No. 22-1170

In the Supreme Court of the United States

335-7 LLC, ET AL.,

Petitioners,

v.

CITY OF NEW YORK, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENTS CITY OF NEW YORK AND NEW YORK CITY RENT GUIDELINES BOARD

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QUESTIONS PRESENTED

Since 1969, a set of New York legal provisions known collectively as the Rent Stabilization Law (RSL) has limited the rate of increase in annual rents and provided qualified lease-renewal and successorship rights in many New York City residential rental units. Following 2019 amendments to the law, petitioners sought injunctive, declaratory, and compensatory relief against the RSL, asserting claims for physical, confiscatory, and regulatory takings. The questions presented are:

1. Whether petitioners' physical-taking challenge to certain of the RSL's lease-renewal and successorship provisions fails, where landlords voluntarily invite tenants onto their property, and the RSL offers various means to remove particular tenants or cease renting to tenants?

2. Whether petitioners' confiscatory-taking challenge to the RSL fails, where that doctrine does not apply to rent regulations?

3. Whether petitioners' regulatory-taking challenges to the RSL fails, where petitioners did not plausibly allege that their claims were ripe or that they had suffered adequate economic harm or interference with investment-backed expectations to sustain the claim on the merits?

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INTRODUCTION

This brief in opposition is filed on behalf of the municipal respondents—the City of New York and the New York City Rent Guidelines Board, which determines the percentage rate of annual rental increases for units covered by the RSL. The New York State respondents and private intervenor respondents are separately represented.

Petitioners—landlords with property subject in whole or in part to the RSL—bring a sweeping challenge to the RSL as an alleged taking of private property, in an effort to exit the State's and City's regulations of the residential rental market. The U.S. Court of Appeals for the Second Circuit rejected this attempt under this Court's settled precedent and following its detailed consideration of similar claims brought by other groups of landlords. This Court should deny certiorari.

First, petitioners' physical-taking claim is not cert-worthy. To begin, the case is a poor vehicle to address physical takings. The complaint does not allege that petitioners are prevented from ending any tenancy that they wish to discontinue, or that the law that they challenge prevents them from exiting the residential rental market. They assert primarily facial claims, based on generalized assertions about the operation of the challenged RSL provisions, that lack the concrete particulars this Court has said are essential for meaningful review of takings

challenges. They appear to have abandoned their as-applied physical-taking claims, but in any event those claims too, offered little in the way of specific facts.

Nor does the question presented otherwise warrant review. There is no circuit split requiring the Court's intervention; a single decision from another circuit applying the same body of law to a very different type of tenancy regulation does not amount to such a conflict. And the issues that petitioners seek to raise have little significance outside of the few jurisdictions that petitioners claim have or are considering regulatory provisions similar to those that petitioners target in the RSL.

Review is also unwarranted because petitioners assert at most that the court below misapplied settled law. Under this Court's precedent, the presence of tenants on property voluntarily offered for rent is not a compelled physical invasion. And petitioners failed to plausibly allege that the RSL bars the removal of a breaching tenant or prevents landlords who no longer wish to open their property to tenants from shifting to a different use. Petitioners' contentions notwithstanding, the Court's most recent physical-taking decisions do not require a different analysis.

Second, petitioners' confiscatory-taking claim does not merit certiorari. This Court has not applied this specialized doctrine, meant for public utilities,

to rent regulations. And contrary to petitioners' arguments, the few decades-old decisions from state high courts that they cite do not justify granting review because those decisions were applications of due-process principles, mainly under state law, not federal takings law.

Nor would this case present an appropriate vehicle to consider the application of confiscatory-taking doctrine to rental regulations in any event. Petitioners' allegations do not establish that they would meet the requirements of that specialized doctrine or that their claims would be ripe, given their failure to avail themselves of available mechanisms to obtain relief from hardship rents.

Third, petitioners' regulatory-taking claim also does not merit certiorari. While petitioners claim that this Court's test for such claims under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), needs to be revised, the reality is that these petitioners' allegations were simply deficient under that well-established precedent. And the fact that a smattering of municipalities and states are considering or have enacted rent regulations does not merit a wholesale revision of this Court's approach to regulatory-taking claims, which has been applied across the nation in countless cases.

STATEMENT

A. New York's Rent Stabilization Law

New York is a city of renters. More than five million of the City's eight-million-plus residents rent, and many will do so for as long as they live here. *See* U.S. Census Bureau, *New York City Housing & Vacancy Survey*, Series VIIB, 2014 tbls. 82 & 84, https://www.census.gov/data/tables/time-series/demo/nychvs/series-7b.2014.html#list-tab-62610108. The City's market for affordable rental housing is exceedingly tight, and its housing market is notoriously volatile, for a unique combination of reasons—including limited space due to natural geographic constraints, exceptional population density, steep construction costs, and a highly desirable location. Thus, for most of the last century, rent regulation has been an important feature of life in the City.

