No. 24-757

IN THE

Supreme Court of the United States

THE GYM 24/7 FITNESS, LLC,
Petitioner,
v.

STATE OF MICHIGAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE MICHIGAN COURT OF APPEALS

BRIEF *AMICUS CURIAE* OF
NEW YORK APARTMENT ASSOCIATION

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QUESTION PRESENTED

Whether *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), should be clarified or overruled?

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59 F.4th 557 (2d Cir. 2023), *cert. denied*,
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Fed. R. Civ. P. 37.6 1

Other Authorities

2019 Sess. Law News of N.Y. Ch. 36 (S. 6458) 14, 17

Caudill, Steven B., Estimating the Costs of Partial-Coverage Rent Controls: A Stochastic Frontier Approach, 75 Rev. Econ. & Stat. 727 (Nov. 1993) 17

Early, Dirk W., Rent Control, Rental Housing Supply, and the Distribution of Tenant Benefits, 48 J. Urb. Econ. 185 (Sept. 2000) 17

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Shkury, Shimon, *Rent Stabilization Is At a Breaking Point: Can NYC Find Balance Before Its Too Late*, *Forbes* (January 31, 2025) 16

INTEREST OF *AMICUS CURIAE*[1]

The New York Apartment Association (NYAA) is an organization formed under Internal Revenue Code § 501(c)(6) that represents a coalition of property owners and managers who provide the majority of rent-regulated multi-family housing in the state of New York. The NYAA sets the industry standard for multifamily housing by promoting a healthy relationship between renters and housing providers through a code of conduct for property owners, advocating for government regulations that improve the quality and lower the cost of housing, and providing education and support to renters and housing operators so they know their rights and responsibilities.

The NYAA can offer this Court a distinct perspective on the first question presented in the Petition—namely, whether *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), should be clarified or overruled. In the NYAA's experience, *Penn Central* has been improperly used to immunize a wide range of invasions of fundamental property rights (including the New York Rent Stabilization Law ("RSL")) from meaningful judicial scrutiny. *Penn Central*'s fatal defect is its malleable standard that is more conducive to legislative policy making than to judicial decision making. Accordingly, the Petition should be granted, so that this Court may consider how to overrule or modify *Penn Central*.

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[1] Pursuant to Rule 37.2(a), amici certify that counsel of record for the parties received timely notice of the intent to file this brief. Pursuant to Rule 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or its counsel made such a monetary contribution.

SUMMARY OF ARGUMENT

In *Penn Central*, this Court attempted to set forth a legal standard to evaluate the core question in regulatory takings—to determine when a "public program adjusting the benefits and burdens of economic life," *Penn Central*, 438 U.S. at 124, falls so heavily on a property owner that "fairness and justice" require just compensation, *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This Court prescribed three factors—economic impact, interference with reasonable investment-backed expectations, and the regulation's character, 438 U.S. at 124-25—to guide its analysis.

Nearly fifty years later, it is clear that *Penn Central* has failed its central task of creating a judicially administrable framework to determine when a regulation has gone "too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Instead, it has spawned a tangle of divergent, contradictory case law and created a cottage industry of critical commentary. The only common thread in *Penn Central* jurisprudence is extreme deference to government imposition of regulatory costs on private actors and a reluctance by every court in the nation to buck that trend.

The root of the problem is that the *Penn Central* test is not judicially administrable. Each factor of the test is indeterminate and invites the consideration of a wide range of policy concerns outside ordinary judicial competence. The test further requires courts to balance these polycentric policy concerns on an ad hoc basis. Deciding how each of the factors weighs against the others "is like being asked to decide 'whether a particular line is longer than a particular rock is heavy.'" *National Pork Producers Council v. Ross*, 598 U.S. 356, 381 (2023) (quoting *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486

U.S. 888, 897 (1988) (Scalia, J., concurring in judgment)). Rather than creating a legal standard–a traditional judicial enterprise–*Penn Central* requires courts to engage in policy analysis more appropriate for legislative bodies. Thus, *Penn Central's* most salient effect over its nearly five-decade reign has been to confuse institutional roles and undermine coherent regulatory policy. In doing so, it has effectively immunized certain types of regulatory takings from meaningful judicial review.

