No. 22-1095

IN THE

Supreme Court of the United States

COMMUNITY HOUSING IMPROVEMENT PROGRAM, *et al.*,

Petitioners,

v.

CITY OF NEW YORK, NEW YORK, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENTS N.Y. TENANTS AND NEIGHBORS, COMMUNITY VOICES HEARD, AND THE COALITION FOR THE HOMELESS

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QUESTIONS PRESENTED

This case involves a facial challenge, under the Takings Clause, to the validity of New York's Rent Stabilization Law of 1969, the Emergency Tenant Protection Act of 1974, and their attendant codes, rules, and regulations (together, the "RSL"). The questions presented are:

1. Whether the United States Court of Appeals for the Second Circuit correctly held that the provisions of the RSL (i) circumscribing the permissible grounds for evicting rent-stabilized tenants or refusing to renew their leases, (ii) extending the RSL's protections to certain family members and close associates of tenants of record, and (iii) regulating the conversion (through sale) of rent-stabilized buildings to cooperative or condominium ownership do not facially effect *per se* physical takings because the RSL neither compels an owner to offer her property for rent nor prohibits a landlord in perpetuity from terminating a tenancy.

2. Whether the Second Circuit correctly rejected Petitioners' argument that the governing standard for regulatory taking claims comes from the dissent in *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

CORPORATE DISCLOSURE STATEMENT

Respondents N.Y. Tenants and Neighbors, Community Voices Heard, and the Coalition for the Homeless have no parent corporation, and no publicly held corporation owns 10% or more of the stock of any of these entities.

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INTRODUCTION

Petitioners—New York landlords and landlord associations—seek this Court's review of a decision by a unanimous Second Circuit panel that affirmed the district court's dismissal of claims that New York's Rent Stabilization Law of 1969, the Emergency Tenant Protection Act of 1974, and their attendant codes, rules, and regulations (together, the "RSL") effect, facially, *per se* physical takings under this Court's precedents and regulatory takings under a theory that has been unanimously rejected by this Court.[1]

The RSL, which applies to nearly one million housing units in New York City alone, has regulated rents and evictions across the state for *fifty years* and has repeatedly withstood takings challenges, as noted by the Second Circuit.[2] These failed challenges included multiple cases brought by Petitioner Rent

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[1] Respondents N.Y. Tenants and Neighbors, Community Voices Heard, and the Coalition for the Homeless are non-profit tenant advocacy organizations that intervened below in defense of the RSL.

[2] See, e.g., *Harmon v. Markus*, 412 F. App'x 420 (2d Cir. 2011); *W. 95 Hous. Corp. v. N.Y.C. Dep't of Hous. Pres. & Dev.*, 31 F. App'x 19 (2d Cir. 2002); *Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45 (2d Cir. 1996); *Greystone Hotel Co. v. City of New York*, 13 F. Supp. 2d 524 (S.D.N.Y. 1998), *aff'd*, 1999 U.S. App. LEXIS 14960 (2d Cir. June 23, 1999) (summary order); *Silberman v. Biderman*, 735 F. Supp. 1138 (E.D.N.Y. 1990); *Tonwal Realties, Inc. v. Beame*, 406 F. Supp. 363 (S.D.N.Y. 1976); *Somerset-Wilshire Apartments, Inc. v. Lindsay*, 304 F. Supp. 273 (S.D.N.Y. 1969).

Stabilization Association of N.Y.C., Inc. ("RSA").[3] The unanimous Second Circuit's faithful application of clear precedent in this case is the latest in this long line of decisions upholding the RSL.

Because there is no conflict among the circuits regarding the applicable standard for analyzing facial challenges to rent regulations under the Takings Clause, the unanimous decision below is fully consistent with this Court's Takings Clause jurisprudence, and this case is a poor vehicle for addressing the parameters of the Takings Clause, the Petition should be denied.

STATEMENT OF THE CASE

A. The Long History of Rent and Eviction Regulations in New York

For over a century, New Yorkers have benefited from federal, state, and local regulation of rents and evictions. This Court and others have repeatedly upheld those protections. Petitioners treat these regulations as though they were a single statute whose provisions may be evaluated in one swoop, but the reality is far more complex.

In 1920, in response to severe housing shortages and rent shocks caused by World War I, the New York state legislature enacted the first rent-regulation laws

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[3] See *Rent Stabilization Ass'n of City of N.Y. v. Dinkins*, 5 F.3d 591 (2d Cir. 1993); *Rent Stabilization Ass'n of N.Y.C., Inc. v. Higgins*, 83 N.Y.2d 156 (1993), *cert. denied,* 512 U.S. 1213 (1994).

for New York City. Pet. App. 4a. The laws—which for ten years capped rent increases and prevented evictions without cause—were the subject of repeated lawsuits. *Id.* This Court and the New York Court of Appeals repeatedly upheld their constitutionality.[4]

During and after World War II, tenancies in the New York City area were regulated by federal law: first the Emergency Price Control Act of 1942, and later the Housing and Rent Act of 1947. Pet. App. 5a. This Court upheld both statutes (and their attendant rent and eviction regulations) against Takings Clause challenges.[5]

In 1950, authority to regulate residential rents in New York passed to the Temporary State Housing Rent Commission, see Pet. App. 5a, whose regulations likewise were repeatedly upheld against constitutional attack.[6]

Pursuant to a 1962 statute delegating rent-regulation authority to large cities, 23 N.Y. Unconsol. Laws § 8605, the New York City Council enacted the Rent

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[4] See *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 249–49 (1922); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 198 (1921); *People ex rel. Durham Realty Corp. v. La Fetra*, 230 N.Y. 429, 444–46, *writ of error dismissed*, 257 U.S. 665 (1921).

