

24-1678

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

HUDSON SHORE ASSOCIATES LIMITED PARTNERSHIP, HAVEN ON THE HUDSON
LLC, KENNETH LEVINSON, HUDSON VALLEY PROPERTY OWNERS
ASSOCIATION,

Plaintiffs-Appellants,

v.

STATE OF NEW YORK, NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL, VILLAGE OF NYACK, NEW YORK, CITY OF
POUGHKEEPSIE, NEW YORK,

Defendants-Appellees.

*On Appeal from the United States District Court
for the Northern District of New York*

**BRIEF OF AMICI CURIAE COMMUNITY VOICES HEARD & FOR THE
MANY IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

Evan Henley
Edward Josephson
THE LEGAL AID SOCIETY
49 Thomas Street, Floor 5
New York, NY 10013

Marcie Kobak
LEGAL SERVICES OF THE
HUDSON VALLEY
90 Maple Avenue
White Plains, NY 10601

Counsel for *Amici Curiae*

CORPORATE DISCLOSURE STATEMENT

Neither Community Voices Heard nor For the Many is owned by a parent corporation, and no publicly held corporation owns more than ten percent of Community Voices Heard or For the Many.

For the Many's fiscal sponsor is Tides Advocacy, which is affiliated with the following entities: Tides, Inc., Tides Foundation, Tides Two Rivers Fund, and Tides Center.

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INTRODUCTION AND STATEMENT OF INTEREST

Amici Curiae Community Voices Heard and For the Many (“*amici*”) are nonprofit organizations that represent low-income tenants throughout New York.¹ They are on the steering committee of the Upstate Downstate Housing Alliance, which led lobbying efforts for the expansion of rent stabilization. *Amici* have members who live in municipalities that have considered opting into rent stabilization and conducted vacancy surveys, including Poughkeepsie, Kingston, and Newburgh. *Amici*’s interest in this appeal stems from their dedication to advocating for affordable and secure housing for all New Yorkers.

Rent regulation has existed in New York for over a century. While its form and geographic coverage have shifted over time, over the past hundred years, rent regulation has benefited millions of New Yorkers by ensuring that they do not face extreme rent hikes and sudden eviction and can make their rental units a long-term home. Also over the past hundred years, the rent regulation system has faced a barrage of constitutional challenges. It has withstood all of them.

In 2019, recognizing that severe rental housing shortages were not limited to New York City and its surrounding counties, the New York State legislature amended the Emergency Tenant Protection Act (“ETPA”) to permit municipalities

¹ *Amici* certify that no party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than *amici* and its counsel contributed money that was intended to fund preparing or submitting the brief.

around the state to opt into rent stabilization by determining and declaring a housing emergency.² Because rent stabilization is just as constitutional elsewhere in the state as it is in New York City and Nassau, Rockland, and Westchester Counties, Plaintiffs-Appellants (“the landlords”) have tried another line of attack: subverting the process by which municipalities can determine that a housing emergency exists and opt into rent stabilization. This new challenge to the rent-stabilization scheme is as flawed as its predecessors.

Rent regulation cannot function without landlords’ disclosures regarding rents, vacancies, and the identity of tenants. Mandating that landlords provide basic information regarding their rentals does not violate the Fourth Amendment, whether this disclosure is required after an apartment becomes subject to rent stabilization or before—when a municipality is deciding if it can and should opt into rent stabilization. Simply put, requiring landlords to disclose this information to a municipality does not infringe on their privacy interests.

The statutory presumption that landlords who fail to respond to a vacancy survey have zero vacancies formalizes a decades-long practice and prevents landlords from obstructing the survey process. It does not impair the landlords’ due process rights.

² And in 2023, the legislature defined the survey process that municipalities use to make this determination.

The Court should affirm the District Court’s dismissal of the landlords’ claims.

ARGUMENT

I. New York’s System of Rent Regulation

“Rent control legislation has been a vital part of the American scene since World War I.” *In re Berry Estates, Inc.*, 812 F.2d 67, 68 (2d Cir. 1987) (citations omitted). This is especially true in New York. Part I of this brief provides needed context for the landlords’ claims.

