No. 20-3366

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, AND SHEILA GARCIA, IN THEIR OFFICIAL CAPACITIES AS CHAIR AND MEMBERS, RESPECTIVELY, OF THE RENT GUIDELINES BOARD, AND RUTHANNE VISNAUSKAS, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF NEW YORK STATE HOMES AND COMMUNITY RENEWAL, DIVISION OF HOUSING AND COMMUNITY RENEWAL, *Defendants-Appellees,*

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

MOTION FOR LEAVE TO FILE BRIEF FOR AMICUS CURIAE NEW YORK STATE ASSOCIATION OF REALTORS® IN FAVOR OF APPELLANTS SUPPORTING REVERSAL

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Dated: January 22, 2021

Attorneys for Amicus Curiae New York State Association of Realtors

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, amicus curiae New York State Association of REALTORS®, Inc. certifies that it has no parent corporation and no corporation or publicly held entity owns 10% or more of its stock.

MOTION FOR LEAVE TO FILE BRIEF FOR AMICUS CURIAE NEW YORK STATE ASSOCIATION OF REALTORS® IN FAVOR OF APPELLANTS SUPPORTING REVERSAL

Pursuant to Federal Rule of Appellate Procedure 29(a)(3) and Second Circuit Rule 27.1, the New York State Association of REALTORS®, Inc. ("NYSAR") hereby moves for leave to file a brief as *amicus curiae* in support of Plaintiffs-Appellants and reversal of the judgment below.

1. NYSAR has sought consent for this filing from the parties. Counsel for Defendants-Appellees City of New York, Rent Guidelines Board, David Reiss, Cecilia Joza, Alex Schwarz, German Tejeda, May Yu, Patti Stone, J. Scott Walsh, Leah Goodridge, and Sheila Garcia, in their Official Capacities as Chair and Members, Respectively, of the Rent Guidelines Board, have informed NYSAR that their clients consent to this *amicus* filing.

Counsel for Defendant-Appellee Ruthanne Visnauskas, In Her Official Capacity As Commissioner of New York State Homes and Community Renewal, Division Of Housing And Community Renewal, have informed NYSAR that their client has no objection to this *amicus* filing.

Counsel for Intervenors N.Y. Tenants And Neighbors (T&N), Community Voices Heard (CVH), and Coalition For The Homeless, have informed NYSAR that their clients consent to this *amicus* filing.

2. NYSAR and its members have a direct and substantial interest in this appeal. NYSAR is a not-for-profit trade organization representing more than 60,000 of New York State's real estate professionals. NYSAR advocates for REALTORS® and their consumers, seeks to elevate professional competence, advances local board collaboration, and promotes the value of realtor membership and engagement.

NYSAR's members are involved in all aspects of the residential and commercial real estate industries. Its membership, composed of residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others, engages in all aspects of the real estate industry. Working for New York's property owners, NYSAR provides a forum for professional development among its members and educates the public and government for the purpose of promoting the right to own real property.

As a consistent advocate of property rights, NYSAR has a keen interest in the ability of property owners to exercise the right to use their

property free from unnecessary or inappropriate government intervention. Many NYSAR members own real property subject to New York's Rent Stabilization Law, and thus are directly affected by this case. NYSAR members also represent buyers and sellers of rent-stabilized properties and are harmed by the negative impact of the Rent Stabilization Law on the value of properties, as owners are unable to realize the full free market potential for rents.

3. NYSAR believes that the attached brief will aid the Court's review by highlighting the physical occupation of private property effected by the New York Rent Stabilization Law ("RSL"). The RSL is markedly different from typical "rent control" statutes that merely limit the amount landlords may charge their tenants by setting a cap on rent and subsequent increases. The RSL, which governs nearly one million apartments in New York City, goes much further than merely controlling rent. It prohibits landlords from deciding who may occupy their property. With limited exceptions, the RSL requires landlords to renew the leases of their tenants and the tenants' successors (who are strangers to the landlords), allowing them to stay in perpetuity.

