NO. _____

In the
Supreme Court of the United States

G-MAX MANAGEMENT, INC., *et al.*,

Petitioners,

v.

STATE OF NEW YORK, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

New York's Housing Stability and Tenant Protection Act of 2019 transforms a temporary rent-regulation system into a permanent expropriation of vast swaths of private real estate, without just compensation, in the name of "affordable housing." Among other things, the Act prohibits owners—even of small and midsized apartment buildings like Petitioners—from reclaiming rental units for their own personal use, and grants tenants a collective veto right over condo/co-op conversions. As Justice Thomas has observed, the constitutionality of regimes like New York's is "an important and pressing question" that has divided the courts of appeals and should be addressed in "an appropriate future case." *74 Pinehurst LLC v. New York*, 2024 WL 674658, at *1 (U.S. Feb. 20, 2024) (statement respecting denials of certiorari). Although case-specific vehicle concerns may have dissuaded the Court from granting other recent petitions that sought to challenge the constitutionality of rent-control regimes in general, this case is based on a substantially different record, targeting only a specific set of amendments to New York's regulatory regime, and thus provides an ideal vehicle for this Court's review.

The questions presented are:

1. Whether New York's rent-regulation laws, and in particular its new restrictions on owner reclamation and condo/co-op conversions, effect physical takings.

2. Whether this Court should overrule *Penn Central* or at least clarify the standards for determining when a regulatory taking occurs.

PARTIES TO THE PROCEEDING

Petitioners Jane Ordway and Dexter Guerrieri, G-Max Management, Inc., 1139 Longfellow LLC, Green Valley Realty LLC, 4250 Van Cortland Park East LLC, 181 W. Tremont Associates LLC, 2114 Haviland Associates LLC, G. Siljay Holding LLC, 125 Holding LLC, J. Brooklyn 637-240 LLC, and 447-9 16th LLC were appellants in the Second Circuit.

The State of New York, Attorney General Letitia James, New York State Division of Housing and Community Renewal Commissioner Ruthanne Visnauskas, and New York State Division of Housing and Community Renewal Deputy Commissioner Woody Pascal were appellees in the Second Circuit.

Community Voices Heard and New York Tenants & Neighbors appeared in the Second Circuit as intervenors supporting appellees.

CORPORATE DISCLOSURE STATEMENT

G-Max Management, Inc., 1139 Longfellow, LLC, Green Valley Realty LLC, 4250 Van Cortland Park East, LLC, 181 W. Tremont Associates, LLC, 2114 Haviland Associates, LLC, G. Siljay Holding LLC, 125 Holding LLC, J. Brooklyn 637-240 LLC, and 447-9 16th LLC have no parent corporations, and no publicly held corporation owns 10% or more of the stock of any of these entities.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition under Rule 14.1(b)(iii):

- *Building & Realty Inst. of Westchester & Putnam Counties, Inc. v. New York*, Nos. 21-2526, 21-2448, 2024 WL 1061142 (2d Cir. Mar. 12, 2024). Judgment entered March 12, 2024.
- *Building & Realty Inst. of Westchester & Putnam Counties, Inc. v. New York*, No. 19-cv-11285, 2021 WL 4198332 (S.D.N.Y. Sept. 14, 2021). Judgment entered September 14, 2021.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully ask this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.1–17) is available at 2024 WL 1061142. The opinion of the district court (App.18–130) dismissing Petitioners' claims is available at 2021 WL 4198332.

JURISDICTION

The Second Circuit issued its opinion on March 12, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment, which applies to the States through the Fourteenth Amendment, provides: "Nor shall private property be taken for public use, without just compensation."

Relevant provisions of New York law, as amended by the Housing Stability and Tenant Protection Act of 2019, are reprinted at App.227–88.

INTRODUCTION

The Takings Clause prevents the government from stripping property owners of their right to exclude others from their property—a right of "central importance" to the very concept of property ownership. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 150 (2021). The core question in this case is whether that

fundamental protection applies to laws that effectively nullify a landlord's right to evict tenants—*i.e.*, to exclude third parties and repossess private property as the owner's "sole ... dominion," which is "one of the most treasured rights" of private property ownership. *Id*. at 149 (quotation marks omitted). Under a proper understanding of the Takings Clause and this Court's precedents, the answer to that question should be easy: a taking is a taking, regardless of whether it can be characterized as a regulation of the landlord-tenant relationship. Governments do not have carte blanche to transform private property into state-controlled housing stock without just compensation.

Based on a misreading of this Court's decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992), however, a number of lower courts, including the Second and Ninth Circuits, have held just the opposite—creating a circuit split and opening a gaping hole in the Fifth Amendment's vital protections for private property. Indeed, the Second Circuit has expressly carved out a landlord-tenant exception to this Court's recent decisions in *Cedar Point* and *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), declaring that "neither case is relevant given neither 'concerns a statute that regulates the landlord-tenant relationship.'" App.7 (quoting *Cmty. Hous. Improvement Program v. City of New York*, 59 F.4th 540, 553 (2d Cir.), *cert. denied*, 144 S. Ct. 264 (2023)).

As Justice Thomas recognized, this issue warrants this Court's intervention. *74 Pinehurst LLC v. New York*, 2024 WL 674658, at *1 (U.S. Feb. 20, 2024) (statement respecting denials of certiorari). While Justice Thomas expressed concern that prior

challenges to New York's regime were too "generalized," *id.*, this petition identifies specific regulations that effect physical takings with respect to specific Petitioners, whose allegations make clear how their right to evict tenants has been eviscerated.

