No. 22-1130

In the Supreme Court of the United States

74 Pinehurst, LLC,
Petitioner,

v.

New York, *et al.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* PROFESSOR RICHARD A. EPSTEIN AND THE BUCKEYE INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Richard A. Epstein
16 Thomas Place
Norwalk, CT 06583
(773) 450-4476
Raepstein43@gmail.com

Robert Alt
Counsel of Record
Dave C. Tryon
Jay R. Carson
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 224-4422
robert@buckeyeinstitute.org
d.tryon@buckeyeinstitute.org
j.carson@buckeyeinstitute.org

Counsel for Amicus Curiae

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Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.[1] The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute is dedicated to promoting free-market policy solutions and protecting individual liberties, especially those liberties guaranteed by the Constitution of the United States, against government overreach.

The Buckeye Institute has taken the lead in Ohio and across the country in advocating for the roll-back of government regulations that burden citizens' ability to exercise their constitutional rights to make free use of their property.

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[1] Pursuant to Rules 37.2(a) and 37.3(a), The Buckeye Institute states that it has provided timely notice of its intent to file this amicus brief to all parties in the case. Further, pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part and no person other than the amici have made any monetary contribution to this brief's preparation or submission.

Richard A. Epstein is the Laurence A. Tisch Professor of Law at the New York University School of Law, where he has taught since 2010. He is also the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution where he has served since 2000. He is also the James Parker Hall Distinguished Service Professor Emeritus and a Senior Lecturer at the University of Chicago. Epstein started his legal career at the University of Southern California, where he taught from 1968 to 1972. He served as Interim Dean of the University of Chicago Law School from February through June 2001.

Professor Epstein has written some twenty books, has prepared over 500 articles for publication in either law reviews or dedicated issues and numerous shorter articles that have appeared in many publications, including the Chicago Tribune, the New York Times and the Wall Street Journal. Of particular relevance to this case, Professor Epstein has written extensively on the law of takings and private property, including *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* (Harvard 2014); *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (Harvard 2011); *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* (Perseus Books 1998); *Simple Rules for a Complex World* (Harvard 1995) *Bargaining with the State* (Princeton 1993); *Takings: Private Property and the Power of Eminent Domain* (Harvard 1985); His numerous articles on property rights and rent control include *Rent Control and the Theory of Efficient Regulation*, 54 Brook. L. Rev. 741 (1988). He served as an editor of the *Journal of Legal*

Studies from 1981 to 1991, and of the *Journal of Law and Economics* from 1991 to 2001.

INTRODUCTION

In *74 Pinehurst LLC* v. *New York*, 59 F.4th 557 (2d Cir. 2023), a unanimous panel of the Second Circuit put itself on intellectual cruise control when, without serious discussion, it sustained the most intrusive rent control law in New York history, which nearly eliminates the right of landlords to remove tenants except for tenant defaults such items as failing to pay rent, creating a nuisance, violating the lease, or using the property for illegal purposes." N.Y. Comp. Codes R. & Reg. tit. 9, § 2524.3

But those default exceptions are wholly illusory. No rational tenant would commit such an imprudent breach of contract, which would trigger a forfeiture of the lease and a loss of hundreds of thousands of dollars. Yet the Second Circuit ignores the magnitude and deterrence effect of those losses as and supposes that because a tenant in an apartment with a market rent of $10,000 and a stabilized rent of $2,500 might commit a breach that would cost $7,500 per month, or $90,000 per year, the compelled extension of the lease is not a permanent physical occupation. The landlord is left hoping for such a breach in order to retrieve its property and restore it to its true fair market value. Consequently, for the overwhelming number of cases, the rent control statute creates a perpetual lease.

At no time does the Second Circuit examine the intellectual foundations of the modern takings law in allowing financial losses that are the direct

consequence of regulation to go uncompensated when the takings clause calls for just compensation in just those circumstances.

This imbalance should not be allowed to remain unchallenged in light of the renewed interest that this Court has shown in the development of takings law. See, *e.g., Knick* v. *Township of Scott,* 139 S. Ct. 2162 (2019); *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063 (2021). That fundamental reexamination has to address two interrelated questions.

