20-3366

In The
United States Court of Appeals
For The Second Circuit

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

v.

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

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK (BROOKLYN)

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF APPELLANTS

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INTERESTS OF AMICUS CURIAE[1]

Founded in 1991, the Institute for Justice (IJ) is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, IJ has litigated cases challenging the use of eminent domain to seize an individual's private property and give it to other private parties. Among the cases that IJ has litigated are *Kelo v. City of New London*, 545 U.S. 469 (2005), in which the Supreme Court held that the U.S. Constitution allows government to take private property and give it to others for purposes of "economic development," and *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), in which the Ohio Supreme Court expressly rejected *Kelo* and held that the Ohio Constitution provides greater protection for private property than does the U.S. Constitution. The Institute for Justice has a substantial interest in ensuring that courts continue to respect the crucial doctrinal difference between government action that

[1] No counsel for a party authored this amicus brief in whole or in part, and no person other than the Institute for Justice, its members, or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. All parties consented to the filing of this brief.

causes a physical invasion of private property and government action that merely restricts an owner's use of property.

IJ also litigates frequently litigates, and wins, equal protection and substantive due process cases under the rational basis test. Among the rational basis cases that IJ has won is *St. Joseph Abbey v. Castile*, 712 F.3d 215, 223 (5th Cir. 2013), in which the Fifth Circuit held that challenged laws cannot be sustained on the basis of "fantasy" and that plaintiffs are entitled to "negate a seemingly plausible basis" for a law "by adducing evidence of irrationality." IJ has a substantial interest in ensuring that the rational basis test remains a meaningful check on government action rather than a charade in which the government always wins.

SUMMARY OF ARGUMENT

As Appellants have demonstrated, New York's Rent Stabilization Law (RSL) is a bizarre and irrational means of regulating the New York housing market. It effectively conscripts some landlords into providing permanent public housing at their own expense. Over the last 50 years, it has made housing in New York more expensive, not less. It has disincentivized the construction of affordable housing. It does nothing to

help the majority of New Yorkers who do not have access to RSL housing. And it provides an unneeded windfall to residents who do not need to live in RSL housing. At least, that is what the Appellants in this case alleged, and that is all that matters at this stage.

Appellants persuasively demonstrate that the district court erred in dismissing their takings claims. The Institute for Justice submits this brief to highlight a particular—outcome determinative—doctrinal error in the district court's takings analysis. The district court erroneously concluded that there were only two categories of takings: permanent physical occupations (which are *per se* takings) and regulations of the use of property (which are subject to a deferential balancing test to determine if they are a taking). Yet the Supreme Court has repeatedly held that physical invasions—even when they are not *per se* takings—are different from mere regulations. When government action causes a physical invasion of private property, that action is at least *presumptively* a taking. And in this case, there is no question that the RSL causes a physical invasion. Property owners must surrender possession of their property to third parties for an indefinite if not permanent time. Even if

the RSL is not quite a *per se* taking, it is so close as to make little difference.

The district court also erred in dismissing Appellants' substantive due process claims. The district court concluded that the Appellants could not prevail, regardless of the facts, because the RSL's objective was legitimate. Yet the Appellants alleged that even if the RSL's objectives were legitimate, there was no rational connection between the RSL and its supposed objectives. Even under the rational basis test, that is all that is required to defeat a motion to dismiss. Supreme Court precedent overwhelmingly establishes that facts matter in rational basis cases, and Appellants are entitled to the opportunity to prove their case.

ARGUMENT

I. The District Court Erred by Dismissing Appellants' Taking Claims.

The district court's analysis of the takings claim presupposed that there are two distinct categories of governmental action that can cause a taking: (1) permanent physical occupations (deprivations that are *per se* takings), and (2) regulations on property use that are subject to a deferential, *ad hoc*, multifactor analysis. If the property owner cannot show the former, according to the lower court, then he must satisfy all

elements of the burdensome and unpredictable regulatory-takings inquiry. Doc. 75 at 83 ("Those [regulatory takings] claims may face a 'heavy burden[.]'"). That approach is incorrect.

