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

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 Statement in the petition remains accurate.

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INTRODUCTION

Respondents do not dispute that New York's Rent Stabilization Law ("RSL") compels Petitioners to enter into renewal leases of their property when they do not wish to do so. This case thus squarely presents the question left open in *Yee v. City of Escondido*: whether a law inflicts a physical taking by forcing "a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 503 U.S. 519, 528 (1992).

The Court should resolve that question, which has divided the circuits. In the decision below, the Second Circuit joined the Ninth Circuit in reading *Yee* to foreclose physical-taking claims regarding laws "that regulat[e] the landlord-tenant relationship." App. 81a. In contrast, the Eighth Circuit has held that a law regulating the landlord-tenant relationship can effect a physical taking if it prevents termination of a tenancy at the conclusion of lease. *See Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733 (8th Cir. 2022).

The Court should also review Petitioners' regulatory-takings claims because the Second Circuit's application of the *Penn Central* test conflicts with decisions of other circuits on every prong of that test. Respondents defend the decision below by arguing that no property owner challenging the RSL could ever establish two of the *Penn Central* factors, such that a regulatory-taking claim could succeed only if the law resulted in a near-total destruction in property value.

The combined effect of Respondents' arguments demonstrates why this Court's review is needed. In Respondents' view, laws governing the landlord-tenant relationship can never effect a physical taking, and, in the case of the RSL, can never run afoul of two of the three *Penn Central* factors. New York could not be more transparent about its belief that it may continue amending the RSL to impose virtually limitless restrictions on property owners without ever implicating the Takings Clause.

The Court should grant the petition.

ARGUMENT

I. The Physical-Takings Question Warrants Review.

A. Respondents attempt to demonstrate that the RSL's compelled lease renewals do not implicate the issue left open in *Yee*, on the ground that the owner can still regain possession if the tenant breaches the lease. State 19-21; City 20-23. The Second Circuit likewise relied on tenant breach (such as nonpayment of rent or using the property for illegal purposes) to conclude that this case is the same as—and not the different case left open by—*Yee*. App. 6a-8a.

But that is no distinction at all: the regulatory scheme in *Yee* also permitted for-cause evictions. *See* Pet. 22. This Court placed no reliance on that fact, because the ability to evict *if* a tenant engages in malfeasance does not relieve owners from the obligation to "renew" lease agreements "over [their] objection." *FCC v. Fla. Power Corp.*, 480 U.S. 245, 251 n.6 (1987); *see Yee*, 503 U.S. at 528. Instead, the critical point in *Yee* was that the challenged

regulations did not "compe[l] owners, once they ha[d] rented their property to tenants, to continue doing so" because owners could evict tenants on 6-12 months' notice. *Id.* Petitioners and other owners regulated by the RSL do not have that option. *See* Pet. 22; *see also* State 6 (conceding that "the RSL requires landlords to … enter into a renewal lease when the existing lease expires"); City 8 (same).

Respondents also cite other purported off-ramps from the RSL to argue that there are alternatives to renewal, such as demolition of the apartment. *See, e.g.*, State 7. The Second Circuit did not mention those provisions, and for good reason: as this Court has held, the government cannot avoid takings liability by pointing to other potential uses of the property. *See* Pet. 19-20. In any event, Petitioners have pled that the off-ramps cited by Respondents are unavailable to them, *see, e.g.*, App. 183a-88a, 192a-193a, 196a, and demolishing an apartment does not restore it to the owner's use. Respondents' protestations that there are viable alternatives to renewal are also belied by their acknowledgement that preventing eviction is a "core element" of the RSL. State 7; *see also* City 6.

The decision below thus deepens a circuit split regarding whether a law compelling owners to renew leases over their objection inflicts a physical taking. The Second and Ninth Circuits have declined to apply *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), to these laws, and have instead adopted a special, deferential rule for the landlord-tenant context, grounded in *Yee*'s voluntariness rationale. Pet. 14-16. In contrast, the Eighth Circuit in *Heights* rejected that special rule and held that the physical takings

analysis is governed by the general principles outlined in *Cedar Point*. Pet. 16-18.

