No. 11-

IN THE

Supreme Court of the United States

JAMES D. HARMON, JR. and JEANNE HARMON,

Petitioners,

v.

JONATHAN L. KIMMEL, in his official capacity as MEMBER AND CHAIR OF THE NEW YORK CITY RENT GUIDELINES BOARD, CITY OF NEW YORK; DARRYL C. TOWNS, in his official capacity as COMMISSIONER, NEW YORK STATE HOMES AND COMMUNITY RENEWAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Jeanne and James Harmon own and live in a small, walk-up brownstone in Manhattan. New York City's Rent Stabilization Law ("RSL") has forced the Harmons to lease apartments permanently to three tenants-in-possession for over 90 tenant years (and *their* designated successors) without regard to financial need. The tenants pay government-set rents 59% below-market, substantially reducing the building's value and excluding the Harmons and their family from their own property without compensation. The RSL, most recently continued by local laws enacted in 2006 and 2009 without proper notice to the Harmons, is premised upon a supposed temporary emergency of over forty years duration, which the City admits has become indefinite. In all that time, the RSL has not achieved its stated objectives.

1. Does a permanent scheme of possessory rent regulation with no foreseeable end exceed the limits of the noncompensable exercise of the police power established in *Block v. Hirsh*, 256 U.S. 135 (1921), *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and other decisions of this Court, which upheld the constitutionality of rent regulation and tenant possession without an owner's consent, only as a temporary measure to address an "emergency" of limited duration?

2. Does the "explicit textual...constitutional protection" of the Fifth Amendment against government takings bar a substantive due process claim that possessory rent regulation is arbitrary in violation of the Fourteenth Amendment?

3. Does rent regulation that "compel[s] a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy" effect a taking proscribed by the Fifth Amendment as posited in *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992)?

4. Prior to enactment of possessory rent regulation, does the Due Process Clause require that personal notice or notice by certified mail and a meaningful opportunity to be heard be provided to an owner whose property selectively is made subject to such rent regulation?

We use the term "possessory rent regulation" to mean apartment rent control not based on fair market value which enables a tenant to remain in permanent possession beyond the termination of a lease with the right to name their successors, all without the owner's consent, under a regulatory regime which prohibits an owner from withdrawing his or her property from the rental market.

TABLE OF CONTENTS

Table of Contents

Table of Contents

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

STATUTES

REGULATIONS

Page

CONSTITUTION

RULES

MISCELLANEOUS

Page

Page

Page

PETITION FOR WRIT OF CERTIORARI

Petitioners Jeanne and James D. Harmon, Jr. ("the Harmons") respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.[1]

OPINIONS BELOW

The panel opinion of the Court of Appeals, App. A-1a, 2011 U.S. App. LEXIS 4629, the order denying rehearing and rehearing *en banc*. App. B-13a, and the opinion of the district court granting Respondents' motions to dismiss under Federal Rule of Civil Procedure 12(b)(1), App. B-7a, are not published but are included in the appendix.

JURISDICTION

On February 28, 2008, the district court granted Respondents' motions to dismiss the Harmons' complaint and ordered the case closed. The Harmons filed a timely appeal to the Second Circuit Court of Appeals. On March 8, 2011, a panel of the Court of Appeals affirmed the district court's dismissal. The Harmons then filed a timely petition for rehearing *en banc*. On May 20, 2011, the active members of the court denied both rehearing and rehearing *en banc*. On June 15, 2011, Justice Ginsburg granted the

1. Pursuant to Supreme Court Rule 35.3, the following party substitutions have been made: Mr. Kimmel for Marvin Markus as Member and Chair of the New York City Rent Guidelines Board, and Mr. Towns for Deborah Van Amerongen, as Commissioner, New York State Homes and Community Renewal, a new agency resulting from the consolidation of the New York State Division of Housing & Community Renewal and another agency.

Harmons' timely application to extend the time within which to file this petition to and including October 17, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment of the United States Constitution provides, in relevant part:

> No person shall be...deprived of life, liberty, or property, without due process of law...nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law...

U.S. Const. amend. XIV, § 1.

The Contract Clause of the United States Constitution provides, in relevant part:

> No State shall ...pass any ...Law impairing the Obligation of Contracts.

U.S. Const. Art. I, § 10, cl. 1.

The New York City Administrative Code §26-502 provides, in relevant part:

> Additional findings and declaration of emergency. The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the City of New York and will continue to exist....

Other relevant provisions of the New York City local laws, including Local Laws 3/2006 and 23/2009 and the Administrative Code, are set forth in the appendix to this petition.

STATEMENT OF THE CASE

For more than four decades, the Harmon family has faithfully borne "public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). They can no longer afford to do so due to rent stabilization, an "off budget...welfare program privately funded by those landlords who happen to have [residential rent-regulated] tenants." *Pennell v. City of San Jose,* 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part.)

This simple case challenges the power of the City and State of New York[2] to impose on the Harmons the

2. The City most recently acted beyond constitutional limits by enacting Local Law 3 in 2006 and Local Law 23 in 2009, thereby subjecting the Harmons' building to rent stabilization, which continues to this day. App. C-40a, 43a.

unconstitutional burden of involuntarily and permanently renting a part of their residence to tenant-strangers whom the Harmons must subsidize for the rest of their lives, all in violation of the proper exercise of the police power and rights guaranteed by the Fifth and Fourteenth Amendments, and the Contract Clause.

The decisions of the the district court and the Second Circuit found no merit in the Harmons' complaint seeking injunctive and declaratory relief, going so far as to tell the Harmons they could sell or demolish their home if they wanted to "easily escape" rent stabilization. App. B-23a, 4a. The Harmons choose to petition this Court rather than exercise the constitutionally intolerable choice of selling or destroying their home of five generations and six decades.

A. Factual Background

1. The Impact of the RSL on the Harmons' and their Building

The Harmons, husband and wife, ages 68 and 67, own and reside in a five story brownstone located at 32 West 76th Street, which is zoned residential and is located in the Upper West Side/Central Park West Historic District. The Harmon family has owned the building since 1949, when Mr. Harmon's immigrant grandparents bought it. They then sold it to Mr. Harmons' parents in 1953, sixteen years before the building was made subject to rent stabilization. On January 17, 1994, Mr. Harmon and his brother inherited the building as tenants in common upon the death of their father, also inheriting three tenants, then and now, in possession of rent-stabilized apartments in the building. The Harmons have owned the

building jointly since January 13, 2005, when Mr. Harmon purchased his brother's interest.

Each of the three floors above the Harmons' first floor apartment contains one rent-stabilized and one market rate apartment. The three rent-stabilized apartments are and have been occupied by the same three tenants for a total of ninety-one (91) tenant-years without the consent of the Harmon family at rents 59% below market rate. The RSL takes leaseholds from the Harmons and gives the tenants permanent possession and lifetime tenure with succession rights, enabling them to pass on their RSL interests to others. 9 NYCRR § 2523.5 (b)(1). The RSL prohibits the Harmons from withdrawing the captive apartments from the rental market. App. E-68a. Thus, any sale of the Harmons' building would be subject to the statutory fee interests of the rent-stabilized tenants which reduce the value of the building, App. E-69a, hardly a surprise since "the permanent occupation of that space by a stranger will ordinarily empty the right [to dispose] of any value." *Loretto v. Teleprompter Manhattan CATV Corp.*,458 U.S. 419, 436 (1982).

Annually, the City Rent Guidelines Board sets regulated rents, not based on individualized fair market value. Owners like the Harmons are then required to offer lease renewals to tenants in possession of rent-stabilized apartments, and then to execute leases on State-dictated forms with mandated rent and terms. State regulations provide enforcement mechanisms and penalties for non-compliance.

2. The RSL Is Based on Luck, Not Financial Need, and Is Full of "Systemic Inequities"

Contrary to popular myth, the RSL is not targeted to help the needy, and here it does not. A person could make millions of dollars annually and still qualify for a rent stabilized apartment. The RSL is not about affordable housing. It is all about luck..... a racket in which property owners and market rate tenants always lose....and that is a matter of common knowledge.

> There are nearly a million rent-stabilized apartments in New York City. Which means that there are at least a million lucky people who know they have relatively low rent that isn't going to rise too far, too fast.

Marc Santora, *The Lucky Break of Rent Stabilization*, N.Y. Times, February 6, 2011, Real Estate Section at 1.

For example, public officials and the Harmons' tenants are among the lucky. The former Governor maintained a rent stabilized apartment while residing in the Governor's mansion in Albany. The former Chairman of the House Ways and Means Committee has four rent stabilized apartments. The Speaker of the City Council has a one bedroom rent stabilized apartment. Since 1991, the Harmons' effectively have been financing the approximately $1500 monthly mortgage payments on the Long Island home of one of their rent stabilized tenants who pays $951.22 monthly rent. App.-E 61a.[3]

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3. The 2006 declaration of emergency and enactment of Local Law 3 was predictable. Speaker of the City Council

It is little wonder that the City's Chairman of the Rent Guidelines Board found rent stabilization to be "antiquated" and plagued by "systemic inequities," one of which is that "the rents between long-term tenants versus new or recent tenants have become increasingly skewed."[4] Long-term compelled tenancy (91 tenant years) is precisely what caused 59% below market rate rents for the three rent-regulated apartments in the Harmons' building. The New York Times even featured a story about a subtenant with "real estate karma" who exulted that rent-stabilized rent in the Harmons' building was "practically free." Trish Hall, *30-Year-Old with a Lease on Real Estate Karma*, N.Y. Times, January 2, 2000, sec. 11.

The inequities inversely extend to The Bronx. Rent-regulated households in Manhattan get a rent discount more than four times that of households in The Bronx, where 42% of regulated units have rent that is close to — or even higher than — the rent for comparable

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Christine Quinn, and at least two other voting members of the City Council, had rent stabilized apartments. Before the hearing even commenced, Speaker Quinn, decreed the outcome when she promised a "fun filled hearing," the purpose of which was "to make sure we are not losing rent protected units.....[and] renewing intact, with no weakenings, our rent protection laws of the City of New York." Transcript, Hearing before City Council Committees on Housing and Buildings and State and Federal Legislation, March 3, 2006 at 22 (Statement of Christine Quinn, Speaker, New York City Council).

4. Final Vote on Rent Guidelines before the New York City Rent Guidelines Board, June 19, 2008 (Statement of Marvin Markus, Chairman of the New York City Rent Guidelines Board).

unregulated units.[5] Tenants and owners each lose in The Bronx.

3. The Private Cost of the RSL and the Availability of Other Means

About one-half of the City's total 2,092,363 rental units are subject to rent stabilization, App. E-59a, which, in general, has lowered rents for regulated one bedroom apartments 36% below market in Manhattan. App. E-73a. Rent stabilization is not free. Citywide, the annual estimated $4 billion cost of "off-budget" rent stabilization is borne by market rate tenants, property owners and the City itself. The estimated annual cost of the RSL is $2.6 billion to property owners, $1.9 billion to market rent tenants, whose rent would be 15% lower in a free market, and $283 million to the City in lost property taxes.[6]

The City has at its disposal and uses many other government-funded alternatives to rent regulation as the means to achieve legitimate goals of public housing policy, including tax incentives, the Mayor's $7.5 billion New Housing Marketplace Plan, App. E-86a, and a variety of programs subsidizing the rent of low, moderate and middle income New Yorkers.[7]

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5. Citizens Budget Commission,"Rent Regulation: Beyond the Rhetoric," p. ii (June 2, 2010)

6. *Id*. at 32 table C-1.

7. New York City Housing Authority, Fact Sheet *available at* http://www.nyc.gov/html/nycha/html/about/factsheet.shtml; New York City Department of Housing Preservation and Development, Mitchell-Lama Housing *available at* http://www.nyc.gov/html/hpd/html/apartment/mitchell-lama.shtml

B. Legislative Proceedings, Their Purpose and Result

The RSL works like this. By State enabling statute, a municipality may declare a housing emergency if the so-called vacancy rate is less than five percent.[8] Most recently, in 2006 and 2009, the New York City Council did so by enacting new local laws, Local 3 and Local Law 23, without personal notice to the Harmons. These local laws continued rent stabilization which would have otherwise ended without the declaration of emergency, since State law requires each local law to have a three year sunset provision.

Since 1969, the stated ultimate statutory objective of the RSL has always been and still is "the transition from regulation to a normal market of free bargaining between landlord and tenant." App. E-54a-55a. New residential construction was and is exempted from rent regulation by the RSL "as a means of encouraging future construction."App. E-64a ¶¶ 45-46.

A claim of "emergency" has always been proferred as the justification for the RSL. Over the years, the nature of the so-called emergency has shifted from war to market factors. In 1969, the City Council's justification for first enacting the RSL was "a serious public emergency... created by war, the effects of war and the aftermath of hostilities."App. E-74a.[9] In 1974, the City Council changed the emergency basis for rent stabilization from an unidentified war to a legal definition, known as the otherwise undefined "vacancy rate." App. E-56a, 78a,

8. Section 3(a) Emergency Tenant Protection Act of 1974.

9. Local Law No. 16 (1969), Section YY51-1.0; App. C 27a.

81a. At least eleven (11) times since 1979, the City Council perpetuated rent stabilization when it enacted local laws, in haec verba, declaring the same purported continuing emergency to exist, App. E-75a, 76a. Six of those laws have been enacted since the Harmons first acquired an interest in the building.

The district court found, as the City has conceded in this litigation, that this rubber stamp process is "fully predictable" and part of an "overarching scheme," App. B-22a, to indefinitely continue rent stabilization, a process which has now gone on for more than forty continuous years. Nonetheless, the City's Commissioner of Housing Preservation and Development contradicted the declaration of emergency when he testified before the Council in June 2008 that:

1. the City had the largest housing stock in 40 years;

2. home ownership in the City was at all-time high;

3. the satisfaction of New Yorkers with their neighborhoods and overall building conditions was at an all time high;

4. a large number of affordable housing units were coming on to the market because of the Mayor's Housing Marketplace Plan and tax benefit programs; and

5. the overall supply of housing had increased.

App. E-78a. The Commissioner's testimony was based, in part, on the 2005 NYC Housing Survey which found that

"... housing and neighborhood conditions were extremely good."App. E-79a.

Forty-two years later, the RSL has failed to accomplish either of its stated objectives, i.e., transition to a free market and new construction. As of the time of the enactment of Local Law 3/2006, about half of the City's apartments remain subject to rent stabilization. App. E-72a. The number of new rental units did not increase from 1969 - 2005, *id.*, nor did the number of dwellings completed annually Citywide increase from 1969-2004. In the meantime, the City's population remains essentially the same as in 1969. App. E-73a.

Abject failure was inevitable. Almost all economists from the left and the right (no matter how defined), including five recipients of the Nobel prize in economics, i.e., Krugman, Hayek, Myrdal, Friedman and Stigler, believe and have predicted accurately and in no uncertain terms that rent regulation will not increase the supply of housing:

- where there is rent control, "the absence of new apartment construction [is] predictable."(Krugman)[10]

- "...the 'housing shortage' will remain as long as rents are held down by legal controls. As long as the shortage created by rent ceilings remains, there will be a clamour for continued rent controls.... Rent ceilings, therefore, cause...retardation of new

10. Paul Krugman, Op Ed, *Reckonings; A Rent Affair*, New York Times, sec. A, p. 31 (June 07, 2000).

construction and indefinite continuance of rent ceilings...."(Friedman & Stigler)[11]

- "The housing shortage which inevitably follows every statutory limitation on rent levels... turns the occupation of a dwelling into a capital asset...."(Hayek)[12]

- "Rent control has in certain Western countries constituted, maybe, the worst example of poor planning by governments lacking courage and vision."(Myrdal)[13]

A 1992 poll of the American Economic Association found 93 percent of its members agreeing that "a ceiling on rents reduces the quality and quantity of housing."[14] Other

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11. Milton Friedman and George J. Stigler, "Roofs or Ceilings? The Current Housing Problem," *Rent Control: A Popular Paradox: Evidence on The Economic Effects of Rent Control*, pp. 99-100 (Vancouver: The Fraser Institute, 1975) (emphasis in original).

12. Friedrich Hayek, "The Repercussions of Rent Restrictions," *Rent Control: A Popular Paradox*, *supra*, p. 69.

13. Dagens Nyeter, August 25, 1965 at 12 cited in Walter Block, *Alienability, Inalienability, Paternalism and the Law*, 28 Am. Cr. L. Rev. 351, 358 n.30 (2001).

14. Richard M. Alston, J. R. Kearl, and Michael B. Vaughan, *Is There a Consensus Among Economists in the 1990's?*, 82 American Economic Review, no. 2 at 204 (1992): *see also*, Walter Block and Michael A. Walker, "Entropy in the Canadian Economics Profession: Sampling Consensus on the Major Issues," 14 Canadian Public Policy, no. 2 at 139-140(1988) (95.3% of Canadian economists concurred with the statement: "A ceiling on rents reduces the quantity and quality of housing available.")

economists have been more graphic in their assessment of the effect of rent regulation on New York City:

- "...next to bombing, rent control seems in many cases to be the most efficient technique so far known for destroying cities...."[15]

- "My conclusion from the experience of New York City is that no area should adopt a rent control ordinance unless it will have different effects than the New York City ordinance. This ordinance appears to have no redeeming social value."[16]

C. Judicial Proceedings

On June 18, 2008, the Harmons filed the present action in district court under 42 U.S.C. §1983 alleging, *inter alia*, that the RSL as applied violated their rights under the Fifth Amendment by taking their property for a private use without just compensation, transgressed the Fourteenth Amendment's guarantee of substantive and procedural due process and equal protection, and impaired the Harmons contract rights in violation of the Contract Clause, for which they sought injunctive and declarative relief.

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15. Assar Lindbeck, *The Political Economy of the New Left: An Outsider's View* at 39 (New York University Press 2d Ed.1977).

