UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREATER CHAUTAUQUA FEDERAL CREDIT UNION, individually and on behalf of all others similarly situated, BOULEVARD FEDERAL CREDIT UNION, individually and on behalf of all others similarly situated, GREATER NIAGARA FEDERAL CREDIT UNION, individually and on behalf of all others similarly situated, Plaintiffs, v. HON. LAWRENCE K. MARKS, in his official capacity as Chief Administrative Judge of the Courts, SHERIFF JAMES B. QUATTRONE, in his official capacity as Sheriff of Chautauqua County, New York, SHERIFF JOHN C. GARCIA, in his official capacity as Sheriff of Erie County, New York, SHERIFF MICHAEL J. FILICETTI, in his official capacity as Sheriff of Niagara County, New York, LETITIA JAMES, in her official Capacity as Attorney General of the State of New York, Defendants.	No. 22 Civ. 2753 (MKV)

BRIEF OF AMICI CURIAE LEGAL SERVICES ORGANIZATIONS IN SUPPORT OF DEFENDANT ATTORNEY GENERAL LETITIA JAMES' MOTION TO DISMISS

Wendy Liu
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Susan Shin
NEW ECONOMY PROJECT
121 W. 27th St., #804
New York, NY 10001
(212) 680-5100

Counsel for Amici Curiae Legal Services Organizations

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INTERESTS OF AMICI CURIAE

Amici curiae are legal services organizations located in New York City and elsewhere in New York State.[1] Amici curiae share the common goal of promoting economic justice in New York's low- and middle-income communities and communities of color, including by helping the people in those communities defend themselves against abusive debt-collection and other financial abuses.

Amici curiae have a substantial interest in the Fair Consumer Judgment Interest Act. Collectively, amici curiae have many decades of experience with debt collectors' litigation practices and the impact of debt-collection lawsuits and money judgments on consumers. Amici provide free civil legal services in the area of consumer law that are available to New Yorkers. These free legal services range from limited-scope legal assistance—including legal advice and assistance preparing pro se papers—to formal representation in consumer debt-collection lawsuits and other litigation.

INTRODUCTION

In December 2021, New York enacted the Fair Consumer Judgment Interest Act (the Act), 2021 N.Y. Laws, ch. 831, which reduced the interest rate on money judgments for consumer debt from nine percent to two percent per year. *See* N.Y. Civil Practice Law and Rules (CPLR) § 5004(a). In this case, the plaintiff credit unions challenge the retroactive application of

[1] Amici curiae consist of the following organizations: Access Justice Brooklyn; CAMBA Legal Services, Inc.; District Council 37 Municipal Employees Legal Service (MELS); The Legal Aid Society; Legal Services of the Hudson Valley; Legal Assistance of Western New York; New Economy Project; New York Legal Assistance Group; Queens Volunteer Lawyers Project, Inc.; and St. Vincent de Paul Legal Program, Inc. (St. John's School of Law Consumer Justice for the Elderly: Litigation Clinic). Amici curiae's organizational statements are attached as Appendix A to this brief.

the Act to unpaid money judgments that were entered prior to the effective date of the Act, alleging, among other things, that the Act is an unconstitutional taking in violation of the Fifth Amendment.

Amici curiae agree with defendants that plaintiffs have failed to plausibly allege a Takings Clause claim. *See* ECF No. 83 (Def. Attorney General Letitia James Mem.); ECF No. 86 ¶ 3 (Spitzer Decl.) (Sheriff Defendants joining the Attorney General's motion to dismiss). Amici curiae file this brief to emphasize that one of the factors set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), for assessing whether an action constitutes a regulatory taking—the character of the government's action—weighs heavily against the conclusion that the Act effects a regulatory taking. The legislation was enacted in the wake of the COVID-19 pandemic to address economic hardships placed on New Yorkers by increasing numbers of debt-collection lawsuits and default judgments that, in many cases, were improperly granted against consumers and that carried an interest rate incommensurate with market rates. The Legislature's amendment of the interest rate to two percent and the retroactive application of that rate are precisely the kind of legislative adjustment of economic burdens to promote the common good that is uncharacteristic of a regulatory taking.

ARGUMENT

THE CHARACTER OF THE FAIR CONSUMER JUDGMENT INTEREST ACT WEIGHS HEAVILY AGAINST A FINDING THAT IT EFFECTS A REGULATORY TAKING.

"The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth, provides that private property shall not 'be taken for public use, without just compensation.'" *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005). Although "[t]he paradigmatic taking … is a direct government appropriation or physical invasion of private property," the Supreme Court has "recognized that government regulation of private property may,

in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster." *Id.* at 537. Governmental regulation of property that "goes too far" is recognized as a regulatory taking. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (citation omitted); *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 374 (2d Cir. 2006).

