Nos. 22-1095, 22-1130

IN THE

Supreme Court of the United States

COMMUNITY HOUSING IMPROVEMENT PROGRAM, ET AL.,
Petitioners,

v.

CITY OF NEW YORK, ET AL.,

74 PINEHURST LLC, ET AL.,
Petitioners,

v.

STATE OF NEW YORK, ET AL.,

On Petitions for Writs of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Other Authorities:

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

The Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community, including cases defending constitutional protections for private property rights against government infringement. To that end, the Chamber filed *amicus* briefs supporting property owners in *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), and *Tyler v. Hennepin County*, No. 22-166 (slip op. May 25, 2023).

The Chamber has a strong interest in the issues in this case. American businesses rely on stable, fair, and predictable property rules—including in the area of takings law. The decisions below are therefore of significant practical concern to the Chamber and its members, which have a substantial interest in ensuring that property owners retain an adequate, efficient,

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of *amicus*'s intent to file this brief.

and prompt remedy against government takings of real and personal property. The Second Circuit's decisions substantially weaken and undermine Fifth Amendment protections, with wide-ranging consequences for business interests and private-property holders nationwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

The "most treasured" of property rights is "[t]he right to exclude," *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). That right was taken away from Petitioners. Their property is being locked up by law to house strangers indefinitely. Yet the Second Circuit held that they have no viable takings claim of any stripe. This Court should grant certiorari.

New York's Rent Stabilization Law ("RSL") imposes significant restrictions on the ability of landlords to exercise control over their properties—requiring landlords, except in narrow circumstances, to renew leases on rental units in perpetuity (even to strangers to the lease), and barring landlords from reclaiming possession of their properties for personal or other uses. Yet the Second Circuit held that the RSL does not constitute a *per se* or regulatory taking of Petitioners' properties. Its reasoning weakens property rights well beyond the boundaries of New York, sows further confusion among the lower courts, and reinforces governments' practice of shifting the cost of remedying social ills onto private parties. Those mistaken holdings warrant review, as to both *per se* and regulatory takings.

I. Physical invasions of private property by government are *per se* takings, and the government has a "clear and categorical obligation" to pay just compensa-

tion for such invasions. *Cedar Point Nursery*, 141 S. Ct. at 2071. That guarantee is what enables property owners to finance, invest in, and improve their properties: they can be confident (and, therefore, lenders and other investors can be confident) that the fruits of their efforts and expense will not be confiscated for public use. By contrast, once those invasions are treated as just another regulatory taking, any hope of compensation becomes faint at best, thanks to the "vague and indeterminate" standard currently governing regulatory-takings claims, which no one "has any idea how to apply." *Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n*, 141 S. Ct. 731, 731-732 (2021) (Thomas, J., dissenting from the denial of certiorari).

The Second Circuit did not dispute that this case involves just such a physical occupation of private property, but it held that just by becoming landlords, Petitioners lost the right to pursue a *per se* takings claim. That is an extraordinary constriction of the *per se* rule that government occupation requires compensation. Leasing a single apartment to a specific individual for a short, defined period now justifies *permanent* or *indefinite* impairment of the right to exclude. New York allows landlords no way out, and the Second Circuit allows them no compensation. The court's rationale will have far-reaching negative consequences, as it threatens to justify permanent, government-backed occupation of all kinds of private property—from rental cars to cyberspace.

This Court's review is needed now. By validating the RSL, the Second Circuit has created a massive disincentive for anyone considering putting property to productive use. Other jurisdictions have taken, or are pursuing, steps to enact similar restrictions into law.

See p. 15, *infra*. The Second Circuit's decisions will only embolden additional governments to follow suit. The Court should not allow these intrusions on private property and the Second Circuit's dilution of the *per se* takings doctrine to be replicated nationwide.

II. This case also presents a prime opportunity for the Court to clarify its regulatory-takings jurisprudence and to place meaningful limits on governments' ability to compel private parties to foot the bill to alleviate public harms they did not cause.

The Takings Clause embodies the principle that the government may not "[f]orce some people alone to bear public burdens" that "should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). That principle requires compensation when the government regulates private property in the absence of a "cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy." *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part). The RSL violates that principle by capping rent based in part on tenants' ability to pay—a status that is in no way caused by the landlords whom the RSL regulates. Yet the Second Circuit dismissed this consideration out of hand. The Court should take this opportunity to reaffirm this principle as a key part of its regulatory-takings jurisprudence.

