No. APL-2022-00049

To be argued by:
MARK S. GRUBE
10 minutes requested

State of New York
Court of Appeals

TAX EQUITY NOW NY LLC,

Plaintiff-Appellant,

v.

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 RESPONDENTS STATE OF NEW YORK AND NEW YORK STATE OFFICE OF REAL PROPERTY TAX SERVICES

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PRELIMINARY STATEMENT

Plaintiff-appellant Tax Equity Now NY LLC (TENNY) filed this lawsuit against the State of New York and the New York State Office of Real Property Tax Services (collectively, the "State Defendants"), as well as the City of New York and the New York City Department of Finance (the "City Defendants") to challenge various aspects of the City's administration of its property tax system.[1] Supreme Court, New York County (Lebovits, J.) dismissed nearly all of the claims against the State Defendants based on the State's lack of involvement in the alleged violations. In a unanimous decision, the Appellate Division, First Department dismissed TENNY's complaint in its entirety. This Court should affirm.

First, TENNY's appeal against the State Defendants should be dismissed because TENNY's opening brief focuses solely on its claims against the City Defendants and makes no argument as to why the lower court's dismissal of its claims against the State Defendants was erroneous.

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[1] This brief is filed on behalf of the State Defendants. The City Defendants are separately represented.

Second, TENNY's claims against the State Defendants were appropriately dismissed. As a general matter, TENNY failed to allege any actionable conduct by the State Defendants relating to the City Defendants' allegedly unlawful assessment and collection of property taxes. In addition, each of the claims TENNY purported to bring against the State Defendants fails on the merits. TENNY's equal protection and due process challenges to various state laws fail because this Court has repeatedly recognized that such laws serve the reasonable purpose of stabilizing year-to-year changes in the value of real property assessments. TENNY's statutory claims fail because Real Property Tax Law § 302(5) imposes no obligations on the State Defendants, and because a mere assertion of disparate impact in a taxation scheme is insufficient to state a federal Fair Housing Act claim.

QUESTIONS PRESENTED

1. Whether the appeal should be dismissed against the State Defendants because TENNY's opening brief did not address any claims against them.

2. Whether the Appellate Division properly dismissed TENNY's claims against the State Defendants because TENNY failed to allege the State Defendants' involvement in purported violations by the City Defendants, or, in the alternative, because TENNY failed to state a claim against the State Defendants under the Equal Protection or Due Process Clauses of the federal and state Constitutions, Real Property Tax Law § 302(5), or the federal Fair Housing Act.

STATEMENT OF THE CASE

A. Statutory Background

1. Article 18 of the Real Property Tax Law (RPTL)

Article 18 of the Real Property Tax Law (RPTL) was passed in 1981 to respond to a decision from this Court which threatened to upend the administration of property tax regimes. *See* Mem. of S. Rules Comm. for ch. 1057 (1981), *in* 1981 *N.Y.S. Legislative*

Annual 546, 546-47 (Mem.). For hundreds of years, real property in New York had been assessed using a fractional assessment system—that is, tax rates were applied to only a percentage of a property's full market value. *Matter of Hellerstein v. Assessor of Town of Islip*, 37 N.Y.2d 1, 13 (1975). In 1975, however, this Court held in *Matter of Hellerstein* that state law precluded fractional assessments and required tax rates to be applied to the full value of real property. *Id.* at 14.

The *Matter of Hellerstein* decision "reverberated throughout the state" by threatening to vastly increase the tax obligations imposed on real property owners—particularly owners of residential properties. *Matter of O'Shea v. Board of Assessors of Nassau County*, 8 N.Y.3d 249, 253 (2007). Because localities had "routinely assessed commercial and industrial property at higher ratios (assessed value over market value) than residential property," there was widespread fear that the decision "would force an unwelcome shift of a significant portion of the property tax burden from businesses to homeowners." *Id.* At the same time, Nassau County faced an onslaught of lawsuits by owners of industrial and commercial property who claimed that

the county had taxed them unequally as compared to homeowners and thus owed them hundreds of millions of dollars in tax refunds. *Id.* The very viability of the State's real property tax scheme was thus under threat. *See* Mem., *supra*.

After six years of studies and reports, the Legislature overrode a gubernatorial veto to enact chapter 1057 of the Laws of 1981. *Matter of O'Shea*, 8 N.Y.3d at 253-54. The Legislature's 1981 amendments permitted real property to be assessed using fractional assessments. *See* RPTL § 305(2). The Legislature also enacted a new article 18 of the RPTL, which made three other changes to the taxation of real property that are pertinent to the underlying action. *See id.* § 1801 et seq.

First, article 18 established four different classes of property in New York City. *Id.* § 1802(1). As relevant here, "Class One" contains primarily one-, two-, and three-family residential property, and "Class Two" contains all other residential property, including condos, co-ops, and rental units.[2] *Id.* Article 18 sets forth a complex

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[2] "Class Three" contains "utility real property." "Class Four" contains all other real property. RPTL § 1802(1).

scheme for determining the real property taxes owed by each class of property. Although localities play the primary role in this process (as explained below), state law imposes certain, limited parameters within which localities must operate.

