No. 11-496

IN THE

Supreme Court of the United States

JAMES D. HARMON, JR. and JEANNE HARMON,

Petitioners,

-v.-

JONATHAN L. KIMMEL, in his official capacity as Member and Chair of the New York City Rent Guidelines Board, City of New York; DARRYL C. TOWNS, in his official capacity as Commissioner, New York State Homes and Community Renewal,

Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENT KIMMEL

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Subject Property's Rent Regulation History

Petitioners focus their complaints about regulation of their property on the Rent Stabilization Law of 1969, enacted twenty years after petitioners' predecessors in title acquired the building in 1949. Complaint ¶¶ 21–22, 24, App. 59a. The apartments housing petitioners' currently regulated tenants are now regulated under this 1969 law. *Id.* ¶ 27, App. 60a.

However, rent controls and anti-eviction regulations were already in place in New York City in 1949, when petitioners' predecessors in title purchased it. The laws were adopted initially by the New York City Council and subsequently ratified by the State Legislature. N.Y.C. Local Laws of 1947, no. 66, § 1, N.Y. Secretary of State, *Local Laws of the Cities, Counties, and Villages in the State of New York Enacted During the Year 1947* 277, 277–81 ("*Local Laws*") (restrictions on evictions), *repealed & reenacted*, N.Y.C. Local Laws of 1948, no. 41, § 1, *1948 Local Laws* 275, 275–80; N.Y.C. Local Laws of 1947, no. 68, § 1, *1947 Local Laws* 282, 282–83 (rent controls), *repealed and reenacted*, N.Y.C. Local Laws of 1949, no. 9, *1949 Local Laws* 139, 140–42; Act of Feb. 3, 1948, ch. 4, § 1, 1948 N.Y. Laws 7 (ratifying aforementioned 1947 local laws); Act of Apr. 11, 1949, ch. 487, § 1, 1949 N.Y. Laws 1166 (ratifying aforementioned 1948 local law); Act of Jan. 10, 1950, § 1, 1950 N.Y. Laws. 1 (ratifying aforementioned 1949 local law). *See generally Tartaglia v. McLaughlin*, 79 N.E.2d 809, 810–12 (N.Y. 1948) (describing disputes over enactment of late 1940s

New York City rent control legislation and upholding Legislature's ratification thereof).

REASONS WHY THE PETITION SHOULD BE DENIED.

A. The Restrictions Imposed by New York's Rent Stabilization Law Do Not Constitute a Physical Taking of Property Requiring Payment of Compensation.

This Court's precedents establish that restrictions like those in the Rent Stabilization Law (RSL) constitute a legitimate exercise of government police power. They do not fall within either of the "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes" because the RSL neither "requires an owner to suffer a permanent physical invasion of her property" nor takes away "'*all* economically beneficial use'" of a rental property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).[1] The RSL falls well within "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." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982).[2]

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[1] Petitioners assert only a physical taking, not deprivation of all economic use.

[2] Petitioners suggest that at the Second Circuit, respondents abandoned ripeness as a reason to dismiss petitioners' Fifth
(footnote continues on next page)

The decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992), removes any basis for petitioners' argument that the RSL effects a physical taking of their property. The Court in *Yee* sustained rent controls and tenant renewal rights more restrictive than those in the RSL. There, the landlords owned pads in mobile home parks. Tenants leased the pads as sites for their "mobile" homes, which, in fact, were rarely moved. *See* 503 U.S. at 523. The restrictions included a state law "limit[ing] the bases upon which a park owner" could terminate a tenancy and "generally" prohibiting an owner from requiring a mobile home's removal when a park tenant sold the home. *Id.* at 524. A local ordinance added rent controls that fixed rents at 1986 levels and prohibited all increases absent the City Council's approval. *Id.*

Amendment Takings Clause claims (Petition 15). However, respondent Kimmel's predecessor in office argued that because petitioners never pursued an available compensation remedy in New York State's courts, they did not have a ripe federal claim that the Rent Stabilization Law constitutes a taking of property requiring just compensation. Brief of Appellee Marvin Markus 5–7, *Harmon v. Markus*, No. 10-1126 (2d Cir.) (ECF No. 115) (citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985), and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984)).

