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

BRIEF FOR *AMICUS CURIAE* CALIFORNIA BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONERS

PAUL D. CLEMENT
Counsel of Record
ANDREW C. LAWRENCE*
DARINA MERRIAM*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

Counsel for Amicus Curiae

June 9, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

STATEMENT OF INTEREST[1]

The California Business Roundtable is a non-partisan organization comprised of the senior executive leadership of the major employers throughout California—with a combined workforce of more than half-a-million employees. For more than 35 years, the Roundtable has identified the issues critical to a healthy business climate in California and provided the leadership needed to strengthen the state's economy and create jobs. Those critical issues include government efforts to restrict the rights of property owners, including in the real-estate rental market.

This case involves a troubling example of government encroachment on the rights of property owners. As petitioners explain, New York City's Rent Stabilization Law ("RSL") runs afoul of textual guarantees protecting property rights, as it essentially eviscerates basic property rights—including the right to exclude. But New York City does not have a monopoly on unconstitutional rent-control regimes. To the contrary, such regimes are all too common in California, the Nation's most populous state and one where 17 million people—nearly 45% of all California

---

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel for the parties received notice of the intent to file an amicus brief at least ten days prior to the deadline for the brief.

residents—live in rental housing.[2] The Roundtable thus has a strong interest in this case, as the constitutional issues here affect the interests of many of its members.

SUMMARY OF ARGUMENT

The Rent Stabilization Law ("RSL") at issue here directly affects thousands of property owners and one million apartments in the Nation's most populous city. A constitutional dispute about the RSL would thus merit this Court's plenary review even if the constitutionality of rent control were just a New York City or East Coast issue. But this case has consequences that extend far beyond the Five Boroughs—and extend across the country to California, the Nation's most populous state.

That is because rent-control regimes like New York City's RSL (or worse) are pervasive in California. Only a few years ago, California enacted a statewide rent-control regime, and that law permits local jurisdictions in the state to preserve or impose exceptionally strict rent-control policies. Thus, some of California's largest cities, including Los Angeles and San Francisco, have some of the most burdensome rent-control regimes in the country, which contain many of the same troubling features that petitioners challenge here—*e.g.*, substantial restraints on a property owner's ability to remove tenants, to reclaim units for personal use, to withdraw units from the market, and to charge fair-market rates. And other jurisdictions in California are following their lead.

---

[2] *See* Cal. Assembly Floor Analysis 1, AB 1482, Tenant Protection Act of 2019 (Sept. 10 2019), https://bit.ly/43b9cFB.

These rent-control regimes are not just bad policy; they run afoul of textual guarantees protecting property rights. Just two Terms ago, this Court underscored the primacy of a property owner's right to exclude and thus made clear that, when the government appropriates that right for third parties, it constitutes a *per se* physical taking that warrants payment of just compensation. *See Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021). *Cedar Point* thus underscores that most of the challenged provisions in New York City's RSL—and their California analogs—are unconstitutional. Moreover, *Cedar Point* and other recent cases point to the need to re-examine precedents that appear to condone limits on rent as if they were just another form of rate regulation, rather than an infringement of the right to exclude.

In sum, this case raises issues that are profoundly important from coast to coast, and the Second Circuit's decision resolving them is profoundly wrong—and in clear conflict with a recent decision from the Eighth Circuit recognizing the import of *Cedar Point*. This Court's plenary review is plainly warranted.

ARGUMENT

I. Rent-Control Regimes Similar To New York City's Rent Stabilization Law Are Pervasive In California.

As petitioners correctly explain, New York City's RSL "severely restricts (and in several instances completely negates) many of the rights that make up building owners' property interests," including the right to exclude. Pet.4. Unfortunately, such extreme intrusions on property interests are not the exclusive

province of the Five Boroughs or even the Empire State. To the contrary, they are prevalent on both coasts, including in California—where some 17 million people (nearly equivalent to the population of all of New York state) occupy rental housing. *See* p.2 n.2, *supra*.

