No. 22-1095

In the Supreme Court of the United States

COMMUNITY HOUSING IMPROVEMENT PROGRAM, ET AL.,

Petitioners,

v.

CITY OF NEW YORK, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CITY OF NEW YORK, RENT GUIDELINES BOARD, DAVID REISS, CECILIA JOZA, ALEX SCHWARZ, GERMAN TEJEDA, MAY YU, PATTI STONE, J. SCOTT WALSH, LEAH GOODRIDGE, AND SHEILA GARCIA

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QUESTIONS PRESENTED

Since 1969, a set of New York legal provisions known collectively as the Rent Stabilization Law (RSL) has limited the rate of increase in annual rents and provided qualified lease-renewal and successorship rights in many New York City residential rental units. Following 2019 amendments to the law, petitioners sought injunctive and declaratory relief against the entire RSL, asserting facial claims for physical and regulatory takings. The questions presented are:

1. Whether petitioners' facial physical-taking claim fails, where landlords voluntarily invite tenants onto their property, the RSL offers various means to remove tenants, and in any event, petitioners have not plausibly alleged that they or their members wish to use their properties for anything other than residential rental?

2. Whether a two-Justice dissenting opinion in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), validates petitioners' facial regulatory-taking claim, where the dissent concerned a legal test that a unanimous Court later repudiated, and the RSL does not present the situation addressed by the dissent in any event?

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INTRODUCTION

This brief in opposition is filed on behalf of the municipal respondents—the City of New York, the Rent Guidelines Board, which determines the percentage rate of rental increases for units covered by the RSL, and the members of that board in their official capacities.[1] The New York State respondent and private intervenor respondents are separately represented.

Petitioners—landlords with property subject in whole or in part to the RSL and two advocacy groups—seek to massively unsettle the City's residential rental market as it has existed for over fifty years by challenging the entire RSL on its face as a taking of private property. Applying this Court's settled precedent, the U.S. Court of Appeals for the Second Circuit rebuffed the attempt. The Court should deny further review.

First, petitioners' physical-taking claim does not warrant certiorari. To begin, the case is an exceptionally poor vehicle to address physical takings, given that the complaint does not even establish

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[1] Since petitioners filed their complaint, the membership of the Board has changed. The current members are Nestor Davidson, Arpit Gupta, Alex Schwartz (so spelled), Doug Apple, Christina DeRose, Robert Ehrlich, Christina Smyth, Genesis Aquino, and Adán Soltren. *See* U.S. Sup. Ct. R. 35.3.

petitioners' standing to assert the claim they now press, and given the facial nature of that claim and paucity of factual allegations they offer to support it.

Nor does the question presented warrant review on its own terms. There is no circuit split requiring the Court's intervention; a single decision from another circuit applying the same body of law to a very different type of tenancy regulation does not amount to such a conflict. And the issues that petitioners seek to raise have little significance outside of the few high-cost municipalities with certain regulatory provisions similar to those petitioners target in the RSL.

Review is also unwarranted because petitioners assert at most that the court below misapplied settled law. Under this Court's precedent, the presence of tenants on property voluntarily offered for rent is not a compelled physical invasion. And petitioners failed to plausibly allege that the RSL on its face prevents landlords who no longer wish to open their property to tenants from pivoting to a different use. Nor does anything in the decision below prevent a landlord from bringing a factually grounded as-applied challenge to a provision of the RSL. Petitioners simply charted a different course.

Second, petitioners' regulatory-taking claim also does not merit certiorari. Petitioners ask the Court to evaluate the RSL's provisions for setting allowa-

ble rent increases under a test articulated by the dissent in *Pennell*, 485 U.S. at 21. But later decisions have undermined the dissent's reasoning. And that reasoning is inapplicable here in any event: the RSL does not authorize departures from regulated rent based on individual tenants' financial hardship—the feature that drew the dissenters' focus in *Pennell*. Nor is the issue even properly presented because petitioners did not allege that they were injured by the use of generalized cost-of-living data about which they complain.

