No. 23-1148

IN THE
Supreme Court of the United States

G-MAX MANAGEMENT, INC., ET AL.,

Petitioners,

v.

STATE 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 OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

The Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community, including cases defending constitutional protections for private property rights against government infringement. To that end, the Chamber has filed *amicus* briefs supporting property owners in cases such as *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), and *Sheetz v. County of El Dorado*, 601 U.S. 267 (2024). The Chamber also filed *amicus* briefs in support of petitions seeking review of the Second Circuit's prior decisions rejecting Takings Clause challenges to New York's Rent Stabilization Law—the same law at issue in this case. *See Community Housing Improvement Program v. City of New York*, No. 22-1095; *74 Pinehurst LLC v. State of New York*, No. 22-1130.

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of *amicus*'s intent to file this brief.

The Chamber has a strong interest in the issues in this case. American businesses rely on stable, fair, and predictable property rules—including in the area of takings law. The decision below is therefore of significant practical concern to the Chamber and its members, which have a substantial interest in ensuring that property owners retain an adequate, efficient, and prompt remedy against government takings of property. The Second Circuit's decision in this case further entrenches its precedent that undermines Fifth Amendment protections against uncompensated government occupation and confiscation of property, with wide-ranging consequences for business interests and private-property holders nationwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The right to exclude" is the "most treasured" of property rights. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021) (citation omitted). Petitioners' right to exclude has been taken. Their property is being locked up by law to house strangers indefinitely. Yet the Second Circuit held that they have no viable takings claim of any stripe. This Court should grant certiorari.

New York's Rent Stabilization Law ("RSL") imposes significant restrictions on landlords' ability to control their properties, including (a) requiring landlords, except in narrow circumstances, to renew leases in perpetuity (even for strangers to the lease); (b) barring landlords from reclaiming possession of their properties for personal use absent an "immediate and compelling necessity"; (c) restricting landlords' ability to convert their rental units to cooperatives or condominiums; and (d) prohibiting landlords from raising rents upon

vacancy to factor in rising costs or to pay for needed improvements. Pet. 5-10. Applying its precedent in *Community Housing Improvement Program v. City of New York*, 59 F.4th 540 (2d Cir. 2023) (*CHIP*), *cert. denied*, 144 S. Ct. 264 (2023), and *74 Pinehurst LLC v. New York*, 59 F.4th 557 (2d Cir. 2023), *cert denied*, 2024 WL 674658 (Feb. 20, 2024), the Second Circuit in this case held that the RSL does not constitute a *per se* or regulatory taking of petitioners' properties. The rationale of the decision below and the circuit precedent it applied weaken property rights well beyond the boundaries of New York and empower the government to shift the cost of remedying social ills onto private parties. These issues are "important" and warrant this Court's review, as to both *per se* and regulatory takings. *See 74 Pinehurst LLC v. New York*, 601 U.S. __ (slip op., at 1, 2) (Feb. 20, 2024) (Thomas, J., statement respecting denials of certiorari).

I. Physical invasions of private property by government are *per se* takings, and the government has a "clear and categorical obligation" to pay just compensation for such invasions. *Cedar Point Nursery*, 594 U.S. at 147. That guarantee is what enables property owners to finance, invest in, and improve their properties: they can be confident (and, therefore, lenders and other investors can be confident) that the fruits of their efforts and expense will not be confiscated for public use without compensation. By contrast, once those invasions are treated as just another regulatory taking, any hope of compensation becomes faint at best, thanks to the "vague and indeterminate" standard currently governing regulatory-takings claims, which no one "has any idea how to apply." *Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n*, 141 S. Ct. 731, 731-732 (2021)

(Thomas, J., dissenting from the denial of certiorari) (citation omitted).

The Second Circuit held that just by becoming landlords, petitioners forfeited a *per se* takings claim. That is an extraordinary constriction of the *per se* rule that government-imposed occupation requires compensation. Leasing a single apartment to a specific individual for a short, defined period now justifies *permanent* or *indefinite* impairment of the right to exclude. New York allows landlords no meaningful way out, and the Second Circuit allows them no compensation. The court's rationale will have far-reaching negative consequences, as it threatens to justify permanent, government-backed occupation of all kinds of private property—from rental cars to cloud storage.