Second, article 18 created a detailed formula by which the City must determine the portion of the City's overall property tax that will be borne by each class—i.e., the "class share." *Id.* § 1803-a. In general terms, this formula begins with the class shares as they existed in 1990 and makes annual adjustments to track changes in the relative market values of the four classes. *See* Ch. 143, § 4, 1989 N.Y. Laws 2107, 2107-08. Adjustments are also made annually to the class shares to reflect changes in the status of property, new construction, and alterations to properties within each class. RPTL § 1803-b(4). To prevent abrupt increases in liability, state law caps the amount by which the class share for each class may increase each year. *See, e.g.*, *id.* § 1803-a(1)(c), (dd).

Third, while localities are responsible for assessing the value of real property within each class (as explained below), article 18 establishes certain caps on the amount by which the assessed value

of certain individual properties may increase on a year-to-year basis also to avoid abrupt increases in tax liability. *See* Mem., *supra*, at 547. For Class One properties, market-driven assessment increases cannot exceed 6% annually and 20% over any five-year period. RPTL § 1805(1). For Class Two properties, assessment increases for buildings with fewer than eleven units cannot exceed 8% annually and 30% over any five-year period. *Id.* § 1805(2). For all other Class Two properties, including large rental, co-op, and condo buildings, any market-driven increase must be phased in over a five-year period. *Id.* § 1805(3). These caps do not apply to new construction or improved properties. *Id.* § 1805(5).

2. New York City's primary role in assessing and collecting real property taxes

The assessment and collection of real property taxes are chiefly undertaken by municipalities—in this case, New York City. (Record on Appeal (R.) 109 (Compl. ¶ 45).) A New York City agency, the Department of Finance, determines the taxes that property owners owe by (a) assessing the property's taxable value, and then (b) multiplying that value by a City-determined tax rate.

First, the City determines the *taxable value* of each parcel by estimating the parcel's market value (using one of several methods determined by the City), then multiplying that market value by the fractional assessment rate the City has set for the particular class of property in question.[3] (R. 109-111, 116 (Compl. ¶¶ 46, 51, 69).)

New York City assesses real property owned or leased by condos and co-ops under RPTL § 581, which provides, in pertinent part, that such assessments shall "not exceed[] the assessment which would be placed upon such parcel were the parcel not owned or leased by a cooperative corporation or on a condominium basis." RPTL § 581(1)(a). In accordance with this statutory provision, the City has elected to assess the market value of condos and co-ops based on what a comparable building would generate in annual rental

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[3] The City has elected to assess Class One properties (i.e., one-, two-, and three-family residential properties) at 6% of their market value, and to assess all other classes at 45% of their market value. Thus, for example, a Class One property with a $100,000 market value would have a $6,000 taxable value, and a Class Two property with a $100,000 value would have a $45,000 taxable value. *See generally* N.Y.C. Dept. of Fin., *Calculating Your Annual Property Tax*, https://www.nyc.gov/site/finance/taxes/property-calculating-your-annual-tax-blll.page.

income, taking into consideration any applicable rent regulation laws that would apply. (R. 110 (Compl. ¶¶ 49-50 & n.2).)

Second, the City determines the *tax rate* for each class of real property by calculating the rate required to satisfy each class's share, as determined by the formula set forth in RPTL § 1803-a, and to meet the City's overall tax needs.[4] (R. 117, 120 (Compl. ¶¶ 74, 86).)

Third, the City multiplies these values to determine each individual property owner's tax obligations. It then further adjusts these obligations by applying a combination of city and state laws and regulations that provide abatements and exemptions for a variety of grounds. (R. 120 (Compl. ¶ 87).) The most significant reduction relevant here is the longstanding abatement for owners of condos and co-ops, which fall within Class Two. (R. 121 (Compl. ¶ 89).) Further tax reductions are available to numerous other groups, such as landlords receiving abatements for renovating residential apartment buildings. *See, e.g.*, N.Y.C. Dept. of Fin., *J-*

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[4] In 2023, Class One has a 20.3% tax rate; Class Two, 12.3%; Class Three, 12.8%; and Class Four, 10.6%. N.Y.C. Dept. of Fin., *Property Tax Rates*, https://tinyurl.com/3syssc4a.

51 Exemption and Abatement, https://www.nyc.gov/site/finance/benefits/benefits-j51.page.

The New York State Department of Taxation and Finance (DTF), of which defendant Office of Real Property Tax Services (ORPTS) is a division, plays a limited role in the City's assessment and collection of property taxes. Although DTF has nominal supervisory authority over assessments, *see* RPTL § 202(1)(d), it does not have authority to "direct substantive assessment decisions," or even to provide "substantive input" in the assessment process, *see Matter of State Bd. of Equalization & Assessment v. Kerwick*, 52 N.Y.2d 557, 572-73 (1981). Owners wishing to challenge their property tax assessments go through a New York City grievance process, followed by tax certiorari proceedings or a Small Claims Assessment Review. *See* ORPTS, DTF, *Contesting Your Assessment in New York State* (Feb. 2012), https://tinyurl.com/3m5ma3cd.

B. Factual Background and Procedural History

1. The complaint's allegations

In April 2017, TENNY filed a complaint in Supreme Court, New York County against the City Defendants and the State Defendants, asserting sixteen causes of action.

First, TENNY alleged that the City Defendants treat Class One properties unequally in violation of article XVI of the state Constitution, RPTL § 305(2), and the federal and state Equal Protection Clauses (Causes of Action 1 to 4). (R. 160-168.) According to TENNY, the City's "application of assessment caps," "differential treatment of properties built prior to or after 1981," and "failure to maintain an assessment ratio that promotes equalization of the tax burden within Class One" result in "substantially disparate" assessments and taxation by the City within Class One. (R. 162-165, 167 (Compl. ¶¶ 212, 220, 229, 238); *see* R. 124-131 (Compl. ¶¶ 102-116).)

