New York County Clerk's Index No. 153759/2017
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; and NEW YORK OFFICE OF REAL PROPERTY TAX SERVICES,

Defendants-Respondents.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

STATUTES AND CONSTITUTIONAL PROVISIONS

RULES AND REGULATIONS

OTHER AUTHORITIES

Page(s)

Page(s)

Plaintiff-Appellant Tax Equity Now NY LLC ("TENNY") respectfully submits this memorandum of law in support of its motion for permission to appeal the February 27, 2020 Decision and Order of the Supreme Court, Appellate Division, First Department (the "Decision") to this Court pursuant to CPLR 5602(a)(1)(i).[1]

PRELIMINARY STATEMENT

Two decades ago, confronted with a property-tax system in Nassau County in which "residential properties located in predominantly minority neighborhoods [were] consistently assessed at disproportionately higher values than the properties of homeowners in white neighborhoods," imposing an unequal "burden upon minority homeowners such that their ability to buy, sell, own and rent their property and to enjoy government services are substantially and disproportionally reduced," the Attorney General of the State of New York argued strongly to this State's courts that such a property-tax system "violates Title VIII of the 1968 Civil Rights Law, 42 U.S.C §3601 et seq. (the 'Fair Housing Act')," as well as state law, and "threatens the peace, order, health, safety, and general welfare of the state and its residents." Complaint-in-Intervention ¶¶ 2, 6-7, *Coleman v. County of Nassau*, No. 97-30380 (Sup. Ct., Nassau County filed Feb. 10, 2000) (emphasis omitted)

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[1] The Decision is contained in Exhibit A. Exhibit references are to the exhibits attached to the Affirmation of James E. Brandt in Support of Motion for Permission to Appeal.

(ROA646-48).[2] The U.S. Department of Justice filed a related suit agreeing that Nassau County's property-tax system flagrantly violated the Fair Housing Act. *See* Complaint ¶¶ 1, 30-31, *United States v. County of Nassau*, No. 99-cv-3334 (E.D.N.Y. filed June 14, 1999) (ROA449, 458-59). After failing to dismiss the State's complaint, Nassau County settled the claims against it by overhauling its illegal and discriminatory property-tax system.

In this case, TENNY filed a 330-paragraph complaint, relying heavily on New York City's own data and admissions, establishing that the City's[3] property-tax system imposes precisely the same kind of discrimination on its minority residents—by assessing and taxing residential properties in minority neighborhoods and property types more commonly occupied by minority residents at substantially higher rates than properties in white neighborhoods or property types more commonly occupied by white residents. As TENNY's Complaint demonstrated, the City's non-uniform assessment and taxation of residential property across the City imposes *hundreds of millions of dollars* of additional taxes on the City's minority residents each year; inhibits the ability of minority residents

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[2] "ROA" references are to the record on appeal filed with the First Department, a copy of which will be electronically submitted to this Court.

[3] Unless context requires otherwise, the "City" refers to Defendants City of New York and New York City Department of Finance, and the "State" refers to Defendants State of New York and New York Office of Real Property Tax Services.

to buy, own, maintain, and rent dwellings; and perpetuates segregation in New York City. As the Department of Justice explained two decades ago, such unequal assessment and taxation of property amounts to "discriminat[ion] in the terms, conditions, and privileges of the sale of dwellings," "the provision of services and facilities in connection therewith," the availability of housing, and the terms and conditions of real-estate transactions, all in violation of the Fair Housing Act. *Id.* ¶ 30 (ROA458).

Faced with overwhelming evidence that the City assesses and taxes properties in a non-uniform, arbitrary, and discriminatory manner, Supreme Court denied the City's motion to dismiss TENNY's suit (and denied the State's motion to dismiss in part), finding that TENNY's allegations—if true—state claims under the Fair Housing Act, provisions of state law that compel New York City to assess all real property within each residential property class "at a *uniform* percentage of value," RPTL § 305(2) (emphasis added), and myriad constitutional provisions.

The First Department reversed. In conflict with prior determinations by the State's own Attorney General and the U.S. Department of Justice, as well as the decisions of other courts, the First Department concluded that overwhelming evidence that the City regularly assesses and taxes residential properties in minority neighborhoods at 200-300% the rate of similarly valued properties in white neighborhoods does not amount to discrimination under the Fair Housing

Act. And in direct conflict with this Court's decision in *O'Shea v. Board of Assessors of Nassau County*, 8 N.Y.3d 249, 254 (2007), the First Department concluded that New York City is not required to assess residential properties in the same City, in the same property class, at a uniform percentage of those properties' value.

If the First Department's decision is permitted to stand, this Court will effectively enshrine New York City's right to discriminate against its minority residents—to the tune of hundreds of millions of dollars annually. Moreover, it would effectively nullify the statutory requirement that jurisdictions uniformly assess properties within this State's largest City. This Court should prevent that result for four overarching reasons.

First, the issues at the heart of this case are of monumental importance. The property tax is the City's largest tax, imposing $30 billion in taxes on New York City residents and businesses each year. TENNY has presented overwhelming evidence that the City assesses property taxes in a discriminatory and non-uniform manner, and that residents in predominantly Black and Hispanic neighborhoods are routinely forced to pay significantly higher taxes for similarly valued properties than residents in white neighborhoods. The political branches have known about and acknowledged these issues for decades—and have done nothing to address it. That indefensible state of affairs will persist indefinitely absent intervention by this

Court. For that reason, this lawsuit has drawn support from numerous amici curiae, including members of the City Council, the Citizens Budget Commission, the NAACP New York State Conference, and LatinoJustice. The important questions presented merit review by and resolution from this Court.

Second, the First Department upheld dramatic disuniformity in property assessments, which is conflicts with RPTL § 305(2), this Court's precedent, and Article XVI, § 2 of the State Constitution. The Court has made clear that § 305(2) requires the City to assess all property within the same class at a "uniform percentage of value." *O'Shea*, 8 N.Y.3d at 258-60. As TENNY has shown, however, the City's property-tax system assesses properties at vastly different percentages of value. Article XVI, § 2 similarly requires the "equalization of assessments." Even if that provision requires the Legislature merely to provide a process for equalization, as the First Department held, any process that enables the disparities produced by the City's property-tax system fails that test. Yet the First Department believed that the pervasively non-uniform (and inequitable) assessment of residential property in New York City offended neither provision. This Court's review is warranted to resolve the conflict between the First Department's decision and this Court's precedent—not to mention the plain language of state law.

Third, the First Department imposed a heightened burden to plead a Federal Fair Housing Act ("FHA") claim that conflicts with other appellate decisions. *See, e.g.*, *Reyes v. Waples Mobile Home Park L.P.*, 903 F.3d 415, 425, 428 (4th Cir. 2018) (the FHA requires the plaintiff merely to plead facts that—taken as true—show that the defendants' policies cause racial disparities). Moreover, the First Department's erroneous reading of the FHA's pleading requirements would vitiate the FHA's protections, despite detailed evidence of disparate racial treatment substantiated by the City's own data. If allowed to stand, the First Department's Decision would seriously weaken the FHA's protections in this State, but read the FHA in conflict with the reading previously afforded it by the Department of Justice and this State's own Attorney General. This Court should resolve the conflict between the Decision and the views of other courts and officials regarding the FHA's scope.

