No.

In the Supreme Court of the United States

COMMUNITY HOUSING IMPROVEMENT PROGRAM, ET AL.,

Petitioners,

v.

CITY OF NEW YORK, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

New York's Rent Stabilization Law (RSL) is the nation's most stringent rental housing regulation, governing one million New York City apartments. It appropriates owners' right to exclude and other property rights by, upon the expiration of a tenant's lease, preventing owners from occupying their property, changing its use, or simply leaving it vacant. Absent unlawful acts, tenants and their broadly-defined "successors" are entitled to lease renewals in perpetuity.

The RSL also imposes the public burden of providing affordable housing on a subset of rental property owners, by setting maximum rent levels based in part on tenant ability to pay. New York's high court held that this subsidization scheme is a "public assistance benefit," "conferred by the government" through regulations "applied to private owners of real property."

The Second Circuit affirmed dismissal of petitioners' claims, holding that owners lose their rights to exclude, use, and change the use of their property by electing to enter into a lease. In effect, these apartments become the government's housing stock, outside the owners' control. The questions presented are:

1. Whether the provisions of the RSL that prevent a property owner from regaining exclusive possession and control of her property after the expiration of a lease effect *per se* physical takings.

2. Whether, by mandating consideration of tenant ability to pay in setting maximum rents, the RSL forces a subset of owners "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," and thereby effects a regulatory taking as Justices Scalia and O'Connor concluded in *Pennell* v. *City of San Jose*, 485 U.S. 1, 22 (1988).

PARTIES TO THE PROCEEDING

Petitioners here, plaintiffs-appellants below, are the Community Housing Improvement Program, Rent Stabilization Association of N.Y.C., Inc., Constance Nugent-Miller, Mycak Associates LLC, Vermyck LLC, M&G Mycak LLC, Cindy Realty LLC, Danielle Realty LLC, and Forest Realty LLC.

Respondents here, defendants-appellees below, are The City of New York, Rent Guidelines Board, David Reiss, Cecilia Joza, Alex Schwarz, German Tejeda, May Yu, Patti Stone, J. Scott Walsh, Leah Goodridge, Sheila Garcia, and RuthAnne Visnauskas.

Respondents here, intervenor-defendant-appellees below, are the N.Y. Tenants and Neighbors (T&N), Community Voices Heard (CVH), and the Coalition for the Homeless.

RULE 29.6 STATEMENT

Petitioners Community Housing Improvement Program, Rent Stabilization Association of N.Y.C., Inc., Mycak Associates LLC, Vermyck LLC, M&G Mycak LLC, Cindy Realty LLC, Danielle Realty LLC, and Forest Realty, LLC have no parent corporation and no publicly held corporation owns 10% or more of the stock of any of these entities.

RELATED PROCEEDINGS

No other case is directly related to the present case within the meaning of Rule 14.1(b)(iii).

Although not directly related to this case, petitioners are aware of other pending actions challenging the constitutionality of New York's Rent Stabilization Law in which decisions have been rendered by the Second Circuit. Those actions are:

335-7 LLC v. *City of New York*, No. 20 Civ. 1053, 524 F. Supp. 3d 316 (S.D.N.Y. 2021), aff'd, No. 21-823, 2023 WL 2291511 (2d Cir. Mar. 1, 2023);

74 Pinehurst LLC v. *State of New York*, No. 19 Civ. 6447, 492 F. Supp. 3d 33 (E.D.N.Y. 2020), No. 21-467, aff'd, 59 F.4th 557 (2d Cir. 2023).

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OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-30a) is reported at 59 F.4th 540. The district court's opinion (App., *infra*, 33a-66a) is reported at 492 F. Supp. 3d 33.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 2023. App., *infra*, 31a-32a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment, which applies to the States through the Fourteenth Amendment, provides "Nor shall private property be taken for public use, without just compensation."

Pertinent provisions of the Rent Stabilization Law, N.Y. Unconsol. Law tit. 23 § 26-501 et seq., and regulations, N.Y.C. Admin. Code § 26-501 et seq. and 9 NYCRR § 2520.1 et seq., are reproduced at App., *infra*, 226a-246a.

STATEMENT

Providing affordable housing for low- and middle-income Americans is an important public policy goal. Governments can seek to achieve that goal in a variety of ways—providing vouchers or other subsidies to families in need; granting tax abatements to private property owners in return for agreed-upon rent caps and income tests for tenants; or constructing government-owned housing.

Those measures, properly, place the cost on taxpayers as a whole.

New York's Rent Stabilization Law (RSL) takes the opposite approach. It imposes all of its costs on a select group of property owners—those with pre-1974 buildings of six or more units—by subjecting them to regulations that strictly limit maximum rents and restrict owners' ability to occupy themselves or otherwise remove properties from the residential rental market. The RSL governs one million units, half of New York City's apartments.

Petitioners—two associations whose members are the tens of thousands of owners of RSL properties, as well as several individual property owners—commenced this lawsuit challenging the RSL under the Takings Clause.

First, the RSL takes from property owners their rights—after expiration of a tenant's lease—to exclude third parties and reclaim apartments for their own use or use by family members; to change the use of their property from residential to commercial rental, to leave the property vacant, or to demolish existing structures; and to choose who may occupy the property. This Court's decision in *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063 (2021), makes clear that such appropriations of an owner's fundamental property rights constitute *per se* physical takings.

The Second Circuit's contrary conclusion rests on its determination that *Cedar Point* does not apply in the landlord-tenant context, because, in that court's view, once an owner leases her property to a tenant, the government has "broad" authority to impose regulations.

That conclusion conflicts with a recent Eighth Circuit decision and leaves the thousands of owners of RSL-regulated properties, who include many

individuals and small family businesses, with no protection against overreaching government regulation. This Court should grant review to make clear that rental properties, like all other properties, are protected against physical takings.

Second, the RSL's regulation of maximum rent levels is not based on the conventional price control standard of reasonable costs plus a reasonable return on capital. Rather, the RSL requires the rent-setting body to take account of tenants' ability to pay when setting rent limits. It therefore is not surprising that, from 1999-2018, rent increases were less than half of New York's own measure of the increase in owners' costs. Nor is it surprising that New York's high court held the RSL to be a "public assistance benefit" for tenants who could not otherwise afford to live in New York City.