[5] See *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146 (1948); *Bowles v. Willingham*, 321 U.S. 503, 517 (1944).

[6] See *I.L.F.Y. Co. v. Temp. State Hous. Rent Comm'n*, 10 N.Y.2d 263, 268 (1961), *appeal dismissed*, 369 U.S. 795 (1962); *Teeval Co. v. Stern*, 301 N.Y. 346, 362, *cert. denied*, 340 U.S. 876 (1950).

Stabilization Law of 1969 (the "1969 RSL"), see Pet. App. 6a. The 1969 RSL initially applied to buildings with six or more units constructed between 1947 and 1969 and established New York City's Rent Guidelines Board to regulate annual rent increases for rent-stabilized apartments. Pet. App. 96a ¶ 44. The 1969 RSL's regulations set the permissible grounds for evicting, or declining to renew the leases of, rent-stabilized tenants. See *The New York Rent Stabilization Law of 1969*, 70 Colum. L. Rev. 156, 173–74 (1970). One basis for eviction was the conversion of a rent-stabilized building to cooperative ownership, which requires approval by the Attorney General and, in the 1970s, required the subscription of 35 percent of tenants. See *Richards v. Kaskel*, 32 N.Y.2d 524, 530 (1973). Multiple courts upheld the 1969 RSL's constitutionality.[7]

In a 1971 effort to spur housing construction and renovation, the state legislature enacted statutes requiring the deregulation of apartments upon vacancy, prohibiting New York City from subsequently regulating such apartments, and permitting owners of newly constructed buildings to opt into rent stabilization in exchange for a tax abatement. See generally *Hewlett Assocs. v. City of New York*, 57 N.Y.2d 356, 360 (1982); *La Guardia v. Cavanaugh*, 53 N.Y.2d 67, 73 (1981). The hoped-for construction and renovation did not materialize, however, and the state enacted the

[7] See *8200 Realty Corp. v. Lindsay*, 27 N.Y.2d 124, 129 (1970); *Somerset-Wilshire Apartments*, 304 F. Supp. at 274.

Emergency Tenant Protection Act of 1974 ("ETPA"),[8] which permitted New York City to expand, and surrounding municipalities to adopt, rent stabilization for buildings with six or more units constructed before 1974 that were not already regulated. See *La Guardia*, 53 N.Y.2d at 74. The ETPA may apply only in municipalities experiencing a housing emergency, as declared by the local legislative body. See *id.* at 75. The ETPA "nullified and terminated" the 1971 "experiment" in vacancy-based deregulation. *520 E. 81st St. Assocs. v. Lenox Hill Hosp.*, 38 N.Y.2d 525, 528 (1976).

In the 1980s, the state legislature designated the Division of Housing and Community Renewal ("DHCR") as the sole agency authorized to administer the RSL, and DHCR issued regulations extending the RSL's non-eviction protections to certain family members and close associates of a tenant of record who resided with the tenant of record in a regulated apartment. See *Rent Stabilization Ass'n of N.Y.C., Inc. v. Higgins*, 83 N.Y.2d 156, 165 (1993). The New York Court of Appeals squarely rejected arguments by Petitioner RSA and others that these successorship regulations created perpetual tenancies or otherwise effected unconstitutional physical or regulatory takings. *Id.* at 171–75. This Court denied certiorari. 512 U.S. 1213 (1994).

Although RSA's challenge in *Higgins* was limited to DHCR's family-succession amendments, RSA filed a separate lawsuit alleging that the RSL's rent

[8] The Second Circuit mistakenly described the ETPA as having been enacted in 1971. See Pet. App. 6a.

restrictions effected unconstitutional takings by purportedly depriving some landlords of reasonable returns. See *Rent Stabilization Ass'n of City of N.Y., Inc. v. Dinkins*, 5 F.3d 591, 594–95 (2d Cir. 1993). The Second Circuit rejected RSA's claims. *Id.*

In 1993, the state legislature amended the RSL to permit, for the first time in twenty years, the deregulation of high-rent apartments that either became vacant or housed high-income tenants. See Pet. App. 98a ¶¶ 50–51; *Roberts v. Tishman Speyer Props. L.P.*, 13 N.Y.3d 270, 280–81 (2009). These deregulatory mechanisms remained in place until 2019.

The Housing Stability and Tenant Protection Act of 2019 ("HSTPA") was enacted on June 14, 2019, in response to the housing crisis that the state legislature found continues to exist in New York. See Pet. App. 6a–7a, 36a. The HSTPA amended various provisions of the RSL and other laws affecting the landlord-tenant relationship. Among other changes, the HSTPA revised the amounts of permissible rent increases based on apartment or building improvements, repealed the statutory mechanisms for deregulating high-rent apartments upon vacancy or based on tenants' income, repealed statutory bases for increasing rents upon vacancy, and restricted landlords' ability to evict tenants or refuse renewal of leases to recover apartments for the landlord's personal use. See *id.* The HSTPA also permits municipalities statewide that are experiencing a housing emergency to opt into the RSL's protections. See L. 2019, Ch. 36, Part G.

