No. 22-1095

In The
Supreme Court of the United States

COMMUNITY HOUSING
IMPROVEMENT PROGRAM, 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,
Second Circuit**

BRIEF *AMICUS CURIAE* OF THE CALIFORNIA APARTMENT ASSOCIATION AND SAN FRANCISCO APARTMENT ASSOCIATION IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The California Apartment Association ("CAA") is the largest statewide rental housing trade association in the country, representing more than 50,000 rental property-owners and operators, who are responsible for nearly two million rental housing units throughout California. CAA's mission is to promote fairness and equality in the rental of residential housing, and to promote and aid in the availability of high-quality rental housing in California. CAA represents its members in legislative, regulatory, judicial, and other state and local fora. Many of its members are located in local jurisdictions subject to rent control laws, including San Francisco, Los Angeles, San Jose, Oakland, Sacramento, Santa Monica, Berkeley, Pasadena, Alameda, Beverly Hills, Richmond, and—increasingly—others as well. Moreover, in 2019 Governor Newsom signed Assembly Bill 1482, Cal. Stats. 2019, ch. 597, which is a new statewide rent and eviction control bill.

The San Francisco Apartment Association ("SFAA") is a full-service, non-profit trade association founded in 1917 of persons and entities who own residential rental properties in San Francisco, which has one of the most stringent rent control regimes in the country, as discussed herein. SFAA currently has more than

[1] Pursuant to Rule 37.2(a), *amici* affirm that notice was provided to counsel for all parties of the intent of *amici* to file this brief at least 10 days before the deadline. Counsel for *amici* authored this brief in whole. No party, party's counsel, or other person besides *amici* contributed money that was intended to fund preparing or submitting this brief.

2,800 active members. The Association is dedicated to educating, advocating for, and supporting the rental housing community, and preserving the property rights of all residential rental property providers in San Francisco. SFAA and its members have a strong interest in preserving their ability to purchase, sell, manage, and otherwise control real property and to exercise their constitutional and statutory rights with respect to real property they own or manage in San Francisco.

CAA's members and SFAA's members have a strong interest—just like landlords in New York—in the standards applicable to the taking of private property for public use.

SUMMARY OF ARGUMENT

Though the Petition in this case deals with New York's draconian rent and eviction control laws, many jurisdictions in California impose similarly severe restrictions on property-owners' rights. As one especially egregious example, discussed more fully below, San Francisco has one of the most stringent rent control regimes in the country, dating back decades. Tenants dominate the San Francisco electorate, and elected officials are well aware of this political reality.[2] The

[2] According to the Census Bureau, tenants substantially outnumber landlords in San Francisco. Of the 350,796 occupied residential units in the City, 209,987 (59.9%) are tenant-occupied. *See* U.S. Census Bureau, 2021 Am. Cmty. Survey 1-Year Estimates, Table DP04, *online at* https://data.census.gov/table?q=dp04&g=050XX00US06075&tid=ACSDP1Y2021.DP04 (last visited May

political dominance of renters in San Francisco has resulted in an increasingly hostile atmosphere where pro-tenant regulations proliferate and rental property-owners are pilloried for the lack of low-cost housing, though the causes of these problems more accurately lie in restrictive and burdensome land use policies and a booming tech economy that has brought tens of thousands of new workers (*i.e.*, renters) to the City. San Francisco's history of anti-landlord legislation is well-documented in the case books.[3]

22, 2023). Of course, not all of the remaining 40.1% are landlords—many are people who simply own and occupy their own homes.

