To Be Argued By:
RICHARD P. BRESS
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APL-2022-00049
Appellate Division, First Department Case No. 2019-3610
New York County Clerk's Index No. 153759/17

Court of Appeals

STATE OF NEW YORK

TAX EQUITY NOW NY LLC,

Plaintiff-Appellant,

—against—

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF FINANCE, STATE OF NEW YORK, and NEW YORK OFFICE OF REAL PROPERTY TAX SERVICES,

Defendants-Respondents.

BRIEF FOR PLAINTIFF-APPELLANT

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July 27, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sections 500.1(f) and 500.13(a) of the Rules of Practice of the New York Court of Appeals, Plaintiff-Appellant Tax Equity Now NY LLC states that it is a limited liability company organized under the laws of the State of New York, and that it has no parents, subsidiaries, or affiliates.

STATEMENT OF RELATED LITIGATION

Pursuant to Section 500.13(a) of the Rules of Practice of the New York Court of Appeals, Plaintiff-Appellant Tax Equity Now NY LLC states that there is no pending litigation related to this case.

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Plaintiff-Appellant Tax Equity Now NY LLC ("TENNY") respectfully submits this brief in support of its appeal from the February 27, 2020 decision and order of the Supreme Court, Appellate Division, First Department, which modified an order of Supreme Court, New York County to dismiss TENNY's complaint and directed entry of judgment against TENNY.

PRELIMINARY STATEMENT

"The integrity of any system of taxation, and particularly real property taxation, rests upon the premise that similarly situated taxpayers pay the same share of the tax burden." *Foss v. City of Rochester*, 65 N.Y.2d 247, 254 (1985). New York City, however, collects $30 billion in property taxes each year by treating similarly situated New Yorkers in a dramatically dissimilar manner. This case raises two fundamental questions that impact millions of this State's residents: *First*, whether the City may assess and tax similar properties, worth the same amount, within the same property class, at radically different values.[1] *Second*, whether the City may assess and tax properties in which minority residents more commonly live at rates double, triple, or more than the rates it uses to assess and tax properties within the same class in which white residents more commonly live.

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[1] Unless context requires otherwise, references to the "City" are to Defendants-Respondents City of New York and New York City Department of Finance, and references to the "State" are to Defendants-Respondents State of New York and New York Office of Real Property Tax Services.

As TENNY alleged in its 300-plus-paragraph complaint, the inequitable and regressive nature of the City's property-tax system and the discriminatory effects of its taxes on the City's minority population are stark. The complaint demonstrates with the City's own data and Defendants' longstanding admissions that the City assesses and taxes properties within the same class at different rates, so that homes worth identical amounts are assessed at wildly disparate amounts and receive dramatically different tax bills. The complaint further shows that the City's minority neighborhoods are assessed and taxed at vastly higher rates than its majority-white neighborhoods, and that rental properties more typically inhabited by the City's minority residents are assessed and taxed at vastly higher rates than condos and co-ops more typically owned by the City's white residents. The upshot is a regressive, arbitrary, and unequal system under which millions of New Yorkers—including many of the City's most vulnerable residents—are forced to bear an outsized tax burden, while those living in multi-million-dollar properties at some of the City's toniest addresses pay dramatically lower rates.

Those results are fundamentally at odds with this Court's precedent, which has held that similarly situated taxpayers must be treated uniformly, and accordingly that properties within the same class must be assessed and taxed at a uniform rate. Supreme Court had little difficulty finding that TENNY's detailed factual allegations adequately plead numerous violations of state and federal law. Other courts, as well

as New York's Attorney General and the U.S. Department of Justice, have likewise held that allegations like those made here state violations of New York or federal law. But, on an interlocutory appeal, the First Department went out of its way to order the dismissal of TENNY's complaint, thereby cutting off discovery and the opportunity to crystallize the legal principles at issue here. The court did not dispute that New York City assesses properties within the same class at different fractions of their value, creates "dramatic disparities" in the taxes paid by residents owning "similar pieces of property," and over-assesses and over-taxes majority-minority neighborhoods or property types in particular. Instead, it held that New York and federal law permits those results. If permitted to stand, the First Department's decision would afford municipalities carte blanche to treat millions of New Yorkers unfairly, impair the ability of countless minority residents to obtain and retain housing, and perpetuate entrenched racial segregation. That is not the law.

Section 305(2) of New York's Real Property Tax Law expressly requires that within each property class, "[a]ll real property in each assessing unit shall be assessed at a *uniform* percentage of value." (Emphasis added.) That statutory command executes the mandate of Article XVI, § 2 of the State Constitution requiring the "equalization of assessments" within a taxing jurisdiction. The First Department did not dispute that, if the plain text of § 305(2) controls, TENNY's allegations of rampant disuniformity amply plead violations of § 305(2). But the

court refused to apply the statute according to its terms because it believed that doing so was barred by other contemporaneously enacted statutes. That was error. It was the court's obligation to harmonize these statutes, not to have one trump the other—let alone in a manner undermining a state constitutional command. Both plain text and this Court's precedent show that these statutes can be harmonized and that there is no impediment to effectuating § 305(2)'s core constitutionally derived requirement that the City must treat like properties within the same class alike.

The First Department also erroneously dismissed TENNY's FHA claims. Despite the complaint's detailed allegations that the City assesses and taxes properties in majority-minority neighborhoods at two or three times the rate prevailing in majority-white neighborhoods, the court held that those facts do not state a claim under the FHA. That holding is wrong as a matter of law, conflicts directly with the holdings of other courts and the past determinations of New York's Attorney General and the U.S. Department of Justice. The First Department's decision vitiates critical FHA rights in America's largest city, and would give municipalities statewide free rein to discriminate in the assessment and taxation of real property. This Court should reject the First Department's enfeebled view of the nation's principal protection against housing discrimination.

Finally, the First Department erred in dismissing TENNY's claims under the State and Federal Equal Protection and Due Process Clauses, for the same basic

reason that undermined its interpretation of § 305(2): The court simply misunderstood how to harmonize the relevant statutes in the Real Property Tax Law, and attributed to those statutes inequitable purposes that the Legislature never had, that this Court has already rejected, or that would be unconstitutional in any event.

In asking this Court to reverse, TENNY is not asking the Court to do anything radical or new. The only issue here is whether the First Department inappropriately ended this case at the pleading stage despite TENNY's detailed allegations showing that the City's property-tax system operates in a non-uniform, inequitable, irrational, and discriminatory manner. New York's courts have not hesitated to intervene when called upon in cases involving the unlawful assessment and taxation of real property. *See, e.g.*, *Matter of Hellerstein v. Assessor of Town of Islip*, 37 N.Y.2d 1 (1975); *Foss*, 65 N.Y.2d at 253; *Coleman v. Seldin*, 181 Misc. 2d 219, 222 (Sup. Ct., Nassau County 1999). In many of those cases, the problems at issue were entrenched. But as this Court explained over 50 years ago, assessment and taxation practices are not insulated from judicial scrutiny even if they are "persistent, widespread and uncorrected." *Hellerstein*, 37 N.Y.2d at 10.

So too here. For years, the City has recognized that its property-tax system is broken, and yet has resisted any serious attempt at reform. It must not be allowed to dodge responsibility for creating and perpetuating an unlawful property-tax system that harms countless New Yorkers today. The First Department's decision, which

gave Defendants a free pass to continue ignoring the fundamental legal flaws in the City's property-tax system, should be reversed.

QUESTIONS PRESENTED

TENNY's complaint includes extensive data and numerous statements by Defendants' own officials showing that the City assesses properties in the same class at wildly disparate percentages of actual market value, that the City's assessment and taxation practices disparately impact minority residents and perpetuate segregation, and that the City assesses and taxes real property in an arbitrary manner bearing no relationship to true value. At issue here is whether TENNY adequately pleaded claims for relief under (I) RPTL § 305(2), which requires the City to assess properties in the same class "at a uniform percentage of value," and implements Article XVI, § 2 of the State Constitution, which requires the "equalization of assessments"; (II) the FHA; and/or (III) the State and Federal Equal Protection and Due Process Clauses. The First Department answered "no."

STATEMENT OF JURISDICTION

On April 28, 2022, this Court granted TENNY's motion for permission to appeal the First Department's February 27, 2020 decision and order. R946-78. The Court has jurisdiction under CPLR 5602(a)(1)(i). All arguments raised in this appeal were presented to, and addressed by, the courts below, and are therefore preserved for this Court's review. *See generally* R18-23, 599-639, 726-66, 957-76.

BACKGROUND

I. HISTORY OF THE CITY'S PROPERTY-TAX SYSTEM

Over the course of New York's history, municipalities have employed property-tax systems that have patently disregarded the requirements of state or federal law, and harmed New Yorkers in the process. New York's courts have played a pivotal role in identifying and stopping those systematic violations.

"[F]or nearly 200 years," state law required jurisdictions to assess real property "at full value," *i.e.*, full market value, and for almost as long, municipalities "flagrant[ly] violat[ed]" that law. *Hellerstein*, 37 N.Y.2d at 13; *see id.* at 10. Assessment practices varied, but municipalities generally assessed real property at a fraction of its value, and often unequally—frequently favoring owners of single-family homes in particular neighborhoods by assessing them at a lower fraction than other residential and commercial property. *See, e.g.*, N.Y.C. Indep. Budget Office, *Twenty-Five Years After S7000A: How Property Tax Burdens Have Shifted in New York City* 8 (2006), https://ibo.nyc.ny.us/iboreports/propertytax120506.pdf ("*IBO Report*"). These practices often disfavored lower-income residents and racial minorities. *See, e.g.*, Frank Domurad et al., N.Y. Pub. Interest Research Group, Inc., *City of Unequal Neighbors: A Study of Residential Property Tax Assessments in New York City* 9-31 (1981).