The *Penn Central* test was intended to provide a framework for analyzing regulatory takings. In practice, it has pushed courts into a quasi-legislative role. Thus, under *Penn Central*, property owners bearing the financial burdens of legislative policy choices must ask judicial actors to make different policy choices. Over the years since *Penn Central*, judicial deference to legislative choices under the Takings Clause has developed to a point where significant loss of value or significant loss of income that is a direct result of government regulation generally does not constitute a taking. And when the magnitude of the loss counsels in favor of a taking, the character of the government action is used as a trump card to dismiss regulatory takings claims. This leaves property owners without effective judicial review of government regulations that single out real property to shoulder burdens that should be borne by society as a whole. F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company*?, 14 Duke Env'tal Law & Policy Forum 121, 141 (Fall 2003) (under *Penn Central*, courts find no compensable taking in over 90% of cases).

Penn Central must be reformed or overruled to align institutional roles with institutional competencies.

The judiciary cannot provide judicial review in regulatory takings cases without a judicially administrable standard.

The New York Rent Stabilization Law ("RSL") is a perfect illustration of the failure of *Penn Central*. The RSL governs nearly one million out of nearly 2.5 million rental units in New York City. Contrary to popular belief, it goes much further than merely controlling rent. In fact, despite this Court's warning in *Yee v. City of Escondido, Cal.*, it effectively "compel[s] a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 503 U.S. 519, 528 (1992).

Even though the RSL deprives New York property owners of fundamental ownership rights, and is used by the government as a program to provide affordable housing to low-income families without requiring public funding, the law has proven largely immune from meaningful judicial review as a compensable taking under the Fifth and Fourteenth Amendments. *See*, *e.g.*, *74 Pinehurst LLC v. New York*, 59 F.4th 557 (2d Cir. 2023), *cert. denied*, No. 22-1130, 2024 WL 674658 (U.S. Feb. 20, 2024) (granting motion to dismiss complaint asserting facial and as applied takings claims); *335-7 LLC v. City of New York*, No. 21-823, 2023 WL 2291511, at *4 (2d Cir. Mar. 1, 2023) (following *Pinehurst* and affirming dismissal of takings claim); *Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc. v. New York*, No. 21-2448, 2024 WL 1061142, at *2 (2d Cir. Mar. 12, 2024), *cert. denied sub nom. G-Max Mgmt., Inc. v. New York*, No. 23-1148, 2024 WL 4743157 (U.S. Nov. 12, 2024), *and cert. denied*, No. 23-1220, 2024 WL 4743164 (U.S. Nov. 12, 2024) (same). The problem lies squarely at the feet of *Penn Central.*

Accordingly, Justice Thomas issued a statement respecting the denials of certiorari in two recent cases involving the RSL, calling for the Court to grant review in

"an appropriate future case." *74 Pinehurst LLC v. New York*, 2024 WL 674658, at *1 (U.S. Feb. 20, 2024). This case represents an ideal vehicle to overrule or modify *Penn Central*.

ARGUMENT

I. This Court Should Grant Review to Reconsider *Penn Central*.

In the tripartite government contemplated by the U.S. Constitution, "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society[.]" *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (Marshall, C.J.). "[T]he application of those rules to individuals in society," by contrast, falls on the judiciary. *Id.* To formulate general rules, legislators gather information from wide-ranging sources, consider broad economic and social impacts, and balance competing interests. *See generally Turner Broadcasting Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195-96 (1997). Courts apply those rules to specific parties in specific circumstances.

Penn Central turns this framework on its head because *Penn Central's* ad-hoc, nebulous, multi-factor test effectively requires courts to engage in the kind of broad-based policy evaluation properly reserved for legislative bodies. The tortured *Penn Central* jurisprudence that exists is a result of courts attempting to create new legal rationales to avoid the perception of broad-based policy evaluation, leading to conflicting interpretations and applications throughout state and federal lower courts of each *Penn Central* factor. This undermines separation of powers, leaves the Constitution's meaning perpetually unsettled, and systematically under-protects property owners from government confiscations.

