NO. 23-1148

In the
Supreme Court of the United States

G-MAX MANAGEMENT, INC., *et al.*,

Petitioners,

v.

STATE OF NEW YORK, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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Respondents' embrace of the Second Circuit's landlord-tenant exception to the Takings Clause underscores the need for certiorari. Requiring a landlord to "suffer the physical occupation of a portion of his building by a third party" is a classic physical taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982). Based on a dubious reading of *Yee v. City of Escondido*, 503 U.S. 519 (1992), Respondents and the Second Circuit have gutted landlords' right to exclude—and with it, this Court's physical-takings jurisprudence. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). As a result, the Second Circuit has deepened a circuit split and, as Petitioners' *amici* warn, paved the way for further expropriation of owners across the country.

Recognizing that this petition does not present the vehicle concerns that may have dissuaded the Court from granting other recent petitions, Respondents strain to concoct other impediments. Respondents assert that Petitioners Ordway and Guerrieri cannot seek review of their federal takings claim because they sought to preserve their due-process rights in a separate state-court case. But even if that due-process claim succeeded, it would not redress the taking Ordway and Guerrieri seek to rectify here. In any event, Petitioners anticipate that the state-court case will be stayed pending this Court's review. Thus, despite Respondents' efforts at evasion, this Court can address both takings questions presented here free and clear.

I. The Physical-Takings Question Warrants Review In This Case.

A. On the physical-takings issue, Respondents argue that the Second Circuit "correctly applied settled law." State 15–23; Intervenors 18–25. As the clear circuit split highlights, however, the application of this Court's precedents to claims like Petitioners' is far from settled. And Respondents fail to justify the Second Circuit's sweeping carveout from the Takings Clause.

1. As Justice Thomas recognized, "the Courts of Appeals have taken different approaches" to "similar claims." *74 Pinehurst LLC v. New York*, 2024 WL 674658, at *1 (U.S. Feb. 20, 2024) (statement respecting denials of certiorari); *see* Pet. 13–15. The Second and Ninth Circuits, overreading *Yee* and disregarding *Cedar Point*, have repeatedly held that "limitations on the termination of a tenancy do not effect a taking so long as there is a possible route to an eviction." Pet. 13 (quotation marks omitted); *see* App.6–8; *GHP Mgmt. Corp. v. City of Los Angeles*, 2024 WL 2795190, at *1 (9th Cir. May 31, 2024); *Kagan v. City of Los Angeles*, 2022 WL 16849064, at *1 (9th Cir. Nov. 10, 2022). The Eighth Circuit has held just the opposite, striking down a partial ban on evictions even though, as here, landlords could still evict tenants for misconduct. Pet. 13–14 (citing *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733 (8th Cir. 2022)).

Indeed, multiple courts have expressly acknowledged the split. The Ninth Circuit recently reaffirmed its broad reading of *Yee* and recognized the conflict with the Eighth Circuit. *See GHP*, 2024 WL

2795190, at *1 n.2 ("Because we are bound by *Yee,* we decline to follow *Heights Apartments*"). District courts have also noted the split. *See, e.g.*, *GHP Mgmt. Corp. v. City of Los Angeles*, 2022 WL 17069822, at *3 n.3 (C.D. Cal. Nov. 17, 2022) ("[T]he Eighth Circuit found *Yee* distinguishable and applied *Cedar Point*.... That has not, however, been the Ninth Circuit's approach"); *Williams v. Alameda County*, 657 F. Supp. 3d 1250, 1256 (N.D. Cal. 2023).

Respondents' half-hearted denial of the split is unconvincing. Respondents acknowledge that, like the law at issue here, the law in *Heights Apartments* prohibited landlords from evicting tenants except for cause—such as "misconduct." *E.g.*, State 2, 22. Because the scope of the for-cause restriction was not exactly the same, however, Respondents say the cases are "materially distinguishable." State 3, 23; Intervenors 19–20.

