20-3366

In the United States Court of Appeals for the Second Circuit

COMMUNITY HOUSING IMPROVEMENT PROGRAM, RENT STABILIZATION ASSOCIATION OF N.Y.C., INC., CONSTANCE NUGENT-MILLER, MYCAK ASSOCIATES LLC, VERMYCK LLC, M&G MYCAK LLC, CINDY REALTY LLC, DANIELLE REALTY LLC, FOREST REALTY, LLC,

Plaintiffs-Appellants,

v.

CITY OF NEW YORK, RENT GUIDELINES BOARD, DAVID REISS, CECILIA JOZA, ALEX SCHWARZ, GERMAN TEJEDA, MAY YU, PATTI STONE, J. SCOTT WALSH, LEAH GOODRIDGE, SHEILA GARCIA, RUTHANNE VISNAUSKAS,

Defendants-Appellees,

N.Y. TENANTS AND NEIGHBORS (T&N), COMMUNITY VOICES HEARD (CVH), COALITION FOR THE HOMELESS,

Intervenors.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF OF GREGORY S. ALEXANDER, MONICA C. BELL, ELIZABETH S. BLACKMAR, MICHAEL C. BLUMM, MATTHEW DESMOND, PAULA A. FRANZESE, DANIEL R. MANDELKER, RICHARD C. SCHRAGGER, CHRISTOPHER SERKIN, AND DANAYA C. WRIGHT AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors who study and teach in the fields of constitutional law, property law, sociology, and urban history and have expertise regarding rent stabilization laws. Given their expertise, *amici* have an interest in ensuring that the Takings Clause of the Fifth Amendment is interpreted, in accordance with its text and history, to permit New York's Rent Stabilization Law, which does not physically take any property or perform the functional equivalent of a taking. *Amici* accordingly have an interest in this case.

A full listing of *amici* appears in the Appendix.

INTRODUCTION

For a half-century, New York City's Rent Stabilization Law, N.Y.C. Admin. Code §§ 26-501 *et seq.*, as amended, and New York State's Emergency Tenant Protection Law, N.Y. Unconsol. Law tit. 23 §§ 8621 *et seq.* (McKinney) (together, "RSL"), have allowed the city and state to regulate "residential rents and evictions" while they face a "serious public emergency . . . in the housing of a considerable number of persons," N.Y.C. Admin. Code § 26-501. Specifically, the RSL, among other things, limits landlords' ability to increase rent for certain units, *id.*, and narrows the grounds for eviction, 9 N.Y.C.R.R. § 2524.3.

[1] No person or entity other than *amici* and their counsel assisted in or made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

A significant portion of New York City's population benefits from the RSL. As of 2017, the RSL applied to nearly one million apartments in the city, comprising 44.3% of the city's rental units. Selected Initial Findings of the 2017 New York City Housing and Vacancy Survey (Feb. 9, 2018), https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2017_hvs_findings.pdf.

Appellants, however, argue that the RSL, among other things, violates the Takings Clause of the Fifth Amendment, which provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The district court properly dismissed those claims, concluding that the RSL, on its face, does not effect a taking within the meaning of the Clause. Allowing the RSL to stand is consistent with the Takings Clause's text and history, and this Court should affirm.

As originally understood, the Takings Clause applied only to the direct physical appropriation of private property. The Framers who drafted the Clause understood that it would be so limited, and for decades after the Clause's adoption, the Supreme Court interpreted it as applying only to direct physical appropriations. As Justice Scalia recognized, "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992).

Toward the end of the nineteenth century, however, the Supreme Court held that the Takings Clause may also apply in cases involving the functional equivalent of a direct physical appropriation of property. Yet even in those cases, the Court was careful to cabin the Clause's application to regulations that could reasonably be considered tantamount to direct appropriations. Thus, for most of the nation's history, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Id.* at 1014 (quoting *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870), and *N. Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1879)).