The Second Circuit did not discuss ripeness, choosing instead to dismiss the takings claim on the merits. In light of this Court's discussion of a similar situation in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1010–13 (1992), respondent Kimmel is not pressing ripeness as a basis for denying the petition.

Like petitioners here, the *Yee* petitioners complained because they could not "set rents or decide who their tenants will be." *Id.* at 526. They argued that the challenged enactments gave a mobile-home-owning tenant the economically valuable "right to occupy a pad at a rent below the value that would be set by the free market," *id.*, and made the home owner "effectively a perpetual tenant of the park," with "the right to occupy a pad at below-market rent indefinitely." *Id.* at 527. They claimed—unsuccessfully—"that what has been transferred from park owner to mobile home owner is no less than a right of physical occupation of the park owner's land." *Id.*

Petitioners here proffer strikingly similar objections to the RSL, which, they say, "takes leaseholds . . . and gives the tenants permanent possession and lifetime tenure with succession rights" (Petition 5). They complain about having "to offer lease renewals to tenants . . . with mandated rents and terms" and about restrictions on their ability to "withdraw[] the captive apartments from the rental market" (*id.*).

In *Yee*, this Court rejected the argument that such restrictions constituted a *per se* taking as a government authorization for uninvited physical occupation of the park owners' property. *See id.* at 526–27. The Court said the petitioners' contention could not be "squared easily with our cases on physical takings," *id.* at 572, since the park owners "voluntarily rented their land" and the government did not compel them "to continue doing so." *Id.* at 527–28. "Put bluntly, no government has required any physical invasion of petitioners' property.

Petitioners' tenants were invited by petitioners, not forced upon them by the government." *Id.* at 528. The restrictions "merely regulate petitioners' *use* of their land by regulating the relationship between landlord and tenant. . . . Such forms of regulation are analyzed by engaging in the 'essentially ad hoc, factual inquiries' necessary to determine whether a regulatory taking has occurred," not as *per se* physical takings. *Id.* (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)). Moreover, because owners "voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Id.* at 530–31. This reasoning applies with equal force to petitioners here. No law or regulation compelled petitioners or their predecessors in title to enter the rental business.

Moreover, the RSL's tenant-selection restrictions are less intrusive in significant respects than those upheld in *Yee*. Mobile-home owners in that case could transfer their tenancies to virtually anyone because sale of a mobile home transferred the tenancy by operation of law. *See* 503 U.S. at 524 (explaining that a pad owner could not "disapprove of mobile-home purchaser" able to pay the rent). Owners under the RSL have far more discretion in tenant selection. When a tenant vacates a rent-stabilized apartment, the landlord chooses the next leaseholder, subject to limited succession rights available to certain household members who had been living in the apartment as their primary residence for specified minimum time periods. *See* N.Y. Comp. Codes R. & Regs., tit. 9, § 2523.5(b)(1); *Rent Stabilization Ass'n of N.Y. City, Inc. v. Higgins*, 630 N.E.2d 626, 632–33 (N.Y. 1993) (finding then-

current succession regulations constitutional, citing *Yee*), *cert. denied*, 512 U.S. 1213 (1994).

Nor does the RSL force owners to keep apartments on the rental market permanently. Thus, petitioners err when they contend that the RSL presents the "different case" that would arise were a statute "to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Yee*, 503 U.S. at 528; Petition 32–33. Except for the limited succession rights noted above, once a tenant leaves an apartment, the RSL neither compels an owner to continue renting that apartment nor takes away the owner's discretion to select the next tenant. Petitioners can put a vacated, regulated apartment in their building to any lawful use.

Additionally, the RSL provides several bases for owners to stop offering renewal leases to rent-stabilized tenants, including "use in connection with [an owner-operated] business," N.Y. Comp. Codes R. & Regs., tit. 9, § 2524.5(a)(1)(i); "[d]emolition," *id.* § 2524.5(a)(2); or "[o]ccupancy by owner or member of owner's immediate family," *id.* § 2524.4(a). Some of these actions require advance approval from the State Division of Housing and Community Renewal. *See generally id.* §§ 2524.4 (no approval necessary) & 2524.5 (approval required).