Second, TENNY alleged that the City Defendants and the State Defendants treat Class Two properties unequally, in violation of article XVI of the state Constitution, RPTL § 305(2), and the federal and state Equal Protection Clauses (Causes of Action 5 to 8).

(R. 168-173.) According to TENNY, Class Two properties are subject to "substantially disparate" assessments and taxation due to some combination of "RPTL section 581 and/or the City's interpretation thereof," RPTL § 1805(2)'s "differential treatment of smaller and larger Class 2 Property," and numerous other acts by the City, including its assertedly "discriminatory treatment of rental property owners and their tenants," "differential treatment of cooperatives and condominiums prior to and after January 1, 1974," "inequitable abatements for favored property owners," "application of assessment caps," and "failure to maintain an assessment ratio that promotes equalization of the tax burden within Class Two." (R. 168-172 (Compl. ¶¶ 244, 250, 257, 264); *see* R. 131-143 (Compl. ¶¶ 117-148).)

Third, beyond the assertedly unequal treatment of properties "*within* Class One and *within* Class Two" (R. 618), TENNY more broadly alleged that the City Defendants and the State Defendants violate both the Equal Protection and the Due Process Clauses of the state and federal Constitutions by taxing properties arbitrarily citywide (Causes of Action 9 to 12) (R. 173-180). TENNY claimed that "similarly valued properties" throughout the City's property

tax system are "arbitrarily assessed and taxed at amounts bearing no rational basis to their true market value or to any fair and realistic value of the property involved" (R. 174-179 (Compl. ¶¶ 271, 278, 286, 297); *see* R. 143-149 (Compl. ¶¶ 149-169)) because city and state policies—such as the caps on the amount each class share can grow per year under RPTL article 18—have privileged the interests of Class One over the interests of the other Classes in a way that assertedly does not further a legitimate state interest or bear a rational relationship to ensuring that real property taxation reflects market value (R. 143-149, 174-175, 177-180 (Compl. ¶¶ 149-169, 272, 279, 287-291, 298-302)).[5]

Finally, TENNY alleged that the practical effect of the alleged unequal taxation of properties is to disparately impact racial minorities and perpetuate segregation in violation of the federal Fair Housing Act (FHA) (Causes of Action 14 to 16). (R. 180-184 (Compl. ¶¶ 308-330); *see* R. 149-160 (Compl. ¶¶ 170-204).) According to

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[5] TENNY also alleged that the City Defendants and the State Defendants create "innumerable subclasses" in violation of RPTL § 1802's requirement that there be only four classes of property in New York City (Cause of Action 13). (R. 180 (Compl. ¶¶ 304-307).)

TENNY, New York City's property tax system results in owners of Class One properties (such as single-family homes) who live in majority-minority districts paying taxes at higher rates than do owners of Class One properties in other districts. (R. 180-182 (Compl. ¶¶ 308-315); *see* R. 149-151 (Compl. ¶¶ 170-175).) Moreover, the property tax system allegedly favors owners of Class Two owner-occupied housing (such as condos and co-ops) over owners of other Class Two housing (such as rental buildings)—creating a burden that allegedly "falls more heavily on members of racial minority groups" because owners of rental buildings purportedly "pass along a substantial portion of property taxes to their renters," who allegedly are composed of racial minorities at greater rates than are owners of condos and co-ops. (R. 182-183 (Compl. ¶¶ 316-324); *see* R. 151-153 (Compl. ¶¶ 176-182).) TENNY further claims that the City's tax system perpetuates "patterns of segregation" by disfavoring Class Two rental properties, newer properties, and properties in certain neighborhoods. (*See* R. 154-160, 183-184 (Compl. ¶¶ 183-204, 325-330).)

TENNY requested a judgment declaring invalid, unenforceable, and unlawful the City Defendants' and the State Defendants' "real property valuation and assessment laws, regulations, policies and practices," as well as the "resulting real property taxation system," and "real property taxes actually imposed and collected from" TENNY's members. (R. 184-185.) The complaint also requested a permanent injunction against the purportedly "unlawful assessment and collection of property taxes within New York City." (R. 185.)

2. Supreme Court dismisses all but two claims against the State Defendants

In July 2017, the City Defendants and the State Defendants moved to dismiss the claims asserted against them on multiple grounds. (R. 25-84, 495-567.) Supreme Court, New York County (Lebovits, J.) denied the City Defendants' motion to dismiss in its entirety but granted the State Defendants' motion to dismiss all but two claims against them. (R. 23.)

The court dismissed TENNY's claims against the State Defendants under RPTL § 1802 (for creating "subclasses") and under the FHA (for perpetuating segregation) (Causes of Action 13 to 16)

because TENNY's complaint failed "to allege any action specific to the State Defendants" on those claims. (R. 22-23.)

The court also dismissed TENNY's claims that the State Defendants treat Class Two properties unequally (Causes of Action 5 to 8) because this Court already recognized that the State's enactment of RPTL § 581, which requires that condos and co-ops be treated as rental properties, serves a rational purpose. (R. 19-21.) The court also dismissed any as-applied challenges against the State Defendants on this ground because the City Defendants—not the State Defendants—are primarily responsible for substantive tax assessments of Class Two properties. (R. 20-21.)