A. *A Brief History of Rent Regulation in New York*

Faced with severe housing shortages following World War I—“a problem of the utmost gravity, calamitous in its possibilities”—New York instituted rent regulation in New York City and the surrounding counties in 1920. *People ex rel. Durham Realty Corp. v. La Fetra*, 130 N.E. 601, 603-604 (N.Y. 1921). This regulatory regime lapsed after ten years. *Cnty. Hous. Improvement Program v. City of New York*, 59 F.4th 540, 544 (2d Cir. 2023). But just over a decade later, the federal government imposed rent controls during World War II. *See id.* at 545. State legislation superseded federal controls in 1950. *E.g.*, N.Y. Unconsol. Laws

ch. 249, § 3; *Cnty. Hous. Improvement Program*, 59 F.4th at 545.³ Rent regulation has existed continuously in New York since then.

In 1969, New York City enacted the Rent Stabilization Laws, which brought units constructed between 1947 and 1969 under rent regulation. *See Cnty. Hous. Improvement Program*, 59 F.4th at 545; W. Dennis Keating, *Landlord Self-Regulation: New York City's Rent Stabilization System 1969-1985*, 31 Wash. U. J. Urb. & Contemp. L. 77, 81-82 (1987) [hereinafter *Landlord Self-Regulation*]. Then, in 1971, the legislature authorized vacancy decontrol, which led to the loss of hundreds of thousands of rent-regulated units over the next three years.

Landlord Self-Regulation 93. This and other factors spurred the passage of the Emergency Tenant Protection Act of 1974 (“ETPA”). *See* N.Y. L. 1974, ch. 576, § 2. Among other changes, the ETPA returned these decontrolled units to rent stabilization and expanded rent-stabilization coverage to municipalities in Westchester, Rockland, and Nassau Counties that declared housing emergencies. *Landlord Self-Regulation* 93-94. So, since 1974, Nyack has had the ability to opt into ETPA coverage upon declaring a housing emergency.

Unlike New York City’s Rent Stabilization Laws, which landlords initially largely enforced themselves, under the ETPA, municipalities opting into rent

³ New York’s rent control legislation initially applied throughout the state to units constructed before February 1, 1947; however, over time, the law permitted units outside New York City to be “decontrolled.” *See, e.g.*, N.Y. Unconsol. Laws ch. 249, § 2(g), (i), (k).

stabilization designated a state agency, the Division of Housing and Community Renewal (“DHCR”), as their programs’ administrator. *Id.* at 94. The shift to state regulation was important because the New York City system of landlord self-regulation erroneously presumed that landlords would charge legal rents and make rent histories available to tenants. This system was woefully ineffective at preventing and penalizing rent overcharges. *See id.* at 111-112.

The ETPA regime remains more or less in place today. DHCR assumed administrative responsibility for rent-stabilized units in New York City in 1984. In 2019, the Housing Stability and Tenant Protection Act expanded rent-stabilization coverage to the rest of the state. N.Y. L. 2019, ch. 36, pt. G.⁴ Now, any municipality in New York, including Poughkeepsie, can opt into rent stabilization following a determination that the vacancy rate for a certain class of housing accommodation is below five percent and a legislative declaration of a housing emergency. N.Y. Unconsol. Laws ch. 249-B, § 3(a).

B. Rent Regulation and Required Disclosures under the Emergency Tenant Protection Act

Monitoring compliance with the ETPA “requires a registry of rent-regulated units and an effective system for monitoring increases.” Vicki Been et al.,

Laboratories of Innovation: Understanding the Diversity of Rent Regulation Laws,

⁴ Rent-stabilized units inside and outside New York City are governed by parallel sets of regulations. N.Y. Comp. Codes R. & Regs. tit. 9, §§ 2500.1-2510.13; N.Y. Comp. Codes R. & Regs. tit. 9, §§ 2520.1-2530.1.

