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 FOR COMMISSIONER RUTHANNE VISNAUSKAS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals properly dismissed petitioners' facial physical takings challenge to provisions of New York's Rent Stabilization Law given the law's numerous constitutional applications.

2. Whether regulatory takings challenges should be governed by Justice Scalia's dissenting opinion in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), notwithstanding this Court's rejection of the dissent's analytical framework in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

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INTRODUCTION

For the past half century, New York State and New York City have administered the Rent Stabilization Law (RSL), which controls the pace of rent increases for regulated apartments and governs the eviction of tenants in regulated units.[1] The RSL is a critical tool to combat the harms caused by rent profiteering in a tight housing market including homelessness and economic instability. At the same time, the law ensures that property owners can earn a reasonable return.

The state Legislature has repeatedly amended the RSL in response to changing economic and local conditions. In the 1990s, for example, the Legislature adopted many owner-friendly provisions, including adding new grounds for rent increases and permitting deregulation of certain units upon vacancies. By the 2010s, however, it became clear that these provisions were pervasively abused in ways that were disrupting the housing market. Accordingly, in 2019, the Legislature enacted the Housing Stability and Tenant Protection Act (HSTPA), ch. 36, 2019 McKinney's N.Y. Laws 154, to strengthen the RSL's tenant protections and curb property owners' attempts to rapidly raise rents, harass tenants, force tenants out of regulated units, and remove regulated units from the RSL's coverage.

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[1] This brief is submitted on behalf of respondent RuthAnne Visnauskas, Commissioner of New York State Division of Housing and Community Renewal (DHCR), the state agency responsible for administering the RSL.

One month later, petitioners (two industry groups and several property owners) initiated this action seeking to invalidate the RSL in its entirety as purportedly violative of the Takings Clause of the Fifth Amendment to the United States Constitution. Petitioners raised only facial takings challenges; no petitioner challenged the application of the RSL to any particular set of factual circumstances. The U.S. District Court for the Eastern District of New York (Komitee, J.) dismissed the complaint for failure to state a claim (Pet. App. 33a-66a), and the Second Circuit affirmed (Pet. App. 1a-30a). Petitioners now seek certiorari. The petition should be denied.

First, petitioners ask this Court to review whether the RSL provisions governing changes in use of property and lease renewals constitute physical takings. This case is a poor vehicle to consider that question for several reasons. As petitioners concede, the RSL permits changes in use of property in numerous circumstances and allows for evictions based on nonpayment, illegal activity, and other misconduct. The existence of these exit ramps alone defeats petitioners' facial physical takings claim. More fundamentally, petitioners' complaints about the challenged provisions are purely hypothetical. No petitioner alleges that it wishes to exit the rental market and has been prohibited from doing so by the RSL, and no petitioner alleges that it is being forced to keep a tenant that it wishes to evict for any reason other than the desire to charge a higher rent. The inability to charge higher rents is not an injury cognizable as a physical taking, nor would that injury be remedied by an order invalidating certain RSL provisions as physical takings.

In any event, the court of appeals correctly applied settled law to hold that the challenged provisions of the RSL are not physical takings, and there is no split in authority requiring this Court's intervention. This Court has long recognized that when property owners voluntarily rent out their property, regulations governing the landlord-tenant relationship are not physical takings. *See Yee v. City of Escondido*, 503 U.S. 519, 528-29 (1992). The RSL neither conscripts property owners into the rental market nor prevents them from exiting. Instead, the RSL permissibly regulates property use and, on its face, gives owners various options to change the use of their property and substantial rights to control who occupies it. The decision below is consistent with *Cedar Point Nursery v. Hassid*, which expressly distinguished between the regulation of property that owners voluntarily hold open to third parties and government-forced intrusions on private land. 141 S. Ct. 2063, 2076-77 (2021). And the Eighth Circuit decision that petitioners cite as conflicting with the decision below involved an emergency eviction moratorium that is materially distinguishable from the RSL.

Second, petitioners ask this Court to review whether the RSL's process for determining annual rent increases effects a regulatory taking under the theory presented in Justice Scalia's dissenting opinion in *Pennell v. City of San Jose*, 485 U.S. 1 (1988). Again, this case is a poor vehicle to consider the question presented. In his dissent, Justice Scalia indicated that no legitimate state interest is served by requiring particular landlords to subsidize individual tenants based on a case-by-case assessment of inability to pay an otherwise reasonable rent. The RSL does not consider individual tenants' ability to pay in rent-

setting. Instead, the statute requires the Rent Guidelines Board to consider a broad range of macroeconomic factors including overall cost of living to set annual percentage rent increases applicable to all regulated units. Nothing in Justice Scalia's dissent sheds doubt on the government's ability to consider objective economic data in making regulatory decisions.

Regardless, this Court has already rejected the *Pennell* dissent's analytical framework in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), where it held that tests centered on the government's purpose have no place in this Court's regulatory takings jurisprudence. Petitioners provide no basis to revisit that unanimous decision; indeed, they do not cite, much less address the decision.

STATEMENT

A. Legal Background

1. The history of rent regulation in New York State dates to at least World War II, when labor shortages and other wartime forces precipitated an acute housing crisis.[2] In 1946, the Legislature enacted the Emergency Housing Rent Control Act, which authorized rent ceilings throughout the State "to prevent speculative, unwarranted and abnormal increases in rents." *See* Ch. 274, § 1, 1946 N.Y. Laws 723, 723 (reproduced at N.Y. Unconsol. Law § 8581 et seq. (McKinney)). In 1962, the Legislature authorized municipalities to enact rent regulations in response to local circumstances. *See* Local Emergency Housing

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[2] DHCR, *Rent Regulations After 50 Years: An Overview of New York State's Rent Regulated Housing* 3 (1993).

Rent Control Act, ch. 21, § 1, 1962 N.Y. Laws 53, 53-56 (reproduced at N.Y. Unconsol. Law § 8601 et seq. (McKinney)).

