No. 22-1170

In the Supreme Court of the United States

335-7 LLC, ET AL.,

Petitioners,

v.

CITY 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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ARGUMENT

New York's Rent Stabilization Laws ("the RSL") transfer Petitioners' property rights in the buildings they own to tenants who rent units therein while requiring Petitioners to operate those units at a loss. But the RSL does not effect a physical taking, Respondents say, because Petitioners have exit options. They can sell their buildings, or destroy them. And Petitioners cannot claim a confiscatory or regulatory taking, Respondents say, because they are not among the handful of landowners who have sought a modest "hardship" rent increase.

None of these options preserve Petitioners' right to exclude, "a fundamental element of the property right" that the RSL prevents Petitioners from exercising. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). Nor, as Respondents know, does their emphasis on the hardship increase provide the Court a realistic picture of that arduous process. This option is not viable for most landlords, as evidenced by the small number who have even pursued it, and it is not viable for Petitioners.

Petitioners are entitled to compensation under any of three takings doctrines—physical, confiscatory, and regulatory—and they challenge the RSL both on its face and as-applied. Their claims are justiciable. Respondents do not seriously dispute that the application of these doctrines to property throughout New York, and ever more jurisdictions, raises issues of national importance. And this case provides a uniquely good vehicle for reviewing those issues. This is the only challenge to the RSL currently before the

Court with both an as-applied physical takings claim and a confiscatory takings claim, and it cleanly presents for review the viability of the *Penn Central* regulatory takings framework. The Court can thus resolve a circuit split regarding Petitioners' physical-takings claim and provide much needed doctrinal clarity on Petitioners' other claims.

This petition should be granted.

I. Petitioners' Physical Takings Claims Require Review.

A. Petitioners bring both a facial and an as-applied physical takings claim. Respondents assert that Petitioners have abandoned their as-applied claim, cherry-picking the petition's statement that "[t]he RSL imposes a facial per se physical taking." Pet.20. Yet Petitioners undisputedly alleged an as-applied physical takings claim in their complaint. The Second Circuit explicitly affirmed the dismissal of that claim. Pet.App.6–8. Petitioners seek review of the Second Circuit's entire decision. Pet.15 (describing that court's holding that the RSL "was not an as-applied physical taking"). And the arguments outlined in the petition illustrate the RSL's unconstitutionality both facially and as-applied. The petition nowhere suggests that, after pressing an as-applied physical takings claim below, Petitioners have abandoned it now. They have not. To the contrary, the petition refers to "Petitioners' facial and as-applied takings claims," Pet.14, including specifically their "physical takings claims," Pet.15, 22 n.2.

B. Respondents also suggest, for the first time, that Petitioners lack standing to bring their physical

takings claims. According to the City Respondents, this is because Petitioners do not allege a wish to replace current tenants; according to the State Respondents, it is because Petitioners' units would remain rent-controlled even with new tenants.

These arguments deliberately overlook the injury Petitioners allege: a deprivation of *the right to exclude*, which necessarily "falls within the category of interests that the Government cannot take without compensation." *Cedar Point*, 141 S. Ct. at 2073 (cleaned up). That injury is directly traceable to the RSL and would be redressed by an order declaring that the RSL effects a per se taking and mandating just compensation. Moreover, Petitioners' complaint details how the loss of this right diminishes the value of their properties—"a classic pocketbook injury," *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 636 (2023)—by forcing them to continue operating the properties as rental properties under a ratemaking structure that guarantees that over time all regulated units will lose money.[1]

C. The decision below splits with the Eighth Circuit's decision in *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022). Respondents try to limit *Heights Apartments* to its facts, emphasizing that it concerned a temporary pandemic measure that barred eviction even for nonpayment of rent. But there is no question that, if *Heights Apartments* were binding in

[1] The same goes for the Intervenor Respondents' apparently omnibus standing argument, which likewise ignores Petitioners' loss of the right to exclude and the alleged economic losses from the RSL's web of removal and rate restrictions.

the Second Circuit, Petitioners' physical takings claims would be allowed to proceed.

