COURT OF APPEALS
STATE OF NEW YORK

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

Plaintiffs-Respondents,

-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

Albany County Index Number: 9096531-21

Third Department Appellate Number: 535695

MEMORANDUM OF LAW OF PROPOSED *AMICI CURIAE* COMMUNITY VOICES HEARD and FOR THE MANY IN SUPPORT OF DEFENDANTS-APPELLANTS' MOTION FOR LEAVE TO APPEAL

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July 25, 2023
New York, NY

CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 500.1 [f] of the Rules of Practice for the Court of Appeals of the State of New York:

Community Voices Heard states that it has no parents or subsidiaries and that it is affiliated with Community Voices Heard Power Inc.

For the Many states that its fiscal sponsor is Tides Advocacy, which is affiliated with the following entities: Tides, Inc., Tides Foundation, Tides Two Rivers Fund, and Tides Center. It has no subsidiaries.

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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 would be protected by local good cause eviction laws. *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. It has members in cities that have enacted or considered enacting good cause eviction legislation.

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. FTM brings people together across race, age, and language to fight for laws and win elections that put the power back in our hands. FTM works with thousands of tenants and homeowners to advocate for affordable and secure housing and has helped enact good cause eviction legislation in a number of cities in New York.

SUMMARY OF ARGUMENT

Responding to an acute housing crisis, the City of Albany (Albany) enacted Local Law F,[1] the "Prohibition of Eviction without Good Cause Law" (Good Cause Law or the Law). Other cities followed suit. 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.

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). The relevant RPL and RPAPL sections are statutes that prescribe forms of notice or afford a procedural mechanism. They leave intact the substantive common law tenancy categories and the common law rules concerning the termination of tenancies. The common law 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, impose a restriction on the exercise of a right given by state law, or otherwise conflict with a state statute.

In deciding that the RPL and RPAPL provisions preempted the Good Cause Law, the Third Department committed two related and substantial errors that warrant

[1] Albany City Code § 30-324 *et seq.*

review and reversal by this Court. First, its application of conflict preemption impermissibly infringes on municipalities' police powers to address the social effects of the eviction crisis. The finding of preemption, which necessarily relies on the construction of the New York Constitution, gives Defendants-Appellants the right to appeal the order. Second, and relatedly, the Third Department erroneously interpreted certain provisions of the RPL and RPAPL as conferring substantive rights on landlords.

New York is a state of renters. If allowed to stand, the Third Department's decision will have effects far beyond Albany and the Third Department. The decision hamstrings local governments' ability to enact legislation intended to reduce the number of evictions and consequent social harms within their borders. And its interpretation of the RPAPL and RPL runs counter to settled landlord-tenant doctrine and will affect the numerous eviction cases involving these provisions.

Therefore, should the Court find that Defendants-Appellants do not have the right to appeal, it should nonetheless grant them permission to appeal.

ARGUMENT

I. Defendants-Appellants have the right to appeal the Third Department's order.

While Defendants-Appellants have sought leave from this Court to appeal, this was unnecessary—they have the right to appeal, because the Third Department's order finally determined the action and directly rested on its construction of the State

Constitution (NY Const, art VI, § 3 [b] [1]; CPLR 5601 [b] [1]). The Third Department nullified Albany's Good Cause Law solely due to conflict preemption (*Pusatere v City of Albany*, 24 AD3d 91, 95-96 [3d Dept 2023]). Conflict preemption is a function of the Constitution, which grants municipalities the power to enact laws that are not inconsistent with the Constitution or any general state law (NY Const, art IX, § 2 [c] [ii]; Municipal Home Rule Law § 10 [1] [ii] [a] [implementing article IX]; *DJL Rest. Corp. v City of New York*, 96 NY2d 91, 94-95 [2001]).

This Court has consistently recognized that parties have the right to appeal final orders based on preemption because such decisions directly involve the construction of the Constitution (*Sunrise Check Cashing & Payroll Servs., Inc. v Town of Hempstead*, 20 NY3d 481, 484-85 [2013] [reviewing determination that ordinance was preempted]; *DJL Rest. Corp.*, 96 NY2d at 94 [reviewing decision that resolution was not preempted]; *cf. Sutton 58 Assoc. LLC v Pilevsky*, 36 NY3d 297, 304-05 [2020] [reviewing decision that plaintiff's claims were preempted by federal law]).