46 Fordham Urb. L.J. 1041, 1057 (2019). Like many laws that are largely policed through private enforcement, rent regulation under the ETPA rests on a robust set of required disclosures from landlords. This “informational regulation” is integral to rent regulation, as it helps correct the informational asymmetry between landlords and tenants regarding the rent history for a particular unit. *Cf.* Margaret Kwoka, *Targeted Transparency as Regulation*, 48 Fla. St. U. L. Rev. 385, 388 (2021); Cass Sunstein, *Informational Regulation and Informational Standing*, 147 U. Pa. L. Rev. 613, 613-614 (1999).

The ETPA’s rent registration requirements began in 1983. N.Y. L. 1983, ch. 403, § 12-a. Within ninety days of the date that a unit becomes subject to the ETPA and each year thereafter, a landlord has to file a statement with DHCR that includes 1) the address of the unit and the name of the owner and tenant; 2) the number of units in the building; 3) the number of rent-regulated units in the building; 4) the rent charged on the registration date; 5) the number of rooms in the unit; and 6) the services provided under the last lease or agreement. N.Y. Unconsol. Laws ch. 249-B, § 12-a. The landlord must provide each tenant in possession with a copy of the portion of each statement that pertains to the tenant’s unit. *Id.* § 12-a(f). After DHCR provides notice of the delinquency, a landlord that fails to file an annual registration statement faces a fine of \$500 per month. *Id.* §

12-a(e). Although the registration statements are not made public, the tenant may obtain the registration information for their unit. *Id.* § 12-a(b).

Disclosure of this information serves a vital dual function. *See* Stephanie Bornstein, *The Enforcement Value of Disclosure*, 72 Duke L.J. 1771, 1775 (2023). Of course, the primary effect of the disclosure is to help tenants gauge the propriety of the rent charged and “nudge” them to perform further investigation and file an overcharge complaint if warranted. However, the disclosure also has a valuable secondary effect, as landlords’ knowledge that they must disclose this information makes it more likely that they will adhere to the law. *See id.* at 1775-1776.

Overcharge caselaw demonstrates the importance of rent registration requirements. Landlords have far too often charged illegally inflated rents, even engaging in brazen fraudulent schemes to do so. *See, e.g., Thornton v. Baron*, 833 N.E.2d 261, 262-263 (N.Y. 2005); *Bradbury v. 342 W. 30th St. Corp.*, 924 N.Y.S.2d 349, 351 (N.Y. App. Div. 2011). They have filed false registration statements bearing the names of fictitious tenants and patently incorrect descriptions of the unit’s regulatory status. *See, e.g., Lyndonville Props. Mgmt. v. Div. of Hous. & Cmty. Renewal*, 737 N.Y.S.2d 617, 617-618 (N.Y. App. Div. 2002); *125 Court St., LLC v. Nicholson*, 115 N.Y.S.3d 817, 820-822 (N.Y. App. Term 2019). The disclosure requirements helped hold these landlords accountable.

And when landlords failed to file or serve registration statements, under prior law, tenants who did not independently recognize that an illegal rent increase had occurred and timely challenge it lost their ability to do so. *See, e.g., Myers v. Frankel*, 708 N.Y.S.2d 566, 567-568 (N.Y. App. Term 2000), *rev'd*, 740 N.Y.S.2d 366 (N.Y. App. Div. 2002). In sum, rent registrations “memorialize facts about tenancies so as to enable landlords, tenants, DHCR, and Courts to accurately evaluate anything having to do with . . . the legality of rents.” *Bel-Air Leasing L.P. v. Berezovska*, Index No. 74804/2019, 2021 N.Y. Misc. LEXIS 2943, at *6 (N.Y. Civ. Ct. June 3, 2021).

