No. _____

In the Supreme Court of the United States

335-7 LLC, ET AL.,

Petitioners,

v.

CITY OF NEW YORK, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

New York has implemented the most sweeping and onerous rent control provisions the United States has ever seen in its Rent Stabilization Laws and accompanying regulations ("the RSL"). As recently amended, the RSL makes New York's once "temporary" rent stabilization regime permanent for over one million apartments. Petitioners are owners of apartment buildings regulated by the RSL. The RSL expropriates a definitional feature of Petitioners' real property—the right to exclude—by granting their tenants a perpetual right to renew their leases. The RSL closes off all viable exit options for Petitioners to change the use of their property and thus avoid RSL regulation. These provisions, when combined with the RSL's ceiling on the rents that landlords can collect, have ensured that Petitioners cannot earn a just and reasonable rate of return. The RSL has dramatically reduced the economic value of Petitioners' property beyond any reasonable expectation. Nevertheless, the Second Circuit held the RSL did not effect any taking of Petitioners' property without just compensation.

The questions presented are:

(1) Does the RSL effect a per se physical taking by expropriating Petitioners' right to exclude?

(2) Does the RSL effect a confiscatory taking by depriving Petitioners of a just and reasonable return?

(3) Does the RSL effect a regulatory taking as an unconstitutional use restriction of Petitioners' property?

PARTIES TO THE PROCEEDING

Petitioners are 335-7 LLC, FGP 309 LLC, 226 LLC, 431 Holding LLC, and 699 Venture Corp. Petitioners were the plaintiffs in the United States District Court for the Southern District of New York and the plaintiffs-appellants in the United States Court of Appeals for the Second Circuit.

The City of New York, the New York City Rent Guidelines Board, RuthAnne Visnauskas, in her official capacity as Commissioner of the New York State Division of Homes and Community Renewal are Respondents. They were defendants in the United States District Court for the Southern District of New York and the defendants-appellees in the United States Court of Appeals for the Second Circuit.

Community Voices Heard (CVH) and N.Y. Tenants & Neighbors (T&N) are Respondents. They were intervenors-defendants in the United States District Court for the Southern District of New York and intervenors-defendants-appellees in the United States Court of Appeals for the Second Circuit.

RULE 29.6 DISCLOSURE STATEMENT

No Petitioner has a parent corporation, and no publicly held corporation owns 10% or more of any of Petitioners' stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *335-7 LLC, et al. v. City of New York, et al.*, No. 21-823 (2d. Cir.) (opinion issued and judgment entered March 1, 2023).
- *335-7 LLC, et al. v. City of New York, et al.*, 1:20-cv-01053 (S.D.N.Y.) (opinion issued and judgment entered March 8, 2021).

In its decision below, the Second Circuit relied, in part, on its near-contemporaneous decisions regarding other challenges to the RSL in *Community Housing Improvement Program, et al., v. City of New York, et al.*, No. 20-3366 (2d Cir.) and *74 Pinehurst LLC v. New York, et al.*, Nos. 21-467(L), 21-558(Con) (2d Cir.).

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Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 2023 WL 2291511 and is reproduced at Pet.App.1. The opinion of the United States District Court for the Southern District of New York is reported at 524 F.Supp.3d 316 and is reproduced at Pet.App.14.

JURISDICTION

The Court of Appeals issued its judgment on March 1, 2023. Pet.App.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

INTRODUCTION

Petitioners are the owners of small and midsize apartment buildings in New York City. But their property is no longer their own. New York has expropriated it through amendments to the State's Rent Stabilization Laws and accompanying regulations (the "RSL"). The provisions of the RSL amount to the most onerous rent control provisions the United States has ever seen. And the RSL effects an unconstitutional taking without just compensation.

Like many jurisdictions, New York regulates aspects of the landlord-tenant relationship. Unlike most, however, the regulatory apparatus of the RSL goes far beyond mere regulation. If real property rights are understood to cover a particular space for a particular time period for a particular use, the RSL has expropriated Petitioners' rights in all dimensions. Because of the RSL, third parties are occupying Petitioners' property for a time the RSL sets for a use the RSL requires—and there is no feasible exit. By the RSL's mandates, Petitioners have been deprived of their right to exclude and are forced to rent their units at confiscatory rates.

Several features of the RSL make plain the uncompensated and effectively permanent requisition of Petitioners' property. In the usual course, residential leases are for a defined length of time, such as one or two years. At the end of the lease, both renewal and rate are matters of mutual consent between landlord and tenant. But the RSL generally forbids Petitioners from refusing to renew leases;

instead, the RSL grants tenants a perpetual option to renew their leases—transforming term leases into government-mandated life estates. Not content with a single generation of beneficiaries, the RSL even grants tenants the option for "family members" who live with them to be their successors to the use of Petitioners' property. All the while, the RSL caps the rent that Petitioners may collect in a manner that, by design, does not keep up with their costs, thereby putting Petitioners on an inexorable path to insolvency.

Recognizing that many landlords would not choose to remain subject to the RSL's strictures, the RSL blocks Petitioners from changing the use of their property. For instance, should Petitioners seek to convert their buildings to condominiums, the RSL mandates that the existing tenants must approve such conversion by *buying* the majority of the units. In essence, not only must Petitioners rent to their tenants, the RSL also mandates that they may sell their units only to their tenants. And Petitioners are generally forbidden, even when individual units become vacant, to use the units for any use other than RSL tenancies.

In a decision that cannot be squared with the Constitution, this Court's precedents, or other lower courts, the Second Circuit held that the RSL's appropriation of Petitioners' property was not an unconstitutional taking. The decision merits this Court's review.

The Second Circuit based its rejection of Petitioners' physical taking claim on a gross

(over)reading of a few lines of this Court's decisions in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), and *Yee v. City of Escondido*, 503 U.S. 519 (1992). On the Second Circuit's reading, the Takings Clause has what amounts to an "open door" exception: because Petitioners or their predecessors in interest initially opened their units for rent, there can be no per se physical taking by the government ever after. Pet.App.5. Not only does that stretch this Court's takings precedents beyond recognition, it diverges from the Eighth Circuit's recent analysis in *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022). There, the Eighth Circuit correctly recognized that a law "turn[ing] every lease … into an indefinite lease, terminable only at the option of the tenant" effects a per se physical taking. 30 F.4th at 733. The Second Circuit's open-door theory is irreconcilable with the Eighth Circuit's decision.