[3] *See*, *e.g.*, *S.F. Apartment Ass'n v. City & Cty. of S.F.*, 881 F.3d 1169 (9th Cir. 2018) (ordinance placing stringent restrictions on landlords' ability to negotiate a voluntary "buyout" of tenants' leases); *S.F. Apartment Ass'n v. City & Cty. of S.F.*, 20 Cal. App. 5th 510 (2018) (ordinance prohibiting no-fault evictions of families with children and educators during the school year); *Levin v. City & Cty. of S.F.*, 71 F. Supp. 3d 1072 (N.D. Cal. 2014) (ordinance imposing requirement that landlords pay lawfully evicted tenants "amounts that range to hundreds of thousands of dollars per unit"), *appeal dismissed as moot*, 680 Fed. Appx. 610 (9th Cir. 2017); *San Remo Hotel v. City & Cty. of S.F.*, 145 F.3d 1095 (9th Cir. 1998) (ordinance requiring owners of residential hotels to obtain special permits from the City before converting residential hotels to tourist hotels, and providing such a permit would only be granted if the landlord promised to make a "one-for-one replacement" of the units being lost, either by constructing a similar quantity of units or paying a substantial fee); *Tom v. City & Cty. of S.F.*, 120 Cal. App. 4th 674 (2004) (striking down ordinance that sought to discourage Ellis Act evictions by prohibiting tenants-in-common from agreeing to occupy separate units in the property under exclusive right of occupancy agreements); *Small Prop. Owners of S.F. v. City & Cty. of S.F.*, 141 Cal. App. 4th 1388 (2006) (ordinance compelling landlords to pay tenants five percent

Nor is San Francisco alone. A number of other California localities like Oakland, Los Angeles, Berkeley, Santa Monica, East Palo Alto, and West Hollywood have long had similar laws, and, after several decades of relative quiet, anti-landlord legislation is once again picking up steam in California. Over the past few election cycles there have been a host of proposals for new local rent control laws, such as recent measures in Sacramento, Santa Rosa, Richmond, Pasadena, Mountain View, and National City. In other places, such Los Angeles County, Santa Ana, Alameda, and Beverly Hills, such laws are being adopted by county boards of supervisors and city councils. The number of jurisdictions with such laws has doubled in the past seven years. Regardless of how they are enacted, in each case these new laws take the long-standing, draconian laws of San Francisco and other early adopters as their model and then typically push the envelope even further.

Additionally, the State of California recently passed its own, more limited form of statewide rent and eviction controls on a statewide basis, and the few state law restrictions on local rent control that exist are under constant assault. In 2018 and 2020, California's voters rejected statewide ballot measures that would have repealed the Costa-Hawkins Rental Housing Act, Cal. Civ. Code § 1954.50-1954.535, which

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interest on security deposits, regardless of market conditions); *Danekas v. S.F. Residential Rent Stabilization & Arbitration Bd.*, 95 Cal. App. 4th 638 (2001) (ordinance restricting the ability of landlords to evict tenants who replace a departing cotenant, in violation of a lease clause prohibiting sublet and assignment).

bars vacancy controls[4] and exempts certain properties—primarily new construction and single-family homes—from local rent control. It appears the voters will face yet another attempt to repeal the Act in 2024.

The steady advance of rent and eviction controls in recent years makes it all the more important that this Court intervene to clarify growing confusion in the case law regarding physical takings as that case law applies to rental housing—confusion that has ripened into a circuit split. As the Petition rightly observes, the Second Circuit's holding below conflicts with the Eighth Circuit's ruling in *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 726-27 (8th Cir. 2022) ("*Walz*"), *reh'g en banc denied at* 39 F.4th 479 (8th Cir. June 16, 2022). The latter case applied this Court's recent decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) ("*Cedar Point Nursery*"), to uphold a physical-takings claim brought by landlords. But the Second Circuit below declined to follow *Cedar Point Nursery*. Relying instead on *Yee v. City of Escondido*, 503 U.S. 519 (1992), and *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980), the appellate court essentially held that the landlord-tenant relationship is categorically exempt from the traditional physical-takings analysis.

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[4] Under vacancy control, when a tenant moves out of a rent-controlled unit, the landlord cannot increase the rent that the next occupant will have to pay beyond the rent-controlled amount. Under vacancy *de*control, a landlord's ability to set the rent for a new tenant at the commencement of the tenancy is limited only by the market, but subsequent increases during the remainder of that tenancy are subject to limits.

But neither *Yee* nor *PruneYard*, nor any other case, justify that conclusion.

