No. 11-496

# 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; and 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**

## BRIEF OF *AMICI CURIAE* RENT STABILIZATION ASSOCIATION OF NEW YORK, INC. AND SMALL PROPERTY OWNERS OF NEW YORK, INC. IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

# TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

## INTRODUCTION

The Rent Stabilization Association of New York, Inc. (the "RSA") and the Small Property Owners of New York, Inc. (the "SPONY") submit this *amici curiae* brief in support of James and Jeanne Harmon's (the "Harmons") petition for a writ of *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit in *Harmon v. Markus*, 2011 U.S. App. LEXIS 4629 (2d Cir. 2011).

## INTEREST OF *AMICI CURIAE*[1]

### The Rent Stabilization Association of New York, Inc.

The RSA is a trade association of approximately 25,000 residential owners and agents who own or manage more than one million apartments throughout New York City (the "City"). Some members of RSA own just a single building; others own or manage

[1] Pursuant to Rule 37.3 of the Rules of the United States Supreme Court (2010) (the "Rules"), counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. The parties have consented to the filing of this brief.

Pursuant to Rule 37.6 of the Rules, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

thousands of apartments. Many RSA members own or manage apartments subject to the New York Rent Stabilization Law (the "RSL"). The RSA has a unique perspective as to the RSL, the implementing state regulations, and relevant local laws enacted by the New York City Council. Most particularly, the RSA has a distinct interest in the application of these laws, rules and regulations today against the backdrop of over four decades since the RSL was first enacted.

**The Small Property Owners of New York, Inc.**

The SPONY is a volunteer, self-help association of owners of regulated rental properties in the City. The SPONY is comprised of approximately 1,000 members throughout the City's five boroughs. The majority of SPONY members live in the buildings they own, which generally contain twenty units or less. As owner-occupants, SPONY members provide some of the best housing in the City. As small property owners, SPONY members are particularly burdened by the City's dense maze of housing regulations.

## FACTS AND PROCEEDINGS BELOW

For the eleventh time since 1969, the City declared a housing "emergency" in 2009. New York City Local Law No. 23 (2009). The City also declared housing emergencies in 1969, 1979, 1982, 1985, 1988,

1991, 1994, 1997, 2000, 2003, and 2006. [Appendix to Brief of Petitioners ("Appx.") E-75a]. In declaring the first of those emergencies, the City enacted the RSL to dictate what rent owners of rent-stabilized apartments may not exceed to "transition from regulation to a normal market of free bargaining between landlord and tenant" while encouraging new construction. New York City Local Law No. 16 (1969). Each housing emergency declaration extends the application of the RSL, which otherwise would end without such declaration because each declaration has a three-year sunset provision. *See, e.g.,* New York City Local Law No. 23 (2009) (noting 2009 declaration of housing emergency and extension of RSL to expire in 2012). Presently, about one million apartments, virtually half of all the apartments in the City, are rent stabilized. [Appx. E-72a].

The RSL originally was enacted in 1969 in response to "a serious public emergency . . . created by war, the effects of war and the aftermath of hostilities." New York Local Law No. 16 (1969). In 1974, the State Legislature changed the emergency basis for rent stabilization from war to the City's vacancy rate – a housing emergency may be declared if the vacancy rate is below five percent. [Appx. E-56a]. Throughout its entire existence, however, the stated goal of the RSL has remained unchanged – transitioning from a regulated market to a free market while encouraging new construction.

Pursuant to the RSL, the City established the Rent Guidelines Board (the "Board") to annually

review and adjust the minimal percentage increase of fair rent that landlords of rent-stabilized apartments may charge their tenants.[2] Owners of rent-stabilized apartments must comply with the RSL or else risk monetary penalties, treble damages through a private right of action, and judicial injunctive relief. [Appx. C-37a, E-68a]

Not once since 1969 has the vacancy rate gone above five percent. *See* [Appx. E-75a]. Additionally, the RSL has utterly failed to force a transition from a regulated market to a free market or stimulate new construction. *See* New York City Local Law No. 23 ("recent studies establish that the acute housing shortage continues to exist; that there has been

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[2] In establishing levels of fair rent, the Board must consider:

> (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 . . . and such other information and data as may be made available to it.

New York City Local Law No. 23.

a further decline in private residential construction. . . .").