This petition also provides the Court with an opportunity to reconsider *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). If New York's unprecedented regulatory regime does not go "too far," *Horne*, 576 U.S. at 360 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)), it is difficult to imagine what would. The decision below highlights the grave problems with *Penn Central*'s "ad hoc" framework for assessing regulatory takings, which has no basis in the text or original understanding of the Constitution. Moreover, in application it has become a rubber stamp for confiscatory government policies, which was surely never this Court's intent.

STATEMENT

A. Background

1. New York's "Temporary" Rent Regulation Regime.

From a historical perspective, rent regulation in the United States is a modern affair. Begun as an emergency wartime measure, several cities and states adopted temporary rent-control or eviction-control measures in the World War I era. Zachary Bray, *The New Progressive Property and the Low-Income Housing Conflict*, 2012 B.Y.U. L. Rev. 1109, 1140 (2012). During World War II, the federal government

briefly introduced rent controls as part of its general wartime price-control program. *Id.*

Anticipating the withdrawal of federal rent control following World War II, the State of New York passed the Emergency Housing Rent Control Law in 1946 "to prevent speculative, unwarranted and abnormal increases in rents." 1946 N.Y. Laws, ch. 274, § 1 (reproduced at N.Y. Unconsol. Law § 8581 *et seq.*). In 1962, the state legislature authorized municipalities to enact rent regulations. Local Emergency Housing Rent Control Act, 1962 N.Y. Laws ch. 21, § 1 (reproduced at N.Y. Unconsol. Law § 8601 *et seq.*).

New York City did not adopt rent regulations until 1969, when the City Council passed the Rent Stabilization Law ("RSL"). N.Y.C. Admin. Code § 25-501 *et seq*. Upon enacting the RSL, the City Council declared that a "serious public emergency continues to exist in the housing of a considerable number of persons." N.Y.C. Admin. Code § 25-501. The City Council stated that "the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for such emergency." *Id.* Notably, this declaration of a public emergency came just eight years after New York City enacted restrictive zoning measures limiting both the size of buildings and occupancy, thereby reducing the City's capacity to house people by four-fifths.[1]

[1] Mihir Zaveri, *Why It's So Hard to Find an Affordable Apartment in New York*, N.Y. Times (Aug. 1, 2022); N.Y. City Planning Comm'n, Rezoning New York City: A Guide to the

Notwithstanding its own contributions to the housing shortage and the RSL's stated policy objectives, the City Council—as required—renewed its finding of a "public emergency" triennially for half a century. N.Y. Unconsol. Law § 8603.

2. The 2019 Amendments and Their Effect on Petitioners' Property.

With the passage of the Housing Stability and Tenant Protection Act of 2019 ("the 2019 Act"), the New York State Legislature abandoned any pretense of ever returning to a free-market system. The 2019 Act is not premised on any "emergency." Indeed, the very purpose of the Act is to "[p]rovide *permanent* rent regulation." *A08281 Memo,* N.Y. STATE ASSEMBLY, https://bit.ly/3MEgvPt (emphasis added). The Act accomplishes this by repealing key provisions of the RSL and adding draconian new restrictions, thereby transforming what began as a temporary wartime measure into a sweeping regime that converts private property into public housing stock indefinitely.

First, lest there be any doubt as to the Legislature's desire to permanently enshrine rent control, the 2019 Act repeals the sunset provisions that required the Legislature to periodically reconsider the need for "emergency" regulation. 2019 N.Y. Sess. Laws § 6458, Part A.

Second, the 2019 Act repeals the RSL's "luxury decontrol" provisions, which allowed landlords to

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Proposed Comprehensive Amendment to the Zoning Resolution of the City of New York (1959), *available at* https://archive.org/details/rezoningnewyorkc00newy (describing the 1961 zoning overhaul).

remove a unit from the RSL's rent-control and eviction-control regime once the monthly rent reached a specified value and the tenant vacated or once the tenant's income equaled or exceeded a statutory threshold. *Id.* at Part D, § 5. At the same time, absent a specific exception, rent-stabilized tenants retain the right to renew their leases continually—and can pass that right on to a wide range of successors (including but not limited to relatives by blood or marriage), who can in turn name their own successors, *ad infinitum*. *See* N.Y. Comp. Codes R. & Regs. tit. 9, § 2523.5(a), (c)(1) (renewal right); *id.* § 2520.6(*o*) (successor definition).

Third, the 2019 Act sharply restricts the circumstances under which owners can reclaim rent-regulated units for use as a primary residence, limiting them to a single unit per building and then only upon a showing of "immediate and compelling necessity." 2019 N.Y. Sess. Laws § 6458, Part I. Before the 2019 Act, owners could recover more than one unit to use as their own home and could do so without demonstrating any "necessity," let alone an "immediate and compelling necessity." *See id.*; *Kokot v. Green*, 836 N.Y.S. 2d 493, 2007 WL 283081, at *5 (N.Y. Civ. Ct. 2007) (Table). Now, absent exigent circumstances, *tenants* (and their designated successors, in perpetuity) have the power to exclude *owners* from the property the owners nominally own. *See* N.Y.C. Admin. Code §§ 26-511(c)(9)(b), 26-408(b)(1); N.Y. Comp. Codes R. & Regs. tit. 9, § 2524.4(a). This new rule applies even if the owner already commenced the reclamation process in reliance on the prior regime. 2019 N.Y. Sess. Laws § 6458 Laws, Part I § 5.