In 2019—the same year that New York City amended the RSL to include the restrictions at issue here, *see* Pet.App.2a-3a—the California legislature passed a statewide rent-control law: AB 1482, known as the "Tenant Protection Act of 2019." Assem. Bill No. 1482, Reg. Sess. (Cal. 2019) ("AB 1482"). Among other things, AB 1482 includes strict limits on the ability of owners of regulated rental units to evict tenants or to refuse to renew leases. More precisely, so long as a tenant in California has occupied residential rental property for at least 12 months, the owner is prohibited from "terminat[ing] the tenancy" absent state-defined "just cause." Cal. Civ. Code §1946.2(a).

AB 1482 recognizes only two categories of "just cause." The first category is "at-fault just cause," which is limited to circumstances that are within the tenant's control—*e.g.*, "[d]efault in the payment of rent" or "[c]riminal activity by the tenant on the residential real property." *Id.* §1946.2(b)(1)(A), (F). The second category is "no-fault just cause," and that category involves circumstances like an "[i]ntent to occupy the residential real property by the owner" and the "[w]ithdrawal of the residential real property from the rental market." *Id.* §1946.2(b)(2)(A)(i), (B). But if an owner proceeds under this second category, he must pay a hefty price—literally. In particular, the

owner must either "provid[e] a direct payment to the tenant" to "[a]ssist the tenant to relocate," or otherwise "[w]aive" enumerated rent payments. *Id.* §1946.2(d)(1)(A)-(B).

AB 1482 regulates the rights of property owners in still other ways. For example, AB 1482 imposes limits on annual rate increases for all regulated properties in California—at "5 percent plus the percentage change in the cost of living, or 10 percent, whichever is lower." *Id.* §1947.12(a); *see also id.* §1947.12(k) ("Any waiver of the rights under this section shall be void as contrary to public policy."). And if a local jurisdiction concludes that these restrictions are insufficiently tenant-protective, AB 1482 authorizes them to preserve or enact even *more* tenant-friendly policies. *See id.* §1946.2(g). Some of California's largest jurisdictions have done just that. *See* Pet.23-24.

Los Angeles provides a clear example. Los Angeles first enacted its Rent Stabilization Ordinance ("RSO") in 1979, *see* L.A. Mun. Code §151.01, and the list of restrictions codified in that ordinance has grown longer and more radical ever since. To take an example, while AB 1482 treats any "[d]efault in the payment of rent" as a legitimate basis to evict a tenant, *see* Cal. Civil Code §1946.2(b)(1)(A), Los Angeles recently took a different tack. An owner of a regulated property in Los Angeles is flatly prohibited from "recover[ing] possession of a rental unit" for "fail[ure] to pay rent" *unless* the outstanding amount "*exceeds* one month of fair market rent for the Los Angeles metro area set annually by the U.S. Department of Housing and Urban Development for

an equivalent sized rental unit as that occupied by the tenant." L.A. Mun. Code §151.09(A)(1) (emphasis added). In other words, lawmakers in Los Angeles have concluded that renters in the city are effectively free to pay rent only every *other* month—or keep themselves a month behind their required and agreed-upon payment schedule in perpetuity—as long as the renter's IOUs never "exceed" a full month's rent.

Los Angeles' RSO features numerous other restrictions that undermine property rights. For instance, while the RSO allows an owner to recover possession of a rental unit "to remove the rental unit permanently from rental housing," she may do so "only" when "withdrawing … *all* of the rental units in a structure or building." *Id.* §151.09(A)(10) (emphasis added). If an owner elects to withdraw units from the market but subsequently places them back on the market within two years, the RSO declares that she "shall be liable" to displaced tenants for "actual and exemplary damages"—and then, for five years, she must maintain rates at the levels that existed at the time of the withdrawal. *Id.* §§151.25(A), 151.26(A). Furthermore, the RSO provides that an owner "may not recover possession of a rental unit" at all if the tenant is a "[p]rotected tenant"—*i.e.*, a renter who is terminally ill or who has resided in the unit for over ten years and is either at least 62 years old or disabled. *Id.* §151.30(D)(1). The RSO further requires owners to pay relocation fees to tenants in all "no-fault" eviction cases—payments that can amount to tens of thousands of dollars. *See Relocation Assistance Bulletin*, L.A. Housing Dep't (March 28, 2023), https://bit.ly/42MBc2S. And landlords who are understandably deterred by these draconian

restrictions—and thus continue to rent—are precluded from increasing rents to fair-market levels, as the RSO caps rent increases at a level below what even AB 1482 permits (and Los Angeles has barred *all* rent increases between March 2020 and January 2024, a period of extraordinarily high inflation). *See Rent Stabilization Bulletin: Allowable Rent Increases*, L.A. Housing Dep't (Dec. 7, 2021), https://bit.ly/3M9V9tf ("L.A. Rent Stabilization Bulletin") (capping annual rent increases at 3% to 8%); *COVID-19 Renter Protections*, L.A. Housing Dep't, https://bit.ly/3Ocfsca (last visited June 9, 2023) ("From March 30, 2020 through January 31, 2024, rent increases are prohibited for rental units subject to the Rent Stabilization Ordinance (RSO).").[3]

