Nos. 22-1095, 22-1130, 22-1170

In The Supreme Court of the United States

CHIP, et al.,

Petitioners,

v.

CITY OF NEW YORK, NEW YORK, et al.,

Respondents.

74 PINEHURST LLC, et al.,

Petitioners,

v.

NEW YORK, et al.,

Respondents.

335-7 LLC, et al.,

Petitioners,

v.

CITY OF NEW YORK, NEW YORK, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF ALEXANDER GALLO IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Alexander Gallo is a landlord in the District of Columbia who operates under a statute like the RSL, and who is familiar with the intricacies of both landlord-tenant law and the Takings Clause. Before becoming a landlord, he was a tenant. His interest is ensuring that rent control operates constitutionally.[1]

SUMMARY OF ARGUMENT

The RSL appears facially unconstitutional on two grounds unaddressed below but "fairly included" (Rule 14.1) in all three cases challenging the RSL. This Court should consolidate these cases and consider the question raised by *335-7 LLC*: whether the RSL is a confiscation of income. This court should also consider the physical taking questions, reformulated to the ground of repossession for personal use and adding to the question presented whether the taking satisfies the public use clause.

These issues were sidestepped below in *335-7 LLC* but are critical to all three cases. "the RSL does not effect a confiscatory taking . . . they cite no case that has ever applied the confiscatory taking doctrine in the landlord-tenant context. We decline to expand the

[1] The parties received timely notice of amicus' intent to file this brief. No party authored the brief in whole or part or contributed monetarily.

doctrine here[2] and thus affirm the district court. Finally, because we have found that the RSL has not effected a taking, it could not have effected a taking for a non-public use" No. 22-1170, Appendix at 12.

ARGUMENT

I. Confiscation Doctrine Should Control Here

a) Rent Control was Always Assessed under "Confiscation" Doctrine

The challenge to price restrictions here was assessed only under *Penn Central*. But a *price* restriction is not a *use* restriction. Under a price control, the property's use is typically static. Only the price increase is restricted.

The Second Circuit below rests entirely on *Penn Central*, but this court in *Pennell* did not even cite *Penn Central*. *Penn Central* considered whether historic preservation is a taking, asking: do enough *uses* of a designated structure remain for a parcel to not be effectively "taken?" This three-part use-centric test should not replace the one-step test long used to assess price restrictions.

[2] The Second Circuit conflicts with itself. See *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 595 (2d Cir. 1993) ("confiscatory rents" & "unable to remedy the confiscatory results")

335-7 LLC raises this question (Petition at 22). This court should consider it or, at a minimum, vacate and remand these cases with instruction to consider it. Courts adjudicating rent control have long used a one-step inquiry under the confiscation doctrine: does it guarantee a "reasonable" rate of return? Property retains sufficient value if so.

DC cases include: *Kennedy Bros. v. Sinclair*, 287 F. 972 (D.D.C. 1923) (compelling a rate of return below the prevailing interest rate would be confiscatory); *Karrick v. Cantrill*, 51 App. D.C. 176, 277 F. 578 (1922) (same); *Rust v. Heavy*, 286 F. 782, 52 App. D.C. 320 (1923) (return of 4 per cent "confiscatory"), *Moore & Hill, Inc. v. Marshall*, 52 App. D.C. 326, 286 F. 990 (1923) ("if the net income from the rental, above the ordinary expenses, falls below 6 per cent . . . confiscatory").

The doctrine was widely applied: *Plaza Management Co. v. City Rent Agency*, 254 N.E.2d 227 (N.Y. 1969) ("the guarantee of a minimum return of 6%, over and above operating costs . . . entirely adequate to insure a landlord against an unconstitutional confiscation"), *Helmsley v. Borough of Fort Lee*, 78 N.J. 200 (N.J. 1978) ("At some point, steady erosion of NOI becomes confiscatory" & "ordinances did not provide constitutionally adequate administrative relief from the

confiscatory effects"),[3] *Zussman v. Rent Control Board of Brookline*, 359 N.E.2d 29 (Mass. 1976) ("A 6.8% rate of return allowed a landlord by a rent control board was not shown to be confiscatory"). These holdings concerning specific rates were published in varying interest rate and legal environments.