In 1969, New York City adopted the Rent Stabilization Law (codified as amended at N.Y. City Admin. Code § 26-501 et seq.). Rent stabilization operates by limiting the amount by which property owners may increase rents each year and imposing certain restrictions on evictions.[3] Two years later, the Legislature, in an "experiment with free-market controls," deregulated newly vacated apartments that had been subject to the City's rent stabilization scheme. *Matter of KSLM-Columbus Apartments, Inc. v. New York State Div. of Hous. & Cmty. Renewal*, 6 A.D.3d 28, 32 (1st Dep't 2004) (quotation marks omitted), *modified on other grounds*, 5 N.Y.3d 303 (2005); *see* Ch. 371, § 6, 1971 N.Y. Laws 1159, 1161-62. The result was "ever-increasing rents," without the anticipated increase in new housing. *La Guardia v. Cavanaugh*, 53 N.Y.2d 67, 74 (1981).

2. Three years after this failed experiment, the Legislature adopted a rent stabilization scheme with the Emergency Tenant Protection Act of 1974 (ETPA), ch. 576, sec. 4, 1974 N.Y. Laws 1510, 1512-33 (reproduced as amended at N.Y. Unconsol. Law § 8621 et seq. (McKinney)).

The ETPA was substantially similar to the City's 1969 law and extended the basic framework of rent stabilization to several additional counties. *See La*

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[3] By contrast, rent control directly sets rental rates for a relatively small number of covered units. (Pet. App. 95a-96a.) Rent control is not at issue in this suit.

Guardia, 53 N.Y.2d at 74-76. The ETPA allowed covered municipalities to adopt rent stabilization upon a "declaration of emergency" if the vacancy rate for certain housing accommodations fell below five percent. ETPA, sec. 4, § 3, 1974 N.Y. Laws at 1513 (Unconsol. Law § 8623). Upon the requisite emergency declaration, the ETPA's rent stabilization scheme applied to rental housing accommodations constructed before 1974 that contained six or more units. (Pet. App. 97a.) Property owners of newer buildings could also opt into rent stabilization for tax benefits. *See* N.Y. Real Prop. Tax Law § 421-a. As amended, the City's 1969 law and the ETPA provide the basic framework for the City's current rent stabilization system, which are collectively referred to as the Rent Stabilization Law (RSL).

Since its enactment, the RSL has aimed to ensure a fair and stable rental housing market in two basic ways.

First, the law controls the pace of rent increases for regulated apartments, while also ensuring that landlords can earn a reasonable rate of return. *See* RSL §§ 26-511, 26-512. To determine permissible rent adjustments in New York City, the Rent Guidelines Board—a nine-person body composed of representatives of property owners, tenants, and the public—annually determines the permissible percentage of rent increases for lease renewals. *See id.* § 26-510(a)-(b). The Board must consider the economic conditions property owners face, such as tax rates and maintenance costs, as well as conditions facing renters as a group, such as vacancy rates and the cost of living. *See id.* § 26-510(b). Accordingly, the authorized increases have shifted depending on changes in economic conditions. In 2022, for example, the Board

authorized a 3.25% increase for one-year leases, and a 5% increase for two-year leases.[4]

To account for the unique financial circumstances of individual property owners, the RSL permits landlords to seek additional rent increases following apartment renovations or building improvements. *See* RSL § 26-511(c)(6), (13). And property owners who believe that the standard rent increases fail to afford them a reasonable income may apply for hardship exemptions permitting larger increases. *See id.* § 26-511(c)(6), (6-a); 9 N.Y.C.R.R. (RSC) § 2522.4(b)-(c).[5]

Second, the RSL requires landlords to offer most existing tenants the opportunity to enter into a renewal lease when the existing lease expires. *See* RSL § 26-511(c)(9); RSC § 2523.5(a). But landlords may evict tenants for nonpayment of rent, committing a nuisance, using the apartment for illegal purposes, and unreasonably refusing the owner access to the apartment, among other grounds. *See* RSC §§ 2524.2, 2524.3. And when a tenant vacates a regulated apartment, landlords may choose their next tenant—subject to a limited exemption for succession rights[6]—and perform background checks on all prospective tenants. *See* N.Y. Real Prop. Law §§ 227-f(1),

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[4] N.Y.C. Rent Guidelines Bd., 2022-23 Apartment/Loft Order #54 (June 21, 2022).

[5] State regulations implementing the RSL are codified in the Rent Stabilization Code (RSC).

[6] Certain family members of rent-stabilized tenants, as well as certain individuals who can prove a close, familial-like relationship to the current tenant, may have the right to succeed to rental of the unit upon the original tenant's departure. *See* RSC §§ 2520.6(o), 2523.5(b)(1).

238-a(1)(b). An owner may also request identification of all persons living in regulated units on an annual basis. *See* RSC §§ 2520.6(o), 2523.5(e).

An owner wishing to exit the rental market entirely has several options under the RSL. For example, owners may (subject to certain conditions) reclaim a single unit or occupy any number of vacant units for personal use, *see* RSL § 26-511(c)(9)(b), use the building for their own business, RSC § 2524.5(a)(1)(i), demolish the rental building, *id.* § 2524.5(a)(2), or sell the building outright. An owner may also exit rent regulation but remain in the rental market by rehabilitating a substandard or seriously deteriorated building. *Id.* § 2520.11(e).

3. Since 1974, the Legislature has repeatedly reenacted the RSL to preserve its core elements: regulations on the rate of rent increases and limitations on evictions. Over time, the Legislature has amended the law in response to changing political and economic circumstances.