The Second Circuit also rejected Petitioners' takings challenge to the confiscatory limits on the rents they are allowed to charge. A "confiscatory taking" is shorthand for the analysis that applies when the government mandates a regulated entity to provide a service to the public and charge a certain price for that service. In such price control situations, the Takings Clause requires the government to set rates that permit, at a minimum, "[a] just and reasonable return" for the private entity. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 305 (1989). Instead of analyzing the RSL and whether it provided the constitutional minimum of just and reasonable rents, the Second Circuit simply dismissed Petitioners' confiscatory takings claim because such a claim

would, in the appellate court's estimation, require "expand[ing]" the confiscatory takings doctrine. Pet.App.12.

Yet this Court's very first rent control decision, *Block v. Hirsch*, 256 U.S. 135 (1921), applied such a confiscatory takings analysis, *id.* at 157; *see also* Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOKLYN L. REV. 741, 751 (1988). State supreme courts have also applied the confiscatory takings doctrine to rent control laws. *See, e.g., Hutton Park Gardens v. Town Council of Town of West Orange*, 350 A.2d 1 (N.J. 1975); *Jeffery v. McCullough*, 652 P.2d 9 (Wash. 1982); *Birkenfeld v. City of Berkeley*, 550 P.2d 1001 (Cal. 1976). Far from expanding the Takings Clause, applying a confiscatory takings framework to the RSL would vindicate it. *See* Thomas W. Merrill, *The Compensation Constraint and the Takings Clause*, 96 NOTRE DAME L. REV. 1421, 1437 (2021) (noting confiscatory takings' applicability to "draconian rent control regimes"). The Second Circuit's perfunctory rejection of the confiscatory takings framework merits this Court's review.

The Second Circuit additionally rejected Petitioners' claim that the RSL was an unconstitutional use restriction under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The Second Circuit's holding is hardly a surprise given that the *Penn Central* standard has become "an almost categorical rule" that the government wins. James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 62 (2016). As applied in the lower

courts, *Penn Central* is not fit for its purpose. *Cf. Nekrilov v. City of Jersey City*, 45 F.4th 662, 682 (3d Cir. 2022) (Bibas, J., concurring) (explaining *Penn Central* is "hard to define" and "hard to meet"). This branch of takings law needs this Court's clarification. *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 141 S. Ct. 731, 732 (2021) (Thomas, J., dissenting from the denial of certiorari).

For decades, the Second Circuit has been reviewing and upholding, erroneously, rent regulations in New York *without* this Court's effective supervision. In fact, it has been over one hundred years since this Court last assessed whether state and city rent regulations in New York were constitutional. *See Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921). At that time, this Court embraced the view that such rent regulations were "temporary measure[s]," with Justice Holmes explaining for the Court that "[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." *Block*, 256 U.S. at 157; *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). But New York's RSL has proven anything but temporary. Petitioners' property will remain appropriated for New York's social policy goals permanently—unless and until this Court provides the meaningful constitutional scrutiny that the Takings Clause requires.

STATEMENT

Rent Regulation in New York.

New York enacted the initial iteration of the Rent Stabilization Law in 1969 to address a "temporary" post-World War II housing emergency. As a general matter, the RSL currently limits the rent that owners can charge to residential tenants living in apartments that were constructed before January 1, 1974, in buildings that contain six or more units. The RSL created a Rent Guidelines Board, which is empowered to determine whether and how much rents for rent-stabilized units may be raised on an annual basis. *See* N.Y. UNCONSOL. LAW TIT. 23, § 8624. Petitioners' units are among the roughly 1,006,000 units in New York City that the RSL covers.

Initially, the RSL was seen as a milder form of rent regulation because it was premised on facilitating a transition from the earlier Rent Control system to a free market system. The original RSL provided mechanisms for owners of apartment buildings to either convert their buildings to other uses or to obtain additional rent increases based on making improvements to their buildings or when an apartment became vacant. Additionally, subsequent state legislation contained a renewal provision for the RSL. This renewal provision required periodic determinations by local authorities that there, in fact, existed a "public emergency requiring the regulation of residential rents" such that temporary rent stabilization should continue. N.Y. UNCONSOL. LAW TIT. 23, § 8623(a).

Despite being a purported solution for a "temporary" emergency, New York City continued for the next fifty years to find—as a matter of course—that a housing "emergency" persisted. Through the decades, the New York State Legislature amended and refined the RSL, ostensibly with the goal of eventually transitioning away from "temporary" emergency regulation.

In 2019, however, the New York State Legislature enacted sweeping amendments to the RSL in the Housing Stability and Tenant Protection Act. According to the sponsor's memo, the purpose of the 2019 amendments was to "[p]rovide *permanent* rent regulation protections to covered buildings." *A08281 Memo*, N.Y. ASSEMBLY, https://bit.ly/3MEgvPt (emphasis added). New York thus no longer maintains even the pretense that the RSL is a temporary measure.

The Amended RSL. With the 2019 amendments to the RSL, New York (1) eliminated Petitioners' ability to exit the regulated market, and (2) ensured Petitioners' allowable rents would be well below any just and reasonable rate.

1. The foundation of the amended RSL is ensuring that tenants can stay in units and that units stay under the RSL. On the unit level, the RSL accomplishes this by generally granting tenants a unilateral right to renew their tenancies in perpetuity. N.Y. COMP. CODES R. & REGS TIT. 9 § 2523.5(a); *In re Santiago-Monteverde*, 22 N.E.3d 1012, 1016 (N.Y. 2014).

An RSL tenancy does not end, however, even when

the tenant decides to move on because New York has granted tenants a right of successorship in their leaseholds. If an individual, who self-identifies as a "family member" of the existing tenant, "has resided with the tenant" for at least two years, then that individual may succeed to the original tenants' indefinite leasehold. N.Y. COMP. CODES R. & REGS TIT. 9, § 2523.5(b). And "family member" is defined unconventionally to include "[a]ny other person … who can prove emotional and financial commitment, and interdependence" between themselves and the tenant. *Id.* § 2520.6(o)(2). Under the RSL, the landlord cannot turn away tenant-designated successors who meet the RSL's minimum occupancy and relationship requirements. And even if there is no successor, because there are no viable options for exit, the RSL compels landlords to rent to another tenant who will then benefit from all of the RSL's protections.