This case also presents the opportunity to correct lower courts' misunderstanding of regulatory-takings doctrine more generally. Although the Second Circuit purported to apply this Court's decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), its expansive rationale gives the green light

to broad categories of government regulation without compensation. This Court's intervention is needed to prevent the already meager protections of current regulatory-takings doctrine from being rendered altogether toothless.

ARGUMENT

I. This Court Should Review And Reverse The Second Circuit's Dilution Of The *Per Se* Takings Rule.

The Second Circuit erred in holding that the onerous restrictions in the RSL do not result in a *per se* taking under the Fifth Amendment. *See* CHIP Pet. 9-20; 74 Pinehurst Pet. 18-24. That error is a significant one that warrants this Court's review. This is the type of case that calls out for the clarity and certainty that come with treatment as a *per se* taking. By holding that a property owner can forfeit the protection of the *per se* takings doctrine simply by engaging in ordinary economic activity, the Second Circuit allowed state and local governments to legislate the indefinite occupation of private property without compensation. Allowing that threat to hang over property owners undermines the security of property rights and discourages investment. (This case also presents an opportunity for this Court to clarify its regulatory-takings jurisprudence, which we discuss in Section II below.)

A. Property Owners Count On The *Per Se* Rule: Government Cannot Physically Occupy Private Property Without Paying For It.

"As John Adams tersely put it, '[p]roperty must be secured, or liberty cannot exist.'" *Cedar Point Nursery*, 141 S. Ct. at 2071 (quoting Discourses on Davila, in 6

Works of John Adams 280 (C. Adams ed. 1851)). Our Constitution provides that security by guaranteeing just compensation when government takes private property for public use—"an affirmance of a great doctrine established by the common law for the protection of private property." 2 Joseph Story, *Commentaries on the Constitution of the United States* 547 (4th ed. 1873). This fundamental protection—that the "government must pay for what it takes," *Cedar Point Nursery*, 141 S. Ct. at 2071—gives property owners certainty in their ownership. For instance, businesses that own property can invest in improving it because they know that their labors and expense will not disappear overnight through government confiscation. But that certainty would erode if government could take effective possession without paying. That is why this Court has consistently treated government-authorized physical invasions of property as *per se* takings, rather than subjecting them to the complex, fact-intensive inquiry that applies to government regulations affecting the use or value of private property. When it comes to outright occupation, only the *per se* rule offers property owners an adequately robust guarantee of compensation that is necessary to fully secure their property rights.

1. Physical invasions of property are *per se* takings. By contrast, the Second Circuit applied this Court's "regulatory takings" jurisprudence, but that body of law applies to claims that the government has taken property by "restrict[ing] an owner's ability to use his own property." *Cedar Point Nursery*, 141 S. Ct. at 2071. Whether a government restriction on the use of property constitutes a regulatory taking has long been governed by an "essentially ad hoc, factual inquir[y]," *Penn Cent. Transp. Co.*, 438 U.S. at 124, which requires courts to undertake "complex factual assess-

ments of the purposes and economic effects of government actions," *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992), and to grapple with whether "a restriction on the use of property went 'too far,'" *Horne v. Dep't of Agric.*, 576 U.S. 350, 360 (2015). "As one might imagine, nobody—not States, not property owners, not courts, nor juries—has any idea how to apply this standardless standard." *Bridge Aina Le'a*, 141 S. Ct. at 731 (Thomas, J., dissenting from the denial of certiorari) (internal quotation marks omitted); *accord First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 340 n.17 (1987) (Stevens, J., dissenting) (describing regulatory-takings jurisprudence as "open-ended and standardless").[2]

Under current precedent, that *ad hoc*, fact-intensive inquiry is neither predictable nor certain. A property owner challenging government action as a regulatory taking faces a daunting task of navigating the complex regulatory-takings framework—with no reliable way to assess in advance the likelihood that it will be compensated for the government's incursion on its property. *See Store Safe Redlands Assocs. v. United States*, 35

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[2] *See also*, *e.g.*, Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn St. L. Rev. 601, 602 (2014) (describing the regulatory-takings doctrine as "a compilation of moving parts that are neither individually coherent nor collectively compatible"); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 Ecology L.Q. 89, 102 (1995) (describing the regulatory-takings jurisprudence as an "unworkable muddle" that "has generated a plethora of inconsistent and open-ended formulations that have failed to make sense"); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561, 562 (1984) ("[C]ommentators propose test after test to define 'takings,' while courts continue to reach ad hoc determinations rather than principled resolutions.").

