New York County Clerk's Index No. 153759/17
First Department Appeal No. 2019-3610

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, NEW YORK OFFICE OF REAL PROPERTY TAX SERVICES,

Defendants-Respondents.

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR PERMISSION TO APPEAL

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Preliminary Statement

Defendants-Appellants, City of New York and New York City Department of Finance (together, the "City") submits this memorandum of law in opposition to Plaintiff[1]'s motion (the "Motion") for permission to appeal to this Court from the unanimous decision and order (the "Decision") of the Appellate Division, First Department (the "Appellate Division") dismissing the Complaint in this action.

This is Plaintiff's third attempt to obtain review by this Court of the well-reasoned Decision. The prior attempts were rejected, and this one should be as well. The relevant facts and law are set out in the Decision (*Tax Equity Now NY LLC v City of New York et. al.*, 182 AD3d 148 [1st Dept 2020]) and in the Brief and Reply Brief the City submitted in connection with the underlying appeal to the Appellate Division (together, the "Briefs"). Those Briefs are incorporated by reference.

As set forth in the Decision, the Briefs, and below, there is no basis on which to grant permission to appeal from the Decision. The Appellate Division properly applied well-settled principles of law in arriving at its Decision to dismiss the Complaint. The issues raised by Plaintiff are neither novel nor are they of state-wide public importance – the entire thrust of the Complaint seeks a reordering of the Property Tax System in the City. Moreover, the Decision does not conflict, but

[1] "Plaintiff" refers to Plaintiff-Appellant, Tax Equity Now NY, LLC.

rather is in conformity with, the decisional law in this State and long-standing legal principles.

Plaintiff's primary contention is that the New York State property tax system, as it is applied in New York City (the "Property Tax System" or the "Tax System"), is unlawful because property owners within the City's four tax classes are not taxed at the same percentage of the property's market value or the same effective tax rate ("ETR"). The Appellate Division roundly rejected Plaintiff's arguments in a well-reasoned opinion, relying on long-standing precedent and bedrock principles of law.

At its core, Plaintiff questions the enactment by the New York State Legislature of certain statutes which govern the real property tax assessment process in the City of New York. None of the choices made by the Legislature, or the City's implementation of those choices, were motivated by an impermissible reason or consideration – and Plaintiff does not allege otherwise. Yet through this lawsuit, Plaintiff seeks a restructuring of the real property tax laws, failing to acknowledge that the shaping of property tax policy involves precisely the type of decisions that are entrusted to the legislative branch and not the judiciary.

This Court dismissed Plaintiff's attempt to appeal the Decision as of right, finding that no substantial constitutional issues were directly involved warranting such an appeal, and the Appellate Division denied Plaintiff's motion for leave to appeal to this Court. There is no basis for granting permission to appeal now.

Background

Plaintiff is an association comprised of owners and renters of condominiums, cooperatives and rental buildings in all five boroughs of the City, as well as various special interest groups (R[2] 106-107, ¶ 33). The Complaint alleges that the Property Tax System violates the Federal and State Constitutions, the New York Real Property Tax Laws, and the Fair Housing Act (42 U.S.C. § 3601 et. seq.). Specifically, Plaintiff argues that the Constitutions and laws are violated because properties within each of the City's four property tax classes[3] do not pay the same ETR.

At the outset, it should be noted that Plaintiff's entire case rests on the fallacy that properties are required to be taxed at a uniform ETR. That is not the law. As demonstrated throughout the City's Briefs and as supported by well-established legal precedent, even where similar properties have "dramatic disparities" in their ETRs, the Constitution is not violated.

Moreover, the disparities of which Plaintiff principally complains are attributable to the application of two State statutes which the City merely administers. The first, RPTL § 1805, limits the amount by which a property's assessment may increase from year to year. The second, RPTL § 581, requires the

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[2] Citations to "R" are to the Joint Record on Appeal filed by the City on May 16, 2019.

[3] Article 18 of the New York State Real Property Tax Law ("RPTL") divides New York City properties into four tax classes.

City to treat cooperative and condominium buildings as if they were income-producing rental properties for purposes of tax assessments. However, these classifications, created by the Legislature, are valid policy choices, and if any changes are to be made, they must be accomplished in that forum.