16. Edgar O. Olsen, "Questions and Some Answers about Rent Control: An Empirical Analysis of New York's Experience," *Rent Control: A Popular Paradox*, *supra*, p. 153.

1. District Court Opinion

The district court granted motions to dismiss the Harmons' Fifth Amendment, Contract Clause and injunctive relief claims on the merits, App. B-19a, rejecting without comment the Harmons' argument and claim that the RSL was not a valid exercise of the police power under long standing Supreme Court precedent led by *Block v. Hirsh*, 256 U.S. 135 (1921) (Holmes, J.) that an emergency of catastrophic scale and limited duration is a constitutional prerequisite to the enactment of possessory rent regulation. In the absence of an emergency as this Court has defined it, the RSL is unconstitutional under bright-line Supreme Court precedent, which the Second Circuit and the highest courts of California, New Jersey and Maryland have declined to follow.

Other than to say so, the district court did not offer any explanation for dismissing the takings claim based on a finding that the Harmons "have suffered no physical occupation of their property" App. B-19a, thereby closing its eyes to the undeniable and undenied reality that the tenants, not the Harmons, are in physical possession of three apartments under the legal compulsion of the RSL.

The district court found that only the owners of the building "who were parties to existing contracts" when the RSL was first enacted in 1969 had standing to assert a Contract Clause claim. App. B-22a. The Harmons rights under existing contracts were not impaired, said the district court, since "there was no change in the law impairing any contractual relationship to which [the Harmons] were parties," App. B-22a, totally ignoring the reality that each new local law compelled the Harmons

to renew statutory leases then in existence. App. B-22a; App. E-62a, 69a, 70a.

Having already decided the merits of the takings claim, the district court proceeded nonetheless to dismiss that claim, as well as the due process and equal protection claims, on grounds that each was not ripe under *Williamson Cnty. Reg'l Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), because the Harmons had not sought compensation via a hardship rent adjustment through State administrative and court proceedings, which could not have provided just compensation in any event. On appeal, the City and State respondents specifically and largely abandoned their *Williamson County* ripeness argument, which played no part in the Second Circuit's affirmance of the dismissal on the merits.

2. Circuit Court Opinion

The Second Circuit affirmed the dismissal of the Harmons' police power, procedural due process and equal protection claims, summarily finding them "among the other arguments...to be without merit." App. A-6a. The court held that "the RSL does not effect permanent physical occupation of the Harmons' property," App. 5a, making no mention that the tenants' occupation and possession always was and is "without [the Harmons'] consent" due to the "legal coercion" of the RSL. App. E-61a - 64a, 67a, 69a, 85a. The court gave overbroad application to the "unique" circumstances in *Yee v. City of Escondido*, 503 U.S. 519, 529 (1992), citing it for the general proposition that where "a property owner offers property for rental housing, the Supreme Court has held

that governmental regulation of the rental relationship does not constitute a physical taking." App. A 4a. Ignoring that the building was inherited in 1994 along with the three rent-stabilized tenants in compelled possession, the holdings in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and relying only on Second Circuit authority, the circuit panel added that the Harmons acquiesced in the building's continued use as rental housing when they "acquired their property in 2005 with full knowledge that it was subject to the RSL," App. A-4a, as if knowledge of a law cured its unconstitutionality. The Harmons acquiesced in the rental of the three rent stabilized apartments only because the RSL compelled them to submit to perpetual statutory leases then in effect because of an emergency that did not exist. App. E 63a, ¶ 44. The substantive due process claim was held to be barred because of the "explicit textual" protection afforded by the Fifth Amendment Takings Clause. App. A 6a.

The Second Circuit further found the Contract Clause claim to be without merit because "the RSL was enacted and became applicable to the Harmons' property many years before they took ownership of it." No merit was found in the equal protection claim because the Second Circuit found it to be "conclusory."[17]

17. The Second Circuit also incorrectly concluded that the Harmons had specific statutory rights to recover possession of the apartments because of "immediate and compelling necessity for their own personal use and occupancy," or "for the immediate purpose of demolishing them...for the purpose of constructing other than housing accommodation," and to evict an unsatisfactory tenant. In so doing, the circuit panel erroneously relied on regulations pertaining to ***rent control***, which is an entirely different regulatory scheme than ***rent stabilization***. The State

The Harmons now petition this Court to resolve questions of broad national importance which can be summarized as to whether and to what extent the police power, the Fifth and Fourteenth Amendments place constitutional limits on permanent and noncompensable possessory rent regulation.

REASONS FOR GRANTING THE PETITION

> *[T]he right to own and hold property is necessary to the exercise and preservation of freedom.*
>
> *- Justices Kennedy and Sotomayor*[18]

> *One of the chief functions of the rule of law is the protection of property rights....*
>
> *- Francis Fukuyama*[19]

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regulations cited in the Second Circuit decision have no application to rent stabilization. N.Y. Comp. Codes R. & Regs. tit. 9, §§ 2104.5(a)(1), (2) and 2204.8(a)(2); *Booke v. Joy*, 88 A.D.2d 569, 451 N.Y.S.2d 393 (1st. Dept 1982)(Under **rent control** regulations, owner did not have an immediate and compelling need for an apartment for his granddaughter). The Harmons advised the Second Circuit of this error in their petition for a rehearing. The court summarily denied rehearing and rehearing *en banc*, leaving its decision unchanged.

18. *Stop the Beach Renourishment, Inc.*,130 S. Ct. 2592, 2614 (2010) (Kennedy and Sotomayor, JJ, concurring in part and concurring in the judgment).

19. Francis Fukuyama, The Origins of Political Order, p. 407(Farrar, Strauss and Giroux 1st ed. 2011)

> *It's time to declare once again a housing emergency.*
>
> *- The Speaker of the New York State Assembly*[20]

I

THE RULE ADOPTED BY THE SECOND CIRCUIT AND THE COURTS OF LAST RESORT IN NEW JERSEY, CALIFORNIA AND MARYLAND, THAT THE POLICE POWER DOES NOT REQUIRE AN "EMERGENCY" AS A CONSTITUTIONAL PREREQUISITE TO THE ENACTMENT OF POSSESSORY RENT REGULATION, CONFLICTS WITH *BLOCK V. HIRSH*, *MARCUS BROWN HOLDING CO. V. FELDMAN*, *PENNSYLVANIA COAL CO. V. MAHON* AND OTHER DECISIONS OF THIS COURT

This Court last reviewed the constitutionality of New York City's rent regulation scheme in the 1920's. The two year emergency regime then in place due to World War I - - just and reasonable rent and temporary compelled holdover tenancy beyond the lease period - - went to the "verge of the law."

> The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing

20. Erin Einhorn, *Sheldon Silver Urges More Protection for Renters as Regulated Apartments Vanish*, New York Daily News, March 13, 2011 at 16.

> for compensation determined to be reasonable by an impartial board. They went to the verge of the law...

Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 416 (1922) (Holmes, J.). Since then, the validity of rent regulation which compelled tenant possession has depended on the existence of an "emergency," which by definition is limited in duration, not permanent.

The constitutional exercise of the police power requires an "emergency" under a continuum of decisions of this Court, all construing the limits of the police power as applied to rent regulation enacted in New York and Washington because of World War I. *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924)(Holmes, J.); *Pennsylvania Coal Co. v. Mahon, supr*a; *Block v. Hirsh, supra*, (Holmes, J.); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921)(Holmes, J.). This Court has "reserved judgment as to whether such a regulatory scheme would be constitutional if it were made part of a permanent scheme..." *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 878 (1983)(emphasis added)(Rehnquist, C.J., dissenting from dismissal of appeal.)"[T]he very fact that there is no foreseeable end to the emergency takes this case outside the Court's holding in *Block v. Hirsh*." *Id.* As a result, this Court has yet to decide whether permanent possessory rent regulation can ever be a noncompensable and valid exercise of the police power in the absence of an emergency. The Harmons assert that it cannot and that the time has come to decide the issue.

The definition of an "emergency" in this context is universally accepted. *Block*, *Marcus Brown* and

Pennsylvania Coal define an "emergency" that will pass constitutional muster under the police power as an exigency existing in fact and characterized by unforeseen circumstances, limited duration (temporality), the need for immediate action and notorious, catastrophic scope. This Court found constitutional justification for the WWI measures because they were "justified only as a temporary measure." *Block*, 256 U.S. at 156 - 157. The emergency in *Block* was real, "growing out of the war," *id*. at 153, "...a publicly notorious and almost world-wide fact." *Id*. at 154. An emergency is "an unforeseen combination of circumstances or the resulting state that calls for immediate action." *Brown v. City of Oneonta, N.Y. Police Dep't*, 106 F.3d 1125, 1131 (2d Cir. 1997) quoting "Webster's Third New International Dictionary of the English Language at 741 (unabridged ed. 1981)"; *Int'l Bhd. of Teamsters v. Local Union Number 810*, 19 F.3d 786, 793 (2d Cir. 1994) (stating that to constitute an emergency, a situation must develop "suddenly and unexpectedly or through an unforeseen combination of circumstances"). "Temporary" means: "That which is to last for a time only, as distinguished from that which is perpetual, or indefinite in its duration. Opposite of permanent." Black's Law Dictionary (6th ed.) at 1464.

Writing for the Court in *Pennsylvania Coal*, Justice Holmes emphasized that the *Block* and *Marcus Brown* decisions marked the temporal outer limit of emergency-based possessory rent regulation. By their terms, the Washington and New York rent regulation laws were in effect for a specific two-year period only. *Block*, 256 U.S. at 154 (Washington); *Marcus Brown*, 256 U.S. at 196, 198 (New York). "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." *Block*, 256 U.S. at 157.

Rent stabilization has continued permanently in the City for more than forty continuous years. The district court adopted the City's concession below that the triennial extensions of the RSL are "fully predictable" and part of an "overarching scheme," thereby conceding the obvious, that the RSL is indefinite and permanent, not temporary. On temporality grounds alone, the RSL cannot be justified by an emergency of constitutional dimension. The Speaker of the New York State Assembly recently described the City's housing problems as "chronic,"[21] not unforseen or sudden. Succession rights are the antithesis of temporality.

California, New Jersey, Maryland Washington, D.C. and New York appear to be the only jurisdictions with compulsory rent regulation laws in place. The Second Circuit and the courts of last resort in California, Maryland and New Jersey explicitly have rejected the "emergency" requirement as a passé relic of another day. *Eisen v. Eastman*, 421 F.2d 560, 567 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970); *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 158 (1976); *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 561-62, 350 A.2d 1, 10 (1975). In ruling that rent control did not require an emergency, the Maryland Court of Appeals recognized "that the Supreme Court *has not expressly overruled* the early rent control cases such as *Chastleton Corp. v. Sinclair*...." *Westchester West No. 2 Ltd P'ship v. Montgomery Cnty.*, 276 Md. 448, 463, 348 A.2d 856, 865 (1975) (emphasis added).

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21. Sheldon Silver, Report: *The New Housing Emergency*, p. 1(released on March 13, 2011.)

Those courts rejecting the "emergency" requirement have all cited *Nebbia v. New York*, 291 U.S. 502 (1934) as authority for their conclusion. However, *Nebbia* merely upheld the constitutionality of milk price control as a "temporary emergency" measure under the familiar due process standard: "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt," id. at 537, but even then only "in the absence of other constitutional restriction." *Id.*

Nebbia excepted the World War I rent control cases from its holding due to their "peculiar facts," 291 U.S. at 552, and did not consider rent regulation requiring tenant possession beyond lease terms or, as here, perpetual succession rights, nor did it overrule the "emergency" precedents. *Nebbia*, a simple temporary price regulation case premised upon a temporary emergency, also did not implicate rights, such as the right to exclude, and other ownership rights emphasized in this Court's holdings in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *FCC v. Fla. Power Corp.*, 480 U.S. 245 (1987), discussed below. The RSL, more than simple price regulation, demands a permanent noncompensable deprivation of property rights otherwise protected by the Constitution. There lies the "constitutional restriction" that renders *Nebbia* inapposite to possessory rent regulation.

An irreconcilable conflict exists between this Court's controlling precedent requiring an emergency as justification for the exercise of the police power in the specific instance of possessory rent regulation, and the contrary rule adopted by the Second Circuit and the

highest courts of three states. These decisions "essentially nullify Mahon's affirmation of limits to the noncompensable exercise of the police power." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992).

The unsettling departure of other courts from the World War I "emergency" decisions in reliance on *Nebbia* raises an issue of vital national importance which can only be settled by this Court. This free-lance departure from the emergency requirement affects many people across the country. They include the millions of tenants who pay artificially inflated market rents, those who pay discounted regulated rents, their landlords, municipalities and legislators, both those guided by the Constitution and those who use "emergency" as an impenetrable label to mask political expediency and financial interest.

As the situation stands in New York, City and State legislators are faced with dueling judicial decisions as to whether or not an "emergency" is the only constitutional justification for permanent, noncompensable possessory rent regulation. New York's highest court appears to adhere to the "emergency" prerequisite. *Orinoco Realty Co., Inc., v. Goodkind*, 239 N.Y. 69, 72 (1924)("[T]he validity of this extension depends upon the fact that the emergency in the housing conditions in New York City still exists,") (citing *Chastleton Corp. v. Sinclair*, 264 U.S. 543). Ordinary citizens and their legislators need to know the limits of legislative power.

Unless this Court intervenes, unconstitutional appropriation of private property will continue without just recourse and without end. As for the Harmons, this is it. They have too long carried their disproportionate

burden for an imaginary public good. (Can anyone explain how perpetually forcing the Harmons to give lucky tenants a 59% rent discount and lifetime tenure with succession rights benefits the public good?) This Court stands as the only institution which can confirm the continued vitality of its own long standing precedent that the police power requires a real emergency as a constitutional prerequisite for the validity of noncompensable possessory rent regulation.

II

THE DECISION OF THE SECOND CIRCUIT THAT A SUBSTANTIVE DUE PROCESS CLAIM IS SUBSUMED IN A TAKINGS CLAIM CONFLICTS WITH *LINGLE V. CHEVRON* AND WITH DECISIONS OF THREE OTHER CIRCUITS, AND DENIES THE HARMONS THE RIGHT TO CHALLENGE THE ARBITRARINESS OF GOVERNMENT REGULATION

The Harmons have asserted a substantive due process violation based on *Lingle v. Chevron*, 544 U.S. 528 (2005), which held that a land regulation's failure to substantially advance legitimate governmental interests states a claim for a due process violation, not a taking. The Harmons claim that the RSL is arbitrary, unreasonable and serves no valid public purpose because, among other reasons, the City Council continued rent stabilization legislation selectively covering only about half of the City's apartments, the scheme has failed to accomplish its stated purposes, and was sought to be justified by a conclusory declaration of a non-existent emergency. App E 81a, 86a. "The failure of a regulation to accomplish its stated or

obvious objective would be relevant to [the] inquiry" as to whether the RSL is arbitrary and irrational. *Lingle*, 544 U.S. at 548-549 (Kennedy, J., concurring).

Contrary to this Court's holding in *Lingle*, the Second Circuit, relying solely on a fragment of dicta in a plurality opinion in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2606 (2010), held that the Fifth Amendment Takings Clause bars substantive due process claims.[22] App. A 6a.

Three circuits squarely conflict with the the Second Circuit's startling holding. *Rose Acre Farms, Inc., v. United States*, 559 F.3d 1260, 1278 (Fed. Cir. 2009), *rehearing and rehearing en banc denied*, 2009 U.S. App. LEXIS 24529 Fed. Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 1470 (2010)("...whether the means chosen by government advance the ends or whether the regulation chosen is effective in curing the alleged ill.....are now confined to a substantive due process inquiry."); A *Helping Hand, LLC v. Balt. Cnty., Md.*, 515 F.3d 356, 369 n.6 (4th Cir. 2008)(citations omitted) (observing that *Lingle*

22. The issue in *Stop the Beach* was whether a state court decision could constitute a judicial taking in violation of the Fifth Amendment. Chief Justice Roberts and Justices Thomas, Alito and Scalia exchanged views with Justices Kennedy and Sotomayor as to whether the Fifth Amendment or substantive due process was best suited for the task. *Stop the Beach* did not resolve the issue. Justices Kennedy and Sotomayor cited the many Supreme Court cases, led by *Lingle* in which this Court "has long recognized that property regulations can be invalidated under the Due Process Clause." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. at 2614 (citations omitted) (Kennedy and Sotomayor, JJ, concurring in part and concurring in the judgment).

"explicitly distinguished between takings and substantive due process claims" and thus substantive due process claims based on property restrictions are not supplanted by takings law); *Crown Point Dev. v. City of Sun Valley*, 506 F.3d 851, 855 (9th Cir. 2007)("Lingle pulls the rug out from under our rationale for totally precluding substantive due process claims based on arbitrary or unreasonable conduct.").[23] The petition for certiorari should be granted to resolve this conflict between the Second Circuit on the one hand and this Court in *Lingle*, followed by the Federal, Fourth and Ninth circuits on the other.

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23. The Harmons' petition for rehearing informed the entire Second Circuit bench of the non-binding exchange of views among Justices of the Court in *Stop the Beach*, in particular the strong views of Justices Kennedy and Sotomayor. The appellate court also was advised that its dismissive rationale is fundamentally incompatible with *Lingle* and also created an irreconcilable conflict with the Ninth Circuit.

In denying rehearing and rehearing *en banc*,, the Second Circuit adhered to its decision that the Harmons' takings claim barred their substantive due process claim, fully aware that it was going its own way in the face of binding precedent to the contrary.

