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 United States Court of Appeals for the Second Circuit

## BRIEF OF AMICUS CURIAE MINNESOTA MULTI HOUSING ASSOCIATION IN SUPPORT OF PETITIONERS


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other/Miscellaneous**

## INTEREST OF AMICUS CURIAE[1]

The Minnesota Multi Housing Association (MHA) is a Minnesota non-profit corporation that was founded in 1967 to promote the highest standards in the development, management, and maintenance of rental and owner-occupied multi housing, and to advocate for Minnesota multi-family property owners and landlords. MHA has over 2,200 members—most of whom own or manage fewer than 50 units each—who collectively own more than 300,000 residential rental units across Minnesota. Since its founding, MHA has served as an advocate for owners' property rights and a promoter of sound public and industry policies in the multi housing industry.

MHA appears as amicus because it—like the Petitioners in New York—has a strong interest in preserving its Minnesota-based members' ability to purchase, sell, manage, and otherwise control real property, and to exercise their constitutional and statutory rights with respect to real property they own or manage. MHA believes that the constitutional and property law issues in this case—namely, the rights of owners and landlords to lawfully exclude others from their property and to determine the amount of rent to charge their tenants—will profoundly affect multi-family property owners and landlords in Minnesota. MHA also believes the Second Circuit erred in its application of this Court's precedent, and granting the

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[1] No party or counsel for a party authored this brief in whole or in part, and no person or entity other than MHA made any monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, MHA has given timely 10 day notice to all counsel of record of its intent to file this *amicus curiae* brief.

petition for certiorari is critical to correct that error and to maintain constitutional protections for property owners in Minnesota and across the nation.

## SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to resolve a Circuit split, reaffirm the vitality of the Court's precedents on the Takings Clause, and clarify significant confusion regarding important points of takings law that will have—and indeed, already has had—a profound negative effect on the rights of property owners in Minnesota and across the nation.

New York's Rent Stabilization Law (RSL) severely restricts property owners' rights to determine who can be on their properties and on what terms. The RSL effectively requires property owners to renew tenants' leases in perpetuity, by obligating owners to lease to strangers deemed by the RSL to be "successors" of a previous tenant, and by limiting owners' ability to possess their properties for their own use or to change the use of their properties. The RSL also restricts a property owner's freedom to charge rent by requiring any rent increases to be based on, among other things, the tenant's ability to pay.

Petitioners challenged the RSL, asserting that (1) its provisions barring an owner from regaining exclusive possession of her property are a *per se* physical taking; and (2) its requirement that rent increases account for tenants' ability to pay is a regulatory taking. The Second Circuit affirmed the dismissal of these claims on the pleadings—effectively holding that an owner loses her rights to exclude, use, and change the use of her property, as well as her right to raise rent according to her own financial needs (as opposed to the tenant's ability to pay), simply by electing to lease the property for a period of time.

That decision squarely conflicts with a recent decision from the Eighth Circuit, which held that a regulation requiring landlords to extend leases in perpetuity was a *per se* physical taking. As a result, the same government actions now constitute a taking in Minneapolis or St. Louis, but not in New York or Buffalo. This Court should resolve the disparity.

The Second Circuit's decision also conflicts with the takings principles previously articulated by this Court. The Court's prior decisions make clear that—contrary to the decision below—requiring an owner to lease her property in perpetuity, without ever being able to recover it for any other use, is *per se* a taking of that property. Certiorari is necessary to uphold and reaffirm that principle.

In addition, this Court's review is warranted to clarify confused points of regulatory takings jurisprudence. In *Pennell v. City of San Jose*, Justice Scalia explained that a government restriction on the rent a landowner may charge is a regulatory taking to the extent it is based on an individual tenant's ability to pay—but the full Court did not reach that question, citing a procedural impediment. *Compare* 485 U.S. 1, 19–24 (1988) (Scalia, J., concurring in part and dissenting in part), *with id.* at 9 (opinion of the Court, finding it "premature to consider this contention on the present record"). Here, the Second Circuit declined to apply the principles articulated by Justice Scalia in *Pennell* because the full Court has not yet adopted them. This case presents the Court with occasion to do so.