STATEMENT

A. New York's Rent Stabilization Law

New York is a city of renters. More than five million of the City's eight million-plus residents rent, and many will do so for as long as they live here. *See* U.S. Census Bureau, *New York City Housing & Vacancy Survey*, Series VIIB, 2014 tbls. 82 & 84, https://www.census.gov/data/tables/time-series/demo/nychvs/series-7b.2014.html#list-tab-62610108. The City's market for affordable rental housing is exceedingly tight, and its housing market is notoriously volatile, for a unique combination of reasons—including limited space due to natural geographic constraints, exceptional population density, steep construction costs, and a highly desirable location. Thus, for most of the last centu-

ry, rent regulation has been an important feature of life in the City.

The RSL itself has formed a key part of the fabric of New York City for more than five decades. According to data from a U.S. Census Bureau survey, the RSL applies to just over a million apartment units, making up just under half of the City's rental market and serving as homes to more than two million residents. *See* Caitlin Waickman et al., *Sociodemographics of Rent Stabilized Tenants* 1-2 (2018), https://perma.cc/GX25-V98T.

1. New York's earliest rental protections were adopted after the World Wars. *See La Guardia v. Cavanaugh*, 53 N.Y.2d 67, 71 (1981), *superseded by statute as recognized in Aurora Assocs. LLC v. Locatelli*, 38 N.Y.3d 112, 122 n.5 (2022); *People ex rel. Durham Realty Corp. v. La Fetra*, 230 N.Y. 429, 437-38 (1921). The prevailing system was born in 1969, in response to landlords "demanding exorbitant and unconscionable rent increases," which led to "severe hardship to tenants" and "uproot[ed] long-time city residents from their communities." N.Y.C. Admin. Code § 26-501; *see La Guardia*, 53 N.Y.2d at 72.

Soon thereafter, the State Legislature tested a regulatory phase-out, only to abandon the experiment after seeing "ever-increasing rents" in deregulated units, without the anticipated increase in new construction. *La Guardia*, 53 N.Y.2d at 74.

The result was the Emergency Tenant Protection Act of 1974 (ETPA). *See* N.Y. Unconsol. Laws, Ch. 249-B, §§ 1-14 (Consol. 2021). The ETPA covers rental units in buildings with six or more units that were built before 1974. *See* N.Y. Unconsol. Law Ch. 249-B, § 5(4)-(5). It does not apply to new construction, except where owners opt in to gain tax incentives. *See, e.g.,* N.Y. Real Prop. Tax Law § 421-a(2)(f).

Since 1974, the Legislature from time to time has revised the provisions of the ETPA and the New York City Administrative Code that jointly codify the RSL. The changes have sometimes favored landlords and sometimes tenants. In 1993, 1997, and 2003, for example, the Legislature afforded landlords new ways to remove units from regulation. 1993 N.Y. Laws ch. 253; 1997 N.Y. Laws ch. 116; 2003 N.Y. Laws ch. 82. More than 150,000 units permanently exited rent stabilization through those mechanisms. *Rent Regulation and Tenant Protection Legis.: Hearing before N.Y. S. Standing Comm. on Hous., Constr and Cmty. Dev.* 19 (May 22, 2019) (testimony of L. Carroll and E. Gaumer), https://perma.cc/MX3M-HMF2.

In contrast, in 2015 and 2019, the Legislature strengthened the RSL's tenant protections. 2015 N.Y. Laws ch. 20, Part A; 2019 N.Y. Laws ch. 36. The 2019 legislation repealed or limited several of

the Legislature's earlier changes. 2019 N.Y. Laws ch. 36, Parts A, B, D, E, & K. It also amended other statutory provisions outside of the RSL, such as those governing converting rental buildings to cooperatives or condominiums. *See* 2019 N.Y. Laws ch. 36, Part N. The Legislature later relaxed the changes as to cooperative conversions for small buildings. *See* 2022 N.Y. Laws ch. 696.

2. The RSL aims to forestall rent profiteering and improve housing stability. It does not set rents, but rather controls the pace of rent increases and regulates evictions. By doing so, the law protects tenants from dislocation and limits the disruption to communities that would result from dramatic changes in rental rates and rapid turnover of tenants. *See* N.Y.C. Admin. Code § 26-501.

