No. 23-1220

IN THE

Supreme Court of the United States

BUILDING AND REALTY INSTITUTE OF WESTCHESTER AND PUTNAM COUNTIES, INC., et al.,
Petitioners,

v.

State of NEW YORK, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR STATE RESPONDENTS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals properly rejected petitioners' physical takings challenges to New York's rent-stabilization laws, insofar as they were amended by the Housing Stability and Tenant Protection Act of 2019, given the laws' numerous constitutional applications and petitioners' failure to allege any government-forced occupation of their property.

2. Whether the court of appeals properly rejected petitioners' regulatory takings challenges to the rent-stabilization laws based on a case-specific application of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

3. Whether the court of appeals properly rejected petitioners' due process and Contracts Clause challenges to the rent-stabilization laws, based on case-specific applications of settled law.

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INTRODUCTION

For the past half century, New York State has administered the Rent Stabilization Law (RSL) and Emergency Tenant Protection Act (ETPA), which control the pace of rent increases for regulated apartments and govern the eviction of tenants in regulated units in New York City and surrounding communities.[1] Rent stabilization is a critical tool to combat the harms caused by rent profiteering in a tight housing market including homelessness and economic instability. At the same time, the carefully reticulated rent-stabilization framework ensures that property owners can earn a reasonable return.

The state Legislature has repeatedly amended the rent-stabilization laws in response to changing economic and local conditions. In the 1990s, for example, the Legislature adopted many owner-friendly provisions, including adding new grounds for rent increases and permitting deregulation of certain units upon vacancies. By the 2010s, however, it became clear that these provisions were pervasively abused in ways that were disrupting the housing market. Accordingly, in 2019, the Legislature enacted the Housing Stability and

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[1] This brief is submitted on behalf of respondents State of New York and RuthAnne Visnauskas, Commissioner of the New York State Division of Housing and Community Renewal (DHCR).

The RSL, which governs rent stabilization in New York City, is codified at New York City Administrative Code §§ 26-501 to 26-520. The ETPA, which principally governs rent stabilization outside of New York City, is reproduced in sections 8621-8634 of *McKinney's Unconsolidated Laws of New York*. Because this case involves regulated units located in Westchester County, this brief in opposition principally cites to the governing provisions of the ETPA as well as its implementing regulations. The ETPA provisions are substantively similar to their RSL analogs.

Tenant Protection Act (HSTPA), ch. 36, 2019 N.Y. Laws 134, to strengthen tenant protections and curb property owners' attempts to rapidly raise rents, harass tenants, force tenants out of regulated units, and remove regulated units from the laws' coverage.

Several months later, petitioners (several property owners and industry groups) initiated this action seeking to invalidate the amendments made by the HSTPA as purportedly violative of the Takings Clause of the Fifth Amendment to the U.S. Constitution, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, and the Contract Clause of Article I to the U.S. Constitution. The U.S. District Court for the Southern District of New York (Karas, J.) dismissed the complaint for failure to state a claim (Pet. App. 17-122). The Second Circuit affirmed, observing that petitioners' claims were "substantially similar" to others it had rejected in two recent cases: *Community Housing Improvement Program v. City of New York* and *74 Pinehurst LLC v. New York*. (Pet. App. 5; *see id.* at 1-16.) The plaintiffs in these two cases—as well as the plaintiffs in a third related case, *335-7 LLC v. City of New York*—petitioned for certiorari, and this Court denied each of the petitions.[2] This petition should likewise be denied.

First, petitioners ask this Court to review whether the HSTPA constitutes a physical taking. This case is a poor vehicle to consider that question. The rent-stabilization laws, as amended by the HSTPA, permit changes in use of property in numerous circumstances and allow

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[2] *See 74 Pinehurst LLC v. New York*, No. 22-1130, 2024 WL 674658 (U.S. Feb. 20, 2024) (decided together with *335-7 LLC v. City of New York*, No. 22-1170); *Community Hous. Improvement Program v. City of New York*, 144 S. Ct. 264 (2023).

for evictions based on nonpayment, illegal activity, and other misconduct. The existence of these exits from the rental market defeats petitioners' facial physical takings claim, which is materially identical to the facial claims raised in the multiple petitions this Court has denied. Petitioners' as-applied claims are identical to their facial claims, as petitioners conceded below, and thus fail for the same reason. In other words, there are no allegations, much less an adequate record, on which to "consider whether specific . . . regulations prevent petitioners from evicting actual tenants for particular reasons," *74 Pinehurst LLC v. New York*, Nos. 22-1130, 22-1170, 2024 WL 674658, at *1 (U.S. Feb. 20, 2024) (statement of Thomas, J.).

In any event, the court of appeals correctly applied settled law to hold that the rent-stabilization laws, as amended by the HSTPA, do not create a physical taking, and there is no split in authority requiring this Court's intervention. This Court has long recognized that when property owners voluntarily rent out their property, regulations governing the landlord-tenant relationship are not physical takings. *See Yee v. City of Escondido*, 503 U.S. 519, 528-29 (1992). Instead, such laws permissibly regulate property use and give owners various options to change the use of their property and substantial rights to control who occupies it.

