No. 22-1095

In the Supreme Court of the United States

COMMUNITY HOUSING IMPROVEMENT PROGRAM, ET AL.,
Petitioners,

v.

CITY OF NEW YORK, ET AL.,
Respondents.

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

BRIEF OF THE CATO INSTITUTE AND MANHATTAN INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Can the government legislate away an apartment owner's right to exclude without compensation?

Can the government require that a subset of private property owners assume costs that should rightfully be borne by the public as a whole?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs.

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This case interests *amici* because it involves the application of the Takings Clause to government subsidy programs and implicates the right to exclude—arguably the most fundamental strand in property's "bundle of rights."

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

New York City subjects property owners to a thicket of regulations that affect their ability to rent, including strict limitations on their right to exclude. Over the years, New York has curtailed more and more of owners' liberty over their property, leading to several lawsuits throughout the decades. This Court's decision in *Cedar Point* warrants taking a fresh look at these impositions, which force one class of residents to shoulder costs that should rightfully be borne by the public. This case is an opportunity for the Court to take that fresh look.

Since the 1940s, New York City has maintained a system of rent control. The City's rent control regime currently consists of various statutes and administrative code provisions. The cornerstone of this regime, the Rent Stabilization Law, or RSL, was enacted in 1969 and has been amended on multiple occasions—most recently in June 2019.

The RSL specifically regulates owners of buildings constructed prior to 1974 and containing six or more units. There are approximately one million units under the purview of the RSL, comprising half of all New York City apartments. The RSL authorizes the Rent Guidelines Board (RGB) to set annual maximum rent increases for stabilized units. The RGB is required to consider factors related to owners' costs as well as housing affordability and tenants' ability to pay. According to the RGB's own data, factoring tenants' ability to pay into the calculation of allowable rent

increases has caused RGB-approved rents to increase at only half the rate of property owners' costs.

In addition to setting maximum allowable rents, the RSL severely limits the property owners' rights to exclude, occupy, use, change the use of, and dispose of their property. The RSL requires owners to renew tenants' leases in perpetuity unless a tenant 1) fails to pay rent; 2) materially violates the lease; 3) creates a nuisance; or 4) uses the apartment for an unlawful purpose. Additionally, tenants' rights under the RSL are heritable and may be passed on to any member of a tenant's family who has lived in an apartment for two years—or one year in the case of an elderly or disabled person. A "tenant's family" is defined broadly enough to encompass grandparents, grandchildren, and in-laws. These successorship rights are also granted to any other person living in the unit who is in "emotional and financial commitment and interdependence with the tenant."

Once a tenant occupies a stabilized unit, an owner may not retake possession of the apartment for personal use. Only upon a demonstration of "immediate and compelling necessity" may an owner reclaim just one of his or her units. However, if the tenant that the owner displaces is 62 or older, physically or mentally impaired, or has occupied the unit for at least 15 years, then the owner must find equivalent, nearby accommodations for the tenant. And buildings held in the name of a corporate entity have no personal use allowance at all.

The RSL also severely restricts owners' rights regarding the buildings themselves. Owners may not withdraw their buildings from residential use, leave their property vacant, or demolish their property. Nor

may owners switch the designated use for a building from residential to commercial (or entirely withdraw the building from the rental market) unless the costs to make the unit habitable exceed its value. If an owner wishes to demolish a property, the owner must either find every single tenant comparable, rent-stabilized housing or pay the tenants a stipend for six years.

Further, owners may not dispose of their property by converting the buildings into cooperatives or condominiums unless that conversion receives the consent of a majority of the tenants. Tenants thus have a collective veto power, even though their perpetual renewal rights are not affected when a building is converted.

The RSL restrictions are triggered when the city council finds that there is a housing emergency in the City, which the RSL defines as a vacancy rate of 5% or less. In practice, this condition is always met; the City has regularly renewed its emergency declaration every three years for the last half-century.

