

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION THIRD DEPARTMENT

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DEBORAH PUSATERE, ROSSWORKS LLC,  
JOHN C. THOMAS, JR., GUS LAZIDES,  
and GGJ CORPORATION,

**Appeal No. 535695**

Plaintiffs-Respondents,

Albany County

Index No. 909653-21

-against-

THE CITY OF ALBANY,  
KATHY M. SHEEHAN, in her capacity as Mayor  
of the City of Albany, THE COMMON COUNCIL  
OF THE CITY OF ALBANY, and the ALBANY  
CITY COURT,

Defendants-Appellants.

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BRIEF OF *AMICI CURIAE* COMMUNITY VOICES HEARD  
and FOR THE MANY  
IN SUPPORT OF DEFENDANTS-APPELLANTS

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## STATEMENT OF INTEREST OF AMICI CURIAE

*Amici curiae* are non-profit organizations that represent low-income tenants throughout New York State, including tenants who are protected by local Good Cause Eviction laws in the Hudson Valley and in the Third Department. *Amici* have a special interest in and substantial expertise regarding evictions and low-income tenants in New York State.

**Community Voices Heard (CVH)** is a member-led organization founded in 1994 and principally composed of women of color and low-income families in New York State. Through grassroots organizing, leadership development, policy changes, and creating new models of direct democracy, CVH seeks to create a truly equitable New York State. CVH works with tenants, tenant associations, and tenant unions in New York City, Westchester County, and the Hudson Valley to fight back against displacement and to win improvements in living conditions.

**For the Many (FTM)** is building a grassroots movement of everyday people to transform New York so that it works for all of us—no matter what we look like, where we come from, or how much money we have. We bring people together across race, age, and language to fight for laws and win elections that put the power back in our hands. We work with thousands of tenants and homeowners to advocate for affordable and secure housing and have helped enact Good Cause legislation in a number of cities in New York, including Kingston.

## I. INTRODUCTION

Responding to an acute housing crisis, the city of Albany (Albany) enacted Local Law F,<sup>1</sup> the “Prohibition of Eviction without Good Cause Law” (Good Cause Law or the Law). Good cause eviction laws prevent needless evictions and the compounding harms that result from evictions while still allowing landlords to rent their properties to tenants they have freely chosen.

The Good Cause Law prohibits covered landlords from evicting tenants without good cause. “Good cause” includes nonpayment of rent, substantial lease violations, criminal activity, creating a nuisance, damaging the property, the tenant’s failure to sign a lease, and an owner’s wish to occupy the property themselves. The Law also prohibits a landlord from evicting a tenant for the nonpayment of an unconscionable rent increase—in this instance, good cause for the rent increase may include the state of the housing market and improvements made to the unit. Owner-occupied properties with four or fewer units, sublet properties, properties which the tenant occupies as an incident to employment, and properties covered by separate good cause requirements are exempt from the Good Cause Law. Given the number of bases for eviction and the carve-outs for small, owner-occupied buildings, the primary effect of the Good Cause Law is to protect good tenants and not objectionable tenants.

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<sup>1</sup> Albany City Code § 30-324 *et seq.*

The Good Cause Law is wholly within Albany's police powers to regulate property and protect the welfare of persons within the city. And the Law is not preempted by state law.

In New York, statutory rules govern the procedures for terminating a tenancy and evicting a tenant through a summary court process. These rules are found in the Real Property Law (RPL) and the Real Actions and Proceedings Law (RPAPL). These are procedural statutes: they leave intact the substantive common law tenancy categories and the common law rules concerning the termination of tenancies. This is the level at which the Good Cause Law operates. It is a space where state law is silent. The Good Cause Law only defines when a tenancy terminates and does not prohibit something which a state statute allows or otherwise conflict with a state statute.

The Supreme Court correctly found that the Good Cause Law is not impermissible rent control and that most of the landlords' challenges to the Good Cause Law were without merit. However, it erred when it found that the Law was preempted due to a direct conflict with state law.<sup>2</sup>

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<sup>2</sup> This brief focuses on conflict preemption, the reason why the Supreme Court invalidated the Good Cause Law. None of the landlords' other arguments provides the Court with a reason to uphold the Supreme Court's determination.



## II. ARGUMENT

This brief first discusses why the Good Cause Law is based on sound social policy, which informs Albany’s exercise of its police powers. It then outlines the common law background for the enactment of the RPL and RPAPL. Finally, it demonstrates why none of the statutes identified by the Supreme Court (or any other provision of the RPL and RPAPL) conflicts with the Good Cause Law.