First, is the government's decision to authorize tenants to remain on the landlord's premises after the lease has expired a per se taking for which compensation is owed?

Second is the apparent distinction between physical and regulatory takings, which subjects "mere regulations" to a low rational basis test consistent with the structure of the takings clause?

As amici demonstrate, the Second Circuit's answer is wrong on both counts. Tenant occupation is a physical taking, and there is no principled reason why so-called "mere regulations"—e.g., state imposed restrictive covenants—should not receive the same per se legal protection as takings of physical occupations.

SUMMARY OF ARGUMENT

The right to exclude is an indispensable element of private property. See *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1970), where this Court held "the 'right to exclude,' so universally held to be a fundamental element the property right falls within this category of interests that the Government cannot take without

compensation." See also *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), which similarly insists that "[t]he right to exclude is 'one of the most treasured' rights of property ownership." The economic fact underlying this statement is simple. Without a right to exclude no one would plant crops or raise a building knowing that the fruits of his labor can be taken from him at will by any of a thousand strangers. A strong presumption of exclusivity, rebuttable only under limited situations of strong necessity, is the only way to permit productive labor to flourish.

After *Penn Central* this Court, and lower courts like the Second Circuit, lapsed into an approach that stressed this Cartesian duality: Physical takings such as eminent domain were subject to one set of rules, while regulatory takings were analyzed under an imprecise multi-factor test. In answer to our first question, the Fifth Amendment's takings clause, however, makes no such distinction. Nor should it, given that the risks of partisan abuse of public power to transfer wealth and income from A to B remains a live possibility in both contexts.

The Second Circuit fell prey to the Cartesian fallacy and treated New York's Rent Stabilization Law ("RSL") as a "mere" economic regulation, subject to a gentle rational basis scrutiny which—no matter what the particulars of the scheme—such regulations easily satisfy. Yet the involuntary renewal of a lease at a government-set price necessarily results in the physical occupation by the tenant of the landlord's property pursuant to a public command. *74 Pinehurst,* which sustains an extreme rent control scheme,

therefore presents an ideal vehicle for clarifying and unifying the law of takings.

Accordingly, this brief examines rent-control schemes from their origin as a temporary wartime emergency measure and evaluates them against this Court's takings jurisprudence.

Finally, this brief addresses the real-world effect of rent control regimes. The economic literature makes it crystal clear that rent control always exacerbates the problem it purports to solve. It artificially limits the supply of rental housing by incentivizing long-term rent-controlled tenants to remain in their subsidized housing, long after their children have left the home, forcing up prices in uncontrolled units while leaving landlords unwilling, and in some cases, unable to pay for the maintenance and improvement of those units. The decline in the housing stock therefore reduces the tax base for public improvements, resulting in a sluggish, corrupt and economically inefficient rental market.

ARGUMENT

I. The Physical vs. Regulatory Distinction Is Inconsistent with the Basic Logic of the Takings Clause.

A principled analysis of the takings law must begin with the seminal takings case of *Armstrong* v. *United States*, 364 U.S. 40 (1960). There, Armstrong recorded a valid materialman's lien in Maine on two vessels built on contract for sale to the United States Navy. After taking possession of the vessel, the United States government then dissolved those liens by the

simple expedient of sailing the vessels out of Maine waters. By stiffing Armstrong, the government sought to make the materialman responsible for a substantial portion of the costs of a boat built for the defense of all. The Supreme rebuffed this effort as follows:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Id. at 49.

That rule is subject to no qualifications and should in principle apply to all cases where the government takes a partial interest in property, whether real or personal, or authorizes—as it did in *Loretto*—some private actor to take that property. But since *Penn Central Transportation Company* v. *New York City*, 438 U.S. 104 (1978), this Court has honored that principle only in the breach. In that case, the City of New York blocked Penn Central's use of air rights in order to preserve views down New York City's Park Avenue for the public at large. The Court offered no explanation why the owner of the air rights should be singled out for this special burden. Instead, the *Penn Central* Court stated, quite simply, that it has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. The Court instead

insisted that a court must engage in essentially ad hoc, factual inquiries" that, among other things, introduce the discordant non-textual element of "investment-backed expectations," *id*. at 105, and a sharp but unexplained line between physical regulation and what it calls "interference [that] arises from some public program adjusting the benefits and burdens of economic life to promote the common good," *id*. at 124. The *Penn Central* Court ignored that the grant of unbridled discretion to makes these determinations is inconsistent with the rule of law. In fact, *none* of the cases cited by the Second Circuit support this novel ad hoc approach adopted with devastating effect in *Penn Central.* See Richard A. Epstein, *Will the Supreme Court Clean Up Takings Law in Murr v. Wisconsin?,* 11 N.Y.U. J. Law & Lib. 860 (2017).