The Supreme Court has repeatedly recognized the "longstanding distinction" between government action which causes a physical invasion—even if not a *permanent* physical invasion subject to the *per se* rule—and government action that merely restricts a property owner's use of property. *Horne v. Dep't of Agric.*, 576 U.S. 350, 361 (2015); *see also Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 33 (2012); *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002); *First Eng. Evangelical Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987). Indeed, the difference is so important that this Court has held that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking." *Tahoe-Sierra Preserv. Council, Inc.* 535 U.S. at 323. And crucially, a property owner alleging a physical invasion has a far easier burden to establish a taking than a property owner challenging a regulation of the use of property. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("A

'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government"); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (noting that mere regulations will not effect a taking unless they are "onerous").[2]

So even if the district court were correct to conclude that there was no *per se* taking in this case—and as appellants demonstrate, that was error—it was also error for the court not to consider the degree to which the RSL caused a physical invasion of property. Just because government action is not a *per se* taking does not mean that the physical character of the action is irrelevant to the takings analysis. As Appellants demonstrate, the RSL effectively compels property owners to provide perpetual public housing. Appellant Br. 10-13. There is no feasible way for property owners to exit the rental market or to regain possession of

[2] By contrast, the diminution of value inquiry is irrelevant when a physical invasion has occurred. *See Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation."); *Horne v. Dep't of Agric.*, 576 U.S. 350 (2015) ("[W]hen there has been a physical appropriation, 'we do not ask . . . whether it deprives owner of all economically valuable use' of the item taken."); *First Eng. Evangelical Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 329-30 (1987) (Stevens, J., dissenting) ("This diminution of value inquiry is unique to regulatory takings.")

their properties. This means that their properties are subject to unwanted occupation by third parties. This is a serious interference with property rights, which, if not a *per se* taking, is at least so close as to be presumptively a taking.

A. The key factor for any takings inquiry is the "character" of the governmental action.

In determining whether a burden on property demands compensation, "the Court's decisions have identified several factors that have particular significance," but the most significant is "the character of the governmental action." *Penn. Cent. Transp. Co.*, 438 U.S. at 124. Indeed, "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *United States v. Cress*, 243 U.S. 316, 328 (1917).

The "character" factor exists on a spectrum. Thomas W. Merrill, *The Character of the Governmental Action*, 36 Vt. L. Rev. 649, 649 (2012) ("[T]he Court appears to understand the power of eminent domain and the police power to be arrayed along a spectrum."). At one end are prohibitions on "noxious use of [] property [that would] inflict injury upon the community." *Mugler v. Kansas*, 123 U.S. 623, 669 (1887). Should a

governmental burden "'inhere . . . in the restrictions that background principles of the State's law of property and nuisance already placed upon [] ownership,'" then it is not a taking—even if the burden denies "all economically beneficial use" of the property. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992)). The opposite end of the spectrum includes "permanent physical occupation[s] of property," which are *per se* takings "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). Yet, even short of "permanent physical occupations," the more a given property interference "can be characterized as a physical invasion" or appropriation, the greater the presumption that a taking has occurred. *Penn Cent.*, 438 U.S. at 124.

For example, aircraft that pass above private property do not permanently occupy that property. *United States v. Causby*, 328 U.S. 256, 260-61 (1946) ("[The doctrine of] Cujus est solum ejus est usque ad coelum . . . has no place in the modern world."). Thus, it is not a *per se* taking whensoever the government authorizes a flightpath over private

property. *Id.* at 266. But at the same time, when "the line of flight is over the land , . . [that] land is appropriated as directly and completely as if it were used for the runways themselves," *id.* at 262, and when an interference of such a direct nature causes "a diminution in value of the property," it suggests "that a servitude has been imposed upon the land" necessitating compensation. *Id.* at 267. *See also Loretto*, 458 U.S. at 430-31. Notably, it was the actual, physical invasion of Causby's property that was the key factor in finding a taking. *Causby*, 328 U.S. at 256-66.