In 1962, before the enactment of the RSL, the City first began regulating rent when, in response to the housing shortage following World War II, it enacted the rent control program pursuant to the City Rent and Rehabilitation Law (New York City Local Law No. 20). *See I.L.F.Y. Co. v. City Rent & Rehab. Admin.*, 11 N.Y.2d 480, 484-85 (1962). In contrast to rent stabilization, which limits the increase on the yearly rent, rent control limits the rent an owner may charge for an apartment. *See* NYC Rent Guidelines Board *available at* http://www.housingnyc.com/html/resources/faq/rentstab.html. Many rent stabilized apartments were previously rent controlled apartments.[3] *Id.* Thus, the City has been regulating rent of many of the same apartments for nearly half-a-century.

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[3] Rent control applies to apartments constructed before 1947 in municipalities that have not declared an end to the postwar rental housing emergency. For an apartment to remain rent controlled, the tenant must have been living in the apartment continuously since July 1, 1971. Rent controlled apartments become decontrolled upon vacancy. If the apartment is in a building with six or more units, it generally becomes rent stabilized upon vacancy (rent stabilization applies to buildings with six or more apartments constructed after 1947 and before 1974). If the apartment is in a building with six or fewer units, it generally becomes a market-rate rental. Presently, there are approximately 40,000 rent controlled apartments in the City. *See id.*

The Harmons own and reside in a five-story brownstone in the City in which there are six one-bedroom apartments on floors above their own; three rent-stabilized. Those three apartments have been occupied by the same three tenants for a combined ninety-one years at rents fifty-nine percent below the market rate. [Appx. B-8a].

The Harmons sued in federal district court under 42 U.S.C. § 1983, alleging, *inter alia*, that the RSL, as applied, violates their rights under the Fifth Amendment by taking their property for a private use without just compensation. The district court dismissed the Harmons' claims. [Appx. B-25a]. The Harmons appealed to the Second Circuit Court of Appeals, which affirmed the ruling of the district court. *Harmon*, 2011 U.S. App. LEXIS 4629, at *6-7. From that decision, the Harmons petition this Court to grant their petition for a writ of *certiorari*.

## SUMMARY OF ARGUMENT

A municipality is generally best able to assess and address its local needs. Federal courts defer to the judgment of a municipality in addressing local needs, provided that the municipality's action serves a legitimate purpose and does so by rational means. *See Kelo v. City of New London*, 545 U.S. 469, 482 (2005); *Berman v. Parker*, 348 U.S. 26, 32 (1954). But, if a local government action does not serve a legitimate purpose or lacks even the semblance of

rationality, a local government's judgment is not entitled to deference.

This is a "back to the future case." The federal courts below failed to recognize the wisdom of hindsight available to them when considering whether to defer to the judgment of the City. Although transitioning from a regulated market to a free market while encouraging new construction may be a legitimate purpose, nearly half-a-century of history reveals that the RSL did not work, does not work, and will not work. Every three years, when the City again declares a housing emergency, it also acknowledges, as it must, that the RSL has again failed. The City cannot rationally believe that the RSL ever will achieve its goal. It is a sisyphean task doomed to failure and frustration that the RSL has laid on half the City's landlords. Enough is enough. Accordingly, this Court has a unique opportunity in this case to define the limits of judicial deference when there is a compelling history that a governmental program simply does not work.

## ARGUMENT

### The Second Circuit Court Failed to Recognize the Wisdom of Hindsight Available to it by Deferring to the Judgment of the Local Government

This Court has consistently recognized the wisdom of deferring to the judgment of a local government in addressing a local need. *See Kelo*, 545 U.S. at

482 ("[v]iewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs."); *Berman*, 348 U.S. at 32 (noting the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation); *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1806) (noting deference to judgment of local government appropriate unless judgment is "palpably without reasonable foundation"). Included among those local needs in which courts defer to the judgment of a local government are protected property interests. *Kelo*, *supra*, at 480; *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 242-43 (1984); *Berman*, *supra*, at 102-03.

Deference to the judgment of a local government is appropriate when the government's purpose is legitimate and its means are rational. *See Kelo*, 545 U.S. at 488 ("[w]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of . . . socioeconomic legislation – are not to be carried out in the federal courts.") (quoting *Midkiff*, 467 U.S. at 242-43 (1984)). Therefore, the judgment of local government is not to be afforded deference if it either does not serve a legitimate purpose or attempts do so by irrational means. In *United States ex rel. TVA v.*

*Welch*, 327 U.S. 546, 552 (1946), this Court emphasized that "[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." *Id.* at 240-41.

