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; 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 *AMICUS CURIAE* COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC. IN SUPPORT OF PETITIONERS

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INTRODUCTION

Community Housing Improvement Program, Inc. ("CHIP") submits this *amicus curiae* brief in support of James and Jeanne Harmon's 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 (2nd Cir. 2011).

INTEREST OF *AMICUS CURIAE*[1]

CHIP is a trade association of approximately 2,500 apartment building owners with properties in all five boroughs of New York City (the "City"). During the approximately 45 years since CHIP was founded, it has been a key player in City housing policy and rent regulation. Many members of CHIP - - over 70 percent - - own fewer than 50 rental units and live in their buildings or the surrounding neighborhood. More than 70 percent of members have owned their properties for more than 20 years. Further, approximately 50 percent of CHIP members have operating costs that exceed building revenues. As a result they share many of the Harmons

1. Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Copies of the consents have been lodged with the Clerk. *Amicus curiae* provided the notice of intent to file to all parties as required by Rule 37.2.

Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any 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 *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

concerns and experiences. Given its long-standing role in the City's apartment building industry and experience with rent stabilization issues, CHIP has a unique perspective on the Rent Stabilization Law ("RSL"), other rent regulatory laws and their impact upon the City's apartment building owners. CHIP members will be directly impacted by the outcome of this case.

STATEMENT OF THE CASE

A. Background Facts

As indicated in the Harmons' petition for a writ of *certiorari* ("Petition"), the Harmons own a five story "brownstone" building in Manhattan's Upper West Side neighborhood. The building is zoned residentially and in a landmark district. The Harmons reside in a first floor apartment. Each of the three floors above contain one rent stabilized apartment and one unregulated apartment.

The Harmons' three rent stabilized tenants have lived in their apartments for many years and pay rents 59 percent below market rate. The RSL effectively prevents the Harmons from moving into the three rent stabilized apartments. Tenants in two of the apartments are older than 62 - - as are the Harmons. Under the RSL, the Harmons can recover their apartments for their use only if they provide the tenants "with an equivalent or superior housing accommodation at the same or lower regulated rent in a closely proximate area to the building." RSL § 26-511(c)(9)(b). As applied, however, this is effectively impossible, given the demand for apartments in the neighborhood, the uniqueness of each apartment in the Harmons' building, and the fact that the Harmons' tenants

pay rents 59 percent below fair market value. Even if relocation was possible, it would not free the Harmons from rent regulation because when a tenant is relocated, the tenant's rent stabilized tenancy is effectively shifted to another premises. For example, the Harmons would have to relocate the tenant to another rent stabilized apartment that they own or relocate the tenant to a market rate apartment (which they own or lease) and subsidize the rent in perpetuity.

Moreover, there are lengthy procedural delays in attempting to recover a rent stabilized apartment based upon an owner's use ground. As stated in the Petition, the Harmons have been attempting to recover possession of their rent stabilized apartment occupied by someone younger than 62 for over two years. There have been numerous delays based upon the tenant's claims of improper service of process, dilatory motion practice and discovery that has only begun. At the end of this long procedural road, the tenant can still pursue a lengthy appeal process.

Contrary to the Second Circuit's decision, demolition is not a viable method for the Harmons to obtain freedom from the RSL - - they cannot demolish their building because it is protected as a landmark. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 117 (1978). Even if it were available, the demolition process is extremely protracted and subject to many layers of review and challenges.

Therefore, the Harmons - - like most CHIP members - - are forced to subsidize and house strangers in an oppressive regulatory scheme for the rest of their tenants' lives without any legal recourse or compensation.

B. Rent Regulation In The City

For nearly 70 years, thousands of City property owners have been constrained by an arbitrary, confusing and unjust "temporary" rent regulatory scheme once described by New York State's highest court as an "impenetrable thicket, confusing not only to laymen but to lawyers." *89 Christopher Inc. v. Joy*, 35 N.Y.2d 213, 360 N.Y.S.2d 612 (1974). Indeed, New Yorkers born since World War II have never known their city to be without rent regulation. Rent regulation is so ingrained in the City's culture and fabric that many New Yorkers treat a cheap rent stabilized apartment as one of the greatest triumphs of urban living. The artificially low rents and life-time tenure are conferred upon an arbitrary population based upon purportedly temporary schemes legislatively enacted to treat "emergency" conditions.