C. Declaration of a Housing Emergency

A municipality opts into the ETPA by declaring a housing emergency as to a certain class of housing accommodations within its borders. N.Y. Unconsol. Laws ch. 249-B, § 3(a). A finding of a vacancy rate of less than five percent for that class of housing accommodations is a necessary, but not a sufficient, condition for a declaration of a housing emergency. *See id.* The municipality must declare the emergency at an end once the vacancy rate exceeds five percent. *See id.* § 3(b); *Executive Towers at Lido, LLC v. City of Long Beach*, 831 N.Y.S.2d 445, 447 (N.Y. App. Div. 2007).

The determination of a vacancy rate, then, necessarily involves a surveying mechanism that takes a snapshot of the vacancy rate for the municipality at a

particular point in time. Because the ETPA requires a factual finding, these surveys have been fiercely contested, and the results have almost invariably been disputed in lengthy and costly court proceedings. *See, e.g., PJB Equities v. Vill. of Ossining*, 209 N.Y.S.3d 548 (N.Y. App. Div. 2024); *Hudson Valley Prop. Owners Ass’n v. City of Kingston*, 208 N.Y.S.3d 322 (N.Y. App. Div. 2024).

The rule announced in *Spring Valley Gardens Associates* has guided courts’ reviews of vacancy surveys for the past forty years: the survey must be a “good faith study based on precise data.” *Spring Valley Gardens Assocs. v. Marrero*, 474 N.Y.S.2d 311, 316 (N.Y. App. Div. 1984), *aff’d*, 496 N.E.2d 216 (N.Y. 1986). A municipality need not completely survey all housing but “must ground its determination upon a common sense approach.” *Executive Towers at Lido, LLC*, 831 N.Y.S.2d at 447.

Given the potential consequences of a vacancy survey, landlords have an incentive to give false information regarding vacancies and to frustrate the survey process. Unfortunately, as evidenced by the cases described in Section I.B, *supra*, some landlords will go to great lengths in an attempt to avoid rent stabilization. In the survey context, such efforts can alter the outcome or muddle the results, giving rise to litigation. In any case, they inflict cost on the municipality by making the survey a more time-consuming and burdensome process. And the tenants living in

the midst of a housing emergency are harmed, as they are deprived of the benefits of legislation intended to protect them.

It follows that one part of a “commonsense approach” to surveying is to assume that nonresponsive landlords have zero vacancies. *See Spring Valley Gardens Assocs.*, 474 N.Y.S.2d at 316. This presumption has been permitted for forty years. *See id.* The amendment to the ETPA ensures that surveying municipalities take a uniform approach in this regard and that landlords are on formal notice of this rule. *See* N.Y. Unconsol. Laws ch. 249-B, § 3(f). Likewise, it is common sense that a municipality would not merely rely on landlords’ self-reported information regarding vacancies on a survey sheet, which may be self-serving or false. *See* Sponsor’s Mem., N.Y. S. 1684 (2023) (providing justification for amendments to survey process).⁵ Instead, particularly where a landlord provides ambiguous or contradictory information, the municipality will follow up by making phone calls, visiting the property, and taking other actions. This is part of the municipality’s mandate to acquire “precise data.” *See Spring Valley Gardens Assocs.*, 474 N.Y.S.2d at 316.

⁵ Available at <https://www.nysenate.gov/legislation/bills/2023/S1684/amendment/original>. The bill sponsor, Senator Hinchey, noted that landlords, including in Kingston and Rochester, had “stymied” the survey process by ignoring requests or giving inaccurate information.

There is a much more streamlined way to ensure that the survey results in an accurate vacancy count: requiring the disclosure of information regarding the total number of units and vacant units in a building, the names of the tenants living in these units, and the rents charged to them. Such information is much harder to manipulate and is easily accessible to landlords from their rent roll records. Thus, it is common sense for the surveying municipality to require the disclosure of this information, when necessary. It effectuates the purpose of the ETPA by ensuring that the survey provides a true picture of the vacancy rate. Moreover, it aids municipalities and landlords alike by affording an efficient means to obtain and provide precise and verifiable data regarding the number of vacancies in a building.⁶

The current litigation regarding Poughkeepsie’s vacancy survey illustrates why the survey amendments⁷ required disclosures will benefit everyone involved. *See Docket, Corlis Manor Realty, LLC v. The City of Poughkeepsie*, Index No. 2024-53504 (N.Y. Sup. Ct.).⁸ In that case, the plaintiffs-petitioners (including

⁶ Requiring three years of rent roll records serves at least two purposes. First, it reduces a landlord’s opportunity to manipulate records. Second, it allows the municipality to “zoom out” and have a fuller picture of the housing market to determine whether it should declare a housing emergency.