III

BY APPLYING *YEE V. CITY OF ESCONDIDO* OUTSIDE OF THE "UNIQUE" CIRCUMSTANCES OF MOBILE HOME PARKS, THE SECOND CIRCUIT AND NEW YORK'S HIGHEST COURT ARE IN CONFLICT WITH THIS COURT'S DECISION IN *STOP THE BEACH RENOURISHMENT, INC. V. FLA. DEP'T OF ENVTL. PROT.*, WHICH REAFFIRMED THE BEDROCK PRINCIPLE THAT "IT IS A TAKING WHEN A STATE REGULATION FORCES A PROPERTY OWNER TO SUBMIT TO A PERMANENT PHYSICAL OCCUPATION"

New York's rent stabilization scheme in effect today goes well beyond the City's post-World War I rent control measures, as well as those found constitutional in *Yee v. City of Escondido*, 503 U.S. 519 (1992). The Harmons seek review for this Court to decide a constitutional question of national importance that it has not yet decided, and to reaffirm the principle that possession is the unyielding test for a physical taking, even under a rent control regime.

> Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." [citation omitted]. To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights.

Loretto v. Teleprompter Manhattan CATV Corp.,458 U.S. 419, 435 (1982).

Government-compelled possession by a third party is a *per se* taking by definition. *Loretto* makes it that simple. "[I]t is a taking when a state regulation forces a property owner to submit to a permanent physical occupation." *Stop the Beach*, 130 S. Ct. at 2601 (citing *Loretto*, 458 U.S. at 425-426); *see also*, *FCC v. Florida Power Corp.*, 480 U.S. at 252 ("required acquiescence is at the heart of the concept of occupation."); *Yee*, 503 U.S. at 527 ("...the government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land.....")

The rule that the Harmons propose is that reserved in *Yee* , namely, that a rent control ordinance effects a physical taking when it either compels a landowner

> "over objection to rent his property **or** to refrain in perpetuity from terminating a tenancy." *Loretto*, 458 U.S. at 528 (emphasis added); *see also*, *Fla. Power Corp.*, 480 U.S. at 252("We do not decide today what the application of *Loretto*...would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements.") This case directly addresses the issues expressly left open in *Yee* and *Fla. Power Corp.*

a. The decision in *Yee* was explicitly limited to the "unusual economic relationship between [mobile home] park owners and mobile home owners" and the "unique protection from...eviction"provided to mobile home owners

Yee was a facial challenge to an Escondido, California rent control ordinance. At issue was whether the local ordinance effected an unconstitutional taking when it prevented mobile park owners from evicting mobile home owners who leased "pads" from them, after the termination of the leases. The *Yee* decision found no physical taking for two reasons, namely, that the property owners: 1) "invited" and "voluntarily rented their land" to their tenants to affix mobile homes on their property, *Yee*, 503 U.S. at 528, a situation which has many permanent physical attributes, and 2) could change the use of their land. *Id*. at. 524 -525.

The "unusual economic relationship between [mobile home] park owners and mobile home owners," *id*. at 526, largely dictated the outcome in *Yee*:

> The term "mobile home" is somewhat misleading. Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself. They are generally placed permanently in parks; once in place, only about 1 in every 100 mobile homes is ever moved. (Citation omitted). A mobile home owner typically rents a plot of land, called a "pad," from the owner of a mobile home park. The park owner provides private roads within the park,

> common facilities such as washing machines or a swimming pool, and often utilities. The mobile home owner often invests in site-specific improvements such as a driveway, steps, walkways, porches, or landscaping. When the mobile home owner wishes to move, the mobile home is usually sold in place, and the purchaser continues to rent the pad on which the mobile home is located.

Id. at 523. This Court explicitly recognized that California sought to give mobile homeowners "unique protection from...eviction" because of the high costs of installation, landscaping, lot preparation and removing the mobile home:

> In 1978, California enacted its Mobilehome Residency Law.... The legislature found 'that, because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter.'

Id. at 524. "[T]he leverage held by a mobile home park owner over his tenants, who are unable to transfer their homes to a different park except at great expense...," *Eastman Kodak Company v. Image Technical Servs., Inc.*, 504 U.S. 451, 458 (1992)(citing Yee), simply do not exist in the Harmons' building, where the tenants have all of the

leverage, and the Harmons' have none, thereby depriving the Harmons of the fundamental fairness underlying this Court's takings jurisprudence.

b. The Second Circuit and the New York Court of Appeals have applied *Yee* too broadly outside of its unique fact situation

This Court should accept this case for review to clarify that the constitutional principle that forced possession by a third party is a physical taking applies to possessory rent regulation, notwithstanding the "unusual economic relationship between [mobile home] park owners and mobile home owners" and the "unique protection from... eviction" which controlled the result in *Yee*.

In two facial challenges, the New York Court of Appeals misapplied *Yee* outside of the "unique protection from...eviction" which *Yee* afforded to mobile homeowners. *Compare Seawall Associates v. City of New York*, 74 N.Y. 2d 92 (1989), *cert. denied*, 493 U.S. 976 (1989)(finding a physical taking where a local law obligated owners of single-room occupancy properties to restore all units to habitable condition and then lease them at regulated rents), *with Rent Stabilization Assn. v. Higgins*, 83 N.Y.2d 156, *cert. denied*, 512 U.S. 1231 (1994) (finding no physical when an owner voluntarily acquiesced "in the use of its property for [apartment] rental housing" subject to the RSL. In its decision in the Harmons' case, the circuit panel also applied *Yee* outside of the mobile home park context, App. A 4a, relying on longstanding Second Circuit authority to that effect, i.e., *Federal Home Loan Mortgage Corp. v. New York State Division of Housing and Community Renewal*, 83 F.3d 45, 47- 48 (2d Cir. 1996).

This Court should grant the petition to adopt the "different case rule" as the test for determining whether possessory rent regulation effects a physical taking outside of the context of mobile home parks

By definition, the Harmons' "as applied" challenge takes this case outside of the Court's holding in *Yee*. The RSL effects a physical taking "in the circumstances of the [Harmons'] particular case." *United States v. Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561, 565 (1972). The validity of the Harmons' challenge depends on the law and the facts applicable today to their apartment building in Manhattan, not those present in the Yees' mobile home park in Escondido, California in 1988.

There are substantial differences between the two which make all the difference. *Yee* provides the test for evaluating these differences as a physical taking in the context of possessory rent regulation:

> *A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property* ***or*** *to refrain in perpetuity from terminating a tenancy.*

Yee, 503 U.S. at 528 (emphasis added) (citing *Florida Power*, 480 U.S. at 251-252, n. 6; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-832 (1987) and *Fresh Pond Shopping Center*, 464 U.S. at 877).

THIS IS THAT DIFFERENT CASE. The Harmons' challenge meets both of these alternatives. The RSL forbids the Harmons from withdrawing the rent stabilized

apartments from the market. N.Y. Comp. Codes R. & Regs. tit. 9 NYCRR 2524.5(a)(1)(i-ii). Conversely, nothing in the Escondido law compelled owners "once they have rented their property to tenants, to continue doing so." *Yee* at 527-528. Over their objection, the RSL requires the Harmons to offer and execute lease renewals for as long as the tenant or the tenant's unilaterally chosen successor resides in the building. The Harmons have been forced to do so several times, in spite of the Fifth Amendment's protection of intangible property rights. *See Monongahela Navigation Co.v. United States*, 148 U.S. 312 (1893) (holding that "government appropriation of real property which necessarily destroys the value of an intangible contract right constitutes a taking of property for which compensation must be made.) The Harmons' tenants also have succession rights, thereby denying the Harmons "[t]he power to exclude [which] has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto*, 458 U.S. at 435 (citations omitted).

The Escondido law mandated "just, fair and reasonable" rents after considering factors, including the rent charged for comparable mobile home pads. *Id*. at 524-525. The Harmons collect stabilized rents 59% below market based on formulaic general market factors, not including fair market comparables. App. E-57a, E-68a. The Harmons have been and continue to be required to acquiesce in the tenants' continued possession and occupation. *See Fla. Power Corp.*, 480 U.S. at 252 ("This element of required acquiescence is at the heart of the concept of occupation."). They never invited the tenants in the rent-stabilized apartments to occupy their property. "[I]t is the invitation...that makes the difference." *Id*.

As a practical matter, the Harmons cannot take back their property simply because it belongs to them, even though "private property gives the right to exclude others *without* the need for justification...which is the essence of freedom...." Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, p. 66 (Harvard University Press 1985). They cannot change the use of the building to escape rent stabilization as could the Escondido mobile park owners. The building is zoned residential. That is its lawful use.

The RSL effectively even prevents the Harmons and their family from living in the three rent stabilized apartments. Each rent stabilized apartment is in a different position. Tenants in two of the apartments are over the age of 62, as are the Harmons. Under the RSL, the Harmons can recover those apartments for family use, only if they provide the occupying tenants "with an equivalent or superior housing accommodation at the same or lower regulated rent in a closely proximate area to the building." 9 NYCRR §§ 2520.6(p), 2524.4(a)(2). This is impossible given the desirable nature of the neighborhood, high demand for apartments, the uniqueness of each apartment and "practically free" rents 59% below market, which is disparate even among rent stabilized apartments. It is also subject to tenant challenge.

For two years, the Harmons have been attempting to recover possession of the third rent stabilized apartment for use by their grandchild.[24] To date, after spending almost $30,000 in legal fees, the case has inched along

24. *Harmon v. Mervine*, docket no. 51685/2010 (Civil Court, New York County).

through a hearing on the adequacy of service of the complaint and denial of a motion to dismiss, with no guarantee of success notwithstanding the Harmons' ownership rights. Discovery has only begun. In the end, the Harmons are required to prove their "good faith" at a trial. *Pultz v. Economakis*, 10 N.Y.2d 542 (2008). It took the owners in *Economakis* four years to reach the point of trial. Id. "Unreasonable delays" in the rent stabilization process itself may constitute a taking. *See*, *Smith v. Ill. Bell Tel. Co.*, 270 U.S. 587, 591 (1926); *Birkenfeld*, 17 Cal. 3d at 169. Meanwhile, the tenant remains in possession with occupancy rights superior to the Harmons.[25]

Contrary to the Second Circuit's decision, demolition is no way out from under the unbrearable weight of the RSL. The Harmons cannot demolish their building because it is a landmark, as if that were a permitted and tolerable option."To protect a Landmark, one does not tear it down." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 117 (1978) (citing the NYC Landmarks Commission). The expensive demolition of individual units to "escape" the RSL would not only be confiscatory, but would add insult to injury by requiring the Harmons to pay the displaced tenant a $5000 stipend plus moving expenses, and to provide "an equivalent or superior housing accommodation at the same or lower regulated rent in a closely proximate area to the building," clearly impossible and subject to tenant challenge. New York State DHCR, Operational Bulletin 2009-1(September 19, 2002); *Peckham v. Calogero*, 12 N.Y.3d 424 (2009).

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25. Letter of James D. Harmon, Jr. to Circuit Judges Robert A. Katzmann, Amalya L. Kearse and Robert D. Sack dated March 7, 2011.

For these reasons, this Court should grant the petition for certiorari.

IV

THE SECOND CIRCUIT'S DECISION FINDING NO MERIT IN THE PROCEDURAL DUE PROCESS CLAIM CONFLICTS WITH THIS COURT'S DECISIONS IN *MULLANE V. CENTRAL HANOVER BANK* AND *SCHROEDER V. CITY OF NEW YORK* AND A DECISION OF NEW YORK STATE'S HIGHEST COURT

The complaint asserts a procedural due process claim because the City did not provide the Harmons with personal notice or service by certified mail of the hearing to address the enactment of Local Laws 3/2006 and 23/2009, respectively, nor a meaningful hearing on the inclusion of their apartment units. App. E-77a, 89a. The circuit panel's dismissal of this claim cannot be squared with the requirements of due process long established in *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Schroeder v. City of New York*, 371 U.S. 208, 213 (1962). This conflict warrants review by this Court of the pre-enactment notice requirement as applied in the context of possessory rent regulation.

The action of the City Council randomly subjected the Harmons' building to the RSL, while just as randomly excluding about half of the rental units in the City. Notice was no abstraction since the City Council retained the discretion to exempt "any class or classes of housing accommodations," Section 3(a) Emergency Tenant Protection Act of 1974, and found that "an emergency

continues to exist in the housing of a considerable number of persons." App. E-76a. The Council's schizophrenia is evident from its denial of rent discounts to about half of the City's apartment dwellers who pay artificially inflated market rate rents. If there was no emergency for them, then there was no emergency at all, including the tenants in rent-stabilized apartments. The Harmons had the right to be heard on those and other relevant issues, especially since the Due process Clause assures the right of a family to live together. *Moore v. East Cleveland*, 431 U.S. 494 (1977).

The due process duty to provide such notice arises because the Harmons' "legally protected interests [were] directly affected by the [City Council] proceedings," *Schroeder*, 371 U.S. at 213, and their "property [would] be substantially affected" by the action of the City Council. *Garden Homes Woodlands Co. v. Town of Dover*, 95 N.Y. 2d 516, 519 (2000)(holding that due process requires actual notice where the owners' name and address are known). Under these circumstances, " ... notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable," *Schroeder*, 371 U.S. at 212-213.

The City's summary treatment of the Harmons and presumably other innocent landowners excluded them from their own property, placing them in the intolerable position of selling their building, or else subsidizing tenant rents forever.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: October 17, 2011

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MARCH 8, 2011

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 10-1126-cv

SUMMARY ORDER

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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of March, two thousand eleven.

Present: AMALYA L. KEARSE,
ROBERT D. SACK,
ROBERT A. KATZMANN,
Circuit Judges,

Appendix A

JAMES D. HARMON, JR., JEANNE HARMON,

Plaintiffs-Appellants,

v.

MARVIN MARKUS, individually and in his official capacity as Member and Chair of the New York City Rent Guidelines Board, City of New York, DEBORAH VAN AMERONGEN, individually and in her official capacity as Commissioner, Division of Housing & Community Renewal, State of New York,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York (Jones, *J.*).

ON CONSIDERATION WHEREOF, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the judgment of the district court be and hereby is **AFFIRMED.**

Plaintiffs-Appellants James D. Harmon, Jr. and Jeanne Harmon (collectively, the "Harmons") appeal from the March 2, 2010 judgment of the district court dismissing the complaint in its entirety. On appeal, the Harmons argue that the district court erred in dismissing their claims that the New York City Rent Stabilization Law, N.Y. City Admin. Code § 26-501 *et seq.* ("RSL"), is unconstitutional under the Takings Clause, the Contracts Clause, the Due Process Clause, and the Equal Protection

Clause of the United States Constitution. We assume the parties' familiarity with the facts and procedural history of this case.

We begin with the Harmons' argument that the district court erred in dismissing their claim that the RSL effects an unconstitutional taking of their property. The Takings Clause of the Fifth Amendment, made applicable to the states and local governments through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. In some instances, government regulation of private property may be "so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). For example, "where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." *Id.* at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). We review *de novo* the district court's dismissal for failure to state a claim. *See, e.g., Harrington v. Cnty. of Suffolk*, 607 F.3d 31, 33 (2d Cir. 2010).

Here, the Harmons argue principally that the RSL effects permanent physical occupation of their property on the ground that it affords their tenants "rights and protections having attributes of fee ownership." Pls.' Br. 14. The Harmons, however, do not dispute that they retain statutory rights, among others, (1) to "recover possession of housing accommodations because of immediate and

compelling necessity for [their] own personal use and occupancy," N.Y. Comp. Codes R. & Regs. tit. 9, § 2104.5(a)(1), (2) to "recover possession of housing accommodations for the immediate purpose of demolishing them," provided that "such demolition is to be made for the purpose of constructing other than housing accommodation," *id.* § 2204.8(a)(2), and (3) to "evict an unsatisfactory tenant," *Rent Stabilization Ass'n of N.Y.C., Inc. v. Higgins*, 83 N.Y.2d 156, 172 (1993). We have observed that where, as here, "a property owner offers property for rental housing, the Supreme Court has held that governmental regulation of the rental relationship does not constitute a physical taking." *Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 47-48 (2d Cir. 1996) (citing *Yee v. City of Escondido*, 503 U.S. 519, 529 (1992)); *see also Higgins*, 83 N.Y.2d at 172 ("That a rent-regulated tenancy might itself be of indefinite duration—as has long been the case under rent control and rent stabilization—does not, without more, render it a permanent physical occupation of property.") (citation omitted).

Moreover, the Harmons concede that they acquired their property in 2005 with full knowledge that it was subject to the RSL. Thus, they have "acquiesced in its continued use as rental housing." *Fed. Home Loan*, 83 F.3d at 48; *see also id.* ("The law does not subject the property to a use which its owner neither planned nor desired. Rather, it regulates the terms under which the owner may use the property as previously planned." (internal alterations, citations, and quotation marks omitted)). We therefore conclude that the RSL does not effect permanent physical occupation of the Harmons'

property and, accordingly, the district court did not err in dismissing this takings claim.

We turn next to the Harmons' contention that the RSL is unconstitutional under the Contracts Clause, which provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. Art. I, § 10. To state a claim for violation of the Contract Clause, the complaint must allege sufficient facts to demonstrate that state law has "operated as a substantial impairment of a contractual relationship." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992) (internal quotation marks omitted). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Id.*

The Harmons argue that the RSL impairs their right to "enter into leases on mutually agreeable terms, and to contract for the sale of their building, unencumbered by the tenants' statutory 'bundle' of property rights." Pls.' Br. 60. A contract, however, cannot be impaired by a law in effect at the time the contract was made. *See, e.g., 2 Tudor City Place Assocs. v. 2 Tudor City Tenants Corp.*, 924 F.2d 1247, 1254 (2d Cir. 1991) ("Laws and statutes in existence at the time a contract is executed are considered a part of the contract, as though they were expressly incorporated therein."). Here, there is no dispute that the RSL was enacted and became applicable to the Harmons' property many years before they took ownership of it. Thus, the Harmons' argument that the RSL impairs their lease agreements with rent-stabilized tenants is without merit.