In *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988), Justices Scalia and O'Connor concluded that limiting rent levels based on tenants' ability to pay constitutes a taking because the government "is not 'regulating' rents in the relevant sense of preventing rents that are excessive; rather, it is using the occasion of rent regulation * * * to establish a welfare program privately funded by those landlords who happen to have 'hardship' tenants." *Id.* at 22. By forcing property owners to "bear public burdens [that] * * * should be borne by the public as a whole," they concluded, such a requirement violates the Takings Clause. *Id.* at 19.

The RSL violates that fundamental restriction.

The Second Circuit dismissed Justice Scalia's opinion as a dissent never endorsed by this Court, but the majority in *Pennell* did not address the issue. And the principle that select property owners cannot be

forced to bear public burdens that they did not cause is a fundamental one, embedded in the very purpose of the Takings Clause and recognized by this Court's precedents. *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978), and *Kelo* v. *City of New London*, 545 U.S. 469 (2005), make it extremely difficult for plaintiffs to prevail on regulatory takings claims. The Court should grant review to affirm this essential limitation on government authority to effect a regulatory taking.

A. The Rent Stabilization Law

The RSL governs half of New York City's rental housing stock—apartments in buildings constructed before 1974 that have six or more rental units. App., *infra*, 75a.

The RSL's restrictions are triggered by an every-three-year finding that there is a housing "emergency" in the City, which the law defines as a vacancy rate of 5% or less. App., *infra*, 112a-113a. The City has declared an emergency every three years for the past half-century, continuously renewing the RSL. App., *infra*, 100a.[1]

The RSL severely restricts (and in several instances completely negates) many of the rights that make up building owners' property interests—specifically their rights to exclude, occupy, use, change the use of, and dispose of their property. It does so because, as the City explained in connection with the most recent tightening of RSL restrictions, the RSL's goal is to "protect" New York's "regulated housing

[1] A property owner may agree to abide by the RSL's requirements voluntarily, in exchange for tax benefits. *E.g.*, N.Y. Real Prop. Tax Law § 421-a. Such consensual applications of the RSL are not at issue here.

stock," to "help prevent the loss of thousands of units of affordable housing by making it harder to deregulate rent-stabilized units," and to "ensure that rent-stabilized apartments remain rent-stabilized." App., *infra*, 105a-106a.

New York exerts control over these private properties by appropriating the owner's rights upon expiration of a tenant's lease.

First, the RSL requires owners to renew tenants' leases in perpetuity, absent circumstances entirely within the tenant's control. An owner cannot refuse to renew the lease of an RSL-controlled unit unless the tenant (1) fails to pay rent, (2) materially violates the lease, (3) creates a nuisance, or (4) uses the apartment for an unlawful purpose. App., *infra*, 103a-104a, 237a-240a.

Second, the RSL forces owners to lease to strangers whom the law deems successors of the existing tenant. A tenant may pass the right to perpetual tenancy to "any member" of the "tenant's family" who has lived in the apartment for two years (one year for senior citizens or disabled persons), a group that includes grandparents, grandchildren, and in-laws. App., *infra*, 104a, 159a, 233a-235a, 235a-236a. Successorship rights also are granted to "[a]ny other person" living in the apartment in "emotional and financial commitment and interdependence" with the tenant. App., *infra*, 159a, 234a.

Third, the RSL prevents owners from refusing to renew a lease in order to regain possession of an apartment for the owner's personal use. Only one tenant-occupied unit may be recovered by owners for personal use, and only when that unit will constitute the owner's primary residence and the owner proves an

"immediate and compelling necessity" for the unit. App., *infra*, 164a-165a, 172a-173a. If the tenant has occupied the unit for fifteen years or more, is 62 years or older, or is physically or mentally impaired, the owner must find that tenant equivalent accommodation nearby at the same stabilized rent, an often impossible feat. App., *infra*, 171a. Buildings held in the name of a corporate entity—as most family-owned buildings are, to limit liability risk—have no personal use allowance at all. App., *infra*, 165a-166a.

Fourth, the RSL severely restricts owners' ability to withdraw their buildings from residential rental use, leave the property vacant, or demolish the property. Owners cannot switch RSL-regulated property to commercial rentals. Nor can they withdraw their property entirely from the residential market unless the cost to make it habitable exceeds its value or the owners will use the building solely for their own business. App., *infra*, 174a-176a.

Owners who wish to demolish their property must relocate regulated tenants to comparable rent-stabilized housing or pay them a stipend for six years. App., *infra*, 176a-178a. These requirements have forced outlandish payments to hold-out tenants standing in the way of major redevelopments. App., *infra*, 129a-130a.

Fifth, the RSL effectively prevents owners from disposing of their property through conversion of regulated apartments to cooperatives or condominiums. Such conversions require the consent of a majority of tenants, even though tenants' perpetual renewal rights are not affected by such a conversion. App., *infra*, 178a-179a.

In addition to these restrictions on owners' physical control of their property, the RSL strictly limits

rent levels. It directs New York City's rent-setting body, the Rent Guidelines Board (RGB), to set, annually, maximum rent increases for stabilized units. The RGB is required to consider factors relating to property owners' costs—but also housing affordability and tenant ability to pay. App., *infra*, 191a-192a, 233a (RGB considers "current and projected cost of living indices for the affected area").

Factoring tenant ability to pay into the calculation of allowable rent increases has led to a widening gap between owner costs and regulated rents. By the RGB's own estimates, from 1999-2018, property owners' operating costs increased at twice the rate of RGB-allowed rent increases. App., *infra*, 190a-191a.

B. Proceedings Below

Petitioners filed suit in the District Court for the Eastern District of New York challenging the RSL as an uncompensated taking of private property. Petitioners allege that the provisions of the RSL described above effect a physical taking by eliminating owners' rights to exclude from, use, and dispose of their property. And they allege it effects a regulatory taking by forcing owners of regulated units—and only those owners—to provide subsidized housing to those who cannot afford market rents, imposing on them public burdens that should be borne by the public as a whole—as Justices Scalia and O'Connor reasoned in *Pennell*.