The "doctrinal potency," Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1226 (1967), of physical invasions in takings analysis is perhaps best illustrated by those rare cases in which physical invasion have been held *not* to cause a taking. Without exception, those cases involve fleeting or transitory invasions causing no damage. For instance, in *YMCA v. United States*, 395 U.S. 85 (1969), the Supreme Court held that a "temporary, unplanned occupation" of property during "the course of battle" did not constitute a taking. *Id.* at 93. Similarly, the California Supreme Court has held that there is no taking when government agents enter private property for the purpose of one-time

groundwater testing. *See Prop. Rsrv., Inc. v. Super. Ct.*, 375 P.3d 887, 923 (Cal. 2016). The Third Circuit has likewise found that there was no taking when police officers physically occupied a property for just two hours while conducting a lawful search. *Jones v. Phila. Police Dep't*, 57 F. App'x 939, 942 (3d Cir. 2003). These types of cases were aptly explained by the Federal Circuit in one of its leading cases on physical invasions. Cases in which physical invasions do not lead to takings are those in which the:

> government's activity was so short lived as to be more like the tort of trespass than a taking of property. The distinction between the government vehicle parked one day on O's land while the driver eats lunch, on the one hand, and the entry on O's land by the government for the purpose of establishing a long term storage lot for vehicles and equipment, on the other, is clear enough.

Hendler v. United States, 952 F.2d 1364, 1371 (Fed. Cir. 1991). Beyond such brief incursions, courts generally find physical invasions to constitute a taking. Indeed, the Supreme Court has established that "while a single act may not be enough [to turn a physical trespass into a taking], a continuance of them in sufficient number and for sufficient time may prove it." *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-30 (1922). "Every successive trespass adds to the force of the evidence" that the incursions effect a taking. *Id.* at 330.

The district court erroneously concluded that physical takings are a binary category: Government action is either a *per se* physical taking, or it is subject to a deferential balancing test. That is wrong. Even short of *a per* se taking, the degree to which "interference with property can be characterized as a physical invasion by government" is central to the takings analysis. *Penn Cent.*, 438 U.S. at 124. Thus, a government authorized invasion of a property falling short of a *per se* taking is nevertheless a "presumptive taking," *Hilton Washington Corp. v. District of Columbia*, 593 F. Supp. 1288, 1291 (D.D.C. 1984), *aff'd*, 777 F.2d 47 (D.C. Cir. 1985).

B. Even if the RSL does not warrant *per se* treatment, its character renders it a presumptive taking.

Should this court decide that the RSL is not a *per se* taking, it should nevertheless find that the RSL's character as a physical invasion strongly suggests a taking, lessening (or obviating entirely) the need for property owners to demonstrate severe economic impact.

There is, of course, nothing "noxious"—even loosely defined—about owners' desire to rent their units at market rates, or merely refrain from leasing them at all—at least absent a *bona fide* and discrete emergency on the market. *See Block v. Hirsh*, 256 U.S. 135, 157 (1921) (upholding

rent control specifically "justified only as a [two-year] temporary measure" following war-related price surges). *Cf. Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548 (1924) ("If about all that remains of war conditions is the increased cost of living that is not itself a justification of the [rent control] Act. . . . In that case the operation of the statute would be at an end."). The RSL resides on the polar opposite end of the character spectrum. Its core provisions extend beyond the mere protection of vulnerable tenants from potential abuse by landlords. *See Loretto*, 458 U.S. at 440. Neither is it generally applicable across properties, which might perhaps promote shared burdens and political accountability. *See Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). It does not even prevent owners from using their property in a way that, though not quite "noxious," might be characterized as deleterious to the community character or aesthetics. *See Penn Cent.*, 438 U.S. at 129 (citing cases).

The RSL certainly "can be characterized as a physical invasion by government," allowing "[a] 'taking' [] more readily [to] be found," even if the RSL falls short of a *per se* taking. *Penn. Cent.*, 438 U.S. at 124. As Appellants exhaustively outline, the RSL makes it practically impossible for owners to use their units for anything other than (below-market) rent.

