APL-2022-00049

To Be Argued By:
Andrea M. Chan
Time Requested: 30 Minutes

Court of Appeals
State of New York

TAX EQUITY NOW NY LLC,

Plaintiff-Appellant,

against

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

Defendants-Respondents.

BRIEF FOR CITY DEFENDANTS-RESPONDENTS

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City Defendants-Respondents ("City") respectfully submit this brief in opposition to the appeal taken by Plaintiff-Appellant, Tax Equity Now NY LLC ("Plaintiff" or "TENNY") from the February 27, 2020 unanimous decision and order (the "Decision") of the Supreme Court, Appellate Division, First Department (the "Appellate Division") dismissing the Complaint in this action.

PRELIMINARY STATEMENT

Reduced to its essence, Plaintiff's Complaint is nothing more than a compilation of sources criticizing New York City's real property tax system and a questioning of the state statutes that govern. Indeed, it is merely a reflection of Plaintiff's disagreement with the New York State Legislature's determinations on tax policy, rather than cognizable claims of discrimination.

The fact that the tax system has been described as imperfect and in need of reform does not establish that it is unlawful. The City is properly implementing the real property tax assessment process adopted by and required by the Legislature. The Appellate Division, First Department agreed with the City's argument in this regard holding that "[i]t is up to the legislature to implement a fair and equitable property tax system. The grievances plaintiff raises are more appropriately addressed by that branch of government" (*Tax Equity Now NY LLC v City of NY*, 182 AD3d 148, 162 [1st Dept 2020]). The Appellate Division's dismissal should be upheld.

With a diverse population of over 8 million residents and a real property tax system comprised of homeowners, renters, retail, offices, factories, utilities, mixed-use developments, community organizations, and various other businesses and commercial space – an overhaul of the workings of the real property tax system would have wide reaching impacts. Moreover, New York City's taxing system is not simply limited to the few provisions that TENNY has sought to challenge. It is a complex statutory scheme implicating difficult and challenging policy choices. Decisions regarding whether, and how, changes to the New York City tax system should be made, should not occur outside of the public process or in a piecemeal fashion. Tax reform requires a delicate balancing of the competing interests and an informed consideration of how each change will affect not just TENNY members, but the countless real property taxpayers in New York City who are not represented by TENNY herein. As such, it is the legislative branch that is the most appropriate body to weigh these competing interests –in a forum where such issues and tax policy can be expressed, debated, thoroughly researched and analyzed, and through the body of government that has been democratically elected by the people.

Even if this were a proper question for the judiciary, TENNY has failed to state any viable or supportable claims against the defendants. As described more fully below, Plaintiff's entire case relies on the misconception that properties are required to be taxed at a uniform effective tax rate ("ETR"), which is the ratio

between bottom-line tax liability (i.e., the amount due) and the estimated market value. Plaintiff complains that the tax system is unlawful because property owners within the same tax class do not pay taxes at the exact same ETR. This metric, ETR, has no legal significance, and has never been the standard by which taxing laws are judged. Plaintiff, however, seeks to transform ETR into the central touchstone of legality.

Indeed, the United States Supreme Court has held that even where similar properties have "dramatic disparities" in ETRs, the Constitution is not violated. Even more astounding, Plaintiff faults the City for disparities that result simply because the City is following State mandates. As Plaintiff concedes, the disparities in ETR of which it complains, are attributable to the application of multiple State statutes which the City merely administers.

Furthermore, Plaintiff fails to state any cognizable theory under the Equal Protection or Due Process Clauses of the federal and state constitutions. Indeed, Plaintiff ignores completely the wide latitude and high degree of deference afforded to the legislative branch of government in crafting taxing schemes. TENNY consistently fails to demonstrate that there is any difference in treatment amongst taxpayers that is palpably arbitrary or amounts to invidious discrimination. In fact, as recognized by the Appellate Division, legislative history demonstrates how each

statutory provision of which Plaintiff complains is rationally related to a legitimate governmental purpose.

Finally, Plaintiff's claims under the Fair Housing Act ("FHA") also fail to state a cause of action because of the federal deference to facially neutral State tax structures and the fact that no showing is made that there exists any robust causality between the alleged disparate impact and the disputed tax policies.

Thus, the Appellate Division correctly concluded that Plaintiff's complaint fails to state a claim against either the City or State defendants, and for all these reasons, and the reasons set forth in the Decision and this Brief, the Appellate Division Decision should be affirmed and the Complaint dismissed.

QUESTIONS PRESENTED

1. Did the Appellate Division properly hold that it is up to the Legislature to determine tax policy and that the grievances Plaintiff raises are more appropriately addressed by that branch of government?
2. Did the Appellate Division correctly find that there was no violation of NY Const. art. XVI, § 2 because "equalization" of assessments only requires a review process structured by the Legislature, which it has already done (RPTL article 2), and not a requirement that all assessments be equal in the literal sense?

3. Did the Appellate Division correctly hold that Plaintiff failed to state any cognizable causes of action against City Defendants with respect to the various statutory provisions under the Real Property Tax Law because any disparities that may exist are merely the result of the City complying with State law?

4. Did the Appellate Division correctly dismiss Plaintiff's equal protection claims as Plaintiff could not demonstrate that either the enactment or the application of any of the applicable statutory provisions were palpably arbitrary nor amounted to invidious discrimination, but rather were rationally related to the achievement of legitimate governmental purposes?

5. Did the Appellate Division correctly dismiss Plaintiff's due process claims because neither New York's property tax statutes nor the City's application of them were unreasonable or arbitrary and because the Legislature has nearly unconstrained authority in the design of taxing measures?

6. Did the Appellate Division properly hold that Plaintiff failed to state a valid claim under the Fair Housing Act where Plaintiff did not adequately (a) allege that any of Plaintiff's members have been deprived of housing, (b) isolate the impact of any of the disputed tax policies to support the robust causality requirement, or (c) demonstrate that New York City is involved with the terms, conditions, or privileges of sale or rental of a dwelling?

7. Are Plaintiff's claims barred by the political question doctrine because it raises solely political questions that are non-justiciable?

BACKGROUND

Plaintiff is an advocacy association alleging to represent owners and renters who claim to be harmed by the New York City tax system (R[1] 106-107). Recognizing that disagreement or dissatisfaction with tax policy alone will not sustain a legal challenge, Plaintiff attempts to posit an assortment of legal theories in support of its cause. The Complaint[2] 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 USC § 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 do not pay the same ETR.[3]

The disparities of which Plaintiff principally complains are attributable to the application of two State statutes which the City administers. The first, RPTL § 1805,

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[1] Citations to "R" refer to the Record on Appeal.

[2] The Complaint in this action is 94 pages. It contains 330 paragraphs, 28 exhibits and makes reference to numerous newspaper articles, several reports concerning issues in real property taxation, and written testimony before the New York State Assembly Committee on Real Property Taxation. However, despite its length and verbosity, what the Complaint fails to address are the legal standards that are invoked when properly reviewing taxing statutes.

[3] Article 18 of the New York State Real Property Tax Law ("RPTL") divides New York City properties into four tax classes. Plaintiff focuses on Class One and Class Two, but taken to its logical endpoint, its demand for uniform ETRs would apply to all four classes.

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 purposes of tax assessments.

Citing claimed inequities and disparities regarding the taxation of real property, many of the sources referenced in the Complaint call for a systemic reform of property tax laws and policy. Interestingly, however, almost all of the sources relied upon by Plaintiff declare that the issues identified are subjects for the Legislature to address.

PROCEDURAL HISTORY

The City moved to dismiss the Complaint (the "Motion to Dismiss") (R 85-567),[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 85-567).

[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.

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 12-24).[5]

The Appellate Division Reversed and Dismissed the Complaint

In a 30-page unanimous Decision, the Appellate Division reversed the Original Decision, as it related to the City, and dismissed all claims against both the City and the State.

In its Decision, the Appellate Division first set forth the 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]).
- 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]).
- The 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

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

> 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]).

(*Tax Equity Now NY LLC v City of NY*, 182 AD3d 148, 157).

Applying these standards, the Appellate Division concluded that, although the application of the challenged statutes results in properties paying different ETRs, the tax system does not violate any laws and unanimously dismissed all of Plaintiff's claims. Moreover, the Appellate Division's Decision determined that Plaintiff's grievances concerning the complex policy choices making up the property tax system were more appropriately addressed to the Legislature.

This Court Dismissed Plaintiff's Attempt to Appeal as of Right and Subsequently Granted Leave to Appeal

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 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. This Court thereafter granted Plaintiff's motion for leave to appeal.

ARGUMENT

THE APPELLATE DIVISION PROPERLY DISMISSED THE COMPLAINT AS PLAINTIFF HAS IGNORED THE WELL-SETTLED BODY OF CASE LAW AND RECOGNIZED LEGAL STANDARDS USED BY THE HIGHEST COURTS IN REVIEWING TAXING STATUTES

Without question, the entirety of TENNY's complaint is nothing more than a reflection of Plaintiff's disagreement with the Legislature's determinations on tax policy, devoid of any cognizable claims of discrimination or recognition of the applicable case law surrounding the review of taxing statutes.

Plaintiff ignores the wide berth and high degree of deference afforded by the judicial branch to the legislative branch of government in determining tax policy. Moreover, Plaintiff studiously avoids the fact that the various RPTL statutes it questions are outwardly neutral.