For some 70 years, New Yorkers have purportedly lived in a city that is under a state of housing emergency. In 1856, *Harper's* Magazine (Vol. 13, p. 272) lamented that "a man born in New York forty years ago finds nothing, absolutely nothing, of the New York he knew." This quote may accurately describe the frenetic, ever-changing story that is the City in 2012 as it did in 1856, with one glaring exception: No matter what happens in the City, there always appears to be a claimed housing emergency. That is not to say that the rationale for the emergency has not changed. In fact, the underlying explanation of the emergency has evolved. In some cases, the definition of what constitutes an "emergency" is crafted out of whole cloth.

Initially, the emergency imposed by the Federal Government during World War II was part of the war-time effort. Then after World War II, the State imposed rent control premised on an "emergency created by war, the effects of war and the aftermath of hostilities." Emergency Housing Rent Control Law ("EHRCL") § 1. This justification of an emergency was continued in 1962 when the State Legislature enacted the Local Emergency Housing Rent Control Act ("LEHRC"), which conferred upon the City the right to regulate residential rents. LEHRC § 1(2)

In 1969, nearly 25 years after the hostilities of World War II had ceased, the City Council enacted the RSL, and the initial declaration remained the "emergency created by war, the effects of war and the aftermath of hostilities." RSL, as initially enacted pursuant to Local Law 16 of 1969, § YY51-1.0 and subsequently codified at New York City Administrative Code § 26-501.

Then, in the 1970's, the justification for the emergency began to shift. In 1974, the State Legislature enacted the Emergency Tenant Protection Act of 1974 ("ETPA") which again noted the "emergency created by war, the effects of war and the aftermath of hostilities." However, the Legislature pivoted and found that there existed a housing emergency based upon an "acute shortage of accommodations." New York Unconsolidated Laws § 8622. The Legislature then numerically defined what the term "emergency" means and declared that it occurred when "the vacancy rate for the housing accommodations within such municipality is not in excess of five percent." New York Unconsolidated Laws § 8623. This provision not only arbitrarily quantified an emergency as a vacancy rate

of less than five percent, but also delegated to the City Council (and other municipalities) the authority to declare a housing emergency.

Nearly 38 years later we have the same numerical quantification of a so-called housing emergency. Nevertheless, the professed state interest in creating a higher vacancy rate is questionable.[2] Further, the State and City's own studies indicate that rent regulation is lowering the vacancy rate rather than raising it by providing for perpetual renewal leases and limiting rent increases. For example, as discussed in the 2005 Housing And Vacancy Survey, at Table 5.4, p. 355, vacancy rates for low-rent units - - rent regulated - - were extremely low, while rates for higher-rent units were correspondingly higher. The vacancy rate in 2005 for units with monthly asking rents of less than $600 could not be determined because of the very small sampling size. The vacancy rate for units with asking rents between $600 and $699 was 2.45 percent; 3.05 percent for units with asking rents of $700 and $999; 3.65 percent for units with asking rents between $1,000 and $1,999; and 7.83 percent for units with asking rents of $2,000 or more. Thus, the City's own survey shows that if the limitations on rent increases were

2. While the City is prospering with low vacancy rates, many major cities are suffering from extremely high vacancy rates. For instance, Dayton, Ohio has an apartment vacancy rate of 26.4 percent, Phoenix's is 15.5 percent and Houston's is 14.5 percent. Daniel Fisher, *America's Emptiest Cities*, FORBES, March 2, 2011. These cities, and many other cities and their suburban surroundings, are suffering from the blight of abandoned homes, unpaid property taxes and destroyed neighborhoods. The City is not suffering from this affliction. In fact, the opposite is true.

eliminated, the so-called "housing emergency" would likely end.

