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Justine V. Beyda

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NOTES

DEFINING PRIMARY RESIDENCE: SOMETIMES IT REALLY IS AS SIMPLE AS THE PLAIN AND ORDINARY MEANING OF THE WORD

JUSTINE V. BEYDA[†]

INTRODUCTION

"This court is not condemning respondent to a life of homelessness. Whether by choice or circumstance, respondent is already homeless."[1]

Michael Tsitsires was not in fact homeless until July of 2005, when the Civil Court of New York evicted him from his one and only home of thirty-five years for failing to use the apartment as his primary residence, despite recognizing that Tsitsires possessed no other residence.[2] This decision was a striking departure from case law, legislative history, and common sense.

The statutory primary residence requirement allows for the removal of rent regulation protection from any housing accommodation that is not the primary residence of the tenant in possession—upon application by the landlord.[3] Essentially, this statute allows a landlord to seek eviction of a rent-regulated

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[†] Editor-in-Chief, *St. John's Law Review*; J.D. Candidate, 2010, St. John's University School of Law; B.A., 2007, State University of New York at Binghamton University.

[1] TOA Constr. Co. v. Tsitsires, 9 Misc. 3d 469, 471, 798 N.Y.S.2d 674, 677 (N.Y. Civ. Ct. N.Y. County 2005), *rev'd per curiam*, 14 Misc. 3d 65, 830 N.Y.S.2d 16 (Sup. Ct. App. T. 1st Dep't 2006), *rev'd*, 54 A.D.3d 109, 861 N.Y.S.2d 335 (1st Dep't 2008).

[2] *See id.* at 493, 798 N.Y.S.2d at 692. The Supreme Court Appellate Term reversed the finding of non-primary residence on the grounds that the tenant possessed only one residence, which was per se his primary residence. *See TOA Constr.*, 14 Misc. 3d at 67, 830 N.Y.S.2d at 18. The Appellate Division reversed the Appellate Term and awarded possession to the landlord on non-primary residence grounds. *See TOA Constr.*, 54 A.D.3d at 117–18, 861 N.Y.S.2d at 341.

[3] *See* Ch. 373, § 1, 1971 N.Y. Laws 1164.

tenant upon a showing that the housing unit is not used as the tenant's primary residence. Prior to the landmark case of *TOA Construction Co. v. Tsitsires*,[4] however, a court has never, in the forty years since New York enacted the primary residence statute, made a finding of non-primary residence when a tenant has undisputedly possessed only one residence. The court's decision raises the following question: Does the primary residence requirement permit the eviction of a tenant from what is undisputedly his only residence on the grounds that he does not maintain it as his primary residence?

This question concerning primary residence law is particularly prone to conflicting viewpoints and great debate because there is no statutory definition of what exactly a "primary residence" is. Rather, the definition of the phrase, as used in New York's rent regulation statutes and codes, has developed entirely from judicial interpretation. There are, however, general principles inherent in the plain language of the statutes and the legislative purpose in creating them that establish the permissible bounds of the statutes' application and scope. These include a focus on helping actual residents of New York attain affordable housing and a reliance on objective evidence to make primary residence determinations. Most importantly, the New York legislature objectively demonstrated an intent to limit the scope of the primary residence requirement to tenants who possess more than one residence.

This limitation has been recognized by courts applying the statute that have refused to evict tenants who possess only one residence on primary residence grounds despite extremely limited usage of these apartments by the tenants in possession because it is clear that these tenants do not maintain the contested apartment for "less than [a] need for a place to call home."[5] Moreover, the legislature recognized that fairness demanded hesitancy in application of the statutes to tenants who utilize their apartments in nontraditional ways but clearly do not do so with profiteering motives. Conversely, subjecting tenants with more than one residence to the loss of rent regulation protection—and, therefore, the loss of reduced rent rates—

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[4] 54 A.D.3d 109, 861 N.Y.S.2d 335.

[5] *See infra* Part II; *see also* Park S. Assocs. v. Mason, 123 Misc. 2d 750, 753, 474 N.Y.S.2d 672, 675 (N.Y. Civ. Ct. N.Y. County 1984), *aff'd per curiam*, 126 Misc. 2d 945, 488 N.Y.S.2d 1020 (Sup. Ct. App. T. 1st Dep't 1984).

seemed implicitly fair when those tenants were affluent enough to concurrently maintain at least two residences. Accordingly, while courts have discretion in making primary residence determinations, an interpretation of the New York rent regulation statutes that permits a finding of non-primary residence when it is uncontested that a tenant has only one residence cannot be reconciled with the plain language of the statutes, legislative history, public policy, or case precedent.

Consistent with this assertion, no court, until *TOA Construction*, has found that a tenant's undisputedly only housing accommodation was not his primary residence, nor explicitly stated that proving at least two residences was not an essential element of the primary residence test. Acceptance of this interpretation of the primary residence requirement has serious ramifications and is a matter of vital importance for the residents of the nearly 1.4 million rent-regulated housing units in New York City.[6] If the possession of at least two housing units is not an essential element of the primary residence test, a whole new category of tenant, never previously considered a target for primary residence claims, may face eviction on these grounds. More importantly, the ultimate effect of subjecting this new category of tenant—who maintains only one residence—to eviction is to allow, and even foster, judicially imposed homelessness.

Furthermore, when a tenant undisputedly possesses only one residence, the legislative mandate that primary residence determinations must rest on objective criteria is not met. Codifying this mandate, New York's current rent regulation guidelines suggest four non-determinative criteria to be used to assess primary residence claims, three of which are objective criteria and one of which is subjective.[7] The first two focus on documentary evidence of the address a tenant uses on certain documents. These two criteria explicitly ask if the tenant lists an address other than the contested apartment on these documents,[8] which would clearly demonstrate which of at least two residences a tenant considered his primary home. This inquiry also

[6] *See* N.Y. CITY RENT GUIDELINES BD., 2008 HOUSING SUPPLY REPORT 3, *available at* http://www.housingnyc.com/downloads/research/pdf_reports/ 08HSR.pdf.

[7] *See infra* note 31 and accompanying text.

[8] *See infra* note 31 and accompanying text.

explicitly reveals that the New York legislature viewed possession of at least two residences as a condition precedent to an assessment of primary residence. The fourth criterion focuses on proof of subletting. It is highly unlikely for a tenant to opt to become homeless by subletting his or her only residence; therefore, this criterion also relies on objective proof that a tenant sublets, which most likely also demonstrates that the tenant possess at least two housing accommodations. The only subjective criterion asks whether a tenant spent at least 183 days in the dwelling in the year preceding the litigation.[9] When tenants have only one residence, which they do not sublet, courts are forced to make the primary residence determination based exclusively on the one subjective criterion of the rent regulation guidelines because the first two are rendered inapplicable when there are no other addresses to compare—the fourth is inapplicable without proof of subletting. A tenant's fate (facing eviction on non-primary residence grounds) in this situation turns, therefore, on the manner and length of time in which he, a rent-paying tenant, utilizes the one residence that he owns. This inquiry contradicts the legislative demand for objective evidence and implicates constitutional infringements on privacy and due process. It also raises credibility issues by relying exclusively on subjective determinations of how much is enough to constitute "truly living" in one's home. Additionally, the subjective nature of the 183-day requirement exacerbates the predictability problems of a statute already criticized for producing arbitrary results.[10]

This Note argues that proving the existence of two residences is, and has always been, a necessary element of a landlord's prima facie case when seeking eviction of a rent-regulated tenant on non-primary residence grounds. Part I of this Note describes the statutes and regulations that establish

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[9] *See infra* note 31 and accompanying text. The 183-day usage requirement lacks objectivity in both its creation and its application. The decision that 183 days is adequate usage of an apartment to constitute a person's primary residence is a subjective decision of appropriate usage. Additionally, the evidence used to assess whether a tenant meets this requirement will often come from testimonial evidence of the tenant and his neighbors, which can hardly be considered objective in nature.

[10] *See* Paul A. Batista, *Primary Residence: The Law the Conflict and the Future*, N.Y. L.J., Sept. 11, 1985, at 1 ("Despite the explosion of 'primary residence' litigation, few guidelines have emerged for establishing basic rules or predicting the outcome of particular cases.").

the primary residence requirement in rent-regulated housing units and describes two irreconcilable interpretations of the proper primary residence test. This Part will also highlight the recent and controversial case of *TOA Construction Co. v. Tsitsires* that raises many issues, including those concerning public policy and prior case law, which are relevant to the discussion of which is the proper test to be used in making primary residence determinations. This Note, however, is not limited to a discussion of this case, but instead raises issues not discussed in *TOA Construction* in an attempt to determine the proper interpretation of the primary residence standard. Part II will evaluate the competing interpretations of the primary residence test against the plain language of the statutes, legislative history and purpose, public policy, and prior judicial interpretation. Part III concludes that an interpretation of the primary residence statutes that does not recognize the possession of two residences as a necessary element of the primary residence test is an improper interpretation of the statute. An interpretation of this nature skews the intended legislative scope of the requirement and leads to illogical results.

I. PRIMARY RESIDENCE LAW: HISTORY, PURPOSE, AND JUDICIAL INTERPRETATION

This Part will explore the statutory and judicial history of the primary residence requirement. Part I.A. will discuss the statutory framework and regulations that create, but do not define, the primary residence requirement for rent-regulated housing units in New York. Part I.B. will explore the legislative purpose in adding a primary residence requirement to the rent regulation scheme already in existence at that time. Part I.C. will describe the judicial interpretation of these statutes by highlighting the seminal cases in this area, which are frequently accredited with creating a judicial definition of the statutorily undefined phrase "primary residence." Finally, Part I.D. will discuss the landmark case *TOA Construction*, which highlights some, but not all, of the issues in determining whether the legislature intended that a tenant could be subjected to the loss of rent regulation protection—essentially allowing eviction—on a non-primary residence claim when that dwelling is the tenant's only residence.

A. *The Statutory Framework*

The rent regulation system[11] is designed to protect tenants from unreasonable evictions and rent increases, while simultaneously giving landlords a fair rate of compensation.[12] Under the system, the risk of unreasonable eviction is far less than in a traditional lease because tenants subject to rent regulation protection are entitled to possession of their rent-regulated apartment indefinitely, as long as they make the required rent payments and are in compliance with the rent regulation laws and regulations.[13]

Rent regulation, in the form of rent control, was first imposed in New York—and across the country—in 1943 as a part of a federal wartime effort to reduce the city housing shortage, which developed in the wake of World War II.[14] On March 1, 1950, rent regulation in New York moved from federal regulation to state regulation with the enactment of the State Emergency Housing Rent Control Law ("SEHRCL").[15] Neither the federal nor the state rent regulation scheme included a primary residence requirement at this time. In 1969, rent stabilization was instituted in New York City by the Rent Stabilization Law of 1969, and was later extended to other areas of the state in 1974 by the Emergency Tenant Protection Act of 1974.[16] Again, neither statute included a primary residence requirement.