It is well-established that the Legislature has broad authority to oversee and create a taxing scheme that is in accordance with the laws of this State (*see e.g. Matter of Central Hudson Gas & Elec. Corp v Assessor of Town of Newburgh*, 73 AD3d 1046, 1051 [2d Dept 2010], citing NY Const. art XVI, § 2 [where the Court found that the challenged provision "was properly enacted in satisfaction of the Legislature's responsibility to provide for 'review... of assessments for purposes of taxation'"]). "Clearly, this provision means that the State Legislature controls the

review of real estate tax assessments" (*749 Broadway Realty Corp. v Boyland*, 1 Misc 2d 575, 578 [Sup Ct, NY County 1955], *aff'd* 1 AD2d 819 [1st Dept 1956], *aff'd* 3 NY2d 737 [1957]).

So sweeping is this grant that this Court has long held that "subject to constitutional inhibitions, the Legislature has very nearly unconstrained authority in the design of taxing impositions" (*Long Island Lighting Co. v State Tax Commn.*, 45 NY2d 529, 535 [1978]). This Court recognized that "fairness and equity are not the principal criteria against which the validity of tax statutes is to be determined" (*id.*). Amplifying this standard further, this Court held that "it seldom suffices, and is often immaterial, in the resolution of tax controversies to demonstrate that in application a particular statute or regulation works even a flagrant unevenness" (*id.*). Thus, the contention that "a 'fairer' taxing formula might have been adopted is of no moment" (*id.*). Indeed, "in the application of tax statutes, unlike many other statutes, it cannot be assumed that when the Legislature designed the particular statute it had either a specific or even a general desire to achieve a fair or balanced formula" (*Long Island Lighting* at 535-536).

Further, "[a] challenge to the validity of a tax classification implicates the lowest level of constitutional review—often described as 'a paradigm of judicial restraint'" (*Supreme Assoc., LLC v Suozzi*, 34 Misc 3d 255, 261 [Sup Ct, Nassau County 2011], citing *Port Jefferson Health Care Facility v Wing,* 94 NY2d 284, 290

[1999]). The rational basis standard that has been consistently applied by this Court "is especially deferential in the context of classifications made by complex tax laws" (*Supreme Assoc.* at 261, citing *Port Jefferson Health Care Facility v Wing*, 94 NY2d at 289; *see also Trump*, 65 NY2d 20).

It is quite telling that TENNY fails to address the wide latitude and great deference that this Court has consistently held applicable to the review of taxing measures. Instead of citing to any legal standards, TENNY merely protests that its members should pay less real property taxes while other members of the New York City real property tax base should pay more. Seeking to pay less taxes while shifting the burden of increased taxes to others is hardly a novel concept. Indeed, it is one that elicits debate at every election – whether it be mayoral, gubernatorial, or presidential. And, thus, it is one which the courts of this state have traditionally eschewed entertaining because such an exercise impermissibly replaces the Legislature with the judiciary in considering and determining a quintessential political question. Were the judiciary to readily entertain such matters it is not difficult to imagine the spike in litigation that would result each time a plaintiff believed that they should be paying less in taxes while someone else should be paying more. And the Appellate Division unequivocally agreed:

> 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

(*Tax Equity Now* at 157, citing *Trump* at 25). "This standard is especially deferential in the context of classifications made by complex tax laws" (*id.* citing *Nordlinger* at 11). "Even dramatic disparities in property taxes paid by persons who own otherwise similar property are likely to survive review (*id.* citing *Nordlinger* 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" (*Tax Equity Now* citing *Lehnhausen* at 359).

POINT I

PLAINTIFF'S INTERPRETATION OF ARTICLE XVI, §2 OF THE STATE CONSTITUTION IS FATALLY FLAWED AND HAS NO BASIS IN THE LAW

Article XVI, § 2 of the State Constitution states, in pertinent part, that "[t]he legislature shall provide for the supervision, review and equalization of assessments for purposes of taxation." Plaintiff claims that New York City's real property tax system somehow violates this provision because properties that are of similar market value may end up with differing ETRs. However, as the Appellate Division held, "[t]here is no basis for such interpretation" (*Tax Equity Now* at 162). First and foremost, "Article XVI, §2 of the New York State Constitution

> *does not require that all assessments be equal in the literal sense*, but rather 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

(*Tax Equity Now* at 162 citing *Matter of Fifth Ave. Off. Ctr. Co. v City of Mount Vernon*, 89 NY2d 735, 740 [1997] [emphasis added]; *see Foss* at 254-255).

Thus, nothing in the State or Federal Constitution can be construed to require literal equality of taxing outcomes. Likewise, a coincidence of market value does not give rise to the requirement of equal tax bills. This Court and the United States Supreme Court have repeatedly held that legislatures have wide latitude in creating real property tax systems. Article XVI § 2 of the State Constitution simply requires that the Legislature have a system that includes "supervision, review, and equalization." RPTL § 305 simply requires that assessors utilize a uniform assessment ratio. Plaintiff pulls the words "equalization" and "uniform" out of context, and simply assumes, in a form of semantic sleight-of-hand, that such words require equal and uniform ETRs.

Far from requiring literal equality of outcomes, the drafters of § 2 stated that this provision was intended to create and provide for a real property tax system that would be structured "as the Legislature may see fit," and that it should be left "to the Legislature to determine and work out, from time to time, change the methods of review as the exigencies of the situation may require." Indeed, those were the exact

phrases that the sponsor of § 2 used at the 1938 Constitutional Convention, as quoted in more detail below:

> Mr. Saxe: Section 2 provides that: 'The Legislature shall provide for the supervision, review and equalization of assessments for purposes of taxation." ... the idea of this provision is to make it mandatory upon the Legislature to provide for the supervision, review and equalization of assessments *in such way that real estate can really have a proper supervision of assessments in the first instance and proper review as the Legislature may see fit.*

(3 Rev Rec, 1938 NY Constitutional Convention at p.1111 [emphasis added]).[6]

The sponsor then went further to explain:

> For instance, we have had proposals before us for a State Board of Review, another proposal for judicial district boards of review, *but we leave it to the Legislature to determine and work out and, from time to time, change the methods of review as the exigencies of the situation may require,* but we do make it mandatory for the Legislature to provide for supervision, review and equalization of assessment.'"

(*id.* [emphasis added]). In a transcript that exceeded one thousand pages, the discussion of § 2 consumed a total of only three pages, and demonstrated no real controversy over its purpose or meaning.

Notably, the theme throughout the brief discussion was deference to the Legislature. For instance, the question of the meaning of "supervision" was ultimately answered by again deferring to the Legislature:

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[6] An excerpt of the transcript for the discussion of § 2 is annexed to this brief in the Addendum.

> Mr. Schackno: On a point of inquiry of the chairman of the committee, what is meant by supervision?
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> ***
>
> Mr. Saxe: ..."The State Tax Commission shall, first, investigate and examine, from time to time, as to the methods of assessment within the State, and confer with, advise, assist and direct assessors and other officials charged by the statutes of this State with duties relating to the assessment of property for taxation."
>
> Now, that really means that they shall investigate and examine from time to time as to the method. *The term "supervision" here imports the idea that they shall or the Legislature shall provide how they shall supervise those assessments in the first instance*

(*id.* at 1112 [emphasis added]).

As opposed to analyzing Article XVI, § 2 within the backdrop of the legislative discussion iterated above, Plaintiff instead pulls the term "equalization" out of context and assumes, without basis, that this single word imposes a substantive requirement for literal equality of tax outcomes – that properties within the same tax class, having the same market value, must pay exactly the same taxes. Not only has Plaintiff failed to cite to any authority that would support such a construction, but the First Department found such claims to be meritless. Moreover, the Appellate Division held that "this section of the New York State Constitution is clearly directed at the state legislature and does not in any way apply to the City defendants" (*Tax Equity Now* at 162-163).

It is also significant to note that Plaintiff's demand for uniform ETRs would, taken to its logical end, require the elimination of all exemptions and abatements. After all, how else could all properties within the same class pay the exact same ETRs? However, Plaintiff does concede that "[t]he City may also reduce assessed value for exemptions created by state law. . ." (brief for plaintiff-appellant at 14 n 4). Indeed, Plaintiff must concede that certain exemptions are protected by Article XVI § 1 of the Constitution. Yet, other exemptions and abatements are purely statutory – the Legislature has created hundreds of exemptions and abatements (e.g., RPTL article 4) to alleviate tax burdens for individuals, organizations, and businesses.

Thus, if Plaintiff's interpretation of "equalization" is accepted and assessments were required to be equal in the literal sense, as Plaintiff implies, then all such exemptions and abatements – for veterans, senior citizens, disabled homeowners, and so many others – would be deemed unconstitutional. Plaintiff's interpretation of Article XVI, §2 would not only lead to absurd results, but ones that would prove detrimental to some of New York City's most vulnerable citizens.

POINT II

THE APPELLATE DIVISION PROPERLY DISMISSED PLAINTIFF'S RPTL § 305 CLAIM

Plaintiff maintains on appeal that it has plead viable claims under RPTL §

305[2] and that despite the City applying a consistent assessment ratio within each tax class – 6% for Class One properties and 45% for Class Two – the defendants somehow fail to assess properties at a uniform fraction of market value. Plaintiff's claim has no merit.