The Supreme Court has distinguished between two kinds of regulatory takings. First, regulatory actions are *per se* takings "where government requires an owner to suffer a permanent physical invasion of her property," *Lingle*, 544 U.S. at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)), or where the regulation "denies all economically beneficial or productive use of land," *Murr*, 137 S. Ct. at 1942 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)). Second, regulatory actions may amount to takings under the standard set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *See Lingle*, 544 U.S. at 538. Under the *Penn Central* test, "a taking … may be found based on 'a complex of factors,'" *Murr*, 137 S. Ct. at 1943 (citation omitted), of which three factors are "[p]aramount," *1256 Hertel Ave. Assocs. v. Calloway*, 761 F.3d 252, 264 (2d Cir. 2014): "the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action," *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (citing *Penn Central*, 438 U.S. at 124). The *Penn Central* test "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. To prove a regulatory taking under the *Penn Central* test, a plaintiff has a "heavy burden" to show that "the interference with property rises to the level of a taking." *Buffalo Teachers*, 464 F.3d at 375.[2]

[2] In addition, the Supreme Court has recognized that "the special context of land-use exactions" may also give rise to a taking. *Lingle*, 544 U.S. at 538.

The third factor—the character of the governmental action—examines whether the challenged action "'amounts to a physical invasion' or appropriation of property or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *1256 Hertel Ave.*, 761 F.3d at 264 (quoting *Penn Central*, 438 U.S. at 539). "[A] number of courts in this circuit" consider this factor to be the 'most important[ ]'." *Remauro v. Adams*, 2022 WL 1525482, at *7 (E.D.N.Y. May 13, 2022) (collecting cases); *see also Gray Gables Corp. v. Arthur*, 2022 WL 905393, at *3 (2d Cir. Mar. 29, 2022) (although the plaintiff alleged an adverse economic impact, finding that "the character of the government action weighs heavily against finding a taking" and that plaintiff failed to allege an unconstitutional taking). Indeed, one court has stated that the third factor has the "power to outweigh the other two." *Lebanon Valley Auto Racing Corp. v. Cuomo*, 478 F. Supp. 3d 389, 402 (N.D.N.Y. 2020).

I. A governmental action that is the product of a public program that adjusts economic burdens to promote the common good does not have the character of a taking.

As the Supreme Court explained in *Penn Central*, a taking "may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124 (citation omitted). For example, in *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014), the Second Circuit held that the town's action amounted to a taking where it targeted the plaintiff's specific property and prevented him from building on it because of various restrictions, moratoriums, additional required submissions and fees, and where the action was "not part of a public program adjusting the benefits and burdens of public life." *Id.* at 565.

In contrast, in *Penn Central*, the Supreme Court concluded that a New York City law that restricted the development of historic landmarks did not have the character of a taking because it "embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and … over 400 landmarks and 31 historic districts have been designated pursuant to this plan." *Id.* at 132. Similarly, in *Buffalo Teachers*, the Second Circuit concluded that a temporary wage freeze imposed on employees in the City of Buffalo did not have the character of a taking where the wage freeze arose from a public program "to help Buffalo obtain fiscal stability … which the state had a right to initiate and regulate" and where the freeze "promote[d] the common good." 464 F.3d at 375. *See also, e.g.*, *Bens BBQ, Inc. v. Cnty. of Suffolk*, 858 F. App'x 4, 9 (2d Cir. 2021) (concluding that a law that was "rationally related to the legitimate purpose of preserving scarce law enforcement resources" was not a regulatory taking); *Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc. v. New York*, 2021 WL 4198332, at *24 (S.D.N.Y. Sept. 14, 2021) ("The [challenged statute] is the State Legislature's response to an ongoing housing emergency in New York and, as such, is a 'public program adjusting the benefits and burdens of economic life to promote the common good.'" (quoting *1256 Hertel Ave.*, 761 F.3d at 264)); *335-7 LLC v. City of New York*, 524 F. Supp. 3d 316, 333 (S.D.N.Y. 2021) ("Like the statute at issue in *Penn Central*, the [challenged statute] is a longstanding and far reaching regulatory scheme that benefits all New Yorkers. … The [challenged statute] thereby aids community stability and diversity to the benefit all New Yorkers, including Plaintiffs.").

That a government action applies retroactively does not transform the nature of that law into one consistent with that of a taking. For example, in *1256 Hertel Ave.*, the Second Circuit held that the retroactive application of an amendment to New York's homestead exemption to judgment debtors was not a regulatory taking. In so holding, the court explained that the nature of the

amendment was "not that of a regulatory taking" because "[t]he government has not physically invaded or appropriated [the plaintiff's] judgment lien for its own use; it has merely adjusted its long-standing statutory protection of debtors' homesteads to account for modern home values." 761 F.3d at 265.[3] "Legislative tinkering of this sort inevitably creates individual winners and losers," the court explained, and the amendment's "interference with judgment lienholders' property rights is of the sort that inevitably follows when the Legislature adjusts the benefits and burdens of economic life to promote the common good." *Id*.