The first two *Penn Central* factors: The *Penn Central* test fails to specify the proper level of generality at which courts should consider economic impact and interference with reasonable investment-backed expectations. In the case of a multi-family housing unit, for example, the economic impact of a regulation and its interference with investment backed-expectations should be assessed on a per-unit basis, rather than property-wide, under the longstanding constitutional principle that the government may not force a company to operate part of its business at a loss. *See e.g., Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396, 399 (1920); *Norfolk & W. Ry. Co. v. Conley*, 236 U.S. 605, 609 (1915).

But the *Penn Central* test fails to make clear the proper level of generality at which courts should consider these economic questions, allowing courts to skirt fundamental constitutional principles. "'Any land-use regulation can be characterized as the 'total' deprivation of an aptly defined entitlement. Alternatively, the same regulation can always be characterized as a mere 'partial' withdrawal from full, unencumbered ownership of the landholding affected by the regulation.'" *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1054 (1992) (Blackmun, J. dissenting) (quoting Michelman, *Takings*, 1987, 88 Colum. L. Rev. 1600, 1614 (1988)).

In this respect, *Penn Central* is in serious tension with this Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982), where this Court looked to the granular effects of a law in finding a compensable taking. *Loretto* held that a New York law worked a taking by proscribing a trespass action by landlords against cable TV companies for placing a small cable box (only a few cubic feet) on building rooftops in exchange for a nominal $1 fee. This Court reached that conclusion even though landlords had little or no

alternative use for the space (which would have remained unoccupied) and even though the cable equipment in *Loretto* did not destroy or impair the value of the apartment building (and arguably enhanced it, by making the apartments more attractive to tenants). *Loretto* represents the proper approach to protecting property rights. *Penn Central* allows the government to avoid the Takings Clause by manipulating the appropriate level of generality at which the law is reviewed.

Moreover, defining the property at the proper level would not, itself, make the *Penn Central* factors administrable. It merely requires courts to make complex policy judgments about how to calculate the economic burden on that property. *See*, *e.g.*, *Colony Cove Props. v. City of Carson*, 888 F.3d 445, 451-52 (9th Cir. 2018) (examining economic impact of ordinance based on sale value of the property, lost income, and discounted future cash flows). The economic impact analysis becomes particularly problematic when courts consider not just direct financial losses but also opportunity costs and potential future uses, which are, by their nature, uncertain and speculative. *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) (adopting a lost profits analysis to determine economic impact and concluding that plaintiffs lost opportunity to secure higher investment returns).

The uncertain and ad-hoc calculation of economic impact is a precursor to the core question of what constitutes an acceptable, non-compensable level of loss. *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1570 (Fed. Cir. 1994) (recognizing "the difficult task of resolving when a partial loss of economic use of the property has crossed the line from a noncompensable 'mere diminution' to a compensable 'partial taking.'"). To answer this question, courts must weigh the economic impact on the property owner against the broader social

policy goals to determine whether the impact was "too much." *Cienaga Gardens*, 331 F.3d at 1345 ("It is perfectly true that no percentage diminution in value necessarily results in a compensable regulatory taking, but that is not the same as saying that below a certain percentage diminution, a taking can never be compensable, or even that an assessment of the economic impact below that percentage can never favor a conclusion that compensation is merited.").

Ultimately, in applying the economic impact *Penn Central* factor, courts inevitably engage in the kind of cost-benefit analysis typically reserved for legislative bodies. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (approximately 75% diminution in value not a taking); *William C. Haas & Co., Inc. v. City & Cnty. of S.F.*, 605 F.2d 1117, 1120 (9th Cir.1979) (finding no taking where "the value of its property was reduced from about $2,000,000 to about $100,000"); *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127–28 (9th Cir. 2013) (81% diminution in value not sufficient economic loss to constitute a taking).

The same is true for *Penn Central's* most inscrutable determinant—interference with distinct investment backed expectations. *Palazzo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring) (in assessing a property-owner's investment backed expectations, "[c]ourts . . . must attend to those circumstances which are probative of what fairness requires in a given case"); *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 36-37 (1st Cir. 2002) (noting that "courts have struggled to adequately define the term").

In evaluating this factor, courts have asked whether a property owner's expectations were "reasonable" in light of existing, contemplated, or even

potential regulatory limits. *Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974, at *8 (R.I. Super. July 5, 2005) ("This Court is mindful that the analysis requires an ad hoc consideration of a number of other relevant factors often unique to the case at hand, including the temporal relationship between Plaintiff's acquisition of title and the regulations giving rise to the takings claim."). But whether existing or contemplated regulations should defeat a property owner's economic expectations is a purely policy question, implicating the competing interests of regulatory stability and property rights.