Finally, the First Department's dismissal of TENNY's constitutional claims cannot be reconciled with precedent from this Court or the U.S. Supreme Court. Those claims, which are intertwined with TENNY's statutory claims, likewise should be resolved by this Court.

For all of these reasons, TENNY respectfully requests that the Court grant permission to appeal the First Department's Decision.

PROCEDURAL HISTORY/TIMELINESS

The State purported to serve a copy of the Decision with written notice of its entry by mail on March 3, 2020. Exhibit B.[4] Pursuant to Executive Order Nos. 202.8 and 202.14, the time to serve and file a notice of appeal or motion for permission to appeal, *see* CPLR 5513(a)-(b), was tolled from March 20, 2020 to May 7, 2020. TENNY filed a notice of appeal on May 7, 2020.

This Court dismissed TENNY's appeal as of right on the ground that "no substantial constitutional question is directly involved." Exhibit D. On July 8, 2021, the City served a copy of the Court's dismissal order with written notice of its entry. *Id.* TENNY timely moved the First Department for leave to appeal to this Court, and served copies of such motion on all other parties, on August 9, 2021. *See Park East Corp. v. Whalen*, 38 N.Y.2d 559, 560 (1976) (the time to serve and file begins "upon service of a copy of the order terminating the first attempted appeal with written notice of its entry"). The State served a copy of the First Department's order denying leave to appeal with written notice of entry of that order on November 1, 2021. Exhibit E. This motion is being served within 30 days of that date, and is therefore timely. CPLR 5513(b), 5514(a).

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[4] Counsel for TENNY received a copy of the State's notice by electronic mail on March 20, 2020. TENNY separately served a copy of the Decision with written notice of its entry on April 6, 2020 and electronically filed such notice with the Office of the Clerk of New York County on May 7, 2020. Exhibit A.

JURISDICTION

This Court may grant permission to appeal because this case "originat[ed] in the supreme court"; the First Department's Decision disposed of all claims, thus "finally determin[ing] the action"; and this Court previously ruled that no appeal lies as of right. CPLR 5602(a)(1)(i); *see, e.g.*, *Andrews v. N.Y.C. Hous. Auth.*, 19 N.Y.3d 1096, 1096 (2012).

QUESTIONS PRESENTED

Under CPLR 3211(a)(7), TENNY stated claims for relief as long as—accepting its allegations as true and giving it the benefit of every favorable inference—its allegations "fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). TENNY respectfully requests review of the legal question whether the First Department's Decision, which held that TENNY's Complaint did not state claims for relief, was properly made. *See, e.g.*, *Rosner v. Paley*, 65 N.Y.2d 736, 738 (1985) (sufficiency of a pleading is a question of law). That question encompasses several sub-questions, all of which warrant this Court's attention, including:

1. Whether TENNY's Complaint—which included extensive data showing that the City's property-tax system assesses properties in the same class at wildly disparate percentages of their actual market value—adequately pleaded a

violation of RPTL § 305(2)'s requirement that properties in the same class be "assessed at a uniform percentage of value." *See infra* at pp. 24-31.

2. Whether TENNY's Complaint—which alleged, among other things, that the City's property-tax system over-assesses and over-taxes properties in majority-minority neighborhoods—adequately pleaded a violation of the FHA. *See infra* at pp. 31-36.

3. Whether TENNY's Complaint—which provided detailed statistics showing that the City's property-tax system produces extreme disuniformity in assessment and taxation and identified numerous admissions by Defendants' officials acknowledging that that system is arbitrary and assesses and taxes properties in a manner bearing no relationship to fair market value—adequately pleaded violations of Article XVI, § 2 of the State Constitution and the Federal and State Equal Protection and Due Process Clauses. *See infra* at pp. 36-42.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the New York Court of Appeals (22 NYCRR § 500.1(f)), TENNY states that it has no parents, subsidiaries, or affiliates.

BACKGROUND

I. NEW YORK CITY'S PROPERTY-TAX SYSTEM[5]

New York City's property-tax system is, in the words of the City's own officials, "rife with inequalities" and plagued with "unfairness and inequity." ROA95-96, 195-96. The system indisputably assesses and taxes similarly valued properties in the same class at wildly different amounts, and systematically favors majority-white neighborhoods at the expense of majority-minority neighborhoods. The profound and discriminatory disuniformity in assessment and taxation is not the result of mere oversight. It flows directly from Defendants' policy choices, which Defendants have refused to change despite knowing for decades about the indefensible results the City's property-tax system produces.

For purposes of assessment and taxation, real property within the City is divided into two residential and two non-residential classes. RPTL § 1802(1). This action primarily concerns the two residential classes: Class One (one- to three-family homes) and Class Two (other residential property, including condominiums, cooperatives, and apartments). To arrive at a tax bill for each property, the City conducts two processes—a bottom-up valuation process and a

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[5] The City's property-tax system and its fundamental flaws are explained in more detail in TENNY's Complaint. ROA108-23.

top-down tax-allocation process—both of which contribute to massive disparities in how similarly situated properties are assessed and taxed.

Valuation. The City first determines a value for each property. For Class One properties, the City estimates value based on recent sales of properties it deems comparable. For Class Two properties, however, the City disregards actual sales prices and instead assigns a "value" based on an estimate of the income that a property of similar age could generate if it were *rented.* *See* ROA249-50. Since many older rental buildings are subject to rent regulation, the City effectively values multi-million-dollar condos and co-ops at some of the toniest addresses in the City as if they were rent-regulated apartments. *See* ROA109-10, 133-35.[6] According to one study, for example, the City valued an Upper East Side co-op

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[6] The City values Class Two condos and co-ops based on rental value because of RPTL § 581, which requires such properties to be "assessed . . . at a sum not exceeding the assessment which would be placed upon" them were they not condos or co-ops. RPTL § 581; *see Greentree at Lynbrook Condo. No. 1 v. Bd. of Assessors of the Vill. of Lynbrook*, 81 N.Y.2d 1036, 1039 (1993) (RPTL § 581 requires condos and co-ops "to be assessed as if they are rental properties"). In conflict with RPTL § 581, however, the City has chosen not to assess condos and co-ops at the amount *those properties* would be assessed if they were rentals. Instead, the City values condos and co-ops by comparison to rental buildings of a similar age, thereby assessing and taxing condos and co-ops in older buildings as if they were rent-regulated apartments—even if those units would not remotely qualify for rent regulation if they were converted to rental property. ROA133-35. This admittedly "artificial" methodology, ROA230, systematically "result[s] in the severe and persistent undervaluation of some of the most valuable co-op and condo properties in the city," ROA135 (citation omitted).