Penn Central emerged in 1977. Afterward, state courts assessing rent control continued to exclusively consider confiscation doctrine: *Fisher v. City of Berkeley*, 37 Cal.3d 644 (Cal. 1984), *San Marcos Mobilehome v. City of San Marcos*, 192 Cal.App.3d 1492 (Cal. Ct. App. 1987), *Baker v. City of Santa Monica*, 181 Cal.App.3d 972 (Cal. Ct. App. 1986), *Mayes v. Jackson Tp. Rent Leveling Bd.*, 103 N.J. 362 (N.J. 1986) ("sufficient flexibility to avoid confiscatory results"), *Silverman v. Rent Leveling Bd.*, 277 N.J. Super. 524 (App. Div. 1994), *Galland v. City of Clovis*, 24 Cal.4th 1003 (Cal. 2001) ("rent ceilings that were set so low as to be confiscatory"). See also *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal.4th 761 (Cal. 1997) (comparing the moorings of confiscation doctrine)[4] and *Quinn v. Rent*

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[3] New Jersey's supreme court issued several rulings articulating these principles. *Troy Hills Vil. v. Tp. Council Tp. Parsippany-Troy Hills*, 68 N.J. 604 (N.J. 1975); *Hutton Pk. Gardens v. West Orange Town Council*, 68 N.J. 543 (N.J. 1975); *Brunetti v. Borough of New Milford*, 68 N.J. 576 (N.J. 1975) (hardship petitions "provide relief for landlords who are unable to meet their expenses or recover a reasonable profit")

[4] "Though the court was addressing a takings issue, it did not cite Penn Central. Instead, it cited due process cases, including Permian Basin" *Kavanau*, at 776, citing *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

Control Board of Peabody, 45 Mass. App. Ct. 357 (Mass. App. Ct. 1998) ("far from suffering an illegal taking, the owners here are secured by statute in the right to a determination of rents that will yield the FNOI . . . far from any confiscatory intention or threat").

Penn Central has seemingly supplanted the confiscation doctrine. For example, when the Ninth Circuit in 2009 assessed a facial challenge to rent control, the inquiry was only whether it "constitutes a regulatory taking under Penn Central" *Guggenheim v. City of Goleta*, 582 F.3d 996 (9th Cir. 2009). It was held not to by the en banc court, which did not address confiscation doctrine. *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010). The Second Circuit lost sight of its history in this context.

This court should return these cases to their natural habitat: whether the statute guarantees a reasonable Net Operating Income (NOI) over and above cost.[5] This is the floor below which price control becomes per se unconstitutional,[6] as made clear by this court in *West v. C. P. Tel. Co.*, 295 U.S. 662 (1935) ("where by legislation prescribing rates or charges the use of the property is taken, just compensation assured by these

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[5] A "fair net operating income." *Marshal House, Inc. v. Rent Control Board of Brookline*, 358 Mass. 686 (Mass. 1971).

[6] Value alone is not an interest: *Reichelderfer et al. v. Quinn et al.*, 287 U.S. 315 (1932) ("value alone does not generate interests protected by the Constitution"). Income is on a higher plane: *Lindsey v. Normet*, 405 U.S. 56 (1972) ("Constitution expressly protects against confiscation of private property or the income therefrom").

constitutional provisions is a reasonable rate of return . . . the utility company is not limited to a return on cost").

b) The Second Circuits Splits with State Courts and the DC Circuit on this Ground

These cases allege facts which, if substantiated, demonstrate the RSL is facially confiscatory:

- "RGB's own estimates confirm that owners' net operating income is being reduced each year" and "could eliminate the owner's net operating income entirely." – No. 22-1095, *Appendix* at 191a
- "preventing the recovery of investments." – *Id.* 199a
- "requirements for demonstrating a 'hardship' are so onerous" that relief is practically unavailable. – *Id.* at 208a
- 5-6% of buildings have costs exceeding revenue, with no recourse. – *Id.* at 208a
- "he had submitted approximately two-dozen hardship applications. All of them were either denied, or never acted upon. Notably, the RSL does not set any timeline for resolution of hardship applications, allowing the DHCR to simply take no action on such application." – *Id.* at 208a.
- "does not keep up with their costs, thereby putting Petitioners on an inexorable path to insolvency." – No. 22-1170, *Petition* at 3.

