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

BRIEF IN OPPOSITION FOR RESPONDENTS CITY OF NEW YORK, NEW YORK CITY RENT GUIDELINES BOARD, DAVID REISS, ALEX SCHWARTZ, ARPIT GUPTA, CHRISTIAN GONZALEZ-RIVERA, CHRISTINA DEROSE, ROBERT EHRLICH, CHRISTINA SMYTH, SHEILA GARCIA, AND ADÁN SOLTREN

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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, declaratory, and compensatory relief against the entire RSL as amended, asserting facial and as-applied claims for physical and regulatory takings. The questions presented are:

1. Whether petitioners' physical-taking challenges to certain of the RSL's lease-renewal and successorship provisions fail, where landlords voluntarily invite tenants onto their property, and the RSL offers various means to remove particular tenants or cease renting to tenants?

2. Whether petitioners' regulatory-taking challenges to certain of the RSL's rent regulations fail, where petitioners did not plausibly allege that the regulations had sufficient economic impact on all regulated landlords for purposes of their facial claim or that it caused sufficient economic impact or interference with investment-backed expectations as applied to the two petitioners that did not voluntary dismiss their as-applied claims?

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INTRODUCTION

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

Petitioners—landlords with property subject in whole or in part to the RSL—seek to upend the City's residential real-estate market through a sweeping challenge to the RSL. The U.S. Court of Appeals for the Second Circuit rejected this attempt under this Court's settled precedent. This Court should deny certiorari.

First, petitioners' physical-taking claim does not warrant further review. To begin, the case is a poor vehicle to address physical takings. The complaint does not allege that petitioners currently are prevented from ending any tenancy that they wish to discontinue. They also assert primarily facial

[1] Since the issuance of the decision on appeal, the membership of the Board has changed. The current members are Nestor Davidson, Arpit Gupta, Alex Schwartz, Doug Apple, Christina DeRose, Robert Ehrlich, Christina Smyth, Genesis Aquino, and Adán Soltren. *See* U.S. Sup. Ct. R. 35.3.

claims, based on generalized assertions about the operation of the challenged RSL provisions, that lack the concrete particulars this Court has said are essential for meaningful review of takings challenges. And they offer only a paucity of factual allegations on their vestigial as-applied claims.

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 states that petitioners claim have 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 or as applied to them bars the removal of a breaching tenant or prevents landlords who no longer wish to open their property to tenants from shifting to a different use. Petitioners' contentions notwithstanding, the Court's most recent physical-taking decisions do not require a different analysis.

Second, petitioners' regulatory-taking claim also does not merit certiorari. To start, here too, the case is a poor vehicle in multiple respects. The issues raised in the petition are not properly preserved. Petitioners also make no attempt to explain how their facial challenge, premised on generalized allegations, could be meaningfully adjudicated under the fact-intensive test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). And their as-applied claims are both unripe and missing key allegations.

Nor does the question presented merit this Court's attention in any event. Petitioners flatly misrepresent the Second Circuit's holdings in their effort to manufacture a circuit split about application of the *Penn Central* factors. In truth, the decision charts a straightforward application of *Penn Central* that would fly in every circuit.

The Second Circuit rejected petitioners' facial claim for a regulatory taking because of their inability to detail the impact of the RSL on all landlords and properties, and petitioners cite no path to salvaging the claim here. And petitioners' as-applied claims are decidedly weak under this Court's settled precedents.

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 century, 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, which make up just under half of the City's rental market and serve 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. 2023). 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 or receive certain public financing. *See, e.g.*, N.Y. Real Prop. Tax Law § 421-a(2)(f); N.Y. Priv. Hous. Fin. Law § 452(8).

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, including the forms of "decontrol" added in 1993 and opportunities for additional rent increases added that year and in 1997 and 2003. 2019 N.Y. Laws ch. 36, Parts A, B, D, E, & K.

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 rate 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. 178a). In New York City, 86 percent of households in rent-stabilized units 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). A landlord for whom the permitted rent increase would not generate a designated level of return may petition DHCR for an exemption. 9 N.Y.C.R.R. §§ 2522.4(b)-(c).

