No. 11-496

IN THE

Supreme Court of the United States

JAMES D. HARMON, JR., *et ux.*,

Petitioners,

v.

JONATHAN L. KIMMEL, *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 RESPONDENT DARRYL C. TOWNS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Rent Stabilization Law for New York City (RSL) aims to address an ongoing and severe shortage of rental housing in New York City and prevent rent profiteering by regulating tenancies and the rate of rent increases for apartment units subject to its terms. The RSL neither compels petitioners to offer for rental the three regulated units in the building they own nor prohibits the eviction of tenants from those units. Rather, the RSL regulates the circumstances in which petitioners may evict a tenant from a regulated apartment. The questions presented are:

1. Is the RSL rational economic regulation that comports with principles of substantive due process?

2. Does the fact that petitioners have chosen to offer the apartment units in their building for rental, and retain the right to terminate a tenancy on numerous grounds, foreclose their claim that the RSL effects an unconstitutional taking by subjecting them to an involuntary permanent physical occupation of their property by tenants?

3. Did the New York City Council satisfy the requirements of procedural due process when it legislatively reauthorized the RSL in 2006 and 2009 after holding public hearings, without giving special individualized notice to petitioners?

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STATEMENT

Petitioners James D. Harmon, Jr. and Jeanne Harmon bring a constitutional challenge to the system of New York State and New York City laws and regulations that collectively constitute the RSL. Respondent Jonathan L. Kimmel is the Chair of the New York City Rent Guidelines Board, which sets the level of rent increases for regulated apartments in New York City. Respondent Darryl C. Towns is the Commissioner/CEO of New York State Homes and Community Renewal, which, through its Division of Housing and Community Renewal (DHCR), promulgates complementary regulations governing permissible grounds for landlords to withdraw regulated apartments from the rental market and evict tenants from regulated apartments. This Brief in Opposition is filed on behalf of Respondent Towns.

1. New York City faces a notorious shortage of affordable rental housing and a volatile housing market for many reasons—including a highly desirable location, exceptional population density, high construction costs, and limited space due to natural geographic boundaries. The RSL aims to ensure a fair and stable rental market by preventing the worst forms of rent profiteering that such a tight housing market would allow. *See* N.Y. City Admin. Code § 26-501 (finding the RSL necessary "to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices"); *see also id.* § 26-502; 9 N.Y. Comp. Code R. & Regs. (N.Y.C.R.R.) § 2520.3. By regulating evictions and the pace of rent increases, the RSL protects tenants, particularly the elderly and disabled, from dislocation, and limits the disruption to neighborhoods and communities that would

result from dramatic changes in rental rates and rapid turnover of tenants year to year. *See* N.Y. City Admin. Code § 26-501; *Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 87 N.Y.2d 325, 332 (1995).

The RSL fosters stability in the rental-housing market by controlling the pace of rent increases in regulated apartments, while ensuring that landlords are able to earn a reasonable rate of return. The RSL does not set rents, but instead regulates the percentage by which landlords may periodically increase the rent on regulated apartment units. The Rent Guidelines Board—a body composed of representatives of landlords, tenants, and the general public—annually determines the permissible percentage of rent increases for lease renewals. *See* N.Y. City Admin. Code § 26-510(a). The Board must consider, among other things, the cost of living and the economic condition of the residential real-estate industry, including tax rates, maintenance costs, the housing supply, and vacancy rates. *Id.* § 26-510(b). Landlords who believe that the guidelines fail to afford them reasonable income may apply to DHCR for a hardship exemption. *See* 9 N.Y.C.R.R. § 2522.4(b)-(c).[1] In addition to the standard percentage increase for lease renewals, the RSL authorizes a larger rent increase when a tenant moves out, *id.* § 2522.8, or when the landlord improves the physical condition of the unit or building, *id.* § 2522.4(a).