The district court granted respondents' motion to dismiss the complaint for failure to state a claim. App., *infra*, 33a-66a. The Second Circuit affirmed. App., *infra*, 1a-30a.

The court of appeals rejected petitioners' physical takings claim because it believed "no provision of the

RSL effects, facially, a physical occupation of" regulated properties. App., *infra*, 18a. The court reasoned that because owners "voluntarily invited third parties to use their properties"—by entering into a lease with the original tenant—"regulations concerning such properties are 'readily distinguishable' from those compelling invasions of properties closed to the public." App., *infra*, 18a-19a (quoting *Cedar Point*, 141 S. Ct. at 2077). In the court of appeals' view, the government's "'broad power'" to regulate the landlord-tenant relationship is not "restrict[ed]—much less upend[ed]"—by this Court's takings rulings. App., *infra*, 19a , 21a (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 528 (1992)). The court concluded that the successorship provisions did not effect a physical taking because they deprive owners "only of the ability to decide *who* their incoming tenants are." App., *infra*, 21a.

The Second Circuit rejected petitioners' claim that the RSL effects a regulatory taking by forcing regulated building owners to subsidize the RSL's public assistance program for those unable to pay market rents. App., *infra*, 22a-23a. The court reasoned that "a majority of the Supreme Court has yet to adopt Justice Scalia's reasoning" articulating that takings principle in *Pennell*. *Ibid*.

REASONS FOR GRANTING THE PETITION

I. Whether The RSL Effects A *Per Se* Physical Taking Is An Exceptionally Important Question Warranting This Court's Review.

In upholding the RSL against petitioners' physical takings challenge, the Second Circuit boldly held that the physical takings protections that this Court recognized in *Cedar Point* and prior decisions do not apply to residential rental buildings—that once an owner

invites in her first tenant, control over who, when, and on what terms the property may be occupied shifts to the government. But that is wrong: the Takings Clause protects "every sort of interest the citizen may possess" in a "physical thing," including the rights to "possess, use, and dispose" of rental property. *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945). In holding otherwise, the court of appeals contradicted this Court's physical takings precedents as well as a recent Eighth Circuit decision.

With one million rent-stabilized apartments in New York City alone now under significant government control pursuant to these restrictions, this Court should grant review to affirm that its physical takings precedents apply to rental housing.

A. This Court's Precedents Confirm That The RSL Effects A Physical Taking And That The Second Circuit Seriously Erred.

The RSL imposes multiple restrictions on building owners' use and control of their property that effect physical takings. These restrictions may be imposed only if New York pays just compensation.

1. Restrictions on an owner's ability to reclaim an apartment for her own use or to change the use of her property.

A property owner's "right to exclude"—the right to decide who may enter the property and who may not—is "'one of the most treasured' rights of property ownership." *Cedar Point Nursery* v. *Hassid*, 141 S. Ct 2063, 2072 (2021) (quoting *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). It is "'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks

in the bundle of rights that are commonly characterized as property.'" *Ibid.* (quoting *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176, 179–80 (1979)); see also *Cedar Point*, 141 S. Ct. at 2073 (citing Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 752 (1998) (characterizing the right to exclude as the "*sine qua non*" of property)).

"Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation." *Cedar Point*, 141 S. Ct. at 2073. That principle applies whether the government-authorized invasion is temporary or permanent, or whether the property is invaded by the government or by a third party authorized by the government. *Id.* at 2072, 2074.

Cedar Point involved a California regulation requiring agricultural employers to allow union organizers on to their property for up to three hours per day, 120 days per year. This Court held that the regulation effected a *per se* physical taking because it "appropriates a right to physically invade the growers' property." *Cedar Point*, 141 S. Ct. at 2074.

New York's RSL confers a much more extensive right to physically invade.

When a residential tenant's lease expires, the tenant no longer has a contractual right to occupy the owner's property. See N.Y. Real Prop. Law § 232-c. But multiple provisions of the RSL require the owner to allow the tenant to remain, and to renew the tenant's lease, notwithstanding the owner's desire to exercise her right to exclude.

First, the RSL severely restricts an owner's ability to exclude third parties in order to reclaim an apartment for her own use or that of her family members.

The law permits an individual owner to recover possession of a single unit—and only if the owner will use the apartment as her primary residence and proves "an immediate and compelling necessity." N.Y. Unconsol. Laws § 26-511(c)(9)(b). If the tenant has occupied the unit for fifteen years or more, is 62 years or older, or has a physical or psychological impairment, the owner cannot recover possession unless she somehow finds a nearby unit for the tenant at an equivalent stabilized rent. *Ibid.* And if the owner is a corporate entity, the owner cannot recover the apartment at all. App., *infra*, 165a-166a.

Whenever these restrictions prevent an owner from reclaiming an apartment for personal use after a lease has ended—and thereby force the owner to allow the tenant to remain in possession of the unit—they appropriate for the benefit of the tenant a right to invade the property that restricts the owner's right to exclude. Indeed, the taking of the owner's rights is much more substantial than the regulation in *Cedar Point* because the RSL takes from the owner and gives to the tenant the right to possess the apartment and to determine who may enter it. That plainly constitutes a *per se* physical taking.

Petitioner Constance Nugent-Miller illustrates the point. App., *infra*, 168a-169a. Since her husband passed away, Ms. Nugent-Miller has lived alone in a second-floor walk-up apartment in the small New York City building she owns. She developed crippling knee pain in 2015, making climbing the stairs to her second-floor home dangerous and painful. Still, her efforts to move into the first-floor apartment in her own

building have been repeatedly denied, because that unit is rent-stabilized, the tenant has lived there for 20 years, and Ms. Nugent-Miller's medical issues are insufficient to demonstrate a compelling need to move into the unit she owns. *Ibid*.