The RSL does not require a landlord to offer a vacant rent-stabilized unit for residential rental 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. *Id.* §§ 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 unit is not the tenant's 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). This provision was amended in 2019 to limit the number of units that may be recovered for personal use. *See* 2019 N.Y. Laws ch. 36, Part I. A landlord may also refuse to renew a lease by demonstrating to DHCR that it intends to either use the unit for a business it owns and operates or withdraw the unit from the market due to substantial code violations that would be financially impracticable to correct. 9 N.Y.C.R.R. § 2524.5(a). And a landlord may obtain DHCR's authorization not to offer renewal leases in order to demolish (including gut renovate) or rehabilitate a building. *Id.*

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' challenge to the Rent Stabilization Law

1. Following the 2019 amendments, petitioners—owners and managers of five residential buildings ranging from 10 to 33 units (Pet. App. 170a-72a)—challenged the entirety of the RSL, as

amended in 2019 (*id.* at 182a). They generally asserted facial and as-applied claims under the Takings Clause, as well as claims under the Due Process Clause and Contracts Clause (*id.* at 230a-46a). One plaintiff—the owner of 177 Wadsworth in the Washington Heights neighborhood at the northern tip of Manhattan—declined to assert any as-applied claims (*id.* at 232a & 237a). And petitioners acknowledged that, as of the time of the 2019 amendments, each was charging some or all tenants at a rate *below* the legal regulated rent for their rent-stabilized units (*id.* at 206a-08a).

The district court (Komitee, J.) dismissed all of the due process, Contracts Clause, and physical-taking claims, the facial regulatory-taking claim, and the as-applied regulatory taking claim for two plaintiffs who had purchased their properties in 2003 and 2008—decades after the RSL's core protections were put in place (*id.* at 21a-54a).

The district court declined to dismiss the as-applied regulatory-takings claims of two other plaintiffs who acquired their properties before the RSL was adopted. But those plaintiffs thereafter voluntarily dismissed their as-applied claims with prejudice (*id.* at 59a).[2] Consequently, those claims

[2] The court's opinion also addressed a separate action that is likewise the subject of a pending petition for certiorari (Pet. App. 22a). *See Cmty. Hous. Improvement Program v. City of*

were not before the Second Circuit and are not before this Court.

2. The court of appeals unanimously affirmed the district court's order of dismissal (*id.* at 1a-20a). It rejected petitioners' claim that the RSL facially causes a physical occupation of their properties (*id.* at 5a-7a), 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. 6a). 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 (*id.* at 7a). The court affirmed the dismissal of petitioners' as-applied physical-taking claims because petitioners had not pleaded that the RSL forced them to enter the regulated residential rental market or that they had attempted to use the mechanisms that allow landlords to exit the market (*id.* at 7a-8a).

N.Y., No. 22-1095. The appeal in that action was heard concurrently with the appeal of this case, and the court of appeals addressed some of the issues in this case in more detail in its opinion in that appeal (Pet. App. 4a; *see id.* at 61a-90a).

The court also rejected 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 (*id.* at 9a). And the court affirmed the dismissal of the two remaining as-applied regulatory-taking claims, noting that they were unripe because the petitioners had not sought hardship exemptions from the annual permitted increases (*id.* at 9a-11a) and that in any case, they had failed to plausibly allege that the 2019 amendments to the RSL, as applied to them, constituted a regulatory taking under *Penn Central* (*id.* at 11a-17a). The court held that those plaintiffs' allegation of a "20 to 40 percent" reduction in value attributable to the 2019 amendments did not suffice under *Penn Central*'s "economic impact" factor (*id.* at 11a-12a), and that plaintiffs failed to show the amendments interfered with reasonable investment-backed expectations—the second *Penn Central* factor—where they knowingly purchased highly regulated properties (*id.* at 13a-15a).[3]

Petitioners did not seek rehearing en banc.

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[3] The court also affirmed the dismissal of petitioners' due-process claim and their argument concerning New York's sovereign immunity, which are outside the scope of the petition (Pet. App. 17a-20a). Petitioners had abandoned their Contracts Clause claim on appeal.

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.