Throughout this litigation, Plaintiff has rested on the fallacy that "uniformity" means that properties are required to be taxed at a uniform ETR. Plaintiff argues that two or more properties within the same tax class, which coincidentally share the same estimated market value constitute "similarly-situated" properties that should pay the same ETR. However, this contention fails for several reasons. The mere fact that two or more properties share the same market value is virtually meaningless in terms of what their bottom-line tax bill should be. The bottom-line tax bill can vary for innumerable reasons – e.g., assessment limitations (RPTL § 1805) and transitional assessments that prevent tax bills from spiking and crashing during periods of rapid appreciation or depreciation. Some properties receive exemptions, which reduce the taxable value, and/or abatements, which reduce the ultimate bills. Furthermore, properties do not appreciate or depreciate in lock-step. Properties that share the same market value in one year likely had different market values in the preceding and subsequent years. The fact that two properties temporarily share the same market value is neither surprising nor significant, and certainly does not give rise to any requirement that such properties pay exactly the same ETR.

As the Appellate Division confirmed, RPTL § 305[2] requires that properties be *assessed* uniformly, not that they must have a uniform ETR (*see Tax Equity Now* at 163). Yet, Plaintiff often conflates the two terms, "assessment ratio" and "effective tax rate," in an attempt to show disparity within the tax classes.

However, even Plaintiff, itself, has acknowledged that these are two separate and distinct concepts. As Plaintiff's Complaint states:

> After a property's market value is calculated, *the assessment ratio determined*, the assessment caps and other rules applied, the exemptions accounted for, the class share constraints employed, the levy calculated, and the tax rate determined, the abatements applicable to that property must be identified. Only then can the tax bill *and resultant effective tax rate* attributable to any one property be determined.

(R 120 at ¶ 87 [emphasis added]). Thus, it is evident from Plaintiff's own description, that the assessment ratio is applied much before the "resultant effective tax rate" is even identified. It is also clear that, in between these two steps, there are various other factors accounted for that will affect the ultimate tax bill a property owner pays, and why it is inevitable that disparities will arise.

One of the factors that significantly affects the ETR is the application of RPTL § 1805, the statutory limitation on increases to assessed values, also known as "assessment caps." For example, all property owners in Class One currently benefit from a 6% cap of their assessment from year to year and a 20% cap over a 5-year basis. As the Appellate Division points out, the Legislature enacted this statute in

order to "protect homeowners from sudden spikes in taxes" (*Tax Equity Now* at 165). In fact, should market values suddenly rise, all Class One properties will enjoy this protection, regardless of who owns the property or where the property is located. This is applied uniformly.

However, it is the amount of protection a property receives from the assessment caps that can vary, and this is where TENNY takes issue. The amount of protection that caps afford depend on how much market values have increased. Properties that have appreciated rapidly will receive more protection than properties that have not. TENNY fails to acknowledge precisely this crucial point: that external factors – most predominantly, the rise and fall of the real estate market – have a significant effect on the ETR and market forces are completely outside of the City's control. This is why TENNY's use of the ETR as the metric for measuring uniformity is misleading. So long as market values continue to rise, assessment caps will always have an impact. As the Appellate Division confirmed, it is the application of assessment caps which cause the disparities in effective tax rates in different neighborhoods, and Plaintiff does not dispute this.

> It is undisputed 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. When the legislature adopted RPTL 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.

(*Tax Equity Now* at 163-164).

The legislative history supports the Appellate Division's decision. In 1981, after extensive deliberation in the aftermath of *Matter of Hellerstein* (37 NY2d 1 [1975]), the Legislature overhauled the real property tax system throughout the State (L. 1981, ch. 1057). RPTL Article 18 established New York City as a "special assessing unit" with a "classified assessment standard" that permitted fractional assessment percentages so long as within each class, property was assessed at a uniform percentage of value (*see Colt Indus., Inc. v Fin. Adm'r of NY*, 54 NY2d 533, 544-545 [1982]; *see also Tilles Inv. Co. v Gulotta*, 288 AD2d 303 [2d Dept 2001]). This legislative overhaul of the real property tax system included various interlocking provisions – e.g., uniform fractional assessment ratios (RPTL § 305); co-operative/condominium valuation (RPTL § 581); assessment caps (RPTL § 1805); class definitions and ratios (RPTL §§ 1802, 1803, 1803-a, 1803-b).

RPTL § 305 and RPTL § 1805 were enacted in the same bill, and, as the Appellate Division correctly held, it is therefore inconceivable that the Legislature would not intend for the two provisions to be harmonized:

> RPTL 305 and 1805 were enacted during the same legislative session as part of a complex statutory scheme to reform the property tax system. Accordingly, those statutes must be read together and applied harmoniously

(*Tax Equity Now* citing *Alweis v Evans*, 69 NY2d 199 [1987]; *see also Tilles Inv. Co.*, 288 AD2d at 306).

Nonetheless, Plaintiff argues that the City is somehow *required* to lower the assessment ratio to counteract the impact of the assessment caps, and cites to *Matter of O'Shea v Board of Assessors of Nassau County* (8 NY3d 249, 258 [2007]), insisting that the City's assessor has an affirmative obligation to do so (R 114-115 at ¶¶ 62-68; *see also* R 161 at ¶ 209 [where Plaintiff alleges such action "could avoid or minimize disparities ...."]). However, the Appellate Division properly rejected this argument, holding that "Plaintiff's argument that *Matter of O'Shea v Board*... obligates the City defendants to reduce their assessment ratio in order for its assessments of Class One properties to comply with RPTL 305(2) is without basis" (*Tax Equity Now* at 163-64 [citation omitted]). Why? Because *O'Shea* involved a drastically different set of facts, and Plaintiff's assertion that *O'Shea* stood for the proposition that lowering the assessment ratio is "the only option" for a special assessing unit to comply with both RPTL § 305(2) and RPTL § 1805 is disingenuous (brief for plaintiff-appellant at 35-36).

In *O'Shea*, Nassau County entered into a stipulation where it agreed that no more than one-half of one percent of residential property would be subject to assessment caps. Thus, the Court found that the county's only option for complying with the stipulation was to reduce its assessment ratio so that the assessment caps would not apply to more than one-half of one percent of residential property (*Tax*

Equity Now at 163-64). Accordingly, the Appellate Division clarified TENNY's misinterpretation of *O'Shea*:

> The Court did not hold that the county was required to reduce its assessment ratio to comply with RPTL 305(2). Here, the City defendants have not entered into any stipulation or otherwise agreed to limit the number of properties that are subject to assessment caps. Thus, plaintiff's reliance on *O'Shea* is misplaced

(*id.* at 164).

While there is no support for Plaintiff's contention that the City is affirmatively required to lower its assessment ratio, there is no evidence that such policy would have the effects that Plaintiff imagines. In fact, the Independent Budget Office researched this exact question, responding directly to Plaintiff's claims that the ratio for Class One should be reduced (*see* George Sweeting, *Considering Property Tax Reform: Will a Lower Target Assessment Ratio Ease Disparate Tax Burdens Among Owners of One- to Three-Family Homes?*, Independent Budget Office [December 2018], available at https://ibo.nyc.ny.us/iboreports/considering-property-tax-reform-will-a-lower-target-assessment-ratio-ease-disparate-tax-burdens-among-owners-of-one-%20to-three-family-homes-december-2018.html).

In this report, Sweeting concluded that lowering the assessment ratio would do nothing to reduce intra-class disparities in ETR because such disparities are

almost entirely due to market forces and assessment caps:

> Much of the difference in tax burdens within Tax Class 1 is caused by a portion of state property tax law that limits the class's assessment increases to 6 percent a year and 20 percent over five years, which prevents assessed values from keeping pace with market values in fast-appreciating neighborhoods. Lowering the target assessment ratio does little to compensate for this.
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> ****
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> Lowering the target assessment ratio limits the range over which tax burdens can vary. But it does not result in a greater concentration towards the midpoint of the allowable range between just above zero and whatever the new target ratio is set at. Thus, intra-class variation in assessment ratios and eventually tax burdens would remain a problem, with differences still determined by variation in appreciation among neighborhoods. The city last changed the Tax Class 1 target assessment ratio for the 2006 assessment roll when the ratio was lowered from 8 percent to 6 percent. There is little evidence that this 25 percent reduction in the target had more than a brief effect on tax burden disparities within Tax Class 1, at least as measured by three statistics commonly used to evaluate the uniformity of property assessments.

(*id.*) Based on the foregoing, it is clear that the Appellate Division correctly rejected Plaintiff's attempt to construe RPTL § 305 as requiring uniform ETRs within the same tax class and Plaintiff has failed to cite to any legal authority that would support its contrary argument. Furthermore, the Appellate Division correctly found no merit to Plaintiff's claim that the City is somehow required to lower its assessment ratio in a futile attempt to make ETRs uniform.

POINT III

THE APPELLATE DIVISION PROPERLY DISMISSED PLAINTIFF'S CONSTITUTIONAL CLAIMS

TENNY argues before this Court that it has adequately plead violations of the equal protection and due process clauses of both the State and Federal Constitutions (brief for plaintiff-appellant at 54). Tellingly, however, TENNY studiously avoids setting forth the long-standing and well-established standards by which such constitutional claims are reviewed.

A. The Complaint Fails to Allege Cognizable Equal Protection Claims

In positing its argument that it has stated a valid equal protection claim under the State and Federal Constitutions, TENNY fails to cite the applicable standards that have been consistently cited by the Federal and State courts when analyzing taxing statutes. TENNY instead cites to a 1918 United States Supreme Court decision, *Sunday Lake Iron Co. v Wakefield Twp.* (247 US 350 [1918]) (brief for plaintiff-appellant at 54).