Second, the RSL imposes substantial restrictions on an owner's ability to change the use of her property. It bars an owner from refusing to renew a lease, and excluding the tenant from the apartment, because the owner wishes to change the property to non-residential uses. 9 NYCRR § 2524.5(a)(1)(i). The owner also may not refuse to renew in order to demolish the building unless she finds the tenant an equivalent RSL-regulated apartment and pays the tenant's moving costs. 9 NYCRR § 2524.5(a)(2)(ii)(b). And an owner may not refuse to renew because she wishes to leave the property vacant unless she can prove that the cost of making the building habitable exceeds its value. 9 NYCRR § 2524.5(a)(1)(ii).[2]

Each of these restrictions forces the owner to allow the tenant to remain in possession of the property, appropriating for the benefit of the tenant not just a right of access, as in *Cedar Point*, but the rights of possession and to determine who may enter the property. *Cedar Point* makes clear that such appropriations of the right to exclude effect *per se* physical takings.

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[2] The RSL allows the owner to refuse to renew if the owner proves that she (1) intends to withdraw the property "from both the housing and nonhousing rental market without any intent to rent or sell all or any part of the land or structure," *and* (2) requires the property "for his or her own use in connection with a business which he or she owns and operates." 9 NYCRR § 2524.5(a)(1)(i). That very restrictive exception is irrelevant because it does not apply when the owner wishes to use the property for the purposes discussed in the text.

The Second Circuit distinguished *Cedar Point* based on this Court's discussion there of *PruneYard Shopping Center* v. *Robbins*, 447 U.S. 74 (1980). But that discussion is inapposite here.

Pruneyard rejected a regulatory taking claim that was grounded in a state court decision holding that the California Constitution protected the public's right to engage in leafleting at a shopping center. In *Cedar Point*, California relied on *Pruneyard* for the proposition that "limited rights of access to private property should be evaluated as regulatory rather than *per se* takings." 141 S. Ct. at 2076.

This Court rejected that contention, observing that "the PruneYard was open to the public, welcoming some 25,000 patrons a day." *Cedar Point*, 141 S. Ct. at 2076. It stated that "[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public." *Id*. at 2077.

The Second Circuit seized on the reference to "property closed to the public," stating that the RSL does not grant a right to invade such property. "Rather," owners "voluntarily invited third parties"—the tenants—"to use their properties, and as the Court explained in *Cedar Point*, regulations concerning such properties are 'readily distinguishable' from those compelling invasions of properties closed to the public." App., *infra*, 18a-19a.

The Second Circuit thus concluded that—with respect to the Takings Clause's protection of an owner's right to exclude—residential rental property should be treated the same as a shopping mall "open to the

public, welcoming some 25,000 patrons a day." That makes no sense.

Unlike the PruneYard mall, a residential rental property is not "a business generally open to the public." The owner opens the rental apartment to tenants and tenants' invitees, not all members of the public. Moreover, once a lease has expired and the owner wishes to change the use of her property, the owner must be able to assert her right to exclude. Surely *PruneYard*'s public-access/no-taking holding would not apply if the property owner had wanted to demolish the mall and build a factory.

At bottom, the Second Circuit's holding rests on the far-reaching proposition that a different, much more government-friendly physical takings standard applies to rental properties. The court of appeals said *Cedar Point* did not "concern[] a statute that regulates the landlord-tenant relationship" and did not "restrict[]—much less upend[]—the State's longstanding authority to regulate that relationship." App., *infra*, 21a (footnote omitted). But nothing in the Takings Clause or this Court's jurisprudence excludes rental properties from the Clause's protections. The Second Circuit's contrary conclusion, if permitted to stand, would allow governments to single out owners of rental property for all manner of onerous restrictions.

The Second Circuit also relied on this Court's decision in *Yee* v. *City of Escondido*, 503 U.S. 519 (1992). App., *infra*, 21a-22a. But *Yee* confirms that these provisions of the RSL effect physical takings.

Yee involved a physical taking challenge to statutes that prohibited the owner of a mobile home park from terminating a tenancy in the event that the

mobile home was sold during the term of the lease. 503 U.S. at 524-26.

The Court explained that a physical taking occurs when "the government authorizes a compelled physical invasion of property." 503 U.S. at 527. The challenged statutes did not impose the requisite government coercion, because "[a]t least on the face of the regulatory scheme, neither the city nor the State compels [mobile park owners], once they have rented their property to tenants, to continue to do so. To the contrary, the [state law] provides that a park owner who wishes to change the use of his land may evict his tenants albeit with 6 or 12 months' notice." *Id*. at 527-28.

Importantly, the Court stated that "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 503 U.S. at 528. The Court thus made clear that its holding depended on a property owner's ability to regain possession of her property—and to do so in a short period of time. And it distinguished the situation in which the owner could not regain possession—where the statute "compel[led] a landowner over objection to rent his property."

These RSL provisions present that "different case" because they "compel a landowner over objection to rent his property." Whenever the RSL prohibits an owner from taking back an apartment for personal use, it compels an objecting owner to continue to rent the unit. And whenever the RSL bars the owner from changing the use of her property, or deciding simply to leave the property vacant, or demolishing the property, it is "compel[ling] a landowner over objection to rent [the] property"—precisely what the *Yee* Court recognized would effect a physical taking. 503 U.S. at

528; accord *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 251-52 n.6 (1987) (drawing same distinction as *Yee*).

The Second Circuit misinterpreted *Yee* to mean that "limitations on the termination of a tenancy do not effect a taking so long as there is a possible route to an eviction." App., *infra*, 19a. Because the RSL "sets forth several grounds on which a landlord may terminate a tenancy"—such as "failing to pay rent, creating a nuisance, violating provisions of the lease, or using the property for illegal purposes"—the court of appeals said that the RSL's limitations do not effect a physical taking. App., *infra*, 19a.

But *Yee* did not state that any restriction of an owner's right to exclude is permissible as long as there is some theoretically-available avenue for the owner to regain control of the property. The Court expressly distinguished the situation in which an owner wished to change the use of her property, making clear that forcing the owner to continue renting the property after the expiration of the lease term would constitute a physical taking.

The RSL does exactly that. Every time it forces an owner to continue accepting residential tenants—and prevents the owner from reclaiming property for personal use, switching it to commercial or other purposes, leaving the property vacant, or demolishing the property—it falls into *Yee*'s "different case" in which a statute "compel[s] a landowner over objection to rent his property" and thereby effects a physical taking.