This Court's review is also necessary to resolve the problem of the lower courts sanctioning slow-motion takings. Time and again the lower courts, including in this case, rely upon past regulations of rental property to justify each new regulation. This is a surefire prescription for the gradual erosion of virtually all landowners' property rights over time, sanctioning death by a thousand cuts, and it is contrary to this Court's precedents, such as *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Takings Clause contains no exception for rental housing properties; they, too, cannot be taken without just compensation. But the standards currently being enforced by the Second Circuit (and other lower courts) means that local governments are increasingly free to deprive those owners of all of the key rights of ownership—to exclude, occupy, use, change the use of, and dispose of their property—so long as it is done incrementally. *Amici* respectfully request that this Court grant the petition for certiorari to clarify the proper application of the Takings Clause to such properties.

ARGUMENT

I. The Issues Raised by the Petition Have Nationwide Implications.

Though this case deals with rent and eviction control laws in New York, it raises important issues that affect landlords in jurisdictions throughout the nation, who are similarly affected by severe limitations on their fundamental property rights—by state and local governments who are determined to regulate residential rental properties in such extremely minute and restrictive detail that property-owners are effectively deprived of their property in all but name.

A. San Francisco as an Example of Another Jurisdiction with Extreme Constraints on Rental Property-Owners' Rights.

For example, the *San Francisco Rent Ordinance* now runs to 138 excruciatingly detailed pages, supplemented by an additional 127 pages of *regulations* adopted by the Rent Board, as well as other ordinances regulating fees charged by the Rent Board, S.F. Admin. Code, ch. 37A; security deposits, S.F. Admin. Code, ch. 49; and landlords' communications with tenants, S.F. Admin. Code, ch. 49A. Like the New York Rent Stabilization Law, the San Francisco ordinance imposes rent control and severely limits the bases for eviction. Rents can only be raised by certain amounts per year, equal to 60% of the increase in the local Consumer Price Index (meaning substantially less than inflation), and, as

in New York, tenants can reside in the rental unit indefinitely, unless the landlord can establish one of 16 "just causes" for eviction.[5] In other words, tenants are given a nearly absolute right to physically occupy a landlord's premises in perpetuity, at a rate that falls further and further behind inflation each year, with a few very limited exceptions. Moreover, each new encroachment becomes part of a vast web of regulations that is used to justify the next encroachment, and the next, just as happened to the New York landlords in this case.

Regarding the annual rental increases, in 2023 the allowable increase is just 3.6%, though the CPI increased by 6%.[6] In other words, the law is purposely designed to prohibit landlords from keeping rents up with the cost of inflation. S.F. Admin. Code § 37.3(a)(1). Moreover, while there is an option for landlords to file a petition with the Rent Board seeking additional increases for things like capital improvements, the process is expensive and time-consuming, and in many cases the landlord may not obtain a rent increase

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[5] Most of these just causes are for nonpayment of rent, nuisance, illegal use of the unit, or material violations of the lease, though San Francisco keeps incrementally restricting the ability to even evict for lease violations; for example, eviction is prohibited for occupancy violations even where a rental agreement or lease otherwise limits the number of occupants, or limits or prohibits subletting. *See* S.F. Admin. Code § 37.9(a)(2).

[6] S.F. Rent Board, "Annual Allowable Rent Increases" (Nov. 2022), *online at* https://sf.gov/sites/default/files/2022-11/571%20Allowable%20Annual%20Increases%2023-24%20EN%2011.16.22.pdf (last visited May 22, 2023).

sufficient to cover the cost of the improvement in any event. For example, for properties of six or more residential units, in general, only 50% of the certified capital improvement costs may be passed through to the tenants, and the amount of the passthrough may not exceed the greater of $30.00 or 10% of a tenant's petition base rent in any 12-month period. S.F. Admin. Code § 37.7(c)(5)(B)(i).

