No. 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,

—against—

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

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The New Civil Liberties Alliance is a nonpartisan, nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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INTERESTS OF *AMICUS CURIAE*[1]

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress and the states, administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

[1] The parties consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for NCLA certifies that no counsel for either party authored this brief in whole or in part and no one other than NCLA and its counsel contributed money to fund the preparation or submission of this brief.

In this instance, NCLA urges the court to determine that the dismissal of Plaintiffs-Appellants' due process claim was in error because property rights are fundamental rights that warrant heightened protection from government interference. And, even if this Court applies rational basis review, the New York Rent Stabilization Law is arbitrary and irrational, and Plaintiffs-Appellants alleged a plausible due process claim.

SUMMARY OF ARGUMENT[2]

The Fourteenth Amendment of the United States Constitution provides that a State may not "deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1.

Property rights are fundamental rights that warrant heightened protection from government interference. The New York Rent Stabilization Law (RSL) impedes Plaintiffs-Appellants' fundamental property rights and should be reviewed under strict scrutiny, which the lower court declined to do. Under the strict scrutiny standard, the RSL fails because it is not narrowly tailored to achieve a compelling state interest.

[2] Plaintiffs-Appellants present three issues for review. *See* Doc. 75 (P-A Br.). This brief only addresses the third: "Whether the District Court erred in concluding that Plaintiffs failed to plausibly allege that the RSL violates due process."

Even under the less stringent rational basis review, Plaintiffs-Appellants pled a plausible due process claim because the RSL is arbitrary and irrational. The arbitrary and irrational nature of the RSL is further demonstrated by recent changes in the housing market stemming from the Covid-19 pandemic, which may impact the process to declare the next triennial housing emergency.

The lower court erred by applying rational basis review and finding that the RSL does not violate Plaintiffs-Appellants' due process rights related to their property. This Court should reverse the judgment of the District Court as to Plaintiffs-Appellants' due process claim and remand the case for further proceedings.

ARGUMENT

I. THE PLAINTIFFS-APPELLANTS SUFFICIENTLY ALLEGED A DUE PROCESS CLAIM

A. Plaintiffs-Appellants Have a Fundamental Right to Their Property Under the U.S. Constitution, so Their Due Process Claim Should Subject the RSL to Strict Scrutiny

Whether a right is fundamental under the Due Process Clause turns on an examination of "our Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997). The Court has routinely determined that fundamental rights and liberties are those that are "deeply rooted in this Nation's history and tradition." *Id.* (quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502 (1977) (plurality opinion)). Fundamental rights and liberties are also those

that are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

Rights in real property are fundamental rights explicitly protected in the Bill of Rights. *See* U.S. Const. amend. V; *see also* U.S. Const. amend. XIV, § 1. Real property rights are also deeply rooted in the Nation's history.

The principles instantiated in the Constitution's property protections existed hundreds of years before the Nation's founding. *See Horne v. Dep't of Agriculture*, 576 U.S. 350, 358 (2015) (discussing how the Magna Carta's protection for private property is "reflected" in the Fifth Amendment's Takings Clause). As the Court noted in *Horne*, "[t]he colonists brought the principles of Magna Carta with them to the New World." *Id.*; *Dent v. State of W.Va.*, 129 U.S. 114, 123 (1889) (noting that due process "c[a]me to us from the law of England, from which country our jurisprudence is to a great extent derived"). And "[b]oth of the Constitution's Due Process Clauses reach back to Magna Carta." *Obergefell v. Hodges*, 576 U.S. 644, 723 (2015) (Thomas and Scalia, JJ., dissenting); *see id.* at 723-25 (discussing reiterations of the Magna Carta's principles over time, including property protections, and their eventual adoption by the Constitution's Framers). History clearly shows "that the Due Process Clause," including its property protections, "like its forebear in the Magna Carta … was 'intended to secure the individual from the

arbitrary exercise of the powers of government.'" *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (cleaned up) (citations omitted); *see also Dent*, 129 U.S. at 124 ("In this country the requirement is intended to have a similar effect against legislative power; that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property.").

