UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

McCONNELL DORCE, CECELIA JONES, and SHERLIVIA THOMAS-MURCHISON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CITY OF NEW YORK, LOUISE CARROLL (Commissioner of the New York City Department of Housing Preservation and Development), SHERIF SOLIMAN (Commissioner of the New York City Department of Finance), NEIGHBORHOOD RESTORE HOUSING DEVELOPMENT FUND CORP., and BSDC KINGS COVENANT HOUSING DEVELOPMENT FUND COMPANY, INC.,

Defendants,

-and-

585 NOSTRAND AVENUE HOUSING DEVELOPMENT FUND CORPORATION and 248 MADISON STREET HOUSING DEVELOPMENT FUND CORPORATION,

Nominal Defendants.

Civil Action No. 1:19-cv-02216-JGK

BRIEF OF AMICI CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., JUSTICE IN AGING, AND MOBILIZATION FOR JUSTICE

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INTEREST OF AMICI CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans and to break down barriers that prevent Black people from realizing their basic civil and human rights. Throughout its history, LDF has challenged policies and practices that deny housing opportunities to Black people. *See, e.g.*, *McGhee v. Sipes*, 334 U.S. 1 (1948) (companion case to *Shelley v. Kraemer*, 334 U.S. 1 (1948)) (racially restrictive covenants); *Cent. Ala. Fair Hous. Ctr. v. Lowder Realty Co.*, 236 F.3d 629 (11th Cir. 2000) (racial steering); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (racial discrimination in public housing and assistance programs); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (redlining); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (exclusionary zoning); *Davis v. City of New York*, 902 F. Supp. 2d 405 (S.D.N.Y. 2012) (racial discrimination in policing public housing residences); *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, No. 95-309, 2006 WL 581260 (D. Md. Jan. 10, 2006) (federal government's obligation to further fair housing affirmatively); *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106 (D.D.C. 1987) (redevelopment plans that unfairly eliminate affordable housing); *see also Novick v. Levitt & Sons, Inc.*, 108 N.Y.S. 2d 615 (1951) (challenging eviction motivated by tenants entertaining Black guests in their Levittown, New York home); *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512 (1949) (challenging Stuyvesant Town's racial exclusion policy). LDF has

[1] Plaintiffs and the Municipal Defendants consent to the filing of the brief. Amici were not able to obtain consent to file their brief from Defendants Neighborhood Restore Housing Development Fund Corp. and BSDC Kings Covenant Housing Development Fund Company, Inc. Amici state that no party's counsel authored this brief either in whole or in part, and that no party's counsel, or person or entity other than amici curiae, their members, and their counsel, contributed money intended to fund preparing or submitting this brief.

also challenged tax foreclosure and water lien policies that disparately impact Black communities. *See Pickett v. City of Cleveland*, No. 19-2911 (N.D. Ohio filed Dec. 18, 2019); *MorningSide Cmty. Org. v. Sabree*, No. 16-008807 (Mich. Cir. Ct. filed July 13, 2016).

Justice in Aging ("JIA") is a nationwide, nonprofit legal organization that uses the power of law to combat senior poverty by securing access to affordable health care, economic security, housing, and the courts for older adults with limited resources. JIA has a particularly strong interest in preserving housing stability for low-income older adults, with a focus on the racial disparities in homeownership and housing affordability experienced by older Black, Latino/a, and immigrant homeowners and renters. JIA works to address the inequitable racial wealth gap through protecting the accumulated equity in the homes of older homeowners of color, and preserving opportunities for the intergenerational transfer of wealth. JIA has filed amicus curie briefs in lawsuits relating to housing and economic stability and access to justice for older adults in numerous jurisdictions including *Georgia State Conference of the NAACP v. City of La Grange*, 940 F3d 627 (11th Cir. 2018) (impact of utility lien on older adults), and *Executive Office of Health and Human Servs. v. Trocki*, 100 Mass. App. Ct. 117 (Mass. 2021) (impact of Medicaid recoupment process on older adults). In addition, JIA has litigated numerous class actions to protect the rights of older adults including *Hart v Colvin,* 310 F.R.D. 427 (N.D. Cal. 2015) (class of social security recipients harmed by agency reliance on disqualified medical examiner), *Alexander v Azar*, No. 11-cv-1703, 2020 WL 1430089 (D. Conn. Mar. 24, 2020) (due process in Medicare coverage determination); and *Chinatown Serv. Ctr. v. U.S. Dep't of Health & Human Servs.*, No 21-331-JEB (D.D.C.) (Administrative Procedure Act challenge to rule change impacting limited English proficient older adults).