Under *Heights Apartments*, Petitioners' claim that the RSL turns every lease "into an indefinite lease, terminable only at the option of the tenant" would be "sufficient to give rise to a plausible *per se* physical takings claim." *Id*. at 733. That is true whether the taking is "permanent or temporary." *Id*. (quoting *Cedar Point*, 141 S. Ct. at 2074). And that remains true, under *Heights Apartments*, even if the challenged regulation preserves some options for removal of an objectionable tenant. Tenants could be removed in that case if they "seriously endangered the safety of other residents," "engaged in illicit activity on the leased premises," "materially violated the lease by seriously endangering the safety of others or significantly damaging property," or if "the landlord's family needed to move into the unit." *Id*. at 725. Petitioners may evict tenants for similar breaches of lease terms, *see* N.Y. COMP. CODES R. & REGS. TIT. 9, § 2524.3, and may recover a single unit on a showing of "immediate and compelling necessity." NYC ADMIN. CODE § 26-511(c)(9)(b). Nevertheless, the Eighth Circuit held that eviction restrictions could constitute a physical taking.

That holding would apply equally to the RSL notwithstanding that Petitioners may evict tenants who stop paying rent. Even in that scenario, the lease effectively is "terminable only at the option of the tenant." *Heights Apartments*, 30 F.4th at 733.

D. The decision below also contradicts this Court's cases. Although government may limit "how a

business generally open to the public may treat individuals on the premises," *Cedar Point* establishes that government cannot take away the right to exclude on other kinds of property without just compensation. 141 S. Ct. at 2077. Respondents' arguments thus require viewing apartment buildings as open to the public, as the Second Circuit did. Yet apartment buildings are not shopping malls. There is no public invitation of entry; Petitioners permit entry through leases (for tenants and, in turn, their permitted invitees) or employment contracts (for staff). Petitioners are thus entitled to the right to exclude, which the RSL transfers in toto to Petitioners' existing tenants, who exercise that right *against Petitioners* by deciding when they will leave and who will succeed them.

Respondents find no shelter in *Yee v. City of Escondido*, 503 U.S. 519 (1992), because the ordinance in *Yee* "neither deprived landlords of their right to evict nor compelled landlords to continue leasing the property past the leases' termination." *Heights Apartments*, 30 F.4th at 733. In contrast, the RSL removes all viable avenues to exit the regulated market. This case thus raises an issue that *Yee* did not decide and indeed explicitly left open. *See* 503 U.S. at 528.

The various exit options Respondents tout do not preserve Petitioners' right to exclude. The option to reclaim a unit for personal or family use extends to one unit, not the whole property, and only in limited circumstances. The option to demolish the property would not restore Petitioners' right to exclude in that property, and Petitioners are not even free to demolish

their properties without permission. Pet.11. Tenants can also block Petitioners from converting the properties into condominiums; conversions have thus ground to a halt since 2019, as the 2019 RSL amendments intended. Pet.10–11 & n.1. And even if Petitioners did have any viable option to "ceas[e] to rent the building to tenants," that option would not ameliorate the physical takings they have suffered. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982); *accord Horne v. Dep't of Agriculture*, 576 U.S. 350, 364–66 (2015).

II. Petitioners' Confiscatory Takings Claims Require Review.

A. Petitioners' confiscatory takings claim is ripe. The court below deemed Petitioners' as-applied regulatory takings claim unripe—and Respondents argue the same of Petitioners' confiscatory takings claim—because Petitioners failed to seek "hardship" rent increases. As noted, Pet.30 n.3, ripeness is not an exhaustion requirement. The Court need only know that Petitioners have "actually been injured by the Government's action" and "how far the regulation goes." *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226, 2230 (2021) (internal quotation marks omitted). Neither the RSL's scope nor the injury underlying Petitioners' confiscatory and regulatory takings claims are in doubt.