For similar reasons, the court dismissed the equal protection claims against the State Defendants relating to treatment of Class One and Class Two properties (Causes of Action 11 to 12). The court explained that the only state action alleged on those claims—the State's enactment of RPTL article 18 and its caps on the amount the City may change tax assessments—is rational because the Legislature enacted these laws to avoid abrupt changes in liability pursuant to the RPTL's legislative scheme. (R. 21.)

The only two claims that Supreme Court permitted to proceed against the State Defendants (Causes of Action 9 to 10) were materially identical due process claims—arising under the federal and state Constitutions—involving the allegedly unequal treatment of Class One and Class Two properties. The court reasoned that the "tax burdens imposed" by the City may ultimately "'bear no relationship to real market values,'" and that such an allegation would support a due process claim against the State Defendants. (R. 21-22.)

The City Defendants and the State Defendants separately appealed (R. 2-8), and TENNY cross-appealed (R. 9-11).

3. The Appellate Division dismisses the complaint in its entirety

On February 27, 2020, the Appellate Division, First Department unanimously held that the complaint should be dismissed in its entirety because TENNY failed to state any claim against either the State Defendants or the City Defendants. (R. 951-978.)

As relevant to the State Defendants, the court rejected TENNY's equal protection and due process claims, holding that the

challenged state statutes serve rational purposes as this Court has previously recognized. (R. 959-965, 970-971.) The court also dismissed TENNY's state law statutory claim, concluding that RPTL §§ 467-a, 581, and 1805 did not conflict with RPTL § 305(2)'s direction to assess property at a uniform percentage of value within each assessing unit. (R. 969-970.) Finally, the court held that TENNY failed to state a claim under the federal FHA because TENNY had not "adequately allege[d] a causal connection between the property tax system and any racial disparities in the availability of housing," among several other pleading deficiencies. (R. 974.)

This Court dismissed TENNY's attempted appeal as of right "upon the ground that no substantial constitutional question is directly involved," *Tax Equity Now NY LLC v. City of New York*, 35 N.Y.3d 1077, 1077 (2020), but granted TENNY's subsequent motion for leave to appeal (R. 947).

ARGUMENT

POINT I

TENNY ABANDONED ITS CLAIMS AGAINST THE STATE DEFENDANTS

The present appeal should be dismissed against the State Defendants because TENNY's opening brief fails to explain why the lower courts' dismissal of the complaint as against the State Defendants was improper. In other words, TENNY offers no basis on which this Court may reverse the decision below as to the State Defendants. A "party's failure to raise an issue in its appellate brief is tantamount to abandonment or waiver of the issue." *Matter of Lehigh Portland Cement Co. v. Assessor of Town of Catskill*, 263 A.D.2d 558, 560 (3d Dep't 1999).

TENNY's substantive arguments on this appeal are directed entirely at the City Defendants. For example, on TENNY's RPTL claims, TENNY argues that "RPTL § 305(2) compels the City, when taxing real property, to assess the properties in the same class at a uniform fraction of market value" (Br. for Pl.-Appellant (Br.) at 23), and that the question on these claims "is whether TENNY adequately pleaded that the City fails to comply with § 305(2)" (*id.* at 28). On

its FHA claims, TENNY argues that "the City's assessment and taxation practices discriminate against minority residents" (*id.* at 40) and that its complaint "provides ample data" showing the disparate impact of "the City's assessment and taxation practices" (*id.* at 42; *see also id.* at 48, 50, 52). Finally, in support of its equal protection and due process claims, TENNY again rests on its arguments concerning how "[t]he City assesses and taxes residential property" and the "[t]he City's own actions or omissions." Br. at 59-60; *see also id.* at 54-56, 58.

TENNY's collective references to "Defendants" and sparse references to the State Defendants in the background section of its brief do not preserve its claims. TENNY makes several references to statements by "Defendants' elected officials" (Br. at 9-10, 18, 28), but the quoted officials are all City officials (*see id.* at 9-10 (quoting City Mayor, City Council Speaker, Commissioner and First Deputy Commissioner of City Department of Finance, Manhattan Borough President, and Deputy Director of City Independent Budget Office)). Similarly, TENNY argues that "Defendants' policies" violate the FHA, but its substantive arguments concerning the FHA concern

only the City's policies. *See id.* at 18. TENNY's references to prior litigation positions taken by the New York State Office of the Attorney General and the U.S. Department of Justice in FHA complaints filed more than twenty years ago in a lawsuit involving Nassau County's property taxation system have no bearing on whether the lower courts appropriately dismissed TENNY's FHA claims against the State Defendants. *See id.* at 48-49; *see also id.* at 3-4, 8.

Likewise, TENNY's argument that "[t]he 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" RPTL article 18 is inadequate to preserve its claims against the State Defendants because, as the preceding sentence in TENNY's brief makes clear, the respective tax burdens of Class One and Class Two properties are established by the City and not by the State. *See* Br. at 58. In any event, a single cursory reference to the State in the argument section of a 13,999-word brief is inadequate to preserve TENNY's claims. *See People v. McDaniel*, 295 A.D.2d 371, 371 (2d Dep't 2002). Finally, TENNY claims that "[r]egular interventions by the City and the State" have kept class shares from

changing as expected, but the cited portions of the complaint refer primarily to actions by the City Council, and TENNY's brief does not identify any pertinent actions by the State. *See* Br. at 17 (citing R. 118-119).