Fed. Cl. 726, 729 (1996) (noting that this Court's "regulatory taking cases" are "so fact specific that general predictability is made very difficult"). And the continued lack of clarity in the Court's regulatory-takings jurisprudence fosters a constant stream of unpredictable decisions resolving litigation in this arena—further increasing the price-tag for businesses seeking to vindicate their property rights against government regulatory action. *See E. Enters. v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J. concurring in the judgment and dissenting in part) ("Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law").

2. In sharp contrast, this Court's *per se* takings doctrine provides a bedrock of clarity for property owners. Simply put: when the government "physically acquires private property for a public use"—whether by using "its power of eminent domain to formally condemn property," by "physically tak[ing] possession of property without acquiring title to it," or by "occup[ying] property" in some other way—"the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." *Cedar Point Nursery*, 141 S. Ct. at 2071. In those circumstances, the *ad hoc* inquiry under the regulatory-takings doctrine "has no place"; the "invariable rule[]" recognizes a taking and requires compensation. *Id.* at 2072; *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012).

The Court has repeatedly applied this "clear and categorical" rule to deem physical invasions of property to be takings, whatever form those physical invasions may take. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 423-424, 434-435, 438

(1982) (holding that a law requiring landlords to allow cable companies to install equipment on their buildings was a *per se* taking); *Horne*, 576 U.S. at 355, 357-362 (holding that a law requiring raisin growers to set aside a certain percentage of their harvest was a *per se* taking); *Cedar Point Nursery*, 141 S. Ct. at 2071-2074 (holding that a law requiring property owners to allow union officials on their premises was a *per se* taking).

This "simple, *per se* rule," *Cedar Point Nursery*, 141 S. Ct. at 2071, offers the predictability and certainty lacking in current regulatory-takings jurisprudence—serving as a "ray of light in the otherwise shadowy areas of 'takings' law." Steven N. Berger, *Access for CATV Meets the Takings Clause: The Per Se Takings Rule of* Loretto v. Teleprompter Manhattan CATV Corp., 25 Ariz. L. Rev. 689, 703 (1983). The *per se* rule allows businesses and other property owners to invest in and manage their properties secure in the knowledge that any government invasion will require compensation at fair market value—regardless of the scope or extent of the physical occupation, *Loretto*, 458 U.S. at 438 n.16, and "no matter how weighty the public purpose behind it," *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). And if the government refuses to pay, vindicating that right is a relatively straightforward matter, without the costly complexity that a regulatory-takings challenge entails.

In short, the *per se* rule is a straightforward one: Occupation requires compensation. The certainty that the rule provides enables businesses and other property owners to use, develop, and invest in their property without the risk of having their labors and resources voided by government confiscation.

B. The Second Circuit's Constricted View Of *Per Se* Takings Discourages Investment By Enabling Physical Invasions Without Compensation.

The Second Circuit's decisions undermine the substantial benefits flowing from this Court's *per se* takings rule, by rejecting *per se* claims in precisely the context in which the *per se* rule was meant to apply—a physical invasion of private property. *See Cedar Point Nursery*, 141 S. Ct. at 2071. The result is the degradation of that "most treasured" of property rights—"[t]he right to exclude." *Id.* at 2072. If not corrected, the lower court's decisions will have far-reaching negative effects and will lay the groundwork for other governments to adopt similarly intrusive laws. Even the *possibility* that a jurisdiction might follow the Second Circuit's lead will affect owners' incentives to put their property to productive use—unless this Court steps in.

