No. 23-1220

IN THE

Supreme Court of the United States

BUILDING AND REALTY INSTITUTE OF WESTCHESTER AND PUTNAM COUNTIES, INC., APARTMENT OWNERS ADVISORY COUNCIL, COOPERATIVE AND CONDOMINIUM COUNCIL, STEPPING STONES ASSOCIATES, L.P., LISA DEROSA, AS PRINCIPAL OF STEPPING STONES ASSOCIATES, L.P., JEFFERSON HOUSE ASSOCIATES, L.P., SHUB KARMAN, INC., DILARE, INC., PROPERTY, MANAGEMENT ASSOCIATES, AND NILSEN MANAGEMENT CO., INC.,

Petitioners,

v.

STATE OF NEW YORK, RUTHANNE VISNAUSKAS, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF NEW YORK STATE HOMES AND COMMUNITY RENEWAL, DHCR,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

KENNETH J. FINGER
Counsel of Record
DOROTHY M. FINGER
FINGER & FINGER,
A Professional Corporation
158 Grand Street
White Plains, New York 10601
(914) 949-0308
kenneth@fingerandfinger.com
dorothy@fingerandfinger.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

The central issues in this case are whether the HSTPA constitutes a physical taking and a regulatory taking as well as a violation of the Due Process and Contract Clauses of the Constitution. The physical and regulatory takings claims are both facial and as applied. The Court should grant certiorari in this case as it presents significant legal questions as to the legality of the legislation particularly in view of the partial dissent of Justice Thomas in *74 Pinehurst LLC v. New York,* No. 19 Civ. 6447, 2024 WL 674658 (U.S. Feb. 20, 2024) in which he stated that the appropriate case would be as those herein in which leases must be continually renewed and to renew leases at reduced rents that were offered to assist tenants for a specific lease term. Additionally, a fundamental issue is that the legislation was passed without the proper findings of a shortage of housing as required by the ETPA. The New York State legislators relied solely on anecdotal evidence. The respondents rely again in the introduction to their reply on unfounded statements that "the adoption of "owner friendly provisions… were pervasively abused in ways that were disrupting the housing market." No documented proof of those allegations has ever been provided.

Respondents also argue that *Community Housing Improvement Program v. City of New York,* 59 F.4th 557 (2d Cir.) cert. denied, 144 S. Ct.164 (2023), *74 Pinehurst LLC and 335-7 LLC v. City of New York*, No. 20-CV-1053 (S.D.N.Y. 2021) support the dismissal of the within case. Those cases were previously distinguished and for those reasons are not relevant to this case.

The respondents and the Court of Appeals mistakenly rely on *Yee v. City of Escondido,* 503 U.S. 519 (1992). In *Yee* the Court made clear that while the owner of a mobile park home could not evict a tenant when the

home was sold during the term of the lease could evict a tenant with six –or twelve months" notice and the statute on its face or applied, compel a landlord to refrain in perpetuity from terminating a tenancy. *Yee* at 528. Similarly, they fail to acknowledge the application of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) inquiry to consider the economic impact on the claimant as has been argued throughout this case.

The Due Process and Contract Clause claims were specifically articulated, and the court below failed to properly address them.

Finally, the reference to Lisa DeRosa and standing. A careful review of the filings would show that the plaintiffs were given leave to amend to name Lisa DeRosa with authority to act as the managing agent of the corporations which she did.

STATEMENT

Respondents' review of the ETPA and its history to support its case is extrinsic but the foundational arguments to support the enactment of the HSTPA are flawed and do not support the required basis. First at p.9 of their brief respondents allege that the legislation was in response to concerns about tenant harassment and displacement. Nothing is cited to support this finding. The first issue related to this argument is that it eliminated the deregulation of high-rent apartments. Why? Tenants with income of $200,000. or more do not have an apparent need for a subsidy. Many of these apartments are large with at least three bedrooms and have families whose children have grown and left so that only one or two people continue to reside there. Incentives for them to leave would free up those apartments for families in need. Respondents cite the 51% consent requirement for conversion to cooperative

or condominium ownership without ever demonstrating the need for such a heavy burden. The non-eviction plans did not harm existing tenants. In fact, in most cases it benefited them as once buildings are converted many improvements to the buildings are made at no cost to them.

Perhaps the biggest flaw in the legislative process regarding the HSTPA is that while respondents agree that the rent stabilization laws still require each municipality to demonstrate the 5% vacancy to continue the ETPA, no municipalities did this. This alone should be sufficient to overturn the legislation.