San Francisco is not to be outdone and maintains its own strict rent-control regime that goes well beyond the statewide standard. San Francisco's Residential Rent Stabilization and Arbitration Ordinance also dates back to 1979, *see* S.F. Admin. Code §37.1 *et seq.*, and its terms are no less problematic than those in Los Angeles' RSO. Among other things, San Francisco's ordinance declares that any "fixed-term" lease agreement—*i.e.*, "any lease or rental agreement that purports to require a tenant to vacate a rental unit at the expiration of a stated term"—is "void as contrary to public policy," and it then significantly limits an owner's ability to remove

[3] Los Angeles County—the most populous county in the Nation, which includes dozens of cities aside from Los Angeles within its borders—*also* imposes similar rental restrictions as part of its Rent Stabilization and Tenant Protections Ordinance. *See* L.A. Cnty. Code tit. 8, div. 3, ch. 8.52.

an unwanted tenant. *See id.* §§37.9(a), 37.9F(b). If an owner wishes to occupy rental units for personal use, for example, she is precluded from doing so with respect to certain units—*e.g.*, those occupied by a person who has "resid[ed] in the unit for [at least ten] years" and is at least "60 years of age." *Id.* §37.9(i)(1)(A). And if the owner manages to find a unit that the city has not proclaimed off-limits, "then no other current or future landlords may recover possession of any other rental unit in the building." *Id.* §37.9(a)(8)(vi).

The list goes on. If an owner withdraws a unit from the rental market in San Francisco, he is required to make substantial relocation payments to tenants—which can reach $30,000 per household (and even more in certain situations). *See id.* §37.9A(e)(2). If an owner who has moved into a rental unit or withdrawn it from the market later has a change of heart and seeks to return the unit to the rental market, the landlord must offer that unit to the previous tenant if the tenant so requests. *See id.* §§37.9A(c), 37.9B(a). If an owner wishes to convert a building from a rental property to a condominium property, she must offer the current tenants the option of receiving a "life time lease" in the building. *See* S.F. Subdivision Code §1396.4(g). And if the owner simply wishes to increase rates to something approaching fair-market rates, she is stonewalled too: Annual rent increases are capped at either 60% of the annual increase in the regional consumer price index or 7%, whichever is lower. *See* S.F. Admin. Code §37.3(a).

These onerous restrictions on property owners are by no means limited to Los Angeles or San Francisco.

Quite the opposite: Jurisdictions throughout California are enacting their own, equally stringent rent-control regimes at a rapid clip. *See* Summer Lin, *More California Cities Enact Rent Control to Protect Tenants*, L.A. Times (Aug. 28, 2022), https://lat.ms/3BDC3qk. The bottom line, then, is that rent-control regimes akin to New York City's RSL are wreaking havoc for property owners across the Golden State.

II. These Rent-Control Regimes Are Inconsistent With The Takings Clause As Properly Understood.

Although "[t]here aren't that many things you can get economists to agree on," "[p]retty much every economist agrees that rent controls are bad." Megan McArdle, *The One Issue Every Economist Can Agree Is Bad: Rent Control*, Wash. Post (June 14, 2019), https://wapo.st/3Imq2tr; *see also* Blair Jenkins, *Rent Control: Do Economists Agree?* 6 Econ. Watch 73, 73 (2009) ("The literature on the whole may be fairly said to show that rent control is bad[.]"). But rent-control regimes like those in New York City and California are not just bad policy. They plainly run afoul of the Fifth and Fourteenth Amendments, which expressly protect property rights from arbitrary regulation and uncompensated takings.