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[11] The system of rent regulation encompasses both rent control and rent stabilization. *See* 7 WARREN'S WEED NEW YORK REAL PROPERTY § 83.02 (Lorraine Power Tharp et al. eds., 5th ed. 2009). The most significant difference between the two systems is the level of rent increase that is permissible under each, with rent stabilization allowing for a much greater increase. *See id.*

[12] *See id.*

[13] *See id.*

[14] *See* Steven R. Weisman, *Rent Control: Nobody May Ever Move Again*, N.Y. TIMES, May 30, 1971, at E1.

[15] *See* N.Y. UNCONSOL. LAWS § 8581 (McKinney 1987). When the federal government released control of rent-regulation systems to the states, it also allowed states to eliminate the system entirely if the state could prove that the state was no longer suffering a housing emergency. *See* Guy McPherson, Note, *It's the End of the World as We Know It (and I Feel Fine): Rent Regulation in New York City and the Unanswered Questions of Market and Society*, 72 FORDHAM L. REV. 1125, 1134–35 (2004). Most states opted to terminate the system and as of 1961, New York City was the only municipality to maintain a rent control regime. *See id.* at 1135.

[16] *See* NEW YORK, N.Y., ADMIN. CODE tit. 26, ch. 4, § 26-501 (West, Westlaw through L. 2008, chs. 1–400 and Local Law 21 of 2008); *see also* N.Y. UNCONSOL. LAWS § 8622 (McKinney 1974). Decision making authority for rent control had previously been transferred from New York State to New York City, under the administration of the local housing agency, with the passage of the Local Emergency

The primary residence requirement first appeared in the rent regulation framework in Chapter 373 of the Laws of New York 1971.[17] The Act amended the SEHRCL and the Local Emergency Housing Rent Control Law ("LEHRCL") by allowing for the removal of rent regulation protection from any housing accommodation that was not the primary residence of the tenant in possession—upon application by the landlord.[18] In relevant part, the Act stated that "housing accommodations which are not occupied by the tenant in possession as his primary residence" shall not be protected by rent regulation "whenever it is established by any facts and circumstances which, in the judgment of the commission, may have a bearing upon the question of residence, *that the tenant maintains his primary residence at some place other than at such housing accommodation*."[19] This Act did not, however, give any legislative definition to the phrase "primary residence."[20]

Since 1971, the primary residence requirement has remained an essential element of rent regulation schemes in New York. Accordingly, all four of the current statutes governing rent regulation in New York contain provisions that permit the removal of rent regulation protection from housing units not occupied as a tenant's primary residence.[21] Significantly, the language of these statutes no longer explicitly references an alternative primary residence like Chapter 373; rather, they now read that rent regulation protection is exempted from dwelling units "not occupied by the tenant . . . as his or her primary

Housing Rent Control Law ("LEHRCL") and the subsequent enactment of the New York City Rent and Rehabilitation Law in 1962. *See* N.Y. UNCONSOL. LAWS §§ 8601–17 (McKinney 1987); *see also* ADMIN. CODE tit. 26, ch. 3, §§ 26-401 to -415.

[17] Ch. 373, § 1, 1971 N.Y. Laws 1164.

[18] *See id.*

[19] *Id.* (emphasis added).

[20] The legislative memorandum on Chapter 373 did, however, provide some examples that may constitute evidence relevant to the "question of residency." *See* Memorandum of State Executive Department, *reprinted in* 1971 N.Y. Laws 2402 (McKinney); *see also infra* note 24 and accompanying text.

[21] *See* ADMIN. CODE tit. 26, ch. 3, § 26-403 (city rent control); *id.* § 26-504(a) (city rent stabilization); *see also* Emergency Tenant Protection Act of 1974, N.Y. UNCONSOL. LAWS § 8625 (McKinney 1974) (state rent stabilization); *id.* § 8582 (state rent control). Additionally, courts often cite the primary residence requirement to the Regulations of the State of New York instead of the statutes. *See* N.Y.C.R.R. tit. 9, ch. VIII, §§ 2524.4(c), 2520.11(k) (LEXIS through Aug. 2009).

residence."[22] The only other significant difference between the primary residence requirement enacted in 1971 and the provision as employed today is the transfer of authority to make a primary residence determination from administrative agencies to the courts.[23] More importantly, what the current statutes do share with their predecessor is the complete lack of a legislative definition for the concept of "primary residence."

In light of the absence of a statutory definition, various regulations have been enacted and amended to help clarify the concept of "primary residence." Like the statutes, however, no version of the primary residence regulations provide an explicit definition of the term.[24] Birthed unofficially in the legislative memoranda in support of Chapter 373, the first legislative attempt to give the term a more concrete meaning came in the form of suggestions as to possible evidence that may be used to make a primary residence determination.[25] Importantly, the criteria suggested in this memorandum paralleled the language and idea of the statutes, stating that the suggested evidence may be used to determine that a tenant "maintains his primary residence *elsewhere*" and by focusing exclusively on *which* address a tenant listed on important documents.[26] Accordingly, it is clear that the legislature assumed the statutes would only apply when a tenant possessed more than one residence.

The first official primary regulations promulgated by the New York legislature shifted the focus of the analysis from a comparison of addresses to a focus on a tenant's relationship to New York itself. Section 54(e) of the former Rent Stabilization Code and section 18 of the former Rent and Eviction Regulations, the first codified regulations to assess primary residence claims, provided a mandatory two-pronged test for making primary

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[22] ADMIN. CODE tit. 26, ch. 3, § 26-403; *see id.* § 26-504(a); N.Y. UNCONSOL. LAWS §§ 8625, 8582. Unfortunately, legislative history is silent on the reason for this change.

[23] *See* Emergency Tenant Protection Act of 1983, Ch. 403, § 55, 1983 N.Y. Laws 739–40 (McKinney).

[24] *See* Batista, *supra* note 10, at 1 ("[T]he words 'primary residence' appear frequently—but without any legislative definition—in the constellation of statutes and regulations designed to implement the system of rent regulation.").

[25] *See* Memorandum of State Executive Department, *reprinted in* 1971 N.Y. Laws 2402 (McKinney).

[26] *See id.* (emphasis added) (citing relevant evidence as "the address from which the tenant votes, files his tax returns, etc.").

residence determinations[27]: (1) the tenant must have been domiciled in New York City *or*, if not domiciled in the City, he or she must have spent "an aggregate of more than 183 days in the preceding calendar year at the apartment"; and (2) in either situation, the tenant must have filed a New York City Resident Income Tax Return at the subject residence—unless not otherwise required for a reason set forth in the regulations.[28] Compliance with or failure to meet both prongs resulted in a conclusive primary residence determination.[29]

The primary residence regulations were adjusted for a second time by the Emergency Tenant Protection Act of 1983. This Act effectively repealed the former code and regulations and granted the courts much greater leniency, while simultaneously offering less guidance, in making a primary residence determination by eliminating the conclusive nature of the previous guidelines.[30] Instead, the post-Emergency Tenant Protection Act regulations embodied in the current Code list four non-exclusive and non-determinative factors for courts to consider when making a primary residence determination:

> (1) Specification by an occupant of an address other than such housing accommodation as a place of residence on any tax return, motor vehicle registration, driver's license or other document filed with a public agency;
> (2) Use by an occupant of an address other than such housing accommodation as a voting address;
> (3) Occupancy of the housing accommodation for an aggregate of less that 183 days in the most recent calendar year . . . ;
> (4) Subletting of the housing accommodation.[31]

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[27] Menachem J. Kastner & Alan D. Zuckerbrod, *Primary Residence Litigation—Analysis of Emerging Case Law*, N.Y. L.J., Mar. 25, 1987, at 1.

[28] *See* Cent. Park W., Inc. v. Greenwald, 127 Misc. 2d 547, 548, 486 N.Y.S.2d 668, 670 (N.Y. Civ. Ct. N.Y. County 1985) (discussing section 18 of the former New York City Rent and Eviction Regulations); Newport Apartments Co. v. Schechter, 124 Misc. 2d 760, 763–64, 477 N.Y.S.2d 576, 578–80 (N.Y. Civ. Ct. N.Y. County 1984) (discussing section 54(E) of the former Rent Stabilization Code).

[29] *See* Kastner & Zuckerbrod, *supra* note 27, at 1.

[30] *See* Emergency Tenant Protection Act of 1983, Ch. 403, § 41(a), 1983 N.Y. Laws 731 (McKinney) (leaving the court to determine what primary residence means).

[31] N.Y.C.R.R. tit. 9, ch. VII, § 220.3(j) (2009). This list is not exclusive and the court may also consider evidence including utility usage, telephone records, and testimonial evidence of usage of the subject apartment. *See* Cox v. J.D. Realty Assocs., 217 A.D.2d 179, 184, 637, N.Y.S.2d 27, 30 (1st Dep't 1995).

Although the new regulations were designed to give courts greater flexibility, it is clear that they, like the original guidelines, direct courts to focus mainly on the address utilized by the tenant on certain documents, while inquiries into the tenants' usage of the apartment are less persuasive.[32] Ultimately, however, these regulations offer only suggestions and, like the primary residence statutes, fail to provide courts with a clear legislative standard for assessing primary residence claims.

B. *Preliminary Glance at the Legislative Purpose in Creating a Primary Residence Requirement*

The requirement that a housing unit must be used as a tenant's primary residence to enjoy the protection of rent regulation was added to the already existent rent regulation system in 1971 by Chapter 373.[33] The bill was a part of Governor Nelson Rockefeller's plan to reform the rent control system, which was originally enacted to ameliorate the housing crisis of the 1940s, but also had the unintended effect of creating new avenues for abuse of New York's limited housing supply.[34] In the legislative memoranda concerning Chapter 373, the Legislature's Statement in Support of the Bill explained:

> At a time when the people of the State, particularly in the City of New York, are confronted with a critical shortage of housing, it is inequitable and anomalous that some persons receive the economic benefits of retaining the rent-controlled status of their housing accommodations although *their primary residence is elsewhere*.[35]

Clearly, the legislature created the primary residence requirement to eliminate the opportunity for abuse of the rent regulation system by targeting persons who were thwarting the

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[32] *See* Claridge Gardens, Inc. v. Menotti, 160 A.D.2d. 544, 544, 554 N.Y.S.2d 193, 194 (1st Dep't 1990) (stating that failure to meet the 183-day usage factor is not sufficient, by itself, to support a finding of non-primary residence); *see also* DANIEL FINKELSTEIN & LUCAS A. FERRARA, NEW YORK PRACTICE SERIES - LANDLORD AND TENANT PRACTICE IN NEW YORK § 15:476 (2008) (stating that inquiry for primary residence determinations should focus on the address utilized on documentation, while evidence concerning usage is merely permitted).

