No. 22-1130

IN THE

Supreme Court of the United States

74 PINEHURST LLC, ET AL.,
PETITIONERS,

V.

STATE OF NEW YORK, ET AL.,
RESPONDENTS.

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

AMICI CURIAE BRIEF OF THE LIBERTY JUSTICE CENTER IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Petitioners own small apartment buildings in New York City that are subject to New York's Rent Stabilization Law ("RSL"). Once an owner leases a unit for a fixed term, the RSL grants the tenant and the tenant's successors a perpetual right to renew the lease, regardless of whether the owner consents. That renewal right strips owners of their right to exclude others from their property and prevents them from living in their own apartments. The Second Circuit held that these facts failed to state a physical-takings claim because Petitioners voluntarily entered the rental market in the first instance and could, in some circumstances, evict tenants who breach their leases. Petitioners' regulatory-takings claims likewise failed because, among other reasons, the RSL serves an important purpose and does not deprive petitioners' property of all value. In so holding, the Second Circuit deepened or created circuit splits at each step of its analysis. The questions presented are:

1. Whether a law that prohibits owners from terminating a tenancy at the end of a fixed lease term, except on grounds outside the owner's control, constitutes a physical taking.

2. Whether allegations that such a law conscripts private property for use as public housing stock, and thereby substantially reduces its value, state a regulatory takings claim.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation center that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME,* 138 S. Ct. 2448 (2018). The Liberty Justice Center is interested in this case because the protection of private property rights is a core value vital to a free society.

SUMMARY OF ARGUMENT

New York's Rent Stabilization Law ("RSL") grants tenants a perpetual, heritable property right that the owners of those apartments would never and could never agree to: as long as the tenants do not completely default on their lease obligations (and sometimes even if they do, *see* Pet. App. 215a), covered apartments in New York City will remain in the possession of the current tenants, and their heirs, until the heat death of the universe. Petitioners may not decline to do business with their tenants, or their tenants' children, grandchildren, or great-grandchildren—each of whom has and will have a right under New York law to retain physical possession of the property. If that does not constitute a physical taking of property, *amicus* is at a loss to think of what ever could.

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amicus* funded its preparation or submission. All parties received timely notice of amicus's intent to file this brief.

This is not a protection against arbitrary evictions, or a grace period to catch up on unpaid rent, or a right of first refusal. A right to physically occupy property in perpetuity—and to pass that same physical occupation down to one's heirs—is not a regulation of market transactions, rather it is a transfer of Petitioners' propert rights to their tenants. New York has taken the right to physically occupy the property from Petitioners, who for all practical purposes can never get it back, except via the generosity of the tenants themselves to return what was taken. And when property rights are taken, the Fifth Amendment requires just compensation.

New York has not stabilized its rental market, it has turned it into a scam—entitling not simply family members but even roommates to transfer Petitioners' property among themselves. The internet is full of how-to[2] guides[3] for getting in on the deal as a tenant, and why not—it's really an unbeatable deal: the perpetual right to cheap rent in one of the most expensive cities in the world. But the Constiution forcloses New York from providing this gravy train at Petitioners' expense.

This Court should grant the petition and put an end to this racket.

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[2] Trulia, "How To Inherit A Rent-Controlled Apartment From A Friend," https://www.trulia.com/blog/how-to-inherit-a-rent-controlled-apartment-from-a-friend/.

[3] Cait Etherington, "How to become the successive leaseholder on a rent control or rent-stabilized apartment + Available rent-stabilized listings," City Realty, June 10, 2021. https://www.cityrealty.com/nyc/market-insight/features/get-to-know/how-become-successive-leaseholder-rent-control-rent-stabilized-apartment-available-rent-stabilized-listings/32681.

ARGUMENT

Granting tenants a perpetual, heritable right to retain possession of property is a permanent physical taking requiring compensation.

Property is "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, Commentaries, *2; *see also Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) ("One of the main rights attaching to property is the right to exclude others." (citing 2 William Blackstone, Commentaries, ch. 1)). That right of exclusion is core to property itself, such that this Court has described the "right to exclude [as] 'one of the most treasured' rights of property ownership." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

Indeed, this Court's cases repeatedly emphasize that "the right to exclude is 'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Hassid*, 141 S. Ct. 2063, 2072-73 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); citing *Dolan v. City of Tigard*, 512 U.S. 374, 384, 393 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987)). New York has taken that key stick from the bundle and transferred it to the tenants.