Second, petitioners ask this Court to review whether the amendments made by the HSTPA effect a regulatory taking. At the outset, regulatory takings challenges are generally unsusceptible to facial review under the fact-intensive *Penn Central* inquiry. In addition, the court of appeals correctly held that petitioners' as-applied regulatory takings claims are unripe and meritless under *Penn Central*. Petitioners offer no basis to revisit these

holdings other than a confused recitation of inapplicable case law.

Third, petitioners do not even attempt to identify a question of law that warrants this Court's review with respect to their due process and Contracts Clause claims; instead, they argue that the Second Circuit reached the wrong result. But mere disagreement with the court below does not present a question that warrants this Court's review, and the decision below was correct in any event.

STATEMENT

A. Legal Background

1. The history of rent regulation in New York State dates back to at least World War II, when labor shortages and other wartime forces precipitated an acute housing crisis.[3] In 1946, the Legislature enacted the Emergency Housing Rent Control Act, which authorized rent ceilings throughout the State "to prevent speculative, unwarranted and abnormal increases in rents." *See* Ch. 274, § 1, 1946 N.Y. Laws 723, 723 (reproduced at N.Y. Unconsol. Law § 8581 et seq. (McKinney)). In 1962, the Legislature authorized municipalities to enact rent regulations in response to local circumstances. *See* Local Emergency Housing Rent Control Act, ch. 21, § 1, 1962 N.Y. Laws 53, 53-56 (reproduced at N.Y. Unconsol. Law § 8601 et seq. (McKinney)).

In 1969, New York City adopted the Rent Stabilization Law (codified as amended at N.Y. City Admin. Code

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[3] DHCR, *Rent Regulations After 50 Years: An Overview of New York State's Rent Regulated Housing* 3 (1993).

§ 26-501 et seq.). Rent stabilization operates by limiting the amount by which property owners may increase rents each year and imposing certain restrictions on evictions.[4] Two years later, the Legislature, in an "experiment with free-market controls," deregulated newly vacated apartments that had been subject to the City's rent-stabilization scheme. *Matter of KSLM-Columbus Apartments, Inc. v. New York State Div. of Hous. & Cmty. Renewal*, 6 A.D.3d 28, 32 (1st Dep't 2004) (quotation marks omitted), *modified on other grounds*, 5 N.Y.3d 303 (2005); *see* Ch. 371, § 6, 1971 N.Y. Laws 1159, 1161-62. The result was "ever-increasing rents," without the anticipated increase in new housing. *La Guardia v. Cavanaugh*, 53 N.Y.2d 67, 74 (1981).

2. Three years after this failed experiment, the Legislature adopted a rent-stabilization scheme with the Emergency Tenant Protection Act of 1974 (ETPA), ch. 576, sec. 4, 1974 N.Y. Laws 1510, 1512-33 (reproduced as amended at N.Y. Unconsol. Law § 8621 et seq. (McKinney)).

The ETPA is substantially similar to the City's 1969 law and extends the basic framework of rent stabilization to several additional counties, including, as relevant here, Westchester County. *See La Guardia*, 53 N.Y.2d at 74-76. Specifically, the ETPA allows covered municipalities to adopt rent stabilization upon a "declaration of emergency" if the vacancy rate for certain housing accommodations fell below five percent. ETPA, sec. 4, § 3, 1974 N.Y. Laws at 1513 (N.Y. Unconsol. Law § 8623). Upon the requisite emergency declaration, the

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[4] By contrast, "rent control" in New York directly sets rental rates and applies to a relatively small number of covered units. Rent control is not at issue in this suit. (Pet. App. 151.)

ETPA's rent-stabilization scheme applies to rental housing accommodations constructed before 1974 that contained six or more units. *Id.*, sec. 4, § 5, 1974 N.Y. Laws at 1515-16 (N.Y. Unconsol. Law § 8625). Property owners of newer buildings may also opt into rent stabilization for tax benefits. *See* N.Y. Real Prop. Tax Law § 421-a. Since the enactment of the ETPA, twenty-one communities in Westchester County have declared a housing emergency and become subject to rent stabilization.[5]

Like the RSL, the ETPA aims to ensure a fair and stable rental housing market in two basic ways.

First, the law controls the pace of rent increases for regulated apartments, while also ensuring that landlords can earn a reasonable rate of return. *See* ETPA, sec. 4, § 6(d), 1974 N.Y. Laws at 1517-18 (reproduced as amended at N.Y. Unconsol. Law § 8626(d)(4)-(5) (McKinney)). To determine permissible rent adjustments in Westchester County, the Rent Guidelines Board—a nine-person body composed of representatives of property owners, tenants, and the public—annually determines the permissible percentage of rent increases for lease renewals. *See* ETPA, sec. 4, § 4(b), 1974 N.Y. Laws at 1514 (reproduced as amended at N.Y. Unconsol. Law § 8624 (McKinney)). The Board must consider the economic conditions property owners face, such as tax rates and maintenance costs, as well

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[5] *See* Off. of Rent Admin., DHCR, Fact Sheet #8, *Emergency Tenant Protection Act (ETPA) of 1974 – Chapter 576 Laws of 1974 as Last Amended* 3 (2024); *see also Central Plains Co. v. City of White Plains*, 48 A.D.2d 326, 330 (2d Dep't 1975) (rejecting challenge to declaration made by White Plains); *Seasons Realty Corp. v. City of Yonkers*, 80 Misc. 2d 601, 608 (Sup. Ct. Westchester County 1975) (rejecting challenge to declaration made by Yonkers).