But the importance of property rights was not limited to the Framer's understanding of Magna Carta. There was also a more general, but strong, understanding of the importance of property rights at the time of the Nation's founding. The Framers viewed private property as providing "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." J. Nedelsky, *Private Property and the Limits of American Constitutionalism* 9 (1990). And they regarded the protection of private property rights as "the first object of government." The Federalist No. 10 (Madison); *see also* James Madison, Property (1792), *reprinted in* The Writings of James Madison 101, 102 (Gaillard Hunt ed., 1906) ("Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*." (emphasis in original)).

As the Eleventh Circuit has observed, "[i]t is simply beyond rational dispute that the Founding Fathers, through the Constitution and the Bill of Rights, sought to *protect* the fundamental right of private property, not to eviscerate it." *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1265 (11th Cir. 2012) (emphasis in original). So too here, where Plaintiffs-Appellants seek to protect their fundamental private property rights through the Fourteenth Amendment's due process guarantees.

Under the Due Process Clause, such fundamental rights and liberty interests are "provide[d] heightened protection against government interference." *Glucksberg*, 521 U.S. at 720. Laws that violate fundamental rights are subject to strict scrutiny, which requires the government to establish that "the infringement [of a person's fundamental rights] is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-302 (1993). Under strict scrutiny, the government bears the burden of demonstrating that the challenged law is constitutional. *See, e.g.*, *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015); *Johnson v. California*, 543 U.S. 499, 506 (2005).

Instead of conducting the analysis outlined in *Glucksberg*, the lower court ignored the history of property rights in our Nation and instead applied rational basis review. Relying on *Pennell v. City of San Jose*, 485 U.S. 1, 11-12 (1988), and *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 544-45 (2005), the lower court summarily

determined that "the Court is engaged in rational-basis review here, not strict scrutiny." SPA-35. But neither *Pennell* nor *Lingle* addressed whether property rights were "fundamental" under the Due Process Clause. Instead, both dealt almost entirely with claims under the Fifth Amendment's Takings Clause. Moreover, while *Pennell* dealt, in passing, with a due process argument, the Court never paused to consider whether property rights were "fundamental" in the first place. 485 U.S. at 11-12. Thus, as Justice Scalia noted in a concurring opinion in *Gonzalez v. U.S.*, 553 U.S. 242 (2008), any suggested analysis set forth in *Lingle* concerning "fundamental rights," was *dicta* and "a formula repeated in dictum but never the basis for judgment is not owed *stare decisis* weight." *Id.* at 256 (Scalia, J., concurring in the judgment). And, as Justice Scalia noted in that same opinion, whether a right is "fundamental" must turn on its "guarantee[] by the Constitution," and "[a]part from constitutional guarantee, [there is] no objective criterion for ranking rights." *Id.*

Because the Plaintiffs-Appellants' fundamental property rights are at stake, any review that provides less than strict scrutiny eviscerates their rights in contravention of the principles set forth in the Bill of Rights. Such a deprivation is improper, so this Court should remand.

B. The RSL Violates Plaintiffs-Appellants' Rights Because It Is Arbitrary and Irrational

Even if this Court—erroneously—finds that Plaintiffs-Appellants' property rights are not fundamental rights, Plaintiffs-Appellants have still adequately pled

that the RSL violates their due process rights, because the RSL is arbitrary and irrational. *See Eastern Enter. v. Apfel*, 524 U.S. 498, 537 (1998). State price controls violate due process if the controls are "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." *Pennell*, 485 U.S. at 11 (citations and quotations omitted).

The RSL permits municipalities, like the City of New York, to determine and declare a housing emergency for any class of housing accommodations or all housing accommodations *if* the vacancy rate exceeds 5%. N.Y. Unconsol. Law tit. 23 § 8623.a (McKinney). Under the RSL, the 5% vacancy threshold triggers the ability to declare a housing emergency but does not require the municipality to exercise such power. *Id.* Conversely, when the vacancy rate exceeds 5%, "[t]he emergency must be declared at an end." N.Y. Unconsol. Law tit. 23 § 8623.b (McKinney).[3] Thus, the vacancy rate threshold is a necessary predicate for the City to exercise its "emergency" powers under the RSL. *See* N.Y. Unconsol. Law tit. 23 § 8623.a (McKinney).