B. The Reach of the RSL

The RSL protects tenants in approximately 946,000 apartments in New York City, or about half the city's rental housing stock. See Pet. App. 9a; Pet. 4. One-fifth of these apartments house families living below the poverty line, and nearly two-thirds house families classified by the Department of Housing and Urban Development as low-income, very low-income, or extremely low-income. Pet. App. 9a. In recent years, approximately 175,000 households in rent stabilized housing were unable to afford even a $25 increase in their monthly rent. *Id.* n.21.

In general, the RSL applies only to buildings constructed before 1974 that have six or more apartments, and only in municipalities whose local legislative bodies have declared, after public hearing, a housing emergency for a housing class with a vacancy rate of 5% or less.[9] See N.Y.C. Admin. Code 26-504(b); 23 N.Y. Unconsol. Laws §§ 8623, 8625. The New York City Council last declared such an emergency in 2022. See N.Y.C. Admin. Code §§ 26-501, 26-502. Absent further legislative action, that emergency declaration will expire on April 1, 2024. *Id.* § 26-520. In addition, the emergency "must be declared at an end once the

[9] The RSL also applies to certain New York City apartments in buildings of six or more units constructed between 1947 and 1969 notwithstanding a declaration of emergency, see N.Y.C. Admin. Code § 26-504(a)(1), and to apartments in buildings receiving certain tax benefits, see *id.* § 26-504(c). Petitioners contend that the latter "consensual applications of the RSL are not at issue here," Pet. 4 n.1, but they do not explain how their facial attack on the entire RSL would carve out any of its applications.

vacancy rate … exceeds five percent." 23 N.Y. Unconsol. Laws § 8623.

The RSL has established a Rent Guidelines Board ("RGB") for New York City.[10] Pet. App. 6a. The RGB comprises members representing the interests of landlords, tenants, and the general public and is charged with determining the amount of permissible rent increases for rent-stabilized renewal leases. See *id.* (citing N.Y.C. Admin. Code § 26-510(a)). The RSL requires the RGB, when making its decision, to consider multiple factors: the economic condition of the housing market, certain costs for which landlords were responsible, the returns generated to landlords, the housing supply, and the cost of living. *Id.* (citing N.Y.C. Admin. Code § 26-510(b)).

Consistent with the RSL, a landlord generally may charge rents up to the RGB-set maximum,[11] may raise rents due to improvements, may apply for hardship exemptions if the landlord is unable to maintain a consistent average rental income or if the gross rental income does not exceed the landlord's annual operating

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[10] The RSL also provides for the creation of an RGB for each county outside of New York City in which a municipality has opted into the RSL's protections by determining the existence of a housing emergency. See 23 N.Y. Unconsol. Laws § 8624(a).

[11] Since the enactment of the HSTPA, when a landlord offers an apartment for a "preferential rent" that is lower than the RGB-set maximum, such preferential rent becomes the baseline for future RGB-permitted rent increases until that tenant vacates the unit. See generally *Burrows v. 75-25 153rd St., LLC*, 215 A.D.3d 105, 111 & n.5 (1st Dep't 2023).

expenses by at least five percent of the gross rent, and must grant tenants and their lawful successors the opportunity to renew their leases, subject to exceptions described below. See N.Y.C. Admin. Code § 26-511(c); 23 N.Y. Unconsol. Laws §§ 8626(d), 8630(a)-(b).

The RSL does not require any landlord to offer vacant apartments for rent and does not prohibit any landlord from terminating a tenancy through statutorily permitted means. Landlords may perform background checks on prospective tenants, N.Y. Real Prop. Law § 238-a(1)(b), and evict unsatisfactory tenants for unsatisfactory behavior, 9 N.Y.C.R.R. §§ 2504.2, 2524.3. Without the approval of DHCR, a landlord who is a natural person may recover an apartment for the personal use of the landlord or her immediate family upon a showing of immediate and compelling necessity. N.Y.C. Admin. Code § 26-511(c)(9)(b); 23 N.Y. Unconsol. Laws § 8630(a). Any landlord may, with DHCR approval and on the condition of paying relocation expenses, decline to renew a lease to withdraw a building from the rental market for business use, rehabilitation, demolition, or gut renovation. See 9 N.Y.C.R.R. § 2504.4(b), (f); *id.* § 2524.5; *Peckham v. Calogero*, 54 A.D.3d 27, 31–32 (1st Dep't 2009) (explaining that gut renovation satisfies the RSL's demolition option).

The RSL does not prevent an owner from selling a regulated building. Although there are other non-RSL provisions of New York law restricting the conversion of residential buildings to cooperative or condominium ownership, see N.Y. Gen. Bus. Law §§ 352-eeee (New York City), 352-eee (surrounding counties), these

provisions apply to all such conversions and are not limited to rent-stabilized buildings. They derive from broader anti-fraud restrictions on real-estate syndication offerings. See N.Y. Gen. Bus. Law § 352-e.