The RSL applies in New York City if the City Council finds a continuing need for statutory protection, contingent on the City's residential vacancy falling at five percent or lower. N.Y. Unconsol. Law Ch. 249-B, § 3(a). Since 1974, New York City's vacancy rate has never risen above five percent, and the City Council has declared a housing emergency every three years (Pet. App. 143a).

In connection with a recent declaration, the City Council received U.S. Census data showing that "[h]alf of renter households are rent burdened[,] [o]ne-third are severely burdened[, and] [m]edian rents are not affordable to the typical New York

household" (J.A. 205, 2d Cir. ECF No. 73). An official explained that "everyday New Yorkers" were "at risk of sharp rent increases, harassment, and displacement" (J.A. 300). And a tenant advocate warned that, absent rent-stabilization protections, "thousands of low income and working families would almost immediately be forced into the City's shelter system" (J.A. 306). Indeed, 86 percent of covered households are low, moderate, or middle income, with the vast majority being low income. *Rent Regulation and Tenant Protection Legis.*, *supra*, at 18.

3. Once triggered by a local legislative declaration, the RSL regulates the percentage by which landlords may periodically increase the rent on regulated apartment units and sets the grounds on which landlords can evict existing tenants or decline to renew their leases. N.Y.C. Admin. Code §§ 26-510(b), 26-511(c)(9). The legislation is supplemented by regulations, known as the Rent Stabilization Code (RSC), promulgated by the State Division of Housing and Community Renewal (DHCR). *Id.* § 26-511(b); *see* 9 N.Y.C.R.R. §§ 2520.1-2531.9.

Under the RSL, the New York City Rent Guidelines Board—composed of representatives of landlords, tenants, and the general public—determines the maximum permissible rent increase annually

(expressed as a percentage of existing rents). N.Y.C. Admin. Code § 26-510(a)-(b). The Board considers the economic condition of the residential real-estate industry, including tax rates, maintenance costs, the housing supply and vacancy rates, as well as the cost of living and housing affordability. *Id.* § 26-510(b).

The RSL does not require a landlord to offer a vacant rent-stabilized unit for rent or dictate the landlord's choice of tenant whenever a unit is vacant. And a landlord may evict a tenant for cause, such as nonpayment of rent or misconduct. 9 N.Y.C.R.R. §§ 2524.1, 2524.2, & 2524.3. But the RSL generally requires a landlord to offer an existing tenant in a rent-stabilized apartment the opportunity to renew their lease upon lease expiration. *Id.* § 2523.5(a). And in certain instances, a landlord must offer a renewal lease to certain family members of an existing tenant who also reside in the unit. *Id.* § 2523.5(b)(1).

The rules governing lease renewal contain key exceptions. The landlord may decline to offer a renewal lease if the tenant does not use the unit as primary residence or if an individual landlord has a compelling need to use a unit as their primary residence or that of an immediate family member. *Id.* § 2524.4(a)-(c). A landlord may also refuse to renew a lease by demonstrating to DHCR either that it intends to use the unit for a business it owns

and operates or that redressing substantial building-code violations would be financially impracticable. *Id.* § 2524.5(a)(1). And a landlord may obtain DHCR's authorization not to offer renewal leases in order to demolish or rehabilitate a building. *Id.* § 2524.5(a)(2)-(3).

In the three decades after 1990, landlords under the RSL saw net operating income increase by more than 40 percent, after adjusting for inflation. N.Y.C. Rent Guidelines Bd., *Housing NYC: Rents, Markets & Trends 2020* 35, https://perma.cc/7NLH-3SG7 (captured Apr. 16, 2021).