as conditions facing renters as a group, such as vacancy rates and the cost of living. *See id.*

To account for the unique financial circumstances of individual property owners, the ETPA permits landlords to seek additional rent increases following apartment renovations or building improvements. *See id.*, sec. 4, § 6(d), 1974 N.Y. Laws at 1517-18 (reproduced as amended at N.Y. Unconsol. Law § 8626(d)(1), (3) (McKinney)). And property owners who believe that the standard rent increases fail to afford them a reasonable income may apply for hardship exemptions permitting larger increases. *See id.*, § 6(d), 1974 N.Y. Laws at 1518 (reproduced as amended at N.Y. Unconsol. Law § 8626(d)(4) (McKinney)); Emergency Tenant Protection Regulations (ETPR), 9 N.Y.C.R.R. § 2502.4(c)-(d).[6]

Second, the EPTA requires landlords to offer most existing tenants the opportunity to enter into a renewal lease when the existing lease expires. *See* ETPA, sec. 4, § 10, 1974 N.Y. Laws at 1521 (reproduced as amended at N.Y. Unconsol. Law § 8630 (McKinney)); ETPR § 2503.5(a). But landlords may evict tenants for nonpayment of rent, committing a nuisance, using the apartment for illegal purposes, and unreasonably refusing the owner access to the apartment, among other grounds. *See* ETPR § 2504.2, 2504.4. And when a tenant vacates a regulated apartment, landlords may choose their next tenant—subject to a limited exemption for

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[6] State regulations implementing the ETPA are codified in the Emergency Tenant Protection Regulations (ETPR), which is printed at parts 2500-2511 of title nine of the *Compilation of Codes, Rules and Regulations of the State of New York*. The ETPR is substantially similar to the Rent Stabilization Code, which contains the implementing regulations for the RSL.

succession rights[7]—and perform background checks on all prospective tenants. *See* N.Y. Real Prop. Law §§ 227-f(1), 238-a(1)(b). An owner may also request identification of all persons living in regulated units on an annual basis. *See* ETPR §§ 2500.2(n), 2503.5(e).

An owner wishing to exit the rental market entirely has several options under the ETPA. For example, owners may (subject to certain conditions) reclaim a single unit or occupy any number of vacant units for personal use, *id.* § 2504.4(a); *see also* N.Y. Unconsol. Law § 8630(a) (McKinney), demolish a rental building, ETPR § 2504.4(f), or sell the building outright. An owner may also exit rent regulation but remain in the rental market by rehabilitating a substandard or seriously deteriorated building. ETPR § 2500.9(e).

3. Since 1974, the Legislature has repeatedly reenacted the RSL and ETPA to preserve the rent-stabilization laws' core elements: regulations on the rate of rent increases and limitations on evictions. Over time, the Legislature has amended the laws in response to changing political and economic circumstances.

For example, in 1993 and 2003, the Legislature responded to requests from property owners to allow deregulation of certain high-rent units with high-income tenants and gave landlords greater ability to increase rents upon renewal or vacancy. *See* Ch. 253, §§ 5-7, 1993 N.Y. Laws 2667, 2669-72; Ch. 82, § 4, 2003 N.Y. Laws 2605, 2608. In 2011 and 2015, however, the Legislature responded to reports of ongoing abuses of vacancy

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[7] Certain family members of rent-stabilized tenants, as well as certain individuals who can prove a close, familial-like relationship to the current tenant, may have the right to succeed to rental of the unit upon the original tenant's departure. *See* ETPR §§ 2500.2(n), 2503.5(d)(1).

increases and deregulation by reducing the amounts by which landlords could increase rent following renovations and improvements, and by raising the rent and income thresholds for deregulation. *See* Ch. 97, pt. B, §§ 12, 16, 35-36, 2011 N.Y. Laws 787, 807-09, 817-18; Ch. 20, pt. A, §§ 10, 16, 29, 2015 N.Y. Laws 29, 33-34, 36, 41-42.

In 2019, the Legislature enacted the Housing Stability and Tenant Protection Act (HSTPA), which further responded to concerns about tenant harassment and displacement. Among other things, the HSTPA eliminated the statutory provisions authorizing deregulation of certain high-rent apartments, Ch. 36, pt. D, § 3, 2019 N.Y. Laws at 138, limited certain rent increases upon renewal, *id.*, pt. E, § 1, 2019 N.Y. Laws at 139, and narrowed the provisions allowing evictions for personal use, *id.*, pt. I, § 3, 2019 N.Y. Laws at 147. The HSTPA also adjusted the procedure for converting buildings to cooperatives or condominiums by, inter alia, requiring the agreement of 51% of tenants (up from 15%). *Id.*, pt. N, § 1, 2019 N.Y. Laws at 174; *see id.*, pt. A, § 5, 2019 N.Y. Laws at 138. Finally, the HSTPA eliminated the need for periodic legislative reauthorization of the rent-stabilization laws while retaining the requirement that municipalities regularly reassess the existence of a housing emergency. *See id.*, pt. A, § 1-a, 2019 N.Y. Laws at 135.