This prong of *Penn Central* is almost insurmountable for any regulated property to overcome. As applied, no property owner in a regulated environment has any investment backed expectations that a court will recognize. The circular reasoning of "investment backed expectations" under *Penn Central* has insulated all long-standing government regulations from regulatory takings challenges.

The use of these two economic factors to determine whether a regulatory taking has occurred conflicts with overall Takings jurisprudence. In *Loretto*, the economic impact was not considered until after the Court found a taking and was evaluating the amount of just compensation. By considering economic factors in determining whether a taking has occurred, *Penn Central* conflates the two questions under the Fifth amendment, which are (1) has a government taking of private property occurred, and (2) what is the amount of just compensation (if a taking has occurred). In *Loretto*, a taking occurred, but the compensation was minimal. This acted to deter future attempts of government to use private property as a public resource for communications equipment. But in the regulatory context, *Penn Central* provides no deterrent. Accordingly, government regulations are more

intrusive and confiscatory on real property than the Constitution permits.

The third *Penn Central* factor: The *Penn Central* test fails to recognize that the character of government action should be dispositive where a regulation forces privately owned property to bear the cost of a government program designed to benefit the public as a whole. After all, "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The New York Court of Appeals has described an interest in a rent-stabilized lease as a "local public assistance benefit." *In re Santiago-Monteverde*, 22 N.E.3d 1012, 1015-17 (N.Y. 2014). As such, it is precisely the kind of cost that should be borne by the public as a whole.

Paradoxically. the third *Penn Central* prong–the character of governmental action–is often used to justify restrictions on property rights aimed at promoting the public interest. In this case, for example, the Michigan State Court of Appeal cited the public benefit to the state as a reason for finding no taking, relying almost entirely on *Penn Central's* third factor–the character of the governmental action. The court held that the "compelling" aim of the shut-down order "strongly favors the State or perhaps *actually demands that we find no taking*." App. 33a (emphasis added). The court found for the State without any evidentiary record, and despite its conclusion that the other two *Penn Central* factors–economic impact of the regulation and interference with investment-backed expectations–supported Petitioner's claim. *Id.*

The Michigan court's analysis was backwards; the public nature of the benefit is a reason that the public should bear its cost, not a rationale for saddling a targeted group with the burden. Indeed, regulations that diminish the value of private property are always intended for public benefit. Relying on the purported public benefit as a reason to deny compensation effectively rubber-stamps the legislative choice. More generally, the Michigan court's decision underscores the flaw in *Penn Central*, which requires courts to evaluate the merits of regulatory programs, pushing them directly into policy-making territory. *Palazzolo*, 533 U.S. at 634 ("The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis.") (O'Connor, J., concurring). But when courts assess whether a regulation promotes the common good or imposes burdens on individuals that "'in all fairness and justice'" are unwarranted, *Penn Cent.*, 438 U.S. at 124 (citation omitted), they essentially engage in the same balancing of competing interests that legislatures perform when crafting statutes. That is another respect in which *Penn Central* requires court to step beyond the traditional judicial role.

Similarly fallacious reasoning has doomed challenges to rent control legislation as well. In *Colony Cove Props*, 888 F.3d 445, the Ninth Circuit reversed a jury verdict in favor of a property owner, finding that no taking had occurred under the *Penn Central* analysis. In examining the "character of the government action" under *Penn Central*, the court re-stated the ordinance's underlying purpose: "to protect Homeowners from excessive rent increases and allow a fair return on investment to the Park Owner." *Id.* at 454 (quoting *MHC Fin. Ltd. P'ship,* 714 F.3d at 1128). The city had concluded in passing the ordinance that this "central purpose" justified the burden on property owners. *Id.* The court

expressly rubber-stamped that conclusion. "This central purpose of the rent control programs 'counsels against finding a *Penn Central* taking." *Id.*

In practice, courts attempting to evaluate the character of the governmental action consistently look to the law's underlying purposes. In doing so, they assume the role of legislatures, weighing social and economic benefits to the public against private burdens. This task exceeds a proper conception of the judicial role.