The RSL also prevents owners from taking possession of their own property. Regardless of the circumstances, at least 80% of every owner's property subject to the law is completely off limits. An owner may recover possession of one—and only one—dwelling unit of the property for the owner's use as a primary residence.

In addition, the RSL denies property owners the right to freely dispose of their property. They cannot simply walk away from the rental market, no matter how severely the RSL interferes with their business. For instance, unless the building is a safety hazard, the owner cannot withdraw the property from the residential rental market except to use it in connection with a business that he or she owns. The owner may not use the property as a commercial rental or simply let it stand empty. Even owners wishing to demolish their buildings cannot simply decline to renew the tenants' leases; rather, they must pay to relocate the tenants *and* pay a stipend for up to six years to make up any difference in rent.

The attached brief shows that these restrictions impose a physical taking on the property of owners subject to the RSL. This is not to say that a local government may not take measures to accomplish the broader social purpose of ensuring occupancy of rental properties. Local

governments enact public assistance measures all the time. But if the government singles out one small segment of the population – property owners – to bear the costs of social assistance measures, it must pay the property owners compensation under the Takings Clause.

CONCLUSION

The motion for leave to file the attached *amicus* brief should be granted.

Dated: January 22, 2021

By: /s/ *Jonathan S. Massey*

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CERTIFICATE OF COMPLIANCE

The foregoing motion has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook 14-point font and contains 793 words as determined by Microsoft Word, excluding the parts of the brief exempted by 27(d)(2) of the Federal Rule of Appellate Procedure, and thus complies with the typeface, typestyle, and type-volume requirements set forth in Rule 27(d) of the Federal Rules of Appellate Procedure.

Dated: January 22, 2021

/s/ Jonathan S. Massey
Jonathan S. Massey

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2021, I electronically transmitted this Motion to the Clerk of the Court using the Court's ECF system. I further certify that all counsel of record are being served with a copy of this Brief by electronic means via the Court's ECF system.

/s/ Jonathan S. Massey
Jonathan S. Massey

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United States Court of Appeals for the Second Circuit

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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INTEREST OF AMICUS CURIAE[1]

The New York State Association of REALTORS®, Inc. ("NYSAR") is a not-for-profit trade organization representing more than 60,000 of New York State's real estate professionals. NYSAR advocates for REALTORS® and their consumers, seeks to elevate professional competence, advances local board collaboration, and promotes the value of realtor membership and engagement.

NYSAR's members are involved in all aspects of the residential and commercial real estate industries. Its membership, composed of residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others, engages in all aspects of the real estate industry. Working for New York's property owners, NYSAR provides a forum for professional development among its members and educates the public and government for the purpose of promoting the right to own real property.

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[1] Counsel for the parties have not authored this brief. The parties and counsel for the parties have not contributed money that was intended to fund preparing or submitting the brief. No person other than the amicus curiae contributed money that was intended to fund preparing or submitting this brief.

As a consistent advocate of property rights, NYSAR has a keen interest in the ability of property owners to exercise the right to use their property free from unnecessary or inappropriate government intervention. Many NYSAR members own real property subject to New York's Rent Stabilization Law, and thus are directly affected by this case. NYSAR members also represent buyers and sellers of rent-stabilized properties and are harmed by the negative impact of the Rent Stabilization Law on the value of properties, as owners are unable to realize the full free market potential for rents.

INTRODUCTION AND SUMMARY OF ARGUMENT

Many observers might assume that a typical "rent control" statute merely limits the amount landlords may charge their tenants by setting a cap on rent and subsequent increases. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 529 (1992) ("Ordinary rent control often transfers wealth from landlords to tenants by reducing the landlords' income and the tenants' monthly payments."). However, the New York Rent Stabilization Law ("RSL"),[2] which governs nearly one million apartments in New York

[2] The New York Rent Stabilization Laws are contained in various statutes and administrative regulations. *See, e.g.,* N.Y. Unconsol. Law tit. 23 §§

City, goes much further than merely controlling rent. Tellingly, in *Yee*, the Supreme Court included a critical caveat: "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. That is essentially what the RSL compels.