The City moved to dismiss the Complaint (the "Motion to Dismiss") (R 85-87),[4] arguing that (i) Plaintiff does not qualify for organizational standing, (ii) the lower court lacked subject matter jurisdiction to hear Plaintiff's tax-based federal claims, (iii) the issues raised by the Complaint are political questions which are reserved for other branches of government, and (iv) Plaintiff failed to allege facts sufficient to state or properly plead any of its causes of action (R 495-567).

The Trial Court Decision

The Supreme Court, New York County (Gerald Lebovits, J.) entered its decision/order on September 25, 2018, denying the City's Motion to Dismiss (the "Original Decision") (R 897-942, 12-24).[5]

The Original Decision did not address critical arguments raised by defendants and failed to properly analyze the arguments that it did consider.

[4] The State of New York and New York Office of Real Property Tax Services were also named defendants and also moved to dismiss the Complaint.

[5] The Original Decision dismissed ten of the twelve claims asserted against the State (*id.*).

The Appellate Division Reversed and Dismissed the Complaint, Relying on Well-Settled Principles of Law and Uniform Precedent

On appeal, following extensive briefing and argument, the Appellate Division unanimously reversed the Original Decision and dismissed the Complaint in its entirety in the Decision dated February 27, 2020.

In its Decision, the Appellate Division first set forth the long-standing and well-settled standards governing Plaintiff's claims:

> Neither the Federal nor the State Constitution "prohibit[s] dual tax rates or require[s] that all taxpayers be treated the same" (*Foss v City of Rochester*, 65 NY2d 247, 256 [1985]). All that they require is "that those similarly situated be treated uniformly. Thus, the creation of different classes for purposes of taxation is permissible as long as the classification is reasonable and the taxes imposed are uniform within the class" (*id.*). Put another way, the legislature may treat one class differently from others "unless the difference in treatment is palpably arbitrary or amounts to an invidious discrimination" (*Trump v Chu*, 65 NY2d 20, 25 [1985] [internal quotation marks omitted]).
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> "This standard is especially deferential in the context of classifications made by complex tax laws" (*Nordlinger v Hahn*, 505 US 1, 11 [1992]). Even dramatic disparities in property taxes paid by persons who own otherwise similar property are likely to survive review (*id.* at 6-7). "Where taxation is concerned and no specific[] right, apart from equal protection, is imperiled,[] States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation" (*Lehnhausen v Lake Shore Auto Parts Co.*, 410 US 356, 359 [1973]).
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> "The scope of our review is narrow. Taxing statutes, like other social and economic legislation that neither classify on the basis of a suspect

> class nor impair a fundamental right, must be upheld if the challenged classification is rationally related to achievement of a legitimate State purpose" (*Trump*, 65 NY2d at 25)

(*Tax Equity Now NY LLC, supra.*, 182 AD3d at 157).

Applying these standards, the Appellate Division concluded that, although the application of the challenged statutes results in properties paying different ETRs, the Taxing System does not violate any laws and unanimously dismissed all of Plaintiff's claims.

Specifically, the Appellate Division found: "[c]onstruing the pleadings liberally, accepting all the facts alleged in the complaint as true and according plaintiff the benefit of every possible favorable inference (*see generally Leon v Martinez*, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]), the complaint fails to state a cause of action against any of the defendants" (*id.* at 156-157).

This Court Dismissed Plaintiff's Attempt to Appeal as of Right

Following the Appellate Division's Decision, Plaintiff filed a Notice of Appeal to this Court on the purported basis that a constitutional question was directly involved (CPLR 5601 [b] [1]). This Court requested comments from the parties regarding the Court's subject matter jurisdiction to hear the appeal as of right.

Following the parties' letter submissions (the City's letter in response to the Court's jurisdictional inquiry is attached hereto and incorporated by reference), this

Court dismissed the appeal, finding that no substantial constitutional questions were raised, implicitly concluding that, at least with respect to the constitutional claims, Plaintiff's appeal lacked colorable merit (12 Weinstein, Korn, & Miller, *New York Civil Practice*: *CPLR* ¶ 5601.09 (2020) ("[T]o qualify as substantial, a constitutional question must appear to have colorable merit...."); *Matter of City of NY v 2305-07 Third Ave., LLC*, 142 AD3d 69, 75-76 [1st Dept 2016]).