### A. New York’s Housing Crisis

New York (including Albany) is experiencing a severe housing crisis. The affordable housing crisis predated the COVID-19 pandemic but has been exacerbated by it. The median sale price for a single-family home in the Capital Region increased 12 percent year-over-year in June 2022, the 27th month in a row (John Cropley, *Capital Region housing prices up over previous year for 27th straight month*, *The Daily Gazette*, July 25, 2022).<sup>3</sup> The increase in the cost of housing and the resulting affordability crisis is not unique to Albany (Tom Waters, *Rental Housing Affordability in Urban New York: A Statewide Crisis*, *Community Service Society*, May 2019, at 4).<sup>4</sup> For example, in Ulster County, the rental housing vacancy rate in 2020 was only 1.81 percent for non-subsidized housing,

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<sup>3</sup>Available at <https://dailygazette.com/2022/07/25/capital-region-housing-prices-up-over-previous-year-for-27th-straight-month/> [last accessed Sept. 25, 2022].

<sup>4</sup> Available at [https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/Rental\\_Housing\\_in\\_Urban\\_New\\_York\\_A\\_Statewide\\_Crisis\\_WEB.pdf](https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/Rental_Housing_in_Urban_New_York_A_Statewide_Crisis_WEB.pdf).

half of what it was in 2019 (Ulster County Planning Dept., *Ulster County Housing Survey 2020*, June 2021, at 1).<sup>5</sup> Kingston declared a housing emergency after an analysis found a vacancy rate of 1.57 percent (Resolution 144 of 2022, Resolution of the Common Council of the City of Kingston Declaring a Housing Emergency and Regulation of Rents Pursuant to the Emergency Tenant Protection Act).<sup>6</sup> In non-subsidized apartments in Ulster County, the average rent for a two-bedroom apartment increased nearly 48 percent between 2016 and 2020 (*Ulster County Housing Survey 2020* at 6).

Due to rising housing costs, tenants who are forced to leave their homes will find it incredibly difficult to find affordable replacement housing. And because such a large share of tenants' income goes toward housing costs already, they are unlikely to have funds readily available to pay the costs needed to obtain a new apartment. Sixty-three percent of Albany's population live in renter households, and 55 percent of Albany renters pay more than 30 percent of their income toward their rent, meaning that they are rent burdened (*Rental Housing Affordability in Urban New York* at 16). Forty-four percent of Albany renters have incomes under \$25,000 annually (*id.*). In the Capital District, 76 percent of low-income tenants

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<sup>5</sup>Available at [https://ulstercountyny.gov/sites/default/files/documents/planning/2020\\_Rental\\_Housing\\_Report.pdf](https://ulstercountyny.gov/sites/default/files/documents/planning/2020_Rental_Housing_Report.pdf). Albany's vacancy rate is likely now lower than the 4.8% estimate given in 2019 (*Rental Housing Affordability* at 12).

<sup>6</sup> Available at <https://hcr.ny.gov/system/files/documents/2022/08/city-of-kingston-resolution-144-of-2022.pdf>.

pay more than 30 percent of their income towards rent, and 38 percent of low-income tenants pay more than 50 percent (*id.* at 7).

The crisis is particularly acute for Albany’s communities of color. The median income for Black, Hispanic, and mixed-race households in Albany is 68 percent of the median household income for all households in Albany (Statistical Atlas, *Household Income in Albany, New York (City)*, Table 8, Median Income by Race).<sup>7</sup> In 2021, over 60 percent of Albany’s eviction filings related to properties in predominantly BIPOC communities, and the percentage is even higher for 2016 to 2020 (Danielle Smith, *Evictions & Our Neighborhoods: Data from 2016 to 2021*, City of Albany, Jan. 4, 2022, at 2-4).<sup>8</sup>

There was a substantial rise in the number of holdover cases<sup>9</sup> as a percentage of Albany’s total eviction cases in 2021. While there had historically been 10 to 15 nonpayment of rent cases filed for every holdover case, in 2021, 34 percent of filed cases were holdover cases (*id.* at 6). This increase aligns with what advocates have observed in other parts of the state. In Kingston City Court, for example, holdovers represented 25 percent of evictions filed between March 2019 through March 2020, 61 percent of those filed in 2021, and 38 percent of those filed in the first

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<sup>7</sup> Available at <https://statisticalatlas.com/place/New-York/Albany/Household-Income> [last accessed Sept. 25, 2022].

<sup>8</sup> Available at <https://www.albanyny.gov/DocumentCenter/View/6793/Evictions-and-Our-Neighborhoods-Data-from-2016-2021>.

<sup>9</sup> Defined as “cases predicated upon lease expirations, lease violations, criminal activity, and any other causes” (*Evictions & Our Neighborhoods* at 6 n 3).

quarter of 2022.<sup>10</sup> Poughkeepsie saw the percentage of holdovers climb from five percent in the year before the pandemic to 24 percent in 2021 and 22 percent in the first quarter of 2022. Mount Vernon experienced an increase from 10 percent in the year before the pandemic to 19 percent in 2021 and 22 percent in the first quarter of 2022.