2. Requirements that an owner accept "successor" tenants and automatically renew the leases of incumbent tenants.

The RSL further appropriates a right to invade an owner's property by forcing owners—after the

expiration of a lease—to accept successor tenants that they did not choose and by requiring owners to renew leases in perpetuity so long as the tenant does not violate the law. Both requirements effect *per se* physical takings.

First, the RSL provides that the statutory right to compel the property owner to renew a lease extends beyond the tenant selected by the owner. This "successor" right may be invoked by:

- A member of the tenant's family who has lived in the apartment as a primary residence for two years (one year if the family member is a senior citizen or is disabled). 9 NYCRR § 2523.5(b)(1).
- Any other person using the apartment as a primary residence for the same time period "who can prove emotional and financial commitment, and interdependence between such person and the tenant." 9 NYCRR § 2520.6(o)(2).

The Complaint alleges, for example, that one plaintiff owns an apartment that has been occupied for nearly fifty years by three generations of the same family—the current tenant is the original tenants' granddaughter. App., *infra*, 159a-160a.

Appropriating a right to invade and possess the property for a third party not chosen by the property owner effects a physical taking. After all, the regulation in *Cedar Point* authorized only three-hour intrusions for 120 days. The RSL's 24-hour/365-day invasion of the property by the third party is a dramatically more substantial taking of the owner's right to exclude.

Second, the RSL requires owners to give incumbent tenants the option of renewing their leases, unless the tenant has violated the lease or the law or ceased to use the apartment as a primary residence. 9 NYCRR § 2524.3. It thus requires the owner to allow the property to be occupied by the tenant, and the tenant's successors, in perpetuity.

An owner's decision to enter into a time-limited rental agreement does not in any way evidence the owner's willingness to lease the property to the same tenant for years or decades, at the tenant's sole option. Forcing upon an owner the continued occupation of her property by someone whom the owner wishes to exclude appropriates a right to invade the property. And does so more extensively than the limited appropriation at issue in *Cedar Point*.

The Second Circuit's rejection of these claims rested on the rationale discussed above—the erroneous view that the Takings Clause applies differently, and allows virtually unlimited government intrusions, in the landlord-tenant context.

It is possible to read this Court's decision in *Yee* to reject the contention that a physical taking occurs when, if an owner has decided to rent a property, the government limits the owner's ability to determine who may occupy her property as a tenant. But construing *Yee* that broadly would create significant tension with two subsequent decisions of this Court.

Cedar Point emphasizes the very substantial protection accorded to an owner's right to exclude. And forcing an owner to permit occupation of her property by someone she did not select, or continued occupation by someone she would like to exclude, restricts that right.

In *Horne* v. *Department of Agriculture*, 576 U.S. 350 (2015), the Court rejected the argument that a property owner's decision to participate in a particular market could absolve the government of takings liability. See *id.* at 365 (discussing *Loretto*). If it would be a physical taking for the government to compel a property owner to rent her property initially to a person she did not select, then it should be a physical taking to compel her to accept a second tenant not of her choosing or to force her to accept continued occupancy by someone she would reject. See also *301, 712, 2103 & 3151 LLC* v. *City of Minneapolis*, 27 F.4th 1377, 1383 (8th Cir. 2022) (analyzing *Cedar Point*, *Horne*, and *Yee* and concluding that "an ordinance that would require landlords to rent to individuals they would otherwise reject might be a physical-invasion taking").

3. Requiring tenant permission to convert a building to a cooperative or condominium.

A property owner may dispose of her ownership of a residential apartment building in various ways. She may choose simply to sell the entire interest in the building and underlying property. Or she may convert the building to a condominium or cooperative, which allows the separate sale of individual apartments. *Pakdel* v. *City and County of San Francisco*, 141 S. Ct. 2226, 2228 (2021); The Steven L. Newman Real Estate Institute at Baruch College, CUNY, *NYC Condominium and Cooperative Conversion: Historical Trends and Impacts of the Law Changes*, 3 (May 5, 2021), https://tinyurl.com/5fcjtunz (describing benefits of condominium conversion).

The RSL prohibits an owner from converting a building unless the owner obtains the agreement of 51% of the tenants. N.Y. Gen. Bus. Law § 352-

eeee(1)(b). That is so even though the conversion does not in any way affect the tenants' rights to renewal and other protections conferred by the RSL.

The Takings Clause protects all interests in property including the right "to dispose * * * of it." *General Motors*, 323 U.S. at 378; see also *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 167 (1998) ("[T]he fundamental maxim of property law [is] that the owner of a property interest may dispose of all or part of that interest as he sees fit.").

Giving tenants a veto over the owner's ability to reconfigure her property in order to sell apartments on an individual basis strips owners of the right to use and to dispose of the property as surely as does barring sale of the property as a whole.

4. Petitioners properly allege facial takings.

The Second Circuit held that petitioners bear the burden on their facial physical takings challenge to show that the RSL "'is unconstitutional in all of its applications.'" App., *infra*, 12a (quoting *Washington State Grange* v. *Washington State Rep. Party*, 552 U.S. 442, 449 (2008)); see also *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) (a plaintiff must "establish that no set of circumstances exists under which the [challenged] Act would be valid"). And it held that under that "high bar," even if the RSL effects a physical taking in some of its applications, it is not facially unconstitutional. App., *infra*, 12a-15a.

That conclusion rests principally on the court of appeals' application of an erroneous substantive standard, as just discussed. But the lower court also misapplied this Court's decisions regarding facial claims.

The Court has explained that, in determining whether a law is facially unconstitutional, a court is to consider "only applications of the statute in which it actually authorizes or prohibits conduct." *City of Los Angeles* v. *Patel*, 576 U.S. 409, 418 (2015). The court of appeals agreed that this is the proper standard, and understood that it means a law's facial constitutionality is assessed by looking at "those to whom the law *actually applies*, not those for whom it has no plausible application—that is, those for whom the law is 'irrelevant.'" App., *infra*, 13a (quoting *Patel*, 576 U.S. at 418-19). The court failed, however, to apply that standard to provisions of the RSL that dispossess building owners of the right to exclude.