Because Defendants-Appellants have a constitutional right to appeal the Appellate Division's order, should the Court to deny their motion for leave to appeal, they may re-file the appeal as of right (CPLR 5514 [a]). Therefore, rather than denying the instant motion because an appeal as of right is available, the Court should deem this appeal as having been taken as of right and allow it to proceed (*cf.*

In re Shannon B., 70 NY2d 458, 462 [1987] [granting appellant's oral motion for permission to appeal when constitutional question was not preserved]).

II. Allowing the Third Department's decision to stand will prevent municipalities from responding to the housing crisis and addressing significant social harms.

The eviction crisis is one of New York's most pressing social issues, and municipalities will continue to seek to enact good cause eviction laws or similar legislation. In the absence of a ruling from this Court, the state's law will be set by, and trial courts will be bound by, the Third Department's ruling. This Court should review the decision to ensure that municipalities may use their police powers to address the negative social effects of the eviction crisis (*see Garcia v New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601, 617 [2018], citing *New York State Club Assn. v City of New York*, 69 NY2d 211, 221 [1987] ["[R]reading conflict preemption principles too broadly risks rendering the power of local governments illusory."]).

The Third Department held that the Good Cause Law impairs a landlord's substantive right to evict tenants and to increase tenants' rent (*Pusatere*, 214 AD3d at 95-96). For the Third Department, RPAPL 711 does not just provide a landlord with a summary eviction procedural mechanism in certain situations—i.e., when the landlord alleges that a tenant's lease has terminated or that a tenant has failed to pay rent. Instead, it defines the substantive elements of the landlord's eviction cause of

action. In the Third Department's view, Albany's good cause requirement amounted to impermissibly adding an additional element to a state statutory cause of action. (*Id.* at 96.) Similarly, the Third Department read RPL §§ 226-c and 228 as affording landlords substantive statutory rights. As will be explained below, these interpretations run counter to settled landlord-tenant doctrine.

If allowed to stand, these errors would not just prevent any municipality from requiring good cause for eviction. They would prohibit municipalities from enacting almost any type of tenant-protective legislation with respect to evictions. Under the Third Department's conception of the RPAPL and RPL, any right accorded to tenants intended to protect against evictions could be seen as a restriction on landlords' "right to evict." This would have grave consequences.

New York has the lowest homeownership rate in the nation, meaning that it has the highest proportion of tenant households (Office of the NY State Comptroller, *Homeownership Rates in New York* [Oct. 2022] [last accessed July 22, 2023]).[2] There are large tenant populations in localities throughout the state. In 2019, Albany had 63 percent tenant households, Newburgh had 68 percent, Poughkeepsie had 65 percent, and Kingston had 53 percent (Tom Waters, *Rental Housing Affordability in Urban New York: A Statewide Crisis* 16, Community Service Society [May 2019]

[2] Available at https://www.osc.state.ny.us/reports/homeownership-rates-new-york.

[last accessed July 22, 2023]).[3]

Communities throughout New York are facing an affordable housing and eviction crisis. Over 3.4% of Albany County households faced eviction in 2022, the third highest rate in the state. Rensselaer, Albany, and Schenectady Counties all ranked in the top five in New York. More than twice as many eviction warrants have issued in Albany County so far this year than in all of 2019, and more than twice as many eviction warrants issued in Ulster County in 2022 than in 2019 (and it is on pace for a similar number this year). Evictions in Orange and Dutchess Counties are on pace to return to 2019 levels. (NY State Unified Court System, *Statewide Landlord-Tenant Eviction Dashboard* [last accessed July 22, 2023].)[4]

Evictions have catastrophic effects, and they fall most heavily on communities of color.[5] There is a growing understanding that 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*

[3] Available at https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/Rental_Housing_in_Urban_New_York_A_Statewide_Crisis_WEB.pdf

[4] Available at https://ww2.nycourts.gov/lt-evictions-33576.

[5] In 2021, over 60 percent of Albany's eviction filings related to properties in predominantly BIPOC communities (Danielle Smith, *Evictions & Our Neighborhoods: Data from 2016 to 2021* at 2-4, City of Albany [Jan. 4, 2022] [last accessed July 22, 2023], available at https://www.albanyny.gov/DocumentCenter/View/6793/Evictions-and-Our-Neighborhoods-Data-from-2016-2021).