Mobilization for Justice ("MFJ"), a nonprofit civil legal services organization based in New York City, envisions a society in which there is equal justice for all. Its mission is to achieve social and racial justice, prioritizing the needs of people who are low-income, disenfranchised or have disabilities. MFJ does this through providing the highest quality direct civil legal assistance, conducting community education, building partnerships, engaging in policy advocacy, and bringing impact litigation. It assists more than 13,000 New Yorkers each year, benefitting over 25,000. MFJ's Foreclosure Prevention and Low-Income Bankruptcy projects in particular seek to preserve intergenerational wealth in communities of color and mitigate the pernicious consequences of the racial wealth gap by preserving homeownership and restructuring or eliminating debt. Since its founding in 1963, MFJ has brought numerous class actions and other litigation to establish due process rights and access to housing and other services for individuals with disabilities, combat discrimination in employment and housing, and challenge unlawful foreclosures and predatory lending and debt collection schemes affecting borrowers and homeowners of color. These lawsuits include *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sykes v. Mel S. Harris & Assocs.*, 780 F.3d 70 (2d Cir. 2015); *Fair Hous. Justice Ctr., Inc. v. Cuomo*, No. 18-cv-03196 (S.D.N.Y.); *Bagley v. N.Y. State Dep't of Health*, No. 15-cv-04845 (E.D.N.Y.); *Sanders v. Houslanger & Assocs.*, No. 17-cv-08985 (S.D.N.Y.); *Barker v. Rokosz*, No. 19-cv-00514 (E.D.N.Y.); and *Golightly v. Uber Techs., Inc.*, No. 21-cv-03005 (S.D.N.Y.). MFJ has also filed amicus curie briefs in lawsuits on behalf of a debtor-tenant in danger of losing her apartment in a bankruptcy proceeding, *In re Santiago-Monteverde*, No. 12-4131 (2d Cir.), tenants who were deceptively overcharged for rent, *Collazo v. Netherland Property Assets, LLC*, Index No. 157486-2016 (N.Y. Court of Appeals), and workers fired due to justice-system involvement, *Graves v. City of New York*, Index No. 151403/2016 (App. Div., 1st Dep't).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 1996, New York City (the "City") amended its tax collection laws to enact Local Law No. 37, which created the Third Party Transfer In Rem Program ("TPT Program"). The TPT Program authorizes the City to seize and transfer tax delinquent, statutorily "distressed" residential properties directly to a predetermined third party—without the City taking ownership and managing the transferred properties or selling the properties to collect any tax revenue—for the purported purpose of rehabilitating and managing those properties. Since the enactment of Local Law No. 37, the City has completed ten rounds of property foreclosures and transfers under the TPT Program.

Plaintiffs, whose homes were seized and transferred in the tenth round of foreclosures, sued the City and various third-party transferees (the "Municipal Defendants") under the TPT Program, alleging violations of the Equal Protection and Takings Clauses of the U.S. and New York Constitutions, among other claims. Plaintiffs allege that, in the most recent round of foreclosures, the Municipal Defendants seized and transferred several homes that were not statutorily distressed and where the taxes owed, if any, represented only a small fraction of the value of the properties. They further contend that the Municipal Defendants failed to provide the owners adequate notice or an opportunity to receive the excess equity of their property or any other compensation. This stripped Plaintiffs of the opportunity to redeem their properties or to receive the equity value of the properties. As Plaintiffs allege, the TPT Program has disproportionately targeted communities of color, particularly older homeowners of color.

Plaintiffs' challenge to the TPT Program raises fundamental issues that go to the heart of the right to equal housing opportunity for people of color and older adults, and their Amended Complaint adequately alleges violations of the U.S. and New York Constitutions. The Municipal

Defendants' arguments for dismissal of Plaintiffs' claims are without merit. The Court should deny the Municipal Defendants' motion to dismiss.[2]

ARGUMENT

I. Plaintiffs' Amended Complaint Adequately Alleges That the TPT Program Unlawfully Stripped Older Homeowners of Color of Their Wealth and Equity Without Just Compensation in Violation of the Takings Clauses of the U.S. and New York Constitutions.

