STATE OF NEW YORK
COURT OF APPEALS

TAX EQUITY NOW NY LLC,

Plaintiff-Respondent-Appellant,

v.

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF FINANCE,

Defendants-Appellants,

STATE OF NEW YORK and NEW YORK OFFICE OF REAL PROPERTY TAX SERVICES,

Defendants-Appellants-Respondents.

Mot. No. 2021-994

Appellate Division
First Department
No. 2019-3610

Supreme Court
New York County
Index No. 153759/2017

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

LETITIA JAMES
Attorney General
State of New York
Attorney for State Defendants
28 Liberty Street
New York, NY 10005
(212) 416-6279
(212) 416-8962 (f)

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
ESTER MURDUKHAYEVA
Senior Assistant Solicitor General
of Counsel

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT

In April 2017, Tax Equity Now NY LLC (TENNY) filed this lawsuit against the State of New York and the New York 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 (collectively, the "City Defendants"), to challenge the allegedly inequitable effects of the City's property tax system, which is partially governed by state law.[1] On February 27, 2020, the Appellate Division, First Department issued a unanimous decision and order dismissing TENNY's complaint on multiple grounds. This Court subsequently dismissed TENNY's attempt to appeal as of right on the ground that "no substantial constitutional question is directly involved." *Tax Equity Now NY LLC v. City of New York*, 182 A.D.3d 148 (1st Dep't), *appeal dismissed*, 35 N.Y.3d 1077 (2020). (Slip copies are reproduced at Exhibits A and D to the Affirmation of James E. Brandt in Support of Motion for Permission to Appeal (Brandt

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[1] This opposition is being filed solely on behalf of the State Defendants. The City Defendants are separately represented and are filing their own opposition.

Affirm.).) TENNY then sought leave from the Appellate Division to appeal to this Court. On October 7, 2021, the First Department denied TENNY's motion. *See* Brandt Affirm., Ex. E.

TENNY now seeks leave to appeal to this Court from the February 27, 2020, decision and order. This Court should deny the motion. The dismissal of TENNY's statutory claims raises no issue of statewide importance and implicates no appellate split of authority. And this Court has already concluded that TENNY's constitutional claims do not merit further review. Accordingly, leave is not warranted here.

STATEMENT OF THE CASE

The full background of this case is set forth in the State's opening brief to the Appellate Division, First Department. *See* Br. for State Defs. ("State Br.") at 4-21. The following summary is provided for the Court's convenience.

In April 2017, TENNY filed this lawsuit against the City Defendants and the State Defendants to challenge the City's property tax system. The City's property tax system is governed in part by provisions of the Real Property Tax Law (RPTL) that were

enacted in 1981 in response to this Court's decision in *Matter of Hellerstein v. Assessor of Town of Islip*, 37 N.Y.2d 1 (1975). In *Matter of Hellerstein*, this Court held that state law required tax rates to be applied to the full value of real property, rather than to only a percentage of that value (a practice known as "fractional assessment"). *See* State Br. at 4-5. 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. First, article 18 established 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 condominiums, co-ops, and rental units. *Id.*

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.

To prevent abrupt increases in liability, state law caps the amount by which the class share for each class may increase each year. *See id.* § 1803-a(1)(c), (dd).

Third, also to avoid abrupt increases in tax liability, 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. *Id.* § 1805.

TENNY's complaint alleged that the foregoing provisions of article 18 have in practice resulted in inequitable and unreasonable tax burdens in New York City—both between Class One and Class Two properties, and between different Class Two properties. In September 2018, Supreme Court, New York County (Lebovits, J.) granted the State Defendants' motion to dismiss TENNY's complaint except as to two due process claims, and it denied the City Defendants' motion to dismiss. (Joint Record on Appeal (R.) 18-23.) All parties appealed. (R. 2-11.)