As stated in the Harmons' Petition, the City and State governments themselves have contradicted the continued existence of any housing emergency. For example, the City's Commissioner of Housing Preservation and Development contradicted the legislative declaration of emergency when he testified before the City 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.

Similarly, the 2005 Housing And Vacancy Survey, at p. 1, found that "housing conditions in the City were extremely good and neighborhood conditions were the best since the HVS started covering them."

Notwithstanding this blatantly incongruous evidence, the City Council perennially and robotically declares a housing emergency. This occurred in 1969, 1979, 1982, 1985, 1988, 1991, 1994, 1997, 2000, 2003, 2006 and 2009. Thus, what was intended to be a temporary measure to

address an emergency, has become the permanent state of affairs - - the band aid has become the permanent prosthesis.

SUMMARY OF ARGUMENT

The Circuit Court made several errors, two of which we address. First, it failed to even consider whether the elementary justification for rent regulation - - a temporary emergency - - even exists and whether the regulation is rational. It is respectfully submitted that the failure to scrutinize the legitimacy of the justification for a vast set of rent regulations that impair fundamental property rights is in error and contrary to this Court's precedent in *Block v. Hirsh*, 256 U.S. 135 (1921) and *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924), which require the existence of a verifiable temporary emergency in order to justify rent regulation.

Second, the Circuit Court erred by relying on *Yee v. City of Escondido*, 503 U.S. 519 (1992), which was explicitly limited to the unusual relationship between "mobile home" park owners and home owners. The remedial regulation in *Yee* was rationally related to the object of ensuring that mobile home owners/tenants were not divested of their pecuniary and "sweat-equity" investments by eviction. Thus, the facts of *Yee* could not be further from the facts of this case, wherein it is the Harmons' investment that is being harmed and threatened.

This Court last reviewed New York rent regulations 90 years ago in *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921). In that case, a two-year emergency regime following World War I was upheld. In 70 of the

last 90 years, New York has imposed emergency rent measures that go wildly beyond the regulations considered in *Marcus Brown.* The *amicus curiae,* therefore, asks this Court to grant *certiorari* and review the *bona fides* of the declared emergency that has justified nearly seven decades of an oppressive regulatory scheme. Upon the grant of *certiorari*, we believe that the following questions should be asked of the State and City:

> Can a temporary regulatory emergency exist for 70 uninterrupted years, or is the emergency not an emergency at all, but rather the enduring (if not self-created) *status quo?*
>
> Can the legislature repeatedly reaffirm the definition of a housing emergency as a static housing vacancy rate of below five percent without ever examining if in fact that vacancy rate bears a rational relation to a housing emergency?
>
> If, in fact, a housing emergency has existed for nearly seven decades without recovery, can the legislature continue to impose drastic regulations in the guise of purported remedial statutes when those statutes clearly have not achieved their stated purpose?

Once these questions are addressed, it should be clear that the temporary remedial statute that is the City's rent regulation is actually a permanent oppressive regulatory scheme.

ARGUMENT

I

THE CIRCUIT COURT FAILED TO CONSIDER THAT NEW YORK'S RENT REGULATORY FRAMEWORK VIOLATES THIS COURT'S RULING IN *BLOCK V. HIRSH* AND *CHASTLETON CORP. V. SINCLAIR*

A. The Circuit Court failed to ascertain whether or not there was a *bona fide* emergency to justify rent regulation.

This Court reviewed a prior New York rent regulatory system in *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921), which was decided with *Block v. Hirsh*, *supra*. *Marcus Brown* and *Block* were ignored by both the Circuit Court and the District Court.

At issue in *Block* was the constitutionality of the District of Columbia Rents Act of 1919, a rent control statute, enacted by Congress to regulate rents and rental practices in the District of Columbia (Act of October 22, 1919, c. 80, Tit. II, 41 Stat. 297). The Court noted that the statute was "made necessary by emergencies growing out of the war, resulting in rental conditions in the District dangerous to the public health and burdensome to public officers, employees and accessories, and thereby embarrassing the Federal Government in the transaction of the public business." 256 U.S. at 154. In deferring to the fact-finding by Congress prior to the enactment of the statute in question, the Court treated the emergency that justified the statute as almost a universal truth at

the time and held that "a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact." 256 U.S. at 154-55.