The Supreme Court has recognized two categories of regulations that fit within those parameters and are thus considered takings *per se*: (1) "regulations that compel the property owner to suffer a physical 'invasion' of his property," "at least with regard to permanent invasions," *id.* at 1015, and (2) regulations that "den[y] *all* economically beneficial or productive use of land," *id.* (emphasis added). These categories "share a common touchstone," as "[e]ach aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

Regulations that do not fall within these two categories of takings *per se* are evaluated under a multifactor test established in *Penn Central Transportation Co. v.*

City of New York, 438 U.S. 104 (1978). *See Lingle*, 544 U.S. at 538-39. Under that test, a court considers, among other things, "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as the "character of the governmental action." *Penn Central*, 438 U.S. at 124.

Under the original understanding of the Takings Clause, the RSL would not have been considered a taking, and it is not a taking under the Supreme Court's and this Court's precedents. It does not effect a physical expropriation of property, nor does it effect the functional equivalent thereof by allowing a permanent physical occupation of private property or by rendering the property valueless. It also does not amount to a taking under the *Penn Central* balancing test. This Court should therefore affirm the judgment of the district court.

ARGUMENT

I. THE TEXT AND HISTORY OF THE TAKINGS CLAUSE DEMONSTRATE THAT THE CLAUSE APPLIES ONLY TO THE DIRECT APPROPRIATION OF PROPERTY OR THE FUNCTIONAL EQUIVALENT THEREOF.

For most of the nation's history, it has been understood "that the Takings Clause reache[s] only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014 (quoting *Legal Tender Cases*, 79 U.S. (12 Wall.) at 551, and *N. Transp. Co.*, 99 U.S.

at 642). The RSL therefore fully comports with the Takings Clause, as it was originally—and properly—understood.

A. The Takings Clause Was Originally Understood to Apply Only to the Direct Physical Appropriation of Property.

The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. By its terms, the Clause's scope is quite narrow: it applies only when the government takes private property, and it does not prevent such takings but rather requires the government to provide just compensation when they occur. *See First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles*, 482 U.S. 304, 314 (1987). A "taking" most naturally means an expropriation of property, such as when the government exercises its eminent domain power to physically acquire private property to build a road, military base, or park. Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. Envtl. Aff. L. Rev. 509, 515 (1998).

This plain-language interpretation of the Clause is consistent with the Founding-era understanding that the Takings Clause would prohibit only actual appropriations of property. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 782 (1995) ("[T]he Takings Clause and its state counterparts originally protected property against physical seizures, but not against regulations affecting value."). Indeed, "the

limited scope of the [T]akings [C]lause[] reflected the fact that, for a variety of reasons, members of the framing generation believed that physical possession of property was particularly vulnerable to process failure," necessitating a compensation requirement specifically for the direct appropriation of private property. *Id.*

Historical circumstances preceding the adoption of the Takings Clause support this understanding of the Clause's original meaning. Prior to the ratification of the Fifth Amendment, "there was no [federal] rule requiring compensation when the government physically took property or regulated it. The decision whether or not to provide compensation was left entirely to the political process." *Id.* at 783; *see id.* ("[T]he framers did not favor absolute protection of property rights."). Thus, during the Revolutionary War, the military regularly seized private goods without providing compensation. *See* 1 William Blackstone, *Commentaries with Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 305-06 (St. George Tucker ed., 1803) (statement by Tucker); *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 363 (Pa. 1788) (upholding uncompensated seizure of provisions from private citizens during the war).

Indeed, only two foundational documents from the colonial era recognized even a limited right to compensation for the taking of private property, and both covered only physical appropriations. Treanor, *supra*, at 785. First, the Massachusetts Body of Liberties, adopted in 1641, imposed a compensation requirement that

applied only to the seizure of personal property: "No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford." Mass. Body of Liberties § 8 (1641), *reprinted in Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* 149 (Richard L. Perry & John C. Cooper eds., 1959) (hereinafter *Sources of Our Liberties*); *see* Treanor, *supra*, at 785 n.12 ("This provision of the Body of Liberties appears to have been modelled on Article 28 of Magna Carta, which barred crown officials from 'tak[ing] anyone's grain or other chattels, without immediately paying for them in money.'" (quoting Magna Carta art. 28 (1215), *reprinted in Sources of Our Liberties* 16)).