[33] *See* Governor's Approval Memorandum, Bill Jacket, ch. 373, L. 1971.

[34] *See id.*

[35] Memorandum of State Executive Department, *reprinted in* 1971 N.Y. Laws 2402 (McKinney) (emphasis added).

system's intended purpose—making affordable housing available to the State's residents during a period of housing shortage—by usurping affordable housing when they had no need for this benefit because they could actually afford to concurrently maintain two homes.

Additionally, the New York legislature exhibited a protectionist purpose in trying to protect its own residents from abuse, not only by persons with additional residences, but by further narrowing the statutes' scope to persons primarily domiciled outside of New York.[36] These tenants truly living in other states, yet usurping New York's affordable housing, had no true need for affordable housing as did true New Yorkers with two residences. They, however, exacerbated this abuse of the rent regulation system by taking advantage of a New York State benefit without compensating the state in return by paying resident income taxes or in the form of daily expenditures to local businesses, which are customarily made when actually living in a state.

The legislature both understood and made apparent that the primary residence requirement was meant to be a tool of equity, aimed at persons without a need for an affordable home in New York when they were affluent enough to possess more than one home, and specifically when their true residence was not in New York. In his statement approving Chapter 373, Governor Rockefeller echoed this two-fold aim of Chapter 373 by citing persons with additional residences outside the city as those the primary residence requirement should affect.[37] Also discernable in Rockefeller's statement is that the primary residence requirement was enacted with an underlying tone of fairness and the recognition that a tenant's attachment to a certain residence should be influential in a primary residence analysis. This

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[36] *See id.* (stating that this requirement would increase the availability of housing accommodations to "actual residents of the community who are in need of apartments"). The legislature goes on to cite as an example of persons who maintain their primary residence elsewhere as persons "who, rather than paying hotel facilities when their presence is required in the community, find it less expensive to retain year-round possession of rent controlled housing accommodations [in New York] which they rarely occupy." *See id.*

[37] *See* Governor's Approval Memorandum, Bill Jacket, ch. 373, L. 1971 (defining persons who do not use their homes as their primary residence as persons who use their apartments for convenience, "staying in them occasionally *when they come to the City*," or even use them for storage (emphasis added)).

sentiment is manifest in the test Rockefeller proposed to make a primary residence determination: decontrol after a finding that the apartment is not the "real home" of the tenant.[38]

While the overarching purpose in adding a primary residence requirement to the existent rent regulation system was to prevent abuse of the system by returning underutilized residences to the market, the goal was not meant to be realized with utter disregard of the intended scope. The requirement was intended to further rent regulation's overall goal of decreasing homelessness in New York. More importantly, to do so, the legislature sought to target a specific group of persons, who would not exacerbate the housing crisis by actually becoming homeless when the primary residence laws were applied—especially when those persons were domiciled outside of New York. Accordingly, application of the requirement without recognition of the limitations on its scope fails to realize the aims of the primary residence legislation.

C. *Judicial Interpretation of the Primary Residence Requirement*

Since neither the statutes nor the regulations delineate a specific test to be used in making a primary residence determination, the standard that has developed has come entirely from case law. The primary residence standard emerged first as a definition, then developed into a test to be used by courts in assessing such claims. In *Emay Properties Corp. v. Norton*,[39] a case often denoted as the pioneering case in defining the primary residence requirement, the Appellate Term First Department stated, "[w]e take primary residence to mean an ongoing, substantial, physical nexus with the controlled premises for actual living purposes—which can be demonstrated by objective, empirical evidence."[40] This definition began to expand into a test for assessing primary residence claims in *Sarraf v. Szunics*.[41] The *Sarraf* court, echoing the language of Chapter 373, allocated the burden of proof to the landlord upon seeking eviction on grounds of non-primary residence, stating that

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[38] *See id.*
[39] 136 Misc. 2d 127, 519 N.Y.S.2d 90 (Sup. Ct. App. T. 1st Dep't 1987).
[40] *Id.* at 128–29, 519 N.Y.S.2d at 92.
[41] 132 Misc. 2d 96, 503 N.Y.S.2d 513 (N.Y. Civ. Ct. N.Y. County 1986).

initially "the burden is on the landlord to establish that the tenant *maintains a primary residence at some place other than the subject premises*."[42]

In reconciling these two statements without explicit guidance from statutes or regulations, two possible tests for determining primary residence have developed. In the first instance ("the Initial Burden Test"), the *Sarraf* court's reference to an alternative primary residence is taken as an independent threshold determination.[43] Initially, a landlord must prove that a tenant possesses at least two residences. If two residences are established, then to prove that the dwelling is not the tenant's primary residence, the landlord must establish by a preponderance of the evidence that the tenant does not have an "ongoing, substantial, physical nexus" with the subject unit "for actual living purposes."[44] If, however, the tenant has only one residence, that apartment is the tenant's primary residence per se, and the tenant in possession cannot be evicted on primary residence grounds.[45]

In an alternative test ("the Pure Physical Nexus Test")—used for the first and only time in *TOA Construction*—the *Sarraf* court's statement is taken merely as an allocation of the burden of proof to the landlord in a non-primary residence case. Thus, the landlord must only prove that the tenant failed to maintain "an ongoing, substantial, physical nexus with the controlled premises for actual living purposes."[46] In this test, it is not necessary to establish that a tenant has an alternative primary

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[42] *Id.* at 99, 503 N.Y.S.2d at 515 (emphasis added).

[43] *See* 12 WARREN'S WEED NEW YORK REAL PROPERTY § 129.121[1] (5th ed. 2009) (emphasis added) ("The Appellate Term, First Department summarized primary residence to mean 'an ongoing, substantial physical nexus with the controlled premises for actual living purposes which can be demonstrated by objective empirical evidence.' The burden of proof remains on the landlord to establish that one residence *as opposed to another* is the tenant's primary residence.").

[44] TOA Constr. Co. v. Tsitsires, 54 A.D.3d 109, 113, 861 N.Y.S.2d 335, 338 (1st Dep't 2008).

[45] For example, in *Sharp v. Melendez*, 139 A.D.2d 262, 531 N.Y.S.2d 554 (1st Dep't 1988), the court conclusively determined the tenant's residence was his primary residence after finding that he possessed only one residence, without further inquiring as to his "physical nexus" with the subject apartment. *See id.* at 264–66, 531 N.Y.S.2d at 556–57; *see also* discussion *infra* Part II.C.

[46] *TOA Constr.*, 54 A.D.3d 109, 113, 861 N.Y.S.2d 335, 338 (quoting Emay Props. Corp. v. Norton, 136 Misc. 2d 127, 129, 519 N.Y.S.2d 90, 92 (Sup. Ct. App. T. 1st Dep't 1987).

residence; the only relevant issue is how the tenant uses the housing unit in question.[47] Therefore, if a tenant does not possess an alternative residence, the only criterion of the regulations that is applicable in making a primary residence determination is whether the tenant has spent 183 days in the subject apartment.

For nearly thirty years, since authority for primary residence determinations was given to the courts, the Initial Burden Test was used to analyze such claims.[48] Though courts did not always explicitly describe a distinctly separate burden of proving at least two residences, nearly every primary residence case in New York involved a tenant who undisputedly possessed a secondary residence, which evidences the understanding that claims lacking an allegation of a secondary residence would quickly be dismissed. In the rare case that a non-primary residence claim was brought against a tenant who possessed only one residence, it is this assertion that is the subject of the litigation. Accordingly, the inquiry has traditionally focused on whether the landlord could prove that the tenant actually possessed an additional housing unit that could be considered a secondary

[47] Case law has recognized certain exceptions to the primary residence requirement, where underutilization of an apartment will not result in the loss of rent regulation protection. *See* TOA Constr. Co. v. Tsitsires, 9 Misc. 3d 469, 490–91, 798 N.Y.S.2d 674, 690–91 (N.Y. Civ. Ct. N.Y. County 2005), *rev'd per curiam*, 14 Misc. 3d 65, 830 N.Y.S.2d 16 (Sup. Ct. App. T. 1st Dep't 2006), *rev'd*, 54 A.D.3d 109, 861 N.Y.S.2d 335. The exceptions involve questions of tenant intent and abandonment. This Note, however, focuses on whether proving an alternative residence is a necessary element of the primary residence test and will not address the closely related topic of exceptions.

[48] *See, e.g.*, Katz v. Gelman, 177 Misc. 2d 83, 84–85, 676 N.Y.S.2d 774, 775 (Sup. Ct. App. T. 1st Dep't 1998) ("Since landlords did not meet their burden of proving that tenant does not occupy the loft as his primary residence, *or* maintains a primary residence at a place other than the subject premises the petition must be dismissed." (emphasis added) (citation omitted)); *see also* Four Winds Assocs. v. Rachlin, 248 A.D.2d 352, 353, 669 N.Y.S.2d 650, 650 (2d Dep't 1998) ("The burden was on the plaintiff landlord to establish by a fair preponderance of the evidence that the defendant maintained her primary residence in a place other than the subject premises."); Sarraf v. Szunics, 132 Misc. 2d 97, 99, 503 N.Y.S.2d 513, 515 (N.Y. Civ. Ct. N.Y. County 1986) ("Initially it should be observed that the burden is on the landlord to establish that the tenant maintains a primary residence at some place other than the subject premises."); Rocky 116 L.L.C. v. Weston, N.Y. L.J., July 3, 2002, at 22, col. 4 (N.Y.C. Civ. Ct. N.Y. County) ("In a non-primary residence holdover it is the petitioner's burden of proof to show that respondent maintains his or her primary residence at a location other than the subject premises.").

residence because a failure to satisfy this burden ended the primary-residence claim without further analysis of a "physical nexus."[49]

D. *TOA Construction Co. v. Tsitsires*

Recently, the First Department, in *TOA Construction Co. v. Tsitsires*,[50] arguably for the first time, employed the Pure Physical Nexus Test and declared that "[t]he terms of the Rent Stabilization Code do not require proof that the tenant maintain[s] an alternative primary residence."[51] In this landmark decision, tenant Michael Tsitsires lost possession of the rent-controlled apartment he had owned for thirty-five years in Manhattan, for failure to use the apartment as his primary residence although it was undisputed that he owned no other residence.