Appellant Br. 10-13. Moreover, it highly restricts owners' abilities to cease renting to a given tenant, effectively requiring them to renew leases. At that point, if not before, the RSL can be characterized as "an actual physical invasion of the privately owned" units—an intrusion upon property rights most severe and strongly indicative of a taking. *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). *See also Loretto*, 458 U.S. at 433 (noting that *Kaiser Aetna*—decided after *Penn. Central*—had found a taking, notwithstanding that the taking "was not considered a taking *per se*").

That analysis does not change merely because the property owner at one point in time invited the tenant to live in the unit. First, as noted above, the RSL makes it practically impossible for owners to use their units for anything other than rent. It cannot be noteworthy, then, that owners "invite" renters, given that the "invitation" exists within a context of effectively "required acquiescence[—]the heart of the concept of occupation." *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987). It would be rather perverse should the government be allowed effectively to abridge owners' "'right to exclude,' so universally held to be a fundamental element of the property right," by deliberately placing

owners in the position where they have little-to-no real choice but to "invite" persons onto their property. *Kaiser Aetna*, 444 U.S. at 179-80.

In determining that a local rent-control ordinance did not effect a physical taking, the Supreme Court noted that the ordinance did not require that owners, "once they have rented their property to tenants, to continue doing so." *Yee v. City of Escondido*, 503 U.S. 519, 527-28 (1992). Indeed, the landlord "who wishe[d] to change the use of his land [was allowed to] evict his tenants, albeit with 6 or 12 months notice." *Id.* at 528. "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." *Ibid.*

This is that "different case." The RSL, as appellants detail, leaves owners with little choice but to rent out their units, and to continue doing so—even to an unwanted tenant, even past the agreed-upon terms of the lease (or "invitation"). Such provisions grant the law a direct and immediate "character" of a physical invasion. It goes beyond regulating the terms of a voluntary commercial agreement and effectively creates a new property right in the tenant. Even if the RSL does not effect a *per se* taking—either because the owner retains bare title, the right to sell, or

because the tenant was at some point "invited" into the property—the RSL has a physical character that makes it presumptively a taking.

II. The district court erred in dismissing Appellants' substantive due process claims.

"[W]hile rational basis review is indulgent and respectful [to the legislature], it is not meant to be 'toothless.'" *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012) (quoting *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981)). The district court erroneously defanged the rational basis test by concluding, essentially, that Appellants are not entitled to the opportunity to prove facts demonstrating irrationality. That flies in the face of precedent going back to *Carolene Products*, the very case that invented the rational basis test.

Appellants have alleged, in extensive detail, that the RSL does not advance its purported objectives, that it in fact undermines them, and that any connection between the RSL and its objectives is so attenuated as to be irrational. Appellant Br. 10-13. If they are correct, then they will prevail. Appellants are entitled to try to prove their allegations are true. In short, *facts matter*, even under rational-basis review.

A. Courts must engage with real-world facts, even under rational-basis review.

In *Carolene Products*, the Supreme Court outlined the rational basis test as it is still applied today. The Court held that although "the existence of facts supporting the legislative judgment is to be presumed," a challenged law must be "pronounced unconstitutional [if] ***in the light of the facts made known*** or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis[.]" *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (emphasis added). The Court went on to explain precisely how rational basis litigation is supposed to proceed:

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.

Id. at 153 (citation omitted). So not only do facts and experiences matter; they matter such that, over time, their development may render a law unconstitutional by demonstrating that its operation lacks a rational connection to a legitimate state interest. That principle is of particular

salience in the present case, where the law at issue was initially enacted to address a "housing emergency" fifty years ago.