Penn Central's ad hoc unpredictable test lacks any consistent application and provides courts with no meaningful opportunity to review regulatory controls that government places on real property.. But its continued vitality effectively requires courts to regurgitate, and credit, policy-based defenses of regulatory takings. This Court should clarify or overrule *Penn Central*.

II. New York's Rent Stabilization Law Negatively Impacts The Price And Availability Of Housing.

The RSL illustrates the fatal flaws in *Penn Central*. As a constitutional matter, the RSL takes property under the Fifth Amendment and turns it over to renters and their heirs at significantly below-market cost without providing compensation to the property owner. The RSL prohibits landlords from ending a tenancy or adjusting rents in an apartment that has a rent below its operating cost. With limited exceptions, the RSL requires landlords to renew the leases of their tenants and the tenants' successors (who are strangers to the landlords), allowing them to stay in perpetuity regardless of the rent level. N.Y. Unconsol. Law § 26-511(c)(9) (McKinney); 9 NYCRR §§ 2520.6, 2524.4.

The New York Court of Appeals has held that "a tenant's rights under a rent-stabilized lease [is] a local public assistance benefit." *In re Santiago-Monteverde*, 22 N.Y.3d at 1015. But it is a benefit funded by transferring the value of the property from the owner to the renter. The RSL protects recipients of this public benefit by preventing landlords from re-taking possession of their own property Regardless of the circumstances, at least 80 percent of every owner's property subject to the law is completely off limits. An owner may recover possession of one–and only one–dwelling unit of the property for the owner's use as a primary residence, no matter the property's size. See N.Y. Unconsol. Law § 26-511(c)(9) (McKinney). And even that right applies only in limited situations: where the owner is a natural person, where the tenant has not occupied the unit for 15 years or more, where the owner can arrange equivalent or better housing for any tenant who is 62 or disabled, and where the owner can show "immediate and compelling necessity" for occupying the property. *See* 9 NYCRR § 2104.5(a)(1). Thus, the costs of the legislature's conclusion that "rent stabilization is necessary to preserve affordable housing for low-income, working poor and middle class residents in New York City" is borne, in perpetuity, by owners of rent-stabilized properties. *In Re Santiago-Monteverde*, 22 N.E. 3d at 1015.

If that were not enough, property owners cannot escape the burden of propping up New York's public assistance program even by disposing of their property. They are prohibited from walking walk away from the rental market, no matter how severe the financial burden. For instance, unless the building is a safety hazard, the owner cannot withdraw the property from the residential rental market except to use it in connection with a business that he or she owns. *See* 9 NYCRR § 2524.5. The owner may not use the property as a commercial rental or simply let it stand empty. An owner cannot convert a

building to a cooperative or condominium without the approval of 51 percent of the tenants. 2019 Sess. Law News of N.Y. Ch. 36, pt. I, § 2 (S. 6458) (McKinney). And owners wishing to demolish their buildings cannot simply decline to renew the tenants' leases; rather, they must pay to relocate the tenants and pay a stipend for up to six years to make up any difference in rent. 9 NYCRR § 2524.5. The time and expense of adjudicating demolition applications makes any such "right" wholly illusory.

The premise of the RSL is that these invasions of property rights are justified to preserve New York's affordable housing supply. Even as the purpose confesses a taking without compensation (the shifting of the cost of public subsidies onto private actors), the falsity of that premise has been revealed repeatedly. The RSL's principal effect is to generate dysfunctional housing markets, constrain housing supply, and drive up prices—the opposite of its purported purpose. Under *Penn Central*, the RSL's highly burdensome economic impact, its significant interference with reasonable investment-backed expectations, and its utter failure to achieve the government's articulated objective, should all be bases for a judicial finding that the RSL goes "too far" in invading settled property rights. Yet the courts have used *Penn Central* to ignore these constitutional deficiencies. *See*, *e.g.*, *74 Pinehurst LLC v. New York*, 59 F.4th 557 (2d Cir. 2023), *cert. denied*, No. 22-1130, 2024 WL 674658 (U.S. Feb. 20, 2024) (granting motion to dismiss complaint asserting facial and as applied takings claims).