The Court was concerned, however, that emergency remedial statutes could go too far. The Court cautioned that "there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law." 256 U.S. at 156, c*iting Martin v. District of Columbia*, 205 U.S. 135 (1907). Recognizing the inherent danger of remedial actions becoming permanent regulations, the Court noted that "[t]he regulation is put and justified only as a temporary measure. **A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."** [Emphasis added, citations omitted]. 256 U.S. at 157.

That last sentence was prescient. The original act that was considered in *Block v. Hirsh*, was limited to expire in two years. The Act of August 24, 1921, c. 91, 42 Stat. 200, extended that statute, with some amendments, until May 22, 1922. On that day, a new act declared that the emergency described in the original act existed, and extended the act until May 22, 1924. This is similar to what repeatedly happens in New York. Indeed, in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 416 (1922), the Court observed that the City's and Washington, D.C.'s rent regulation ordinances went "to the verge of" what was permissible.

A new challenge to the District of Columbia Rents Act was reviewed by the Court in *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924). This time, however, the result was very different. Justice Holmes, again writing for the Court, held:

> We repeat what was stated in *Block v. Hirsh*, 256 U.S. 135, 154 as to the respect due to a declaration of this kind by the legislature so far as it relates to present facts. **But, even as to them, a Court is not at liberty to shut its eyes to an obvious mistake when the validity of the law depends upon the truth of what is declared.** 256 U.S. 154. *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 536.
>
> **And still more obviously so far as this declaration looks to the future it can be no more than prophecy, and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed**. *Perring v. United States*, 232 U.S. 478; *Missouri v. Chicago, Burlington & Quincy R. Co.*, 241 U.S. 533, 539, 540. [Emphasis added].

Thus, in no uncertain terms, this Court determined that the existence of an emergency must be real and verifiable. While courts defer to legislatures to determine present facts, the Court need not turn a blind eye to obvious facts that affect the truth of what is being declared.

As such, the Court in *Chastleton* concluded that it was important to know the condition of Washington at different dates and to carefully ascertain and weigh the facts. 264 U.S. at 549. The Court, therefore, remanded the case for appropriate fact finding. *Id. See also, Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 211-12 (1934).

Block, Marcus Brown, Pennsylvania Coal and *Chastleton* all make it clear that validity of rent and similar regulatory schemes utilizing police power depends on the existence of an "emergency" - - which is commonly understood to reference a condition based upon unforeseen circumstances that is limited in duration, not permanent. For example, in *Block*, the Court noted that "emergencies growing out of the war" were the predicate for the regulations and that they were "justified only as a temporary measure." 256 U.S. at 153, 156-57. In *Pennsylvania Coal*, the Court stated that the emergency rent regulations reviewed in the *Block* and *Marcus Brown* decisions, "intended to meet a temporary emergency," rose to the limit of permissible regulation. 260 U.S. at 416. In *Chastleton Corp. v. Sinclair*, the Court questioned whether there the emergency upon which the rent regulatory scheme upheld in *Block* still existed and remanded for further fact finding.

The 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) (Rehnquist, C.J., dissenting from dismissal of appeal).

Here, the purported temporary housing emergency upon which New York's rent regulation system is based

has continued for seven decades, not just a brief two years, and is in reality the type of "permanent change" not present during the Court's last review approximately 90 years ago. History has conclusively demonstrated that, although framed as indefinite, New York's rent regulatory framework has effectively provided for permanent regulation.

