No. 22-1095

IN THE

Supreme Court of the United States

COMMUNITY HOUSING IMPROVEMENT PROGRAM, ET AL.,

Petitioners,

v.

CITY OF NEW YORK, NEW YORK, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NEW YORK ASSOCIATION OF REALTORS®, INC. IN SUPPORT OF PETITIONER

JONATHAN S. MASSEY
MATTHEW M. COLLETTE
Counsel of Record
MASSEY & GAIL LLP
1000 Maine Ave. SW
Suite 450
Washington, DC 20024
(202) 652-4511
jmassey@masseygail.com
mcollette@masseygail.com

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QUESTIONS PRESENTED

Whether New York's Rent Stabilization Law (RSL), which prevents a property owner from regaining exclusive possession and control of her property after the expiration of a lease, effects a *per se* physical taking.

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The New York State Association of REALTORS®, Inc., respectfully submits this brief as amicus curiae in support of petitioner.[1]

The New York State Association of REALTORS®, Inc. ("NYSAR") is a not-for-profit trade organization representing more than 60,000 of New York State's real estate professionals. NYSAR advocates for REALTORS® and their consumers, seeks to elevate professional competence, advances local board collaboration, and promotes the value of REALTOR® membership and engagement.

NYSAR's members are involved in all aspects of the residential and commercial real estate industries. Its membership, composed of residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others, engages in all aspects of the real estate industry. Working for New York's property owners, NYSAR provides a forum for professional development among its members and educates the public and government for the purpose of promoting the right to own real property.

As a consistent advocate of property rights, NYSAR has a keen interest in the ability of property owners to exercise the right to use their property

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[1] Pursuant to Rule 37.2, amicus certifies that counsel of record for the parties received timely notice of the intent to file this brief. Pursuant to Rule 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or its counsel made such a monetary contribution.

free from unnecessary or inappropriate government intervention. Many NYSAR members own real property subject to New York's Rent Stabilization Law, and thus are directly affected by this case. NYSAR members also represent buyers and sellers of rent-stabilized properties and are harmed by the negative impact of the Rent Stabilization Law on the value of properties, as owners are unable to realize the full free market potential for rents.

SUMMARY OF ARGUMENT

The New York Rent Stabilization Law ("RSL")[2] governs nearly one million apartments in New York City. Despite its name, the RSL is not a typical "rent control" statute that merely limits the amount landlords may charge their tenants by setting a cap on rent and subsequent increases. *See Yee v. City of Escondido, Cal.,* 503 U.S. 519, 529 (1992) ("Ordinary rent control often transfers wealth from landlords to tenants by reducing the landlords' income and the tenants' monthly payments."). Instead, the RSL prohibits landlords from deciding who may occupy their property, prevents owners from taking possession of their own property, and denies property owners the right to freely dispose of their property.

These restrictions impose a physical taking on the property of owners subject to the RSL. A taking occurs when the government authorizes a "physical

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[2] The New York Rent Stabilization Laws are contained in various statutes and administrative regulations. *See, e.g.,* N.Y. Unconsol. Law tit. 23 §§ 26-501 *et seq.* (McKinney); N.Y. Unconsol. Law tit. 23 §§ 8621 *et seq.* (McKinney); 9 NYCRR §§ 2520.1 *et seq.* For convenience, this brief refers to these measures by the singular "Rent Stabilization Law" or "RSL."

occupation" of the property that eliminates the right to "possess, use and dispose" of the occupied space. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). That is precisely what the RSL does.

First, the RSL provides for the indefinite physical occupation of the property. With limited exceptions—none of which are in the control of the property owner—the RSL requires landlords to renew the leases of their tenants and the tenants' successors (who are strangers to the owner), allowing them to stay in perpetuity. N.Y. Unconsol. Law § 26-511(c)(9) (McKinney); 9 NYCRR §§ 2520.6, 2524.4. That deprives landlords of the right to exclude others from their property—"'one of the most treasured' rights of property ownership." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (quoting *Loretto*, 458 U.S. at 435-36).