This case is a poor vehicle for a grant of certiorari on the physical-taking issue. Petitioners focus their physical-taking claim on the RSL's lease-renewal and successorship provisions (Pet. 11). But the complaint does not establish that petitioners even have article III standing to seek injunctive or declaratory relief against those RSL provisions, because it does not allege that petitioners have any current wish to decline to renew the leases of their rent-stabilized tenants. Nor does the complaint establish that petitioners are entitled to monetary compensation for a physical taking allegedly caused by the lease-renewal provisions because petitioners did not claim that any replacement tenant would have been charged an unregulated rent, or that they would have declined to renew rent-stabilized leases in order to exit the residential rental market for a more profitable line of business.

The complaint alleges that each building is a multi-unit residential apartment property (Pet. App. 170a-172a). Petitioners do not claim that they wish to change the use of their buildings; indeed,

they allege that in some cases they would not be able to do so for reasons unrelated to the RSL (*id.* at 196a). Nor does the complaint allege that petitioners wish to convert their buildings into condominiums or cooperatives, as New York law allows. *See* N.Y. Gen. Bus. Law § 352-eee.

Although petitioners reference the personal-use option for claiming a rent-stabilized unit, their allegations concerning it are threadbare. The complaint offers an individual petitioner's allegations about a past personal-use application to the housing court—filed eight years before the 2019 RSL amendments that they purport to challenge—only by way of example (*see* Pet. App. 187a). Any claim challenging the outcome of that application 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).

The allegation that a non-party family member of several individual petitioners "has considered" occupying a unit in the same building and "remains interested" (Pet. App. 187a-88a) is insufficient to plausibly allege that the petitioners were prevented from employing the personal-use option. Among other things, the complaint does not allege that these individual petitioners actually attempted to remove a rent-stabilized tenant or that this family member could not occupy one of the units in the

building that the RSL does not regulate (*see id.* at 170a). And the reference to the corporate petitioners being unable to use and occupy rent-stabilized units for personal use (*id.* at 188a) does not state that any of the shareholders of any of these petitioners actually wish to personally occupy a rent-stabilized unit that these petitioners own.

The allegations concerning the RSL's lease-renewal and successorship provisions, which petitioners focus on in their petition, are equally deficient. The complaint merely states that each petitioner has been required to offer a renewal lease "on one or more instances" when they would not otherwise have done so over the many decades that some of the petitioners have owned their properties (*id.* at 192a; *see id.* at 171a-72a (Panagoulias family have owned building since 1974, Eighty Mulberry Realty Corporation since 1950)). They do not allege that those unwanted tenants were still living in their buildings at the time the complaint was filed.

And as for the successorship regulation, the complaint merely alleges that one petitioner has had to offer one successor lease (*id.* at 193a), but not that the successor tenants are unsatisfactory or that the petitioner wishes to evict them. In any event, the complaint does not explain how the presence of one 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.

Petitioners' focus on the provisions concerning renewal and successorship leases also fundamentally conflicts with their allegation that they challenge the RSL as amended in 2019 (*id.* at 182a). Other than some changes to the personal-use option, the provisions that petitioners complain of all pre-date the 2019 amendments. *See, e.g.*, 9 N.Y.C.R.R. §§ 2523.5; 2524.4. While petitioners suggest that the 2019 amendments to other provisions of the RSL restricted their ability to cease renting their property (Pet. 5-7), they do not explain why they are targeting the pre-existing lease-renewal provisions, rather than those provisions amended in 2019.

Beyond these pleading difficulties, the essentially facial nature of petitioners' physical-taking claim raises additional barriers to review. Petitioners' allegations lack the "actual factual setting" that this Court has demanded when considering taking claims. *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988) (cleaned up). And even outside of takings jurisprudence, this Court has warned that facial claims are "disfavored." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Litigants must meet a high standard to succeed at a facial challenge because such a challenge amounts to "a claim that the law or policy at

issue is unconstitutional in all its applications." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). Petitioners' facial allegations are thus doubly suspect, offering an essentially generic legal challenge to all applications of the RSL across a million apartment units, in an area of law in which this Court has demanded details.

While petitioners note in passing that they also asserted as-applied physical-taking claims (Pet. 36), they do not discuss the details of their allegations or attempt to show that the court of appeals erred by dismissing these claims specifically. And for good reason because, as described above, their as-applied allegations are exceedingly spare, failing to identify any concrete injury flowing from the challenged provisions. 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 true 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 the RSL's lease-renewal and successorship provisions (Pet. 12-18). 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, including by not paying rent. 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 Apts.*, 30 F.4th at 733.