B. Petitioners' facial challenge to the Rent Stabilization Law

1. Following the 2019 amendments, petitioners challenged the entirety of the RSL on its face under the Takings Clause and Due Process Clause, seeking injunctive and declaratory relief. Large portions of petitioners' complaint addressed their now-abandoned due-process claim (Pet. App. 110a-153a) and regulatory-taking claim under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (Pet. App. 183a-216a). The district court

(Komitee, J.) dismissed the complaint (*id.* at 33a-66a).[2]

2. The court of appeals unanimously affirmed (*id.* at 1a-30a). It rejected petitioners' claim that the RSL facially causes a physical occupation of their properties (*id.* at 18a-19a), drawing on *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), and *Yee v. City of Escondido*, 503 U.S. 519 (1992). The court noted this Court's decisions respecting the states' long-standing authority over the landlord-tenant relationship and affirming the validity of rent regulations (Pet. App. 19a, 21a). It also explained that the RSL on its face does not prohibit a property owner from exiting the rental market or evicting an unsatisfactory tenant (Pet. App. 19a-22a). The court affirmed the dismissal of petitioners' facial regulatory-taking claim because petitioners had not plausibly alleged that the RSL worked a taking under *Penn Central* as to every regulated landlord (Pet. App. 22a-28a).[3]

Petitioners did not seek rehearing en banc.

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[2] The court's opinion also addressed a separate action that is likewise the subject of a pending petition for certiorari (Pet. App. 34a). *See 74 Pinehurst LLC v. New York*, No. 22-1130.

[3] The court also affirmed the dismissal of petitioners' due-process claim, which is outside the scope of the petition (Pet. App. 28a-30a).

REASONS FOR DENYING THE PETITION

I. The physical-taking question does not warrant review.

A. This case is a poor vehicle for addressing physical takings.

In several respects, this case is a poor vehicle for a grant of certiorari on the physical-taking issue. First, petitioners' physical-taking claim cannot redress their real grievance with the RSL—the statute's requirement that they accept below-market rents. Indeed, this Court's precedents have repeatedly confirmed that price controls are not physical takings. *Pennell*, 485 U.S. at 12 n.6; *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987). Even petitioners now seem to recognize this: while their complaint sought to enjoin the entire RSL as a physical taking (Pet. App. 224a), and their circuit brief was framed similarly, their petition's physical-taking arguments focus on a handful of RSL provisions other than those governing the pace of rent increases.

Second, with the physical-taking claim appropriately focused, the claim runs into other problems. The complaint does not establish that petitioners even have article III standing to seek injunctive or declaratory relief against the now-targeted provisions—at a minimum, the Court

would need to resolve the threshold question of standing before it could reach the merits. Nor is it clear what significance the physical-taking claim really holds from petitioners' standpoint. While the petition complains about the RSL's restrictions on the ability to change the use of their properties (Pet. 9-16), the complaint does not allege that the owner petitioners or the organizational petitioners' members actually wish to stop using their properties for residential rentals.

By stipulation, only multi-unit residential properties in New York City are covered by the RSL—two petitioners, for example, own 84-unit residential buildings (Pet. App. 87a-88a). The complaint does not allege that applicable zoning would even allow changes of petitioners' properties away from residential use.

The complaint also does not allege that the owner petitioners or the organizational petitioners' members have any current wish to change the use of their properties, either by redeveloping them, converting them to condos or cooperatives, or living in them. Petitioners do not claim to wish to change their properties into commercial or industrial sites, even assuming zoning would allow it (*contra* Pet. 9-16). They also do not claim any wish to stop renting covered residential units—the complaint does not, for example, allege any current desire on the part of the petitioner property owners or their sharehold-

ers to reside in the properties personally.[4] And while the petition briefly complains (at 19-20) about restrictions enacted in 2019 on property owners' ability to explore the common forms of non-rental use of large multiple dwellings in New York City—such as conversion to condominium or cooperative ownership—the provisions in question are outside the scope of the relief sought in this case.[5] In any event, here too, the complaint does not

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[4] The complaint offers the individual petitioner's allegations about two past personal-use applications—filed more than seven years ago and long before the 2019 RSL amendments—only by way of example (see Pet. App. 167a-169a). Any claim challenging the outcome of those applications would be long time-barred in any event. *See Sherman v. Town of Chester*, 752 F.3d 554, 566 (2d Cir. 2014) (noting three-year statute of limitations for claims under 42 U.S.C. § 1983 in New York). And those long-past episodes would not support a present injunction, where the petitioner in question does not allege that she currently wishes to exercise any personal-use option.