Petitioners are a not-for-profit trade association representing the owners and managing agents of more than 4,000 apartment buildings in the City and a group of property owners subject to the RSL. They filed suit against the City in the Eastern District of New York, challenging the RSL as an uncompensated taking. The district court granted the City's motion for summary judgment. Pet. App. at 33a–66a. First, the court rejected Petitioners' claim that the RSL's deprivation of their right to exclude constitutes a *per se* physical taking under *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). And second, the court also rejected Petitioners' claim that the RSL's rent control scheme violates the Takings Clause by impermissibly

taking tenants' ability to pay into account. On appeal, the Second Circuit affirmed. Pet. App. at 1a–30a.

In light of the Second Circuit's holding, this case presents several important issues under the Takings Clause. First, this Court's recent opinion in *Cedar Point* casts serious doubt on the constitutionality of the RSL, since the City has appropriated building owners' right to exclude and granted that right to third parties. As more cities and municipalities experiment with rent control, it is crucial that property owners know to what extent their property is protected from government appropriations of their core property rights. This Court's precedents addressing the constitutionality of rent-control statutes long predate the *per se* rule for physical takings articulated in *Cedar Point*, which calls for this Court to address how that *per se* rule applies in the rent-control context.

Second, there is a circuit split between the Eighth and Second Circuits over whether property owners can even claim that rent control constitutes a *per se* taking under *Cedar Point*. This circuit split affects millions of units and scores of property owners, making it critically important that this Court clarify the boundaries of property owners' constitutional rights.

Finally, this Court should reaffirm the foundational takings principle that government cannot require a subset of society to privately incur costs that should rightfully be borne by society as a whole. The RSL impermissibly imposes those societal costs on property owners alone. For all these reasons, this Court should grant certiorari.

ARGUMENT

I. THIS CASE PRESENTS THE OPPORTUNITY TO CLARIFY THE EXTENT OF THE RIGHT TO EXCLUDE

This Court has repeatedly and correctly acknowledged the centrality of the right to exclude as the fundamental element of property. However, the Court's key precedents addressing the constitutionality of rent control long predate the Court's recent decision in *Cedar Point*, which set down crucial guidelines for evaluating regulatory takings and restrictions on the right to exclude. This case presents the opportunity to provide vital guidance on the applicability of the Takings Clause to modern rent-control measures in light of *Cedar Point*.

The right to exclude is the *sine qua non* of property. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730–31 (1998). The rights to use, transfer, include, and dispose of property "are dependent upon and derive from the right to exclude, which is indispensable." Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 25 (2014) [hereinafter Merrill, *Right to Exclude II*]. Blackstone described the "right of property" as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES *2. Blackstone's definition traces its lineage to Roman conceptions of the right. *See* Juan Javier Del Granado, *The Genius of Roman Law from a Law and Economics Perspective*, 13 SAN DIEGO INT'L L.J. 301, 316 (2011) ("Roman property law typically gives a single property holder a bundle of rights with respect

to everything in his domain, to the exclusion of the rest of the world.").

Put another way, the ancient and fundamental understanding of "the right to property" holds "[t]he notion of exclusive possession" to be "implicit in the basic conception of private property." RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 63 (1985). "Exclusion lies at the root of property because the institution of property is dependent on possession, and exclusion lies at the root of possession." Merrill, *Right to Exclude II*, *supra*, at 14. Thus, a physical taking "is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

This Court's Takings Clause cases have shown an increasing awareness of the vital nature of the right to exclude and the need to protect it. Over a century ago, this Court determined that regulations of property, in addition to confiscations, constitute takings if they "go[] too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Approximately half a century later, the Court held that whether a regulation went too far would be determined by an "essentially ad hoc, factual inquir[y]" that balances multiple factors. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

In the ensuing decades, this Court modified the *Penn Central* standard in *Loretto* and *Lucas v. South Carolina Costal Council*, 505 U.S. 1003 (1992). These decisions "carved out *per se* exceptions for permanent physical occupations and regulations resulting in total

value loss, respectively." Sam Spiegelman & Gregory C. Sisk, *Cedar Point: Lockean Property and the Search for a Lost Liberalism*, 2020–2021 CATO SUP. CT. REV. 165, 178 (2021). Most recently, in *Cedar Point*, the Court further protected the right to exclude when it determined that a state law requiring agricultural employers to allow union organizers onto their property for up to three hours per day for 120 days per year effected a *per se* physical taking. 141 S. Ct. at 2072.