Likewise, the 1669 Fundamental Constitutions of Carolina, which were drafted by John Locke and never fully implemented, would have mandated compensation for the direct seizure of real property. Treanor, *supra*, at 785-86. These documents sought to authorize public construction of buildings and highways, so long as "[t]he damage the owner of such lands (on or through which any such public things shall be made) shall receive thereby shall be valued, and satisfaction made by such ways as the grand council shall appoint." *Id.* at 786 (quoting Fundamental

Constitutions of Carolina art. 44 (1669), *reprinted in* 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 115 (1971)).

Although colonial governments commonly regulated land use and business operations, *see id.* at 789 (collecting examples), no colonial charter required compensation for property owners affected by those regulations—not even when the regulations affected a property's value, *id.* at 788-89; *see* John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099, 1100 (2000) ("American legislatures extensively regulated land use between the time America won its independence and the adoption of the property-protecting measures of the Constitution and the Bill of Rights."). Indeed, "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." *Lucas*, 505 U.S. at 1028 n.15. After the American Revolution, most state constitutions echoed their colonial predecessors in this respect, as "[n]one of the state constitutions adopted in 1776 had just compensation requirements" for physical takings or for regulations that affected property rights. Treanor, *supra*, at 789.

As state constitutions later began to require compensation for the taking of property, those requirements applied only to physical appropriations of property. *See id.* at 791. The Vermont constitution, for example, provided that "whenever any particular man's property is taken for the use of the public, the owner ought to

receive an equivalent in money." Vt. Const. of 1777, ch. I, art. II, *reprinted in* 6 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 3740 (Francis N. Thorpe ed., 1909) (hereinafter *The Federal and State Constitutions*). Similarly, the Massachusetts Constitution of 1780 stated that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. of 1780, part I, art. X, *reprinted in* 3 *The Federal and State Constitutions*, *supra*, at 1891. Further, the Northwest Ordinance of 1787 stated that "should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same." Northwest Ordinance of 1787, art. 2, *reprinted in Sources of Our Liberties*, *supra*, at 395. Significantly, "[i]n each case, a plain language reading of the text indicates that it protected property only against physical confiscation, and the early judicial decisions construed them in this way." Treanor, *supra*, at 791.

Ultimately, when the federal Takings Clause was added to the Constitution, "the right against physical seizure received special protection . . . because of the framers' concern with failures in the political process." *Id.* at 784. For various reasons, the Framers feared that the ordinary political process would not adequately protect physical possession of property. *Id.* at 827; *see, e.g.*, *id.* at 829-30 (explaining

how Vermont's Takings Clause and other state analogues were "designed to provide security against the type of process failure to which majoritarian decisionmaking processes were peculiarly prone"—namely that affecting "real property interests").

The statements of James Madison, who drafted the Takings Clause, "uniformly indicate that the clause only mandated compensation when the government physically took property." Treanor, *supra*, at 791; *see Lucas*, 505 U.S. at 1057 n.23 (Blackmun, J., dissenting) ("James Madison, author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government."); *accord* Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 Okla. L. Rev. 417, 420 (1994). Madison believed that physical property needed special protection in the form of a compensation requirement "because its owners were peculiarly vulnerable to majoritarian decisionmaking." Treanor, *supra*, at 847. Madison wrote, for instance, of the need for a means to protect physical property ownership separate from the political process because, "[a]s the holders of property have at stake all the other rights common to those without property, they may be the more restrained from infringing, as well as the less tempted to infringe the rights of the latter." James Madison, *Note to His Speech on the Right to Suffrage* (1821), *in* 3 *The Records of the Federal Convention of 1787*, at 450-51 (Max Farrand ed., 1911). He described "[t]he necessity of . . . guarding the rights of property," a matter that he observed "was for obvious reasons unattended to in the

commencement of the Revolution." James Madison, *Observations on the "Draught of a Constitution for Virginia" (ca. Oct. 15, 1788)*, *in* 11 *The Papers of James Madison* 287 (Robert A. Rutland et al. eds., 1977). Thus, Madison was concerned that the political process would be insufficient to preserve physical property rights, and he drafted the Takings Clause to protect against political-process failures. *See* Treanor, *supra*, at 854.