[5] The complaint seeks relief against the RSL (Pet. App. 224a), which it defines as the ETPA, N.Y. Unconsol. Laws, Ch. 249-B, New York City Administrative Code § 26-501 *et seq*., and DHCR's implementing regulations for those statutes (Pet. App. 74a-75a). While the complaint references the laws governing condominium and cooperative conversions (Pet. App. 178a-179a), it does not seek relief against those laws, which are contained in New York's General Business Law and apply whether or not units are rent-stabilized. *See* N.Y. Gen. Bus. Law § 352-eeee.

allege any wish to convert the properties to condominiums or cooperatives away from rental use.

Likewise as to the RSL's renewal and successorship provisions that petitioners complain about (Pet. 16-19), which long pre-date the recent RSL amendments. As an initial point, landlords do not have an unfettered right to choose their tenants, even apart from the RSL. *See Yee*, 503 U.S. at 529. More pointedly for the purpose of standing, petitioners do not allege that they wish to change their tenants. They do not claim that the specific tenants that they have offered renewal or successor leases are unsatisfactory tenants; nor do they explain how the presence of one satisfactory rent-stabilized tenant could constitute a physical invasion—a necessary element of a physical-taking claim—where petitioners would just replace that tenant with another one paying the same rent on the same terms (*see* Pet. App. 93a-94a, 159a-60a).

Third, beyond petitioners' standing difficulties, the purely facial nature of their physical-taking claim raises additional problems. Petitioners' allegations lack the "actual factual setting" that this Court has demanded when considering taking claims. *Pennell*, 485 U.S. at 10 (cleaned up). Indeed, petitioners disclaim any obligation to show how the RSL's provisions apply to them (*see* Pet. App. 74a). Instead, their complaint offers "illustrations" and general examples of how its provisions

may apply in some instances (*see, e.g.*, *id.* at 159a-160a, 162a). Tellingly, petitioners try to recast the standard for a facial challenge to avoid having to show that the challenged provisions effect a taking as to all or even most landlords (Pet. 20-21)—a maneuver that the court of appeals rejected (*see* Pet. App. 12a-15a). But whatever the proper standard, petitioners' broad allegations cannot pave over the variations as to how the RSL applies to thousands of landlords' use of their respective properties. For this reason, too, the case does not provide a good vehicle to address petitioners' first question presented.

B. The physical-taking question presents no split in authority or issue of national importance.

There is also no need for this Court to take up the first question presented in any case—and certainly not to do so now. Petitioners identify no conflict among the decisions of the lower courts, and the case raises no issue of national importance.

1. Petitioners falter in trying to show a circuit split about the application of physical-taking principles to tenancy protections (Pet. 22-23). The cited decision of the Eighth Circuit addressed a markedly different type of regulation from the one at issue here.

Heights Apartments, LLC v. Walz, 30 F.4th 720, 725 (8th Cir. 2022), concerned a pandemic-era emergency order prohibiting eviction of tenants even if they were materially breaching their leases. Applying *Cedar Point*, 141 S. Ct. at 2072, and *Yee*, 503 U.S. at 527-28, just as did the Second Circuit below, the Eighth Circuit held that the plaintiff had stated a claim that the restriction on removing breaching tenants worked a physical taking. *Heights Apartments*, 30 F.4th at 733.

The RSL, unlike the eviction moratorium in *Heights Apartments*, does not prohibit the eviction of materially breaching tenants. 9 N.Y.C.R.R. §§ 2524.1, 2524.2, & 2524.3. *Heights Apartments*' holding is thus consistent with the Second Circuit's decision below, which relied on the availability of various means under the RSL to terminate a tenancy (Pet. App. 19a-20a). Any broader dicta in the Eighth Circuit's decision does not raise a ripe conflict at this time.

If a conflict did exist, it would be an exceedingly shallow one. And if petitioners are correct that rent regulations are becoming more popular nationwide (Pet. 23-24), other circuit courts will surely have the opportunity to weigh in, and this Court can assess whether to grant certiorari after further percolation. If petitioners are incorrect, then no conflict of significance may ever arise. In either case, review is not warranted at this time.