Finally, we conclude that the Harmons' due process and equal protection claims fail as a matter of law. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2606 (2010) (observing that the Due Process Clause cannot "do the work of the Takings Clause" because "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims") (other internal quotation marks omitted); *see, e.g., Rivera-Powell v. N.Y.C. Bd. of Elections*, 470 F.3d 458, 470 (2d Cir. 2006) (holding that conclusory allegation of an equal-protection claim of impermissible classification does not survive motion to dismiss).

We have considered the Harmons' remaining arguments and find them to be without merit. For the reasons stated herein, the judgment of the district court is **AFFIRMED.**

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK
/s/

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, DATED FEBRUARY 28, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

08 Civ. 5511 (BSJ)

JAMES D. HARMON, JR., and JEANNE HARMON,

Plaintiffs,

v.

MARVIN MARKUS, individually and in his official capacity as MEMBER AND CHAIR OF THE NEW YORK CITY RENT GUIDELINES BOARD, CITY OF NEW YORK; DEBORAH VAN AMERONGEN, individually and in her official capacity as COMMISSIONER, DIVISION OF HOUSING & COMMUNITY RENEWAL, STATE OF NEW YORK,

Defendants.

ORDER

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Plaintiffs James D. Harmon, Jr. and Jeanne Harmon ("Plaintiffs") filed this action on June 18, 2008, against

Marvin Markus, individually and in his official capacity as a member and chairperson of the New York City Rent Guidelines Board (hereinafter "City Defendant"), and Deborah Van Amerongen, individually and in her official capacity as Commissioner of the New York State Division of Housing and Community Renewal (hereinafter "State Defendant" and collectively "Defendants"). Plaintiffs allege that the rent stabilization provisions of the New York City Administrative Code are unconstitutional. In October 2008 Defendants both submitted motions to dismiss the Plaintiffs' Complaint, arguing among other things that Plaintiffs' claim is not ripe for adjudication. For the foregoing reasons, Defendants' Motions to Dismiss are GRANTED.

BACKGROUND

Plaintiffs are owners of a five-story brownstone constructed in 1891 in the Upper West Side/Central Park West Historic District. Plaintiffs currently reside on the entire first floor of the building with the rest of the building occupied by renters in six apartments. Of these six apartments, three are subject to rent regulation under New York's Rent Stabilization Law, and three are rented at market rates. Plaintiffs claim that the regulated apartments are currently rented at 59% below market value.

Plaintiffs seek declaratory and injunctive relief declaring the Rent Stabilization Law of 1969 ("RSL"), N.Y. City Admin. Code § 26-501 *et seq*. (McKinney 2000), to be unconstitutional as applied to Plaintiffs and their property,

declaring that the three regulated apartment leases are null and void, and permanently enjoining the Defendants, the City of New York, and the State of New York, from enforcing the RSL to Plaintiffs. (Compl. ¶ 5.) Plaintiffs argue that the RSL violates the Takings Clause of the Fifth Amendment, the Due Process Clause, the Contract Clause of Article I, § 10, the Thirteenth Amendment, and the Equal Protection Clause of the United States Constitution.

Plaintiffs bring this action against two defendants. City Defendant Marvin Markus is a Member and Chair of the New York City Rent Guidelines Board ("RGB"). In 1969, the New York City Council ("City Council") established the RSL which limited the percentage by which rents could be raised for certain apartments "in order to prevent speculative, unwarranted and abnormal increases in rents." Admin. Code § 26-501. The RSL was amended in 1974 by state legislation[1] which authorized the City Council to declare the existence of a housing emergency, after which housing accommodations become subject to rent guidelines boards in each county. For over two decades, the City Council has periodically declared the continued existence of a housing emergency.[2] In New

1. *See* Chapter 576 of the Laws of 1974, which enacted, among other things, the Emergency Tenant Protection Act of 1974 ("ETPA"). The ETPA was designed to facilitate the extension of rent stabilization.

2. Although these statutes have been in effect for an extended period, each of them, by its terms, is of limited duration, and must be periodically reenacted by the City Council. § 26-502 states: "The council hereby finds that a serious public emergency

York City, the Rent Guidelines Board ("RGB") establishes annual guidelines for rent adjustments. Defendant Markus is the RGB's chief administrative officer. Once the RGB establishes its annual guidelines for rent adjustments, "no owner of property ... shall charge or collect any rent in excess of the [regulated rent amount] until such a time as a different legal regulated rent shall be authorized." *Id.* § 26-512.

Plaintiffs also bring this action against State Defendant Deborah Van Amerongen, the Commissioner of New York State Division of Housing and Community Renewal ("DHCR"). The DHCR is responsible for the administration and enforcement of the RSL. Property owners may apply for a hardship exception with the DHCR which would exempt them from the RGB guidelines. *Id.* § 26-511(c). Plaintiffs have made no application for a hardship exception with the DHCR.

LEGAL STANDARD

The Fifth Amendment of the U.S. Constitution prohibits the taking of private property without just compensation. *See* U.S. Const. amend. V. The taking of private property by the government for public use may occur when the government physically occupies or acquires ownership of private property or when the

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continues to exist in the housing of a considerable number of persons within the City of New York and will continue to exist on and after April first, two thousand six and hereby reaffirms and repromulgates the findings and declaration set forth in section 26-501 of this title."

government enacts or enforces laws, regulations or rules that restrict some beneficial use or the full exploitation of private property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). In analyzing a regulatory takings claim, the Court looks at several factors. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Chief among those factors are "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.*; *see also Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537-40 (2005). Thus, to determine whether a regulatory taking has occurred, the Court must analyze to what extent the RSL has deprived the Plaintiffs of economically viable uses of their property. *See Federal Home Loan Mortgage Corp. v. DHCR*, 83 F.3d 45, 48 (2d Cir. 1996).

Ripeness is a judicially-created doctrine designed to avoid premature review or adjudication of administrative actions. *See de St. Aubin v. Flacke*, 68 N.Y.2d 66, 75 (1986). The rationale for the doctrine is "to conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems." 4 Davis, *Administrative Law*, § 25:1, at 350 (2d ed. 1983). The ripeness requirement also ensures that a dispute satisfies the case and controversy requirement of Article III of the U.S. Constitution by preventing a federal court from entangling itself in disagreements where the injury is merely speculative and may never occur, depending on the final administrative resolution. *See Abbott Laboratories et al. v. Gardner*, 387 U.S. 136, 148 (1967); *Marchi v. Board of Coop. Educ.*

Servs., 173 F.3d 469, 478 (2d Cir. 1999) (stating ripeness is a "constitutional prerequisite of jurisdiction by federal courts.").

Under the doctrine of ripeness or finality, judicial review of an administrative determination may not be sought until the decision maker has come to "a definitive position" which has caused "actual, concrete injury." *Dozier v. New York City*, 130 A.D.2d 128, 133 (2d Dep't 1987). Thus, the focus of a ripeness inquiry is on the "finality and effect of the challenged action and whether harm from it might be [subsequently] prevented or cured by administrative means available to the plaintiff." *Id.* at 33 (quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192-93 (1985) [hereinafter *Williamson*]).[3] Accordingly, a "controversy cannot be ripe [for judicial review] if the claimed harm may be prevented or significantly ameliorated by further administrative action ...." *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 520, *cert. denied*, 479 U.S. 985 (1986).

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3. The requirement that an administrative action be ripe or final before it may be judicially reviewed is "conceptually distinct" from the requirement that administrative remedies be exhausted. *Williamson*, at 192-93. "While the policies underlying the two concepts often overlap," the ripeness or "finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Id.*

Appendix B

DISCUSSION

A. Plaintiffs' Takings Claim

1. Plaintiff's 5th Amendment Claim Is Not Ripe For Judicial Determination

As alleged in the Complaint, Plaintiffs are seeking a judgment declaring the RSL "unconstitutional as applied to" them. (Compl. ¶ 4.) Specifically, Plaintiffs argue that the RSL violates their constitutional rights under the Fifth Amendment, the Due Process Clause, the Contract Clause of Article I, § 10, the Thirteenth Amendment, and the Equal Protection Clause. However, Plaintiffs have not applied to the DHCR for a rent adjustment based on any hardship, as set forth in the RSL. *See* 9 NYCRR § 2522.4(b)-(c). Therefore, this action is not ripe for judicial review.

Facial challenges to regulations are generally considered "ripe the moment the challenged regulation or ordinance is passed." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736, n.10 (1997). However, Plaintiffs specifically allege that this case is an "as applied" challenge to the RSL. (Compl. ¶¶ 4-5, *passim*). Indeed, Plaintiffs had to do so in response to the well-settled law that a facial taking challenge to rent stabilization laws will not lie as of right. *See Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Hodel*, 452 U.S. at 294-95 (1981); *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988); *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 596-97 (2d Cir. 1993).

Appendix B

The ripeness doctrine bars land use challenges under the Takings Clause, as well as equal protection and due process claims, which are not based on a final decision. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-90 (1985); *Dougherty v. Town of North Hempstead*, 282 F.3d 83 (2d Cir. 2002). In *Williamson*, the Supreme Court established a two-prong test for analyzing ripeness claims asserted under the Fifth Amendment's Takings Clause. 473 U.S. at 194-95. First, the Court held that a takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. Second, the Court held that a takings claim is not ripe until the landowner has availed itself of the state's procedures for obtaining just compensation. *Id.* at 195.

Here, Plaintiffs fail to meet the first *Williamson* prong because Plaintiffs have not applied to the DHCR for any of the hardship exceptions permitted by the RSL statute. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981) ("[T]he constitutionality of statutes ought not be decided except in an actual factual setting."); *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 596-97 (2d Cir. 1993) (dismissing association's takings challenge to RSL on standing grounds based on fact that Court would have to engage in *ad hoc* factual inquiry for each landlord).[4] The absence

4. Further, in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, the Supreme Court rejected a claim that the Surface Mining Control and Reclamation Act of 1977 constituted a taking because there was no indication in the record that the plaintiffs had availed themselves of the opportunities provided

of a final determination - or any determination for that matter - by the DHCR regarding the appropriateness of the hardship exceptions of the RSL to Plaintiffs, prevents a determination of the constitutional harm incurred. "[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186-88.

Plaintiffs fail to meet the second prong of the *Williamson* test because they have not applied to New York State Court seeking just compensation for the

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by the Act to obtain administrative relief by requesting either a variance or a waiver from the restrictions set forth in that Act. 452 U.S. 264 (1981). The Court concluded that if the plaintiffs were to seek such administrative relief "a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution." *Id.* at 297. Similarly, in *Agins v. Tiburon*, the Supreme Court held that a challenge to the application of a zoning ordinance was not ripe because the property owners had not yet submitted a plan for development of their property. 447 U.S. 255, 260 (1980). Also, in *Penn Central Transp. Co. v. New York City*, the Supreme Court declined to find that the application of the New York City Landmarks Preservation Law to Grand Central Terminal effected a taking because the property owners had not sought approval for any plan other than the one disapproved, and it was thus unclear whether the New York City Landmarks Commission "would deny approval for all uses that would enable the plaintiffs to derive economic benefit from the property." 438 U.S. 104, 136-37 (1978).

alleged taking. "A landowner 'has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State'." *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 379 (2d Cir. 1995) (citing *Williamson*, 473 U.S. at 195). "Thus, before a plaintiff may assert a federal takings claim, he must first seek compensation from the state if the state has a 'reasonable, certain and adequate provision for obtaining compensation.'" *Villager Pond, Inc.*, 56 F.3d at 379-80 (citing *Williamson*, 473 U.S. at 194). "Even in physical takings cases, compensation must first be sought from the state if adequate procedures are available." *Villager Pond, Inc.*, 56 F.3d at 380. Here, Plaintiffs have failed to seek compensation in state court for the alleged taking. As such, Plaintiffs' claims are not ripe.[5]

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5. In a recent submission, Plaintiffs notified the Court of a recent Ninth Circuit Court of Appeals decision Plaintiffs feel is relevant. *Guggenheim v. City of Goleta*, 582 F.3d 996 (9th Cir. Sept. 28, 2009). The Court finds this case unpersuasive. Notwithstanding the non-precedential effect of a Ninth Circuit decision on this Court and the fact that it directly conflicts with decisions of the Second Circuit already cited above, the Ninth Circuit in *Guggenheim* found that the plaintiffs' takings claim was ripe for review on the merits because the defendant City of Goleta "forfeited its claim that the case was not ripe for decision" and the parties had already "litigated and settled several state law issues relevant to the alleged taking" in state court "several times over." *Guggenheim*, 582 F.3d at 1005, 1011-12; *see also Thunderbird Hotels, LLC v. City of Portland*, 2009 U.S. Dist. LEXIS 103371, **10-11 (D. Ore. Nov. 5, 2009) (distinguishing *Guggenheim*). Here, Defendants have made no such concessions or forfeitures.

2. Plaintiffs' Other Takings Arguments Fail to Satisfy Ripeness

Plaintiffs cite three main reasons as to why this Court should ignore the ripeness deficiency: (1) Plaintiffs allege that the RSL constitutes a *per* se taking, (2) Plaintiffs request injunctive relief rather than compensation, and (3) Plaintiffs argue that they are an exception to the ripeness doctrine. These arguments fail to establish that their takings claim is ripe.

First, Plaintiffs allege that the RSL constitutes a "taking by physical occupation" and not a regulatory taking, a claim articulated for the first time in Plaintiffs' opposition papers. Plaintiffs claim that the RSL compels Plaintiffs to permit three tenants to reside in their building in a way which conveys to the tenants by operation of law many of the attributes of fee ownership, including succession rights. This allegedly constitutes a taking by physical occupation and the RSL is thus a *per se* taking under the *Loretto* standard and "qualitatively more intrusive than perhaps any other category of property regulation." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

Plaintiffs do not meet the standard for a *per se* taking. In *Loretto*, the Supreme Court found that a regulation requiring a property owner to permit a cable company to install its cable facilities upon his property amounted to a permanent physical occupation of the plaintiff's property. The Court held that regardless of the economic impact on the property owner, when government action

produces or allows such an invasion, a taking occurs and just compensation must be provided to the owner. However, the Court's holding in *Loretto* does not dictate that the regulations challenged here effect a taking. The RSL's mandatory lease and service provisions are not comparable to the statute involved in *Loretto*. Indeed, the Supreme Court in *Loretto* emphasized that its decision did not affect the government's power to legislate with respect to housing conditions and landlord-tenant relations. *Id.* at 440. Moreover, a number of courts have expressly held that land use and housing laws which restrict the owner's use or control of his property or even place affirmative obligations on property use do not amount to the type of physical intrusion found in *Loretto*. *See Yee v. City of Escondido*, 503 U.S. 519, 527-28 (1992) (rejecting petitioners' claims that the rent control laws effected a physical taking of their property); *Penn Central Transp. Co. v. City of New York*, 438 U.S. at 135; *Nasca v. Town of Brookhaven*, 2008 U.S. Dist. LEXIS 73644, **22-28 (E.D.N.Y. Sept. 28, 2008) ("The Fifth Amendment is deemed to allow state and local governments broad power to regulate housing conditions without paying compensation for all resulting economic injuries."). Here, Plaintiffs have suffered no physical occupation of their property, despite their claims to the contrary.[6]

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6. Further, a regulatory action will be deemed a *per se* taking if the regulations completely deprive an owner of "all economically beneficial use" of their property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). As Plaintiffs allege that they receive market-rate rents for three of the apartments in the subject premises (Compl. ¶ 27), and still collect rents for three other apartments on the premises (Comp. ¶¶ 27-43), Plaintiffs clearly do retain some economically viable use of their property.

Second, Plaintiffs argue that because they are seeking injunctive relief and not compensation that the *Williamson* ripeness standard (requiring a landowner to first seek compensation through State procedures) does not apply. This argument is premised upon the flawed notion that an injunction removing Plaintiffs' property from the RSL is appropriate in a takings claim, particularly in the case of an alleged taking that has already occurred as here. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking *without just compensation*." *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297, n.40 (1981) (emphasis added). The government may effect a "taking" of property, so long as it provides "just compensation" to do so.[7] Plaintiffs' request for injunctive relief does not make the Supreme Court's precedent in *Williamson* inapplicable to them.

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7. The only case Plaintiffs rely on in support of their injunction argument is *Goldstein v. Pataki*, 2007 U.S. Dist. LEXIS 44491 (E.D.N.Y. Feb. 23, 2007). The Court finds this case inapposite to the present action. First, the parties in *Goldstein* agreed that the *Williamson* framework was inapplicable because the plaintiffs there sought relief pursuant to the Fifth Amendment's "Public Use Clause" with respect to the government eminent domain procedures, which is not at issue herein. *Id.* at *34. Second, in *Goldstein*, the Court relied on the fact that the taking had not yet occurred. *Id.* at **35-36. Here, Plaintiffs are complaining about an alleged taking that occurred beginning 40 years ago. Third, the Court in *Goldstein* concluded that the matter was ripe for review based on the highly specific "unique facts" therein. *Id.* Moreover, when the Second Circuit reviewed the case on appeal, it noted that the defendants conceded the ripeness issue because the condemnation was much further along at the time of the appeal than it was at the time the action was commenced. *Goldstein v. Pataki*, 516 F.3d 50, 54, n.2 (2d Cir. 2008).