Since the HSTPA, the Legislature has adjusted the law in multiple ways that favor property owners. In 2022, the Legislature responded to concerns from small-building owners by allowing conversion of owner-occupied buildings with five or fewer units with the agreement of only 15% of tenants. Ch. 696, 2022 McKinney's N.Y. Laws 1990, 1990-91. And in 2024, the Legislature raised the amount by which landlords may increase

rent for regulated units following qualifying renovations and improvements. Ch. 56, pt. FF, § 3, 2024 McKinney's N.Y. Laws (Westlaw).

B. Procedural History

1. Petitioners are trade associations representing the interests of property owners and owners of residential apartment buildings located in Westchester County with units subject to the ETPA. (Pet. App. 125-128.) In December 2019, petitioners commenced a 42 U.S.C. § 1983 action in the Southern District of New York, naming as defendants the State of New York, DHCR, and DHCR Commissioner RuthAnne Visnauskas. (Pet. App. 128-129; *see id.* at 123-239.) Two tenant advocacy groups intervened as defendants. (Pet. App. 22 n.7.)

Petitioners alleged that the rent-stabilization laws, as amended by the HSTPA, violate the Fifth Amendment as a physical and regulatory taking, and that various aspects of the laws violate due process and the Contracts Clause. Petitioners sought a declaration that the amendments made by the HSTPA are unconstitutional and an injunction permanently enjoining the State from enforcing those statutory changes. (Pet. App. 233-239.)

2. The district court granted respondents' motions to dismiss the complaint.[8] (*See* Pet. App. 17-122.) The district court first held that three of the petitioners (Property Management Associates, Nilsen Management

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[8] The court decided the motions to dismiss together with motions to dismiss a related action raising similar claims. (Pet. App. 19-22.) The Second Circuit affirmed both decisions in a single summary order (Pet. App. 1-16), and the plaintiffs in the related action have also petitioned for a writ of certiorari. *See G-Max Mgmt., Inc.* v. *New York*, No. 23-1148.

Co., and Lisa DeRosa) lack standing, a finding that petitioners do not challenge here. (Pet. App. 44-50.) On the merits, the district court concluded that the rent-stabilization laws as amended by the HSTPA do not constitute a facial physical taking because they merely regulate owners' intended use of their property for residential rentals. (Pet. App. 57-62.) The district court observed that petitioners did not raise an as-applied physical takings claim (Pet. App. 62-63 n.15) but found that it would reject such a claim on the merits in any event (Pet. App 62-72). The district court also dismissed petitioners' regulatory takings claims because they failed to allege a taking under the fact-intensive inquiry mandated by *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). (Pet. App. 78-96.)

The district court then rejected plaintiffs' substantive due process claim, noting that plaintiffs "cannot invoke the substantive due process doctrine to circumvent the requirements of takings claims." (Pet. App. 101) and that the HSTPA is, in any event, rationally related to several important governmental interests (Pet. App. 102-109). Similarly, the district court dismissed plaintiffs' claim under the Contracts Clause, noting that their claims are based on alleged impairments to future leases and finding that the HSTPA is reasonably designed to advance the governmental interest in preventing sudden rent increases and tenant displacement. (Pet. App. 112-121.)

3. Soon after this Court denied certiorari in three prior cases challenging the RSL (see *supra* at 2 n.2), the court of appeals affirmed the decision in this case, observing that petitioners raised "substantially similar claims" (Pet. App. 5).

First, the court determined that the rent-stabilization laws, as amended by the HSTPA, do not effect a facial physical occupation of petitioners' property because they regulate a voluntary landlord-tenant relationship. (Pet. App. 6-7.) Similarly, petitioners' as-applied claims failed because petitioners did not allege that the law compels them to remain in the rental market or "that they have exhausted all the mechanisms . . . that would allow a landlord to evict current tenants." (Pet. App. 8 (quotation marks omitted).)

Next, the court rejected petitioners' facial regulatory takings claim because petitioners did not show that, "for all affected property holders, the economic impacts are universally negative and that investment-backed expectations were subverted." (Pet. App. 10.) The court likewise rejected petitioners' as-applied regulatory takings claims as unripe, and, on the merits, finding that the alleged diminution in value of petitioners' property and petitioners' other allegations of economic harm did not support a regulatory taking. (Pet. App. 10-12.)

Finally, the court affirmed the dismissal of petitioners' Contracts Clause and due process claims, largely for the reasons given by the district court. (Pet. App. 13-15.)

REASONS FOR DENYING THE PETITION

I. PETITIONERS' PHYSICAL TAKINGS CLAIMS DO NOT WARRANT THIS COURT'S REVIEW.

This case is a poor vehicle to address petitioners' physical takings challenges. The rent-stabilization laws, as amended by the HSTPA, permit changes in use of property and evictions of tenants in many circumstances. The existence of these exits from the rental market defeats petitioners' generalized physical takings challenges, whether characterized as facial or as-applied. In any event, the court of appeals correctly rejected petitioners' physical takings claims on the merits and there is no split in authority requiring this Court's review.