Both the relevant facts of the case and the manner in which they were presented highlight the subjectivity and evidentiary issues that arise when subjecting tenants to a primary residence analysis when it is undisputed that they do not possess a secondary housing accommodation. The court recognized that Tsitsires suffered from mental illness, specifically including a panic disorder, which caused him to spend much of his time away from the apartment and away from other persons.[52] When not staying in the apartment, Tsitsires slept outside on city benches or stoops within a twenty-block "safe area" surrounding the apartment.[53] Throughout the contested period, Tsitsires kept his personal possessions at the subject premises, received mail there, and allowed his girlfriend of thirty-five years to do the same.[54] Evidence of the frequency of Tsitsires' actual presence in the apartment was greatly contested and entirely circumstantial. The court relied on the testimony of the building's former building manager who testified as to his recognition of Tsitsires' habits and his assessment of four months of video surveillance of the building's entrance taken over a year after service of the

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[49] *See* discussion *infra* Part II.C.
[50] 54 A.D.3d 109, 861 N.Y.S.2d 335 (1st Dep't 2008).
[51] *Id.* at 113, 861 N.Y.S.2d at 338.
[52] *Id.* at 112–14, 861 N.Y.S.2d at 337–38.
[53] *Id.* at 112, 861 N.Y.S.2d at 337.
[54] *See id.*

notice of termination.[55] The landlord paid the building manager $3,000 to install the surveillance system and to later review the footage in preparation for the litigation.[56]

Despite the court's recognition that the streets cannot constitute a primary residence and, therefore, Tsitsiris did not maintain a primary residence elsewhere, Tsitsires lost possession of the apartment.[57] The court justified its decision by asserting that the question for the court was solely whether the tenant maintained "an ongoing, substantial, physical nexus with the controlled premises for living purposes," which Tsitsires had not done because he merely used the apartment for "storage facility and mail drop."[58] Upon discussing the policy rationale behind its decision, the court, somewhat disjointedly, asserted that a failure to evict Tsitsires would severely warp the concept of regulation, but then contradicted itself by stating that Tsitsires' eviction would not serve rent regulation's goal of alleviating the public need for affordable housing in New York.[59] Using the primary residence requirement to evict a tenant from his only home and essentially issuing a judicial decree of homelessness does not further the goal of reducing the housing crises in New York. Proponents of the Pure Physical Nexus Test argue that critics of this decision are driven by emotion rather than an analysis of the law; however, an understanding of the purpose and history of primary residence law reveals that it is precisely the distortion of the requirement's aims that drives the objections.[60]

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[55] *See id.* at 119, 861 N.Y.S.2d at 342.

[56] *See id.*

[57] *See id.* at 116, 861 N.Y.S.2d at 340 ("[W]e are not finding that the tenant's primary residence is a park bench. I think we all agree that a person *cannot* maintain a primary residence on a park bench." (internal quotation marks omitted)).

[58] *Id.* at 115–16, 861 N.Y.S.2d at 339–40.

[59] *See id.* at 115–17, 861 N.Y.S.2d at 340–41.

[60] *See* Dov Treiman, Commentary, TOA Constr. Co. v. Tsitsires, 36 HOUSING CT. REP. 749, 750 (2008) ("It appears clear that the majority's view in this case is based on its perception of 'law' and the dissent's view is based on its perception of 'justice.' ").

II. THE PURE PHYSICAL NEXUS TEST CANNOT BE RECONCILED WITH THE PLAIN LANGUAGE OF THE STATUTES, LEGISLATIVE HISTORY, PUBLIC POLICY, OR PRIOR JUDICIAL INTERPRETATION

This Part examines whether the Initial Burden Test or the Pure Physical Nexus Test is the appropriate test for analyzing primary residence claims using the traditional mores of statutory interpretation. Part II.A. evaluates each test in light of the plain and ordinary meaning of the phrase "primary residence" and concludes that the customary usage of the term clearly connotes a comparison of at least two residences; thus, any interpretation of a primary residence test requires a threshold showing that the tenant possesses more than one housing accommodation. Assuming, arguendo, that the plain meaning rule is not conclusive, Part II.B. evaluates each test against the legislative history and purpose of the primary residence requirement and against the public policy objectives underlying the statutes. Part II.B. concludes that while the primary residence requirement was enacted to make underutilized apartments available to New York residents who were in need of affordable housing, the legislature demonstrated an unmistakable intent to limit the target of the statutes to tenants who maintain at least two residences. Finally, Part II.C. demonstrates that until *TOA Construction*, judicial interpretation and application of the primary residence statutes had been consistent with the two-residence limitation gleaned from the traditional canons of statutory interpretation.

A. *Plain Language of the Primary Residence Statute*

"The starting point in every case involving construction of a statute is the language itself."[61] Under the plain meaning rule, " 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.' "[62] When a statute's language is plain, courts must give the language its ordinary and natural meaning.[63] If a word is not explicitly

[61] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975).

[62] Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)).

[63] *See id.*

defined in a statute, a court typically looks to dictionaries to ascertain the common meaning of that word.[64] Because the term "primary residence" has not been statutorily defined, one must consider the term's commonplace meaning, as this meaning is most likely the meaning the legislature intended. If the ordinary definition of the term clearly indicates that being "primary" demands the existence of something else for comparison, it follows that the primary residence statute demands that a tenant possess at least two residences. Accordingly, to determine whether the primary residence test requires a court to make a threshold inquiry into whether a tenant possesses at least two residences before applying the Purely Physical Nexus Test, our analysis must begin with the plain and ordinary meaning of the term "primary residence."[65]

The common understanding that something can only be "primary" when assessed in relation to something else strongly favors use of the Initial Burden Test to assess primary-residence claims—which requires a comparative analysis—recognizing that the legislative intent, pursuant to the plain meaning rule, intended this interpretation when drafting the statute. The dictionary defines the word "primary" as "first or highest in rank or importance" or "first in order in any series [or] sequence."[66] This definition clearly connotes a comparative aspect. Accordingly, something can only be considered primary when it is compared by its importance to some other thing. Inherent in this definition is the notion that there must be, at the very least, two things ("residences") to compare. Further buttressing the common understanding of the comparative nature of the word "primary," Black's Law Dictionary, while not offering a definition for the word "primary," or "primary residence," lists nine other

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[64] *See* 224 E. 18th St. Assocs. v. Sijacki, 138 Misc. 2d 494, 498, 524 N.Y.S.2d 964, 967 (N.Y. Civ. Ct. N.Y. County 1987), *aff'd*, 143 Misc. 2d 565, 546 N.Y.S.2d 981 (Sup. Ct. App. T. 3d Dep't 1989); *see also* Coronet Props. Co. v. Brychova, 122 Misc. 2d 212, 213, 469 N.Y.S.2d 911, 912 (N.Y. Civ. Ct. N.Y. County 1983), *aff'd*, 126 Misc. 2d 946, 488 N.Y.S.2d 1020 (Sup. Ct. App. T. 1st Dep't 1984).

[65] *See Sijacki*, 138 Misc. 2d at 497–98, 524 N.Y.S.2d at 967 ("The legislature has provided no guidance as to what constitutes a primary residence. That is, however, a term in common use . . . .").

[66] *See id.* at 498, 524 N.Y.S.2d at 967 (quoting THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987)); *see also Coronet Props.*, 122 Misc. 2d at 213, 469 N.Y.S.2d at 912 ("The ordinary meaning of the word 'primary' is 'first in rank or importance; chief or principal.' ") (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1800 (1981)).

phrases where primary precedes the subsequent word, each of which is defined in relation to at least one other type of the base word.[67]

The first step in statutory interpretation, giving words of a statute their plain and ordinary meaning, strongly suggests that in implementing a primary residence requirement, the legislature promulgated a standard to differentiate between at least two residences. To rebut this presumption, proponents of the Pure Physical Nexus Test attempt to disregard the plain meaning rule entirely, actually faulting application of the canon as far too literal an approach for statutory interpretation in the primary residence context.[68] This approach directly contradicts one of the most well-known and universally accepted norms of statutory interpretation. In fact, plain statutory language is considered so indicative of legislative intent that when language has a common meaning, the plain meaning rule is typically considered the first and last step in statutory interpretation.[69] In discerning the proper primary residence test, the plain meaning rule clearly sides with proponents of the Initial Burden Test, which recognizes and enforces the phrase' commonplace meaning.

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[67] *See* BLACK'S LAW DICTIONARY 1228–29 (8th ed. 2004). For example: "Primary Authority" as compared to "Secondary Authority"; "Primary Boycott" as compared to "Secondary Boycott"; "Primary Liability" as compared to "Secondary Liability"; and "Primary Obligation" as compared to "Secondary Obligation." *See id.* at 143, 199, 933, 1105.

[68] *See* Dov Treiman, *supra* note 60, at 750 ("But without getting hung up on a close reading of the word 'primary' . . . ."). Equally dismissive, in *TOA Construction*, rather than confront the dissent's plea to the plain meaning rule, the majority skirted the issue by noting the dissent's claim then merely restating that a landlord need not provide evidence of a secondary residence to satisfy his burden of proving non-primary residency instead of justifying their departure. *See* TOA Constr. Co. v. Tsitsires, 54 A.D.3d 109, 112–13, 861 N.Y.S.2d 335, 337–38 (1st Dep't 2008).

[69] *See* 49 WB, L.L.C. v. Vill. of Haverstraw, 44 A.D.3d 226, 233, 839 N.Y.S.2d 127, 133 (2d Dep't 2007) ("[A court's] primary purpose in interpreting [a] statute is to ascertain and give effect to the intent of the Legislature, and the best evidence of that intent is the plain wording of the statute itself."); *see also* Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when [that] statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but most extraordinary circumstance, is finished.").

B. *Legislative History and Purpose in Creating a Primary Residence Requirement*

1. Target of the Statutes

Though the canons of statutory interpretation generally demand that unambiguous statutory language eliminates the need for any further inquiry into legislative intent, "where the language of the statute does not make crystal clear its intended scope," a court must "resort to the legislative history to determine whether, in light of articulated purposes of the legislation, Congress intended that the statute apply to the particular cases in question."[70] Legislative history indicates that the purpose in engraphing a primary resident requirement into New York's already existent rent regulation scheme was to reduce the system's susceptibility to abuse. The primary residence requirement was added in 1971, as a part of a series of bills designed to reform the rent regulation system to ensure that the system was not being used to exacerbate the very housing shortage it was created to ameliorate.[71] More importantly, the legislative history demonstrates that although the overarching policy goal in enacting Chapter 373 was to alleviate the housing shortage in New York, the bill was not enacted blindly, but rather it targeted a very specific type of tenant who possessed at least two residences. Additionally, the primary residence requirement was further aimed at persons with homes in New York, yet primarily domiciled elsewhere. Conversely, New York domiciliaries, with only one residence, have traditionally been viewed as outside the scope of the statutes' application.[72]

From both the language used by the legislature in promulgating Chapter 373 and the Legislature's Statement in Support of the Bill, it is obvious that the intended targets of the primary residence bill were persons without a need for affordable housing, demonstrated by their possession of more than one residence. Both Chapter 373 and the legislative memoranda on

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[70] Allen v. State Bd. of Elections, 393 U.S. 544, 570 (1969); *see also* Ganley v. Giuliani (*In re* Ganley), 171 Misc. 2d 654, 660, 655 N.Y.S.2d 264, 268 (Sup. Ct. N.Y. County 1997) ("A statute that can be interpreted in different, but reasonable, ways is sufficiently ambiguous to warrant a court to consider legislative history to determine [a] statute's intended scope."), *rev'd*, 94 N.Y.2d 207, 723 N.E.2d 73, 701 N.Y.S.2d 324 (1999).