Second, the RSL prevents owners from taking possession of their own property. Regardless of the circumstances, at least 80 percent of every owner's property subject to the law is completely off limits. An owner may recover possession of one—and only one—dwelling unit of the property for the owner's use as a primary residence, no matter the property's size. *See* N.Y. Unconsol. Law § 26-511(c)(9) (McKinney). And even that right applies only in limited situations.

If that were not enough, the RSL denies property owners the right to freely dispose of their property. The RSL throws up so many roadblocks to any effort to withdraw from the rental market (including demolishing the building) that any such option is virtually nonexistent. *See, e.g.,* 9 NYCRR § 2524.5. Because the RSL authorizes a physical invasion of

owners' property, it works a physical taking requiring just compensation.

The court of appeals' holding to the contrary rests upon a series of broad propositions that cannot be reconciled with this Court's precedent. Each of those errors merits this Court's intervention.

First, the court of appeals declined to follow this Court's cases governing the right to exclude because this case involves the regulation of the landlord-tenant relationship. But there is no exception to the Fifth Amendment's Takings Clause for rental properties. *Loretto*, 458 U.S. at 439 ("We fail to see, however, why a physical occupation of one type of property but not another type is any less a physical occupation.").

Second, the court of appeals' erred in reasoning that a physical taking cannot occur on property "open to the public" (a term the court did not define). The *Cedar Point* court distinguished the decision in *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), a case permitting leafletting at a shopping center "open to the general public." But the notion that New York City rental properties are "open to the general public" like the shopping center in *Pruneyard* is specious. Private property does not become "open" to the public merely because portions of it are rented to tenants. *See Kaiser Aetna v. United States*, 444 U.S. 164, 168 (1979). And New York State law requires many landlords to provide locked entrance doors and intercom systems—hardly the hallmark of property "open to the public."

Finally, the court of appeals' reasoning that property owners' voluntary entry into the rental market overrides the right to exclude is inconsistent

with this Court's clear precedent. *Horne v. Dep't of Agric.*, 576 U.S. 350, 365 (2015). "[A] a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Loretto*, 458 U.S. at 439 n.17.

"The Takings Clause 'was designed to bar 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.'" *Tyler v. Hennepin Cnty., Minn.*, No. 22-166, 2023 WL 3632754, at *8 (U.S. May 25, 2023) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The RSL, however well intentioned, violates this precept by imposing on one small segment of the population—property owners—to bear the costs of social assistance measures without compensation to them.

This Court should grant certiorari to correct the court of appeals' erroneous decision and make clear that its physical takings precedent applies in the context of the landlord-tenant relationship.

ARGUMENT

I. The RSL affects a Physical Taking.

Physical occupation of property implicates the heart of the Fifth Amendment's prohibition of governmental takings without just compensation. "When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." *Cedar Point*, 141 S. Ct. at 2071. Thus, "[w]henever a regulation results in a physical appropriation of property, a *per se* taking has occurred . . . ." *Id.* at 2072; *see Loretto*,

458 U.S. at 426 ("a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve").

The deprivation of the right to exclude others—"one of the most treasured strands" of the bundle of property rights—works a physical taking. *Loretto*, 458 U.S. at 435-36; *see also Kaiser Aetna* , 444 U.S. at 179-80 ("the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."). Indeed, "[g]iven 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.

Here, the RSL imposes a physical taking by depriving property owners of their right to exclude. In *Loretto*, this Court found a physical taking when a New York law required landlords to permit cable TV companies to place their equipment upon the landlords' buildings, in exchange for a nominal $1 fee. The law effectively operated in the same way as the RSL, by authorizing third parties (in *Loretto*, cable companies rather than tenants) to occupy a landlord's property. Unlike in this case, the physical invasion in *Loretto* was tiny (only a few cubic feet), and involved a small amount of rooftop space for which the landlord had no alternative use. Absent the cable equipment, the rooftop space would have remained unoccupied. Moreover, the cable equipment in *Loretto* did not destroy or impair the value of the apartment building, but rather

enhanced it by making the apartments more attractive to tenants.