Third, Plaintiffs cannot demonstrate that the exceptions to the ripeness doctrine apply to them. The ripeness doctrine contains exceptions which permit early review when (a) "the legal question is 'fit' for resolution and delay means hardship," or (b) when exhaustion would prove "futile." *Shalala v. IL Council on Long Term Care*, 529 U.S. 1, 13 (2000) (citations omitted). Plaintiff has shown neither. Plaintiffs claim that appealing to the DHCR would be a hardship "by causing them the expense and effort of participating in a complex administrative process which cannot compensate them ... especially true considering the plaintiffs' ages of 65 and 64," and the tenants' similar ages. (Pl. Opp. Memo. at 25.) Such time and expense to wade through a complex process is a consequence of being in a regulated industry, and Plaintiffs' ages do not show any particular hardship deserving of exception. Further, Plaintiffs argue that an application for exception before the DHCR would be "futile." However, they do not claim that the DHCR lacks the power to grant them a hardship exception or that the DHCR "has dug in its heels and made clear that all such applications will be denied." *Southview Assoc. Ltd. v. Bongartz*, 980 F.2d 84, 98-99 (2d Cir. 1992). Plaintiffs merely believe that their hardship application will likely not prevail. That Plaintiffs may not ultimately obtain any relief by proceeding through the proscribed administrative process does not render the requirement that they apply for hardship exemptions to the DHCR as "futile."[8]

8. While DHCR cannot provide Plaintiffs with the equitable relief that they seek herein, a hardship exemption increasing the amount of rents that Plaintiffs may charge their rent-regulated tenants would be directly relevant to reviewing Plaintiffs' "as

B. Plaintiffs' Due Process and Equal Protection Claims Are Also Unripe

Plaintiffs also put forth equal protection, and substantive and procedural due process claims. "The ripeness requirement of *Williamson*, although announced in a takings context, has been extended to equal protection and due process claims asserted in the context of land use challenges." *Dougherty v. Town of North Hempstead*, 282 F.3d 83, 89-90 (2d Cir. 2002). Plaintiffs' equal protection and both due process claims thus fail due to ripeness as well.

C. Plaintiffs' Other Claims Fail as a Matter of Law

Plaintiffs make two other claims: that the RSL is unconstitutional because it violates and deprives Plaintiffs of their rights under (1) the Contract Clause of Article I, § 10 of the Constitution, and (2) the Thirteenth Amendment. Both of these claims fail as a matter of law.

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applied" takings claim - i.e., the economic impact of the RSL "as applied" to Plaintiffs' property. *See, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537-40 (2005); *Federal Home Loan Mortgage Corp. v. DHCR*, 83 F.3d 45, 48 (2d Cir. 1996). Because Plaintiffs couch their takings challenge as an "as applied" challenge, in the absence of a final determination by DHCR or by the state court that Plaintiffs are not entitled to compensation, this Court cannot determine whether the Plaintiffs have suffered any constitutional harm. *See Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 596-97 (2d Cir. 1993).

Appendix B

Plaintiffs' Complaint alleges that the RSL violates the Contracts Clause of the Constitution. Article I, § 10 provides: "No State shall ... pass any ... Law impairing the Obligation of Contracts . . . . " To state a claim for violation of the Contract Clause, a plaintiff must allege facts sufficient to demonstrate that a state law has "operated as a substantial impairment of a contractual relationship." *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992) (citation omitted). One component to this inquiry is "whether a change in law impairs that contractual relationship." *Id.* Here, there was no change in the law impairing any contractual relationship that Plaintiffs were parties to. *See Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983). Plaintiffs first took ownership of the subject premises in 2005, long after the RSL was in effect and applicable to the building. Such an argument could only be asserted by the prior owners of the premises who were parties to existing contracts at the time the RSL was enacted in 1969. Plaintiffs have not shown that a change in law impaired their contractual relationships with the rent-stabilized tenants.[9] Plaintiffs' Contract Clause claim fails as a matter of law.

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9. In their opposition papers, Plaintiffs argue that the Contract Clause argument should survive because the Legislature's periodic extension of rent regulation served as a change in the law. However, it is well-settled that the RSL's extensions of rent regulation do not create a Contract Clause problem. The regular renewals of the RSL are fully predictable and were authorized by the overarching scheme of the Emergency Tenant Protection Act of 1974 and the local laws comprising the RSL. Thus, Plaintiffs cannot claim that each extension of the RSL impaired existing contracts. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978); *Freeport Randall Co. v. Herman*, 56 N.Y.2d 832 (1982).

Plaintiffs' Complaint also alleges that the RSL has forced Plaintiffs into involuntary servitude in violation of the Thirteenth Amendment by forcing Plaintiffs to provide repairs, maintenance, utilities, and janitorial services to the regulated tenants. The Thirteenth Amendment commands: "Neither slavery nor involuntary servitude ... shall exist within the United States." New York courts have found Thirteenth Amendment challenges to rent control provisions to be "frivolous." *Dawson v. Higgins*, 197 A.D.2d 127, 138 (1st Dep't 1994), *appeal dismissed* 83 N.Y.2d 996, *cert. denied*, *sub nom.*, *Dawson v. Halperin*, 513 U.S. 1077 (1995). In *Dawson*, the court noted that the plaintiffs purchased their property "knowing that it was occupied by rent-controlled tenants and that its use was regulated." *Id.* at 138. Moreover, the Court observed that "Plaintiffs need only sell their building to escape the minimal restrictions placed upon them by the challenged provisions." *Id.* Here, too, Plaintiffs took possession of the subject premises knowing that it was subject to the provisions of the RSL. (*See* Compl. ¶ 6, 24.) Indeed, like the plaintiffs in *Dawson*, Plaintiffs can easily escape the rent stabilization provisions on certain apartments in their building by selling it. Plaintiffs' Thirteenth Amendment claim fails as a matter of law.

D. Request to Amend Complaint and Add Defendants

On March 4, 2009, Plaintiffs moved to add the City of New York as a party defendant in this action, amend the complaint, submit a sur-reply, and permit oral argument on Defendants' pending motions to dismiss. On July 1, 2009, Plaintiffs further requested leave to serve a supplemental pleading setting forth events which have happened since

the filing of the Complaint in this action, namely the City Council's 2009 renewal of Local Law 3 which extended the RSL another 3 years. Plaintiffs entered these motions respectively three and seven months after the motions to dismiss were fully briefed and submitted.

Rule 15(a) of the Federal Rules of Civil Procedure directs that leave to amend a pleading "shall be freely given." *State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981). However, a court may deny an amendment to a pleading as futile if the newly added claim "would be subject to immediate dismissal." *Lavaggi v. The Republic of Argentina*, 2008 U.S. Dist. LEXIS 76422, at *4 (S.D.N.Y. Sept. 30, 2008) (quoting *Jones v. New York State Div. of Military & Naval Affairs*, 166 F.3d 45, 55 (2d Cir. 1999). The Court has reviewed Plaintiffs' proposed Amended Complaint as well as their other papers. The Court finds that adding a party defendant, amending the complaint, serving a supplemental pleading, and submitting a sur-reply all would be futile as none of these actions would remedy the ripeness or failure to state a claim deficiencies as detailed above. Such motions are therefore DENIED.

Appendix B

CONCLUSION

Defendants' Motions to Dismiss (Dkt. # 12 and #19) are GRANTED. Plaintiffs' Motion to Amend the Complaint (Dkt. # 28), Request for Oral Argument (Dkt. # 28), and Motion to Permit Supplemental Pleading (Dkt. #34) are DENIED. The Clerk of the Court is directed to close this case.

SO ORDERED:

/s/_____
BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
February 28, 2010

APPENDIX C — NEW YORK CITY LAWS AND ADMINISTRATION CODES

LOCAL LAWS OF THE CITY OF NEW YORK FOR THE YEAR 1969

NO. 16

A LOCAL LAW

To amend the administrative code of the city of New York, in relation to stabilization of rents in certain housing accommodations presently exempt from residential rent control by voluntary self-regulation by industry and providing for the establishment of a rent guidelines board, the creation of industry stabilization associations, the adoption of a code for stabilization of rents, the establishment of a conciliation and appeals board and other matters in relation thereto.

Be it enacted by the Council as follows:

Section 1. Chapter fifty-one of the administrative code of the city of New York is hereby amended by adding thereto a new title, to be title YY, to read as follows:

TITLE YY

Rent Stabilization

Appendix C

§ YY51-1.0 **Findings and declaration of emergency.** The Council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York which emergency was created by war, the effects of war and the aftermath of hostilities; that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist an acute shortage of dwellings; that unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; that to prevent such perils to health, safety and welfare, preventive action by the Council continues to be imperative; that such action is necessary in order to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare; that the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for such emergency; and that the policy herein expressed is now administered locally within the city of New York by an agency of the city itself, pursuant to the authority conferred by chapter

twenty-one of the laws of nineteen hundred sixty-two.

The Council further finds that many owners of housing accommodations in multiple dwellings not subject to the provisions of the city rent and rehabilitation law, enacted pursuant to said enabling authority, either because they have been constructed since nineteen hundred forty-seven or because they were decontrolled due to monthly rental of two hundred fifty dollars or more or for other reasons are demanding exorbitant and unconscionable rent increases as a result of the aforesaid emergency which has led to a continuing restriction of availab1e housing, as evidenced by the 1968 vacancy survey by the United States Bureau of the Census; that such increases are being exacted under stress of prevailing conditions of inflation and of an acute housing shortage resulting from a sharp decline in private residential construction brought about by a combination of local and national factors; that such increases and demands are causing severe hardship to tenants of such accommodations and are uprooting long-time city residents from their communities; that unless such accommodations are subjected to reasonable rent and eviction limitations, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; and that such conditions constitute a grave emergency.

§ YY51-2.0 **Short title.** This law may be cited as the rent stabilization law of nineteen hundred sixty-nine.

§ YY51-3.0 **Application.** This law shall apply to Class A multiple dwellings not owned as a cooperative or as a condominium, containing six or more dwelling units which:

a. were completed after February first, nineteen hundred forty-seven, except dwelling units (1) owned or leased by, or financed by loans from, a public agency or public benefit corporation, (2) subject to rent regulation under the private housing finance law or any other state law, (3) aided by government insurance under any provision of the National Housing Act, to the extent this loca1 law or any regulation or order issued thereunder is inconsistent therewith, or (4) located in a building for which a certificate of occupancy is obtained after March tenth, nineteen hundred sixty-nine; or (5) any class A multiple dwelling which on June first, nineteen hundred sixty-eight was and still is commonly regarded as a hotel, transient hotel or residential hotel, and which customarily provides hotel service such as maid service, furnishing and laundering of linen, telephone and bell boy service, secretarial or desk service and use and upkeep of furniture and fixtures; or

b. were decontrolled by the city rent agency pursuant to section Y51-12.0 of the city rent and rehabilitation law; or

c. are exempt from control by virtue of items (1), (2), (6) or (7) of subparagraph (i) of paragraph 2 of subdivision e of section Y51-3.0 of such law.

Appendix C

§ YY51-4.0 **Stabilization of rents.** a. Dwelling units covered by this law as provided in section Y51-3.0 shall be deemed to be housing accommodations subject to control under the provisions of title Y of the administrative code notwithstanding any provision of such title to the contrary, unless the owner of such units is a member in good standing of any association registered with the housing and development administration pursuant to YY51-6.0. For the purposes of this law a "member in good standing" of such an association shall mean an owner of a housing accommodation subject to this law who joined such an association within thirty days of its registration with the housing and development administration or within thirty days after becoming such owner, whichever is later, provided such accommodations were not under actual control of the city rent agency when he became the owner thereof, and further provided such owner complies with prescribed levels of fair rent increases established under this law, does not violate any order of the conciliation and appeals board and is not found by the conciliation and appeals board to have harassed a tenant to obtain vacancy of his housing accommodation.

b. In the event that such dwelling units shall be subject to control under the provision of such title as provided in subdivision a, the city rent agency shall establish the maximum rent therefor on the basis of the rent charged on May thirty-first, nineteen hundred sixty-eight.

c. The housing and development administration shall have power to promulgate such rules and regulations as it may deem necessary for the effective implementation of this law.

Appendix C

§ YY51-5.0 **Rent guidelines board.** a. There shall be a rent guidelines board which shall consist of nine members, at least six of whom shall have had five years experience either in finance, economics or housing.

b. All of the members of the board shall be appointed by the mayor, three shall be appointed for a term of two years; three for a term of three years and three until April first, nineteen hundred and seventy-four. Their successors shall be appointed for like terms unless they shall extend beyond the date of April first, nineteen hundred seventy-four, in which event they shall be appointed to serve only until such date. The mayor shall designate one of the original members appointed to serve until April first, nineteen hundred seventy-four to act as chairman of the board during the pleasure of the mayor. No person may be appointed as a member of the board who owns real estate which is covered by this law as provided in section YY51-3.0 or who is an officer of any tenant's organization.

c. Such members shall be compensated on a per diem basis of one hundred dollars per day for no more than ten days a year except that the chairman shall be compensated at one hundred twenty-five dollars a day for no more than fifteen days a year, and shall be provided staff assistance by the housing and development administration.

d. The rent guidelines board shall establish a guideline for rent increases upon renewal leases or new tenancy to dwelling units covered by this law at a level of fair rent increase over the rental charged on May thirty-first, nineteen hundred sixty-eight, but not in excess of ten per cent for a two year lease and fifteen per cent for a three year

lease over the rental charged on May thirty-first, nineteen hundred sixty-eight except as hereinafter provided with respect to a new tenancy. On Ju1y first, nineteen hundred seventy and once annually each succeeding year the rent guidelines board shall cause a review to be made of the level of fair rent increase provided under this section and may establish a different level of fair rent increase as a guideline for rent increases upon renewal of leases or any new tenancy to dwelling units covered by this law. Such levels of fair rent increase shall be filed with the city clerk and published in the City Record upon adoption by the rent guidelines board. In establishing such levels of fair rent increase the rent guidelines board shall consider, among other things,

> (1) the economic condition of the residential real estate industry in the city of New York, including such factors as the prevailing and projected (a) real estate taxes and sewer and water rates, (b) gross operating and maintenance costs (including insurance rates, cost of fuel and labor costs), (c) costs and availability of financing (including effective rates of interest) and (d) overall supply of housing accommodations and overall vacancy rates:
>
> (2) relevant data from the current and projected cost-of-living indices for the New York metropolitan area;
>
> (3) such data as may be available from the conciliation and appeals board, hereinafter

provided for, and such other information and data as may be made available to it. All agencies of the city of New York shall make available to the rent guidelines board information requested by it for purposes consistent with its responsibilities under this law.

e. Any housing accommodation covered by this law owned by a member in good standing of an association registered with the housing and development administration pursuant to section YY51-6.0 which becomes vacant for any reason, other than harassment of the prior tenant, may be offered for rental at any price notwithstanding any guideline level established by the guideline board for renewal leases, provided the offering price does not exceed the rental then authorized by the guideline board for such dwelling unit plus five per cent for a new lease not exceeding two years and a further five per cent for a new lease having a minimum term of three years, until July first, nineteen hundred seventy, at which time the guidelines board shall determine what the rental for a vacancy shall be.

§YY51-6.0 **Real estate industry stabilization association.** A real estate industry stabilization association having as members the owners of no less than forty per cent of the dwelling units covered by this law may register with the housing and development administration under the terms and for the purposes herein provided by filing with such administration copies of its articles of incorporation or association, copies of its rules, and such other information as the administration may require within sixty days of the effective date of this law.

b. An association shall not be accepted for registration hereunder unless it appears to the housing and development administration that (1) consistent with the provisions of section YY51-4.0, membership is open to any owner of a multiple dwelling having dwelling units covered by this law; (2) the association has adopted a code for stabilization of rents covering related terms and conditions of occupancy which is approved by such administration; (3) the association has established a conciliation and appeals board consisting of four members representing the public, four members representing the real estate industry and an impartial chairman, all to be appointed by the mayor with the approval of the council, to serve until April first, nineteen hundred seventy-four, to receive and act upon complaints from tenants and upon appeals from owners claiming hardship under the levels for fair rent increases adopted under this law; (4) each member is required to agree in writing to comply with the code and to abide by orders of the conciliation and appeals board; and (5) the association is of such character that it will be able to carry out the purposes of this law.

c. A code shall not be approved hereunder unless it appears to the housing and development administration that such code (1) is designed to provide safeguards against unreasonably high rent increases and, in general, to protect tenants and the public interest and not to impose any industry wide schedule of rents or minimum rentals; (2) binds the members of the association not to exceed the level of fair rent increases under any lease renewal or new tenancy bearing an effective date on or after June first, nineteen hundred sixty-eight for dwelling units covered

by this law, provided that nothing herein shall supersede or modify the rent increase permitted by the city rent agency following decontrol pursuant to section Y51-12.0 of the city rent and rehabilitation law and the regulations adopted thereunder; (3) provide for a cash refund or a credit, to be applied against future rent, in the amount of the excess, if any, of rent paid since January first, nineteen hundred sixty-nine over the permitted level of fair rent increases; (4) includes provisions requiring members to grant a two- or a three-year lease at the option of the tenant and which also requires members to grant a one-year renewal lease upon the request of a tenant at such fair rent levels provided for by the rent guidelines board except where a mortgage or mortgage commitment existing as of April first, nineteen hundred sixty-nine, provides that the mortgagor shall not grant a one-year lease; (5) includes guidelines with respect to such additional rent and related matters as, for example, security deposits, advance rental payments, the use of escalator clauses in leases and provision for increase in rentals for garages and other ancillary facilities, so as to insure that the level of fair rent increase established under this law will not be subverted and made ineffective; (6) provides criteria whereby the conciliation and appeals board may act upon applications by owners for increases in excess of the level of fair rent increase established under this law provided, however, that such criteria shall provide (a) as to hardship applications, for a finding that the level of fair rent increase is not sufficient to enable the owner to maintain approximately the same ratio between operating expenses (which shall include taxes and labor cost, but which may not include debt service, financing costs nor management

fees) and gross rents which prevailed on the average over the immediately preceding five-year period, or for the entire life of the building if less than five years, except that notwithstanding the foregoing, upon the owner's application made within one year after the effective date of this law and the board may find that the level of fair rent is not sufficient to enable the owner to pay out of gross rents, the operating expenses of the building and also, interest and amortization on existing indebtedness to a lending institution, an insurance company, a retirement fund or welfare fund which is operated under the supervision of the banking or insurance laws of the State of New York or of the United States; and (b) as to completed building-wide major capital improvements, for a finding that such improvements are deemed depreciable under the Internal Revenue Code and that the cost is to be amortized over a five-year period, based upon cash purchase price exclusive of interest or service charges; (7) establishes a fair and consistent formula for allocation of rental adjustment to be made upon granting of an increase by the conciliation and appeals board; (8) requires the members of the association to maintain all services furnished by them on May thirty-first, nineteen hundred sixty-eight, in connection with the leasing of the dwelling units covered by this law; (9) provides that an owner shall not refuse to renew a lease except where he intends in good faith to demolish the building and has obtained a permit therefor from the department of buildings or where he notifies the housing and development administration and the tenant that he intends to convert the building to cooperative or condominium ownership and has filed an offering plan therefor with the attorney general in accordance with the provisions of the general business law and provided that

the tenants in occupancy shall have the exclusive right to purchase their dwelling units for a period of ninety days from the date of mailing of the offering plan to such tenants, and at least fifteen per cent of them agree to purchase cooperative shares or title to their dwelling units, all non-purchasing tenants in occupancy shall have the right to continue in possession of their dwelling units at the then rental for a period of at least one year from the date of the aforesaid notification and provided further that any dwelling unit which shall become vacant prior to the transfer of the property to the cooperative corporation or the condominium owner, or a declaration of abandonment of the offering plan, shall not be rented except at a rental which would have been authorized had the vacating tenant remained in possession, and on specified grounds set forth in the code approved by the housing and development administration consistent with the purpose of this law; (10) specifically provides that if a member fails to comply with any level of fair rent increase established under this law or any order of the conciliation and appeals board or is found by the conciliation and appeals board to have harassed a tenant to obtain vacancy of his housing accommodation, he shall not be a member in good standing of the association; (11) for any violation of the articles, code or other rule or regulation of the association, other than those specified in subparagraph (10) immediately preceding, members shall be appropriately disciplined by such sanction as fine or censure; and (12) provides for the imposition of dues upon the association's members solely for the purpose of defraying the reasonable expenses of administration and authorizing the equitable allocation of dues among the association's members.

d. The housing and development administration may, after notice and opportunity for hearing, suspend the registration of an association if it finds that the articles, code, rules or other conduct thereof do not conform to the requirements of this law and any such suspension shall remain in effect until such administration issues an order determining that such articles, rules, code or other conduct have been modified to conform with such requirements. For the purposes of paragraph a of section YY5.1-4.0 of this law, the members in good standing of the association shall be deemed to be members in good standing of an association registered with the housing and development administration during and only during, the first sixty days of such period of suspension.