Chief Justice Roberts, writing for the Court, clarified that "Government action that physically appropriates property is no less a physical taking because it arises from a regulation." *Id.* As a result, the "essential question" to determine whether a *per se* physical taking has occurred is "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Id.* The Chief Justice further explained that "[w]henever a regulation results in a physical appropriation of property a *per se* taking has occurred, and *Penn Central* has no place." *Id.*

Additionally, the duration and size of appropriations are not relevant to the determination of whether *per se* physical takings have occurred; they "bear[] only on the amount of compensation" due. *Id.* at 2074. The fundamental problem with the California access law was that "[r]ather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude." *Id.* at 2072.

Cedar Point's reasoning demonstrates why rent-control laws effect *per se* physical takings when they appropriate the right to exclude. Fundamentally,

"[r]ent control statutes operate to take part of the landlord's interest in his reversion [at the expiration of a lease] and transfer it to the tenant." Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 744 (1988) [hereinafter Epstein, *Rent Control*]. The laws accomplish this by "compelling the landlord, usually in the context of a lease renewal, to convey an additional term of years for the benefit of the tenant, at a price demanded by the state." *Id.* "That renewed lease is an interest in property, just like the original lease. Its transfer deprives the landlord of the immediate right to possession [and thus the right to exclude] that was reserved in the original conveyance." *Id.* at 744–45. As a result, "[t]he standard rent control statue gives the tenant the identical private ownership that any other tenant enjoys under an ordinary lease. There is a naked transfer from A to B that the Constitution prohibits regardless of the details of the compensation system that is provided." *Id.* at 746.

New York's RSL takes this dynamic to extreme lengths, in ways that clearly transgress this Court's holding in *Cedar Point*. In addition to setting the maximum rent an owner may charge, the RSL requires owners to renew tenants' leases in perpetuity. This requirement has only a few exceptions, and all of them are entirely within the tenants' control. Pet. App. at 103a–104a, 237a–240a. In addition, these perpetual leases are heritable and may be passed to "any member" of a "tenant's family" who has lived in an apartment for two years (or one year if the current tenant is a senior citizen or disabled). Eligible successors encompass grandparents, grandchildren, and in-laws, as well as "[a]ny other person" living in the apartment in "emotional and financial commitment and

interdependence" with the tenant. Pet. App. at 104a, 159a, 233a–235a, 235a–236a.

The RSL's appropriation of the right to exclude is so severe that owners do not even have a presumptive right to reclaim an apartment for their own personal use. An owner may only reclaim possession of a unit if he demonstrates an "immediate and compelling necessity" for it. Pet. App. at 164a–165a, 172a–173a. And even upon such a showing, there are several circumstances in which the owner must bear the cost of finding the tenant an equivalent accommodation with an identical stabilized rent. Pet. App. at 171a. Further, an owner of multiple units is only permitted to make a showing of necessity related to one of his units. And if a building is held in the name of a corporate entity, as many buildings in the City are, there is no personal use allowance. Pet. App. at 165a–166a.

Finally, the RSL restricts owners' ability to withdraw their properties from residential rental, leave their properties vacant, or convert their units to commercial rentals, cooperatives, or condominiums. Pet. App. at 174a–176a. Owners who wish to demolish their property are required to relocate their current tenants to comparable rent-stabilized housing or pay them a stipend for six years. Pet. App. at 176a–178a.