Both the Fifth Amendment to the U.S. Constitution and Article 1, Section 7 of the New York State Constitution prohibit the government from taking private property without just compensation. U.S. Const. amend. V and N.Y. Const. art. I, § 7. The U.S. Supreme Court recently reaffirmed this principle, explaining that, "[i]f a local government takes private property without paying for it, that government has violated the Fifth Amendment—just as the Takings Clause says." *Knick v. Township of Scott,* 139 S. Ct. 2162, 2170 (2019). The Municipal Defendants ignore the many takings cases that support Plaintiffs' claims, arguing instead that owners are not owed any surplus funds following *in rem* tax foreclosure. Municipal Defs.' Mem. of Law in Supp. of Mot. to Dismiss Am. Compl. ("Mun. Defs. Br.") at 11, ECF No. 113.

The Municipal Defendants are incorrect. Plaintiffs have sufficiently alleged that the most recent round of foreclosures pursuant to the TPT Program failed to provide them with a constitutionally adequate process as guaranteed by the U.S. and New York Constitutions. Several courts have concluded that a taking, whether through the exercise of eminent domain or a tax lien, causes the same deprivation of property by government action, subject to constitutional requirements of just compensation. Plaintiffs' claims fall squarely within a long line of takings jurisprudence and should not be dismissed.

[2] Amici do not write to address the motion to dismiss filed by Defendants Neighborhood Restore Housing Development Fund Corp. and BSDC Kings Covenant Housing Development Fund Company, Inc., but also contend it is without merit and should be denied.

A. The City's Most Recent Round of Foreclosures Under the TPT Program Failed to Provide a Constitutionally Adequate Process for Obtaining Just Compensation.

Plaintiffs' Amended Complaint sufficiently alleges that the City's most recent round of foreclosures failed to compensate Plaintiffs for the surplus equity in their properties and did not provide Plaintiffs and similarly situated individuals a constitutionally adequate process for obtaining just compensation for their takings. *See* Am. Compl. ¶¶ 54-56, 193-98, ECF No. 91. In their motion to dismiss, the Municipal Defendants rely on *Nelson v. City of New York*, 352 U.S. 103, 110 (1956), to claim that "nothing in the Federal Constitution" prevents the unrestricted stripping of all surplus equity from a property owner without an adequate process to recover the excess proceeds. Mun. Defs. Br. at 11.

Not so. The Supreme Court in *Nelson* distinguished, but did not overrule, its longstanding precedent that withholding the surplus equity from the owner without an adequate means to recover that equity constitutes a taking without just compensation in violation of the Fifth Amendment's Takings Clause. *See Nelson*, 352 U.S. at 109-10 (citing *United States v. Lawton*, 110 U.S. 146, 149-50 (1884)). The Court in *Nelson* was persuaded that, in the circumstances of that particular case, the process for a foreclosed property owner to receive notice and avail themselves of the opportunity to obtain the surplus equity provided the required remedy, as the statutory foreclosure process provided for a court-directed sale and distribution of the proceeds. *Id.* at 110. It also noted that the New York Legislature had amended the statute at issue to permit the reconveyance of property acquired by the City upon payment of arrears, interest, and the costs of foreclosure. *Id*. at 111.

There were no such protections for Plaintiffs and other homeowners here. Plaintiffs have plausibly alleged that they did not receive notice adequate to avail themselves of any opportunity

to retain or recover their equitable interest, that there was no adequate opportunity to obtain the surplus equity, and that the City's immediate reconveyance to a third party peremptorily closes the door on any potential remedy. *See* Am. Compl. ¶¶ 85-88, 111-116, 143-146.