The *Penn Central* rubric necessarily asks either judges or administrative bodies to determine what count as a reasonable rate of return in case where competitive markets are far superior to determine quickly, cheaply and accurately, how rents should fluctuate with supply and demand. There is thus no reason to ask courts to develop an unprecedented balancing theory that necessarily requires landlords to sacrifice their welfare without any compensation for their supposed contribution to the public welfare. See Richard A. Epstein, *From Penn Central to Lingle: The Long Backwards Road*, 40 John Marshall L. Rev. 593 (2007).

In this context, therefore, it is important to stress, as in *Cedar Point* Court that the physical/regulatory "label can mislead" and that a "[g]overnment action that physically appropriates property is no less a

physical taking because it arises from a regulation." *Cedar Point Nursery*, 141 S. Ct. at 2072. Yet by focusing on the takings' label rather than its effect, courts have superimposed exceptions to the just compensation requirement that neither its text nor common sense can support. See Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 Stan. L. Rev. Online 99 (2012), http://www.stanfordlawreview.org/online/physical-regulatory-takings.

II. The Rule that Suspends or Limits Property Rights in Cases of Emergency Does Not Apply to Rent Control Regulations.

The unhappy departure from the categorical rule of property protection in rent control settings began with the Court's 1921 decision in *Block* v. *Hirsh*, 256 U.S. 135, 159 (1921). *Block* involved a 1919 post-war federal statute enacted to address skyrocketing rents in Washington, D.C. after the end of World War I, when an influx of outsiders, in need of housing transformed what was sleepy southern town into a bustling center of a global power. The limited supply of rental housing in the city led to sharp rent increases.

Congress therefore enacted a statue that for *two years* capped rents in the District at their historical levels. Landlords challenged that cap as an uncompensated taking of their property. Justice Holmes wrote for a divided 5-4 court upholding the statute as a temporary wartime measure. "The general proposition to be maintained is that circumstances have clothed the letting of buildings in

the District of Columbia with a public interest so great as to justify regulation by law." *Id.* at 155. Holmes allowed, however, that "circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern." *Id.* He insisted, incorrectly, that real estate in Washington "is necessarily monopolized in comparatively few hands." In fact, to the contrary, the rapid increase in local rents was no result of undue landlord power, but a rational market response to sudden increases in demand.

Holmes then anticipated his decision in *Pennsylvania Coal* v. *Mahon*, 262 U.S. 393 (1922), by noting, without explaining why, "just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law." *Block*, 256 U.S. at 156.

As Professor Epstein observed, "[w]ith Holmes's formulation, the argument shifts from protection against private misconduct to the prevention of windfall gains as a result of a public necessity—the war." Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 Brook. L. Rev. 741, 748 (1988). But the public necessity fails as a compelling rationale in *Block* and likewise fails in modern rent control cases because "public necessity does not defeat the obligation to pay compensation." *Id.* Neither Holmes nor the modern proponents of rent control provide any reason why, if affordable housing in a crowded city is a general public good, that landlords

must bear this public burden alone.

The dissent of Justice Joseph McKenna in *Block*, was direct and succinct. The statutory conditions were "contrary to every conception of leases that the world has ever entertained, and of the reciprocal rights and obligations of lessor and lessee." This conclusion was undoubtedly correct because the landlord/tenant law in every jurisdiction always allowed a landlord to evict a tenant who remained in possession after the expiration of a lease. See, holdover tenant:

> Holdover tenant refers to a renter staying in the property after their lease terminates without signing a new lease. In this situation, the landlord may take steps to remove the tenant from the property or bind the tenant to a new lease.