On February 27, 2020, the Appellate Division unanimously held that the complaint should be dismissed in its entirety because TENNY had failed to state any federal or state claims against either

the State Defendants or the City Defendants. *See Tax Equity Now*, 182 A.D.3d at 157-68. As relevant to the State Defendants, the court held that TENNY had failed to state a claim under the federal Fair Housing Act (FHA), 42 U.S.C. § 3601 et seq., 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. *Tax Equity Now*, 182 A.D.3d at 167. The Court also rejected all of TENNY's constitutional claims, including its claims under article XVI, § 2 of the New York State Constitution; the state and federal Equal Protection Clauses; and the state and federal Due Process Clauses. *Id.* at 157-63, 164-65.

TENNY attempted to file an appeal as of right to this Court on the ground that the Appellate Division's decision and order directly involved the construction of the state and federal Constitutions. On September 15, 2020, this Court dismissed the appeal "upon the ground that no substantial constitutional question is directly involved." *Tax Equity Now*, 35 N.Y.3d at 1077.

TENNY then filed a motion for leave to appeal to this Court with the Appellate Division. On October 7, 2021, the Appellate Division denied the motion. *See* Brandt Affirm., Ex. E. TENNY's present motion for permission to appeal is substantially similar to the motion denied by the Appellate Division.

ARGUMENT

This Court should deny TENNY's motion for leave to appeal. This Court's dismissal of TENNY's claims implicates no split in appellate authority and raises no issue of statewide importance that would justify further review. *See* Rules of Ct. of Appeals (22 N.Y.C.R.R.) § 500.22(b)(4). To the contrary, the Appellate Division properly applied well-settled precedents from this Court and the United States Supreme Court to each of TENNY's claims. At most, TENNY's arguments amount to disagreements with taxation policies, arguments that are appropriately raised with legislative and executive bodies. No further review is warranted.

POINT I

THE APPELLATE DIVISION'S DISMISSAL OF TENNY'S CLAIMS UNDER THE FAIR HOUSING ACT DOES NOT WARRANT FURTHER REVIEW

TENNY's leave motion is largely focused on the dismissal of its RPTL § 305(2) claims, which do not apply to the State Defendants and are accordingly not addressed here.[2] *See* Mem. of Law in Supp. of Mot. for Permission to Appeal (TENNY Mem.) at 18-31.

With respect to the Appellate Division's dismissal of TENNY's FHA claims, TENNY asserts that the decision is leave-worthy because it "conflicts with other appellate decisions" of federal courts outside of New York. *Id.* at 32-34. TENNY is mistaken for several reasons. First, the Appellate Division correctly applied controlling

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[2] As relevant here, section 305(2) requires that "[a]ll real property in each assessing unit shall be assessed at a uniform percentage of value (fractional assessment)." RPTL § 305(2). As the State Defendants previously explained (Reply & Response Br. for State Defs. at 33), the portion of section 305(2) challenged by TENNY imposes no obligations on the State Defendants. TENNY does not allege and has never argued that the State Defendants assess properties. Accordingly, the Appellate Division evaluated TENNY's RPTL § 305(2) claim solely with respect to the City Defendants, *see Tax Equity Now,* 182 A.D.3d at 163-64, and TENNY's leave motion likewise limits its RPTL § 305(2) argument to the City Defendants (*see* Mem. of Law in Supp. of Mot. for Permission to Appeal at 18-31).

precedent from the United States Supreme Court to conclude that the allegations in TENNY's complaint failed to meet the FHA's "'robust causality requirement.'" *Tax Equity Now,* 182 A.D.3d at 166 (quoting *Texas Dept. of Hous. & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 542 (2015)). The Appellate Division's determination about the sufficiency of TENNY's pleading is correct and is in any event a case-specific ruling that does not present an issue of statewide importance or merit further review. Second, the Appellate Division's ruling is consistent with the cases cited by TENNY, all of which involved more robust allegations or proof of causation. Moreover, TENNY identifies no basis to conclude that a purported conflict with out-of-state federal case law is sufficient to warrant review by this Court.[3]

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[3] TENNY also asserts that the Appellate Division's holding that "the setting of tax assessments does not constitute a term or condition of the sale or rental of property under the FHA" conflicts with prior litigation positions of the New York Attorney General and the U.S. Department of Justice, citing to complaints filed more than twenty years ago in a lawsuit involving Nassau County's property taxation system. *See* TENNY Mem. at 35-36 (quotation marks omitted); *see also id.* at 1-2, 31-32. TENNY cites no case law with which the First Department's ruling purportedly conflicts, nor

(*continued on the next page*)

A. The Appellate Division Correctly Concluded That TENNY Failed to Plead Causation Sufficient to Sustain Fair Housing Act Claims.