building at $188 per square foot even though a unit within that building had sold for "approximately *$4500 per square foot*"—over 20 times higher. Furman Ctr. for Real Est. & Urb. Pol'y, *Shifting the Burden: Examining the Undertaxation of Some of the Most Valuable Properties in New York City* 1 (2013) (emphasis added) ("*Shifting the Burden*").[7] The City's own Property Tax Commission recently acknowledged that this practice results in the "non-uniform valuation" of property, in which "higher-valued properties are assessed at a fraction of the true values" and in which valuations "do[] not comport with the principles of fairness." N.Y.C. Advisory Comm'n on Prop. Tax Reform, *Preliminary Report* 46 (Jan. 31, 2020) ("*Advisory Commission Preliminary Report*").[8]

After the City values each property, it takes certain steps to compute "assessed" value—the value on which tax bills are actually based. Although state law requires the City to assess properties uniformly within each residential class, RPTL § 305(2), the City instead has adopted a process that leads to dramatic disparities. The City first purports to set a "target" assessment ratio—a term of its own creation. The City then multiplies a property's City-determined value by the City's "target" assessment ratio (currently 6% in Class One and 45% in Class Two)

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[7] Available at https://furmancenter.org/files/FurmanCenter_ShiftingtheBurden.pdf.

[8] Available at https://www1.nyc.gov/assets/propertytaxreform/downloads/pdf/NYC-AdvCommission-Prelim.pdf.

to produce another number, which it further adjusts to account for caps and certain other adjustments that depend on a property's class, type, and size and are generally created by state law. ROA110-16; *see O'Shea v. Bd. of Assessors of Nassau Cty.*, 8 N.Y.3d 249, 254 (2007) (describing fractional assessments). The City treats the resulting figure as the property's assessed value.

The City could set a "target" assessment ratio that facilitates the equalization of assessments and the uniform assessment of residential properties as a fraction of their value. *See infra* at pp. 27-29 & n.23. As a result of the City's policy choice not to do so, the end result is that properties are assessed at wildly different percentages of their market value, such that similarly valued properties receive vastly different assessments. For example, while the City ostensibly "targets" for Class One properties a 6% assessment ratio, it in fact assesses these properties at rates ranging from 1% to 6%. ROA207, 665-67. This creates vast disparities by borough—with properties in the Bronx being assessed on average at over *double* the rate of Manhattan properties—and within each borough—with, *e.g.*, properties in Flatlands/Canarsie (a less wealthy, 74% minority neighborhood in Brooklyn) assessed at over *three times* the rate of properties in Park Slope/Carroll Gardens (a wealthier, 63% white neighborhood in Brooklyn). ROA125-27, 129. Similar disparities pervade Class Two as well, with condo and co-op owners receiving

hugely preferential treatment at the expense of renters—who are disproportionately lower-income and minority. *See* ROA131-49; *Shifting the Burden*, *supra*, at 7.

Tax Allocation. During its annual budgeting process, the City determines how much revenue it needs to raise from property taxes overall, then allocates it among the property classes using a formula provided by state law. That formula largely locks in each class's share of total property taxes from decades ago—which disproportionately favored Class One. While the class shares were supposed to adjust over time so they would eventually reflect each class's share of total property value, State and City officials have regularly intervened to keep that from happening. *See* ROA117-20; N.Y.C. Indep. Budget Office, *Twenty-Five Years After S7000A: How Property Tax Burdens Have Shifted in New York City* 21 (2006) ("*Twenty-Five Years After S7000A*").[9]

The results are profoundly unsound and inequitable. Class One still retains a huge benefit: It comprises *47%* of total property value in the City but pays only *15%* of total property taxes. This comes at a correspondingly high cost to the other property classes. Class Two, for example, comprises *24%* of property value but pays *37%* of the taxes. ROA120. Furthermore, the tax-allocation process compounds the already deleterious effects of the City's valuation process. Class

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[9] Available at https://ibo.nyc.ny.us/iboreports/propertytax120506.pdf.

Two's disproportionately high share of the overall tax burden is distributed unequally to residents within that class—those who live in vastly undervalued condos and co-ops on Fifth Avenue or Central Park West pay a fraction of their property's value, shifting the burden in practice to renters, who are "already struggling to afford housing" and are "much more likely to be black or Hispanic." *Shifting the Burden*, *supra*, at 7; *see, e.g.*, ROA99 (showing how a co-op had a 0.06% effective tax burden, whereas "[t]he average renter within the same property class bears the expense of an effective tax rate over *66 times* higher").

II. TENNY'S CHALLENGE

In 2017, TENNY filed this lawsuit seeking declaratory and injunctive relief against the City's property-tax system. In disposing of the City's and the State's motions to dismiss, Supreme Court held that TENNY's 94-page Complaint, which relied on the City's own data and admissions from Defendants' officials, had adequately pleaded that the City's property-tax system violates numerous statutory and constitutional provisions.[10]

Supreme Court's decision encompassed three key holdings. *First*, Supreme Court held that TENNY had alleged dramatic disparities in assessment and taxation within Classes One and Two—stemming, at least in part, from the City's

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[10] Supreme Court denied the City's motion to dismiss across the board. The court held that only certain claims sufficiently implicated the State, and thus granted the State's motion to dismiss in part. ROA19-23.

"failure to maintain an assessment ratio that promotes equalization of the tax burden"—and thus had adequately pleaded violations of RPTL §§ 305(2) and 1802(1), Article XVI, § 2 of the State Constitution, and the State and Federal Equal Protection Clauses. ROA18; *see* ROA18-20, 22, 123-43, 160-73, 180. *Second*, Supreme Court likewise held that TENNY had adequately pleaded FHA claims because it had "allege[d] facts that, taken as true, give rise to an inference" that the City's property-tax system disparately impacts racial minorities by assessing and taxing properties in minority neighborhoods at higher rates. ROA23; *see* ROA149-60, 180-84. *Third*, Supreme Court held that TENNY had adequately pleaded violations of the State and Federal Equal Protection and Due Process Clauses based on the "disparity between similarly situated properties" arising from a "complex statutory formula" and the fact that "the tax burdens imposed 'frequently bear no relationship to real market values.'" ROA21-22 (quoting N.Y.C. Dep't of Fin., *Annual Report on the NYC Real Property Tax: Fiscal Year 2003*, at 2 (2003) ("*Property Tax 2003 Annual Report*")[11]); *see* ROA143-49, 173-80.

While the parties' interlocutory appeals were pending, the New York City Advisory Commission on Property Tax Reform issued a report further

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[11] Available at https://www1.nyc.gov/assets/finance/downloads/pdf/02pdf/taxpol_property_03.pdf.

corroborating TENNY's allegations. Among other things, the City's own Commission highlighted "[d]isparities" in the way in which properties are assessed and taxed, "result[ing] in inequities across the five boroughs and across neighborhoods," in which "similarly-valued properties may pay different property taxes," and "a high-value Class 1 property may pay a lower tax . . . than a lower valued property." *Advisory Commission Preliminary Report*, *supra*, at 47, 49. The Commission likewise acknowledged that properties are assessed and taxed according to "non-uniform valuation methods," that "do[] not comport with . . . principles of fairness." *Id.* at 46. The Commission thus confirmed that high-end condos and co-ops "are assessed at a fraction of the[ir] true values," "caus[ing] the system to be regressive because higher value[d] properties are assessed at a *smaller* fraction than lower valued properties." *Id.* (emphasis added).