None of these features justified the intrusion into the landlord's property. *Loretto* drew a clear line: "physical invasion cases are special." *Id.* at 432 (emphasis omitted). The *Loretto* Court stated that a *per se* taking occurs when the government authorizes a third party to "'regularly' use, or 'permanently' occupy, . . . a thing which theretofore was understood to be under private ownership." *Id.* at 427 n.5 (internal quotation marks and citation omitted). That is exactly what the RSL does. A physical occupation is "of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Horne*, 576 U.S. at 362, *quoting Loretto*, 458 U.S. at 432.

Just as in *Loretto*, the RSL "chops through the bundle [of property rights], taking a slice of every strand." 458 U.S. at 435. The *Loretto* Court explained that property rights consist of the rights to "possess, use and dispose" of the property, concluding: "[t]o the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights." *Id.* (emphasis in original).

The *Loretto* Court's description of precisely how the bundle of rights was taken in that case applies with full force here. The *Loretto* Court explained that "the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space." *Id.* In addition, "the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot

exclude others, but can make no nonpossessory use of the property." *Id.* at 436.[3]

The RSL imposes the same restrictions found to constitute a physical taking in *Loretto*. An owner subject to the RSL loses the right to possess over 80 percent of the property (far more than the few cubic feet at issue in *Loretto*, which would have remained unoccupied in any event). As noted, the RSL permits occupation of only one unit in each building for the owner's own use. N.Y. Unconsol. Law § 26-511(c)(9)(b) (McKinney); *see Sassouni v. Adams*, 119 N.Y.S.3d 828 (N.Y. Civ. Ct. 2019) (owner who previously recovered a unit in a building for personal use could not recover a second unit). In fact, most owners lose far more. In a 6-unit building (the smallest subject to the RSL), the owner cannot occupy 5 of the units (or 83 percent). The percentage increases enormously the larger the building.

In fact, most owners have no right at all to occupy even one unit of their own property. If the owner holds title to the property through a corporate form (as many landlords do), there is no right to occupy the property at all. *See 1077 Manhattan Assocs., LLC v. Mendez*, 798 N.Y.S.2d 714 (App. Term 2004) ("[O]nly a natural person and not a corporation can recover an apartment for personal use . . . even when the principal of the corporation is its sole stockholder."). And if the property is owned by more than one individual, only one of the multiple owners can occupy a unit for personal use. N.Y. Unconsol.

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[3] Despite *Loretto*'s reference to "permanent" occupation, this Court has made clear that "a physical appropriation is a taking whether it is permanent or temporary." *Cedar Point*, 141 S. Ct. at 2074.

Law § 26-511(c)(9)(b) (McKinney). A second or third owner has no rights whatsoever.

The RSL also denies all owners the right to occupy a unit if the tenant has been occupying the unit for fifteen years. *See id.* Nor can an owner seek to occupy the unit of a tenant who is over 62 or disabled without offering to provide "an equivalent or superior housing accommodation at the same or lower stabilized rent in a closely proximate area." *Id.*

And even if a single, non-corporate property owner wishes to occupy the tiny fraction of his own property as a personal residence that the State permits—provided the tenant whose lease is not renewed has been there less than 15 years, is not 62, and is not disabled—the landlord still cannot live in the unit without demonstrating an "immediate and compelling necessity" for doing so. 9 NYCRR § 2104.5(c)(2).

In addition, the RSL deprives the owner of the right to make any "nonpossessory use of the property," *Loretto*, 458 U.S. at 436, by requiring owners to renew the leases of tenants or their successors in perpetuity, without the ability to exclude them. The RSL requires that a property owner allow people who are otherwise strangers — lessees — to occupy her or his property. Indeed, this is the core of New York's landlord-tenant real property law: "The landlord may recover a reasonable compensation for the use and *occupation* of real property." N.Y. Real Prop. Law § 220 (McKinney) (emphasis added). This occupation is much larger than the cables and boxes at stake in *Loretto*, 458 U.S. at 422, and involves real property, not the personal property addressed by *Horne*, 576 U.S. at 361-62.