A. This Case Is a Poor Vehicle to Address Physical Takings Challenges to New York's Rent Stabilization Law.

Petitioners' physical takings claims suffer from several threshold defects that make this case a poor vehicle to address whether the HSTPA constitutes a physical taking.

1. To prevail on a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). "Facial challenges are disfavored" because they "often rest on speculation" and thus "raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (quotation marks omitted). They are also inconsistent with principles of judicial restraint and "threaten to short circuit the democratic process by preventing laws embodying the

will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 450-51.

Petitioners are simply wrong to argue that *Salerno* is no longer good law. *See* Pet. 7, 14. To the contrary, this Court reaffirmed *Salerno*'s vitality just this past term. *See United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024) (explaining that to prevail on a facial constitutional challenge to a state, a government "need only demonstrate that [the statute] is constitutional in some of its applications").

Petitioners cannot prevail in their effort to invalidate the HSTPA because the law has countless lawful applications. The law, on its face, gives landlords various options for changing the use of their property, as well as the power to evict tenants on numerous grounds. See *supra* at 7. In addition, a property owner may agree to abide by the rent-stabilization laws voluntarily in exchange for tax benefits. *See* N.Y. Real Prop. Tax Law §§ 421-a, 489; N.Y. Priv. Hous. Fin. Law § 804. Petitioners do not demonstrate that any aspect of the HSTPA amendments "completely bar[s] landlords from evicting tenants," making their facial challenge indistinguishable from those in which this Court recently denied review in three separate cases. *See 74 Pinehurst*, 2024 WL 674658, at *1 (statement of Thomas, J.).

2. Petitioners' purported as-applied physical takings challenge suffers from additional vehicle problems. As the district court noted, the complaint does "not once . . . mention[s] an 'as-applied' taking challenge to the HSTPA" and "is devoid of analysis as to [the HSTPA's] application to the various landlords involved in the" lawsuit. (Pet. App. 62-63 n.15.) In their brief to the Second Circuit, petitioners acknowledged that "the essence of the 'as applied' claim is the same as the 'facial' claim."

Br. for Appellants at 16, *Building & Realty Inst. of Westchester & Putnam Cntys. v. New York*, No. 21-2526 (CA2 Jan. 13, 2022), ECF No. 61. And in the sole paragraph addressing their purported as-applied physical takings claims in the petition, petitioners simply reference the complaint with a generalized citation to the appendix and point to presumed monetary injuries rather than alleged physical occupations. Pet. 16-17. Petitioners simply did not raise an as-applied physical takings claim, even though the district court and court of appeals generously analyzed the merits of such a claim as part of their analyses of the companion case. (Pet. App. 8, 62-78.)

In any event, this case would be a poor vehicle to resolve an as-applied physical takings claim even if the complaint could be construed to raise such a challenge. As the court of appeals noted (Pet. App. 8), no petitioner has been denied the ability to reclaim a unit for personal use, convert the unit into a condominium, or otherwise exit the rental market. Indeed, petitioners' failure to allege that they wish to exit the rental market or have taken any concrete steps to do so renders their claims "speculative and not ripe." (*See* Pet. App. 70 n.20; *see also* Pet. App. 8.)

B. The Court of Appeals Correctly Rejected Petitioners' Physical Takings Claims, and There Is No Conflict Requiring This Court's Review.

The court of appeals correctly applied settled law to reject petitioners' physical takings claims, and there is no split in appellate authority requiring this Court's intervention.

1. Physical takings "are relatively rare" and "easily identified." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002). The "essential question" is "whether the government has physically taken property for itself or someone else—by whatever means." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021).

In *Yee v. City of Escondido*, this Court held that regulations of the landlord-tenant relationship are not physical takings because, "[p]ut bluntly, no government has required any physical invasion of [the owner's] property." 503 U.S. at 528. In *Yee*, owners of mobile-home parks challenged rent regulations that limited their rights to evict tenants and to convert their property to other uses. *See id.* at 524-27. This Court determined that such restrictions are not physical appropriations but "merely regulate petitioners' *use* of their land by regulating the relationship between landlord and tenant." *Id.* at 528. In other words, a restriction on landlords' ability to choose incoming tenants "does not convert regulation into the unwanted physical occupation of land." *Id.* at 530-31. Because landlords "voluntarily open their property to occupation by others, [they] cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Id.* at 531.

Yee was consistent with more than a century of precedent confirming States' "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (collecting cases); *see also FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) ("statutes regulating the economic relations of landlords and tenants are not *per se* takings"). The "element of required acquiescence is at the heart of the concept of occupation," *Florida Power Corp.*, 480 U.S. at 252, and there is no physical taking where the statute does not "require any person . . . to offer any accommodations for rent," *Bowles v. Willingham*, 321 U.S. 503, 517 (1944) (quotation marks omitted).

2. The court of appeals correctly dismissed petitioners' claims in this case. As in *Yee*, petitioners voluntarily hold out their property for rent, and the provisions to which they object permissibly regulate the terms of the landlord-tenant relationship without effecting a government-forced occupation. *See Yee*, 503 U.S. at 528; *see also Fresh Pond Shopping Ctr., Inc. v. Callahan*, 464 U.S. 875, 875 (1983) (dismissing appeal for want of substantial federal question in challenge to rent-control ordinance limiting removal of property from rental market). Petitioners do not plausibly allege that the ETPA compels all landlords—or even petitioners themselves—to remain in the rental market against their wishes. Petitioners thus do not present the "different case" that *Yee* envisioned "were the statute, on its face or as applied, to compel a landlord over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *See* 503 U.S. at 528.