Respondents attempt to distinguish *Heights* on its facts, arguing that *Heights* involved temporary eviction moratoriums while this case involves permanent housing regulations. State 23; City 18. But they offer no good reason why a temporary housing measure would effect a taking while a permanent one would not. Respondents note that the RSL allows owners to evict tenants who breach their leases, but the *Heights* regulations similarly allowed owners to evict tenants on several grounds, such as "endanger[ing] the safety of others or significantly damag[ing] property," or "when the landlord's family needed to move into the unit," 30 F.4th at 724-25. *Heights* held that compelling renewal of a tenancy *against the owner's will* constitutes a physical taking. *See id.* at 733 (regulations "turned every lease … into an indefinite lease, terminable only at the option of the tenant"). That holding squarely conflicts with the decision below, which concluded that the possibility of termination at the tenant's option forecloses a physical-takings claim.

B. Respondents cannot reconcile the decision below with *Cedar Point* and *Horne v. Department of Agriculture*, 576 U.S. 350 (2015). In those decisions, which postdate *Yee,* this Court rejected arguments that owners could be forced to accept appropriation of their property as a condition of participating in a regulated industry. *Cedar Point*, 141 S. Ct. at 2080; *Horne*, 576 U.S. at 364-66. Just as growing raisins does not implicitly consent to appropriation of part of the crop, and running a farm does not implicitly consent to an easement for union organizers, renting

out an apartment for a limited term does not mean that the owner "voluntarily" submits to its indefinite occupation by the tenant and a broad range of successors.

Respondents' sole substantive response is to reiterate the Second Circuit's argument that *Horne* and *Cedar Point* are inapposite because they did not address the "landlord-tenant relationship." City 24; *see* App. 6a-8a, 78a-79a, 81a. That response demonstrates, despite Respondents' insistence otherwise, that the decision below carves out a special takings rule for rental housing. *See* State 18.

Respondents also argue that the RSL is exempt from a physical-takings analysis because rental apartments are "open to members of the public." Intervenor 26; *see* State 21. But New York law is clear that even the common areas of apartment buildings, let alone individual apartment units, are *not* open to the general public. *See, e.g.*, *People v. Barnes*, 26 N.Y.3d 986, 989 (2015). Such apartments certainly are not comparable to a shopping mall that is "open to the public *at large*," *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980) (emphasis added), and "welcom[es] some 25,000 patrons a day," *Cedar Point*, 141 S. Ct. at 2076-77 (distinguishing *PruneYard*).[1]

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[1] This case does not implicate anti-discrimination law. *Contra* State 19-20; City 22. The government may require an owner who rents out an apartment to select a tenant without regard to race or other protected characteristics. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964). But that does not mean the government may, without providing just compensation, compel the owner to rent the apartment in perpetuity.

II. The Regulatory-Takings Question Warrants Review.

Respondents assert that the Second Circuit's regulatory-takings analysis does not present a clean circuit split. *E.g.*, State 31-32. But *Penn Central* claims rarely implicate clear splits because they depend on an ad hoc, fact-dependent balancing test. Pet. 25. That does not mean regulatory-takings questions are immune from this Court's review. *See, e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

The reality is that, under *Penn Central*, courts reach divergent results in similar cases. *See, e.g.*, *Bridge Aina Le'a v. Haw. Land Use Comm'n*, 141 S. Ct. 731, 731 (2021) (Thomas, J., dissenting from denial of certiorari); *Nekrilov v. City of Jersey City*, 45 F.4th 662, 681 (3d Cir. 2022) (Bibas, J., concurring). And here, the Second Circuit applied each of the *Penn Central* factors in ways that conflict with decisions of other courts. Pet. 25-29.

