No. 22-739

In the Supreme Court of the United States

DAVID KAGAN; JUDITH KAGAN; FRANK REVERE AND RACHEL K. REVERE,

Petitioners,

v.

CITY OF LOS ANGELES; AND CITY OF LOS ANGELES HOUSING AND COMMUNITY INVESTMENT DEPARTMENT,

Respondents.

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

BRIEF OF THE COMMUNITY HOUSING IMPROVEMENT PROGRAM AND RENT STABILIZATION ASSOCIATION OF N.Y.C., INC. AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*[1]

Community Housing Improvement Program ("CHIP") is a not-for-profit trade association representing more than 4,000 owners and managing agents of some 400,000 rent-stabilized rental properties across New York City's five boroughs. Founded in 1966, CHIP has been a key participant in New York City and State housing policy for nearly 60 years, educating, advising, and advocating on critical housing issues, including most prominently on the issue of rent regulation.

Rent Stabilization Association of N.Y.C., Inc. ("RSA") is a not-for-profit trade association that represents 25,000 property owners and agents responsible for approximately one million rent-stabilized units of housing in New York City. Among its core functions, RSA advocates on behalf of its members before the New York City Council, the New York State Legislature, and City and State Agencies.

CHIP and RSA are two of the largest associations of property owners in New York City, which is the most populous residential housing market in the country and home to the nation's most restrictive rent regulation regime: New York's Rent Stabilization Law (the "RSL"). Their interest in this case arises from their pending constitutional challenge to the RSL.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. *Amici* provided timely notice of intent to file this brief to all parties pursuant to Rule 37.2.

CHIP, RSA, and a number of their members who own buildings with rental apartments regulated under the RSL are the plaintiffs in a lawsuit challenging that rental apartment regulation scheme, in which they argue, among other things, that the RSL effects an uncompensated physical taking of building owners' private property. Among the provisions of the RSL that effect a physical taking is one that—like the law at issue in *Kagan*—prevents a property owner from recovering a rented unit for personal family use. The district court dismissed *amici*'s challenge to the RSL, and the Second Circuit affirmed that determination. *Community Housing Improvement Program v. City of N.Y.*, 492 F. Supp. 3d 33 (E.D.N.Y. 2020), aff'd, 59 F.4th 540 (2d Cir. 2023). *Amici* plan to file a certiorari petition seeking review by this Court of the Second Circuit's judgment. That petition is due by May 8, 2023.

The application of this Court's physical takings precedents to laws restricting—or in the case of the RSL, virtually eliminating—property owners' right to exclude in the rental apartment context is an issue urgently warranting this Court's review. *Amici* believe that this Court would benefit from considering the petition in *Kagan* alongside the petition that *amici* will soon file, which will raise that important issue in a different setting.

The 10 *amicus* briefs filed in the Second Circuit in support of CHIP and RSA demonstrate the profound importance and practical impact of the issues raised in that case. And because New York's RSL serves as a model for rental apartment regulation laws in other jurisdictions, a ruling from this Court in the context of the RSL would provide much-needed guidance to lower courts around the country.

Because of their own pending physical takings challenge to the RSL, CHIP and RSA have a compelling interest in the issue presented in *Kagan*. And in light of the importance and practical impact of *Community Housing Improvement Program v. City of New York*, we respectfully submit that the Court should coordinate its consideration of the petition in *Kagan* with the petition for writ of certiorari that *amici* will soon file.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has recognized that the right to exclude is so fundamental to property ownership that it defines the very concept of private property. "[T]he right to exclude is 'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179–180 (1979)); see also *Cedar Point*, 141 S. Ct. at 2073 (citing Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730, 752 (1998) (calling the right to exclude the "*sine qua non*" of property)). Government-authorized restrictions of this fundamental right, even temporary ones, constitute physical takings requiring just compensation. *Ibid.*

Yet lower courts are struggling with how—or even whether—to recognize this critical aspect of property ownership in the context of rental housing. Some courts have held that a property owner does not forfeit her fundamental right to exclude merely by participating in the rental market. *E.g., Heights Apartments LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022). Other courts have disagreed, holding that once an owner

rents her property, even restrictions that effectively prevent the owner from ever reasserting her right to exclude do not constitute a physical taking.

The Second Circuit recently adopted that view in upholding a law that appropriates the right to exclude (and other property rights) with respect to more than one million rent-stabilized apartments, affirming the dismissal of *amici*'s physical takings claim in *Community Housing Improvement Program v. City of N.Y.*, 59 F.4th 540, 551 (2d Cir. 2023).