The RSL does not permit Petitioners, as corporate entities, to remove units for their own purposes, such as retail use, office space, or storage. The RSL only permits natural persons, who are owners of rent-stabilized units, to recover a *single* unit for "his or her own personal use and occupancy" if, and only if, he or she demonstrates "immediate and compelling necessity for the unit's use." NYC ADMIN. CODE § 26-511(C)(9). If the existing tenant is over 62 years old or has an impairment, then the owner must provide that individual with *another* rent-stabilized unit. *Id.* § 2104.5(a)(2).

The RSL does not permit removing a unit from rent control even when the rent qualifies as "high rent" or the tenant is "high income." Prior to 2019,

Petitioners could exit units under so-called "luxury decontrol" and "high-income decontrol" provisions, which kicked in "when the rent or tenant's income reached a specified level." *Cmty. Housing Improvement Program v. City of New York*, 59 F.4th 540, 546 (2d Cir. 2023) ("*CHIP*"); *Roberts v. Tishman Speyer Properties, L.P.*, 918 N.E.2d 900, 902–03 (2009) (describing decontrol provisions). If the RSL was predicated on ensuring the affordability of New York's housing stock, then it would make little sense to ensure that high-income tenants or high-rent units are subject to the RSL. But New York has abandoned such pretenses. Now, in order to "prevent uncertainty, potential hardship and dislocation of tenants," the RSL simply closes these doors to exit. *See* A08281, Tenant Protection Act, Part D, https://bit.ly/3WBv8HX.

The RSL ensures that Petitioners' buildings stay within its grasp. Prior to the 2019 amendments, landlords could convert their buildings to condominiums or cooperatives, and thereby exit rent control. For example, under a "non-eviction conversion," landlords previously could sell 15 percent of their units and then, as tenants gradually vacated the remaining unsold units, the landlords could sell those units or rent them out at free market rates. *See* N.Y. GEN. BUS. LAW § 352-eeee (2018). Over time, the buildings would become non-rent controlled co-ops or condominiums.

Now, the amended RSL does not allow for such "non-eviction conversions." Instead, the only means to convert a rent controlled building is to *sell it to the tenants*. Specifically, a building may only exit rent

regulation by conversion if Petitioners sell 51% of the units to bona fide tenants in occupancy. *See* N.Y. GEN. BUS. LAW § 352-eeee (2023). If the landlord falls short of this 51% threshold, no conversion is possible. Thus, in addition to granting tenants a perpetual leasehold, the RSL has granted tenants an exclusive ability to buy or, as is significantly more common, an option to block any conversion of the property. Unsurprisingly, condominium conversions have ground to a virtual halt since the RSL was amended.[1]

What the RSL does permit, at least in theory, is for Petitioners to demolish their buildings. But, in order to do so, Petitioners must seek approval from regulators, "pay all reasonable moving expenses for tenants," and relocate tenants to "suitable housing accommodation." N.Y. COMP. CODES R. & REGS. TIT. 9, § 2524.5(a)(2). The relocation costs can include pre-paying any difference in rent between the tenants' RSL apartment and their new housing for a period of 72 months. *Id.* § 2524.5(b). This often amounts to a stipend in the six figures for each tenant. Needless to say, the exaction imposed to actually demolish a building means it is not financially feasible for most landlords, including Petitioners, and is rarely taken

[1] The year after the RSL amendments, the aggregate value of condominium conversions was down 99% from $600 million to $6 million. *See NYC Condominium and Cooperative Conversion: Historical Trends and Impacts of the Law Changes*, THE STEVEN L. NEWMAN REAL ESTATE INST. AT BARUCH COLLEGE, CUNY (May 5, 2021), https://bit.ly/3kvMAMA. In 2021, there were only four successful conversions. *See 2022 RGB Housing Supply Report*, at 10, N.Y.C. RENT GUIDELINES BD. (May 26, 2022), https://bit.ly/43sOBNd.

by those who own tenanted buildings.

2. The units that are subject to the RSL's indefinite tenancy requirements are also subject to the RSL's rent regulations. These rents are, by definition, below market—and unsurprisingly so, as the board tasked with setting rents considers, *inter alia*, the means of indigent tenants and general advocacy from the public. N.Y. UNCONSOL. LAW TIT. 23, § 26-510 (b), (h); *see 2023 Income and Affordability Study*, N.Y.C. RENT GUIDELINES BD. (Apr. 13, 2023), https://bit.ly/3WRojm1. For example, between 2014 and 2017, the median monthly contract rent for market units increased annually 3.22%—a 10% increase over three years. By contrast, the rent for stabilized units averaged annual increases of only 0.85%—a 2.6% increase. And these regulated rents, by Respondents' own data, do not keep up with costs. Over the twenty-year period between 1998 and 2018, landlords' costs cumulatively increased by 169% but Respondents permitted landlords to increase RSL rents by only a cumulative 66%—less than half. For 2023, the RGB found that rents would have to increase by 8.25% for a one-year lease in order to keep pace with cost increases—yet the RGB has preliminarily set a range of just 2–5% for what it will allow.

The amended RSL depresses contemporary RSL rents to low and confiscatory levels by removing any means for owners to compensate for the RGB's inadequate annual increases. Prior to the 2019 amendments to the RSL, Petitioners were permitted to increase rents when a unit became vacant. Now, the RSL bans adopting adjustments targeted to when an

apartment unit becomes vacant. *See* A08281, Tenant Protection Act, Part B §§ 1, 3; Part C. There will be no more catch up in rents.

The RSL also largely eliminates the ability to pass along costs for making major capital improvements to Petitioners' buildings or improvements to individual units. For individual units, an owner may recover a maximum of $15,000 per unit over any given fifteen-year period—nowhere near the actual cost to renovate—with the result that tens of thousands of units now sit vacant because they cannot be economically renovated. For building-wide improvements, where the value is added to the building's tax base, the rent may be increased by no more than 1/150th of the cost, limited to a maximum of 2% per year. And, after thirty years, any improvement increase must be removed from the rent. These improvement and renovation limits are simply inadequate to recoup Petitioners' costs, even though improvements are often required to maintain compliance with the applicable codes.

The amended RSL ensures that rents will remain permanently below market rates under an artificial permanent "emergency." As upkeep and financing costs increase well beyond allowable rent increases, landlords, including Petitioners, can expect to find themselves on an inexorable slide to insolvency.