To ensure the effectiveness of the regulation of rent increases, the RSL also regulates evictions. Subject to

1. DHCR's regulations governing such matters as lease renewals and evictions are known as the Rent Stabilization Code. *See* 9 N.Y.C.R.R. pts. 2520-31.

a limited exception for succession rights,[2] when a tenant vacates a regulated apartment, the landlord may choose whether to continue offering the apartment for rental and retains discretion to select the next tenant. On the other hand, the RSL generally requires a landlord to offer an existing tenant in a regulated apartment the opportunity to enter into a new lease when the existing lease expires. *Id.* § 2523.5(a). But a landlord may evict a tenant for cause, such as nonpayment of rent or misconduct, *id.* § 2524.3, and may refuse to renew a lease if the apartment unit is not the tenant's primary residence, *id.* § 2524.4(c). A landlord may withdraw one or more units from the rental market during a tenancy for use as his primary New York City residence or as the primary New York City residence of an immediate family member. *Id.* § 2524.4(a)(1). To protect especially vulnerable tenants, the RSL requires a landlord seeking to retake an apartment from a senior citizen or disabled person to ensure that the tenant can obtain equivalent or better housing nearby at the same or lower regulated rent. *Id.* § 2524.4(a)(2).

A landlord may also withdraw a unit or building from the rental market during a tenancy by demonstrating to DHCR either that he intends to use it in connection with a business he owns and operates or that redressing substantial building-code violations would be financially

2. Certain family members of a rent-stabilized tenant who reside in an apartment unit for a designated period may obtain the right to succeed to rental of the unit upon the tenant's departure. *See* 9 N.Y.C.R.R. §§ 2523.5(b)(1), 2520.6(o). Successor tenants are subject to removal on the same grounds as any other tenant. As discussed below, succession rights under the RSL are not implicated here because the Harmons' rent-stabilized tenants live alone. See *infra* at 7, 18 n.6.

impracticable. *See id.* § 2524.5(a)(1). Further, a landlord may obtain DHCR's authorization to demolish a building by submitting proof of financial ability and an approved demolition plan, subject to the requirement to relocate affected tenants to comparable apartment units or pay a monetary stipend. *Id.* § 2524.5(a)(2).

The RSL envisions a gradual and orderly transition to a housing market where regulation of rent increases is no longer needed. *See* N.Y. City Admin. Code § 26-501. Today, less than half of the roughly two million rental apartment units in New York City are subject to the RSL. *See* N.Y. City Rent Guidelines Bd., *Housing NYC: Rents, Markets & Trends 2011* ("*Housing NYC*") at 71. An apartment leaves the RSL's ambit when it becomes vacant and the regulated monthly rent equals or exceeds $2,500, *see* N.Y. City Admin. Code § 26-504.2(a), or when, during an existing tenancy, the monthly rent equals or exceeds $2,500 and the tenants' combined annual adjusted gross income has exceeded $200,000 for two years, *id.* § 26-504.1.

The law also aims to increase the housing stock in New York City by exempting new construction, N.Y. Unconsol. Laws § 8625(a)(5) (McKinney), and by offering incentive programs that afford tax reductions to owners of newly constructed buildings who voluntarily choose to place units under the RSL for a certain number of years, *see, e.g.*, N.Y. City Admin. Code § 26-504(c); N.Y. Real Prop. Tax L. § 421-a(2)(f). State law authorizes rent regulation only so long as the City's rental vacancy rate remains at or below five percent. N.Y. Unconsol. Laws § 8623(a) (McKinney). The City Council has reassessed the need for continued rent regulation roughly every three years. *See*

N.Y. City Admin Code § 26-502; *see also* N.Y. Unconsol. Laws § 8603 (McKinney).

In 2010, about 17,000 apartment units left the RSL because of rent or income deregulation, expiration of tax incentives, condominium or cooperative conversion, or other reasons. In the same year, about 12,000 units became newly regulated, the majority because their landlords opted into the system to receive tax benefits. *See Housing NYC*, *supra*, at 85-90.