For instance, the RSL prohibits landlords from deciding who may occupy their property. With limited exceptions, the RSL requires landlords to renew the leases of their tenants and the tenants' successors (who are strangers to the landlords), allowing them to stay in perpetuity. N.Y. Unconsol. Law § 26-511(c)(9) (McKinney); 9 NYCRR §§ 2520.6, 2524.4.

The RSL also prevents owners from taking possession of their own property. Regardless of the circumstances, at least 80 percent of every owner's property subject to the law is completely off limits. An owner may recover possession of one—and only one—dwelling unit of the property

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26-501 *et seq*. (McKinney); N.Y. Unconsol. Law tit. 23 §§ 8621 *et seq*. (McKinney); 9 NYCRR §§ 2520.1 *et seq*. For convenience, this brief refers to these measures by the singular "Rent Stabilization Law" or "RSL."

for the owner's use as a primary residence, no matter the property's size. *See* N.Y. Unconsol. Law § 26-511(c)(9) (McKinney). And even that right applies only in limited situations: where the owner is a natural person, where the tenant has not occupied the unit for 15 years or more, where the owner can arrange equivalent or better housing for any tenant who is 62 or disabled, and where the owner can show "immediate and compelling necessity" for occupying the property. *See* 9 NYCRR § 2104.5(c)(2).

If that were not enough, the RSL denies property owners the right to freely dispose of their property. They cannot simply walk away from the rental market, no matter how severely the RSL interferes with their business. For instance, unless the building is a safety hazard, the owner cannot withdraw the property from the residential rental market except to use it in connection with a business that he or she owns. *See* 9 NYCRR § 2524.5. The owner may not use the property as a commercial rental or simply let it stand empty. An owner cannot convert a building to a cooperative or condominium without the approval of 51 percent of the tenants. 2019 Sess. Law News of N.Y. Ch. 36, pt. I, § 2 (S. 6458) (McKinney). And owners wishing to demolish their buildings cannot

simply decline to renew the tenants' leases; rather, they must pay to relocate the tenants *and* pay a stipend for up to six years to make up any difference in rent. 9 NYCRR § 2524.5.

These restrictions impose a physical taking on the property of owners subject to the RSL. A taking occurs when the government authorizes a "physical occupation" of the property that eliminates the right to "possess, use and dispose" of the occupied space. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). That is precisely what the RSL does.

First, the RSL deprives a property owner of the right to possess the occupied space. Owners cannot possess over 80 percent of their own property, and even the right of a landlord to occupy one unit in a building is heavily circumscribed.

Second, the RSL provides for the indefinite physical occupation of the property. A fundamental right of property ownership is the right to exclude others from the property. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Yet the RSL tramples that right, requiring owners to continue to lease their property to a tenant, and even to a stranger who is the tenant's successor.

Third, the RSL tramples the right to dispose of one's property. Any effort to sell the property merely transfers the physical occupation with it. *Loretto*, 458 U.S. at 436. And the RSL throws up so many roadblocks to any effort to withdraw from the rental market (including demolishing the building) that any such option is virtually nonexistent.

The district court's decision to the contrary is fundamentally flawed. In the district court's view, any amount of physical intrusion is not a taking if the owner retains title to the property and can sell it. But that rationale conflicts directly with a wide range of Supreme Court precedent, in cases like *Loretto*, *Kaiser Aetna*, and other decisions repeatedly finding physical takings even though the property owner retained title and the right to sell. *See, e.g., United States v. Causby*, 328 U.S. 256, 265, 267 (1946); *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825, 832 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994). And the district court's reliance on previous decisions upholding rent control ordinances fails to account for more recent judicial precedent and significant changes in the RSL.