For example, in 1993 and 2003, the Legislature responded to requests from property owners to allow deregulation of certain high-rent units with high-income tenants and gave landlords greater ability to increase rents upon renewal or vacancy. *See* Ch. 253, §§ 5-7, 1993 N.Y. Laws 2667, 2669-72; Ch. 82, § 4, 2003 N.Y. Laws 2605, 2608. In 2011 and 2015, however, the Legislature responded to reports of ongoing abuses of vacancy increases and deregulation and reduced the amounts by which landlords could increase rent following renovations and improvements and raised the rent and income thresholds for deregulation. *See* Ch. 97, pt. B, §§ 12, 16, 35-36, 2011

N.Y. Laws 787, 807-09, 817-18; Ch. 20, pt. A, §§ 10, 16, 29, 2015 N.Y. Laws 29, 33-34, 36, 41-42.

In 2019, the Legislature enacted the Housing Stability and Tenant Protection Act (HSTPA), which further responded to concerns about tenant harassment and displacement. Among other things, the HSTPA eliminated the RSL provisions authorizing deregulation of certain high-rent apartments, limited certain rent increases upon renewal, and narrowed the provisions allowing evictions for personal use. *See* Ch. 36, pt. D, § 5, 2019 McKinney's N.Y. Laws at 158 (repealing RSL §§ 26-504.1, 26-504.2, 26-504.3); RSL § 26-511(c)(9)(b), (14).

The HSTPA also adjusted the procedure for converting regulated buildings to cooperatives or condominiums by requiring the agreement of 51% of tenants (up from 15%). N.Y. Gen. Bus. Law § 352-eeee. In 2022, the Legislature responded to concerns from small-building owners by modifying the law to allow conversion of owner-occupied buildings with five or fewer units with the agreement of only 15% of tenants. *See id.*; Ch. 696, 2022 McKinney's N.Y. Laws (Westlaw).

B. Procedural History

1. Petitioners are owners of New York City residential apartment buildings with units subject to the RSL, as well as two trade associations whose members include owners of rent-stabilized apartments. In July 2019, they commenced a 42 U.S.C. § 1983 action in the Eastern District of New York, naming as defendants the City of New York, the New York City Rent Guidelines Board and its members, and RuthAnne Visnauskas, Commissioner of DHCR.

(Pet. App. 88a-89a.) Three tenant advocacy groups intervened as defendants.

As relevant here, petitioners alleged that the RSL facially violates the Fifth Amendment as a physical and regulatory taking. Petitioners sought a declaration that the entire RSL is facially unconstitutional and an injunction permanently enjoining the State and City from enforcing it. (Pet. App. 219a-225a.) No petitioner asserted that the law was unconstitutional as applied to any particular set of factual circumstances, and no petitioner asserted that it wishes to exit the residential rental market but was precluded from doing so by the RSL.

2. The district court granted respondents' motions to dismiss the complaint.[7] (Pet. App. 34a-35a.) The district court concluded that the RSL does not constitute a facial physical taking because it merely regulates owners' intended use of their property for residential rentals. (Pet. App. 45a-46a.) The district court also dismissed petitioners' regulatory takings claim, holding that the purely facial claim failed to allege a taking under the fact-intensive inquiry mandated by *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). (Pet. App. 50a-53a.)

3. The court of appeals affirmed. The court began by recounting the long history of amendments to the RSL, noting that the law reflects political "negotiation and compromise over a very long list of complicated

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[7] The court decided the motions to dismiss together with motions to dismiss a related action raising similar claims. (Pet. App. 34a.) The Second Circuit affirmed in both cases, and the plaintiffs in the related action have also petitioned for a writ of certiorari. *See 74 Pinehurst LLC v. New York,* No. 22-1130.

and difficult questions," and "that no interested party will be entirely satisfied by what the legislature does." (Pet. App. 9a-10a.) The court then rejected petitioners' constitutional challenges.

First, the court determined that the RSL does not effect a physical occupation of petitioners' property insofar as it regulates a voluntary landlord-tenant relationship. The court noted that the RSL permits owners to change the use of their property in certain circumstances and provides "several grounds on which a landlord may terminate a lease." (Pet. App. 19a; *see id.* 19a-21a.) The existence of these features therefore defeated petitioners' facial physical takings claim. (Pet. App. 20a-22a.)

Second, the court concluded that petitioners failed to state a regulatory takings claim. (Pet. App. 22a-28a.) It also rejected petitioners' reliance on Justice Scalia's *Pennell* dissent, observing that this Court has never adopted the dissent's reasoning. (Pet. App. 22a n.25.)

REASONS FOR DENYING THE PETITION

I. THIS COURT'S REVIEW OF PETITIONERS' PHYSICAL TAKINGS CLAIM IS NOT WARRANTED.

Petitioners' first question presented is whether the RSL's provisions governing changes in use of property and lease renewals constitute physical takings. (Pet. i.) Petitioners' facial challenge is a poor vehicle to address the constitutionality of any of these provisions.

Petitioners concede that the RSL permits changes in use of property and evictions of tenants in many circumstances. Petitioners' concern that the RSL may not permit changes of use or evictions in *other*

circumstances is purely hypothetical, as no petitioner wishes to exit the residential rental market or to evict a tenant for any reason other than the desire to charge higher rents.

In any event, the court of appeals correctly rejected petitioners' physical takings claim based on a century of precedent and there is no split in authority requiring this Court's review.

A. This Case Is a Poor Vehicle to Address Physical Takings Challenges to New York's Rent Stabilization Law.

Petitioners' determination to proceed with a facial challenge makes this case a poor vehicle to address whether any provision of the RSL constitutes a physical taking for several distinct but overlapping reasons.

1. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). Because "a statute may be invalid as applied to one state of facts and yet valid as applied to another," *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (quotation marks omitted), "as-applied challenges are the basic building blocks of constitutional adjudication," *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (quotation and alteration marks omitted).

This Court has explained that "[f]acial challenges are disfavored" because they "often rest on speculation" and thus "raise the risk of premature

interpretation of statutes on the basis of factually barebones records." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (quotation marks omitted). Facial challenges are also inconsistent with principles of judicial restraint because they force courts to "anticipate a question of constitutional law in advance of the necessity of deciding it," thereby risking a constitutional ruling broader than necessary to resolve the case at hand. *Id.* (quotation marks omitted). And "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451; *see also New York v. Ferber*, 458 U.S. 747, 767-68 (1982).

