, it is not the Court's place to strike it down as a violation of due process); *see also* Curtis J. Berger, *Home Is Where the Heart Is: A Brief Reply to Professor Epstein*, 54 BROOK. L. REV. 1239, 1240–41, 1248 (1989) (defending the general constitutionality of rent regulation and the RSL's effectiveness in providing tenants with an important sense of stability and community); Dean Preston & Shanti Singh, *Dear Business School Professors: You're Wrong, Rent Control Works*, SHELTERFORCE (Mar. 28, 2018), <https://shelterforce.org/2018/03/28/rent-control-works/> [<https://perma.cc/7VRE-PT66>] (arguing that rent regulation is effective policy and disputing certain economic studies suggesting the opposite as methodologically flawed).

351. N.Y.C. ADMIN. CODE § 26-501.

352. *See supra* note 245 and accompanying text.

353. *See supra* Part II.B.1.

354. *See supra* notes 89–90 and accompanying text.

355. *See supra* note 238.

protection toward New York's low- and middle-income renters.<sup>356</sup> Despite landlords' arguments to the contrary, this disconnect is not fatal to the RSL under due process analysis.<sup>357</sup> First, the RSL does in fact house a large number of low-income renters, providing them with affordable rent.<sup>358</sup> Second, the RSL is rationally related to many other goals, such as generally preserving affordable housing in New York City<sup>359</sup> and providing tenants with housing stability through protection from unreasonable and unpredictable rent increases.<sup>360</sup> Although under no compulsion from due process legal challenges, the New York State Legislature should modify the RSL regime to better direct the RSL's benefits toward assisting those who actually need protection from the hardships associated with a free market during a housing emergency.<sup>361</sup> This policy goal can be accomplished by adding a means test to the RSL.<sup>362</sup>

The legislature should adopt means testing to ensure that the RSL's benefits are focused on low- and middle-income tenants, to the exclusion of wealthy tenants.<sup>363</sup> The means test would only allow low- and middle-income tenants to be eligible for a stabilized apartment and the RSL's protection.<sup>364</sup> Such a test would require stabilized tenants to submit a yearly tax return to the DHCR to show that they still qualify for RSL protection.<sup>365</sup> To avoid abrupt disruptions of occupancy, tenants would have to show an income over the specified threshold for a consecutive number of years before being given a reasonable amount of time to vacate the regulated apartment and relocate. Such a measure would increase the availability of affordable regulated units for low- and middle-income tenants. Additionally, unlike the prior RSL's luxury and high-rent decontrol provisions, the proposed measure would not deregulate the apartment itself; after reaching a certain threshold

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356. *See supra* Parts I.C.2, II.B.1.

357. *See supra* Parts II.B.2, III.B.1.

358. *See supra* note 245 and accompanying text.

359. *See supra* note 88 and accompanying text.

360. *See supra* note 285 and accompanying text.

361. The RSL has allowed wealthy tenants to obtain stabilized apartments and take advantage of the RSL's protection despite being perfectly capable of competitively transacting in the unregulated housing market. *See supra* notes 242–43 and accompanying text. The HSTPA's elimination of the RSL's luxury and high-rent decontrol provisions removed any statutory means of preventing wealthy tenants from benefiting from the RSL. *See supra* notes 246–47 and accompanying text.

362. *See* Konrad Putzier, *The Long View: The Fix That Could Create Thousands of Affordable Housing Units Overnight*, REAL DEAL (Dec. 21, 2016, 1:53 PM), <https://therealdeal.com/2016/12/21/the-fix-that-could-create-thousands-of-affordable-housing-units-overnight> [<https://perma.cc/3YUS-GVDU>].

363. This Note does not attempt to place exact thresholds for qualifying a person as low-, middle-, or high-income for purposes of RSL eligibility. However, the scope for low- and middle-income should be sufficiently wide as to only exclude those who clearly do not need protection from the unregulated housing market.

364. This restriction would not be enforced retroactively. It would take effect only after the tenant currently occupying a regulated unit at the time of enactment has vacated the unit.

365. *See* Putzier, *supra* note 362 (describing how an RSL income-based means test could be modeled).

rent, it would merely remove the means testing requirement.<sup>366</sup> In doing so, the proposed measure would both preserve the regulated housing stock and more efficiently pair affordable units with renters who need the RSL's protection from New York's unregulated housing market amidst a housing crisis.

Currently, no jurisdiction employing a rent regulation scheme utilizes a means test as a tenant qualification.<sup>367</sup> The primary arguments against such a policy are that it imposes high administrative costs and that it is detrimental to garnering broad political support for rent regulation.<sup>368</sup> However, these arguments do not pose insurmountable barriers preventing the adoption of means testing to the RSL. First, New York already employs means testing in its Mitchell-Lama housing program,<sup>369</sup> and the RSL can use this as a model for its administration of RSL means testing.<sup>370</sup> Second, efficiently directing the RSL's benefits toward low- and middle-income tenants can help reduce spending elsewhere on the creation and preservation of affordable housing.<sup>371</sup> Third, this Note contends that a progressive city like New York City may well support an effort aimed at providing low- and middle-income tenants with affordable housing, even if it means that a particular voter will be, or may become, ineligible to rent a stabilized apartment.

#### CONCLUSION

The HSTPA is the strongest, most tenant-friendly version of New York's RSL in history. Despite the increased restrictions on landlords' property interests, the district court correctly rejected landlords' attempt to dismantle the entire RSL regime as an unconstitutional regulatory taking or a violation of due process. However, the constitutional challenge exposed legal and policy concerns that stem from the new RSL amendments. Tying annual rent increases to a pre-determined formula, as opposed to the wide discretion of the RGB, will better ensure that landlords have the opportunity to earn a reasonable return and incentivize owners to maintain the regulated housing stock. Additionally, employing a means test to determine tenant eligibility

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366. This threshold rent for removing the means test would need to be set at a price prohibitively higher than could be afforded by a low- to middle-income renter.

367. See Been et al., *supra* note 318, at 1054.

368. See *id.* at 1053–54; Putzier, *supra* note 362.

369. The Mitchell-Lama Rehabilitation and Preservation Program offers building developers “low-cost financing” for housing construction projects in exchange for keeping rents in those buildings affordable for a specified period of time. See *Directory of NYC Housing Programs: Mitchell-Lama Rehabilitation and Preservation Program (RAP)*, NYU FURMAN CTR., <https://furmancenter.org/coredata/directory/entry/mitchell-lama-rehabilitation-and-preservation-program> [<https://perma.cc/CA8N-YHMT>] (last visited Sept. 17, 2021).

370. See Putzier, *supra* note 362.

371. Seth Pinsky, former head of the New York City Economic Development Corporation, in discussing means testing for the RSL, claimed that the city is “spending billions [on affordable housing programs], when overnight we could free up tens of thousands of units at no cost.” Putzier, *supra* note 362; see also Adam Zeidal, *Affordable Housing: The Case for Demand-Side Subsidies in Superstar Cities*, 42 URB. LAW. 135, 140–41 (2010) (discussing the high costs associated with New York City's affordable housing developer subsidy programs).

for regulated units will better target the RSL toward providing affordable housing for low- and middle-income New Yorkers. Advocates on both sides should be willing to address these concerns and seriously consider these policy proposals.