II. The Fair Consumer Judgment Interest Act is the kind of "legislative tinkering" that is uncharacteristic of a taking.

The Act reduces the interest rate on money judgments for consumer debt from nine percent to two percent per year, both prospectively on judgments entered after the Act's effective date and retroactively on judgments that were entered before but are unpaid as of the Act's effective date *See* CPLR § 5004(a). The two-percent interest rate does not apply to judgments, or portions of judgments, satisfied prior to the effective date, *id.* § 5004(c), and it applies only to money judgments arising out of consumer debt, *se id.* §§ 5004(a), (b). All other money judgments are subject to the pre-existing interest rate of nine percent. *Id*. The Act passed by a wide margin in both the Senate and the Assembly, with more than 70% of legislators voting in favor of the bill.[4]

[3] The homestead exemption "protects a debtor's principal residence from being used to satisfy a creditor's judgment up to a statutorily defined maximum value." *1256 Hertel Ave.*, 761 F.3d at 255. The challenged amendment raised the statutory limit for the exemption from $10,000 to $50,000. *Id.*

[4] *See* Bill Jacket, 2021 N.Y. Laws, ch. 831, at 3.

A. Consumer-debt judgments at the nine-percent interest rate imposed significant hardships on New Yorkers.

Over the past two decades, significant numbers of debt-collection lawsuits have been filed against consumers.[5] Many of these debt-collection lawsuits were filed by debt buyers who purchase, for pennies on the dollar, "vast portfolios of bad debts—mostly delinquent credit cards—from lenders who have written them off as a loss."[6] Debt buyers "often direct their collection efforts at unenforceable debts, including debts discharged in bankruptcy and those for which the limitations period on any collection claim has expired."[7]

Although debt buyers attempt to collect on debt through a variety of means, they have increasingly turned to filing lawsuits.[8] Accordingly, courts in New York, as well as throughout the country, have had numerous debt-collection cases on their dockets. Indeed, the Federal Trade Commission has observed that "[t]he majority of cases on many state court dockets on a given day

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[5] For example, according to a PEW Charitable Trusts report, "[f]rom 1993 to 2013, the number of debt collection suits more than doubled nationwide, from less than 1.7 million to about 4 million, and consumed a growing share of civil dockets, rising from an estimated 1 in 9 civil cases to 1 in 4. PEW Charitable Trusts, *How Debt Collectors Are Transforming the Business of State Courts* 8 (2020), https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts.

[6] Human Rights Watch, *Rubber Stamp Justice* [hereafter, *Rubber Stamp Justice*] (2016), https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor. For example, according to a January 2013 study conducted by the Federal Trade Commission, debt buyers paid an average of four cents per dollar of debt face value. Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* 23 (2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

[7] Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. Rev. 327, 331 (2014).

[8] The Legal Aid Society et al., *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* [hereafter, *Debt Deception*] 6 (2010), https://www.neweconomynyc.org/wp-content/uploads/2014/08/DEBT_DECEPTION_FINAL_WEB-new-logo.pdf; *see also Rubber Stamp Justice*, *supra* n.6 (stating that "the debt buying industry is heavily reliant on litigation as a collections strategy").

often are debt collection matters."[9] In 2011 alone, nearly 200,000 debt-collection lawsuits were filed in New York's courts.[10] According to a report by the Urban Justice Project, the number of consumer debt cases filed in New York in 2006 (approximately 320,000) was "comparable to the total number of civil and criminal cases filed in the federal trial courts nationwide that year."[11]

Debt-buyer lawsuits, however, in "thousands of cases across the country," have been found to be "legally deficient," filed against the wrong people or for the wrong amounts; or lacking in sufficient evidence or "rooted in false evidence or misleading, 'robo-signed' affidavits."[12] For example, according to a 2013 study conducted by New Economy Project, "[i]n 9 out of 10 cases, an employee of the debt buyer—who had no connection to the original creditor—fraudulently testified to facts that only the original creditor could possibly know."[13] A 2007 report from The Urban Justice Center similarly found that "in 99.0% of applicable cases reviewed, debt buyers submitted facially invalid evidence in support of applications for default judgments."[14]

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[9] Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change* 55 (2009), https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf.

[10] New Economy Project, *The Debt Collection Racket in New York* [hereafter, *Debt Collection Racket*] 1 (2013), https://www.neweconomynyc.org/wp-content/uploads/2014/08/DebtCollectionRacketUpdated.pdf.

[11] The Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor* [hereafter, *Debt Weight*] 1 (2007), https://takerootjustice.org/wp-content/uploads/2019/06/CDP_Debt_Weight.pdf.

[12] *Rubber Stamp Justice*, *supra* n.6; *see also Debt Collection Racket*, *supra* n.10, at 3 (discussing "rampant 'robo-signing' of affidavits").

[13] *Debt Collection Racket*, *supra* n.10, at 4.

[14] *Debt Weight*, *supra* n.11, at 7.