[71] *See supra* text accompanying notes 17–18.

[72] *See infra* notes 79, 82–86 and accompanying text.

Chapter 373 explicitly state that the bill would allow for the removal of rent regulation protection from any housing unit upon a finding that the tenant "maintains his primary residence *at some place other* than at such housing accommodation."[73] The original framing of the primary residence language with a clear reference to an additional place of residence evidences an absolute legislative mandate that a tenant subject to this new requirement must have at least two residences.

Corroborating the explicit language of the bill, Governor Rockefeller, the initial author of the primary residence requirement, undoubtedly intended that a secondary residence was a precondition to the loss of rent regulation protection. In the Governor's Memoranda explaining the purpose of his proposed bill to the legislature, the section explaining Chapter 373 was labeled "Rent decontrol, secondary residences."[74] In choosing to label the section discussing Chapter 373 "secondary residences," rather than using the language of the statute—"primary residence"—it is clear that the Governor intended that *all* tenants subject to the primary residence requirement would be able to fit squarely within this heading. Accordingly, tenants without a secondary residence could not fit under this label and were not meant to be included in the primary residence requirement.

Additionally, the senate debate concerning the enactment of Chapter 373 demonstrates that the Senate understood that the bill was would apply exclusively to persons with more than one residence.[75] In describing the purpose of the bill to the Senate, Senator Barclay stated:

> This is the primary residence bill. Throughout the years since rent control has been in effect throughout the State there has been a practice because economically it is a good deal at times, to have a rent-controlled apartment and to keep that apartment in New York State *but than have a secondary apartment, somewhere else* or a house such as in Florida or other areas and

[73] Ch. 373, § 1, 1971 N.Y. Laws 1164 (emphasis added); *see also* Memorandum of State Executive Department, *reprinted in* 1971 N.Y. Laws 2402 (McKinney). The legislative statement summarizing the bill differs slightly from the actual language of Chapter 373, explaining that decontrol would occur upon a finding "that the tenant maintains his primary residence *elsewhere*." Memorandum of State Executive Department, *reprinted in* 1971 N.Y. Laws 2402 (emphasis added).

[74] Governor's Memoranda, *reprinted in* 1971 N.Y. ST. LEGIS. ANN. 313.

[75] *See* Senate Debate on Chapter 373, Bill Jacket, ch. 373, L. 1971, at 4710–16.

> since we do have such a tight housing market, *it only seems right* that those who are in rent-controlled apartments have a primary residence there and what the bill does is it allows the landlord to [bring a suit on grounds of nonprimary residence] *in the event of this situation* . . . .[76]

Moreover, after explaining the bill as targeting persons with multiple residences, the rest of the debate centered only on whether it was proper to fault persons for having two residences. This further strengthens the notion that the understanding and intention of the legislature was that the bill was designed to affect persons with at least two residences.[77] In relevant part:

> Senator Zaretzki: . . . A person has a right to have two residences or more. Why should he not be permitted to do so?
> Senator Barclay: In my opinion, the person with two residences should pay his fair economic rent and not be subsidized by the rest of the tenants. If he can afford two residences, it appears to me that he should pay his fair share.
> Senator Zaretzki: . . . I really have trouble with this bill. . . . They have a right to two residences. . . .
> Senator Ferraro: . . . If they can afford the luxury of traveling around the world and traveling to other states of this nation, let them have a decontrolled apartment and not buy up a controlled apartment.[78]

The Senate debate demonstrates that the legislature perceived an implicit fairness aspect inherent in the primary residence requirement. The rent regulation system was designed to make housing available to persons who previously could not afford any housing at all, so prohibiting persons capable of affording more than one residence from enjoying this privilege is easily justified. The bill was promulgated with the understanding that it was inequitable for persons who could afford to own two homes simultaneously to usurp the limited supply of affordable housing and the Senate's only issue of contention was whether it was appropriate to target this affluent tenant. The possibility that a tenant with only one residence would be subject to this requirement was never even contemplated. Logically, it is obvious that if the legislature raised issue with the appropriateness of subjecting tenants with two residences to the

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[76] *Id.* at 4712 (statement of Senator Barclay) (emphasis added).

[77] *See id.* at 4712–16.

[78] *Id.* at 4713–14 (statements of Senators Zaretzki, Barclay, and Ferraro).

loss of one of those residences, its members certainly would have discussed the appropriateness of evicting persons from their only residence if they intended that the statutes would be used against this type of tenant.

Additionally, the intended target of the new primary residence requirement was not only the affluent tenant who could afford multiple residences, but specifically the out-of-stater who was taking advantage of New York's rent regulation system at the expense of the state's actual residents. In Governor Rockefeller's Memoranda to the Legislature, he explains that the primary residence requirement would "open up many of these apartments to occupancy of *actual residents of the community*."[79] Upon signing Chapter 373 into law, the Governor wrote: "Thousands of controlled apartments in New York City and elsewhere are rented by people who do not live in them. They use the apartments as a convenience, staying in them occasionally *when they come to the City*. Some [of these people] even use them for storage."[80] Once again, demonstrating its understanding of the statute's specific target, the legislature—Senator Ferraro specifically—upon debating the enactment of Chapter 373 stated, "And if they cannot live in our City for at least six months, I think they should pay the higher rent."[81]

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[79] Memorandum of State Executive Department, *reprinted in* 1971 N.Y. Laws 2402 (McKinney) (emphasis added).

[80] Governor's Approval Memorandum, Bill Jacket, ch. 373, L. 1971 (emphasis added).

[81] Senate Debate on Chapter 373, Bill Jacket, ch. 373, L. 1971, at 4713–14 (statement of Senator Ferraro). The legislature was not alone in recognizing that the primary residence requirement was designed to subject persons with two residences, especially persons with secondary residences outside of New York, to the loss of rent regulation protection. *See* Report of Rent Control Subcommittee, dated May 25, 1971, Bill Jacket, ch. 373, L. 1971, at 12 ("No benefit affecting . . . New York City tenants appears to be provided by continued control of housing occupied by those having a 'primary residence' *outside the City or State*." (emphasis added)); Letter of the New York City Council Against Poverty, dated May 18, 1971, Bill Jacket, L. 1971, ch. 373, at 5 ("The idea of not permitting persons who *maintain a secondary residence* in the City to benefit from Rent Control is good . . . ." (emphasis added)); Batista, *supra* note 10 ("The concepts of residence and primary obviously raise a series of potentially complex factual questions: . . . [W]hich residence is primary, [and] which [residence] is secondary?" (internal quotation marks omitted)); *Hole in the Roof over Rents*, N.Y. TIMES, Apr. 29, 1971, at 40 ("[Chapter 373] calls for decontrolling apartments held by tenant who have in fact moved to Florida or other places but hang on to their low-rent apartments for occasional use."); Kastner & Zuckerbrod, *supra* note 27 ("A continuing issue before courts in New York is the

The focus on out-of-staters demonstrates that the original primary residence statute had a protectionist purpose in protecting genuine New York residents from persons domiciled elsewhere, yet exploiting New York's rent regulation without compensating the state in the form of taxes and daily living expenses.[82] This original focus on domicile created a legislative and judicial expectation of leniency when a tenant was domiciled in New York and undisputedly possessed only one residence, even if it was rarely used—a leniency echoed in the regulations promulgated to assess primary residence claims and case precedent.

2. The Regulations Promulgated Corroborate the Legislative Intent in Limiting Application of the Statutes to a Specific Type of Tenant

Though they do not establish a mandatory primary residence test, the New York legislature has passed regulations to guide courts in application of the requirement, which also highlight and corroborate the scope and policy aims gleaned from analysis of the primary residence statutes. The administrative interpretation given to a statute by an agency charged with its enforcement is given "great weight and judicial deference," so long as that interpretation is neither absurd, nor unreasonable.[83] Accordingly, the legislature's intent to limit the scope of the primary residence statute by narrowing the scope of the requirement to include only a specific type of tenant is both apparent and persuasive in the regulations promulgated to assess whether a certain residence would be considered a primary residence. Like the statutes, the regulations target

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matter of the housing rights of tenants *with two homes, one of which is a primary residence*." (emphasis added)).

[82] This Note argues that the original primary residence regulations, which demanded a conclusive determination of primary residence if a tenant was domiciled in New York City and filed resident income taxes from the subject residence, demonstrates that the legislature was willing to allow actual New Yorkers insulation from the statute because they would compensate the state in alternative ways. Under the original regulations, a person domiciled in New York City could possess two residences in New York, or could possess one residence, which they never used and still enjoy rent regulation protection, presumably because the legislature believed it was not improper for these tenants to enjoy affordable housing when they contributed to the overall wealth of the state.

[83] *See* Trump-Equitable Fifth Ave. Co. v. Gliedman (*In re* Trump-Equitable Fifth Ave. Co.), 62 N.Y.2d 539, 545, 467 N.E.2d 510, 513, 478 N.Y.S.2d 846, 849 (1984).

tenants who are affluent enough to afford multiple residences, especially those truly residing outside New York. The first suggestions offered by the legislature came in the form of the legislature's summary of Chapter 373.[84] Though not officially mandated, the legislature suggested that "the address from which the tenant votes, files his tax returns, etc., would be relevant" to determine that the tenant "maintains his *primary residence elsewhere*."[85] These suggestions demonstrate that the legislature was concerned with usage of the apartment in question, but that the inquiry into usage was exclusively comparative in nature. In asking *which* of at least two addresses a tenant specified as his true address on certain documents, the legislature evidenced that it did not fathom that a tenant being subjected to this assessment would possess only one residence. Rather, the assumption was that every tenant facing a non-primary residence claim would possess more than one residence.

The first official regulations promulgated to assess primary residence claims exhibit the legislature's intent to further reduce the scope of the primary residence requirement by insulating tenants genuinely domiciled in New York City from facing the loss of rent regulation protection despite even a complete lack of use of their apartments. The first guidelines established a two-pronged test: If a tenant was found to either be domiciled in New York City *or* had spent a total of 183 days in the apartment, and had filed a New York City Resident Income Tax Return from that residence, it was conclusively determined that the residence in question was the tenant's primary residence.[86] Theoretically, under this version of the regulations, a tenant such as Michael Tsitsires whose domicile undisputedly remained New York—regardless of any contentions as to his residence—would have undoubtedly defeated the landlord's non-primary residence claim even if he had not spent a single day actually in the subject apartment during the contested year. Being domiciled in New York, such a tenant could defeat a primary residence claim merely by filing the requisite tax form.