C. District Court Proceedings

On July 15, 2019, Petitioners filed suit in the United States District Court for the Eastern District of New York, asserting three claims under 42 U.S.C. § 1983. *First*, Petitioners claimed that the RSL on its face effects a *per se* physical taking of rent-stabilized properties in violation of the Takings Clause by purportedly compelling the physical occupation of regulated properties through mandatory lease renewal offers and eviction restrictions. See Pet. App. 221a–222a. *Second*, Petitioners claimed that the RSL on its face effects a regulatory taking of rent-stabilized properties in violation of the Takings Clause by purportedly interfering with owners' investment-backed expectations and imposing costs unrelated to harms that landlords cause. See Pet. App. 222a–223a. *Third*, Petitioners claimed that both the RSL as a whole and New York City's 2018 emergency declaration triggering its application on their faces violate the Due Process Clause by purportedly exacerbating the issues the RSL seeks to resolve and failing to specify what constitutes a housing emergency. See Pet. App. 219a–221a. As a remedy, Petitioners sought the nullification of the RSL in its entirety, including its enabling statutes and every statute and regulation it comprises. See Pet. App. 223a–224a.

The district court granted Respondents' motions to dismiss all three of Petitioners' claims, holding that they were "foreclose[d]" by binding precedent from the Second Circuit and this Court. Pet. App. 35a.

First, the district court held that the RSL does not on its face effect a physical taking of regulated properties. See Pet. App. 45a–47a. The district court reasoned that the RSL does not deprive Petitioners or other regulated owners of their right to possess title to their regulated properties or their right to dispose of their properties through sale. Pet. App. 46a. The district court further explained that the RSL's use restrictions, even if significant and even considering the incremental amendments of the HSTPA, do not amount to *per se* physical takings under this Court's or the Second Circuit's precedents. *Id.* The district court rejected Petitioners' argument that their "acquiescence" by participating in the rent-stabilized rental market could not cure an unconstitutional taking, reasoning that, under this Court's precedents, "no physical taking has occurred in the first place." Pet. App. 46a–47a.

Second, the district court held that Petitioners failed to state a facial regulatory-taking claim under either of their two theories. See Pet. App. 47a–57a. The district court held that, to prevail on a facial claim, a plaintiff "must demonstrate that 'no set of circumstances exists under which the [RSL] would be valid.'" Pet. App. 49a (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The district court explained that Petitioners failed to meet this standard because their allegations of economic harm and

interference with reasonable investment-backed expectations were insufficient to satisfy, on a facial basis, the "ad hoc" standard required by *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). See Pet. App. 50a–53a. And the district court rejected as premature Petitioners' argument that the RSL's purported consideration of tenants' economic hardship effects a regulatory taking under the rule proposed in the dissenting opinion in *Pennell v. City of San Jose*, 485 U.S. 1 (1988). See Pet. App. 53a–57a.

Third, the district court held that the RSL and New York City's emergency declaration triggering its application on their faces satisfy due process. See Pet. App. 61a–63a.

D. Second Circuit Proceedings and the Instant Petition

Petitioners appealed, and the Second Circuit affirmed. See Pet. App. 1a–30a.

First, the court of appeals agreed that *Salerno* provides the governing "no set of circumstances" standard for a facial claim, and it rejected Petitioners' arguments that *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015), or *United States v. Stevens*, 559 U.S. 460, 472 (2010), permits the application of a different standard to Petitioners' claims. See Pet. App. 12a–15a.

Second, the court of appeals affirmed the dismissal of Petitioners' physical-taking claim, finding that "no provision of the RSL effects, facially, a physical occupation of the Landlords' properties." Pet. App. 18a. In

particular, the court held that the RSL does not grant "a third party the right to invade 'property closed to the public,'" *id.* (quoting *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077 (2021)), and does not compel regulated landlords to "refrain in perpetuity from terminating a tenancy," because the RSL provides numerous grounds on which a landlord may terminate a lease, Pet. App. 19a (quoting *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992)). The court likewise rejected Petitioners' arguments that the RSL's requirements concerning renewal leases, eviction restrictions, and transfers of leases to successors amount to a "permanent physical occupation," reasoning that "[n]one of these provisions involve unconditional requirements imposed by the legislature." Pet. App. 20a.

Third, the court of appeals affirmed the dismissal of both of Petitioners' regulatory-takings theories. Applying the balancing test set out in *Penn Central,* the court held that Petitioners failed to allege either that every owner of a regulated property has suffered an adverse economic impact, or that the RSL interferes with every property owner's investment-backed expectations, given that "[d]ifferent landlords, who purchased properties at different times and under different RSL regimes, will necessarily have a range of differing expectations." Pet. App. 25a. The court also held that the RSL does not have the character of a taking because it forms "part of a comprehensive regulatory regime that governs nearly one million units," and "[l]egislation designed to promote the general welfare commonly burdens some more than others." Pet. App. 27a (quoting *Penn Cent.*, 438 U.S. at 133). And the court rejected Petitioners' "argument that the

appropriate standard under which to determine whether a taking has occurred comes from a dissent in *Pennell*," reasoning that this Court's precedents require applying the *Penn Central* standard to the regulatory taking claim. Pet. App. 22a n.25.

Finally, the court of appeals rejected Petitioners' due process claim, reasoning that Petitioners could not rely on the Due Process Clause to "do the work of the Takings Clause." Pet. App. 29a (quoting *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 720–21 (2010)). The court further held that, in any event, neither the RSL nor New York City's emergency declaration on its face violates due process. See Pet. App. 30a.

Petitioners seek this Court's review only as to the Second Circuit's rejection of their *per se* physical taking claim and their argument that the RSL effects a regulatory taking under the rule proposed by the *Pennell* dissent. See Pet. i–ii. Petitioners have thus abandoned their claims under the *Penn Central* framework and the Due Process Clause.