Adolescent to Adult Health, Social Science & Medicine [Mar. 2021] [last accessed July 22, 2023]).[6] These negative health outcomes can endure for years after an eviction, and children are particularly impacted (*see* Marci McCoy-Roth et al., *When the Bough Breaks: The Effect of Homelessness on Young Children* 2, Child Trends [Feb. 2012] [last accessed July 22, 2023]).[7]

Laws that require "good cause" for eviction have had demonstrated success in reducing the number of case filings and actual evictions (*see* Julietta Cuellar, *Effect of "Just Cause" Eviction Ordinances on Eviction in Four California Cities*, J Pub & Intl Affairs, May 21, 2019 [last accessed July 22, 2023]).[8] Seeking to lessen the harm caused to their communities by evictions, Albany, Beacon,[9] Kingston,[10] Newburgh,[11] and Poughkeepsie[12] decided to require good cause for eviction. However, the Supreme Court nullified Albany's Good Cause Law based on conflict preemption, and trial courts have subsequently invalidated both Newburgh[13] and

[6] Available at https://repository.upenn.edu/cgi/viewcontent.cgi?article=1063&context=psc_publications.
[7] Available at https://cms.childtrends.org/wp-content/uploads/2012/02/2012-08EffectHomelessnessChildren.pdf.
[8] Available at https://jpia.princeton.edu/news/effect-just-cause-eviction-ordinances-eviction-four-california-cities.
[9] Beacon City Code § 173-14 *et seq*.
[10] Kingston City Code § 332-13 *et seq.*, subsequently repealed by Local Law 5 of 2023.
[11] Newburgh City Code § 240-30 *et seq.*
[12] Poughkeepsie City Code § 12-175 *et seq.*
[13] *HYH Newburgh LLC v The City of Newburgh*, Sup Ct, Orange County, Nov. 29, 2022, Sciortino, J., index No. EF001050-2022.

Poughkeepsie's[14] good cause eviction laws. Presently, the Third Department is the only Appellate Division department to have ruled on this issue.[15]

The Court should review the Appellate Division's decision now to clarify that municipalities may act to fill gaps in state law and protect their tenants.

III. This Court should review the Third Department's erroneous interpretation of RPL § 228, RPL § 226-c, and RPAPL 711.

The foundation for the Third Department's overbroad conflict preemption analysis is its flawed statutory interpretation. The relevant portions of the RPL and RPAPL provide notice requirements for tenants and a summary eviction procedural mechanism for landlords. They do not create any substantive rights or change the common law rules regarding the types or termination of tenancies.

A. *Background on the RPL, RPAPL, and Landlord-Tenant Relations*

Tenancies in New York are still governed to a considerable degree by the same rules that existed in pre-Revolutionary War England, while 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

[14] *Lakr Kaal Rock, LLC v Paul*, 78 Misc 3d 1019 [Poughkeepsie City Ct 2023].
[15] An appeal in *HYH Newburgh LLC* is pending before the Appellate Division, Second Department (2023-00044).

good cause eviction laws to bring housing policy within their borders into the 21st century.

Historically, the common law completely governed landlord-tenant relations. Common law rules governed the types of tenancies, how these tenancies could terminate, and what 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 bring 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 (*Flewwellin 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 Apts., 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.

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 when, 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, either party can terminate this tenancy 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 do 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.

The common law did not require any type of notice before the termination of many types of tenancies. As the cited cases show, 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 does not define

the types of tenancies and is silent as to when a landlord may properly terminate or choose not to renew a 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 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 where a summary proceeding "may be maintained" (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.*).[16] 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 establish the substantive elements of a landlord's claim for possession; it provides a summary procedural mechanism for a landlord with a valid basis to recover possession from the tenant (*cf. 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."]).

B. *The Third Department erroneously viewed RPAPL 711, RPL § 226-c, and RPL § 228 as establishing substantive rights for landlords.*

Viewed against this backdrop, the Appellate Division's construction of the RPAPL and RPL as "establishing" substantive rights for landlords (*Pusatere*, 214 AD3d at 94, n *) is plainly wrong.

[16] 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.