Community Housing Improvement Program involves New York's Rent Stabilization Law, which requires owners of rent-stabilized apartments to offer renewal leases to tenants and their "successors"—often complete strangers to the property owner—in perpetuity. The RSL further prevents property owners from evicting unwanted tenants in these apartments except in the most narrow of circumstances. And like the California law at issue in *Kagan*, the RSL prohibits a property owner from evicting a tenant or refusing a lease renewal even when the owner wishes to use the apartment to house her own family members. The RSL, in addition, expressly prohibits or effectively prevents owners from transitioning regulated properties to other uses, converting them to condominiums or cooperatives, or demolishing them to put the property to higher use, including uses that would create additional apartment units.

Together, these provisions transfer to the tenant the owners' most fundamental property rights—stripping the owner of the rights to exclude, use, and enjoy their property. And as a byproduct, the RSL depresses New York City's stock of available housing by preventing the creation of new housing units and lessening tenant mobility—incentivizing tenants to stay in

units that have become too large, too small, or remote from jobs.

In an effort to restore the property rights of their members, CHIP and RSA filed a lawsuit in 2019 in the United States District Court for the Eastern District of New York, challenging the constitutionality of the RSL. The lawsuit alleges, principally, that the RSL effects a physical taking and imposes on a subset of private citizens public burdens that ought to be borne by the public as a whole. The district court dismissed the action for failure to state a claim. See *Community Housing Improvement Program v. City of N.Y.*, 492 F. Supp. 3d 33 (E.D.N.Y. 2020).

The Second Circuit affirmed. 59 F.4th 540 (2d Cir. 2023). That decision, like the Ninth Circuit's ruling in *Kagan*, rests on a patently erroneous interpretation of this Court's takings precedents. It upholds a law that strips New York property owners of their most basic rights while contorting the entire New York City housing market. CHIP and RSA are preparing a certiorari petition seeking this Court's review of the Second Circuit's erroneous decision.

CHIP and RSA agree with the *Kagan* petitioners that the Ninth Circuit erred in affirming the dismissal of petitioners' takings claim based upon an erroneous reading of this Court's decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992). We agree as well that this Court's more recent physical takings decisions confirm that the *Kagan* petitioners stated a valid claim under the Fifth and Fourteenth Amendments. And we further agree that the issue of how to apply the Court's physical takings precedents in the rental housing context is important and worthy of review by this Court.

We submit this brief to advise the Court of the soon-to-be-filed petition for a writ of certiorari in *Community Housing Improvement Program*, which raises a similar question in the context of physical takings violations imposed by the RSL on one million rent-stabilized apartments in New York City. Ten *amicus* briefs filed in the Second Circuit—by national and local organizations representing rental apartment owners, realtors, and builders, as well as organizations devoted to vindicating the Constitution's protection of property rights—confirm that our petition will present issues of immense practical and legal significance that warrant this Court's plenary consideration.

Coordinating this Court's review of the petition in *Kagan* with the forthcoming petition in *Community Housing Improvement Program* will enable the Court to consider the different contexts in which these takings issues arise and, we believe, assist this Court in making its certiorari determinations.

ARGUMENT

The *Kagan* petitioners present an important question: whether a California law preventing a rental property owner from recovering the property for her personal use effects a physical taking. The Ninth Circuit held that it did not, relying principally on its interpretation of this Court's decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992), and the fact that petitioners "voluntarily rented their land." See Pet. App. 3a.

Two months ago, the Second Circuit employed similar reasoning in rejecting a physical takings claim asserted by CHIP and RSA with respect to New York's Rent Stabilization Law. *Community Housing Improvement Program v. City of N.Y.*, *supra.* As with the

California law in *Kagan*, the RSL prevents a rental property owner from recovering a rent-stabilized unit even for use by her own family.

But the RSL goes well beyond that—it is the country's most stringent rental apartment regulation regime, enacted with the express goal of preventing property owners from removing from regulation any of the over one million apartments it governs.

The Second Circuit's ruling in *Community Housing Improvement Program*, like the Ninth Circuit's ruling in *Kagan*, cannot be reconciled with this Court's physical takings precedents, including *Horne v. Department of Agriculture*, 576 U.S. 350 (2015) (holding that a participant who knowingly enters a regulated market neither acquiesces to an unconstitutional taking nor waives a takings claim), and *Cedar Point Nursery* (holding that government-authorized invasions of private property constitute per se physical takings), among others. The Second Circuit also fundamentally misunderstood this Court's decision in *Yee*, interpreting it to exempt any rental apartment regulation from invalidation as a physical taking. *Community Housing Improvement Program*, 59 F.4th at 551-52.