POINT II

THE APPELLATE DIVISION PROPERLY DISMISSED TENNY'S CLAIMS AGAINST THE STATE DEFENDANTS

If this Court does not dismiss the appeal as against the State Defendants, it may affirm the Appellate Division's decision to dismiss the complaint against the State Defendants on any of several independent grounds.

A. TENNY Failed to Adequately Allege the State Defendants' Involvement in the Alleged Violations.

Dismissal was appropriate because TENNY failed to adequately allege that the State Defendants have any role in the purported violations giving rise to TENNY's asserted injuries.

There is no dispute that the City, and not the State, undertakes the assessment and collection of real property taxes challenged by TENNY. (R. 109 (Compl. ¶ 45).) *See, e.g.*, *Foss v. City of Rochester*,

65 N.Y.2d 247, 254 (1985) ("assessments are the responsibility of local assessing units"). There is also no dispute about the State's limited role in these assessments. See *supra* at 7-10. The only purportedly relevant function performed by the State in this case is the Legislature's enactment of RPTL article 18, which: (1) set parameters for localities to determine the class share for each class of property, with caps on the amount each class share may increase every year, RPTL § 1803-a; and (2) capped year-to-year increases for assessments of individual properties in order to avoid abrupt jumps in tax liability, *id.* § 1805. TENNY makes no effort to connect the State's enactment of these statutes to its claims, repeatedly attributing responsibility for its injuries to the City alone.[6] (*See*

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[6] To the extent TENNY contends that article 18 is itself unconstitutional, such an argument would still not give rise to an articulable claim against the State Defendants, who play no role in the administration or enforcement of municipal property tax regimes. Although the Attorney General has a right to be heard when the constitutionality of a state statute is challenged and may intervene as of right in such cases, *see* C.P.L.R. 1012(b), the State and state agencies are not required to participate as party-defendants in the absence of a viable cause of action, *see, e.g.*, *Cass v. State*, 58 N.Y.2d 460, 463-64 (1983) (dismissing State on the merits).

R. 19-20 (N.Y. Const. art. XVI, § 2), 20-21 (RPTL § 305(2)), 21 (Equal Protection Clauses), 22 (RPTL § 1802(1)), 23 (FHA).)

TENNY's pleading failures are especially stark with respect to ORPTS. The complaint is devoid of allegations regarding ORPTS, aside from the generic statement that it is a "division within the New York State Department of Taxation and Finance" and that its principal office is in Albany. (R. 107 (Compl. ¶ 37).) This Court has recognized that DTF's power of "general supervision of the function of assessing" does not include the ability to "direct substantive assessment decisions" or provide "substantive input" in the assessment process. *See Kerwick*, 52 N.Y.2d at 572-73 (quotation marks omitted). Accordingly, there is no allegation that ORPTS—or DTF—have ever engaged in any unlawful conduct pertaining to the allegations in the complaint.

Dismissal of the claims against the State Defendants is further appropriate because TENNY has made clear that it does not seek "any specific reforms" from the State. *See* Br. at 53. TENNY does not, and cannot, ask this Court to order the Legislature to enact an

alternative real property tax scheme and it has identified no other form of relief that it could obtain against the State Defendants.

The Appellate Division's dismissal of TENNY's claims against the State Defendants can be affirmed on this basis alone. But even if TENNY's complaint could possibly be read to allege the State Defendants' involvement in the underlying violations, TENNY's claims would fail on the merits for the reasons discussed below.

B. TENNY Failed to State a Constitutional Claim Against the State Defendants.

The Appellate Division concluded that TENNY failed to state a claim against the State Defendants under either the Equal Protection or the Due Process Clauses of the federal and state Constitutions. (R. 959-965, 970-971.) This Court should affirm.

1. TENNY failed to state an equal protection claim against the State Defendants.

This Court has made clear that "[t]he Federal and State Constitutions do not prohibit dual tax rates or require that all taxpayers be treated the same. They require only that those similarly situated be treated uniformly." *Foss*, 65 N.Y.2d at 256. Thus,

a State "may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable." *Allegheny Pittsburgh Coal Co. v. County Commn. of Webster County*, 488 U.S. 336, 344 (1989). In delineating these classifications, the State has "large leeway" and may exercise its "judgment [to] produce reasonable systems of taxation." *Shapiro v. City of New York*, 32 N.Y.2d 96, 103 (1973) (quotation marks omitted); *see Matter of Long Is. Light. Co. v. State Tax Commn.*, 45 N.Y.2d 529, 535 (1978) ("[I]n taxation, even more than in other fields, Legislatures possess the greatest freedom in classification."). Applying this framework, each of TENNY's equal protection arguments fails.

First, TENNY incorrectly contends that the allocation of distinct tax burdens to Class One and Class Two properties violates equal protection. *See* Br. at 57-58. As this Court has already held, the Legislature had a rational basis to draw distinctions between Class One and Class Two properties: namely, to "maintain the stability of relative property class tax burdens." *Matter of O'Shea*, 8 N.Y.3d at 254 (quotation marks omitted). Otherwise, changing

fractional assessments to uniform, full value assessments—as would have been required under this Court's interpretation of the state statute at issue in *Matter of Hellerstein* (former RPTL § 306)—would have caused major spikes in the tax burdens on Class One properties. *See id.* at 252-53. TENNY's references to disparities between the classes (*see* Br. at 58 (citing R. 147)) fails to show that those "similarly situated" have been treated disparately or that the classification itself is unreasonable, *see Foss*, 65 N.Y.2d at 256.