This Court's review is needed now. The Second Circuit has created a massive disincentive for anyone considering putting property to productive use. Other jurisdictions have taken, or are pursuing, steps to enact similar restrictions into law. *See* p. 16, *infra*. The Second Circuit's decisions will only embolden additional governments to follow suit. The Court should not allow these intrusions on private property and the Second Circuit's dilution of the *per se* takings doctrine to be replicated nationwide.

II. This case also presents a prime opportunity for the Court to clarify its regulatory-takings jurisprudence and to place meaningful limits on governments' ability to compel private parties to foot the bill to alleviate public harms they did not cause.

"By requiring the government to pay for what it takes, the Takings Clause saves individual property owners from bearing 'public burdens which, in all fair-

ness and justice, should be borne by the public as a whole.'" *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 273-274 (2024) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). That principle requires compensation when the government regulates private property in the absence of a "cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy." *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part). The RSL violates that principle by converting New York's limited and ostensibly temporary rent- and eviction-control rules into what is effectively a permanent and sweeping affordable housing program designed to remedy social ills not caused by the property owners the RSL regulates. The Court should take this opportunity to reaffirm the prohibition on governments shifting the costs of social projects onto private parties without compensation.

This case also presents the opportunity to correct lower courts' misunderstanding of the regulatory-takings doctrine more generally. Although the Second Circuit purported to apply this Court's decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), its expansive interpretation of that decision demonstrates that, in practice, *Penn Central* has become little more than a blank check for governments to impose broad categories of costly and burdensome regulation without any realistic prospect of having to pay compensation. This Court's intervention is needed to prevent the protections of *Penn Central* from being rendered altogether toothless.

ARGUMENT

I. This Court Should Review And Reverse The Second Circuit's Dilution Of The *Per Se* Takings Rule.

Following its precedent, the Second Circuit has once again grievously erred in holding that the RSL's onerous restrictions do not effect a *per se* taking under the Fifth Amendment. By holding that a property owner can forfeit the protection of the *per se* takings doctrine simply by engaging in ordinary economic activity, the Second Circuit allowed governments to legislate the indefinite occupation of private property without compensation. Allowing that threat to hang over property owners undermines the security of property rights and discourages investment. The Court should grant review to address this "important" issue and correct the court of appeals' error. *See 74 Pinehurst*, slip op., at 1, 2 (Thomas, J., statement respecting denials of certiorari).

A. Property Owners Count On The *Per Se* Rule: Government Cannot Physically Occupy Private Property Without Paying For It.

"As John Adams tersely put it, '[p]roperty must be secured, or liberty cannot exist.'" *Cedar Point Nursery*, 594 U.S. at 147 (quoting Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851)). Our Constitution provides that security by guaranteeing just compensation when government takes private property for public use—"an affirmance of a great doctrine established by the common law for the protection of private property." 2 Joseph Story, *Commentaries on the Constitution of the United States* 547 (4th ed. 1873).

This fundamental protection—that the "government must pay for what it takes," *Cedar Point Nursery*, 594 U.S. at 148—gives property owners certainty in their ownership. For instance, businesses that own property can invest in improvements because they know that the fruits of their labors and expense will not disappear overnight through government confiscation. But that certainty would erode if government could take effective possession without paying. That is why this Court has consistently treated government-authorized physical invasions of property as *per se* takings, rather than subjecting them to the complex, fact-intensive inquiry that applies to government regulations affecting the use of private property. When it comes to outright occupation, only the *per se* rule offers property owners the robust guarantee of compensation necessary to fully secure their property rights.