Taken together, the various previsions of the RSL: enable continuous physical occupation of an owner's unit at the expiration of an agreed upon lease; further extend the unwanted physical occupation by enabling tenants to assign successors to their lease; prevent owners from possessing and using their property for their own purposes; prevent owners from changing how their property is used; and prevent owners from disposing of their property. The RSL "appropriates for

enjoyment of third parties the owners' right to exclude" to a far greater degree than the access regulation at issue in *Cedar Point*. 141 S. Ct. at 2072. And to say that the RSL "'does not constitute a taking of a property interest but rather . . . a mere restriction on its use, is to use words in a manner that deprives them of all their ordinary meaning.'" *Id.* at 2075 (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987)).

The extreme nature of the City's regulatory scheme and its incompatibility with *Cedar Point* calls for this Court's intervention. The Court should grant the petition and vindicate Petitioners' right to exclude.

II. A CIRCUIT SPLIT EXISTS OVER WHETHER PARTIES MAY STATE A CLAIM THAT RENT CONTROL CONSTITUTES A *PER SE* PHYSICAL TAKING

The Eighth and Second Circuits are split over whether, under *Cedar Point*, parties may allege that rent control constitutes a *per se* physical taking. The Eighth Circuit, consistent with this Court's reasoning in *Cedar Point*, concluded that parties challenging rent control laws may allege a *per se* taking. But the Second Circuit here concluded that they may not. If allowed to stand, the Second Circuit's reasoning would effectively eliminate any Takings Clause limitations on government regulation of rental apartments, significantly undermining the right to exclude. This Court should grant the petition to resolve this vital issue.

In *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), the Eighth Circuit considered a challenge brought by an owner of residential rental units in Minnesota. The owner challenged executive orders

issued by the governor of Minnesota during the COVID-19 pandemic mandating a statewide residential eviction moratorium. These executive orders "forbade the nonrenewal and termination of ongoing leases, even after they had been materially violated, unless the tenants seriously endangered the safety of others or damaged property significantly." *Id.* at 733. The owner argued that the orders functionally "turned every lease in Minnesota into an indefinite lease, terminable only at the option of the tenant." *Id.* (internal quotations omitted).

In evaluating this claim, the Eighth Circuit rightly acknowledged the rigorous protections that the right to exclude is afforded under *Cedar Point*. The court explained that the *Cedar Point* approach applies whenever a regulation results in a physical appropriation of property. For that reason, the court concluded that the owner had sufficiently alleged a deprivation of the right to exclude existing tenants without just compensation. *Id.* Additionally, the court correctly distinguished *Yee v. City of Escondido*, 503 U.S. 519 (1992), when it noted that "[t]he rent controls in *Yee* limited the amount of rent that could be charged and neither deprived landlords of their right to evict nor compelled landlords to continue leasing the property past the leases' termination" whereas the Minnesota executive orders "forbade nonrenewal and termination" of the ongoing leases. *Id.*

By contrast, the Second Circuit here denied Petitioners' *per se* takings claim, and in doing so misapplied *Cedar Point* and *Yee*. The court's key distinction was that here, "the [Petitioners] voluntarily invited third parties 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." Pet. App. at 18a–19a (quoting *Cedar Point*, 141 S. Ct. at 2077). The court also invoked *Yee* to conclude that "limitations on the termination of a tenancy do not effect a taking so long as there is a possible route to eviction." Pet. App. at 19a.

Each of the Second Circuit's conclusions were error. First, and most significantly, the mere fact that a property owner decides to rent his or her property to another person does not make the property open to the public. A landlord only consents to the use of the premises by the tenant(s) and their guests, not the general public. In fact, this Court specifically addressed that distinction in *Cedar Point*, distinguishing the agricultural property at issue in the case from a public shopping mall at issue in a prior case. The Court explained that "[u]nlike the growers' properties, the [shopping mall] was open to the public, welcoming some 25,000 patrons a day. Limitations 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. Cedar Point Nursery employed over 400 seasonal workers and 100 full-time workers, none of whom resided on the property, and yet the Court rightly characterized the nursery itself as unquestionably closed to the public. *Id.* at 2070. The rental apartments at issue in this case are thus also unquestionably closed to the public, since they are only leased out to individuals who reside in them; no unit is open to the general public for business and no unit encounters traffic anywhere close to 25,000 patrons per day. The Second Circuit's interpretation of what constitutes property "open to the public" would

virtually eliminate the right to exclude from every owner of rental property.