Fourth, the 2019 Act prohibits owners from converting rent-regulated and free-market rental properties into cooperatives or condominiums without majority tenant approval. *Id.* at Part N. Before the 2019 Act, property owners could exit the rental market by securing purchase agreements for 15% of their apartments, either from current tenants or *bona fide* outside purchasers who intended to occupy units upon vacancy. Then, as soon as tenants vacated the unsold units, the landlords could sell those units too. *See* N.Y. Gen. Bus. Law § 352-eeee (2018). Now, however, a property owner can exit the rental market via a condo/co-op conversion only by securing purchase agreements for 51% of apartments, *all* from current tenants. In other words, the tenants—not the property owner—get to decide whether the owner can convert its property.[2]

Fifth, the 2019 Act significantly limits owners' ability to account for rising costs through rent increases, even where those increases would not impact existing tenancies or lead to rents above the government-sanctioned rate. Before the 2019 Act, for example, owners could increase rents upon vacancy subject to the approval of rent guideline boards. N.Y. Unconsol. Law § 26-510. The 2019 Act, however, repealed these provisions. 2019 N.Y. Sess. Laws § 6458, Parts B & C. The Act now caps annual rent

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[2] The year after the 2019 Act, the aggregate value of condominium conversions fell 99% from $600 million to $6 million. *See* Steven L. Newman Real Estate Inst., Baruch Coll., CUNY, NYC Condominium and Cooperative Conversion: Historical Trends and Impacts of the Law Changes 8 (May 5, 2021), *available at* https://tinyurl.com/284xca7r.

increases for rent-controlled units at the average of the previous five years of increases authorized for rent-stabilized apartments and precludes property owners from adjusting rents to account for rising fuel costs. *Id.* at Part H. The 2019 Act even penalizes owners who had voluntarily offered a "preferential rent" (*i.e.*, a rent below the legal regulated rent) by prohibiting those owners from raising rent to the full government-sanctioned rate upon renewal, even if the owner agreed to the discount before the 2019 Act took effect. *See id.* at Part E.

Sixth, the 2019 Act handicaps owners' ability to invest in the upkeep of their properties by limiting rent increases that account for renovations and improvements. In addition to limiting rent increases generally, the Act significantly lowers the rent increase cap for major capital improvements ("MCIs")—such as the installation of a new roof, elevators, or boilers—and eliminates increases for MCIs altogether for buildings comprised less than 35% of regulated units. 2019 N.Y. Sess. Laws § 6458, Part K. Further, the 2019 Act makes these rent increase caps retroactive by applying the new caps to any MCIs approved since June 2012. *Id.* at Part K, § 5. For individual apartment improvements—such as new appliances, flooring, or air conditioners—property owners can increase rents only in the amount of $15,000 per apartment over a 15-year period. *Id.* There is no exception for substantial renovations, like plumbing projects, which are typically necessary after a long tenancy. Landlords unable to absorb costs in excess of $15,000 over a 15-year period will need to either offer subpar units or take units off the market.

Neither option furthers the Legislature's goal of maintaining quality, affordable housing stock.

Seventh, the Act imposes other significant new limits on evictions for both rent-regulated and non-regulated apartments. These amendments, *inter alia*, extend the period for staying evictions from six months to a year and require the court to vacate an eviction warrant if the tenant pays the full amount of unpaid rent at any time before an eviction warrant's execution (unless the landlord can prove that the tenant withheld the rent in bad faith). *Id.* at Part M, §§ 5, 19, 21, 25.

Petitioners Jane Ordway and Dexter Guerrieri own an eight-unit apartment building in Brooklyn. App.189 ¶ 168. The other Petitioners are small businesses that each own small to mid-size apartment buildings in New York City and Yonkers. App.144–49 ¶¶ 22–40.

The 2019 Act has substantially infringed on the property rights of all Petitioners. App.176 ¶ 127. Take Ms. Ordway and Mr. Guerrieri. After devoting considerable time and expense to repairing their eight-unit building, the two decided to recover a first and second floor unit for themselves. App.190–91 ¶ 170–71. Rather than continue living in two units separated by a public hallway, Ms. Ordway and Mr. Guerrieri planned to consolidate units on the first two floors of the building into their long-term home by also recovering the first-floor garden unit upon the expiration of its tenant's lease. App.190–91 ¶ 171. But the garden unit's tenant—a successful businessman and professional athlete—refused to vacate when his lease expired. App.191 ¶ 172. And

while Ms. Ordway and Mr. Guerrieri initiated owner-occupancy holdover proceedings in September 2018, which had progressed past the midway point by June 2019, the Act's new restrictions forced an abrupt end to Ms. Ordway's and Mr. Guerrieri's previously lawful consolidation efforts. App.191–92 ¶ 173. Because of the 2019 Act, Ms. Ordway and Mr. Guerrieri cannot recover their own property for their personal use.

Petitioners are also struggling to operate their small residential buildings for even a marginal profit. The 2019 Act's elimination of rent increases upon vacancy and limits on recoverable spending for improvements have forced both 181 W. Tremont Associates, LLC, and 125 Holding LLC to take deteriorating units off the market, and Brooklyn 637-240 and 447-9 16th LLC will need to do the same soon. App.184 ¶ 154; App.194–96 ¶¶ 180–85; App.197–98 ¶ 190. And, thanks to the 2019 Act's nearly impossible requirements for co-op/condo conversions, Petitioners can no longer avail themselves of that alternative. While several Petitioners believed their buildings were suitable for conversion into co-ops or condominiums and had anticipated carrying out such conversions, that option is no longer feasible due to the 2019 Act's requirement of majority tenant approval. *See, e.g.*, App.171 ¶¶ 113–15; App.182 ¶ 149; App.187–88 ¶ 163; App.195 ¶ 181; App.196 ¶ 186.