The Municipal Defendants incorrectly point to New York's Administrative Code §11-409(d) as meeting the required statutory process for "just compensation" articulated in *Nelson*. Mun. Defs. Br. at 11. That code section permits a homeowner who makes a timely allegation of substantial equity to demand additional time to sell their property, pay the liens from the proceeds, and to retain any surplus. However, this option: (1) presumes that the property homeowner is actually aware of the *in rem* proceeding, which Plaintiffs credibly allege that they were not, Am. Compl. ¶¶ 85-88, 111-13, 143-45, and (2) does not require the governmental entity engaging in the taking to conduct the sale and return the excess equity. This limited option for a property owner to attempt a rushed property sale to a third party, subject to liens, does not provide the constitutionally required just compensation from the governmental entity that is engaging in the taking. The requirement under the Fifth Amendment's provision that private property shall not be taken without just compensation means that the government must provide full monetary equivalent to the property taken. *United States v. Reynolds*, 397 U.S. 14, 16 (1970). Accordingly, that provision does not trump Plaintiffs' claims.

B. Other Courts Have Held That the TPT Program and Similar Tax *In Rem* Property-Transfer Programs Were Constitutionally Deficient or Otherwise Subject to Constitutional Scrutiny.

Because Plaintiffs have properly pleaded that the Municipal Defendants have taken Plaintiffs' surplus equity without compensation, Am. Compl. ¶¶ 166; 193-196, they have stated a claim. Several courts assessing the constitutionality of similar *in rem* foreclosure processes, including those in the TPT Program, have found them constitutionally deficient because they failed to provide an adequate opportunity to obtain the surplus equity. For example, in *In Rem Tax*

Foreclosure Action No. 53 Borough of Brooklyn, Index No. 8700/2015, 2019 WL 1431423 (Sup. Ct. Kings Cty, Mar. 28, 2019), the court ruled that the City's seizure of six Brooklyn properties under the TPT Program was an unconstitutional taking and ordered the City to give them back to their owners, restoring millions of dollars of intergenerational wealth in the Black and Latino communities. The court specifically rejected the Municipal Defendants' argument that the plaintiffs' claims were barred, finding that an unjustified taking of the value of the property in excess of the tax liens "would constitute an unlawful taking of the plaintiffs' private property without just compensation" under the Takings Clauses of the United States and New York Constitutions. *Id.* at *11-12, *23, *29.

Similarly, the Michigan Supreme Court in *Rafaeli, LLC v. Oakland County*, 952 N.W. 2d 434, 460 (Mich. 2020), rejected the proposition that the government cannot be held accountable for a taking without just compensation because the property seizure is for overdue taxes. Indeed, the court in *Rafaeli* concluded:

> Nothing in this opinion impedes defendants' right to hold citizens accountable for failing to pay property taxes by taking citizens' properties in satisfaction of their tax debts. *What defendants may not do under the guise of tax collection is seize property valued far in excess of the amount owed in unpaid taxes, penalties, interest, and fees and convert that surplus into a public benefit.* The purpose of taxation is to assess and collect taxes owed, not appropriate property in excess of what is owed. Defendants' ability to take plaintiffs' properties was limited by what plaintiffs actually owed as a result of failing to pay their taxes. Thus, defendants' retention of the surplus proceeds amounts to a taking of plaintiffs' properties far in excess of plaintiffs' tax debts that cannot be justified as a valid form of tax collection.

Raefaeli, 952 N.W. at 463-464 (emphasis added and omitted). *See also Coleman ex rel Bunn v. District of Columbia,* 70 F. Supp. 3d 58 (D.D.C. 2014) (rejecting the city's argument that "forfeiting the equity is an extra incentive for the payment of taxes" rather than an unconstitutional taking).

C. The Municipal Defendants' Unconstitutional Takings Disproportionately Impact Communities of Color.

Plaintiff McConnell Dorce's story is but one example of the devastating impact the Municipal Defendants' unconstitutional takings through the TPT Program has had on families of color, many of whom are older homeowners.[3] Mr. Dorce is an older Black resident of East New York, Brooklyn—a City neighborhood with a predominantly Black and Latino population.[4] Am. Compl. ¶ 74. Since 2012, Mr. Dorce has owned his four-unit property free of any mortgage and had substantial equity in his property. *Id.* at ¶ 75. Without giving him proper notice, Mr. Dorce's home was taken through the TPT Program due to water and sewer charges, even though he was current on his payment plan with the City. *Id.* at ¶¶ 78, 84-5. Through the TPT Program, the Municipal Defendants stripped him of ownership of his property and provided no avenue for him to obtain the surplus equity. *Id.* ¶¶ 84, 87. The Municipal Defendants thus expropriated from Mr. Dorce a lifetime of accumulated equity at a stage in his life when he has no opportunity to recover and rebuild. Mr. Dorce's story is not unique, as Plaintiffs allege that the Municipal Defendants have targeted communities of color across New York City in a similar fashion. *See, e.g.*, *id.* at ¶ 166.