In this case the Supreme Court rejected an equal protection challenge by a plaintiff claiming that its property was assessed at full value while other properties in the county were assessed at a value not exceeding one-third of a property's actual worth. The Supreme Court noted that the following year a diligent effort was made to rectify any error. In light of this the Supreme Court held that no equal protection

violation had occurred as "mere errors of judgment by officials will not support a claim of discrimination. There must be something more – something which in effect amounts to an intentional violation of the essential principal of practical uniformity" (*Sunday Lake Iron Co.* at 353). This case stands in stark contrast to the gravamen of TENNY's complaint: rather than attacking errors of judgment, TENNY takes issue with the effects of duly enacted state statutes, as applied to real property in New York City.

It is not surprising that Plaintiff relies on *Sunday Lake* and avoids the well-established standards used by the courts, because the applicable standards dictate that in the context of classifications made by taxing statues a reviewing court is obligated to apply an especially deferential and narrow standard of review as states have considerable leeway in enacting tax measures.

B. The Equal Protection Standard and the High Deference Accorded to Tax Laws

In *Nordlinger*, the United States Supreme Court summarized the applicable standard of judicial review of a tax statute challenged on equal protection grounds. "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* at 10, quoting *McGowan v Maryland*, 366 US 420, 425-426 [1961]).

> "[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. " Id. at 11 (internal citations omitted). "This standard is especially deferential in the context of classifications made by complex tax laws. In structuring internal taxation schemes the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation."

(*Nordlinger* at 11 [internal citations omitted]).

As noted by this Court in *Trump*:

> The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it. Indeed, "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.

(*Trump* at 25 [internal citations omitted]).

As correctly noted by the Appellate Division First Department decision, the "State Equal Protection Clause is no broader in coverage than its federal counterpart" (*Tax Equity Now* at 157, citing *Matter of Walsh v Katz*, 17 NY3d 336, 343 [2011]). It is not at all clear however that a state court can appropriately consider federal claims in a challenge to a New York State taxation scheme that is administered by New York City. In this case, the operative principle would preclude an exercise of

jurisdiction over Plaintiff's Federal Constitutional claims and its FHA claims because state courts are prohibited from issuing declaratory or injunctive relief under federal law in cases challenging state taxes. (*see Natl. Private Truck Council v Okla. Tax Commn.*, 515 US 582 [1995]). This principle has been partially codified in the federal Tax Injunction Act (TIA) (28 USC § 1341), which prohibits federal district courts from issuing declaratory or injunctive relief in state tax cases where there is an adequate remedy under the law, and extended by the Supreme Court to state courts as well. The reason behind the rule restricting federal interference with local taxation is that:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that modes adopted to enforce the taxes levied should be interfered with as little as possible

(*Natl. Private Truck Council* at 586 [citation omitted]; *see Berry v NY State Dept. of Taxation & Fin.*, 162 AD3d 606, 607 [1st Dept 2018]; *see also Tri -State Christian T.V., Inc. v Dillenberg*, 275 AD2d 993 [4th Dept 2000]). Moreover, district courts have held that adequate state remedies are available to challenge a tax assessment. (*See, e.g., Terminello v Vil. Of Piermont,* 2009 US Dist LEXIS 100953, at *6-7 [SDNY Oct. 28, 2009, No. 08 CV 01056 (WCC/DCP)]; *Xuong Trieu v Urbach*, 1999 US Dist. LEXIS 10172, at *13-14 [SDNY July 6, 1999, 98 Civ. 8278 (JGK)]; *see*

also United States v County of Nassau, 79 F Supp 2d 190, 192 [EDNY 2000][an adequate remedy under state law exists or FHA claims]).

1. The Assessment Caps Contained in RPTL § 1805 (1) Are Supported By a Rational Basis And Therefore Do Not Violate Equal Protection Principles

The primary tax policy TENNY complains of with respect to Class One properties is the assessment caps contained in RPTL § 1805(1). The history of those caps, however, indicates that they are the result of lengthy consideration by the Legislature. "For over 200 years New York municipalities assessed real property at a fraction of full value notwithstanding the requirement of former section 306 of the Real Property Tax Law and its predecessors that it be assessed at full value" (*Foss* at 251). In 1975, the Court of Appeals in *Hellerstein*, held that RPTL § 306 required properties to be assessed at full value and that fractional assessments were in violation of that law. Following the *Hellerstein* decision,[7] "there was widespread fear that, without ameliorative legislative action, *Hellerstein* would force an unwelcome shift of a significant portion of the property tax burden from businesses

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[7] TENNY seeks to characterizes its overture for judicial intervention in the setting of tax policy as a modest request claiming that "...[it] is not asking the Court to do anything radical or new" (brief for plaintiff-appellant at 5). This statement turns a blind eye to the facts of the two Court of Appeals cases cited by TENNY to support this proposition.

In *Hellerstein*, this Court acted precisely because RPTL § 306 was *not* being followed. It is the height of irony that Plaintiff invokes *Hellerstein* to attack the City's compliance with real property tax laws Further, TENNY's citation to *Foss*, 65 NY2d 247 is similarly inapposite as that case concerned the anomalous setting of one county being answerable to two different taxing authorities driven solely by the happenstance of one's location within the county.

to homeowners" (*O'Shea* at 253). Ultimately, the State Legislature repealed RPTL § 306 and "added a new section 305(2) to specify generally that '[a]ll real property in each assessing unit shall be assessed at a uniform percentage of value (fractional assessment); and, as relevant here, added a new article 18 to apply to special assessing units, by definition limited to New York City and Nassau County" (*id.*). "Article 18 allowed special assessing units to apply different fractional assessment percentages to each of four classes of property .... [and was] 'designed to maintain the stability of relative property class tax burdens'" (*O'Shea* at 259).

RPTL § 1805 was also enacted to limit increases on assessed values and protect homeowners from sudden spikes in assessments. These are often referred to as "assessment caps" and work in practice as follows: the starting point is to determine the full market value of each property (R 109-110 at ¶¶ 46-50). Next, the market value of all Class One properties is uniformly reduced to six percent of that value (R 110-111 at ¶¶ 51-52). Then RPTL § 1805(1) is applied to limit any increase in assessed value to six percent a year, and no more than twenty percent over a five-year period.

As noted above, this is not where the final tax bill is calculated. After the uniform assessment ratio is applied, there are other variables that are subsequently accounted for which impact the ultimate tax bill on a property. In addition to the aforementioned assessment caps, there are various exemption and abatement

programs, including those, for example, available to senior citizens and military veterans. The net result when taking into account statutory limitations on assessments *and* applicable exemption and abatement programs is what then results in an "effective tax rate" ("ETR").

Of note, on this round of briefing, TENNY downplays these factors impacting an ETR precisely because depending on the statutory limitations on assessed value, the applicability of various exemption and abatement programs, and market forces affecting particular areas, differences will always be found when comparing properties. In fact, in purporting to describe the assessment process, TENNY relegates these very significant considerations to a mere footnote stating that "[t]he City may also reduce assessed value for exemptions created by state law. . ." (brief for plaintiff-appellant at 14 n 4).

Every Class One property is treated in this same manner and Plaintiff does not dispute it. The crux of Plaintiff's equal protection claim is the rather unremarkable assertion that the assessment caps result in properties with the same market value receiving different tax bills or having different ETRs. No one can reasonably dispute that two homes with the same market value, one that has appreciated rapidly in value and the other with flat growth, will have different tax bills as a result of the caps (R 111-113 at ¶¶ 52-68). The Appellate Division acknowledged this consideration when it stated "[a]s a result of the caps, properties that have appreciated rapidly are

arguably underassessed relative to other Class One properties that have appreciated more gradually" (*Tax Equity Now* at 158).

As the Appellate Division correctly concluded regarding the application of RPTL § 1805(1):

> Even though plaintiff is correct that the statutorily imposed assessment caps provided for in RPTL 1805 (1) have a different effect on otherwise similarly situated Class One properties based on how much these properties have appreciated, such different effect is not actionable here because the legislature has a rational basis for making a distinction between those properties which appreciate rapidly and those which appreciate more gradually. The 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. This distinction is not palpably arbitrary, does not amount to invidious discrimination and is rationally related to the achievement of a legitimate governmental purpose ...

(*Tax Equity Now* at 158, *see also Colt Indus., Inc.* at 544; *Suozzi* at 263).

TENNY claims on this appeal that the First Department erred on this point. First, TENNY takes issue with the notion that assessment caps were enacted to protect homeowners from tax increases, stating that the assessment cap provision was limited by the *O'Shea* decision (brief for plaintiff-appellant at 55). This contention fails for two reasons. First, *O'Shea* merely noted that the caps were "principally 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...." (*O'Shea* at 259). It cannot be seriously disputed that the general intention of the caps was to protect homeowners from dramatic increases in property taxes from year to year, regardless of the reason for the increase (R 207).[8] Second, there is no language in section 1805 limiting its application to the nature of the increase.

Next, TENNY disagrees with the First Department's conclusion that although the application of assessment caps can lead to "...dramatic disparities by persons owning similar properties..." such an outcome is not violative of equal protection principles. TENNY terms the resulting disparities "disuniformity" (brief for plaintiff-appellant at 55). TENNY again cites to the *O'Shea* decision of this Court for the proposition that the City can eliminate "disuniformity" by an adjustment to the assessment ratio[9] as was done by Nassau County. However, as already noted above, TENNY has wrongly interpreted the *O'Shea* decision in that the City has not

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[8] Notably, the Sweeting Testimony at Exhibit "E" to the Complaint acknowledges that the state law assessment caps mandated by RPTL § 1805(1) on Class One Properties "were introduced to protect property owners whose ability to pay may not keep up with tax increases driven by rapid appreciation."