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[84] Memorandum of State Executive Department, *reprinted in* 1971 N.Y. Laws 2402 (McKinney).

[85] *Id.* (emphasis added).

[86] *See supra* note 28 and accompanying text.

In promulgating disjunctive regulations mandating either domicile or usage, the legislature, though attempting to reduce the housing shortage in New York, objectively manifested intent to aim the primary residence requirement at a specific type of tenant, while simultaneously insulating actual New Yorkers from its scope. Because the primary residence requirement was enacted to ensure that persons benefiting from New York's affordable housing were "actual residents of the community,"[87] the legislature was not concerned with actual usage of the apartment upon a showing that a tenant receiving rent regulation protection was genuinely domiciled in the city.

The first official primary residence regulations were replaced with the Rent Stabilization Code's current list of four non-exclusive and non-determinative factors, which neither highlight the importance of domicile nor establish any mandatory elements. Rather, the current code suggests four criteria, which are relevant to the assessment of whether a certain residence is a tenant's primary residence.[88] The Code does, however, emphasize the need to establish more than one residence by returning to the comparative analysis intended by the legislature and manifested in the first unofficial suggestions offered to make primary residence determinations.[89] The first two factors unambiguously direct the courts to compare the relative importance of two residences by assessing whether the tenant votes from or lists "an address other than such housing accommodation" on certain documents.[90] The third factor—whether the tenant has spent less than 183 days in the subject apartment in the most recent year that they do not sublet—has traditionally been used in a comparative fashion to determine which of two residences was used *more often*, rather than as a black letter minimum requirement.[91]

Moreover, when a tenant in a non-primary residence claim has only one residence, courts—prior to *TOA Construction*—have consistently disregarded the 183-day requirement; instead, courts continued to focus on the domicile of the tenant despite

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[87] Memorandum of State Executive Department, *reprinted in* 1971 N.Y. Laws 2402 (McKinney).

[88] *See supra* note 31 and accompanying text.

[89] *See supra* note 25 and accompanying text.

[90] N.Y.C.R.R. tit. 9, ch. VII, § 2200.3(j)(1) (2000).

[91] *See, e.g.*, Sarraf v. Szunics, 132 Misc. 2d 97, 100–01, 503 N.Y.S.2d 513, 515–16 (N.Y. Civ. Ct. N.Y. County 1986).

the elimination of an explicit domicile exception in the regulations.[92] This leniency demonstrates a parallel legislative propensity towards comparison in the sense of balancing intended policy aims. When the tenant is an actual resident of the community who would face homelessness because the subject unit is their only dwelling, the interest in protecting actual residents of the community from of underutilization of rent-controlled housing units is far lessened.

Lastly, it is commonsensical to infer that the fourth criterion, which focuses on whether a tenant has sublet the subject residence, was promulgated by the legislature upon the underlying assumption that the tenant would not be rendering himself homeless by subletting his only residence. The subletting of the residence would provide objective evidence that the tenant maintained at least two residences, and that the possession of the residence in question was not used primarily for living purposes, but rather for profiteering motives.

3. Public Policy Implications

The public policy objectives of the primary residence requirement must be framed in a manner consistent with the explicit language and legislative history of the primary residence statutes and regulations, which clearly demonstrate that the requirement was created with both a specific purpose and a specific target. Proponents of the Pure Physical Nexus Test base their strongest argument for denying the necessity to prove at least two residences before applying the "substantial, physical nexus" analysis on the public policy that the goal of rent regulation is "to alleviate the shortage of housing in New York City by returning underutilized apartments to the market."[93]

This approach distorts the intended goal of the legislature in enacting the primary residence requirement by selectively focusing on the aim of the legislation and disregarding the intended target. Rather than directing the effort to reduce the

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[92] *See id.*; *see also infra* Part II.C. The pre-Omnibus regulations established a "domicile exception" in the sense that upon a showing of New York City domicile and a filing of a Resident Income Tax Return from the subject residence, a claim of non-primary residence was defeated without any inquiry into usage. *See supra* note 28 and accompanying text.

[93] TOA Constr. Co. v. Tsitsires, 54 A.D.3d 109, 117, 861 N.Y.S.2d 335, 341 (1st Dep't 2008) (quoting Herzog v. Joy (*In re* Herzog), 74 A.D.2d 372, 374, 428 N.Y.S.2d 1 (1st Dep't 1980)), *aff'd*, 53 N.Y.2d 821, 422 N.E.2d 582, 439 N.Y.S.2d 922 (1981)).

need for housing to any specific portion of the rent-regulated population, proponents of the Pure Physical Nexus Test demand a blanket decontrol of all apartments, which are perceived to be underutilized. For example, in *TOA Construction*, the court proclaimed, "[h]owever sympathetic respondent's plight, the concept of rent-stabilized tenancy is warped beyond recognition" by a tenant who uses the apartment solely for convenience and storage.[94]

While advocates of the Pure Physical Nexus Test are correct in stating that the goal of the primary residence requirement is to alleviate the need for affordable housing in New York, they fail to recognize that the legislature imbued an implicit fairness element into the primary residence requirement; one that is objectively manifested in the language and history of the statutes and regulation that were designed to ensure that persons who would face the loss of one residence were those that had another residence elsewhere.[95] In fact, the assertion often used by proponents of the Pure Physical Nexus Test to justify the blanket underutilization theory, that the use of a residence for purposes of convenience and storage is improper, is significantly distorted. The reference to convenience and storage originated from an example in Governor Rockefeller's statement upon signing Chapter 373, which noted that this type of usage was improper, but further specified that the behavior was improper when done by a specific type of tenant who possessed more than one residence, one of which was located outside of New York, where they were truly living.[96] The statement was not intended to allow arbitrary judicial determinations of adequate usage, which would result in eviction from a tenant's only home, but instead presupposed that eviction based on determinations of this nature could only be justified when a tenant has some other residence to live in, a showing that would be objectively demonstrated by documentary evidence.

Allowing the eviction of tenants domiciled in New York who have only one residence on grounds of non-primary residency would actually exacerbate the need for affordable housing in the state. Failing to demand that a landlord must establish that a tenant maintains at least two residences would allow the

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[94] *See id.* at 115, 861 N.Y.S.2d at 340.

[95] *See infra* Part II.B.1.

[96] *See supra* note 80 and accompanying text.

primary residence requirement to become a tool used by landlords to threaten a much broader class of rent-regulated tenants with eviction than those that could be affected when a court employs the Initial Burden Test. Paradoxically, this new type of tenant is a tenant who will face homelessness upon eviction from his sole residence, by a legislative tool designed to reduce this very problem.[97]

While the legislature has the authority to choose the scope of its legislative aims, it is clear from the language, history, and policy aims of the primary residence requirement that the legislature did not intend to affect persons with one residence who choose to live an atypical lifestyle for reasons unrelated to the abuse of the rent regulation system. It is proper for the legislature to broaden the scope of the primary residence requirement to reach this type of tenant if it believes such an expansion is necessary; however, judicially broadening this scope in contradiction to objective legislative limitations is an improper usurpation of the legislative function. Until and unless the legislature takes this action, courts should employ the Initial Burden Test to implement the legislature's intent concerning primary residence regulation.

C. *Judicial Recognition of the Limited Scope of the Primary Residence Requirement*

As previously noted, non-primary residence suits have rarely been brought against tenants with only one residence, but when these suits have been brought, courts, in accordance with the intended legislative scope of the requirement, have never—prior to *TOA Construction*—found a tenant's only residence not to be their primary residence. Most courts, even after the specific reference to a "secondary residence" disappeared from the language of the primary residence statute, have continued to echo the original language of Chapter 373, explicitly stating that

[97] Like Tsitsires, tenants who do not fall into the traditional categories of exemption from primary residence regulation, yet possess only one housing accommodation, will face eviction from their only place of residence or face the burden of defending themselves from such a claim. For example, a tenant who works excessive hours, often spending the night at the office, or a tenant who spends a significant time at a mate's residence, and who has no intention to end this conduct, may face eviction from their only housing accommodation.

in a non-primary residence case, a landlord must demonstrate that the tenant maintains their primary residence somewhere other than the subject residence.[98]

Moreover, courts have not interpreted the language demanding evidence of an alternative primary residence merely as an allocation of the burden of proof as proponents of the Pure Physical Nexus Test argue, but rather, in line with proponents of the Initial Burden Test, most courts have applied a two-pronged test in deciding primary residence cases, where the existence of an alternative residence is a separate showing that must be made.[99] When a landlord has not been able to make a threshold showing of at least one other residence, no court—prior to *TOA Construction*—has ever continued the primary residence analysis by applying the "substantial, physical nexus" test to asses the tenant's relationship with their only residence.

For example, in *Sharp v. Melendez*,[100] a landlord brought a suit on non-primary residence grounds against a tenant who was leasing two apartments on different floors of the same building.[101] There, the landlord claimed that the tenant was not using one of the two apartments as his primary residence and sought possession of that apartment pursuant to the primary residence statutes.[102] The tenant, however, claimed that the two apartments should in fact be considered one apartment, and accordingly, because he legally possessed only one apartment, that apartment was per se his primary residence.[103] The court agreed and found that the two apartments were, in fact, only one residence and, therefore, the landlord failed to meet his burden of proving non-primary residence.[104]

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[98] *See supra* text accompanying note 49.

[99] *See* Katz v. Gelman, 177 Misc. 2d 83, 84, 676 N.Y.S.2d 774, 775 (1st Dep't 1998) (finding that the "landlords did not meet their burden of proving that tenant does not occupy the loft as his primary residence, *or* maintains a primary residence at a place other than the subject residence") (emphasis added).

[100] 139 A.D.2d 262, 531 N.Y.S.2d 554 (1st Dep't 1988).

[101] *See id.* at 263–64, 531 N.Y.S.2d at 555–56.

[102] *See id.* at 264, 531 N.Y.S.2d at 555.

[103] *See id.* at 263, 531 N.Y.S.2d at 555. It is well recognized that in certain situations, two non-contiguous apartments may legally be considered a single residential unit for purposes of primary residence determinations. *See id.* at 265, 531 N.Y.S.2d at 557. It seems likely that this principle was developed upon the underlying assumption that if a tenant could prove that he only owned one residence, then that residence would constitute his primary residence without any further inquiry into usage.