Because of its erroneous conclusion that rental properties are "open to the public," the Second Circuit misapplied *Cedar Point* and failed to recognize a *per se* taking. This Court was clear that "[w]henever a regulation results in a physical appropriation of property a *per se* taking has occurred." *Id.* at 2072. Here, it is ineluctably clear that RSL "appropriates for the enjoyment of third parties the owners' right to exclude." *Id.* The law requires owners to continue leasing their premises beyond the agreed upon term, prevents owners from taking possession of their own property, and prevents them from altering the designated use of their properties. In each instance, the owners' right to exclude is severely inhibited by the actions of the state or persons empowered by the state. Consequently, under *Cedar Point*, a taking has occurred, and no further inquiry is necessary.

The Second Circuit also erred when it took *Yee* to hold that no physical taking has occurred so as long as eviction is theoretically possible. In fact, although the Court found that the particular regulations at issue in *Yee* were not takings, the Court explained 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 (emphasis added). The Second Circuit disregarded the pivotal "or" in this sentence. The RSL, on its face, puts owners in a position where they are required to rent their properties over objection each time a tenant stays beyond the original lease term. And unlike the law in *Yee*, owners regulated by the RSL may not simply evict

tenants upon 6 or 12 months' notice. *See id*. Owners of RSL-controlled apartments may evict tenants only for a narrow set of reasons that are solely within the tenants' control.

The Second Circuit's conclusion that the owners of one million RSL-regulated apartments have little to no recourse under the Takings Clause for government intrusion upon their right to exclude warrants correction by this Court. This Court should grant the petition and reverse the Second Circuit before the owners of millions of other units in New York and cities across the country have their most fundamental property rights regulated away.

III. THIS CASE PRESENTS THE OPPORTUNITY TO REAFFIRM THE CONSTITUTIONAL PRINCIPLE THAT A SUBSET OF PROPERTY OWNERS CANNOT BE FORCED TO SHOULDER COSTS THAT SHOULD RIGHTFULLY BE BORNE BY THE PUBLIC

This Court has repeatedly affirmed that "[t]he 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.*, No. 22-166, slip op. at 5 (May 23, 2023) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Despite this constitutional maxim, the Second Circuit declined to adopt Justice Scalia's position from his partial concurrence and partial dissent in *Pennell v. City of San Jose*, 485 U.S. 1, 15–23 (1988). In that opinion, Justice Scalia would have declared a San Jose rent control measure an unconstitutional taking because it gave hearing officers discretion to consider a tenant's ability

to pay in determining whether to approve a rent increase proposed by a landlord.

The *Pennell* majority declined to reach the merits of the takings claim because it found that there was no evidence that this tenant hardship clause had ever been relied upon by hearing officers to reduce rent below what it otherwise would have been. The Court noted that there was nothing in the ordinance *requiring* hearing officers to reduce a proposed rent increase on the basis of tenant hardship. *Id.* at 9–10. Justice Scalia disagreed, however, and provided an astute analysis of the political dynamic underlying the rent control scheme.

First, he noted that the problem the city was trying to solve was not attributable to the particular landlords who were regulated by the statute; they just happened to be the ones who had "hardship tenants" at the time. *Id.* at 21. He further noted that just because the "government acts though the landlord-tenant relationship," this "does not magically transform general public welfare, which must be supported by all the public, into mere 'economic regulation,' which can disproportionately burden particular individuals." *Id.* at 22.