[9] Plaintiff alleges in its Complaint that "t[]he City could avoid or minimize these dipartites" in Class One by "still applying assessment caps required by state law, by lowering Class One's assessment ratio" (R 161 at ¶ 209). Yet at Exhibit "E" to the Complaint is the testimony of George Sweeting, Deputy Director of the New York City Independent Budget Office of New York City's property tax system, to the New York State Assembly Committee on Real Property Taxation (2016)(hereinafter "Sweeting Testimony")(R 206-212). The Sweeting Testimony actually mentioned such an option but notes that "such a change would narrow the disparities between neighborhoods, although it would do little to address the inefficiencies due to the caps. And it would lock in the erosion to the tax base that has already occurred" (R 208).

agreed, as the county did in *O'Shea*, to limit the number of properties that are subject to the assessment caps and, therefore, it is not required to lower the assessment ratio to avoid the caps.[10]

[10] RPTL § 1805[5] further supports the City in that it requires that capped properties must be excluded from any analysis done to determine uniformity. While Plaintiff argues that capped properties should not be excluded from calculations of state or class equalization rates, Plaintiff is not challenging equalization rates, it is challenging its members' assessments.

2. RPTL § 581 Requiring Cooperative and Condominium Units to be Treated as Rental Properties for Assessment Purposes Does Not Violate Equal Protection Principles.

TENNY takes issue with the Appellate Division's decision in its analysis of RPTL § 581 which requires that condominium and cooperative apartments be assessed as rental properties. Specifically, TENNY objects to the First Department's observation that in "accordance with . . . [RPTL 581(1)(a)] the city values pre-1974 condominium and cooperative buildings by comparing them to comparable rental buildings of a similar age, size and location, *some of which are rent-regulated*" (*Tax Equity Now* at 159 [emphasis added]).

TENNY states that RPTL § 581 "requires only that the City assess condos and co-ops as if they were rental properties; it does not require that the City *under-assess* condos and co-ops by treating them as if they were rent regulated apartments" (brief for plaintiff-appellant at 55-56). TENNY's position is flawed for the following reasons. The Appellate Division specifically said that in the course of the City's exercise in valuing pre 1974 condominium and cooperative buildings by comparison to comparable buildings of a similar age, size and location, that process would yield a comparison to buildings which either in whole or in part are rent regulated. It does not mean, as TENNY suggests, that all pre-1974 condominium and cooperative buildings are universally, and across the board, assessed as rent regulated.

Moreover, TENNY makes the argument that the City's valuing of cooperative and condominium apartments by comparison to rent-regulated apartments is not supported by *Greentree at Lynbrook Condominium No. 1 v Bd. of Assessors* (81 NY2d 1036 [1993]). TENNY interprets the *Greentree* decision as an anomaly driven by the fact that all rental apartment buildings in the Village of Lynbrook with at least six (6) units or more were subject to rent stabilization regulation (*Greentree* at 1039; brief for plaintiff-appellant at 37 n 11). TENNY's analysis is not supported by *Greentree*.

The unanimous *Greentree* decision by this Court makes clear that RPTL § 581 unequivocally means that "condominiums and cooperatives [should] be assessed as if they were conventional apartment houses whose occupants were rent paying tenants" (*Greentree* at 1039 [citation omitted]). Continuing its analysis, the *Greentree* Court stated that in giving effect to RPTL § 581 "the condominium status of the subject properties [is] disregarded for tax assessment purposes . . . As such the properties are to be assessed as if they are rental properties" (*id.*). Giving effect to the principle that in such an analysis one does not ignore the characteristics of the comparison property, this Court held that:

> All rental apartment buildings in the Village of Lynbrook with a least six units are subject to rent regulation . . . Thus it follows that if the condominium status of the subject properties is disregarded, the properties are required to be assessed as if they are rent stabilized.

(*id.*). Simply put, *Greentree* does not stand for the proposition that one is free to ignore or nullify the characteristics of a comparison property when applying RPTL § 581.

Against this backdrop the Appellate Division rejected TENNY's equal protection claim based upon the City's application of RPTL § 581:

> Plaintiff's argument that the enactment and application of RPTL 581 violates equal protection fails to state a claim. First RPTL 581 does not create different classes for purposes of taxation, which is a prerequisite for review on equal protection grounds. Rather, it treats pre 1974 rental, condominium and cooperative buildings as similarly situated and defendants have assessed them accordingly. Absent an allegation that RPTL 581 discriminates between similarly situated taxpayers, plaintiff cannot plead a violation of the Federal and State Equal Protection Clauses. Second, even if an equal protection analysis does apply, 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. 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 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. The decision to treat pre-1974 rental, condominium, and cooperative buildings similarly is rationally related to that end

(*Tax Equity Now* at 159-160 [citations omitted]).

Lastly, TENNY takes issue with the Appellate Division's reliance upon *Nordlinger*. TENNY instead argues that *Allegheny Pittsburgh Coal Co. v. County Commission* (488 U.S. 336 [1989]) controls. It does not.

In *Allegheny*, the West Virginia Constitution and laws provided that all property "shall be taxed at a rate uniform throughout the State according to its estimated market value" (*id.* at 345). The Webster County tax assessor, however, valued real property on the basis of its recent purchase price, but otherwise made only minor modifications in the assessments of land which had not been recently sold (*id.* at 338). The Court held that the Webster County assessment practices violated the Equal Protection Clause (*id.* at 343). Although the Court recognized that States have broad power to classify properties, West Virginia had not adopted the classifications the assessor was applying – there was no law providing that properties would only be assessed upon a transfer (*id.* at 344-345). Rather, the assessor made his own classification,[11] which the Court found unconstitutional. The Court expressly did not decide whether the methods used by the assessor would be lawful "if it were the law of a State, generally applied, instead of the aberrational enforcement policy...." (*id.* at 344 n 4).

[11] Indeed, Chief Justice Rehnquist described the assessor's practices as contrary to the guide published by the West Virginia Tax Commission as an aid to local assessors in the assessment of real property (*id.* at 345).

Significantly, the Court noted that California had adopted a law which provided for reassessment only upon a transfer of property, with assessment increases otherwise capped at 2% per year (*id.*). California's system was subject to equal protection review by the Supreme Court three years later in *Nordlinger*.

In *Nordlinger*, the Court observed that despite "dramatic disparities in the taxes paid by persons owning similar pieces of property," resulting from the assessment caps, California's tax system did not violate equal protection because the law was rationally related to furthering the legitimate state interest of neighborhood preservation and stability (*id.* at 6, 12).

Nordlinger is directly on point. Allegations of differing ETRs are insufficient to state an equal protection claim where the state makes reasonable classifications that result in different ETRs. New York, like California, has adopted limits on how much a property's assessed value may increase from year to year. This is a legally valid policy choice.

To support its assertion that *Allegheny* controls and not *Nordlinger*, TENNY relies upon another United States Supreme Court case, *Armour v City of Indianapolis*, (566 U.S. 673 [2012]). In *Armour*, the Supreme Court was confronted with a claim that arose from the City of Indianapolis implementing an upgrade in its sewer system and the apportioning of the project's cost to homeowners. Specifically, under the replaced system, Indianapolis would issue an assessment to

all abutting lots to apportion the cost of the sewer improvement project, and the assessment could be paid in a lump sum or over time in installment payments. Subsequently, Indianapolis went to a new system to fund such projects through the sale of bonds. Indianapolis forgave outstanding installment payments from the replaced system but at the same time it refused refunds to those having made payments in full. A group of individuals who were denied a refund after having made payment in full commenced an action claiming an equal protection violation. The Supreme Court held that the decision by Indianapolis to suspend installment payments but deny refunds to those paying in full neither involved a "fundamental right nor a suspect classification" and was a tax classification that was supported by a rational basis (*Armour* at 681-682). The Supreme Court noted that the City's interest in reducing administrative costs and preserving its limited resources provided a rational basis (*id.*).

In the course of discussing the Supreme Court's jurisprudence on tax legislation analyzed under the equal protection clause Justice Breyer noted *Allegheny* as an exception because, the case concerned an assessor who was assessing properties in a manner that could not be reconciled with state law and in fact "dramatically violated" state law. The Court went on to note that *Allegheny* is "... the rare case where the facts precluded" any alternative reading of state law and thus any alternative rational basis" (*id.* at 687; *Nordlinger* at 16).

Significantly, by contrast, TENNY's core complaint is that New York City follows state law and is dissatisfied with the results of adherence to such laws which the Appellate Division First Department noted have a rational basis to support their enactment. Clearly, TENNY is challenging the operation of specific statutory taxing schemes such as the assessment caps and the treatment of cooperative and condominium apartments as rental apartments for assessment purposes. Such a challenge is squarely controlled by *Nordlinger* rather than *Allegheny* which concerned a rogue assessor who had assessed properties in a manner that did not comport with West Virginia law.