Despite these core and indisputable infirmities in the City's property-tax system, the First Department modified Supreme Court's order to "grant[] the motions to dismiss in their entirety." Decision 3. TENNY appealed the First Department's Decision as of right, invoking this Court's jurisdiction to review final orders "where there is directly involved the construction of the constitution of the state or of the United States." CPLR 5601(b)(1). The Court dismissed the appeal because, it said, "no substantial constitutional question is directly involved."

Exhibit D. The First Department subsequently denied TENNY's motion for leave to appeal to this Court. *See supra* at p. 7.

APPLICABLE LEGAL STANDARD

Permission to appeal should be granted "when required in the interest of substantial justice," such as when the issues involved are novel or of public importance, when a decision conflicts with prior decisions of this Court or other appellate courts, or when there has been a strong showing of reversible error. N.Y. Const. art. VI, § 3(b)(6); *see, e.g.*, *Seawright v. Bd. of Elec. in the City of N.Y.*, 35 N.Y.3d 227, 234 & n.2 (2020); 22 NYCRR § 500.22(b)(4); Arthur Karger, *The Powers of the New York Court of Appeals* § 10:3 (Westlaw online ed. Sept. 2021 update). For the reasons described below, that standard is met here.

ARGUMENT

I. WHETHER NEW YORK CITY MAY CONTINUE IMPOSING PROPERTY TAXES UNDER AN ADMITTEDLY ARBITRARY AND DISCRIMINATORY SYSTEM IS A QUESTION OF EXTRAORDINARY IMPORTANCE THAT DESERVES THIS COURT'S ATTENTION

Property taxes are the single largest revenue source for the single largest jurisdiction in the State. Each year, the City collects about $30 billion in property taxes from millions of residents and businesses under a scheme that its own leaders have acknowledged is arbitrary, irrational, and unfair. ROA116; *see, e.g.*, Council of the City of New York, *Economic and Revenue Forecast: Tax Revenue*

Collections and Cash Plan 20 (Mar. 2, 2021).[12] Properties are assessed and taxed in an extremely non-uniform manner, imposing an unequal and outsized burden on Black and Hispanic residents—who have been made even more vulnerable by the COVID-19 pandemic. *See, e.g.*, Michael Karpman et al., *Parents Are Struggling to Provide for Their Families During the Pandemic*, Urb. Inst. (May 21, 2020).[13] Although City and State leaders have known about these problems for decades, they have refused to fix them. Whether millions of New Yorkers must continue to pay billions of dollars of taxes indefinitely under a system that tramples over their rights is a question of extraordinary importance that deserves the attention of the State's highest court.

The problems with the City's property-tax system were apparent from the start. When the current property-tax system was proposed, the State Board of Equalization and Assessment—the predecessor entity to Defendant State Office of Real Property Tax Services—denounced it as a "dangerous piece of legislation" and convinced the Governor to veto it. ROA343; *see* ROA427 (Governor's veto message stating, among other things, that the legislation did "not provide for a fair, equitable and reasonable system of real property taxation"). Legislators

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[12] Available at https://council.nyc.gov/budget/wp-content/uploads/sites/54/2021/03/FY22-Economic-and-Tax-Revenue-Forecast.pdf.

[13] Available at https://www.urban.org/research/publication/parents-are-struggling-provide-their-families-during-pandemic.

recognized the "very real problems" with the legislation—including that it imposed a "blatantly racist" system—but voted to override the veto anyway. ROA429; E.J. Dionne Jr., *Legislature Overrides Carey; Property Tax Bill Is Now Law*, N.Y. Times, Dec. 4, 1981, at A1.[14]

The City's property-tax system has faced a barrage of criticism ever since. Over 25 years ago, a property-tax-reform commission declared that "the property tax in New York City not only appears unfair, it is unfair." Reg'l Plan Ass'n, *NYC Residential Property Taxes: Four Reforms* 1 (Feb. 2019) (quoting 1993 report);[15] *see* ROA407-08. More recent commentary *by the City's own officials* has been harsher: The City's property-tax system contains "obvious inequities" that "have grown over decades," ROA201, 404 (Mayor de Blasio and his spokesman); is "crazy" and "really, really unfair," ROA403 (City Council Speaker); is riddled with "unfairness and inequity," ROA196 (Finance Commissioner); and uses "artificial" methods of assessment that "codif[y] historical inequities in assessment practices," ROA250, 253 (First Deputy Finance Commissioner). The New York City Advisory Commission on Property Tax Reform recently added its voice, concluding that the City's property-tax system "is not fair" and produces "vast

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[14] Available at https://nyti.ms/30rrBA7.

[15] Available at https://s3.us-east-1.amazonaws.com/rpa-org/pdfs/RPA-Reforms-to-Residential-Property-Tax-in-NYC-2019_02.pdf.

differences in how properties are classified, valued, and assessed, lending credence to the widely held characterization that the system is overly complex, opaque, and arcane." *Advisory Commission Preliminary Report*, *supra*, at 9, 37. And a very recent analysis by Bloomberg likewise found that the City's property-tax system produces "absurd results." Jason Grotto et al., *How a $2 Million Condo in Brooklyn Ends Up With a $157 Tax Bill*, Bloomberg Businessweek (Oct. 14, 2021).[16]

These criticisms are well founded. As TENNY alleged, the City's property-tax system is non-uniform, arbitrary, and discriminatory. Similarly situated properties—even homes in the *same class* with the *exact same value*—carry widely different assessments and tax bills. *See, e.g.*, ROA126 (187 Class One properties were sold for $750,000 in 2015 but carried tax bills ranging from $1,900 to $8,700). Pricey Manhattan properties are assessed and taxed at rates approaching *half* of those that prevail elsewhere in the City. *See, e.g.*, ROA125-26. Class One pays roughly *one-third* of its fair share in taxes as measured by total market value. *See* ROA120. Further, a huge tax burden is shifted from owners of the City's most valuable properties onto those least able to afford it—resulting in billions of dollars of "over-assessments in majority-minority and super-majority (over 60%) minority

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[16] Available at https://www.bloomberg.com/graphics/2021-new-york-property-tax-benefits-rich/.

districts." ROA149; *see, e.g.*, Rachel Michelle Goor, *"Only the Little People Pay Taxes": Reforming New York City's Property Tax Structure to Mitigate Inequality and Increase Efficiency* 7 (June 2017) ("[R]enters in New York City are taxed at 6.4 times the rate of homeowners (compared to an average of 1.4 times nationwide).");[17] Grotto, *supra* (noting that a recent study "found that flawed valuations for condos shift roughly $292 million in annual property taxes from the top 10% of such residences by value to the remaining 90%"); *see also infra* at pp. 25-26, 33 (discussing disparities in more detail).[18] Notably, nobody defends the City's property-tax system as a fair or rational exercise of the taxing power.