In a similar vein, increased debt service costs or property taxes resulting from a change in ownership may not form the basis of an increase above the default 60% of CPI. *See* S.F. Admin. Code § 37.8(e)(4)(A)(ii). Especially for a building that has been under the same ownership for a long time—perhaps decades—this restriction may be a *significant* burden to a new purchaser. A long-time owner may have not any debt service remaining; or that owner may have very low property taxes, particularly when one considers the effect that California's Proposition 13 has on limiting annual tax increases in the absence of a change of ownership.[7]

As to the bases for eviction, in theory the San Francisco rent ordinance permits several types of

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[7] Proposition 13 generally limits property taxes to 1% of the assessed value of the property and limits annual increases in the assessed value of real property to no more than 2 percent a year, except when property changes ownership or undergoes new construction. These exceptions mean that a property purchased after decades of unchanged ownership may experience significant property tax increases relative to the amounts charged to the prior owner.

"no-fault" eviction, like owner move-in or an eviction for the purpose of leaving the rental market altogether. But these bases are so heavily regulated that they are all but impossible for most landlords to pursue. For example, a landlord may recover possession of a rental unit for the occupancy of the owner or certain close relatives of the owner for use as their principal residence for a period of at least 36 continuous months.[8] However:

- Owners who evict for relatives to move in must already live in the building or be moving into the building at the same time as the relative;[9]
- If a comparable unit in the building is vacant or becomes vacant during the period of the notice terminating tenancy, then the notice to vacate must be rescinded. A vacant, non-comparable unit owned in San Francisco must be offered to the tenant being evicted.[10]
- Certain tenants—disabled or catastrophically ill tenants who meet certain minimum residency requirements—cannot generally be evicted, nor can any tenant who has resided

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[8] A relative move-in eviction is only permitted for certain close relatives of the owner, including a child, parent, grandparent, grandchild, sibling or the owner's spouse or spouses of such relations. The term "spouse" includes domestic partners. *See* S.F. Rent Board, Topic No. 204, "Evictions Based on Owner or Relative Move-In" (May 2021), *online at* https://sf.gov/information/evictions-based-owner-or-relative-move (last visited May 22, 2023).

[9] *Id.*

[10] *Id.*

in a unit for 12 months or more be evicted for an owner or relative to move in during the school year for the San Francisco Unified School District, if a child under 18 or a person who works at a school in San Francisco resides in the rental unit, is a tenant in the unit or has a custodial or family relationship with a tenant in the unit;[11]

- Landlords are required to pay relocation expenses to tenants who are being evicted for owner or relative move-in. For the current year, each authorized occupant, regardless of age, who has resided in the unit for at least one year, is entitled to a relocation payment of $7,540.00, with a maximum payment of $22,618.00 per unit. In addition, each tenant who is 60 years or older, each disabled tenant, and each household with one or more minor children, is entitled to an additional payment of $5,027.00. Each year, the amount of these relocation payments, including the maximum relocation expenses per unit, is adjusted for inflation (and, unlike rent increases, these adjustments keep up with inflation, S.F. Admin. Code § 37.9C(e)(3));[12] and

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[11] *Id.*

[12] *Id. See also* S.F. Rent Board, "Relocation Payments for Evictions Based on Owner/Relative Move-in OR Demolition/Permanent Removal of Unit from Housing Use OR Temporary Capital Improvement Work OR Substantial Rehabilitation" (Mar. 1, 2023), *online at* https://sf.gov/sites/default/files/2023-02/577%20All%20Rates%203.1.23.pdf#page=2 (last visited May 22, 2023).

- If the unit is subsequently re-rented within a specified number of years, it must be reoffered to the original tenant at the original rent.[13]

The other various types of "no-fault" evictions are subject to similarly high hurdles. For example, in 1985 the California Legislature passed the Ellis Act, Cal. Gov. Code § 7060-7060.7, designed to overturn *Nash v. City of Santa Monica*, 37 Cal. 3d 97 (1984), and give landlords the right to exit the rental industry. But under the guise of enacting "procedural protections" for tenants, San Francisco has repeatedly sought to so significantly burden a landlord's ability to exercise its nominal state law rights as to render it illusory.[14]

Landlords seeking to exercise their rights under the Ellis Act must comply with elaborate notice requirements; certain categories of tenants—those who are elderly or disabled—can extend the time of the eviction for up to a year; the tenants retain re-occupancy rights for up to ten years; if the unit ends up being re-leased during the first five years, it must be rented at the old rent-controlled rate; and here, too, the

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[13] *Id*.