The RSL itself has formed a key part of the fabric of New York City for more than five decades. According to data from a U.S. Census Bureau survey, the RSL applies to just over a million apartment units, which make up just under half of the City's rental market and serve as homes to more than two million residents. *See* Caitlin Waickman et al., *Sociodemographics of Rent Stabilized Tenants* 1-2 (2018), https://perma.cc/GX25-V98T.

1. New York's earliest rental protections were adopted after the World Wars. *See La Guardia v. Cavanaugh*, 53 N.Y.2d 67, 71 (1981), *superseded by statute as recognized in Aurora Assocs. LLC v. Locatelli*, 38 N.Y.3d 112, 122 n.5 (2022); *People ex rel. Durham Realty Corp. v. La Fetra*, 230 N.Y. 429, 437-38 (1921). The prevailing system was born in 1969, in response to landlords "demanding exorbitant and unconscionable rent increases," which led to "severe hardship to tenants" and "uproot[ed] long-time city residents from their communities." N.Y.C. Admin. Code § 26-501; *see La Guardia*, 53 N.Y.2d at 72.

Soon thereafter, the State Legislature tested a regulatory phase-out, only to abandon the experiment after seeing "ever-increasing rents" in deregulated units, without the anticipated increase in new construction. *La Guardia*, 53 N.Y.2d at 74.

The result was the Emergency Tenant Protection Act of 1974 (ETPA). *See* N.Y. Unconsol. Laws, Ch. 249-B, §§ 1-14 (Consol. 2023). The ETPA covers rental units in buildings with six or more units that were built before 1974. *See* N.Y. Unconsol. Law Ch. 249-B, § 5(4)-(5). It does not apply to new construction, except where owners opt in to gain tax incentives or receive certain public financing. *See, e.g.,* N.Y. Real Prop. Tax Law § 421-a(2)(f); N.Y. Priv. Hous. Fin. Law § 452(8).

Since 1974, the Legislature from time to time has revised the provisions of the ETPA and the New York City Administrative Code that jointly codify the RSL. The changes have sometimes favored landlords and sometimes tenants. In 1993, 1997, and 2003, for example, the Legislature afforded landlords new ways to remove units from regulation. 1993 N.Y. Laws ch. 253; 1997 N.Y. Laws ch. 116; 2003 N.Y. Laws ch. 82. More than 150,000 units permanently exited rent stabilization through those mechanisms. *Rent Regulation and Tenant Protection Legis.: Hearing before N.Y. S. Standing Comm. on Hous., Constr and Cmty. Dev.* 19 (May 22, 2019) (testimony of L. Carroll and E. Gaumer), https://perma.cc/MX3M-HMF2.

In contrast, in 2015 and 2019, the Legislature strengthened the RSL's tenant protections. 2015 N.Y. Laws ch. 20, Part A; 2019 N.Y. Laws ch. 36. The 2019 legislation repealed or limited several of the Legislature's earlier changes, including the forms of "decontrol" added in 1993 and opportunities for additional rent increases added that year and in 1997 and 2003. 2019 N.Y. Laws ch. 36, Parts A, B, D, E, & K.

2. The RSL aims to forestall rent profiteering and improve housing stability. It does not set rents, but rather controls the pace of rent increases and regulates evictions. By doing so, the law protects tenants from dislocation and limits the disruption to

communities that would result from dramatic changes in rental rates and rapid turnover of tenants. *See* N.Y.C. Admin. Code § 26-501.

The RSL applies in New York City if the City Council finds a continuing need for statutory protection, contingent on the City's residential vacancy rate falling at five percent or lower. N.Y. Unconsol. Law Ch. 249-B, § 3(a). Since 1974, New York City's vacancy rate has never risen above five percent, and the City Council has declared a housing emergency every three years. In New York City, 86 percent of households in rent-stabilized units are low, moderate, or middle income, with the vast majority being low income. *Rent Regulation and Tenant Protection Legis.*, *supra*, at 18.

3. Once triggered by a local legislative declaration, the RSL regulates the percentage by which landlords may periodically increase the rent on regulated apartment units and sets the grounds on which landlords can evict existing tenants or decline to renew their leases. N.Y.C. Admin. Code §§ 26-510(b), 26-511(c)(9). The legislation is supplemented by regulations, known as the Rent Stabilization Code (RSC), promulgated by the State Division of Housing and Community Renewal (DHCR). *Id.* § 26-511(b); *see* 9 N.Y.C.R.R. §§ 2520.1-2531.9.

Under the RSL, the New York City Rent Guidelines Board—composed of representatives of

landlords, tenants, and the general public—determines the maximum permissible rent increase annually (expressed as a percentage of existing rents). N.Y.C. Admin. Code § 26-510(a)-(b). The Board considers the economic condition of the residential real-estate industry—including tax rates, maintenance costs, the housing supply, and vacancy rates—as well as the cost of living and housing affordability. *Id.* § 26-510(b). If a landlord believes that the permitted rental increase would create a hardship, including where the authorized increase would not allow the landlord to collect annual gross rental income of at least five percent above annual operating expenses, it may petition DHCR for an exemption. 9 N.Y.C.R.R. § 2522.4(b)-(c).