This Court has thus cautioned that its power to declare a law unconstitutional "is not to be exercised with reference to hypothetical cases thus imagined." *United States v. Raines*, 362 U.S. 17, 22 (1960); *see also Yazoo & Miss. Valley R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219 (1912). A plaintiff cannot prevail on a facial challenge by merely asserting that the challenged law could not be enforced under different circumstances against someone else. *See Ferber*, 458 U.S. at 767. "Facial challenges of this sort are especially to be discouraged." *Sabri v. United States*, 541 U.S. 600, 609 (2004).

2. Because petitioners seek wholesale invalidation of various RSL provisions (*see* Pet. 20-21; Pet. App. 221a-222a, 224a), they must show that there is "no set of circumstances" under which those provisions would be valid. *See Salerno*, 481 U.S. at 745. Yet petitioners concede that there are countless lawful applications of the RSL. For example, petitioners acknowledge that the RSL, on its face, gives landlords various options for

changing the use of their property, as well as the power to evict tenants on numerous grounds. (*See* Pet. 5-7, 21 n.3; *see also* Pet. App. 19a.) Likewise, petitioners acknowledge that "[a] property owner may agree to abide by the RSL's requirements voluntarily, in exchange for tax benefits." (Pet. 4 n.1.) Many New York City landlords are subject to the RSL based on such an arrangement. *See* N.Y. Real Prop. Tax Law §§ 421-a, 489; N.Y. Priv. Hous. Fin. Law § 804.[8]

Faced with these indisputably lawful applications of the statute, petitioners attempt to excise them from the scope of their claims. For example, petitioners assert that "consensual applications of the RSL are not at issue here." (Pet. 4 n.1.) And they argue that it is enough to simply allege that the RSL works a physical taking on occasions where "it forces an owner to continue accepting residential tenants[] and prevents the owner from reclaiming property for personal use, switching it to commercial or other purposes, leaving the property vacant, or demolishing the property." (Pet. 16.) But critically, none of the petitioners allege that they wish to exit the residential rental market and are precluded from doing so by the RSL.[9] At most,

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[8] Although these programs are no longer available for new projects, the Legislature recently passed bills that (similar to earlier programs) provide tax abatements to certain owners who rehabilitate their buildings and in turn agree to abide by the RSL. *See* S. 4709-A/A. 7758, 246th Leg. (N.Y. 2023).

[9] Petitioner Constance Nugent-Miller alleges that, eight years ago, she unsuccessfully attempted to reclaim a unit for personal use under a prior iteration of the RSL. (Pet. 11 (citing Pet. App. 168a-169a).) Yet petitioners concede that this anecdote serves only to "illustrate" their arguments. (Pet. 11.) As the court of appeals observed (Pet. App. 11a) and petitioners acknowledge (Pet. 20-21), the only claims at issue are facial challenges.

they assert that some hypothetical landlord may eventually be placed in such a position. But petitioners cannot state a facial claim by waving away the law's concededly lawful applications and proceeding based solely on hypothetical unconstitutional applications. Such an approach is precisely the sort of maneuver that this Court has expressly discouraged. *See Sabri*, 541 U.S. at 609.

City of Los Angeles v. Patel, 576 U.S. 409 (2015), does not help petitioners. (*See* Pet. 21.) *Patel* explained that, in assessing a facial challenge, this Court considers "only applications of the statute in which it actually authorizes or prohibits conduct." 576 U.S. at 418. In other words, "[t]he proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* (quotation marks omitted).

But the RSL is not "irrelevant" to landlords who, consistent with the RSL's terms, successfully reclaim units for personal use, otherwise convert the use of their property, or evict breaching tenants. Nor is it inapplicable to the many thousands of landlords who have agreed to abide by its terms in exchange for tax benefits. The RSL operates as a "restriction" governing the conduct of all such landlords.

Petitioners give the game away in arguing that there exist only "narrow avenues" by which landlords may change the uses of their property consistent with the RSL. (*See* Pet. 21 n.3.) The availability of these avenues does not foreclose a facial challenge, petitioners say, because a taking will still occur if "an owner is unable to satisfy [the RSL's] prerequisites." (Pet. 21 n.3) This argument is simply a concession that, under petitioners' theory, the RSL is valid as

applied to some sets of facts yet invalid as applied to others. *See Washington State Grange*, 552 U.S. at 457 (existence of constitutional applications is "fatal" to a facial challenge).

3. Petitioners' purely hypothetical allegations of unconstitutionality reveal another vehicle problem: an order finding that the RSL's change-of-use or lease-renewal provisions are physical takings would not remedy petitioners' asserted injuries: the inability to charge market rents and the corresponding diminution in property values. (*See* Pet. App. 92a-94a.) Petitioners thus lack standing because their claims, as narrowed at the certiorari stage, do not allege an injury that is "fairly traceable" to the defendants' conduct in enforcing the challenged RSL provisions and "likely to be redressed by the requested relief." *See California v. Texas*, 141 S. Ct. 2104, 2113 (2021) (quotation marks omitted).

For example, a ruling that the RSL's limitation on personal use reclamations is unconstitutional might allow petitioners to reclaim more than one unit for personal use but it would not allow them to rent those units to third parties free from rent regulation. Likewise, a ruling that the increased tenant-approval threshold for condominium and cooperative conversions constitutes a physical taking would loosen restrictions on a particular type of property sale but would not allow the building to operate on the unregulated rental market. And a ruling that the RSL's lease-renewal and successorship provisions are unconstitutional might allow owners to bring in new tenants, but the rents for the units would still be subject to rent regulation. These redressability concerns are especially potent because none of the petitioners even attempt to allege that they wish to

reclaim multiple units for personal use, convert their entire building to condominiums or cooperatives, or deny a renewal or successor lease for any reason other than the desire to charge market rents. Indeed, all petitioners apparently wish to continue renting their property to residential tenants.[10] (*See* Pet. App. 93a-94a.)

