No. 22-1095

In the Supreme Court of the United States

COMMUNITY HOUSING IMPROVEMENT PROGRAM, ET AL.,

Petitioners,

v.

CITY OF NEW YORK, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The Rule 29.6 statement in the petition remains accurate.

Respondents do not seriously dispute the very substantial importance of the questions presented. Nor could they in the face of 13 *amicus* briefs filed by 18 organizations and a prominent property rights professor. Petitioners, representing owners of approximately one million rent-stabilized New York apartments, are joined by

- property owners from California, Minnesota, and Westchester, including representatives of individual and family owners;
- national organizations representing the rental housing ecosystem—builders, owners, realtors, and mortgage bankers;
- the broader business community (U.S. Chamber and California Business Roundtable); and
- defenders of property rights (Institute for Justice, Cato, and Manhattan Institute).

These briefs explain the national trend toward ever more burdensome rental housing regulations and the urgent need for this Court's intervention to clarify the limits imposed by the Takings Clause.

Respondents cite the RSL's age and point out that the petition challenges provisions pre-dating the recent 2019 amendments. But age is no defense against a takings challenge—*Horne* involved a federal program enacted in 1937. The Intervenors' suggestion (Br. 29) that the Court should leave the law to "the push-and-pull of politics" ignores the purpose of the Takings Clause—to protect property owners against unfair majoritarian decisionmaking. Pet. 32.

I. Physical Taking.

A. Standing.

Respondents did not challenge Petitioners' standing to assert the physical takings claims in the courts below. This newly-discovered argument—a transparent attempt to thwart this Court's review—is meritless for two independent reasons.

First, Respondents assert that Petitioners' only injury claim is "the inability to charge market rents" and the resulting reduction in property value. State Br. 16. Because success on the physical takings claims would not eliminate the restriction on rent levels, Respondents argue that there is no connection between injury and relief sought.

Respondents' premise is wrong. The complaint plausibly alleges harm to owners from the diminution in property value caused by the challenged restrictions on exercising their right to exclude—an injury suffered by all of the individual Petitioners and members of the two associations. Pet. App. 179a ("[i]n any sale of [a regulated] property, the buyer would be subject to" the restrictions challenged as physical takings, "and thus the sale would result in" a "substantial diminution of economic value"), 192a (the reduced value of regulated properties results from "the forced physical occupation and deprivation of the ability to use one's own building" as well as limits on rent levels). It is self-evident that property is less valuable when it is burdened by restrictions preventing a buyer from using it herself, or changing its use or demolishing it, or deciding for herself who may occupy it.

Diminution in value plainly is an injury cognizable under Article III—as Respondents themselves recognize. State Br. 16-17. And the injury is fairly

traceable to the challenged restrictions and would be redressed by a judgment holding those restrictions unconstitutional, which would eliminate the diminution in property value resulting from the restrictions.[1]

Second, Respondents do not seriously challenge the two organizations' standing based on "suffer[ing] an injury in [their] own right." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2157 (2023) (quotation marks omitted). That injury exists when the challenged law requires an organization to "spend extra time and money educating its members about [challenged]

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[1] Respondents imply—but never actually assert—that Article III requires identification of a specific property owner with a present desire to exercise the right to exclude prohibited by a challenged law. *E.g.*, State Br. 14. That claim is baseless for multiple reasons.

To begin with, the diminution in value harms every property owner burdened by these restrictions—and that harm establishes standing.

Moreover, the complaint alleges injury to the individual Petitioners and the organizations' members from the challenged restrictions' interference with their ability to control their property. Pet. App. 79a (¶10), 221a-222a (¶¶379-80). That is a separate Article III injury.

And the complaint contains more specific allegations. For example, Petitioner Nugent Miller has been prevented from reclaiming property for her personal use. Pet. 11-12. The City (Br. 13 n.4) and Intervenors (Br. 27) ignore that her inability to reclaim her property is a continuing harm triggered anew at each forced lease renewal. See also Pet. App. 169a-170a (describing another owner's inability to reclaim property for personal use). Other Petitioners allege harm from the forced renewal and succession rights provisions, stating that they "have been forced to rent units" to "strangers who claim 'succession rights'" and that they have "limited or no ability to oust these strangers from their property." Pet. App. 94a.

provisions and how to avoid their negative effects." *OCA-Greater Houston* v. *Texas*, 867 F.3d 604, 610 (5th Cir. 2017); see also *Online Merchants Guild* v. *Cameron*, 995 F.3d 540, 547 (6th Cir. 2021); Wright & Miller, *Federal Practice & Procedure* § 3531.9.5.