First, petitioners are wrong to argue that the HSTPA's amendments to the longstanding personal-use provision effect a taking by "appropriat[ing] a right to invade the property." Pet. 8. As amended, the ETPA's personal use provision allows owners to recover one unit for personal use upon a showing of "immediate and compelling" need. N.Y. Unconsol. Law § 8630(a) (McKinney). Moreover, the law does not impose any restrictions on the reclamation of vacant units. The availability of these exit options from the rental market forecloses a facial challenge to the statute. *See Yee*, 503 U.S. at 528-29.

Second, petitioners complain that the HSTPA amendments require owners to obtain the approval of a majority of tenants before converting a rental apartment building into a cooperative or condominium. Pet. 13. But petitioners miss the point: the availability of an exit from the rental market through conversion is itself sufficient to defeat petitioners' facial claim. *See Yee*, 503 U.S. at 527-28. And to state an as-applied claim, petitioners were required to allege that they "have run that gauntlet" by attempting conversion. *See id.* Petitioners do not allege that they have taken any steps to convert their buildings or that they have a present desire to do so.

Third, petitioners falsely assert (Pet. 9-13) that owners are required to rent property to tenants against the owners' wishes indefinitely. This mischaracterization ignores landlords' ability to expeditiously evict tenants on a variety of grounds, including for nonpayment of rent, violating lease terms, damaging the premises, and refusing access to the owner. *See* ETPR § 2504.2. A landlord may also refuse to renew a lease if the tenant does not use the regulated unit as their primary residence or if the landlord decides to exit the

rental market by changing the use of their property for specified purposes. *Id.* §§ 2504.4-2504.5. And contrary to petitioners' assertion that a tenant can simply designate a successor (Pet. 9), succession rights extend only to individuals who have long resided with the tenant and share a close, familial-like relationship.[9] *See id.* §§ 2500.2(n), 2503.5(d)(1).

3. Despite petitioners' assertions to the contrary (Pet. 6-16), the court of appeals correctly applied this Court's decision in *Cedar Point Nursery v. Hassid*, 594 U.S. 139.

In *Cedar Point*, this Court held that a California law constituted a physical taking where it granted labor organizations a right to "take access" to farmland to speak with workers. *Id.* at 144-45, 162. In reaching that conclusion, the Court emphasized the importance of "longstanding background restrictions on property rights," including that farms are *not* generally open to the public. *See id.* at 160-62. The Court thus distinguished its prior case law holding that intrusions on properties that owners have already opened to third parties in some manner—like private shopping malls that are generally open to the public—are not physical takings but are at best subject to a regulatory takings analysis. *See id.* at 156-57 (discussing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)).

The court of appeals appropriately distinguished *Cedar Point* in finding that the rent-stabilization laws do not effect a physical taking. (*See* Pet. App. 7.) In

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[9] This Court has previously declined to consider a takings challenge to the RSL's tenant-succession provisions. *See Rent Stabilization Ass'n of N.Y.C., Inc. v. Higgins*, 83 N.Y.2d 156 (1993), *cert. denied*, 512 U.S. 1213 (1994).

contrast to the property at issue in *Cedar Point*, landlords generally invite third parties to occupy the premises as tenants and the regulations challenged here govern the landlord-tenant relationship that owners have voluntarily entered. *See Yee*, 503 U.S. at 528.[10]

Petitioners likewise misplace their reliance (Pet. 12-13) on *Horne v. Department of Agriculture*, which held that a statute requiring raisin growers to reserve a portion of their crop for the government was a physical taking. 576 U.S. 350, 354-55, 362 (2015). In so holding, the Court rejected the claim that the reserve requirement was not a taking because "raisin growers voluntarily choose to participate in the raisin market." *Id.* at 365. But unlike *Horne*, where the government physically confiscated a portion of farmers' crops without the promise of compensation, rent-stabilization laws do not result in a "compelled physical occupation" because property owners willingly accept tenants' presence in apartments when they choose to become landlords. *See Yee*, 503 U.S. at 530-31. In addition, landlords remain free to collect rents (subject to certain limits on the amount of annual increase).

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[10] Statutory rent regulation is also "consistent with longstanding background restrictions on property rights" and thus would not effect a taking even if it involved a physical invasion (which it does not). *See Cedar Point*, 594 U.S. at 160. Far from a "modern affair" (Pet. 3), rent regulation in New York City has a long history, *see* 1 *Report of the New York State Temporary Commission on Rental Housing* 42-46 (1980), and antecedents to the RSL have existed since World War II (see *supra* at 4). *Cf. Tahoe-Sierra*, 535 U.S. at 352 (Rehnquist, C.J., dissenting) (New York City zoning laws dating to 1916 qualified as "a longstanding feature of state property law").

5. Finally, petitioners are incorrect to argue (Pet. 15) that the decision below conflicts with *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022).