§ YY51-7.0. **Separability clause.** If any provision of this law or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of this law and the applicability of such provision to other persons or circumstances shall not be affected thereby.

§ 2. This local law shall take effect immediately and shall expire on April first, nineteen hundred seventy-four unless rent control shall sooner terminate as provided in subdivision three of section one of the local emergency housing rent control law.

Appendix C

THE CITY OF NEW YORK, OFFICE OF THE CITY CLERK, S.S.:

I hereby certify that the foregoing is a true copy of a local law of The City of New York, passed by the Council on April 24, 1969, and approved by the Mayor on May 6, 1969.

HERMAN KATZ, City Clerk, Clerk of the Council.

CERTIFICATION PURSUANT TO
MUNICIPAL HOME RULE LAW SECTION 27

Pursuant to the provisions of Municipal Home Rule Law Section 27, I hereby certify that the enclosed local law (Local Law 16 of 1969, Council Int. No. 828, Print Nos. 974-980-985) contains the correct text and:

Received the following vote at the meeting of the New York City Council on April 24, 1969: Thirty-five affirmative votes and one negative vote.

Was approved by the Mayor on May 6, 1969.

Was returned to the City Clerk on May 6, 1969.

J. LEE RANKIN, Corporation Counsel.

Appendix C

LOCAL LAWS OF THE CITY OF NEW YORK FOR THE YEAR 2006

NO. 3

Introduced by Council Members Mendez, Dilan, The Speaker (Council Member Quinn), Sears, Comrie, Gennaro, Garodnick, Lappin, Palma, Foster, Liu, Avella, Martinez, Weprin, Vacca, Vann, Katz, Clarke, Mark-Viverito, Brewer, Monserrate, Dickens, Koppell, Gentile, Nelson, Seabrook, Sanders, Addabbo Jr., Fidler, Gonzalez, Jackson, Yassky, Baez, White, Arroyo, Reyna and the Public Advocate (Ms. Gotbaum).

A LOCAL LAW

To amend the administrative code of the City of New York, in relation to extending the rent stabilization laws.

Be it enacted by the Council as follows:

Section 1. Section 26-502 of the administrative code of the city of New York, as amended by local law number 21 for the year 2003, is amended to read as follows:

§26-502 Additional findings and declaration of emergency. The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the City of New York and will continue to exist *on and* after April first, [two thousand three] *two thousand six* and hereby

reaffirms and repromulgates the findings and declaration set forth in section 26-501 of this title.

§2. Section 26-520 of the administrative code of the city of New York, as amended by local law number 12 for the year 2000, is amended to read as follows:

§26-520 Expiration date. This chapter shall expire on April first, [two thousand six] *two thousand nine* unless rent control shall sooner terminate as provided in subdivision three of section one of the local emergency housing rent control law.

§3. This local law shall take effect immediately upon its enactment into law.

THE CITY OF NEW YORK, OFFICE OF THE CITY CLERK, s.s.:

I hereby certify that the foregoing is a true copy of a local law of the City of New York, passed by the Council on March 22, 2006 and approved by the Mayor on March 29, 2006.

VICTOR L. ROBLES, City Clerk of the Council

CERTIFICATION PURSUANT TO MUNICIPAL HOME RULE LAW §27

Pursuant to the provisions of Municipal Home Rule Law §27, I hereby certify that the enclosed Local Law (Local Law 3 of 2006, Council Int. No. 118) contains the correct text and:

Appendix C

Received the following vote at the meeting of the New York City Council on March 22, 2006: 48 for, 2 against, 0 not voting.

Was signed by the Mayor on March 29, 2006.

Was returned to the City Clerk on March 29, 2006.

JEFFREY D. FRIEDLANDER,
Acting Corporation Counsel

Appendix C

LOCAL LAWS OF THE CITY OF NEW YORK FOR THE YEAR 2009

NO. 23

Introduced by Council Member Gonzalez, The Speaker (Council Member Quinn), and Council Members Brewer, Dickens, Fidler, Garodnick, Gerson, Jackson, James, Koppell, Liu, Mealy, Nelson, Palma, Recchia Jr., Sears, Weprin, White Jr., Lappin, Mendez, Baez, Vann, Avella, Dilan, Martinez, Comrie, Vacca, Reyna, Eugene and Gennaro

A LOCAL LAW

To amend the administrative code of the City of New York, in relation to extending the rent stabilization laws.

Be it enacted by the Council as follows:

Section 1. Section 26-502 of the administrative code of the city of New York, as amended by local law number three for the year 2006, is amended to read as follows:

§26-502 Additional findings and declaration of emergency. The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the City of New York and will continue to exist on and after April first, [two thousand six] *two thousand nine* and hereby reaffirms and repromulgates the findings and declaration set forth in section 26-501 of this title.

§2. Section 26-520 of the administrative code of the city of New York, as amended by local law number three for the year 2006, is amended to read as follows:

§26-520 Expiration date. This chapter shall expire on April first, [two thousand nine] *two thousand twelve* unless rent control shall sooner terminate as provided in subdivision three of section one of the local emergency housing rent control law.

§3. This local law shall take effect immediately upon its enactment into law.

The City of New York, Office of the City Clerk, s.s.:

I hereby certify that the foregoing is a true copy of a local law of The City of New York, passed by the Council on March 24, 2009 and approved by the Mayor on March 30, 2009.

Michael McSweeney, City Clerk
Clerk of the Council.

CERTIFICATION PURSUANT TO MUNICIPAL HOME RULE LAW § 27

Pursuant to the provisions of Municipal Home Rule Law § 27, I hereby certify that the enclosed Local Law (Local Law 023 of 2009, Council Int. No. 923) contains the correct text and:

Appendix C

Received the following vote at the meeting of the New York City Council on March 24, 2009: 48 For, 2 Against, 0 Not Voting

Was signed by the Mayor on March 30, 2009

Was returned to the City Clerk on March 30, 2009.

Jeffrey D. Friedlander,
Acting Corporation Counsel.

Appendix C

NEW YORK CITY ADMINISTRATIVE CODES
§§ 26-501 – 26-503

New York City Administrative Code –
Title 26
Housing and Building

§ **26-501 Findings and declaration of emergency.** The council hereby finds:

a. that a serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York and will continue to exist after April first, nineteen hundred seventy-four;

b. that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist an acute shortage of dwellings which creates a special hardship to persons and families occupying rental housing;

c. that the legislation enacted in nineteen hundred seventy-one by the state of New York, removing controls on housing accommodations as they become vacant, has resulted in sharp increases in rent levels in many instances;

d. that the existing and proposed cuts in federal assistance to housing programs threaten a

virtual end to the creation of new housing, thus prolonging the present emergency; that unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare;

e. that to prevent such perils to health, safety and welfare, preventive action by the council continues to be imperative;

f. that such action is necessary in order to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare;

g. that **the transition from regulation to a normal market** of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for such emergency; and

h. that the policy herein expressed is now administered locally within the city of New York by an agency of the city itself, pursuant to the authority conferred by chapter twenty-one of the laws of nineteen hundred sixty-two.

The council further finds:

a. that, prior to the adoption of local laws sixteen and fifty-one of nineteen hundred sixty-nine, many owners of housing accommodations in multiple dwellings, not subject to the provisions of the city rent and rehabilitation law enacted pursuant to said enabling authority either because they were constructed after nineteen hundred forty-seven or because they were decontrolled due to monthly rental of two hundred fifty dollars or more or for other reasons, were demanding exorbitant and unconscionable rent increases as a result of the aforesaid emergency, which led to a continuing restriction of available housing as evidenced by the nineteen hundred sixty-eight vacancy survey by the United States bureau of the census;

b. that prior to the enactment of said local laws, such increases were being exacted under stress of prevailing conditions of inflation and of an acute housing shortage resulting from a sharp decline in private residential construction brought about by a combination of local and national factors; that such increases and demands were causing severe hardship to tenants of such accommodations and were uprooting long-time city residents from their communities;

c. that recent studies establish that the acute housing shortage continues to exist; that there has been a further decline in private residential construction due to existing and proposed cuts in federal assistance to housing programs;

d. that unless such accommodations are subjected to reasonable rent and eviction limitations, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; and

e. that such conditions constitute a grave emergency.

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§ **26-502 Additional findings and declaration of emergency.** The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the City of New York and will continue to exist on and after April first, two thousand six and hereby reaffirms and repromulgates the findings and declaration set forth in section 26-501 of this title.

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§ **26-503 Short title.** This law may be cited as the rent stabilization law of nineteen hundred sixty-nine.

APPENDIX D — NEW YORK CITY ADMINISTRATIVE CODE § 26-510

§ **26-510 Rent guidelines board.** a. There shall be a rent guidelines board to consist of nine members, appointed by the mayor. Two members shall be representative of tenants, two shall be representative of owners of property, and five shall be public members each of whom shall have had at least five years experience in either finance, economics or housing. One public member shall be designated by the mayor to serve as chairman and shall hold no other public office. No member, officer or employee of any municipal rent regulation agency or the state division of housing and community renewal and no person who owns or manages real estate covered by this law or who is an officer of any owner or tenant organization shall serve on a rent guidelines board. One public member, one member representative of tenants and one member representative of owners shall serve for a term ending two years from January first next succeeding the date of their appointment; one public member, one member representative of tenants and one member representative of owners shall serve for terms ending three years from the January first next succeeding the date of their appointment and two public members shall serve for terms ending four years from January first next succeeding the dates of their appointment. The chairman shall serve at the pleasure of the mayor. Thereafter, all members shall continue in office until their successors have been appointed and qualified. The mayor shall fill any vacancy which may occur by reason of death, resignation or otherwise in a manner consistent with the original appointment. A member may be removed by the mayor for cause, but not without an opportunity to be heard in

person or by counsel, in his or her defense, upon not less than ten days notice.

b. The rent guidelines board shall establish annually guidelines for rent adjustments, and in determining whether rents for housing accommodations subject to the emergency tenant protection act of nineteen seventy-four or this law shall be adjusted shall consider, among other things (1) the economic condition of the residential real estate industry in the affected area including such factors as the prevailing and projected (i) real estate taxes and sewer and water rates, (ii) gross operating maintenance costs (including insurance rates, governmental fees, cost of fuel and labor costs), (iii) costs and availability of financing (including effective rates of interest), (iv) over-all supply of housing accommodations and over-all vacancy rates, (2) relevant data from the current and projected cost of living indices for the affected area, (3) such other data as may be made available to it. Not later than July first of each year, the rent guidelines board shall file with the city clerk its findings for the preceding calendar year, and shall accompany such findings with a statement of the maximum rate or rates of rent adjustment, if any, for one or more classes of accommodations subject to this law, authorized for leases or other rental agreements commencing on the next succeeding October first or within the twelve months thereafter. Such findings and statement shall be published in the City Record.

APPENDIX E — COMPLAINT IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, DATED JUNE 18, 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

08 Civ. 5511

JAMES D. HARMON, JR. and JEANNE HARMON,

Plaintiffs,

- against-

MARVIN MARKUS, individually and in his official capacity as MEMBER AND CHAIR OF THE NEW YORK CITY RENT GUIDELINES BOARD, CITY OF NEW YORK; DEBORAH VAN AMERONGEN, individually and in her official capacity as COMMISSIONER, DIVISION OF HOUSING & COMMUNITY RENEWAL, STATE OF NEW YORK,

Defendants.

COMPLAINT

Plaintiffs James D. Harmon, Jr. and Jeanne Harmon by their attorney James D. Harmon, Jr., as and for their Complaint in this action, allege as follows

Appendix E

Jurisdiction

1. This court has jurisdiction pursuant 28 U.S.C. § 1331, 28 U.S.C. § 2201 and 28 U.S.C. § 1343.

Venue

2. Venue is proper in this district pursuant to 28 U.S.C. § 1391 (b)(2) because a substantial part of the events giving rise to the claims alleged herein have occurred, and will continue to occur, in this district, and because the property which is the subject of this action is located in this district.

Nature of the Action

3. This is an action pursuant to 42 U.S.C. § 1983, and the inherent authority of federal courts to protect rights safeguarded by the Constitution, for a declaratory judgment that Chapter 4 of Title 26 of the New York City Administrative Code ("Administrative Code") pertaining to rent stabilization, and the regulations implementing and administering the Administrative Code, 19 NYCRR Parts 2520-2530 (the "Rent Stabilization Code"), have deprived, do deprive, and will continue to deprive, plaintiffs of rights guaranteed by the Constitution of the United States. (The "Administrative Code" and the "Rent Stabilization Code" are both collectively referred to herein as "the Rent Stabilization Law").

4. In particular, the Rent Stabilization Law is unconstitutional as applied to plaintiffs because it violates and deprives them of their rights under:

    a. the Takings Clause of the Fifth Amendment of the Constitution;

    b. the Due Process Clause of the Fourteenth Amendment to the Constitution;

    c. the Contract Clause of Article I § 10 of the Constitution;

    d. the Thirteenth Amendment to the Constitution; and

    e. the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

5. Plaintiffs seek declaratory and permanent injunctive relief declaring the Rent Stabilization Law to be unconstitutional as applied to plaintiffs and their property, declaring that certain apartment leases are null and void, and permanently enjoining the defendants, and the City of New York (the "City") and the State of New York (the "State"), from enforcing the Rent Stabilization Law as to plaintiffs and their property, as well as the issuance of writs necessary or appropriate in aid of the jurisdiction of this Court.

Appendix E

Parties

6. James D. Harmon, Jr. and Jeanne Harmon (the "plaintiffs") are husband and wife. They are also citizens of the United States who reside in their home at 32 West 76th Street, New York, New York (the "Building"). They are 64 and 63 years old, respectively. Plaintiffs own, and have owned, the Building jointly since January 13, 2005.

7. Defendant Marvin Markus is a Member and Chair of the New York City Rent Guidelines Board (the "Rent Guidelines Board") and is its chief administrative officer.

8. Defendant Deborah Van Amerongen is the Commissioner, Division of Housing & Community Renewal ("DHCR") of the State, and is responsible for the administration and enforcement of the Rent Stabilization Law.

The Role of the New York City Council

9. The New York City Council (the "City Council") is vested with the legislative power of the City and has the power to adopt local laws and resolutions which it deems appropriate, and which are not inconsistent with the Constitution or laws of the United States.

10. State law has enabled, and continues to enable, the City Council to declare an emergency for any or all housing accommodations, if the vacancy rate is not in

excess of five percent (5%), and also enables the City Council to declare the end to a housing emergency once the vacancy rate exceeds five percent (5%).

11. On March 29, 2006, the City Council enacted Local Law 3 which found that "a serious public emergency continues to exist in the housing of a considerable number of persons" within the City, and that the rent stabilization provisions of the Administrative Code should continue until April 1, 2009. Local Law 3 thereby subjected apartments #2R, #3F and #4F in plaintiffs' Building to continued rent regulation, when it was signed into law by the Mayor of the City on March 29, 2006.

12. Upon information and belief, neither the Rent Stabilization Law, nor any related legislation enacted by the State or the City, define the term "vacancy rate" for purposes of the Rent Stabilization Law.