The drafting history of the Takings Clause is also consistent with this understanding of its scope. As originally drafted, the Clause read, "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." *Lucas*, 505 U.S. at 1028 n.15 (quoting Speech Proposing Bill of Rights (June 8, 1789), *in* 12 J. Madison, *The Papers of James Madison* 201 (C. Hobson et al. eds., 1979)). Although no legislative history exists to explain why a select committee, of which Madison was a member, altered the wording before the Amendment's adoption, "[i]t is . . . most unlikely that the change in language was intended to change the meaning of Madison's draft Takings Clause." Schwartz, *supra*, at 420.

As one scholar has argued, "[t]he substitution of 'taken' for Madison's original 'relinquish' did not mean that something less than acquisition of property would bring the clause into play," *id.*, because Samuel Johnson's *Dictionary*—a prominent Founding-era dictionary—defined "to take" in 1789 as, among other things, "[t]o

seize what is not given"; "[t]o snatch; to seize"; "[t]o get; to have; to appropriate"; "[t]o get; to procure"; and "[t]o fasten on; to seize," *id.* at 420-21 (quoting 1-2 Samuel Johnson, *A Dictionary of the English Language* (1755-56)). Moreover, because no one besides Madison advocated for the inclusion of a Takings Clause in the Bill of Rights, and there is no record of anyone advocating to expand the scope of Madison's original draft, there is no reason to think the final draft was meant to be more robust than the original. *See* Treanor, *supra*, at 834 ("Aside from Madison, there was remarkably little desire for any kind of substantive protection of property rights against the national government." (footnote omitted)).

Accounts from shortly after the Clause's adoption confirm that it was understood to apply only to physical appropriations. "[A]lthough 'contemporaneous commentary upon the meaning of the compensation clause is in very short supply,'" *Lucas*, 505 U.S. at 1057 n.23 (Blackmun, J., dissenting) (quoting Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 58 (1964)), an 1803 treatise recognized that the Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war," 1 Blackstone, *supra*, at 305-06. Another treatise writer observed in 1857 that "[i]t seems to be settled that, to entitle the owner to protection under [the Takings] [C]lause, the property must be actually taken in the physical sense of the word." Theodore Sedgwick, *A Treatise*

on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law 519 (1857).

Moreover, the few Supreme Court decisions prior to 1870 interpreting the Takings Clause held that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held *not* to be a taking within the meaning of the constitutional provision." *N. Transp. Co.*, 99 U.S. at 642 (emphasis added). In fact, until the last few decades of the nineteenth century, the Court steadfastly refused to extend the Clause beyond actual appropriations. In 1870, the Court affirmed that the Takings Clause "has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." *Legal Tender Cases*, 79 U.S. (12 Wall.) at 551; *see Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002) ("The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations . . . .").

B. The Supreme Court Has Since Held That the Takings Clause Also Applies to the Functional Equivalent of a Physical Appropriation of Property.

The notion that the Takings Clause may apply to government actions beyond the physical expropriation of property emerged gradually over the next century as the Supreme Court considered cases in which government action very closely resembled expropriations of property. The first of these cases, *Pumpelly v. Green Bay & Mississippi Canal Co.*, involved a state-authorized dam that flooded the petitioner's property. 80 U.S. 166 (1871). The Court noted that "[i]t would be a very curious and unsatisfactory result, if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it . . . can inflict irreparable and permanent injury to any extent," or "in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use." *Id.* at 177-78. To avoid such a result, the Court held that, "where real estate is *actually invaded* by superinduced additions of water, earth, sand, or other material, . . . so as to *effectually destroy or impair its usefulness*, it is a taking, within the meaning of the Constitution." *Id.* at 181 (emphases added). The Court made clear, however, that "[b]eyond this we do not go, and this case calls us to go no further." *Id.*

Nearly fifty years later, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court again slightly expanded the reach of the Takings Clause to

encompass regulations that it viewed as particularly oppressive. Yet the Court was once again careful to limit its newly recognized regulatory takings doctrine to instances in which the effect of a regulation is tantamount to the direct appropriation of property contemplated in the Fifth Amendment's text. *See Lingle*, 544 U.S. at 539 (noting that to bring a successful regulatory takings claim, a plaintiff must "identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain").