REASONS FOR DENYING THE PETITION

Petitioners assert that "[r]estrictions" on reclaiming apartments for personal use, selecting tenants, and selling apartment buildings through a conversion into a cooperative or condominium constitute physical takings. Because Petitioners cannot point to any actual conflict among the circuits, they instead seek review of the Second Circuit's application of this Court's "right to exclude" or "right to dispose" jurisprudence.

The Second Circuit's application of existing precedent to a complex municipal scheme was correct, however, and does not present a cert-worthy issue.

Petitioners also argue that the RSL effects a taking because it requires the RGB, when setting rents, to "consider, among other things[,] … relevant data from current and projected cost of living indices." N.Y.C. Admin. Code § 26-510(b)(2). Relying on the rationale of the dissent in *Pennell v. City of San Jose*, 485 U.S. 1, 15–24 (1998), Petitioners contend that even considering the cost of living in setting rent rates (regardless of which direction the cost of living moves rates, if at all) effects an unconstitutional taking. But Petitioners fail to identify any case that has ever applied the *Pennell* dissent's rationale, much less a conflict among the circuits, and they ignore that this Court, including the Justices who dissented in *Pennell*, unanimously rejected the *Pennell* dissent's rationale in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005).

Moreover, this case is a particularly bad vehicle to address any Takings Clause questions purportedly raised by the RSL. Petitioners fail to identify which provisions of the RSL are implicated by their claims and seek overbroad relief invalidating New York's entire rent-stabilization scheme, despite not identifying a concrete and particularized injury fairly traceable to any aspect of that scheme. Their facial challenge conflates several statutes and fails to establish that there is no circumstance under which any of those statutes would be valid. Petitioners' effort to invalidate a municipal regulation that has evolved—at times in favor

of landlords and at times in favor of tenants—in response to more than a century of changing local economic conditions should be rejected.

I. There Is No Conflict Among the Circuits on the Applicable Standard for Takings Clause Challenges to Rent Regulations

The Petition rightly does not claim that the decision below conflicts with a decision of any other court of appeals with respect to Petitioners' regulatory takings claim. As to their physical takings claim, Petitioners try to manufacture a split with only one other circuit, arguing that "the Second Circuit's holding that *Cedar Point* does not apply to rental apartment regulations appropriating the owner's right to exclude conflict[s] with the Eighth Circuit's ruling in *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 732–33 (8th Cir. 2022)—which applied *Cedar Point* to uphold a physical taking claim." Pet. 22. Petitioners are wrong.

The Second Circuit did not hold that *Cedar Point* never applies to apartment regulations. Instead, the court distinguished *Cedar Point* on its facts: *Cedar Point* concerned "granting a third party the right to invade 'property closed to the public,'" which "ha[d] not occurred here" because Petitioners "voluntarily invited third parties to use their properties." Pet. App. 18a.

Although the Eighth Circuit in *Heights* upheld a physical takings claim, the different outcomes do not reflect the existence of a conflict among the circuits, but rather the vast differences between the statutes

at issue. *Heights* concerned a COVID-19 eviction moratorium banning virtually all evictions—including for rent non-payment or other material lease breaches. *Heights*, 30 F.4th at 725. The Eighth Circuit thus held that the state engaged in a physical taking by "forc[ing] landlords to accept the physical occupation of their property regardless of whether tenants provided compensation." *Id.* at 733.

The RSL imposes no such requirement. Under the RSL, landlords can evict a tenant who does not pay rent, violates their lease, commits a nuisance, or uses the apartment for unlawful purposes. 9 N.Y.C.R.R. §§ 2504.2, 2524.3. Landlords may also **(1)** decline to renew a lease if the owner or an immediate family member has an immediate and compelling need to occupy it, N.Y.C. Admin. Code § 26-511(b)(9); 23 N.Y. Unconsol. Law § 8630(a); **(2)** withdraw a unit from the rental market for the owner's own commercial use, 9 N.Y.C.R.R. § 2524.5(a)(1)(i); **(3)** decline to renew a lease if the tenant has another primary residence, *id.* §§ 2504.4(d), 2524.4(c); **(4)** demolish or gut renovate a building (with payment of relocation expenses), *id.* §§ 2504.4(f), 2524.5(a)(2), (3); *Peckham*, 54 A.D.3d at 32, **(5)** withdraw a building from the rental market because of a safety hazard that would cost more than the building's worth to repair, 9 N.Y.C.R.R. § 2524.5(a)(1)(ii); **(6)** convert regulated apartments to condominiums or cooperatives with purchase agreements from at least fifty-one percent of tenants, 2019 Amendments Part N (codified at N.Y. Gen. Bus. L. § 352-eeee); or **(7)** elect not to offer a regulated unit for rent upon vacancy.

Thus, nothing in the decision below conflicts with the Eighth Circuit's ruling that the state may not force a landlord to permit a tenant to occupy a space rent-free or after a tenant has materially violated the terms of their lease. The Eight Circuit concluded the law at issue in *Heights* went far beyond the bounds permitted by this Court's precedent. The RSL does not. There is, therefore, no conflict among the circuits, much less a conflict justifying review.

II. The Decision Below Is Fully Consistent with This Court's Takings Jurisprudence

A. The Second Circuit's Physical Taking Analysis Comports with This Court's Precedent

"The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (emphasis in original). No landlord is compelled by the RSL to offer a vacant unit for rent. Petitioners cannot, and do not, contest that all regulated landlords voluntarily invited tenants onto their properties in the first place. Nor do they contest that should a landlord wish to stop renting a property, the RSL provides options for them to do so.