The complaint and supporting declarations satisfy this standard. Pet. App. 90a-92a; CHIP Standing Declaration, Dist. Ct. Dkt. 1-3 ¶¶11-16 (CHIP's expenditures relating to educating members and assisting them in complying with the law and to public education efforts); RSA Standing Declaration, Dist. Ct. Dkt. 1-4 ¶¶7, 11 (same).

The State asserts (Br. 17 n.10) that the organizations did not specifically allege that their efforts related to the RSL provisions challenged as physical takings and that those provisions were not enacted in 2019. But nothing in the allegations or declarations distinguishes among the RSL's provisions. CHIP Decl. ¶11 (referring to assisting in compliance with "regulatory requirements"); RSA Decl. ¶11 (same).[2]

The fact that the organizations engaged in these activities prior to the 2019 amendments is irrelevant: the challenged provisions require continuing efforts, and nothing in Article III places a time limit on standing based on such harms to the organizations. Moreover, the 2019 law increased the burdens on regulated properties, including revising some of the provisions challenged as physical takings and eliminating routes to deregulation. Pet. App. 105a-109a. That increased

[2] Respondents' arguments ring hollow given their failure to raise standing in the district court, where more specific declarations could easily have been submitted.

the organizations' activities with respect to the RSL. CHIP Decl. ¶13.

B. Merits.

Respondents' arguments regarding the merits rehash their contentions in the court of appeals—which are addressed in the petition and *amicus* briefs. Pet. 9-10, 12-16.

We highlight four points.

First, Respondents argue that because the RSL sometimes does not bar an owner from exercising her right to exclude, it cannot effect a physical taking. State Br. 20-22. But each challenged provision on its face prevents an owner from exercising that right on the expiration of the lease. *Cedar Point* makes clear that whenever the law does that, it effects a physical taking. And Respondents cannot rely on *Yee* because the RSL's provisions on their face bar owners from refusing to renew a lease in order to take back property for personal use or to change the property's use. Pet. 15-16. It is true that *Yee* appeared to permit one limitation on the right to exclude—restrictions on an owner's ability to choose her tenants—but the petition (at 18) explains that such a limitation cannot survive *Cedar Point*. See also Chamber Br. 5-16; N.Y. Realtors Br. 5-19; pages 7-8, *infra*.

Second, Respondents—remarkably—agree with the Second Circuit that an owner's decision to rent an apartment to one or two specific individuals is the equivalent of a decision to operate a mall open to the public at large in terms of the consequences for the owner's right to exclude. State Br. 23. As the petition explains, that makes no sense. And even the mall owner retains the right to convert the mall to her own offices or a warehouse and exclude the public when

the stores' leases are up—but the RSL bars an owner from changing the use of her property. Pet. 13-14; Pet. 19 (explaining that Respondents' argument is precluded by this Court's decision in *Horne*, which holds that a decision to enter voluntarily into a market (here, residential rental) does not permit restrictions that otherwise constitute physical takings).

Third, the State cites (Br. 20) the dismissal for want of a substantial federal question in *Fresh Pond Shopping Center* v. *Callahan*, 464 U.S. 875 (1983). But such rulings have limited precedential effect, *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974), and that is especially true here given the intervening decisions in *Cedar Point* and *Yee*. Pet. 9-10 & 12-16. Much more relevant is then-Justice Rehnquist's dissent in *Callahan*, which explains that restrictions on taking back property for personal use or changing its use (including for demolition) constitute physical takings. 464 U.S. at 876-877.