To comply with certain provisions of the RSL, the City of New York sponsors the New York City Housing and Vacancy Survey (NYCHVS), which is conducted by the United States Census Bureau. *See* U.S. Census Bureau, New York City

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[3] Any "resolution declaring the existence or end of an emergency" may not be adopted absent a public hearing. N.Y. Unconsol. Law tit. 23 § 8623.b. (McKinney).

Housing and Vacancy Survey (NYCHVS) (last visited Jan. 22, 2021) *available at* https://www.census.gov/programs-surveys/nychvs.html. The triennial NYCHVS surveys "the supply of housing accommodations within such city, the condition of such accommodations and the need for continuing the regulation and control of residential rents and evictions within [New York City]." *See* N.Y.C. Admin. Code § 26-415; N.Y. Unconsol. Law tit. 23 § 8603 (McKinney); *compare* N.Y. Unconsol. Law tit. 23 § 8623.a (McKinney) (requiring emergency determination based on a city's housing accommodation "supply" and "condition" and "the need for regulating and controlling residential rents."). The NYCHVS is used to help determine the vacancy rates in the City. *See id*. The City must determine whether the housing emergency continues by April 1 every third year after completion of the survey.[4]

Historical data shows that since the RSL's passage, the net rental vacancy rate has never exceeded the statute's 5% threshold. *See* NYC Housing Preservation & Development, *50+ Years of Housing in New York City* (last visited Jan. 22, 2021), https://public.tableau.com/profile/elyzabeth.gaumer6154#!/vizhome/HVS_KeyTrends_Test_3-14/Story1 (showing NYCHVS historical data since 1965). The 2017 NYCHVS showed a net vacancy rate of 4%. *Id.*

[4] In years like 2021, where the triennial determination is due to be made but occurs in a year after the decennial census, the determination is postponed by one year. *See* N.Y. Unconsol. Law tit. 23 § 8603 (McKinney).

Once it is established that the vacancy rate is below the 5% threshold, the RSL permits a city, here the City of New York, to determine that there is a "public emergency requiring the regulation of residential rents." The determination must be based on "the supply of housing accommodations", their "condition", and "need for regulating and controlling residential rates" within the municipality. *Id.* The RSL's provisions may only be invoked if the City of New York determines "the existence of a public emergency requiring regulation of residential rents" within its bounds. *See* N.Y. Unconsol. Law tit. 23 §§ 8622, 8623.a. Thus, the RSL places a statutory obligation on the City of New York to provide a rational basis for determining that an emergency exists beyond the simple existence of a vacancy rate below the 5% threshold.

When an emergency is declared, the RSL places restrictions on property owners' rights to use, possess, occupy, and sell or otherwise dispose of covered properties. *See, e.g.*, JA-98 ¶223, JA-103 ¶238-39, JA-106-09 ¶¶248-56.

In their briefing Plaintiffs-Appellants highlight at length the various ways the RSL is arbitrary, irrational, or demonstrably irrelevant and how it violates their due process rights even under the more indulgent rational basis review. *See* P-A Br. at 60-65. *Amicus* raises two additional rationales for the Court's consideration below.

1. Standardless Perpetual Emergencies Violate Due Process Because They Are Arbitrary and Irrational

What constitutes an "emergency" remains undefined under the RSL by either New York City or the State. Despite this, for the last 50 years the City of New York has consistently declared an emergency every three years in order to keep the RSL's strictures in place. *See, e.g.*, JA-80-88 ¶¶ 167-192. This perpetual and mechanical emergency declaration process by the City Council is arbitrary and irrational.