ARGUMENT

THE MOTION FOR LEAVE TO APPEAL SHOULD BE DENIED AS THIS CASE DOES NOT PRESENT A LEAVEWORTHY ISSUE

The Motion should be denied because the proposed issues are not novel or of State-wide importance, and they do not present a conflict with prior decisions of this Court or involve a conflict among the departments of the Appellate Division (22 NYCRR § 500.22 [b] [4]); *Matter of City of NY v 2305-07 Third Ave., LLC*, 142 AD3d 69, 75-76 [1st Dept 2016]).[6] In fact, the Appellate Division's Decision

[6] Citing to *de Reyes v. Waples Mobile Home Park L.P*, 903 F.3d 415 (4th Cir. 2018), Plaintiff claims that the Decision somehow conflicts with this 4th Circuit case in imposing a heightened burden to plead an FHA claim (Plaintiff's Brief at 33.). The *de Reyes* case, however, reinforced well-settled Supreme Court precedent that a complaint must allege a robust causality between the challenged practice and the alleged discriminatory impact (*de Reyes, supra.* at 425) – the same standard applied in the Decision. The Tax System is nothing like the mobile home park's policy in *de Reyes* to evict tenants who were unable to provide proof of legal status. The Decision is not inconsistent with *de Reyes*. Plaintiff cannot shoehorn its allegations into a cognizable FHA claim; the Tax system does not deny anyone housing "because of race". Moreover, there is no jurisdiction to reach the FHA claims under the principles of the Tax Injunction Act and comity (*see e.g., Nat'l Private Truck Council v Okla. Tax Comm'n*, 515 US 582, 588 [1995]; *Berry v NY State Dept. of Taxation & Fin.*, 162 AD3d 606, 607 [1st Dept 2018]).

preserves the deeply rooted legal principles surrounding the treatment of taxing statutes in New York State, which should not be disturbed without careful consideration of the Legislature.

I. The Appellate Division's Decision is Consistent with Controlling Legal Precedent, and it is Well-Settled that Courts Accord a High Degree of Deference to Tax Laws.

Where a decision merely applies well-established principles to the facts of a particular case, leave to appeal is not appropriate (*id*; *cf. Plowden v Manganiello*, 143 Misc 2d 446, 451 [Sup Ct, Bronx County 1989] (noting that this Court grants "permission to appeal in almost no cases where the only issue is the application of well-established principles to the facts of the particular case")).

That is, indeed, the case here. The gravamen of Plaintiff's Complaint is that the tax system creates disparities in the assessment and taxation of similarly situated properties between and within the boroughs throughout the City. However, Plaintiff's arguments are nothing new. Plaintiff's claims invoke well-established principles surrounding the review of taxing schemes and classification, and the disparities of which Plaintiff complains are attributable to the application of established New York State statutes, which have withstood judicial scrutiny and been found to have a rational basis.

"As a general rule, 'legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some

inequality'" (*Nordlinger v Hahn*, 505 US 1 [1992]). In particular, taxing jurisdictions are afforded wide latitude in structuring internal taxation schemes. As the Court of Appeals has held, "[t]his standard is especially deferential in the context of classification made by complex tax laws" (*Trump v Chu*, 65 NY2d at 25). Further, "when examining classification, it should be remembered that in the field of taxation the Legislature is 'not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value,' but rather it has 'large leeway in making classifications and drawing lines which in [its] judgment [produces] reasonable systems of taxation' (*id.* [internal citations omitted]).

What Plaintiff has repeatedly failed to acknowledge is that the disparities of which it complains are the result of statutorily mandated requirements that the City merely administers. In accordance with Article 18 and RPTL § 305(2), the City assesses every property within each tax class at a uniform percentage of value. In other words, a property's assessed value is based on a percentage of the property's market value. This percentage is called the assessment ratio, which is determined by tax class. Tax Class One properties are assessed at 6% of market value and Tax Class Two properties are assessed at 45% of market value. Once these assessment ratios are applied to each tax class, the City is then statutorily mandated to apply the

assessment cap rates set in RPTL § 1805(1) to come up with a property's assessed value.[7]

Plaintiff argues that the assessment caps create a disparity within Class One and Class Two properties such that taxpayers end up paying varied ETRs once the cap is applied. As noted above, this contention mistakenly equates an assessed value with an "effective tax rate." It also ignores the "undisputed [fact] that the effect of the application of the assessment caps is that over time, certain properties that appreciate in value more rapidly are assessed at a lesser percentage of their market value compared to properties that appreciate more gradually" (*Tax Equity Now New York LLC v City of New York*, 182 AD3d 148, 163-164 [1st Dept 2020]).