2. The RSL's balanced approach to regulation of tenancies and rent increases reflects New York's long experience with rent regulation. The State enacted its first rent-control statute in 1946 in response to the housing shortage following World War II and the end of federal wartime rent regulation. *See* Ch. 274, 1946 N.Y. Laws 723; *La Guardia v. Cavanaugh*, 53 N.Y.2d 67, 71 (1981). In 1962, the Legislature gave New York City and certain other municipalities the authority to enact their own rent regulations. *See* Ch. 21, § 1(4)-(6), 1962 N.Y. Laws 53, 54-56. Under this authority, the New York City Council introduced the prevailing scheme of rent regulation with the Rent Stabilization Law of 1969 (codified as amended at N.Y. City Admin. Code § 26-501 *et seq*).[3]

In 1971, the Legislature, in an "experiment with free-market controls," deregulated newly vacated apartment units that had been subject to the RSL. *KSLM-Columbus*

3. A second form of rent regulation, known as "rent control," was enacted in 1962 under the same enabling statute. *See* N.Y. City Admin. Code § 26-401 *et seq*. Rent control, which does not apply to petitioners' property, is more stringent than the RSL and applies today only to a small and dwindling number of units.

Apartments, Inc. v. N.Y. State Div. of Hous. & Cmty. Renewal, 6 A.D.3d 28, 32 (1st Dep't 2004), *mod. 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 construction of new housing. *La Guardia*, 53 N.Y.2d at 74. Three years later, deeming the experiment a failure, the Legislature reaffirmed its commitment to rent stabilization. *See* Emergency Tenant Protection Act of 1974, Ch. 576, § 4, 1974 N.Y. Laws 1510, 1512-23 (reproduced as amended at N.Y. Unconsol. Laws § 8621 *et seq.* (McKinney)); *Roberts v. Tishman Speyer Props., L.P.*, 62 A.D.3d 71, 76 n.4 (1st Dep't), *aff'd*, 13 N.Y.3d 270 (2009).

3. Petitioners own a five-story apartment building in New York City. *See* Pet. App. E (Complaint) at 55a ¶ 6, 58a ¶ 17, 60a ¶ 27. Mr. Harmon's grandparents purchased the building in 1949. *Id.* at 59a ¶¶ 21-22. Public property records do not disclose the exact purchase price, but do show that the mortgage on the property was in the amount of $22,000. As of 1949, the building was already subject to rent regulation. *See* Ch. 274, 1946 N.Y. Laws 723. Mr. Harmon and his brother inherited the building jointly in 1994. Pet. App. E at 59a ¶ 22; Pet. at 4. In 2005, the Harmons purchased the half interest held by Mr. Harmon's brother for $1.5 million, reflecting a total valuation for the building of $3 million. *See* Pet. App. E at 58a ¶ 17; Pet. at 4-5.

The Harmons' building is located in an area zoned residential and designated a historic district by the New York City Landmarks Preservation Commission. Pet. App. E at 58a ¶ 17. Since 2002, the Harmons have occupied the building's lower floors as their residence. *Id.* at 60a ¶ 26. Each of the three higher floors contains two one-bedroom

apartments. *Id.* at 60a ¶ 27. Three of the six rental units in the building are unregulated. *Id.* at 60a ¶ 28. The other three units, each occupied by a tenant living alone, are regulated by the RSL. *See id.* at 61a ¶ 32, 62a ¶¶ 35, 39. Two of the tenants in the regulated units now qualify as senior citizens under the RSL, although neither was a senior citizen when the Harmons acquired ownership in 1994. *Id.* at 61a ¶ 30, 62a ¶ 35.

In 2010, the Harmons filed a petition in local court to evict the tenant from one of the three regulated apartments, after serving legally required notice on the tenant that they would not renew the tenant's lease because their granddaughter intended to occupy the unit as her primary residence. *See Harmon v. Mervine*, 34 Misc. 3d 1218(A), 2012 N.Y. Slip Op. 50134(U), 2012 WL 280704 (N.Y. City Civil Court Feb. 1, 2012). The local court dismissed the proceeding when the granddaughter affirmed that she no longer intended to occupy the apartment. *Id.* at *3, 2012 WL 280704, at *2. The court rejected the Harmons' attempt to amend their petition to change the identity of the intended occupant of the unit from their granddaughter to their grandson, finding that this change would make the petition inconsistent with the nonrenewal notice served on the tenant. *Id.* at *4, 2012 WL 280704, at *3.