Even on Respondents' terms, however, these claims are ripe. For one thing, the RSL has no exemptions for its restrictions on the right to exclude that also contribute to confiscatory and regulatory takings. As to the rate restrictions, "[a] property

owner is of course not required to resort to … unfair procedures," *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 350 n.7 (1986), because the government "may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001). That is what Respondents seek to do here by pointing to the RSL's hardship provisions, which purport to offer exemptions from the RSL's rent caps in certain circumstances.

The offer is illusory. As detailed in Petitioners' complaint and Second Circuit briefing, the hardship requirements are all but impossible to satisfy. There is no requirement that hardship applications be adjudicated in any period of time, let alone a reasonable one. And applications often remain pending for years, during which the landowner remains subject to rent control. *See* N.Y. UNCONSOL. LAW TIT. 23, § 26-511(c)(6), (6-a); *London Terrace Assocs., L.P. v. DHCR*, 937 N.Y.S.2d 567 (N.Y. Sup. Ct. 2012) (hardship application litigated for 17 years), *Rizzo v. DHCR,* 789 N.Y.S.2d 139 (N.Y. App. Div. 2005) (nine years). As a result, the process is almost never used: from 2011 to 2015, total annual applications ranged from zero to four.

Respondents are accordingly well-aware that a hardship application is not a fair option. And Petitioners' allegations establish at this stage that applying would be futile. The first hardship option, for "comparative hardship," allows limited rent increases equivalent to a return on equity for the first three years of ownership. *See* N.Y. COMP. CODES R. & REGS. TIT. 9, § 2522.4(b). For Petitioner 699 Venture, which

bought a burned-out shell in the South Bronx in 1995 and restored it over several years—while operating at a loss—this option provides nothing. The second option, "alternative hardship," purports to ensure a 5% profit above operating expenses. *See id.* § 2522.4(c). But, among other issues, revenue is based on collectible rather than actually collected rents, and the State imputes income where none is collected. In the 15-apartment building owned by Petitioner FGP 309 LLC, this exemption would not have made up for the rent not collected from the unit required for a live-in superintendent.[2]

B. Respondents also argue that the confiscatory takings doctrine is unique in takings law because it applies only to public utilities. But Respondents offer no logical reason why that would be.

The Court has never said that only a public utility has a takings claim when a government-mandated rate infringes on its ability "to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed." *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 605 (1944). Rather, the Court has said that, when the government sets rates, the property owner must receive "the cost of prudently invested capital used to provide the service," *Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 485 (2002), or a return equal to what

[2] Respondents' ripeness argument also cannot apply to FGP because FGP has already sold this building and could not seek a hardship increase. As alleged, the 2019 RSL amendments directly affected the sale—by causing a significant drop in the price of an existing offer—providing clear damages traceable to the RSL.

prudent investors "expect given the risk of the enterprise," *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989).[3] This rule applies equally where other enterprises' investments are appropriated for public services—as seen in the cases that have applied it in other contexts.[4]

This Court itself applied an early version of the doctrine to the rental context in *Block v. Hirsh*, upholding an eviction that "secure[d] to the landlord a reasonable rent." 256 U.S. 135, 157 (1921). Respondents argue that *Block* was an early regulatory takings case. But that argument cuts against them. Confiscatory takings are a form of regulatory takings, which can, of course, be challenged by entities other than public utilities. And decades before articulating the regulatory takings framework of *Penn Central*, the Court decided *Block* based on principles that continue to govern other confiscatory takings. Those well-

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[3] When a rent-stabilized apartment becomes vacant, an owner can only obtain a return of less than 6% on the first $15,000 it invests in renovation, and no return at all on any additional funds. As proof that this return does not meet prudent investor expectations, there are at least 88,000 vacant rent-stabilized apartments that cannot attract the capital necessary to bring them to market.