California's Supreme Court in *Birkenfeld* found the unworkability of that regime's hardship process

was dispositive. Other state courts held similarly: *AOBA v. Washington*, 343 A.2d 323, 331 (D.C. 1975) ("inherently incapable of functioning as the required pass-through mechanism."), *Helmsley v. Borough of Fort Lee*, 78 N.J. 200 (N.J. 1978) (process must afford "prompt and efficacious relief from widespread confiscatory effects"),[7] *Westchester West No. 2 v. Mont. Co.*, 276 Md. 448, 464 (Md. 1975) ("landlords are protected by the law's procedures permitting rent increases exceeding the allowable basic annual increases"). The Second Circuit also splits with *District Properties v. District of Columbia et al.*, 743 F.2d 21 (D.C. Cir. 1984) (finding facial challenge permissible against the "practices and procedures" of the rent control office which would entitle landlords to "'structural' forms of relief").

This court should reaffirm robust protections under confiscation doctrine.[8] Value will be restored once the RSL is made non-confiscatory, without this court wading into policy judgments over "burdens" or who "subsidizes" whom once owners are assured a reasonable return. Accordingly, this court should consolidate

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[7] See also *Property Owners Ass'n of North Bergen v. North Bergen Tp.*, 74 N.J. 327, 336 (1977) (finding rent control ordinance with insufficient hardship relief unconstitutional).

[8] There are other reasons to avoid a "value" test in this context. Confiscation is a per se test which guarantees *every* owner a "reasonable" return. "Value" is an ambiguous concept which would give some owners who claim sufficiently large "value" reductions a full reimbursement by the government despite possibly having made a positive rate of return for decades (e.g., a windfall), while other owners with less "value" reduction but possibly zero or negative returns would be denied any relief.

these three cases and consider the Question Presented by *335-7 LLC*.

II. Physical Taking

This court's attention is equally warranted here. However, the court should reformulate the multiple questions presented to one which captures the essence of these cases while avoiding issues of state law or widening the aperture to "no-fault" regulations generally. The court may wish to reformulate a consolidated Question Presented to:

- *Is the RSL's prohibition on possessory use by an owner – by prohibiting the termination of a statutory tenancy – a physical taking? And if so, is the taking for Public Use?*

Reformulating allows resolution of the issue of whether an owner has a right to possess his or her own house without hinging on state law issues such as (1) whether a lease "expires" or is "time-limited" or (2) whether a successor is a "stranger." The answer seems to have been identified in *Yee*: "refrain in perpetuity from terminating a tenancy." *Yee v. Escondido*, 503 U.S. 519, 528 (1992). The RSL does precisely that, but given the tenancy is compensated, only the Public Use clause is the boundary here.

a) Extended Tenancies and Successorship

State law may control who constitutes a "stranger" or whether leases "expire."[9] These questions are irrelevant here. The RSL can be understood or construed as simply prohibiting at-will or term-limited estates, permitting "periodic" or "sufferance" estates. The minutiae need not complicate the issue here, which is: compelled statutory tenancy.[10] New York's Court of Appeals found that family members are not strangers in *Rent Assn. v. Higgins*, 83 N.Y.2d 156, 172 (N.Y. 1993), instead putting the physical taking focus under *Yee* on whether the owner had "voluntary acquiescence" with the *use* of the property as a rental. A leasehold estate is property of the tenant: "A leasehold has long been regarded in this State as a 'chattel real' and as such is personal property." *Ampco Print. – Advs. Offset Corp. v. City of*

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[9] New York's court of chancery stated long ago: "the renewed lease is, in equity, considered as a mere continuance of the original lease, subject to the additional charges upon the renewal . . . whoever has a lease, has an interest in its renewal." *Phyfe v. Wardell & Woolley*, 5 Paige Ch. 268 (1835). Similar doctrine has been stated here: *Soper v. Myers*, 45 App. D.C. 286 (1916) ("equity will compel the landlord to renew"); *R. Harris & Co. v. Weller*, 52 App. D.C. 6, 280 F. 980 (1922) ("a renewal of a lease by a tenant in possession is considered in equity as a mere continuance of the original lease").