[14] Of course, even if this were not true, this Court has made clear in several cases that the ability to exit the market entirely, to avoid regulation, does not obviate a takings claim. *See Horne*, 576 U.S. at 365 ("In [*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 n.17 (1982)], we rejected the argument that the New York law was not a taking because a landlord could avoid the requirement by ceasing to be a landlord. We held instead that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.").

City has imposed a requirement that the landlord pay a tenant tens of thousands of dollars for the "privilege" of regaining possession of the landlord's property.[15]

Other no-fault evictions, such as condominium conversions, demolition of the unit, and substantial rehabilitation are subject to relocation payments and other restrictions as well, including a ten-year ban on merging a unit removed from the rental market with another unit for the purpose of residing in or selling the merged units. *S.F. Apartment Ass'n v. City & Cty. of S.F.*, 3 Cal. App. 5th 463, 479 n.8 (2016).

In the past, many landlords sought to avoid the headaches of these regulations by directly negotiating with tenants to voluntarily vacate a rent-controlled unit in exchange for agreed-upon compensation. But San Francisco has sought to restrict that option as well, imposing stringent restrictions on such negotiations: tenants and the Rent Board now must be given notice before a landlord can even approach the tenant about a voluntary buyout; a buyout agreement may be executed no sooner than 30 days after buyout discussions commence, and the tenant has a 45-day recission period; a copy of the entire agreement must be lodged with the Rent Board, which is then made

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[15] *See* S.F. Rent Board, Topic No. 205, "Evictions Pursuant to the Ellis Act" (Sept. 2022), *online at* https://sf.gov/information/evictions-pursuant-ellis-act (last visited May 22, 2023); S.F. Rent Board, "Relocation Payments for Tenants Evicted Under the Ellis Act" (Mar. 1, 2023), *online at* https://sf.gov/sites/default/files/2023-02/577%20All%20Rates%203.1.23.pdf#page=2 (last visited May 22, 2023).

publicly available (the personal information of tenants—but not landlords—is redacted); and the City has deputized various tenants' rights organizations to file lawsuits against landlords alleged to have violated these requirements, seeking fees and awarding attorneys' fees.[16]

As the ever-expanding regulations to which owners of rental property in San Francisco are subject grow ever more complicated and burdensome, it is small wonder that some would wish to stop being landlords. As Ellis Act evictions are tightly limited, as discussed above, another option is to sell a rental property. Here, too, San Francisco has intervened. Any building with three or more residential units—or vacant land that could be developed into three or more residential units—is now subject to the Community Opportunity to Purchase Act ("COPA"), S.F. Admin. Code, ch. 41B.

COPA provides that before marketing a covered property to prospective sellers, the owner must first give certain "qualified" non-profit organizations ("QNPs") a right of first offer and then wait up to 30 days for such an offer to be made. The owner need not accept an offer from a QNP and may instead choose to market the property to private purchasers. However, once an agreement is reached, the owner must give the QNPs

[16] *See* S.F. Admin. Code § 37.9E; S.F. Rent Board, Topic No. 263, "Buyout Agreements" (Mar. 29, 2023), *online at* https://sf.gov/information/buyout-agreements (last visited May 22, 2023); *San Francisco Apartment Ass'n v. City & Cty. of S.F.*, 881 F.3d at 1169.

a second bite at the apple—a right of first refusal. And that right must be renewed if the terms of the agreement materially change after the QNP declines. The law is subject to enforcement by damages, stiff penalty provisions for willful or knowing violations (10% of the sale price the first time, 20% the second time, and 30% each additional time), and other "consistent" remedies, and attorneys' fees. *Id*.