In *Berman*, *Midkiff* and *Kelo*, this Court found that the local government programs served a legitimate purpose through rational means. In *Berman*, the government enacted the District of Columbia Redevelopment Act to redevelop slum areas in Washington D.C., a purpose the Court found as legitimate. *Berman*, 348 U.S. at 233. Specifically, the Court observed that it is "the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled." *Id.* The means to achieve that purpose, which this Court deemed rational, were to condemn property for redevelopment. *Id.* at 36; *see id.* ("[i]f the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for the successful consummation of the project that unsafe, unsightly or unsanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.").

In *Midkiff,* the Hawaii Legislature enacted the Land Reform Act of 1967 (the "Act") to condemn and transfer property of lessors to lessees in an effort to reduce concentrated land ownership, which it believed skewed the residential fee simple market. *Midkiff*, 467 U.S. at 232. The Court found "[r]egulating oligopoly and the evils associated with it" to be a legitimate purpose. *Id.* at 242. The Court further concluded that condemning fees simple for the purpose of redistribution rationally served that purpose. *Id.* at 243.

In *Kelo*, the City of New London, Connecticut, which had been designated a "distressed municipality" by a Connecticut state agency, sought to stimulate its economy. *Kelo*, 545 U.S. at 484. The Court found that promoting economic development is a legitimate, traditional and long accepted function of local government. *Id.* To serve that legitimate interest, the City of New London "carefully formulated" an economic development plan in which private property was to be condemned for redevelopment. *Id.* at 483. The City of New London speculated that its plan would provide appreciable benefits to the community, including new jobs and increased tax revenue. *Id.* This Court deemed those means rational. *Id.* at 488.

In looking back at the ultimate effect of the judgment of each local government in *Berman, Midkiff* and *Kelo*, it is now apparent that the legitimate purposes of government action involved in those cases did not come to fruition in whole or in part. If the courts in *Berman, Midkiff* and *Kelo* had the wisdom

of hindsight available to them when considering whether to defer to the judgment of local government, they might have been decided differently.

The outcome of the redevelopment project in *Berman* produced mixed results. Although the renewal project attracted higher income residents, it failed to achieve one of its major objectives of replacing condemned shops with the Waterside Mall, a commercial area envisioned as "a hundred-store complex with rooftop restaurant terraces." Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 THE URB. LAW. 423, 464-65 (2010). Just twenty-six stores were developed, only a quarter of what had been promised, and the Waterside Mall was eventually demolished. *Id.* at 465. Additionally, the plan fueled the growth of sprawling and unsustainable land development patterns. *Id.* at 425. Finally, it was not until after the decision in *Berman* that it was made clear that there would be no rebuilding of housing for the residents who had been living in the slums there. *Id.* at 467. Accordingly, many of those residents who had lived in the slums were permanently displaced and relocated to public housing projects characterized by poverty and racial segregation. *Id.* Had this Court been able to go back to the future in deciding *Berman*, would it have been so deferential?

Under the Act involved in *Midkiff*, it appeared that poor, working-class, and middle-class tenants would be the primary beneficiaries in being enabled to purchase the land on which they lived and had been leasing. A 1978 amendment to the Act, however,

removed the requirement that the tenant purchasing the property live on the land for it to be condemned and redistributed. Debra Pogrund Stark, *How Do You Solve A Problem Like in* Kelo*?*, 40 J. MARSHALL L. REV. 609, 628 (2007). Without that provision, the new owner could lease the property and do so at rents even higher than before. *Id.* As the residential leaseholds were made available in fee simple, many of them were purchased by Japanese investors who paid well above the market rate for "aging, suburban bungalows in order to tear them down, build luxurious new houses on their sites, and market them to Japanese tycoons as vacation homes." Gideon Kanner, Kelo v. New London*, Bad Law, Bad Policy & Bad Judgment*, 38 THE URB. LAW. 201, 214 (2006). What the Hawaii Legislature had hoped would rectify feudal land title misallocations by providing lessees with lower cost fee simple title to their homes in effect caused home prices to sky-rocket and transferred the land to foreign tycoons. *Id.* Had this Court known the totally counter-intuitive and unintended consequences of the program in *Midkiff*, would it have reached the same result?