1. The Second Circuit did not seriously dispute that the RSL entails physical occupations of property for public use—for example, its requirement for indefinite renewals of leases means that the government-favored occupant can stay permanently. Yet the court of appeals treated the RSL's restrictions as mere regulations on the *use* of property—rather than physical takings. That was largely because Petitioners voluntarily entered into *limited-term* leases with tenants sometime in the past. *See* CHIP Pet. App. 18a (reasoning that Petitioners "*voluntarily* invited third parties to use their properties" (emphasis added)); 74 Pinehurst Pet. App. 6a (same). On the Second Circuit's reasoning, that was enough to surrender the Takings Clause's protection against permanent occupation—the right to exclude is gone and all that matters is the govern-

ment's power to regulate the price. And even if the government-controlled rent makes the whole enterprise a money-losing one, there is no exit—no way to regain the right to exclude. That sweeping rationale will have damaging ramifications for businesses and the security of their property rights—undermining the important values of predictability and clarity the *per se* rule fosters, and relegating property owners to the costly, inefficient, and unpredictable tangle of this Court's regulatory-takings jurisprudence.

In any jurisdiction that follows the Second Circuit's reasoning, entering the rental market will mean passing the point of no return. Governments will be free to intrude on virtually any rental property, both real and personal, without the "clear and categorical obligation to provide the owner with just compensation," *Cedar Point Nursery*, 141 S. Ct. at 2071—simply because the property owner has granted a limited license to a third party. It makes no difference how fleeting or restricted the invitation; according to the Second Circuit, any property owner that invites third parties onto its property automatically has opened itself up to a *permanent* government-mandated expansion of that limited license, with no recourse to the important protections of the *per se* takings rule.

That reasoning has dangerous implications. For example, the government could require a rental car company to permanently lease its vehicles to existing or future renters, without effecting a physical taking, so long as the lessee paid some amount of rent—controlled, of course, by the government. And that same dynamic could carry over to a host of other business arrangements—the company that leases its equipment for construction projects, the IT company

that rents out cloud space, the landowner that leases property for cattle grazing or natural gas exploration. All of these property owners (and more) will, under the Second Circuit's rule, be deemed to have relinquished the important protections of the *per se* takings rule and opened themselves up to permanent occupation of their property merely for having granted a *limited* license to *select* members of the public.

2. This Court's decisions illustrate why the Second Circuit was wrong to conclude that property owners give up their right to exclude unless they actually exclude everyone. For example, in *Loretto* this Court held that the government effected a *per se* taking by requiring landlords to allow cable companies to install equipment on their properties. 458 U.S. at 423. Under the Second Circuit's rationale, if a building owner had allowed *any* equipment to be installed on the premises, even temporarily, the government could have mandated that it allow the cable equipment—and without effecting a *per se* taking. Or consider *Cedar Point Nursery*, in which the Court found a *per se* taking where the government required an agricultural business to allow union officials on its property for up to three hours per day, 120 days a year. 141 S. Ct. at 2069. By the court of appeals' rationale, if Cedar Point Nursery had voluntarily allowed union officials onto its premises for *one hour* a year, the government could impose the exact same requirement at issue in that case, but without a physical taking having occurred. Neither can be correct: "The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated." *Loretto*, 458 U.S. at 439 n.17; *see also Cedar Point Nursery*, 141 S. Ct. at 2076 ("property rights 'cannot be so easily manipulated'").

In fact, the Court has already rejected reasoning nearly identical to that employed by the Second Circuit here. In *Loretto*, the Court dismissed the argument that the government's actions were not a physical taking because the landlord could avoid the regulation by exiting the rental-property market, an option that does not meaningfully exist under the RSL. 458 U.S. at 419 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."). In other words, a landlord's voluntary decision to enter the rental market did not give the government permission to occupy its property, nor did it blur the government's *per se* obligation to pay for any such occupation. The Court reaffirmed that principle in *Horne*—holding that the Horne family did not forfeit a *per se* takings claim by choosing to sell raisins, rather than using their grapes for another purpose (*e.g.*, making wine) outside the scope of the challenged government order. *See* 576 U.S. at 365. So too here: Petitioners did not relinquish the protections of the *per se* takings rule by engaging in a business the government has chosen to regulate.

3. The Second Circuit justified denying Petitioners a *per se* right to compensation for the invasion of their property rights, on the theory that their businesses were open to the public—like the shopping center in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), and unlike in *Horne* and *Cedar Point Nursery*. *See* CHIP Pet. App. 18a-19a. But the shopping center in *PruneYard* welcomed some *25,000 patrons per day*. *See* 447 U.S. at 77-78. Renting a single apartment to a particular tenant for a limited time is the exact opposite of an open invitation to the public—yet the Second Circuit wrongly perceived no distinction.