Under *Patel*, petitioners have adequately alleged that the challenged RSL provisions on their face effect physical takings. The RSL effects a physical taking when—after a lease has expired—it bars a property owner from exercising her right to exclude and other property rights to regain the property for her own use; no longer rent out the property; change the use of the property; demolish the property; or prohibit the owner from converting the property for sale as a condominium or cooperative. As explained above, this Court's precedents establish that every time the RSL applies to prevent the property owner from taking those actions—when it operates as "a restriction" on owners' control of their property—it effects a physical taking. *Patel*, 576 U.S. at 418. Petitioners have therefore properly alleged that these RSL provisions are invalid on a facial basis.[3]

[3] The RSL provisions' extremely narrow avenues for avoiding their restrictions—such as finding a tenant an equivalent regulated apartment at the same rent—do not preclude facial

B. The Issue is Extremely Important.

The Second Circuit's holding extinguishes the physical takings claims of the thousands of owners of the one million RSL-regulated apartments. This Court should determine the constitutionality of a law governing such a large number of properties.

Indeed, one member of the Second Circuit panel indicated that this Court's guidance was needed with respect to the physical takings issues presented here. Judge Calabresi stated during oral argument that the court of appeals is "bound by what I read the Supreme Court to have done in the past. The fact that they may be going someplace else and that I may agree with that doesn't allow me to go there. * * * I have to wait for them." Oral Argument at 4:06, *Community Housing Improvement Prog.* v. *City of New York*, 59 F.4th 540 (2d Cir. 2023) (No. 20-3366), https://tinyurl.com/y9m7wv2h.

Moreover, the Second Circuit's holding that *Cedar Point* does not apply to rental apartment regulations appropriating the owner's right to exclude conflicts with the Eighth Circuit's ruling in *Heights Apartments, LLC* v. *Walz*, 30 F.4th 720, 732-33 (8th Cir. 2022)—which applied *Cedar Point* to uphold a physical taking claim.

Heights Apartments involved a rental property owner's challenge to a Minnesota executive order imposing a moratorium on residential evictions during the COVID-19 pandemic. The court of appeals held that the executive order "turned every lease in Minnesota into an indefinite lease, terminable only at

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invalidity because the provisions effect takings in every instance in which an owner is unable to satisfy those prerequisites.

the option of the tenant." 30 F.4th at 732-33. That restriction deprived the property owner of its "right to exclude existing tenants" and "g[a]ve rise to a plausible *per se* physical takings claim under *Cedar Point Nursery*." *Ibid.*

If the RSL challenge had arisen in the Eighth Circuit, *Heights Apartments* would require assessment of the physical taking claim under *Cedar Point*. That further supports this Court's review.

Finally, New York is considering new restrictions. One bill would impose the mandatory renewal requirement to post-1974 buildings. N.Y. Senate Bill S3082. Others would severely penalize owners who leave units vacant (Senate Bill S1281), permit demolition only when buildings become entirely uninhabitable (Senate Bill S129), and extend RSL-regulation to commercial properties (Senate Bill S5466).

Other States have enacted rental apartment regulation laws or permit local governments to enact such laws, none as draconian as the RSL. But two very large cities—Los Angeles and San Francisco—have rental regulation provisions that resemble those in the RSL.

Los Angeles' Rent Stabilization Ordinance restricts landlords from withdrawing properties from the rental market and from reclaiming apartments for personal use. L.A. Mun. Code §§ 151.30(D)(1), 151.25, 151.26(A); see also *Kagan* v. *City of Los Angeles, et al.*, pet. for cert. pending, No. 22-739 (filed Feb. 3, 2023) (challenging provisions barring owner from reclaiming property for personal use).[4]

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[4] Petitioners filed an *amicus* brief in *Kagan* suggesting that the Court would benefit from considering the petitions in tandem.

San Francisco imposes significant restrictions on owners' ability to reclaim units for personal use. S.F. Admin. Code § 37.9(a)(8). It also requires owners seeking to convert buildings to condominiums to offer tenants a lifetime lease. S.F. Subdivision Code § 1396.4. In *Pakdel*, *supra*, this Court—recognizing that the requirement of a lifetime lease intruded on the owners' right to exclude—directed the lower courts to assess the plaintiffs' physical taking claim under the standards set forth in *Cedar Point*. 141 S. Ct. at 2229 n.1.

If the Second Circuit's decision is permitted to stand, other jurisdictions are likely to seek to address their housing issues by following New York's example of enacting ever more restrictive regulation that commandeers private property.

Given the RSL's broad impact on one million apartments in New York City, New York's potential expansion of RSL-like regulation to all residential rentals, and perhaps commercial rentals as well, and the Second Circuit's expansive exclusion of rental apartment regulation from Takings Clause limits, the Court's review now is critically important.

II. This Court Should Grant Review To Establish That Forcing A Select Group Of Property Owners To Subsidize Tenants Who Cannot Afford Market Rents Effects A Regulatory Taking.

The RSL imposes strict limits on rent levels. Those limits are not based solely on owners' costs plus reasonable return on capital.

Rather, the RSL requires the rate-setting agency to take into account tenants' ability to pay. As New York's highest court put it, "[r]ent stabilization provides assistance to a specific segment of the

population that could not afford to live in New York City without a rent regulatory scheme" and therefore constitutes a "local public assistance benefit." *In re Santiago-Monteverde*, 24 N.Y.3d 283, 290 (2014). The result: owners' costs have increased at double the rate of allowable rent increases. App., *infra*, 190a-191a.

Subsidizing needy tenants as part of a "public assistance" program is a public good that should be paid for with public funds. That is precisely what Justices Scalia and O'Connor reasoned in *Pennell* v. *City of San Jose*, 485 U.S. 1, 22 (1988) (concurring in part and dissenting in part). The Second Circuit's failure even to address the issue—raised squarely in this case—undermines the very purpose of the Takings Clause as a critical limit on government's power to regulate the property of the few to benefit the many.

Confirming this fundamental limitation against undue burden on select property owners, who will invariably be outvoted in the political process by the many constituents they are forced to subsidize, is particularly important in light of decisions that have curtailed Takings Clause protections, such as *Kelo* v. *City of New London*, 545 U.S. 469 (2005).