This Court found these fractional-assessment practices unlawful in *Hellerstein*, "forc[ing] Albany legislators to tackle … the inequitable assessment of properties in localities all across the state, including New York City." *IBO Report* at 4. The system the Legislature devised—known as S7000A for the bill proposing it—repealed the statute requiring the assessment of property at full value and replaced it with one requiring that "[a]ll real property in each assessing unit shall be assessed at a *uniform* percentage of value." RPTL § 305(2) (emphasis added). S7000A was supposed to result in a fairer distribution of the property-tax burden over time, and ensure that jurisdictions uniformly assessed property within their borders. *See IBO Report* at 17, 23.

Despite S7000A, however, problems of unequal assessment and taxation have persisted, sometimes disproportionately impacting the State's minority residents. Two decades ago, New York's Attorney General brought suit against Nassau County, finding that "residential properties located in predominantly minority neighborhoods [we]re consistently assessed at disproportionately higher values than the properties of homeowners in white neighborhoods," in violation of the FHA and the State Equal Protection Clause. Complaint-in-Intervention ¶¶ 2, 6-7, *Coleman v. County of Nassau*, No. 97-30380 (Sup. Ct., Nassau County filed Feb. 10, 2000) (emphasis omitted) (R646-68). The U.S. Department of Justice filed a similar suit. *See infra* at 42, 48-49. After New York's courts rejected Nassau County's attempt

to dismiss the Attorney General's suit, Nassau County settled the case and agreed to reassess properties in a manner that was "'fair'" and "'nondiscriminatory'" and assessed all residential properties at "a uniform percentage of value." *Matter of O'Shea v. Board of Assessors of Nassau County*, 8 N.Y.3d 249, 256-57 (2007) (citation omitted).

This case involves New York City. Like Nassau County 20 years ago, the City operates a property-tax system that, as TENNY's complaint explains in painstaking detail, assesses and taxes real property in a profoundly inequitable and discriminatory manner. Defendants' own leaders have admitted that the City's property-tax system produces "obvious inequities" that "have grown over decades," R201, 404 (then-Mayor de Blasio and his spokesman); is "crazy" and "really, really unfair," R403 (then-City Council Speaker Mark-Viverito); is riddled with "unfairness and inequity," R196 (then-Finance Commissioner Jiha); uses "artificial" methods of assessment that "codif[y] historical inequities in assessment practices," R250, 253 (First Deputy Finance Commissioner Hyman); and "guarantees that similar properties will face widely different tax burdens depending on where they are located," R207 (Independent Budget Office Deputy Director Sweeting).

But even though Defendants' elected officials have acknowledged the problem for decades, they have done nothing to remedy it—dismissing property-tax reform as "just too political," R410 (then-Manhattan Borough President Brewer),

and "the most controversial thing you could imagine," R199 (then-Mayor de Blasio). Every New York City mayor since Ed Koch has touted the need for reform, but has done little more than pay lip service to it—instead allowing pervasive disparities in assessment and taxation to fester and imposing billions of dollars of excess taxes on disadvantaged groups. *See* R407; Jana Cholakovska, *All the Times Politicians Called for Fixing NYC's Property Tax System*, City & State N.Y. (Feb. 5, 2020), https://www.cityandstateny.com/politics/2020/02/all-the-times-politicians-called-for-fixing-nycs-property-tax-system/176434/. It is an open secret that, without a "court ruling or some other external prod," nothing will change. *IBO Report* at 12.

II. HOW THE CITY ASSESSES AND TAXES REAL PROPERTY

Under S7000A, the City is a "[s]pecial assessing unit"—a taxing jurisdiction with a population of one million or more, in which real property is divided into four classes: Class 1 (one- to three-family homes); Class 2 (other residential property, including apartment buildings, condos, and co-ops); Class 3 (utility property); and Class 4 (everything else). RPTL §§ 1801(a), 1802.[2] Special assessing units may assess *different* property classes at different fractions of full value, *see O'Shea*, 8 N.Y.3d at 254, but must assess all properties *within* a property class "at the same percentage of full value," *41 Kew Gardens Rd. Assoc. v. Tyburski*, 70 N.Y.2d 325, 330 (1987).

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[2] The City and Nassau County are the only special assessing units.

This case focuses on the assessment and taxation of residential properties in Classes 1 and 2. As explained below, the City's convoluted property-tax system creates massive disparities in how similarly situated properties within these classes are assessed and taxed.[3]

A. Assessment

The City first generates an "assessed value" for each property. Because state law now permits fractional assessment, a property's assessed value is only a fraction of its actual market value. The City assesses real property in three basic steps.

First, the City determines a property's "market value." For Class 1 properties, the City estimates value based on data from comparable sales, which is "commonly the most accurate standard." *Matter of Merrick Holding Corp. v. Board of Assessors of County of Nassau*, 45 N.Y.2d 538, 542 (1978); *see, e.g.*, N.Y.C. Dept. of Fin., *Class 1 Property Tax Guide* 4 (rev. Jan. 20, 2022), https://www1.nyc.gov/assets/finance/downloads/pdf/brochures/class_1_guide.pdf ("*Class 1 Guide*"); R109. For Class 2 properties, the City instead estimates value using an income-based approach that varies depending on the type of property involved. *See Merrick Holding*, 45 N.Y.2d at 542; R109-10 & n.2.

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[3] TENNY's complaint provides additional detail on how the City assesses and taxes real property. *See* R108-23.

The City estimates the value of apartment buildings based on the actual rental income they generate. *See, e.g.*, N.Y.C. Dept. of Fin., *Class 2 Property Tax Guide* 7 (rev. Jan. 20, 2022), https://www1.nyc.gov/assets/finance/downloads/pdf/brochures/class_2_guide.pdf ("*Class 2 Guide*"). The City does not determine the value of condos and co-ops based on the actual income those properties would generate if rented. Instead, the City assigns an artificial market "value" to them based on an estimate of the income generated by *rental properties of similar age*. *See* R133-34, 249-50. Since most rentals constructed before 1974 are subject to rent regulation, the City chooses to assess most pre-1974 luxury condos and co-ops as if they were rent-regulated apartments. It thus values eight-figure condos and co-ops at the City's most prestigious addresses as if they were rent-regulated apartments, even though they would not remotely qualify for rent regulation if they were rented. *See* R133-35.

Because of this practice, the City values many condos and co-ops at small fractions of their true value. According to one study, the City valued an Upper East Side co-op building at $188 per square foot even though a unit within that building had sold for "approximately *$4500 per square foot*"—over 20 times higher. Furman Ctr. for Real Estate & Urban Policy, *Shifting the Burden: Examining the Undertaxation of Some of the Most Valuable Properties in New York City* 2 (2013) (emphasis added), https://furmancenter.org/files/FurmanCenter_ShiftingtheBurden.

pdf ("*Shifting the Burden*"); *see also, e.g.*, N.Y.C. Real Prop. Tax Reform Commn., *Final Report* 14-15 (Dec. 30, 1993) ("*Greyson Commission Report*") (noting that rental value understates sales-based value, and that using rent-regulated buildings as comparables "tends to accentuate the undervaluation"). The City's most recent property-tax commission likewise determined that the City values condos and co-ops at a fraction of their sales-based value—with pricier condos and co-ops undervalued to a much greater extent. *See* N.Y.C. Advisory Commn. on Prop. Tax Reform, *The Road to Reform: A Blueprint for Modernizing and Simplifying New York City's Property Tax System* 24 (Dec. 29, 2021), https://www1.nyc.gov/assets/propertytaxreform/downloads/pdf/final-report.pdf (the City values condos worth over $10 million at 12% of their sales-based value vs. 53% for condos worth less than $100,000); *id.* at 22 (similar figures for co-ops).

This systematic undervaluation of condos and co-ops shifts the property-tax burden within Class 2 to the owners and renters of rental apartments—leaving them with a far higher tax burden. *Shifting the Burden* at 5-7; R210 (Independent Budget Office Deputy Director Sweeting testifying that "a portion of the property tax flows through to tenants in the form of higher rents").

Second, having determined a property's market value, the City sets a target assessment ratio—*i.e.*, the City's putative target for the ratio of assessed value to full value. R110-11. The City's current targets are 6% for Class 1 and 45% for Class 2.

R120 n.5. So, if the City values a Class 1 property at $100,000, applying the target assessment ratio of 6% would yield a target assessed value of $6,000.

Third, the City applies statutory assessment caps and similar adjustments, which limit the amount by which the assessed value of a property may change over time, to arrive at assessed value.[4] R111. For Class 1 properties, increases in assessed value are capped at 6% year-over-year and 20% over five years. RPTL § 1805(1). For Class 2 properties with 11 or fewer units, increases in assessed value are capped at 8% year-over-year and 30% over five years. *Id.* § 1805(2). And for other Class 2 properties, increases in assessed value are phased in over five years. *Id.* § 1805(3).[5]

The City has the power to adjust its target assessment ratios over time to cure intra-class inequities and ensure that, notwithstanding these caps, properties are assessed uniformly within each class. Correlatively, a *failure* to adjust the target assessment ratios leads to unequal assessment and taxation of properties within each class.

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[4] The City may also reduce assessed value to account for exemptions created by state law. R116.

[5] As this Court has explained, caps were not intended to protect homeowners from tax increases resulting from "market forces" (*i.e.*, property appreciation); nor were they intended to prevent municipalities from "curing inequities" within a given property class. *O'Shea*, 8 N.Y.3d at 259. Caps were instead intended to protect residential taxpayers from "tax increases caused by tax shifts from businesses to homeowners as a result of revaluation" after *Hellerstein. Id.*; *see infra* at 33-34.

The City's own examples are instructive. As the City's Finance Department has explained, if certain Class 1 properties initially worth $100,000 and assessed at $6,000 appreciate by 50% in a year (and the City does not change its 6% target assessment ratio) the assessed value would increase not by 50%, but by the 6% cap, to $6,360. *See Class 1 Guide* at 5. But other Class 1 properties initially worth $100,000 that appreciate by only 6% in the same year would be assessed at an identical amount. As a result, the City would assess those properties at markedly non-uniform fractions of their market values.