Tenants facing holdover proceedings without the benefit of good cause eviction protections—who may have lived in an apartment for decades, paid rent each month, and otherwise complied with their leases—are subject to eviction in many cases simply because the landlord chooses not to renew the tenancy. It is likely that such tenants have little savings due to being rent burdened, and they now must come up with thousands of dollars to move and pay the security deposit and first month’s rent for a new apartment in under three months—that is, if they are lucky enough to find an apartment within their means that will accept their application in the first place. Many tenants are unable to timely move and are evicted. Others know that voicing complaints could anger their landlord and lead to the decision not to renew their tenancy, so they remain silent regarding housing code violations and illegal actions by their landlord (*cf. Evictions & Our Neighborhoods* at 9 (“Among a 2021 sample of 531 identifiable Albany eviction

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<sup>10</sup> Legal Services of Hudson Valley received this information from the Office of Court Administration in response to a Freedom of Information Law request.

addresses, nearly two-thirds . . . had an open code violation case in 2020 and/or 2021.”)).

### B. Harm Caused by Evictions

Evictions have catastrophic effects. Evicted individuals must quickly find new housing and often move into poor quality housing, family members’ homes, or become homeless. Providing shelter, social services, and other services to homeless individuals is enormously expensive. In Westchester County alone, the cost for homeless shelters funded through the Continuum of Care program is more than 17 million dollars (*Westchester County Housing Needs Assessment*, May 2019, at 98-99).<sup>11</sup> Residential instability also impairs community bonds and investment (Matthew Desmond & Rachel Tolbert Kimbro, *Eviction’s Fallout: Housing, Hardship, and Health*, Social Forces, Feb. 24, 2015, at 2).<sup>12</sup>

Eviction imposes high costs on individuals and society through adverse health outcomes. Evictions have significant negative health effects due to increased psychosocial stress, environmental exposures, and increased infectious disease risk (see generally Megan Hoke & Courtney Boen, *The Health Impacts of Eviction: Evidence from the National Longitudinal Study of Adolescent to Adult Health*,

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<sup>11</sup> Available at <https://homes.westchestergov.com/images/stories/HNA/1125fullrep.pdf>.

<sup>12</sup> Available at [https://scholar.harvard.edu/files/mdesmond/files/desmondkimbro.evictions.fallout.sf2015\\_2.pdf](https://scholar.harvard.edu/files/mdesmond/files/desmondkimbro.evictions.fallout.sf2015_2.pdf).

Social Science & Medicine, Mar. 2021).<sup>13</sup> These negative health outcomes can endure for years after an eviction. For example, mothers still experienced “significantly higher rates of material hardship and depression” two years after their eviction (*Eviction’s Fallout* at 23). Children are particularly impacted by eviction, as the lack of stable housing and homelessness can negatively affect their physical, social, emotional, and cognitive development, and children who are homeless are more likely to develop acute medical conditions such as asthma (Marci McCoy-Roth et al., *When the Bough Breaks: The Effect of Homelessness on Young Children*, Child Trends, Feb. 2012 at 2).<sup>14</sup>

### C. Role of Good Cause Requirements

The lack of affordable housing is a major driver of housing instability and evictions. Housing instability, evictions, and homelessness have significant deleterious effects on individuals and the community at large. Facing this problem, Albany has instituted good cause requirements for evictions.

Good cause eviction laws are widely recognized as a means of addressing the housing crisis and stabilizing neighborhoods. According to the Community Service Society, half of the renters throughout the state, including over 67 percent of renters in Albany County, would benefit from good cause eviction laws (Kate

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<sup>13</sup> Available at [https://repository.upenn.edu/cgi/viewcontent.cgi?article=1063&context=psc\\_publications](https://repository.upenn.edu/cgi/viewcontent.cgi?article=1063&context=psc_publications).

<sup>14</sup> Available at <https://www.childtrends.org/wp-content/uploads/2012/02/2012-08EffectHomelessnessChildren.pdf>.

Ham, *Good Cause Legislation Would Protect 1.6 Million Households, Nearly 50% of Tenants Statewide*, Community Service Society, Sept. 29, 2021).<sup>15</sup> Along with Albany and Kingston<sup>16</sup> within the Third Department, the cities of Beacon,<sup>17</sup> Newburgh,<sup>18</sup> and Poughkeepsie<sup>19</sup> have passed good cause eviction laws in the past year.

Jurisdictions outside of New York that instituted good cause eviction laws have seen a decrease in the numbers of evictions filed. In California, a study of cities with good cause laws found that there were statistically significant differences in their rates of filed eviction proceedings and actual evictions compared with cities without these protections (Julieta Cuellar, *Effect of “Just Cause” Eviction Ordinances on Eviction in Four California Cities*, *Journal of Public & International Affairs*, May 21, 2019).<sup>20</sup> Good cause eviction laws therefore have a marked impact on promoting housing stability in the face of rising housing costs. A statewide good cause eviction statute would protect approximately half of New York State’s households—about 1.6 million—from

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<sup>15</sup> Available at <https://www.cssny.org/news/entry/good-cause-eviction-legislation-protect-rental-households-tenants> [last visited Sept. 26, 2022].