Faced with all of these burdens, many landlords—particularly of the mom-and-pop variety—have thrown up their hands and simply ceased renting rental properties out when they become vacant. But there is no escape. In November 2022, the City's voters adopted Proposition M, which imposes a new tax on any owner of a residential property who keeps one or more units vacant for more than half the year. The amount of the tax increases based on the size of the "vacant" unit and the number of years it is subject to the tax, eventually rising to $20,000 *per unit*. *See* S.F. Bus. & Tax. Regs. Code, art. 29A.

As a practical matter, landlords in San Francisco are subject to extraordinarily strict limits on the amount they can rent their units for; when they can gain repossession; their ability to sell the property in many cases; and their ability to exit the rental market altogether. Of the three main rights in the "bundle of sticks" identified by *Horne—i.e.*, "the rights to possess, use and dispose of" property, *see* 576 U.S. at 361-62—all are limited in San Francisco to a substantial degree.

B. The Significance of the Issues Raised by the Petition Keeps Growing, as More and More Jurisdictions Adopt Rent and Eviction Control Laws.

As noted above, while rent control is not new to California, it has historically been limited to a handful of coastal cities until recently. In the 1970s and 1980s, fourteen cities adopted some form of rent control. That number remained unchanged until 2016, when the cities of Richmond and Mountain View adopted the first new rent control ordinances in nearly 30 years. Since 2016, the number of rent-control jurisdictions in California has doubled, reaching jurisdictions both large, like Sacramento, and unincorporated Los Angeles County, and small, like Pasadena and Antioch.

The number of jurisdictions imposing "just cause for eviction" laws has likewise expanded rapidly. Traditionally imposed by rent control jurisdictions as a way to prevent evasion of rent limits,[17] these laws have taken on a life of their own, applying even where rent limits do not. For example, the City of San Diego does not have rent control, but it recently enacted a new ordinance imposing restrictive new limits on the ability of landlords to evict tenants. And the City of Los Angeles, which has long had rent control, adopted new code provisions in 2023 that expand eviction controls to units that are exempt from rent control. Los Angeles County and Oakland did the same in November 2022.

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[17] *See, e.g.*, *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 707 (1984).

Moreover, these laws are being proposed in new jurisdictions all the time.

And, as noted, the State of California recently adopted limited rent and eviction controls on a statewide basis.

In many ways these new laws are, if anything, even more stringent than the long-standing ones in San Francisco and other early rent control jurisdictions. Those older jurisdictions have spent the last few decades ratcheting up the reach of their laws incrementally, gobbling up a bit more of landlords' property rights at a time. The new laws compile all the most restrictive innovations from each of the various laws adopted in the 1970s and the 1980s, and refined over the decades, and adopt the new laws in one fell swoop. For example, the City of Pasadena's recently enacted rent and eviction control law is, in virtually every respect, as draconian or more so than the most stringent of its big-city counterparts.[18]

In short, new, increasingly stringent rent and eviction control laws are being passed at a rapid rate, which makes the significance of the issues presented by the Petition greater by the year.

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[18] *See* Pasadena Charter, Article XVIII (commencing with § 1801).

II. Review by this Court Is Necessary to Clarify the Reach of *Yee v. City of Escondido*, Especially in Light of this Court's More Recent Decision in *Cedar Point Nursery v. Hassid*, and to Resolve a Circuit Split on this Question.

In the first place, this Court's review is necessary to clarify confusion in the takings case law that has ripened into a circuit split.

As this Court reaffirmed in *Cedar Point Nursery*, a physical taking occurs whenever "the government has physically taken property for itself *or someone else—by whatever means* . . . " 141 S. Ct. at 2072 (emphasis added). The mere fact that a purported right to physically invade the owner's land arises from a regulation, "statute, or ordinance, or miscellaneous decree" does not make it a "regulatory" taking rather than a physical taking, if it "results in a physical appropriation of property." *Id*. By creating a system of severe eviction controls that give tenants a virtual lifetime estate in rental properties—one that, in some instances, they can pass along to others as well—New York and San Francisco, and various other jurisdictions, have authorized the ongoing physical occupation of rental properties by tenants over the landlords' objection, even, in many cases, where the landlord wishes to recover the property for personal use or make other uses of the property. This is no different from any other physical taking, in which the government simply takes "a servitude or an easement" on behalf of a third party. *Id*. at 2073. Despite that fact, the Second Circuit,

relying on this Court's opinion in *Yee v. City of Escondido*, held that rental property-owners could not state a physical-takings claim in such circumstances.