1. Physical invasions of property are *per se* takings. The Second Circuit, however, held that this rule has no relevance here and instead applied this Court's regulatory-takings jurisprudence. But that body of law applies to claims that the government has taken property by "restrict[ing] an owner's ability to use his own property." *Cedar Point Nursery*, 594 U.S. at 148. This Court has subjected that type of takings claim to an "essentially ad hoc, factual inquir[y]," *Penn Cent. Transp. Co.*, 438 U.S. at 124, which requires courts to undertake "complex factual assessments of the purposes and economic effects of government actions," *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992), and to grapple with whether "a restriction on the use of property went 'too far,'" *Horne v. Dep't of Agric.*, 576 U.S. 350, 360 (2015) (citation omitted). "As one might imagine, nobody—not States, not property owners, not courts, nor juries—has any idea how to apply this

standardless standard." *Bridge Aina Le'a*, 141 S. Ct. at 731 (Thomas, J., dissenting from the denial of certiorari); *accord First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 340 n.17 (1987) (Stevens, J., dissenting) (describing regulatory-takings jurisprudence as "open-ended and standardless").[2]

As currently applied, that *ad hoc*, fact-intensive inquiry is neither predictable nor certain. Cases applying it are "among the most litigated and perplexing in current law." *E. Enters. v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). A property owner navigating that complex framework simply has no reliable way to assess the likelihood of receiving compensation. And the continued lack of clarity in this Court's regulatory-takings jurisprudence fosters a constant stream of unpredictable decisions—further increasing the price-tag for businesses seeking to vindicate their property rights.

2. In sharp contrast, this Court's *per se* takings doctrine provides a bedrock of clarity for property own-

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[2] *See also*, *e.g.*, Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn St. L. Rev. 601, 602 (2014) (describing regulatory-takings doctrine as "a compilation of moving parts that are neither individually coherent nor collectively compatible"); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 Ecology L.Q. 89, 102 (1995) (describing regulatory-takings jurisprudence as having "generated a plethora of inconsistent and open-ended formulations that have failed to make sense"); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561, 562 (1984) ("[C]ommentators propose test after test to define 'takings,' while courts continue to reach ad hoc determinations rather than principled resolutions.").

ers. Simply put: when the government "physically acquires private property for a public use"—whether by using "its power of eminent domain to formally condemn property," by "physically tak[ing] possession of property without acquiring title to it," or by "occup[ying] property" in some other way—"the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." *Cedar Point Nursery*, 594 U.S. at 147-148. In those circumstances, the *ad hoc* inquiry under the regulatory-takings doctrine "has no place," *id*. at 149; the "invariable rule[]" recognizes a taking and requires compensation. *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31-32 (2012).

The Court has repeatedly applied this "clear and categorical" rule to deem physical invasions of property to be takings. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 423-424, 434-435, 438 (1982) (holding that a law requiring landlords to allow cable companies to install equipment on their buildings was a *per se* taking); *Horne*, 576 U.S. at 355, 357-362 (holding that a law requiring raisin growers to set aside a certain percentage of their harvest was a *per se* taking); *Cedar Point Nursery*, 594 U.S. at 147-152 (holding that a law requiring property owners to allow union officials on their premises for a certain amount of time was a *per se* taking).

This "simple, *per se* rule," *Cedar Point Nursery*, 594 U.S. at 148, offers the predictability and certainty lacking in current regulatory-takings jurisprudence—serving as a "ray of light in the otherwise shadowy areas of 'takings' law." Steven N. Berger, *Access for CATV Meets the Takings Clause: The Per Se Takings Rule of* Loretto v. Teleprompter Manhattan CATV

Corp., 25 Ariz. L. Rev. 689, 703 (1983). The *per se* rule allows businesses and other property owners to invest in and manage their properties secure in the knowledge that any government invasion will require "compensat[ion] … at fair market value," *Sheetz*, 601 U.S. at 273—regardless of the scope or extent of the physical occupation, *Loretto*, 458 U.S. at 438 n.16, and "no matter how weighty the public purpose behind it," *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). And if the government refuses to pay, securing compensation is a relatively straightforward matter, without the costly complexity that a regulatory-takings challenge entails.

In short, the *per se* rule is a straightforward one: Occupation requires compensation. That clear rule enables businesses and other property owners to use, develop, and invest in their properties.