B. Proceedings Below

Petitioners filed suit in the Southern District of New York on January 23, 2020, alleging, *inter alia*, that the Act effected a taking both facially and as applied. The District Court had jurisdiction under 28 U.S.C. § 1331. The District Court dismissed

Petitioners' complaint, and Petitioners timely appealed.

The Second Circuit affirmed the dismissal of Petitioners' claims. The court found no physical taking because Petitioners entered the rental market voluntarily (albeit long before the 2019 Act) and can (at least in theory, albeit under very limited circumstances) evict tenants. *See* App.6–7. As in the Second Circuit's prior decision in *Community Housing*, the court emphasized *Yee*'s statement that localities have "broad power to regulate housing conditions in general and the landlord-tenant relationship." App.6 (quoting *Yee*, 503 U.S. at 528–29). Because neither the co-op/condo conversion amendments nor the extreme limitations on owner reclamation were *completely* "unconditional" impediments to owners' exercise of their rights, the court held, they could not constitute physical takings. App.7 (quoting *Cmty. Hous.*, 59 F.4th at 552). The court also stated that Petitioners' "reliance on *Cedar Point* ... and *Horne*" was "misplaced because neither case is relevant given [that] neither 'concerns a statute that regulates the landlord-tenant relationship.'" App.7 (quoting *Cmty. Hous.*, 59 F.4th at 553).

With respect to Petitioners' as-applied physical takings claims, the court focused on Ms. Ordway and Mr. Guerrieri's efforts to recover their property for personal use. The court observed that the 2019 Act allows a landlord to terminate a tenant's lease on several grounds, "such as for failing to pay rent, creating a nuisance, violating the lease, or using the property for illegal purposes." App.8 (quoting *74 Pinehurst LLC v. New York*, 59 F.4th 557, 563 (2d

Cir. 2023)). Ignoring the fact that all of those grounds are beyond the landlord's control—and without identifying any ground that would be available to Petitioners—the court asserted that Petitioners had failed to plead an as-applied physical takings claim because they had not "demonstrated that they have attempted to use all available methods to either exit the rental market or evict tenants." App.8. The court did not separately address the as-applied physical takings claims of the Petitioners who had been effectively foreclosed from pursuing condo/co-op conversions.

Applying *Penn Central*'s "flexible 'ad hoc'" test, the court also affirmed the dismissal of Petitioners' regulatory takings claims. App.9. With respect to the facial regulatory takings claim, the court concluded that Petitioners had not plausibly alleged that every owner of a rent-stabilized property had suffered an adverse economic impact or an interference with investment-backed expectations and that "the character of the government action sought to promote general welfare and public interest through a 'comprehensive regulatory regime that governs nearly one million units,'" App.9 (quoting *Cmty. Hous.*, 59 F.4th at 555)—as if the sheer scale or purported intent of a taking could render it not a taking. Regarding the as-applied regulatory takings claims, the court agreed with the District Court's finding that certain of Petitioners' claims were not prudentially ripe because of the potential availability of hardship exemptions for modest rent increases and because of the theoretical possibility that a landlord could get majority tenant approval for a condo/co-op conversion. App.10–11. On the merits, the court below acknowledged that

Petitioners "alleged specific facts" showing a negative economic impact, but the court reasoned that any reasonable investor would have anticipated the possibility of regulatory changes and that the character of the legislation, which had the stated purpose of serving the public interest, "weighs strongly against [Petitioners'] claims." App.11–12.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Decision Deepens A Circuit Split Regarding The Physical Takings Doctrine.

A. Courts Are Divided Over Whether Regulations That Generally Prohibit Landlords From Evicting Tenants Constitute a Physical Taking.

The Second Circuit has now held four times that "limitations on the termination of a tenancy do not effect a taking so long as there is a possible route to an eviction." *335-7 LLC v. City of New York*, 2023 WL 2291511, at *2 (2d Cir. Mar. 1, 2023) (quoting *Cmty. Hous.*, 59 F.4th at 552), *cert. denied*, 2024 WL 674658 (U.S. Feb. 20, 2024); *accord Pinehurst*, 59 F.4th at 563; App.6–8. The Ninth Circuit has likewise determined that the government does not inflict a physical taking by forcing a property owner to continue tenancy after the expiration of the parties' lease agreement, at least where the law allows for some at-fault evictions. *Kagan v. City of Los Angeles*, 2022 WL 16849064, at *1 (9th Cir. Nov. 10, 2022), *cert. denied*, 144 S. Ct. 71 (2023).

The Eighth Circuit, in *Heights Apartments, LLC v. Walz*, arrived at the exact opposite conclusion. 30

F.4th 720, 733 (8th Cir. 2022). There, the court found a physical taking where an eviction moratorium "forbade the nonrenewal and termination of ongoing leases, even after they had been materially violated, unless the tenants seriously endangered the safety of others or damaged property significantly." *Id.* In other words, the Eighth Circuit concluded that a law authorizing lease renewal against a landlord's wishes gives rise to a *per se* physical taking even where, as here, landlords retain a possible route to eviction.