Indeed, this is an unavoidable effect, as there is no question that external factors, such as property value trends and real estate market forces, impact property values and result in properties paying different ETRs. As the Appellate Division astutely observed, "[t]he legislature adopted the assessment caps provided for in RPTL § 1805(1) to protect homeowners from sudden dramatic tax increases which would make continued home ownership more burdensome and unaffordable for many homeowners" (182 AD3d at 158) and "[w]hen the legislature adopted RPTL

[7] RPTL 1805(1) caps assessment increases for Class One properties to no more than six percent per year and twenty percent in five years and caps assessment increases for Class Two properties to no more than eight percent per year and thirty percent in five years.

§ 305(2) and the assessment caps provided for in RPTL § 1805, it knew that, over time, those assessment caps were going to necessarily create disparities" (182 AD3d at 164).

As previously mentioned, real property tax systems that result in "dramatic disparities in the taxes paid by persons owning similar pieces of property" are not violative of equal protection (*Nordlinger*, 505 US at 6). Moreover, it well-settled that "[e]xcept in rare and special instances, the due process of law clause... is not a limitation upon the taxing power conferred upon Congress by the Constitution" (*Magnano Co. v Hamilton*, 292 US 40, 44 [1934]). Indeed, through the Court's jurisdictional inquiry and in dismissing Plaintiff's appeal as of right, this Court has already determined that, at least with respect to the constitutional claims, the issues Plaintiff raises are not leaveworthy (*Matter of City of NY v 2305-07 Third Ave., LLC*, 142 AD3d 69, 75-76 [1st Dept 2016] (the Court of Appeals performs the same "careful, threshold consideration of the issues presented" in determining whether a case is "leaveworthy" as it does in determining whether an appeal as of right is warranted). As such, the Motion presents no issues that warrant leave to appeal.

II. Plaintiff's Dissatisfaction with the Legislature's Policy Choices Does Not Create a Leaveworthy Issue.

"The Legislature has nearly unconstrained authority in the design of taxing measures unless they are utterly unreasonable or arbitrary" (*Ames Volkswagen v State Tax Commn*, 47 NY2d 345, 349 [1979]). Reduced to its essence, Plaintiff's contention is merely that certain taxpayers should pay less in property tax and other taxpayers should pay more.[8] If such complaints provided a basis for leave to appeal to the Court of Appeals, this Court would be inundated with endless suits from taxpayers who, from their perspective, pay too much in property taxes.

Plaintiff merely disagrees with the laws that result in disparate ETRs. The laws, however, are the product of a series of permissible choices made by the Legislature in crafting tax policy. Changes to the Tax System should not come piecemeal from litigation but rather should be made through comprehensive legislation by elected officials who serve in the interest, and as the voice of, their constituents.

As this Court has stated "[i]t is not within the province of the judiciary to balance the advisability of a lawfully implemented public policy against the hardship or illogic it may be said to impose" (*Maresca v Cuomo*, 64 NY2d 242, 253 [1984]).

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[8] Ironically, some of Plaintiff's members would pay more in property taxes if Plaintiff's proposed reforms were implemented, which highlights the conflicts present among its members and shows why Plaintiff is not a proper representative of its members' interests.

"The rational basis test which is often characterized as 'a paradigm of judicial restraint,' is not a license for courts to judge 'the wisdom, fairness or logic of legislative choices'" (*Tilles Inv. Co. v Gulotta*, 288 AD2d 303, 304-305 [2d Dept 2001] [internal citations omitted]). "Nor does it authorize 'the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that affect fundamental rights nor proceed along suspect lines'" (*id.*).