C. The Complaint Fails to Allege Cognizable Due Process Claims

A tax law violates due process only when it is so arbitrary that it effectively ceases to function as a tax. Plaintiff's allegations that properties are paying differing ETRs in no way establishes that the property tax laws have lost their essential nature as a tax and instead are confiscatory. "Except 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" (*A. Magnano Co. v Hamilton*, 292 US 40, 44 [1934]). The due process clause is applicable to a taxing statute "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, as, for example, the confiscation of property" (*id.*; *see also Shapiro*

v City of New York, 32 NY2d 96, 102 [1973]). Put another way, "[t]he Legislature has nearly unconstrained authority in the design of taxing measures unless they are utterly unreasonable or arbitrary" (*Ames Volkswagen, Ltd. v State Tax Com.*, 47 NY2d 345, 349 [1979]; *Rokowsky v State Bd. Of Equalization & Assessment*, 172 AD2d 93, 96-97 [3d Dept 1991] [a taxpayer's due process right "does not include an opportunity to judicially contest the merits of every legislative determination in the taxing statute"]).

When measured against such a standard, Plaintiff's due process claims fail. Rather than being arbitrarily assessed, properties within the City are assessed under a system with stated policy objectives. As articulated by the Appellate Division:

> Plaintiff has failed to state a cause of action under either the Federal or State Due Process Clauses because it has not adequately alleged the defendants have acted in excess of their taxing power in enacting and applying the property tax system.
>
> The Legislature has nearly unconstrained authority in the design of taxing measure s unless they are utterly unreasonable or arbitrary. 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.' The statues 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.

(*Tax Equity Now* at 165).

On this appeal, as it did with its equal protection analysis, TENNY avoids stating the recognized applicable standard for a due process challenge to taxing legislation. In taking issue with the First Department's holding that no due process violation had been adequately stated, TENNY summarily concludes that the Appellate Division's observation that the taxing measures complained of were "grounded in legislative policy determinations," is somehow unavailing (brief for plaintiff-appellant at 59-60). But TENNY's mere disagreement with the Appellate Division's reasoned conclusion hardly suffices as a ground for establishing reversable error.

Lastly, TENNY concludes by restating its disagreement with the Appellate Division, First Department regarding the application of RPTL § 581 and in particular notes that ". . . luxury condos and co-ops" are assessed as if they were rent-regulated apartments. TENNY once again invokes the *Foss* case (*Foss* at 60). As to its disagreement with the application of RPTL § 581, that provision is clear in its mandate that cooperative and condominium apartments be treated as rental apartments and the *Greentree* case makes equally clear that the characteristics of a comparable unit are not to be ignored, including if the comparable unit is rent regulated. TENNY's invocation of the *Foss* case, moreover, misses the mark as that

matter dealt with the unique issue of one county being assessed by two separate and distinct assessing authorities depending on a property's location within the county (*Foss* at 254). New York City, as had been made clear, is one assessing unit.

POINT IV

THE APPELLATE DIVISION PROPERLY DISMISSED THE FHA CLAIMS

The Appellate Division, First Department carefully considered and properly rejected TENNY's claims under the Fair Housing Act ("FHA"). In rejecting these claims, the First Department correctly found that Plaintiff's claims for relief under 42 USC §§ 3604 (a) and (b) sounded in a theory of "disparate impact," and concluded that TENNY's theories failed to state a cause of action[12] (*see Tax Equity Now* at 166-68).

Specifically, the First Department correctly found that Plaintiff was required to show, in order to properly plead its claims under 42 USC § 3604 (a), a "robust causality" linking the disputed policies to any alleged disparate impact. The Court concluded that Plaintiff had not stated a claim under 42 USC § 3604 (a) or (b) that the City's property tax system 1) disparately impacted minority residents by making the rental and ownership of housing unavailable; 2) has a disparate impact on

[12] The City notes that an even more fundamental consideration to a court's ability to entertain claims of a Fair Housing Act violation stemming purportedly from real property tax policies is an analysis under the Tax Injunction Act (*supra*).

minority residents by perpetuating existing patterns of segregation in the City of New York; or 3) that Defendants, in the context of taxation, were "not involved in the terms and conditions of the sale or rental of real property" (*id*). Accordingly, for these reasons and for the reasons more fully outlined below, this Court should affirm the decision of the Appellate Division, First Department as to Plaintiff's claims under the FHA.

A. The Appellate Division, First Department Properly Dismissed Plaintiff's Claims Under 42 USC § 3604 (a)

1. The First Department Properly Required Plaintiff to Show a "Robust Causality" at the Pleading Stage Between Alleged Statistical Disparities and the Disputed Policy

After prefacing its discussion of Plaintiff's FHA claims by noting the purpose and reach of the FHA, the First Department began its analysis of Plaintiff's claims under 42 USC § 3604 (a). In reviewing the pleading requirements for these claims, the First Department stated that a "robust causality requirement" attached to these allegations. Contrary to Plaintiff's contentions in their brief before this Court, the pleading standard outlined by the First Department in this case is the proper one.

In finding that allegations under 42 USC § 3604 (a) must show "robust causality," the First Department cited to *Texas Dept of Hous. and Community Affairs v Inclusive Communities Project, Inc.,* (576 US 519 [2015]) (hereinafter, "ICP"), which provides, in relevant part, that:

> "[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that "[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create"

(*id.* at 2523).

Contrary to Plaintiff's contentions in their brief before this Court, the balance of law in the several Circuits establishes, unequivocally, that ICP's "robust causality requirement" applies even at the *pleading stage* in the context of a motion to dismiss. Indeed, courts in almost every Circuit in the country have found this to be the case (*see e.g. Bldg. & Realty Inst. of Westchester & Putnam Counties, Inc. v. New York,* 2021 U.S. Dist. LEXIS 174535, *43-44 [SDNY Sep. 14, 2021, No. 19-CV-11285 (KMK)] [applying the "robust causality" requirement on a 12(b)(6) motion to dismiss]). These cases unequivocally establish that ICP's "robust causality" requirement applies to Plaintiff's FHA claims, even at the pleading stage. Thus, the First Department properly applied this standard to Plaintiff's pleadings.

2. The First Department Properly Found that Plaintiff Failed to State a Claim That the City's Property Tax System Makes Housing Unavailable to Minority Residents

The First Department found that Plaintiff failed to state a claim with regard to their allegations that the City's property tax system makes housing unavailable for minority residents. Specifically, the First Department rejected these claims because

Plaintiff not only failed to plead the robust, causal link between the property tax system and the disputed policy, but also failed to isolate, specifically, the property tax's role in any alleged causation.[13]

In its brief before this Court, Plaintiff maintains that housing is nevertheless made "unavailable" when a policy "disproportionately increases costs" for members of a racial minority group. In support of this, Plaintiff cites to cases which involved discriminatory credit scoring and lending to minority individuals (*see Ojo v. Farmers Grp.*, 600 F3d 1205, 1207 [9th Cir 2010]; *Hargraves v. Capital City Mortg. Corp.*, 140 F Supp. 2d 7, 14 [DDC 2000]). Suffice it to say that neither of these cases involves a policy even remotely similar in form or application to the City's property tax system, and are thus unhelpful to any analysis of Plaintiff's claims in this matter.

In further support of its contention that the City's property tax system makes housing unavailable to minority residents, Plaintiff cites to statistical disparities that show differences in ETRs between majority-minority communities and majority non-minority communities (*see* brief for plaintiff-appellant at 43). Again, Plaintiff fails to show how the *property tax*, and not one of a panoply of other possible

[13] It should be noted here that Plaintiff's Complaint fails to plead the required deprivation of housing to maintain an FHA claim under Section 3604 (a) (*see e. g. Cox v. City of Dall.*, 430 F3d 734, 741 [5th Cir 2005]; *and Robinson v City of NY*, 143 AD3d 641, 642 [1st Dept 2016]).

factors,[14] have caused the alleged discrepancy seen in the statistics above (*see ICP* at 2524).

Plaintiff further maintains that the City's housing is made unavailable because the disparate ETRs paid across City neighborhoods cause "financial barriers" and result in "higher rates of foreclosure" among minority residents. Again, the First Department properly rejected this claim, as Plaintiff does nothing to show how the alleged disparities in foreclosure rates are actually caused by the property tax as opposed to other potential factors[15] (*see ICP* at 2524).

Plaintiff further maintains that the City's property tax system makes housing unavailable to minority residents by disincentivizing the production of rental housing and notes, in support of this claim, that fully 65% of the City's renters are minority residents. Once again, the First Department properly rejected this claim.

First, the decision to develop rental housing in the City is largely the domain of private developers. Second, as the Supreme Court noted in *ICP*, there are "multiple factors that go into investment decisions about where to construct or

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[14] These factors may include, but are not limited to, gaps between majority-minority neighborhoods and non-majority-minority neighborhoods in areas such as the median sales price per square foot of office space, the median sales price per square foot of retail space, and the median sales price per square foot of residential space, along with other market-influenced factors.

[15] These factors may include, but are not limited to, long-recognized gaps in educational attainment, income, and access to health care between minority residents and non-minority residents.

renovate housing units" (*ICP* at 2523-24).[16] Third, as the First Department provided in *Robinson*, "[t]he mere demonstration of a statistical imbalance, without 'a showing that similarly situated members of nonminority groups will not be as adversely affected as members of minority groups or that segregation will be perpetuated' is not enough to establish a violation of the Fair Housing Act" (*Robinson* at 383-84; *accord Hous. Justice Campaign v. Koch*, 164 AD2d 656, 672-73, [1st Dept 1991]).[17] Accordingly, the First Department properly found that Plaintiff failed to state a claim on these grounds as well.