[4] Respondents assert that these were due-process cases. Yet these cases all either cite this Court's confiscatory takings jurisprudence, adjudicate takings claims, or otherwise rely upon confiscatory takings principles. And while some also rely on due-process principles or involve due-process claims, others do not mention due process at all. *See Kennedy v. City of Seattle*, 617 P.2d 713 (Wash. 1980) (en banc). If this controversy arose in one of these other jurisdictions—for example, just on the other side of the Hudson—Petitioners could avail themselves of confiscatory takings principles.

established principles remain applicable to this type of regulatory taking.

Indeed, Petitioners are the same in all relevant respects to the public utilities also protected by the confiscatory takings doctrine. Pet.28. Petitioners' properties require heavy investment; these fixed assets cannot be moved beyond the reach of the RSL; and the RSL mandates that these properties be used to serve the New York housing market at government rates. There is no exclusive group of quasi-public entities that receive special takings protection from such regulation. The Takings Clause applies with at least as much force to entities, like Petitioners, that cannot be generally considered quasi-public.

C. Petitioners plausibly allege that the RSL effects a confiscatory taking. Respondents dispute that the RSL in fact depresses returns. But this factual dispute should be adjudicated on remand; it is not a reason to deny certiorari.

III. Petitioners' Regulatory Takings Claims Require Review.

Petitioners have brought both an as-applied and facial regulatory takings claim,[5] and Petitioners seek review not just of the application of *Penn Central* to this case, but of that entire framework. As to the "character of the regulation" prong, the RSL's "interference" with the right to exclude can only "be characterized as a physical invasion." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124

[5] Petitioners' as-applied regulatory takings claim is ripe for the same reasons as their confiscatory takings claim.

(1978). And it cannot be the case that regulatory takings doctrine has nothing to say when a regulation interferes on its face with the exercise of that fundamental right. By doing so, the RSL imposes on regulated private entities "burdens which, in all fairness, ought to be borne by the public as a whole." *Id*. at 123 (internal quotation marks omitted). The Second Circuit's failure to find these burdens redolent of a regulatory taking illustrates that this prong is practically meaningless.

That court's application of the remaining *Penn Central* factors only further shows *Penn Central's* unworkability. Petitioners allege that, by locking them into renting out units at rates well below what they could and ultimately must charge to realize any profit, the RSL has significant economic impact. But in practice, this prong is barely distinguishable from the complete-ouster standard of *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992); *see* Pet.App.42 (noting that regulations obliterating up to 90% of a property's value will not support a claim under *Penn Central*). Petitioners also allege that their investment-backed expectations of actual profit from their units were reasonable, especially given that the RSL was long billed as an *emergency* measure only. But this prong can be—and here has been—used to deny compensation for any entity that enters a regulated market. That contradicts the Second Circuit's own recognition that other highly regulated entities, *i.e.*, public utilities, can assert a brand of regulatory takings claim. Pet.33–34. And it contradicts the normal rule, recognized in takings cases, that a regulation must withstand constitutional

scrutiny on its own terms, including as applied to plaintiffs who entered the market after the regulation's enactment. *Palazzolo*, 533 U.S. at 626–28.

The decision below thus raises the question of what protection, if any, current regulatory takings doctrine offers normal landowners. That question is unlikely ever to result in a clean circuit split. But it is vitally important to resolve.

To be sure, as Respondents repeatedly note, a facial claim can be difficult to prove. But *Penn Central*, as applied below, makes a facial regulatory takings claim impossible even to plead, since specific landlords will have specific investment-backed expectations and suffer specific economic impact upon losing the right to exclude. Pet.App.5–6. For a century, the "general rule" has been that "if regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). That recognition is, if anything, more important today than in Justice Holmes's time. It must be clarified and strengthened, and this case presents a uniquely suitable vehicle to do so.

CONCLUSION

The Court should issue a writ of certiorari in this matter.

Respectfully submitted,

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