More recent Supreme Court cases further illustrate that rational-basis scrutiny requires meaningful engagement with the factual record. For example, the Court held unconstitutional a permit requirement for a home for the mentally retarded "[b]ecause . . . the record [did] not reveal any rational basis" for the requirement. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985). The Court considered the city's purported rationale "that the facility was across the street from a junior high school, and [the city] feared that the students might harass the occupants of the [] home." *Id.* at 449. That rationale, however, did not make sense: "[T]he school itself [was] attended by about 30 mentally retarded students." *Ibid.* Other purported rationales for the differential treatment similarly failed to hold water when viewed in context: As the Court stated, "***this record*** does not clarify how [the requirement was] rationally justif[ied]." *Id.* at 450 (emphasis added). Of course, if rational basis meant that rank speculation could defeat specific allegations of irrationality, then *Cleburne* would have ended with a motion to dismiss, and that dispositive record would never have been presented.

When engaging in rational-basis scrutiny, this circuit too has engaged with real-world facts and contexts. That is true for cases in which plaintiffs ultimately win. *See, e.g.*, *Winston v. City of Syracuse*, 887 F.3d 553, 563-64 (2d Cir. 2018) ("[T]he City's policy . . . 'divorces itself entirely from the reality of legal accountability for the debt involved.'"); *Fortress Bible Church v. Feiner*, 694 F.3d 208, 220 (2d Cir. 2012) ("[O]n the record before us there was no rational basis for the Town's actions."); *Myers v. County of Orange*, 157 F.3d 66, 75-76 (2d Cir. 1998) ("The facts in this case serve to illustrate the policy's distortion of the goal of even-handed justice and impartial administration of the law."). And even when *upholding* a challenged law on rational-basis review, this court noted that there must be a "reasonably conceivable ***state of facts*** that could provide a rational basis for [a] classification," before finding that expert testimony and factual points suggested an actual connection between the law and a legitimate public interest. *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 284 (2d Cir. 2015) (emphasis added).

The Fifth Circuit has outlined three principles that illustrate how rational-basis review is meaningful, if still deferential. First, even though the government may invoke hypothetical justifications for a law, those

rationales must be plausible and "cannot be fantasy." *St. Joseph Abbey v. Castile*, 712 F.3d 215, 223 (5th Cir. 2013).[3] Second, even though the rational-basis test "places no affirmative evidentiary burden on the government," the appellants "may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality." *Ibid.* This point is crucial for the present case because Appellants are specifically alleging irrationality, and they are entitled to prove it. Finally, any asserted justification must be examined in its larger context to ensure that an assertion that seems rational in the abstract is not in fact irrational when viewed in context. *Ibid. See also Merrifield v. Lockyer*, 547 F.3d 978, 988-92 (9th Cir. 2008) (explaining the final, preceding point at length).

As a Third Circuit panel majority articulated while striking down a statute under rational-basis scrutiny, "[a]n undercurrent to our dissenting colleague's argument is that under rational basis review, the

[3] To be sure, this circuit has disagreed with the Fifth Circuit—and the Sixth, and the Ninth—in holding that "shield[ing] a particular group from intrastate economic competition" is a legitimate governmental interest. *Sensational Smiles*, 793 F.3d at 286. But as this case does not concern alleged economic protectionism, St. Joseph Abbey is persuasive precedent insofar as it speaks to the contours of rational-basis review generally.

government always wins. That, quite simply, cannot be so. In fact, were that the case, our review of issues under this standard would be equivalent to no review at all." *Doe v. Penn. Bd. of Probation & Parole*, 513 F.3d 95, 112 n.9. (3d Cir. 2008). The district court, finding that it was necessarily "bound to defer to legislative judgments," Doc. 75 at 114, before a record had even been created, in effect engaged in "no review at all." *Doe*, 513 F.3d at 112 n.9. This court should reverse and remind the district court that "rational basis review . . . is not meant to be 'toothless.'" *Windsor*, 699 F.3d at 180 (quoting *Schweiker*, 450 U.S. at 234). By dismissing this case on the pleadings, the district court impliedly held that facts do not matter in rational basis cases. That is incorrect.