Instead, Petitioners complain that they do not have *unfettered* rights to remove tenants from their homes, select the specific tenant they want, or sell their properties by converting them to condominiums or cooperatives without seeking approval from a majority of the tenants. Pet. 9–20. The RSL's limitations,

they argue, violate this Court's "right to exclude" and "right to dispose" jurisprudence, which they contend the Second Circuit misapplied. See, e.g., *id.* at 11, 13–14, 17, 20. Not so, and such a call for error correction, in any event, would be no basis for granting review. See Sup. Ct. R. 10.

First, Petitioners argue the RSL effects a taking because "the RSL severely restricts an owner's ability to exclude third parties for her own use or that of her family members" and "imposes substantial restrictions on an owner's ability to change the use of her property." Pet. 11–12. Petitioners' argument is particularly hollow because no Petitioner has alleged that they want to reclaim a building for personal use or the use of a family member or to change the use of the property.[12] Regardless, the Second Circuit's decision fully comports with this Court's precedent.

In *Yee*, this Court rejected a facial challenge to a rent regulation under which landlords could refuse to renew a lease only if they changed the use of their property. Reiterating that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land," the Court noted that "Petitioners' tenants were invited by

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[12] Petitioners point to Constance Nugent-Miller, who does not assert an as-applied claim and last sought to recover a unit in 2015—well beyond the applicable three-year statute of limitations. *Milan v. Wertheimer*, 808 F.3d 961, 963 (2d Cir. 2015). In 2015, Nugent-Miller had to show only "good faith" to occupy the unit for personal use, which she apparently could not do. See Pet. App. 80a; *Samra v. Messeca*, 17 N.Y.S.3d 385, 2015 WL 3369276, at *1 (1st Dep't May 22, 2015) (table decision).

petitioners, not forced upon them by the government." *Yee*, 503 U.S. at 528 (emphasis in original). Although the landlords argued that changing the use of their property "was in practice a kind of gauntlet," the Court held that the difficulty of running such a gauntlet in any particular case has no bearing on a facial claim. *Id.* (internal quotation marks omitted).

Seeking to distinguish *Yee*, Petitioners assert that the law at issue there permitted landlords to "evict [their] tenants … with 6 to 12 months' notice." Pet. 15. They ignore, however, that the way to evict tenants in *Yee* was "to change the use of [the] land," which the landlords argued was such a "gauntlet" that they were "not in fact free" to do so. *Yee*, 503 U.S. at 528. Nonetheless, the Court rejected their facial challenge. *Id.*

Petitioners' argument in this case is the same one that *Yee* rejected. On the face of the RSL, landlords may refuse to renew a lease for numerous reasons, including to reclaim a unit for personal use or the use of their family, to change the use of the building from rental to another commercial purpose for the landlord, to demolish, gut, or renovate the property—at which point the landlord can even build new, unregulated apartments—to remove the property from the rental market if there is a safety hazard that would cost more than the building is worth to repair, and to remove a tenant who has breached his or her lease. See *supra* pp. 17–18. Petitioners may believe that these options in practice are too onerous, or not available, for specific landlords. See Pet. 11–12. But those specific landlords must "run that gauntlet" and assert as-applied claims to provide "occasion to consider how

the procedure has been applied to [their] property." *Yee*, 503 U.S. at 528. Petitioners chose not to do so here—even though RSA and CHIP count thousands of landlords as members. See Pet. App. 86a.

Petitioners mistakenly imagine that *Cedar Point* upended takings law. As the Second Circuit explained, *Cedar Point* "evaluated a regulation granting labor organizations the 'right to take access' to an agricultural employer's property for up to 120 days a year to solicit support for unionization." Pet. App. 17a. That regulation "granted a right to invade the grower's property," which was otherwise "closed to the public." Pet. App. 17a–18a (quoting *Cedar Point*, 141 S. Ct. at 2077). Such "regulations granting a right to invade property closed to the public" are "readily distinguishable" from regulations—like the RSL—"[l]imit[ing] how a business generally open to the public may treat individuals on the premises." *Cedar Point*, 141 S. Ct. at 2077. And Petitioners' assertion that "a residential property is not 'a business generally open to the public,'" Pet. 14, is both wrong (when any landlord decides to rent property, that property is open to the public to rent and occupy) and misses the point. "[I]t is the invitation," not the number of people that access the property, "that makes the difference." *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987). Whereas laborer organizers were never invited onto the property in *Cedar Point*, the entire point of being a landlord is to invite tenant occupation.

Second, Petitioners claim that the RSL effects a physical taking by purportedly "[a]ppropriating a right to invade and possess the property for a third

party not chosen by the property owner." Pet. 17. These "third part[ies]" are actually "family members" of the tenant—through blood, marriage, or "interdependence" and "emotional and financial commitment" with the tenant—who have lived with the tenant for at least two years (one year if the "third party" is disabled or a senior citizen). 9 N.Y.C.R.R. §§ 2520.6, 2523.5(b)(1). Petitioner RSA asserted a takings claim against this same provision three decades ago and lost, *Rent Stabilization Ass'n of N.Y.C., Inc. v. Higgins*, 83 N.Y.2d 156, 171–75 (1993), and this Court denied its petition for certiorari, 512 U.S. 1213 (1994).