In fact, the cases are materially *identical* because in both, landlords could not evict tenants except in narrow circumstances beyond the landlords' control. As this Court has instructed, the "essential question" when considering a physical taking is "whether the government has physically taken property for itself or someone else—*by whatever means*." *Cedar Point*, 594 U.S. at 149 (emphasis added). The Eighth Circuit's reasoning in *Heights Apartments* did not hinge on the particular contours of the for-cause restriction, such as the unavailability of eviction for "nonpayment of rent." State 20. Indeed, the landlords argued that they had "*not only the landlord's right to receive rent but also the 'right to exclude' others* from the real estate." 30 F.4th at 728 (emphasis added) (quotation marks

omitted). The court held that the moratorium constituted a physical taking because it had made the leases "terminable only at the option of the tenant" and had thereby deprived landlords of their "right to exclude." *Id.* at 733 (quotation marks omitted). The law at issue here suffers from the same critical defect, *see* N.Y. Comp. Codes R. & Regs. tit. 9, § 2524.3; yet the Second Circuit reached the opposite conclusion.

2. Respondents' efforts to defend the merits of that decision likewise fall flat. Echoing the Second Circuit's untenably expansive reading of *Yee*, Respondents claim that *Yee* "held that regulations of the landlord-tenant relationship are not physical takings." *E.g.*, State 15–18; *see* App.6–7. But *Yee* did nothing of the sort. Far from announcing a landlord-tenant exception to the Takings Clause, it merely reaffirmed that not "'*all economic injuries* that such regulation entails'" are "automatically" compensable takings. 503 U.S. at 528–29 (emphasis added) (quoting *Loretto*, 458 U.S. at 440). Respondents also ignore that the regulations challenged in *Yee* "allowed landlords to evict tenants after a notice period, even *without cause*." Pet. 18 (citing 503 U.S. at 528). And *Yee* specifically cautioned that a statute lacking that protection—one that "compel[led] a landowner over objection to rent his property"—would present a "different case." Pet. 18 (quoting 503 U.S. at 528). That "different case" is now squarely before this Court.

Moreover, if Yee *had* announced the sweeping rule Respondents and the Second Circuit favor, it would contradict this Court's physical-takings precedents. Pet. 15–18. For example, as *Cedar Point* made clear, "*[w]henever* a regulation results in a

physical appropriation of property, a *per se* taking has occurred." 594 U.S. at 149 (emphasis added). That holding leaves no room for a landlord-tenant exception.

Respondents contend that *Cedar Point* is inapplicable because apartment buildings are "already opened to third parties in some manner." State 21 (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)); Intervenors 25. But a residential building is "readily distinguishable," *Cedar Point*, 594 U.S. at 157, from a shopping mall that is "open to the public at large," *PruneYard*, 447 U.S. at 83, "effectively replace[s] ... traditional First Amendment forums," *id.* at 90 (Marshall, J., concurring), and "welcome[s] some 25,000 patrons a day," *Cedar Point*, 594 U.S. at 156–57. Under New York law, even an apartment building's common areas (much less individual units) are "*not* generally open to the public." State 21; *see People v. Barnes,* 26 N.Y.3d 986, 989 (2015). And this Court specifically applied the physical-takings rule to a New York apartment building in *Loretto*, 458 U.S. at 421–22.

Respondents' cursory attempt to cabin *Horne* fares no better. According to Respondents, *Horne* is distinguishable because property owners who "choose to become landlords" thereby "willingly accept tenants' presence in apartments"—forever. State 22. But that is precisely the kind of fallacy that *Horne* rejected. That the plaintiffs "voluntarily [chose] to participate in the raisin market," *Horne v. Dep't of Agric.*, 576 U.S. 350, 365 (2015), and could "exit the [raisin] market entirely" by selling their grapes for juice or wine, State 7, did not mean the government

could take their raisins without compensation, *see* Pet. 17. Whether of raisins or of rental apartments, a physical taking is a physical taking.

B. Unable to rebut Petitioners' arguments, Respondents seek to avoid certiorari by raising illusory "vehicle" concerns.

1. Respondents first contend that "the law, on its face, gives landlords various options" for evicting tenants. *E.g.*, State 13. But as discussed above, whether those exceedingly narrow "options" are constitutionally adequate is a disputed merits issue, not an "indisputabl[e]" vehicle problem. State 13. Petitioners vigorously contest the Second Circuit's holding that any "possible route to an eviction" will do, no matter how illusory in practice or outside the landlord's control. Pet. 13 (quotation marks omitted).