⁷ N.Y. Unconsol. Laws ch. 249-B, § 3(d).

⁸ *Available at* https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=ejn9I3_PLUS_1Nwq0mdbRrWE MCA==&PageNum=1&narrow=.

Plaintiff-Appellant Hudson Valley Property Owners Association) have alleged that Poughkeepsie used a flawed survey methodology and undercounted the number of vacancies. *See, e.g.*, Petition-Complaint 2, *Corlis Manor Realty, LLC*, NYSCEF Doc. No. 1. Poughkeepsie has responded to the allegations in part through an affirmation by a member of the company that conducted the survey on Poughkeepsie's behalf. Guha Aff., *Corlis Manor Realty, LLC*, NYSCEF Doc. No. 52. Ms. Guha states that her company used the same methodology that it used for Ossining's survey five years ago, which courts approved. *Id.* at 2. She details the process that her company used to conduct the survey, including mailings, follow-up phone calls, and site visits. *See generally id.* On the other hand, the plaintiffs-petitioners submit their own analysis of the survey responses and provide affirmations from landlords or their employees contesting the analysis of their survey responses and the vacancy counts for their properties. Each affirmation attaches an email sent to the mayor of Poughkeepsie to challenge the survey results' accuracy. *See Corlis Manor Realty, LLC*, NYSCEF Doc. Nos. 7, 17-27.

The stakes of the Poughkeepsie litigation are high, especially for the tenants who are experiencing the effects of a declared housing emergency and now face uncertainty about whether they will be protected by rent stabilization. New York courts will decide the current dispute. But what is evident is that survey results will always be subject to some manner of interpretation, a survey cannot continue

indefinitely, and a survey seeking precise data cannot rely on responses made in after-the-fact emails to a mayor. This type of dispute is exactly the scenario that the survey amendments attempt to prevent. The disclosure of objective data from the rent rolls will help avoid a situation where ETPA coverage is delayed due to vacancy survey litigation that revolves around, for example, what was said during a survey phone call. *See Lussow Aff., Corlis Manor Realty, LLC*, NYSCEF Doc. No. 24.

II. **Vacancy surveys do not violate the Fourth Amendment.**

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. When an individual seeks to preserve an area or sphere as private, and the expectation of privacy is reasonable, “official intrusion into that private sphere generally qualifies as a search and requires a warrant.” *Carpenter v. United States*, 585 U.S. 296, 304 (2018). If the individual does not have a reasonable expectation of privacy in a location or sphere, then there is no “search,” and no warrant is required. *See, e.g., Minnesota v. Carter*, 525 U.S. 83, 88, 91 (1998); *United States v. Holland*, 755 F.2d 253, 255 (2d Cir. 1985).

The disclosures required by the vacancy survey, including the production of rent roll and vacancy records, do not violate the landlords’ Fourth Amendment rights because they have no reasonable expectation of privacy in the information in these records. *See Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 66-67 (1974); *Hotop*

v. City of San Jose, 982 F.3d 710, 714-16 (9th Cir. 2020). The ETPA requires certain disclosures,⁹ and the survey amendments merely expand the timeframe in which landlords must make them.