Mahon involved a challenge to a Pennsylvania law that prevented coal companies from mining coal that formed the support for surface-level land. 260 U.S. at 416-17. Pennsylvania law recognized this support property as a distinct property interest, and the Court stated that the Act "purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate." *Id.* at 414. The Court declared that the Pennsylvania law had "very nearly the same effect for constitutional purposes as appropriating or destroying [the estate]," *id.*, and, again relying on this analogy to an expropriation of property, declared that a regulation can be considered a taking when it "goes too far," *id.* at 415; *see Lucas*, 505 U.S. at 1014 (reiterating the "oft-cited maxim" that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" (quoting *Mahon*, 260 U.S. at 415)); *accord Tahoe-Sierra Preservation Council*, 535 U.S. at 325 n.21.

The Court concluded in *Mahon* that "[b]ecause the statute made it commercially impracticable to mine the coal, and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, . . . the statute was invalid as effecting a 'taking' without just compensation." *Penn Central*, 438 U.S. at 127-28 (describing the holding in *Mahon*); *cf. Armstrong v. United States*, 364 U.S. 40, 48 (1960) (holding that although "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense," the government's "total destruction" of the full value of certain liens constituted a "taking"); *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (explaining that if the government were to limit the height of buildings in a city "so far as to make an ordinary building lot wholly useless," such a limit would require compensation).

The task of determining what regulations were sufficiently akin to an expropriation to require compensation under the Takings Clause proved to be "a problem of considerable difficultly," however, as the Supreme Court acknowledged in *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 123; *see id.* at 124 ("[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government."). The Court explained that it primarily relies on a balancing of three factors: (1) the economic impact of the regulation, (2)

the extent the regulation interferes with "distinct investment-backed expectations," and (3) "the character of the governmental action." *Id.* Under this balancing test, no one factor is determinative, and significant diminutions in property value are generally permissible without compensation. *See id.* at 124-25.

In recent years, the Court has sought to clarify its regulatory takings doctrine, and it has continued to recognize that there are limits on applying the Takings Clause beyond direct appropriations. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court held that "a *permanent* physical occupation of property is a taking." *Id.* at 441 (emphasis added). Importantly, the *Loretto* Court "underscore[d] the constitutional distinction between a permanent occupation and a temporary physical invasion." *Id.* at 434. Similarly, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court held that a "permanent physical occupation" amounts to an unconstitutional taking "where individuals are given a *permanent and continuous* right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id.* at 832 (emphasis added).

In *Lucas v. South Carolina Coastal Council*, the Court reflected on its regulatory takings jurisprudence and explained that it has recognized two categories of regulations that are takings *per se*, regardless of the public interest furthered by the governmental action: (1) "regulations that compel the property owner to suffer a

physical 'invasion' of his property," *Lucas*, 505 U.S. at 1015—"at least with regard to permanent invasions," such as those requiring landlords to permanently place cable facilities in their apartment buildings, *id.* (citing *Loretto*, 458 U.S. at 419), and (2) regulations that "den[y] *all* economically beneficial or productive use of land," *id.* (emphasis added) (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)); *see id.* at 1017 (suggesting that the justification for the latter rule might be "that *total deprivation* of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation" (emphasis added)). The Court thus emphasized that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019. The Court in *Lucas* ultimately held that a South Carolina law that prevented the petitioner from erecting any permanent habitable structures on his land, rendering the parcels "valueless," *id.* at 1020, "accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of 'just compensation,'" *id.* at 1007 (quoting U.S. Const. amend. V).

Thus, the Supreme Court has primarily applied the Takings Clause to prevent uncompensated expropriations of physical property, and while it has held that some regulations amount to takings *per se*, it has been careful to limit that classification to regulations that are tantamount to direct expropriations because they either effect

a permanent physical invasion of property (as in *Loretto* and *Nollan*) or render it valueless (as in *Mahon* and *Lucas*). Where a challenged regulation does not fit into either of these categories, the Court applies the multifactor test articulated in *Penn Central*. *See Lingle*, 544 U.S. at 538-39.