This is not to say that a local government may not take measures to accomplish the broader social purpose of ensuring occupancy of rental

properties. Local governments enact public assistance measures all the time. But if the government singles out one small segment of the population – property owners – to bear the costs of social assistance measures, it must pay the property owners compensation under the Takings Clause. Thus, the New York Court of Appeals highlighted the constitutional flaw in the RSL when it held that an interest in a rent-stabilized lease is a "local public assistance benefit" sufficient to warrant exemption from bankruptcy laws. *In re Santiago-Monteverde*, 22 N.E.3d 1012, 1015-17 (N.Y. 2014). That description of the RSL as a public welfare program underscores the need for just compensation. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Although the government may implement programs designed to support the public welfare — Social Security, public schools, medical care for the indigent — those programs are usually paid for from the public fisc: the burden is shared by everyone. No matter how noble the end, the

Constitution still constrains the means the government may choose. Hence, the need for judicial action is acute. "In any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1893). "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Id.* at 325 (internal quotation marks and citation omitted).

ARGUMENT

I. The RSL Effects A Physical Taking.

Physical occupation of property implicates the heart of the Fifth Amendment's prohibition of governmental takings without just compensation. However one might view the effect of a regulation on the use of property, "people still do not expect their property, real or personal, to be actually occupied or taken away." *Horne v. Dep't of Agriculture*, 576 U.S. 350, 361 (2015). Indeed, such physical occupation is a *per se* taking. *Loretto*, 458 U.S. at 426 ("a permanent physical occupation authorized by

government is a taking without regard to the public interests that it may serve").

Loretto involved a New York law which proscribed a trespass action by landlords against cable TV companies for placing their equipment upon the landlords' buildings, in exchange for a nominal $1 fee. The law effectively operated in the same way as the RSL, by authorizing third parties (in *Loretto*, cable companies rather than tenants) to occupy a landlord's property. The primary difference between *Loretto* and this case is that, in *Loretto*, the physical invasion was tiny (only a few cubic feet), and involved a small amount of rooftop space for which the landlord had no alternative use. Absent the cable equipment, the rooftop space would have remained unoccupied. Moreover, the cable equipment in *Loretto* did not destroy or impair the value of the apartment building, but rather enhanced it by making the apartments more attractive to tenants.

None of these features justified the intrusion into the landlord's property. *Loretto* drew a clear line: "physical invasion cases are special." *Id.* at 432. The *Loretto* Court stated that a *per se* taking occurs when the government authorizes a third party to "'regularly' use, or 'permanently' occupy, . . . a thing which theretofore was understood to be under private

ownership." *Id.* at 427 n.5 (internal quotation marks and citation omitted). That is exactly what the RSL does. A physical occupation, even of personal property, is "of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Horne*, 576 U.S. at 362, *quoting Loretto*, 458 U.S. at 432.

Just as in *Loretto*, the RSL "chops through the bundle [of property rights], taking a slice of every strand." 458 U.S. at 435. The *Loretto* Court explained that property rights consist of the rights to "possess, use and dispose" of the property, concluding: "[t]o the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights." *Id.* (emphasis in original).

The *Loretto* Court's description of precisely how the bundle of rights was taken in that case applies with full force here. The *Loretto* Court explained that "the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space." *Id.* In addition, "the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property." *Id.* at 436.

The RSL imposes the same restrictions found to constitute a physical taking in *Loretto*. An owner subject to the RSL loses the right to possess over 80 percent of the property (far more than the few cubic feet at issue in *Loretto*, which would have remained unoccupied in any event). As noted, the RSL permits occupation of only one unit in each building for the owner's own use. N.Y. Unconsol. Law § 26-511(c)(9)(b) (McKinney); *see Sassouni v. Adams*, 119 N.Y.S.3d 828 (N.Y. Civ. Ct. 2019) (owner who previously recovered a unit in a building for personal use could not recover a second unit); *Fried v. Lopez*, 106 N.Y.S.3d 591, 595 (N.Y. Civ. Ct. 2019), *reargument denied*, 120 N.Y.S.3d 715 (N.Y. Civ. Ct. 2020) (owner could not recover all apartments in a building to convert it to a private home for personal use). In fact, most owners lose far more. In a 6-unit building (the smallest subject to the RSL), the owner cannot occupy 5 of the units (or 83 percent). The percentage increases enormously the larger the building.