Petitioners' rental properties were no more "open to the public"—and no less protected by the *per se* takings rule—than a rental car leased to a specific individual or an Airbnb. Indeed, if it were otherwise, this Court's decision in *Loretto* could not have come out as it did, as the plaintiff in that case owned and rented units in a five-story apartment building. 458 U.S. at 421-422.

The Second Circuit relied on *Yee v. City of Escondido*, *supra*, to sidestep this Court's decisions in *Loretto*, *Horne*, and *Cedar Point Nursery*, reasoning that "[n]one of them concerns a statute that regulates the landlord-tenant relationship" and relying on the "State's longstanding authority to regulate that relationship." CHIP Pet. App. 21a; *see also* 74 Pinehurst Pet. App. 6a (same). That is a misreading of *Yee* and, in any event, is irreconcilable with this Court's later decisions in *Horne* and *Cedar Point Nursery*. *See* CHIP Pet. 14-16; 74 Pinehurst Pet. 21-24.

In addition, the Second Circuit assumed that a history of government regulation in a particular area can defeat the applicability of the *per se* takings rule, but that misunderstands the purpose of the Takings Clause and is a recipe for diluting property rights. The Takings Clause is not a bar on government regulation; it only dictates that when government regulates in a particular way (by taking private property), it has a "clear and categorical obligation to provide the owner with just compensation." *Cedar Point Nursery*, 141 S. Ct. at 2071. Thus, the fact of regulation (even extensive regulation) in a particular commercial context is no reason to deem the protections of the *per se* takings rule inapplicable. For example, in both *Horne* and *Cedar Point Nursery*, the commercial activity involved had long been subject to regulation. *See Horne*, 576

U.S. at 355 (agricultural regulations dating back to 1937); *Cedar Point Nursery*, 141 S. Ct. at 2069 (regulation of labor relations dating back to 1975). Nonetheless, in both cases the Court found the government's efforts to invade private property to be *per se* takings, without any indication that decades of prior regulation diminished the applicability of that doctrine. Nor should it here.

* * *

The decisions below impermissibly narrow the scope of the physical takings doctrine for any property owner who has engaged in a basic form of economic activity. That is significant not only in New York and within the Second Circuit, but throughout the country. The Second Circuit excused the RSL from the *per se* rule based on decisions that property owners made well before the 2019 amendments to the RSL were even proposed. Thus, any property owner in a jurisdiction that *might* follow the Second Circuit's rule is already seeing the certainty of its property rights erode: deciding to enter the rental market today, even as a tentative experiment, could mean living with an unwelcome tenant indefinitely. This Court should grant certiorari to prevent those harms from being replicated nationwide.

The risk of that contagion is high. As the petitions explain, other jurisdictions have enacted or are considering enacting similar laws governing rental properties. *See* CHIP Pet. 23-24 (discussing and collecting laws); 74 Pinehurst Pet. 35 (similar). The Second Circuit's decisions will only embolden more governments to follow suit and to be even more aggressive in restricting property rights each time they do—confident that businesses and other property owners wishing to obtain compensation will face the costly and burden-

some hurdles imposed by this Court's regulatory-takings jurisprudence. *See* pp. 6-8, *supra*. The Court should not allow those harms to take root.

II. The Second Circuit's Regulatory Takings Holdings Also Warrant This Court's Review.

The Second Circuit's distortion of the physical takings doctrine is reason enough to grant the petitions and reverse the decisions below. But the court of appeals' rulings on Petitioners' regulatory-takings claims likewise warrant this Court's review, as they offer the Court a prime opportunity to provide much-needed clarity in this area of takings law and to impose meaningful limits on governments' ability to shift the cost of redressing public problems on private parties not responsible for those harms. Granting both questions would also compel respondents to defend the complete denial of compensation here, rather than resist the *per se* holding while hinting that perhaps some future ideal plaintiff might win under *Penn Central*. Recently, in *Tyler v. Hennepin County*, *supra*, the Court granted both questions presented (one addressing the Takings Clause and one the Excessive Fines Clause) even though the takings argument was sufficient for reversal. The Court should likewise grant on both questions here.

A. The Court Should Reaffirm That A Taking Occurs When The Government Tries To Shift The Cost Of Curing Social Problems Onto Private Entities That Did Not Cause Them.