Heights Apartments concerned a COVID-19–related executive order which precluded evictions except where a tenant seriously endangered the safety of other residents or engaged in illicit activity. *Id.* at 733. The Eighth Circuit concluded that the plaintiff landlord stated a physical takings claim because the order "forced landlords to accept the physical occupation of their property regardless of whether tenants provided compensation" and "forbade the nonrenewal and termination of ongoing leases, even after they had been materially violated." *Id.* at 733. Thus, the court concluded that the executive order had deprived the landlord "of its right to exclude existing tenants without compensation." *Id.*

In contrast, the ETPA does not prevent landlords from excluding lease violators, including for nonpayment of rent. To the contrary, landlords retain substantial control over who rents their property, including robust eviction powers. See *supra* at 7-8. The statute also provides multiple mechanisms to ensure that landlords can receive a reasonable return, including by allowing landlords to offset the cost of improvements and renovations through rent increases, providing hardship exemptions to landlords, and requiring that the Rent Guidelines Board consider landlords' costs and expenses in setting maximum annual rent increases. See *supra* at 6-7.

To the extent there is any question about whether *Heights Apartments* reached the correct result under the unique circumstances presented, *see Heights Apartments, LLC v. Walz*, 39 F.4th 479, 480 (8th Cir. 2022) (Colloton, J., dissenting from denial of rehearing en

banc), this case does not provide an appropriate vehicle to resolve that question because of numerous factual and legal differences described above.

II. PETITIONERS' REGULATORY TAKINGS CLAIMS DO NOT WARRANT THIS COURT'S REVIEW.

Regulations that restrict an owner's ability to use his or her property are judged by a standard different than the one that applies to physical occupations. *Cedar Point*, 594 U.S. at 148. This Court evaluates such claims under *Penn Central*, "balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." *Id.*

This case is a poor vehicle to consider petitioners' regulatory takings claims, and the court of appeals correctly rejected them under *Penn Central*.

A. This Case Is a Poor Vehicle to Address Regulatory Takings Challenges to New York's Rent-Stabilization Law.

1. This Court's observation that facial constitutional challenges are generally disfavored (see *supra* at 13-14) applies with special force to petitioners' facial regulatory takings claim. Such claims "face an uphill battle," *Tahoe-Sierra*, 535 U.S. at 320 (quotation marks omitted), because the *Penn Central* inquiry is particularized and must be "informed by the specifics of the case," *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017).

Petitioners' challenge to the rent-stabilization laws, as amended by the HSTPA, is improper for facial review because the law's effects vary substantially across property type, building size, and owner. For example, the effects of limits on rent increases differ from landlord

to landlord, who each own buildings with different quantities of regulated units offered at different rents. (*See* Pet. App. 9-10.) And landlords may seek individualized hardship exemptions allowing them to charge higher rents, as well as rent increases to offset specific building improvements. See *supra* at 7. Similarly, landlords' reliance interests may vary significantly based on when they purchased their property.

2. Petitioners' as-applied regulatory takings claims suffer from the same vehicle problem as their purported as-applied physical takings claims: no such claim was raised in the complaint. As the district court observed (Pet. App. 84 n.28), the complaint makes no mention of an as-applied regulatory taking claim. Moreover, as the court of appeals noted (Pet. App. 10-11), any as-applied regulatory taking claim is not ripe because petitioners have not taken "reasonable and necessary steps to allow regulatory agencies to exercise their full discretion," which includes giving the agency "the opportunity to grant any variances or waivers allowed by law." *See Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001). "As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established."[11] *Id.* at 621.

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[11] This Court also articulated this finality requirement in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-94 (1985). In *Knick v. Township of Scott*, this Court overruled *Williamson County*'s holding that federal plaintiffs must seek just compensation through state procedures before filing a Fifth Amendment takings claim in federal court, but the Court did not disturb *Williamson County*'s additional holding (relevant here) that "any taking was . . . not yet final" because "the developer still had an opportunity to seek a variance." *See* 588 U.S. 180, 187-88 (2019).

B. The Court of Appeals Correctly Rejected Petitioners' Regulatory Takings Claims.

Petitioners' regulatory takings claims fail under a straightforward application of *Penn Central* in any event. Petitioners discuss at length various cases involving physical takings claims (Pet. 17-27), but these cases do not govern claims based on economic diminution in value based on regulatory requirements.

1. Petitioners do not plausibly allege that the HSTPA disrupted their reasonable investment-backed expectations, which are "particularly" important to the regulatory takings analysis. *See Penn Central*, 438 U.S. at 124. Such expectations are "informed by the law in force in the State in which the property is located." *See Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 38 (2012); *see also Murr*, 582 U.S. at 397-98. Thus, a plaintiff who knowingly does business in a highly regulated field cannot claim that its reasonable expectations have been defeated when "the legislative scheme is buttressed by subsequent amendments to achieve that legislative end." *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Tr. Fund*, 508 U.S. 602, 645 (1993) (quotation marks omitted) (collecting cases).

Petitioners do not dispute that landlords' expectations vary widely depending on when they purchased their property. Because petitioners cannot establish that the amendments made by the HSTPA disrupted the expectations of all landlords, their facial claim necessarily fails. (*See* Pet. App. 9-10.)