In *Yee*, owners of a mobile home park alleged that a city's mobile home rent control ordinance effected a physical taking of their property because preexisting state law limited the bases upon which the park owner could terminate the mobile homeowner's tenancy to "the nonpayment of rent, the mobile home owner's violation of law or park rules, and the park owner's desire to change the use of his land." 503 U.S. at 523. The mobile home park owners did "not claim that the ordinary rent control statutes regulating housing throughout the country violate the Takings Clause," *id*. at 526, and they also did not challenge the state law restrictions on terminating the lease, *see id*. at 531 n.*. As this Court understood the argument, the owners only contended that the rent control system undermined their ability to influence the tenant's choice of whom to sell to, by depriving the park owners of the power to threaten a rent increase for a disfavored purchaser. *Id*. Under those limited circumstances, this Court held that the landlords had failed to state a physical-takings challenge.

A number of lower court decisions—including the Second Circuit decision at issue here—have expanded *Yee* well beyond its narrow facts, however, essentially exempting rental properties from physical-takings law altogether. In particular, those courts have latched on to *Yee*'s statement that "[b]ecause [landlords] voluntarily open their property to occupation by others,

petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Id*. at 531. Despite the *Yee* decision's explicit recognition of the limits of that proposition—stating, for example, that a statute that compelled the landlord to refrain in perpetuity from terminating a tenancy might constitute a physical taking, *id*. at 528—many lower courts have taken this "voluntariness" principle to remarkable extremes. Some have even gone so far as to hold that because landlords initially invited tenants to rent their properties, they could not state a physical-takings claim when the government subsequently prevented the landlord from evicting tenants for nonpayment of rent for *several years* during the COVID-19 pandemic. *See*, *e.g.*, *Williams v. Alameda Cty.*, 2022 U.S. Dist. LEXIS 212072, at *18-21 (N.D. Cal. Nov. 22, 2022); *Jevons v. Inslee*, 561 F. Supp. 3d 1082, 1107 (E.D. Wash. 2021); *Gallo v. District of Columbia*, 2022 U.S. Dist. LEXIS 109644, at *20-23 (D.D.C. June 21, 2022).

At least one Court, however—the Eighth Circuit in *Walz*, 30 F.4th at 726-27—has reached a contrary conclusion. Citing *Cedar Point Nursery* and this Court's decision in *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021), *Walz* held that even a landlord who voluntarily rented the property in the first instance can state a physical-takings claim where the government compels physical occupation of an owners property by a tenant on an ongoing basis. *See also Cwynar v. City & Cty. of San Francisco*, 90 Cal. App. 4th 637, 658 (2001) ("But the *Yee* court *did not* hold or intimate

that government coercion is relevant only if it corresponds to the initial physical occupation of the premises.").

Nor is the Second Circuit's approach consistent with *Horne* and *Loretto*, which rejected the principle that the decision to voluntarily participate in a given industry (raisin-growing in *Horne*; property rental in *Loretto*) signals the property-owners' acquiescence to having that property forcibly occupied by another party at the government's insistence, and to the exclusion of the property-owner him- or herself. *See Horne*, 576 U.S. at 365; *Loretto*, 458 U.S. at 439 n.17.

Given the confusion in the law—both the inconsistency between *Yee* and this Court's later decisions and the circuit split between the decision below and *Walz*—this Court's review is necessary to provide much-needed clarity regarding the application of the Takings Clause in this context.

III. Review Is Also Needed to Solve the "Boiling the Frog" Problem: Allowing Past Invasions of Property Rights to Perpetually Justify New Ones Nullifies the Takings Clause.