Second, TENNY misses the mark in claiming that "disuniformity related to assessment caps" violates equal protection. *See* Br. at 55. The U.S. Supreme Court has recognized that a property tax scheme that is not entirely uniform satisfies equal protection principles if it preserves "stability" in the housing market and "discourag[es] rapid turnover in ownership of homes and businesses." *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992). In *Nordlinger*, the Court acknowledged the petitioner's argument that the tax statute at issue appeared to "vest benefits in a broad, powerful, and entrenched segment of society," but concluded that it nonetheless satisfied equal protection because it was "not palpably arbitrary" and served

a legitimate state interest. *Id.* at 18. TENNY attempts to distinguish *Nordlinger* on the basis that New York requires equal valuation of equally valuable property. *See* Br. at 56-57. But by capping the increases to tax burdens for individual properties under RPTL § 1805, New York permits disparate taxation of equally valuable property to serve other interests, such as preventing abrupt increases in tax liability.

As in *Nordlinger*, the application of RPTL § 1805's caps similarly rationally serves the State's legitimate interests in preserving stability in the housing market. These provisions "provide a high degree of stability" to longtime residents and homeowners in areas with rapidly appreciating real estate prices by capping increases in their property tax burdens. *See Matter of O'Shea*, 8 N.Y.3d at 255.[7] These caps prevent abrupt increases in tax liability, while allowing for changes in property value to be phased in over time, and thus

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[7] TENNY is mistaken to claim that this Court held in *Matter of O'Shea* that the caps were not intended to address market forces. *See* Br. at 55. In fact, this Court held that the "principal[]," but *not exclusive*, aim was to protect residential taxpayers from tax increases "caused by tax shifts from businesses to homeowners as a result of revaluation." *Matter of O'Shea*, 8 N.Y.3d at 259.

serve the reasonable purpose of ensuring that longtime residents are not abruptly priced out of their neighborhoods, while allowing for market-based changes to gradually be reflected in property taxes. TENNY's suggestion that other desirable ends could be served by eliminating the caps does not undermine the Legislature's rational basis for enacting RPTL § 1805.

Finally, TENNY does not state an equal protection claim against the State Defendants concerning the assessments of condos and co-ops. TENNY's complaint that the City Defendants on occasion use the income of rent-regulated properties as comparators to value condos and co-ops is a challenge to the City Defendants' assessment practice and not to RPTL § 581 itself, which this Court has already recognized serves a rational purpose. *See* Br. at 55-56. RPTL § 581 provides, in pertinent part, that assessments for condos and co-ops shall "not exceed[] the assessment which would be placed upon such parcel were the parcel not owned or leased by a cooperative corporation or on a condominium basis." RPTL § 581(1)(a). As this Court has recognized, the purpose of the statute "was to insure that owners of condominium and cooperative properties would be

taxed fairly compared to rental properties held in single ownership and not penalized because of the type of ownership involved in their multiple dwellings." *Matter of D. S. Alamo Assoc. v. Commissioner of Fin. of City of N.Y.*, 71 N.Y.2d 340, 347 (1988). Ensuring that condos and co-ops do not receive higher assessments because of the nature of ownership of the parcel "bears a rational connection" to the State's legitimate interest in ensuring that owners of condos and co-ops do not bear a higher tax burden simply because of the form of their buildings' ownership. *See Barklee Realty Co. v. Pataki*, 309 A.D.2d 310, 318 (1st Dep't 2003).

2. TENNY failed to state a due process claim against the State Defendants.

To the extent that TENNY's cursory due process argument can be construed as preserving its claim that RPTL article 18 violates due process, the statutory scheme plainly survives the deferential standard of review applicable to such claims. *See* Br. at 59-60. The Appellate Division correctly recognized that a taxing statute violates due process only if it is "'so arbitrary as to compel the conclusion that [the statute] does not involve an exertion of the taxing power,

but constitutes, in substance and effect, the direct exertion of a different and forbidden power.'" (R. 970 (quoting *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934)).) "Even a 'flagrant unevenness' in application of the tax will not prevent the statute from passing constitutional muster" if the Legislature is pursuing a rational tax-related objective. *See Heimbach v. State*, 59 N.Y.2d 891, 893 (1983).

The aspects of the statutory scheme challenged by TENNY—principally, caps on increases in class shares and individual assessments, *see* RPTL §§ 1803-a, 1805—serve the eminently reasonable function of stabilizing year-to-year changes in assessment value. This Court has already recognized this salutary purpose, explaining that article 18 was "designed to maintain the stability of relative property class tax burdens" in the wake of the *Matter of Hellerstein* decision, which "reverberated throughout the state" by threatening to vastly increase the tax obligations imposed on real property owners—particularly owners of residential properties. *Matter of O'Shea*, 8 N.Y.3d at 253-54 (quotation marks omitted). The bill that became RPTL article 18 "was 'the only ball game in town' to prevent a dramatic shift of real property taxes from businesses to home-

owners, and provide a high degree of stability in the relative tax burdens of these categories of taxpayers." *Id.* at 255 (citing legislative history). And since article 18's enactment, the Legislature has continually revised its caps to continue its policy objective of maintaining stability among homeowners year-to-year and preventing any abrupt and disruptive changes in tax liability.[8]