The Role of the New York City Rent Guidelines Board

136. The Rent Stabilization Law requires the Rent Guidelines Board annually to establish allowable rent adjustments for lease renewals for rent stabilized apartments, considering, among other things:

    a. the economic condition of the residential real estate industry in the affected area including such factors as the prevailing and projected

i. real estate taxes, and sewer and water rates,

ii. gross operating maintenance costs (including insurance rates, governmental fees, cost of fuel and labor costs),

iii. costs and availability of financing (including effective rates of interest),

iv. over-all supply of housing accommodations and over-all vacancy rates,

b. relevant data from the current and projected cost of living indices for the affected area, and

c. such other data as may be made available to it.

14. The Rent Guidelines Board had and has no power or authority to:

a. consider how factors pertaining to the economic condition of the residential real estate industry affect plaintiffs' Building in particular; or

b. permanently exempt plaintiffs' Building from the Rent Stabilization Law; or

c. establish a particularized rent adjustment specifically for plaintiffs' Building, taking into account the Building's economics, including the market rent for apartments #2R, #3F and #4F.

Appendix E

The Role of the New York State Division of Housing & Community Renewal "DHCR"

15. DHCR is responsible for the supervision, maintenance and development of affordable low- and moderate-income housing in the State, and is also responsible for the administration and enforcement of the Rent Stabilization Code.

16. DHCR has no power or authority to:

    a. permanently exempt plaintiffs' Building from the Rent Stabilization Law; or

    b. provide plaintiffs with just compensation for the taking of their property.

STATEMENT OF FACTS

The Harmon Family Building

17. Plaintiffs own the five story brownstone Building subject to a $1.5 million mortgage held by a financial institution. Constructed in 1891 and situated on lot 51, block 1128 in New York County (Manhattan), the Building is located in the Upper West Side/ Central Park West Historic District, so designated by the New York City Landmarks Preservation Commission.

18. The Rent Stabilization Law renders the Building and its apartments subject to rent regulation, as a

multiple dwelling of six or more units built before 1974.

19. The City's 2005 New York City Housing and Vacancy Survey found that, in 2005, the City had a total of 2,092,363 rental units of which 1,043,677 were subject to rent stabilization regulation.

20. As of 2005, only 4.6% of the total number of rent stabilized apartment units Citywide were located in buildings built before 1900.

21. The Harmon family has owned the Building since 1949, i.e., twenty (20) years before the Building was made subject to rent stabilization in 1969.

22. Sylvie and Louis Bebert, the immigrant grandparents of plaintiff James Harmon, purchased the Building by deed dated August 17, 1949. Ownership then passed to their daughter, i.e., plaintiff James Harmon's mother, by deed dated May 13, 1953.

23. At various times since 1953, three (3) generations of the Harmon family have resided in the Building as their home.

24. For thirty-nine (39) years without interruption, the Building has been subject to rent regulation by the Rent Stabilization Law since its enactment, while in the continuous ownership of plaintiffs, the Harmon family and their ancestors.

25. At all times relevant to this complaint, the defendants and the City and the State knew that plaintiffs owned the Building, knew plaintiffs' address and knew that certain apartments in the Building were subject to rent regulation by the Rent Stabilization Law.

The Rent Stabilized Apartments

26. Plaintiffs have resided in the Building since April 2002. They now reside on the first floor of the Building.

27. The three floors above plaintiffs' residence contain two (2) one-bedroom apartments on each floor for a total of six (6) apartments on those floors. Three (3) of those apartments, i.e., #2R, #3F and #4F are subject to rent regulation by the Rent Stabilization Law. The three other apartments, i.e., #2F, #3R and #4F, are market rate rentals.

28. As a result of the Rent Stabilization Law, the Harmon family has subsidized the rent for apartments #2R, #3F and #4F for a total of eighty-eight (88) tenant-years for the benefit of the current tenants of those apartments.

29. The combined regulated average monthly rent for the Building's three rent stabilized one (1) bedroom apartments, i.e., #2R, #3F and #4F, is fifty-nine percent (59%) lower than the average monthly rent for the three unregulated, market rate one (1) bedroom apartments in the Building.

30. Upon information and belief, Tenant 3F residing in apartment 3F is 63 years old. Tenant 3F has resided in apartment #3F since 1977 under a lease dated December 12, 1976, which then called for a monthly rent of$325 per month. The current regulated rent for apartment #3F is $951.22.

31. The Rent Stabilization Law has regulated the rent and other conditions of occupancy of apartment #3F for the thirty-one (31) year duration of Tenant 3F's occupancy. The current lease, executed by plaintiffs without their consent because of the legal coercion of the Rent Stabilization Law, covers the period February 1, 2007 - January 31, 2009.

32. Upon information and belief, Tenant 3F currently owns a private home located in the Hamptons area of Long Island which she purchased for $320,000 in 2001, and which is now held subject to a mortgage from Citibank in the amount of $190,000. Upon information and belief, Tenant 3F's monthly mortgage payment for her private home on Long Island is approximately $1500.

33. Tenant 3F paid the regulated rent for March 2008 with a check dated February 22, 2008.

34. Upon information and belief, Tenant 3F is a senior vice president of a New York based executive search firm. Upon information and belief, Tenant 3F specializes in conducting searches for senior executives in a range of industries, with a special

focus on law and professional services firms. Her functional expertise reportedly lies in the areas of finance/controllership, human resources, marketing, general administrative and in-house legal roles.

35. Upon information and belief, Tenant 2R is seventy (70) years old. Tenant 2R has resided in apartment #2R since 1976 under a lease dated February 1, 1976, which then called for a monthly rent of $425. The current regulated rent for apartment #2R is $1298.24.

36. The Rent Stabilization Law has regulated the rent and other conditions of occupancy of apartment 2R for the thirty-two (32) year duration of Tenant 2R's occupancy. The current lease, executed by plaintiffs without their consent because of the legal coercion of the Rent Stabilization Law, covers the period February 1, 2007 - January 31, 2009.

37. Tenant 2R paid the regulated rent for March 2008 with a check dated March 5, 2008.

38. On June 26, 2006, the Rent Guidelines Board established the lawful rent for apartments #2R and #3F in plaintiffs' Building, the leases for which were renewed in 2007 without plaintiffs' consent and due to the legal coercion of the Rent Stabilization Law.

39. Tenant 4F has resided in apartment #4F since 1982 under a lease dated November 2, 1982, which then called for a monthly rent of $400. The current regulated rent for apartment #4F is $908.72.

40. The Rent Stabilization Law has regulated the rent and other conditions of occupancy of apartment #4F for the twenty-five (25) year duration of Tenant 4F's occupancy. The current lease, executed by plaintiffs without their consent because of the legal coercion of the Rent Stabilization Law, covers the period December 7, 2007 - December 6, 2008.

41. Upon information and belief, Tenant 4F is a senior vice president/creative director for a New Jersey health care product brand-building advertising agency employing 110 employees with reported annual revenues of $51.7 million.

42. Tenant 4F paid the regulated rent for March 2008 with a check dated March 1, 2008.

43. On June 26, 2007, the Rent Guidelines Board established the lawful rent for apartment #4F, the lease for which must be renewed in 2008 without plaintiffs' consent and due to the legal coercion of the Rent Stabilization Law.

The Rent Stabilization Law

44. The Rent Stabilization Law regulates allowable rents in apartments #2R, #3F and #4F in the Building, compels plaintiffs to lease those apartments to the tenants occupying them and to their successors in perpetuity on terms dictated by law, and denies plaintiffs the right to exclude the tenants of those apartments and their successors from the Building,

thereby requiring plaintiffs to remain in the residential real estate business for life without their consent.

45. Since its original enactment in 1969, and at all times since, new residential construction has been exempt, is exempt, and will continue to be, exempt from regulation by the Rent Stabilization Law.

46. In an affidavit dated July 18, 1969, the Administrator of the City's Housing and Development Administration stated that the purpose of exempting new residential construction from rent regulation by the Rent Stabilization Law was "as a means of encouraging future construction of housing accommodations by allaying the fears of builders concerned about possible further extention (sic) of rent control to new construction."

47. Since its original enactment in 1969, and at all times since, the City Council has declared that the transition from regulation to a normal market of free bargaining between landlord and tenant is the objective of City policy.

48. The Rent Stabilization Law in combination with other statutes grants Tenants 2R, 3F and 4F rights and protections having attributes of fee ownership, including the following:

    a. A lifetime right to renew their leases with rent set and regulated by law, without the owner's

consent and against his or her will;

b. A lease renewal term of one or two years at the tenants' option, without the owner's consent and against his or her will;

c. Only one of the plaintiffs may recover possession of apartments #2R, #3F and #4F solely for their personal use and occupancy as their primary residence, or that of their immediate family, limited to their daughters, mother, brothers, sisters, grandsons or granddaughters and son-in-law, as applied to plaintiffs, and no other persons and for no other purpose;

d. Because Tenants 2R and 3F are over sixty-two (62) years old, plaintiffs may not recover occupancy, unless plaintiffs offer to provide and, if requested, provide those tenants with an equivalent or superior housing accommodation at the same or lower regulated rent in a closely proximate area to the Building;

e. Tenants 2R, 3F and 4F have absolute, statutory succession rights for family members and other persons with whom they have emotional and financial commitment, and interdependence and who may have resided with them for two (2) years. Without plaintiffs' consent, such family members and others would succeed to the rights of the tenant of record upon the tenant's permanent departure or death;

f. The right to sublease with the owner's consent which may not be unreasonably withheld;

g. Leases for apartments #2R, #3F and #4F may not limit occupancy of those apartments to the tenant/lessee named in the lease;

h. Tenants may collect rent from any occupant/roommate not named as a lessee in the lease;

i. Plaintiffs cannot evict a tenant for having an excessive number of non-lessee roommates;

j. No eviction is permitted except on grounds allowed by statute;

k. Apartment #2R, #3F or #4F would be removed from rent regulation, if the legal regulated rent for a particular apartment was two thousand dollars ($2000) or more per month when, and if, the apartment was vacated by one of those tenants;

l. If the total annual federal adjusted gross income of a tenant occupying #2R, #3F or #4F were in excess of one hundred seventy-five thousand dollars ($175,000) in each of the two (2) preceding calendar years, and the legal regulated rent for a particular apartment was two thousand dollars ($2000) or more per month, only then could the apartment occupied by that tenant be removed from rent regulation;

m. In that case, plaintiffs would be required to offer the apartment to the high-income tenant at a rent not in excess of the market rent;

n. Because tenants 2R and 3F are over sixty-two (62) years of age, the City could subsidize their rent by exempting them from rent increases, provided that the tenant's "aggregate disposable income" (not including gifts, inheritances, payments, certain social security and private pension payments), did not exceed twenty five thousand dollars ($25,000), in exchange for which plaintiffs would receive a tax abatement, not a direct subsidy;

o. Tenants 2R, 3F and 4F have the right to have plaintiffs perform or provide janitorial services on a twenty-four (24) hour basis, and to have their apartments painted every three (3) years; and

p. Plaintiffs are required to register apartments ##2R, 3F and 4F and their rent with the State annually.

49. The Rent Stabilization Law requires plaintiffs to provide these and other services for life without plaintiffs' consent, and without regard to plaintiffs' financial and personal circumstances, physical health, family situation, age and pursuit of happiness.

50. The Rent Stabilization Law prohibits plaintiffs from withdrawing apartments #2R, #3F and #4F from the market with the intent to sell or rent the Building, or any part of it.

51. Upon vacancy by its rent stabilized tenant, apartments #2R, #3F and #4F would remain subject to rent stabilization.

52. Upon vacancy of#2R, #3F or #4F, plaintiffs would be required to execute a lease with a new, successor tenant with a regulated rent and term set by the Rent Stabilization Law.

53. The new, successor tenant would then acquire the status of a rent stabilized tenant with all of the legal rights and protections accorded that status.

54. The Rent Stabilization Law permits a rent increase for apartments #2R, #3F and #4F equal only to 1140th or 1160th of the pro rata total cost of a major capital improvement in the Building, excluding any finance charges.

55. Waivers by tenants of their rent stabilization rights are contrary to public policy.

56. The provisions of any lease inconsistent with the Rent Stabilization Law are void and unenforceable.

57. The Rent Stabilization Law provides for enforcement through monetary penalties, treble damages through a private right of action and judicial injunctive relief.

Appendix E

The Impact of the Rent Stabilization Law

a. Impact on the Plaintiffs

58. Through rent regulation by the Rent Stabilization Law, the City has permanently taken, and will continue to take, plaintiffs' property for a private use without just compensation, with succession rights granted to tenants in perpetuity, potentially beyond the lives of plaintiffs and the current tenants of apartments #2R, #3R and #4F.

59. The Rent Stabilization Law permits Tenants 2R, 3F and 4F to physically and permanently occupy the Building without plaintiffs' consent and against their will.

60. Neither the City nor the State has paid, nor will pay, plaintiffs any compensation for the taking of their property, including lost beneficial use, lost rent, leasehold encumbrances on title and reduced property value, nor does the Rent Stabilization Law provide any authority and process through which just compensation may be sought and paid.

61. The Rent Stabilization Law has also forced, and will continue to force, plaintiffs to work and provide services for life for the tenants of apartments #2R, #3F and 4F# without plaintiffs' consent and by the threat of coercion through law and the legal process.

62. The Rent Stabilization Law substantially impairs and abrogates plaintiffs' right to contract: a) to

enter into leases with tenants, including Tenants 2R, 3F and 4F and their successors in interest, on price, duration and other terms as might be agreed upon between plaintiffs and those tenants, and b) to contract for the sale of, and to sell, the Building, free of any statutory leasehold interests in apartments #2R, #3F and #4F.

63. The Rent Stabilization Law prevents plaintiffs from bequeathing the Building to the next generation of the Harmon family, free of any statutory leasehold interests in apartments #2R, #3F and #4F.

64. The Rent Stabilization Law compels and forces plaintiffs to use the Building as a multiple dwelling.

65. The Rent Stabilization Law has denied, and will continue to deny, plaintiffs' right to equal protection of the law, among other ways, by:

    a. Without a rational basis, compelling plaintiffs (without regard to their ages) to provide Tenants 2R and 3F (because of their ages) with an equivalent or superior housing accommodation at the same or lower regulated rent in a closely proximate area to the Building, as a condition precedent to plaintiffs' recovery of possession of those apartments for plaintiffs' own use;

    b. Without a rational basis, subjecting plaintiffs' Building to the Rent Stabilization Law, while exempting new construction from rent

regulation, thereby shifting the burden of rent stabilization to the owners of existing buildings;

c. Without a rational basis, compelling plaintiffs to rent apartments #2R, #3F and #4F at a regulated rent to tenants having an adjusted gross income of up to $175,000 without due regard for the plaintiffs' financial circumstances; and

d. Substantially interfering with plaintiffs' fundamental rights:

i. to use and enjoy their home and property;

ii. to the pursuit of happiness; and

iii. to be free from arbitrary legal discrimination on account of their ages, tenant incomes and the status of the Building as existing construction.

b. Impact on the Market

66. Upon information and belief, as reported by the Rent Guidelines Board, during the period 1960 - 2005, the average annual net rental vacancy rate (as that term was understood by the Rent Guidelines Board) for the City overall was 2.70% as follows:

Appendix E

Year	Vacancy Rate		Year	Vacancy Rate
2005	3.09%		1981	2.13%
2002	2.94%		1978	2.95%
1999	3.19%		1975	2.77%
1996	4.01%		1970	1.50%
1993	3.44%		1968	1.23%
1991	3.78%		1965	3.19%
1987	2.46%		1960	1.81%
1984	2.04%			

67. On March 10, 1969, the Rent Guidelines Board issued a report stating that, in the Spring of 1968, there were 2,096,058 renter-occupied housing units in the City.

68. The 2005 New York City Housing and Vacancy Survey (the "2005 NYC Housing Vacancy Survey") reported that, during the period February-March 2005, there were 2,092,363 rental units in the City.

69. The U.S. Census Bureau has reported that the City's population was 7,894,862 in 1970, 8,008,278 million in 2000 and 8,214,426 in 2006.

70. Upon information and belief, the staff of the Rent Guidelines Board compiled data which established that the number of new dwellings completed annually Citywide did not increase during the period 1969-2004, i.e., years in which the Rent Stabilization Law

has been in effect, notwithstanding exemptions from rent regulation for new construction.

71. The Rent Guidelines Board report, *Housing NYC: Rents, Markets and Trends 2007*, reported that, as of 2006, 87,358 (8.6%) of the residents of the City's 1,015,655 apartments under rent stabilization had household incomes of $100,000 or more.

72. The City's 2002 Housing New York City Housing Report found that Citywide median stabilized rents for pre-194 7 buildings was twenty percent (20%) lower than non-regulated, market rents.

73. The City's 2005 New York City Housing and Vacancy Survey found that Citywide median stabilized rents for pre-1947 buildings was nineteen percent (19%) lower than non-regulated, market rents.

74. The Rent Guidelines Board found that, as of Spring 2005, in Manhattan, the median market-rate rent for a one (1) bedroom apartment was $2200, and $1400 for a rent stabilized one (1) bedroom apartment, i.e., the rent for rent stabilized apartments was $800 per month or thirty-six percent (36%) lower than the rent for market rate apartments.

City Council Findings and Declaration of Emergency

75. New York State law required, and continues to require, the City Council to do the following as conditions precedent to the enactment of the rent stabilization provisions of the Administrative Code:

a. to adopt a resolution declaring the existence of a housing emergency; and

b. to conduct a public hearing on not less than ten days reasonable public notice.

76. When it enacted the Rent Stabilization Law in 1969, the City Council made the following findings and declaration of emergency, which the City Council has since found to continue for the next thirty-nine (39) years, among other findings:

a. that a serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York which emergency was created by war, the effects of war and the aftermath of hostilities;

b. that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents;

c. that there continues to exist an acute shortage of dwellings;

d. that to prevent such perils to health, safety and welfare, preventive action by the Council continues to be imperative;

e. that such action is necessary in order to prevent exactions of unjust, unreasonable and

oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare;

f. that the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for such emergency.