The RSL, unlike the eviction moratorium in *Heights Apartments*, does not prohibit the eviction of materially breaching tenants, such as tenants who do not pay rent. 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. 7a-8a). 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, as petitioners identify just one other

circuit besides the Second and Eighth that they claim has addressed these issues (Pet. 16). And if petitioners are correct that rent regulations are becoming more popular nationwide (Pet. 35), other 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 have been enacted in a few states (Pet. 34-35). 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 triggering threshold. N.Y. Unconsol. Law Ch. 249-B, § 3.

Nor does the prospect of future legislation in New York merit this Court's intervention now (*contra* Pet. 35). 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. 70a; *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.

The pendulum may already be swinging back. While the petition highlights proposed tenant-friendly legislation in New York (Pet. 35), the cited bills failed in the just-concluded legislative session, confirming the real estate 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. This feature distinguished the situation from prior taking cases, like *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1983), where invasion had been compelled by government action. *Yee*, 503 U.S. at 531-32. This Court held that "[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' challenge (Pet. App. 5a-8a).

The RSL's lease-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. 18-24) on the basis of *Yee*'s holding that a landlord does not have a physical-taking claim simply because that landlord lacks the unfettered ability to select their tenants. *Yee*, 503 U.S. at 529-32.

Petitioners mistakenly argue that any renewal or successorship provision whatsoever is a physical taking (Pet. 18-19). *Yee* rejected a physical-taking challenge to a law that allowed tenants to freely assign their below-market long-term leases—a far greater incursion on tenant selection than any worked by the RSL. Indeed, the Court noted that the challenged law meant that owners could "no longer … decide who their tenants w[ould] be." *Yee*, 503 U.S. at 526. And as the Court also observed, many regulations—including antidiscrimination laws—may require a landlord "to accept tenants he does not like." *Id.* at 529 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964)). In some circumstances, this may include having to retain tenants that the landlord might wish to replace.

The court of appeals' analysis of the RSL's "exit options" also follows directly from *Yee*. 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. The court correctly concluded that petitioners had not shown these provisions to be unavailable in all instances, thus failing to meet their burden to "plausibly allege[] that the RSL effects a taking in all of its applications" (Pet. App. 7a).

While petitioners argue variously that the existence of exit options does not matter (Pet. 19) or that the options must be within the unfettered control of the landlord (*id.* at 22), both assertions are inconsistent with *Yee*. The Court regarded the option there to change the use of property as dispositive—and did so even though the option was not fully within the owner's control. *See Yee*, 503 U.S. at 528 (noting the petitioners' assertion that the statutory procedure for changing use was "kind of a gauntlet" (cleaned up)).

3. Petitioners mistakenly argue that *Yee*, a well-established precedent that no opinion of this Court has questioned, is "at odds" with the Court's more recent physical-taking decisions, in particular *Cedar Point*, 141 S. Ct. 2063, and *Horne v. Depart-*

ment of Agriculture, 576 U.S. 351 (2015) (Pet. 23). But the Second Circuit did not ignore this Court's more recent decisions. Instead, the court correctly concluded that *Cedar Point* and *Horne*, which did not involve a regulation of the landlord-tenant relationship, neither abrogated nor undermined *Yee* (Pet. App. 6a-7a, 75a-82a).

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)).

Cedar Point also recognized that restrictions on a property owner's use of property are evaluated under the regulatory-taking doctrine. *Id.* at 2071-72. And it did not walk back *Yee*'s statement that regulations of the landlord-tenant relationship are such use regulations. 503 U.S. at 528. The court of appeals thus correctly recognized that *Cedar Point*

did not require it to disregard the clear implications of *Yee* for petitioners' claim.

Horne is likewise consistent with the decision below. That case dealt with an administrative order that essentially required raisin producers to surrender title to a portion of their crops to the federal government. *Horne*, 576 U.S. at 354-55. The Court found a "classic taking … in which the government directly appropriates private property for its own use." *Id.* at 357 (cleaned up); *accord id.* at 361. The RSL, on the other hand, does not require landlords to surrender a portion of their buildings to the government without compensation. It merely regulates the conditions of the landlord-tenant relationship that forms once a landlord voluntarily invites a tenant onto the property in exchange for rent. As *Yee* stated, such provisions are use regulations, not physical invasions. Nothing in *Horne* undermined that distinction; nor did the case purport to narrow *Yee* or to limit states' authority over landlord-tenant law (*see* Pet. App. 81a).