The landlords' amended complaint contains no allegations concerning their privacy interests in the information contained in the relevant business records. (A9-28). Instead, by conceding that they are not challenging "the constitutionality of . . . rent stabilization in itself," (A204), the landlords also concede that they would be legally obligated to provide the same information required by the surveys once their municipality opts into rent stabilization, *see* N.Y. Unconsol. Laws ch. 249-B, § 12-a. This is fatal to any claim that they have a privacy interest in this information. *See Hotop*, 982 F.3d at 715 ("The complaint does not contain any factual allegations distinguishing the information at issue in this case from the similar information landlords already provide to the City in other contexts under regulations whose validity has not been challenged.").

As described above, the disclosures required by the ETPA are central to rent stabilization and are akin to many other types of transparency and financial disclosure requirements that exist throughout the United States. These disclosure requirements are essential regulatory tools, Section I.B, *supra*, and they are

⁹ Nyack landlords have been on notice that they might have to provide this information since 1983, while Poughkeepsie landlords have been on notice since 2019. *See* N.Y. Unconsol. Laws ch. 249-B, § 12-a.

constitutional so long as they are reasonable, *Cal. Bankers Ass'n*, 416 U.S. at 67.

The information sought by disclosure requirements must be “sufficiently described and limited in nature” and “sufficiently related to a tenable” legislative purpose.

*Id.*¹⁰

The vacancy survey disclosure requirements are reasonable. First, as in *California Bankers Association*, the landlords are a party to the transactions that they are required to report, earn income from the transactions, and have kept records regarding the transactions for their own purposes. *See* 416 U.S. at 66. Second, the requirements are definite: upon request, landlords must disclose information regarding rents, tenants, and vacancies.¹¹ N.Y. Unconsol. Laws ch. 249-B, § 3(d). Third, for the reasons provided above, the information is

¹⁰ “The inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.” *Cal. Bankers Ass'n*, 416 U.S. at 67 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950)).

¹¹ “[T]he most recent records of rent rolls and, if available, records for the preceding thirty-six months. Such records shall include the tenant’s relevant information relating to finding the vacancy rate of such municipality including but not limited to the name, address, and amount paid or charged on a weekly, monthly, or annual basis for each occupied housing accommodation and which housing accommodations are vacant at the time of the survey and available for rent. Such records shall also include any housing accommodations that are vacant and not available for rent and provide the reason why such unit is not available for rent.” N.Y. Unconsol. Laws ch. 249-B, § 3(d). The landlords fix on the “including but limited to” language to argue that the statute confers broad latitude on municipalities to make intrusive demands, Appellants Br. 19, but they provide no examples where municipalities have requested any additional information whatsoever.

undoubtedly relevant to conducting an accurate vacancy survey and the decision to declare a housing emergency.

The landlords' repeated invocation of *City of Los Angeles v. Patel*, 576 U.S. 409 (2015), ignores a critical point: in *Patel*, "it was undisputed that hotel owners do not ordinarily disclose, and are not expected to disclose, the kind of commercially sensitive information contained in the [guest registries]," *Hotop*, 982 F.3d at 716 (quoting *Patel v. City of Los Angeles*, 738 F.3d 1058, 1062 (9th Cir. 2013) (en banc), *aff'd*, 576 U.S. 409). The same is not true here. Instead, in municipalities throughout New York, landlords *do* ordinarily disclose, and are indeed required to disclose, the information requested by the vacancy surveys. *See, e.g.*, N.Y. Unconsol. Laws ch. 249-B, § 12-a. *Patel* is inapposite.

For a similar reason, the landlords' critique of the District Court's "closely regulated business exception" analysis misses the mark. Central to the exception is the recognition of "such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (citation omitted). In other words, a history of extensive government oversight means that there can be no reasonable expectation of privacy with respect to that part of the business's property that is closely regulated. *See id.*; *cf. Anobile v. Pelligrino*, 274 F.3d 45, 59 (2d Cir. 2001) (holding that closely regulated industry exemption did

not permit warrantless search of dormitory rooms on racetrack premises). The vacancy survey does not require landlords to provide municipalities access to their property or papers apart from their rent rolls and vacancy records. For purposes of the landlords' challenge, then, the question is not whether the residential rental industry as a whole is highly regulated but whether landlords have a reasonable expectation of privacy in their rent rolls and vacancy records. They do not.