77. According to the City Council, as of 1969, the "emergency was created by war, the effects of war and the aftermath of hostilities."

78. Five years later, in 1974, the City Council amended the rent stabilization provisions of the Administrative Code and re-declared the emergency, but changed the rationale for it.

79. The City Council did this by deleting the finding that the "emergency was created by war, the effects of war and the aftermath of hostilities," and substituting the finding that "many owners of housing accommodations in multiple dwellings, not subject to [rent regulation] ... were demanding exorbitant and unconscionable rent increases as a result of the aforesaid emergency, which led to a continuing restriction of available housing ... ".

80. Upon and information and belief, beginning in 1969, and then in 1979, 1982, 1985, 1988, 1991, 1994, 1997,

2000, 2003 and 2006, the City Council declared that "a serious public emergency continues to exist in the housing of a considerable number of persons ... [and] ... the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for such emergency."

2006 Declaration of Emergency and Extension of the Rent Stabilization Law

81. Upon information and belief, in February and March 2006, the exact dates as yet unknown, the City Council provided notice of a public hearing regarding extending the rent regulation provisions of the Administrative Code and "[d]etermining that a public emergency requiring rent control... continues to exist."

82. Upon information and belief, this notice was published through the City Council's website http://council.nyc.gov/, through notice to the press and through posting of a notice in City Hall.

83. Upon information and belief, during the period January through March 2006, the City Council did not publish notice of the hearing in the City Record which is the official newspaper of the City.

84. Upon information and belief, the City Council did not publish notice of the hearing in New York's

major daily newspapers of general circulation and readership, i.e., The New York Times, The New York Daily News, The New York Post and Newsday.

85. Upon information and belief, the notice did not state that the hearing concerned whether or not to declare a public housing emergency as a prerequisite for extending the rent stabilization provisions of the Administrative Code for three (3) more years.

86. Upon information and belief, the notice did not state that plaintiffs, other property owners and other members of the public would be given the opportunity to be heard.

87. The City Council did not provide, and plaintiffs did not receive, personal service of notice of a public hearing regarding the extension of the rent stabilization laws and a declaration of housing emergency, nor service by certified mail, return receipt requested, nor any other notice.

88. The Council's notice by website and press release publication of a public hearing on a declaration of the existence of a housing emergency and extension of the rent stabilization laws was unreasonable and failed to provide plaintiffs with adequate notice, thereby denying them an opportunity to be heard.

89. On March 3, 2006, the Committees on Housing and Buildings and State and Federal Legislation of the City Council (the "Council Committees") conducted

a hearing regarding a declaration of the existence of a housing emergency and extension of the rent stabilization laws.

90. At the hearing, the Council Committees received testimony from Shaun Donovan, the City's Commissioner of Housing Preservation and Development, that, as of June 2005:

    a. the City had the largest housing stock in 40 years;

    b. home ownership in the City was at all-time high;

    c. the satisfaction of New Yorkers with their neighborhoods and overall building conditions was at an all time high;

    d. a large number of affordable housing units were coming on to the market because of the Mayor's Housing Marketplace Plan and tax benefit programs;

    e. the overall supply of housing had increased; and

    f. the vacancy rate in Manhattan was 3.79%.

91. Applying the undefined 5% vacancy rate figure as did Commissioner Donovan, the declared housing emergency would have been over in Manhattan in 2005 if there had been 1.21% more apartments available for rent in Manhattan, i.e., 6,819 apartments,

from a market consisting of a total of 563,589 renter-occupied units in Manhattan.

92. The Commissioner's testimony was based, in part, on the 2005 NYC Housing Survey to which the City Council and the Council Committees had access.

93. The City's 2005 Housing Survey found that: "In 2005, housing and neighborhood conditions were extremely good."

94. On March 22,2006, the Council Committees passed a resolution determining that a public emergency requiring rent control in the City of New York continues to exist and will continue to exist.

95. Thereafter, on March 29, 2006, the City Council enacted Local Law 3, which was then signed into law, extending the rent stabilization provisions of the Administrative Code until April 1, 2009.

96. The legislation also reaffirmed and "repromulgated" the declaration of emergency and findings which were first declared in 1969, and which were then again restated ten (10) times in subsequent years over almost four (4) decades, including the following:

    a. that a serious public emergency continues to exist;

    b. that such emergency necessitated the intervention of federal, state and local government;

c. that there continues to exist an acute shortage of dwellings;

d. that New York State legislation enacted in 1971, removing controls on housing accommodations as they become vacant, resulted in sharp increases in rent levels in many instances;

e. that existing and proposed cuts in federal assistance to housing programs threaten a virtual end to the creation of new housing;

f. that regulated rents would prevent exactions of unjust, unreasonable and oppressive rents, and unspecified disruptive practices and abnormal conditions from creating an unstated serious threat to the public health, safety and general welfare;

g. that recent studies establish that the acute housing shortage continues to exist;

h. that there has been a further decline in private residential construction due to existing and proposed cuts in federal assistance to housing programs;

i. that such conditions constitute a grave emergency.

Appendix E

The City Council's Basis for the Declaration of Emergency and Rent Stabilization Extension

97. The action of the City Council enacting Local Law 3 in 2006, which extended the rent stabilization provisions of the Administrative Code, was arbitrary and served no valid public purpose, among other reasons, because:

    a. The City Council relied on the undefined vacancy rate standard;

    b. The City Council's proffered justification was unsupported and contradicted by the facts before the Council;

    c. The City Council continued rent stabilization legislation known to have failed to accomplish its stated purpose;

    d. The City Council failed to consider whether the stabilization of the rent for apartments #2R, #3F and #4F would further the law's stated purpose; and

    e. During the approximate period January 1, 2005 to the present, the Rent Stabilization Law was, is and will continue to be the antithesis of "a normal market of free bargaining."

98. The hearing record, the 2005 New York City Housing and Vacancy Survey and the testimony

of City Housing Commissioner Shaun Donovan do not provide either a rational basis or reasonable foundation for the Council Committees' resolution, nor the City Council's 2006 findings and declaration of a grave housing emergency.

99. The legislative extension of the Rent Stabilization Law was not reasonably related to the City Council's proffered justification for its enactment. Since 1969, the City has repeatedly declared that the "objective" of rent stabilization is "the transition from regulation to a normal market of free bargaining between landlord and tenant." This has not occurred for plaintiffs' Building, nor the rental market as a whole. The City Council's March 22, 2006 declaration of a housing emergency, however unsubstantiated, admitted the failure of the Rent Stabilization Law to accomplish the stated objective of a return to a free rental market, almost four decades after its initial enactment.

100. In 1969, the City Council first made the exact same findings regarding a serious public emergency, the intervention of federal, state and local government, serious threats to the public health, safety and general welfare and a grave emergency.

101. In 1974, the City Council first made the exact same findings regarding sharp increases in rent levels and proposed cuts in federal assistance to housing programs.

102. The City Council stated its basis for the 2006 declaration of housing emergency and extension of the Rent Stabilization Law as follows:

    a. a citywide rental vacancy rate of 3.09%;

    b. the vacancy rate in 2003 was 2.94%;

    c. approximately 65,000 vacant available rental units which was an increase of approximately 4,000 units since 2002;

    d. the number of housing units increased by approximately 52,000 units since 2002;

    e. the total number of rental units increased by 0.4% during the period 2002-2005;

    f. the rental stock subject to rent stabilization did not change significantly during the period 2002-2005; and

    g. the median monthly gross rent increased by 5.4% (adjusted for inflation) during the period 2002-2005.

103. Upon information and belief, no facts or information were before the City Council in the public record at the March 3, 2006 hearing, and when the City Council enacted Local Law 3 on March 29, 2006, regarding the intervention of federal and state government, sharp increases in rent levels, proposed cuts in

federal assistance or the existence of a grave housing emergency.

The 2006 and 2007 Regulated Rent Adjustments by the Rent Guidelines Board

104. On June 19 and 22, 2006, and then again on June 12 and 19, 2007, the Rent Guidelines Board held public hearings, the purpose of which was to collect information relating to all factors enumerated in paragraph 13 of this complaint, in order to establish annual guidelines for rent adjustments for housing accommodations subject to rent stabilization.

105. These hearings were required by section 26-510(h) of the Administrative Code.

106. The Administrative Code required the Rent Guidelines Board to publish notice of the date, time, location and summary of subject matter for the public hearing or hearings in the City Record daily for a period of not less than eight days and at least once in one or more newspapers of general circulation at least eight days immediately preceding each hearing date, at the expense of the City.

107. Upon information and belief, the Rent Guidelines Board did not publish notice of the hearing in New York's major daily newspapers of general circulation and readership, i.e., The New York Times, The New York Daily News, The New York Post and Newsday.

108. Upon information and belief, in 2006 and 2007, the Rent Guidelines Board did not provide, and plaintiffs did not receive, personal service of notice of the June 2006 and 2007 public hearings to establish allowable rent adjustments for lease renewals for the three rent stabilized apartments in their Building, nor did plaintiffs receive service of such notice by certified mail, return receipt requested.

109. Upon information and belief, in 2006 and 2007, the Rent Guidelines Board published notice in the City Record of the June 19 and 22, 2006, and June 12 and 19, 2007 public hearings "to consider public comments concerning rent adjustments for renewal leases for apartments ... subject to the Rent Stabilization Law."

110. The City Record notice did not state the criteria upon which the Rent Guidelines Board would make its decision, as enumerated in paragraph 13 of this Complaint.

111. The published notices in the City Record were unreasonable and failed to provide plaintiffs with adequate notice, thereby denying them an opportunity to be heard.

112. In 2006 and 2007, by order 2006 Apartment & Loft Order #38 dated June 27, 2006 and by order 2007 Apartment & Loft Order #39 dated June 26, 2007, the Rent Guidelines Board established the allowable rent for rent stabilized apartments #2R, #3F and #4F in plaintiffs' Building without plaintiffs' consent.

Appendix E

The City and State's Alternatives to Targeted, Discriminatory Rent Regulation

113. As applied to plaintiffs, the Rent Stabilization Law was, is and will continue to be unfair, unreasonable, and unnecessarily broad given the taking of plaintiffs' property, impairment of their contract rights, involuntary servitude, plaintiffs' ages and other circumstances, and the less restrictive and less intrusive alternatives available to the City to accomplish the proffered purpose of the Rent Stabilization Law.

114. The City had, is using, and will continue to have and use, alternatives to rent stabilization to accomplish the legitimate goals of public housing policy, such as, Section 8 and other government rent subsidies, as well as tax incentives, and the Mayor's New Housing Marketplace Plan funded by the City with $7.5 billion, including $6.1 billion since 2002, with the purpose of providing affordable housing.

115. Upon information and belief, as of 1999, 6.5% of rent stabilized households received Section 8 subsidies.

116. Upon information and belief, since 2002, the City has funded 83,000 affordable housing units, including 64,408 units funded under the New Housing Marketplace Plan, which is projected to provide 165,000 affordable housing units by 2013.

117. Upon information and belief, on April 10, 2008, the State announced a historic increase of $300 million in funding for the State's housing programs.

118. After a thirty-nine (39) year experiment, plaintiffs should not be made to bear any longer the burden of a City and State rent stabilization policy, legislation and regulations which have not abated the alleged housing emergency, and which, in fairness, should be borne by the public as whole.

119. The means (rent stabilization) did not produce the desired end (rental free market), nor does the proffered end justify the continued use of the failed means, where other less intrusive means are available to further legitimate housing policy goals.

First Claim for Relief
(Taking Without Just Compensation -
Fifth Amendment - 42 U.S.C. § 1983)

120. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 3 through 114 above, as if fully set forth herein.

121. The defendants have caused, and will continue to cause, plaintiffs to be deprived of their right to possess, use and dispose of the Building, and have taken plaintiffs' property for a claimed public use, whereas it is in fact a private use, without just compensation in violation of the Takings Clause of the Fifth Amendment of the Constitution.

122. In the absence of injunctive relief, plaintiffs will continue to be irreparably harmed and to be subjected to this deprivation of rights guaranteed to them by the Constitution.

123. By reason of the foregoing, plaintiffs are entitled to declaratory judgment against the defendants.

Second Claim for Relief
(Substantive Due Process -
Fourteenth Amendment - 42 U.S.C. § 1983)

124. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 3 through 114 above, as if fully set forth herein.

125. The defendants have caused, and will continue to cause, plaintiffs to be deprived of their property without due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution.

126. In the absence of injunctive relief, plaintiffs will continue to be irreparably harmed and to be subjected to this deprivation of rights guaranteed to them by the Constitution.

127. By reason of the foregoing, plaintiffs are entitled to declaratory judgment against the defendants.

Appendix E

Third Claim for Relief
(Procedural Due Process -
Fourteenth Amendment - 42 U.S.C. § 1983)

128. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 3 through 114 above, as if fully set forth herein.

129. The defendants have caused, and will continue to cause, plaintiffs to be deprived of their property without due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution.

130. In the absence of injunctive relief, plaintiffs will continue to be irreparably harmed and to be subjected to this deprivation of rights guaranteed to them by the Constitution.

131. By reason of the foregoing, plaintiffs are entitled to declaratory judgment against the defendants.

Fourth Claim for Relief
(Contract Clause -
Article I - 42 U.S.C. § 1983)

132. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 3 through 114 above, as if fully set forth herein.

133. The defendants have caused, and will continue to cause, plaintiffs to be deprived of their right to

be free from any law impairing the obligation of contracts guaranteed by the Contract Clause of Article I § 10 of the Constitution.

134. In the absence of injunctive relief, plaintiffs will continue to be irreparably harmed and to be subjected to this deprivation of rights guaranteed to them by the Constitution.

135. By reason of the foregoing, plaintiffs are entitled to declaratory judgment against the defendants.

Fifth Claim for Relief
(Involuntary Servitude -
Thirteenth Amendment - 42 U.S.C. § 1983)

136. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 3 through 114 above, as if fully set forth herein.

137. The defendants have caused, and will continue to cause, plaintiffs to be deprived of their right to be free from involuntary servitude guaranteed by the Thirteenth Amendment to the Constitution.

138. In the absence of injunctive relief, plaintiffs will continue to be irreparably harmed and to be subjected to this deprivation of rights guaranteed to them by the Constitution.

139. By reason of the foregoing, plaintiffs are entitled to declaratory judgment against the defendants.

Appendix E

Sixth Claim for Relief
(Equal Protection Clause -
Fourteenth Amendment - 42 U.S.C. § 1983)

140. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 3 through 114 above, as if fully set forth herein.

141. The defendants have caused, and will continue to cause, plaintiffs to be deprived of their right to equal protection of the law guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

142. In the absence of injunctive relief, plaintiffs will continue to be irreparably harmed and to be subjected to this deprivation of rights guaranteed to them by the Constitution.

143. By reason of the foregoing, plaintiffs are entitled to declaratory judgment against the defendants.

Seventh Claim for Relief
(Permanent Injunctive Relief
- 42 U.S.C. § 1983 and the Court's Inherent Authority
to Issue Injunctions to Protect Constitutional
Rights)

144. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 3 through 114 above, as if fully set forth herein.

145. In the absence of injunctive relief, plaintiffs will continue to be irreparably harmed and to be subjected to the deprivation of rights guaranteed to them by the Contract Clause of the Constitution, and by the Fifth, Thirteenth and Fourteenth Amendments to the Constitution.

146. By reason of the foregoing, plaintiffs are entitled to injunctive relief against the defendants.

147. There has been no prior application for injunctive relief.

Eighth Claim for Relief
(Necessary and Appropriate Writs - 28 U.S.C. § 1651)

148. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 3 through 114 above, as if fully set forth herein.

149. By reason of the foregoing, plaintiffs are entitled to the issuance of writs necessary or appropriate in aid of the jurisdiction of this Court, and agreeable to the usages and principles of law.

Ninth Claim for Relief
(Award of Attorney's Fees, Expert Fees and Costs - 42 U.S.C. § 1988)

150. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 3 through 114 above, as if fully set forth herein.

151. Plaintiffs are entitled to award of costs, including reasonable attorney's fees and expert fees.

Prayer for Relief

WHEREFORE, plaintiffs request judgment as follows:

A. Declaring the Rent Stabilization Law unconstitutional as applied to plaintiffs and the Building because it violates the Takings Clause of the Fifth Amendment of the Constitution;

B. Declaring the Rent Stabilization Law unconstitutional as applied to plaintiffs and the Building because it violates the Due Process Clause of the Fourteenth Amendment to the Constitution;

C. Declaring the Rent Stabilization Law unconstitutional as applied to plaintiffs and the Building because it violates the Contract Clause of Article I of the Constitution;

D. Declaring the Rent Stabilization Law unconstitutional as applied to plaintiffs and the Building because it deprives plaintiffs of their right to be free from involuntary servitude guaranteed by the Thirteenth Amendment to the Constitution;

E. Declaring the Rent Stabilization Law unconstitutional as applied to plaintiffs because it violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution;

F. Declaring that the Building and apartments #2R, #3F and #4F are not subject to any regulation by the Rent Stabilization Law;

G. Declaring that the leases for apartments #2R, #3F and #4F are null, void, unenforceable and of no legal effect;

H. Directing the defendants, the City and the State to remove the Building and apartments #2R, #3F and #4F from registration as a rent stabilized building and apartments;

I. Permanently enjoining the defendants, the City and the State from enforcing the Rent Stabilization Law with respect to plaintiffs and with respect to the Building, including apartments #2R, #3F and #4F;

J. Awarding plaintiffs reasonable attorneys fees, costs and expert fees; and

K. Together with such other relief as this Court may deem just, equitable and proper.

Dated: New York, New York
June 18, 2008

By: /s/_____
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