In fact, most owners have no right at all to occupy even one unit of their own property. If the owner holds title to the property through a corporate form (as many landlords do), there is no right to occupy the property at all. *See 1077 Manhattan Assocs., LLC v. Mendez*, 798

N.Y.S.2d 714 (App. Term 2004) ("[O]nly a natural person and not a corporation can recover an apartment for personal use . . . even when the principal of the corporation is its sole stockholder."). And if the property is owned by more than one individual, only one of the multiple owners can occupy a unit for personal use. N.Y. Unconsol. Law § 26-511(c)(9)(b) (McKinney). A second or third owner has no rights whatsoever.

The RSL also denies all owners the right to occupy a unit if the tenant has been occupying the unit for fifteen years. *See id.* Nor can an owner seek to occupy the unit of a tenant who is over 62 or disabled without offering to provide "an equivalent or superior housing accommodation at the same or lower stabilized rent in a closely proximate area." *Id.*

And even if a single, non-corporate property owner wishes to occupy the tiny fraction of his own property as a personal residence that the State permits—provided the tenant whose lease is not renewed has been there less than 15 years, is not 62, and is not disabled—the landlord still cannot live in the unit without demonstrating a "immediate and compelling necessity" for doing so. 9 NYCRR § 2104.5(c)(2).

In addition, the RSL deprives the owner of the right to make any "nonpossessory use of the property," *Loretto*, 458 U.S. at 436, by requiring owners to renew the leases of tenants or their successors in perpetuity, without the ability to exclude them. The RSL requires that a property owner allow people who are otherwise strangers — lessees — to occupy her or his property. Indeed, this is the core of New York's landlord-tenant real property law: "The landlord may recover a reasonable compensation for the use and *occupation* of real property." N.Y. Real Prop. Law § 220 (McKinney) (emphasis added). This occupation is much larger than the cables and boxes at stake in *Loretto*, 458 U.S. at 422, and involves real property, not the personal property addressed by *Horne*, 576 U.S. at 361-62.

Under the RSL, an owner must renew a lease except under specific conditions: the building is to be demolished, the owner wishes to occupy the unit her- or himself, or the owner is a charitable or educational public institution using the unit for specific purposes. N.Y. Unconsol. Law § 26-511(c)(9) (McKinney). And, as noted, the RSL requires the owner to permit the tenant's successor to occupy the property. Under ordinary landlord-tenant law, the owner cannot enter the leased apartment

("interfere[] with the quiet enjoyment of the leased premises") except under particular circumstances, N.Y. Real Prop. Law § 235 (McKinney), and is otherwise deprived of the use of that part of her or his property except as a rental unit.

The RSL thus deprives the owner of the "power to exclude the occupier from possession and use of the space." *Loretto*, 458 U.S. at 435. The right to exclude others is "one of the most treasured strands" of the bundle of property rights. *Loretto*, 458 U.S. at 435-36; *see also Kaiser Aetna v. United States,* 444 U.S. at 179-80 ("the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.").

Loretto's reference to "permanent" occupation in no way requires that the invasion last forever. In *Loretto* itself, the physical occupation lasted only "[s]o long as the property remains residential and a CATV company wishes to retain the installation." 458 U.S. at 439. "Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable." *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty., Cal.*, 482 U.S. 304, 318 (1987) (internal

quotation marks and citation omitted). The Supreme Court has made clear that "temporary" takings "are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.; see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 631 (1952) (Douglas, J., concurring) ("though the seizure is only for a week or a month, the condemnation is complete and the United States must pay compensation for the temporary possession"); *United States v. General Motors Corp.*, 323 U.S. 373, 380 (1945) ("The right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value.").

As one scholar as noted, "[v]ery little in property law is 'permanent' in the sense of lasting forever. What *Loretto* seems to have had in mind by a permanent occupation, with the benefit of later clarifying decisions, is governmental action that amounts to the imposition of an easement of indefinite duration." Thomas W. Merrill, *The Character of the Governmental Action*, 36 Vt. L. Rev. 649, 658 (2012). That is precisely the case here.