Residential rents in New York have been highly regulated over the past century. *See, e.g.,* Section I.A, *supra*; Note, *Stronger than Ever: New York's Rent Stabilization System Survives Another Legal Challenge*, 90 Fordham L. Rev. 831, 838-42 (2021). The past forty years of registration requirements, N.Y. Unconsol. Laws ch. 249-B, § 12-a, mean that landlords have no reasonable expectation of privacy with respect to any records related to rents. At any time over the past forty years in Nyack and the past five years in Poughkeepsie, if justified, the municipalities could have declared a housing emergency and triggered the landlords' obligation to register rents and disclose the same information required by the vacancy surveys. The fact that these disclosures had not been required yet does not make the information within the records any more private. *See Hotop*, 982 F.3d at 715.

Without a legitimate expectation of privacy, the landlords cannot prevail on their Fourth Amendment claims. The District Court correctly dismissed them.

III. **The zero-vacancy presumption does not violate the Fourteenth Amendment.**

The landlords base their challenge to the zero-vacancy presumption, N.Y. Unconsol. Laws ch. 249-B, § 3(f), on procedural due process. However, while the landlords do not use this term, their argument rests on the idea that the zero-vacancy presumption is a sort of “irrebuttable presumption” that denies them the right to be heard. *See* Appellants Br. 43, 46-47. In other contexts, the Supreme Court and this Court have rejected this type of procedural due process claim. *See Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989); *Caitlin v. Sobol*, 93 F.3d 1112, 1118 (2d Cir. 1996). With a so-called irrebuttable presumption, the relevant constitutional inquiry is not procedural due process, but rather equal protection or substantive due process: “the adequacy of the ‘fit’ between the classification and the policy that the classification serves.” *See Michael H.*, 491 U.S. at 120-121 (citation omitted); *see also Caitlin*, 93 F.3d at 1118 (“We limit our consideration to the claim that the statute violates substantive due process.”).

The ETPA is economic legislation subject to rational basis review. *See, e.g., 74 Pinehurst LLC v. New York*, 59 F.4th 557, 569 (2d Cir. 2023). By dressing their claim in procedural due process garb,¹² the landlords fail to acknowledge the

¹² The landlords do not identify any additional procedures that they claim should be offered before or after the declaration of a housing emergency. Rather, their quarrel is with the perceived substantive effect of the zero-vacancy presumption within the available procedures. *See* Appellants Br. 43-50. Besides, their contention that they are being deprived of the opportunity to

deference given to such legislation. It is constitutional provided that it is “rationally related to legitimate government interests.” *74 Pinehurst LLC*, 59 F.4th at 569 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997)).

To opt into rent stabilization under the ETPA, a municipality must first find that the vacancy rate for a class of accommodations is less than five percent. N.Y. Unconsol. Laws ch. 249-B, § 3(a). The New York legislature determined that this is the appropriate benchmark for gauging whether a housing emergency exists, but it could have just as rationally chosen another metric. It has now clarified that the threshold for a housing emergency is a “vacancy rate of less than five percent where nonresponding landlords are considered to have zero vacancies.” The Sponsor’s Memorandum explains the rational basis for this legislation—it prevents landlords from stymying the survey process. Sponsor’s Mem., N.Y. S. 1684 (2023). Without the presumption, nonresponsive landlords with no vacancies could delay the survey process indefinitely and benefit from their refusal to respond. Municipalities facing the familiar problem of nonresponsive landlords have long employed this rationale for the presumption, and the New York Court of Appeals has approved it. *See Spring Valley Gardens Assocs.*, 496 N.E.2d at 217. Now, the

prove the “truth” regarding vacancy rates, Appellants Br. 43, is undercut by the fact that they are simultaneously contesting the requirement that landlords disclose records during the survey process, which would make the surveys more accurate.

legislature has instructed all municipalities to apply the same presumption and warned landlords of the consequences of not responding.