Petitioners also fail to plausibly allege that the HSTPA amendments disrupted their individual expectations. As the court of appeals found, petitioners "would have anticipated their rental properties would be subject

to regulations, and that those regulations in the [law] could change yet again." (Pet. App. 12 (quotation marks omitted).

Petitioners do not explain how any specific HSTPA amendment ran counter to their investment-backed expectations and instead attempt to cast aspersions on the entire package of legislative changes. (*See* Pet. 20, 26-27.) But the amended provisions to which petitioners object existed in substantially similar form prior to the HSTPA, with numerical constraints changing both up and down over time.[12] *See 74 Pinehurst LLC v. New York*, 59 F.4th 557, 567 (2d Cir. 2023), *cert. denied*, 2024 WL 674658 (2024).

2. Petitioners' allegations of economic harm are also inadequate. This Court has explained that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking," *Concrete Pipe*, 508 U.S. at 645, and has rejected regulatory takings challenges based on diminutions in value of 75% to nearly 90%, *Penn Central*, 438 U.S. at 131.

At the outset, petitioners do not dispute the court of appeals' holding that their facial claims fail because they "have not shown that, for all affected property holders, the [HSTPA's] economic impacts are universally negative." (Pet. App. 9-10.)

The court of appeals was also right to find that petitioners' allegations of economic impact do not

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[12] For example, over the years, the threshold for tenant consent to condominium/cooperative conversion has changed from 35% to 15% to 51% (Pet. App. 61), and back to 15% for small-building owners, Ch. 696, 2022 McKinney's N.Y. Laws at 1990-91. And the law's limits on personal-use reclamations predate the HSTPA. See Ch. 36, pt. I, § 3, 2019 N.Y. Laws at 147.

support their as-applied claims. (*See* Pet. App. 11.) Specifically, petitioners fail to show how their alleged inability to collect higher rents or the unquantified diminution in their property values amount to a taking under this Court's precedents. *Cf. Concrete Pipe*, 508 U.S. at 645 (alleged diminution of 46% not indicative of taking). Nor do petitioners attempt to isolate the incremental impact of the HSTPA amendments from the preexisting statutory framework—which they do not challenge as a taking.[13]

3. Finally, petitioners do not plausibly allege that the challenged law has the character of a taking. That factor asks whether the regulation "amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (quotation marks omitted).

As discussed (at 16-17), the ETPA, as amended by the HSTPA, does not approximate a physical invasion. And the court of appeals correctly found that the law "is concerned with 'broad public interests' and 'the legislature has determined that [it] is necessary to prevent 'serious threats to the public health, safety and general welfare.'" (*See* Pet. App. 12 (quoting *Community Hous. Improvement Program v. City of New York*, 59 F.4th 540, 555 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 264 (2023)).)

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[13] Petitioners also fail to account for intervening changes to the RSL favoring landlords, including an increase in the amount by which landlords may raise rents following qualifying renovations and improvements. See *supra* at 9-10.

Petitioners do not dispute that the Legislature enacted the HSTPA amendments to serve "important public interests," *see Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987), and instead they take issue with the effectiveness of such measures. *See* Pet. 20-21. But this Court has eliminated this type of means-end scrutiny from its takings jurisprudence because it "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights" and thus is a poor indication of whether a taking has occurred. *Lingle*, 544 U.S. at 542-43.

III. PETITIONERS' DUE PROCESS AND CONTRACTS CLAUSE CLAIMS DO NOT WARRANT THIS COURT'S REVIEW.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. Rule 10. Accordingly, this Court typically requires petitioners to identify why the question on which they seek review is important, presents a conflict, or has "departed from the accepted and usual course of judicial proceedings." *Id.* And this Court's rules make clear that a petition "is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." *Id.*

In challenging the court of appeals' ruling that affirmed dismissal of their due process and Contracts Clause claims, petitioners do not identify a certworthy question or any error in the court's articulation of the applicable legal standards. Pet. 27-29. Instead, they merely assert that those claims are valid and should not have been dismissed. Such claims do not warrant this Court's review, and in any event, the court of appeals' decision was correct.

As this Court has already held, a due process claim based on the same substantive harm as a takings claim is improper: "Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that amendment, not the more generalized notion of substantive due process must be the guide for analyzing these claims." *Stop the Beach Renourishment Inc. v. Florida Dep't of Env't Prot.*, 560 U.S. 702, 721 (2010) (quotation marks omitted). The court of appeals expressly invoked this point (Pet. App. 14), and petitioners do not explain why it should not apply here. Moreover, the court of appeals correctly found that petitioners' "policy and efficacy disagreements with the legislature" do not give rise to a cognizable due process claim. (Pet. App. 15.)

As for the Contracts Clause, the court of appeals correctly found that the changes made by the HSTPA apply to future leases and therefore do not implicate this constitutional provision. (Pet. App. 13.) In any event, the HSTPA cannot be read to "substantially impair" a contractual relationship, *Sveen v. Melin*, 584 U.S. 811, 819 (2018), because petitioners had no reasonable expectation to the indefinite application of any portion of the rent-regulatory framework. See *supra* at 24. Moreover, as the district court found (Pet. App. 118-120), the Legislature acted reasonably in amending the rent-stabilization laws to address specific concerns about the law's operation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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