Finally, the Second Circuit's ruling conflicts with the Eighth Circuit's decision in *Heights Apartments, LLC v. Walz*, *supra*. *Walz* recognized that owners of rental properties are entitled to the same protection against government takings as owners of other types of property.

In addition to permitting an unconstitutional taking with respect to half of the apartments in New York City, the Second Circuit's reasoning in *Community*

Housing Improvement Program would render governments immune from physical takings claims so long as the restriction is framed as a regulation of the landlord-tenant relationship. The lack of any constitutional limit on a State's ability to destroy the property rights of owners in the residential real estate market will only embolden New York and other cities and States to legislate more aggressively.

CHIP and RSA will soon file a petition for a writ of certiorari in *Community Housing Improvement Program*, and respectfully request that the Court coordinate its consideration of that forthcoming petition with its consideration of the petition in this case. [2]

A. New York's RSL, the Most Stringent Rental Apartment Regulation Regime in the Country, Effects a Physical Taking with Respect to a Million New York City Apartments.

New York is the most populous city in the country—a mecca of culture, finance, entertainment, education, and politics. New York City has over two million renter-occupied apartments, many of which are in buildings owned by individuals or family businesses who depend on income from these units. Only about half of the apartments in New York are subject to the normal market forces of supply and demand, in which tenants and owners agree upon the terms of a tenancy

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[2] On the same day that it decided *Community Housing Improvement Program*, the Second Circuit decided another takings challenge to the RSL, *74 Pinehurst LLC, et al. v State of New York, et al.*, 59 F.4th 557 (2d Cir. 2023). Plaintiffs in *74 Pinehurst* have advised that they likewise plan to file a certiorari petition seeking review by this Court of the Second Circuit's judgment, and that petition likewise is due by May 8, 2023.

and rent levels. The other half—approximately one million apartments—are regulated by the RSL.

In 2019, when the RSL underwent its latest and most draconian round of legislative changes, the New York Senate Majority Leader touted the revamped RSL as providing "the strongest tenant protections in history." See *Community Housing Improvement Program v. City of N.Y.*, No. 20-3366 (2d Cir.), Doc. 72, Joint Appendix (cited herein as "JA"), at 50 ¶ 65.

The stated goal of these additional regulatory constraints was to "protect" New York's "regulated housing stock," to "help prevent the loss of thousands of units of affordable housing by making it harder to deregulate rent-stabilized units," and to "ensure that rent-stabilized apartments remain rent-stabilized." JA-50 ¶¶ 65, 66. As the State of New York candidly stated before the Second Circuit: the purpose of the 2019 changes to the RSL was to "prevent the rapid and escalating loss of regulated units." See *Community Housing Improvement Program v. City of N.Y.*, Case No. 20-3366 (2d Cir.), Doc. 149 (Brief for Appellee RuthAnne Visnauskas), at 19.

In other words, New York has adopted a web of restrictions that place the government in control of privately owned apartment buildings, making it essentially impossible for owners to change the use of the property or recover apartments for themselves—vitiating owners' right to exclude and many of the other rights that inhere in property ownership.

Among its key features, the RSL:

- Requires owners to offer a renewal lease to the tenant in perpetuity, absent the occurrence of certain limited conditions that are solely within the tenant's control, such as the tenant's failure

to pay rent or use of a unit for an illegal purpose. JA-48-49 ¶ 61.

- Extends those same perpetual renewal rights to the tenant's relatives or caregivers—if the tenant no longer wishes to live in the apartment or the tenant passes away—as long as they live in the apartment for at least two years (or one year in the case of senior citizens or disabled persons). JA-49 ¶ 62.
- Deprives owners of the right to refuse a lease renewal in order to occupy a stabilized unit for their own family's use, permitting an owner to recover possession of only one tenant-occupied unit in her own building and only then when the unit comprises the owner's primary residence and the owner has demonstrated an "immediate and compelling necessity for the unit" (a standard that has proven exceedingly difficult to satisfy in practice). JA-98; 104 ¶¶ 223 & 241-43 (internal quotation marks omitted).
- Prohibits recovery of even a single unit for personal use if the tenant has lived in the unit for 15 years or more (not unusual given the financial disincentives to ever leave a rent-stabilized unit, no matter how unfit for purpose) unless the owner secures an equivalent accommodation at the same stabilized rent in a nearby neighborhood for the tenant—a near-impossible feat. JA-98 ¶ 223.
- Forbids recovery of regulated units where the tenant or her spouse is 62 years of age or older, or has physical or psychological impairments. JA-103 ¶ 238-39.