Cornell Law School, *holdover tenant*, Legal Information Institute, https://tinyurl.com/holdovertenant (last visited June 19, 2023).

On this account, forcing an eager tenant on an unwilling landlord is a taking of property that (allowing that it is done for a public use) requires that the state make up the difference between the market and the statutory rent. Regardless, McKenna did not accept the plea of wartime necessity when "the country has had other wars with resulting embarrassments, yet they did not induce the relaxation of constitutional requirements nor the exercise of arbitrary power." *Block*, 256 U.S. at 159 (McKenna, J., dissenting).

McKenna's dissent then points out that majority's ad hoc public necessity justification lacks any limiting principle:

> If such exercise of government be legal, what exercise of government is illegal? Houses are a necessary of life but other things are as necessary. May they, too, be taken from the direction of their owners and disposed of by the government? Who supplies them, and upon what inducement? And when supplied may those who get them under promise of return, and who had no hand or expense in their supply, dictate the terms of retention or use, and be bound by no agreement concerning them?

Id. at 160–61 (McKenna, J., dissenting).

The fragility of *Block* becomes even clearer after *Chastleton Corp* v. *Sinclair*, 264 U.S. 543 (1924). There, a unanimous Supreme Court, again speaking through Justice Holmes, struck down a 1922 effort of Washington D.C. to extend the original 1919 law for another two years. The circumstances that "justified interference with ordinarily existing property rights as of 1919 had come to an end by 1922." Holmes also added that "[i] t is conceivable that, as is shown in an affidavit attached to the bill, extensive activity in building has added to the ease of finding an abode." *Id.* at 548.

One common feature of both these cases was that the legislature could not simply declare an emergency situation and leave it at that. Yet that limitation has consistently been ignored in all decisions under New

York's rent control and rent stabilization laws that define an emergency as a vacancy rate at below five percent. The RSL applies only to units in New York City, which, as the City council, has declared every three years for decades suffers from a continuing housing emergency based on a single figure—a city wide vacancy rate below 5 percent on all units whether or not covered by the RSL. N.Y. Unconsol. Law § 8585 (McKinney); N.Y. Emergency Housing Rent Control Law § 5 (1946); N.Y.C. Admin. Code § 26-408(a).

To meet constitutional standards, however, a bona fide emergency, created by factors like wars, plagues, fires and the like to justify the use of the police power. See *The Mayor of New York* v. *Lord*, 1837 WL 3244 (N.Y. 1837), which confined the emergencies to include only "in cases of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other great public calamity. . ."

A vacancy rate of under 5 percent cannot be the source of a public emergency. It is solely the consequence of a misguided government decision to cap rents so that sitting tenants are unwilling to leave. Nothing in *Block* supports modern rent control laws, even though the *74 Pinehurst* court cites the case in a pro forma footnote that incorrectly claims that "the validity of rent control statutes are the necessary result of this long line of consistent authority. *74 Pinehurst*, 59 F.4th at 563. The Second Circuit never notes the vast substantive differences between the modest statute at issue in *Block* with New York's hydra-headed monster.

III. The Rise of *Penn Central* and the Dangerous Creation of Two-Tier Takings.

One hundred years since *Block* rent control persists and evolves in ever more mischievous ways. Little changed doctrinally until this Court's 1978 decision in *Penn Central* muddied the intellectual waters by articulating a new test for regulatory—as opposed to physical—takings. *Penn Central* involved New York City's historic preservation ordinance and limits imposed on owners' ability to alter their property. The Court held that the historic preservation regulations in question did not amount to a taking by creating the artificial distinction between regulatory and physical takings to wipe out air rights, which had been a well-established form of property rights under state law. The third prong of the *Penn Central* test—"the character of the government action"—that when combined with *Loretto Teleprompter* that creates the hard break between physical invasions, which are *per se* compensable takings and the regulatory takings subject to an all-too-forgiving rational basis test. Yet *Penn Central* offers no explanation of the enormous gulf between the two. With sufficient ingenuity the government can call any general rule that restricts property rights for many people a regulation when these actions are just broad impositions of restrictive covenants that bind many individuals, even when none of these owners receive a reciprocal benefit from the impositions place on their neighbors. These shenanigans cannot be justified by calling it, as done in *Penn Central*, as "some public program adjusting the benefits and burdens of economic life to promote the common good."