Nor does it matter that a private citizen rather than the government occupies the property. "A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." *Loretto*, 458 U.S. at 432 n.9. Indeed, "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property." *Id*. at 437 (emphasis in original). To require "that the owner permit another to exercise complete dominion literally adds insult to injury." *Id*. That aptly describes the RSL.

Finally, the *Loretto* Court observed that even though the owner retained the "bare legal right" to sell the property, "the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Loretto*, 458 U.S. at 436. That is the case here. If an owner sells property subject to the RSL, the property remains subject to the same requirements: tenants and their successors may stay in perpetuity and the new owner may not occupy more than one unit of his or her own property.

Because of the ongoing physical occupation and the inability to exclude others, the owner "thus lose[s] the entire 'bundle' of property rights in the [apartment spaces]—'the rights to possess, use and dispose of' them." *Horne*, 576 U.S. at 361-62, *quoting Loretto*, 458 U.S. at 435. Accordingly, the RSL imposes a physical taking that requires just compensation.

II. The District Court's Rationale For Finding No Physical Taking Is Inconsistent With Supreme Court Precedent.

The district court reasoned that there could be no physical taking because landlords have not lost the *entire* bundle of property rights. According to the district court, property owners "retain the first and third strands" of the bundle of property rights, because they retain title to their property and may sell it. *See* JA 524.

The district court's rationale cannot be squared with *Loretto*. As the Court held there, "even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." 458 U.S. at 436. And in *Horne*, the Supreme Court explained: "in *Loretto*, we held that the installation of a cable box on a small corner

of Loretto's rooftop was a *per se* taking, even though she could of course still sell and economically benefit from the property." *Horne*, 576 U.S. at 363.

Indeed, the district court's rationale would require the Court to rewrite a century of takings jurisprudence. Numerous cases have found physical takings even though the property owner retained title and the right to sell the property. *See, e.g., Causby*, 328 U.S. at 265, 267 (intermittent passage of low-level flights was a physical taking); *Nollan*, 483 U.S. at 832 (easement for beach access); *Dolan*, 512 U.S. at 384 (easement for public greenway).

At bottom, the district court's rationale reflects a fundamental misunderstanding of how the takings analysis approaches the deprivation of strands in the "bundle of rights." The district court appears to have held that a restriction is not a physical taking unless it deprives the owner of every strand in the bundle of property rights. *See* JA 523-24.

But the Supreme Court has repeatedly found physical takings when only one strand of the bundle of rights—the right to exclude others—has been deprived. In *Kaiser Aetna*, for instance, the Supreme Court held that

the federal government imposed a physical taking when it established a navigational servitude requiring a corporation to permit public access to a marina on a pond it leased. *See* 444 U.S. at 179-80. The Court held that "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Id.*

In *Nollan*, 483 U.S. at 832, the Supreme Court held that an easement allowing beach access as a condition for a building permit amounted to a "permanent physical occupation" because "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." The deprivation of the right to exclude others was enough, even though the owner retained title, the right to use the property, and the ability to sell it.

And in *Dolan*, 512 U.S. at 384, the Court held that the city could not condition a building permit upon the dedication of an easement for public use on a strip of the land. Citing *Nollan*, the Court noted that "[w]ithout question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use . . ., a taking would have

occurred." 512 U.S. at 384. The Court explained that "[s]uch public access would deprive petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id*. (quoting *Kaiser Aetna,* 444 U.S. at 176).

The district court's rationale would permit the government to completely eliminate the right of the owner to exclude others from his property, as long as the owner's title remained intact. As *Kaiser Aetna, Nollan* and *Dolan* make clear, however, the loss of the right to exclude *itself* can be sufficient to constitute a physical taking, even if the other strands of the bundle remain intact. In fact, the dissent in *Dolan* criticized the Court for finding a physical taking when "a single strand—the power to exclude—in the bundle of rights" had been impaired. 512 U.S. at 409 (Stevens, J., dissenting).