- Prevents owners from withdrawing their buildings from the rental market to rent those buildings for non-residential purposes. JA-106 ¶ 249.
- Prevents owners from withdrawing their property entirely from the rental market, unless the cost of making it habitable exceeds its value or they seek to use the building for their own (non-rental) business. JA-106-09 ¶¶ 249-56.
- Prevents owners from demolishing a property without paying to relocate tenants in regulated units—a requirement that has led to outlandish payments to holdout tenants standing in the way of major redevelopments. JA-69-70 ¶¶ 127-30.
- Prohibits owners from converting a stabilized building into a cooperative or condominium without consent of a majority of tenants, which almost certainly would never happen because the RSL guarantees tenants subsidized, below-market rents in perpetuity. JA-51-52 ¶ 68(d).[3]

These provisions strip from rental property owners the right to exclude third parties from, or to use, their property—all in the express interest of keeping those properties regulated and "protecting" what the government views as "its" stock of affordable housing.

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[3] The RSL also forbids the property owner from increasing rent beyond the percentage set by the New York Rent Guidelines Board, increases that have been far outpaced by increases in operating expenses. See JA-119-20 ¶¶ 291-92.

B. The Second Circuit's Decision Holding that the RSL Does Not Effect a Physical Taking Warrants Review by this Court.

1. CHIP and RSA, along with several of their individual property-owner members, filed suit in the United States District Court for Eastern District of New York, asserting (among other claims) a facial constitutional challenge to the RSL on the ground that it effects a physical taking. See *Community Housing Improvement Program v. City of N.Y.*, Case No. 19-cv-4087 (E.D.N.Y.) (Doc No. 1). At bottom, the RSL authorizes the perpetual physical occupation of private property by tenants and their chosen successors, vitiating the right of owners to exclude those tenants or to reclaim or otherwise use their own property.

The complaint supports this claim with a detailed explanation of the RSL's web of restrictions along with dozens of studies, scholarly articles, and economic analyses demonstrating not only that the RSL effects a physical taking of owners' property, but does so in the interest of a destructive and irrational policy. *Ibid.*

For example, the RSL does not target its benefits to tenants in need of a rent subsidy or prevent high-income tenants from taking advantage of them. Indeed, the RSL protects even tenants who have second or third homes outside New York City that they use as alternate residences, vacation homes, or income-generating properties. JA-58-64 ¶¶ 84-109. Nor does the RSL promote diversity (JA-64-65 ¶¶ 110-13), or increase the stock of affordable housing (JA-65-73 ¶¶ 114-41). In fact, it does the opposite, by depressing the vacancy rate (*ibid.*), deterring the development of additional housing (JA-66-70 ¶¶ 118-30), creating higher rents in the unregulated market (JA-75 ¶¶ 151-52), and reducing property tax revenue for the

City (JA-75-76 ¶¶ 153-55)—revenue that might be used for alternative government programs that actually address affordable housing, such as direct subsidies to low-income tenants, tax abatements, or construction projects (JA-76-80 ¶¶ 156-66).

2. The district court dismissed the complaint. *Community Housing Improvement Program v. City of N.Y.*, 492 F. Supp. 3d 33 (E.D.N.Y. 2020). The court observed that "[n]o precedent binding on this Court has ever found any provision of a rent-stabilization statute to violate the Constitution, and even if the 2019 amendments go beyond prior regulations, it is not for a lower court to reverse this tide." *Id.* at 38 (internal quotation marks omitted). The district court held principally that, because the property owners "continue to possess the property (in that they retain title), and they can dispose of it (by selling)," plaintiffs could not establish a physical taking. *Id.* at 43.

On appeal to the Second Circuit, CHIP and RSA received substantial *amicus* support, from both national and local organizations representing apartment property owners, builders, and realtors, as well as from organizations devoted to vindicating the Constitution's protection of property rights. In all, 10 *amicus* briefs were filed in support of reversing the district court's decision.[4]

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[4] *Amicus* briefs were filed by the Cato Institute, Institute for Justice, National Association of Home Builders, The Real Estate Board of New York, National Apartment Association, National Multifamily Housing Council, San Francisco Apartment Association, California Apartment Association, National Association of Realtors, New York State Association of Realtors, and Pacific Legal Foundation.

During the pendency of the appeal, this Court issued its decision in *Cedar Point Nursery*, which further supported the position of CHIP and RSA that when the government "appropriates for the enjoyment of third parties the owners' right to exclude," as the RSL does, there is a *per se* physical taking. 141 S. Ct. at 2072.