Justice Scalia's key insight was that "[t]he politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget,' with relative invisibility and thus relative immunity from normal democratic processes." *Id.* Justice Scalia further posited that San Jose could have achieved the same result by "simply raising the real estate tax upon rental properties and using the additional revenues thus acquired to pay part of the rents of the 'hardship' tenants." *Id.* Had the

city chosen this option, it is less likely that voters would have permitted such objectionable wealth transfers to continue. *See id.* at 22–23.

Justice Scalia's careful emphasis on "normal democratic processes" is significant because it encourages judges to take an active role in identifying the aforementioned political dynamic and invalidating regulations that exploit it. "Descriptively, there is nothing more commonplace than having democratic processes generate systems of 'off-budget' financing. Most regulations are themselves disguised forms of taxation, designed to create the mismatch between the benefit and burdens of public programs." Epstein, *Rent Control*, *supra*, at 754. This dynamic is clear with rent control programs since "local citizens [will] vote for programs, the costs of which are borne by nonlocal landlords." *Id.* Thus, "[t]o say that off budget legislation is not part of normal political processes is to place a very powerful normative constraint on what legislatures can do and how they can behave." *Id.* at 754–55.

Close examination of the RSL demonstrates Justice Scalia's prescience on this issue and invites this Court to clearly articulate a standard under the Takings Clause to evaluate Petitioners' claim. In this case, unlike in *Pennell*, there is no doubt that the Rent Guideline Board does in fact consider tenants' ability to pay when it sets rental rates. The Board evaluates "current and projected cost of living indices for the affected area." Pet. App. at 191a–192a, 233a. Therefore, this case presents the opportunity to reach the merits of the takings claim that the *Pennell* majority did not.

As Petitioners note, the RSL does not, in practice, ameliorate the harms it claims to. Petitioners cite several studies showing that "RSL is not rationally

related to promoting socioeconomic or racial diversity," or to "increasing the supply of housing." Pet. App. at 123a–138a. Through a combination of administrative convenience and historical happenstance, the RSL and its amendments are limited to units sharing a discrete set of characteristics, and those limitations have little or nothing to do with alleviating the targeted harms.

For example, there is no connection between "promoting socio-economic or racial diversity" and limiting the 2019 RSL amendments to "pre-1974, six-unit plus building[s]." Pet. App. at 75a–77a. The amendments cannot plausibly be said to alleviate systemic harms, but instead redistribute wealth haphazardly. Beyond the obvious, there is a "mountain of scholarly research" pointing to this random redistribution, which Petitioners have catalogued well. Pet. App. at 118a–120a.

If a government seeks to mitigate systemic socioeconomic disparities, it should pursue overt wealth transfers: taxation and subsidization. This policy would restrict redistributions to those that are arguably necessary and tailored to the common good. And most important, this policy would be explicit and subject to democratic scrutiny.

But politicians beholden to a scrutinizing public are apt not to push for redistributions that carry more political risks than rewards. As tenants have become a more visible voting bloc in recent years, rental housing issues have become part of the national discussion, morphing the legal questions involved from what the government can and must do to what it can get away with doing to curry favor with a growing base of affordable-housing voters. *See*, *e.g.*, Emily Badger, *Renters Are Mad. Presidential Candidates Have Noticed*, N.Y. TIMES (Apr. 23, 2019), https://nyti.ms/2Lt9Ps5.

Without an obvious need for continuing "off-budget" rent stabilization measures where "on-budget" subsidization would do as well if not better, New York City ought to bear the burden of demonstrating the RSL's service to the public weal. Municipal authorities have consistently failed to meet this burden: "The New York City Council has made its every-three-years emergency determinations without any meaningful support for or analysis of whether a housing emergency actually exists." Pet. App. at 79a.

The RSL places a public burden on the shoulders of a subset of private property owners in a manner that is entirely inconsistent with the purpose and historical application of the Takings Clause. This Court should grant the petition and adopt some version of Justice Scalia's *Pennell* concurrence/dissent as a standard to be applied in future takings cases.

CONCLUSION

For the foregoing reasons, and those described by the Petitioners, this Court should grant the petition.

Respectfully submitted,

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