Economic impact. Petitioners alleged that the RSL has reduced the value of their property by 60-70%. *See* App. 198a, 234a. Respondents defend the Second Circuit's erroneous focus on the *incremental* 20-40% diminution caused only by the 2019 Amendments, arguing that this diminution is relevant because petitioners challenge only those Amendments. *E.g.*, City 33. But that argument misunderstands the complaint: Petitioners allege that the RSL in its entirety, as amended in 2019, inflicts a taking. App. 166a-67a, 234a-41a, 246a-47a. Because Petitioners challenge the RSL as amended, not the amendments in isolation, there is no basis for Respondents' blinkered approach.

If only incremental diminution were relevant, laws (such as the RSL) that result from a series of enactments over time would be practically immune from regulatory-takings challenge, as each individual enactment would be unlikely to produce a sizable enough diminution to constitute a regulatory taking. Respondents' argument would thus make property rights vulnerable to death by a thousand cuts. *See* California Apt. Ass'n Amicus Br. 21-24.

Respondents argue that the Second Circuit did not insist on near-total destruction of value to satisfy this first *Penn Central* factor. City 31-34. But the decision below compared the alleged diminution in the value of Petitioners' property with cases finding no taking even with 75-90% diminutions, before noting that Petitioners had not alleged that the RSL rendered specific properties "unusable for permitted purposes or otherwise unmarketable." App. 12a. The rule that only a near-total diminution in value will satisfy the first *Penn Central* factor is thus not a "mischaracterization" of the decision below, as Respondents repeatedly insist, but implicit in that decision.

Respondents contend that Petitioners' as-applied regulatory-takings claims are unripe because Petitioners have not requested a "hardship exemption." State 25-27. But Petitioners have alleged that those purported "exemptions"—i.e., permission for a slight rent increase—are unavailable to them, irrelevant to their non-economic injuries (e.g., loss of their right to exclude), and incapable of redressing the RSL's economic impacts. Pet. 33-34; App. 216a-19a. Petitioners' claims are thus ripe because it is clear "how the regulations at issue apply

to the particular land in question." *Pakdel v. City & County of San Francisco*, 141 S. Ct. 2226, 2230 (2021) (per curiam) (cleaned up).

Investment-backed expectations. Contrary to Respondents' assertion, the Second Circuit's analysis of the second *Penn Central* factor—whether the challenged law interferes with reasonable investment-backed expectations—is not "grounded in the facts of this case." Intervenors 32; *see* State 29. The court instead applied a categorical rule that all but forecloses regulatory-takings challenges to the RSL by holding that "no property owner could reasonably expect the continuation of any particular combination of RSL provisions." App. 85a; *see also* App. 15a.

Character of the taking. Respondents defend the RSL by arguing that it serves "important public interests." *E.g.*, State 31. But even if that were true, it would not give the New York state legislature license to take Petitioners' property without providing just compensation: "[S]trong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Horne*, 576 U.S. at 362 (citation omitted). Moreover, "that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere 'economic regulation.'" *Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part); App. 235a-236a, 239a-40a. And regardless of the interest the RSL serves, it has the character of a taking because its "interference with property can be characterized as a physical invasion by government."

Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

III. This Case Is an Excellent Vehicle.

A. This case is an excellent vehicle to consider these issues. Petitioners have alleged that the RSL effects both physical and regulatory takings, both on its face and as-applied to them, App. 230a-41a, and the Second Circuit resolved those issues in published opinions. Granting review would enable the Court to provide a comprehensive answer regarding how the Takings Clause applies to modern housing regulations while preserving analytical flexibility should members of the Court conclude that the regulatory-takings framework governs. These issues are important, as the number of briefs filed in support of Petitioners by *amici* located across the country underscores. *See also* Pet. 34-36 (surveying laws in other jurisdictions).

Respondents repeatedly note the importance of the RSL because it governs approximately one million apartments. *E.g.*, City 4, 17, 19, 28, 40. But that fact also underscores the breadth of the harms that the RSL inflicts on both the owners of rent-stabilized apartments and on market-rate tenants. It cannot be simultaneously true, as Respondents would have it, that this case portends vast consequences *and* is a purely local matter that does not warrant this Court's attention. *Cf.* City 19.