A. By Setting Rent Limits Based On Tenant Ability To Pay, The RSL Improperly Imposes On A Select Group A Public Burden That Should be Borne by Society As A Whole.

This Court has repeatedly explained that the purpose of the Takings Clause "is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo* v. *Rhode*

Island, 533 U.S. 606, 617-18 (2001) (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)).

That principle animated the reasoning of Justices Scalia and O'Connor in *Pennell*, where property owners challenged a San Jose rent regulation ordinance that, like the RSL, set maximum rent levels based on multiple factors. Six of those factors were objective and "related either to the landlord's costs of providing an adequate rental unit, or to the condition of the rental market." 485 U.S. at 9, 21. But a seventh permitted consideration of "the hardship to the tenant." *Ibid.*

The *Pennell* majority declined to consider whether the existence of the tenant hardship factor rendered the law unconstitutional, absent evidence that this factor actually was relied upon to reduce allowable rent levels. 485 U.S. at 9-10.

Justices Scalia and O'Connor did take up the issue. They explained that traditional land-use regulation such as zoning or emergency price regulation does not offend the fundamental purpose of the Takings Clause "because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy." 485 U.S. at 20. But this cause-and-effect relationship is missing when it comes to the tenant's ability to pay her rent, which is "no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes." *Id.* at 21.

The law at issue in *Pennell* effected a taking, in the view of Justices Scalia and O'Connor, by setting rent levels based in part on tenant hardship. San Jose was "not 'regulating' rents in the relevant sense of

preventing rents that are excessive" but rather was "using the occasion of rent regulation * * * to establish a welfare program privately funded by those landlords who happen to have 'hardship' tenants." 485 U.S. at 22.

That reasoning applies with even greater force to the RSL, where consideration of tenant ability to pay when setting rent levels is a mandatory element of the process that sets maximum rent increases for all regulated apartments—in contrast to *Pennell*, which involved case-by-case hardship reductions. The RSL requires the rent-setting body, the RGB, to consider "relevant data from the current and projected cost of living indices for the affected area" when determining the maximum allowable rents. N.Y. Admin. Code § 26-510(b)(2). To meet this requirement, the RGB commissions an annual "Income and Affordability Study"—a thorough, data-intensive statistical analysis that "reports on housing affordability and tenant income in the New York City (NYC) rental market" to highlight for the RGB "major economic factors affecting NYC's tenant population" and "public policies affecting housing affordability, such as unemployment rates; wages; housing court and eviction data; and rent and poverty levels."[5]

The RGB's consideration of these affordability metrics has led to a wide disparity between increases in owner's operating costs and the rent increases permitted by the RGB. App., *infra*, 190a-191a. And the RGB's use of these metrics is reflected in the New York high court's conclusion that the RSL is a public assistance benefit that provides assistance to New

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[5] New York City Rent Guidelines Board, *2022 Income and Affordability Study (*Apr. 20, 2022), https://tinyurl.com/3fv5rk82.

York renters who could not otherwise afford to live there. *Santiago-Monteverde*, 24 N.Y.3d at 290.

As in *Pennell*, the financial hardship of New York City tenants, which the RSL aims to address, "is not * * * caused or exploited by landlords," 485 U.S. at 22-23—still less by the arbitrary subset of landlords to whom the RSL applies: owners of buildings in New York City built before 1974 and containing six or more units. The burden of addressing that financial hardship, therefore, may not be imposed on this select group of property owners. Rather, it is a public good that must be achieved through "the distribution to [tenants] of funds raised from the public at large through taxes." *Id.* at 21.

The issue is thus squarely presented in this case and is ripe for review by this Court.[6]

B. This Issue Is Critically Important And Worthy Of This Court's Review.

The Second Circuit held that shifting from the public fisc to select property owners the public burden of providing subsidized housing does not implicate the Takings Clause, stating simply that "Justice Scalia's [*Pennell*] dissent was just that; a majority of the Supreme Court has yet to adopt Justice Scalia's reasoning." App., *infra*, 22a. The Second Circuit's cursory dismissal of this fundamental Takings principle

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[6] As with petitioners' physical takings claim, the allegations here support a facial regulatory takings claim under *Patel*. See pages 20-21, *supra*. The law's unconstitutional method of restricting rent increases—by considering tenants' ability to pay—harms every owner of apartments covered by the RSL who wishes to increase rents above the amount allowed by the RGB and is therefore unconstitutional on its face.

has profound impact, and should be addressed by this Court.

First, the Second Circuit misconstrued *Pennell* and ignored key elements of the Court's other Takings precedents.

The *Pennell* majority did not reject the reasoning of Justices Scalia and O'Connor; it held that it could not reach the question because the record was insufficient to show that tenant hardship was actually considered in reducing rent levels. See page 26, *supra*. The issue is squarely presented in this case. No respondent denies that the RGB considers tenant ability to pay in setting rent levels, the RGB generates reams of statistical data on "affordability" to do exactly that, and the New York high court has ruled the RSL to be a public assistance benefit.

Moreover, recognition of the principle that a select few ought not be forced to bear a public burden is not confined to single concurring opinion in *Pennell*—it is embedded in the Takings Clause and consistently reflected in the Court's Takings jurisprudence. See*, e.g.*, *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

Accordingly, the principle has been recognized by courts invalidating rental property regulations that impose public burdens on isolated sets of property owners. See *Property Owners Assoc. of North Bergen* v. *North Bergen T'ship*, 74 N.J. 327, 333 (N.J. 1977) (holding unconstitutional, as both a denial of due process and taking of private property, a freeze on rent levels for low-income senior citizens that "attempt[ed]

to shift [the] burden of all the citizens and taxpayers" onto a select set of property owners); *Cienega Gardens* v. *United States*, 331 F.3d 1319, 1338-39 (Fed. Cir. 2003) (declaring unconstitutional a law that prevented owners of low-income apartments from prepaying federally subsidized mortgages; relying in part on determination that "Congress' * * * method—forcing some owners to keep accepting below-market rents—is the kind of expense-shifting to a few persons that amounts to a taking. This is especially clear where, as here, the alternative was for all taxpayers to shoulder the burden.").