Nonetheless, debt lawsuits frequently result in default judgments against the consumer.[15] A May 2020 PEW Charitable Trusts report stated that "[m]ultiple studies have shown that more than 70 percent of debt cases end in default judgments."[16] The Federal Trade Commission reported in July 2010 that panelists convened by the Commission "from throughout the country estimated that sixty percent to ninety-five percent of consumer debt collection lawsuits result in defaults, with most panelists indicating that the rate in their jurisdictions was close to ninety percent."[17] In New York, the New Economy Project found, based on an analysis of statewide data on debt-collection lawsuits filed in New York city and county courts in 2011, that "[d]ebt collection lawsuits accounted for 8 out of 10 of all default judgments entered."[18] The Urban Justice Center estimated, based on a 600-case sample of debt-collection lawsuits filed in New York City Civil Court in February 2006, that "80.0% of cases result in default judgments, which are routinely granted without the requisite proof to establish the damages sought."[19]

In amici curiae's experience, "sewer service," where debt collectors fail to serve properly consumer-defendants but claim that service was accomplished, contributes to the high rate of default judgments in debt-collection actions.[20] For example, a class action lawsuit filed in New

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[15] PEW Charitable Trusts, *supra* n.5, at 15; *id.* at 16 (stating that "default judgments are alarmingly common in debt claims"); *see also Debt Deception*, *supra* n.8, at 6 (stating that the "vast majority of [debt-collection] cases result[ed] in default judgments").

[16] PEW Charitable Trusts, *supra* n.5, at 16.

[17] Federal Trade Commission, *Repairing A Broken System: Protecting Consumers in Debt Collection Litigation And Arbitration* 7 (2010), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf.

[18] *Debt Collection Racket*, *supra* n.10, at 3.

[19] *Debt Weight*, *supra* n.11, at 1.

[20] *See also Debt Deception*, *supra* n.8, at 6; *Rubber Stamp Justice*, *supra* n.6 (stating that "debt buyers have … [o]btained default judgments against defendants who never received proper notice that they were being sued").

York alleged that the defendants engaged in a "default judgment mill" that used sewer service and obtained default judgments "in 49,114 cases in New York City Civil Court" between 2007 and 2010. *Sykes v. Mel S. Harris & Assocs.*, 780 F.3d 70, 76 (2d Cir. 2015).[21] The lawsuit alleged, among other things, "hundreds of instances of the same process server executing service at two or more locations at the same time" and other "irregularities" in service that were a "physical impossibility." *Id.* Other examples of sewer service include instances where debt collectors have submitted false affidavits of service that reflect purported service at incorrect addresses or on persons unknown to the defendant.[22] Many New Yorkers have learned of the debt-collection suit filed against them only when a default judgment entered against them was enforced through, for example, the garnishment of the person's wages or restraints imposed on a bank account.[23]

The impact on New Yorkers from debt-collection lawsuits cannot be overstated. Consumers who receive notice of a lawsuit "incur significant expenses in the form of attorney fees and lost wages for time spent appearing in court."[24] And if a default judgment is entered against the consumer, the consequences can be "devastating"[25]:

> Armed with default judgments, debt buyers can seize people's assets, freeze their bank accounts, or garnish their wages to collect the debts. Judgments also appear on credit reports, preventing people from being able to secure housing, obtain

[21] The lawsuit settled in 2015 for $59 million. Benjamin Mueller, *Victims of Debt Collection Scheme in New York Win $59 Million in Settlement*, N.Y. Times (Nov. 13, 2015), https://www.nytimes.com/2015/11/14/nyregion/victims-of-debt-collection-scheme-in-new-york-win-59-million-in-settlement.html?_r=1.

[22] MFY Legal Services, Inc., *Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York* 6–7 (June 2008), http://mobilizationforjustice.org/wp-content/uploads/reports/Justice_Disserved.pdf.

[23] *See id.*; *see also Debt Deception*, *supra* n.8, at 7; *Debt Weight*, *supra* n.11, at 4.

[24] *Debt Weight*, *supra* n.11, at 24.

[25] *Rubber Stamp Justice*, *supra* n.6.

> credit, and even find employment. Judgments are enforceable for 20 years, and even longer in some cases.[26]

Debt-collection lawsuits have a disproportionate impact on low- and middle-income consumers and on communities of color. As the New York Court of Appeals observed decades ago, "[o]ften associated with consumer debt collection and landlord-tenant litigation, questionable service practices have their greatest impact on those who are poor and least capable of obtaining relief from the consequences of an improperly imposed default judgment." *Barr v. Dep't of Consumer Affs. of City of New York*, 70 N.Y.2d 821, 822–23 (1987). More recently, a 2010 study by New Economy Project of debt-buyer lawsuits in New York City found that "91% of people sued by debt buyers and 95% of people with default judgments entered against them live in low- or moderate-income communities," and that "51% of people sued by debt buyers and 56% of people with default judgments entered against them lived in communities in which the population is more than 50% black or Latino."[27] Similarly, a 2015 study by *ProPublica* found that debt-collection lawsuits are disproportionately prevalent in black communities.[28]

Before enactment of the Act, the statutory judgment interest rate of nine percent exacerbated the adverse consequences of default judgments on New Yorkers. With an interest rate of nine percent, the amount owed from a money judgment can far exceed the amount originally

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[26] *Debt Deception*, *supra* n.8, at 1; *see also Debt Collection Racket*, *supra* n.10, at 6; *Debt Weight*, *supra* n.11, at 4 (stating that "families are prevented from paying the rent, purchasing necessities like food and medication, and paying for utilities").

[27] *Debt Deception, supra* n.8, at 10.