Proceedings Below.

Petitioners are the landlords of small to midsize apartment buildings facing a range of hardships because of the amended RSL. Petitioner 699 Venture Corp. is the owner of a fully occupied 23-unit building

in the South Bronx. With the growth in expenses and the RSL's limits, 699 is threatened with insolvency. Petitioner FGP 309 LLC previously owned a small rent controlled building in East Harlem. At the time the RSL amendments were enacted in 2019, FGP had an accepted offer to purchase its building for $2.725 million. Upon passage of the 2019 amendments, that offer immediately dropped by 34% to $1.8 million, the sum FGP ultimately realized. Petitioners 335-7 LLC, 226 LLC, and 431 Holding LLC own buildings in lower Manhattan which have a mix of regulated and unregulated tenants. They all invested substantial sums in renovations in their respective buildings prior to enactment of the 2019 amendments. Under the amended RSL, they will be unable to recoup the cost of their investments. And unregulated rents in Petitioners 226 LLC's and 431 Holding LLC's buildings run some two-and-a-half times that of the allowed RSL rents—an effective yearly windfall (discount) to individual RSL tenants of $25,000.

Facing the prospect of an accelerating decline in revenues, an inability to recoup expenses, and an indefinite inability to exit the RSL, Petitioners filed suit in the Southern District of New York. Petitioners alleged that the RSL effected a taking both facially and as-applied. The District Court had jurisdiction under 28 U.S.C. § 1331. The District Court dismissed Petitioners' complaint, and Petitioners timely appealed.

The Second Circuit affirmed the dismissal of Petitioners' facial and as-applied takings claims. In doing so, the court divided its legal analysis between a facial analysis and an as-applied analysis and relied

almost entirely on the decisions it had issued three weeks prior in *CHIP* and *74 Pinehurst LLC v. New York*, 59 F.4th 557 (2d Cir. 2023).

For Petitioners' physical takings claims, the Court of Appeals relied on language in this Court's opinion in *Cedar Point* to hold that the RSL did not on its face effect a physical taking because Petitioners "voluntarily invited third parties to use their properties" and "regulations concerning such properties are 'readily distinguishable' from those compelling invasions of properties closed to the public." Pet. App.5 (quoting *Cedar Point*, 141 S. Ct. at 2077). The RSL was not an as-applied physical taking because it "does not compel the Landlords to 'refrain in perpetuity from terminating a tenancy.'" PetApp.7 (quoting *Yee*, 503 U.S. at 528).

The Court of Appeals also rejected Petitioners' claims under *Penn Central*. The court ruled that Petitioners' facial *Penn Central* claims could not properly be assessed on a "groupwide basis." Pet.App.5. With respect to Petitioners' as-applied *Penn Central* claims, the court found them unripe, and, in any event, wrong as a matter of law. Petitioners lacked sufficient allegations "about the economic impact of the law on their buildings," and their reasonable expectations should have "anticipated their rental properties would be subject to regulations, and that those regulations in the RSL could change yet again." Pet.App.11. Moreover, the RSL's service as "part of a broader regulatory regime … weigh[ed] against finding a regulatory taking." Pet.App.12.

Finally, the Second Circuit rejected Petitioners' "confiscatory takings" claims. The court explained that the "doctrine arises in the context of private companies that are required to provide public utilities and 'creates its own set of questions under the Takings Clause of the Fifth Amendment.'" Pet.App.12 (quoting *Duquesne Light Co.*, 488 U.S. at 307). And landlords are not utilities.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Decision Leaves Landlords with No Meaningful Protection under the Takings Clause.

The decision below is not only wrong but poses a triple threat to the protections of the Takings Clause by undermining not one but three different frameworks. In its per se physical takings analysis, the Second Circuit stretched this Court's precedents beyond recognition and split with the Eighth Circuit. The Second Circuit's cavalier rejection of the application of the confiscatory takings framework—an essential constitutional backstop to overreaching government price-controls—cannot be squared with this Court's precedents and creates another division of authority in the lower courts. And the Second Circuit's regulatory takings analysis shows that the lower courts' application of *Penn Central* is an unworkable heads-government-wins, tails-property-owners-lose test that requires reexamination.

A. The Second Circuit's "Open Door" Theory of Per Se Physical Takings Conflicts with the Eighth Circuit and Cannot Be Squared with this Court's Precedents.

1. The decision below splits with the Eighth Circuit.

The Second Circuit put forward what could be called an "open door" theory of per se physical takings. According to this theory, once Petitioners (or their predecessors in interest) decided to offer units for rent sometime before 1974, they subsequently empowered New York to requisition their property indefinitely without effecting a physical taking.

The Second Circuit reached its decision based on its (over)reading of language in this Court's decisions in *Cedar Point* and *Yee*. Relying on *Cedar Point*, the panel below held that the RSL was not a physical taking because "regulations concerning" properties open to the public "are 'readily distinguishable' from those compelling invasions of properties closed to the public." Pet.App.5 (quoting *Cedar Point*). In *Cedar Point*, this Court distinguished between a regulation requiring access to a shopping mall "welcoming some 25,000 patrons a day" and a regulation compelling access to the property of strawberry and grape growers. 141 S. Ct. at 2076. The latter was a per se physical taking, but the former was not. *Id.* Since Petitioners' property is not "closed to the public" in the same manner as the growers' property was in *Cedar Point*, the Second Circuit reasoned that Petitioners could not plausibly allege a physical taking.

Pet.App.5. Instead, Petitioners had opened their residential apartments, like a shopping mall, to government-compelled occupancy.

The Second Circuit then explained that Petitioners retained the ability to "exit" because a landlord may terminate a tenant's lease "for failing to pay rent, creating a nuisance, violating the lease, or using the property for illegal purposes." Pet.App.7. According to the Second Circuit, if property owners may remove disruptive, delinquent, or law-breaking tenants, then the government may mandate the perpetual occupancy of non-disruptive, rent-paying, law-abiding tenants.