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

A. Petitioners' case is a poor vehicle for addressing regulatory takings.

Petitioners' vehicle problems are, if anything, even worse on their regulatory-taking claims than they are on the physical-taking side.

First, petitioners have refashioned their regulatory-taking challenge to the point of asserting new claims that were neither pressed nor passed on below—and thus are not properly before the Court. *See United States v. Williams*, 504 U.S. 36, 41 (1992).

In this Court, petitioners' regulatory-takings discussion focuses on the RSL's lease-renewal, personal-use, and change-of-use provisions that they also challenge as physical takings (Pet. 30, 33). But in both their complaint and their briefing before the court of appeals, petitioners' regulatory-taking claim challenged entirely distinct portions of the RSL, as amended in 2019, that regulate rents.

Thus, in both lower courts, petitioners' challenge was directed at the annual rent increases that the Rent Guidelines Board has approved, as well as the 2019 RSL amendments repealing or modifying allowances for additional rent increases upon vacancy or for certain renewals, deregulation

of certain units, and recovery of certain capital investments (*see* Pet. App. 198a-214a; Br. for Appellants 44-51, 2d Cir. ECF No. 103).[4] Those features have vanished from the petition's arguments—and been replaced by others that weren't challenged before—leading to serious problems of forfeiture.

Second, the petition fails to discuss—let alone meaningfully challenge—the core ground on which the Second Circuit rejected the facial regulatory-taking claim that is the petition's main focus.

As the Circuit held, and petitioners do not rebut, the facial claim cannot be meaningfully adjudicated given the diverse ways that the RSL affects regulated property and owners. Adjudicating regulatory-taking claims under *Penn Central* test involves balancing the economic impact of the challenged provision, its interference with reasonable investment-backed expectations, and the character of the government action. *Cedar Point*, 141 S. Ct. at 2072. Applying these factors involves an "ad

[4] Petitioners also previously argued that 2019 amendments to New York's eviction procedures, which are not part of the RSL, also effected a regulatory taking (*see* Br. for Appellants 47-48). They have now abandoned that argument too.

hoc factual inquiry." *Horne*, 574 U.S. at 360 (cleaned up).

As the court of appeals explained, the economic impact of the law on landlords across the City—covering over a million apartment units—necessarily varies and cannot be judged collectively simply from the face of the statute (Pet. App. 9a). Among many other things, landlords vary in how many regulated units their buildings contain, how much rent-regulated tenants are paying, and the amount of their operating costs. Landlords also acquired their property at different points, when different versions of the RSL applied, and thus may have different claims concerning their reasonable expectations about what regulations would apply to their property.

At bottom, as the Second Circuit held, there is no way to determine whether the RSL goes too far as to every regulated unit and landlord in New York City, as a facial challenge requires. *Bucklew*, 139 S. Ct. at 1127. Indeed, some landlords—including petitioners here—were renting at least some of their rent-stabilized units at rates *below* what the RSL permitted at the time of the 2019 amendments. And another petitioner here declined to assert as-applied claims altogether—strongly suggesting that it had no such valid claim and thereby defeating any charge of facial invalidity. The petition addresses none of these points.

Third, the as-applied claims of the two petitioners who have them—in contrast to the petitioner who forwent any such claim and the two others who voluntarily dismissed them *after* surviving a motion to dismiss—also have major vehicle problems in the form of lack of ripeness (Pet. App. 10a). The court of appeals correctly found the as-applied claims to be unripe: because the claims as pleaded and argued below were based on allegedly insufficient rental increases and feared inability to recover the cost of certain capital improvements (Pet. App. 201a-202a, 208a, 212a-213a), the DHCR processes that permit rental increases in certain instances must be exhausted before the RSL's impact on petitioners' rental incomes will become final and determinable (Pet. App. 10a (citing *Pakdel v. City and County of San Francisco*, 141 S. Ct. 2226, 2231 (2021)). Indeed, the complaint alleges that one petitioner had a pending application to increase rents to recover the costs of a capital improvement at the time suit was filed (Pet. App. 212a-213a). At the very least, this Court would need to resolve whether petitioners' remaining as-applied regulatory-taking claims were ripe before reaching the merits issues that petitioners urge the Court to consider.