438 U.S. at 124. Nor can the program be saved by claiming some intangible policy goal—such as "affordable housing" to avoid the duty of compensation.

Most critically, there is with rent control not a semblance of an "average reciprocity of advantage" that binds all for the benefit of all. See *Pennsylvania Coal*, 260 U.S. at 415 (holding that "an average reciprocity of advantage that has been recognized as a justification of various laws"). To be sure, Holmes offered no example of the privilege, but the most powerful example comes from Baron Bramwell's famous remark in *Bamford* v. *Turnley*, 122 Eng. Rep. 27 (Ex. 1862), which in the context of nuisance laws allowing low-level "reciprocal nuisances [that] are of a comparatively trifling character." *Id.* at 33.

That principal has worked its way in to modern constitutional law. As Justice Scalia cautioned in his dissent in *Pennell* v. *San Jose*:

> "The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget,' with relative invisibility and thus relative immunity from normal democratic processes."

485 U.S. 1, 23 (1988) (Scalia, J. dissenting).

IV. Rent Control is undermined in the Wake of *Cedar Point Nursery*

The recent decision *Cedar Point Nursery* does not address the dubious line between regulation and occupation. But it lays bare the improper fiction of *Yee* v. *Village of Escondido*, 503 U.S. 519 (1992), that pretends that a tenant does not take possession of the apartment that he or she uses: "On their face, the state and local laws at issue here merely regulate petitioners' *use* of their land by regulating the relationship between landlord and tenant." *Id.* at 528. But there is no way to use land of which the tenant cannot gain possession, which is why these laws always limit the landlord's right to evict the tenant. As the Court stated in *Cedar Point Nursery*:

> Government action that physically appropriates property is no less a physical taking because it arises from a regulation. The essential question is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property.

Cedar Point Nursery, 141 S. Ct. at 2072.

The statute in *Cedar Point Nursery* deprived landowners of their right to exclude union organizers and thus effected a physical appropriation. *Cedar Point Nursery* further insisted that even a temporary

physical appropriation required compensation. *Id.* at 2075. This exposition explains why sound principles of takings law do not allow tenants to remain in possession of property on advantageous terms just by referring to the law as mere regulation of the "use" of the property. In *Cedar Point Nursery*, the offending regulation allowed union representatives to enter property only for up to three hours a day, 120 days per year. Rent control allows the tenant entry into the landlord's property 24 hours per day 365 days per year, which must (to the extent that this distinction matters be a physical taking.

In his 1988 article, Professor Epstein made the conceptual case for treating rent control regulations as categorical takings. Starting from the premise that "any fee simple absolute in possession can be divided into its constituent parts by grant or devise" and that "[a] lease . . . is one of the limited estates that can be carved out of the fee simple. . . ." Epstein, *Rent Control and the Theory of Efficient Regulation*, *supra*, at 744. The lease is a limited estate because the fee owner maintains a reversionary—and inherently possessory—interest. *Id.* "Rent control statutes," Professor Epstein writes, "operate to take part of the landlord's interest in his reversion and transfer it to the tenant." *Id.* This coerced transaction constitutes a "'taking of private property' both for the student of ordinary English and the conveyancing master.'" *Id.* at 745.

V. The Second Circuit's Treatment of Rent Control as a Regulatory Restriction Rather than a Physical Appropriation Cannot Stand.

Under any ordinary lease, the payment of rent is an exchange whereby the landlord gives the tenant a limited right to exclude the landlord from his own property in exchange for cash. So long as that exchange is voluntary, *both* as to the space leased and the *duration* of the lease no taking occurs. But the RSL doesn't comply with this principle on the duration of a lease, because it treats a one-year lease as if it were a perpetual lease for which the tenant continues to pay a below-market rental to a landlord—in perpetuity.

The Second Circuit's logic that the landlord cannot be heard to complain because he has voluntarily offered his property to let to the public fails because it ignores the inherently temporary nature of rental agreements. The law makes the landlord's decision to enter the rental market essentially irrevocable, by cutting out all leases of intermediate length. This is a far graver and more permanent deprivation of the right to exclude than the temporary access to union organizers at issue in *Cedar Point Nursery*. The doctrinal justification is said to come from *Yee*:

> Because they voluntarily open their property to occupation by others, petitioners cannot assert a per se right to compensation based on their inability to exclude particular individuals.