Nor should the Court await further "percolation." City 18-19. Because the RSL has existed for decades, it is well-settled what the law requires. And it is unlikely that the split will deepen meaningfully, when

the jurisdictions that have enacted or are likely to enact comparable regulations are largely concentrated in a handful of circuits.

This Court should not cede resolution of these issues to the "political process." *Contra* State 33; City 19-20. "The very purpose of a Bill of Rights was to" place some issues "beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). If New York City were indeed a "city of renters," City 4, that would show why fundamental protections for property rights cannot be left solely to majority rule.

B. Respondents raise various standing objections for the first time in this Court. The reason they were not raised before is obvious: The RSL burdens Petitioners' ability to use and exclude others from their property, and those injuries would be redressed by a declaration that the law inflicts a taking for which the governmental respondents must pay compensation. This suit thus readily satisfies the "irreducible constitutional minimum of standing." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

By Respondents' lights, Petitioners lack standing to challenge the RSL's lease-renewal and successorship provisions because invalidating those provisions would not allow Petitioners to charge market-rate rents. But that argument misrepresents Petitioners' allegations.[2] Petitioners allege that they

[2] Nor is it accurate that the harms flowing from compelled occupation of Petitioners' apartments are financially insignificant or peripheral to Petitioners' true goals, as

are injured by being deprived of their rights to possess and exclude others from their apartments. App. 188a-89a, 192a-93a, 230a-33a. The requested relief—a declaration that the RSL works a taking, App. 246a, not "wholesale invalidation" of the RSL, as Respondents assert—would redress those injuries.[3]

Respondents also contend that Petitioners have not pleaded injury with particularity, but Article III does not require Petitioners to identify specific leases that they would not renew or the reasons why they do not wish to renew that lease. Petitioners have alleged that the RSL has compelled them to issue renewal leases and accommodate successor tenants over their objections. App. 192a-93a. Those "general factual

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Respondents suggest. Those harms involve core attributes of property ownership. For example, Petitioner Dino Panagoulias has alleged that the RSL prevented him from using one apartment as a home for his own family, and from setting aside another unit as a home for his sister. App. 187a-88a, 233a. Nor has the basis for Petitioners' claims shifted. *See* City 26-27. Petitioners have consistently argued that the RSL, including the provisions compelling lease renewals, inflicts a taking. *See* App. 230a-41a.

[3] The State improperly refers to extra-record material and contends that two Petitioners voluntarily assented to the RSL's terms, "at least in part." State 15. That evidentiary assertion, which Respondents did not raise at any point in the proceedings below, is a red herring. The State's contention that it will disprove Petitioners' allegations on the merits is irrelevant to the legal question presented here. Moreover, the State does not assert that these Petitioners consented to the RSL as amended in 2019—the regulatory scheme challenged here. In all events, this defense poses no obstacle to the Court's review because it pertains only to as-applied claims brought by two Petitioners and says nothing about Petitioners' facial challenges or the other Petitioners' as-applied claims.

allegations" are sufficient to establish standing "[a]t the pleading stage." *Lujan*, 504 U.S. at 561.

* * *

The RSL eviscerates Petitioners' rights to occupy and exclude by requiring them, over objection, to renew leases in perpetuity. Indeed, the RSL prevents Petitioners *from living in their own apartments*. Those allegations squarely implicate the question reserved in *Yee*, and the lower courts have split on whether such laws constitute a taking. The decision below answers "no" as to both physical and regulatory takings, declining to apply the general principles articulated in *Cedar Point* and instead applying a special, deferential rule for laws governing the "landlord-tenant relationship." That reasoning conflicts with this Court's precedents and the Eighth Circuit's analysis in *Heights*, and also provides a blueprint for governments to justify further invasions of owners' property rights. This Court should grant certiorari to answer the question left open in *Yee* and make clear that there is no landlord-tenant exception to the Takings Clause.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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