Petitioners' only response is to again misrepresent what they asserted below. Petitioners now complain that the DHCR processes would not

address their grievances about the RSL's lease-renewal provisions (Pet. 33), but as we show above, those aspects of the RSL were not at issue in the regulatory-taking challenge they pressed below. That challenge instead focused on the RSL's rent regulations. Petitioners fail to explain why the regulatory processes could not have remedied their concerns as to the latter provisions.

Fourth, petitioners' recast as-applied claims suffer from serious pleading deficiencies that raise article III concerns. Neither of the petitioners with live as-applied claims alleges any economic impact from the RSL's lease-renewal and related provisions that are the focus of their petition. And likewise, they allege nothing to suggest that the lease-renewal provisions (which were in place for decades before these petitioners purchased their properties in 2003 and 2008 respectively) interfered with any reasonable investment-backed expectations that they possessed, let alone what those expectations were. Once again, the focus of the complaint with regard to economic impact and investment-backed expectations was on other provisions of the RSL, most notably (and logically) its rent regulations as inflected by the 2019 amendment (*see* Pet. App. 198a-214a). The absence of meaningful allegations on the points that petitioners now press is another reason the case is unsuitable for the Court's review.

B. The regulatory-taking question presents no split in authority.

The question that petitioners seek to press regarding regulatory takings does not warrant review in any event. Petitioners' attempt to identify a circuit split concerning the application of the *Penn Central* factors falls flat.

To start, petitioners identify no split as to economic impact. Contrary to petitioners' assertion (Pet. 26), the court of appeals did not require an allegation of near-total loss of economic value to allege a regulatory taking (*see* Pet. App. 11a-12a). The court's observation that an alleged "20 to 40 percent" diminution in value on the as-applied claims does not weigh in favor of finding a regulatory taking (*id.* (cleaned up)) is consistent with the decisions of other circuits. Indeed, while petitioners claim the Federal Circuit follows a different approach (Pet. 27), that court itself has noted that it is "aware of no case in which a court has found a taking where diminution in value was less than 50 percent." *CCA Assocs. v. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011) (cleaned up). And petitioners cite no case where a plaintiff alleged a 20 to 40 percent diminution in value and was held to have plausibly alleged a regulatory taking.

Their tack instead is simply to misrepresent the Second Circuit's holding. The court did not "h[o]ld

that Petitioners' allegation of a 60-70% diminution in value" was insufficient or apply any supposed floor at "90% reductions in value" (Pet. 26). Rather, the Second Circuit understood that petitioners' allegation of diminution attributable to the 2019 amendments—the focus of their claim—was in the range of 20 to 40 percent (Pet. App. 11a; *see also id.* at 238a-239a)—which no court has found sufficient. Petitioners (at 26) construct a convoluted mash-up that (1) attributes to the Second Circuit a holding concerning "60-70%" loss of value that it never made; (2) misleadingly quotes a portion of a sentence from the opinion (incidentally, without noting that the passage itself quoted a different case); and (3) plucks one number from a series of parentheticals containing several and casts it as some bright-line rule of the court's.

Indeed, while the petition repeatedly refers to a "60-70%" reduction in value (Pet. 8, 26, 29), petitioners' opening brief in the court of appeals never set forth that range. Petitioners get there only by aggregating (a) the 20 to 40 percent diminution in value to three of the petitioners' properties that the complaint alleged was attributable to the 2019 amendments, and (b) a general citywide statistic reporting an average 50 percent reduction in value worked by background RSL rules that had already been in place for decades by the time that the as-applied petitioners acquired their properties (*see* Pet. App. 198a).

Petitioners have never explained why a supposed decades-old loss of value that was fully baked into their purchase price would be the proper subject of as-applied regulatory-taking claims now. In any event, the Second Circuit understood—quite correctly—that the relevant allegation for the purpose of petitioners' claims challenging the 2019 amendments was the pleading of a 20 to 40 percent reduction in value of their properties that was attributable to those amendments. And it held—again quite correctly, and in step with every other circuit—that such a range did not satisfy the first *Penn Central* factor. Petitioners' misrepresentation of the Circuit's analysis changes none of that.