The district court also failed to appreciate that a taking may be found without the complete deprivation of each strand of the bundle. It is sufficient if the government takes "a slice of every strand." *See Loretto*, 458 U.S. at 435. That is what happened in *Loretto*, and that is what the RSL does here.

The RSL chops through the bundle entirely, at least as much if not more than the requirement to permit the installation of cable equipment did in *Loretto*. In *Loretto* only a small portion of the owners' property was affected. Yet here an owner must permit the indefinite occupancy of over 80 percent of the property, with no ability to reoccupy it for personal use. And the owner loses the right to exclude others, along with the right to sell the property free from these encumbrances.

The district court's reliance on *Andrus v. Allard*, 444 U.S. 51 (1979) is misplaced. In *Andrus* there was no physical invasion of the plaintiffs' property (eagle feathers). As the Court in *Horne* explained, the plaintiffs in *Andrus* "retained the rights to possess, donate, and devise their property." *Horne*, 576 U.S. at 363-64.

Nor did *Andrus* create a *per se* rule that there is no physical taking unless all strands of the "bundle" of rights have been eliminated. The Court merely held that the deprivation must be viewed in the aggregate, and "the denial of one traditional property right does not *always* amount to a taking ... [a]t least where an owner possesses a full 'bundle' of property rights." *Andrus*, 444 U.S. at 65-66 (emphasis added). Nothing in

Andrus detracts from the clear import of *Loretto*, *Kaiser Aetna*, *Nollan*, and *Dolan*.

III. The RSL Cannot Be Saved By The Theory That Property Owners "Acquiesced" To The Physical Occupation.

The RSL's physical taking cannot be excused on the theory that property owners somehow acquiesced in the violation of their constitutional rights by agreeing to rent their properties in the first place or by purchasing a building subject to the RSL. The district court properly rejected that argument. JA 525-26.

Any such "acquiescence" theory could have been raised in any of the Supreme Court's physical occupation decisions, and the Court has always rejected it. For example, in *Loretto*, the Court found a taking even though the property owner had acquiesced in the use of the property for rental housing. 458 U.S. at 435. The previous owner had even directly agreed to have the cables placed on the building, and the current owner had purchased the building with the cables already attached. *Id.* at 421-22. Nonetheless, the Court opined: "[A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. … The right of a property owner to exclude a

stranger's physical occupation of his land cannot be so easily manipulated." *Id.* at 439 n.17.

In *Horne*, the Court expressly rejected the government's argument that raisin growers voluntarily participated in the raisin market and "constructively" acquiesced to the regulation:

> "Let them sell wine" is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history. … In *Loretto*, 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."

Horne, 576 U.S. at 365 (internal quotation marks and citation omitted).

Similarly, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), held that prior knowledge that property is subject to government regulation does not permit an uncompensated taking: "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title [of the property in question]." *Id.* at 629-30. "A regulation or common-law rule cannot be a background principle for some owners but not for others." *Id.* at 630.

Any suggestion of property owner "acquiescence" is therefore legally flawed.

IV. Previous Decisions Addressing Rent Control Statutes Do Not Support The District Court's Decision.

The district court relied upon previous decisions holding that rent control provisions did not constitute physical takings, concluding that the "incremental effect" of the 2019 amendments "is not so qualitatively different from what came before as to permit a different outcome." JA 525. That was error.

This Court's decision in *Fed. Home Loan Mortg. Corp. v. New York State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 47-48 (2d Cir. 1996), does not support the district court's decision. There the Court relied on the acquiescence theory, which was subsequently rejected in *Horne* and disavowed by the district court in this case. *Id.* at 49; *see* JA 525-26 (disavowing reliance on the acquiescence theory). Moreover, the Court merely stated, citing *Yee*, that rent control generally does not constitute a taking. *Id*. at 47-48.

But even if a typical "rent control" provision does not constitute a taking, that does not save the RSL here. In *Loretto*, the Court distinguished several past cases involving rent control, noting that "[i]n

none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party." 458 U.S. at 440. Moreover, in *Yee* the Court found no physical taking because the government did not compel landowners to continue renting their property, and owners could evict tenants, albeit with six or twelve months' notice. 503 U.S. at 527-28. But the Court held 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." *Id.* That is precisely what the RSL does here.