Finally, remedying the Second Circuit's error, and clarifying the appropriate parameters of a Takings Clause claim in the context of "rent control" or "rent stabilization laws," is an issue of critical importance to landowners in Minnesota and nationwide, many of whom are MHA members. Rent control is a hotly contested issue in Minnesota. The City of St. Paul, Minnesota enacted a rent control ordinance in 2022, which a federal district court recently upheld in reliance on the Second Circuit's erroneous decision in this case. The City of Minneapolis, Minnesota is currently discussing similar rent control provisions. These policies negatively affect tens of thousands of property owners in Minnesota, and economic studies show that these policies harm tenants as well. The Second Circuit's error in this case threatens to exacerbate these difficulties.

The Court should grant the petition for certiorari, reverse the judgment below, and provide clear, authoritative guidance as to the correct constitutional parameters of the Takings Clause with respect to "rent control" or "rent stabilization laws."

## REASONS FOR GRANTING THE PETITION

As this Court has observed, the right to exclude others is "one of the most treasured rights of property ownership" and "is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property[.]'" *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) and *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). "Given the central importance to property ownership of the right to exclude . . . the Court has long treated government-authorized physical invasions as takings requiring just compensation." *Id.* at 2073.

Similarly, while affordable housing is an important problem, "compelled subsidization by landlords" of a tenant's rent "is an improper and unconstitutional method of solving the problem." *Pennell v. City of San Jose*, 485 U.S. 1, 23–24 (1988) (Scalia, J., concurring in part and dissenting in part) (cleaned up). Requiring owners to limit their rent based on a tenant's ability to pay contradicts the "guiding principle of the Takings Clause that 'public burdens . . . should be borne by the public as a whole,'" and not by individual property owners. *Id.* at 22 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

This case deeply implicates those foundational constitutional principles. The Court should grant the petition for certiorari to correct the Second Circuit's error in upholding New York's RSL, and to restore protections for property owners in Minnesota and around the nation who rent their property.

## I. Rent Control is a Specious Solution to Affordable Housing.

Rent control—or rent stabilization—was first imposed in the United States in response to wartime difficulties; during World War II, many housing markets around the country were overwhelmed as soldiers and their families relocated around the country. Blair Jenkins, *Rent Control: Do Economists Agree?*, 6 ECON. J. WATCH 73, 74 (Jan. 2009). Rent control was billed as a way of ensuring affordable housing. *Id.*

Unfortunately, not all that glitters is gold. Rent-control measures that were designed to alleviate temporary emergencies have since become permanent regimes—and in that context, have created new problems much greater than the ones they purported to fix. Since the imposition of rent control measures in various locales in the United States, comprehensive research has found that rent control actually accomplishes the *opposite* of its goal: it drives up rent and decreases the supply of affordable housing. A 2009 study conducted a comprehensive review of economic research on rent control, covering "both theoretical and empirical research on [the] many dimensions of the issue, including housing availability, maintenance and housing quality, rental rates, political and administrative costs, and distribution." *Id.* at 105. It found that "economic research quite consistently and predominantly frowns on rent control" and that the economics profession had reached a "rare consensus: Rent control creates many more problems than it solves." *Id.* at 105 (internal citation omitted). Even when rent control has provided some short term

benefits to a limited set of renters, those benefits were outweighed by the fact that "the lost rental housing supply likely drove up market rents in the long run, ultimately undermining the goals of the law[.]" Rebecca Diamond et. al., *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, 109(9) AM. ECON. REV. 3365, 3365, 3393 (Sept. 2019). Despite its glaring flaws, rent control has persisted.

New York City has been subjected to failed rent control policies for decades. New York's RSL, which is at issue in this case, is extremely stringent. Under its provisions, property owners who lease their property are effectively required to renew their tenants' leases in perpetuity (absent circumstances outside the owners' control). *See* 9 NYCRR §§ 2524.1-2524.3. Owners are also required to continue to lease to strangers deemed by the RSL to be "successors" of the previous tenant—including any member of the tenant's extended family, and any other person living with the tenant who has an "emotional and financial interdependence" with the tenant. *See* 9 NYCRR §§ 2520.6, 2523.5. Notably, people who succeed to a tenancy in this way can then pass on their successorship rights to others who live with them—and those third-generation successors can pass on *their* successorship rights, and so on indefinitely. The RSL also heavily restricts an owner's ability to regain possession of her own property for her own use, absent an "immediate and compelling necessity." *See, e.g.*, NY. Unconsol. Laws § 26-511; 9 NYCRR § 2524.4.

In addition, the RSL restricts owners from changing the use of their properties. An apartment owner may not switch to commercial rentals,

withdraw her property from the residential market, or even demolish her own property, unless she satisfies extremely strict requirements (and in some cases, pays tenants a stipend and relocates them to equal or superior housing). *See* 9 NYCRR § 2524.5; *see also* N.Y. Unconsol. Laws § 26-511(c)(9)(a).