Nonetheless, following submission of supplemental briefs addressing *Cedar Point Nursery*, the Second Circuit affirmed the district court's judgment dismissing the action. *Community Housing Improvement Program*, 59 F.4th at 557.

3. The Second Circuit's decision misconstrues this Court's precedents, conflicts with decisions from other circuits, and threatens to give state governments *carte blanche* to authorize effectively perpetual physical invasions of private property, so long as the invasion takes place in a landlord-tenant context—as the forthcoming certiorari petition will explain in detail.

The Second Circuit's rejection of the physical takings claims in *Community Housing Improvement Program* rested primarily on the court's conclusion that, because rental property owners, by the very nature of their business, voluntarily invite tenants onto their properties by offering them a lease in the first instance, the government has effectively unlimited authority to impose restrictions on owners' ability to regain control of their property. 59 F.4th at 551.

The court of appeals based that conclusion largely on this Court's decision in *Yee*, which rejected a physical takings claim in the context of rental property. But it ignored the fundamental limitation included in this Court's opinion.

In *Yee*, the Court observed that the California statute at issue allowed an owner "who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months notice." 503 U.S. at 528. And it went on to state that "a different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Ibid*.

The RSL presents that "different case."

Rather than assessing the RSL's restrictions together, and considering both the statutory and regulatory text and the law's actual effect—as this Court did in *Yee*—the Second Circuit reviewed each restriction in isolation, and ignored their real-world effect. Thus, it theorized that there might be some possible bases on which an owner could terminate a lease (59 F.4th at 552-53), and concluded that the law therefore could not effect a physical taking. The Second Circuit grounded this conclusion in what it termed the State's "longstanding" authority to regulate the landlord-tenant relationship, which the court used as a basis to avoid categorically this Court's non-landlord-tenant precedents, such as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Horne*, and *Cedar Point Nursery*. 59 F.4th at 553.

That reasoning is incompatible with this Court's precedents, which nowhere suggest that the physical appropriation of private property by the State is rendered non-actionable so long as it is couched as a regulation of the landlord-tenant relationship. To the contrary, this Court's most recent takings precedent makes clear that government-endorsed physical intrusions on private property, and the appropriation

(even temporarily) of the owner's critical right to exclude, constitutes a taking *per se*. *Cedar Point Nursery*, 141 S. Ct. at 2072.

Moreover, the Second Circuit's decision in *Community Housing Improvement Program* squarely conflicts with the Eighth Circuit's recent decision in *Walz*. There, a rental property owner challenged a Minnesota executive order imposing a moratorium on residential evictions during the COVID-19 pandemic. 30 F.4th at 723-24. The Eighth Circuit held that the property owner plausibly alleged a physical takings claim under *Cedar Point Nursery* (notwithstanding *Yee*) because the executive order "deprived [the owner] of its right to exclude existing tenants without compensation." *Id*. at 733.

CHIP and RSA are preparing a certiorari petition seeking this Court's review of the Second Circuit's determination. *Amici* will show in their certiorari petition that *Community Housing Improvement Program* warrants this Court's plenary review because of the importance of the issues addressed, the erroneous interpretation of this Court's decisions in *Yee* and *Cedar Point Nursery*, and the direct conflict with the Eighth Circuit's holding in *Walz*. Because *Kagan* raises overlapping but narrower issues, we believe that the Court would benefit by considering the petitions together.

C. The Court Should Coordinate its Consideration of the *Kagan* Petition with *Community Housing Improvement Program v. City of New York*.

The *Kagan* petition raises an important issue that is worthy of review: whether a law effects a physical

taking when it prevents a property owner from recovering possession of her property upon expiration of a lease.

That issue also is implicated by the petition that CHIP and RSA soon will file in *Community Housing Improvement Program*. But the *Community Housing Improvement Program* petition challenges the RSL's multiple limitations on the owner's right to exclude that, together, vitiate the owner's ability to control her property. And it does so in the context of a law governing one million apartments in the nation's largest metropolitan center, and one that serves as a model for rent regulation throughout the country. A decision in *Community Housing Improvement Program*, therefore, would have broad practical impact while providing crucial guidance to lower courts.

Kagan and *Community Housing Improvement Program* provide complementary perspectives on how rental apartment regulation laws operate as uncompensated physical takings of private property. We respectfully submit that the Court will benefit from considering the petitions together.

CONCLUSION

For the reasons set forth herein, the Court should coordinate its consideration of the certiorari petition in this case with its consideration of the forthcoming petition in *Community Housing Improvement Program v. City of New York*, which will be submitted by May 8, 2023.

Respectfully submitted.

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