Because petitioners' alleged injuries stem from aspects of the RSL they do not challenge as physical takings, those injuries would persist even if petitioners were to obtain an injunction against enforcement of the challenged provisions. *See California*, 141 S. Ct. at 2119-20 (injuries stemming from independently operating provisions not traceable to statutory provision challenged in complaint). And if petitioners seek an injunction against enforcement of the RSL in its entirety, they fail to explain how that expansive remedy could possibly be necessary to address the specific constitutional infirmities alleged in their physical takings claim. *Cf. Barr v. American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2350-51 (2020) ("The Court presumes that an unconstitutional provision in a law is severable from the remainder of the law or statute.")

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[10] Petitioner trade associations purport to have standing because they have devoted time and resources to counseling their members about the RSL and especially the HSTPA's 2019 amendments. But they do not allege that these efforts involved the aspects of the RSL now challenged as physical takings, which existed in similar form prior to the HSTPA. The injuries asserted on behalf of the associations' members are likewise related to the RSL's rent-setting provisions and not to the provisions challenged as physical takings. (*See* Pet. App. 90a-92a.)

B. The Court of Appeals Correctly Rejected Petitioners' Facial Physical Takings Claim, And There Is No Conflict Requiring This Court's Review.

The court of appeals correctly applied settled law to reject petitioners' facial physical takings claim, and there is no split in appellate authority requiring this Court's intervention.

1. Physical takings "are relatively rare" and "easily identified." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002). The "essential question" is "whether the government has physically taken property for itself or someone else—by whatever means." *Cedar Point*, 141 S. Ct. at 2072.

In *Yee*, this Court held that regulations of the landlord-tenant relationship are not physical takings because, "[p]ut bluntly, no government has required any physical invasion of [the owner's] property." 503 U.S. at 528. In *Yee*, owners of mobile-home parks challenged rent regulations that limited their rights to evict tenants and to convert their property to other uses. *See id.* at 524-27. The Court found that such restrictions are not physical appropriations but "merely regulate petitioners' *use* of their land by regulating the relationship between landlord and tenant." *Id.* at 528. The fact that a regulation allegedly deprives landlords of their "ability to choose their incoming tenants . . . may be relevant to a regulatory taking argument," but "does not convert regulation into the unwanted physical occupation of land." *Id.* at 530-31. Because landlords "voluntarily open their property to occupation by others, [they] cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Id.* at 531.

Yee followed in step with more than a century of precedent confirming States' "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (collecting cases); *see also FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) ("statutes regulating the economic relations of landlords and tenants are not *per se* takings"). As this Court recognized, "the government may place ceilings on the rents the landowner can charge or require the landowner to accept tenants he does not like without automatically having to pay compensation." *See Yee*, 503 U.S. at 529 (citations omitted). The "element of required acquiescence is at the heart of the concept of occupation," *Florida Power Corp.*, 480 U.S. at 252, and there is no physical taking where the statute does not "require any person . . . to offer any accommodations for rent," *Bowles v. Willingham*, 321 U.S. 503, 517 (1944) (quotation marks omitted).

2. Petitioners misread the court of appeals to hold that "physical takings protections . . . do not apply to residential rental buildings." (Pet. 8; *see also id.* at 3, 9, 22.) The court of appeals did no such thing. Instead, the court of appeals correctly held that the RSL provisions challenged in this suit do not constitute facial physical takings under this Court's precedents. (Pet. App. 18a-22a.) The court of appeals in no way foreclosed physical takings challenges in the residential rental context based on different laws, or even based on the application of RSL provisions in particular factual circumstances.

3. Petitioners' facial challenge, however, was properly dismissed for several reasons. As in *Yee*, petitioners voluntarily hold out their property for rent, and each RSL provision to which they object permissibly regulates the terms of the landlord-tenant relationship without effecting a government-forced occupation. *See Yee*, 503 U.S. at 528; *see also Fresh Pond Shopping Ctr., Inc. v. Callahan*, 464 U.S. 875, 875 (1983) (dismissing appeal for want of a substantial federal question in challenge to rent-control ordinance limiting removal of property from rental market). Petitioners have not alleged that the RSL compels all or even most landlords to remain in the rental housing market against their wishes. The RSL therefore does not, as petitioners argue (Pet. 15), present the "different case" that *Yee* envisioned "were the statute, on its face or as applied, to compel a landlord over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *See* 503 U.S. at 528.

First, petitioners argue that the RSL limits landlords' abilities to reclaim units for personal use or to otherwise change the use of their property. (Pet. 9-16.) But petitioners do not dispute that these options are available on the face of the RSL, which (for example) allows owners to (i) recover one unit for personal use upon a showing of "immediate and compelling" need, RSL § 26-511(c)(9)(b); (ii) remove a building from the rental market for the owner's business use, RSC § 2524.5(a)(1)(i); (iii) demolish a building, *id.* § 2524.5(a)(2); (iv) rehabilitate a building in substandard or seriously deteriorated condition and remove it from rent regulation, *id.* § 2520.11(e); (v) convert the building to a cooperative or condominium with the agreement of a certain portion of

residents, N.Y. Gen. Bus. Law § 352-eeee; or (vi) sell a building outright. Petitioners also ignore that the RSL does not impose restrictions on the personal use of vacated units.

At bottom, petitioners argue (Pet. 11-12) that the RSL's "procedure for changing the use" of their property "is in practice 'a kind of gauntlet,' in that they are not in fact free to change the use of their land." *See Yee*, 503 U.S. at 528. But because petitioners' facial claim does not depend on their having "run that gauntlet," their claim is "confine[d] . . . to the face of the statute." *See id.* And where, as here, the statute does not on its face "compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy," a facial physical takings claim fails. *See id.* at 528-29. In reaching this conclusion, the court of appeals did not rely on a "different" legal standard unique to rental housing as petitioners claim (Pet. 14) but rather observed that the RSL simply does not operate in the manner that petitioners allege (Pet. App. 20a-21a).