RPL § 226-c does not establish a landlord's substantive right to raise a tenant's rent by more than five percent or decline to renew the lease (*see id.*). The plain language of the statute demonstrates that it prescribes a certain amount of notice when a landlord "intends" to take these actions (RPL § 226-c [1] [a]). RPL § 226-c is silent as to whether the landlord is permitted to take them. Should the landlord have the right to decline to renew a lease, this 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)). The same is true for rent increases. This statute creates a right to advance notice for tenants; it does not create a right for landlords.

Similarly, RPL § 228 prescribes the type and amount of notice that a landlord must give to terminate a tenancy at will or sufferance. It does not establish the landlord's substantive right to terminate a tenancy at sufferance or at will (which comes from the common law); rather, it sets parameters for how this termination may occur (*Rowan*, 11 Wend at 618-19; *Smith*, 51 NY at 541). Moreover, "[t]he statute does not define what shall constitute a tenancy at will [or sufferance], but leaves that question to be determined by the rules of the common law" (*Larned*, 60 NY at 105).

Finally, the Third Department incorrectly assigned the phrase "expiration of his [or her] term" in RPAPL 711 [1] a fixed meaning—the temporal "expiration of

a tenant's lease" (*Pusatere*, 214 AD3d at 94-95). The Appellate Division then viewed Albany's good cause requirement as invalidly requiring an additional element for a landlord's eviction claim (*id.* at 95-96). However, RPAPL 711 [1] does not supply any such fixed definition or the elements for a cause of action. In fact, it is an open-ended vehicle intended to afford a summary eviction mechanism to a landlord who may have grounds to evict the tenant under the common law (such as the end of the tenant's lease or the tenant's violation of the lease) or under a statutory scheme (such as the tenant's violation of an obligation under the Rent Stabilization Laws and Code) (*Calvi*, 195 AD2d at 830; *1646 Union, LLC*, 2019 NY Misc LEXIS 272, *4).

The Third Department's interpretation of the RPAPL and RPL may affect tens of thousands of tenants annually. Amidst the continuing eviction crisis, granting leave to examine the Third Department's construction of these statutes would ensure that lower courts and municipalities have clarity regarding the interplay between the common law and state law and guidance about what is permitted going forward.

IV. This Court should review the Third Department's erroneous preemption analysis.

The Third Department pre-ordained the outcome of its preemption analysis by wrongly finding that RPL § 226-c, RPL § 228, and RPAPL 711 [1] establish substantive rights. If the statutes themselves gave landlords the right to terminate leases and evict tenants, then almost any attempt by municipalities to regulate lease

termination and evictions would be invalid. This Court should act to ensure that the power of municipalities to regulate the evictions within their borders is not rendered nonexistent (*see People v Cook*, 34 NY2d 100, 109 [1974]).

For a local law to be invalid pursuant to the conflict preemption doctrine,[17] "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]). 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 Entertainment Corp. v New York City Dept. of Consumer Affairs*, 74 NY2d 761, 764 [1989]; *Matter of Chwick v Mulvey*, 81 AD3d 161, 168 [2d Dept 2010], quoting *Matter of Landsdown Entertainment Corp.*, 74 NY2d at 764 ["The crux of conflict preemption is whether there is 'a head-on collision between the . . . ordinance as it is applied' and a state statute."]).

Additionally, 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

[17] There is no indication that the legislature wished to occupy the entire field of landlord-tenant relations by enacting the RPL and RPAPL. The Third Department has 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]).

local law is preempted (*Cook*, 34 NY2d at 109). 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.*).

The Good Cause Law operates in a space where state law is silent. It 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 Appellate Division.

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

RPL § 228 only applies to tenancies at sufferance and tenancies at will (*see, e.g., Donnelly v Neumann*, 170 AD3d 597, 598 [1st Dept 2019]). When such

tenancies exist, state law requires a thirty-day notice to quit to terminate them (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, RPL § 228 does not define a tenancy at will or tenancy at sufferance; the common law does (*Larned*, 60 NY at 105). By providing tenants with substantive protections against eviction and setting the conditions by which tenancies may be terminated, the Good Cause 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.

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). 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]).

Albany has the power to act in a space 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. Because these types of tenancies do not exist as a practical matter under the regime created by the Good Cause Law, there is no possibility that the Law would require a landlord "seeking to evict a tenant at will or by sufferance who has provided 30 days' notice to also establish good cause for the eviction" (*Pusatere*, 214 AD3d at 96).