The parties here do not dispute the applicable legal standard governing FHA claims. TENNY concedes, as it must, that the FHA requires proof of a causal connection. *See* TENNY Mem. at 32-33. The United States 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 show 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.

Applying this binding law, the Appellate Division correctly identified several ways in which, on the specific allegations raised in this particular complaint, TENNY failed to plead causation under the FHA. Specifically, the First Department concluded that TENNY had not made sufficiently specific allegations "showing that the

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any basis to conclude that statements made in decades-old complaints are sufficient to create a leave-worthy conflict.

application of the property tax system, as opposed to other factors, causes financial barriers that inhibit the ability of minority residents to own homes." *Tax Equity Now*, 182 A.D.3d at 167. Likewise, TENNY had not sufficiently alleged "how the current property tax system contributes to higher rates of foreclosure or discourages the production of rental units in majority-minority communities." *Id.* And TENNY had improperly assumed that the property tax system caused New York City's patterns of housing segregation by surmising, based on no evidence whatsoever, that "New York City residents would elect to relocate to other neighborhoods if defendants applied the property tax system differently." *Id.*

TENNY's leave motion, like its complaint, continues to emphasize the assertedly disparate effects of the City's property taxes (*e.g.*, TENNY Mem. at 33-34), without identifying any concrete allegations establishing a causal connection between the City's property tax system and the claimed disparities—aside from conclusory assertions that such a "causal chain . . . is clear, direct, and unassailable" (*id.* at 33). Neither TENNY's complaint nor its leave motion points to evidence showing that RPTL article 18 specifically

caused any disparate effects. Nor does TENNY support its speculative assertion that an allegedly favorable tax burden for condominium and co-op owners discourages construction and renovation of new residential rental units in a statistically significant way. And TENNY fails to present any evidence showing that the property tax system has had any causal effect on patterns of housing segregation in New York City or is in any way attributable to conduct by the State Defendants.

The determination that TENNY failed to plead an essential and undisputed component of an FHA claim in this proceeding is a case-specific conclusion and does not raise a legal issue of statewide importance that warrants this Court's further review.

B. The Appellate Division's Decision Does Not Conflict with the Out-of-State Cases Cited by TENNY.

TENNY also erroneously argues that the Appellate Division's decision conflicts with other appellate decisions interpreting the FHA, citing two cases from the United States Court of Appeals for the Fourth Circuit and one case from the United States District Court for the Northern District of Illinois. TENNY Mem. at 32-34

(citing *Reyes v. Waples Mobile Home Park L.P.*, 903 F.3d 415 (4th Cir. 2018); *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982); *County of Cook v. Wells Fargo & Co.*, 314 F. Supp. 3d 975 (N.D. Ill. 2018)). The Appellate Division's ruling on the sufficiency of TENNY's complaint is in fact consistent with the cases cited by TENNY, all of which involved more robust allegations or proof of a causal relationship between a specific challenged practice and purported disparities.

In *Reyes*, for example, the Fourth Circuit found that the causation requirement was satisfied when plaintiffs did more than "merely allege that Latinos would face eviction in higher numbers" but rather presented statistical evidence showing that a "specific policy" requiring proof of legal residency would disproportionately cause evictions of Latino residents in a particular mobile park. 903 F.3d at 428-29. Likewise in *Smith*, the plaintiff established at trial that a specific practice (the termination of a project to construct fifty units of public housing) disparately impacted Black residents who had the highest percentage of presumptively eligible applicants. 682 F.2d at 1064-66. And in *County of Cook*, the trial court found

that plaintiff sufficiently pleaded causation by alleging that specific, "key aspects" of a bank's lending practices "pushed borrowers into foreclosure in a manner resulting in statistical disparities." 314 F. Supp. 3d at 994.