The RSL does not require a landlord to offer a vacant rent-stabilized unit for residential rental or dictate the landlord's choice of tenant whenever a unit is vacant. And a landlord may evict a tenant for cause, such as nonpayment of rent or misconduct. *Id.* §§ 2524.1, 2524.2, & 2524.3. But the RSL generally requires a landlord to offer an existing, compliant tenant in a rent-stabilized apartment the opportunity to renew their lease upon lease expiration. *Id.* § 2523.5(a). And in certain instances, a landlord must offer a renewal lease to certain family members of an existing tenant who also reside in the unit. *Id.* § 2523.5(b)(1).

The rules governing lease renewal contain key exceptions. The landlord may decline to offer a renewal lease if the unit is not the tenant's primary residence or if an individual landlord has a compelling need to use a unit as their primary residence or that of an immediate family member. *Id.* § 2524.4(a)-(c). This provision was amended in 2019 to limit the number of units that may be recovered for personal use. *See* 2019 N.Y. Laws ch. 36, Part I. A landlord may also refuse to renew a lease by demonstrating to DHCR that it intends either to use the unit for a business it owns and operates or to withdraw the unit from the market due to substantial code violations that would be financially impracticable to correct. 9 N.Y.C.R.R. § 2524.5(a). And a landlord may obtain DHCR's authorization not to offer renewal leases in order to demolish (including gut renovate) or rehabilitate a building. *Id.*

In the three decades after 1990, landlords under the RSL saw net operating income increase by more than 40 percent, after adjusting for inflation. N.Y.C. Rent Guidelines Bd., *Housing NYC: Rents, Markets & Trends 2020* 35, https://perma.cc/7NLH-3SG7 (captured Apr. 16, 2021).

B. Petitioners' challenge to the Rent Stabilization Law

1. Following the 2019 amendments, petitioners—owners or former owners of six residential buildings

ranging from 15 to 56 units (App. 15-16, 2d Cir. ECF No. 75)—challenged the entirety of the RSL as well as the 2019 amendments. Several of petitioners' buildings contain a mix of rent-stabilized and unregulated residential rental units (*id.*). Petitioners did not allege that they were prevented from evicting rent-stabilized tenants that they wished to evict or that they wished to put their buildings to a use other than residential rental; they conceded that zoning laws or economic realities would prevent such changes in use (App. 31-32). Nonetheless, petitioners asserted claims under the Takings Clause and Due Process Clause, seeking injunctive and declaratory relief and monetary compensation for the alleged physical, regulatory, confiscatory, and non-public-use takings (*id.* at 117-18). The district court (Ramos, J.) dismissed the complaint (Pet. App. 14-53).[1]

2. The court of appeals unanimously affirmed the district court's order of dismissal in a summary order (*id.* at 1-13). It rejected petitioners' claim that the RSL facially effected either a physical or regulatory taking (*id.* at 4-6), drawing on *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), and the court of appeals' recent decisions in *Community*

[1] Petitioners agreed to the dismissal of their due-process claim after a New York Court of Appeals decision limited the scope of a specific provision of the 2019 amendments that they had challenged (*see* Pet. App. 23 n.2).

Housing Improvement Program v. City of New York, 59 F.4th 540 (2d Cir. 2023), and *74 Pinehurst LLC v. New York*, 59 F.4th 557 (2d Cir. 2023), which rejected similar challenges to the RSL.[2] The court affirmed the dismissal of petitioners' as-applied physical-taking claim because the RSL offers several bases for landlords to terminate tenants' leases, and petitioners' inability to convert their rent-stabilized units to market-rate rentals did not effect a physical occupation (Pet. App. 7). The court also noted that the petitioners had not attempted to use any of the RSL's mechanisms to either exit the rental market or evict unsatisfactory tenants (*id.* at 8).

The court of appeals also rejected petitioners' as-applied regulatory-taking claim because petitioners had not pursued exemptions under the RSL, and thus their claims were not ripe (*id.* at 8-10). In the alternative, the court held that petitioners had not plausibly alleged that the RSL, as applied to petitioners, worked a taking under *Penn Central*, given their failure to adequately plead economic impact from the RSL or how the RSL interfered with their reasonable investment-backed expectations in light of the law's long history, and given the RSL's

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[2] These cases are the subjects of pending petitions for certiorari. *See Cmty. Hous. Improvement Program v. City of N.Y.*, No. 22-1095, & *74 Pinehurst LLC v. New York*, No. 22-1130.

character as a broad regulatory regime in the service of public health and general welfare (*id.* at 10-12). And the court affirmed the dismissal of petitioners' confiscatory-taking claim, noting that this Court had developed the confiscatory-taking doctrine in the specific setting of public utilities, and that petitioners had not cited any case in which the doctrine was applied to landlord-tenant regulations (*id.* at 12).[3]

Petitioners did not seek rehearing en banc.