Properties	**Year 2 Market Value**	**Year 2 Assessed Value**	**Actual Assessment Ratio (AV/MV)**
Group 1	$150,000	$6,360	4.24%
Group 2	$106,000	$6,360	6.00%

Historically, the City worked to prevent this sort of inequity by reducing its target assessment ratios. *See O'Shea*, 8 N.Y.3d at 259; R115-16. To illustrate how that works, consider the above example if the City lowered its target assessment ratio to 4%. Even though the caps would still be implemented, they would not prevent the City from assessing the properties at a uniform fraction of market value.[6]

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[6] Reducing the assessment ratio reduces properties' assessed value but does *not* affect the amount of money the City can raise from property taxes. As explained *infra* at 17, each property class contributes a particular share of the City's levy. When the City adjusts a class's assessment ratio, it also adjusts the class's tax rate

Properties	Year 2 Market Value	Year 2 Assessed Value	Actual Assessment Ratio (AV/MV)
Group 1	$150,000	$6,000	4.00%
Group 2	$106,000	$4,240	4.00%

The City, however, has not reduced its target assessment ratios to facilitate uniformity since 2004. R115. Predictably, massive disparities have arisen in how the City assesses similarly valued properties across the City. Today, the City actually assesses Class 1 properties at rates ranging from 1% to 6% of market value depending on where they are located in the City—with wealthier and majority-white areas benefiting from lower assessment ratios, while lower-income and majority-minority areas suffer from assessment ratios that may be double or triple in size. *See* R207, 665-67; *infra* at 28-31.

B. Allocation Of Taxes

After the City determines an assessed value for each property, it then determines each property's tax bill.

First, the City determines the amount it needs to raise from property taxes—considering the City's overall revenue need, other sources of revenue (*e.g.*, income

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so that the City raises the same amount of taxes, but in a manner more uniformly distributed within the class.

and sales taxes), and constraints imposed by the State Constitution. R116-17. For fiscal year 2017, this amount was $25.8 billion, and it has only grown since. R116.

Second, the City allocates taxes to each property class pursuant to a statutory formula. When S7000A was enacted, the Legislature intended each property class in a special assessing unit to initially bear the same share of the property-tax burden that it bore previously—but the Legislature expected class shares to change annually, so that each class's share of the property-tax burden would evolve over time to more closely reflect the class's share of market value. *See* R117-20; *IBO Report* at 21. Regular interventions by the City and the State have kept class shares from changing as expected, however, locking in and even exacerbating the pre-S7000A preferential treatment for one- to three-family homes in Class 1. *See* R118-19; *Greyson Commission Report* at 8-9, 11. Thus, Class 1 now comprises 47% of the total property value in the City but pays only 15% of the total property taxes, whereas Class 2 comprises 24% of the property value but pays 37% of the taxes. R120.

Finally, the City adopts a tax rate based on the share of taxes to be paid by each class and that class's total assessed value. R117.

The end result of the City's assessment and taxation practices is to skew the distribution of property taxes in two ways: *within* classes, because properties are undervalued or under-assessed relative to others in the same class; and *between* classes, because each class's share of the City's total property-tax burden is

unrelated to its share of the City's total property value. TENNY alleged numerous instances of these disparities, as further described below.

III. TENNY'S CHALLENGE

TENNY is a membership organization committed to pursuing legal and political reform of the City's property-tax system. R106-07. TENNY's members include owners and renters of real property who are harmed by that system, as well as organizations dedicated to securing equal treatment and economic justice for minority residents of the City. R106-07; *see* R662-94.

In April 2017, TENNY filed this lawsuit on behalf of its members. TENNY's 300-plus-paragraph complaint sets forth extensive public data and admissions from Defendants' officials showing that the City knowingly assesses and taxes real property—including properties in the same class—at wildly different rates and in a manner that adversely affects minority residents. *See infra* at 27-32, 42-53. Based on these detailed allegations, TENNY claimed, among other things, that the City fails to assess or tax Class 1 or Class 2 properties uniformly, in violation of RPTL § 305(2), Article XVI, § 2 of the State Constitution, and the State and Federal Equal Protection Clauses; that Defendants' policies disparately impact minorities, discriminate in the terms and conditions of housing, and perpetuate segregation, in violation of the FHA; and that the City taxes residential properties within and across Classes 1 and 2 arbitrarily and at amounts bearing no relationship to actual value, in

violation of the State and Federal Equal Protection and Due Process Clauses. R160-84. TENNY sought declaratory and equitable relief against these legal violations. R184-85.

Defendants moved to dismiss.[7] Supreme Court held that TENNY had adequately pleaded all of its claims against the City, and denied the City's motion to dismiss in full. R14-24. The court found, however, that certain claims did not sufficiently implicate the State, and thus granted the State's motion to dismiss in part. R19-23. Defendants appealed the denial of their motions to dismiss (in full or in part), and TENNY cross-appealed the partial grant of the State's motion to dismiss. R3-4, 6, 10-11.

On interlocutory appeal, the First Department modified Supreme Court's order to instead dismiss TENNY's complaint in its entirety. Although this Court has held that RPTL § 305(2) requires the City to assess properties in the same class at a "uniform percentage of value," the First Department found immaterial TENNY's allegations of pervasive disuniformity within Classes 1 and 2. *See* R967-70 (citation omitted). In the name of harmonizing related statutes, the court concluded that

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[7] In addition to seeking dismissal on the merits, Defendants raised numerous arguments attacking courts' jurisdiction to hear this dispute. The courts below properly rejected these jurisdictional arguments. R16-18, 954-55.

§ 305(2) is inoperative where applying the statute as written would, in the court's view, conflict with other contemporaneously enacted provisions.

First, it concluded that the Legislature knew that the assessment caps of RPTL § 1805 "were going to necessarily create disparities" in assessments, and therefore held that even gross disuniformities arising from the application of these caps cannot violate § 305(2). R968; *see* R967-70. In so concluding, the First Department did not address this Court's recognition that § 1805 was "aimed at protecting residential taxpayers from tax increases caused by tax shifts from businesses to homeowners as a result of revaluation, *not tax increases driven by market forces*," and this Court's holding that § 1805's assessment caps therefore do not "hamstring a special assessment unit from curing inequities *within* [a] class" by lowering the assessment ratio to achieve uniformity. *O'Shea*, 8 N.Y.3d at 259 (emphases added).

Second, the First Department held that RPTL § 581—which requires condos and co-ops to be assessed as if they were rentals—justified the City's gross under-assessment of condos and co-ops relative to rental apartments in the same class. *See* R970. But the court did not address the City's practice (which § 581 neither requires, contemplates, nor condones) of valuing and assessing condos and co-ops based not on the income they would actually generate if rented but instead on the significantly lower income that similarly aged rent-regulated apartments would generate.

The First Department next held that Article XVI, § 2, which requires the "equalization of assessments," does not mandate "that all assessments be equal" so long as the State has "a process in place for the adjustment and review of assessments of individual taxpayers to ensure that each property owner generally bears a fair share of the cost of government in relation to every other property owner in a taxing district." R966. The court appeared to believe that Defendants' "process" satisfies that requirement despite the massively unequal burdens it imposes on different New York City residents.

The First Department likewise rejected TENNY's FHA claims. Although New York's Attorney General and the U.S. Department of Justice found factual allegations identical to TENNY's pleadings to demonstrate "discriminat[ion] in the terms, conditions, and privileges of the sale of dwellings" and to impose a disparate impact on the availability of housing, all in violation of the FHA, R458, the court held the opposite, *see* R973-74. The court similarly concluded that TENNY did not allege sufficient facts or statistics "'demonstrating a causal connection' between the property tax system and the continued segregation of New York City neighborhoods." R975 (citation omitted).

The First Department also rejected TENNY's equal-protection and due-process claims. The First Department acknowledged that this Court had previously held that it would violate equal protection to tax similarly situated properties within

the same jurisdiction non-uniformly. R959; *see* R957-65, 970-71. But it held that TENNY's showing regarding the "dramatic disparities in the taxes paid by persons owning similar pieces of property," R959 (citation omitted), was inadequate even to plead an equal-protection claim.

TENNY appealed the First Department's decision as of right, invoking this Court's jurisdiction to review final orders "where there is directly involved the construction of the constitution of the state or of the United States." CPLR 5601(b)(1). The Court dismissed that appeal "upon the ground that no substantial constitutional question is directly involved." *Tax Equity Now NY LLC v. City of New York*, SSD No. 41 (Sept. 15, 2020).[8] The Court subsequently exercised its discretion to grant TENNY's motion for permission to appeal. R946.

STANDARD OF REVIEW

Whether TENNY's complaint states claims for relief is a question of law that this Court reviews de novo. *See, e.g.*, *Rosner v. Paley*, 65 N.Y.2d 736, 738 (1985). The Court must accept the allegations in TENNY's complaint as true, afford TENNY every favorable inference, and "determine[] only whether the alleged facts

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[8] The Second Department subsequently issued a decision concluding that a tax-assessment practice that treats certain residents more favorably than others states an equal-protection violation. *See Matter of Scarsdale Comm. for Fair Assessments v. Albanese*, 202 A.D.3d 966, 969-70 (4th Dept. 2022); *infra* at 26-27.

'fit within any cognizable legal theory.'" *Sassi v. Mobile Life Support Servs., Inc.*, 37 N.Y.3d 236, 239 (2021) (citation omitted).

ARGUMENT

I. TENNY PLEADED VIABLE CLAIMS UNDER RPTL § 305(2)

RPTL § 305(2) compels the City, when taxing real property, to assess properties in the same class at a uniform fraction of market value. As TENNY alleged, the City fails to comply with this duty—and disproportionately harms low-income and minority communities in the process. TENNY's allegations more than suffice to plead viable § 305(2) claims.