The rejection of RSA's earlier challenge to the RSL was for good reason. As this Court unequivocally held in *Yee*, "[w]hen a landowner decides to rent his land to tenants, the government may … require the landowner to accept tenants he does not like without automatically having to pay compensation." 503 U.S. at 529 (citation omitted). The Second Circuit correctly applied this Court's precedent, stating that the RSL's successorship provisions, at most, "deprive the Landlords only of the ability to decide *who* their incoming tenants are," which has "nothing to do with whether a law or regulation causes a physical taking." Pet. App. 21a (alterations omitted).

Third, Petitioners argue that requiring owners to "obtain[] the agreement of 51% of the tenants" in a building to convert a building to a condominium or cooperative violates their right "to dispose of the property." Pet. 19–20. Notably, Petitioners cite no takings case even remotely suggesting that such a condition on a particular type of sale amounts to a *per se*

physical taking. And no Petitioner has alleged that it actually wants to convert its property to a condominium or cooperative but cannot obtain the requisite consents.

As Petitioners concede, the RSL merely restricts (but does not eliminate) one type (not all types) of the "various ways" of selling a rent stabilized apartment building: the "reconfigur[ation]" of "property in order to sell apartments on an individual basis" through a condominium or cooperative conversion. Pet. 19, 20. Every landlord "may choose simply to sell the entire interest in the building and the underlying property." *Id.* at 19. Restricting one form of sale is not a taking, and government could hardly go on if it were. See, e.g., 17 C.F.R. § 230.144 (restricting the sale of "restricted securities" except to certain groups); 18 U.S.C. § 922 (restricting the sales of firearms to minors); N.Y. Alco. Bev. Cont. Law § 65 (restricting the ability to sell alcohol to "[a]ny visibly intoxicated person" or person "under the age of twenty-one years").

B. The Second Circuit's Regulatory Takings Analysis Comports with This Court's Precedent

"[R]egulatory takings challenges are governed by *Penn Central*," which "identified several factors—including the regulation's economic impact on the claimant, the extent to which it interferes with distinct investment-backed expectations, and the character of the government action—that are particularly significant in determining whether a regulation effects a taking." *Lingle*, 544 U.S. at 528–29 (citing *Penn Cent.*

Transp. Co. v. City of New York, 438 U.S. 104 (1978)). The Second Circuit correctly applied *Penn Central* to conclude that the RSL does not effect a regulatory taking. Pet. App. 22a–28a.

Petitioners do not challenge the Second Circuit's faithful application of *Penn Central*. Rather, they challenge the Second Circuit's decision not to follow the *dissent* in *Pennell* to hold that the City effects a taking by considering "the relevant data from the current and projected cost of living indices for the affected area" when setting rent increases. Pet. 25–28. It should go without saying, though, that not following a dissent is no basis for certiorari.

At the center of *Pennell* was a rent regulation that allowed consideration of tenant hardship, among other factors, in setting rent increases. The majority held that it would be premature to consider whether applying the ordinance effected a taking because the record did not contain evidence of the hardship provision ever being used. *Pennell*, 485 U.S. at 9–10. Justice Scalia, joined by Justice O'Connor, would have reached the regulatory takings claim because, at the time, "a zoning law 'effect[ed] a taking if the ordinance d[id] not substantially advance legitimate state interests,'" an inquiry that Justice Scalia believed could be assessed facially. *Id.* at 18 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

Subsequently, this Court unanimously rejected the central premise of the *Pennell* dissent. The Court held in *Lingle* that the "substantially advances" takings analysis underpinning the dissent "has no proper

place in our takings jurisprudence." 544 U.S. at 540. The Court explained that looking to the means-ends fit of a regulation "reveals nothing" about the magnitude, character, or distribution of a challenged law's burden on property rights. *Id.* at 542. Even Justice Scalia agreed, abandoning his dissenting theory from *Pennell* and joining the unanimous *Lingle* decision, authored by Justice O'Connor. During oral argument in *Lingle*, Justice Scalia even expressly noted that the Supreme Court would have to "eat crow" on its prior use of the "substantially advances" test for takings claims, which he had applied in his *Pennell* dissent. Tr. of Oral Arg. at 21, *Lingle*, 544 U.S. 528 (No. 04-163); see also John D. Echeverria, *Antonin Scalia's Flawed Takings Legacy*, 41 Vt. L. Rev. 689, 699–700 (2017) ("As Justice Scalia may have intended to acknowledge with his quip, the reversal was a particularly stinging rebuke of his own efforts to legitimize the 'substantially advance' test.").

The Second Circuit correctly followed this Court in rejecting Petitioners' invitation to smuggle through the Takings Clause "heightened means-end review of virtually any regulation of private property"—which the Court has "long eschewed." *Lingle*, 544 U.S. at 544–45. The court of appeals' decision not to follow a dissent, particularly one later disavowed by its author and rejected in a unanimous opinion, offers no basis for this Court's review.

III. The Case Is a Poor Vehicle for Addressing the Parameters of the Takings Clause

Petitioners' shotgun attack on various housing regulations and statutes does not lend itself to neat resolution of the constitutional issues they purport to present and is thus a bad vehicle for this Court's review. In the Petition and throughout this case, Petitioners have not cleanly identified what they are challenging. Petitioners style their case as a challenge to the RSL, yet they make repeated arguments about restrictions on converting rental apartments to condominiums or cooperatives—restrictions that are codified not in the RSL but rather in New York's General Business Law. See Pet. 19–20; N.Y. Gen. Bus. Law § 352-eee(1)(b). Likewise, they blur together the RSL, which governs property in New York City, with the ETPA, which governs property in the remainder of the State. Their arguments focus on select portions of the RSL, but they seek wholesale invalidation of the RSL and complementary statutes, such as the ETPA. Put simply, Petitioners case is a roving challenge to disparate state and city laws that offers an inefficient, improper vehicle for resolving any constitutional questions.