Despite the RSL's language to the contrary, the history of the RSL's application shows that it is not an "emergency" measure. *Cf. County of Gloucester v. State*, 132 N.J. 141, 144, 148, 152 (1993) (a "parade of annual Executive Orders" over a twelve-year period violated emergency statute because the emergency the orders sought to address, prison overcrowding, was a long-term problem that could not be addressed by serial annual orders). Left undefined by either the City or the State, it can hardly be said that continual declarations of "emergency" over a 50-year period meet even the colloquial definition of emergency. *See* Merriam-Webster, *Emergency* (last visited Jan. 22, 2021), https://www.merriam-webster.com/dictionary/emergency (an "emergency" is "an unforeseen combination of circumstances or the resulting state that calls for immediate action" or "an urgent need for assistance or relief ").

The RSL is arbitrary because an undefined standard is inherently immeasurable and subjects property owners' due process rights to the whims of the

legislature or City Council. Likewise, the RSL is irrational because an undefined standard is by its nature incapable of logical or reasonable application. Stated another way, when everything is capable of being an emergency, nothing is an emergency. These concerns are exacerbated when, as here, the purported "emergency" extends for decades.

2. The Covid-19 Pandemic Has Further Exposed the Arbitrary Nature of the RSL

Since March 2020, like much of the nation, the City of New York has struggled with the Covid-19 pandemic. In the intervening months, the State and the City of New York imposed numerous emergency measures meant to stop the spread of the novel disease and limit its economic impact—including shelter-in-place orders, closing non-essential businesses and schools, reducing transit services, and imposing eviction moratoria. But despite these measures, Covid-19 caused residents to flee the City in droves. *See* Kevin Quealy, *The Richest Neighborhoods Emptied Out Most as Coronavirus Hit New York City*, N.Y. Times The UpShot (May 15, 2020), https://www.nytimes.com/interactive/2020/05/15/upshot/who-left-new-york-coronavirus.html ("Roughly 5 percent of residents — or about 420,000 people — left the city between March 1 and May 1."). It is also likely that the pandemic exacerbated a growing population loss trend occurring in the City and statewide. *See* Alexandre Tanzi and Wei Lu, *Even Before Covid 2,600 People a Week Were Leaving New York City*, Bloomberg (Dec. 5, 2020, 6:00 AM EST),

https://www.bloomberg.com/news/articles/2020-12-05/even-before-covid-2-600-people-a-week-were-leaving-new-york-city (noting that New York City was losing 376 per day "before it became the epicenter of the country's virus outbreak in March"); *see also* Joseph Spector, *New York, again, leads nation in population decline: It could now lose two House seats*, USA Today (updated Jan. 5, 2021, 5:17 PM ET), https://www.usatoday.com/story/news/politics/2020/12/23/new-york-population-decline-coronavirus-house-seats/4023477001/ (noting that U.S. Census Bureau figures show the state lost 126,355 people between July 2019 and July 2020).

As people moved out of the City, rental vacancy rates increased. For example, one market report indicated that Manhattan's vacancy rate in February 2020 was 2.01%—well below the RSL's 5% threshold—but rose as high as 6.14% in October and November.[5]

And, as vacancy rates increased, the average rental price decreased as landlords competed to attract new tenants. *See* Carmen Reinicke, *Rents in big cities*

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[5] *Compare* Miller Samuel Real Estate, Elliman Report at 1 (February 2020), https://www.elliman.com/resources/siteresources/commonresources/static%20pages/images/corporate-resources/q4_2019/rental%2002_2020.pdf *with* Miller Samuel Real Estate, Elliman Report at 1, 2 (November 2020), https://www.elliman.com/resources/siteresources/commonresources/static%20pages/images/corporate-resources/q3_2020/rental11_2020.pdf; *see also* Jennifer White Karp, *Manhattan vacancy rate hits grim 5 percent benchmark*, Brick Underground (Sept. 10, 2020, 9:30 AM), https://www.brickunderground.com/rent/douglas-elliman-manhattan-brooklyn-queens-rental-market-report-august-2020 (noting that Manhattan's August 2020 vacancy rate of 5.1% was the highest the Elliman Report had seen in 14 years of tracking).

are falling due to Covid. Here's how to negotiate your monthly payment, CNBC (Nov. 5, 2020, 12:23 PM EST), https://www.cnbc.com/2020/11/05/rents-are-falling-due-to-covid-heres-how-to-negotiate-a-lower-rate.html (noting that New York City saw a 15.3% reduction in median rents from March through October 2020); *see also* Miller Samuel Real Estate, Elliman Report at 2 (November 2020) ("From April 2020, the first full month of the COVID lockdown, through November, the monthly net effective median rent [in Manhattan] fell by $797.").