REASONS FOR DENYING THE PETITION

I. The physical-taking question does not warrant review.

A. This case is a poor vehicle for addressing physical takings.

This case is a poor vehicle for a grant of certiorari on the physical-taking issue. Petitioners focus their physical-taking claim on the RSL's lease renewal and successorship provisions (Pet. 3-4, 17-22). But the complaint does not establish that petitioners even have article III standing to seek relief against those RSL provisions because it does not allege that petitioners have any current wish to decline to

[3] The court also affirmed the dismissal of petitioners' claim that the RSL effects a taking for a non-public use, which is outside the scope of the petition (Pet. App. 12).

renew the leases of their rent-stabilized tenants or cite examples of when they renewed leases or offered successor leases only because the RSL was in place.

The complaint alleges that each building is a residential apartment property (App. 15-16). Although several petitioners' buildings include unregulated units, there is no allegation that those units are used for anything other than residential rentals (*see id.*). And although the petition references the RSL's options for changing the use of regulated property (Pet. 3, 9-12), petitioners do not claim that they wish to exit the business of residential rentals. In any case, the RSL does allow landlords to withdraw rent-stabilized units to use them for their own non-rental business purposes (*contra id.* at 9). *See* 9 N.Y.C.R.R. § 2524.5(a)(1). Moreover, the complaint acknowledges that petitioners would not be able to exit the residential rental market for reasons unrelated to the RSL, such as zoning laws that they do not challenge or simple economic realities (*see* App. 31-32). And though the petition's objections complains about the process for converting buildings into cooperatives or condominiums (Pet. 10-11), the complaint does not allege that petitioners wish to convert their buildings into cooperatives or condominiums or would have done so had the laws governing this process not been amended in 2019. *See* N.Y. Gen. Bus. Law § 352-eee. Likewise, while the petition complains about limits on the ability of natural

persons to claim rent-stabilized units for personal use (Pet. 9), the complaint does not state that any of the shareholders of any of these petitioners actually wish to personally occupy a rent-stabilized unit that these petitioners own.

Likewise as to the RSL's renewal and successorship provisions that petitioners complain about (Pet. 8-9, 20-21), which long pre-date the recent RSL amendments. As an initial point, landlords do not have an unfettered right to choose their tenants, even apart from the RSL. *See Yee v. City of Escondido*, 503 U.S. 519, 529-31 (1992). More pointedly for the purpose of standing, petitioners do not allege that they wish to change their tenants. They do not claim that the specific tenants that they have offered renewal or successor leases are unsatisfactory tenants; nor do they explain how the presence of one satisfactory rent-stabilized tenant could constitute a physical invasion—a necessary element of a physical-taking claim—where petitioners would just replace that tenant with another one.

Beyond these standing difficulties, the essentially facial nature of petitioners' physical-taking claim raises additional barriers to review. Petitioners' allegations lack the "actual factual setting" that this Court has demanded when considering taking claims. *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988) (cleaned up). And even outside of takings jurisprudence, this Court has warned that facial

claims are "disfavored." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Litigants must meet a high standard to succeed at a facial challenge because such a challenge amounts to "a claim that the law or policy at issue is unconstitutional in all its applications." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). Petitioners' facial allegations (*see* App. 37) are thus doubly suspect, offering an essentially generic legal challenge to all applications of the RSL across a million apartment units, in an area of law in which this Court has demanded details.

While petitioners also challenged the RSL as applied to them (*id.*), they appear to have abandoned their as-applied claims before this Court (*see* Pet. 20 (asserting that the RSL "imposes a facial per se physical taking")). They do not discuss the details of their allegations or attempt to show that the court of appeals erred by dismissing these claims specifically. And for good reason because, as described above, their as-applied allegations are exceedingly spare. Those allegations fail to identify any concrete injury flowing from the challenged provisions. The deficiencies in petitioners' as-applied allegations—to the point that they have abandoned the claims altogether—confirms the petition's vehicle shortcomings.

B. The physical-taking question presents no split in authority or issue of national importance.

There is also no need for this Court to take up the first question presented in any case—and certainly not to do so in this one. Petitioners identify no true conflict among the decisions of the lower courts, and the case raises no issue of national importance.

1. Petitioners falter in trying to show a circuit split about the application of physical-taking principles to the RSL's lease-renewal and successorship provisions (Pet. 17-20). The cited decision of the Eighth Circuit addressed a markedly different type of regulation from the one at issue here.

Heights Apartments, LLC v. Walz, 30 F.4th 720, 724-25 (8th Cir. 2022), concerned a pandemic-era emergency order prohibiting eviction of tenants even if they were materially breaching their leases, including by not paying rent. Applying *Cedar Point*, 141 S. Ct. at 2072, and *Yee*, 503 U.S. at 527-28, just as did the Second Circuit below, the Eighth Circuit held that the plaintiff had stated a claim that the restriction on removing breaching tenants worked a physical taking. *Heights Apts.*, 30 F.4th at 733.