Even though "[w]e all know the property-tax system is unfair" and discriminatory, ROA399 (City Council Speaker), elected officials have done nothing because property-tax reform is "just too political," ROA407 (Manhattan Borough President), and "the most controversial thing you could imagine," ROA199 (Mayor de Blasio). Every New York City mayor since Ed Koch has touted the need for reform, but has done little more than pay lip service to it—instead allowing pervasive disparities in assessment and taxation to fester. *See*

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17 Available at https://dspace.mit.edu/handle/1721.1/111382.

18 The impact of the disuniformity created by the City's property-tax system has only grown since TENNY filed its Complaint. For example, disfavored Class One property owners cumulatively pay almost $1 billion more than they would if the City actually assessed and taxed Class One properties uniformly.

ROA407; Jana Cholakovska, *All the Times Politicians Called for Fixing NYC's Property Tax System*, City & State N.Y. (Feb. 5, 2020).[19] A 1993 property-tax-reform commission "cited many issues that plagued the system"—which persist to this day—but was quickly disbanded. *Advisory Commission Preliminary Report*, *supra*, at 10. In 2014, the City Council proposed and funded another property-tax-reform commission, but by 2016 had lost its "appetite to tackle the issue." ROA400; *see* ROA104-05, 195-96, 218-21, 402-04, 408-09. The most recent reform effort has stalled and is unlikely to result in meaningful change. *See, e.g.*, Donna Borak, *NYC Property Tax Overhaul Fizzles Out Amid Pandemic, Politics*, Bloomberg Tax (Mar. 31, 2021);[20] Ethan Geringer-Sameth, *De Blasio Delay Plus Pandemic Means Property Tax Reform Appears Off the Table This Year*, Gotham Gazette (May 29, 2020).[21]

From the outset of the case, Defendants urged the courts not to act, claiming that property-tax reform was a problem for the political branches to untangle. This case is not about whether the City's property-tax system is good *policy*, however, but about whether it is *unlawful*. That is a question that is clearly for the courts to

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[19] Available at https://www.cityandstateny.com/articles/politics/new-york-city/all-times-politicians-called-fixing-nycs-property-tax-system.html.

[20] Available at https://news.bloombergtax.com/daily-tax-report-state/nyc-property-tax-overhaul-fizzles-out-amid-pandemic-politics.

[21] Available at https://www.gothamgazette.com/city/9444-de-blasio-delay-plus-pandemic-property-tax-reform-off-the-table-2020.

resolve. In any event, the political branches have made clear at every turn that they are unwilling to stop the rampant inequality and discrimination of the current system. Without a "court ruling or some other external prod," the City will continue doing exactly what it is doing. *Twenty-Five Years After S7000A*, *supra*, at 12. Whether the City's non-uniform, discriminatory assessment and taxation of residential property violates the law is an issue that divided the courts below. This Court should have the last word on whether the City can continue assessing and taxing properties non-uniformly, irrationally, and discriminatorily—thereby imposing massive harm on those New Yorkers who can least afford to bear it.

II. THE KEY STATE AND FEDERAL STATUTORY QUESTIONS WARRANT REVIEW BY THIS COURT

The First Department took a different approach from Supreme Court and ultimately dismissed TENNY's challenges to the City's property-tax system. Further review by this Court is warranted because the First Department's resolution of TENNY's statutory claims conflicts with decisions from this Court and other appellate courts.

A. The First Department's Interpretation Of RPTL § 305(2) Conflicts With This Court's Precedent And Will Frustrate The Constitutionally Mandated Equalization Of Assessments

The First Department's interpretation of RPTL § 305(2) represents a clear departure from binding precedent. Section 305(2) requires properties in the same class to be "assessed at a uniform percentage of value." TENNY alleged in

detail—and the City's own Independent Budget Office has confirmed—that properties within the same class are *not* assessed at a uniform percentage of value. ROA123-43, 207. Under existing precedent, Supreme Court held that such an allegation is sufficient to plead a violation of § 305(2). ROA20-21. The First Department nonetheless concluded that even proof of dramatic disuniformity in assessment would not be enough, holding that § 305(2) requires the City merely to apply the same "target" assessment ratio to properties in the same class—even if it, in *actuality*, assesses properties at rates that are far from uniform. *See* Decision 20. That holding conflicts with precedent from this Court interpreting § 305(2) to require uniformity of actual assessments and holding Article XVI, § 2 of the State Constitution to require the "equalization of assessments."

Section § 305(2) generally provides that "[a]ll real property in each assessing unit shall be assessed at a uniform percentage of value." The City, a "special assessing unit"[22] that divides real property into classes, must assess all property within each class uniformly, which is necessary to avoid expanding the number of classes beyond the four defined by RPTL § 1802(1). *See O'Shea v. Bd. of Assessors of Nassau Cty.*, 8 N.Y.3d 249, 254 (2007) ("Article 18 allow[s] special assessing units to apply different fractional assessment percentages to *each*

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[22] A "special assessing unit" is "an assessing unit with a population of one million or more." RPTL § 1801(a).

of four classes of property . . . ." (emphasis added)); *see also* RPTL § 502(3). The City indisputably does not assess all the property within Classes One and Two at a uniform percentage of value, as § 305(2) requires.

The First Department held that the City's property-tax system complies with § 305(2), largely for the reason that the City applies the same "target" assessment ratio to all the property within each class. *See* Decision 20; *supra* at pp. 12-13. That determination ignores that the City's target assessment ratio does not reflect the rate at which the City *actually* assesses real property. Instead, as a result of the City's policy choices, the City today assesses properties within the same property class in a non-uniform manner, as the facts and data in TENNY's Complaint show. *See, e.g.*, ROA125 (median Class One assessment ratio of 2.40% for Manhattan, 3.98% for Brooklyn, 4.65% for Queens, 5.47% for the Bronx, and 5.60% for Staten Island—notwithstanding 6% target ratio); ROA128 (assessment rates for 90 Brooklyn homes that sold for $750,000 in 2015 ranged from 1.3% to 6.0% of their value); *see also, e.g.*, ROA125-31, 672-73.

The City has insisted—and the First Department accepted—that the disuniformity in actual assessments is triggered by assessment caps imposed by state law that limit the amount by which assessments can rise each year. *See* RPTL § 1805. The City likewise claimed—and the First Department also accepted—that its failure to uniformly assess properties within the same property

class does not violate § 305(2) because the caps are also created by state law. In particular, the First Department stated that "the legislature . . . knew that, over time, those assessment caps were going to necessarily create disparities," and, "[t]hus, the legislature could not have intended the disparities created by the RPTL 1805 assessment caps to result in a violation of" § 305(2). Decision 20.

That understanding of §§ 305(2) and 1805—which conflicts with this Court's own past reading of those provisions—would effectively terminate the right of City residents to have their properties assessed at a uniform percentage of market value. The First Department's understanding of § 305(2) merits this Court's attention for three principal reasons.