Second, petitioners assert that the RSL's lease-renewal and tenant-succession provisions prevent them from choosing their tenants. (Pet. 16-19.) But this argument runs headlong into *Yee*'s holding that the government may require a landlord "to accept tenants he does not like."[11] 503 U.S. at 529; *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

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[11] This Court has previously declined to consider a takings challenge to the RSL's tenant-succession provisions. *See Rent Stabilization Ass'n of N.Y.C., Inc. v. Higgins*, 83 N.Y.2d 156 (1993), *cert. denied*, 512 U.S. 1213 (1994).

In any event, petitioners ignore landlords' substantial rights under the RSL to control who occupies their property. Among other things, landlords can select their own tenants upon vacancy, refuse to renew leases to tenants who do not use regulated units as their primary residences, and expeditiously evict tenants on a variety of grounds. *See* RSC §§ 2524.3-2524.5. And succession rights extend only to individuals who have long resided with the tenant and share a close, familial-like relationship. *See id.* §§ 2520.6(o), 2523.5(b)(1). There is thus no merit to petitioners' contention that the RSL eliminates landlords' exclusion rights or requires that leases be renewed "in perpetuity" (Pet. 18). And while petitioners may wish to rent their property to residential tenants unconstrained by rent caps, the Constitution does not give them that right. *See, e.g.*, *Pennell*, 485 U.S. at 12-13 & n.6.

Third, petitioners object (Pet. 19-20) to the RSL's requirement that owners obtain the approval of a majority of tenants before converting a rental apartment building into a cooperative or condominium. *See* N.Y. Gen. Bus. Law § 352-eeee(1)(b). Petitioners incorrectly suggest that such conversions are necessary before owners can sell anything less than their entire interest in a building. (*See* Pet. 19-20.) But the RSL in fact places no restrictions on a property owner's ability to sell a building, or a partial interest in a building, to a buyer who maintains the units' stabilized status. And petitioners cite no authority holding that the Takings Clause mandates the availability of an owner's preferred form of sale—i.e., unit-by-unit sale of converted apartments.

Setting aside that petitioners allege no desire to engage in condominium or cooperative conversion (see

supra at 16-17), petitioners cannot dispute that conversion is available to landlords on the face of the RSL. The Legislature in fact amended the RSL in December 2022 to relax the conversion requirements for owners of small apartment buildings (see *supra* at 9), which petitioners fail to mention.

4. Notwithstanding petitioners' vociferous insistence to the contrary (Pet. 10-14, 17-18, 22-23), the court of appeals correctly applied this Court's decision in *Cedar Point Nursery*, 141 S. Ct. 2063 (2021). In *Cedar Point*, this Court held that a California law constituted a physical taking where it granted labor organizations a right to "take access" to farmland to speak with workers. 141 S. Ct. at 2069-70, 2079-80. In reaching that conclusion, the Court emphasized the importance of "longstanding background restrictions on property rights," including that farms are *not* generally open to the public. *See id.* at 2079-80. The Court thus distinguished its prior case law holding that intrusions on properties that owners have already opened to third parties in some manner—like private shopping malls that are generally open to the public—are not physical takings but are at best subject to a regulatory takings analysis. *See id.* at 2076-77 (discussing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)).

The court of appeals appropriately distinguished *Cedar Point* (Pet. App. 18a-19a) in finding that the challenged RSL provisions are not physical takings. In contrast to the property at issue in *Cedar Point*, landlords generally invite third parties to occupy the premises as tenants and the regulations challenged

here govern the landlord-tenant relationship that owners have voluntarily entered. *See Yee*, 503 U.S. at 528.[12]

Petitioners likewise misplace their reliance (Pet. 19) on *Horne v. Department of Agriculture*, which held that a statute requiring raisin growers to reserve a portion of their crop for the government was a physical taking. 576 U.S. 350, 354-55, 362 (2015). In so holding, the Court rejected an argument that the reserve requirement was not a taking because "raisin growers voluntarily choose to participate in the raisin market." *Id.* at 365. But unlike *Horne*, where the government physically confiscated a portion of farmers' crops without the promise of compensation, the RSL does not result in a "compelled physical occupation" since property owners willingly accept tenants' presence in apartments when they choose to become landlords. *See Yee*, 503 U.S. at 530-31. In addition, landlords remain free to collect rents (subject to certain limits on the amount of annual increase).[13]

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[12] Statutory rent regulation like the RSL is also "consistent with longstanding background restrictions on property rights" and thus would not effect a taking even if it involved a physical invasion (which it does not). *See Cedar Point*, 141 S. Ct. at 2079. Rent regulation in New York City dates back a century, *see* 1 *Report of the New York State Temporary Commission on Rental Housing* 42-46 (1980), and antecedents to the RSL have existed since World War II (see *supra* at 4). *Cf. Tahoe-Sierra*, 535 U.S. at 352 (Rehnquist, C.J., dissenting) (New York City zoning laws dating to 1916 qualified as "a longstanding feature of state property law").

[13] Petitioners also misread (Pet. 24) *Pakdel v. City and County of San Francisco*, which concerned the finality requirement for a regulatory takings claim. 141 S. Ct. 2226 (2021). This Court's observation in a footnote that the Ninth

(*continues on next page*)

5. Finally, petitioners are incorrect to argue (Pet. 22-23) that the decision below conflicts with *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022).