Although TENNY believes that an alternative approach would better promote fairness and equity, such policy choices are entrusted to the Legislature, not to the courts reviewing due process challenges to duly enacted state laws. *See* Br. at 59-60. This Court has recognized that the judicial branch should not engage in policymaking that is "conferred upon a coordinate branch of government." *Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82 AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233, 238-39

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[8] *See, e.g.*, Assembly Sponsor's Mem., *in* Bill Jacket for ch. 541 (2011), at 7 (explaining that the Legislature sought to "provide relief for the residential property tax class one" to avoid "dramatically increas[ing]" its tax burden year-to-year); Assembly Sponsor's Mem., *in* Bill Jacket for ch. 306 (2018), at 5-6 (explaining that the Legislature sought to "provide relief for residential property tax class one" to avoid "significant increases in the tax bills for residential homeowners" year-to-year).

(1984). This concern is heightened in areas where, as here, courts are "ill-equipped to undertake the responsibility and other branches are far more suited to the task." *Roberts v. Health & Hosps. Corp.*, 87 A.D.3d 311, 323 (1st Dep't 2011) (quotation marks omitted). For these reasons, courts have long adhered to the view that they should not "intrud[e] upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches." *Id.* at 324 (quotation marks omitted).

Because the statutory provisions in RPTL article 18 are neither utterly unreasonable nor arbitrary, the Appellate Division properly dismissed TENNY's due process claims against the State Defendants. (R. 970-971.)

C. TENNY Failed to State a Statutory Claim Against the State Defendants.

1. TENNY failed to state an RPTL § 305(2) claim against the State Defendants.

RPTL § 305(2) provides in pertinent part that "[a]ll real property in each assessing unit shall be assessed at a uniform percentage of value (fractional assessment)." RPTL § 305(2). In its complaint, TENNY alleged that the State Defendants violated

RPTL § 305(2) because New York City taxes "equally valuable properties" within Class Two unequally depending on different property uses and form of ownership. (R. 169 (Compl. ¶¶ 248-249) (quotation marks omitted).) TENNY again identified assessment caps and the assessment of condos and co-ops as the purported causes of disparities. (R. 169-170 (Compl. ¶¶ 249-250).)

As the State Defendants have consistently explained (App. Div. Reply & Response Br. for State Defs. at 33), RPTL § 305(2) imposes no obligations on the State that are relevant to this proceeding.[9] The Appellate Division therefore evaluated TENNY's RPTL § 305(2) claims primarily with respect to the City Defendants (R. 967-970), and TENNY's motion for leave to appeal and opening brief limited the RPTL § 305(2) argument to TENNY's claims against the City Defendants (*see* Mem. of Law in Supp. of Mot. for Permission to Appeal at 18-31; Br. at 23-40).

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[9] The State values "special franchise" property under RPTL article 6 and must assess that property at a uniform percentage of value in accordance with RPTL §§ 305 and 606. Special franchise property is in Class Three and is not challenged in this litigation.

To the extent this Court concludes that TENNY has properly maintained an RPTL § 305(2) claim against the State Defendants in this appeal, it should affirm the dismissal of such a claim as meritless.[10] Nothing in RPTL § 305(2) precludes the State from imposing assessment caps "to prevent a dramatic shift" and "provide a high degree of stability" while accounting for changes in property value over time. *See Matter of O'Shea*, 8 N.Y.3d at 255. TENNY is wrong to claim that RPTL § 1805's caps were not intended to prevent tax increases driven by market forces. *See* Br. at 34. Rather, this Court in *Matter of O'Shea* observed that RPTL article 18 *in its entirety*—including its classification scheme—was *principally* aimed at protecting residential taxpayers from tax increases caused by shifts in businesses' and homeowners' respective shares of the real property tax burden. 8 N.Y.3d at 259. Read in context, nothing in *Matter of O'Shea* forecloses the application of RPTL § 1805's caps to protect residential homeowners from volatile property taxes following rapid appreciation of property. While many provisions in RPTL

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[10] The State Defendants take no position on the merits of TENNY's RPTL § 305(2) claim against the City Defendants.

article 18 are aimed at protecting homeowners in the residential class from revaluation-driven tax shifts, *see, e.g.*, RPTL §§ 1802–1803-b, 1805, the caps contained in RPTL § 1805 serve a distinct function: to limit year-to-year assessment increases on individual residential properties due to nonphysical factors, such as market conditions. TENNY does not suggest any other plausible purpose for RPTL § 1805 or argue that this purpose is invalid under this Court's decision in *Matter of O'Shea*.

TENNY is also wrong to claim that article XVI, § 2 of the New York Constitution supports its reading of RPTL § 305(2) as requiring mathematically equal assessments within classes. *See* Br. at 38-40. This constitutional provision requires the Legislature to "provide for the supervision, review and equalization of assessments for purposes of taxation." N.Y. Const. art. XVI, § 2. The provision does not require that all assessments be mathematically equal but only that the State provide a process for the adjustment and review of individual taxpayer assessments. *See, e.g.*, *Matter of Fifth Ave. Off. Ctr. Co. v. City of Mount Vernon*, 89 N.Y.2d 735, 740 (1997); *Foss*, 65 N.Y.2d at 254-55. The State satisfies this requirement by provid-

ing for, among other things, the "administrative [and judicial] review of property assessments" under RPTL articles 5 and 7. *See Matter of Fifth Ave.*, 89 N.Y.2d at 740; *see also* RPTL §§ 522-528, 550-558, 700-739.