II. ON ITS FACE, THE RSL DOES NOT EFFECT A TAKING.

Under the original understanding of the Takings Clause, as well as Supreme Court and Second Circuit precedent, the RSL does not effect a taking, and it is certainly not unconstitutional in all instances, as is required for a facial challenge. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). The RSL simply regulates how landlords can use certain property; it does not physically take any property from them. *Cf. Yee v. City of Escondido*, 503 U.S. 519, 528 (1992) ("On their face, the state and local [rent-control] laws at issue here merely regulate petitioners' *use* of their land by regulating the relationship between landlord and tenant."); *see also id.* at 528-29 ("This Court has consistently affirmed that States have broad power to regulate . . . the landlord-tenant relationship . . . without paying compensation . . . ." (quoting *Loretto*, 458 U.S. at 440)). In fact, this Court has already rejected takings challenges to the RSL on multiple occasions. *See, e.g.*,

Harmon v. Markus, 412 F. App'x 420, 422 (2d Cir. 2011); *West 95 Hous. Corp. v. NYC Dep't of Hous. Pres. & Dev.*, 31 F. App'x 19, 21 (2d Cir. 2002).

A. On Its Face, the RSL Does Not Effect a Physical Taking of Property.

As explained above, "[a] physical taking occurs when there is either a condemnation or a physical appropriation of property." *1256 Hertel Ave. Associates, LLC v. Calloway*, 761 F.3d 252, 263 (2d Cir. 2014). Neither has occurred here. Thus, "[t]his case does not present the 'classi[c] taking' in which the government directly appropriates private property for its own use." *Tahoe-Sierra Pres. Council*, 535 U.S. at 324 (second alteration in original) (quoting *Eastern Enters. v. Apfel*, 524 U.S. 498, 522 (1998)).

In fact, in *Yee v. City of Escondido*, the Supreme Court rejected a physical takings challenge to a similar ordinance regulating the landlord-tenant relationship. Under the ordinance at issue there, mobile "[p]ark owners [could] no longer set rents or decide who their tenants will be." 503 U.S. at 526. Instead, the ordinance set rents in mobile-home parks at a certain rate and required a council to review requests for rent increases. *Id.* at 524. The Supreme Court nevertheless rejected the argument that the ordinance effected a physical taking, explaining that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of the land." *Id.* at 527. "Thus whether the government floods a landowner's property, or does no more than require the landowner to suffer the

installation of a cable, the Takings Clause requires compensation if the government authorizes a compelled physical invasion of property." *Id.* (citing *Pumpelly*, 80 U.S. at 166, and *Loretto*, 458 U.S. at 419). But, the Court reasoned, the challenged rent-control ordinance "authorize[d] no such thing." *Id.*

The Court emphasized that the petitioners challenging the ordinance had "voluntarily rented their land to mobile home owners" and that, "[a]t least on the face of the regulatory scheme, neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so." *Id.* at 527-28. Thus, "no government has required any physical invasion of petitioners' property." *Id.* at 528; *see Fed. Home Loan Mortg. Corp. v. N.Y.S. Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 47-48 (2d Cir. 1996) ("*FHLMC*") ("[W]here a property owner offers property for rental housing, the Supreme Court has held that government regulation of the rental relationship does not constitute a physical taking."). The same is plainly true here, as the RSL merely regulates landlord-tenant relationships into which landlords have voluntarily entered.

Appellants in this case nevertheless rely heavily on dicta from *Yee*, which suggested 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." 503 U.S. at 528. They contend that "[t]he RSL presents that 'different case,' because it makes it virtually impossible for an

owner to change the property's use." Appellants' Br. 17. This argument should fail for two reasons.