I. RESPONDENTS REASONS FOR DENYING THE PETITION ARE ERRONEOUS AND SHOULD FAIL AND THE PETITION SHOULD BE GRANTED

I. The Physical Takings Claims are viable. The respondents cite *United States v. Salerno,* 481 U.S. 739 (1987) for the proposition that for a facial challenge to succeed the "challenger must establish no set of circumstances exists under which the Act would be valid." It is disingenuous for the respondents to cite *Salerno* when it was previously pointed out that the case was overturned by *Doe v. City of Albuquerque,* 67 F.3d 1111, 124-126 (10th Cir. 2021*); City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999), *United States v. Stevens*, 559 U.S. 460, 472 (2010).

Bucklew v. Precythe, 139 S. Ct. 112 (2019) also cited by respondents is inapplicable herein as it is a death penalty case in which the appeal failed because the plaintiff did not provide an adequate alternative. In the present case the alternatives regarding the challenged provisions are to return to the legislation that existed prior to the enactment of the HSTPA.

The Court of Appeals in the *City of Los Angeles v. Patel,* 576 U.S. 409, 418 (2015) held that facial constitutionality is assessed by "looking at those to whom the law actually applies not those for whom it has no plausible application…." The Court failed to apply that standard to the HSTPA provisions that dispossess building owners of the right to exclude. It bars owners from that right to exclude when a lease has expired, factually excluding conversion to cooperative or condominium ownership, or changing the use of the property.

Washington *State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) cited by respondents is not relevant to the case herein. That was an election ballot case that hinged on the issue of a facial claim regarding the names on a primary ballot. The facial claim was denied because the mere possibility of confusion does not pass the facial challenge test, i.e., no issue of degree and results. In the instant matter the degree and the results of this legislation are clear: limits on rents, evictions, screening of prospective tenants, renewal of leases, and conversions.

Respondents cite *United States v. Rahimi,* 144 S. Ct. 1889, 1898 (2024) (regarding a criminal indictment) for the proposition that a "government need only demonstrate that the statute is constitutional in some of its applications" and then use a boot-strap argument to state that in the within matter the statute is lawful in some applications. None of the options that respondents suggest are either available in the real world or permit landlords to evict tenants. The citation to *74 Pinehurst*, 2024 WL 674658 at*1 and Justice Thomas' statement does not change the fact that this case does not provide the loophole that defendants believe supports their argument. Justice Thomas made it

clear that "in an appropriate future case, we should grant certiorari to address this important question." This is just such a case given the very limited situations in which a proceeding may be brought to evict a tenant who now has permanent rights to renew at restricted rents.

The argument that the "as-applied physical takings claim" is not available because plaintiffs have not been denied the ability to reclaim a unit for personal use, convert the unit into a condominium or otherwise exit the rental market…..or even wish to exit the rental market" is devoid of any understanding of the rental market in Westchester County. Owners do not want to exit the market (probably at a significantly discounted value) when they have owned and operated the properties for many years. None of the plaintiffs herein are large corporations. This is their work as well as their livelihood. As in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) the claim should not be precluded because the landlords did not pursue other procedures, nor should the landlord have to sell or abandon the property. While it is true that the owners have not attempted to convert the apartments to cooperative or condominium ownership it should be recognized that they should not be required to pursue a futile endeavor. The respondents have not adequately responded to these cases which apply.

Most importantly the argument that the as-applied claims and the facial claims are essentially the same refers to the fact that the owners are suffering the same kind of losses under either situation. The appendix that plaintiffs have relied on is set forth to demonstrate how the various components of the HSTPA affect different owners differently.

II. The Court of Appeals Incorrectly Rejected Petitioner's Physical Takings Claims

The continued misunderstanding of *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021) seems to be an effort to confuse the issues and holdings of that decision. In *Cedar Point* the court addressed the issue and held that tenants like employees are invited onto the premises. Under HSPA the owners do not control the selection of or "invite "tenants onto the premises but they are required to accept them. Importantly, as previously discussed *Heights Apartments v. Walz*, 30 F. 4th 720, 732-33 (8th Cir. 2022) applied *Cedar Point* to uphold a physical talking claim based upon an order imposing a moratorium on residential evictions. The court said that the restriction deprived the owner of its "right to exclude existing tenants" and "gave rise to a plausible per se physical takings claim under *Cedar Point Nursery*. Ibid.

A careful reading of *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002) cited by the respondents allows for the petitioners' claims. The holding provided that where the regulation permanently denied the "productive use of the entire parcel" *Lucas v. South Carolina Coastal Council*, *Inc.* 505 U.S. 1003 would apply. Respondents have repeatedly asserted that the owners could always sell the property or abandon it as a way out. This is not under *Lucas* an acceptable alternative.