B. The Second Circuit's Constricted View Of *Per Se* Takings Dilutes Property Rights And Fosters Uncertainty.

The Second Circuit's decision and the circuit precedent it applied undermine this Court's *per se* takings rule, by refusing to apply it in precisely the context in which it is most appropriate—a physical invasion of private property. *See Cedar Point Nursery*, 594 U.S. at 147-148. The result is the degradation of that "most treasured" of property rights—"[t]he right to exclude." *Id.* at 149 (citation omitted). If not corrected, the Second Circuit's precedent will have far-reaching negative effects and will incentivize other governments to adopt similarly intrusive laws. The potential that other courts will follow the Second Circuit's lead will diminish owners' incentives to put their properties to productive use—unless this Court steps in.

1. The decision below does not seriously dispute that the RSL entails physical occupations of private property for public use. For example, the RSL's provision for the indefinite renewal of leases and its prohibition on landlords' reclaiming rental units for personal use mean that the government-favored occupants can stay permanently. Pet. 6. Yet the Second Circuit treated the RSL's restrictions as mere regulations on the *use* of property—rather than physical takings. That was largely because petitioners voluntarily entered into *limited-term* leases sometime in the past. *See* Pet. App. 6. On the Second Circuit's reasoning, that was enough to surrender the Takings Clause's protection against physical occupation—the right to exclude is gone, and on top of that, the government strictly controls the rent the property owner may charge. And those controls persist even *after* a tenant has voluntarily vacated the premises. Pet. 7. There is no exit. Even if the government-controlled rent makes the enterprise unsustainable, property owners are left with no way to regain the right to exclude. That sweeping rationale will have damaging ramifications for businesses and the security of their property rights outside this particular context—undermining the important values of predictability and clarity that the *per se* rule fosters, and relegating property owners to the costly, inefficient, and unpredictable tangle of the regulatory-takings jurisprudence.

In any jurisdiction that follows the Second Circuit's reasoning, merely entering the rental market to any degree or in any context will mean passing the point of no return. Governments will be free to intrude on virtually any rental property, both real and personal, without the "clear and categorical obligation to provide the owner with just compensation," *Cedar Point Nurse-*

ry, 594 U.S. at 147—simply because the property owner initially granted a *limited* license to a third party. It makes no difference how fleeting or restricted the invitation; under Second Circuit precedent, any property owner that invites third parties onto its property automatically has opened itself up to a *permanent* government-mandated expansion of that limited license, with no recourse to the important protections of the *per se* takings rule.

That reasoning has dangerous implications for numerous other segments of the economy besides real estate. For example, the government could require a rental car company to permanently lease its vehicles to existing or future renters, without effecting a physical taking, so long as the lessee paid some amount of rent—controlled, of course, by the government. That same dynamic could carry over to a host of other business arrangements—such as the leasing of construction equipment, cloud storage, or air rights.

All these property owners (and more) will, under the Second Circuit's rule, be deemed to have relinquished the important protections of the *per se* takings rule and opened themselves up to permanent occupation of their property—and the risk of being forced to operate at a loss for the benefit of their government-favored renters—merely for having granted a *limited* license to *select* members of the public at one point in time.

2. This Court's decisions illustrate why the Second Circuit was wrong to conclude that property owners relinquish their right to exclude unless they categorically exclude *everyone*. For example, in *Loretto* this Court held that the government effected a *per se* taking by requiring landlords to allow cable companies to in-

stall equipment on their properties. 458 U.S. at 423. Under the Second Circuit's rationale, if a building owner had allowed *any* equipment to be installed on the premises, even temporarily, the government could have mandated that it allow the cable equipment without having effecting a *per se* taking. Or consider *Cedar Point Nursery*, in which the Court found a *per se* taking where the government required an agricultural business to allow union officials on its property for up to three hours per day, 120 days a year. 594 U.S. at 143-145. By the Second Circuit's reasoning, if Cedar Point Nursery had voluntarily allowed union officials onto its premises for *one hour* a year, the government could have imposed the exact same requirement at issue in that case, but without a physical taking having occurred. Neither can be correct: "The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated." *Loretto*, 458 U.S. at 439 n.17; *see also Cedar Point Nursery*, 594 U.S. at 155 (same).