The RSL, unlike the eviction moratorium in *Heights Apartments*, does not prohibit the eviction of materially breaching tenants, such as tenants who do not pay rent. 9 N.Y.C.R.R. §§ 2524.1, 2524.2, &

2524.3. *Heights Apartments*' holding is thus consistent with the Second Circuit's decision below, which relied on the availability of various means under the RSL to terminate a tenancy (Pet. App. 6-7). Any broader dicta in the Eighth Circuit's decision does not raise a ripe conflict at this time.

If a conflict did exist, it would be an exceedingly shallow one. And if petitioners are correct that rent regulations are becoming more popular nationwide (Pet. 34-37), other courts will surely have the opportunity to weigh in, and this Court can assess whether to grant certiorari after further percolation. If petitioners are incorrect, then no conflict of significance may ever arise. In either case, review is not warranted at this time.

2. Petitioners' assertion that the physical-taking issue holds national importance likewise rings hollow. While rent stabilization is extremely important to everyday New Yorkers—since New York is a city of renters, and millions live in rent-stabilized units—the issue does not have broad significance nationwide. Petitioners assert only that a few purportedly similar provisions have been enacted or are being considered in a few jurisdictions (Pet. 36). Indeed, New York's rent-stabilization scheme does not even apply to the entire state, as localities may opt into it only if housing vacancies are below the triggering threshold. N.Y. Unconsol. Law Ch. 249-B, § 3.

Despite petitioners' claim that New York has "progressively pushed" rent-stabilization in the direction of greater stringency "[o]ver the last hundred years" (Pet. 35), the reality is one of ebb and flow. Multiple times, the New York Legislature has amended the RSL to make regulation friendlier to landlords. 1993 N.Y. Laws ch. 253; 1997 N.Y. Laws ch. 116; 2003 N.Y. Laws ch. 82. Petitioners are asking the Court to intercede simply because the balance recently shifted somewhat towards tenants.

Indeed, the pendulum may already be swinging back. Several tenant-friendly bills failed in the just-concluded legislative session, confirming the real estate industry's enduring influence in New York politics. *See* Luis Ferré-Sadurni & Grace Ashford, *New York Lawmakers Pass Clean State Act as Legislative Session Fizzles to an End*, N.Y. Times, June 11, 2023, at A20; Eddie Small & Nick Garber, *Impasse Over 'Good Cause' Imperils Push for More Housing*, Crain's N.Y. Business, May 15, 2023, at 1.

C. Petitioners' objection to the Second Circuit's application of settled law does not warrant review.

Review should also be denied because petitioners merely take issue with the court of appeals' application of settled law.

1. In *Yee*, the Court rejected a facial physical-taking challenge to a municipal mobile-home rent

regulation that operated against the backdrop of a state statute limiting the grounds on which a landowner could evict a mobile-home-park tenant. 503 U.S. at 524. The plaintiff landowners argued that the statute and ordinance gave tenants "a right of physical occupation" of their property. *Id.* at 527.

The Court explained that there was no compelled physical invasion because "tenants were invited by petitioners, not forced upon them by the government." *Id.* at 528. This feature distinguished the situation from prior taking cases, like *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1983), where invasion had been compelled by government action. *Yee*, 503 U.S. at 531-32. This Court held that "[w]hen a landowner decides to rent his land to tenants, 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." *Id.* at 529 (cleaned up). The Court suggested, however, that a restriction on the use of property might become a physical taking if, "on its face or as applied," it were "to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Id.* at 528.

2. The Second Circuit faithfully followed *Yee* in *Community Housing Improvement Program*, 59 F.4th at 550-53, and *74 Pinehurst LLC*, 59 F.4th at

563, which the court relied on in rejecting petitioners' challenge (Pet. App. 5-7).

The RSL's lease-renewal and successorship provisions closely resemble those in the statute discussed in *Yee*. *See* 503 U.S. at 524. The court of appeals rejected petitioners' arguments concerning renewal and successorship rights (Pet. App. 7) on the basis of *Yee*'s holding that a landlord does not have a physical-taking claim simply because that landlord lacks the unfettered ability to select their tenants. *Yee*, 503 U.S. at 529-32.

Petitioners mistakenly argue that any renewal or successorship provision whatsoever is a physical taking (Pet. 20-22). *Yee* rejected a physical-taking challenge to a law that allowed tenants to freely assign their below-market long-term leases—a far greater incursion on tenant selection than any worked by the RSL. Indeed, the Court noted that the challenged law meant that owners could "no longer … decide who their tenants w[ould] be." *Yee*, 503 U.S. at 526. And as the Court also observed, many regulations—including antidiscrimination laws—may require a landlord "to accept tenants he does not like." *Id.* at 529 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964)). In some circumstances, this may include having to retain tenants that the landlord might wish to replace.