This Court's review is needed for another reason as well. As both the district court and Second Circuit opinions below amply demonstrate, takings jurisprudence in the rent and eviction control context suffers from a "boiling frog" problem. In the parable, the frog cannot be dropped into a pot of boiling water because

it will leap out and save itself. However, if it is placed in a cool pot of water and the temperature is raised one degree at a time, the frog will fail to appreciate the danger and will not jump out, resulting in it being boiled alive. In a similar vein, under the mode of analysis employed by the lower courts, each encroachment on landlords' property rights can be used to justify the next and the next, until little remains.

For example, much of the district court's analysis focused on the fact that some of the plaintiff landlords had purchased properties when some form of rent control was already in effect in New York. *Cmty. Hous. Improvement Program v. City of N.Y.*, 492 F. Supp. 3d 33, 50-51 (E.D.N.Y. 2020) ("these Plaintiffs bought their properties under a different, and more mature, version of the RSL"). Accordingly, the district court concluded, the landlords' takings claims could not succeed, because their reasonable, investment-backed expectations must be evaluated against the likelihood the legislature will act again. And again. And again. The Second Circuit endorsed this conclusion as well.

California's courts have likewise justified new, ever-expanding encroachments on landlords' property rights by reference to past encroachments. *See*, *e.g.*, *Danekas v. S.F. Residential Rent Stabilization & Arbitration Bd.*, 95 Cal. App. 4th 638, 651 (2001) (argument that rent control amendments were unconstitutional rejected, in part because the rental industry is routinely regulated); *Interstate Marina Development Co. v. County of Los Angeles*, 155 Cal. App. 3d 435, 447 (1984) ("Rent control, like the imposition of a new tax, is

simply one of the usual hazards of the business enterprise.").

But there is no obvious limit to this principle. It merely counsels governments to deprive property-owners of their property rights in slow motion, rather than all at once—to turn up the heat on the frog one degree at a time. The district court made a passing nod to this problem, acknowledging that "it cannot be said that there is no such thing as a regulatory taking in the world of rent stabilization, and it remains eminently possible that at some point, the legislature will apply the proverbial straw that breaks the camel's back," 492 F. Supp. 3d 33, 44. The court even acknowledged that this "Court has spoken about the need for takings jurisprudence to redress this kind of incremental deprivation of property rights." *Id*. at n.10.

Specifically, this Court noted in *Lucas* that if "the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature would be to extend the qualification more and more until at last private property disappeared.'" 505 U.S. at 1014 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

Despite the district court's recognition of this problem, its ruling and the Second Circuit's continue to abet the gradual erosion of New York landlords' property rights until very little is left. At some point,

the courts must take *Lucas*'s admonition to heart, lest the Takings Clause slowly be rendered dead letter.[19]

What started out as comparatively modest, emergency measures during World War I[20] have, over the course of decades (especially the last few decades), metastasized into all-encompassing regulatory regimes that give property-owners little choice but to continue renting their property while imposing ever-stricter—and more expensive—obligations on the maintenance of the property[21] and tightly constraining the rents that they can charge.

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[19] The lower courts' approach incentivizes property-owners to resist even modest actions, lest those become a justification for later, more draconian ones. For example, *amici* noted above that California recently enacted its first statewide rent control law. Though considerably less restrictive than the laws in place in many localities, some property-owners understandably view that law as the camel's nose under the tent, particularly in jurisdictions where rent control did not previously exist.

[20] *See Edward A. Levy Leasing Co., Inc. v. Siegel*, 258 U.S. 242 (1922); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Block v. Hirsch*, 256 U.S. 135 (1921).

[21] These obligations are substantial. Under California law, landlords have an implied duty to maintain the "habitability" of a rental unit, *Green v. Superior Court*, 10 Cal. 3d 616 (1974), and the Legislature has elaborated upon this duty in *considerable* detail, Cal. Civ. Code § 1941 *et seq*. San Francisco has imposed a host of its own, additional requirements. *See* S.F. Hous. Code, ch. 13. Significant penalties can attach to the failure to comply with these obligations, up to and including criminal misdemeanor prosecution. *See* S.F. Hous. Code § 204(a).

CONCLUSION

Amici respectfully request that the Court grant the petition to address the important constitutional questions it raises.

Respectfully submitted,

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