1. This Court has long emphasized that "the right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *see also, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally

been considered one of the most treasured strands in an owner's bundle of property rights."); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S.Ct. 2485, 2489 (2021) (per curiam) ("[O]ne of the most fundamental elements of property ownership" is "the right to exclude."). This Court reaffirmed and extended those principles in *Cedar Point*. There, this Court made crystal clear that, when a government "regulation appropriates for the enjoyment of third parties the owners' right to exclude," that regulation "constitutes a *per se* physical taking" that "requir[es] just compensation"—full stop. 141 S.Ct. at 2072, 2074; *see id.* at 2077 ("Our cases establish that appropriations of a right to invade are *per se* physical takings, not use restrictions subject to *Penn Central*[.]"). Indeed, this robust protection for the right to exclude is a necessary corollary of the government's ability to regulate third parties that the property owner voluntarily allows onto the premises. *See id.* at 2076-77 (distinguishing cases involving property generally open to the public).

A straightforward application of *Cedar Point* confirms that numerous features of the rent-control regimes in effect in New York City and California run afoul of the Takings Clause. That is because "multiple provisions of the RSL"—just like multiple provisions of the rent-control regimes in effect in California—"require the owner to allow the tenant to remain … notwithstanding the owner's desire to exercise her right to exclude." Pet.10. As noted, these jurisdictions erect formidable barriers to eviction, even when tenants have violated the terms of their leases, and all but compel owners to renew tenant leases. *Compare* Pet. 5, *with* L.A. Mun. Code §151.09(A); S.F. Admin.

Code §§37.9(a), 37.9F(b). These jurisdictions severely restrict owners' ability to reclaim their property for personal use. *Compare* Pet.5-6, *with* L.A. Mun. Code §151.30(D)(1); S.F. Admin. Code §37.9(i)(1)(A). These jurisdictions substantially limit owners' ability to withdraw rental properties from the market. *Compare* Pet.6, *with* L.A. Mun. Code §§151.09(A)(10), 151.25(A), 151.26(A); S.F. Admin. Code §37.9A(e)(2). And these jurisdictions preclude landlords from converting rental properties to condominiums unless objecting tenants can remain in those properties indefinitely. *Compare* Pet.6, *with* S.F. Subdivision Code §1396.4(g). It is difficult to understand these serial impositions as anything other than an impermissible and uncompensated government effort to "appropriate[] for the enjoyment of third parties the owners' right to exclude." *Cedar Point*, 141 S.Ct. at 2072. If anything, the physical takings here are even more obvious than in *Cedar Point*. Even the dissenters in *Cedar Point* recognized that state laws allowing permanent and continuous access were distinctly problematic. *See id.* at 2083-84 (Breyer, J., dissenting). While the regulation at issue in *Cedar Point* granted union organizers a right to physically enter private property essentially for only three hours every third day, *see id.* at 2074, the rent-control regimes in New York City and California allow tenants to continuously occupy private property for months or sometimes years on-end.

The Second Circuit nevertheless saw no violation of the Takings Clause, primarily on the theory that *Cedar Point* is categorically inapplicable in the landlord-tenant context. But the Eighth Circuit has already emphatically rejected that theory. *See*

Heights Apartments, LLC v. Walz, 30 F.4th 720, 733 (8th Cir. 2022) (holding that "*Cedar Point Nursery* controls" in a case in which the government allegedly "forced landlords to accept the physical occupation of their property regardless of whether tenants provided compensation"). The Eighth Circuit clearly has the better view on this circuit split. *Cedar Point* makes clear that, once a property owner voluntarily decides to open property to the general public, the government can ensure access for particular uses that the government favors. *See* 141 S.Ct. at 2077 (distinguishing properties like shopping malls that are "generally open to the public" and that "welcom[e] some 25,000 patrons a day"). But the government's greater ability to regulate once access to the general public is voluntarily conveyed only underscores the importance of protecting the property owner's right to exclude and prerogative to decide whether to open her property to greater regulation. Put differently, the ability of a property owner who has opened her property to the general public to reassert her right to exclude is an important check on the government's ability to regulate.