The RSL also heavily restricts owners' ability to raise rent, even to cover increasing costs. Permissible rent increases are determined by a Rent Guidelines Board, which takes into account "relevant data from the current and projected cost of living indices for the affected area[.]" N.Y. Unconsol. Laws § 26-510(b)(2). Put another way, any rent increases are necessarily restricted or prohibited based not on the property owner's expenses or finances—and not on any problems or public expenses generated by an owner's particular property or by rental properties in general—but instead based on considerations of housing affordability in the area and a tenant's ability to pay.

The provisions of the RSL obliterate a property owner's right to exclude others from the property, "one of the most essential sticks in the bundle of rights that are commonly characterized as property[.]" *Cedar Point Nursery*, 141 S. Ct. at 2072 (internal citation and quotation marks omitted). And by restricting rent increases based on cost-of-living indices and tenants' ability to pay, the RSL effectively compels landlords to subsidize tenants' rent. This sort of forced subsidy is an "improper and unconstitutional" method of attempting to solve affordable housing problems because it contradicts the "guiding principle of the Takings Clause that 'public burdens . . . should be borne by the public as a whole,'" and not by individual

property owners. *Pennell*, 485 U.S. at 22–24 (Scalia, J., concurring in part and dissenting in part) (quoting *Armstrong*, 364 U.S. at 49).

## II. The Second Circuit's Decision Creates a Circuit Split, Contradicts this Court's Precedent, and Magnifies Confusion in the Law.

In this case, the Second Circuit held that these provisions of New York's RSL were neither a *per se* nor a regulatory taking. That conflicts with both a recent Eighth Circuit decision and this Court's precedent. This Court should grant certiorari to resolve the conflict between the Courts of Appeals, to correct the errors below, and to clarify the appropriate standard for Takings Clause claims in the rent control context.

First, the Second Circuit's decision conflicts with a decision from the Eighth Circuit in *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), creating a Circuit split that this Court should resolve.

In *Heights Apartments, LLC*, the Eighth Circuit addressed a challenge to a Minnesota executive order imposing a moratorium on residential evictions during the COVID-19 pandemic. 30 F.4th at 723–24. The Eighth Circuit applied this Court's holding in *Cedar Point Nursery*, 141 S. Ct. at 2072, noting that whenever a regulation physically appropriates property, a *per se* taking has occurred. *Id.* at 733. As the Eighth Circuit observed, it is "immaterial whether physical invasion is 'permanent or temporary,' 'intermittent as opposed to continuous,' or whether the government is directly invading the land or allowing a third party to do so." *Id.* (quoting *Cedar Point Nursery*,

141 S. Ct. at 2074–76). The Eighth Circuit held that, because the executive orders at issue in *Heights Apartments, LLC* "forbade the nonrenewal and termination of ongoing leases," they effectively turned every lease in Minnesota "into an indefinite lease, terminable only at the option of the tenant." *Id.* Such allegations, the Eighth Circuit held, gave rise to a plausible *per se* physical takings claim under *Cedar Point*. *Id.*; *see also Lamplighter Village Apartments LLP v. City of St. Paul*, 534 F. Supp. 3d 1029, 1034-36 (D. Minn. 2021) (deciding an ordinance that required landlords to rent to individuals they would otherwise exclude likely constituted a *per se* physical taking and a regulatory taking).[2]

The Second Circuit's decision on the *per se* taking issue here directly contradicts the Eighth Circuit's decision in *Heights Apartments, LLC*. Where the Eighth Circuit holds (at the pleading stage) that regulations effectively requiring perpetual leases are a *per se* physical taking, the Second Circuit holds (also at the pleadings stage) the opposite. *Compare Heights Apartments, LLC*, 30 F.4th at 732–33, *with* Pet. App. 22a-28a. Notably, the Second Circuit does not even address the *Heights Apartments, LLC* decision, much less distinguish its reasoning. There is no reason why the same government acts should be takings in one

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[2] MHA has a particular interest in *Heights Apartments, LLC* because MHA submitted an amicus brief in support of the appellants in that case, opposing the appellees' request for rehearing *en banc*. *See* Br. of Amicus Curiae Minnesota Multi Housing Association in Opp'n to Defendants-Appellees' Petition for R'hrg or R'hrg *En Banc* (filed June 2, 2022), *Heights Apartments, LLC v. Walz*, No. 21-1278 (8th Cir.). The Eighth Circuit denied the appellees' request for rehearing. *See Heights Apartments, LLC v. Walz*, 39 F.4th 479 (Mem.) (8th Cir. 2022).

part of the country but not another. This Court should grant certiorari to resolve the split.