Penn Central purportedly makes relevant the reasonableness of the RSL's restriction on property rights. But under *Penn Central* the courts have simply ignored the overwhelming evidence that the RSL reduces the supply of affordable housing. Most recently, a study by the New York City Independent Budget Office revealed that

although most apartments subject to the RSL were occupied, the number kept vacant for a period of two-years or longer—a proxy for those withdrawn from the market—nearly doubled between 2019 and 2022.[2]

The reason for this reduction in supply is clear: the costs of maintaining and managing properties exceed the permitted rent-based revenue stream. The New York City Rent Guidelines Board's annual income and expense study shows that net operating income for rent-stabilized properties declines year after year.[3] Indeed, the ability of current owners to repay existing loans on multifamily properties subject to the RSL is reaching a crisis level, with owners of large portfolios of rent-stabilized units at imminent risk of foreclosure.[4]

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[2] *Compare, New York City By The Numbers – Most Rent Stabilized Apartments Do Not Remain Vacant Year-to-Year*, NEW YORK CITY INDEPENDENT BUDGET OFFICE REPORTS (Aug. 2023), https://www.ibo.nyc.ny.us/iboreports/most-rent-stabilized-apartments-do-not-remain-vacant-year-to-year-august-2023.html.

[3] *2024 Income and Expense Study*, NEW YORK CITY RENT GUIDELINES BOARD (Mar. 28, 2024), https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2024/03/2024-IE-Study.pdf; *2023 Income and Expense Study*, NEW YORK CITY RENT GUIDELINES BOARD (Mar. 30, 2023), https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2023/03/2023-IE-Study.pdf.

[4] *A&E Real Estate Faces Foreclosure on Massive City-wide Portfolio*, THE REAL DEAL (Feb. 4, 2025, 5:23 AM), https://therealdeal.com/new-york/2025/02/04/ae-real-estate-faces-foreclosure-on-3500-unit-portfolio/.

The financial pitfalls faced by property owners flow, in turn, to the banks that hold loans on rent-stabilized properties. For example, on March 12, 2023, Signature Bank was closed and the FDIC was appointed its receiver.[5] At the time it closed, Signature held over 2200 loans on rent-stabilized or rent-controlled properties with an aggregate balance in excess of $15 billion.[6] When New York Community Bank acquired Signature, it declined to acquire its real estate portfolio because notes on properties subject to the RSL were "understood by the industry to be problematic."[7]

Accordingly, the RSL so reduces revenue from apartments subject to its terms that further investment in the properties is irrational, resulting in withdrawal of affordable housing units from the market. *See* Shimon Shkury, *Rent Stabilization Is At a Breaking Point: Can NYC Find Balance Before Its Too Late*, *Forbes* (January 31, 2025) ("Many owners, faced with rising costs and capped revenues, are choosing to keep units vacant rather than re-renting them, resulting in a system where no one benefits."). Moreover, because the RSL reduces housing

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[5] *Bank Failures, Multifamily Loan Portfolio Frequently Asked Questions*, FDIC, https://www.fdic.gov/bank-failures/multifamily-loan-portfolio-frequently-asked-questions (last visited Feb. 13, 2025).

[6] *Id.*

[7] Letter from New York City Comptroller Brad Ladner to FDIC Chari Martin Gruenberg (dated March 30, 2023) https://comptroller.nyc.gov/reports/letter-to-federal-and-state-regulators-about-signature-banks-rent-stabilized-housing-portfolio/.

supply, it increases rent in the unregulated market.[8] By one estimate, rents in uncontrolled units in New York City were between 22% and 25% higher than they would have been without the RSL.[9]

The 2019 Amendments to the RSL make the problem worse by further restricting costs that a property owner can incorporate into rent increases and reducing the permitted annual rent increase. Ch. 36 of the Laws of 2019, Part K, §§ 2, 4.

The RSL is, at best, an ineffective method to address housing affordability. In truth, it is disastrously counterproductive, effectively confiscating property *and* exacerbating the exact problem it purports to address.

III. At Minimum, This Court Should Make Clear that *Penn Central* Does Not Apply to Laws Like the RSL.

At minimum, this Court should clarify that physical takings are outside of *Penn Central*'s reach. When the government forces a property owner to allow for continued possession by third parties, as in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 830-32 (1987), *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), the deprivation implicates the heart of the Takings Clause, even if the government does not physically occupy the property itself. *See Loretto*, 458 U.S.