Needless to say, rental properties are not open to the general public, as property owners generally *exclude* the public and welcome only tenants and their invitees, subject to the terms of a lease. *Contra* Pet.App.18a-19a. And while it is certainly true that owners "voluntarily invite[]" that finite group of "third parties to use their properties," Pet.App.18a, that makes them far more like the nursery in *Cedar Point* than the shopping mall in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). Nothing in *Cedar Point* suggests that owners somehow forfeit their right to

receive just compensation for physical appropriations as a result of inviting a limited universe of people onto their property, as the Second Circuit seemed to think here. Quite the opposite: *Cedar Point* looked to both *Loretto* and *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), for guidance, *see, e.g.*, *Cedar Point*, 141 S.Ct. at 2073-74, and both cases fatally undermine the Second Circuit's view. *See Loretto*, 458 U.S. at 439 n.17 ("[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 (citing *Loretto* to reject the government's argument that a government-mandated "reserve requirement" for raisins "is not a taking because raisin growers voluntarily choose to participate in the raisin market"). Moreover, even if allowing tenants and their guests onto their property would open the door to additional marginal restrictions on their right to exclude, that would only make it more important for property owners to be able to reassert their right to exclude more broadly to preserve their property rights and keep the government in check. But the RSL and its California analogs infringe on that right by restricting the ability of property owners to withdraw rental properties from the market or exclude tenants that fail to comply with the terms of their leases.

It thus cannot seriously be disputed that "the provisions of the RSL that prevent a property owner from regaining exclusive possession and control of her property after the expiration of a lease"—just like the comparable provisions in laws in California—"effect *per se* physical takings." Pet.i.

2. The takings problems with such laws run deeper still. After all, New York City's RSL and the similar laws in effect in California *also* "strictly limit[] rent levels"—*i.e.*, the maximum rates that landlords are permitted to charge. Pet.6-7; *see* L.A. Rent Stabilization Bulletin, *supra*; S.F. Admin. Code §37.3(a). Petitioners offer compelling arguments that such caps are unconstitutional when (as with the RSL) tenant-ability-to-pay is a consideration in a rate-setting formula, as Justice Scalia argued in *Pennell v. San Jose*, 485 U.S. 1, 15-24 (1988) (Scalia, J., concurring in part and dissenting in part). But the problems with restricting a property owner's right to exclude those unwilling to pay an agreed-upon rent are more fundamental. To the extent that this Court's precedents allow such uncompensated restrictions on the fundamental right to exclude, they are ripe for reconsideration in light of more recent precedents more faithful to the basic guarantee of the Takings Clause.

That much is confirmed by *Cedar Point*. As already described, this Court held in *Cedar Point* that the government engages in a *per se* physical taking when it appropriates a property owner's right to exclude for the enjoyment of third parties. *See* 141 S.Ct. at 2072. But as a slew of commentators have recognized, that holding clearly calls into question policies that limit what property owners may charge existing tenants, as that kind of policy is really just another way of fettering a property owner's right to exclude. As one commentator recently put it, "[t]he potential application of [*Cedar Point*] to rent regulations is straightforward: By enacting laws that limit landlords' ability to control … how much they

rent their property for, … the government appropriates from the landlords their right to exclude for the enjoyment of the occupying tenants, who may remain in situ despite the landlord's desire to rent or sell the apartment at market rate." Abigail K. Flanigan, *Rent Regulations After* Cedar Point, 123 Colum. L. Rev. 475, 498 (2023). Academics across the ideological spectrum likewise agree that *Cedar Point* undermines the validity of rate caps in the rental context. *See, e.g.*, Aziz Z. Huq, *Property Against Legality: Takings After* Cedar Point, 109 Va. L. Rev. 233, 261-62 (2023) ("Perhaps the most obvious application[] … of *Cedar Point* would be to … rent control ordinances[.]"); Nikolas Bowie, *Antidemocracy*, 135 Harv. L. Rev. 160, 197 (2021) (recognizing that *Cedar Point Nursery* "threatens" "rent-control policies"); Richard A. Epstein, *A Bombshell Decision on Property Takings*, Hoover Inst. (June 28, 2021), https://hvr.co/3MEIDU7 (noting that the proposition that the government's "'power to regulate … the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails'" is "up for grabs after *Cedar Point*").