<sup>16</sup> Kingston City Code § 332-13 *et seq.*

<sup>17</sup> Beacon City Code § 173-14 *et seq.*

<sup>18</sup> Newburgh City Code § 240-30 *et seq.*

<sup>19</sup> Poughkeepsie City Code § 12-175 *et seq.*

<sup>20</sup> Available at <https://jpia.princeton.edu/news/effect-just-cause-eviction-ordinances-eviction-four-california-cities>.

sudden eviction, including over 50 percent of renters in counties outside of New York City (*Good Cause Legislation Would Protect 1.6 Million Households*).

As will be discussed below, tenancies in New York are still governed to a considerable degree by the same rules that existed in pre-Revolutionary War England. The current state of the rental housing market could not be more different from the world of livery of seisin and Lord Coke (*see Garner v Gerrish*, 63 NY2d 575, 578-79 [1984]). Albany and other cities have recognized the disastrous effects caused by the mismatch between reality and these antiquated common law rules and have prudently enacted good cause eviction laws to bring housing policy within their borders into the 21<sup>st</sup> century. The Good Cause Law is sensible and entirely within Albany's home rule powers.

#### D. Background on the RPL, RPAPL, and Landlord-Tenant Relations

Historically, landlord-tenant relations were wholly governed by the common law. Common law rules governed the types of tenancies, how these tenancies could terminate, and what type of notice needed to be given to terminate a tenancy. While notice requirements varied based on the type of tenancy (*see, e.g., Carlo v Koch-Matthews*, 53 Misc 3d 466, 470-472 [Cohoes City Ct 2016] (citations omitted)), landlords generally had to pursue a common law ejectment action to remove tenants from their property (*Fisch v Chason*, 99 Misc 2d 1089, 1090 [Civ Ct, NY County 1979]). The legislature then codified notice requirements and



created the summary proceeding to allow evictions to proceed more expeditiously. This proceeding was “entirely statutory in origin” (*Perotta v Western Regional Off-Track Betting Corp.*, 98 AD2d 1, 2 [4th Dept 1983] (citations omitted)). Because the summary proceeding derogates tenants’ common law rights, its statutory procedures must be strictly followed (*Flewellin v Lent*, 91 AD 430, 430, 432 [2d Dept 1904]). These procedures include the “predicate notice” required to terminate a tenancy (*see, e.g., Chinatown Apartments, Inc. v Chu Cho Lam*, 51 NY2d 786, 788 [1980]). With the RPL and RPAPL (and their antecedents), the legislature sought to formalize and provide clear guidance regarding notice requirements and the procedural steps landlords need to take to terminate tenancies and evict tenants. The relevant portions of these statutes provide procedural rights to landlords and tenants. They do not create any substantive rights or change the common law rules regarding the types or termination of tenancies.

### 1. *Types of Tenancies under the Common Law*

New York imported the English common law tenancy categories, and these serve as the backdrop for the RPL and RPAPL and their predecessor statutes. Importantly, there is no legislation that codifies these categories or defines when a tenancy forms or terminates in either set of statutes (*see, e.g., Larned v Hudson*, 60 NY 102, 105 [1875] (“The statute does not define what shall constitute a tenancy at will, but leaves that question to be determined by the rules of the common law.”))).

Instead, the statutes simply codify or modify certain common law rules regarding notice for the termination of tenancies and the legal removal of tenants.

Under the common law, a periodic tenancy (most frequently “month-to-month”) is formed where, at the time of the tenancy’s formation, the parties agree upon the amount of periodic rent, but not on the duration of the lease; the tenancy “may and can continue indefinitely” (*Carlo*, 53 Misc 3d at 471-72). The English common law cases required reasonable notice from either party to terminate the tenancy, and New York courts formulated a rule of proportion: a week-to-week tenancy requires a week’s notice, and a month-to-month tenancy requires a month’s notice (*id.* at 472, quoting *Anderson v Prindle*, 23 Wend 616, 619 [1840]).

Under the common law, a monthly tenancy is an implied contract that occurs when a tenant tenders, and a landlord accepts, a month’s rental payment after the expiration of a lease with a definite term (*Carlo*, 53 Misc 3d at 471). While a landlord may eject a tenant without notice at the end of the lease’s term, if a landlord accepts a month’s rental payment after the lease’s expiration date, this creates a new rental contract for one month—a fixed term. At the end of each month, this tenancy can be terminated by either party without notice, or the parties can form a new month-long tenancy by the offer and acceptance of rent. (*Id.* at 470-471 (citations omitted)).

Under the common law, a tenancy for a year or years is formed when the landlord and tenant enter into a lease agreement with a fixed duration (*see Adams v Cohoes*, 127 NY 175, 182 [1891]). Because the lease has a definite end date, no notice is required to terminate the tenancy (*id.* (citations omitted)). If the tenant remains in possession after the lease expires, the landlord has the option of ejecting the tenant or holding the tenant to the terms of the lease for another year (*Kennedy v New York*, 196 NY 19, 23 [1909] (citations omitted)).