This Court's unpublished memorandum in *Harmon v. Markus*, 412 F. App'x 420 (2d Cir. 2011), does not support the RSL here. In *Harmon*, which pre-dated *Horne*, the Court rejected the plaintiffs' physical takings claim by citing the owner's ability to recover possession of housing accommodations for their personal use, demolish the property, and "evict an unsatisfactory tenant." *Id.* at *422.

But the RSL has changed significantly since the unpublished decision in *Harmon*. Under the 2019 amendments to the RSL, owners no longer have a right to recover possession of any part of their property via

demolition or for personal use; they are limited to one unit—and then only if the owner is a natural person and the tenant is not over 62 nor disabled, and the tenant has not occupied the property for 15 years. The loss of the right to occupy and the right to exclude others from the vast bulk of one's property is precisely the sort of physical intrusion that makes the RSL a physical taking.[3]

V. The Existence Of Limited Exceptions Does Not Defeat A Facial Challenge To The RSL.

The fact that the RSL provides limited exceptions does not doom the facial challenge brought by plaintiffs here. Even assuming, arguendo, that a party making a facial challenge must establish that the law "is unconstitutional in all of its applications," *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008), that standard is satisfied here. To be sure, the RSL allows property owners to decline to renew a lease in narrow circumstances, or (for some owners) to occupy a small portion of their own property after showing compelling

[3] The *Harmon* court also relied on the acquiescence rationale, which (as noted), has been abandoned. *See* 412 F. App'x at *422.

necessity. But, as discussed above, the RSL works an unconstitutional taking even with those exceptions.

For instance, regardless of the circumstances, the RSL prevents *all* owners of buildings subject to the law from occupying more than 80 percent of their property. It also prevents owners from deciding who to allow to occupy their property, and from excluding those the owner does not want.

The fact that some owners may not want to occupy more than one unit or have no desire to remove particular tenants is of no moment. "The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 894 (1992).

The ability of some non-corporate owners to take possession of a small portion of their own property under a narrow set of circumstances does not alter the analysis. As *Loretto* and other cases make clear, physical intrusion of a portion of the property is still a taking. *See Loretto*, 458 U.S. at 435-36; *Nollan*, 483 U.S. at 832; *Dolan*, 512 U.S. at 384.

City of Los Angeles, Cal. v. Patel, 576 U.S. 409 (2015), is instructive. In that case, the Supreme Court held that a municipal code provision

requiring hotel operators to provide police officers with specified information concerning guests upon demand violated the Fourth Amendment on its face. The Court squarely rejected the contention that because a warrantless demand for records would be permissible in exigent circumstances, the ordinance cannot be unconstitutional "in all applications." *Id.* at 417. The Court explained that "[i]f exigency or a warrant justifies an officer's search, the subject of the search must permit it to proceed irrespective of whether it is authorized by statute." *Id.* at 418-19. Those outcomes are not constitutional "applications" of the statute; they exist independent of it. *Id.*

So too here. The RSL's limited exceptions merely permit landlords (in very limited situations) to exercise rights that every property owner enjoys without restriction, such as the right to occupy the property or to exclude others from occupying it. A property owner who exercises one of those rights through a statutory exception is not applying the RSL; the owner is exercising rights that exist independent of the RSL. Stated another way, it is the RSL's *restrictions*, and not its exceptions, that govern the facial validity of the law. And, as we have discussed, those restrictions, unless compensated, violate the Takings Clause.

CONCLUSION

The district court's judgment should be reversed.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because this brief contains 5,736 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook 14-point font.

Dated: January 22, 2021

/s/ Jonathan S. Massey
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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2021, I electronically transmitted this Brief to the Clerk of the Court using the Court's ECF system. I further certify that all counsel of record are being served with a copy of this Brief by electronic means via the Court's ECF system.

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