Indeed, the District Court adopted the City's concession below that the regular extensions of the RSL are "fully predictable" and part of an "overarching scheme." Appendix B to Petition, p. 22a. Further, the granting of "succession rights" by the RSL shows that the regulations are of a permanent nature, and not temporary. Although perhaps not intended, a rent stabilized apartment can be "passed along like a baton in a relay race . . ." *Melohn v. Heins,* New York Law Journal, April 9, 1981, p. 10, col. 5 (App. Term 1st Dep't). The RSL can therefore no longer be justified by the claim of a temporary emergency.[3]

Unfortunately in New York, the facts have become irrelevant. Perennially, New Yorkers are asked to turn a blind eye to the truth of what is being declared by the

3. The Second Circuit and various state courts of last resort have held an emergency is not a necessary predicate to rent regulation. *Eisen v. Eastman*, 421 F.2d 560, 567 (2d Cir. 1969), *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 conceded, however, "that the Supreme Court has not *expressly* overruled the early rent control cases such as *Chastleton Corp. v. Sinclair....*" *Westchester West No. 2 Ltd Partnership v. Montgomery Cty.*, 276 Md. 448, 463, 348 A.2d 856, 865 (1975).

State Legislature and City Council. Without ever lifting a finger (except perhaps to cut and paste an "emergency declaration"), New York's legislators presume the existence of a housing emergency from the mechanical application of an arbitrary vacancy rate. Never is that vacancy rate questioned. Thus, New York State has created a vacancy rate paradox:

> New York State declares that an emergency exists when the housing vacancy rates fall below five percent and permits local municipalities to declare local emergencies.
>
> This mathematical emergency exists continually without regard to any externalities such as causation, economic changes, population and demographic shifts and regulatory burdens.
>
> The regulations imposed as a result of the emergency create long-term, if not lifetime tenure, thereby encouraging tenants to not vacate their units and further limiting rent increases.
>
> Vacancy rates actually remain artificially low, at least in part, due to the tenure provision of rent regulation.

As the Court in *Chastleton* decreed, a declared emergency must be a real emergency. While the Second Circuit did not address whether there is a true emergency - - whether there is "an unforeseen combination of circumstances or the resulting state that calls for immediate action." *Brown v. City of Oneonta, N.Y.,*

Police Dept., 106 F.3d 1125, 1131 (2d Cir. 1997), *abrogated by Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). A set of events that have been in place for nearly 70 years cannot, under any reasonable interpretation, be considered an emergency.

B. The Circuit Court failed to acknowledge that the RSL is not a "temporary" regulation.

As Petitioner notes, "temporary" means "that which is to last for a time only, as distinguished from that which is perpetual, or indefinite in its duration. The opposite of permanent." Petition, at 20, *citing* Black's Law Dictionary (6th ed.) at 1464. A permanent law to remediate a temporary emergency will not be tolerated, whereas 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.

This was a concern raised by Justice Rehnquist in his compelling dissent in *Fresh Pond Shopping Centers, Inc. v. Callahan,* 464 U.S. 875 (1983). *Fresh Pond* addressed a challenge to Cambridge, Massachusetts' rent control provisions. The Cambridge ordinance was similar in many ways to New York's: it placed large numbers of residential rental properties under regulatory control and restricted an owner's right to occupy its own property for personal use.

The Supreme Court of Massachusetts upheld the Cambridge ordinance and an appeal was taken to this Court. The Court dismissed the appeal for want of a substantial federal question. Justice Rehnquist dissented, expressing his concern that the Cambridge ordinance

was not a temporary regulation designed to remediate an emergency situation, but, rather, a permanent taking. Justice Rehnquist explained:

> It might also be argued that the rent control provisions are justified by the emergency housing shortage in Cambridge, **but the very fact that there is no foreseeable end to the emergency takes this case outside the Court's holding in *Block v. Hirsh***, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865 (1921). . . . [In *Block*] **[w]e held the rent control statute constitutional because it was enacted to deal with a wartime emergency housing shortage. We noted that "[a] limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change."** *Id.*, at 157, 41 S.Ct., at 460.

Thus, although the Court upheld a regulatory scheme in *Block* that was similar to the Cambridge scheme as well as New York's regulatory scheme, the Court reserved judgment as to whether such a regulatory scheme would be constitutional if it were permanent.

Justice Rehnquist also noted that Cambridge's regulatory scheme was really no different in the way it effected a permanent physical invasion as the New York statute struck down in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, the Court called a permanent physical occupation of another's property "the most serious form of invasion of an owner's property interest." 458 U.S. at 435.