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

The Third Department also erred when it ruled that the notice provisions of RPL § 226-c preempted the Good Cause Law.

1. 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[18]—a

[18] By its terms, this would apply primarily to a periodic tenancy, a monthly tenancy, and a tenancy for a year or years.

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. 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. Indeed, the Law explicitly states that it preserves all existing legal requirements concerning notice to tenants (Albany City Code § 30-329).

2. 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 (Albany City Code § 30-328 [A] [1]). The Law does not impose different notice requirements on landlords than RPL § 226-c: it specifically incorporates RPL § 226-c's notice requirements (*id.* § 30-328 [A] [10] [4]).

The Good Cause Law does not limit what rent a landlord may charge or what rent a tenant may agree to pay (*id.* § 30-328 [A] [1]).[19] It also does not prevent a landlord from bringing a summary nonpayment of rent eviction proceeding under RPAPL 711 [2]. The Law permissibly supplies contours for the well-established defense of unconscionability within its specific context.

Neither RPL § 226-c nor any other generally applicable state law gives a landlord the untrammeled 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]; *see also* Real Property Law § 235-c).

In effect, the Good Cause Law provides the trial court with guideposts for this common law defense (Albany City Code § 30-328 [A] [1]). To the extent that the Good Cause Law modifies typical evidentiary burdens by creating a rebuttable

[19] For this reason, among others, the Supreme Court correctly found that the Law is not rent control.

presumption of unconscionability in certain cases, this presumption "bears a reasonable relationship to the police power and is reasonably calculated to achieve" the legitimate purposes of the Law (*see N.Y. State Club Assn.*, 69 NY2d at 222 [citations omitted]). Certainly, the unconscionability defense is essential to the Law's functioning. If landlords were able to evict tenants for not paying inflated rents, the other protections of the Law would be meaningless, enabling an unconscionable result (*see* Real Property Law § 235-c).

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

A landlord may seek to 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 thereby cause the tenant's term to expire) for good cause.

This Court should follow the analysis of the California Supreme Court in *Birkenfeld v Berkeley* and hold that this aspect of the Law does not create a conflict.[20]

[20] There appears to be no meaningful difference between the definition and operation of conflict preemption in California and New York (*see* Cal Const, art XI, § 7 ["A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."]; *Sherwin-Williams Co. v City of Los Angeles*, 4 Cal 4th 893, 897, 844 P2d 534 [1993] ["A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (citations and internal quotation marks omitted)]). For purposes of conflict preemption, "contradict" means that the local legislation is "inimical" to a general state law (*id.* at 898 [citation omitted]).

Birkenfeld concerned a similar good cause eviction law. 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).[21] The California Supreme Court found that no conflict existed because the unlawful detainer statute's purpose was procedural (it implemented the landlord's common law right to recover property), while the good cause law was Berkeley's creation of a "substantive ground of defense in unlawful detainer proceedings" pursuant to its police power (it placed a limitation on the landlord's common law property rights) (*id.*). The same is true here, and so the Good Cause Law places no restriction on any rights that a landlord may possess pursuant to RPAPL 711 [1].

The Third Department 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

[21] As this quotation suggests, the text of California's unlawful detainer statute also mirrors New York's summary proceeding law, providing grounds for an unlawful detainer eviction action "[w]hen the tenant continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to the tenant (Cal Code Civ Proc § 1161 [1]).

provided in the RPAPL" (276 AD2d at 54). The same comparison applies in this case 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 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. There is no inconsistency, and no conflict, between state statutes that create a summary eviction procedure for certain types of claims and local laws that modify or supplement a landlord's common law entitlement to bring those claims in the first instance.

For these reasons, the Court should review the Appellate Division's nullification of the Good Cause Law due to conflict preemption.

CONCLUSION

For the reasons stated above, the Court should find that Defendants-Appellants may take an appeal from the Appellate Division's order as of right. Alternatively, the Court should grant Defendants-Appellants permission to appeal.

Respectfully submitted,

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CERTIFICATION

I hereby certify that the length of the foregoing memorandum of law, exclusive of the caption, table of contents, table of authorities, Rule 500.1 [f] statement, and signature block, is 6,572 words

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Evan Henley