The court of appeals' analysis of the RSL's "exit options" also follows directly from *Yee*. The RSL does

not require a landlord to "refrain in perpetuity from terminating a tenancy," *Yee* 503 U.S. at 528, because it and other provisions of New York law provide various grounds to evict a tenant or not to renew a lease, *see, e.g.*, 9 N.Y.C.R.R §§ 2524.3, 2524.4, 2524.5. The court correctly concluded that petitioners had not shown these provisions created a physical taking facially (Pet. App. 5) or that they unduly limit petitioners specifically (*id.* at 7).

3. Petitioners assert that *Yee*, a well-established precedent that no opinion of this Court has questioned, should be overruled (Pet. 22 n.2), suggesting that it is inconsistent with *Cedar Point*, 141 S. Ct. 2063. But the Second Circuit was well aware of *Cedar Point* and correctly concluded that it raises no conflict with *Yee* and simply does not govern petitioners' case (Pet. App. 5).

Cedar Point held that a state regulation granting labor organizations a right to access the premises of agricultural employers "constitute[d] a *per se* physical taking" because it conferred "a right to invade" the property. 141 S. Ct. at 2080. The case thus involved a regulation granting access to a category of entrants that a property owner did not want to admit. It confirmed the vitality of the key distinction underlying *Yee*'s analysis, between a government restriction that compels entry of uninvited persons and a restriction that limits an owner's ability to

exclude persons of a type (here, tenants) that the owner allows entry as part of its business. *See id.* at 2076-77 (discussing *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980)).

Cedar Point also recognized that restrictions on a property owner's use of property are evaluated under the regulatory-taking doctrine. *Id.* at 2071-72. And it did not walk back *Yee*'s statement that regulations of the landlord-tenant relationship are such use regulations. 503 U.S. at 528. The court of appeals thus correctly recognized that *Cedar Point* did not require it to disregard the clear implications of *Yee* for petitioners' claim.

II. The confiscatory-taking question does not warrant review.

Certiorari should also be denied as to petitioners' second question presented, which invites the Court to review the RSL's rent regulations under the so-called confiscatory-taking doctrine. This Court has applied the doctrine only to a few highly regulated industries, and never to rent regulations. There is no split of authority on this point requiring the Court's intervention. And this case would be a poor vehicle for considering the question.

A. This Court has not applied the confiscatory-taking doctrine to rent regulations.

Extending the highly circumscribed confiscatory-taking doctrine to the RSL's rental regulations would be unprecedented and unwarranted.

As the court below observed, confiscatory-taking doctrine "arises in the context of private companies that are required to provide public utilities," which "'creates its own set of questions under the Takings Clause of the Fifth Amendment'" (Pet. App. 12 (quoting *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989))). *See Verizon Commc'ns., Inc. v. FCC*, 535 U.S. 467, 477 & 481 (2002). The doctrine is implicated by price regulations of monopolies that are under a statutory duty to serve the public on demand and provide continuous service. *See id.* at 477; *Duquesne*, 488 U.S. at 307. The Court has applied it to electric utilities, telecommunication companies, natural-gas distributors, and railroads. *See Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942); *Smyth v. Ames*, 169 U.S. 466 (1898). The Second Circuit correctly concluded that petitioners had identified no case applying the doctrine in the landlord-tenant context (Pet. App. 12).

Petitioners mistakenly discern stirrings of the doctrine in *Block v. Hirsch*, 256 U.S. 135 (1921), which reviewed a District of Columbia rent regulation. But *Block* was an early regulatory-taking case. It considered whether the challenged regulation went "too far," 256 U.S. at 156, which is the question that modern regulatory-taking doctrine attempts to answer, *see Horne v. Dep't of Agriculture*, 576 U.S. 351, 360 (2015). Indeed, the canonical regulatory-taking case, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922), cited as relevant precedent both *Block* and other early 20th century cases involving landlord-tenant regulations—*Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921), and *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922). Later taking cases, too, have consistently cited *Block* and this Court's later review of rent control in *Bowles v. Willingham*, 321 U.S. 503 (1944), as regulatory-taking cases. *See, e.g.*, *Brown v. Legal Found.*, 538 U.S. 216, 233-34 (2003); *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987); *Loretto*, 458 U.S. at 440.

Moreover, the doctrine is a poor fit for rent regulations. Despite petitioners' assertions, New York City landlords are not like public utilities. They are not monopolies, *Verizon Commc'ns.*, 535 U.S. at 477, and are not compelled by law to serve the public on demand and at all times, *see Duquesne*, 488 U.S. at 307. The RSL does not require landlords with property subject to it to rent to residential tenants. They

need not offer vacant units for residential rent; they may instead put their property to other uses or may keep units vacant—petitioners' claims to the contrary notwithstanding (Pet. 3). And landlords do not provide services the "public." They have a limited number of units to offer; they let those units to specific tenants; and they are free to screen potential tenants. None of these aspects of their business is akin to a public utility's.