[104] *See id.* at 266, 531 N.Y.S.2d at 557.

The *Sharp* court held in no uncertain terms that "[i]n a nonprimary residence case, the burden is on the landlord to establish that the tenant maintains a primary residence in a place other than the subject premises."[105] After finding that the two apartments were legally only one residence, the court ended its inquiry without assessing the tenant's "substantial, physical nexus" with the residence because the landlord could not prove that the tenant possessed a secondary residence.

The *Sharp* court's explicit language and its application of the primary residence test clearly demonstrates that a landlord must make a threshold showing that a tenant maintains at least two residences before proceeding to an assessment of "physical nexus," yet the court in *TOA Construction* egregiously misconstrues this clear mandate in an attempt to justify its misdirected use of the Pure Physical Nexus Test. The *TOA Construction* court, attempting to validate its use of the Pure Physical Nexus Test, distinguished the holding in *Sharp* by suggesting that there is a different primary residence test in cases involving two noncontiguous apartments that is inapplicable to traditional non-primary residence cases.[106] The court claimed that *Sharp* and cases like it are different because the landlord typically frames his claim by stating that the tenant resides in an alternative residence rather than directly alleging that the tenant does not primarily reside in the subject apartment.[107] Therefore, the court correctly demanded that the landlord demonstrate proof that the tenant did in fact possess an alternative residence, but that this was a burden placed upon himself, not the court, by the nature of his claim.[108] Alternatively, the *TOA Construction* court claimed that the *Sharp* court, despite its statement regarding an alternative residence, ruled against the landlord not because he failed to demonstrate an alternative residence, but because he failed to

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[105] *See id.* at 264, 531 N.Y.S.2d at 556.

[106] *See* TOA Constr. Co. v. Tsitsires, 54 A.D.3d 109, 113, 861 N.Y.S.2d 335, 338 (1st Dep't 2008).

[107] *See id.* at 113, 861 N.Y.S.2d at 338.

[108] *See id.*

demonstrate that the tenant did not have a "substantial physical nexus" with the apartment in question because the two apartments were actually a single residence.[109]

There is simply no support in the primary residence statutes and regulations, legislative history, or even in *Sharp* itself to support the notion that a different primary residence test should be applied to cases involving noncontiguous apartments. First, there is no judicial precedent—in any area of law—that supports the assertion that a claimant can be subjected to the burden of proof that he himself creates instead of the test governed by the law in that area. In stating that a landlord has the burden of proving that the tenant resides in some place other than the residence in question, the *Sharp* court did not employ any qualifying language to limit this rule to specific types of primary residence claims.[110] Rather, the statement was made as a conclusion of law, in the typical fashion of a court explaining the body of law in a certain area before applying those rules to the facts of the case.

Secondly, the *Sharp* court's ruling that the landlord failed to meet his burden did not rest on the failure of the landlord to meet the "substantial physical nexus test," but rather it was decided on the underlying assumption that a tenant's only home, when domiciled in New York, is per se his or her primary residence. The decision centered on whether or not the two apartments could be considered a single residence, because if either one was the tenant's only residence, the court recognized that it must conclusively determine it was the tenant's primary residence.[111] The *Sharp* court explained: "The issue before us is whether two noncontiguous apartments leased by defendant tenant comprise a single residential unit and, *as such, constitute a primary residence* subject to the protection of the rent regulatory statutes."[112] Likewise, the court's holding focused not on usage of the two apartments to determine which apartment was primary, but rather the focus on usage of the apartments was limited to the question of whether the two could be

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[109] TOA Constr. Co. v. Tsitsires, 9 Misc. 3d 469, 488, 798 N.Y.S.2d 674, 688–89 (N.Y. Civ. Ct. N.Y. County 2005), *rev'd*, 14 Misc. 3d 65, 830 N.Y.S.2d 16 (Sup. Ct. App. T. 1st Dep't 2006), *rev'd*, 54 A.D.3d 109, 861 N.Y.S.2d 335 (1st Dep't 2008).

[110] *See Sharp*, 139 A.D.2d at 263, 531 N.Y.S.2d at 556.

[111] *See id.* at 263, 531 N.Y.S.2d at 555.

[112] *Id.* (emphasis added).

considered a single residence.[113] In analyzing the landlord's non-primary residence claim, the *Sharp* court undoubtedly employed the Initial Burden Test in initially assessing whether the landlord had established the existence of a secondary residence. When the landlord failed to meet this burden, the court ended its analysis, determining that the tenant's only residence was per se his primary residence.

Additionally, case precedent demonstrates that courts have continuously refused to permit a finding of non-primary residence when a tenant maintains only one residence, by continuing to focus on domicile rather than usage, as the legislature initially mandated in the first official primary residence guidelines.[114] As previously discussed, the disjunctive usage or domicile test of the original guidelines demanded that a tenant domiciled in New York City conclusively defeated a non-primary residence claim even if that tenant did not spend a single day in the subject apartment—provided they filed Resident Income Tax Returns from the apartment.[115] Accordingly, a tenant domiciled in New York, but clearly underutilizing the apartment, was not considered to be undermining the purpose of rent regulation.

Despite the removal of any specific reference to domicile in the current primary residence regulations, courts have continued to hold that in instances where a tenant undisputedly possesses only one residence, the tenant's domicile is given nearly determinative weight in deciding primary residence.[116] For

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[113] *See id.* at 264–65, 531 N.Y.S.2d at 556. The court held that "[t]his burden was not met here, where tenant and his parents . . . gave extensive and persuasive testimony establishing that tenant in fact maintains apartments 2-H and 9-U as a single residential unit." *Id.* at 265, 531 N.Y.S.2d at 556. The court supported this decision by describing how the tenant used each apartment. *See id.* at 265, 531 N.Y.S.2d at 556–57. The court did not, however, employ the language "substantial physical nexus" or employ any of the four criteria listed in the regulations. Rather, the analysis was consistent with the intent-based approach used to determine whether two non-contiguous apartments can be considered a single apartment, and completely inconsistent with traditional primary residence analysis.

[114] *See supra* text accompanying notes 27–30.

[115] *See id.*

[116] *See* Coronet Props. Co. v. Brychova, 122 Misc. 2d 212, 213, 469 N.Y.S.2d 911, 912 (N.Y. Civ. Ct. N.Y. County 1983), *aff'd*, 126 Misc. 2d 946, 488 N.Y.S.2d 1020 (Sup. Ct. App. T. 1st Dep't 1984); *see also* Sommer v. Ann Turkel, Inc., 137 Misc. 2d 7, 10, 522 N.Y.S.2d 765, 767 (N.Y. Civ. Ct. N.Y. County 1987) ("A tenant's domicile may be a factor to consider, particularly in the situation where a tenant spends little time in New York but is not shown to have any other primary or permanent

example, in *Coronet Properties Co. v. Byrchova*, the court, upon holding that an apartment—located in Manhattan—used on average only a "handful of days every year" by a tenant who had no other residence, was her primary residence, stated:

> While there may be instances when a legal domicile is not a tenant's primary residence within the meaning of the Rent Stabilization Law, the two concepts are not unrelated; legal domicile ordinarily will be sufficient to prove primary residence unless there are unusual circumstances demonstrating that the legal domicile is being maintained for reasons unrelated to housing accommodations.[117]

There, the tenant was a professional singer and music teacher who traveled extensively throughout the United States and Canada.[118] While on tour, the tenant stayed in private homes provided to her by certain sponsors and stayed in her residence in New York for about three days out of every month.[119] Despite her "itinerant" lifestyle, the court found that subjecting her to the loss of rent regulation would be counterproductive to the goals of the legislature in enacting the primary residence requirement because, although she barely spent any time in the apartment, that apartment was still her home; a home she needed for actual living purposes.[120]

In *Sarraf v. Szunics*,[121] the court, in determining a non-primary residence claim, incorporated the notions that: (1) the primary residence requirement was not meant to affect persons with only one residence; (2) the public policy behind the requirement cannot be selectively interpreted; and (3) domicile continues to be a nearly conclusive factor when a tenant does not possess at least two residences.[122] In *Sarraf*, the tenant facing

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residence."). Moreover, removal of the domicile exception was most likely meant to extend the target of the primary residence statutes to curb abuse by persons with more than one residence in the state who were previously immune from the statutes upon a showing of New York City domicile and not meant to allow the eviction of tenants with only one residence. Given the legislature's concern in the appropriateness of evicting persons with two residences from only one residence pursuant to the statute, the lack of any legislative debate on the equity of evicting tenants from their only residence implies that the elimination of domicile was not intended to lead to this result.

[117] *Coronet Props.*, 122 Misc. 2d at 214, 469 N.Y.S.2d at 912.

[118] *See id.* at 212, 469 N.Y.S.2d at 911–12.

[119] *See id.* at 212, 469 N.Y.S.2d at 912.

[120] *See id.* at 214, 469 N.Y.S.2d at 912–13.

[121] 132 Misc. 2d 97, 503 N.Y.S.2d 513 (N.Y. Civ. Ct. N.Y. County 1986).

[122] *See id.* at 98–101, 503 N.Y.S.2d at 515–16.

eviction on non-primary residence grounds spent only two to three hours, two times a week, in the subject apartment, while spending all other time at her business—which was actually her sister's apartment.[123] The court first employed the Initial Burden Test, finding that to prevail the landlord must "establish that the tenant maintains a primary residence at some place other than the subject premises."[124] The court further explained, "[t]hus, to prevail petitioner must establish that the . . . business apartment is her primary residence."[125] Accordingly, the landlord could only meet his burden of proof if he could show that the business residence constituted a secondary residence, or else the tenant's only residence would constitute her primary residence per se. Ultimately, the court found that although the tenant lives a "bizarre existence" and that the apartment was clearly underutilized, the tenant did not possess a secondary residence and thus was not the type of tenant that was meant to be targeted by the primary residence statute; therefore, she could not be evicted on non-primary residence grounds.[126] The court explained that "[a]lthough the goal of the primary residence law was to remove 'the benefits of rent control with respect to . . . underutilized housing accommodations,' such result only occurs if the tenant does maintain a primary residence elsewhere."[127]

To further support the outcome, the court noted that domicile continues to be an incredibly influential factor in deciding primary residence claims when a tenant has only one residence, even after the specific domicile requirement disappeared from the official regulations.[128] The court explained, " 'where a statute prescribes 'residence' as a qualification for a privilege or the enjoyment of a benefit, the word is equivalent to 'domicile.' "[129] Finally, the court noted that the tenant's domicile continued to remain the subject apartment, despite the fact that she rarely spent any time there because she kept most of her

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[123] *See id.* at 98, 503 N.Y.S.2d at 514.

[124] *Id.* at 99, 503 N.Y.S.2d at 515.