As the petitions explain, the Takings Clause embodies the bedrock principle that the government cannot "[f]orce some people alone to bear public burdens

which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49; *see also Tyler*, slip op. 14 (same). The RSL provides public assistance at private expense, off the government's books, by forcing landlords to accept payment based on the tenants' need. That states a takings claim.

The RSL's draconian restrictions mandate that the New York rate-setting agency fix the maximum rent landlords can charge based, at least in part, on tenants' ability to pay, CHIP Pet. 7, 24-25—a requirement New York courts have candidly deemed a "local public assistance benefit." *In re Santiago-Monteverde*, 22 N.E.3d 1012, 1015-1016 (N.Y. 2014). As Justice Scalia explained in his concurring and dissenting opinion in *Pennell v. City of San Jose*, joined by Justice O'Connor, whether a burden is "public"—and therefore one that the public must pay to alleviate—must be determined by assessing whether there is a "cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy." 485 U.S. at 20; *see* CHIP Pet. 26. Under this principle, rent control premised on the tenant's financial condition—unrelated to the reasonableness of the landlord's rent based on market factors—constitutes a regulatory taking. *Pennell*, 485 U.S. at 21. In those circumstances, the landlord is being forced to bear a "public burden[]," *Armstrong*, 364 U.S. at 49, which it did not create. *See* CHIP Pet. 24-34; *accord* 74 Pinehurst Pet. 30-31.

The Second Circuit refused to apply that principle to the RSL—or even to discuss it in any meaningful way. Instead, the court of appeals cursorily dismissed the argument on the theory that it "has never been adopted by the Supreme Court." CHIP Pet. App. 22a-

23a n.25. That premise is incorrect—the principle discussed in *Pennell* has been applied by this Court in cases that remain good law to this day—and in any event is an incomplete answer to the constitutional question.

The Court applied the cause-and-effect rationale a year before *Pennell*, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In that case, the Court addressed whether a government could condition approval of a building permit for construction of a beachfront home on the property owners' granting a public "easement to pass across a portion of their property." *Id.* at 828. The Court observed that in a case where approving the permit would result in blocking the public's view of the beach, the government could permissibly condition the approval on the landowners' "provid[ing] a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.* at 836. Such a condition could be said to redress a harm caused by the landowner's proposed use of the property. But the "evident constitutional propriety disappears … if the condition … utterly fails" to redress the problem caused by the property. *Id.* at 837. In that case, the Court held, the condition constitutes a taking—an effort to "obtain[] an easement to serve some valid governmental purpose, but without payment of compensation." *Id.*

The Court reapplied the same cause-and-effect principle in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). There, the government sought to condition approval of development on the landowner turning part of its property into "greenway" and granting the city a *public* recreational easement. *Id.* at 381-382, 394. The development did not encroach on existing green-

way. *Id.* at 394. The Court held that there was no connection between the city's stated purpose, reducing flooding problems, and enabling "recreational visitors [to] trampl[e] along petitioner's floodplain easement," *id.* at 393. Therefore, the city's effort to require the easement, without compensation, violated the Takings Clause. *Id.* at 396.

Although these cases involved unconstitutional-conditions claims, the theory of takings law underlying those decisions is exactly the same theory embraced by Justice Scalia and Justice O'Connor in *Pennell*—a government regulation is a taking, rather than a legitimate exercise of the police power, if it seeks to burden a private entity's property to alleviate a social problem not attributable in any sense to that property. As one scholar has explained: *Dolan* was "a takings case" and "its importance lies in the Court's explicit adoption" of the "takings analysis" "articulated by Justice Scalia in his dissent in *Pennell v. City of San Jose*: causation." Jan G. Laitos, *Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard's Exaction Was A Taking*, 72 Denv. U. L. Rev. 893, 895-896, 905-907 (1995); *accord* CHIP Pet. 33 (discussing additional academic literature).

The Second Circuit thus erred in dismissing the reasoning of Justice Scalia and Justice O'Connor in *Pennell* as the mere musings of dissenting Justices that have no place in the Court's takings jurisprudence. As subsequent decisions have elaborated, *see* CHIP Pet. 29-30, the separate opinion in *Pennell* simply collected principles that are already part of the Court's takings jurisprudence.