In fact, this Court has already rejected nearly identical reasoning. In *Loretto*, the Court dismissed the argument that the government's actions were not a physical taking because the landlord could avoid the regulation by exiting the rental-property market, an option that does not meaningfully exist under the RSL. 458 U.S. at 439 n.17 ("[A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."). In other words, a landlord's voluntary decision to enter the rental market does not give the government license to occupy its property for free. The Court reaffirmed that principle in *Horne*—holding that the Horne family did not forfeit a *per se* takings claim by choosing to sell raisins, rather than using their grapes for another

purpose (*e.g.*, making wine) outside the scope of the challenged government order. *See* 576 U.S. at 365. So too here: Petitioners did not relinquish the protections of the *per se* takings rule by engaging in a business the government has chosen to regulate.

3. Following the lead of *CHIP* and *74 Pinehurst*, the Second Circuit decision below relied on *Yee v. City of Escondido*, *supra*, to sidestep this Court's decisions in *Horne* and *Cedar Point Nursery*—reasoning that "neither concerns a statute that regulates the landlord-tenant relationship." Pet. App. 6, 7 (citation and internal quotation marks omitted). That is a misreading of *Yee* (Pet. 18-19), and, in any event, is irreconcilable with this Court's later decisions in *Horne* and *Cedar Point Nursery*. As those later decisions illustrate, the force of the physical takings rule does not wax and wane depending on the identity of the property owner who is the target of government confiscation. Whether the property be raisins or rental units, the rule is the same: "the Takings Clause imposes a clear and *categorical* obligation to provide the owner with just compensation" whenever "the government physically acquires private property for public use." *Cedar Point Nursery*, 594 U.S. at 147 (emphasis added).

CHIP and *74 Pinehurst* assumed that a history of government regulation in a particular area can defeat this categorical rule, but that misunderstands the function of the Takings Clause and is a recipe for diluting property rights. The Takings Clause is not a bar on government regulation; it only dictates that when government regulates in a particular way (by taking private property), it has a "clear and categorical obligation to provide the owner with just compensation." *Cedar Point Nursery*, 594 U.S. at 147. Thus, the fact of

regulation (even extensive regulation) in a particular commercial context is no reason to deem the protections of the *per se* takings rule inapplicable. For example, in both *Horne* and *Cedar Point Nursery*, the commercial activity involved had long been subject to regulation. *See Horne*, 576 U.S. at 355 (regulation of agriculture dating back to 1937); *Cedar Point Nursery*, 594 U.S. at 144 (regulation of labor relations dating back to 1975). Nonetheless, the Court found the government's efforts to invade private property to be *per se* takings, without any indication that decades of prior regulation diminished the applicability of that doctrine.

The RSL's provision for uncompensated physical invasions of petitioners' properties cannot be justified on the theory that those properties are open to the public—like the shopping center in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), and unlike in *Horne* and *Cedar Point Nursery*. The shopping center in *PruneYard* welcomed some *25,000 patrons per day*. *See* 447 U.S. at 77-78. Renting a single apartment to a particular tenant for a limited time is the exact opposite of an open invitation to the public. Indeed, if it were otherwise, this Court's decision in *Loretto* could not have come out as it did, as the plaintiff in that case owned and rented units in a five-story apartment building. 458 U.S. at 421-422.

* * *

The decision below and the circuit precedent that "dictate[d]" its outcome (Pet. App. 7) impermissibly barred property owners engaged in common forms of economic activity from receiving compensation for physical takings. That is significant not only within the Second Circuit, but throughout the country. The Second Circuit excused the RSL from the *per se* rule

based on decisions that property owners made well before the 2019 amendments to the RSL were even proposed. Thus, any property owner in a jurisdiction that *might* follow the Second Circuit's rule is already seeing the certainty of its property rights erode: remaining in the rental market today, or entering the market even as a tentative experiment, could mean living with an unwelcome tenant indefinitely. This Court should grant certiorari to prevent those harms from proliferating nationwide.