2. Next, Respondents take aim at Petitioners Ordway and Guerrieri, who have been forced to suffer the occupation of part of their building by an unwanted tenant since 2019. Ignoring the requirement to accept allegations as true at the pleading stage, Respondents assert that Ordway and Guerrieri "*voluntarily discontinued*" their owner-reclamation proceeding. State 14; Intervenors 36. Not so. Petitioners' allegations explain why Ordway and Guerrieri sought to reclaim a unit, how they went about it, and why, more than halfway through the proceeding, they had no choice but to discontinue it—namely, because the impossibly high bar established by the 2019 Act, App.160–61 ¶ 82, "forced an abrupt end" to it, App.189–93 ¶¶ 168–76. Ordway and Guerrieri were not obligated to spend additional time and money in a futile quest. In any event, they have

at least plausibly established that "the HSTPA ... caused their alleged injury." State 14. At this stage of the proceedings, no more is required. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *see FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 385 (2024) ("[T]o establish causation, the plaintiff must show a predictable chain of events leading from the government action to the asserted injury").

Respondents also err in contending that the takings claim is not "ripe" because Ordway and Guerrieri filed a "separate action in state court" against the unwanted tenant in 2022. State 14–15, Intervenors 36–37. As an initial matter, "[t]he settled rule" is that "exhaustion of state remedies is not a prerequisite to an action under ... § 1983," *Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474, 479 (2021) (per curiam) (emphasis omitted) (quoting *Knick v. Township of Scott*, 588 U.S. 180, 185 (2019)). As Petitioners explained below, Ordway and Guerrieri's takings claim ripened when the 2019 Act was enacted. 2d Cir. ECF 107 at 1; *compare, e.g.*, *S. Grande View Dev. Co. v. City of Alabaster*, 1 F.4th 1299, 1306 (11th Cir. 2021) ("[A] zoning ordinance can itself be a final decision on the merits"). The later state-court action, which is based on a due-process theory, has no bearing on the justiciability of the takings claim here.[1]

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[1] The decision below was in no way "[b]ased on" the state-court action. State 15. Instead, citing "the same reason given in *Pinehurst*," the Second Circuit asserted that Petitioners had not "'exhausted all the mechanisms *contemplated by the RSL*,'" App.8 (emphasis added) (quotation marks omitted), which, as Petitioners have shown, are exceedingly narrow and would not have offered any relief to Ordway and Guerrieri.

Notably, Respondents do not argue that the state-court suit could *moot* Ordway and Guerrieri's takings claim—and for good reason. Even if they prevail in that suit, it would not fully redress their constitutional injury. Petitioners here seek an "award of just compensation." App.224–25. If Ordway and Guerrieri succeed in state court, they may finally be able to get their apartment back, but that would not afford them "just compensation" for the years the government has forced them to accommodate the unwanted tenant at below-market rents.[2]

Further putting to rest any "vehicle" concern, Petitioners do not intend to "actively litigat[e]" the state-court matter while the Court considers this case. State 14–15. Now that discovery has closed in state court and this petition is fully briefed, Petitioners have obtained the other state-court party's consent to a stay of that case pending this Court's review.

3. Finally, Respondents question the standing of the Petitioners who had, before the 2019 Act, anticipated converting their buildings into co-ops or condominiums. State 15; Intervenors 35–36. Respondents argue that Petitioners' "failure to allege they have taken any steps to convert their buildings renders their claims 'speculative and not ripe.'" State 15 (quoting App.74 n.20). As Respondents acknowledge, however, those Petitioners "allege that ... the amendments made by the HSTPA make[]

[2] Moreover, the state-court pleadings confirm that Ordway and Guerrieri discontinued the owner-reclamation proceeding "solely" because of the 2019 Act. 2d Cir. ECF 105 at Ex. A ¶¶ 24, 25, 27.

conversion too difficult." State 15; Pet. 27. *Cf. S. Grande View*, 1 F.4th at 1308 n.12 (finding claim "ripe because of the futility" of further action where "no variances" were "available under the applicable local law" (quotation marks omitted). Although Respondents tout a 2022 amendment easing conversion for "owner-occupied buildings with *five or fewer units*," State 9, 19 n.10 (emphasis added), that tweak is irrelevant because Petitioners' buildings have eight or more units. *See* App.144–48 ¶¶ 22–33.

II. The Regulatory-Takings Question Warrants Review In This Case.

Respondents' struggle to defend the Second Circuit's toothless regulatory-takings analysis underscores the need for this Court to "take a fresh look at [its] regulatory takings jurisprudence." *Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n*, 141 S. Ct. 731, 731–32 (2021) (Thomas, J., dissenting from denial of certiorari). The *Penn Central* inquiry has proved to be "fundamentally misguided," *Loper Bright Enters. v. Raimondo*, 2024 WL 3208360, at *19 (U.S. June 28, 2024), and this case offers a prime opportunity to correct course.