Petitioners contend that these rights are illusory "[a]s a practical matter" (Petition 34), but that claim is not properly before this Court. In their complaint, petitioners sought relief based solely on the facial restrictions in the RSL, not any "practical" difficulties that might preclude them from using the

aforementioned regulations to terminate renewable tenancies. *Compare* Petition 34–35 *with* Complaint, ¶¶ 48(c)–(d), App. 65a. *Cf. Yee*, 503 U.S. at 528 (declining to review the petitioners' claim that the challenged law's exemptions were "a gauntlet" since the owners had not tried to use them).[3]

Nor was the outcome in *Yee* a limited holding predicated on the particular harm that pad tenants could suffer if forced to relocate their valuable, practically immovable, mobile homes from a pad (Petition 30–31). Petitioners' argument conflates two different concepts: the degree that the law intrudes on pad owners' property rights and the justification for the intrusion. Only the former matters when considering if a law effects a *per se* taking by "permanent physical invasion of property," *Lingle*, 544 U.S. at 538, although justification might have some relevance in a regulatory takings analysis. *See id.* at 540 ("[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the

[3] Petitioners note their effort to decline to offer one tenant a renewal lease so her apartment could be occupied by petitioners' "grandchild" (Petition 34). The petition does not mention that their initial notice to the tenant said the apartment was needed for a granddaughter planning to attend college in New York City. When petitioners sued to evict the tenant, the Civil Court ordered discovery, after which petitioners switched to claiming that they now desired the apartment for a grandson because the granddaughter was no longer planning to live there. *See Harmon v. Mervine*, No. 51685/10, 2012 N.Y. Misc. LEXIS 347 at *4–5 (Civ. Ct. Feb. 1, 2012). The court held that the change in theory rendered the initial notice to the tenant defective and dismissed the petition. *Id.* at *8–9.

magnitude of a regulation's economic impact.") (referring to *Penn Cent. Transp. Co. v. N.Y. City*, 438 U.S. 104 (1978)). In any event, New York City's tenants face risks different in kind but similar in degree. In a housing market where millions of people rent apartments and affordable housing is scarce, that supply shortage provides owners with leverage comparable to that possessed by the pad owners in *Yee* (*infra* pp.13–14).

In sum, *Yee* forecloses any argument that the RSL amounts to a physical taking of petitioners' property, and there is "no need to reconsider the constitutionality of rent control *per se*." *Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988).

B. The Due Process Clause Does Not Limit Use of Anti-Eviction Restrictions and Rent Controls to Addressing Short-Term Housing Emergencies.

According to petitioners, a series of post-World War I decisions, "led by *Block v. Hirsh*, 256 U.S. 135 (1921)," raised the possibility that "an emergency of catastrophic scale and limited duration is a constitutional prerequisite to the enactment of possessory rent regulation" (Petition 14, 19). In *Block*, the Court upheld a rent control law that was adopted "and justified only as a temporary measure," and left open whether the same result would be reached regarding a law passed "as a permanent measure." 256 U.S. at 157. Citing *Block*, former Chief Justice Rehnquist raised this issue in his lone dissent in *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 875 (1983), an attack on Cambridge, Massachusetts' rent control ordinance.

Petitioners rely on this dissent to argue that "this Court has yet to decide whether permanent possessory rent regulation can ever be a noncompensable and valid exercise of the police power in the absence of an emergency" (Petition 19).

This Court necessarily rejected that argument in *Fresh Pond* when it dismissed the appeal "for want of substantial federal question." 464 U.S. at 875. As the dissent noted, the challenged rent control ordinance presented the emergency issue,[4] and the dismissal of the appeal for lack of a substantial federal question "constitute[d] a decision on the merits." *Boggs v. Boggs*, 520 U.S. 833, 849 (1997).

Other decisions in the 81 years since *Block* also establish that the Due Process Clause does not create a special standard invalidating rent control laws unless they address short-term emergencies. RSL restrictions, "like any other form of regulation, [are] unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." *Nebbia v. New York*, 291 U.S. 502, 539 (1934); *accord Pennell*, 485 U.S. at 11 (citing *Nebbia*).[5] Modern decisions

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[4] Cambridge, Massachusetts adopted the ordinance after the Massachusetts Legislature amended state law to "extend, indefinitely, Cambridge's powers to impose rent and eviction controls on residential property owners, such controls having been first imposed in Cambridge, on a temporary emergency basis, approximately six years earlier." Jurisdictional Statement 3, *Fresh Pond*, 464 U.S. 875 (No. 82-2151).