Second, the decision below conflicts with this Court's takings decisions in *Cedar Point*, mentioned above, and *Yee v. City of Escondido*, 503 U.S. 519, 528–29 (1992). The Second Circuit held that the RSL's restrictions on property owners' ability to recover their own property or change its use did not effect a physical taking. Pet. App. 19a. Because Petitioners "voluntarily invited third parties to use their properties[,]" the Second Circuit held, the government had "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Ibid.* (quoting *Yee*, 503 U.S. at 528–29 and citing *Cedar Point Nursery*, 141 S. Ct. at 2077).

That holding distorts *Cedar Point* and *Yee*. In *Yee*, this Court addressed a California statute that limited property owners' rights to change the use of their land, but did not bar it entirely; owners could change the use of their land and evict their tenants, "albeit with 6 or 12 months notice." *Yee*, 503 U.S. at 528. The Court noted that the right to exclude was an "essential stick" in the bundle of property rights, but decided that the law at issue had not taken that right from the property owners. *Id.* Critically, however, the Court noted 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.* (collecting cases). That is *exactly* what New York's RSL does: it bars a landowner from declining to continue to rent her property and, subject to certain conditions

entirely within the control of the tenant (and an indefinite chain of his successors), forces her to refrain in perpetuity from terminating a tenancy. *See* 9 NYCRR §§ 2524.1–2524.5; 9 NYCRR §§ 2520.6, 2523.5; NY. Unconsol. Laws §§ 26-510, 26-511.

Similarly, in *Cedar Point*, this Court addressed a California law granting union organizers a right to enter the properties of agricultural employers for up to three hours per day, 120 days per year, in order to solicit support for unionization. 141 S. Ct. at 2069. In ruling that the law constituted a taking, the Court observed that "physical invasions constitute takings even if they are intermittent as opposed to continuous." *Id.* at 2075, 2080. California had argued the case was like *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 83 (1980), in which the Court held that the state did not commit a taking by requiring the owner of a shopping center to allow visitors to engage in leafleting. *Cedar Point*, 141 S. Ct. at 2076. Distinguishing *PruneYard*, this Court observed that the agricultural right-to-enter law was different from the shopping-mall leafletting requirement: "Unlike the growers' properties, the PruneYard 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." *Ibid.* Because the *Cedar Point* right-to-enter "regulation appropriate[d] for the enjoyment of third parties the owners' right to exclude[,]" even temporarily, the Court held it constituted a *per se* physical taking. *Id.* at 2072.

*Cedar Point* is directly applicable to the RSL's provisions eliminating owners' ability to exclude tenants from their properties, and requiring them instead to re-lease property to tenants (and their successors) in perpetuity. The distinction *Cedar Point* draws between private property closed to the public, and private property open to the public, is an important one that the Second Circuit glosses over. When a landlord rents an apartment, she does not open it to the public – she opens it to a specific tenant, approved by her, for a specific period of time, on agreed-upon terms. New York's RSL, however, requires the landlord to continue renting to that tenant and his successors—even against the landlord's will—in perpetuity, subject only to factors within the tenant's control. In doing so, the RSL "appropriates for the enjoyment of third parties the owners' right to exclude[,]" and so effects a *per se* physical taking under *Cedar Point*'s guidance. *Id.* at 2072.

The Court should grant review to reaffirm the continuing applicability of the principles it articulated in *Cedar Point* and *Yee.*

Third, while the decision below creates a Circuit split and conflicts with this Court's guidance on *per se* takings, the Second Circuit's decision on Petitioners' regulatory takings claim illustrates the confusion among the lower courts regarding how regulatory takings principles apply in the rent-control context. In *Pennell*, Justice Scalia's opinion noted that while affordable housing is an important problem, "compelled subsidization by landlords" of a tenant's rent "is an improper and unconstitutional method of solving the problem." 485 U.S. at 23–24. Requiring owners to limit their rent based on a tenant's ability to

pay contradicts the "guiding principle of the Takings Clause that 'public burdens . . . should be borne by the public as a whole,'" and not individual property owners. *Id.* at 22 (quoting *Armstrong*, 364 U.S. at 49). That is exactly the situation that the Second Circuit confronted here—but the court below declined to enforce Justice Scalia's *Pennell* principles, stating that they had not been adopted by a majority of this Court. Pet. App. 22a-23a n.25.