Under the common law, the essence of a tenancy at will is that the tenant takes possession with the consent of the landlord, but without any agreement as to the length of the tenancy or the payment of rent (*Harris v Frink*, 49 NY 24, 32 [1872] (citations omitted)). No notice to quit is generally required to terminate a tenancy at will, but courts did occasionally require them for equitable reasons (*id.* at 33).

Under the common law, a tenancy at sufferance exists when a tenant remains in possession after the conclusion of the lease period, and the landlord does not accept rent or otherwise consent to the tenant's continued possession (*Smith v Littlefield*, 51 NY 539, 541 [1873]; *Rowan v Lytle*, 11 Wend 616, 618-19 [Sup Ct 1834]). The tenant has only a "naked" possessory right; no notice to quit is required, and the landlord can enter and terminate the tenancy at any time (*Smith*, 51 NY at 541).

2. *The RPL contains requirements for providing notice of the termination of tenancies and rent increases.*

As described above, the common law did not require any type of notice before the termination of many types of tenancies. The cited cases show that this engendered considerable confusion as to when notice was required and when the different types of tenancies terminated. The legislature began to fill this void and to provide clarity, evidently no later than 1820 (*Rowan*, 11 Wend at 618-19 (“The Legislature provide[s] for tenants at will and sufferance, that their tenancy shall be terminated by a notice before they can be removed; the reason is, because, without such notice, their tenancy does not terminate on a day certain.”); *see also Smith*, 51 NY at 541 (“The object of the notice was to give [the tenant] information when the lease would terminate.”)).

The notice provisions contained in the RPL were grafted on the existing common law categories (*see, e.g., Smith*, 51 NY at 541 (“At common law, a tenant who held over after the expiration of his term became a tenant by sufferance . . . and was not entitled to any notice to quit . . . . This is still the law, except as modified by the statute.”)). While the RPL prescribes certain minimum notice periods to terminate a tenancy (depending on the type and length of tenancy), it is silent as to when a landlord may properly terminate or choose not to renew the tenancy in the first place (*see Real Property Law* §§ 226-c, 228, 232-a, 232-b).

Similarly, Real Property Law § 226-c requires landlords to give a certain amount of notice before seeking to increase a tenant's rent by more than five percent. It is silent as to whether any such rent increase is legal.

3. *RPAPL 711 [1] provides a summary procedural mechanism to evict a tenant whose term has expired. It does not govern when the term expires.*

The legislature created the summary eviction proceeding to obviate the need for a lengthy and complicated ejectment proceeding in most cases (*Rowan*, 11 Wend at 618). In the RPAPL, the legislature lists the grounds which can serve as the basis for a summary proceeding (and consequently, where an ejectment action can be avoided) (*e.g.*, RPAPL 711, 713; *see also Calvi v Knutson*, 195 AD2d 828, 830 [3d Dept 1993]).

For instance, RPAPL 711 [1] provides that a landlord may commence a summary proceeding to recover possession when “[t]he tenant continues in possession of any portion of the premises after the expiration of his term . . . .” This is commonly known as a “holdover” proceeding (*Park Summit Realty Corp. v Frank*, 56 NY2d 1025, 1026 [1982]). To maintain a proceeding on this ground, the landlord must show that the “tenancy *has expired* prior to the time the proceeding is commenced” (*Calvi*, 195 AD2d at 830 (emphasis in original)). Courts have construed “expiration” to mean the conclusion of the lease term or the occurrence of a breach of lease which results in the automatic termination of the tenancy

(*id.*).<sup>21</sup> In other words, no statute defines when an unregulated tenant’s term expires; the common law still does.

A proceeding under RPAPL 711 [1] presupposes that the tenant’s right to possession has properly terminated or expired. The statute is silent as to when this right to possession ends. RPAPL 711 [1] does not create a substantive right or cause of action; it merely provides a summary means for a landlord with a valid basis to recover possession from the tenant. Therefore, RPAPL 711 [1] is a procedural statute (*see Calvi*, 195 AD2d at 830; *see also Birkenfeld v Berkeley*, 17 Cal 3d 129, 148, 550 P2d 1001 [1976] (“The purpose of the unlawful detainer statutes is procedural. The statutes implement the landlord’s property rights by permitting him to recover possession once the consensual basis for the tenant’s occupancy is at an end.”)).