The fault line is the proper application of this Court's physical takings precedent, specifically *Yee v. City of Escondido*, 503 U.S. 519 (1992). Notwithstanding *Yee*'s acknowledgment that a "different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy," *id.* at 528, the Second and Ninth Circuits interpret *Yee* as foreclosing a physical takings claim where an owner voluntarily placed his property on the rental market and any route to eviction—no matter how theoretical and unlikely—remains. App. 6–8; *Cmty. Hous.*, 59 F.4th at 552; *Kagan*, 2022 WL 16849064, at *1.[3]

[3] District courts have adopted similar interpretations of *Yee*—while recognizing the conflict with the Eighth Circuit. *See, e.g.*, *Pakdel v. City & County of San Francisco*, 636 F. Supp. 3d 1065, 1073–74 (N.D. Cal. 2022); *Williams v. Alameda County*, 642 F. Supp. 3d 1001, 1016–20 (N.D. Cal. 2022); *Gallo v. District of Columbia*, 610 F. Supp. 3d 73, 87 (D.D.C. 2022). As the *Williams* court later observed in assessing a petition for interlocutory appeal, "there is a circuit split" on how to apply *Yee* and *Cedar Point* to housing laws and "there are substantial grounds for

For its part, the Eighth Circuit distinguished *Yee* because the rent controls at issue in *Yee* limited the amount of rent landlords could charge but allowed landlords to evict tenants after a notice period (even without cause). *See Heights Apartments*, 30 F.4th at 733; *Yee*, 503 U.S. at 527–28 ("[N]either the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so"). The Eighth Circuit therefore applied *Cedar Point*'s holding that "[w]henever a regulation results in a physical appropriation of property, a *per se* taking has occurred." *Heights Apartments*, 30 F.4th at 733 (quoting *Cedar Point*, 594 U.S. at 149).

The Court should grant this petition to clarify that *Yee* does not foreclose a physical takings claim just because a regulation preserves a narrow, theoretical path to eviction—dependent on circumstances outside the landlord's control, such as whether the tenant "us[es] the property for illegal purposes," App.8 (quoting *Pinehurst*, 59 F.4th at 563)—where the regulation as a practical matter deprives owners of their fundamental right to exclude tenants from what nominally is the owner's property.

B. The Second Circuit Is on the Wrong Side of This Circuit Split.

With its most recent decision, the Second Circuit dug its heels further into the wrong side of this circuit split. This Court clarified just two terms ago that "[g]overnment action that physically appropriates property is no less a physical taking because it arises

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difference of opinion" on that question. *Williams v. Alameda County*, 657 F. Supp. 3d 1250, 1256 (N.D. Cal. 2023).

from a regulation." *Cedar Point*, 594 U.S. at 149. Rather, the "essential question" when considering a physical taking is "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Id.*; *see also Sheetz v. County of El Dorado*, __ S. Ct. __, 2024 WL 1588707, at *4 (U.S. Apr. 12, 2024) ("[I]nterfer[ing] with the owner's right to exclude others ... is a *per se* taking.").

That approach makes sense "because our Constitution deals in substance, not form." *Id.* at *8 (Gorsuch, J., concurring). As in *Cedar Point*, the law here works a physical taking because it "appropriates for the enjoyment of third parties the owners' right to exclude." 594 U.S. at 149. Nowhere is that physical taking more obvious than in the government's taking of Ms. Ordway's and Mr. Guerrieri's property. Before the 2019 Act, they were entitled to recover a unit for their own personal use and had begun proceedings to do so. The Act, however, has given another person an exclusive right to occupy that unit—to prevent the owners from living in their own property. As this Court has explained, no matter how minimal the invasion, "[t]o require ... that the owner permit another to exercise complete dominion literally adds insult to injury." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982). If stringing a cable across property is a physical taking, then there is no doubt that giving a third party the right to enter an owner's property and live there indefinitely is a physical taking.

What makes no sense is the Second and Ninth Circuits' insistence on evaluating a physical taking based on an owner's original decision to enter the rental market (no matter how many decades ago) and whether the regulatory scheme preserves some pathway for landowners to end a tenancy (no matter how unlikely or outside of the owner's control). *See* App.6 (citing *Cmty. Hous.*, 59 F.4th at 551); *Kagan*, 2022 WL 16849064, at *1. This Court has already rejected the idea that a physical taking cannot occur where someone made a voluntary choice to enter the regulated market. *Horne*, 576 U.S. at 365 ("'Let them sell wine' is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history."). To the contrary, "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Loretto*, 458 U.S. at 439 n.17.

The notion that a property owner's right to exclude can be eviscerated as long as there are *some* circumstances in which eviction may be legally possible is similarly untenable. *See* App.8 (reasoning that New York law allows Petitioners to evict on "several bases" beyond their control, such as if a tenant fails to pay rent or commits illegal acts (quoting *Pinehurst*, 59 F.4th at 563)). In contrast to the Second Circuit's assumption that a regulation can effect a physical taking only if the regulation is "unconditional" (*i.e.*, unbounded), App.7 (quoting *Cmty. Hous.*, 59 F.4th at 552), this Court has held that the rule against physical takings applies regardless of circumstances such as the size of the space invaded, *Loretto*, 458 U.S. at 435, the length of the invasion, *Cedar Point*, 594 U.S. at 152; or the nature of the

property (be it real or personal), *Horne*, 576 U.S. at 361. In *Cedar Point*, the labor organizers' right of access to the owners' property applied only "when certain conditions [were] met." App.7 (quoting *Cmty. Hous.*, 59 F.4th at 552); *see Cedar Point*, 594 U.S. at 166 (Breyer, J., dissenting) (summarizing set of "detailed regulations that describe and limit the access at issue," including limits on duration and a bar on "disruptive" conduct (quotation marks omitted)). Despite acknowledging those conditions on the access right, the Court held that "a *per se* taking has occurred." *Cedar Point*, 594 U.S. at 143–49. Here, the rule against physical takings should likewise apply regardless of whether a landlord has some remote and theoretical means of evicting a tenant.

Properly understood, *Yee* is consistent with *Cedar Point*, *Horne*, and *Loretto*. In *Yee*, the challenged regulations allowed landlords to evict tenants after a notice period, even *without cause*. 503 U.S. at 528 (citing Cal. Civ. Code § 798.56(g)). The Court specifically cautioned that "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Id.* That is just what New York has done with its owner-reclamation and condo/co-op conversion regulations.