In *Hassid*, this Court rejected the Ninth Circuit's holding that an easement for unions to enter a property 120 days out of the year was simply a use restriction rather than a taking. *Hassid*, 141 S. Ct. at

2075. "Saying that appropriation of a three hour per day, 120 day per year right to invade the growers' premises 'does not constitute a taking of a property interest but rather . . . a mere restriction on its use, is to use words in a manner that deprives them of all their ordinary meaning.'" *Id.* (quoting *Nollan*, 483 U.S. at 831).

So too with the Second Circuit's holding that a right of tenants to remain in possession of a property 365 days a year, every year, until Judgment Day, is somehow just a reasonable regulation of the landlord-tenant relationship: to compare the RSL program to basic tenants' rights ordinances that simply prevent abuses deprives words of their ordinary meaning.

The court below relied on *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992), for the proposition that landowners who enter the rental market necessarily subject themselves to reasonable regulation. But *Yee* itself distinguished the precise scenario presented in this case and suggested it might require a different outcome: "A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Id.* (citing *FCC v. Florida Power Corp.*, 480 U.S. 245, 251-52 (1987), n.6; *see also Nollan*, 483 U.S. 825, 831-32 (1987); *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 877 (1983) (Rehnquist, J., dissenting)). Here, New York has, in fact, "compel[led] a landowner over objection to . . . refrain in perpetuity from terminating a tenancy."

In truth, New York's law is not about protecting tenants from exploitation, but about exploiting landlords. For various reasons, New York housing costs are

extremely expensive. But rather than building more housing, subsidizing rents, or enacting any number of other initiatives, New York instead has decided to place the burden of its own policy failure on Petitioners. That is exactly the solution the Takings Clause forecloses: The Clause is "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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Government actors are therefore barred from putting the private property of an individual to a public use without first providing that individual compensation for the exaction—it is neither right nor just to single out individuals to bear the cost of fulfilling the public good. And yet that is precisely New York's strategy here.

The Second Circuit believed that the perpetual physical possession was of no moment because in theory tenants who completely stop paying rent might eventually be removed. Pet. App. 7a. But even temporary physical occupation of property is still a taking. *See Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 33, 133 S. Ct. 511, 519 (2012) ("In support of the war effort, the Government took temporary possession of many properties. These exercises of government authority, the Court recognized, qualified as compensable temporary takings.") (citing cases). So it can't be the theoretical possibility of a tenant one day leaving that saves the law—under this Court's takings jurisprudence, brief invasions are takings and the brevity of the invasion simply goes to the amount of compensation. *United States v. Dow,* 357 U.S. 17, 26, 78 S. Ct. 1039, 1046 (1958). If the temporary flooding in *Arkansas Game & Fish Commission* was a taking of

property, then indefinite flooding must also be a taking. And indefinite physical occupations are what New York's law requires on its face.

In *Loretto*, this Court treated the presence of cable television wires as a permanent physical occupation of the property. 458 U.S. 427. But wiring can be removed—the cable hookup was "permanent" only in the sense that New York law prevented the property owner from removing it: if the tenant wanted to pay for cable television to be installed, the landlord had to permit the running of the wires. It was entirely possible that the wires could one day be removed after tenants moved out. And so too here: it is possible that Petitioners' tenants might one day decide to forgo the perpetual tenancy they've been granted, but the indefinite nature of that tenancy is permanent for purposes of the takings analysis.

And the costs here to Petitioner are substantial—a reduction in value of some 60 to 70% in many cases. Pet. at 8. "This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property"; rather, "the imposition" of the RSL "will result in an actual physical invasion" of Petitioners' property. *Loretto*, 458 U.S. at 433. New York has *permanently devalued* Petitioners' property, placing the cost on them, rather than accepting the burden of the area's housing costs as its own responsibility. There is no mechanism to end this—except, in narrow cases, Petitioners might be able to demolish the building and start over, as long as they can afford to pay the tenants hundreds of thousands of dollars to relocate. Pet. at 6, n.1; 9 NYCRR §§ 2524.5(a). And that condi-

tion is itself a taking—directly, of money from Petitioners for the right to use the property they've owned for decades.