Six years after this Court's decision in *Kelo*, the City of New London's development plan has yet to move forward. The City of New London and the State spent approximately $78 million to bulldoze the condemned property as part of the development plan. *Pfizer and Kelo's Ghost Town*; *Pfizer Bugs Out, Long After the Land Grab*, THE WALL STREET JOURNAL, Nov. 11, 2009, at A20. Presently, the condemned land

formerly at issue remains "barren and wholly undeveloped." Jeff Benedict, *Apology Adds an Epilogue to* Kelo *Case; Supreme Court Justice's Startling Apology Adds Human Context to Tough Ruling*, HARTFORD COURANT, September 18, 2011, *available at* http://articles.courant.com/2011-09-18/news/hc-op-justice-palmer-apology-20110918_1_epilogue-justice-palmer-s-susette-kelo. Had this Court been blessed with the wisdom of hindsight, would it have deferred to New London's plan which is now widely recognized as a colossal failure in every respect?

In the Harmons' case, however, both the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit had the benefit of judicial hindsight available when considering whether to defer to the judgment of local government. In particular, the complaint fairly alleged[4] that there is nearly half-a-century of history that reveals that the RSL has not worked, does not work and will not work. Approximately every three years, the City declares the existence of a housing emergency to extend the application of the RSL, *see* [Appx. E-75a], which otherwise would end without such declaration because each extension of the RSL has a three-year sunset provision. *See, e.g.,* New York City Local Law No. 23 (2009). With each declaration of a housing emergency, the

[4] On a motion to dismiss, all facts are considered favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 235-36 (1974).

City acknowledges that the RSL continues to fail. *See id.* ("[t]he 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. . . ."). In view of that extensive history, an external judicial check on the application of deference to local legislative judgment is especially necessary in this case if the constraint on government power is to amount to more than "hortatory fluff." *Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting).

This Court may take judicial notice of the City's own Housing and Vacancy Survey, which reveals that in 2008, the City had its largest housing stock in the forty-three year history of that survey, with a two-and-a-half percent increase in rental stock between 2005 and 2008. *See* New York City Housing and Vacancy Survey (2008), *available at* http://www.nyc.gov/html/hpd/html/pr/vacancy.shtml. Even with that increased supply, the vacancy rate remains below five percent; it always has and always will.

The Federal District Court for the Southern District of New York found that the declaration of a housing emergency and extension of the RSL is "fully predictable" and part of an "overarching scheme" to continue rent stabilization in perpetuity. [Appx. B-22a, n.9]. The only way that the RSL continues in perpetuity is if it fails in perpetuity. The City cannot and does not believe that the RSL will ever rationally serve its stated purpose. *See Midkiff*, 467 U.S. at 242 ("this Act, like any other, may not be successful in

achieving its intended goals. But whether *in fact* the provision will accomplish its objectives is not the question, the [constitutional requirement] is satisfied if . . . the . . . [state] legislature *rationally could have believed* that the [Act] would promote its objective.") (emphasis in original).

It is no wonder that the RSL has failed for its near half-century existence and that the City has conceded that it will continue to fail. The ultimate goal of the RSL is to transition from a regulated market to a free market. Regulating the rental market is completely contradictory to the goal of the RSL – transitioning to a free market. *See Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925) (holding deference to legislature's "public use" determination required "until it is shown to involve an impossibility"). In view of the extensive evidence revealing the long history of failure of the RSL, the City's legislative judgment is not entitled to judicial deference and, in fact, violates the Harmons' rights under the Fifth and Fourteenth Amendments.

## CONCLUSION

A local government's legislative judgment should not be a trump card. The judgment of a local government cannot go against the entire weight of evidence. In this back-to-the-future case, the Second Circuit deferred to the City's judgment in light of nearly half-a-century of history that the RSL has not worked and

does not work. It is as if the Harmons are playing against a dealer – the City – that has an unlimited number of trump cards to deal when needed. This Court's review of the Harmons' case would facilitate the understanding of the courts, governments, and property owners as to when historical evidence should be considered in establishing the outer limits of judicial deference. When there is such obvious evidence of long-term, abject failure of government principles and programs, it ought to be carefully considered, perhaps even shifting the burden of proof to the government to demonstrate rationality.

For all of the above reasons, *amici curiae*, RSA and SPONY respectfully request that the Court grant the Harmons' petition for a writ of *certiorari*.

Respectfully submitted this 21st day of November, 2011,

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