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[3] *See, e.g.*, Stephen Witt & Kelly Mena, *City Takes Property from Working Class Latinos,* PoliticsNY (Oct. 9, 2018), https://www.kingscountypolitics.com/city-takes-property-from-working-class-latinos/ (detailing the story of six Latino co-op shareholders in East Williamsburg, Brooklyn); Stephen Witt & Kelly Mena, *City Sits on Brownstone as Elderly Woman Waits on Bated Breath*, PoliticsNY (Oct. 26, 2018), https://www.kingscountypolitics.com/city-sits-on-brownstone-as-elderly-woman-waits-on-bated-breath/ (chronicling the story of an elderly Black resident of Crown Heights, Brooklyn whose paid-off Brownstone has been in the family for over 30 years).

[4] N.Y. Univ. Furman Ctr., *East New York/Starrett City BK05: Neighborhood Indicators*, https://furmancenter.org/neighborhoods/view/east-new-york-starrett-city (last visited Dec. 22, 2021).

Plaintiffs have properly pleaded takings claims under the U.S. and New York Constitutions and the Municipal Defendants' motion to dismiss these claims should be denied.

II. Plaintiffs' Amended Complaint Adequately Alleges That the TPT Program Unlawfully Discriminates Against Communities of Color in Violation of the Equal Protection Clauses of the U.S. and New York Constitutions.

Plaintiffs' Amended Complaint adequately states equal protection claims under the U.S. and New York Constitutions. For the reasons Plaintiffs explain, the Amended Complaint adequately alleges that the TPT Program has been discriminatorily enforced against elder homeowners of color. Pls.' Mem. of Law in Opp'n to Defs.' Mots. to Dismiss Am. Compl. ("Pls. Opp'n") at 14-17, ECF No. 121. Further, under circumstances like this case—where Plaintiffs challenge the Municipal Defendants' discriminatory enforcement of the facially neutral TPT Program—Plaintiffs need not identify a similarly situated person or property to proceed with their Equal Protection claim. Such an onerous requirement would frustrate the aims of the federal and state Equal Protection Clauses and would make litigating challenges like Plaintiffs' impossible under many circumstances. And importantly, under the facts of this case, it would leave unchecked Plaintiffs' plausible allegations that the TPT Program perpetuates and exacerbates homeownership disparities and disproportionately strips older homeowners of color of wealth they have accumulated for decades.

A. Plaintiffs Have Plausibly Pleaded an Equal Protection Violation.

The Second Circuit has held that the Equal Protection Clause is violated when a defendant's "actions were motivated by discriminatory animus and [their] application results in a discriminatory effect." *Pyke v. Cuomo*, 567 F.3d 74, 78 (2d Cir. 2009) (citation omitted). Plaintiffs have met their pleading burden at the Complaint filing stage by alleging that the TPT Program

deliberately targets properties in Black and brown neighborhoods, resulting in properties being taken from mostly elder Black homeowners. Am. Compl., ¶¶ 220-223.

As Plaintiffs allege, New York City's TPT Program is leading to the loss of homeownership in communities of color. *Id.* at ¶ 230. The TPT Program was created in 1996 in response to the City's lack of capital resources to address abandoned properties it took ownership of in the 1960s and 1970s.[5] However, "[w]hat began as a focused anti-abandonment initiative . . . has become something far more expansive, far more excessive and far more entangled with America's treacherous history of race and homeownership."[6]

In 2019, amid growing concern that the TPT program had deviated from its initial purpose of preserving affordable housing for low-income residents, and was instead harming older Black, Latino, and immigrant households while causing the loss of intergenerational wealth in those communities,[7] the New York City Council convened oversight hearings on the TPT Program. The Oversight Committee's report documented widespread abuses in the program, and disproportionate seizures of properties in predominantly non-white neighborhoods that were rapidly gentrifying.[8]

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[5] *Oversight – Taking Stock: A Look into the Third Party Transfer Program in Modern Day New York*, N.Y.C. Council, Comm. on Hous. and Bldgs, Comm. on Oversight and Investigations, Briefing Paper at 2-3 (July 22, 2019), available at https://on.nyc.gov/30hWJm7 [hereinafter *Oversight – Taking Stock*].