To be sure, as petitioners point out (Pet. 26), the plaintiff in *Heights Apartments* did not allege a diminution in value at all, relying instead on an allegation that it was deprived of rental income. *See* 30 F.4th at 734. The petition itself suggests that this approach is an outlier, noting (at 27 n.5) that the Federal Circuit has observed that the "vast majority of takings jurisprudence" has focused on the "lost value of the taken property" rather than lost profits. *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1268 (Fed. Cir. 2009). But in any case, neither the Federal Circuit's nor the Eighth Circuit's approach conflicts with the decision below, since the Second Circuit addressed petitioners' allegations concerning diminution in value, as well

as those about the RSL's impact on petitioners' revenue or profits (*see* Pet. App. 11a-12a). The court of appeals just found petitioners' allegations deficient on that score as well, as they "fail[ed] to allege any specific impact on profit or revenue" (Pet. App. 12a). Petitioners show no error in that holding.

Nor do petitioners identify a split as to the second *Penn Central* factor. They mistakenly read a categorical rule into the court of appeals' analysis of investment-backed expectations where none exists (Pet. 27-28). The court simply concluded that in the specific circumstances of the RSL, which had been in place since 1969 and had been amended periodically over the years to address landlords' and tenants' concerns, the petitioners with as-applied claims would have anticipated that their properties would be subject to the RSL's changing provisions (Pet. App. 13a-15a). Indeed, the 2019 amendments that were targeted in the claim as presented to the Circuit—in contrast to their starkly different framing before this Court—largely restored provisions that had existed in the RSL at previous times. *See* 2019 N.Y. Laws ch. 36, Parts A, B, D, E, & K.

Contrary to petitioners' assertions (Pet. 27-28), the court's treatment of this factor did not conflict with the decisions of either the Eighth or Federal

Circuits.[5] *Heights Apartments*, as discussed above, considered an emergency order, enacted in response to the unprecedented COVID-19 pandemic, prohibiting eviction of tenants even if they were materially breaching their leases, including by not paying rent. 30 F.4th at 724-25. Unsurprisingly, the court held that the plaintiff had alleged that no landlord could have reasonably expected that regulation. *Id.* at 734. That regulation was wholly novel and a sharp departure from long-prevailing law—whereas New York's 2019 amendments were neither.

Nor does the Second Circuit's analysis conflict with *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003). The Federal Circuit expressly observed there that a "business that operates in a heavily-regulated industry should reasonably expect certain types of regulatory changes that may affect the value of its investments." *Id.* at 1350. The Second Circuit applied the same principle below (Pet. App. 13a-15a). In *Cienega Gardens*, unlike in this case, the plaintiffs could show that the gov-

[5] While petitioners also cite *Andrews v. City of Mentor*, 11 F.4th 462, 472 (6th Cir. 2021), that decision held merely that the district court had applied an incorrect standard in evaluating whether the plaintiff had a property interest to assert a regulatory-taking claim, not the merits of that claim. *Id.* at 473.

ernment had abrogated a specific right that had been guaranteed by contract and regulation when the plaintiffs first entered the regulated industry. *Id.* at 1353. Those unusual facts, rather than a disagreement about analytical approach, explain the difference in outcome.

Petitioners are likewise mistaken in claiming that the Eighth and Federal Circuits also analyze the character factor of *Penn Central* differently from the Second Circuit (Pet. 28-29). Once again, the differences in the programs at issue in the cases drove the analysis. The RSL is a long-standing and comprehensive regulatory regime meant to address housing instability (Pet. App. 16a). The executive order at issue in *Heights Apartments*, on the other hand, was a new and sudden measure imposed on landlords out of the blue, and the laws at issue in *Cienega Gardens* abrogated express contractual rights of specific property developers. 331 F.3d at 1326.

Finally, petitioners suggest (at 31) that "if [their] claims cannot survive a motion to dismiss under the *Penn Central* test," it is clear that the test needs to be "overhauled or discarded." But they ignore that two of their regulatory-taking claims *did* survive a motion to dismiss—they simply opted to voluntary dismiss those claims with prejudice for whatever reason. They have to live with that choice, but instead they have tried to undo it by

misrepresenting what was before the Second Circuit and what the Circuit held.