The panel asserted that its conclusion was buttressed by this Court's decision in *Yee v. City of Escondido*. In *Yee*, this Court evaluated regulations that capped the rent that owners of mobile home parks could charge and limited the grounds on which park owners could evict their tenants. 503 U.S at 527–28. *Yee* held that no physical taking had occurred because mobile park owners were free to exit regulation by changing the use of their land. *Id.* (citing CAL. CIV. CODE § 798.56(g)(1992)). The mobile home park owners just needed to provide sufficient notice to their tenants. *Id.* That the RSL does not provide Petitioners such an exit option was beside the point, according to the Second Circuit, because it is "well settled that limitations on the termination of a tenancy do not effect a taking so long as there is a *possible* route to an eviction." Pet.App.7. (emphasis added). Nor did it matter that "even after 'an eviction, the tenant is just replaced with another rent-stabilized tenant at the same rent,'" because

"decid[ing] who their incoming tenants are has 'nothing to do with whether [a law or regulation] causes a physical taking.'" Pet.App.7 (quoting *Yee*, 503 U.S. at 530).

The Eighth Circuit in *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), split sharply with the Second Circuit's approach in this case. In *Heights Apartments*, the Eighth Circuit evaluated an eviction moratorium in Minnesota. 30 F.4th at 726. There, as here, the defendants argued that "no physical taking has occurred because landlords were not deprived of their right to evict a tenant." *Id.* at 733. There, as here, the challenged law provided at least some path to evict unruly tenants. *Id.* But the Eighth Circuit rejected that argument. Under *Cedar Point* and consistent with *Yee*, the court explained, Minnesota *had* effected a per se physical taking of the landlords' right to exclude. "*Whenever* a regulation results in a physical appropriation of property, a *per se* taking has occurred." *Id.* (quoting *Cedar Point*, 141. S. Ct. at 2072) (emphasis added). And the moratorium had "turned every lease in Minnesota into an indefinite lease, terminable only at the option of the tenants." *Id.* at 733. That gave rise to a *per se* takings claim. Moreover, the Eighth Circuit held that *Yee* was not to the contrary, as that decision only controlled when a state's regulation "neither deprive[s] landlords of their right to evict nor compel[s] landlords to continue leasing the property past the leases' termination." *Id.* But a moratorium that allows indefinite renewal and effectively forbids change of use is outside of *Yee*'s scope. Under *Heights Apartments*, had this case been litigated in the Eighth Circuit, Petitioners' physical

takings claim would have been allowed to proceed.

2. The RSL effects a per se physical taking.

If laying a half-inch cable across an apartment building's roof is a per se physical taking, it cannot be seriously doubted that the same is true for filling a building's apartments with permanent tenants. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). In both instances, a property owner's right to exclude—"'one of the most treasured' rights of property ownership"—has been expropriated. *Cedar Point*, 141 S. Ct. at 2072.

As recognized in *Cedar Point*, the Takings Clause establishes a constitutional default rule: "[w]henever a regulation results in a physical appropriation of property, a per se taking has occurred." *Id.* at 2072. Generally, the government cannot without compensation appropriate property owners' "right to exclude" by taking the decision of who may "physically enter and occupy" property away from the owner and giving it to either itself or a third party. *Id.*

The RSL imposes a facial per se physical taking. Under the RSL, tenants have been awarded the right to determine when and whether they will leave; the landlord no longer can decide to exclude them. In other words, by virtue of the RSL, tenants have "tak[en] as [their] own" the right to exclude themselves from Petitioners' property. *Cedar Point*, 141 S. Ct. at 2077. And under the RSL's succession provisions, the tenant has also been awarded the right to choose the next tenant, creating a government mandated tenancy in perpetuity or for as long as a

tenant and his or her successors decide. *Id.* at 2075.

The RSL takes not only Petitioners' present right to exclude but also Petitioners' reversionary right to possess and use the property after the term of the lease expires. A condition of a lease is that there will be an "eventual resumption of possession by the landlord after the term of the lease is over." RESTATEMENT (SECOND) OF PROPERTY, LAND. & TEN. § 12.2, cmt. C (1977); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 485 (N.Y. 1994). But the tenancy mandated by the RSL effectively transfers that reversionary interest from Petitioners to their tenants or the successors the tenants choose. That is a taking in all but a "topsy-turvy" sense of the Constitution. Richard A. Epstein, *From* Penn Central *to* Lingle: *The Long Backwards Road*, 40 JOHN MARSHALL L. REV. 593, 601 (2007); *see also Fresh Pond Shopping Ctr. v. Callahan*, 464 U.S. 875, 878 (1983) (Rehnquist, J., dissenting). It is of no moment that the owner will (hopefully) eventually secure its reversion—a temporary taking is a still a taking.

Cedar Point said that there is an exception to per se physical takings for "limitations on how a business generally open to the public may treat individuals on the premises." 141 S. Ct. at 2077. Relying on this exception, as the Second Circuit did, would stretch it beyond recognition. For one, Petitioners' apartment buildings and the individual units are not "generally open to the public." *Id.* Unlike a shopping mall welcoming some 25,000 patrons a day, *id.* at 2076, an apartment building and its units are not open to the public at large but rather only to staff, tenants, and their invitees. Moreover, the RSL's regulation

permitting perpetual tenancies and successorships is not properly understood as a "[l]imitation" on how Petitioners "treat individuals on the premises." *Id.* at 2077. Instead, the RSL appropriates to the tenant an actual estate in land. By contrast, a requirement to open up a shopping mall to allcomers is an equal access requirement—all are welcome to the property already open to the public on equal terms. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). But the RSL does not impose an equal access requirement on tenancies; rather, it imposes an *extra* access requirement, allowing RSL tenants to stay *longer* than tenants are otherwise entitled to stay. For another, this exception is inapt because Petitioners are not *voluntarily* submitting to RSL regulation, as they are not free to exit by changing the use of their property. *Yee,* 503 U.S. at 528.[2]

B. The Second Circuit's Confiscatory Takings Analysis Is Contrary to this Court's Precedents and Creates a Division of Authority.

When the government obligates a private entity to serve the public and then imposes price controls on that service, the government cannot deprive the regulated entity of a "just and reasonable" return. Or, to put it another way, the government may not mandate rates for the services that are so low they are "confiscatory." *See Duquesne Light Co.*, 488 U.S. at 307. If the mandated rates are confiscatory, then the

[2] To the extent *Yee* is understood to foreclose Petitioners' physical takings claims, Petitioners respectfully submit that *Yee* should be overruled.

regulated private entity's property has been taken.