The risk of that contagion is high. As the petition explains, other jurisdictions have enacted or are considering enacting similar laws governing rental properties. Pet. 30 (collecting laws). The Second Circuit's decisions will encourage more governments to follow suit and to be even more aggressive in restricting property rights each time they do—confident that property owners wishing to obtain compensation will face the high cost and uncertainty of the existing regulatory-takings jurisprudence. The Court should grant review to ensure that those harms do not take root and the Takings Clause does not become a mere parchment guarantee.

II. The Second Circuit's Regulatory-Takings Holding Also Warrants This Court's Review.

The Second Circuit's distortion of the physical takings doctrine is reason enough to grant the petition and reverse the decision below. But the court's ruling on petitioners' regulatory-takings claim likewise warrants this Court's review, as it offers the Court a prime opportunity to provide much-needed clarity in this area of takings law and to impose meaningful limits on governments' ability to shift the cost of redressing public problems on private parties that did not cause those

harms. Granting both questions would also compel respondents to defend the complete denial of compensation here, rather than resist the *per se* holding while hinting that perhaps some future ideal plaintiff might win under *Penn Central*. Recently, in *Tyler v. Hennepin County*, 598 U.S. 631 (2023), the Court granted both questions presented (one addressing the Takings Clause and one the Excessive Fines Clause), even though the takings argument was sufficient for reversal. The Court should likewise grant certiorari on both questions here.

A. The Court Should Reaffirm That A Taking Occurs When The Government Tries To Shift The Cost Of Curing Social Problems Onto Private Entities That Did Not Cause Them.

The Takings Clause embodies the bedrock principle that the government cannot "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49; *see also Sheetz*, 601 U.S. at 273-274 (same). As Justice Scalia explained in his concurring and dissenting opinion in *Pennell v. City of San Jose*, joined by Justice O'Connor, whether a burden is "public"—and therefore one that the public must pay to alleviate—must be determined by assessing whether there is a "cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy." 485 U.S. at 20.

The RSL's draconian restrictions conspire to violate this principle. That law grants tenants and their "successors" (even non-relatives) an automatic right of renewal in perpetuity (Pet. 6); curtails landlords' ability

to reclaim their properties for personal use absent an "immediate and compelling necessity" (*id.*); dictates that landlords obtain purchase agreements from a majority of *existing* tenants before converting rental property into condominiums (*id.* at 7); and strictly limits rent increases, even to account for inflation and necessary improvements (*id.* at 8). In effect, the RSL creates a permanent affordable housing program for millions of New Yorkers and shifts the cost of that program onto individual landlords, who are simply not responsible for the market and other forces that are driving up rent. That constitutes a regulatory taking: the landlords are being forced to bear a "public burden[]," *Armstrong*, 364 U.S. at 49, which they did not create.

The principle articulated by Justice Scalia and Justice O'Connor in *Pennell* has been applied by this Court in cases that remain good law. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)—decided a year before *Pennell*—the Court addressed whether a government could condition approval of a building permit for construction of a beachfront home on the property owners' granting a public "easement to pass across a portion of their property." *Id.* at 828. The Court observed that the government could permissibly impose conditions that directly redress a harm caused by the permitted use. But the "evident constitutional propriety disappears … if the condition … utterly fails" to redress the problem caused by the property. *Id.* at 837. In that case, the Court held, the condition constitutes a taking—an effort to "obtain[] an easement to serve some valid governmental purpose, but without payment of compensation." *Id.*; *see also Dolan v. City of Tigard*, 512 U.S. 374, 381-382, 394, 396 (1994) (holding that a city violated the Takings Clause by conditioning approval of a development on the landowner's

converting part of its property into a greenway and granting the city a public recreational easement, where the proposed development did not encroach on existing greenway).

Sheetz reaffirmed that the rule of *Nollan* and *Dolan* applies equally to conditions imposed on the use of property, not just to "ad hoc" permit conditions. 601 U.S. at 271. The Court reiterated that the government may impose conditions to address a problem caused by a proposed use—*e.g.*, requiring a landowner to "deed over the land needed to widen a public road" as a condition for "a proposed development [that] will 'substantially increase traffic congestion.'" *Id.* at 274-275 (citation omitted). But when the government seeks to impose conditions on land use that are "unrelated" to the proposed use, or that are otherwise disproportionate, the imposition "amount[s] to 'an out-and-out plan of extortion,'" which the Takings Clause forbids absent the payment of compensation. *Id.* at 275 (citation omitted).