4. The Harmons brought this action in the United States District Court for the Southern District of New York, alleging that the RSL is unconstitutional under the Takings Clause of the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment, the Contracts Clause of Article I, § 10, the Thirteenth Amendment, and the Equal Protection Clause. They named the Chair of the Rent Guidelines Board and the Commissioner of DHCR as

defendants, in their individual and official capacities. Pet. App. E at 52a, 55a ¶¶ 7-8. The Harmons principally sought a declaratory judgment that the RSL is unconstitutional as applied to them and an injunction permanently barring the City and State from enforcing the RSL against them. *Id.* at 93a-94a.

The district court granted the defendants' motions to dismiss. *See* Pet. App. B at 7a-25e. The court held that the Harmons' regulatory-taking, due process, and equal protection claims were unripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), because petitioners had sought neither a hardship exemption from the RSL nor just compensation in New York state court. Pet. App. B. at 13a-16a, 21a. The court further rejected the Harmons' physical-taking claim because the RSL did not effect a permanent physical occupation of their property. *Id.* at 17a-18a. Finally, the court found no merit in the Harmons' claims under the Contracts Clause and Thirteenth Amendment. *Id.* at 21a-23a.

5. The court of appeals affirmed by nonprecedential summary order. *See* Pet. App. A at 1a-6a. It held that the RSL did not effect a permanent physical occupation of the Harmons' property because they retained the rights to recover possession for "'immediate and compelling necessity for [their] own personal use and occupancy'"; to demolish the property under certain circumstances; and to evict an unsatisfactory tenant. *Id.* at 3a-4a (quoting 9 N.Y.C.R.R. § 2104.5(a)(1)). The court stated that "where, as here, 'a property owner offers property for rental housing, the Supreme Court has held that governmental regulation of the rental relationship does not constitute a physical taking.'" *Id.* at 4a (quoting *Fed. Home Loan*

Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal, 83 F.3d 45, 47-48 (2d Cir. 1996)). It noted that the Harmons "concede[d] that they acquired their property in 2005 with full knowledge that it was subject to the RSL," and thus "acquiesced in its continued use as rental housing." *Id.* (quotation marks omitted).

The court of appeals held that the Harmons' substantive due process claim failed as a matter of law because the specific analysis directed by the Takings Clause, rather than general notions of substantive due process, provided the correct framework for analyzing the case. *See id.* at 6a. The court also rejected the Harmons' claims under the Equal Protection Clause and the Contracts Clause. *Id.* at 5a-6a.

REASONS FOR DENYING THE PETITION

The petition in this case presents no question that warrants this Court's review. Petitioners fail to identify any conflict between the decision of the court of appeals here and any decision of this Court or the other courts of appeals. To the contrary, all of petitioners' challenges to the RSL fail under clear and established precedent from this Court.

A. Petitioners' Substantive Due Process Challenge Seeks To Undo Decades of Settled Precedent Holding That Economic Regulation Is Valid If Rational.

The primary argument in the Harmons' petition seeks to revive a mode of substantive due process analysis that this Court repudiated generations ago for economic regulation. Relying solely on decisions from the 1920s,

petitioners argue (Pet. at 18-24) that rent control may be constitutionally enacted only upon a showing of a "catastrophic" emergency that is "characterized by unforeseen circumstances" and a "limited duration" (*id.* at 20). But rent control is simply one form of price control, and this Court's 1934 decision in *Nebbia v. New York* put to rest any notion that price control is subject to special scrutiny requiring proof of exigent circumstances. 291 U.S. 505 (1934). *Nebbia* firmly established that "[p]rice control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt." *Id.* at 539. Thus, "[t]he time when extraordinarily exigent circumstances were required to justify price control . . . passed on the day that [*Nebbia*] was decided." *Eisen v. Eastman*, 421 F.2d 560, 567 (2d Cir. 1969) (Friendly, J.).