2. Petitioners' assertion that the physical-taking issue holds national importance likewise rings hollow. While rent stabilization is extremely important to everyday New Yorkers—since New York is a city of renters, and millions live in rent-stabilized units—the issue does not have broad significance nationwide. Petitioners assert only that a few purportedly similar provisions apply in just a couple of other high-cost municipalities (*id.*). Indeed, New York's rent-stabilization scheme does not even apply to the entire state, as localities may opt into it only if housing vacancies are below the five percent threshold. N.Y. Unconsol. Law Ch. 249-B, § 3.

Nor do petitioners' claims of political victimization warrant the Court's intervention (Pet. 25, 31). Takings jurisprudence does not license courts to overrule the judgments of a functioning democratic system. *See, e.g.*, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 545 (2005); *Penn Central*, 438 U.S. at 134. And, in any case, the real-estate industry is among the most powerful interest groups in New York. As the court below noted, the history of rent stabilization in New York demonstrates that there is a robust political process meant to find "an appropriate balance between the sharply diverging interests of landlords and tenants … over a very long list of complicated and difficult questions" (Pet. App. 9a-10a; *accord id.* at 15a). Indeed, the Legislature has

amended the RSL multiple times to make regulation friendlier to landlords. 1993 N.Y. Laws ch. 253; 1997 N.Y. Laws ch. 116; 2003 N.Y. Laws ch. 82. Petitioners are asking the Court to intercede simply because the balance recently shifted somewhat towards tenants.

Already the pendulum may be swinging anew. In 2022, the Legislature amended the cooperative-conversion provisions enacted in 2019 to ease conversions of smaller buildings. *See* 2022 N.Y. Laws ch. 696. And while the petition highlights proposed tenant-friendly legislation (Pet. 23), the cited bills failed in the just-concluded legislative session, confirming the industry's enduring influence in New York politics. *See* Luis Ferré-Sadurni & Grace Ashford, *New York Lawmakers Pass Clean State Act as Legislative Session Fizzles to an End*, N.Y. Times, June 11, 2023, at A20; Eddie Small & Nick Garber, *Impasse Over "Good Cause" Imperils Push for More Housing*, Crain's N.Y. Business, May 15, 2023, at 1.

C. Petitioners' objection to the Second Circuit's application of settled law does not warrant review.

Review should also be denied because petitioners merely take issue with the court of appeals' application of settled law.

1. In *Yee*, the Court rejected a facial physical-taking challenge to a municipal mobile-home rent regulation that operated against the backdrop of a state statute limiting the grounds on which a landowner could evict a mobile-home-park tenant. 503 U.S. at 524. The plaintiff landowners argued that the statute and ordinance gave tenants "a right of physical occupation" of their property. *Id.* at 527.

The Court explained that there was no compelled physical invasion because "tenants were invited by petitioners, not forced upon them by the government." *Id.* at 528. Thus, "[w]hen a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge, or require the landowner to accept tenants he does not like, without automatically having to pay compensation." *Id.* at 529 (cleaned up). The Court suggested, however, that a restriction on the use of property might become a physical taking if, "on its face or as applied," it were "to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Id.* at 528.

2. The Second Circuit faithfully applied *Yee* in rejecting petitioners' facial challenge (Pet. App. 19a-22a).

The RSL's renewal and successorship provisions closely resemble those in the statute discussed in *Yee*. *See* 503 U.S. at 524. The court of appeals rejected petitioners' arguments concerning renewal and successorship rights (Pet. 16-19) because *Yee* held that a landlord does not have a physical-taking claim simply because the landlord lacks unfettered ability to select their tenant. *Yee*, 503 U.S. at 529-31. Petitioners suggest that a physical taking occurs any time a tenancy regulation requires the presence of "a third party not chosen by the property owner" (Pet. 17). But as *Yee* noted, regulations—including antidiscrimination laws—may require a landlord "to accept tenants he does not like." 503 U.S. at 529 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964)).

The court's analysis of the RSL's exit options also follows directly from *Yee* (Pet. 9-16, 19-20). The RSL does not require a landlord to "refrain in perpetuity from terminating a tenancy," *Yee* 503 U.S. at 528, because it and other provisions of New York law provide various grounds not to renew a lease, *see, e.g.*, 9 N.Y.C.R.R §§ 2524.4, 2524.5; N.Y. Gen. Bus. Law § 352-eeee. Petitioners' complaints about the alleged difficulties of exercising these exit options fail for the same reason that the facial challenge failed in *Yee*: exit options exist on the face of the RSL, and petitioners here, like those in *Yee*, do not allege that they have tried and failed to use

them (aside from a single allegation that one petitioner attempted to reclaim one rent-stabilized unit for personal use more than seven years ago).