Heights Apartments concerned a COVID-19–related executive order which precluded evictions except where a tenant seriously endangered the safety of other residents or engaged in illicit activity. *Id.* at 733. The Eighth Circuit concluded that the plaintiff landlord stated a physical takings claim because the order "forced landlords to accept the physical occupation of their property regardless of whether tenants provided compensation" and "forbade the nonrenewal and termination of ongoing leases, even after they had been materially violated." *Id.* at 733. Thus, the court concluded that the executive order had deprived the landlord "of its right to exclude existing tenants without compensation." *Id.*

In contrast, the RSL does not prevent landlords from excluding lease violators, including for nonpayment of rent. To the contrary, landlords retain substantial control over who rents their property, including robust eviction powers. See *supra* at 7, 22. The RSL also does not force landlords to rent their property without compensation but rather provides multiple mechanisms to ensure that landlords can receive a reasonable return, including by allowing

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Circuit could "give further consideration" to plaintiffs' physical taking claim "in light of" *Cedar Point* did not endorse the merits of the underlying claim. *See id.* at 2229 n.1. Indeed, the district court dismissed the physical takings claim on remand. *See Pakdel v. City & County of San Francisco*, No. 17-cv-03638, 2022 WL 14813709, at *5-6 (N.D. Cal. Oct. 25, 2022).

landlords to offset the cost of improvements and renovations through rent increases, providing hardship exemptions to landlords, and requiring that the Rent Guidelines Board consider landlords' costs and expenses in setting maximum annual rent increases. See *supra* at 6-7.

To the extent there is any question about whether *Heights Apartments* reached the correct result under the unique circumstances presented, *see Heights Apartments, LLC v. Walz*, 39 F.4th 479, 480 (8th Cir. 2022) (Colloton, J., dissenting from denial of rehearing en banc), this case does not provide an appropriate vehicle to resolve that question because it arises from wholly distinct facts.

II. THIS COURT'S REVIEW OF PETITIONERS' REGULATORY TAKINGS CLAIM IS NOT WARRANTED.

Regulations that restrict an owner's ability to use his or her property are judged by a different standard than physical occupations. *Cedar Point*, 141 S. Ct. at 2071. This Court evaluates such claims under *Penn Central*, "balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." *Id.* at 2071-72.

Petitioners abandon any claim that the RSL effects a regulatory taking under *Penn Central*; indeed, petitioners all but concede that such a claim is meritless. (Pet. 4, 30.) Instead, petitioners ask this Court to grant review on the question of whether regulatory takings challenges should instead be governed by Justice Scalia's dissent in *Pennell*. (*See*

Pet. 24-34 (citing 485 U.S. at 19-24 (Scalia, J., concurring in part and dissenting in part)).)

This case is a poor vehicle to address the applicability of the *Pennell* dissent. In any event, this Court unanimously rejected the dissent's analytical framework in *Lingle*, 544 U.S. 528, a case petitioners fail to cite, much less address.

A. This Case Is a Poor Vehicle to Address the Viability of the *Pennell* Dissent's Framework.

As explained in more detail below, Justice Scalia's dissent in *Pennell* was based on a concern about a scheme in which the government could require for a specific tenant a downward departure from an otherwise reasonable rent based on that tenant's hardship. But the RSL does not permit consideration of a particular tenant's ability pay in setting rents; instead, it directs the Rent Guidelines Board to consider a broad range of objective macroeconomic data in setting a maximum rate of permissible rent increases for all regulated units. This case is accordingly a poor vehicle to adjudicate the potential viability of the *Pennell* dissent's framework.

1. *Pennell* involved a challenge to a San Jose, California, ordinance's mechanism for determining annual rent increases. 485 U.S. at 5. The ordinance entitled landlords to increase tenants' rent by up to eight percent. But if a landlord increased rent above that threshold, an objecting tenant could request a hearing to determine the reasonableness of that tenant's increase. *Id.* The ordinance established seven factors for the hearing officer to consider. The first six factors were "objective" and "related either to the

landlord's costs of providing an adequate rental unit, or to the condition of the rental market." *Id.* at 9. The seventh factor was the individual tenant's "economic and financial hardship." *Id.* at 5 (quotation marks omitted).

The *Pennell* petitioners challenged the tenant-hardship provision as a Fifth Amendment taking. *Id.* at 9. The first six factors, petitioners argued, advanced a "legitimate purpose of rent control: the elimination of 'excessive' rents caused by San Jose's housing shortage." *Id.* But further reducing rent based on individual tenant hardship, the argument continued, would improperly "force[] private individuals to shoulder the 'public' burden of subsidizing their poor tenants' housing." *Id.*

The Court declined to resolve the takings challenge on the merits because there was no evidence that the tenant-hardship clause had "ever been relied on by a hearing officer to reduce a rent below the figure it would have been set at on the basis of the other factors." *Id.* at 9-10. And nothing in the ordinance required "that a hearing officer in fact reduce a proposed rent increase on grounds of tenant hardship." *Id.* at 10. Accordingly, the case did "not present a sufficiently concrete factual setting for the adjudication of the takings claim." *Id.*

Dissenting in part, Justice Scalia, joined by Justice O'Connor, would have held that the tenant-hardship provision violated the Takings Clause. Describing petitioners' challenge as whether the challenged ordinance "substantially advance[s] legitimate state interests," *id.* at 15, Justice Scalia reasoned that the ordinance impermissibly went beyond traditional rent regulation "to establish a welfare program privately

funded by those landlords who happen to have 'hardship' tenants," *id.* at 22.

2. Unlike the *Pennell* ordinance, the RSL directs the Rent Guidelines Board to consider objective, generally applicable economic data in setting the maximum rate of permissible rent increases for all regulated units; the Board does not adjudicate permissible rent increases on a tenant-by-tenant basis depending on individual hardship.[14] For example, the Board must consider the condition of the rental-housing industry (such as tax and utility rates, operating costs, financing costs, housing supply data, and vacancy rates) and relevant cost-of-living indices. RSL § 26-510(b). The Board's consideration of cost-of-living data does not include individuals' ability to pay but rather information such as "unemployment rates; wages; housing court and eviction data; and rent and poverty levels." (Pet. 27 (quotation marks omitted).)