[10] The DC Circuit upheld an older rent control regime which permitted tenants to continue residing "Notwithstanding she had no lease, or that her lease had expired" so long as they don't breach the original lease terms. *Myers v. H.L. Rust Co.*, 134 F.2d 417 (D.C. Cir. 1943).

N.Y., 14 N.Y.2d 11 (N.Y. 1964).[11] New York has regulated and converted estates before.[12]

The crux of these cases is: Petitioners no longer voluntarily acquiesce to rental use, which was the dispositive factor in the New York court's physical takings analysis. Reformulating the questions allows this court to focus on perpetually compelled statutory tenancy over objection.

b) The "Fairly Included" Public Use Question

Let's say the RSL is held to be a physical taking. The state would then simply declare the taking is for a public use with compensation ensured by statute. This court has stated that statutory tenancy is a *compensated* taking: "The standard of the statute is as definite as the 'just compensation' standard adopted in the Fifth Amendment to the Constitution, and therefore ought to be sufficiently definite to satisfy the Constitution." *Levy Leasing Co., Inc. v. Siegel*, 258 U.S. 242 (1922). It is permissible for "lessees to initiate the taking process." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (footnote 6). Similarly, "the exigency existing in the District clothed the letting of buildings

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[11] This court has held the same in the District: "the title to the leasehold term being personalty, would have passed to and vested in him." *Prout v. Roby*, 82 U.S. 471 (1872).

[12] See *Van Rensselaer v. Kearney et al.*, 52 U.S. 297 (1850) (abolishing estates tail and converting them into fee simple). See also *Wendell v. Crandall*, 1 N.Y. 491 (1848).

there with a public interest." *Block v. Hirsch*, 256 U.S. 135 (1921). *Block* also stated, relevantly: "assuming the owner in this case did not desire the premises for his own use." *Id*.

There are surely public interests in ensuring that, upon an owner's desire to personally use, statutory tenants have sufficient time to relocate. There is public interest in rent stability and security of residences broadly. However, "the city could not take petitioners' land simply to confer a private benefit on a particular private party." *Kelo v. City of New London*, 545 U.S. 469 (2005).

Amicus' proposed question limits this court's consideration to cases where the owner *truly desires* possession. Take for example a large corporate-owned apartment building. Regulations prohibiting eviction for "expiration" of term (thus protecting tenants from "no-fault" eviction suits) need not be considered to affirm Petitioners' right to possession. Such buildings cannot be personally possessed by the corporate lessor in most cases. Smaller buildings, owned by natural persons or closely held family entities, are far fewer in number and thus seemingly less "clothed" with public interest. Where lessors do not seek to cease rental use, statutory tenancy does not implicate the possessory rights claimed here where the owner desires to occupy.[13]

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[13] As this court observed in *Sheets v. Selden*, 74 U.S. 416 (1868), a landlord's right to repossess for nonpayment of rent is "an incident intended to secure its payment." Landlords in such

c) The Split Between Appeals Courts is Real – but Different

Petitioners present a split between the Second and Eighth Circuits.[14] Amicus contends different circuit splits exist which warrant this court's attention.