[5] The citation of *Nebbia* in *Pennell* undermines petitioners' contention that the principles stated in *Nebbia* do not apply to rent control laws (Petition 22). Furthermore, petitioners beg the (footnote continues on next page)

upholding rent control laws do not mention any special rule confining the police power to remediation of temporary emergencies. Rather, these cases "have 'consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular.'" *Pennell*, 485 U.S. at 12 n.6 (quoting *Loretto*, 458 U.S. at 440). In *Pennell*, the Court observed that the petitioners who challenged San Jose's rent control ordinance did not even dispute that it was "a legitimate exercise of [San Jose's] police powers." *Id.* at 12. The Court cited *Block* to illustrate the wisdom of petitioners' decision. *Id.* Moreover, former Chief Justice Rehnquist joined the majority in *Yee* and *Pennell*, notwithstanding his earlier dissent in *Fresh Pond*.

Finally, in other cases where this Court has cited *Block* to illustrate that government can regulate the landlord-tenant relationship without paying compensation, it has not indicated that such restrictions must address a temporally limited emergency. *E.g.*, *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322–23 (2002) (citing *Block* for the proposition that "[A] government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent . . . does not constitute a categorical taking.") (citations

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question when they argue that the instant case differs from *Nebbia* because it involves "a permanent noncompensable deprivation of property rights *otherwise protected by the Constitution*" (Petition 22) (emphasis added). As previously explained, this assertion is belied by the precedents establishing that the RSL is not a *per se* taking of property.

omitted); *Loretto*, 458 U.S. at 440; *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987).

C. The RSL Is a Rational Legislative Effort to Address a Serious Shortage of Affordable Rental Housing and Does Not Violate Petitioners' Rights to Substantive Due Process.

This Court should not issue a writ of certiorari to consider petitioners' contention that the RSL violates their substantive due process rights because its provisions are so irrational and ineffective as to be arbitrary (Petition 24). Since the law manifestly satisfies the most extensive substantive due process review that might be applied to it, this case provides no reason for this Court to consider whether the RSL and other claimed takings of property are unreviewable for due-process arbitrariness either because the Takings Clause furnishes "'an explicit textual source of constitutional protection'" against the behavior challenged by petitioners, 2d Cir. Op., App. 6a (quoting *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Prot.*, 130 S. Ct. 2592, 2606 (2010)) (plurality opinion) (citations omitted); or because substantive due process does not protect "economic liberties." *Stop the Beach*, 130 S. Ct. at 2606 (plurality opinion); *but see Lingle*, 544 U.S. at 548 (Kennedy, J., concurring).

Assuming for argument's sake that some measure of judicial review is available under the Substantive Due Process Clause, it would be on the theory that "a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due

Process Clause." *Lingle*, 544 U.S. at 542. The RSL easily passes muster under the principles governing such reviews.

Petitioners cite numerous critics who object to the RSL as ineffective, unwise public policy (Petition 11–12), but this Court has already established that it is not for the courts to decide if the RSL's proponents or critics have the better argument. Such an analysis would be "remarkable, to say the least, given that [this Court has] long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation. The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established . . . . " *Lingle*, 544 U.S. at 545 (citations omitted). "[I]t is, by now, absolutely clear that the Due Process Clause does not empower the judiciary 'to sit as a "superlegislature to weigh the wisdom of legislation" . . . .'" *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 124 (1978) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)). Arguments resting "simply on an evaluation of the economic wisdom of the statute . . . cannot override the State's authority 'to legislate against what are found to be injurious practices in their internal commercial and business affairs . . . .'" *Id.* (citation omitted) (second ellipsis in original) (quoting *Lincoln Fed. Labor Union v. Nw Iron & Metal Co.*, 335 U.S. 525, 536 (1949)).

The RSL addresses a pressing local problem. "In contrast to the rest of the country, most New Yorkers do not own the homes in which they live." New York City Rent Guidelines Board, *2011 Housing Supply Report* 3 (June 2, 2011) ("*Supply Report*"),

www.housingnyc.com/downloads/research/pdf_reports/11HSR.pdf. Moreover, "New York City's Housing Market remains tight," with a low vacancy rate, *id.* at 3, and substantial overcrowding in rental housing. *Id.* at 4.