The Court should grant review to expressly adopt the well-reasoned principles Justice Scalia articulated in *Pennell*.

## III. The Court Should Grant the Petition to Protect the Property Rights of Minnesota Property Owners and Provide Clear Guidance on Rent-Control-Based Takings Claims.

Absent reversal by this Court, the Second Circuit's decision upholding New York's RSL will likely have *disastrous* effects on property owners—including MHA's members in Minnesota.

Indeed, the effects of the Second Circuit's decision are already being felt in Minnesota. Recently, the District of Minnesota relied on the Second Circuit's decision to uphold rent stabilization laws in St. Paul, Minnesota against a regulatory-taking challenge. *See Woodstone Ltd. P'ship v. City of Saint Paul*, No. 22-CV-1589 (NEB/DLM), 2023 WL 3586077 (D. Minn. May 22, 2023).

In 2021, a slim majority of St. Paul's general-election voters made it the first city anywhere in the

Midwest to enact a rent-control ordinance. *See Woodstone Ltd. P'ship*, 2023 WL 3586077, at *1. The St. Paul ordinance parallels the RSL in multiple ways: it generally limits rent increases to 3% within a 12-month period on any residential rental property, and it prohibits owners from recovering apartments for their or their families' personal use unless the owner offers the tenant a similar apartment at a similar rent (if available). *See* City of St. Paul Ordinance 22-37 at § 193A.05(b)(2) (adopted Sept. 21, 2022) (amending St. Paul Leg. Code § 193A.01 *et. seq*.) (accessible at https://tinyurl.com/STPord23).

As economists have long predicted, this law immediately caused the *opposite* of its intended effects. As the district court in the *Woodstone* case observed, within a few months of the ordinance being approved, St. Paul's residential housing supply took a significant hit: new multifamily building permits decreased over 80% compared to the year before, financing dried up for new-housing developers, and numerous housing projects (including affordable housing projects) had to be paused. *See Woodstone Ltd. P'ship*, 2023 WL 3586077, at *2.

Two residential property owners sued the City of St. Paul, asserting (among other claims) that the St. Paul ordinance constituted a non-categorical regulatory taking under the Fifth Amendment. *Id.* at *16. The plaintiffs asserted the same or similar regulatory-takings arguments brought by the Petitioners in this suit, including an argument that Justice Scalia's concurrence in *Pennell* should be adopted. But the district court rejected those arguments and instead explicitly relied on the Second Circuit's analysis of New York's RSL in this case to

uphold St. Paul's rent stabilization ordinance. *Id.* at *17 n.13, *18.

The Second Circuit's ruling, which the District of Minnesota followed in *Woodstone*, may embolden other Minnesota cities to enact similarly intrusive ordinances. Several Minneapolis city council members have expressed support for rent control—against the recommendations of city staff, who (among other things) counseled the City of Minneapolis to wait for the outcome of the *Woodstone* case.[3] This Court's review is needed to provide definitive guidance for cities in Minnesota and elsewhere.

The Takings Clause is especially important in rent control cases like this one. The Takings Clause was intended to provide property owners with "some extra measure of protection" from the failures of the political process, particularly where a majority who are not property owners inflict onerous restrictions on the rights of property owners through the ballot. William Michael Treanor, *The Original Understanding of The Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 850–51 (1995). Property owners and landlords are vastly outnumbered by the combined voting power of tenants who are the intended beneficiaries of rent control laws. Given this disparity in voting power, 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

[3] *See* Susan Du, *Minneapolis city staff report recommends against adoption of rent control*, STAR TRIBUNE (April 14, 2023), https://tinyurl.com/msprc23; *see also* CITY OF MINNEAPOLIS, *Rent Stabilization Staff Analysis* 15 (April 2023) (available at https://tinyurl.com/msprep23).

against the majority's will[,]" which in turn benefits those "citizens with disproportionate influence and power in the political process[.]" *Kelo v. City of New London*, 545 U.S. 469, 496, 505 (2005) (O'Connor, J., dissenting).

The decision below eviscerates the constitutional protections that the Takings Clause was designed to provide. Granting the writ will allow this Court an opportunity to resolve the Circuit split and clarify the law—for the benefit not just of Petitioners in this case, but also for property owners nationwide, including in Minnesota, who have already been harmed by the ruling below.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: **June 9, 2023**
Respectfully submitted,

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