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[8] Dirk W. Early, Rent Control, Rental Housing Supply, and the Distribution of Tenant Benefits, 48 J. Urb. Econ. 185 (Sept. 2000).

[9] Steven B. Caudill, Estimating the Costs of Partial-Coverage Rent Controls: A Stochastic Frontier Approach, 75 Rev. Econ. & Stat. 727 (Nov. 1993).

at 426 ("a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve"); *see also Kaiser Aetna*, 444 U.S. at 179-80 ("the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."). *Penn Central* has no purchase in these situations. Thus, not only is *Penn Central* internally incoherent and inadequate to review regulatory takings, but its reach has also expanded beyond the pure regulatory taking context to statutes that are in fact and law physical takings.

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

In fact, most owners have no right at all to occupy even one unit of their own property. If the owner holds title to the property through a corporate form (as many landlords do), there is no right to occupy the property at all. See *1077 Manhattan Assocs., LLC v. Mendez*, 798 N.Y.S.2d 714 (App. Term 2004) ("[O]nly a natural person and not a corporation can recover an apartment for personal use even when the principal of the corporation is

its sole stockholder.") (cleaned up). And if the property is owned by more than one individual, only one of the multiple owners can occupy a unit for personal use. N.Y. Unconsol. Law § 26-511(c)(9)(b) (McKinney). A second or third owner has no rights whatsoever.

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

And even if a single, non-corporate property owner wishes to occupy the tiny fraction of his own property as a personal residence that the State permits—provided the tenant whose lease is not renewed has been there less than 15 years, is not 62, and is not disabled—the landlord still cannot live in the unit without demonstrating an "immediate and compelling necessity" for doing so. 9 NYCRR § 2104.5(a)(1).

In addition, the RSL deprives the owner of the right to make any "nonpossessory use of the property," *Loretto*, 458 U.S. at 436, by requiring owners to renew the leases of tenants or their successors in perpetuity, without the ability to exclude them. The RSL requires that a property owner allow people who are otherwise strangers–lessees–to occupy her or his property. Indeed, this is the core of New York's landlord-tenant real property law: "The landlord may recover a reasonable compensation for the use and occupation of real property." N.Y. Real Prop. Law § 220 (McKinney). Again, this occupation is much larger than the cables and boxes at stake in *Loretto*, 458 U.S. at 422.

Under the RSL, an owner must renew a lease except under specific conditions: the building is to be demolished, the owner wishes to occupy the unit her-or himself, or the owner is a charitable or educational public institution using the unit for specific purposes. N.Y. Unconsol. Law § 26-511(c)(9) (McKinney). And, as noted, the RSL requires the owner to permit the tenant's successor to occupy the property. Under ordinary landlord-tenant law, the owner cannot enter the leased apartment ("interfere[] with the quiet enjoyment of the leased premises") except under particular circumstances, N.Y. Real Prop. Law § 235 (McKinney), and is otherwise deprived of the use of that part of her or his property except as a rental unit.

The RSL thus deprives the owner of the "power to exclude the occupier from possession and use of the space." *Loretto*, 458 U.S. at 435. Because of the ongoing physical occupation and the inability to exclude others, the owner "thus lose[s] the entire 'bundle' of property rights in the [apartment spaces]—'the rights to possess, use and dispose of' them." *Horne v. Dep't of Agric.,* 576 U.S. at 350, 361-62 (2015), quoting *Loretto*, 458 U.S. at 435.

While the government's intention to provide affordable housing to those who cannot afford to live in New York City at market rents is a noble one, it must be done within the bounds permitted by the Constitution. Providing affordable housing is a burden that should be borne by society as a whole (through government-funded housing vouchers and other rent subsidies). Ironically, the availability of privately-owned affordable housing has diminished as a result of this government intrusion. Courts must be freed from the deferential shackles of *Penn Central*, so that the Takings Clause properly can limit this type of government overreach and prevent the government from "forcing some people alone to bear

public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

If this Court does not overrule *Penn Central*, it should at minimum make clear that its test does not apply to laws like the RSL, which authorize third parties to physically occupy private property.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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