Although these cases involved unconstitutional-conditions claims, the theory of takings law underlying those decisions is the same theory embraced by Justice Scalia and Justice O'Connor in *Pennell*—a government regulation is a taking if it seeks to burden a private entity's property to alleviate a social problem not attributable in any sense to that property. That principle deserves to be restored to prominence in this Court's regulatory-takings jurisprudence.

The need for that correction is particularly pressing now, as governments across the country are engaged in renewed efforts to impose rent controls, *see* Pet. 30, and may seek to emulate the RSL specifically. The Court should grant review to ensure that its regulato-

ry-takings jurisprudence is not a dead letter and that governments do not have free rein to shift the costs of public benefits onto private parties.

B. The Second Circuit's Diminished Version Of This Court's Regulatory-Takings Jurisprudence Urgently Needs Correction.

This Court's review is also warranted to restore some clarity to the *Penn Central* analysis. The amorphousness of that line of cases has led courts to exclude vast swaths of onerous government regulation from the Takings Clause's protection. *See* pp. 7-8, *supra*. The decisions below only exacerbate those problems.

Take the Second Circuit's application of the first *Penn Central* factor—the "economic impact of the regulation on the claimant." 438 U.S. at 124. The court of appeals acknowledged that petitioners had alleged "specific facts … tending to show a negative economic impact due to the [RSL]." Pet. App. 11. Nonetheless, the court dismissed these severe economic harms on the theory that "loss of profit" and "diminution in the value of property" are insufficient—"*however serious*" they might be. Pet. App. 11 (emphasis added) (citations omitted). That rationale—that even the most devastating of economic harms is insufficient under a factor designed to assess the "economic impact" on the regulated party—guts this inquiry of any meaning. That the Second Circuit believed itself constrained to take this position by this Court's precedents only underscores the need for this Court to intervene. *See* Pet. App. 11 (quoting *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 645 (1993)).

Or consider the Second Circuit's treatment of the second *Penn Central* factor—the interference with "investment-backed expectations." 438 U.S. at 124. The court reasoned that because New York has long regulated rental properties, petitioners should "have anticipated" that "those regulations … could change yet again." Pet. App. 12 (quoting *74 Pinehurst*, 59 F.4th at 567). Yet the court simply ignored that the premise of petitioners' regulatory-takings theory is that the recent amendments to the RSL were a shift in kind, not merely degree, from the prior restrictions. *See* Pet. 22. Under the Second Circuit's theory, no matter how dramatically a new government regulation departs from the status quo, the answer is always the same in any regulated area of the economy.

The court of appeals' application of the third *Penn Central* factor—the "character of the governmental action," 438 U.S. at 124—is equally problematic. This factor is designed to differentiate between government "interference" that "can be characterized as a physical invasion" of property, rather than an effort to "adjust[] the benefits and burdens of economic life to promote the common good." *Id*. But despite the clear *physical* nature of the RSL's mandates, the Second Circuit held that the character of the RSL's restrictions nonetheless weighed *against* finding a regulatory taking merely because the RSL is "concerned with 'broad public interests.'" Pet. App. 12 (quoting *CHIP*, 59 F.4th at 555). That re-conception drains the third *Penn Central* factor of any substance. After all, most government action could be said to advance *some* important public interest—and courts typically defer to legislatures on those judgments. The Second Circuit's rationale thus twists this factor into a blank check for government regula-

tion, rather than a tool for assessing the parallels between the government's action and physical invasions.

Without this Court's intervention, the confusion in regulatory-takings doctrine will persist, and the *Penn Central* analysis will continue to be used to insulate substantial amounts of onerous government regulation from the important protections of the Takings Clause, while enabling governments to continually shift the cost of alleviating public harms onto private parties in no way responsible for the ills being redressed. The Court should grant review to correct the Second Circuit's misunderstanding of the Takings Clause's protection against uncompensated regulatory takings.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted.

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