Respondents wrestle with *Yee v. City of Escondido, supra.* The peculiar situation of *Yee* in that it concerned a mobile home park has created the opportunity to misconstrue its full meaning and to understand its proper application. As previously set forth *Yee* made it clear that the underlying basis for the opinion was that there were opportunities for the owner to evict a

tenant after a short period of time. That is clearly not the case under the HSTPA wherein there is no escape hatch from the legislation as it exists and for all the reasons previously set forth the HSTPA does, both on its face and as-applied, compel the owners to rent the property and/or refrain in perpetuity from terminating a tenancy. Respondents seek to bolster their argument with respect to *Yee* by citing *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983) wherein the Court denied certiorari in a rent- control case that limited removal of property from the rental market. The significance of *Fresh Pond* lies in Judge Rehnquist's lengthy dissent in which he analogizes the case to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and finds a taking.

Respondents then argue that owners have not attempted a conversion even though the effort would be futile or that "succession rights extend only to individuals who have long resided with the tenant and share a close, familial relationship." A careful reading of the statute makes it clear that a roommate of the roommate will also have those rights even if the original tenant has either passed away or simply left the apartment.

Similarly, the respondents mistakenly misinterpret *Horne v. Department of Agricultur*e, 576. U.S. 350 (2015) by insisting that the HSTPA does not compel physical occupation when they become landlords. Becoming a landlord is not the issue in this case. The ability to choose the tenant and to control renewals controls this situation and does in fact compel physical occupation.

Respondents' attempt to distinguish *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022) is insufficient. The claim that under "ETPA" (they mean HSTPA) "landlords retain substantial control

over who rents their property, including robust eviction powers." As previously set forth, owners no longer have control over the selection of tenants. It is also a clear misstatement of the language of the statute, particularly the provisions for increases for costs of improvements and renovations. The Court can take judicial notice of the fact that because these costs are no longer able to be passed on to the tenants over time owners are no longer making those improvements. Also important is the fact that the HSTPA also prevents rents from returning to original lease rents if the tenant has been given a preferential reduced rent. This will not help future tenants to obtain any concessions.

III. Petitioner's Regulatory Claims Warrant This Court's Review

Respondents are correct in that the regulatory claims need to be evaluated under *Penn Central*. The fact that the various plaintiff owners have various claims does not render the challenge moot. The claims as set forth were considered because of the impact on each of the owners which varied as described in the appendix and are sufficient. *Palazzo v. Rhode Island,* 533 U.S. 606 (2001) is not to the contrary as it cited Lucas and remanded the case for the matter to be reviewed again under *Penn Central,* infra. *Williamson Cty. Planning v. Hamilton Bank,* 473 US.172 (1985) is also not controlling as the court held that if, as in the within case, the theory that the regulation is violative of the Due Process Clause of the Fourteenth Amendment then the issue is the effect on the investment backed expectations which has been alleged in this case. Respondents also cite *Murr v. Wisconsin,* 532 U.S. 383 (2017) for the proposition that it is the specifics of the case that must be addressed under *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922). That is

precisely the analysis required in this case that the Court failed to do.

The regulatory takings claim does in fact allege that their reasonable investment backed expectations were "disrupted" by the HSTPA. Suffice it to say that no matter when a property was purchased in Westchester the expectation was that the basic requirement of the ETPA was that each community would have to do a survey that demonstrated the continued shortage of housing. Admittedly that was never done.

IV. The Due Process and Contract Clause Claims Are Valid

Stop the Beach Renourishment Inc. v Florida Dep't. of Env't Prot., 560 U.S. 702 (2010) did not rule out petitioner's due process claims. Justice Scalia writing the opinion made it clear that the government must pay compensations if it destroys a previously established property right such as selecting tenants or strips it of all economic value as the respondents' claim that the owner could just walk away.

The Contract Clause claim is valid and the HSTPA does impair the contractual relationship as it exists. One example is the preferential rent permanency. The expectations for Major Capital Improvements and other provisions have also been impaired. Most importantly, the allegation that the petitioners had no expectation of the permanency of the laws is patently false. The expectations was that any changes would be pursuant to the surveys of vacancy rates which did not occur. The legislature did not act reasonably to address concerns because it did not conduct any surveys of vacancy rate.

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

KENNETH J. FINGER
Counsel of Record
DOROTHY M. FINGER
FINGER & FINGER,
A Professional Corporation
158 Grand Street
White Plains, New York 10601
(914) 949-0308
kenneth@fingerandfinger.com
dorothy@fingerandfinger.com

Counsel for Petitioner