Yee, 503 U.S. at 531-532.

It should, however, be painfully obvious that the original consent had an explicit temporal limitation that made the coerced extension involuntary. Otherwise, under *Yee*, if you invite someone into your home for the evening, the state can bar you from asking them to ever leave. And under *Yee*, the state could make you retain for life a worker whom you hired for the day. The Court in *Yee* is flatly wrong that "there has simply been no compelled physical occupation giving rise to a right to compensation that petitioners could have forfeited." *Id*. at 532. Nonetheless, in *74 Pinehurst*, the Second Circuit relied extensively on *Yee*. *74 Pinehurst*, 59 F.4th at 563–564. In light of *Cedar Point Nursery*, *Yee* must go.

VI. The Perverse Economics of Rent Control

A. Rent Control Hurts Those It Is Meant to Help

Economists from across the ideological spectrum have long agreed that rent control not only fails to provide the public good that it promises, but in fact reduces the availability of affordable housing. A 2018 report from The Brookings Institution concludes that "[w]hile rent control appears to help current tenants in the short run, in the long run it decreases affordability, fuels gentrification, and creates negative spillovers on the surrounding neighborhood." Rebecca Diamond, *What Does Economic Evidence Tell Us About Rent Control?*, Brookings (October 18, 2018), https://tinyurl.com/RentControlEconomicEvidence.

The Brookings study examined recent economic studies on the effect of rent control in San Francisco beginning in the 1990s. The economists concluded that

owners of apartment units subject to rent control were more likely to seek to convert them to condominiums and that this conversion took place at the rate of about 15% per year. The authors found that "rent control operated as a transfer between the future renters of San Francisco (who would pay these higher rents due to lower supply) to the renters living in San Francisco in 1994 (who benefited directly from lower rents)." *Id.* In addition, "since many of the existing rental properties were converted to higher-end, owner-occupied condominium housing and new construction rentals, the passage of rent control ultimately led to a housing stock that caters to higher income individuals." *Id.*

Likewise, scholars at the Manhattan Institute reviewed the literature and concluded that "cities that implement rent control see substantial declines in the availability of rental housing." Michael Hendrix, *Issues 2020: Rent Control Does Not Make Housing More Affordable*, Manhattan Institute (Jan. 8, 2020), https://tinyurl.com/ManhattanInstituteRentControl. Indeed, "[r]ent control leaves owners with a limited ability to recoup operational costs and investments through rents or an appreciation of their building's value. As a result, the quality of rent-controlled housing generally decays through a lack of investment in maintenance and improvements until it reaches a lower quality living space compatible to such below-market rents." *Id.*

Previously, in 1984, Edward H. Rabin mused that "[t]he popularity of rent control is puzzling in the view of the virtual unanimity among professional economists that rent control is, in the long run, bad for

all concerned—tenants as well as landlords." Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 Cornell L. Rev. 517, 555 (1984).

Even earlier, the economists Milton Friedman and George Stigler made this point by comparing available housing in San Francisco in the aftermath of the 1906 earthquake, which destroyed more than half of the city's housing, with the city's housing occupation rate in the 1940s. Milton Friedman and George J. Stigler, *Roofs or Ceilings?—The Current Housing Problem* 7 (1946), https://fee.org/resources/roofs-or-ceilings-the-current-housing-problem/. "[A]fter the disaster, it was necessary for many months for perhaps one-fifth of the city's former population to be absorbed into the remaining half of the housing facilities," but new "construction proceeded rapidly" and contemporary news accounts make no mention of housing shortage. Indeed, within a month after the destruction of the housing stock there were listed 64 offers to rent or lease houses for sale, with no mention anywhere of a housing shortage. The units available were at all price points. *Id* at 14.