Cedar Point and other recent decisions from this Court undermine the validity of rate caps in the rental context in still other ways. As the Second Circuit recognized below, *see* Pet.App.19a, the foundational case authorizing those rate caps is this Court's 5-4 decision in *Block v. Hirsh*, 256 U.S. 135 (1921). *See also, e.g.*, *Pennell*, 485 U.S. at 12 (citing *Block*); *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987) (same); *Loretto*, 458 U.S. at 440 (same). In *Block*, the Court (over a vigorous dissent) upheld a D.C. rent-control

regulation designed to address an "emergency housing shortage" purportedly precipitated by World War I. 256 U.S. at 156-57. In upholding that regulation, Justice Holmes' majority opinion stressed both the property owner's right to re-possess on 30 days' notice, and the "temporary" nature of the "emergency" rent-control measure: "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." *Id.* at 157; *cf. Pennell*, 485 U.S. at 20 (Scalia, J., dissenting in relevant part) (noting that emergency price controls may be more justifiable because of clear nexus between rents that produce "exorbitant returns" and "economic hardship"). *But see Block*, 256 U.S. at 159-60 (McKenna, J., dissenting) ("[T]he provisions of the Constitution seem so direct and definite as to need no reinforcing words and to leave no other inquiry than does the statute under review come within their prohibition."). Unsurprisingly, then, jurisdictions like New York City, Los Angeles, and San Francisco have strained to frame their rent-control regimes as responses to "emergencies." *See, e.g.*, Pet.4 ("The RSL's restrictions are triggered by an every-three-year finding that there is a housing 'emergency' in the City, which the law defines as a vacancy rate of 5% or less."); L.A. Mun. Code §151.01 (explaining that Los Angeles enacted its RSO to counteract a "housing crisis" and that deregulation would generate a "recurrence of the crisis"); S.F. Admin. Code §37.1(b)(1) (similar).

But in *Cedar Point*, this Court emphasized that "a physical appropriation is a taking whether it is permanent or temporary" and that "[t]he duration of an appropriation … bears only on the amount of

compensation." 141 S.Ct. at 2074. And in recent cases addressing measures to counteract the unprecedented COVID-19 pandemic, this Court admonished that the Constitution's protections apply with full force even in emergency circumstances. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 68 (2020) (per curiam) ("[E]ven in a pandemic, the Constitution cannot be put away and forgotten.").

Finally, it bears emphasis that limiting a property owner's ability to exclude those that will not pay agreed-upon rents differs fundamentally from other forms of rate regulation. First, and most obviously, the Constitution itself textually protects against the uncompensated taking of private property in distinct ways. Thus, suspending the right to exclude a tenant who cannot comply with the prevailing rent is different in kind from merely limiting price for goods and services. Second, this distinct protection for property makes sense given the inability of property owners to curb regulation by voting with their proverbial feet. While businesses confronting an overzealous regulator may be able to relocate if things get out of hand—or threaten such action to keep things from getting out of hand—property owners do not have the same flexibility. The location of the property is fixed, and thus an important practical constraint on overregulation is eliminated, particularly if governments can limit the ability of property owners to sell rental properties or convert them to personal use.

The distinct nature of real property fully justifies the Constitution's unique protection from uncompensated takings or efforts to force "some

people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). That is a sound principle of takings law, and it applies with particular force to concerns about affordable housing. That is a broad societal concern; the solution should not be borne by a handful of property owners or come at the expense of their right to exclude. *See Pennell*, 485 U.S. at 21-22 (Scalia, J., dissenting in relevant part). Moreover, as Justice Scalia emphasized, the problem with allowing governments to force landlords to shoulder disproportionate burdens in addressing the problem of affordable housing goes beyond interfering with their right to exclude, and raises fundamental problems of accountability: "The politically attractive feature of [such] regulation is … that it permits wealth transfers to be achieved 'off budget,' with relative invisibility and thus relative immunity from normal democratic processes." *Id.* at 22.

As all of this reveals, this Court's precedent authorizing government efforts to impose rate caps in the rental market rests on shaky foundations. Those precedents have given rise to permanent emergencies and ongoing constitutional violations. This Court should grant review to remedy this situation and reconcile its more recent decisions with the precedents relied upon by the Second Circuit in the decision below.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.[4]

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ANDREW C. LAWRENCE*
DARINA MERRIAM*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

Counsel for Amicus Curiae

June 9, 2023

[4] For similar reasons, this Court should also grant the currently pending petition for certiorari in *74 Pinehurst LLC v. New York*, No. 22-1130 (U.S. filed May 17, 2023).