The court of appeals nonetheless opined that the principles articulated in Justice Scalia's *Pennell* opin-

ion are "in tension (if not conflict)" with this Court's decision in *Penn Central*—despite coming nearly a decade later. CHIP Pet. App. 22a n.25. This observation only underscores the extent to which lower courts' reading of *Penn Central* has blurred or omitted fundamental takings principles. The longstanding principle at stake—that government cannot impose the cost of fixing social ills onto property owners who did not cause them—deserves to be restored to prominence in regulatory-takings jurisprudence.

The need for that correction is particularly pressing now, as governments across the country are engaged in renewed efforts to impose rent controls, *see* p. 15, *supra*,[3] and may seek to emulate the RSL by doing so based on tenant ability to pay. The Court should grant review to ensure that its regulatory-takings jurisprudence is not a dead letter and that governments do not enjoy complete license to shift the costs of public benefits onto private parties.

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[3] *See Woodstone Ltd. P'ship v. City of Saint Paul*, No. 22-cv-1589, 2023 WL 3586077, at *1 (D. Minn. May 22, 2023) (noting that Minneapolis had authority to impose rent controls since 1984, but did not invoke that authority until 2021); Andrew Kenney, *Rent Control could come to some Colorado cities under a new bill from state Democrats*, CRP News (Jan. 24, 2023), https://www.cpr.org/2023/01/24/colorado-rent-control-bill/; Jack Elbaum, *A Rent Control Renaissance is Underway in the US – and It's Sure to Make the Housing Shortage Worse*, Foundation for Economic Education (May 25, 2023), https://fee.org/articles/a-rent-control-renaissance-is-underway-in-the-us-and-its-sure-to-make-the-housing-shortage-worse/.

B. The Court's Correction Of Its Regulatory-Takings Jurisprudence Is Urgently Needed.

Even setting aside the significance of the ability-to-pay criterion to the takings analysis here, this is an appropriate case to restore some clarity to the core *Penn Central* analysis. The amorphousness of that line of cases has led courts to exclude vast swaths of onerous government regulation from the Takings Clause's protection altogether. *See* pp. 6-8, *supra*. The decisions below only exacerbate those problems.

Take, for example, the Second Circuit's application of the third *Penn Central* factor—the "character of the governmental action," 438 U.S. at 124. As this Court stated in *Penn Central*, this factor is designed to differentiate between government "interference" that "can be characterized as a physical invasion" of property, rather than an effort to "adjust[] the benefits and burdens of economic life to promote the common good." *Id*. But despite the clear *physical* nature of the RSL's mandates, the Second Circuit held that the character of the RSL's restrictions nonetheless weighed *against* finding a regulatory taking merely because the RSL is "part of a comprehensive regulatory regime" that serves "important public interests." CHIP Pet App. 26a-27a; *see also* 74 Pinehurst Pet App. 16a (similar). That re-conception guts the entire point of the third *Penn Central* factor—and in the process will insulate huge portions of government action from the restrains of the Takings Clause. After all, most government action could be said to advance *some* important public interest—and courts typically defer to legislatures on those judgments. The Second Circuit's rationale thus twists this *Penn Central* factor into a blank check for

government regulation, rather than a tool for assessing the parallels between the government's action and physical invasions.

The court of appeals' application of the second *Penn Central* factor—the interference with "investment-backed expectations," 438 U.S. at 124—is similarly problematic. The court reasoned that because New York has long regulated rental properties, Petitioners should "have anticipated" that "those regulations … could change yet again." 74 Pinehurst Pet. 14a. The court relied on that rationale even though Petitioners' takings theory is that the recent amendments to the RSL were a shift in kind, not merely degree, from the prior restrictions. *See* 74 Pinehurst Pet. 5-7. Thus, under the Second Circuit's theory, businesses will automatically lack cognizable investment-backed expectations solely because they operate in a heavily regulated area of the economy—no matter how dramatically a new government regulation departs from the status quo.

Without this Court's intervention, the confusion in regulatory-takings doctrine will persist, and the *Penn Central* analysis will continue to be used to insulate substantial amounts of onerous government regulation from the important protections of the Takings Clause, while enabling governments to continually shift the cost of alleviating public harms onto private parties in no way responsible for the ills being redressed. The Court should grant review to correct the Second Circuit's misunderstanding of the Takings Clause's protection against uncompensated regulatory takings.

CONCLUSION

The Court should grant the petitions for certiorari.

Respectfully submitted.

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