But both authors then ruefully noted that forty years later, under a rent control scheme ostensibly enacted to help returning veterans, housing was scarce and "[r]ental property [was] rationed by various forms of chance and favoritism." *Id.* at 21. After analyzing the various demographic and economic factors, Friedman and Stigler concluded that "rent ceilings, therefore, cause haphazard and arbitrary allocation of space, inefficient use of space, retardation of new construction and indefinite continuance of rent

ceilings, or subsidization of new construction and a future depression in residential building." *Id.*

Sometimes these market inefficiencies can be jarring. For example, in 2018, CNN reported on a woman who had lived for decades in two-bedroom Greenwich Village apartment while paying $28.43 a month. Lawrence Crook, *An Actress Lived For Decades in this New York City Apartment—for $28.00 a Month, CNN* (May 15, 2018), https://tinyurl.com/ActressRentControl. It was no surprise that the level of service declines for such apartments given the lack of revenues to make improvements.

B. Rent Control Incentivizes Corruption

Common sense teaches that a market that allows some participants to pay orders of magnitude less than others is ripe for abuse. In his 1988 article, Epstein recounts his first encounter with New York's rent control regime in 1963 as a Columbia College Senior looking for an off-campus apartment.

> My original quest turned up a lovely four room apartment on 111th Street and Amsterdam Avenue, ideal for me and my prospective roommate, and a steal at $125 per month. I saw the unit but was unable to get the superintendent to reach the building owner to close the deal. Later I was told by a wise graduate student that my naivete was the source of my undoing. The superintendent 'needed to have his palm smeared' in order to make the appropriate connection. Someone else more savvy in the ways of New York City

had made the necessary side payment.

Epstein, *Rent Control and the Theory of Efficient Regulation*, *supra*, at 741.

The willingness of potential tenants to make these side payments—essentially bribes—is unsurprising given the stark difference between market rental rates and "stabilized" rent. Tenants are happy to pay the illegal "key money" which enriches the third party but does not induce any expansion of housing supply.

Veteran New Yorker Nora Ephron described in *The New Yorker* how in 1980, she enthusiastically paid "the previous tenant twenty-four thousand dollars in key money (as it's known in New York City) for the right to move in," which she then amortized over the next twenty-four years, and still came out ahead. Nora Ephron, *Moving On*, The New Yorker (June 5, 2006), https://www.newyorker.com/magazine/2006/06/05/moving-on-nora-ephron. But others are not so lucky. Low-income tenants forced to play the same game often discover that the superintendent turned the unit over to someone else who had paid the key money. Move to a system of market rents and the racket disappears because supply and demand come into equilibrium, which is what should be done here.

C. Rent Control Harms Small Landlords

All too often, the defenders of rent control write as if rich landlords and corporate "fat-cats" take advantage of tenants in New York's steamy real estate markets. But nearly 40% or rental units are owned by individuals who bear the brunt of the governmentally enforced below-market rent schedules. Further research shows that:

> • Among landlord households, about 30 percent are low- to moderate-income (earning annual household incomes of less than $90,000).
>
> • Property income comprises a greater proportion of low- to moderate-income landlord households' total income than it does for higher income landlord households.
>
> • Property income for landlord households earning less than $50,000 provides nearly 20 percent of their total household income.

Kristen Broady, Wendy Edelberg, and Emily Moss, *An Eviction Moratorium Without Rental Assistance Hurts Smaller Landlords, Too*, Brookings (Sept. 21, 2020), https://tinyurl.com/BrookingsBlogLandlords. For "many mom and pop landlords," the cost of keeping up a property and paying property taxes can "consume more than half of their property income." *Id.* Even if this redistribution of wealth were constitutional, there is no logical or equitable justification for the imposition of these burdens "for the common good" upon these land owners.

CONCLUSION

Accordingly, *Amici Curiae* Professor Richard A. Epstein and The Buckeye Institute urge that the Court grant the Writ of Certiorari to examine the constitutionality of New York's RSL.

Respectfully submitted,

Robert Alt
Counsel of Record
David C. Tryon
Jay R. Carson
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 224-4422
robert@buckeyeinstitute.org
j.carson@buckeyeinstitute.org
d.tryon@buckeyeinstitute.org

Richard A. Epstein
16 Thomas Place.
Norwalk, CT 06583
(773) 450-4476
Raepstein43@gmail.com

Counsel for Amicus Curiae

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