The Second Circuit's refusal to apply this fundamental principle warrants review by this Court.

Second, decisions of this Court that limit the scope of takings protections make it critically important that the reasoning of Justices Scalia and O'Connor in *Pennell* be given effect in cases like this, where the government is imposing on a subset of owners the burden of addressing social problems for which they are not responsible. *Kelo* and *Penn Central*, in particular, create gaps in the protection of private property from government requisition that the *Pennell* principle should and does fill.

Four members of this Court in *Kelo* lamented the majority's decision there to allow the condemnation of private property for "public use" whenever "the legislature deems [the new use] more beneficial to the public," because that ruling "abandon[ed the] long-held, basic limitation on government power" that a legislature may not promulgate a "'law that takes property from A. and gives it to B.'" 545 U.S. at 494 (O'Connor, J., Rehnquist, C.J., Scalia and Thomas, JJ., dissenting) (quoting *Calder* v. *Bull*, 3 Dall. 386, 388 (1798) (Chase, J.)). The effect of that ruling, the dissenters

explained, "is to wash out any distinction between private and public use of property." *Ibid.*

With the line between public and private use eroded by *Kelo*, it becomes all the more important that courts give full effect to the second requirement of the Takings Clause—"the just compensation requirement"—which "spreads the cost of condemnations and thus 'prevents the public from loading upon one individual more than his just share of the burdens of government.'" 545 U.S. at 494 (quoting *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 325 (1893)). Public uses, like providing subsidized rental housing, can readily be foisted upon "owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will," to benefit "those citizens with disproportionate influence and power in the political process." *Kelo*, 545 U.S. at 496, 505.

The easily-demonized owners of New York City rental units covered by the RSL are vastly overwhelmed in New York's political process by the combined voting power of the tenant-beneficiaries of those million subsidized apartments and the 4.3 million working taxpayers in the City who would otherwise foot the bill for providing affordable housing. Politicians can make tenants and taxpayers alike happy by shifting the cost of providing below-market-rate housing onto a minority of building owners.[7]

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[7] As one commentator explained, "[t]he unfairness of imposing inordinate burdens on the few is compounded by the fact that in a democracy the few will be outvoted and the majority inevitably will be tempted to impose burdens upon them in lieu of financing government through taxes." Steven J. Eagle, *The Development of*

As the New York Court of Appeals candidly recognized, "the rent-stabilization laws do not provide a benefit paid for by the government," but "they do provide a benefit *conferred* by the government" through "a unique regulatory scheme applied to private owners of real property." *Santiago-Monteverde*, 24 N.Y.3d at 291.

The Framers had this paradigm in mind when crafting the Takings Clause. They understood that "the landed interest was peculiarly vulnerable to majoritarian decisionmaking" and that "the propertyless, who would eventually become a majority in this country, would have the votes to secure their ends." William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 850-51 (1995). The Takings Clause was intended to provide property owners "some extra measure of protection" from "political process failures" where the propertyless majority effected onerous restrictions on the rights of property owners. *Id.* at 851. The Clause "mandated a remedy—compensation—in those classes of cases in which the political process was unlikely to consider property claims fairly." *Id.* at 854.

Lacking protection from the Takings Clause, those relatively few owners have become the sole providers of "a local public assistance benefit" for "a specific segment of the population that could not afford to live in New York City without a rent regulatory scheme." *Santiago-Monteverde*, 24 N.Y.3d at 291.

Pennell can similarly fill in gaps in constitutional protection left by the decision in *Penn Central*,

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Property Rights in America and the Property Rights Movement, 1 Geo. J. L. & Pub. Pol'y 77, 114 (2002).

especially in light of how narrowly that ruling has been interpreted by lower courts to limit takings claims to cases in which the property owner loses essentially all use or value. *E.g.*, *Brace* v. *United States*, 72 Fed. Cl. 337, 357 & nn.32 & 33 (2006) (collecting cases).

Commentators ranging from social justice to libertarian perspectives agree that the *Pennell* principle "is necessary to move the constitutional concern beyond the more conventional categories covering outright governmental seizures, complete destruction of the value of property, and ill-motivated exactions that seek to illegitimately coerce private parties to cede property or concessions on the use of property to the state." Samuel Issacharoff, *Bearing the Costs*, 53 Stan. L. Rev. 519, 522 (2000), discussing Mark Kelman, *Strategy or Principle: The Choice Between Regulation and Taxation* (1999) (Kelman); see also *id.* at 523 (when rent regulation takes account of tenant hardship, "[t]he regulated party is no more responsible for the beneficiaries' poverty than are nonregulated parties. The harm the program seeks to alleviate (poverty) is not the sort of harm (exploitation or the bearing of unwarranted social costs) regulation can justifiably alleviate") (quoting Kelman, *supra*, at 48); see also Richard Epstein, *Missed Opportunities, Good Intentions: The Takings Decisions of Justice Antonin Scalia*, 6 Brit. J. Am. Legal Stud. 109, 119-123 (2017) (contrasting the *Penn Central* and *Armstrong/Pennell* approaches).

Rather than focus on the economic impact of a regulation—a test that allows government to take a great deal of private property without compensation provided it does not take "too much"—Justice Scalia's *Pennell* standard more appropriately focuses on

whether the challenged regulation forces some owners to pay for programs, like tackling housing affordability or tenant hardship, the cost of which would otherwise have to be spread more broadly among taxpayers.

This Court's review is urgently needed to clarify the framework that applies when a law places the burden of rectifying a societal problem on a select minority of property owners.

Third, proper application of *Pennell*'s limiting principle to the RSL is critical because of the enormous practical impact of the law. The RSL disproportionately burdens thousands of owners of rent-stabilized properties, many of whom are individuals or small businesses. And some other municipalities have enacted similar provisions that set rent levels based on ability to pay, including Berkeley and Santa Monica. Regs. of the Berkeley Rent Stabilization Bd., ch 12, subch. C, § 1274.5; Santa Monica Reg., ch. 4, subch. G, § 4107.

This Court should grant review to reaffirm the Takings Clause's limits on the power of government to force a select group of property owners to bear the economic burden of a public good.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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