Petitioners acknowledge that the RSL's rent controls effectively push rents below market rates (Petition 7–8), thus achieving one of its key objectives. *See* N.Y.C. Admin. Code § 26-501(f) (finding a need for legislation "to prevent exactions of unjust, unreasonable and oppressive rents"). Petitioners complain that rents are held down unevenly, being further below market level in Manhattan, where their property is located, than in other parts of the City. However, even in the Bronx, the borough petitioners point to as having a smaller gap between regulated and market rents, the law keeps 58% of regulated units at rents that petitioners themselves deem significantly below unregulated rents (Petition 7) (describing 42% of Bronx rental properties as having rents "close to" or above unregulated rents). Petitioners consider this inter-borough disparity inequitable, *id.* at 7, but it means only that in parts of the City where market rents are the most onerous, the RSL provides a larger rent reduction. Given the law's intent to make housing affordable, that difference is hardly irrational or unrelated to the law's purpose.

The scarcity of affordable housing also justifies the RSL's provisions mandating lease renewals. In earlier rent control challenges, this Court has recognized government's legitimate interest in ameliorating "the social costs" of forcing tenants to relocate in a market suffering from "a

housing shortage." *Pennell*, 485 U.S. at 14 n.8. Petitioners' contention that the RSL exacerbates these shortages (Petition 11–12) provides an argument for legislative debate, not a basis for invalidating the law. Renewal rights assure tenants they will not need to undertake periodic hunts for housing in a market with few affordable choices and also protect them from harassment. When tenants have few housing options and no lease-renewal rights, unscrupulous landlords can make it risky to complain about lack of basic building services, like heat and hot water. A tenant facing the choice of silence or eviction into a market with precious little affordable housing may well choose silence.

Nor is it unconstitutional for the RSL to regulate apartment rents without regard to the occupying tenant's income. A law easing rent controls based on tenant income would make wealthier tenants especially desirable and give landlords another reason to turn poorer people away or push them out of existing tenancies. Of course, governments have other ways to increase the supply of affordable housing—and New York City uses them—such as development efforts and rent subsidy programs, but this Court has already upheld rent controls as another legitimate tool to address this basic human need.

Simply put, rent regulation raises difficult and important questions of public policy, but its constitutionality has been settled. Over one million apartments in New York City are regulated under the RSL or its predecessors. *See Supply Report* 4 (chart). The shortcomings of the City's rental housing market create "one of the most intensely local and

specialized of all municipal problems." *Rwy. Express Agency, Inc. v. New York*, 336 U.S. 106, 109 (1949). When the Court used this phrase to describe another difficult New York City problem—traffic—it declined to assess the wisdom of local remediation efforts since responsible officials had found the challenged enactment beneficial "[a]nd nothing has been advanced which shows that to be palpably false." *Id.*

The same is true here. The rent control debate is ongoing, and it should continue in the political branches of New York State and City government, not in federal courts. *See Guggenheim v. City of Goleta*, 638 F.3d 1111, 1123 (9th Cir. 2010) (finding economic arguments against rent control persuasive, but rejecting them as the basis for a due process attack), *cert. denied*, 131 S. Ct. 2455 (2011).

D. Petitioners Had No Right to Special Notice of the Legislative Hearing to Consider Renewing the RSL.

Petitioners had no right under the Due Process Clause to receive "personal notice or service by certified mail of the hearing to address the enactment" of the 2006 legislation continuing rent regulation in New York City (Petition 36), just as the countless tenants with leaseholds protected by the RSL did not have notice rights. When legislation affects the property interests of large numbers of people, the workings of the legislative process provide the notice due under the Constitution. *See Atkins v. Parker*, 472 U.S. 115, 129–30 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432–33 (1982). The notice "requirements of due process long established" in *Mullane v. Central Hanover Bank &*

Trust Co., 339 U.S. 306 (1950), and *Schroeder v. City of New York*, 371 U.S. 208 (1962) (Petition 36), apply to commencement of legal proceedings, not enactment of legislation.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

DATED: March 2, 2012

Respectfully submitted,

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