A. Section 305(2) Requires The City To Assess Properties In The Same Class At A Uniform Fraction Of Market Value

As part of the reforms enacted by S7000A, the Legislature repealed the long-ignored requirement that real property be assessed at its full market value. *See* L. 1981, ch. 1057, § 1, 1981 N.Y. Laws 2777, 2777; *Matter of Hellerstein v. Assessor of Town of Islip*, 37 N.Y.2d 1, 13 (1975). In place of that requirement, the Legislature authorized the common—albeit previously unlawful—practice of using "fractional assessment[s]." RPTL § 305(2); *see Matter of O'Shea v. Board of Assessors of Nassau County*, 8 N.Y.3d 249, 253-54 (2007). But § 305(2) imposes an important limitation on that practice: "All real property in each assessing unit shall be assessed at a uniform percentage of value." The City, which divides real property into four classes, must assess all real property in the same class "at the same

percentage of full value." *41 Kew Gardens Rd. Assoc. v. Tyburski*, 70 N.Y.2d 325, 330 (1987).

Section 305(2)'s requirement that real property "be assessed at a uniform percentage of value" is neither nuanced nor subject to misinterpretation: Properties within each class must be assessed at a uniform percentage of their market value. Thus, if the City assesses two Class 1 properties worth $100,000 and $1,000,000 respectively, the assessed value of both properties must share the same relationship to those properties' market value. If Property 1 is assessed at $4,000, then Property 2 must be assessed at $40,000—the same percentage of market value. This mandate follows inexorably from the Real Property Tax Law, the case law, and basic constitutional precepts.

a. The Real Property Tax Law distinguishes between a property's "value" or "full value," referring to its market value, and its "assessment," "assessed value," or "total assessed valuation," referring to its "fractional assessed value." *O'Shea*, 8 N.Y.3d at 260; *see* RPTL § 102(2); *Foss v. City of Rochester*, 65 N.Y.2d 247, 253 (1985); *Hellerstein*, 37 N.Y.2d at 10. The relationship between these two figures is the "uniform percentage of value" required by § 305(2)—*i.e.*, the assessment is the market value multiplied by a uniform fraction. *Cf. City of New York v. New York State Div. of Hous. & Community Renewal*, 97 N.Y.2d 216, 224 (2001) (explaining this relationship); N.Y. Dept. of Taxation & Fin., *Overview of the Assessment Roll*,

https://www.tax.ny.gov/pubs_and_bulls/orpts/tentasmtroll.htm (last updated Apr. 23, 2021). "To comply with the[] State-wide mandates of the Real Property Tax Law, cities calculate real property taxes by determining the full value of each parcel, fixing the ratio of full value to assessed value in each class, and, finally, applying a uniform tax rate for each class of property to the assessed value producing the tax due." *41 Kew Gardens*, 70 N.Y.2d at 330.

Section 305(2) permits fractional assessment, but only if an assessing unit assesses property at a uniform fraction of market value. *See O'Shea*, 8 N.Y.3d at 260. In fact, because a property's fractional assessment is critical to uniform property taxation, it is the "[o]nly" value "subject to judicial review," RPTL § 502(3)—and it may be challenged on the ground that it was determined "at a different percentage of [the property's] full value than other properties" in the same class, *Matter of Markus v. Assessors of Town of Taghkanic*, 24 A.D.3d 1066, 1066-67 (3d Dept. 2005) (citation omitted), *lv. denied*, 6 N.Y.3d 709 (2006); *see Matter of Colt Indus. v. Finance Adm'r of City of N.Y.*, 54 N.Y.2d 533, 541-42 (1982). Thus, when § 305(2) directs that real property be "assessed at a uniform percentage of value," it means that the assessments on which taxes are actually based must be uniform, relative to market value, within the class.

b. Pre-*Hellerstein* case law bears out this understanding of the uniformity requirement. Before *Hellerstein*, courts had frequently held that municipalities did

not need to assess properties at full value, as long as "the assessments [were] at a uniform rate or percentage of full or market value for every type of property in the assessing unit." 37 N.Y.2d at 7 (quoting *C.H.O.B. Assoc. v. Board of County of Nassau*, 45 Misc. 2d 184, 192 (Sup. Ct., Nassau County), *affd.*, 22 A.D.2d 1015 (2d Dept. 1964), *affd.*, 16 N.Y.2d 779 (1965)). And when considering property-tax schemes that allegedly operated non-uniformly, courts made clear that uniformity of *actual* assessments was of paramount importance. *See, e.g.*, *Margeson v. Smith*, 41 A.D.2d 896, 896 (4th Dept. 1973) (across-the-board increase in land assessed value of $10 per acre violated uniformity requirement because it impacted actual assessment ratios differently); *New York Pub. Interest Research Group v. Board of Assessment Review of City of Albany*, 104 Misc. 2d 128, 132 (Sup. Ct., Albany County 1979) (denying motion to dismiss complaint alleging that "some neighborhoods within the taxing unit are over-assessed while other neighborhoods are under assessed, all in violation of the requirement that assessments shall be uniform throughout the tax unit").

Recent case law interpreting the same uniformity requirement in § 305(2) is in accord. In 2017, residents of Scarsdale challenged the tax assessor's use of a "square root formula." *Matter of Scarsdale Comm. for Fair Assessments v. Albanese*, 202 A.D.3d 966, 967 (2d Dept. 2022). Although this method was consistently applied, it allegedly "resulted in larger homes being valued at less than

100% market value and smaller homes being valued at 100% or more of their market value." *Id.* The Second Department held that the residents had "sufficiently stated a cause of action for violation of RPTL 305" because Scarsdale's uniform use of the "square root formula" *actually* "resulted in . . . not all properties [being] assessed at a uniform percentage of value." *Id.* at 969.

c. If any question about the meaning of § 305(2) remains, the constitutional principles animating the statute answer it. Section 305(2) implements Article XVI, § 2 of the State Constitution, which requires the "equalization of assessments," *i.e.*, that properties in the same class actually be assessed at a uniform percentage of value. *See Matter of Krugman v. Board of Assessors of Vil. of Atl. Beach*, 141 A.D.2d 175, 183 (2d Dept. 1988); *infra* at 38-40. Equal-protection and due-process principles likewise "demand[]" "[u]niformity in the assessment" of properties in the same class, *Tappan v. Merchants' Natl. Bank*, 86 U.S. 490, 505 (1874), and preclude property-tax schemes in which "actual values are deliberately and systematically disregarded," *Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County*, 284 U.S. 23, 29-30 (1931). *See infra* at 54-60.

Statutes should be construed "in accord with constitutional requirements." *People v. Viviani*, 36 N.Y.3d 564, 579 (2021) (citation omitted). For that reason as well, § 305(2) must be interpreted in line with its plain text and precedent.

B. TENNY Amply Alleged That The City Grossly Violates Its Duty To Assess Properties In The Same Class Uniformly

The only remaining question is whether TENNY adequately pleaded that the City fails to comply with § 305(2). The allegations in TENNY's complaint more than suffice. TENNY did not allege one-off, aberrational departures from a general practice of uniform assessment. Rather, TENNY alleged pervasive *dis*uniformity, compiled substantial data confirming it, and identified numerous statements from Defendants' own officials admitting it. As Supreme Court found, therefore, TENNY pleaded claims for the City's failure to comply with § 305(2).

1. Class 1

To begin with, TENNY alleged "dramatic and systemic disparities in the assessment ... of similarly situated Class One properties between and within different boroughs throughout the City." R131. The data in TENNY's complaint amply demonstrate this phenomenon. In fiscal year 2017, the median Class 1 assessment ratio—*i.e.*, the ratio of assessed value to market value—varied significantly by borough. Notwithstanding the City's 6% target assessment ratio, the City-wide median assessment ratio was 4.71%, and borough-wide median assessment ratios ranged from 2.40% to 5.60%. *See* R125.

Disparities were evident *within* each borough as well—as the City assessed properties with the same market value, within the same borough, at wildly different rates. For instance, TENNY's complaint shows that the assessment of 90 Brooklyn

homes, which all sold for $750,000 in the same year, varied from 1.3% to 6.0% of their sales price. R128. These vast disparities in assessment lead inexorably to vast disparities in taxation, causing some property owners to receive property-tax bills *four times or more* higher than the property-tax bills received by others with properties worth the exact same amount, in the same class, in the same city. *Id.*; *see also* R126 (showing borough- and City-wide median Class 1 effective tax rates ranging from 0.48% to 1.12%); R130 (map showing disparities in effective tax rates by Council District).

As TENNY also alleged, the City's assessment practices are deeply regressive, benefiting wealthier taxpayers in rapidly appreciating neighborhoods at the expense of less wealthy taxpayers in slower-appreciating neighborhoods. For instance, Class 1 properties in Flatlands/Canarsie, "a less wealthy, 74% minority district, are assessed on average at a little less than 5.0% of value." R129. By contrast, Class 1 properties in "Park Slope/Carroll Gardens—which is wealthier and 63% white—are assessed on average at only *1.5%* of market value." *Id.* (emphasis added). As a result, the City assesses and taxes Class 1 properties in Flatlands/Canarsie at over *triple* the rate of properties in the same class in Park Slope/Carroll Gardens. *Id.*

These intraclass disparities are not news to the City, as TENNY's complaint and its exhibits show. The City's Department of Finance has admitted that the City

assesses properties in the same class at percentages of market value that vary dramatically from neighborhood to neighborhood. *See* R315 ("[O]ne of the things with caps is it does treat different neighborhoods differently, depending on rates of market value growth compared to assessed value growth."). The City's Independent Budget Office has likewise confirmed that the City's assessment practices "guarantee[] that similar properties will face widely different tax burdens depending on where they are located in the city." R207.

2. Class 2

Class 2, which has its own assessment caps and similar provisions, exhibits the same kinds of intraclass disparities in assessment as Class 1. *See* RPTL § 1805(2)-(3), (6); R135-36. But on top of that, significant disparities within Class 2 are caused by a different practice—the City's systematic undervaluation of condos and co-ops.

Under RPTL § 581, the City is required to assess a condo or co-op "at a sum not exceeding the assessment which would be placed upon such parcel were" it not a condo or co-op. RPTL § 581(1)(a). In effect, § 581 requires the City to value condos and co-ops "as if they are rental properties"—*i.e.*, by reference to the income they generate (or would generate if rented). *Matter of Greentree At Lynbrook Condominium No. 1 v. Board of Assessors of Vil. of Lynbrook*, 81 N.Y.2d 1036, 1039 (1993). But that is not what the City does. Instead of valuing condos and co-ops on

the basis of what income they would actually generate if they were rented, the City illogically values them by reference to the rent charged by rental properties of a similar age, many of which are subject to rent regulation. As a result, the City treats some of the most valuable property in the City—eight-figure properties on Fifth Avenue and Central Park West—as though they were *rent-regulated apartments*.