3. The First Department Properly Found that Plaintiff Failed to State a Claim That the City's Property Tax System Perpetuates Existing Patterns of Segregation

The First Department properly found that Plaintiff failed to state a claim with regard to its allegations that the City's property tax system perpetuates existing patterns of segregation. Indeed, as the First Department stated, Plaintiff must, at the pleading stage, not only show a plausible causal link between the alleged impact and the disputed policy, but also how the impact of the disputed policies, in isolation, as opposed to other factors, have caused the disparate impact.

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[16] It is important to note that the Supreme Court in *ICP* noted this in the context of the safeguards necessary in the context of disparate-impact claims under the FHA, of which the Supreme Court's "robust causality" is undoubtedly one.

[17] What is more, and as noted in Defendant's brief before the First Department (*see* Defendant's Opening Brief before the First Department at 30), this assertion also rests on several false assumptions, not least of which is the assertion that all property taxes are passed through to renters.

Plaintiff cannot meet this requirement because no robust causal link exists. Plaintiff contends that the property tax is a financial consideration for minority residents to the degree they seek to relocate, but households' decisions to move are based on a complex set of factors of which property taxes is just one variable (*see e. g.* Board of Governors of the Federal Reserve System, *Report on the Economic Well-Being of U. S. Households in 2015*, at 34-36 [May 2016], available at https://www.federalreserve.gov/2015-report-economic-well-being-ushouseholds-201605.pdf).

Further, as the First Department noted, "New York City is a deeply segregated City" (*see Tax Equity Now* at 167). Issues of segregation in the City of New York have a deep and wide history, and to lay the blame for causing segregation at the foot of a property tax system, the modern genesis of which post-dates the genesis of the problem itself, grossly understates and misunderstands the variegated factors that gave rise to the situation at present.

Plaintiff's suggested changes to the property tax system, namely that of lowering the assessment ratio (*see e.g.* brief for plaintiff-appellant at 20, 35, 48), would result in the same disparities that exist today or would cause the City to violate certain provisions of state law with which it is bound to comply. Finally, the First Department was correct in noting that this specific change would likely decrease

mobility into supermajority-white neighborhoods, and so the Court properly rejected Plaintiff's claims in this regard as well (*see Tax Equity Now*, at 167-68).

B. The Appellate Division, First Department Properly Dismissed Plaintiff's Claims Under 42 USC § 3604 (b)

1. Plaintiff's FHA Claims Are Not Actionable Under § 3604 (b)

The Appellate Division, First Department properly dismissed Plaintiff's claims under § 3604 (b) of the FHA. The decision makes it clear that, "in the context of taxation, defendants are not involved in the terms and conditions of the sale or rental of property" (*see Tax Equity Now* at 167-68). The First Department's decision affirms a line of cases that unequivocally hold that actions involving property tax assessments are not actionable under 42 USC § 3604 (b) (*see Robinson*, at 642; *see also Koch*).

In *Robinson*, the court held that, in the context of taxation, neither the City nor the State are involved, as a matter of law, in the "terms, conditions, or privileges of sale or rental of a dwelling" (*Robinson* at 642). This precedent is entirely consistent with the Court of Appeals' broader position that disparities in tax assessments are not actionable (*see e.g. Trump* at 25).

Plaintiff counters this position in its brief by citing to complaints related to the litigation in the *Coleman v. Seldin* (181 Misc 2d 219 [Sup Ct, Nassau County 1999]) and *United States v. County of Nassau* (79 F Supp 2d 190 [EDNY 2000]) matters. Both *Coleman* and *United States v. Nassau*, however, were issued before this Court's

decision in *Robinson*, which clarified that tax assessment policies do not constitute a condition or term under § 3604 (b) (*see Robinson*).

Further, the *Coleman* decision regards discriminatory intent, and the court makes no distinction between sections 3604 (a) and (b), instead discussing the FHA claims generally in the context of discriminatory intent (*Coleman* at 233-37). The decision in *United States v. Nassau*, does not at all consider whether the setting of tax assessments is a "term or condition" of housing and instead dismissed the FHA causes of action on grounds related to the Tax Injunction Act (*see Nassau*).

Plaintiff attempts to save its § 3604 (b) claims by asserting that it is "obvious" that the property tax is a "term" of the sale or rental of housing. In support, Plaintiff cites to two inapposite cases that make no reference to property taxes or tax assessments. In the first, *Owens v. Nationwide Mut. Ins. Co.* (2005 US Dist LEXIS 1570 [ND Tex Aug. 2, 2005, No. 3:03-CV-1184-H]), the court held that *homeowner's insurance*, not the property tax, constitutes a term, condition, or privilege of sale or rental of a dwelling. In the second, *National Fair Hous. Alliance v. Travelers Indem. Co.*, (261 F Supp 3d 20 [DDC 2017]), the Court references neither the property tax or even 42 USC § 3604 (b), and instead merely discusses the large body of case law that insurers can be held liable under the FHA.

The holding in *Robinson* is clear and Plaintiff has not cited any case which indicates otherwise. As the Defendants are only involved in the taxation of real

property, they are not in any way involved with any term or condition of the sale or rental of real property. Therefore, Plaintiff's claims under 3604 (b) should be dismissed for failure to state a claim.[18]

POINT V

PLAINTIFF'S CLAIMS ARE BARRED BY THE POLITICAL QUESTION DOCTRINE AND RAISE NON-JUSTICIABLE QUESTIONS

The political question doctrine is an aspect of justiciability which stems from the concept of "separation of powers" and requires courts to refrain from deciding issues that are properly reserved for another branch of government (*see e.g. N. Y. State Inspection v Cuomo*, 64 NY2d 233, 238-239 [1984]). As this Court has stated:

> Each department of government should be free from interference, in the lawful discharge of duties expressly conferred, by either of the other branches.... With respect to the distribution of powers within our system of government, it has been said that no concept has been "more universally received and cherished as a vital principle of freedom.... "The lawful acts of executive branch officials, performed in satisfaction of responsibilities conferred by law, involve questions of judgment, allocation of resources and ordering of priorities, which are generally not subject to judicial review

(*id.* [citations omitted]). Where policy matters have demonstrably and textually been

[18] Plaintiff's claims under 42 USC § 3604 (b) must also fail because this claim was never pled in the first instance. R 180-184. In fact, Plaintiff's first reference to § 3604 (b) in the instant litigation was in Plaintiff's response to Defendant's motion to dismiss at the trial level.

committed to a coordinate, political branch of government, the court is not the proper branch to consider such issues (*see Jones v Beame*, 45 NY2d 402, 408-409 [1978]).

The Complaint primarily takes issue with the application of two State laws - the limits that restrict the amount a property's assessed value may increase, and the statute which requires condominiums and cooperatives to be valued as though they were rental properties. No one disputes the impact these laws have on the assessed values of properties, but these policy choices are within the purview of the other branches and should not be second-guessed by the courts.[19]

Plaintiff's complaints about the City's adherence to and administration of these tax laws raise solely political questions. Consequently, Plaintiffs recourse is with the legislative or executive branches (*see e. g. Gaynor v Rockefeller*, 15 NY2d 120, 134 [1965]; *Abrams v NY City Tr. Auth.*, 39 NY2d 990, 993 [1976]).

It is noteworthy, however, that in compiling critiques of the real property tax system in New York City, many of the sources relied upon by Plaintiff also acknowledge that the road to potential reforms must go through Albany: The Sweeting Testimony at Exhibit "E" to the Complaint notes that the genesis of most

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[19]Tellingly, even authorities that TENNY relied upon in its Complaint acknowledge this bedrock principle. 4 https://furmancenter.org/files/FurmanCenter_ShiftingtheBurden.pdf ("Amending the state law to authorize DOF to use sales prices to estimate the value of co-op and condo buildings would solve the problem we highlight here"); https://www.cityandstateny.com/articles/policy/housing/why-dontowners-super-luxury-apartments-pay-their-fair-share-taxes.html (George Sweeting: "They're following the law….")

policy issues are "… rooted in state law and therefore would require state legislation to address" (R 206-212). Exhibit "D" to the Complaint quotes then newly appointed DOF Commissioner Jacques Jiha in 2014 stating that unfairness and inequities in the tax system need to be addressed by lawmakers who would have to "go to Albany to really change the structure" ((R 204-205); the Complaint at ¶243 references the Furman Center and in particular a report entitled Shifting the Burden: Examining the Undertaxation of some of the most valuable properties in New York City 5 (2013) available at http://furmancenter.org/files/FurmanCenter_ShiftingtheBurden.pdf ("Furman Report")(R. 168)). This Report concludes that addressing some of the controversial issues discussed in its Report regarding the property system will "require significant changes in the law [and will] also be politically challenging" (Furman Report at p. 9). On this appeal as well, Plaintiff cites to this Report at pages 12, 13, and 31 of its brief.

Yet, it is not surprising that TENNY has resorted to the judiciary to pursue adjudication of a political question. Although TENNY describes itself as a "membership organization committed to pursuing legal and political reform of the City's property tax system" (brief for plaintiff-appellant at 18, citing R 106-107) in the five (5) years since TENNY filed the instant action it has failed to obtain legislatively the change it seeks. However, TENNY's unsuccessful efforts at

legislative reform of the real property tax system do not serve as a basis to establish this court's jurisdiction over what is plainly a political question.