First, the First Department's Decision is inconsistent with this Court's interpretation of the legislation that enacted §§ 305(2) and 1805. The First Department stated that the Legislature "knew" the caps in § 1805 "were going to create disparities" within a class due to changes in market value. Decision 20. But this Court has said just the opposite. In *O'Shea*, the Court expressly recognized that the legislation creating the City's current property-tax system was "aimed at protecting residential taxpayers from tax increases caused by tax shifts from businesses to homeowners as a result of revaluation, *not tax increases driven by market forces*." 8 N.Y.3d at 259 (emphasis added). Additionally, as to § 1805 specifically, the Court found that "the legislative history does not in any way

suggest that section 1805(1) was expected to limit the distribution of the tax burden *within* the class of residential taxpayers, or to hamstring a special assessment unit from curing inequities within this class"—which is directly contrary to the supposition that the Legislature expected § 1805 to create massive intraclass disparities in assessment that would go unchecked for decades. *Id.*

In response to the Court's landmark decision in *Hellerstein v. Assessor of the Town of Islip*, 37 N.Y.2d 1 (1975), which invalidated the then-prevailing system for assessing real property statewide, the Legislature endorsed a compromise that permitted jurisdictions to assess properties using fractional value so long as properties in the same class were assessed uniformly. The caps do not "necessarily create disparities" or otherwise alter the City's obligation to comply with § 305(2)'s uniformity requirement. The City is perfectly capable of applying the caps and ensuring that actual assessments are at a uniform percentage of value within each class, as § 305(2) requires. All it has to do is lower its target assessment ratio for the class so that properties are assessed at a uniform rate.[23]

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[23] As an example, suppose that in year one, two new Class One properties are valued at $100,000 and the City maintains a target assessment ratio of 6%. In year one, both properties would have an assessed value of $6,000—the market value of each property multiplied by 6%. Now imagine that five years later, in year six, Property A appreciates to $200,000, Property B appreciates to $120,000, and the target assessment ratio remains constant at 6%. Without assessment caps, the assessed value of Property A would rise to $12,000 and the assessed value of Property B would rise to $7,200. In that scenario, each property would continue to

Indeed, as this Court has recognized, the City previously did lower assessment ratios to achieve intraclass uniformity. In *O'Shea*, this Court upheld Nassau County's decision to lower its assessment ratio for Class One to "cur[e] inequities within this class." *Id.* The Court observed that that practice "reflected a settled understanding of section 1805(1)," as evidenced by the City's decision to "lower[] its class one fractional assessment percentage . . . over a period of time in order to bring assessed values for residential taxpayers in line with market values." *Id.* The City's decision to stop lowering the assessment ratio in 2004 is a marked departure from the "settled understanding" of how §§ 305(2) and 1805 are meant to operate. *Id.* And by openly permitting such a departure, the First Department's Decision frustrates, rather than furthers, legislative intent.

Second, the First Department's Decision rests on a definition of "assessment" that is inconsistent with the statutory definition of that term and this Court's use of it. The First Department's reasoning suggests that the Real Property

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be assessed proportionately with the market value of the property. The assessment caps, however, prevent that result. Class One assessments cannot rise more than 20% over a five-year period, so Property A's assessed value would be limited to $7,200—the exact same assessed value as Property B, a property actually worth 40% less. Indeed, Property A's actual assessment ratio (assessed value divided by market value) drops to 3.6%, well below the City's 6% target. But if the City lowers the target assessment ratio in year six to, say, 3%, this problem disappears: Property A's assessed value would be $6,000 in year one ($100,000 multiplied by 6%) and in year six ($200,000 multiplied by 3%), Property B's assessed value would drop from $6,000 to $3,600, and both properties would actually be assessed at the same percentage of value in both years.

Tax Law distinguishes between an assessment before the application of caps and an assessment after the application of caps—and mandates uniformity only of the former. But the law draws no such distinction. Section 305(2) requires property in the same class to be "assessed at a uniform percentage of value," and § 1805 caps increases in "assessment[s]"; presumably the words "assessed" and "assessment" refer to the same thing. *See, e.g.*, *Mental Hygiene Legal Serv. v. Sullivan*, 32 N.Y.3d 652, 659 (2019). Further, as this Court has made clear, there is only a *single* assessment for a property, *i.e.*, the final assessed value assigned to a property (*i.e.*, *after* applying caps to the extent relevant). *See O'Shea*, 8 N.Y.3d at 258-60; *see also* RPTL § 502(3) (the assessment roll must show the "total assessed valuation" of a property next to "the uniform percentage of value applicable to the class"). That is what must be "at a uniform percentage of value" within each class under § 305(2).

Third, if the First Department is correct about the requirements of §§ 305(2) and 1805, then the statutory scheme clearly violates Article XVI, § 2 of the State Constitution, which mandates the "*equalization* of assessments." (Emphasis added.) At minimum—and as the First Department held—Article XVI, § 2 "requires the State to have *a process* in place . . . 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." Decision 18 (emphasis added). *But see*

infra at pp. 37-38. Section 305(2) is a crucial part of the assessment process enacted pursuant to Article XVI, § 2. *See Krugman v. Bd. of Assessors of Atl. Beach*, 141 A.D.2d 175, 183 (2d Dep't 1988). If § 305(2) permits countless properties within a particular class to be routinely assessed at five times the rate of other properties in the same class, then it is doing nothing to ensure the "equalization" of assessments, let alone to ensure that property owners bear their "fair share of the cost of government." Decision 18; *cf. In re Del. Pub. Schs. Litig.*, 239 A.3d 451, 486-90 (Del. Ch. 2020) (finding more modest disparities to represent a "profound lack of uniformity"). In short, the First Department's Decision rendered § 305(2) ineffectual, contrary to the statute's language and purpose, as well as directly relevant precedent from this Court.

B. The First Department's Understanding Of The FHA Conflicts With Other Appellate Decisions

The First Department's treatment of TENNY's FHA claims also merits this Court's review. The New York Attorney General's Office and the U.S. Department of Justice charged Nassau County with FHA violations for maintaining a property-tax system that systematically assessed properties in "predominantly minority neighborhoods . . . at disproportionately *higher* values than the properties of homeowners in white neighborhoods, even though the fair market values of the minority-owned properties [were] significantly *lower* than those of whites," causing "minorities [to] pay *more* in property taxes per dollar of

actual market value in their homes than whites." Complaint-in-Intervention ¶ 2, *Coleman v. County of Nassau*, No. 97-30380 (Sup. Ct., Nassau County filed Feb. 10, 2000) (ROA646); *see* ROA449-61, 645-61. In its Complaint, TENNY alleged that the City's property-tax system does the same thing: It assesses properties in majority-minority neighborhoods at much higher rates than properties in majority-white neighborhoods, causing properties in majority-minority neighborhoods to be over-taxed by hundreds of millions of dollars per year. *See* ROA149-60, 180-84. Indeed, TENNY's Complaint went further and showed how the City's property-tax system also unlawfully perpetuates segregation and discriminates in the terms and conditions of housing for Class Two properties. *See id.* The First Department's holding as to TENNY's FHA claims, Decision 24-28, should be reviewed by this Court for three reasons.