The Second Circuit dismissed out of hand the claim that New York constitutionally is prohibited from depriving Petitioners of a just and reasonable return through confiscatory rents. The decision is patently wrong, as this Court's precedents establish that the confiscatory takings framework applies to rent control laws, state supreme courts have likewise applied the analysis to rent regulations, and Petitioners' complaint establishes a plausible claim that the RSL's rents are confiscatory.

1. Both this Court and State Supreme Courts Recognize that the Confiscatory Takings Doctrine Applies to Rent Regulation.

A confiscatory takings claim arises when the government has regulated property "in a way that restricts the freedom of the owner to determine the price or level of services associated with its use." Merrill, *supra*, 96 NOTRE DAME L. REV at 1435. By compelling the dedication of private property to a public service within a defined territory, the government has "[i]n effect … appropriated the property to a public use, and therefore has a legal obligation to provide just compensation." *Id.* at 1437. In determining whether a given rate is unconstitutionally confiscatory, courts ask whether the rate "enable[s] the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed." *Fed. Power Comm'n v. Hope Nat. Gas*

Co., 320 U.S. 591, 605 (1944).

From the dawn of this Court's analysis of government efforts to control rent, this Court has applied the confiscatory takings framework. In *Block v. Hirsch*, 256 U.S. 135 (1921), this Court applied the framework to a federal statute governing rents in the District of Columbia in the wake of World War I and "emergencies growing out of the war" in the District's "rental conditions." *Id.* at 154. That act permitted a tenant to occupy any rental property "notwithstanding the expiration of his term [lease] … so long as he pays the rent" and otherwise complied with the lease or applicable regulations. *Id.* at 154. Justice Holmes explained for the Court that the "regulation is put and justified only as a temporary measure" and it was not a taking because "[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." *Id.* at 156–57. And, critically, the law provided "[m]achinery … to secure to the landlord a reasonable rent" and only went "little if at all farther than the restriction" imposed by "usury laws." *Id.* at 157.

Block stands for the proposition that a "landlord should be entitled to a 'just and reasonable return'" when regulated in a manner akin to "public utilities." Epstein, *supra*, 54 BROOKLYN L. REV. at 751; *see also Merrill, supra*, 96 NOTRE DAME L. REV. at 1437 ("Some property owners may be able to make such a claim; for example, owners of apartment complexes subject to rent controls who are not allowed to convert their apartments to condominiums.").

This Court held as much in its canonical decision

in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In *Pennsylvania Coal*, Justice Holmes, again writing for the Court, set out that government regulations on property may go "too far" and thereby constitute a taking. *Id.* at 416. Holmes contrasted the statute at issue in *Pennsylvania Coal* with the rent control laws in "Washington and New York." Those rent control laws were constitutional because they were "intended to meet a temporary emergency and *provid[ed]* for compensation determined to be *reasonable* by an impartial board." *Id.* at 415 (emphasis added). Since *Block*, a confiscatory takings analysis—as a constitutional check on government price controls—has been "the standard" and "it has been reiterated in [more] recent cases." Epstein, *supra*, 54 BROOKLYN L. REV. at 751.

The Second Circuit's rejection of any government obligation to avoid imposing confiscatory rates on landlords creates a clear division in authority, as three state supreme courts have applied the confiscatory takings framework to rent control. In *Hutton Park Gardens v. Town Council of Town of W. Orange*, A.2d 1, 5 (N.J. 1975), the Supreme Court of New Jersey assessed municipal rent control ordinances, explaining that "it is now well-established that the constitution requires that price regulation be non-confiscatory in effect and that courts will enforce that requirement." 350 A.2d at 13. The municipal defendants had argued that such a claim had to be limited to "public utilities." *Id.* at 14 n.9. But the court rejected that argument "as being both unsound in principle and unsupported by contemporary judicial authority." *Id.* Accordingly, while the New Jersey

Supreme Court found that the rates at issue were not confiscatory, it recognized that the Constitution served as a backstop to ensure rates were "just and reasonable."

The Supreme Court of Washington has similarly explained that rental rates "must be reasonable and not unnecessarily prohibitory or confiscatory." *Jeffery v. McCullough*, 652 P.2d 9, 12 (Wash. 1982); *Kennedy v. Seattle*, 617 P.2d 713, 717–18 (Wash. 1980). For instance, an allegation that "the rates set or the expenses [incurred] would prohibit them from continuing as … lessors" may be unconstitutionally confiscatory. *Kennedy*, 617 P.2d at 718.

The Supreme Court of California likewise found a rent control regulation unconstitutional under a confiscatory takings analysis. *Birkenfeld v. City of Berkeley*, 550 P.2d 1001, 1027 (Cal. 1976). In *Birkenfeld*, the court assessed a provision that set a "maximum rent chargeable for each housing unit" by rolling back rents to the rate at an earlier date. 550 P.2d at 1006, 1027. But, as the court explained, Berkeley's ordinance led to an "arbitrary imposition of unreasonably low rent ceilings" such that "[i]t [was] clear that if the base rent for all controlled units were to remain as the maximum rent for an indefinite period many or most rent ceilings would be or become confiscatory." *Id.* at 1029–30. Accordingly, it was unconstitutional.

The Second Circuit was simply wrong to hold that applying a confiscatory takings analysis would require "expand[ing]" the doctrine. By not even recognizing that such a claim exists, the Second

Circuit broke with a hundred years of precedent and created a clear division in authority.

2. Petitioners Have Pleaded a Plausible Claim that the RSL Is Confiscatory.

A confiscatory takings inquiry is two-part: (a) whether the government, in fact, compels the regulated entity to provide public services for which the government has established price controls and (b) whether the allowed prices are set to a confiscatory level. Petitioners have pleaded a plausible confiscatory takings claim under this framework.

a. As in other contexts in which this Court and other courts apply the confiscatory takings framework, Petitioners are legally compelled to provide services for which the government has set rates. *Hutton Park Gardens*, 350 A.2d at 14 n.9. That is, the RSL "require[s] that the apartments in question be used for purposes which bring them under the Act." *Bowles v. Willingham*, 321 U.S. 503, 517 (1944). This analysis turns on whether the property "owner has invested in specific assets that cannot be redeployed to alternative," non-public uses. Merrill, *supra*, 96 NOTRE DAME L. REV. at 1437 n.55.