The City has admitted that this practice is "artificial" and causes condos and co-ops "to be undervalued." R250. That woefully understates matters. The City values condos and co-ops at a small fraction of their actual value—and regularly values whole buildings at less than the actual value of a single unit. *See, e.g.*, R134 (over 5,000 Manhattan condos sold in 2014 at an average sales price of $1,600 per square foot but were valued by reference to rental buildings worth roughly $304 per square foot); R99 (a 68-unit building was valued at $48.5 million even though *one unit* sold for $70 million); *id.* (a 66-unit building was valued at $41 million even though *one unit* sold for $54 million). This "result[s] in the severe and persistent undervaluation of some of the most valuable co-op and condo properties in the city," R135 (alteration in original) (citation omitted). Consequently, rental properties may be assessed and taxed at rates approaching *70 times* higher than some of the most valuable and luxurious condo and co-op properties in the City, shifting the tax burden from wealthy homeowners to renters struggling to find affordable housing. R99, 136-37; *see Shifting the Burden* at 6-7 (the City "effectively shift[s] the tax

burden from undervalued properties to the other properties in the same class," particularly "large rental buildings").

* * *

TENNY's allegations of widespread disuniformity in assessment within Classes 1 and 2 are well pleaded, and no more is needed at this stage. Indeed, as discussed *supra* at 26-27, the Second Department recently found that allegations of disuniformity far less extensive than those pleaded in TENNY's complaint stated a § 305(2) claim. *See Scarsdale Comm.*, 202 A.D.3d at 969. The dismissal of TENNY's § 305(2) claims must be reversed.

C. The First Department's Contrary Decision Misinterpreted The Relevant Statutes

The First Department dismissed TENNY's claims on the pleadings because it believed that § 305(2)'s mandate that property "shall be assessed at a uniform percentage of market value" cannot be applied as written without creating an irreconcilable conflict with §§ 1805 and 581. That was error. Instead of interpreting these statutes to give force to each, the First Department effectively treated § 305(2)'s requirement to assess property uniformly as superseded by the other provisions enacted within the same statutory scheme. But each of those provisions can and must be given force without sacrificing the operability of any of them. This Court has already expressly held that nothing in § 1805 prevents municipalities from assessing properties at a uniform percentage of value, as § 305(2)'s text expressly

requires. And likewise, nothing in § 581's text requires municipalities to artificially under-assess multi-million-dollar condos and co-ops as if they were rent-regulated apartments. The First Department's contrary reading is inconsistent with this Court's precedent and fundamental rules of statutory interpretation.

1. As *O'Shea* Held, RPTL § 1805 Does Not Excuse The City's Failure To Comply With § 305(2)

The First Department believed that the Legislature expected that § 1805's caps would "necessarily" lead to municipalities assessing properties at a non-uniform percentage of market value. *See* R968-69. Reasoning that the Legislature could not have intended those "disparities" to violate § 305(2), the First Department concluded that § 305(2) should not be read to require properties to be actually assessed at a uniform percentage of market value. R967-68.

That conclusion is incompatible with this Court's decision in *O'Shea*—which already resolved that § 1805 does not prevent municipalities from pursuing the uniform assessment of properties required by § 305(2). In *O'Shea*, certain Nassau County residents challenged the county's decision to reduce its Class 1 target assessment ratio as part of "a countywide revaluation mandated by" a settlement of a lawsuit challenging the county's unequal property-tax assessments. 8 N.Y.3d at 252 (discussing settlement in *Coleman v. County of Nassau*, No. 97-30380 (Sup. Ct., Nassau County)). Although that action enabled the county to uniformly assess residential properties, it increased taxes paid by those who were previously under-

assessed.[9] Certain Nassau County residents so affected brought suit, alleging that § 1805(1)'s caps were intended to prevent taxpayers from just that sort of "sudden and drastic tax increase[]." *O'Shea*, 8 N.Y.3d at 259. Under that view—effectively, the view adopted by the First Department—§ 305(2) could not be read to require uniform assessment in light of § 1805(1)'s assessment caps.

But this Court rejected that view. The Court explained that § 1805(1)'s caps were "aimed at protecting residential taxpayers from tax increases caused by tax shifts from businesses to homeowners as a result of revaluation, *not tax increases driven by market forces*." *Id.* (emphasis added). Importantly, moreover, the Court found that "the legislative history does not in any way suggest that section 1805(1) was expected to limit the distribution of the tax burden *within* the class of residential taxpayers, *or to hamstring a special assessment unit from curing inequities within this class*." *Id.* (emphasis altered). Accordingly, this Court held that § 1805 is not intended to prevent and does not in fact prevent municipalities from assessing properties in the same class at a uniform percentage of value.

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[9] The example discussed *supra* at 15-16, as well as the "Mrs. Jones" example discussed in *O'Shea*, illustrate why. Reducing the target assessment ratio enables municipalities to assess properties that have appreciated quickly and those that have not at a similar percentage of market value, such that those who previously paid "less than their equitable share" of the property tax will pay a more proportionate share going forward. *O'Shea*, 8 N.Y.3d at 260-61.

The First Department's contrary reading is incompatible with this "settled understanding" of § 1805. *Id*. In holding that § 1805 should be read to nullify § 305(2)'s uniformity requirement, the First Department made several errors.

First, the court was wrong to conclude that the Legislature expected that assessment caps would "necessarily create disparities" that would prevent the City from assessing properties at a uniform percentage of value. As *O'Shea* recognized, the City can easily respect both § 1805's assessment caps and § 305(2)'s uniformity requirement; it just has to lower its target assessment ratio. Indeed, *O'Shea* specifically pointed to New York City's reduction of its target assessment ratio from 28% to 8% over time "in order to bring assessed values for residential taxpayers in line with market values" as according with the "settled understanding" that § 1805 does not prevent the uniform assessment of property.[10] *Id.* at 259.

Second, while the First Department understood that the City *could* assess properties in the same class uniformly by lowering assessment ratios, it held that § 305(2) did not *require* the City to do so. *See* R968-69. But § 305(2) speaks in mandatory terms: Properties in the same class "*shall* be assessed at a uniform

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[10] The First Department's understanding of the purpose of caps makes little sense because caps apply only in special assessing units, *i.e.*, the City and Nassau County. *See* RPTL § 1805. If the Legislature had intended to protect residential taxpayers from tax increases driven by market appreciation, as the First Department believed, it presumably would have put caps in place protecting *all* residential taxpayers across the State, not just those in the City and Nassau County.

percentage of value." (Emphasis added); *see Matter of Natural Resources Defense Council v. New York City Dept. of Sanitation*, 83 N.Y.2d 215, 220 (1994) ("The use of the verb 'shall' ... illustrates the mandatory nature of the duties contained therein. The clear import of the words used is one of duty, not discretion." (footnote omitted)).

Finally, and relatedly, the First Department failed to harmonize §§ 305(2) and 1805, instead interpreting § 1805 to nullify § 305(2)'s requirement that municipalities assess properties at a uniform percentage of their market value. That result is incompatible with "fundamental rules of statutory interpretation." *Matter of Avella v. City of New York*, 29 N.Y.3d 425, 434 (2017). The First Department's reasoning also failed to construe these statutes "in accord with constitutional requirements," which, like § 305(2), require the City to assess properties in the same class at a uniform percentage of value. *Viviani*, 36 N.Y.3d at 579 (citation omitted); *see infra* at 38-40, 54-60.

The City suggested in the alternative below that § 305(2)'s uniformity command is satisfied if the City sets the same target assessment ratio for all properties within a class, even if—in actuality—properties are assessed at wildly unequal percentages of market value. That is far off the mark. As shown *supra* at 23-27, the language of the Real Property Tax Law and precedent require that assessing units *actually assess* properties at a uniform percentage of value. The

relevant measure as to which uniformity is required is "assessed value over market value." *O'Shea*, 8 N.Y.3d at 253. That mandate certainly is not limited to a target of the City's own invention that the City admits is far from the rate at which it actually assesses most properties. *See, e.g.*, *Class 1 Guide* at 5 ("[M]ost [C]lass 1 properties are assessed at less than 6%."). In short, the City cannot satisfy § 305(2) by employing a consistent target assessment ratio that does not actually result in uniform assessments.

2. RPTL § 581 Can And Must Be Applied To Advance The Assessment Of Class 2 Properties At A Uniform Fraction Of Market Value

The First Department also concluded that the Legislature "could not have intended" that the City's application of § 581 would "violate RPTL 305(2)" with respect to Class 2 properties. That was error too. Section 581 neither mandates nor condones the City's practice of valuing expensive condos and co-ops as if they were rent-regulated apartments. It merely directs the City to value condos and co-ops like rental properties—*i.e.*, to value them based on the income *those condos and co-ops* would generate if rented. *See Greentree*, 81 N.Y.2d at 1039.[11] But the City does

[11] The City has claimed that its decision to value condos and co-ops by reference to rent-regulated apartments is compelled by cases like *Greentree*. But in *Greentree* "*[a]ll* rental apartment buildings in the Village of Lynbrook ... [we]re subject to rent regulation," so valuing condos and co-ops as if they were rental properties necessarily meant valuing them as if they were rent-regulated apartments. 81 N.Y.2d at 1039 (emphasis added). The same is not true in the City.

not do that; instead it undervalues those properties based on what a similarly aged, often rent-regulated, apartment might generate.

Harmonizing § 581 with § 305(2) means construing § 581 to promote § 305(2)'s requirement that all properties within Class 2 be assessed at a uniform percentage of value. At a minimum, that means valuing all Class 2 properties the same way: by using values based on a property's actual rent or the actual rent the property would command if rented.