Petitioners further seek overbroad relief for the narrow "injuries" they allege, manufacturing a legal controversy out of political disagreements. The Petition, for example, challenges regulation of Petitioners' ability to regain possession of occupied units, to convert rental buildings to condominiums or cooperatives, to change the use of their property to commercial rentals, and to demolish existing structures. E.g., Pet. App. 21. Yet Petitioners claim no intention to do

any of these things, depriving them of Article III standing for the relief they request. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (Article III standing requires an injury that is "actual or imminent, not conjectural or hypothetical," and "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision" (cleaned up)). Likewise, any claim that Petitioners would raise rents if the caps imposed by the RSL were lifted is purely speculative, because they have not alleged that they actually could or would raise the rents they currently charge if the RSL were struck down. See generally *id.*; see also Pet. App. 207a ¶ 328 (general allegation that unspecified "owners" will "face a steady decline of income production"); Pet. App. 204a ¶ 322 ("With a $15,000 cap on any rent increases from [improvements]," unspecified "owners would be unable to fully recover the[ir] costs ….."). Such speculation is insufficient for standing, and the lack of standing obviates the possibility of meaningful review.

The Petition highlights the allegations of Petitioner Nugent-Miller, who claims that she desired to reclaim an apartment from a tenant for personal use, Pet. 11–12, and that she was unable to do so because a judge determined that a rent-stabilized tenant has resided there for more than 20 years, Pet. App. 168a ¶ 230. Ms. Nugent-Miller, however, last sought to recover a unit in 2015—well beyond the applicable three-year statute of limitations. See *Milan*, 808 F.3d at 963. In 2015, Nugent-Miller had to show only "good faith" to occupy the unit for personal use, which she apparently could not do. Pet. App. 80a; see *Samra*, 2015 WL 3369276, at *1. Her injury is not "fairly

traceable to the challenged" statute, *Lujan*, 504 U.S. at 560 (cleaned up), but is rather the result of her own delay and inability to demonstrate a good-faith basis to reclaim the apartment. Moreover, her dissatisfaction with the outcome of the 2015 proceeding presents no basis for a facial challenge to the RSL and other statutes.

Petitioners' facial challenge to the RSL is especially poorly suited for adjudication by this Court. To succeed, Petitioners would have to "establish that no set of circumstances exists under which the [RSL] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Petitioners cannot surmount this burden because, as set forth above, see *supra* pp. 8–9, 16–17, 19–20, there are abundant circumstances in which the RSL would not even colorably raise constitutional questions—a point that Petitioners have not disputed. Nor have they disputed the Second Circuit's recognition that the different circumstances of different landlords frustrate a facial takings analysis. See Pet. App. 25a. Petitioners thus dispute the standard for a facial challenge, invoking *City of Los Angeles v. Patel*, where this Court explained that a court considering a facial challenge evaluates "only applications of the statute in which it actually authorizes or prohibits conduct" and looks only at "the group for whom the law is a restriction." 576 U.S. 409, 418 (2015). As the Second Circuit explained, Pet. App. 13a, *Patel* mererly clarified *Salerno* and does not lower Petitioners' burden. Owners of rent-stabilized buildings, like Petitioners, are "the group for whom the [RSL] is a restriction," and Petitioners fail to address all circumstances "in which [the RSL] actually authorizes or

prohibits conduct," such as the cases where it expressly authorizes evictions. *Patel*, 576 U.S. at 418. This facial challenge presents a burden Petitioners cannot meet and demands that this Court exhaustively review every application of the RSL rendering it a poor and unworkable vehicle for review of any constitutional question.

More generally, a local housing scheme that implicates a variety of state laws that evolved through the political process over the course of 100 years to manage shifting municipal conditions is a poor case for review. As set forth above, see *supra* pp. 2–9, rent stabilization in New York is governed by a patchwork of statutes that have been repeatedly amended and supplemented in the push-and-pull of politics and in light of legislative findings regarding economic conditions in New York City and New York State. Sometimes those changes have favored landlords; other times they have favored tenants. The landlords' attempt to "to short circuit the democratic process" through a facial challenge should be rejected. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). As the Petition concedes, forthcoming legislation may further amend the RSL. Pet. 23.

Finally, Petitioners speculate that "[i]f the Second Circuit's decision is permitted to stand, other jurisdictions are likely to seek to address their housing issues by following New York's example." Pet. 24. But New York's RSL has been in existence for decades, and evolved over decades, and upheld in numerous challenges. See *supra* pp. 2–6. Petitioners offer no reason to assume that RSL's impact outside of the state will

be greater in the coming years than in the past. And of course, if other states do adopt their forms of the RSL, and those laws are then challenged as takings, other circuits will have the opportunity to address the issues presented here and either coalesce around the Second Circuit's decision or reach differing conclusions. If a conflict among the circuits emerges, this Court can then consider whether its review is appropriate. At this time, however, review is unwarranted.

* * *

CONCLUSION

The Petition for a writ of certiorari should be denied.

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