[28] Paul Kiel and Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, ProPublica (Oct. 8, 2015), https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods.

owed and can easily balloon to an amount essentially impossible for many consumers to pay.[29] For example, a client of New Economy Project faced garnishment for a twelve-year-old debt-buyer judgment he had never known about; during those twelve years, the judgment amount had more than doubled, reaching an amount he could not afford.[30] Similarly, *The Buffalo News* reported that a student in New York learned, years later, that a college had obtained a judgment against him for a semester's charges, that the student had never been served with the lawsuit against him, and that because of the nine-percent interest rate on judgments, the student owed more than double the amount the college had charged for the semester.[31]

B. Through the Fair Consumer Judgment Interest Act, the Legislature adjusted the benefits and burdens of economic life to address hardships placed on New Yorkers by consumer debt.

The legislative history of the Act demonstrates that the Legislature intended to address the economic hardships associated with debt-collection lawsuits and consumer-debt judgments. In examining the legislature history and the purpose of a statute, courts frequently rely on the statements in the sponsor's memorandum, which accompanies the introduction of a bill. *See, e.g.*, *1256 Hertel Ave.*, 761 F.3d at 259 (quoting from the sponsor's memorandum in discussing the legislative history of the statute); *Haar v. Nationwide Mut. Fire Ins. Co.*, 138 N.E.3d 1080, 1084 (N.Y. 2019) (stating that the legislative history "could not be much clearer" on one issue and citing the statements in the sponsor's memorandum); *In re Shannon*, 34 N.E.3d 351, 352–53 (N.Y. 2015)

[29] *See Rubber Stamp Justice*, *supra* n.6 (stating that "[f]or people who lack the means to make significant monthly payments, high rates of post-judgment interest can make it hard to make any headway paying off their balance, and substantially increase the amount they must ultimately repay").

[30] *See* Mem. from Fordham L. Sch. Feerick Ctr. for Soc. Justice et al. to Gov. Kathy Hochul (Nov. 3, 2021), Bill Jacket, 2021 N.Y. Laws, ch. 831, at 18 (citing Memorandum of Support).

[31] Mark E. Blue & George F. Nicholas, *Another Voice: Debt law would fix an economic and racial injustice*, The Buffalo News (Dec. 2, 2021), Bill Jacket, 2021 N.Y. Laws, ch. 831, at 83.

(similar); *see also Jaquan L. v. Pearl L.*, 179 A.D.3d 457, 459 (N.Y. Ct. App. 2020) (citing the sponsor's memorandum in discussing the purpose of the statute). Here, the Sponsor's Memorandum explained that the Act "intends to remedy the hardship placed on a significant number of New Yorkers by a statutory judgment interest rate that has long been incommensurate with market interest rates, and which has been intensified by the COVID-19 pandemic."[32]

Where the challenged legislation is merely "[l]egislative tinkering" in which the government "merely adjust[s]" its prior regime "to account for modern" prices, the legislation is not the kind of action that constitutes a regulatory taking. *1256 Hertel Ave.*, 761 F.3d at 265. That is exactly what the Act did here. In lowering the interest rate to two percent, the Legislature determined that an interest rate of two percent better aligned with current market rates. For example, the Sponsor's Memorandum explained that the nine-percent rate, in place since 1981, "has for too long been incongruent with market interest rates."[33] In 1981, the "average rate for the one-year United States Treasury bill (i.e., One Year Treasury Constant Maturity Yield) was over 14 percent," whereas "[f]rom 2000 to 2020, the average rate was under 2 percent."[34] By 2021, the nine-percent rate was therefore "widely out of step with current market rates."[35] As Assemblywoman Helene Weinstein stated, "By more closely aligning the interest rate with market conditions, the bill will reduce the financial burden of consumer debt on a significant number of

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[32] Sponsor Mem., 2021 N.Y. Laws, ch. 831, *available at* https://www.nysenate.gov/legislation/bills/2021/S5724 (also available in Bill Jacket, 2021 N.Y. Laws, ch. 831, at 8).

[33] Sponsor Mem., *supra* n.32

[34] *Id.*; *see also* N.Y. State Senate Debate Tr., 244th Sess. (June 8, 2021), at 4734, https://www.nysenate.gov/transcripts/floor-2021-06-08t130800 ("Today's rates are significantly lower [than the benchmark rate in 1981], remaining under 2 percent for the last 20 years.") (statement of Sen. Thomas).

[35] N.Y. State Senate Debate Tr., *supra* n.34, at 4734.

New Yorkers, a burden which has been exacerbated by the COVID-19 pandemic."[36] Thus, like the retroactive adjustment of the amount of the homestead exemption in *1256 Hertel Ave.*, the retroactive adjustment of the amount of the statutory judgment interest rate is not characteristic of a taking because the Act's "interference with … property rights is of the sort that inevitably follows when the Legislature adjusts the benefits and burdens of economic life to promote the common good." *1256 Hertel Ave.*, 761 F.3d at 265.