The Second Circuit held: the government can *extend* a tenancy and there's no physical taking because the tenancy was "invited" by the landlord with the statute merely adjusting the estate's duration to perpetual, "regulating" a relationship with no occupation "imposed by the legislature." No. 22-1095, Appendix at 20a. This conflicts with *Warthen v. Lamas*, 43 A.2d 759 (D.C. 1945) (stating such laws "create a non-contractual statutory right of possession in the tenant"). A statutory grant of possession is inherently a physical taking. What the RSL really does, as *335-7 LLC* observes (Petition at 21) is: perpetually bar the landlord's reversionary interest from becoming *present*.[15] A

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cases – unlike Petitioners here – do not seek to permanently repossess, but rather evict persons committing theft. See also *Manocherian v. Lenox Hosp*, 84 N.Y.2d 385 (N.Y. 1994) Levine, J. (dissenting) ("dominion property interests, that is, the right to exclude others or recover possession, may be of significance to an individual homeowner or even perhaps the lessor of a modest multifamily dwelling, but not for the modern urban real estate entrepreneur's leasing of a large apartment building where the values at stake in the landlord's reversionary rights are almost completely economic").

[14] *Heights Apartment* considered compelled occupancy by a breached tenant "without compensation" – a different scenario.

[15] See *DC v. Design Center Owner*, 21-TX-0473 (D.C. 2022) (observing landlords' already-vested *future* interests become

tenancy was terminable before and under the RSL it's not. The leasehold is now at sufferance – inherently compelled.

The Second Circuit conflicts with the DC Circuit in *National Wildlife Federation v. I.C.C.*, 850 F.2d 694 (D.C. Cir. 1988) (holding that delaying a reversion in land is a physical taking), the Federal Circuit in *Caquelin v. United States*, No. 19-1385 (Fed. Cir. 2020) (extending an easement for new use is a physical taking) and Washington's Supreme Court in *Lawson v. State*, 107 Wn. 2d 444 (Wash. 1986) (en banc) (same).

A non-confiscatory rent satisfies the Fifth Amendment if the public use clause is satisfied. *West v. C. P. Tel. Co*., 295 U.S. 662 (1935).

d) The Owner's Right is to Repossession – not Necessarily "Exclusion"

Reformulating would clarify subtle points. The right to exclude lies with a tenant as long as a tenant remains a tenant: See Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. (1998): "All other present possessory estates-the fee tail, the fee simple determinable, the life estate, the tenancy for years, the periodic tenancy, and even the tenancy at will – include the right to exclude others so long as the estate remains possessory." (at 747). Petitioners here seek to terminate a tenancy. If tenancies are validly extended

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present upon termination of lease). Precluding termination takes the right of possession.

by the RSL or if the tenancies are inherently "periodic" under it, then the landlord has no right to "exclude" prior to termination.

The Eighth Circuit used imprecise language on this point in *Heights Apartments*: "forbade . . . termination of ongoing leases, even after they had been materially violated" and "deprived Heights of its right to exclude existing tenants without compensation." 30 F.4th at 733. The Ninth Circuit was more precise decades earlier, holding that upon material breach a tenant does not remain a tenant but rather "the appellant ceased to be a tenant of the appellee and became a trespasser . . . " *Western Un. Tel. Co. v. Hansen Rowland Corp*., 166 F.2d 258 (9th Cir. 1948). *Heights* concerned trespass while the cases below concern tenancies at sufferance.

CONCLUSION

This court should reaffirm that price restriction must be non-confiscatory, and "property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them." *Smith v. Illinois Bell Tel. Co*., 270 U.S. 587 (1926).

This court should consider the physical taking issue – including the corollary public use clause – for owners who desire to personally reoccupy. The case of *Kagan v. Los Angeles*, No. 22-739, raises a similar question (whether a law which "bars termination" of an unwanted tenancy, preventing owner occupancy, is a

physical taking) but does not raise the public use clause issue. Consideration of the reformulated question would not disturb no-fault eviction rules where an owner does not desire to reoccupy.[16]

Respectfully submitted,

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[16] Should this court choose to consider successorship rights, prohibition on no-fault evictions (e.g., "expiration" of term), or condo conversion restrictions – a vast undertaking for one case – consideration of the public use clause becomes even more critical. Non-confiscatory rent has been held sufficient to uphold condominium conversion restrictions. See *Griffin Development Co. v. City of Oxnard*, 39 Cal. 3d 257 (1985) (affirming conversion restriction) and *Hornstein v. Barry*, 560 A.2d 530 (D.C. 1989) (same). Regulations on conversions from one rental use to another rental use seem appropriate for *Penn Central* consideration.