Under the RSL, an owner must renew a lease except under specific conditions: the building is to be demolished, the owner wishes to occupy the unit her- or himself, or the owner is a charitable or educational public institution using the unit for specific purposes. N.Y. Unconsol. Law § 26-511(c)(9) (McKinney). And, as noted, the RSL requires the owner to permit the tenant's successor to occupy the property. Under ordinary landlord-tenant law, the owner cannot enter the leased apartment ("interfere[] with the quiet enjoyment of the leased premises") except under particular circumstances, N.Y. Real Prop. Law § 235 (McKinney), and is otherwise deprived of the use of that part of her or his property except as a rental unit.

The RSL thus deprives the owner of the "power to exclude the occupier from possession and use of the space." *Loretto*, 458 U.S. at 435. Because of the ongoing physical occupation and the inability to exclude others, the owner "thus lose[s] the entire 'bundle' of property rights in the [apartment spaces]—'the rights to possess, use and dispose of' them." *Horne*, 576 U.S. at 361-62, *quoting Loretto*, 458 U.S. at 435. Accordingly, the RSL imposes a physical taking that requires just compensation.

II. The Court of Appeals' Decision Is Inconsistent With This Court's Precedent.

The court of appeals based its decision on several incorrect propositions that merit correction by this Court. The court of appeals' ruling would negate application of this Court's precedent on physical takings in every case involving the landlord-tenant relationship. And the court of appeals would limit this Court's physical takings precedents only to

properties "closed to the public"—an undefined standard that the court of appeals apparently believed did not include any private property a third person is allowed to enter. Finally, the court of appeals rationale that there can be no physical taking because the landowner "invited" tenants to the property is flatly inconsistent with this Court's uniform precedent. Certiorari is necessary to correct these holdings and clarify the scope of physical takings under the Fifth and Fourteenth Amendments.

1. First, the court of appeals' dismissed this Court's precedents on physical takings and the right to exclude, including *Loretto, Horne,* and *Cedar Point* because they did not "concern[] a statute that regulates the landlord-tenant relationship." Pet. App. 21a. But there is no exception to the Fifth Amendment's Takings Clause for rental properties. In *Loretto*, for instance, the Court rejected the contention that limiting the statute to rental properties negated the physical taking, stated: "We fail to see, however, why a physical occupation of one type of property but not another type is any less a physical occupation." *Loretto*, 458 U.S. at 439.

In fact, the *Loretto* Court held that physical invasions for the convenience of tenants—plainly an aspect of the "landlord-tenant" relationship—would amount to a physical taking. *See id.* at 436 ("Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops *for the convenience of the tenants*, the requirement would be a taking.") (emphasis added). And the Court made clear that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to

compensation for a physical occupation." *Id.* at 439 n.17.

The court of appeals' reliance on the State's "longstanding authority" to regulate the landlord-tenant relationship (Pet. App. 21a) does not save the RSL here. The *Loretto* court recognized the States' power to regulate "housing conditions in general and the landlord-tenant relationship in particular." But the court emphasized that "[i]n none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party." *Id.* at 440. And that is exactly what the RSL does here.

There is no basis for the court of appeals' holding that what would be a physical taking in any other context is nonetheless permissible because the invasion involves the "landlord-tenant relationship." If the government requisitioned a portion of the owner's property for its own office space, it would be a compensable physical taking regardless of the type of property at issue. *See id.* at 439 n.17 (noting that it would be a taking to "allow the government to requisition a certain number of apartments as permanent government offices."). It is no less a physical intrusion merely because the third party granted permanent occupation of the property is a tenant or a tenant's successor.

Nor does it make sense to single out the landlord-tenant relationship for an exemption when other heavily regulated relationships are subject to the accepted physical takings analysis. *Cedar Point* involved the labor-management relationship, which is heavily regulated. *See, e.g., Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 238 (1967) (referring to the National Labor Relations Act as "a comprehensive

code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce."). In fact, the California regulation at issue in *Cedar Point* included access to the employer's property by union organizers as a right of the *employees* under the California Labor Code. *Cedar Point*, 141 S. Ct. at 2069; Cal. Code Regs., tit. 8, § 20900(e). Yet the fact that the State regulation involved the labor-management relationship did not justify physical occupation of the property without compensation.

The court of appeals' conclusion to the contrary rests on a misunderstanding of *Yee*. In *Yee* the Court found no physical taking because "a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months notice." 503 U.S. at 528. Thus, "neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so." *Id.* at 527-28. But the Court held 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." *Id.* at 528.