Contrary to the reasoning of the Second and Ninth Circuit, *Yee* did not establish an exception to physical takings doctrine for laws that purport to regulate the landlord-tenant relationship. *See* App.6–8; *Kagan*, 2022 WL 16849064, at *1. "The essential question is not, as the Ninth [and Second] Circuit[s]

seemed to think, whether the government action at issue comes garbed as a [landlord-tenant] regulation[.]" *Cedar Point*, 594 U.S. at 149. Whether the beneficiary of the government action is a labor organizer, a tenant, or anyone else, what matters is that "the regulation appropriates for the enjoyment of third parties the owners' right to exclude." *Id.*

II. The Second Circuit's Regulatory Takings Holding Also Warrants Review.

The Second Circuit also dismissed Petitioners' claims that the 2019 Act constitutes a regulatory taking under *Penn Central*. This holding is incorrect and, by highlighting how malleable the *Penn Central* test has become, invites this Court to revisit *Penn Central* and clarify when a regulatory taking occurs.

A. The Second Circuit's Regulatory Takings Decision Is Wrong.

Had the Second Circuit properly applied *Penn Central*, it would have concluded that Petitioners stated a claim for a regulatory taking. Under the *Penn Central* test, courts consider "the character of the governmental action" along with the "economic impact of the regulation," including "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Cent.*, 438 U.S. at 124.

To begin with, the government action here has all the trappings of a taking. The "central purpose of the Takings Clause" is to "'bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Murr v. Wisconsin*, 582 U.S. 383, 405–06 (2017) (quoting *Armstrong v. United States*, 364 U.S.

40, 49 (1960)). The Act forces Petitioners to disproportionately bear the cost of what is essentially a government-sponsored affordable housing initiative. As the title of the 2019 Act—the Housing Stability and Tenant Protection Act—demonstrates, New York City wanted to protect tenants from having to pay higher rents and wanted to "stabili[ze]" the supply of rental housing by preventing landlords from taking units off the rental market. And the City wanted to do all of that without incurring any cost itself, so it foisted the costs of these "public burdens" off onto property owners.

What's more, Petitioners specifically alleged that the Act's draconian restrictions on rent increases and eviction would be counterproductive. As Petitioners explained, the Act will "exacerbate any housing shortage because tenants will be further disincentivized from giving up their apartments and moving as market conditions shift, because units will be permanently rent-regulated at absurdly reduced rents, and because it will be too expensive for developers to build new units because of all of the market distortions caused by rent regulation." App.135–36 ¶ 4. Individual Petitioners even alleged that they had been forced to take deteriorating units off the market because of limitations on rent increases for improvements and other burdens imposed by the Act. *See, e.g.*, App.184 ¶ 154; App.188–89 ¶ 166. Like the Eighth Circuit in *Heights Apartments*, at the pleading stage, the Second Circuit should have accepted allegations like these as true rather than assuming that government action would be beneficial. *See* 30 F.4th at 734.

The Second Circuit focused instead on what it presumed to be the government's good intentions. App.9 ("[T]he government action sought to promote general welfare and public interest"); App.12 (concluding that "[t]he character of the governmental action ... weighs strongly against [Petitioners'] claims" because the Act "is concerned with 'broad public interests'" (quoting *Cmty. Hous.*, 59 F.4th at 555)). That approach, which accepts the government's own description of the "character of the government action" on faith, would "relegat[e] [the Takings Clause] ... to the status of a poor relation." *Sheetz*, 2024 WL 1588707, at *7 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)). Nearly every taking of private property will come wrapped in some public purpose, and a "strong 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 (quotation marks omitted).

As for economic impact, the Second Circuit was forced to acknowledge that Petitioners had "alleged specific facts in their complaints tending to show a negative economic impact." App.11. Yet the court held that "loss of profit" was "insufficient"—without explaining what *would* be sufficient under this factor. App.11 (quotation marks omitted). After all, Petitioners described economic harms including but not limited to sharp declines in rental income and "dramatic[ ]" devaluation of property. App.164–65 ¶¶ 91–92; App.172 ¶ 119; App.208 ¶ 224. That the Act deprives Petitioners of rental income needed to maintain their properties in marketable condition, and tanks the value of their real estate, should have been sufficient to plead economic harm weighing in

favor of a regulatory taking. *See Heights Apartments*, 30 F.4th at 734 (finding deprivation of rental income sufficient to establish this factor).

The Second Circuit also gave short shrift to Petitioners' reasonable investment-backed expectations. Petitioners alleged that they had invested considerable sums in their properties, not only to purchase them to but to make major improvements to previously rundown structures. *See, e.g.*, App.190, 194, 195–96, 198–99 ¶¶ 170, 179, 184, 194. When Petitioners made these investments, they could not reasonably have foreseen such a dramatic, unprecedented shift in the regulatory environment—a new regime that the enactors of the 2019 Act touted as the most stringent "in history." App.141–42 ¶¶ 15–16. Yet the Second Circuit opined that because the RSL had "changed many times" over the years, "any reasonable investor" would have anticipated the RSL's radical transformation in 2019. App.12.

In dismissing Petitioners' claims, the Second Circuit "abandon[ed] the guiding principle of the Takings Clause that 'public burdens ... should be borne by the public as a whole.'" *Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part) (quoting *Armstrong*, 364 U.S. at 49). And it underscored just how meaningless the *Penn Central* test has become as a constraint on regulatory takings.