B. Appellants sufficiently alleged that the RSL is irrational.

In dismissing the due process claims, the district court held that the RSL "was [in part] intended to allow people of low and moderate income to remain in residence in New York City – and specific neighborhoods within – when they otherwise might not be able to." Doc. 75 at 114. Because this objective was valid, the court held that the regulation must be upheld. Doc. 75 at 115. ("And where, as here, there are multiple justifications offered for regulation, the statute in question

must be upheld so long as any one is valid.") That, frankly, is not how rational-basis scrutiny works. To be sure, if a law has an illegitimate objective, then it must be struck down regardless of whether the law is rationally related to that objective. But even laws whose purposes are legitimate must be struck down if the facts demonstrate that those laws have no rational relationship to that purpose. *See, e.g.*, *Cleburne*, 473 U.S. at 449 (determining on the basis of a full record that the legitimate justifications proffered for the challenged law did not in fact make sense). The district court's decision erroneously treated the legitimacy of the RSL's purpose as the dispositive issue.

Notably, Appellants have alleged that the RSL has not only failed to advance its supposed purposes but that it has clearly worked against its stated objectives by exacerbating housing shortages and driving prices higher. Appellant Br. 11. The district court was bound to accept these allegations as true, and a law which clearly undermines its stated objectives is obviously irrational.

Yet even if the RSL did advance, in some tiny way, its stated objectives, that would still not be enough to satisfy rational basis. The Supreme Court has repeatedly struck down laws where there is an

extreme mismatch between a law's alleged benefits and its demonstrable costs.[4] In other words, if the means-end fit is too poor, the law is irrational. Appellants have alleged just such a mismatch because, in addition to driving housing costs up and reducing investment in affordable housing, the RSL also distributes its benefits at random: Relatively few of New York City's renters enjoy RSL's privileges, which are gained not based on need (either the tenant's or the neighborhood's) but on the arbitrary fact that a given building was constructed prior to

[4] See, e.g., *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336, 340-46 (1989) (rejecting property-tax-assessment scheme which unfairly resulted in gross disparities in tax assessments); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (rejecting government's assertion that denying public education to children of illegal immigrants could help save government funds as a "wholly insubstantial [benefit] in light of the costs involved to these children, the State, and the Nation" of creating a subclass of illiterates); *Zobel v. Williams*, 457 U.S. 55, 61-62 (1982) (rejecting Alaska's rationale that retroactive oil-dividend distribution scheme would encourage settlement in Alaska because scheme disproportionately benefitted long-term residents, despite creating some financial incentives for people to settle in Alaska); *James v. Strange*, 407 U.S. 128, 141-42 (1972) (harm inflicted on debtors by denying indigent defendants exceptions to the enforcement of debt judgments was grossly disproportionate to state funds saved); *Lindsey v. Normet*, 405 U.S. 56, 77-78 (1972) (cost savings from deterring a few frivolous appeals were insufficient to justify a surety requirement that allowed many frivolous appeals, blocked many meritorious appeals, and conferred windfall on landlords); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (reducing workload of probate courts by excluding women from service as administrators in certain cases would be unconstitutionally arbitrary).

1974. And *even within the same building*, the RSL might protect one tenant but not another—solely because a prior, unrelated tenant earned a high income at some point between 1993 and 2019. *See* N.Y. UNCONSOL. LAW, Ch. 249-B, § 5(a)(12) (LexisNexis); Admin. Code of the City of New York §§ 26-504.1–26.504.3. It is not apparent how such a scheme could be rationally related to preserving neighborhood stability, and, even at the complaint stage, Appellants have cited evidence suggesting a deleterious impact on communities and their stability by exacerbating housing shortages.

To be sure, rational basis review is deferential, and Appellants must carry a significant burden to prevail. Whether they can do so is not clear. What is clear, however, is that they have overwhelmingly *alleged* that the RSL is irrational in that it exhibits no means-end fit and in fact undermines its stated objectives.

CONCLUSION

For the foregoing reasons, this court should reverse the decision of the district court and remand for further proceedings.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 22nd day of January, 2021, I caused this Brief of *Amicus Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

/s/ Robert McNamara
Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

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Dated: January 22, 2021

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