Because the Act is the result of a "public program adjusting the benefits and burdens of economic life to promote the common good," it does not have the character of a taking. *Id.* at 264 (quoting *Penn Central*, 438 U.S. at 539); *see also Bldg. & Realty Inst. of Westchester & Putnam Cntys.*, 2021 WL 4198332, at *24 ("The [challenged law] is the State Legislature's response to an ongoing housing emergency in New York and, as such, is a 'public program adjusting the benefits and burdens of economic life to promote the common good.'"). Here, the Act's reduction of the interest rate to two percent was the Legislature's adjustment of the economic benefits and burdens for New Yorkers, in furtherance of the State's goal of alleviating economic hardships arising from debt-collection actions. For example, the Sponsor's Memorandum described the "unprecedented numbers" of debt-collection lawsuits filed against consumers that "are notoriously lacking basic information and are sometimes filed against the wrong people," and that have involved "widespread and well-documented fraud in service of process."[37] Senator Kevin Thomas, one of the sponsors of the Act, noted that the "disparity" between the two-percent market rate and the pre-existing nine-percent rate "has directly contributed to an epidemic of abusive debt collection lawsuits, which have inundated New York courts since the early 2000s," where "[p]redatory debt

[36] Letter from Assemblywoman Helene E. Weinstein to Gov. Kathy Hochul (Dec. 7, 2021), Bill Jacket, 2021 N.Y. Laws, ch. 831, at 5.

[37] Sponsor Mem., *supra* n.32

buyers exploit our laws" at the expense of New York consumers.[38] Similarly, Assemblywoman Weinstein stated that "the problem of consumer debt has affected all New Yorkers" and that "a 9% interest rate on consumer debt has had a crushing impact on lower and middle income New Yorkers, as debt collectors seek and enforce judgments for rent and mortgage arrears, medical debt, overdue credit card and utility bills, and student loans."[39] Assemblywoman Weinstein explained that "[i]f a change is not made, our 9% interest rate will continue to wreak havoc on lower and middle income communities,"[40] with "[m]any consumers … sued for small debts … only to find that judgments entered against them are entered for a much greater amount because of this nature of the nine-percent interest."[41] In addition, in setting an interest rate of two percent, the Legislature sought to alleviate the disproportionate impact of the economic hardships of debt-collection lawsuits on lower- and middle-income consumers and on communities of color.[42]

Of particular relevance here, the Legislature found that retroactive application of the two-percent interest rate was necessary to ameliorate the economic hardships faced by New Yorkers saddled with consumer debt, particularly in light of the financial pressures on New Yorkers caused by the COVID-19 pandemic. The Sponsor's Memorandum explained that the pandemic "imposed unprecedented financial pressure on consumers" and emphasized the interest of the State in

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[38] N.Y. State Senate Debate Tr., *supra* n.34, at 4734–35.

[39] Letter from Assemblywoman Helen Weinsteine to Gov. Kathy Hochul, *supra* n.36, at 5.

[40] *Id.*

[41] N.Y. State Assembly Debate, 244th Sess. (June 10, 2021), at 35:50, https://nystateassembly.granicus.com/MediaPlayer.php?view_id=6&clip_id=6328# (statement of Assemblywoman Weinstein).

[42] Sponsor Mem., *supra* n.32 (stating that "[t]he legislature finds that the confluence of these systemic failures disproportionately harm communities of color, increasing and entrenching racial inequity").

protecting New Yorkers from the adverse consequences of consumer-debt judgments entered in the past:

> The long-lasting economic effects of the[] measures [employed by debt collectors] are deeply concerning and it is in the interest of the State to protect vulnerable New Yorkers from bank levies and wage garnishments to pay unjustly high interest amounts that originate in State law on judgments for consumer debts. New York state has an opportunity to protect New Yorkers from further financial hardship - with no financial outlay by the state - by lowering the interest rate that defendants pay on consumer judgments and accrued claims.[43]

Senator Thomas stated during the Senate floor debate that "[o]ne of the primary reasons" for the legislation was "to protect consumers and give them a lending hand and a second chance."[44] Similarly, Assemblywoman Weinstein stated during the Assembly floor debate that "[t]his legislation particularly in coming out of the time of the pandemic will be a lifeline for consumers trying to reasonably get out of crushing consumer debt."[45] She stated that retroactive application of the two-percent interest rate "to unpaid amounts on current judgments" was needed to "get consumers out of the crushing debt they are in and back into spending in our economy."[46]

Thus, the Legislature determined that it was in the public interest to reduce retroactively the interest rate on unpaid consumer-debt judgments from nine percent to two percent. For example, the Sponsor's Memorandum stated that "[i]t would be unjust and contrary to public policy to allow interest at this inflated and harsh rate on unpaid amounts for judgments entered in the past."[47] In addition, Assemblywoman Weinstein stated that the nine-percent rate was "punitive," and "[i]t would be unjust and contrary to public policy to allow" that rate "to be charged

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[43] *Id.*

[44] N.Y. State Senate Debate Tr., *supra* n.34, at 4728 (statement of Sen. Thomas).

[45] N.Y. State Assembly Debate, *supra* n.41, at 36:05 (statement of Assemblywoman Weinstein).