B. The Court Should Overrule *Penn Central* or Clarify the Proper Standard.

As the foregoing illustrates, the Second Circuit interpreted *Penn Central* so narrowly as to render it a

dead letter. If the Second Circuit's approach is viewed as faithful to *Penn Central*, then it is time for this Court to overrule that opinion. This Court's *stare decisis* factors only confirm that *Penn Central* is ripe for repudiation. The decision was poorly reasoned, its multi-factor test is unworkable, it is inconsistent with other takings decisions and constitutional developments since, and the lack of clarity surrounding *Penn Central* undermines any claim of reliance. *See Janus v. Am. Fed. of State, County, & Mun. Emps.*, 585 U.S. 878, 916–17 (2018).

Penn Central was never meant to be a definitive legal interpretation of the Takings Clause. It was not even meant to announce "a set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government." 438 U.S. at 124 (quotation marks omitted). Rather, as explained in *Penn Central*, the Court was "engaging in … essentially ad hoc, factual inquiries" to determine whether a taking occurred, and the factors identified were just "several factors that have particular significance." *Id.* To elevate the multi-factor *Penn Central* inquiry to the status of a definitive constitutional test is to ignore the decision itself.[4]

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[4] Indeed, as one casebook has observed, "[c]lose reading of the opinion must cope with the report by Justice Brennan's law clerk ... that it 'was basically written Memorial Day weekend in three consecutive near all-nighters.'" Sara C. Bronin & J. Peter Byrne, Historic Preservation Law 360 (2d ed. 2021) (quoting Transcript, *Looking Back on* Penn Central*: A Panel Discussion with the Supreme Court Litigators*, 15 Fordham Env't L. Rev. 287, 302 (2004)).

As myriad jurists and commentators have noted, the ad hoc *Penn Central* inquiry is unworkable. More than 35 years ago, Justice Stevens described this Court's regulatory-takings jurisprudence as "open-ended and standardless." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 340 n.17 (1987) (Stevens, J., dissenting); *see also Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 886 (D.C. Cir. 1999) (Williams, J., concurring) ("Few regulations will flunk this nearly vacuous test."). And, as Justice Thomas explained just a few years ago, no one has figured out the test in the interim: "nobody—not States, not property owners, not courts, nor juries—has any idea how to apply this standardless standard." *Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n*, 141 S. Ct. 731, 731 (2021) (Thomas, J., dissenting from denial of certiorari).

Penn Central is markedly out of step with this Court's constitutional jurisprudence. Consider this Court's Second Amendment decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). There, the Court held "that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 17. The government cannot justify a regulation by "simply posit[ing] that the regulation promotes an important interest" but rather "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*

This "standard accords with how we protect other constitutional rights." *Id.* at 24. "[W]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its

actions." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000). Where "a litigant asserts the right in court to 'be confronted with the witnesses against him,' we require courts to consult history to determine the scope of that right." *N.Y. State Rifle & Pistol Ass'n*, 597 U.S. at 25 (quoting U.S. Const. amend. VI). And "when a litigant claims a violation of his rights under the Establishment Clause, Members of this Court 'loo[k] to history for guidance.'" *Id.* (quoting *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 32 (2019) (plurality opinion)). The ad hoc *Penn Central* multi-factor balancing test is woefully at odds with how this Court treats other constitutional protections. *See Nekrilov v. City of Jersey City*, 45 F.4th 662, 686–87 (3d Cir. 2022) (Bibas, J., concurring) (noting that *Penn Central* is "hard to square" with the original understanding of the Takings Clause and outlining an alternative test grounded in history).

Finally, reliance interests are weak. As *Penn Central* made clear, it is effectively an ad hoc, fact-specific inquiry that provides little guidance to regulators or regulated parties. The Court has expressly "eschewed 'any set formula'" that might establish a stable rule of law. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002) (quoting *Penn Cent.*, 438 U.S. at 124). The doctrine is effectively "[a] know-it-when-you-see-it test" that "invites unprincipled, subjective decisionmaking dependent upon the decisionmaker." *Bridge Aina Le'a*, 141 S. Ct. at 732 (Thomas, J., dissenting from denial of certiorari) (quotation marks omitted).

III. This Case Provides An Excellent Vehicle To Address Two Exceptionally Important Issues.

A. This Case Is an Excellent Vehicle to Address When Restrictions on Eviction Effect a Physical Taking.

This case squarely implicates a significant constitutional issue that has divided the lower courts: whether regulations that prevent a landlord from evicting a tenant, except for reasons beyond the landlord's control, effect a physical taking. As Justice Thomas has observed, "[t]he constitutionality of regimes like New York City's is an important and pressing question" on which this Court "should grant certiorari" in "an appropriate future case." *Pinehurst*, 2024 WL 674658, at *1 (Thomas, J., statement respecting denials of certiorari).

That "appropriate future case" has now arrived. *Id.* While Justice Thomas suggested that prior challenges to New York's regime may have been too "generalized" to facilitate proper review, Petitioners have identified "specific New York City regulations" that "prevent [them] from evicting actual tenants for particular reasons." *Id.* For example, as discussed, the 2019 owner-occupancy amendments effectively nullified Ms. Ordway's and Mr. Guerrieri's efforts to reclaim a garden unit in their building for use as part of their long-term home. App.189–93 ¶¶ 168–76. Ms. Ordway and Mr. Guerrieri wish to evict the current tenant, an affluent businessman and professional athlete, from their rent-stabilized unit so that they can occupy it themselves. *See id.* The couple was pursuing proceedings to recover the unit until those

efforts were short-circuited by the 2019 Act, which prohibits owners from reclaiming a dwelling unit absent an "immediate and compelling necessity." App.191–92 ¶ 173 (quotation marks omitted). As a result, they have been excluded indefinitely from their own property. *Id.*

In addition, several Petitioners have specifically alleged that the condo/co-op conversion amendments prevent them from carrying out contemplated conversions of specific buildings. *See, e.g.*, App.171 ¶¶ 113–15; App.182–83 ¶ 149; App.1877–88 ¶ 163; App.195 ¶ 181; App.196 ¶ 186. While these Petitioners believed their buildings were suitable for conversion, the 2019 Act effectively foreclosed that option by granting current tenants a collective veto right. Like Ms. Ordway and Mr. Guerrieri, and as New York no doubt intended, these landlords have no choice but to continue renting.