The RSL is precisely the statute *Yee* identified as imposing a physical taking. Unlike in *Yee*, a property owner cannot choose to terminate a lease after notice. Owners are compelled *both* to rent their property *and* to "refrain in perpetuity from terminating a tenancy." *Id.* And while the property owner in *Yee* could terminate every lease and devote the property to another use, an owner subject to the RSL has no choice but to continue renewing each lease.

Nor was the court of appeals correct in suggesting that a physical taking occurs only if the forced tenancy continues "in perpetuity." This Court made clear in *Cedar Point* that physical occupation is a taking "whether it is permanent or temporary." 141 S. Ct. at 2074; *see Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825, 832 (1987) (physical invasion may be a taking "even though no particular individual is permitted to station himself permanently on the premises."). Expressly rejecting the argument that granting union organizers access to landowners' property less than 365 days a year was not a taking, the Court held that "[t]he fact that the regulation grants access only to union organizers and only for a limited time does not transform it from a physical taking into a use restriction." *Cedar Point*, 141 S. Ct. at 2075.

In any event, the "possible route[s] to an eviction" cited by the court of appeals (Pet. App. 19a) do not negate the compelled physical invasion of property here. All of those avenues—failure to pay rent, creating a nuisance, violating the lease provisions, or using the property for illegal purposes—are entirely within the tenant's control. Unlike *Yee*, in which the landlord could choose to terminate the tenancy with adequate notice to the tenant, a landowner subject to the RSL has no choice in the matter.

The court of appeals' rationale would convert the right to exclude into a right that applies only to those who misbehave. By that logic, the government could compel a property owner to renew its lease for office space in perpetuity, provided the government abided by the lease and did not create a nuisance. Or the government could have compelled the property owner in *United States v. Causby*, 328 U.S. 256

(1946), to suffer U.S. government overflights in perpetuity as long the owner could prohibit them if the government violated FAA regulations. But those instances are no less physical invasions merely because misbehavior can lead to ejection.

In fact, the regulation in *Cedar Point* permitted landowners to deny access to labor organizers who violated any of the access restrictions in the regulation by, for instance, failing to provide adequate notice or engaging in disruptive behavior. *Cedar Point*, 141 S. Ct. at 2069; Cal. Code Regs., tit. 8, § 20900(e)(5)(A). Yet that did not stop this Court from finding that the regulation "grants a formal entitlement to physically invade the growers' land." *Id.* at 2080.

So too here. The fact that a property owner can evict an individual tenant who violates the lease terms or creates a nuisance does not give the State *carte blanche* to require permanent physical occupation of property by third parties.

2. The court of appeals also erred in reasoning that privately-owned rental properties are "open to the public," thereby permitting the government to compel the renewal of leases in perpetuity. Pet. App. 17a-18a.

Contrary to the court of appeals' view, *Cedar Point* did not limit the physical takings doctrine to property "closed to the public," a term neither it nor the court of appeals attempted to define. Rather, the Court merely distinguished the decision in *PruneYard,* in which the Court held that a requirement to provide access to individuals distributing leaflets in a public shopping center with 25,000 daily visitors did not constitute a physical

taking. *See Pruneyard*, 447 U.S. at 77-78. The *Cedar Point* court merely observed 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." 141 S. Ct. at 2076-77.

But neither *Cedar Point* nor *PruneYard* suggested that private property becomes "open to the public" and thereby exempt from compensation for physical takings, merely because it is rented to tenants. Such a holding could not be squared with *Kaiser Aetna*, which found a physical taking even though the owner of a private marina invited boat owners to use the marina for a fee. 444 U.S. at 167–68.[4] The marina was available to 1500 waterfront lot lessees, 86 non-marina lot lessees, and 56 non-resident boat owners. *Id*. At the time of the litigation, over 600 boats used the marina's mooring and fueling facilities. *United States v. Kaiser Aetna*, 584 F.2d 378, 381 (9th Cir. 1978), *rev'd*, 444 U.S. 164 (1979).