2. TENNY failed to state a claim under the federal Fair Housing Act.

The FHA addresses the denial of housing on the basis of race and prohibits practices that are intentionally discriminatory or result in a disparate impact on protected groups. *See* 42 U.S.C. § 3601 et seq.; *see also Texas Dept. of Hous. & Community Affairs v. Inclusive Communities Project, Inc.,* 576 U.S. 519, 533-40 (2015). Because New York's real property tax scheme is facially neutral, TENNY asserts an FHA claim in this action on a disparate-impact theory. (*See, e.g.*, R. 149-160 (Compl. ¶¶ 170-204).)

As stated in its complaint, TENNY's FHA claims against the State Defendants are premised upon the theory that the State's policies—i.e., RPTL article 18—cause a disparate impact on minorities in New York City because higher percentages of minorities live in certain properties (such as rental buildings) or certain districts

than non-minorities do; that the City taxes these different types of properties at different rates; and that the State's tax policies therefore disparately affect minority individuals throughout the City. In its brief to this Court, TENNY has offered no articulation of the basis for its FHA claim against the State Defendants, alleging violative conduct only by the City.[11] *See* Br. at 40-54.

The FHA claim was correctly dismissed by the Appellate Division as against the State Defendants. (R. 972-976.) The U.S. Supreme Court's decision in *Inclusive Communities* made clear that allegations about disparity alone do not satisfy the FHA's causation requirement. *See* 576 U.S. at 543-44. Rather, a plaintiff must also allege facts showing that a defendant's "policy or policies [are] causing that disparity." *Id.* at 542. And as the Supreme Court recognized, it may be "difficult to establish causation because of the multiple factors that go into" pertinent housing decisions. *Id.* at 543.

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[11] TENNY relies heavily (*see, e.g.*, Br. at 42, 48-49) on an FHA complaint challenging a distinct property tax regime implemented by Nassau County under RPTL article 18 that relied solely on historical values of residential property without periodic reassessments (*see* R. 650-651). That complaint has no bearing on whether TENNY has stated a claim that RPTL article 18 violates the FHA.

Applying *Inclusive Communities*, the Appellate Division concluded that TENNY had not made sufficiently specific allegations "showing that the application of the property tax system, as opposed to other factors, causes financial barriers that inhibit the ability of minority residents to own homes," higher rates of foreclosure, or lower levels of rental property development. (R. 974.) And TENNY had improperly assumed that the property tax system caused New York City's patterns of housing segregation by surmising, based on no factual allegations whatsoever, that "New York City residents would elect to relocate to other neighborhoods if defendants applied the property tax system differently." (R. 975.)

TENNY's brief to this Court, like its complaint, continues to emphasize the assertedly disparate effects of the City's property taxes on minorities (*e.g.*, Br. at 42-43, 51), without identifying any concrete allegations establishing a causal connection between the City's property tax system and the claimed disparities—aside from conclusory assertions of causation (*e.g.*, *id.* at 43-44). Instead, TENNY claims that the causal effect of property taxes is "self-evident" and

"common sense."[12] *Id.* at 46-47 (quotation marks omitted). But that argument ignores controlling precedent, which is clear that a "plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact." *See Inclusive Communities*, 576 U.S. at 543;[13] *see also Robinson v. City of New York*, 143 A.D.3d 641, 641 (1st Dep't 2016) (dismissing complaint based on "speculative" theory that rents in New York City "would be reduced were real property taxes to be shared equitably among the different classes of real property").

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[12] TENNY relies (Br. at 74) on *Reyes v. Waples Mobile Home Park Limited Partnership*, 903 F.3d 415, 428 (4th Cir. 2018), for this supposed standard. In *Reyes*, the Fourth Circuit explained why certain pre-*Inclusive Communities* decisions comported with *Inclusive Communities*' "robust causality requirement" and remained good law. *Id.* Those decisions—which concerned the termination of a public housing project and a rental policy barring children—involved practices that had a far more direct impact on access to housing for minorities than the tax scheme at issue here.

[13] TENNY relegates its discussion of *Inclusive Communities* to a footnote, observing that *Inclusive Communities* arose from an appeal after a bench trial. *See* Br. at 45 n.13. But *Inclusive Communities* established more generally the parameters for assessing a disparate-impact claim under the FHA, including an express discussion of pleading burdens.

TENNY also fails to allege any facts showing that the property tax system has had any causal effect on patterns of housing segregation in New York City or that the alleged effect is in any way attributable to conduct by the State Defendants. TENNY offers only conclusory assertions that the State's policies increase the financial burden on renters and "minority-majority neighborhoods" in a way that constrains their mobility and "perpetuat[es] existing segregation" on a neighborhood-by-neighborhood basis. (R. 184 (Compl. ¶¶ 328-329).) Such allegations are insufficient given the "complex set of considerations" that come into play when individuals choose where to live. (*See* R. 975.)

CONCLUSION

For the foregoing reasons, the Court should dismiss TENNY's appeal against the State Defendants, or, in the alternative, affirm the Appellate Division's decision and order dismissing the complaint as against the State Defendants.

Dated: New York, New York
December 9, 2022

Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Mark S. Grube, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 7,598 words, which complies with the limitations stated in § 500.13(c)(1).

/s/ Mark S. Grube

Mark S. Grube