By contrast, the allegations in prior challenges were not as specific or as robust. In *Pinehurst*, for example, the complaint alleged only that one owner had made an unsuccessful attempt at reclamation in 2011, many years before the 2019 Act, and that the owner's sister had "considered" occupying a rent-stabilized unit in the building. BIO at 16, 2024 WL 674658 (No. 22-1130). In *335-7 LLC*, "no petitioner allege[d] that it wishes to exit the rental market or that the RSL has stopped it from doing so." BIO at 14, 2024 WL 674658 (No. 22-1170). Here, several Petitioners have alleged that they wish to exit the rental market, whether through reclamation for personal use or condo/co-op conversions, and that the 2019 Act has prevented them from taking that course.

Thus, this petition cleanly presents the issue left open in *Yee*: whether a law that "compel[s] a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy" effects a physical taking. *Yee*, 503 U.S. at 528. That some for-cause evictions remain available under the 2019 Act does not bring the Second Circuit's decision within *Yee*'s ambit. The challenged scheme in *Yee* permitted not only for-cause evictions, but also, as the Court emphasized, evictions with six or twelve months' notice *without* cause. *Id*. Thus. the landlords in *Yee* were not compelled to continue renting their property indefinitely. The 2019 Amendments, in contrast, provide no such escape hatch: a tenant, unless she commits a crime or creates a nuisance in the apartment, can live in the owner's apartment as long as she wishes—and can designate a successor to live in it afterward. All the while, the landlord is excluded from what is purportedly her own property.

Nor is there any way to avoid the reality of a deepening circuit split by somehow reconciling the Second and Ninth Circuits' position with the Eighth's. As discussed, the challenged regulations in *Heights* allowed for the eviction of tenants under narrow circumstances. 30 F.4th at 724. But the Eighth Circuit still held that the plaintiffs alleged a *per se* physical taking under *Cedar Point* because the regulatory scheme turned every lease "into an indefinite lease, terminable only at the option of the tenant." *Id.* (quotation marks omitted). On materially indistinguishable facts, the Second Circuit came to the opposite conclusion. This case thus offers an excellent vehicle for this Court to resolve the split.

B. This Case Is an Excellent Vehicle to Clarify the Standards Applicable to Regulatory Takings.

This case is also an ideal vehicle to clarify the standards applicable to regulatory takings. Because it arises from a motion to dismiss, the facts are not in dispute and the errors in the Second Circuit's *Penn Central* analysis are purely legal. As the Second Circuit acknowledged, Petitioners have alleged specific facts detailing the economic and practical impact of specific regulations. And while the ad hoc *Penn Central* "test" may be too much of a muddle to lend itself to a square, explicit circuit split, it is widely acknowledged to be so amorphous as to provide no meaningful guidance, such that courts reach divergent results on similar facts. That is all the more reason for the Court to grant this petition; "[a] know-it-when-you-see-it test is no good if one court sees it and another does not." *Bridge Aina Le'a*, 141 S. Ct. at 732 (Thomas, J., dissenting from denial of certiorari).

C. The Issues Are Pressing and Exceptionally Important.

The Takings Clause is the most critical protection that our Constitution gives property owners. But the Second Circuit's decision defines physical and regulatory takings so narrowly as to render the Takings Clause virtually inapplicable to landlords.

The Second Circuit's misguided approach will have an outsized effect. For one thing, New York City is the nation's largest rental market, with roughly one million rent-stabilized units. Many of these units' owners are individuals and small businesses like

Petitioners. Forcing this small portion of the population to shoulder the burden of a very public crisis is not only antithetical to the Takings Clause but detrimental to the affordable-housing cause itself. Indeed, as a result of the 2019 Act's draconian caps on rent increases, many individuals and small businesses have simply chosen to leave their units vacant. *See* Sam Rabiyah, *NYC Had 88,830 Vacant Rent-Stabilized Apartments Last Year, City Housing Agency Estimates*, The City (Oct. 20, 2022), https://bit.ly/3WEdPpC.

The impact of this case also extends well beyond New York City. Jurisdictions across the country are advancing rent and eviction controls. *See, e.g.*, Cal. Civ. Code § 1946.2; D.C. Code § 42-3505.01; Or. Rev. Stat. § 90.427; H.3744, 193d Gen. Ct. (Mass. 2023) (proposed Boston regulation); Regs. of Berkeley Rent Bd., ch. 12, subch. C, § 1274.5 (Cal.); Santa Monica Reg., ch. 4 subch. G, § 4107 (Cal.). Even the White House has advocated for national "just- or good-cause eviction protections." Domestic Pol'y Council & Nat'l Econ. Council, The White House Blueprint for a Renters Bill of Rights 16 (Jan. 2023).

This Court's review is necessary to resolve a clear circuit split over when a physical taking occurs in the landlord-tenant context and to address the confusion clouding the application of the Takings Clause to regulatory takings. Property owners like Petitioners are entitled to meaningful protection under the Takings Clause—not to have the lower courts read that fundamental protection out of existence whenever a government acts to benefit tenants at property owners' expense.

CONCLUSION

The Court should grant this petition for certiorari.

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