First, the First Department construed the requirements to plead an FHA claim in a manner that conflicts with other appellate decisions. According to the First Department, TENNY did not "allege sufficient concrete facts or produce statistical evidence" showing "a causal connection between the property tax system and any racial disparities in the availability of housing." Decision 26. But the FHA requires a plaintiff merely to show that "a defendant's policy or policies caus[ed] th[e] disparity" complained of; the effect on housing availability can be alleged more generally or inferred, especially if it is "self-evident" or needs merely

"common sense analysis." *Reyes v. Waples Mobile Home Park L.P.*, 903 F.3d 415, 425, 428 (4th Cir. 2018) (citations omitted); *see, e.g.*, *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064-66 (4th Cir. 1982) (under "any common sense analysis," termination of a public-housing project disparately impacted Black citizens when the Black population had the highest percentage of presumptively eligible applicants).

TENNY made sufficient allegations to show that the racial disparity of which it complains is caused by Defendants' policies. TENNY's core complaint—backed up by data, admissions from government officials, and other evidence—is that properties owned and rented by minorities are assessed and taxed at far higher rates than are properties owned and rented by whites. *See, e.g.*, ROA149-50 (Class One properties in majority-minority neighborhoods are assessed at rates *20% higher* than are Class One properties in supermajority-white neighborhoods). If the City actually assessed properties in the same class uniformly, which it could easily do by, for example, lowering its target assessment ratios, that disparity would vanish. *See supra* at pp. 27-29 & n.23. The causal chain between Defendants' policies and the racial disparities of which TENNY complains is clear, direct, and unassailable. *Cf., e.g.*, *Reyes*, 903 F.3d at 428-29 (plaintiffs' general statistics showing that Latinos were far more likely to be adversely affected by the challenged policy adequately pleaded an FHA violation); *County of Cook v. Wells*

Fargo & Co., 314 F. Supp. 3d 975, 992-95 (N.D. Ill. 2018) (plaintiff alleged that defendant "issued a disproportionate number of high-cost . . . loans to minority borrowers" and linked that result to its "equity-stripping practice").

Likewise, the disparate effect of Defendants' policies on the availability of housing was well pleaded and is evident. TENNY alleged, for example, that Class One and Class Two properties in majority-minority neighborhoods are over-taxed compared to properties in the same class in majority-white neighborhoods. *See* ROA150-53. TENNY also alleged that that money comes straight from the pockets of owners and renters in those neighborhoods, contributes to higher rates of foreclosure and eviction, and lowers production of the rental units on which minority residents depend. *See* ROA150-59. Under the decisions of other courts, these allegations made by TENNY would have more than sufficed to plead an FHA violation.

Second, the First Department failed to read TENNY's pleadings in the light most favorable to TENNY with respect to how the City's property-tax system unlawfully perpetuates segregation. The First Department stated that TENNY "concedes that the changes to the property tax system it envisions would dramatically increase property taxes in majority-White neighborhoods," which "would make those neighborhoods less, not more, accessible to minority residents" and would thus do nothing to end segregation in the City. Decision 27. But as

TENNY explained, increasing property taxes in majority-white neighborhoods can help break existing patterns of segregation by, for example, lowering taxes in majority-minority neighborhoods and making them cheaper and more attractive to whites or members of a non-predominant minority group. Regardless of the precise effects of possible reforms, however, what matters here is that TENNY alleged that the current property-tax system perpetuates past segregation and is an obstacle to overcoming the City's segregated present. *See* ROA154-60, 183-84. That should have sufficed to plead an FHA claim.

Finally, the First Department'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," Decision 28, is at odds with the views of the New York Attorney General's Office, the U.S. Department of Justice, and other courts, *see supra* at pp. 1-2, 31-32. With respect to sales, a property's tax assessment—and any cap or similar limitation thereon—transfers with the property on sale,[24] leads directly to the taxes a home-buyer must pay, and undeniably affects the price a home-buyer would pay—a "term" of the sale. With respect to rentals, tax assessments lead to property

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[24] Some state property-tax systems—most notably, California's—restrict increases in assessed value, but allow assessed value to reset to market value when the property is sold. *See, e.g.*, Cal. Const. art. XIII-A, § 2(a). The caps and similar provisions in RPTL § 1805 attach to the property, and are not modified when the property is sold.

taxes, which are passed through to renters as part of their rent, and are thus a "term" of any rental. *See* ROA152-53.

The contrary view expressed by the First Department conflicts with the understanding of the New York Attorney General's Office and the U.S. Department of Justice. *See supra* at pp. 1-2, 31-32. It also conflicts with how the FHA is normally construed. The First Department's interpretation of the "terms and conditions" of housing applies to disparate-impact as well as disparate-treatment claims. On the First Department's theory, a tax assessor could, for example, openly assess minority-owned properties at higher rates for the purpose of driving up minorities' housing costs, and the FHA would have nothing to say about it. But ordinarily courts construe the FHA "expansively" to "end discrimination." *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir.), *aff'd*, 488 U.S. 15 (1988). This Court should address whether the First Department improperly departed from that principle.

III. THIS COURT SHOULD ALSO RESOLVE THE CONSTITUTIONAL QUESTIONS

The First Department's dismissal of TENNY's constitutional claims also merits review by this Court. The First Department erred in several ways, departing from precedent from this Court and the U.S. Supreme Court in the process. Moreover, the constitutional issues are intertwined with the facts and other legal

issues in the case. This Court should undertake a single, comprehensive review of all the issues presented in this case.

Article XVI, § 2. Article XVI, § 2 of the State Constitution requires the Legislature to provide for the "equalization of assessments for purposes of taxation." Thus, this Court has said, "[t]he Constitution mandates that assessments within the various assessing units *must be equalized* for taxation purposes," *Foss v. City of Rochester*, 65 N.Y.2d 247, 259 (1985) (emphasis added), *i.e.*, that "all taxable property is placed on the assessment rolls at a uniform percentage of its actual value." 84 C.J.S. *Taxation* § 701 (Westlaw Nov. 2021 update). As explained above, the City does not even come close to assessing properties at a uniform percentage of value. *See supra* at pp. 11-13, 20-22, 25-26, 33; ROA99; TENNY First Dep't Principal Br. 34-36.

The First Department nonetheless held that Article XVI, § 2 does not require the actual equalization of assessments as long as the State has "a *process* in place for the adjustment and review of assessments of individual taxpayers to ensure that each property owner generally bears a fair share of the cost of government." Decision 18 (emphasis added). That conclusion deserves further scrutiny for two reasons. *First*, the First Department cited no authority to support its procedural-only interpretation of Article XVI, § 2—which is inconsistent with the plain language of that provision and this Court's decision in *Foss*. *See* 65 N.Y.2d at 259.

Second, as explained above, even if Article XVI, § 2 required only such a "process," the State would still fail the test. *See supra* at pp. 30-31. The First Department's Decision robs Article XVI, § 2 of any real force or effect. This Court should address that interpretation.