D. If Sections 1805 and 581 Nullified Section 305(2) In The Way The First Department Suggested, They Would Conflict With Article XVI, § 2 Of The State Constitution

Section 305(2) is a critical part of the Legislature's implementation of Article XVI, § 2 of the State Constitution. Article XVI, § 2 was enacted because of concerns about municipalities' long history of "extremely unequal" assessments and assessing practices. N.Y. State Constitutional Convention Comm., *Report on Problems Relating to Taxation and Finance* 153 (1938). It requires the Legislature to "provide for the supervision, review, and *equalization of assessments* for purposes of taxation." N.Y. Const. art. XVI, § 2 (emphasis added). Thus, this Court has stated, "[t]he Constitution *mandates* that assessments within the various assessing units *must be equalized* for taxation purposes," *Foss*, 65 N.Y.2d at 259 (emphases added), meaning that "all taxable property [must be] placed on the assessment rolls at a uniform percentage of its *actual value*," 84 C.J.S. *Taxation* § 668 (Westlaw May

2022 update) (emphasis added). Correctly understood, § 305(2) fits hand-in-glove with this constitutional requirement. *See supra* at 23-27; *see also Krugman*, 141 A.D.2d at 183 (§ 305(2) is "in keeping with the State's constitutional mandate" in Article XVI, § 2).

In contrast, the First Department's interpretation of §§ 1805 and 581 is wholly incompatible with Article XVI, § 2. The First Department believed that the Legislature expected those provisions to produce "dramatic disparities in the taxes paid by persons owning similar pieces of property," and permitted the City to assess certain condos and co-ops artificially and unequally. This reads §§ 1805 and 581 to conflict with and override § 305(2)'s constitutionally derived mandate that property be assessed uniformly.

Of course, as explained *supra* at 32-38, there is no conflict. Sections 1805 and 581 can both be applied in ways that advance the uniformity requirement in Article XVI, § 2 and § 305(2). And settled principles of statutory interpretation counsel in favor of interpreting §§ 1805 and 581 "in accord with" § 305(2)'s constitutionally based uniformity requirement, *Viviani*, 36 N.Y.3d at 579 (citation omitted), and to avoid "grave doubts" about the constitutionality of those statutes, *Fantis Foods v. Standard Importing Co.*, 49 N.Y.2d 317, 327 (1980). But if there were any conflict between §§ 1805 and 581 on the one hand and § 305(2) on the other, it would be §§ 1805 and 581 that must yield. *See, e.g.*, *Matter of Mott v. Krug*,

278 N.Y. 457, 461 (1938) (a state statute that conflicts with a state constitutional provision "must be held to be invalid").

* * *

The reasons the First Department gave for rejecting TENNY's § 305(2) claims are unconvincing. The City can comply with §§ 1805 and 581 while respecting the uniformity requirement in § 305(2). And the plain text of § 305(2), precedent, and Article XVI, § 2 require the City to do just that.

II. TENNY PLEADED VIABLE FAIR HOUSING ACT CLAIMS

The FHA aims to stamp out racial discrimination in housing. Yet, as TENNY alleged, the City's assessment and taxation practices discriminate against minority residents, over-taxing them by hundreds of millions of dollars every year. TENNY's allegations plead viable FHA claims.

A. The FHA Prohibits Neutral Policies That Disparately Impact Minority Groups Or Perpetuate Segregation

The FHA is a "broad remedial" statute that combats "racial segregation" by promoting "'fair housing throughout the United States.'" *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 928 (2d Cir.) (quoting 42 U.S.C. § 3601), *affd.*, 488 U.S. 15 (1988). It is "construed expansively" to "end discrimination." *Id.* at 935. To that end, the FHA prohibits intentional discrimination and facially neutral policies that disparately impact particular minority groups or perpetuate segregation, which harms the community as a whole.

See, e.g., *Texas Dept. of Hous. & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 534-35 (2015); *Huntington Branch*, 844 F.2d at 937.

TENNY's claims implicate two broad and overlapping FHA provisions that bar a wide range of discriminatory policies. *First*, the FHA makes it unlawful "[t]o … *make unavailable or deny*[] a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (emphasis added). This provision applies to policies that make it more difficult for minorities to obtain or maintain housing, as well as policies that tend to exclude minority groups from particular areas. *See, e.g.*, *Ojo v. Farmers Group, Inc.*, 600 F.3d 1205, 1208 (9th Cir. 2010); *MHANY Mgt. Inc. v. County of Nassau*, 843 F. Supp. 2d 287, 329 (E.D.N.Y. 2012), *affd. in part*, *vacated in part*, 819 F.3d 581 (2d Cir. 2016).

Second, the FHA makes it unlawful "[t]o discriminate against any person in the *terms, conditions, or privileges of sale or rental of a dwelling* . . . because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b) (emphasis added). The "terms, conditions, or privileges" of housing encompass not only terms of the rental or sales agreement itself, *see United States v. Balistrieri*, 981 F.2d 916, 929 (7th Cir. 1992), but also "terms, conditions, or privileges *relating to* the sale or rental of a dwelling," 24 C.F.R. § 100.65(a) (emphasis added).

B. As Alleged, The City's Assessment And Taxation Practices Disparately Impact Minorities

TENNY's complaint provides ample data showing that the City's assessment and taxation practices disparately impact minorities by drastically over-assessing and over-taxing majority-minority communities and the types of property that minorities disproportionately live in relative to the communities and types of property that whites disproportionately live in. As the State and Federal Governments themselves previously recognized in pursuing essentially identical claims, these allegations suffice to state disparate-impact claims under the FHA. *See* Complaint ¶ 1, *United States v. County of Nassau*, No. 99-cv-3334 (E.D.N.Y. filed June 14, 1999) (R449) ("Under [Nassau] County's tax assessment system, residential properties in predominantly African-American and Latino communities are systematically assessed at higher rates than residential properties in white communities. As a result, the owners of residential properties in minority communities pay relatively more in property taxes ...."); Complaint-in-Intervention ¶ 2, *Coleman v. County of Nassau*, No. 97-30380 (Sup. Ct., Nassau County filed Feb. 10, 2000) (R645-46) (similar).

1. Disparate Impacts On Majority-Minority Neighborhoods

TENNY alleged that the City's assessment and taxation practices unlawfully create racially discriminatory disparities within Classes 1 and 2. For example, TENNY's complaint shows that the City assesses and taxes Class 1 properties in

majority-minority neighborhoods at sharply higher rates than those in supermajority-white (*i.e.*, over 60% white) neighborhoods. R123-31. As a result, Class 1 homeowners in majority-minority neighborhoods are over-assessed by *$1.9 billion* annually, and over-taxed by *$376 million* annually, compared to homeowners in majority-white neighborhoods. R103.

The same pattern holds true in Class 2. Minorities comprise 72% of the 15 community-planning districts whose Class 2 properties are taxed at the *highest* rates. R151. By contrast, minorities comprise only 45% of the 15 community-planning districts in which Class 2 properties are taxed at the *lowest* rates. R151. The City taxes owners of Class 2 properties in the most disfavored community-planning districts at *over 275%* the rate imposed on owners in the most favored districts, disparately affecting minorities given the stark demographic differences between the districts. *Id.* These kinds of disproportionate impacts on minority communities violate the FHA by making housing unavailable and by discriminating in the terms and conditions of housing.

a. As alleged, the City's policies discriminate with respect to the availability of housing. *See* 42 U.S.C. § 3604(a). TENNY alleged that the City causes disparate tax burdens that disparately affect majority-minority communities and make housing unavailable by raising the cost of housing in those communities; contributing to higher rates of foreclosure in those communities; and inhibiting the

ability of minorities to buy, own, maintain, and rent dwellings. R150, 182. Courts routinely hold that housing is "ma[de] unavailable" under § 3604(a) when a policy disproportionally increases housing costs for members of a racial minority group. *See, e.g.*, *Ojo*, 600 F.3d at 1208 (insurance rates can make housing unavailable because "without insurance, there may be no loan, and without a loan, there may be no home available to a person who wants to buy [it]"); *Hargraves v. Capital City Mtge. Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000) (lending practices "can make housing unavailable by putting borrowers at risk of losing the property which secures their loans"). TENNY's allegations likewise state a claim under the FHA.

At least two courts have so held in circumstances indistinguishable from this case. In *Coleman v. Seldin*, individuals contended that Nassau County "maintain[ed] a racially discriminatory residential assessment system that impacts minority homeowners." 181 Misc. 2d 219, 222 (Sup. Ct., Nassau County 1999). Nassau County Supreme Court thoroughly analyzed the pleadings, the arguments, and relevant case law; held that the plaintiffs had adequately pleaded that the county's property-tax system made housing unavailable; and thus denied the county's motion to dismiss. *Id.* at 235-37. More recently, plaintiffs attacked Illinois' largest county's property-tax system for similar reasons. *Brighton Park Neighborhood Council v. Berrios*, No. 17 CH 16453, 2019 WL 4178606, at *8 (Ill. Cir. Ct. Feb. 7, 2019). The trial court denied the county's motion to dismiss. Closely following the reasoning

in *Coleman*, the court concluded that the plaintiffs' allegations—that the county's "chronic over-assessment of predominantly minority communities and under-assessment of predominantly white communities places a disproportionate burden on African-American and Hispanic neighborhoods"—"stated a cause of action [for making housing unavailable] under Section 3604(a)." *Id.*[12] TENNY's allegations are virtually identical, and are legally sufficient.

The First Department's contrary conclusion does not withstand scrutiny. The court found TENNY's complaint insufficient because it supposedly failed to "allege sufficient concrete facts or produce statistical evidence" showing "a causal connection between the property tax system and any racial disparities in the availability of housing." R974. But that grossly overstates TENNY's burden at the pleading stage.

The FHA does not impose a heightened pleading standard. *See Henderson v. JP Morgan Chase Bank, N.A.*, 436 F. App'x 935, 936-37 (11th Cir. 2011).[13] Indeed,

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[12] Both cases succeeded, as government officials agreed to reform the property-tax systems at issue. *See O'Shea*, 8 N.Y.3d at 256-58, 261 (discussing Nassau County's reforms); *Brighton Park* Agreed Order of Dismissal (Nov. 6, 2019), https://jnswire.s3.amazonaws.com/jns-media/a6/c0/8494341/Brighton_Park_Dismissal_Order.pdf.