Plaintiff seeks to do an end run around the legislative branch and asks the courts to legislate tax policy. The only "solution" Plaintiff has ever proposed throughout the litigation is for the City to lower the assessment ratio in order to avoid the effect of the assessment caps mandated under RPTL § 1805. However, this is merely an attempt by Plaintiffs to circumvent the legislature's policies, and if done hastily, and without careful consideration, may do more harm than good. The Legislature's original intent behind RPTL § 1805 was to encourage property ownership and to protect property owners, and as demonstrated more fully in the City's Briefs, these appropriate legislative choices have already been upheld by the courts. If a change is to be made to the property tax system, that change must come, after due deliberation, from the Legislature.

Lastly, the Motion should be dismissed for the additional reasons that (i) Plaintiff has failed to establish that it qualifies for organizational standing, (ii) the

political question doctrine bars Plaintiff's claims, which are merely complaints about the legislature's policy choices, and (iii) with respect to Plaintiff's federal claims, the Courts lack jurisdiction (*see* City Opening Brief at Points I, II, and VII and Reply Brief at Points I, II, VII.B and VIII). There are no grounds present here that warrant leave to appeal.

Conclusion

For all of these reasons, the Motion should be denied.

Dated: December 10, 2021
New York, New York

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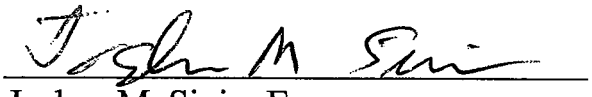
By: 

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June 15, 2020

By Overnight Mail

Hon. Heather Davis
Deputy Clerk
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: Tax Equity Now NY v City of New York (APL 2020-00073)
NY County Clerk's Index No 401069/2005
First Department Case No 2019-3610

Dear Ms. Davis:

This office represents respondents – the City of New York and the New York City Department of Finance (together, the "City") – in the above-referenced matter. I write in response to your May 28, 2020 letter inviting comments on the Court's subject matter jurisdiction of this appeal which appellant seeks to take as of right pursuant to CPLR § 5601(b)(1).

As set forth more fully below, there is no basis to support an appeal as of right because no substantial constitutional question is implicated. Plaintiff argues that the Federal and State Constitutions mandate that all property owners within each property class[1] be taxed at the same percentage of the property's market value or the same effective tax rate ("ETR").[2] As the Appellate Division unanimously

[1] Article 18 of the New York State Real Property Tax Law ("RPTL") divides New York City properties into four tax classes.

[2] ETR is the tax paid divided by the fair market value of the property. A tax bill may be impacted by, among other things, exemptions or abatements available to a taxpayer which will reduce the tax paid and, as result, reduce the ETR.

found, there is no basis for such interpretation. The United States Supreme Court has long held that even where properties with identical market values pay drastically different tax bills, the Constitution is not violated. Where a constitutional question is well-settled, it is not substantial and not appealable as of right.

Background

The Complaint challenges the New York City property tax system – which is governed and bound by State law – claiming that it violates, *inter alia*, the Federal and State Constitutions. Specifically, Plaintiff argues that the Federal and State Equal Protection and Due Process clauses, as well as article XVI, § 2 of the State Constitution (the "Equalization Provision") are violated because properties within each of the City's four property tax classes do not pay the same ETR. Plaintiff alleges that the disparities in ETRs arise principally from the application of two State statutes. The first, RPTL § 1805, limits the amount by which a property's assessment may increase from year to year. The second, RPTL § 581, requires the City to treat cooperative and condominium buildings as if they were income producing rental properties for tax assessment purposes.

The Appellate Division rejected Plaintiff's arguments as both the United States Supreme Court and the courts of this State have long held that that there is no Federal or State Constitutional requirement that all taxpayers be treated the same. States are granted large leeway in making classifications where taxes are concerned and the courts have found that even dramatic disparities in property taxes shall survive review.