First, appellants' assertion is factually incorrect. Under the RSL, as amended, landlords retain the ability to recover possession of property for their own occupancy, N.Y.C. Admin. Code § 26-511(b)(9)(b); to evict tenants for cause, including nonpayment of rent, 9 N.Y.C.R.R. § 2524.3; to demolish a building after certain conditions are met, *id.* § 2524.5(a)(2); to withdraw a unit from rent stabilization for commercial use, *id.* § 2524.5(a)(1)(i); and to withdraw a building from rent stabilization where it would be impracticable to redress certain building-code violations, *id.* § 2524.5(a)(1)(ii). In other words, under the RSL, no landlord is required to rent out her property in perpetuity—and certainly not *all* landlords are locked into such a scheme, as would be required to show that the RSL, on its face, effects a physical taking.

Second, even if it were true—which it is not—that the RSL makes it "virtually impossible" for landlords to change their property's use, that would still be insufficient to state a claim that the RSL, on its face, effects a physical taking. Appellants' assertion fails to satisfy the requirement that "*no set of circumstances* exists under which the [challenged a]ct would be valid." *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 595 (2d Cir. 1993) (alteration in original) (quoting *Gen'l Elec. Co. v. N.Y. State Dep't of Labor*, 936 F.2d 1448, 1456 (2d Cir. 1991)); *accord Salerno*, 481 U.S.

at 745. Indeed, even appellants do not suggest that it is *always* "impossible for an owner to change the property's use," *see* Appellants' Br. 17 (describing it as "*virtually* impossible for an owner to change the property's use" (emphasis added)), which indicates that at least some owners can change their property's use and that the law is therefore valid in at least some circumstances. Thus, the RSL does not effect a physical taking—much less do so on its face.

B. On Its Face, the RSL Does Not Effect a Regulatory Taking *Per Se*.

For the same reasons, the RSL does not fit within the first category the Supreme Court has recognized of *per se* regulatory takings because it does not "compel the property owner to suffer a physical 'invasion' of his property . . . (at least with regard to [a] permanent invasion[])," *Lucas*, 505 U.S. at 1015. As explained above, the RSL does not require owners to rent out their property or to continue renting in perpetuity. It therefore does not compel a permanent physical invasion of an owner's property, like a regulation requiring the permanent placement of cables in apartment buildings. *Id.* (citing *Loretto*, 458 U.S. at 419).

The RSL also does not fit within the second category of *per se* regulatory takings because it does not deprive landlords of "all economically beneficial or productive use of [their] land." *Id.* Far from it. Under the RSL, landlords continue to charge and collect rent from tenants for use of their property. Even if they cannot charge as much in rent as they would without the RSL, they are hardly deprived of

"*all* economically beneficial uses" of their property, as is required for a *per se* taking. *Id.* at 1019. Indeed, landlords retain the ability to evict tenants for cause, including nonpayment of rent, 9 N.Y.C.R.R. § 2524.3, and to apply for a hardship exemption if the rent guidelines do not afford a sufficient income, N.Y.C. Admin. Code 26-511(c)(6-a). Thus, the RSL does not render landlords' property "economically idle," *Lucas*, 505 U.S. at 1019—and it certainly does not deprive *every* landlord of *all* economically viable use of their property, as is necessary to state a claim that the RSL on its face effects a taking *per se*.

C. On Its Face, the RSL Does Not Effect a Regulatory Taking Under *Penn Central*.

Finally, the RSL does not effect a regulatory taking under the multifactor balancing test set forth in *Penn Central*, which examines: (1) the economic impact of the regulation, (2) the extent the regulation interferes with "distinct investment-backed expectations," and (3) "the character of the governmental action." 438 U.S. at 124.

Critically, the sort of sweeping facial challenge advanced here cannot satisfy the *Penn Central* test, as that test requires courts to engage in "ad hoc, factual inquiries," *id.*, that depend primarily "upon the particular circumstances of each case," *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *see Yee*, 503 U.S. at 523 (explaining that the *Penn Central* analysis "necessarily entails complex factual assessments of the purposes and economic effects of government actions");

Dinkins, 5 F.3d at 597 ("[W]hether a taking has occurred depends not only on a legal interpretation of takings jurisprudence, but also on a variety of financial and other information unique to each landlord."). In contrast with that fact-intensive inquiry, "[t]o succeed in a typical facial attack, [appellants] would have to establish that no set of circumstances exists under which [the RSL] would be valid, or that the statute lacks any plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472 (2010) (internal quotation marks and citations omitted). As the district court aptly put it, "[s]imply to apply [*Penn Central*'s] 'ad hoc' factors to the instant *facial* challenge is to recognize why the RSL is not generally susceptible to such review." SPA-21.