Nor would extending the confiscatory-taking doctrine to rental regulations provide any improvement over existing doctrine. Instead, it would just raise the same difficult questions about how to determine confiscatory rates that the Court has struggled with in past cases. *See Verizon Commc'ns.*, 535 U.S. at 481-83; *Duquesne*, 488 U.S. at 308 ("How [fair] compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question." (cleaned up)).

B. There is no split of authority on the application of the confiscatory-taking doctrine to rent regulations.

Nor is there a split of authority about the application of the doctrine. Petitioners identify just four decisions of three state high courts, none less than 40 years old, which hardly suggests a live issue calling out for clarification (Pet. 25-26). And the decisions, which petitioners did not cite below, fail to

show a split because they addressed rent regulations under due-process provisions, under either state law alone or federal and state law, not the federal Taking Clause. Thus, none supports extending the confiscatory-taking doctrine to rent regulations.

In one case petitioners cite (Pet. 25), the New Jersey Supreme Court considered whether a rent regulation prevented a just return, citing some of this Court's confiscatory-taking cases. *Hutton Park Gardens v. Town Council of W. Orange*, 68 N.J. 543, 566 (1975). But a companion case described the inquiry as rooted in substantive due process, *Troy Hills Vill. v. Twp. Council of Parsippany-Troy Hills*, 68 N.J. 604, 618-19 (1975), and the court subsequently confirmed the point, *see Orange Taxpayers Council v. City of Orange*, 83 N.J. 246, 255 (1980).

The other decisions are similarly inapt (Pet. 26). In *Kennedy v. City of Seattle*, 94 Wn. 2d 376 (1980), the Washington Supreme Court evaluated a rent regulation as a matter of due process under Washington law. *Id.* at 381 (citing *Petstel, Inc. v. County of King*, 77 Wn. 2d 144, 147 & 154-55 (1969), a due-process case). A later case, *Jeffery v. McCullough*, 97 Wn. 2d 893, 898-99 (1982), followed *Kennedy* and reviewed a rent regulation both for a violation of substantive due process and for a taking under the same analysis, applying the same method as *Kennedy*. And the California Supreme Court has labeled the decision petitioners cite, *Birkenfeld v. City of*

Berkeley, 17 Cal. 3d 129 (1976), a due-process case. *See Galland v. City of Clovis*, 24 Cal. 4th 1003, 1021 (2001); *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 772 (1997).

Notably, petitioners had a federal due-process claim but withdrew it in the district court (Pet. App. 23 n.2). In any event, that claim did not challenge regulated rents, just a specific provision of the 2019 RSL amendments that involved retroactive calculations of rent overcharges (*see* App. 115-16). The fact that some state courts have examined the reasonableness of price regulations as a matter of due process, is irrelevant to the issues that petitioners ask the Court to review.

C. This case would be a poor vehicle in any event.

Finally, this case would be a poor vehicle to consider whether to apply the confiscatory-taking doctrine to rent regulations. Petitioners' complaint lacks factual allegations sufficient to state either a facial or as-applied claim, and their as-applied claims would not be ripe for adjudication in any event.

First, petitioners' challenge is not appropriately framed, as they identify no rental-increase order or orders of the Rent Guidelines Board that they purport to challenge as insufficient. But rate orders lie

at the core of confiscatory-taking challenges. *See Verizon Commc'ns.*, 535 U.S. at 525 (noting "the general rule is that any question about the constitutionality of rate setting is raised by rates"). Petitioners' general challenge to the RSL and its 2019 amendments (App. 114, 117-18) is an inadequate substitute, since the RSL does not set permissible annual increases, let alone specify that the increase must be small. Within the last decade, an increase above seven percent has been permitted. *N.Y.C. Rent Guidelines Board Apartment Orders #1 through #54*, https://perma.cc/9QPD-GNBW (captured July 9, 2023). To judge whether the RSL has led to a confiscatory taking, petitioners would need to identify the annual orders (issued within the limitations period) that individually or cumulatively set unjustly or unreasonably low annual rent increases. They have not even attempted to do so.

Second, petitioners fail to plausibly allege that the Rent Guideline Board's rent orders result in confiscatory rents. This Court has held that rates that allowed companies to "operate successfully," maintain "financial integrity," "attract capital," and compensate investors for their risks are not confiscatory. *Verizon Commc'ns.*, 535 U.S. at 484 (cleaned up). Although the complaint parrots in conclusory terms that the RSL prevents landlords from doing these things (App. 84), it does not back up those claims with plausible allegations that the RSL does so, either facially or as applied to petitioners Their facial

claim requires showing that the Rent Guideline Board's rent orders result in confiscatory rents in all of their applications. *Bucklew v. Precythe*, 139 S. Ct. at 1127. But petitioners do not even attempt to identify how, on the face of the RSL, a court could determine whether all landlords are unable to operate successfully, attract investors, or maintain their financial integrity. The pleading failure is particularly evident given that the Rent Guideline Board does not set rents, but rather permissible annual rent increases, so the total rent that landlords receive may vary widely. Petitioners' as-applied claims similarly lack allegations regarding the impact on them (*see* App. 62, 64, 66-67).