[6] N.Y.C. Council, Hr'g of Comm. on Hous. and Bldgs., Comm. on Oversight and Investigations, (July 22, 2019) Hr'g Tr. at 10 (statement of Chairperson Ritchie Torres), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3968975&GUID=17B27FCE-9E66-4803-AB35-7792BA254245&Options=&Search=.

[7] Stephen Witt and Kelly Mena, *City Takes Property from Working Class Latinos*. (Oct. 9, 2018), PoliticsNY, https://politicsny.com/2018/10/09/city-takes-property-from-working-class-latinos/.

[8] *Oversight - Taking Stock*, *supra* note 5.

For example, as Plaintiffs allege, every borough—except Staten Island[9]—is represented among homes included in the most recent TPT round. Am. Compl. ¶ 222. Plaintiffs allege that approximately 50 percent of these properties were concentrated in just 11 neighborhoods (in the remaining four boroughs) where residents are primarily people of color. *Id.* This is striking, as Staten Island has both the highest homeownership rate in New York City (69 percent)[10]and the largest white population in New York City (60.1 percent).[11] Yet, the populations in the 11 neighborhoods targeted by the TPT Program range from 65 percent Black and Latino (Bedford, Brooklyn)[12] to 94 percent Black and Latino (University Heights, Bronx).[13] *See also id.* ¶¶ 220-21 (explaining how the TPT Program is "targeting Brooklyn and the Bronx, it's targeting black and brown neighborhoods").

The City's inequitable and targeted seizures under the TPT Program exacerbate wealth and homeownership disparities in New York City's communities of color. The racial wealth gap has long been a tragic fixture in American society, spawned in large part by discriminatory taxing and property schemes, and has required Black and Latino homeowners in New York City and elsewhere to overcome significant barriers to homeownership not faced by their white counterparts. For instance, predatory foreclosure systems were used throughout the Jim Crow era to target Black homeowners—a practice that future Supreme Court Justice Thurgood Marshall

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[9] *Id.* at 13.
[10] *Snapshot of Homeownership in New York City*, N.Y. Univ. Furman Ctr.: The Stoop (Dec. 17, 2019), https://furmancenter.org/thestoop/entry/snapshot-of-homeownership-in-new-york-city [hereinafter Furman Ctr. *Snapshot*].
[11] *Id.*
[12] N.Y. Univ. Furman Ctr., *Bedford Stuyvesant BK03: Neighborhood Indicators*, https://furmancenter.org/neighborhoods/view/bedford-stuyvesant (last visited Dec. 22, 2021).
[13] N.Y. Univ. Furman Ctr., *Fordham/University Heights BX05: Neighborhood Indicators*, https://furmancenter.org/neighborhoods/view/fordham-university-heights (last visited Dec. 22, 2021).

described in 1940 as a means to "depriv[e] Negroes of their property through subterfuge."[14] Describing property tax schemes against Black communities as a "potent instrument of white supremacy,"[15] historian Andrew Kahrl has noted that Black communities have been exploited by such schemes since they gained the ability to purchase property:

> Almost from the moment African Americans ceased to be taxable property and began having their property taxed, they became subject to discriminatory administrative practices and the victim of structural inequities in its levying and enforcement, both of which allowed local governments to subtly shift the tax burden onto the backs of racial minorities, and in some states created opportunities for real estate speculators and investors to prey on hard-pressed homeowners through acquiring liens on tax-delinquent properties.[16]