[46] N.Y. State Assembly Debate, *supra* n.41, at 36:45 (statement of Assemblywoman Weinstein).

[47] Sponsor Mem., *supra* n.

on unpaid judgment amounts."[48] The nine-percent rate "harms communities by transferring hard-earned wealth from the wages of low- and moderate-income New Yorkers to judgment creditors and debt collectors, as well as those who securitize debts," she explained, and "[f]rom a public policy perspective, it is simply better for these monies to remain in the hands of these communities, and get reinvested back into the economy for food, medicine, rent, and other essential needs."[49]

Finally, the fact that the retroactive application of the two-percent interest rate may reallocate the economic burdens between the consumer debtor and the debt collector does not make the Act a taking. Although "the net effect of the [challenged action] may well be to take from Peter to pay Paul, … such burden shifting does not, without more, amount to a regulatory taking." *Buffalo Teachers*, 464 F.3d at 376. Indeed, "[l]egislation designed to promote the general welfare commonly burdens some more than others," and that a law "has a more severe impact on some [persons] than on others … in itself does not mean that the law effects a 'taking.'" *Penn Central*, 438 U.S. at 133; *see also Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 223 (1986) ("[I]t cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.").

CONCLUSION

For the foregoing reasons, the Court should grant defendant Attorney General Letitia James' motion to dismiss.

[48] Letter from Assemblywoman Helene Weinstein to Gov. Kathy Hochul, *supra* n.36, at 5.

[49] *Id.* at 6.

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Respectfully submitted,

/s/ Wendy Liu
Wendy Liu
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Susan Shin
NEW ECONOMY PROJECT
121 W. 27th St., #804
New York, NY 10001
(212) 680-5100

Counsel for Amici Curiae Legal Services Organizations

Appendix A

Access Justice Brooklyn

Access Justice Brooklyn partners with compassionate pro bono attorneys to provide high-quality, civil legal services that help ensure equal access to the legal system. The organization's approach prioritizes the most basic, essential elements and experiences of human life, including housing, family stability, and subsistence income. Its proven pro bono model—recruit, train, supervise, and support— also provides flexibility to address new legal issues as they emerge. Everyone, whether an attorney or not, has a role to play in expanding access to justice.

CAMBA Legal Services, Inc.

CAMBA Legal Services is a community based non-profit legal services provider located in the Flatbush neighborhood of Brooklyn. CAMBA provides legal services in the areas of housing, immigration, foreclosure, and consumer law. Since its inception 15 years ago, the CAMBA Consumer Law Project works to assist working poor New Yorkers with a broad spectrum of consumer law issues including: representing defendants in collection actions filed in New York City Civil Court; assisting pro se defendants draft legal papers; and helping consumers facing debt collection abuse. The chief goal of the Consumer Law Project is to help our clients achieve self-sufficiency.

District Council 37 Municipal Employees Legal Service (MELS)

District Council 37 Municipal Employees Legal Services (MELS) was established in 1977 as a legal service benefit available to New York City municipal employees and retirees who are represented in their job titles by the American Federation of State, County and Municipal Employees (AFSCME) District Council 37. MELS is the largest pre-paid legal service provider of its kind in the country. Over 125,000 active employees and retirees in City government and New York cultural institutions who reside in New York City and Nassau, Suffolk, Westchester and Rockland Counties are eligible for MELS' legal services. Although employed or receiving pensions, our clients earn minimal wages and lack the financial resources to retain private counsel. Many are the head of single parent households, whose municipal employment marks their initial entry into the job market. MELS protects these working poor New Yorkers from homelessness, economic hardship and family instability. In addition to legal representation, MELS' Consumer/Debt/Bankruptcy Unit and Housing Unit have many clients impacted by judgment interest who benefited by Fair Consumer Judgment Interest Act.

The Legal Aid Society

The Legal Aid Society (Legal Aid), the nation's oldest and largest not-for-profit legal services organization. Legal Aid provides comprehensive legal services in all five boroughs of New York City for people who cannot afford to pay for private counsel. Since 1876, Legal Aid has advocated for low-income families and individuals and has fought for legal reform in City, State, and Federal Courts across a variety of civil, criminal and juvenile rights matters. Legal Aid also takes on law reform and appellate cases, the results of which benefit more than 1.7 million low-income New Yorkers; the landmark rulings in many of these cases have a state-wide and national impact. The mission of the Society's Civil Practice is to improve the lives of low-income New Yorkers by

providing legal representation and advocacy to vulnerable families and individuals so that they are able to obtain and maintain the basic necessities of life, and to access the benefits to which they and their families are entitled. The Society's Civil Practice focuses on enhancing individual, family and community stability by serving our clients in resolving a full range of legal problems in the areas of housing, public benefits, foreclosure prevention, immigration, domestic violence and family law, health law, employment, elder law, tax law, community economic development, health law and consumer law.