It also makes no difference whether a tenant's invasion of the property right predates Petitioners' ownership of the property: in *Loretto*, the CATV cables had been installed before the owner purchased the apartment building. 458 U.S. at 421. This is not a scenario where a new owner purchases property subject to existing leases and must fulfill them to the end of their term—here they are required to fulfil those leases well *beyond* the agreed to term, or any term at all. The Second Circuit's admonition that property owners who have entered the market must accept regulation of lease terms falls short because this is not simply a regulation of, or addition of terms to, a lease; this is a prohibition on *exiting* the market—property owners *may not* take their property out of the rental market, even for their own personal use. Like guests of the Hotel California, they can check out any time they like, but they can never leave. And even if one believed that the Petitioners have acquiesced to the prior law, they certainly did not acquiesce to the 2019 amendments that further abrogated their rights in their property, which they have owned since 1974.

Indeed, these are not leases in any meaningful sense—leases, by definition, *end*. *Harlen Hous. Assocs., LP v. Metered Appliances, Inc.*, 2008 NY Slip Op 50460(U), ¶ 4 (An "agreement is a lease where it contains a description of the specific premises to be occupied exclusively by the party providing the services, specifies the amount of rent to be paid, provides for the respondent's exclusive use and *occupancy for a definite term*.") (emphasis added); *Polner v. Arling Realty, Inc.*,

194 Misc. 598, 600, 86 N.Y.S.2d 891, 893 (Sup. Ct. 1949) (a valid lease "contains a description of the premises to be occupied exclusively by the plaintiff, the amount of rent to be paid, also *the period of occupancy*") (emphasis added) (citing 1 McAdam on Landlord and Tenant [5th ed.], p. 175; *Coyne v. Feiner*, 1891 N.Y. Misc. LEXIS 384, at *2 (City Ct. Nov. 16, 1891); *Brooklyn Dock & Terminal Co. v. Bahrenburg*, 120 N.Y.S. 205, 206 (App. Div. 2nd Dept. 1909)). New York has for all intents and purposes granted tenants a kind of heritable life estate, at the expense of Petitioners, and they will pass their physical occupation of the property down to their heirs.

And here "heirs" does not simply mean spouses, or children, or other close relatives. N.Y. Comp. Code R. & Regs., title 9 § 2520.6(o) defines a "Family member" to include not only "A spouse, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law or daughter-in-law of the tenant or permanent tenant," but also "*Any other person* residing with the tenant or permanent tenant in the housing accommodation as a primary or principal residence, respectively, who can prove *emotional and financial commitment*, and interdependence between such person and the tenant or permanent tenant" (emphasis added).

This is not about family members. It is not even about domestic partnerships that have the practical features, but until recently might not have been allowed the legal status, of marriage. It is simply a racket. New York lays out an eight-factor test, among which "no single factor shall be soley [sic] determina-

tive." *Id.* These factors include "longevity of the relationship," "relying upon each other for payment of household or family expenses," "intermingling of finances" by "sharing a household budget," "jointly attending" "family-type activities" such as "social and recreational activities," "caring for each other," or "any other pattern of behavior" that suggests a "emotionally committed relationship." *Id.*

This sort of "emotional and financial commitment and interdependence" could be claimed by any pair of long-term roommates—the law is in fact explicit that "[i]n no event would evidence of a sexual relationship between such persons be required or considered." It's not simply that the units can be kept in the family—they can be passed on to anyone who hangs out and chips in for groceries. By contrast, Petitioners *cannot* reclaim their property for use by their own immediately family—they cannot provide their own property to their own daughter. Pet. at 8. Instead New York has granted a tenant the right to transfer perpetual physical possession of that same property to anyone they develop an emotional attachment to .

CONCLUSION

In what meaningful sense could Petitioners be said to actually *own* the apartments in question? They cannot physically occupy them. They cannot demolish them without paying the existing tenants hundreds of thousands of dollars for the privilege of doing so. They cannot cut their losses and leave them to rot—they in fact have a duty to maintain the residences. They essentially have a right to collect a fraction of their prop-

erties' fair-market rent, as a kind of royalty on a property they can never get back. If this is not a permanent physical occupation of their property, what would be?

This Court should grant the petition and hold that the perpetual right to occupy property effects a permanent physical taking requiring just compensation.

Respectfully submitted,

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