TENNY's desire to entreat the judiciary to act is made clear by the statement in its brief that "It is an open secret that, without a "court ruling or some other external prod," nothing will change" (brief for plaintiff-appellant at 10, citing IBO Report at 12). But the political question doctrine exists precisely so as to avoid embroiling the judiciary in such matters and is no less to be ignored simply because the proponent of a particular position is unsuccessful in convincing legislators to pursue a favored agenda. The ultimate relief in such a scenario is not using the judiciary as a last resort to exercise jurisdiction to jumpstart the legislative process but rather, to support candidates for elected office who share like views as those being advocated by a particular group. And even if such efforts are unsuccessful the net result is that the judiciary is not imbued with jurisdiction by default. As wisely noted by Justice Blackmun in *Nordlinger*, in rejecting an equal protection challenge to a California real property tax statute:

> Time and again, however, this Court has made clear in the rational-basis context that the "Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted " (footnote omitted). Certainly, California's grand experiment appears to vest benefits in a broad, powerful, and entrenched segment of society, and, as the Court of Appeal surmised, ordinary

> democratic processes may be unlikely to prompt its reconsideration or repeal. Yet many wise and well-intentioned laws suffer from the same malady. Article XIIIA is not palpably arbitrary, and we must decline petitioner's request to upset the will of the people of California.

So, too, the ppellate Division First Department in its opinion below, noting the deference afforded legislative bodies in constructing tax laws stated:

> . . . we recognize the property tax system does, in many respects, result in unfairness. However, as previously stated, property tax systems that result in "dramatic disparities in the taxes paid by persons owning similar pieces of property" are not, for that reason, violative of equal protection (*Nordlinger*, 505 U.S. at 6).
>
> As the Court of Appeals has aptly 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].
>
> It is up to the legislature to implement a fair and equitable property tax system. The grievances plaintiff raises are more appropriately addressed by that branch of government.

(*Tax Equity Now* at 162).

In the final analysis, Plaintiff has done no more than establish that the system for assessing real property taxes has generated much discussion, and criticism from many quarters, including by elected and appointed City officials. That the system has been described as imperfect and in need of reform does not establish that it is unlawful. Such criticism, moreover, does not serve to remove consideration of these

issues from the New York State Legislature and place the judicial branch in the role of determining real property tax policy. Nor has the Legislature forfeited its role in setting tax policy by adopting reforms Plaintiff disagrees with.

CONCLUSION

For all of these reasons, the Plaintiff's Appeal should be dismissed, and the Appellate Division Decision should be affirmed.

Dated: New York, NY
December 9, 2022

Respectfully submitted,

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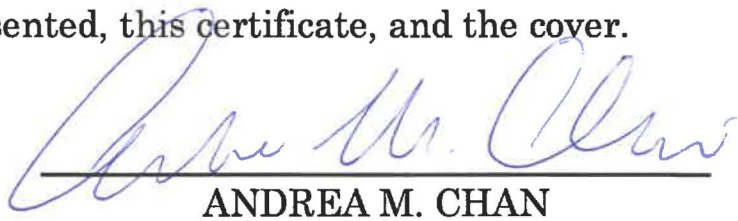
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 13,660 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.



ANDREA M. CHAN

ADDENDUM

REVISED RECORD

OF THE

CONSTITUTIONAL CONVENTION

OF THE

STATE OF NEW YORK

APRIL FIFTH TO AUGUST TWENTY-SIXTH

1938

VOLUME IV

ALBANY
J. B. LYON COMPANY, PRINTERS
1938

to work out a limitation so that the taxable property will not suffer by reason of the extension of these exemptions in the future.

The Chairman: The gentleman from New York will proceed to the next section.

Mr. Saxe: Section 2 provides that:

"The Legislature shall provide for the supervision, review and equalization of assessments for purposes of taxation."

Now, Mr. Chairman, there has been a great deal of complaint, and it is an old time complaint, about assessments, particularly of real property. The tax law today contains a provision in the nature of supervision and review and equalization of assessment, but they do not seem to have satisfied the situation by any means. So the idea of this provision is to make it mandatory upon the Legislature to provide for the supervision, review and equalization of assessments in such way that real estate can really have a proper supervision of assessments in the first instance and proper review as the Legislature may see fit. For instance, we have had proposals before us for a State Board of Review, another proposal for judicial district boards of review, but we leave it to the Legislature to determine and work out and, from time to time, change the methods of review as the exigencies of the situation may require, but we do make it mandatory for the Legislature to provide for supervision, review and equalization of assessment.

Mr. Dooling: Mr. Chairman.

The Chairman: The gentleman from New York.

Mr. Dooling: I offer an amendment to Section 2, which I think will improve it and which will be of great help to the taxpayers of the State. I have submitted it to the chairman of the Committee on Taxation and I understand that so far as he is concerned the proposed amendment to that section is not objected to by him. It provides for the addition of line 8—

The Chairman: Just one minute. The Chair will have to hold that the amendment must be at the desk.

Mr. Dooling: It is on its way.

The Chairman: The gentleman from New York offers an amendment. The Clerk will read it.

The Secretary: By Mr. Dooling. To amend proposed constitutional amendment, Int. No. 657, Pr. No. 732, as follows, Section 2, page 2, line 8, after the period insert in italics the following: "Assessments shall in no case exceed full value."

Mr. Dooling: The purpose—

The Chairman: The gentleman from New York.

Mr. Dooling: —of the amendment is made clear by that simple addition. Assessments in some parts of the State, I regret to say, have gone far beyond the fair value and the full value, and they should not continue, and the Constitution should make that firm and positive declaration, and I respectfully ask that that amendment be adopted.

The Chairman: The gentleman from New York.

Mr. Saxe: The amendment is acceptable to me, Mr. Chairman.

Mr. Piper: Will the introducer of the amendment yield for a question?

Mr. Dooling: Yes.

The Chairman: The gentleman yields.

Mr. Piper: Will you explain to the Convention who is to determine, and how the nature of full value of real property is to be determined?

Mr. Dooling: Why, you have provided here for a method of review, and on the question of review, the reviewing authorities, to wit, the courts, will be able to determine that, but there is a declaration here by this Convention that the value shall not exceed the full value.

The Chairman: The question comes upon the—the gentleman from the Bronx.

Mr. Schackno: On a point of inquiry of the chairman of the committee, what is meant by supervision?

The Chairman: The gentleman from New York.

Mr. Saxe: Judge Schackno, if you will turn to Section 171 of the tax law, you will find the tax law now provides, with respect to the powers and duties of the State Tax Commission:

> "The State Tax Commission shall, first, investigate and examine, from time to time, as to the methods of assessment within the State, and confer with, advise, assist and direct assessors and other officials charged by the statutes of this State with duties relating to the assessment of property for taxation."

Now, that really means that they shall investigate and examine from time to time as to the method. The term "supervision" here imports the idea that they shall or the Legislature shall provide how they shall supervise those assessments in the first instance.

Mr. Schackno: I was just wondering, Mr. Chairman, whether that is the correct word to use.

Mr. Saxe: What suggestion has the gentleman?

Mr. Riegelman: Mr. Chairman.

The Chairman: Mr. Riegelman.

Mr. Riegelman: In behalf of the amendment that was just offered, I would like to call the attention of the delegates to the fact that our limitation on debt-incurring powers and our limitation on the taxing power are predicated upon the assessed valuation of real estate. That is a very strong inducement from time to time to jack up those assessments with only scant regard for the value of the property that is assessed. I think that the proposed amendment will serve a very useful purpose in making the debt limitation and the taxing limitation and other provisions of the Constitution real limitations. I therefore hope that the amendment will be adopted.

The Chairman: The question occurs upon the adoption of the amendment offered by Mr. Dooling. All those in favor say Aye; contrary-minded, No. The amendment is adopted.

The gentleman from New York.

Mr. Saxe: We next proceed to Section 3, Mr. Chairman.

Mr. Bruce: Mr. Chairman.

The Chairman: Mr. Bruce.

Mr. Bruce: One question further about the word "supervision." I understand that town assessors are constitutional officers and protected by the Constitution. Would the word "supervision" as used here in Section 2 enable the Legislature to destroy or abolish the office of local assessor?

Mr. Saxe: Absolutely not. Section 2 of Article X protects the local assessor in his constitutional functions.

Now, with respect to Section 3, Mr. Chairman. That reads:

> "Moneys, credits, securities and other intangible personal property within the State not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation. Intangible personal property shall not be taxed ad valorem nor shall the possession thereof be subject to any excise tax."

Now, all that does is to write into the Constitution a well-settled rule of domicile with respect to taxation. That rule has been expressed by Cooley as follows:

> "The rule is that the situs of intangible property for purposes of taxation is the domicile of the owner unless the property has acquired a different situs in another State."

Now, I want the Convention to appreciate that we have got in this State a great economic asset that no other State in the Union possesses, and owing to the development of taxation in other states we can reap, maintain, conserve and reap a further benefit from assuring to people of other states that they can keep their money and their securities in the State of New York, and until they employ them in business in the State of New York they are not going to be subjected to taxation merely by sending it here and leaving it here.

Now, that tends to develop the financial supremacy of the City of New York, and it is to the interests of the State and the economy of the State to conserve, protect and promote that, and that is the underlying purpose of Section 3; that is, at least of the first sentence. With respect to doing away with ad valorem taxation of intangible personal property, we want to remember that we have tried and other states have tried to reach intangible personal property on an ad valorem basis, and have utterly failed. The reason we went away from the personal property tax was on account of the impossibility of taxing intangible personal property the same as real estate, and you will recall that we entered upon such experiments as the investment tax, the secured debt tax, and the lamented money capital tax,