Although the Second Circuit and some state courts dispensing with the "emergency" requirement have cited *Nebbia v. New York*, 291 U.S. 502 (1934), that reliance is misplaced. First, *Nebbia* merely upheld the constitutionality of a milk price control as a "temporary emergency" measure under a due process standard. Second, *Nebbia* distinguished the World War I rent control cases from its holding based upon their "peculiar facts" (291 U.S. at 552), and did not consider rent regulation forcing continued possession beyond an agreed upon lease term and providing broad succession rights. Third, *Nebbia* did not consider typical land ownership rights, such as the right to exclude. *Loretto*, *supra*; *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). The RSL, unlike simple price regulation, imposes a permanent deprivation of property rights otherwise protected by the Constitution.

In *Rent Stabilization Association v. Higgins*, 83 N.Y.2d 156, 608 N.Y.S.2d 930 (1993), New York Court of Appeals Judge Joseph Bellacosa prophetically noted in his concurring opinion:

> It is virtually certain that long, successive successorships to rent stabilized leaseholds will not be just theoretical possibilities because, markets being markets, they are likely to bloom as perennials, becoming functionally transformed into perpetual stakeholds. The Legislature should satisfy itself, as the courts will have to, that unwarranted de facto results from administrative quasi- judicial determinations do not constitute the functional equivalent of divestitures from landowners of reversionary rights to their properties without just compensation and due process.

New York's rent regulatory scheme neither addresses a *bona fide* emergency nor is it temporary.

C. The Circuit Court failed to recognize that the RSL serves no legitimate purpose and regulates by irrational means.

For nearly 70 years, the State Legislature has determined that a housing emergency exists. And for nearly 70 years the legislative response to this emergency is rent regulation. This of course begs the question: If after 70 years of rent regulation, the emergency for which rent regulation was designed to remediate still exists, is rent regulation in any way accomplishing its legislative goals?

This question is not being posed as a political critique. This is not simply a question as to whether the Legislature is able to competently and adequately address a housing emergency. Rather this is a critical inquiry into the question of whether the rights of property owners can be abridged for decades without any rational or legitimate means.

"When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 488 (2005), quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

Deference to the legislature should not be granted when the means are irrational. *Pennell v. City of San*

Jose, 485 U.S. 1 (1988). In the context of New York's rent regulatory scheme, history has demonstrated that the regulations in place, while unduly burdensome to property owners, have not accomplished the goal of alleviating a housing emergency. If the Court is to accept and to defer to the legislative declaration that a housing emergency in fact exists, the Court should look at whether the regulations imposed actually accomplish anything other than imposing pure futile regulatory burdens.

This comports with the Court's holding in *Pennell*, where the Court found the San Jose rent control ordinance was not unconstitutional because the ordinance "so carefully considers both the individual circumstances of the landlord and the tenant" and that it did not constitute an a "welfare program privately funded by those landlords who happen to have [rent- regulated] tenants." *Pennell v. City of San Jose,* 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part.)

Unlike in San Jose, our legislature has not "so carefully" considered both the landlord's and tenant's individual circumstances. Instead, New York mechanically applies an oppressive regulatory scheme with no rational relationship to the purported problem - - a low vacancy rate.

II

THE CIRCUIT COURT ERRED IN APPLYING *YEE V. CITY OF ESCONDIDO* OUTSIDE THE "UNIQUE" CIRCUMSTANCES OF MOBILE HOME PARKS

The Circuit Court's sweeping application of *Yee v. City of Escondido*, 503 U.S. 519 (1992) to uphold New York's rent regulation scheme was erroneous because *Yee* was explicitly limited to the unusual relationship between "mobile home" park owners and home owners. The unavoidable distinctions between mobile home ownership and traditional rental accommodations are critical to understanding why the Circuit Court erred.