To start, under the first *Penn Central* factor, this Court must assess the economic impact of the RSL by "compar[ing] the value that has been taken from the property with the value that remains in the property," *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987), an assessment that illustrates the fact-intensive nature of the *Penn Central* analysis. Appellants have alleged in broad terms that "[r]ents charged in stabilized units are, on average, 25% lower than market rents," and that "rent-stabilized properties are worth 25% to 50% less than similar properties with market-rate units." Appellants' Br. 49, 50. These vague allegations, covering a wide range of percentages, reveal that any diminution in value will vary greatly from one property to another, so appellants have failed to establish that there

is "no set of circumstances," *Salerno*, 481 U.S. at 745, in which the RSL applies in a constitutional manner. Moreover, "the inability of [owners] to receive a reasonable return on their investment by itself does not, as a matter of law, amount to an unconstitutional taking." *Park Ave. Tower Assocs. v. City of New York*, 746 F.2d 135, 138 (2d Cir. 1984); *see Bowles v. Willingham*, 321 U.S. 503, 517 (1944) (holding that the mere reduction of property value as a result of regulation does not constitute a taking); *cf. FHLMC*, 83 F.3d at 48 (rejecting an as-applied challenge to an earlier iteration of the RSL because "[a]lthough [the particular property owner] will not profit as much as it would under a market-based system, it may still rent apartments and collect the regulated rents").

Appellants also fail to plausibly allege that the RSL substantially interferes with their "distinct investment-backed expectations" under the second *Penn Central* factor, another fact-intensive requirement. *Penn Central*, 438 U.S. at 124. The RSL in no way interferes with appellants' "primary expectation concerning the use of [their property]"—that is, their expectation to make regulated apartments available for residential use in exchange for the payment of rent. Indeed, the complaint does not assert that any of the landlord appellants obtained their properties before the enactment of New York City's 1969 RSL, *see* Compl. ¶¶ 18-24, nor does it plausibly allege any means by which the 2019 amendments "subject their properties to a use which they neither planned nor desired," *FHLMC*, 83 F.3d at 48 (alterations omitted)

(quoting *Seawall Assoc. v. City of New York*, 542 N.E.2d 1059, 1065 (N.Y.), *cert. denied*, 493 U.S. 976 (1989)). To the extent that some landlord appellants bought their property earlier than others, or perhaps did so with varying, but reasonable, expectations, that merely illustrates why their sweeping facial challenge to the RSL cannot be sustained under the fact-intensive *Penn Central* analysis.

Finally, the third *Penn Central* factor assesses the "character of the governmental action." *Penn Central*, 438 U.S. at 124. Consistent with the text and history of the Takings Clause, "[a] 'taking' may more readily be found when the interference with property can be characterized as a *physical invasion* by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (emphasis added) (internal citation omitted). The RSL fits squarely into the latter category and does not effect a taking.

Appellants argue that the "RSL results in a physical invasion by saddling owners with non-removable tenants and substantially eliminating owners' rights to determine the use of their property and even to use it themselves." Appellants' Br. 47. But that argument reflects a gross mischaracterization of the RSL, even after the 2019 amendments. As discussed earlier, *see supra* at 22, landlords retain the ability to recover possession of property for their own occupancy, N.Y.C. Admin. Code § 26-511(c)(9)(b); to evict tenants for cause, including nonpayment of rent, 9 N.Y.C.R.R. § 2524.3; and to engage in a variety of alternative uses of their property,

provided that they comply with the governing law. "Put bluntly, no government has required any physical invasion of [appellants'] property," *Yee*, 503 U.S. at 528; rather, the government merely requires appellants to play by democratically adopted rules that are regulating a market that they voluntarily entered.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 6,724 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify that on April 23, 2021, the foregoing document was filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit, using the appellate CM/ECF system.

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