C. The Second Circuit's application of *Penn Central* does not warrant review.

The petition should also be denied because the Second Circuit's application of the well-established *Penn Central* factors to petitioners' claims does not merit review.

Petitioners do not address the basis for the court of appeals' rejection of their facial claim. As discussed (*supra* at 12), the court held that the claim foundered at the first factor on petitioners' inability to show that "no set of circumstances exists under which the RSL would be valid" (Pet. App. 9a (cleaned up)). The court noted the considerable "variation" in the RSL's effects across properties and landlords, which precluded determining its economic impact "on a collective basis" (*id.*). While petitioners regard the dismissal of their claim as evidence of some flaw in the *Penn Central* test (*see* Pet. 24-25, 32-33), the outcome instead reflects the incompatibility between their generalized allegations and the high bar for pleading a facial claim.

The court of appeals also did not err in concluding that two petitioners failed to state a claim with the as-applied allegation that the 2019 amendments to the RSL reduced the value of certain

petitioners' properties by 20 to 40 percent. The court's analysis was a straightforward application of this Court's observation that diminution of value, by itself, is insufficient to allege a regulatory taking, and this Court has held that far larger alleged diminutions in value do not justify taking claims. *See Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993). While petitioners claim that the appropriate measure was a larger diminution allegedly reflecting the economic impact of the pre-2019 version of the RSL (Pet. 29), as discussed above their own complaint alleged that it was the RSL, as amended in 2019, that constituted a regulatory taking (Pet. App. 182a). It is unsurprising, then, that the court of appeals considered the diminution in value that they alleged had resulted from the 2019 amendments (*id.* at 198a). Petitioners' objections to that approach amount to a mere bid for error correction—and a weak one at that.

Likewise, when analyzing petitioners' regulatory-taking arguments concerning the 2019 RSL amendments that they challenged below, the court of appeals correctly held that those amendments did not interfere with reasonable investment-backed expectations. This Court has made clear that "those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Concrete Pipe & Prods.*, 508 U.S. at 645

(cleaned up). That principle is especially apt in the case of the 2019 amendments, which broke little new ground and instead largely restored earlier iterations of the RSL's provisions. 2019 N.Y. Laws ch. 36, Parts A, B, D, E, & K. Those amendments were just the latest chapter in a long history of legislative revision of the RSL, a process "that, at times, favored landlords, and, at other times, tenants" (Pet. App. 14a).

If petitioners had advanced their current argument about the lease-renewal provisions of the RSL, they would have run afoul of this Court's observation that a "property owner's distinct investment-backed expectations [are] a matter often informed by the law in force" at the time of investment. *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 38 (2012). The RSL's provisions concerning lease renewals were in place at the time the as-applied petitioners purchased their properties, and would have informed any reasonable expectations.

Finally, in analyzing the character of the RSL, the court of appeals was guided by this Court's instruction to look to whether the law was "enacted solely for the benefit of private parties" as opposed to a legislative desire to serve "important public interests." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485–86 (1987). The

court appropriately noted the similarities between the RSL and the law at issue in *Penn Central* itself, both of which are examples of comprehensive plans designed to promote the general welfare of the residents of New York City (Pet. App. 16a). *See Penn Central*, 438 U.S. at 133. Petitioners' arguments to the contrary (Pet. 30-31), which focus on the physical invasion supposedly worked by the RSL, reflect their pivot away from the rent-regulation provisions that they challenged below, in favor of their belated and thus forfeited contention that the lease-renewal provisions are the ones that effect a regulatory taking. It was not error for the court of appeals to address the challenge that petitioners actually made.

* * *

There is no reason to grant review on either of petitioners' questions, as neither speaks to questions of national importance or involves a split in authority requiring this Court's intervention. Moreover, both have serious vehicle problems that might prevent the Court from reaching the legal issues that petitioners press. And granting this petition would cause deep uncertainty and disruption across the New York residential rental market. Millions of New York City residents live in rent-stabilized units and rely on the stability that the RSL's rent regulations provide. The real estate industry likewise has operated under the RSL for

fifty years, making educated investments based on it. Petitioners have shown no warrant for disrupting lives and plans throughout the City.

CONCLUSION

The petition for a writ of certiorari should be denied.

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