E. The Good Cause Law is not preempted by the RPL or RPAPL.

Under the New York Constitution, local governments such as Albany have the power to adopt local laws related to the “government, protection, order, conduct, safety, health and well-being of persons or property therein” so long as they are not inconsistent with the Constitution or any state law (NY Const, art IX,

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<sup>21</sup> RPAPL 711 [1] applies equally to rent stabilized and unregulated apartments (*e.g.*, *1646 Union, LLC v Simpson*, 2019 NY Misc LEXIS 272, \*4, 2019 NY Slip Op 50089(U) [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019]; *72-15 Realty Co. LLC v Marmol*, 70 Misc 3d 199, 203 [Civ Ct, Queens County 2020]). The procedure for bringing a summary eviction proceeding is the same for both types of tenancies, while the substantive rights of the parties are different.

§ 2 [c] [10]; *see also N.Y. State Club Ass'n v City of New York*, 69 NY2d 211, 217 [1987] (citations omitted)). For the reasons discussed above, the Good Cause Law clearly relates to the safety, health, and well-being of Albany residents and is firmly within Albany's police powers. Nonetheless, the Supreme Court found that the Law was inconsistent with state law and preempted under the doctrine of conflict preemption.<sup>22</sup> This holding was in error.

For a local law to be invalid pursuant to the conflict preemption doctrine, “the State must specifically permit the conduct the local law prohibits or provide ‘some other indication that deviation from state law is prohibited’” (*People v Torres*, 37 NY3d 256, 268 [2021], quoting *Garcia v New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601, 617-618 [2018]; *Matter of Chwick v Mulvey*, 81 AD3d 161, 168 [2d Dept 2010] (“Put differently, conflict preemption occurs when a local law prohibits what a state law explicitly allows, or when a state law prohibits what a local law explicitly allows.”)). Inconsistent does not mean “different” (*Zorn*, 276 AD2d at 55 (citations omitted)). Instead, there must be a “head-on collision” between the local law and state law (*Matter of Lansdown*

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<sup>22</sup> There is no indication that the legislature wished to occupy the entire field of landlord-tenant relations by enacting the RPL and RPAPL. Indeed, this Court has previously held that no field preemption existed with respect to Ithaca's addition of an additional grounds for eviction (*Zorn v Howe*, 276 AD2d 51, 53-54 [3d Dept 2000]).

*Entertainment Corp. v New York City Dept. of Consumer Affairs*, 74 NY2d 761, 764 [1989]).

Moreover, the Legislature’s silence on a subject, which might be taken to mean that state law allows an act that a local law prohibits, does not mean that a local law is preempted (*People v Cook*, 34 NY2d 100, 109 [1974]). If that were the case, local governments would not have any power to regulate, and the home rule established by the Constitution would be illusory (*id.*). “Any time that the State law is silent on a subject, the likelihood is that a local law regulating that subject will prohibit something permitted elsewhere in the State. . . . A different situation is presented when the State has acted upon a subject, and in so acting has evidenced a desire that its regulations should pre-empt the possibility of varying local regulations” (*id.*).

Here, the Law operates in a space where state law is silent. The Good Cause Law displaces common law rules about tenancy termination; in other words, it supplants certain judge-made rules about when a tenant’s “term expires” (*see Calvi*, 195 AD2d at 830). Because no statutes set these rules, the Law neither prohibits what state law explicitly allows nor allows what state law explicitly prohibits (*Matter of Chwick*, 81 AD3d at 168). To expand on *Matter of Lansdown Entertainment Corp.*’s “head-on collision” metaphor (74 NY2d at 764), the Law is not even on the same road as the RPL and RPAPL; it is operating on a level



beneath them. Therefore, preemption does not exist with respect to any of the bases found by the Supreme Court.

1. *The Good Cause Law is not preempted by RPL § 228.*

At the outset, the Supreme Court mischaracterized RPL § 228 as applying to “month-to-month” tenancies (*Pusatere v City of Albany*, Sup Ct, Albany County, June 30, 2022, Ryba, J., index No. 909653-21, Decision/Order at 5) (*Pusatere* Decision/Order). By its own terms, the statute only applies to tenancies at sufferance and tenancies at will (*see, e.g., Donnelly v Neumann*, 170 AD3d 597, 598 [1st Dept 2019]). As explained above, these tenancies are not defined by statute: at common law, a tenancy at sufferance comes into being when a tenant remains in possession after the term of their lease without consent of the landlord, while a tenancy at will arises when a tenant takes possession with the consent of the landlord but without an agreement as to the duration of the tenancy or the amount of rent to be paid. When such tenancies exist, state law provides that they may be terminated by the service of a thirty-day notice to quit (Real Property Law § 228).

First, the Good Cause Law does not conflict with RPL § 228 because the latter prescribes the type of notice required for terminating these two types of common law tenancies, while the Good Cause Law does nothing of the sort. There is no “head-on collision” between the Law and RPL § 228—the statutes do not

speak to the same subject matter. Second, by providing tenants with substantive protections against eviction and setting the conditions by which tenancies may be terminated, the Law displaces these and other common-law categories, meaning that the number of tenants at sufferance and tenants at will in properties covered by the Law would be essentially zero.