A mobile home owner typically rents a plot of land - - a "pad" - - from the land owner. Although the land owner provides some common facilities, including roads, utility infrastructure and recreational facilities, the mobile home owner provides site improvements, including driveways, walkways and stairs, porches and landscaping. *Id.* at 523. Thus, the term "mobile home" is misleading, since they are effectively immobile once installed. When the home owner wishes to move, the mobile home is usually sold in place, and the purchaser continues to rent the pad. *Id.* In fact, only about one in every 100 mobile homes is ever moved. *Id.*

The Court recognized that California sought to give mobile homeowners "unique protection from . . . eviction" because of the high costs of installation, landscaping, lot preparation and removing a home. *Id.* at 524. Nevertheless, the Court found no physical taking for two reasons. First,

the Court ruled that the property owners "invited" and "voluntarily rented their land" for mobile homes to be placed on the property. *Yee*, 503 U.S. at 524. Second, owners could change the use of their property. *Id.* at. 524-525. Thus, the "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" plainly dictated the result in *Yee*. *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 458 (1992) (citing *Yee*). Under the RSL, it is tenants and not landlords who have much of the leverage.

There is a vast chasm between the type of possessory interest held by mobile home owners and residential tenants. While mobile home owners invest a great amount of money and sweat equity in preparing the pads they have rented, residential tenants in New York typically make no such investment. A residential tenant does not typically invest directly in the structure or habitability of their apartment. Rather it is the landlord that provides not only the pad, but also the home and all improvements. Thus, with few exceptions, critically absent in the relationship between a New York landlord and a New York tenant is the *quid pro quo* normally found the relationship between mobile home owner and pad landlord. As such, the Second Circuit, relying upon its decision in *Federal Home Loan Mortgage Corp. v. New York State Division of Housing and Community Renewal*, 83 F.3d 45, 47-48 (2d Cir. 1996), applied *Yee* outside of its unique factual circumstances to the City's rent regulation scheme.

Additionally, nothing in the Escondido law compelled owners "once they have rented their property to tenants, to continue doing so." *Yee* at 527-528. However, the RSL

requires the Harmons to offer lease renewals as long as the tenant resides in the building. *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, further 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.

Unlike the regulations at issue in *Yee*, the RSL also effectively forbids the Harmons from withdrawing their rent stabilized apartments from the market. They cannot change the use of the building to escape rent stabilization as could the Escondido mobile park owners because of strict zoning restrictions. As stated previously, the Harmons cannot realistically use demolition to obtain freedom from the RSL.

As indicated previously, the RSL also effectively prevents the Harmons and their family members from taking over and moving into the three rent stabilized apartments. Tenants in two of the apartments are over the age of 62 - - as are the Harmons - - and it is realistically impossible to provide them "with an equivalent or superior housing accommodation at the same or lower regulated rent in a closely proximate area to the building." RSL § 26-511(c)(9)(b).

Further, as set forth in the Petition, the Harmons have suffered numerous delays based upon the tenant's claims regarding improper service of process, dilatory

motion practice and discovery that has only begun. In the end of this long procedural road, the tenant can engage in a long appeal process. "Unreasonable delays" may alone constitute a taking. *See*, *Smith v. Ill. Bell Tel. Co.*, 270 U.S. 587, 591 (1926).

Additionally, the Escondido law upheld in *Yee* mandated "just, fair and reasonable" rents after considering factors, including the rent charged for comparable mobile home pads. *Id*. at 524-525. Under the RSL, however, the Harmons are forced to accept stabilized rents 59 percent below market based upon general guideline increase amounts, and not fair market comparables. Petition, Appendix E, pp. E-57a, E-68a.

Moreover, the Harmons' "as applied" challenge distinguishes this case from *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 particular apartment building, not those presented in the Yees' mobile home park in Escondido in 1988. There are substantial differences between the two. Thus, New York's rent stabilization scheme goes well beyond the statute upheld in *Yee*.

CONCLUSION

For all of the above reasons, the *amicus curiae,* respectfully request that the Court grant the Harmons' Petition and review the *bona fides* of the declared emergency that has justified nearly seven decades of an oppressive regulatory scheme.

Respectfully submitted this 4th day of January, 2012,

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