[13] *Inclusive Communities*, the primary case on which the First Department relied, was an appeal *after trial*. *See* 576 U.S. at 525-27. It had no occasion to—and did not—alter the standard for *pleading* FHA claims. *See County of Cook v. HSBC N. Am. Holdings Inc.*, 314 F. Supp. 3d 950, 967 & n.9 (N.D. Ill. 2018).

such a heightened standard would cut off potentially meritorious claims early in the litigation—in conflict with the FHA's "broad remedial purpose" of ending discrimination. *Georgia State Conference of the NAACP v. City of LaGrange*, 940 F.3d 627, 631 (11th Cir. 2019) (citation omitted). Rather, the normal pleading rules apply: A court must accept the allegations as true, afford the plaintiff every favorable inference, and "determine[] only whether the alleged facts 'fit within any cognizable legal theory.'" *Sassi v. Mobile Life Support Servs., Inc.*, 37 N.Y.3d 236, 239 (2021) (citation omitted).

In the context of the causation requirement cited by the First Department, this means that an FHA plaintiff need not conclusively *establish* causation through statistical analysis or other evidence to *plead* a viable FHA claim. *See National Fair Hous. Alliance v. Federal Natl. Mtge. Assn.*, 294 F. Supp. 3d 940, 948 (N.D. Cal. 2018) (at the pleading stage, "the question of causation—to what extent the discrepancy is explainable by objective data or race—is premature" (citation omitted)). In line with the usual pleading rules, the plaintiff need only plead facts giving rise to a plausible inference that "a defendant's policy or policies caus[ed] th[e] disparity" complained of. *Reyes v. Waples Mobile Home Park L.P.*, 903 F.3d 415, 425 (4th Cir. 2018) (citation omitted); *see National Fair Hous. Alliance*, 294 F. Supp. 3d at 948 ("fair inference of causation" (citation omitted)). The effect on housing availability can be alleged more generally or inferred, especially if it is "self-

evident" or flows logically from "common sense analysis." *Reyes*, 903 F.3d at 428 (citations omitted); *see also, e.g.*, *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065-66 (4th Cir. 1982) (under "any common sense analysis," termination of a public-housing project disparately impacted Black citizens when the Black population had the highest percentage of eligible applicants); *National Fair Hous. Alliance v. Travelers Indem. Co.*, 261 F. Supp. 3d 20, 30 (D.D.C. 2017) (courts should not "abandon common sense or necessary logical inferences that follow from the facts alleged").

For reasons such as these, courts routinely deny motions to dismiss where a plaintiff alleges that a particular policy disproportionally raises costs associated with housing for minorities, thereby reducing housing availability. *See, e.g.*, *Fulton County v. Wells Fargo & Co.*, No. 1:21-cv-1800, 2022 WL 846903, at *16 (N.D. Ga. Mar. 22, 2022) (allegations that, due to unfavorable loan terms, "higher percentages of FHA protected minority borrowers have experienced a greater rate of ... foreclosures" (citation omitted)); *County of Cook v. Wells Fargo & Co.*, 314 F. Supp. 3d 975, 992-95 (N.D. Ill. 2018) (similar); *Saint-Jean v. Emigrant Mtge. Co.*, 50 F. Supp. 3d 300, 319-20 (E.D.N.Y. 2014) (similar); *City of Los Angeles v. Wells Fargo & Co.*, 22 F. Supp. 3d 1047, 1059-60 (C.D. Cal. 2014) (similar); *see also NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992)

(summarizing a viable FHA claim based on high insurance prices as "[n]o insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable").

TENNY's allegations amply state a claim under these precedents. TENNY's core complaint—backed up by data, admissions from Defendants' officials, and other evidence—is that the City drives up housing costs for minorities by assessing and taxing properties owned and rented by minorities at far higher rates than properties owned and rented by whites. *See, e.g.*, R149-50 (the City assesses Class 1 properties in majority-minority neighborhoods at rates *20% higher* than Class 1 properties in supermajority-white neighborhoods). If the City actually assessed properties in the same class uniformly, which, for example, it could do in Class 1 by lowering its target assessment ratio, that disparity would vanish. *See supra* at 15-16, 35. The causal chain between the City's policies and the racial disparities of which TENNY complains is clear, direct, and unassailable. TENNY adequately pleaded that the City makes housing unavailable in a manner that disparately impacts minorities, in violation of the FHA.

b. For similar reasons, TENNY also adequately pleaded that the City discriminates with respect to the terms and conditions of housing. *See* 42 U.S.C. § 3604(b). That reflects not only TENNY's view but the considered views of the State and Federal Governments. As mentioned *supra* at 42, New York's Attorney General and the U.S. Department of Justice sued Nassau County for the

discriminatory tax-assessment practices at issue in *Coleman*. They alleged that the county's practice of "imposing disproportionate property tax assessments and, as a result, disproportionately higher property taxes on properties located in predominantly minority communities" amounts to "discrimination ... 'in the terms[] [and] conditions ... of sale or rental of a dwelling.'" R657 (quoting 42 U.S.C. § 3604(b)); *accord* R458-59. TENNY's complaint is more robust than those complaints, and adequately alleged discrimination in the terms and conditions of housing.

The First Department disagreed, categorically holding that "the setting of tax assessments does not constitute a term or condition of the sale or rental of property under the FHA." R976. But they do. With respect to sales, a property's tax assessment—and any cap or other limitation thereon—transfers with the property on sale, leads directly to the taxes a home-buyer must pay, and undeniably affects the price a home-buyer would pay—an obvious "term" of any sale. *Cf. Owens v. Nationwide Mut. Ins. Co.*, No. 3:03-CV-1184-H, 2005 WL 1837959, at *5 (N.D. Tex. Aug. 2, 2005) (homeowner's insurance constitutes a "term[], condition[], or privilege[] of sale or rental of a dwelling" (citation omitted)). With respect to rentals, tax assessments lead to property taxes, which are passed through to renters as part of their rent, and are thus a "term" of any rental. *See* R152-53, 210; *see also* RPTL § 304(2) (owner must "apply the first money received each month from the renter to

taxes due on the real property under his ownership"). Courts regularly accept that such pass-through costs count when evaluating FHA claims. *See Natl. Fair Hous. Alliance*, 261 F. Supp. 3d at 29 (describing the "large body of case law holding that insurers—including insurers who sell products to landlords—can be held liable under the FHA").

The First Department's view conflicts with the State and Federal Government's historic views and how the FHA is normally construed. The court's interpretation of the "terms and conditions" of housing, if upheld, would apply to both disparate-impact and disparate-treatment claims. On the First Department's theory, a municipality could, for example, openly assess minority-owned properties at higher rates *for the purpose* of driving up minorities' housing costs, and the FHA could not do anything about it. That would emasculate the FHA, which must be construed "expansively" to "*end* discrimination." *Huntington Branch*, 844 F.2d at 935 (emphasis added).

2. Disparate Impacts On Rental Properties

As TENNY alleged, the City's assessment and taxation practices have an especially pronounced effect on renters—a subset of residents of Class 2 properties—who are disproportionately members of minority groups. As explained *supra* at 30-31, the City grossly under-assesses condos and co-ops by valuing them in comparison to rent-regulated rental properties. R133. And the City caps increases

in assessed value in a manner that disfavors large rental buildings and lower-income communities. *See* R135-36. These policies consistently favor Class 2 condos and co-ops over Class 2 rentals. *See* R136. The disparate impact on Class 2 rentals in particular translates to a disparate impact on minorities. "In every borough, minorities constitute a majority of renters; in Brooklyn, the Bronx, and Staten Island, minorities constitute over two-thirds of renters." R153. By contrast, owners of residential property are disproportionately white. *Id.*

These allegations state violations of the FHA with respect to both the terms and conditions of housing and the availability of housing. R182-83. Higher property taxes on rental-property owners are passed through, at least in part, to renters as part of the rent, which is indisputably a term or condition of every rental. R137, 152, 210, 240; *see supra* at 49. And the disproportionately high tax burden placed on rentals is a strong disincentive to rental housing development and suppresses the availability of rental housing. Because 65% of renters are non-white, while only 33% to 40% of condo and co-op owners are non-white, the City's discouragement of new rental development makes housing unavailable to minorities. *See MHANY Mgt.*, 843 F. Supp. 2d at 329 (there is a disparate impact when a policy "significantly decrease[s] the potential pool of minority residents likely to move into housing ... in proportion to the number of non-minorities affected); R73 (State admission that

government action "directly impact[ing] ... the construction of housing" is within "the 'heartland of disparate-impact liability'" (citation omitted)).

The First Department did not independently consider these claims. Instead, it lumped them together with TENNY's other disparate-impact claims and summarily rejected them based on the same misunderstandings about the FHA. R972-74. And for the same reasons discussed above, that decision should be reversed.

C. As Alleged, The City's Assessment And Taxation Practices Perpetuate Rampant Segregation In The City

TENNY alleged, and the First Department acknowledged, that "New York City is a deeply segregated city." R975. The City is the second most segregated city in the United States, with nearly half of its neighborhoods "dominated by a single racial or ethnic group." R154 (citation omitted). The disparity is most pronounced between white and Black New Yorkers, with the vast majority of the City's neighborhoods having populations that are less than 10% white or less than 10% Black. R154-55.

Yet, as TENNY's complaint alleged, the City, through its assessment and taxation practices, strongly disfavors renters and owners in highly segregated neighborhoods from moving in a way that would integrate those neighborhoods. The City effectively makes it harder for "insiders" to move out; excessive taxation means that those in predominantly minority neighborhoods have fewer resources to relocate to predominately white neighborhoods, which tend to be more expensive.

R154-60. Concomitantly, the City discourages economically rational "outsiders" from moving into predominantly minority neighborhoods, where they would have to take on a higher property-tax burden. R160.