In its Decision, the Appellate Division set forth the well-established standards it invoked in rejecting Plaintiff's claims:

> Neither the Federal nor the State Constitution "prohibit[s] dual tax rates or require[s] that all taxpayers be treated the same" (*Foss v City of Rochester*, 65 NY2d 247, 256 [1985]). All that they require is "that those similarly situated be treated uniformly. Thus, the creation of different classes for purposes of taxation is permissible as long as the classification is reasonable and the taxes imposed are uniform within the class" (*id.*). Put another way, the legislature may treat one class differently from others "unless the difference in treatment is palpably

> arbitrary or amounts to an invidious discrimination" (*Trump v Chu*, 65 NY2d 20, 25 [1985] [internal quotation marks omitted]).
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> "This standard is especially deferential in the context of classifications made by complex tax laws" (*Nordlinger v Hahn*, 505 US 1, 11 [1992]). Even dramatic disparities in property taxes paid by persons who own otherwise similar property are likely to survive review (*id.* at 6-7). "Where taxation is concerned and no specific[] right, apart from equal protection, is imperiled,[] States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation" (*Lehnhausen v Lake Shore Auto Parts Co.*, 410 US 356, 359 [1973]).
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> "The scope of our review is narrow. Taxing statutes, like other social and economic legislation that neither classify on the basis of a suspect class nor impair a fundamental right, must be upheld if the challenged classification is rationally related to achievement of a legitimate State purpose" (*Trump*, 65 NY2d at 25).[3]

Applying these standards and relying on bedrock principles, the Appellate Division concluded that although the application of the challenged statutes results in different ETRs, the taxing system violates neither the Federal nor State Constitutions and unanimously dismissed all the Complaint's claims.

This Case Does Not Raise a Substantial Constitutional Question

CPLR § 5601(b)(1) permits an appellant to take an appeal to the Court of Appeals as of right "from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States." In order to be appealable as of right the constitutional issue raised must be "substantial" (*People ex rel. Uviller v. Luger*, 38 N.Y.2d 854, [1976]). "[T]o qualify as substantial, a constitutional question must

[3] Decision and Order of the Supreme Court, Appellate Division, First Department, dated February 27, 2020 ("Decision") at 8-9.

appear to have colorable merit...." 12 Weinstein, Korn, & Miller, *New York Civil Practice: CPLR* ¶ 5601.09 (2020). Moreover, where a constitutional question "has been clearly adjudicated against appellant's position ... [it] must be held to lack the requisite substantial[ity] to sustain [an] appeal as of right under CPLR 5601 (subd b, par 1)" (*Tabankin v Codd*, 40 NY2d 893, 894 [1976] [internal citations omitted]). For all the reasons set forth in the Appellate Division's unanimous Decision, and for the reasons discussed below, Plaintiff's claims do not meet the standard for an appeal as of right.

The Equal Protection Claims Have No Merit

It is well-established that Equal Protection is violated only where similarly situated persons are treated differently (*Nordlinger v Hahn*, 505 US 1, 10 [1992]). The legislature has broad discretion to make classifications which, in its judgment, produce a reasonable tax system (*id.* at 11-12). So long as the classification rationally furthers a legitimate state interest, Equal Protection is satisfied (*id.* at 11). While noting that application of the statutory caps contained in RPTL § 1805 results in properties paying differing ETRs, the Appellate Division found that the statute had a rational basis, namely, "to protect homeowners from sudden dramatic tax increases which would make continued home ownership more burdensome and unaffordable for many homeowners" (Decision at 10). Supreme Court precedent makes clear that "[t]he fact that the assessment caps may have 'created dramatic disparities in the taxes paid by persons owning similar pieces of property' does not violate the Equal Protection Clause" (Decision at 11 [citing *Nordlinger*, 505 US at 6]). As a result, the Appellate Division found that RPTL § 1805, and its application, do not violate the Equal Protection clause. Significantly, the taxing methods under Article 18 have withstood Constitutional scrutiny from the Appellate Division (*see, e.g., Tilles Inv. Co. v Gulotta*, 288 AD2d 303, 305-306 [2d Dept 2001]; *Supreme Assoc. v Suozzi*, 65 AD3d 1219, 1220-1221 [2d Dept 2009]).