3. Because the RSL does not set rents based on individual hardship, the logic of the *Pennell* dissent is not implicated here. Justice Scalia took no issue with the consideration of objective economic factors, and he never suggested that the government effects a taking when, in determining reasonable rent increases, it looks to macroeconomic factors that impact tenants. Instead, he believed that landlords should not be forced to subsidize specific "renters who are too poor to afford even *reasonably* priced housing." *Pennell*, 485 U.S. at 21 (Scalia, J., dissenting in part) (emphasis added).

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[14] The RSL does, however, allow landlords to apply for hardship exemptions permitting larger increases. See *supra* at 7.

Because landlords set rents in a market setting, whether a given level of rent is "reasonably priced" necessarily depends in part on what tenants as a group are willing and able to pay and the economic forces driving demand. Accounting for such conditions does not sever the "connection" between "the high-rent problem" and its source and thus does not implicate Justice Scalia's concerns. *See id.* at 22. And price controls in general do not offend the Constitution because commodity owners directly benefit from charging exorbitant prices that cause "economic hardship, and in that respect singling them out to relieve it may not be regarded as 'unfair.'" *Id.* at 20. Justice Scalia acknowledged that this justification may also apply to rent regulation.[15] *Id.*

B. This Court Has Already Rejected the *Pennell* Dissent's Framework.

As the court of appeals correctly concluded (Pet. App. 22a n.25), this Court has never adopted the *Pennell* dissent despite issuing numerous regulatory takings opinions in the intervening years. Indeed, in *Lingle*, this Court unanimously rejected the core logic underpinning the *Pennell* dissent. Petitioners offer no justification to depart from *Lingle*; indeed, they do not even mention the case.

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[15] The New York Court of Appeals' statements about rent stabilization in *Matter of Santiago-Monteverde*, 24 N.Y.3d 283 (2014), on which petitioners rely, are entirely tangential to the question presented. *See* Pet. 25, 28-29, 32. *Santiago-Monteverde* concerned whether a rent-stabilized lease qualifies as a statutory "public assistance benefit" that may be exempted from bankruptcy proceedings—not whether the RSL is a form of impermissible wealth transfer. *See* 24 N.Y.3d at 287.

1. *Lingle* involved a challenge to a Hawai'i statute that limited the rent oil companies could charge dealers leasing company-owned service stations. Chevron U.S.A., Inc. challenged the law, arguing that the rent cap was an unconstitutional taking. Like petitioners here, Chevron relied on the *Pennell* dissent to argue that *Penn Central* balancing is not "necessary when, at the threshold, the property taken is not the source of the condition sought to be corrected." Br. for Resp't 19, *Lingle*, 544 U.S. 528 (No. 04-163), 2005 WL 103793. And like petitioners here, Chevron relied on Justice Scalia's concern that governments would force certain economic actors to bear financial responsibility for harms that are attributable to others to advance general state interests. *See id.* at 19-20.

In *Lingle*, this Court unanimously rejected Chevron's arguments and reaffirmed that "regulatory takings challenges are governed by the standards set forth in *Penn Central*." 544 U.S. at 538. And *Lingle* expressly disavowed consideration of whether a regulation "substantially advance[s] legitimate state interests"—the exact standard used in the *Pennell* dissent, *see* 485 U.S. at 18 (Scalia, J., dissenting in part)—on the ground that this formulation sounds in substantive due process, 544 U.S. at 539-42, and is "not a valid takings test," *id.* at 548. In other words, *Lingle* established that "a takings claim should focus exclusively on the severity of the government intrusion and not the purpose of that intrusion." *South Grande View Dev. Co. v. City of Alabaster*, 1 F.4th 1299, 1311 (11th Cir. 2021).

2. Petitioners suggest (Pet. 34) that this Court's review is necessary to "clarify" the law with respect to the *Pennell* dissent's viability, but *Lingle* already considered *Pennell*'s dissent and rejected its reasoning.

By disentangling takings from substantive due process, this Court explained that it was correcting and simplifying its regulatory takings jurisprudence while guarding against judicial policymaking.[16] Injecting means-end review into every regulatory takings claim "would require courts to scrutinize the efficacy of a vast array of state and federal regulations" and encourage "courts to substitute their predictive judgments for those of elected legislatures and expert agencies." *Lingle*, 544 U.S. at 544. Petitioners' proposal to introduce a freewheeling, purpose-driven inquiry into the regulatory takings framework would reignite the confusion that *Lingle* dispelled.

Indeed, petitioners provide no criteria or limits for their new test. They merely "appeal[] to the general principle that the Takings Clause is meant 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.'" *Id.* at 542 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Yet, as in *Lingle*, "that appeal is clearly misplaced"—not because the principle is unimportant but because a purpose-driven inquiry does not serve it. *See id.* at 543. "A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might

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[16] *See* Robert G. Dreher, Lingle*'s Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 Harv. Envtl. L. Rev. 371, 406 (2007); D. Benjamin Barros*, At Last, Some Clarity: The Potential Long-Term Impact of* Lingle v. Chevron *and the Separation of Takings and Substantive Due Process*, 69 Alb. L. Rev. 343, 350-51 (2005); John D. Echeverria, *Making Sense of* Penn Central, 23 U.C.L.A. J. Envtl. L. & Pol'y 171, 199-203 (2005).

require that the burden be spread among taxpayers through the payment of compensation." *Id.* For this reason, the Court employs the *Penn Central* test, which does account for these factors. *See id.* at 539-40.

* * *

As the court of appeals observed, balancing the competing interests of landlords and tenants is "a quintessential function of a legislature." (Pet. App. 9a-10a.) Petitioners complain that property owners "are vastly overwhelmed in New York's political process" (Pet. 31), but that assertion is squarely contradicted by New York's history of rent regulation and is a poor reason to grant certiorari in any event. Landlords have repeatedly taken their cause to the Legislature with varying degrees of success. Petitioners' displeasure with the most recent legislative amendments does not present a concern of constitutional magnitude warranting this Court's intervention. Petitioners must instead, as in the past, seek recourse through the political process. *Cf. National Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1161 (2023) (op. of Gorsuch, J.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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