Third, petitioners' as-applied claims are unripe. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001); *accord Pakdel v. City and Cnty. of San Francisco*, 141 S. Ct. 2226, 2231 (2021). Petitioners did not attempt to exercise the option of a hardship exemption to obtain relief from an unreasonably low annual rent increase. 9 N.Y.C.R.R. § 2522.4(b)-(c). While petitioners claim that the DHCR exemption process is futile (Pet. 30 n.3), that assertion is conclusory, as petitioners do not allege that they attempted to use the process (App. 76-77).

III. The regulatory-taking question also does not warrant review.

Finally, the regulatory-taking question does not warrant review. Petitioners assert that *Penn Central* should be rethought, without identifying what should replace it or why (*see* Pet. 30-34). But *Penn Central* has been applied nationwide thousands of times for decades, and this Court just recently noted that it provides the appropriate test for regulatory takings. *See Cedar Point*, 141 S. Ct. at 2072. And while petitioners suggest that a regulatory-taking plaintiff can never win against the government (Pet. 34), they ignore that *Heights Apartments*, the very case they rely on for their first question presented, held that the plaintiff had plausibly pleaded a regulatory-taking claim against a regulation of the landlord-tenant relationship. *See* 30 F.4th at 733-35; *see also Cienega Gardens v. United States*, 331 F.3d 1319, 1336-37 (Fed. Cir. 2003) (holding that certain plaintiffs had proved a regulatory taking under the *Penn Central* factors). Nor is the Second Circuit inhospitable to regulatory-taking claims. *See, e.g.*, *Sherman v. Town of Chester*, 752 F.3d 554, 557 (2014).

The Second Circuit's rejection of petitioners' facial arguments also does not suggest that *Penn Central* needs to be clarified. As noted above, facial challenges are disfavored. *Wash. State Grange*, 552 U.S. 442 at 450. And the RSL is a long-standing, multifaceted scheme regulating more than a million

apartment units. Among many other things, landlords vary in how many regulated units their buildings contain, how much rent their regulated tenants are paying, and the amount of their operating costs. Landlords also acquired their property at different points, when different versions of the RSL applied, and thus may have different claims concerning their reasonable expectations about what regulations would apply to their property. Petitioners have never explained how any test for regulatory takings could be adjudicated facially in this setting.

The difficulties of pleading a facial challenge against the RSL does not foreclose as-applied challenges that are properly pleaded. *See Cmty. Hous. Improvement Program v. City of N.Y.*, 492 F. Supp. 3d 33, 49-51 (E.D.N.Y. 2020) (holding that two plaintiffs had plausibly alleged as-applied regulatory-taking claims concerning the RSL). These specific petitioners simply failed to plausibly allege the necessary facts under *Penn Central*. One petitioner, for example, alleged a roughly 33 percent diminution in the sale price of its building after the 2019 amendments to the RSL (App. 17-18, 65). But the complaint is silent about that petitioner's investment-backed expectations, such as the price petitioner paid for its property and what it invested into the building before selling it. Similarly, other petitioners allege that their rental income from their unregulated units is higher than from their rent-stabilized ones (App. 62,

64), but again the complaint does not include allegations concerning their investment-backed expectations, such as the buildings' purchase prices or the mortgages that petitioners may have taken out on the buildings in reliance on receiving certain rent levels. The fourth petitioner alleges that it may not be able to recoup the entire costs of a particular capital investment by charging higher rents to its rent-stabilized tenants (App. 66-67), but it has not sought approval from the DHCR to even attempt to do so, so this claim is not ripe. *See* 9 N.Y.C.R.R. § 2522.4(a)(2).

Moreover, despite petitioners' complaints about the "physical character" of the RSL (Pet. 31), neither the complaint nor the petition attempts to connect any of petitioners' alleged economic injuries, which involve having to charge lower rents and potentially not fully recovering the cost of capital improvements, to the lease-renewal provisions of the RSL that petitioners reference when discussing the "character" of the RSL. Regulating the amount of rents and how capital costs are recovered are quintessentially economic regulations, and petitioners provide no authority to support the idea that they should be able to mix and match the economic impact of one provision of a statute and the character of an unrelated provision of that statute to cobble together a claim, whether under *Penn Central* or any other potential test for a regulatory taking.

* * *

There is no reason to grant review on any of petitioners' questions, as none identifies issues of national importance or splits in authority requiring this Court's intervention. Moreover, petitioners' case is not the right vehicle to address any of the legal issues that they press. While petitioners' arguments about a national resurgence in landlord-tenant regulation is speculative, what is sure is the disruption that petitioners' case would cause across the New York residential rental market if it continued. Millions of New York City residents live in rent-stabilized units and rely on the stability that the RSL provides. And the real-estate industry likewise has functioned under the RSL for fifty years, making educated investments based on it. Petitioners' case would needlessly disrupt the residential rental market, and countless lives, throughout the City.

CONCLUSION

The petition for a writ of certiorari should be denied.

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