Fourth, Respondents' argument (State Br. 25) that there is no conflict with *Heights Apartments, LLC* v. *Walz*, 30 F.4th 720 (8th Cir. 2022), suffers from the same flaws. The Eighth Circuit interpreted *Cedar Point* to hold that a physical taking occurs whenever there is a "physical invasion"—whether "'permanent or temporary,' 'intermittent as opposed to continuous,' or whether the government is directly invading the land or allowing a third party to do so." *Id*. at 733. And (*ibid*.) it distinguished *Yee* because that case did not involve a statute "compell[ing] landlords to continue leasing the property past the leases' termination."

The fact that the Eighth Circuit applied its test to an eviction moratorium rather than laws resembling the challenged RSL provisions is no distinction. Under

the Eighth Circuit's test, the RSL provisions would be held to effect physical takings. The conflict is clear.

The dispute between Petitioners and Respondents over the meaning of *Cedar Point* and *Yee* simply confirms the urgent need for this Court to address the application of those precedents to restrictions on the right to exclude in the context of rental property.[3]

C. Facial Challenge.

Respondents' attack on Petitioners' facial claims is not surprising. They would prefer to require each of the tens of thousands of regulated property owners—many of whom are individuals or families—to bear the cost of filing and litigating an individualized challenge. That burden would deter a significant number of owners, and leave many properties subject to the RSL's unconstitutional restrictions.

Patel makes clear that facial claims are proper here, because every time a challenged provision applies to limit an owner's exercise of the right to exclude, the provision violates the Takings Clause. Pet. 20-21. Respondents point only to situations in which the RSL does not limit exercise of that right—which *Patel* held irrelevant.

Thus, the State refers (Br. 14) to unchallenged provisions of the RSL allowing an owner to evict a tenant for nonpayment of rent or other violations. However, *Patel* focuses on the restriction imposed by the

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[3] The City is wrong in asserting (Br. 13 n.5) that the complaint fails to cite the law imposing the tenant-consent requirement for conversion to a condominium or cooperative. Pet. App. 107a (citing 2019 law provision imposing requirement). And (*contra* City Br. 11), Petitioners raised each specific physical takings claim in the complaint. Pet. App. 154a-179a.

challenged provisions. "Conduct that is independently authorized by a legal provision or doctrine other than the challenged law is * * * not relevant to that law's facial constitutionality." *Garcia* v. *City of Los Angeles*, 11 F.4th 1113, 1119 n.7 (9th Cir. 2021).

Next, the State cites (Br. 14-15) a separate program under which a property owner may voluntarily subject herself to the RSL's restrictions in return for tax abatements. But *Patel* held that a facial claim is not precluded by some persons' voluntary compliance with a government's demand. 576 U.S. at 418-419.

Finally, the State observes (Br. 14, 15) that some of the challenged provisions contain exceptions that could allow an owner to regain her property. The existence of statutory exceptions is irrelevant—otherwise an unconstitutional statute could be protected against facial challenge by including a narrow, unlikely-to-be-satisfied exception. "[T]he proper focus of the constitutional inquiry is [government intrusions] that the law actually authorizes," *Patel*, 576 U.S. at 418—here, that it violates the Constitution every time it restricts an owner from exercising her right to exclude.

The State cites (Br. 16) *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 454 (2008), but the Court there rejected a facial challenge that did not depend "on any facial requirement of [the challenged statute], but on the" challengers' arguments relating to possible voter confusion. Here, the challenge rests entirely on the text of the challenged provisions. See also *Sabri* v. *United States*, 541 U.S. 600, 609 (2004) (rejecting facial challenge resting on erroneous construction of statute).

Petitioners' facial challenge is proper.

II. *Pennell*.

The Takings Clause prevents 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.'" *Palazzolo*, 533 U.S. at 617-618 (citation omitted). In *Pennell*, Justices Scalia and O'Connor explained that a law capping rent levels based on tenant financial hardship violates that principle, because a landlord "no more cause[s] or exploit[s]" such hardship than "grocers who sell needy renters their food," or "department stores that sell them their clothes." 485 U.S. at 21. Rent levels based on tenant ability to pay—rather than a reasonable-costs-plus-reasonable-return standard, the norm in rate regulation—is "a welfare program privately funded" by landlords. *Id.* at 22.

That is just how New York's highest court describes the RSL: a program with "all the characteristics of a local public assistance benefit" paid for through a "regulatory scheme applied [only] to [certain] private owners of real property." *Santiago-Monteverde*, 24 N.Y.3d at 290-291.