The First Department dismissed this claim for two reasons, both erroneous. *First*, the court suggested that this claim rested on an assumption that "residents would elect to relocate to other neighborhoods if defendants applied the property tax system differently"—an assumption the court said was "without basis." R975. But property taxes are part of the cost of housing, and residents inevitably choose where to live based on such financial considerations. The State itself has accepted, when pursuing FHA claims, that inequality in property taxation "inhibits the ability of families in minority communities to buy, sell, own and rent residential properties and obtain mortgages." R657-58.

Second, the First Department indicated that TENNY "concedes that the changes to the property tax system it envisions would dramatically increase property taxes in majority-white neighborhoods, which "would make those neighborhoods less, not more, accessible to minority residents." R975. But TENNY has made no such concession; it has not advocated any specific reforms. And, even if property taxes in majority-white neighborhoods did have to increase, that would likely mean lower property taxes in majority-minority neighborhoods—which could (giving TENNY the benefit of every favorable inference) break existing patterns of

segregation by, for example, causing whites or members of a non-predominant minority group to move into majority-minority neighborhoods. *See National Fair Hous. Alliance v. Bank of Am., N.A.*, 401 F. Supp. 3d 619, 641 (D. Md. 2019) (denying motion to dismiss complaint alleging that leaving housing in majority-minority neighborhoods in disrepair could "forestall housing integration and freeze existing racial segregation patterns").

III. TENNY PLEADED VIABLE EQUAL-PROTECTION AND DUE-PROCESS CLAIMS

The claims discussed above provide ample means to allow this case to proceed past the pleading stage. But TENNY's detailed allegations also state viable claims under the State and Federal Equal Protection and Due Process Clauses.

A. Equal Protection Forbids The City's Alleged Disparate Treatment Of Properties In The Same Class

Much like § 305(2) and Article XVI, § 2, equal protection requires "practical uniformity" in assessment and taxation. *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352-53 (1918); *see Foss*, 65 N.Y.2d at 259 (equal protection requires that property "taxes imposed are uniform within the class"). The "intentional systematic undervaluation by [taxing] officials of other taxable property in the same class contravenes" equal protection. *Sunday Lake*, 247 U.S. at 353. As TENNY alleged, and as the First Department acknowledged, the City routinely undervalues, under-assesses, and under-taxes many properties in the same class relative to others.

See R956-60; *supra* at 27-32. These disparities suffice to plead a violation of equal protection. *See Scarsdale Comm.*, 202 A.D.3d at 970 (reversing dismissal of equal-protection claim where pleadings alleged that some properties in "the same tax assessment class" were treated "more favorably" than others).

The First Department made critical errors in concluding otherwise, many of which repeat its mistakes in rejecting TENNY's § 305(2) claims. *First*, the court concluded that disuniformity related to assessment caps is permissible because caps are supported by a rational basis—to protect homeowners from tax increases due to market-driven appreciation in property values. R958. But as discussed *supra* at 33-37, caps need not create disuniformity within the class, because the City can lower a class's target assessment ratio to promote uniformity within the class; and this Court has already held that caps were never meant to protect residential property owners from "tax increases driven by market forces." *O'Shea*, 8 N.Y.3d at 259.

Second, and relatedly, the First Department held that the City's under-assessment of condos and co-ops relative to rental apartments in the same class was reasonable because § 581 "treats pre-1974 rental, condominium and cooperative buildings as similarly situated and defendants have assessed them accordingly." R961. But as explained *supra* at 37-38, § 581 requires only that the City assess condos and co-ops as if they were rental properties; it does not require the City to

under-assess condos and co-ops by treating them as if they were rent-regulated apartments.

Third, the court believed that the City treats properties in the same class equally because it "applies one uniform assessment ratio to every property within a class." R958-59. But that ignored TENNY's pleadings and Defendants' admissions. The City unquestionably assesses different properties in the same class at different percentages of market value. If the First Department meant that the City employs a uniform target assessment ratio, that makes no difference. What matters is whether the City *actually* assesses and taxes similarly situated properties in the same class uniformly. Indeed, the U.S. Supreme Court long ago recognized that "the fact that a uniform percentage of assigned values is used" does not prevent an equal-protection violation if the methodology "ignores differences in actual values so that property in the same class as that of the complaining taxpayer is valued at the same figure ... as the property of other owners which has an actual value admittedly higher." *Cumberland Coal*, 284 U.S. at 29. The City's uniform target assessment ratios are meaningless because, as TENNY alleged, the City *actually* assesses properties in the same class at wildly different rates. *See supra* at 27-32.

Finally, the First Department believed that *Nordlinger v. Hahn*, 505 U.S. 1 (1992), bore on TENNY's claim. *See* R959, 965. *Nordlinger* upheld California's system of limiting increases in property assessment except when a property is sold,

even though it caused disparities in assessment and taxation, because it was supported by rational bases favoring existing property owners. *See* 505 U.S. at 4-6, 17-18. But as the U.S. Supreme Court has made clear, its reasoning in *Nordlinger* does not apply when a state, like New York, "require[s] equal valuation of equally valuable property," because then there is no legitimate basis for the state to treat property owners unequally. *Armour v. City of Indianapolis*, 566 U.S. 673, 686-87 (2012); *see Nordlinger*, 505 U.S. at 14-15. Rather, in that context, the U.S. Supreme Court's decision in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989), applies. Pursuant to *Allegheny*, assessment practices like the City's that result in some property being assessed at much higher rates than comparable property over an extended period of time violate equal protection. *See Armour*, 566 U.S. at 686-87 (discussing *Allegheny*).

B. Equal Protection Also Prohibits The City's Allegedly Unreasonable Distribution Of Property Taxes Between Classes 1 And 2

Equal protection also constrains how taxes may be distributed among different property classes. While a "State may divide different kinds of property into classes and assign to each class a different tax burden," the classifications and resulting relative tax burdens must be "reasonable," *Allegheny*, 488 U.S. at 344, and cannot result in arbitrary distinctions nor enable "invidious discrimination," *Foss*, 65 N.Y.2d at 257. These principles prohibit tax schemes based on "artificial constructs [resulting from] statutory formulae" untethered to actual value. *Foss*, 65 N.Y.2d at

257. TENNY has alleged precisely that. The City discriminates in favor of certain residential property owners over others by apportioning tax burdens according to "a complex statutory formula," R21, that bears no rational relationship "to a 'fair and realistic value of the property involved,'" R117 (quoting *Matter of Allied Corp. v. Town of Camillus*, 80 N.Y.2d 351, 356 (1992)). This creates gross disparities: Class 2 is taxed at nearly *five times* the rate of Class 1. R147.

The First Department's only response was that the classification was enacted "as part of a complex statutory scheme in response to [*Hellerstein*]" and "'lock[s] in'" class shares as they previously existed. R963-64 (citation omitted). But as this Court has recognized, continuing an unlawful status quo is "not a legitimate end of government." *Foss*, 65 N.Y.2d at 260. And that misapprehends what S7000A did in any event. S7000A initially fixed each class's share of the tax burden, but provided mechanisms for each class's share to evolve over time to more closely track the class's share of market value. *See* R117-20; *IBO Report* at 21. But the City has unexpectedly adjusted class shares to *widen* disparities, dramatically decreasing Class 1's share of the City's tax burden while Class 1 was becoming an increasingly predominant share of the City's overall property value. R118. The State's formula for allocating the tax burden among the residential classes is thus wholly unmoored from actual value or the Legislature's intent when enacting S7000A. Such facts adequately state a claim.

C. TENNY Sufficiently Alleged That The City Assesses And Taxes Real Property In An Incoherent And Arbitrary Manner, In Violation Of Due Process

Due process forbids gross and patent inequalities in taxation and arbitrary uses of the taxing power. *E.g.*, *Ames Volkswagen v. State Tax Commn.*, 47 N.Y.2d 345, 348-49 (1979); *Matter of Schulz v. New York State Legislature*, 230 A.D.2d 578, 583 (3d Dept. 1997). TENNY's complaint—which includes numerous admissions from Defendants' own officials—demonstrates such inequality and arbitrariness. The City assesses and taxes residential property "by methods that are artificial," R101-02 (citation omitted); imposes tax based on "market values" that "aren't truly reflective of fair market values," R334; is "rife with inequalities," R95; is designed to "codif[y] historical *inequities* in assessment practices," R101 (alteration in original) (citation omitted); and—most importantly—admittedly imposes tax burdens that "frequently bear *no relationship* to real market values," N.Y.C. Dept. of Fin., *Annual Report on the NYC Real Property Tax: Fiscal Year 2003*, at 2 (2003) (emphasis added), https://www1.nyc.gov/assets/finance/downloads/pdf/02pdf/taxpol_property_03.pdf. And TENNY has alleged at length the arbitrary results that ensue. R143-49. That suffices to state a claim. *See, e.g.*, *Schulz*, 230 A.D.2d at 583 (rejecting motion to dismiss claim that tax was so arbitrary as to violate due process).

The First Department's sole response was that the City's property-tax system is "grounded in legislative policy determinations." R970. That justification fails.

The City's own actions or omissions—*e.g.*, its failure to lower its target assessment ratios and its illogical valuation of luxury condos and co-ops as though they were rent-regulated apartments—are responsible for many of the problems TENNY has highlighted, and they are not grounded in *any* "legislative policy determination[]." Finally, the salient question for due process is not whether there is an articulable justification for one provision or another, but whether the taxes imposed are arbitrary in relation to the property-tax system's goal. For all the reasons discussed, and accepting TENNY's allegations as true, the City fails to ensure that "similarly situated taxpayers pay the same share of the tax burden"—the goal the City's property-tax system is supposed to achieve. *Foss*, 65 N.Y.2d at 254.

CONCLUSION

The First Department's decision and order should be reversed, and the case should be remanded for further proceedings.

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New York, New York

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

This brief complies with Section 500.13(c)(1) of the Rules of Practice of the New York Court of Appeals because the total number of words in the body of this brief is 13,999, excluding the portions exempted by Section 500.13(c)(3).