A paradigmatic case of compelled service arises in public utilities. *Duquesne Light*, 488 U.S. at 307. "[P]ublic utilities are under a state statutory duty to serve the public, and must furnish 'service on demand to all applicants' at government-determined rates." *Garelick v. Sullivan*, 987 F.2d 913, 916 (1993) (quoting W. Pond, *The Law Governing the Fixing of Public Utility Rates: A Response to Recent Judicial*

and Academic Misconceptions, 41 ADMIN. L. REV. 1, 5 (1989)). Moreover, public utilities have invested in fixed capital—assets like power plants and transmission lines—which may not be removed from public service without regulatory approval. Pond, *supra*, 41 ADMIN L. REV. at 5. Even when services prove unprofitable, public utilities may not "discontinue" them. *Id.*

The RSL's compulsion of Petitioners is materially indistinguishable from the compulsion to serve required of utilities. As discussed above, the RSL mandates that Petitioners provide their property to tenants at government set rates indefinitely. *See Hutton Park Gardens*, 350 A.2d at 14 n.9; *Birkenfeld*, 550 P.2d at 1027. Additionally, like a public utility, Petitioners have "invest[ed] heavily in fixed … assets that cannot be moved to an unregulated jurisdiction." Thomas W. Merrill, *Constitutional Limits on Physician Price Controls*, 21 HASTINGS CONST. L. Q. 635, 640 (1994). A landlord dissatisfied with the RSL cannot simply uproot its apartment building or excise individual RSL units and move across the Hudson. *See Hutton Park Gardens*, 350 A.2d at 14 n.9; *cf. Kennedy*, 617 P.2d at 719. And the potential to divest from a property does not obviate the takings analysis. *Cf. Tyler v. Hennepin Cnty.*, No. 22-166, 2023 WL 3632754, at *7 (U.S. May 25, 2023).

Because property owners of both public utilities and of RSL apartment buildings have heavily invested in property that "cannot be moved or transferred to an uncontrolled market," they are made "especially vulnerable to expropriation through price controls." Merrill, *supra*, 21 HASTINGS CONST. L. Q. at 640. After

all, "an owner of such assets has little choice but to submit to the government-imposed price. The only alternative is to abandon the asset and forgo any recovery of the investment altogether." *Id*. But, as this court recognized in *Block*, "[t]he power to go out of business, when it exists, is an illusory answer to gas companies and waterworks." 256 U.S. at 157. The same is true for landlords regulated by the RSL.

Since Petitioners are captive to the RSL to provide housing at government-set rates, "[i]n effect, the state has appropriated the property to a public use, and therefore has a legal obligation to provide just compensation." Merrill, *supra*, 96 NOTRE DAME L. REV. at 1437; *cf. Block*, 256 U.S. at 156–57.

b. Because they are compelled to serve the public, Petitioners are entitled to recover "the cost of prudently invested capital used to provide the service," *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 485–86 (2002), or a return equal to what prudent investors "expect given the risk of the enterprise," *Duquesne Light Co.*, 488 U.S. at 314. Petitioners' allegations are more than sufficient to state a plausible claim they are denied constitutionally required compensation under the RSL.

As alleged, the RSL caps recoverable costs for improvements at a grossly inadequate rate, even when such improvements are necessary to meet the government's codes. The Rent Guidelines Board's decisions on rent increases, based in part on tenants' ability to pay, have *consistently* trailed behind increasing costs by nearly 50% over a twenty-year period. The gap compounds over the decades such that

the allowed rent falls further and further behind both costs and market pricing. Apartments equivalent to those owned by Petitioners but that are not subject to the RSL generate rents as much as two-and-a-half times greater than the maximum rents that Petitioners are permitted to collect. Such allegations are sufficient to proceed past a motion to dismiss for discovery and expert testimony on whether the RSL's allowed rates are "just and reasonable."

C. The Second Circuit's Decision Demonstrates that *Penn Central* Needs Clarification.

The Second Circuit dismissed Petitioners' claims that the RSL imposes an unconstitutional use restriction on their property rights. Pet.App.10–12.[3] The decision below demonstrates the need for this Court's clarification of the proper standard to apply

[3] The Second Circuit held that Petitioners' as-applied claim that the RSL imposes an unconstitutional use restriction under *Penn Central* was not "ripe" because "the Landlords admit that they have not attempted to apply for any of the exemptions allowed by the RSL." Pet.App.9. Beside the fact that Petitioners explained at length why they do not qualify for any of those largely illusory "exemptions," the court confused ripeness for an exhaustion requirement. But ripeness, a "relatively modest" requirement, does not require exhausting all means of partial relief a government may deign to provide in theory. *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226, 2229–30 (2021) (per curiam). Petitioners' Complaint alleged such procedures are futile; the four years since passage of the 2019 amendments have laid bare just how futile the hardship application is as property owners are opting to leave thousands of apartments vacant, instead of pursuing them.

when a use restriction "goes too far." *Pennsylvania Coal*, 260 U.S. at 415.

Courts generally apply the three factors identified in *Penn Central*: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." 438 U.S. at 124. Yet "nobody—not States, not property owners, not courts, nor juries—has any idea how to apply this standardless standard." *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 141 S. Ct. 731, 732 (2021) (Thomas, J., dissenting from the denial of certiorari). And the standard is inconsistent with the original public meaning of the Takings Clause. *See id.*; *Nekrilov v. City of Jersey City*, 45 F.4th 662, 683 (3d Cir. 2022) (Bibas, J., concurring).

Consider the Second Circuit's review of the "character of the governmental action" in this case. In *Penn Central*, this Court said, "[a] taking may more readily be found when the interference with property can be characterized as a physical invasion" as opposed to when the regulation is a "public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. But the Second Circuit wholly ignored the physical character of the RSL—tenants are physically occupying Petitioners' units. The Court of Appeals simply relied on the claimed public purpose of the RSL to find no taking. Pet.App.11–12.

The Second Circuit's approach is wrong twice over. First, physical intrusions are at the core of the

Takings Clause's protections. Well before *Penn Central* and *Pennsylvania Coal* expounded on "regulatory takings," this Court held the Takings Clause reached government actions that were the "functional equivalent of a 'practical ouster of [the owner's] possession." *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (quoting *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879)). Practical ouster is the purpose and effect of the RSL. If *Penn Central* permits courts to ignore the physical aspect of a regulation, then *Penn Central* "is inconsistent with the historical compact recorded in the Takings Clause" and must be corrected. 505 U.S. at 1028; *see also Nekrilov*, 45 F.4th at 685–86 (Bibas, J., concurring) (noting character factor "aligns closely with the original meaning of the Takings Clause").