Discriminatory federal, state and local governmental policies have played a significant role in the creation and perpetuation of racial gaps in homeownership.[17] One of the most prominent examples of the government's role in perpetuating segregation was right outside of the City, on Long Island: Levittown. A sprawling suburban development of 17,500 homes built after World War II, Levittown was financed by the Federal Housing Administration "on condition that . . . it be all white."[18] Black veterans and their families were completely excluded from this homeownership opportunity that was made possible only because the developers were, in their own words, "100 percent dependent on Government."[19] Similarly, New York City facilitated the development of Stuyvesant Town, a 9,000 unit, "white people only" housing complex built in

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[14] Thurgood Marshall, *Cold, Cold Ground*, The New Republic, Aug. 12, 1940, at 216.
[15] Andrew W. Kahrl, *Unconscionable: Tax Delinquency Sales as a Form of Dignity Taking*, 92 Chi.-Kent L. Rev. 905, 910 (2017).
[16] *Id.* at 905.
[17] *See generally* Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (Liveright Publ'g. Co., 2017); Ira Katznelson, *When Affirmative Action Was White, An Untold History of Racial Inequality in Twentieth Century America* (W.W. Norton & Co., 2005).
[18] Rothstein, *supra* note 17, at 71.
[19] *Id.* at 72.

Manhattan in the 1940s.[20] In order for Stuyvesant Town to be built, "New York City condemned and cleared eighteen square city blocks and transferred the property" to the developer,[21] and "[a]bout 40 percent of those evicted were African American or Puerto Rican."[22]

The present-day gap in homeownership rates between white households and households of color reflects the legacy of this historical racial and economic discrimination.[23] In 2018, 27 percent of Black households and 17 percent of Latino households in New York City owned their homes, compared to 43 percent of white households.[24] Consistent with the racial and ethnic composition of the respective boroughs, Staten Island had the highest homeownership rate, far higher than any other borough, and the Bronx had the lowest. And even once they own their homes, homeowners of color in New York City face greater challenges to remaining in their homes than white families: foreclosures were more prevalent in majority-Black neighborhoods, and brown and Black communities are more likely to be targeted for scams, burdened by tax liens, or have difficulty funding large repairs.[25] As a result of these challenges, between 2005 and 2017, there was a loss of 20,000 Black homeowners in Queens alone.[26]

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[20] *Id.* at 106. The current population of the neighborhood in which the Stuyvesant Town complex is located is 72 percent white. *See* Demographic Profile of Stuyvesant Town - Cooper Village, N.Y.C. Dept. of City Planning, Population Fact Finder, https://popfactfinder.planning.nyc.gov/profile/391/demographic (last visited Sept. 1, 2020).
[21] Rothstein, *supra* note 17, at 106.
[22] *Id.* at 107.
[23] Courtney Connley, *Why the Homeownership Gap Between White and Black Americans Is Larger Today Than It Was Over 50 Years Ago*, CNBC, The Great Divide (Aug. 21, 2020), https://www.cnbc.com/2020/08/21/why-the-homeownership-gap-between-white-and-black-americans-is-larger-today-than-it-was-over-50-years-ago.html (noting that "today's lag in Black homeownership is a direct result of years of unfair policies and discrimination").
[24] Furman Ctr. *Snapshot*, *supra* note 10.
[25] *Closing the Racial Wealth Gap*, Black Homeownership Project, Ctr. for N.Y.C. Neighborhoods, https://bhp.cnycn.org/about (last visited Dec. 22, 2021).
[26] *Id*.

The racial disparities caused by the TPT program and similar discriminatory programs are even more pronounced among older homeowners of color. These homeowners are disproportionately housing cost-burdened. While older homeowners have historically carried less mortgage debt than younger homeowners, this is no longer true. The percentage of people over 62 with a mortgage has doubled over the last 20 years, and their average housing debt level has tripled.[27] A 2018 Report by the New York City Comptroller cited the City's 98 percent increase in residential property tax revenues from 2005 to 2016 as a major factor contributing to growing unfairness and cost burdens borne by lower income senior and minority homeowners.[28]

The racial disparities in housing cost burdens among older (age 50-plus) homeowners are glaring, and directly impact their ability to keep current with mortgages and rising tax, water, and sewer assessments. Statewide, age 50-plus homeowners of color are twice as likely as 50-plus white homeowners to be severely cost-burdened, paying half or more of their incomes to cover housing costs. [29] More than 40 percent of age 50-plus African American/Black, Hispanic/Latino, and Asian American/Pacific Islander homeowners are cost burdened, compared to 29 percent of 50-plus white homeowners.[30] The TPT Program exacerbates the risk of homeownership loss for the City's already cost-burdened older homeowners of color.