As discussed above, the common law defines a tenant at sufferance as someone who remains in possession after a lease's end date, without the consent of the landlord (*Smith*, 51 NY at 541). A tenant at sufferance is not in privity of estate or contract with the landlord, and consequently has no rights beyond possession and no obligation to pay rent (*Rowan*, 11 Wend at 618). Under the Good Cause Law, there is no such thing as a tenancy at sufferance: when the lease period ends, the tenancy continues under the same terms until the landlord provides the tenant with a new lease in compliance with the Law (Albany City Code § 30-328 [A], [A] [10]). The failure to sign a compliant lease is “good cause” for eviction under the Law (*id.*).

Similarly, while a tenancy at will traditionally commences when the landlord consents to a person occupying the property for an indefinite period without charge and can be terminated when the landlord revokes such consent (*Larned*, 60 NY at 104-05), the Good Cause law also erases this category by giving all covered

tenants the option to remain in possession by accepting the landlord's offer of a lease (Albany City Code § 30-328 [A], [A] [10]).

In sum, Albany has the power to act where state law is silent (*Cook*, 34 NY2d at 109). RPL § 228 only applies to tenancies at sufferance and tenancies at will, which are only defined by the common law (*e.g.*, *Larned*, 60 NY at 105). Because these types of tenancies do not exist as a practical matter under the regime created by the Law, it does not prohibit what state law explicitly allows, and is not preempted.

2. *The Good Cause Law is not preempted by RPL § 226-c.*

The Supreme Court also erred when it ruled that the notice provisions of RPL § 226-c regarding the landlord's intent not to renew the tenancy or to increase the rent preempted the Good Cause Law.

i. Tenancy Non-Renewal

Like RPL § 228, RPL § 226-c prescribes how much advance notice of a termination of a tenancy—in this case based on non-renewal of the tenancy<sup>23</sup>—a landlord is required to give. The amount of required notice depends on the length of the tenancy (Real Property Law § 226-c [2]). However, also like RPL § 228, RPL § 226-c is a procedural statute. The landlord's right to choose not to renew and terminate the tenancy is derived not from the statute, which mandates a notice

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<sup>23</sup> By its terms, this would apply primarily to a periodic tenancy, a monthly tenancy, and a tenancy for a year or years.

when the landlord “does not intend to renew the tenancy” (Real Property Law § 226-c [1] [a]). Rather, the right comes from the common law (*e.g.*, *Carlo*, 53 Misc 3d at 471-72 (monthly and periodic tenancies); *Adams*, 127 NY at 182 (tenancy for a year or years)). So, RPL § 226-c merely sets the amount of notice a landlord is required to give when the landlord is otherwise legally permitted to terminate or decline to renew the tenancy.

As discussed above, the Good Cause Law does not conflict with RPL § 226-c because it does not contain notice requirements regarding tenancy non-renewal and termination. Indeed, the Law explicitly states that it preserves all existing legal requirements concerning notice to tenants (Albany City Code § 30-329). It also does not conflict with RPL § 226-c because it eliminates a landlord’s common law right to choose not to renew a lease (*id.* § 30-328). So, as with RPL § 228, the notice of non-renewal required by RPL § 226-c will not be generally applicable to properties covered by the Law. If there were a case where a landlord could lawfully choose not to renew a lease in a covered property, the notice of non-renewal would remain subject to RPL § 226-c’s requirements.

ii. Rent Increases

The Good Cause Law also protects tenants from eviction for the nonpayment of unconscionable rent increases or rent increases that are intended to circumvent the Law’s protections (*id.* § 30-328 [A] [1]). There is no conflict between this

provision and RPL § 226-c. The Law does not impose different notice requirements on landlords: it specifically incorporates RPL § 226-c's notice requirements (*id.* § 30-328 [A] [10] [4]). And as discussed above, RPL § 226-c does not grant a landlord legal permission to do anything; it merely requires a landlord to give a tenant notice of its intent to increase the rent.

The Good Cause Law only applies to evictions, so it does not limit what rent a landlord may charge, and a tenant may agree to pay (*id.* § 30-328 [A] [1]).<sup>24</sup> There is no generally applicable state law that provides that a landlord has the untrammelled right to increase a tenant's rent and then evict the tenant for nonpayment. A landlord's right to evict a tenant for not paying rent is founded in the rental contract, as nonpayment of rent is a breach of contract that may justify forfeiture of the lease (*see e.g., Restoration Realty Corp. v Robero*, 87 AD2d 301, 305 [1st Dept 1982]; *57 E. 54 Realty Corp. v Gay Nineties Realty Corp.*, 71 Misc 2d 353, 354-55 [App Term, 1st Dept 1972]). Because a lease is a contract, tenants may defend against eviction proceedings by raising common law contract defenses, including unconscionability (*Matter of Conifer Realty LLC (Envirotech Servs., Inc.)*, 106 AD3d 1251, 1253-54 [3d Dept 2015]).

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<sup>24</sup> For this reason, among others, the Supreme Court correctly found that the Law is not rent control.