While the data emerging are not as comprehensive as the RSL's triennial statutorily required survey,[6] there is the distinct possibility that vacancy rates in the City of New York are above and may stay above the 5% threshold, thus meeting the preconditions to declare an end to the housing emergency and the City's ability to regulate under the RSL. *See* N.Y. Unconsol. Law tit. 23 § 8623.b (McKinney).

To avoid this statutorily delineated consequence, legislators have attempted, but not yet succeeded, to temporarily amend the RSL by pausing the completion of the NYCHVS "until two years after the state's COVID-19 emergency declaration is over." *See* Rachel Holiday Smith, *Lawmakers Aim to Stop COVID-19 Apartment*

[6] Due to the Covid-19 pandemic, the start of the 2020 NYCHVS was delayed from November 2020 to February 2021, thus changing the survey reference year to 2021. *See* U.S. Census Bureau, Notice, *Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; 2021 New York City Housing and Vacancy Survey*, 85 Fed. Reg. 68286 (Oct. 28, 2020). The Census Bureau also reduced the number of respondents from 30,000 to 12,000. *See id.*

Vacancies from Upending Rent Regulation, The City (Jul. 29, 2020, 9:04 PM EDT), https://www.thecity.nyc/2020/7/29/21347547/new-york-city-apartments-rent-regulation-pandemic-tenants.

The rationale for the proposed bill—that the increase in vacancy rates because of the pandemic should not end the next scheduled continuation of the housing emergency—highlights the arbitrary and irrational nature of the RSL. *See id.* ("We just strengthened the rent laws last year … We're not going to just let the vacancy rate result in losing all those protections."). For example, if, as a necessary predicate to an emergency declaration, the 5% vacancy threshold partially forms the definition of "emergency," then it should not matter how that threshold is exceeded, only that it is. But, as the proposed legislation indicates, the overwhelming concern is that if vacancy rates exceed 5% then the emergency cannot be continued. Thus, the 5% threshold has been exposed as an arbitrary means to an end—the trigger that allows the City of New York to regulate under the RSL—not truly a standard measuring whether an emergency exists in the first instance.

The proposed legislation also shows, to an extent, that the continuation of the emergency is pretextual, that the policy is for the emergency to be continued no matter what. *Cf. Dep't of Commerce v. New York*, 128 S. Ct. 2551, 2573-76 (2019) (affirming district court's determination to remand an agency decision and authorize extra-record discovery because the Secretary's determination rested on arbitrary and

capricious pretextual reasoning). Such possibilities render the RSL arbitrary and irrational in violation of Plaintiffs-Appellants' due process rights.

CONCLUSION

This Court should reverse the judgment of the District Court as to Plaintiffs-Appellants' due process claim and remand the case for further proceedings.

January 22, 2021

Respectfully,

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CERTIFICATE OF COMPLIANCE

I certify that this *Amicus Curiae* brief complies with the type-volume limitations of Rule 32(a)(7)(B) and Rule 29(a)(5) of the Federal Rules of Appellate Procedure, as modified by Local Rules 32.1(a)(4)(A) and 29.1(c), respectively, because it contains 3,470 words, excluding those portions of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman font.

January 22, 2021

/s/ Kara Rollins
KARA ROLLINS

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this *Amicus Curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system on January 22, 2021. I also certify that the foregoing document is being served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h)(1) & (2).

January 22, 2021

/s/ Kara Rollins
KARA ROLLINS