The proliferation of similar schemes, as well as the broad impact in New York, make this Court's intervention urgent. California Business Roundtable Br. 5, 7; National Apartment Association Br. 7-9; Chamber Br. 16-20. Respondents' objections are easily refuted.

First, Respondents contend that Justice Scalia's analysis rested on the standard disapproved in *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

But *Lingle* held only that the Takings Clause did not invalidate regulations because they fail to substantially advance a legitimate state interest. That

due process-like standard was irrelevant to takings analysis, the Court held, because it "cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation"—which *Lingle* recognized as the key inquiry under the Takings Clause. 544 U.S. at 543.

The issue here, by contrast, involves that "guiding principle" that "'public burdens … should be borne by the public as a whole'" through "taxing and spending," not imposed "disproportionately [on] individuals" who are not "the source of the social problem." *Pennell*, 485 U.S. at 20, 22-23.

As Professor Laitos (at 9-11) and the Chamber (at 18-19) explain, Justice Scalia's cause-and-effect test—asking whether the property owner caused the social problem addressed by regulation—is the standard applied in *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), and *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), where the Court held that conditions on permits constitute a taking when they do not address a problem "created" or "caused by" the proposed development. 483 U.S. at 838-839. Far from inviting a "freewheeling, purpose-driven inquiry" with "no criteria or limits" (State Br. 32), the *Pennell* test centers on a criterion—causation—that has proved administrable in the permit condition context.

Second, Respondents say the principle underlying *Pennell* is already built into the *Penn Central* test. But Justice Scalia endorsed causation as a separate threshold requirement, not relegated to one element of an indeterminate multi-factor test. And then-Justice Rehnquist's *Penn Central* dissent illustrates why a threshold test is needed: the Court found no taking even though New York "imposed a substantial cost on less than one one-tenth of one percent" of buildings

"for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the 'taking' protection is directed." 438 U.S. at 147. Review would allow the Court to plug the large gaps in takings protection opened by *Penn Central* and *Kelo*, which have gutted the Clause's guiding principle. Pet. 30-34; Chamber Br. 6-8, 21-22.

Third, Respondents argue that *Pennell* is inapplicable because the regulation there applied on an individual tenant basis. But the RSL's across-the-board consideration of tenant ability to pay is a clearer case for application of *Pennell*—requiring targeted property owners to finance a City-wide assistance program. What would be a reasonable increase based on higher owner costs is reduced because the City concludes that "a majority of rent stabilized tenants are not able to afford their apartments," using rent-to-income measures and taking into account the City's "homeless levels," "public assistance caseloads," "a decrease in average wages in inflation-adjusted terms," and "sharp increases in non-payment cases in Housing Court and residential evictions." Rent Guidelines Board (RGB), *2023 Income and Affordability Study* 12, 27 (Apr. 13, 2023).

The impact is dramatic: after years of rent increases lagging owner cost increases (Pet. App. 101a), the City this year calculated owner costs increasing 8.1%, but allowed only a 3% rent increase. RGB, *2023 Price Index of Operating Costs* 4 (Apr. 20, 2023); RGB, *2023 Apartment & Loft Order #55* (June 21, 2023). Requiring regulation of rents based on reasonable owner costs, and barring reductions based on tenant affordability factors, would not "imperil rent regulation as a concept" (City Br. 25)—merely bring it in line with permissible rate regulation schemes that prevent

"excessive" rents and "exorbitant returns" without making owners alone bear the cost of subsidizing housing. *Pennell*, 485 U.S. at 20, 22.

Fourth, the City is wrong in asserting (Br. 25) that Petitioners did not properly plead a claim based on the *Pennell* dissent. Petitioners alleged that permissible rent increases from 1999-2019 totalled 66%, compared to owner cost increases of 169%—a disparity attributable only to the RGB's consideration of tenant affordability (Pet. App. 101a, 191a-192a), and cited *Pennell* and other decisions (Pet. App. 186a-187a, 214a-215a). See also Pet. App. 22a n.25 (Second Circuit rejected *Pennell* argument on the merits, not for lack of pleading).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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