Therefore, nothing in the Law prevents a landlord from complying with RPL § 226-c (or from bringing a nonpayment of rent summary proceeding pursuant to RPAPL 711[2]). To the contrary, the Law establishes a substantive defense which is essential to its functioning. If landlords were able to evict tenants for not paying inflated unconscionable or pretextual rents, the other protections of the Law would be meaningless.

3. *The Good Cause Law is not preempted by RPAPL 711 [1].*

The Supreme Court also found that the Good Cause Law “places an impediment to landowners’ free access to the courts and limits the remedies provided in RPAPL” (*Pusatere* Decision/Order at 5, quoting *Zorn*, 276 AD2d at 54). However, just as with RPL §§ 228 and 226-c, nothing in the Law impedes any statutory right held by landlords.

As explained in Section II.D.3, *supra*, a landlord may evict a tenant through an RPAPL 711 [1] proceeding when the tenant’s term has expired. No statute defines when a tenant’s term expires; the common law does (*Calvi*, 195 AD2d at 830). The Good Cause Law fills this void by providing that a landlord may only terminate a tenancy (and cause the tenant’s term to expire) for good cause.

The Law does not curtail any rights provided by RPAPL 711 [1] because the RPAPL statute only provides a procedural mechanism, not any substantive rights.<sup>25</sup> A similar good cause law in Berkeley, California was at issue in *Birkenfeld*. There, the law’s challengers argued that it conflicted with, and was preempted by, a state law that made “the continuation of a tenant's possession after expiration of the term a form of unlawful detainer for which the landlord may recover possession in summary proceedings” (*Birkenfeld*, 17 Cal 3d at 148). The California Supreme Court found that no conflict existed because the unlawful detainer statute’s purpose was procedural, while the good cause law was Berkeley’s creation of a “substantive ground of defense in unlawful detainer proceedings” pursuant to its police power (*id.*). The mere fact that the creation of a substantive defense may affect an RPAPL 711 [1] proceeding is not enough to create a conflict; Albany can create a substantive defense to a summary proceeding just as Ithaca can create a substantive ground for one (*see Zorn*, 276 AD2d at 54).

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<sup>25</sup> The Second Department’s decision in *Bar Mar, Inc. v County of Rockland* (164 AD2d 605 [2d Dept 1991]) does not hold otherwise. This decision concerned manufactured homes, which involve a type of property interest that did not exist at common law. The Second Department found that the legislature intended to occupy the field with respect to manufactured home regulation (*id.* at 613-14). While the Second Department also found that Rockland’s good cause requirements conflicted with the version of RPAPL 733 in effect at that time due to its lack of a provision concerning holdover tenants, RPAPL 733 lists the grounds for which a manufactured home tenant “may be evicted” (*id.* at 615), while RPAPL 711 [1] is solely a procedural statute that prescribes when “[a] special proceeding may be maintained.” Additionally, in finding there was a conflict, the Second Department mistakenly assumed that the “expiration of the tenant’s term” was fixed by state law (*see id.* at 615).

This Court remarked that there was a “telling contrast” between the Ithaca ordinance challenged in *Zorn* and the local law at issue in *Tartaglia v McLaughlin* (190 Misc 266 [Sup Ct, Kings County 1947], *affd* 273 AD 821 [2d Dept 1948], *revd on other grounds* 297 NY 419 [1948])—the Ithaca ordinance “place[d] no impediment upon landowners’ free access to the courts or to the remedies provided in the RPAPL” (276 AD2d at 54). The same comparison applies here and illustrates why there is no conflict between the Good Cause Law and RPAPL 711[1].

The New York City ordinance challenged in *Tartaglia* required landlords to obtain a certificate from a city commission certifying that a permissible ground for eviction existed before they could commence a summary eviction proceeding against a tenant (190 Misc at 268). Landlords challenged a similar requirement in *Birkenfeld* (17 Cal 3d at 151). Both laws conflicted with state summary eviction proceeding statutes because they required landlords to take an additional procedural step before accessing the courts and availing themselves of the statutory procedure (*Tartaglia*, 190 Misc at 271; *Birkenfeld*, 17 Cal 3d at 151). This contrasts with good cause requirements, which “affect summary repossession proceedings only by making substantive defenses available to the tenant” (*Birkenfeld*, 17 Cal 3d at 151). Otherwise stated, there is a “head-on collision” between the laws requiring eviction certificates and RPAPL 711 [1] because the



former require different procedures for commencing a summary eviction proceeding than state law, while there is no conflict between a state procedural statute and a local law that establishes a substantive ground for or a defense to such proceeding.

### **III. CONCLUSION**

For the reasons stated above, the Good Cause Law is a valid exercise of Albany's police powers directed at addressing a pressing social problem. It is not preempted by state law. The Court should reverse the decision below and remand the case with instructions to enter judgment in favor of the defendants-appellants.

Respectfully submitted,

/s/ Evan Henley

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