A. Respondents assert that the Second Circuit's regulatory-takings analysis does not present a square split. State 24, 32; Intervenors 26. But as Petitioners noted, the *Penn Central* "test" is such "a muddle" that it is unlikely to yield clear divisions of authority. Pet. 29. That does not mean *Penn Central* decisions are insulated from this Court's review. *See, e.g., Murr v. Wisconsin*, 582 U.S. 383 (2017). Courts and commentators have long observed that *Penn Central* can produce "starkly different outcomes based on the

application of the same law," even in the same case. *Bridge Aina*, 141 S. Ct. at 731 (Thomas, J., dissenting); *see Nekrilov v. City of Jersey City*, 45 F.4th 662, 681 (3d Cir. 2022) (Bibas, J., concurring).

Moreover, the Second Circuit's application of *Penn Central* is particularly egregious in its laxity. In considering "economic impact," the Second Circuit gave Petitioners' massive harm essentially no "weigh[t]." App.11. Given the severe deprivations alleged in the complaint, the upshot appears to be that only a near-total elimination of value may even begin to tip the scales—making *Penn Central* analysis largely redundant with this Court's total-takings rule, *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). In contrast, the Eighth Circuit held in *Heights Apartments* that the "economic impact" factor weighed in favor of landlords alleging a loss of "rental income." 30 F.4th at 734 (quotation marks omitted).

Regarding "investment-backed expectations," the Second Circuit treated as dispositive the fact that "the RSL has been adjusted and changed many times." App.12. But such a loose application of this factor creates a one-way ratchet in favor of the government: more regulation begets still more regulation. *Heights Apartments*, in contrast, considered the unprecedented "duration and extent" of new restrictions, 30 F.4th at 734, rather than rationalizing them as "only the latest in a long series" of changes in a "highly regulated field," State 26–27; Intervenors 29–30.

As for the "character of the governmental action," the Second Circuit accepted at face value the

government's self-serving descriptions of the 2019 Act's purposes while ignoring Petitioners' allegations that the Act would be counterproductive and disproportionately burden landlords. *See* App.12; State 29. Not all courts have been so deferential to government protestations of virtue. As the Federal Circuit observed in a similar context, the government may have "acted for a public purpose (to benefit a certain group of people in need of low-cost housing), but just as clearly, the expense was placed disproportionately on a few private property owners." *Cienega Gardens v. United States*, 331 F.3d 1319, 1338–39 (Fed. Cir. 2003) ("[This] is the kind of expense-shifting to a few persons that amounts to a taking"). That approach is far more in keeping with this Court's admonition that a "strong public desire to improve the public condition is not enough." *Horne*, 576 U.S. at 362 (quotation marks omitted).

Respondents claim that "none of the *stare decisis* factors" supports overruling *Penn Central*. State 30–32; Intervenors 31–33. Yet Respondents cannot deny that the *Penn Central* "test" is "routinely denounced as an unworkable, if not incomprehensible, standard." R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731, 732 & n.7 (2011). "It has launched and sustained a cottage industry of scholars attempting to decipher its basis and meaning," *Loper Bright*, 2024 WL 3208360, at *19, and "[m]embers of this Court have long questioned its premises," *id*; *see* Pet. 24. Nor can Respondents claim that *Penn Central*'s factors are grounded in text and history, as this Court's constitutional jurisprudence generally requires. *See* Pet. 24. It is high time to revisit *Penn*

Central's hopelessly "impressionistic and malleable" standard. *Loper Bright*, 2024 WL 3208360, at *19.

B. Respondents argue that the regulatory-takings claims are "not ripe" because owners must take "reasonable and necessary steps" to allow agencies to "grant any variances or waivers allowed by law." State 25; Intervenors 28–29. In particular, Respondents emphasize the potential availability of "hardship" allowances for slight rent increases. But as Petitioners have alleged, even on the rare occasion that a "hardship" application is granted, a modest rent increase "cannot ... offset" the 2019 Act's draconian restrictions on market-based rents, evictions, and deregulation of units. App.200–04; *see* Pet. 8–10, 19–22. Petitioners' claims are ripe because, with or without "hardship" allowances, "there is no question that the government's definitive position" has "inflicted an actual, concrete injury." *Pakdel*, 594 U.S. at 478 (cleaned up).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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