The ETPA embodies the New York legislature's judgment that a housing emergency exists in many municipalities throughout the state. Indisputably, the legislature would be entitled to change the substantive definition of "housing emergency" in response to changed conditions. With the zero-vacancy presumption, it has only concretized a presumption that municipalities had already been applying for decades to ensure that they are able to efficiently and effectively conduct vacancy surveys. The zero-vacancy presumption has a close fit to the policies promoted by the ETPA and is neither arbitrary nor unreasonable. It is constitutional. *See Caitlin*, 93 F.3d at 1119.

Additionally, the presumption changes none of the steps that municipalities must follow to declare a housing emergency and opt into rent stabilization. As to their own properties, the landlords can avoid the zero-vacancy presumption by simply responding to any future vacancy surveys. To the extent that the landlords have a protected property right that is affected by fellow landlords not responding, the zero-vacancy presumption does not impair their due process rights because the presumption has no effect on their right to be heard before or after the declaration of a housing emergency.

The ETPA obligates municipalities to hold a public hearing with at least ten days' notice before declaring a housing emergency. N.Y. Unconsol. Laws ch. 249-B, § 3(c). Given that hundreds or thousands of stakeholders may wish to be heard regarding this legislative act, a public hearing is appropriate to the nature of the situation and complies with due process. *See Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971); *Bowles v. Willingham*, 321 U.S. 503, 520-521 (1944). The zero-vacancy presumption does not circumscribe a municipality's discretion: a vacancy rate of less than five percent does not necessitate the declaration of a housing emergency. N.Y. Unconsol. Laws ch. 249-B, § 3(a). If a landlord presents concrete evidence that the vacancy rate for a property is wrong, a municipality will consider it because it must declare the end of the housing emergency once the vacancy rate exceeds five percent. *Id.* § 3(b).¹³ A municipality's decision to nonetheless declare the existence of a housing emergency does not mean that a landlord lacked a meaningful opportunity to be heard.

Similarly, post-declaration of a housing emergency, the landlords retain their ability to bring an Article 78 proceeding or a hybrid Article 78 proceeding and declaratory judgment action to contest it.¹⁴ *See, e.g., Colonial Arms Apts. v. Mt.*

¹³ The municipality will also make multiple attempts to contact a landlord before applying the presumption to ensure that it is later deemed to have conducted the survey in good faith. *See Spring Valley Garden Assocs.*, 474 N.Y.S.2d at 316.

¹⁴ This is the form of action brought by the Poughkeepsie petitioners-plaintiffs. Docket, *Corlis Manor Realty, LLC v. The City of Poughkeepsie*, Index No. 2024-53504.

Kisco, 480 N.Y.S.2d 895 (N.Y. App. Div. 1984). The availability of an Article 78 proceeding following the declaration of a housing emergency satisfies due process. *See, e.g., Interboro Inst., Inc. v. Foley*, 985 F.2d 90, 93-94 (2d Cir. 1993).

Landlords can challenge the survey methods or the results—with or without a zero-vacancy presumption, the housing emergency can only exist if the vacancy rate is below five percent, N.Y. Unconsol. Laws ch. 249-B, § 3(b). Therefore, the zero-vacancy presumption does not infringe on the landlords’ substantive or procedural due process rights.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's judgment dismissing the landlords' claims.

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Respectfully submitted,

/s/ Evan Henley

Evan Henley

Edward Josephson

THE LEGAL AID SOCIETY

49 Thomas Street, Floor 5

New York, NY 10013

212-298-5233

ewhenley@legal-aid.org

Marcie Kobak

LEGAL SERVICES OF THE HUDSON

VALLEY

90 Maple Avenue

White Plains, NY 10601

914-376-3757

mkobak@lshv.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the limitations of Federal Rule of Appellate Procedure 29(a)(5) and Local Rule 29.1(c). It contains 5,163 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). It has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word.

/s/ Evan Henley

Evan Henley