Despite the extensive use of the marina by fee-paying lessees and boat owners, this Court recognized that the marina was "private property" that was not open to the public. *See Kaiser Aetna*, 444 U.S. at 165-66, 179-80. In fact, the question in

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[4] "[W]hile *Kaiser Aetna* may have referred to the test from *Penn Central* [*Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)], see 444 U.S. at 174–75, 100 S. Ct. 383, the Court concluded categorically that the government must pay just compensation for physical invasions . . . ." *Cedar Point*, 141 S. Ct. at 2078.

the case was whether the government could force the landowner "to open the now dredged pond to the public without payment of compensation to the owner." *Id.* at 169; *see id.* at 178 (referring to "the Government's attempt to create a public right of access"). In fact, the Court in *Pruneyard* distinguished *Kaiser Aetna* because in that case "[t]he marina was open only to fee-paying members . . . ." *PruneYard*, 447 U.S. at 84.

New York City rental properties are no more "open to the public" than the marina in *Kaiser Aetna*. In fact, they are "closed to the public" under any reasonable definition. Under New York State law, multiple dwellings built or converted to rental use after January 1, 1968, must have automatic self-closing and self-locking doors at all entrances, kept locked unless an attendant is on duty. N.Y. Mult. Dwell. Law § 50-a (McKinney). And such buildings with eight or more apartments must have intercom systems that allow tenants to open the entrance door from their apartments. *Id.* Buildings rented before January 1, 1968, must install self-locking doors and an intercom system at the request of a majority of the apartments. *Id.* And even where the tenants do not make such a request, a landlord who does not adequately secure the entrance to an apartment building risks tort liability. *Jacqueline S. by Ludovina S. v. City of New York*, 81 N.Y.2d 288, 293–94 (1993). Indeed, "[n]egligent security actions against property owners are not uncommon in New York." *Scurry v. New York City Hous. Auth.*, 140 N.Y.S.3d 255, 259 (2021), *aff'd*, No. 36, 2023 WL 3588692 (N.Y. May 23, 2023).

3. Finally, the court of appeals was wrong to base its holding in part on the fact that landlords

"voluntarily invited third parties to use their properties." Pet. App. 18a. As noted above, the landowner in *Kaiser Aetna* invited numerous lessees and boat owners to use the marina, 444 U.S. at 167–68, yet the Court did not suggest that somehow negated the physical taking at issue in that case.

Moreover, in *Loretto*, the Court found a taking even though the property owner had acquiesced in the use of the property for rental housing. 458 U.S. at 435. The previous owner had even directly agreed to have the cables placed on the building, and the current owner had purchased the building with the cables already attached. *Id.* at 421-22. Nonetheless, the Court opined: "[A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. … The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated." *Id.* at 439 n.17.

And in *Horne*, the Court expressly rejected the government's argument that raisin growers voluntarily participated in the raisin market and "constructively" acquiesced to the regulation:

> "Let them sell wine" is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history. … In *Loretto*, we rejected the argument that the New York law was not a taking because a landlord could avoid the requirement by ceasing to be a landlord. We held instead that a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."

Horne, 576 U.S. at 365 (internal quotation marks and citation omitted).

The court of appeals dismissed this precedent on the ground that the court did not "conclude that [landlords] have acquiesced in a physical taking, but because 'no physical taking had occurred in the first place.'" Pet. App. 21a (quoting district court opinion). But that reasoning is circular: the court of appeals concluded that there was no physical taking *because* landlords "voluntarily invited third parties to use their properties." Pet. App. 18a. In any event, *Loretto* and *Horne* did not merely reject the argument that a previously acknowledged taking was negated by the landowner's acquiescence. They rejected the argument that the landowner's acquiescence meant there was "not a taking" in the first instance. *See Horne*, 576 U.S. at 365. The court of appeals' circular reasoning does not excuse the physical taking here.

CONCLUSION

This Court should grant the petition for certiorari and reverse the judgment of the Court of Appeals.

Respectfully submitted,

JONATHAN S. MASSEY
MATTHEW M. COLLETTE
Counsel of Record
MASSEY & GAIL LLP
1000 Maine Ave. SW
Suite 450
Washington, DC 20024
(202) 652-4511
jmassey@masseygail.com
mcollette@masseygail.com

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