In fact, *Yee* rejected an argument identical to petitioners' contentions: because the plaintiffs did "not claim to have run th[e] gauntlet" that was supposedly presented by the statutory exit option, the Court was required to "confine [itself] to the face of the statute." *Yee*, 503 U.S. at 528. And on its face, the RSL offers landlords exit options. These petitioners just chose not to use them, perhaps because they do not wish to exit the residential rental market at all.

Contrary to petitioners' assertions (*see, e.g.*, Pet. 14, 18), the Second Circuit's decision does not foreclose a physical-taking challenge to the RSL. The court decided only the case that petitioners brought—one alleging purely facial claims against the entirety of the RSL, without factual allegations that the complained-of provisions compelled the presence of tenants on all owners' property. The court's holding does not preclude an as-applied claim by an owner who alleged that the RSL actually prevented change of use of its property.

3. The petition does not include any request for the Court to overrule *Yee*, instead asserting that the court of appeals "misinterpreted" it (Pet. 16) in light of the Court's more recent physical-taking

decisions, in particular *Cedar Point*, 141 S. Ct. 2063. But contrary to petitioners' refrain (Pet 2, 14), the Second Circuit did not hold that *Cedar Point* is inapplicable to the landlord-tenant setting. Instead, the court correctly concluded that *Cedar Point*, which did not involve a regulation of the landlord-tenant relationship, neither abrogated nor undermined *Yee* (Pet. App. 18a-19a, 21a-22a).

Cedar Point held that a state regulation granting labor organizations a right to access the premises of agricultural employers "constitute[d] a *per se* physical taking" because it conferred "a right to invade" the property. 141 S. Ct. at 2080. The case thus involved a regulation granting access to a category of entrants that a property owner did not want to admit. It confirmed the vitality of the key distinction underlying *Yee*'s analysis, between a government restriction that compels entry of uninvited persons and a restriction that limits an owner's ability to exclude persons of a type (here, tenants) that the owner allows entry as part of its business. *See id.* at 2076-77 (discussing *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980)). The court of appeals thus correctly recognized that *Cedar Point* did not require it to disregard the clear implications of *Yee* for petitioners' claim.

II. The regulatory-taking question also does not warrant review.

Certiorari should also be denied as to petitioners' second question presented, which addresses an issue that is not raised by this case and does not warrant review in any event.

A. The *Pennell* dissent's test is neither sound nor relevant to petitioners' case.

Petitioners ask the Court to evaluate the RSL's provisions for determining the maximum annual rent increase, and in particular its direction to the Rent Guidelines Board to consider cost-of-living data as a factor in setting those increases, under the reasoning of the dissenting opinion in *Pennell*, 485 U.S. at 19-24 (Scalia, J., dissenting). But the dissent's analysis applied the now-discredited idea that a law "effects a taking if [it] does not substantially advance legitimate state interests." *Id.* at 18 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)); *see Lingle*, 544 U.S. at 545 (unanimously discarding the "substantially advances" test). Moreover, the root principle articulated by the dissent—that individuals should not bear burdens that properly should be borne by society as a whole (*see* Pet. 29)—is already reflected in the prevailing *Penn Central* test for regulatory takings. 438 U.S. at 123-24; *accord Tahoe-Sierra Pres.*

Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336 (2002).

Nor does the RSL present the circumstances that animated the dissent in *Pennell*. That dissent endorsed the general concept of rent regulation and found fault with the ordinance at issue only in that it allowed a showing of financial hardship by an individual tenant to reduce that particular tenant's permissible rent "below what would otherwise be a 'reasonable rent.'" *Pennell*, 485 U.S. at 20-21 (Scalia, J., dissenting). But the RSL differs in at least two important ways. First, the RSL does not allow particular tenants to seek a haircut to their rent based on individual financial circumstances. And second, cost of living is simply one factor to be considered among many others in analyzing where to set the rent increase permitted by the RSL, not the direct source of any quantifiable reduction in the authorized increase.