Legal Services of the Hudson Valley

The mission of Legal Services of the Hudson Valley is to provide free, high-quality counsel in civil matters for individuals and families who cannot afford to pay an attorney where basic human needs are at stake. Legal Services of the Hudson Valley is the only provider of comprehensive civil legal services to seven counties of the Hudson Valley: Westchester, Putnam, Dutchess, Rockland, Orange, Ulster and Sullivan. We assist hundreds of vulnerable consumers every year. We help defendants in consumer credit cases avoid or obtain relief from money judgments.

Legal Assistance of Western New York

Legal Assistance of Western New York, Inc. (LawNY) is a nonprofit civil legal services organization that represents low-income and vulnerable individuals across 14 counties and 10,000 square miles of New York. The Consumer Project at LawNY provides representation and advocacy services to people dealing with debt collection, auto fraud, student loans, bankruptcy, identity theft, credit reporting, and more. The Consumer Law Project operates a free know-your-rights hotline to provide information and *pro se* resources to people dealing with consumer debt collection cases, regardless of their eligibility for full representation from our organization. In addition to *pro se* assistance provided to all callers over the hotline, for eligible clients, we provide direct representation in consumer debt collection lawsuits. In 2021, LawNY partnered with the NYS Permanent Commission on Access to Justice to establish the Rochester City Court Consumer Debt Assistance Project (CDAP), a pilot program designed to address the high number of default judgments in Rochester City Court consumer debt collection cases. To date, the work of the Consumer Law Project has served more than 2,000 individuals and helped save over a million dollars for low-income New Yorkers.

New Economy Project

New Economy Project works to promote economic justice and to eliminate discriminatory economic practices that perpetuate inequality and poverty. Since 2005 we have operated a free hotline through which we have helped thousands of low-income New York City residents resolve legal issues stemming from debt collection lawsuits, credit reporting problems, unfair banking practices, and more. We effectively combine our direct legal services with cutting-edge impact litigation, policy advocacy, coalition-building, and applied research to secure vital policy changes to curb the extraction of wealth from New York City's low-income neighborhoods and neighborhoods of color.

New York Legal Assistance Group

Founded in 1990, New York Legal Assistance Group (NYLAG) is a leading civil legal services organization that combats economic, racial, and social injustice by advocating for New Yorkers experiencing poverty or in crisis. Our work includes comprehensive, free civil legal services, financial empowerment, impact litigation, policy advocacy, and community partnerships. NYLAG exists because wealth should not determine who has access to justice. We aim to disrupt systemic racism by serving individuals and families whose legal and financial crises are often rooted in racial inequality. NYLAG goes to where the need is, providing services in more than 150 community sites in New York and in our Mobile Legal Help Center. During COVID-19, most of our services have been virtual to keep our community safe. NYLAG's Consumer Protection Unit Project (CPU) represents and advises consumer debtors in debt collection lawsuits, and assists them in challenging abusive debt collection practices, combating identity theft, and repairing credit. As part of a program conducted in partnership with the Unified Court System, CPU also supervises the Volunteer Lawyer for a Day – Consumer Credit Project in Bronx County, Queens County, and Richmond County Civil Courts, through which NYLAG and volunteer attorneys assist and represent thousands of pro se consumer debtors at court appearances each year.

Queens Volunteer Lawyers Project, Inc.

Queens Volunteer Lawyers Project, Inc. (QVLP) was created by the Queens County Bar Association to continue its history of community service provided since the association's inception in 1876. For over 30 years QVLP has provided free legal assistance to residents of Queens County, New York on a wide range of civil law issues involving basic human needs, focusing on the vast majority of the low-income community who do not have the resources to retain paid legal counsel. QVLP's Queens Conference Project provides advice and representation to Queens homeowners facing foreclosure and our CLARO-Queens Consumer Debt Clinic has helped thousands of pro se Defendants since its inception in January 2008.

St. Vincent de Paul Legal Program, Inc. (St. John's School of Law Consumer Justice for the Elderly: Litigation Clinic)

The St. Vincent de Paul Legal Program, Inc. is a 501(c)(3) non-profit corporation that provides free legal services to persons with limited means. St. John's University School of Law operates its law school clinics through the St. Vincent de Paul Legal Program, Inc., including the Consumer Justice for the Elderly: Litigation Clinic ("CJELC"), whose work relates to the subject matter of this lawsuit. CJELC has a dual mission: to provide free legal assistance to low income, older residents of Queens County who would not otherwise have access to legal representation, and to guide law students in the development of their lawyering skills and professional identities, emphasizing the duty to practice ethically and in the service of justice. Because senior citizens are particularly vulnerable to financial abuse and consumer deception, CJELC focuses its representation of seniors in cases involving predatory lending, foreclosure, consumer debt litigation, debt collection, and home improvement contractor fraud. CJELC advocates for public policy and legal reform, based on systemic problems observed in its collective work for individual clients. CJELC also engages in community education on consumer issues, through law student presentations at Queens senior centers and through faculty presentations at programs for the public and the advocacy community. CJELC regularly assists older people, including disabled older

people, who have been sued for consumer credit debt. We frequently represent clients who are subject to old default judgments, entered seven or more years prior to when the client learns of the judgment through collection activity. The judgment amount might have doubled by the time our client discovers it. Thus, the issues in this lawsuit are of vital interest to CJELC's clients.