Equal Protection—Intraclass Claims. Whereas Article XVI, § 2 requires uniformity in *assessment*, the State and Federal Equal Protection Clauses require uniformity in *taxation*. *See Foss*, 65 N.Y.2d at 256 (equal protection requires that "the taxes imposed *are uniform within the class*" (emphasis added)). The City indisputably fails to follow this mandate, *see, e.g.*, ROA672-73 (identifying properties with similar tax bills but radically different market values, and properties with similar market values but radically different tax bills), and the City's officials have admitted as much, *see, e.g.*, ROA136 (Independent Budget Office); ROA207 (Finance Commissioner); *Advisory Commission Preliminary Report*, *supra*, at 37.

The First Department's contrary holding warrants this Court's attention because it creates tension with precedent from this Court and the U.S. Supreme Court precedent in three ways. *First*, the First Department distinguished *Foss* by suggesting that the City "applies one uniform assessment ratio to every property within a class." Decision 11. But, as explained above, that is incorrect; the City actually assesses different properties at fractions of market value that are far from

uniform. *See supra* at pp. 11-13, 20-22, 25-26, 33. Since taxes are imposed based on actual assessments, those assessments must be uniform to achieve the "uniform[ity] within the class" that equal protection demands. *Foss*, 65 N.Y.2d at 256; *see Am. Oil Co. v. Neill*, 380 U.S. 451, 455 (1965) ("When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax . . . .").

Second, the First Department accepted as legally sufficient Defendants' proffered justifications for problematic aspects of the City's property-tax system, Decision 10, despite this Court's contrary precedent. For example, the First Department found that "the legislature has a rational basis for making a distinction between those properties which appreciate rapidly and those which appreciate more gradually." *Id.* As this Court explained in *O'Shea*, however, that is manifestly *not* the purpose of assessment caps. 8 N.Y.3d at 259; *see supra* at pp. 27-29.

Finally, the First Department misapplied *Nordlinger v. Hahn*, 505 U.S. 1 (1992). *See* Decision 8, 11, 17. *Nordlinger* does not control in the context of a state, like New York, that "require[s] equal valuation of equally valuable property." *Armour v. City of Indianapolis*, 566 U.S. 673, 687 (2012). Rather, in this context the U.S. Supreme Court's decision in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster Cty.*, 488 U.S. 336 (1989), is applicable. Pursuant

to *Allegheny*, assessment practices like the City's that result in some property being assessed at much higher rates than comparable property over an extended period of time violate equal protection. *Armour*, 566 U.S. at 686-87 (discussing and quoting *Allegheny*); *see* TENNY First Dep't Principal Br. 33-34.

Equal Protection—Interclass Claims. Equal protection also constrains how taxes may be distributed among different property classes. While a "State may divide different kinds of property into classes and assign to each class a different tax burden," those classifications must be "reasonable," *Allegheny*, 488 U.S. at 344, and not based on "artificial constructs [resulting from] statutory formulae" untethered to actual value, *Foss*, 65 N.Y.2d at 257. The City's property-tax system violates these precepts. It discriminates in favor of certain residential property owners—especially owners of Class One property—over others by apportioning tax burdens according to "a complex statutory formula" that bears no rational relationship "to a 'fair and realistic value of the property involved.'" ROA117 (quoting *Allied Corp. v. Town of Camillus*, 80 N.Y.2d 351, 356 (1992)). Among other things, this results in Class One paying 15% of the total property taxes while accounting for 47% of the total property value—whereas Class Two pays 37% of the taxes while accounting for 24% of the value. ROA120.

The First Department nonetheless found no violation of equal protection because the formula that determines class shares purportedly serves the rational

objective of "maintain[ing] the stability of relative property class tax burdens." Decision 16. But as the State Board of Equalization and Assessment explained, the class-share formula is based on a decades-old distribution designed simply "to institutionalize the status quo" as it existed before this Court struck down the State's prior property-tax system in *Hellerstein*, ROA352—a purpose that is "not a legitimate end of government," *Foss*, 65 N.Y.2d at 260. That status quo has continued and will continue unless the Court steps in. *See* ROA116-20; TENNY First Dep't Principal Br. 41-42; *Twenty-Five Years After S7000A*, *supra*, at 21.

Due Process. Finally, the State and Federal Due Process Clauses limit the taxing power, forbidding "utterly unreasonable or arbitrary" taxes. *Ames Volkswagen, Ltd. v. State Tax Comm'n*, 47 N.Y.2d 345, 349 (1979). Nothing could describe the City's property-tax system better. As the City's own officials have explained, the current system assesses and taxes residential property "by methods that are artificial," ROA230; uses "market values" that "aren't truly reflective of fair market values," ROA334; is "rife with inequalities," ROA195; is designed to "codif[y] historical inequities in assessment practices," ROA101, 232; and imposes tax burdens that "frequently bear *no relationship* to real market values," *Property Tax 2003 Annual Report*, *supra*, at 2 (emphasis added). The City's own data and reports further show that the results are arbitrary, as described extensively above and in TENNY's Complaint.

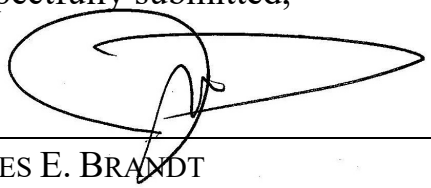
Yet the First Department dismissed TENNY's due-process claims, asserting that "[t]he statutes effectuating the property tax system which are at issue in this matter are . . . grounded in legislative policy determinations." Decision 22. That assertion is problematic for two reasons. *First*, TENNY has pointed to significant disparities in the City's property-tax system that are attributable not to the Legislature's "policy determinations" but to the City's failure to, for example, lower its target assessment ratio—which is not mandated by state law. *See supra* at pp. 26-29; *see also Advisory Commission Preliminary Report*, *supra*, at 10. The City should not be permitted to defend its action or inaction on the basis of legislative policy determinations that were never made. *Second*, the relevant question should not be whether the Legislature could potentially articulate a rationale for having enacted one tax provision or another, but whether the ultimate taxes imposed are arbitrary in relation to the property-tax system's goal. *Cf. Allegheny*, 488 U.S. at 343 ("[I]t is not theory, but the impact . . . that counts." (second alteration in original) (citation omitted)). For all of the reasons discussed, and accepting TENNY's allegations as true, the City's property-tax system fails to carry out the goal of ensuring that "similarly situated taxpayers pay the same share of the tax burden." *Foss*, 65 N.Y.2d at 254. This Court should determine whether taxpayers must nonetheless have to continue paying into such an "utterly unreasonable or arbitrary" system. *Ames Volkswagen*, 47 N.Y.2d at 349.

CONCLUSION

Whether millions of City residents and businesses are subjected to a property-tax system that tramples on their rights is an important question implicating substantial legal issues on which this Court should have the final say. The Court should grant TENNY permission to appeal the First Department's Decision.

Dated: December 1, 2021
New York, New York

Respectfully submitted,



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