Indeed, the Rent Guidelines Board uses a variety of data—including data about general cost of living and affordability—to determine reasonable rent increases for all covered units citywide. *See* N.Y.C. Admin. Code § 26-510(b). Nothing in the *Pennell* dissent hints that the mere addition of general cost-of-living data to other economic indicators transforms an otherwise permissible system of rent regulation into an unconstitutional taking. And since general affordability is an area of con-

cern for almost all rent regulation, that approach would seem to imperil rent regulation as a concept—which the *Pennell* dissent disavowed.

B. The viability of the *Pennell* dissent is also neither properly raised here nor cert-worthy.

1. In any event, petitioners failed to properly plead any claim challenging the Rent Guidelines Board's use of cost-of-living data—the asserted basis for their invocation of the *Pennell* dissent. Petitioners' complaint did not allege that consideration of cost-of-living data was the cause of their alleged injuries. It did not even mention the provision of the RSL that requires the Board to consider this information. Petitioners' allegations that the RSL required them to charge below-market rents (*e.g.*, Pet. App. 93a-94a, 189a), is not sufficient, since that circumstance inheres in all rent regulation—which the *Pennell* dissent did not object to in general, and which petitioners do not purport to contest here. Perhaps for that reason, petitioners' brief-like complaint mentioned *Pennell* only in passing and focused on *Penn Central* instead (Pet. App. 185a-216a).

2. Petitioners also identify no decision of a federal court of appeals or state high court that disagrees with the Second Circuit's treatment of *Pennell*. That is so even though (a) petitioners argue

that the path is open for lower federal courts to adopt the *Pennell* dissent, claiming that the majority did not reject its reasoning (Pet. 29), and (b) state courts would be free to adopt its reasoning as a matter of state law even if it were foreclosed as a matter of federal precedent. Indeed, the two cases cited by petitioners (Pet. 29-30) do not address *Pennell*, let alone adopt its dissent as governing law. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1337 (Fed. Cir. 2003) (applying *Penn Central* test); *Property Owners Ass'n of N. Bergen v. Twp. of N. Bergen*, 74 N.J. 327, 333 (1977) (predating *Pennell*). Despite petitioners' critiques of *Penn Central*, courts have dutifully applied it for decades. Petitioners cite nothing to suggest that any court of appeals or state supreme court has abandoned it or adopted a different test rooted in the *Pennell* dissent.

3. Nor do petitioners' assertions that the *Pennell* issue holds national importance (Pet. 31-34) withstand scrutiny. To begin, petitioners cite only two other jurisdictions that they claim consider tenants' ability to pay (*id.* at 34). And, again, considering particular tenants' ability to pay in setting specific rent increases is different from considering general cost-of-living data in an overall analysis, as the RSL directs for New York City.

Petitioners also vastly overstate the significance of the inclusion of cost-of-living data on landlords'

returns within New York City. The Board has authorized three percent or greater rent increases in each of the last two years. *See* N.Y.C. Rent Guidelines Board, *2023 Apartment & Loft Order #55* (June 21, 2023), https://perma.cc/AD3N-WK9Ll; *N.Y.C. Rent Guidelines Board Apartment Orders #1 through #54*, https://perma.cc/9QPD-GNBW (captured July 9, 2023). And the history of the RSL demonstrates that the size of annual increases has varied as the Board considers changing conditions and the interests of landlords, tenants, and the public, as the statute requires. *See id.*

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There is no reason to grant review on either of petitioners' questions. Both have serious vehicle problems and implicate no split in authority or question of national importance. At the same time, the petition aims to stoke deep uncertainty and disruption across the New York residential rental market. Millions of New York City residents live in rent-stabilized units; those New Yorkers and their communities rely on the stability that the RSL's rent regulations provide. And the industry too has operated under the RSL for decades, making educated business decisions based on it. The shock to the system that petitioners seek would disrupt lives and plans throughout the City.

CONCLUSION

The petition for a writ of certiorari should be denied.

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