With respect to RPTL § 581, the Appellate Division found that Equal Protection analysis does not apply because the statute "does not create different classes for purposes of taxation, which is a prerequisite for review on equal protection grounds" (Decision at 12-13). Nevertheless, the Appellate Division found that even if Equal Protection analysis were warranted, "RPTL 581 and its application do not violate the Federal or State Equal Protection Clauses as RPTL 581 has a rational basis and is not otherwise palpably arbitrary or a form of invidious discrimination" (Decision at 13). The Court went on to articulate the purpose of

the statute: "RPTL 581 was adopted 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'.... The essential purposes of RPTL 581 are to encourage home ownership and to place homeowners on a level playing field with owners of rental buildings for taxation purposes" (Decision at 13 [internal citations omitted]).[4]

RPTL §§ 1805 and 581 each clearly have a rational basis. The firmly established principles discussed by the Appellate Division foreclose Plaintiff's Equal Protection claims. Because they both lack colorable merit and have been clearly adjudicated against Plaintiff's position, Plaintiff's Equal Protection claims are not substantial and do not support an appeal as of right.

The Due Process Claims Have No Merit

Plaintiff's Due Process claims similarly lack colorable merit. As the Appellate Division stated "[a] taxing statute, or the application thereof, violates the Federal and State Due Process Clauses 'only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power' (*A. Magnano Co. v Hamilton*, 292 US 40, 44 [1934])" (Decision at 22). Applying this standard, the Appellate Division found that "[t]he statutes effectuating the property tax system which are at issue in this matter are not arbitrary but are instead grounded in legislative policy determinations to, for example, protect homeowners from sudden spikes in taxes. Particularly in view of the legislature's broad authority in designing taxing measures, it cannot be said that those statutes or their application are so arbitrary as to be violative of due process" (*Id.* at 22-23). Plaintiff's Due Process claims lack colorable merit and have been clearly resolved against Plaintiff's position and therefore, they do not meet the "substantial" requirement to permit an appeal as of right.

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[4] As the Appellate Division stated "[i]t is worth noting that, outside of the context of equal protection, the Court of Appeals and the Second Department have held that it is permissible for assessing units to interpret RPTL 581 so as to compare condominiums and cooperatives to rent-regulated buildings (*see Matter of Greentree At Lynbrook Condominium No. 1 v Board of Assessors of Vil. of Lynbrook*, 81 NY2d 1036, 1039 [1993]; *Matter of Interlaken Owners v Assessor of Town of Eastchester*, 225 AD2d 696 [2d Dept 1996])" (Decision at 14, fn 3).

Plaintiff's Equalization Provision Claims Have No Merit

Finally, Plaintiff has claimed a violation of article XVI, § 2 of the New York State Constitution, which requires the "legislature [to] provide for the supervision, review and equalization of assessments for purposes of taxation." The Appellate Division found that, as a threshold matter, the Equalization Provision "is clearly directed at the state legislature and does not in any way apply to the City defendants" (Decision at 19). For that reason, alone, the Equalization Provision claims against the City lack merit and are not appealable as of right.

The Appellate Division went on to analyze Plaintiff's claim: "Plaintiff interprets [the Equalization Provision] ... to mandate that all properties within each property class be assessed at the same percentage of their market value. There is no basis for such interpretation" (Decision at 18). Rather, the Appellate Division found that the Equalization Provision only requires "the State to have 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" and that the State has met this requirement "by setting forth procedures for administrative and judicial review of property assessments" (*id.* at 18-19). The Equalization Provision claim does not even apply to the City and lacks colorable merit in any event, and therefore does not support a basis for an appeal as of right.

Conclusion

Plaintiff raises no substantial constitutional question in this matter. The issues presented are in no way novel, but rather, have been already litigated and ruled upon by the United States Supreme Court and the courts of this State. The Appellate Division correctly found that all properties within a tax class are not required, as Plaintiff claims, to pay the same ETR. The Appellate Division further found that there was a rational basis for each of the state laws whose application results in differing ETRs and that the laws are not arbitrary. If Plaintiff's construction of the Federal and New York State Constitutions were credited, there could be no property tax exemptions, including those available to senior citizens and veterans, which impact a property's ETR. Plaintiff's construction is simply incorrect. As discussed above, the standards analyzed by the Appellate Division are not novel, but rather are well-settled. For all of the reasons set forth in the

Decision and herein, Plaintiff has not raised a substantial constitutional question, and therefore no appeal as of right is permitted.

Respectfully submitted,

/s/ Joshua M. Sivin

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