Second, the court of appeals' overreliance on the claimed public purpose of the RSL ignores the fact the Takings Clause does not permit the government to "establish a welfare program privately funded by those landlords who happen to have 'hardship' tenants." *Pennell v. San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part, dissenting in part). As Justice Scalia wrote, "the traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to such persons of funds raised from the public at large through taxes …" 485 U.S. at 21. But the RSL does the opposite—eschewing taxes or drawing on the public fisc to instead rely on the property of Petitioners to foot the bill for "a local public assistance benefit." *In re*

Santiago-Monteverde, 22 N.E.3d at 290. Courts cannot whistle past this central and unconstitutional aspect of the RSL's character.

Careful consideration of the character of the governmental action is essential because that consideration is most often the key to separating regulations that take property from those that do not. Thomas W. Merrill, *The Character of Governmental Action*, 36 VT. L. REV. 649, 673 (2012). The other two are "indeterminate and circular" and thus analytically unhelpful. *Id.*

No court seems to know how much economic harm the government must cause for this factor to weigh in favor of finding a taking. Pet.App.42 (citing *Park Ave. Tower Assocs. v. City of New York*, 746 F.2d 135, 139–40 (2d Cir. 1984) (collecting cases rejecting taking claims where property value diminished from 75 to 90%) "). Nor do the courts seem to know if lack of severe economic harm is individually dispositive or simply a factor to weigh. The Second Circuit appeared to be of two minds. Pet.App.11. (finding allegations of harm "insufficient" for a taking, but proceeding to briefly consider other factors). And it is not clear why the economic effect of a regulation should even be considered on the front-end analysis of whether a taking has occurred, instead of on the back-end analysis as to what level of compensation is owed. Epstein, *supra*, 40 JOHN MARSHALL L. REV. at 602.

The investment-backed expectations factor—as applied by the Second Circuit—is likewise analytically empty. The Second Circuit simply held that "any reasonable landlord involved in New York's

rental market 'would have anticipated their rental properties would be subject to regulations, and that those regulations in the RSL could change yet again." Pet.App.11. But the fact that regulations—which are ubiquitous in the landlord-tenant context—*may* change should not be the relevant inquiry, rather it must be *what* the change is. Otherwise, "regulation [simply] begets regulation." *Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring). By the Second Circuit's lights, as long as the government has regulated previously, it has *carte blanche* to do so again. That cannot be the standard.

The muddle of *Penn Central* has led to a "decisional tool," Merrill, *supra*, 36 VT. L. REV. at 671, that leads almost inevitably to decisions upholding uncompensated government restrictions on property. *See, e.g.,* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 62 (2016); Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 FED. CIR. BAR J. 677, 692 (2013), https://bit.ly/42aP1a9). If there is "such a thing as a regulatory taking," this Court should ensure that the framework courts use is actually able to find one. *Bridge Aina Le'a*, 141 S. Ct. at 732 (Thomas, J., dissenting from the denial of certiorari).

II. This Court Needs To Address Increasingly Common and Aggressive Regulation of Landlord-Tenant Relationships.

Rent control regulations are "politically attractive" because restrictions on evictions and limits

on rents are achieved "off budget"—the costs borne by property owners, rather than taxpayers. *Pennell* 485 U.S. at 22 (Scalia, J., concurring in part, dissenting in part). This is antithetical to the Takings Clause. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Yet this is exactly what New York has been doing for decades under the rubber-stamp review of the Second Circuit. Over the last hundred years, New York has progressively pushed its rent control regime "to the verge" of unconstitutionality. *Pennsylvania Coal*, 260 U.S. at 416. All under the guise of a "temporary" emergency, *Block*, 256 U.S. at 157, that has led to "rule by indefinite emergency" for decades, *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1316 (2023) (Statement of Gorsuch, J.). Whatever may be said about the RSL before 2019, it has undoubtedly now gone "too far" whether assessed as a per se physical taking, a deprivation of a just and reasonable return, or an unconstitutional use restriction under *Penn Central*. In fact, the situation is so burdensome for some landlords that they would prefer to leave their units *vacant*, instead of entering into new RSL tenancies (or rather life estates). *See* Sam Rabiyah, *NYC Had 88,830 Vacant Rent-Stabilized Apartments Last Year, City Housing Agency Estimates*, THE CITY (Oct. 20, 2022), https://bit.ly/3WEdPpC.

The Takings Clause is a bulwark against majoritarian excesses. *Pennell*, 485 U.S. at 21–22 (Scalia, J., concurring in part, dissenting in part). "The fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere 'economic regulation,' which

can disproportionately burden particular individuals" or single out politically unpopular entities that own a particular type of property. *Id.* at 22. Here the group "disproportionately burdened" is owners of buildings of certain size built before 1974. *Id.* In other jurisdictions, it may be other groups of property owners. Whoever it is, the Constitution does not permit the government to force them and only them to "privately fund[]" the government's social welfare programs. *Id.*

Throughout the country, governments are increasingly asserting aggressive authority in the landlord-tenant context, following a path carved by New York and blessed by the Second Circuit. *See, e.g.*, S.F. SUBDIVISION CODE § 1396.4; L.A. MUN. CODE § 151.25, 151.26(A); *see also* Lauren Dake, *As inflation hits, Oregon lawmakers consider more state rent control limits*, OREGON PUBLIC BROADCASTING (Mar. 27, 2023), https://bit.ly/454Hexk; Will Parker, *Eviction Bans Remain in California More Than 3 Years Into the Pandemic*, WALL ST. J. (May 8, 2023), https://on.wsj.com/3ot0mVk; Katie Galioto, *What you need to know about St. Paul's rent control law*, STAR TRIBUNE (Jan. 21, 2023), https://bit.ly/42OuHfu; Morgan Baskin, *Prince George's County Passes Temporary Rent Stabilization, Capping New Increases at 3%*, DCIST (Feb. 28, 2023), https://bit.ly/3BG76Sz.

"The Constitution … is concerned with means as well as ends." *Cedar Point*, 141 S. Ct. at 2074. Regardless of whether New York or any other state could accomplish its housing policy goals in some other manner (such as using tax revenues to subsidize renters or tax credits to subsidize landlords), this

Court should provide the necessary guidance to lower courts to reaffirm that taking property without just compensation is not one of them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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