[125] *Id.*

[126] *See id.* at 98–99, 503 N.Y.S.2d at 514–15.

[127] *Id.* at 99, 503 N.Y.S.2d at 515 (citation omitted).

[128] *See id.* ("On analysis, primary residence is closely related to the concept of domicile.").

[129] *Id.* at 100, 503 N.Y.S.2d at 515 (quoting State v. Collins, 78 A.D.2d 295, 297, 435 N.Y.S.2d 161, 163 (3d Dep't 1981)).

possessions in the apartment.[130] Ultimately the court, incorporating the inherent fairness element intended by the legislature, determined that the tenants only residence was her primary residence because "there is no proof that retention of this apartment . . . is a fiction or device employed to enable her to retain the benefits of rent regulation."[131]

Although the case law concerning primary residence claims involving tenants who possess only one residence is slight, the precedent that does exist—prior to *TOA Construction*—uniformly recognizes that a tenant domiciled in New York who does not possess a secondary residence is not the intended target of the primary residence requirement. In recognizing this notion, the courts addressing the issue have both impliedly and explicitly found that the Initial Burden Test is the proper test to employ when assessing primary residence claims against tenants who undisguisedly possess only one residence.

D. Additional Considerations

The implications of allowing judicial application of a primary residence test which does not demand that a landlord make an initial showing that a tenant maintains at least two residences is not only inconsistent with the traditional means of statutory interpretation, but it also fosters constitutional infringement of privacy rights, raises due process concerns, and is inconsistent with the legislative demand for objectivity in making these determinations.[132] When a tenant undisputedly possesses only one residence, which he has not sublet, the only criteria left to assess a primary residence claim concerns how much time that tenant has spent in the residence.[133] Ultimately, in this situation, the primary residence test becomes a test to determine whether a rent-paying tenant has spent a sufficient amount of time in his own residence to avoid eviction from his or her only home.

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[130] *See id.* at 100–01, 503 N.Y.S.2d at 515–16.

[131] *Id.* at 101, 503 N.Y.S.2d at 516.

[132] *See* Emay Props. Co. v. Norton, 136 Misc. 2d 127, 128–29, 519 N.Y.S.2d 90, 92 (Sup. Ct. App. T. 1st Dep't 1987) (stating that evidence of primary residence must be objective and empirical).

[133] *See supra* note 10 and accompanying text.

Basing the entirety of the primary residence determination on the amount of time spent in the subject apartment both contradicts the legislative demand for objectivity and also clashes with numerous court decisions stating that the amount of time spent in the apartment "is not a sufficient basis for a finding of non-primary residence."[134] More importantly, because courts have been unwilling to see the 183-day requirement as a strict requirement,[135] similar fact patterns will result in vastly different outcomes. The possibility of subjecting persons to eviction, a severe civil penalty, without sufficiently clear standards to provide adequate notice raises due process concerns and leaves the 1.4 million rent-regulated tenants in New York[136] with few guidelines to structure their behavior to avoid eviction from their only homes.[137]

Furthermore, privacy concerns are implicated when a court, basing its determination entirely on usage of the apartment, will surely be forced to rely on hidden surveillance and other intrusive methods of tenant monitoring and/or witness testimony for evidence of the tenant's usage.[138] Application of the primary residence test as a pure usage assessment—which it becomes when a tenant undisputedly possesses only one residence—encourages improper monitoring of persons in their own home and may open the statute to claims of unconstitutionality for the violation of a person's fundamental right to privacy in their own

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[134] *See* Claridge Gardens, Inc. v. Menotti, 160 A.D.2d 544, 544, 554 N.Y.S.2d 193, 194, (1st Dep't 1990); *see also* Coronet Props. Co. v. Brychova, 122 Misc. 2d 212, 213–14, 469 N.Y.S.2d 911, 912–13 (N.Y. Civ. Ct. N.Y. County 1983), *aff'd*, 126 Misc. 2d 946, 488 N.Y.S.2d 1020 (Sup. Ct. App. T. 1st Dep't 1984).

[135] *See, e.g.*, *Sarraf*, 132 Misc. 2d 97, 100–01, 503 N.Y.S.2d 513, 515–16.

[136] ASS'N FOR NEIGHBORHOOD & HOUS. DEV., INC., THE $200,000 STOVE: HOW FRAUDULENT RENT INCREASES UNDERMINE NEW YORK'S AFFORDABLE HOUSING 3 (2009), *available at* http://www.wnyc.org/files/stove_report.pdf.

[137] *See* 164th Bronx Parking, L.L.C. v. City of New York, 20 Misc. 3d 796, 800, 862 N.Y.S.2d 248, 253 (Sup. Ct. Bronx County 2008) (stating that if an administrative code fails to provide "notice of required conduct" or standards to the person charged with its enforcement, it is unconstitutionally vague, which occurs when persons of "ordinary intelligence must guess at its meaning" and differ in its application).

[138] For example, in *TOA Construction*, the majority of the evidence used at trial came from the testimony of the manager of Tsitsires' building. *See* TOA Constr. Co. v. Tsitsires, 54 A.D.3d 109, 119, 861 N.Y.S.2d 335, 342 (1st Dep't 2008) (Andrias, J., dissenting). The manager testified to Tsitsires' presence in the apartment and concerning his viewing of hidden camera video surveillance of the lobby from a camera specifically installed to monitor Tsitsires, which he had been paid to view by the landlord. *See id.* at 119, 861 N.Y.S.2d at 342.

home.[139] In the absence of surveillance evidence, a court would likely rely on testimonial evidence, which is often ripe with credibility issues or misperceptions, despite the legislative call for objective evidence in making primary residence determinations. For instance, a tenant like Tsitsires who has a proven phobia of people, who testified to only entering and leaving the building if nobody was around, and who ignores knocks on the door, could be subject to eviction from his only residence because nobody truly knew how much time he actually spent in the apartment.[140]

Use of the Pure Physical Nexus Test, which fails to require a showing that a tenant possesses more than one residence, cannot be reconciled with the legislative history, the public policy behind and the explicit statutory language of the primary residence requirement, nor is it safe from constitutional attacks on privacy and due process grounds. When a tenant undisputedly possesses only one residence, the Pure Physical Nexus Test becomes an assessment only of how much time a tenant has spent in the subject dwelling in the preceding year. Accordingly, the primary residence analysis, which can result in a tenant losing possession of his only home, depends entirely on whether a court finds the tenant has spent an adequate amount of time in that residence. This subjective determination, not governed by any clearly delineated factors and evidenced either by intrusive or unreliable sources, violates constitutional guarantees of privacy and due process, and clearly contradicts the legislative demand for objectivity in making primary residence determinations.

CONCLUSION

Application of the Pure Physical Nexus Test to determine primary residence claims cannot be reconciled with the plain language of the primary residence statutes, legislative history, public policy, or case precedent. To award landlords possession on primary residence grounds without requiring proof that a tenant possesses more than one residence vastly aggrandizes a landlord's ability to evict beyond the level comprehended by the

[139] *See* Johnson v. United States, 333 U.S. 10, 14 (1948) (noting that people have a fundamental right of privacy to be free from surveillance in their homes).

[140] *See TOA Constr.*, 54 A.D.3d at 127–28, 861 N.Y.S.2d at 347–48.

legislature in enacting this requirement. Moreover, this standard effectively warps a statute designed to diminish homelessness into a tool that will create it.

Accordingly, the Initial Burden Test is the proper standard to employ when assessing primary residence claims. Under this test, a landlord must first prove that a tenant possesses more than one residence. Upon satisfaction of this threshold burden, the landlord must then prove by a preponderance of the evidence that the subject residence is not the tenant's primary residence by providing objective evidence that the tenant does not have an "ongoing, substantial, physical nexus" with the contested residence "for actual living purposes."[141]

While an explicit legislative mandate demanding an initial showing of at least two residences is absent in the primary residence statutes and regulations, each and every stop in the traditional path of statutory interpretation bolsters the conclusion that the legislature deemed it a necessary part of the primary residence test. While a statutory definition of the term is absent, the plain and ordinary meaning of the phrase "primary residence," a meaning known and likely intended by the legislature that crafted the initial primary residence requirement, clearly connotes a comparison between two residences before one can be considered primary. Additionally, the legislative history concerning the addition of the primary residence requirement reveals that the legislature intended to limit the scope of the primary residence requirement to persons thwarting the goals of the rent-regulation system by usurping the limited supply of affordable rent-regulated housing, when they clearly had no need as demonstrated from owning more than one residence. Moreover, the legislature, in initially focusing on domicile or usage, revealed a simultaneous effort to limit the scope of the statutes by insulating actual New York residents from primary residence litigation, despite even the most extreme underutilization of a tenant's residence.

Delving into the legislative history makes clear that the public policy behind creating a primary residence requirement was not meant to be selectively paraphrased. While the legislature intended to return underutilized housing units to the

[141] *See* Emay Props. Co. v. Norton, 136 Misc. 2d 127, 129, 519 N.Y.S.2d 90, 92 (Sup. Ct. App. T. 1st Dep't 1987).

market to alleviate the housing shortage in New York,[142] it cannot be ignored that the legislature also had a specific target in mind to achieve this goal. The legislation was directed at tenants, who, facing eviction, would not exacerbate the housing shortage in New York by actually becoming homeless. Moreover, the legislature most likely would have expressly noted its willingness to allow for unprecedented judicial decrees of homelessness somewhere in the statutes, regulations, or memorandums regarding the primary residence requirement if it intended this outcome. Lastly, judicial interpretation of the primary residence requirement prior to *TOA Construction* has uniformly demanded, albeit not always in express terms, that a tenant's only residence is per se their primary residence.

There is simply no support for the notion that there is no need to prove that a tenant possesses at least two residences before subjecting him to the possibility of eviction on primary residence grounds. This idea is both beyond reconciliation with every traditional means of statutory interpretation and, moreover, an application of the test in this manner distorts the primary residence requirement from an innately comparative test to a purely usage-based test. The resulting reliance on purely subjective evidence to determine what constitutes sufficient usage of a tenant's only home raises constitutional issues of privacy and vagueness, and allows for decisions based purely on testimonial evidence, which clearly contradicts the legislative demand for objectivity in primary residence criteria. Accordingly, the primary residence statute must be interpreted to demand that a tenant facing eviction on non-primary residence grounds must possess at least two residences.

If not, the overworked attorney, who works eighty hours a week, who takes advantage of her firm's "sleeping pods" four nights a week, who does little but store her possessions in her apartment, and who has no intention of soon giving up this lifestyle, may be at risk of losing her only home. She can't be sure, however, because the primary residence determination, which centers solely on what constitutes sufficient usage of her apartment, will be left to the arbitrary perceptions of appropriate usage of whichever court she happens to be in front of.

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[142] *See supra* note 93.