The Appellate Division's ruling on the sufficiency of TENNY's complaint in no way conflicts with these cases, which applied the same undisputed legal standards as the First Department. The fact that other courts found other allegations in other cases sufficient to plead an FHA claim does not create a conflict, much less a conflict warranting further review. Moreover, TENNY fails to explain how a purported conflict with three out-of-state federal cases creates a leave-worthy question for this Court.

POINT II

TENNY'S CONSTITUTIONAL CLAIMS DO NOT PRESENT NOVEL OR SUBSTANTIAL QUESTIONS OF LAW

In dismissing TENNY's attempted appeal as of right, this Court expressly concluded that TENNY's constitutional claims do not present a substantial constitutional question. *See Tax Equity Now*, 35 N.Y.3d at 1077. This Court should deny TENNY's motion

for leave to appeal with respect to the constitutional claims for the same reason. The Appellate Division correctly found TENNY's constitutional claims to be foreclosed by directly applicable precedent.

With respect to TENNY's claims under federal and state due process, 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.'" *Tax Equity Now,* 182 A.D.3d at 165 (quoting *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934)). Here, RPTL article 18 plainly survives under this deferential standard because the aspects of the statute that TENNY challenges—principally, the caps on increases in class shares and individual assessments—have already been held by this Court to serve the rational, tax-related purpose of preventing sudden spikes in tax liability. *See Matter of O'Shea v. Board of Assessors of Nassau County*, 8 N.Y.3d 249, 253-54 (2007). And TENNY's further allegation that article 18 has resulted in uneven taxation across property

classes does not raise any substantial constitutional issue because, as this Court has already squarely recognized, "[e]ven a 'flagrant unevenness' in application of the tax will not prevent the statute from passing constitutional muster" if, as here, the Legislature is pursuing a rational tax-related objective. *See Heimbach v. State*, 59 N.Y.2d 891, 893 (1983).

The Appellate Division also properly applied precedents from this Court and the United States Supreme Court to dismiss TENNY's equal protection claims. It is well established that 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); *see also Shapiro v. City of New York*, 32 N.Y.2d 96, 103 (1973). Here, there was a rational basis for RPTL article 18 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. Similarly, this Court has already recognized that article 18's distinct treatment of condos and co-ops serves the legitimate purpose of ensuring "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." *Matter of D. S. Alamo Assoc. v. Commissioner of Fin. of City of N.Y.*, 71 N.Y.2d 340, 347 (1988).

TENNY likewise failed to raise a substantial question as to whether the State Defendants have violated article XVI, § 2 of the New York Constitution, which requires the Legislature to "provide for the supervision, review and equalization of assessments for purposes of taxation." *See* N.Y. Const. art. XVI, § 2. This 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 v. City of Rochester, 65 N.Y.2d 247, 254-55 (1985). And this Court has already recognized that the State satisfied this requirement by providing 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.

Finally, TENNY's policy disagreement with the City's property tax system and its frustration with the pace of the political response (TENNY Mem. at 18-24; *see also* Amicus Br. for Citizens Budget Commission at 13-14) provide no basis for further review. Courts do not "usurp the function of the Legislature in this area." *Matter of Watson*, 70 A.D.2d 777, 778 (4th Dep't 1979). Rather, it is well established that the "remedy for an oppressive tax is political, not judicial," *Foss*, 65 N.Y.2d at 257, and "[i]nterested parties . . . may press their arguments upon the Legislature," *Matter of Watson*, 70 A.D.2d at 778. *See also Supreme Assoc., LLC v. Suozzi*, 34 Misc. 3d 255, 264-65 (Sup. Ct. Nassau County 2011) (rejecting challenge to RPTL article 18 as raising a "complex policy matter best addressed by the Legislature").

CONCLUSION

The motion for leave to appeal should be denied.

Dated: New York, New York
December 10, 2021

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for State Defendants

By: /s/ Ester Murdukhayeva
ESTER MURDUKHAYEVA
Senior Assistant Solicitor General

28 Liberty Street
New York, NY 10005
(212) 416-6279
Ester.Murdukhayeva@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
ESTER MURDUKHAYEVA
Senior Assistant Solicitor General
of Counsel