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[27] Alexander Hermann, Chris Herbert & Jennifer Molinsky**,** Joint Ctr. for Hous. Studies of Harvard Univ., *The Association Between High Mortgage Debt and Financial Well-Being in Old Age* at 3 **(**February 2020), https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_mortgage_debt_financial_well_being_hermann_2020.pdf.

[28] Scott M. Stringer, New York City Comptroller, *Growing Unfairness: The Rising Burden of Property Taxes on Low-Income Households* (September 6, 2018), https://comptroller.nyc.gov/reports/growing-unfairness-the-rising-burden-of-property-taxes-on-low-income-households/.

[29] AARPNY, Disrupting Disparities 3.0: Covid-19 Wreaking Havoc on Communities of Color at 16 (2020), https://online.flippingbook.com/view/301219/2/.

[30] *Id*.

Based on the foregoing, Plaintiffs have adequately alleged an Equal Protection claim, and the Municipal Defendants' motion to dismiss those claims should be denied.

B. Plaintiffs Need Not Identify a Comparator to Proceed with Their Equal Protection Claims.

The Municipal Defendants argue that Plaintiffs' equal protection claims fail because they fail to identify "individuals of different races or ages whose properties were eligible for foreclosure through TPT but were not foreclosed." Mun. Defs. Br. at 14. However, Plaintiffs are not required to identify a comparator to proceed with these claims.

The Second Circuit has long recognized that a plaintiff need not identify a better-treated, similarly situated group of individuals of a different race to establish an equal protection claim where they alleged that "a facially neutral law or policy has been applied in an intentionally discriminatory race-based manner, or that a facially neutral statute or policy with an adverse effect was motivated by discriminatory animus." *Pyke v. Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001); *see also Doe v. Village of Mamaroneck*, 462 F. Supp. 2d 520 (S.D.N.Y. 2006) (holding, consistent with *Pyke*, that an equal protection claim based on intentionally discriminatory enforcement of facially neutral laws was not barred by "virtually impossible" task of finding similarly situated group of persons).

This strand of equal protection analysis dispenses with the need to plead that a similarly situated group was treated differently because discriminatory effects are either independently demonstrated or can readily be presumed. *Doe*, 462 F. Supp. 2d at 543. "Once racially discriminatory intent infects the application of a neutral law or policy, the group that is singled out for discriminatory treatment is no longer similarly situated to any other in the eyes of the law, so adverse effects can be presumed." *Id*. "In effect, the law recognizes that a government that sets out

to discriminate intentionally in its enforcement of some neutral law or policy will rarely if ever fail to achieve its purpose." *Id*.

A significant part of the reasoning behind dispensing with the comparator requirement in these cases is because it "would be difficult, if not impossible, to find" comparators. *Pyke*, 258 F.3d at 109. If courts enforced a need for comparators to make a successful equal protection claim, and comparators were impossible to find, this would permit discrimination to persist without any possible remedy, an outcome that the Second Circuit concluded "is clearly not the law." *Id.*

Here, Plaintiffs' allegations that the TPT Program targeted and disproportionately foreclosed properties in communities of color plausibly state an equal protection violation. To require more, i.e., to require Plaintiffs to identify and name an individual of a different race or age whose property was also eligible for foreclosure through the TPT Program but was not foreclosed, *see* Mun. Defs. Br. at 14, especially at this pleading stage, would not only be inconsistent with the law. It would upset the aims of the Equal Protection Clause and inhibit Plaintiffs' ability to challenge the TPT Program's discriminatory targeting of New Yorkers of color and perpetuation of race-based wealth disparities.

CONCLUSION

For the foregoing reasons, this Court should deny the Municipal Defendants' Motion to Dismiss.

Dated: December 22, 2021

Respectfully Submitted

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief contains 5,224 words (not including the cover page, table of contents, table of authorities, certificate of service or this certificate of compliance) and that the brief complies with the formatting rules contained in the Court's Individual Practices.

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2021, I electronically filed the foregoing with this Court's CM/ECF system, which will send notice to all registered users.

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