Nebbia's holding reflects the broader principle, consistently affirmed by this Court for decades, that courts should not sit as super-legislatures reviewing matters of economic policy, but should ask only whether a legislature's policy judgments are rational. "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *see Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (observing that "the test of due process" for economic legislation is satisfied by "a legitimate legislative purpose furthered by rational means" (quotation marks omitted)).

To the extent petitioners suggest that more exacting limits on permissible governmental purposes or heightened means-end scrutiny applies to rent-control statutes (*see* Pet. at 22-23), a unanimous Court ruled otherwise in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). There, the Court held that a commercial rent-control statute should be analyzed under the test of minimal rationality applicable to all economic regulation: "[W]e have long eschewed . . . 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." *Id.* at 545 (citations omitted). *Lingle* flatly contradicts petitioners' contention that rent-control legislation may be constitutionally enacted only upon a finding of exigent circumstances.

Here, the RSL was appropriately enacted to ameliorate "an acute shortage of dwellings" and "to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare." N.Y. City Admin. Code § 26-501. These are proper areas of governmental concern: "[T]he purpose of preventing excessive and unreasonable rent increases caused by the growing shortage of and increasing demand for housing . . . is a legitimate exercise of [the] police powers." *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988) (quotation and alteration marks omitted); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982).

The RSL is rationally designed to curb rent profiteering, promote stability in the housing market, and avoid the disruptions to neighborhoods and communities that would result from dramatic rent increases. Although petitioners disagree with this policy choice, it reflects long legislative experience with rent regulation in New York City, including the failed experiment with deregulation in the early 1970s. See *supra* at 5-6. The regulation of rent increases is a rational response to the tightness and volatility of the housing market in New York City. And the regulation of evictions ensures that the regulation of rent increases can be effective: otherwise, landlords could use the threat of eviction to coerce tenants to accept greater rent increases. While the Harmons would no doubt prefer a policy of immediate deregulation, the Legislature and City Council have rationally chosen to pursue a gradual transition to an unregulated market by deregulating units when rents increase beyond designated thresholds, exempting new construction from regulation, and enacting tax-incentive programs to encourage new construction.

Because petitioners' substantive due process claim fails under settled precedent, it does not matter that a passing statement in the court of appeals' summary order, addressing one of the numerous causes of action petitioners pressed below, mistakenly suggests that their substantive due process claim is duplicative of their takings claim. Pet. App. A. at 6a. Petitioners (Pet. at 24) are correct that *Lingle* describes substantive due process analysis as "logically prior to and distinct from" analysis under the Takings Clause, 544 U.S. at 543. But contrary to petitioners' claim (Pet. at 24-26), there is no genuine circuit split on this point: all the courts of appeals to address the question in a precedential opinion after *Lingle*

have recognized the distinction between a substantive due process challenge to a regulation and a claim that a regulation effects a taking. *See Alto Eldorado P'ship v. County of Santa Fe*, 634 F.3d 1170, 1175 (10th Cir.), *cert. denied*, 132 S. Ct. 246 (2011); *Franklin Mem'l Hosp. v. Harvey*, 575 F.3d 121, 128 n.9 (1st Cir. 2009); *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1276-78 (Fed. Cir. 2009); *A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356, 369 n.6 (4th Cir. 2008); *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855-56 (9th Cir. 2007). This Court does not sit to correct the lower court's recitation of the law, *see* Sup. Ct. R. 10, when the court below indisputably reached the correct result.

B. Petitioners' Takings Claim Is Controlled By the Court's Decision in *Yee v. City of Escondido*.

1. As an initial matter, petitioners' takings claim is noteworthy for what it does not assert. Petitioners do not contend that the RSL effects a taking under the multifactor analysis described in *Penn Central Transportation Corp. v. City of New York*, which focuses primarily on "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," 438 U.S. 104, 124 (1978); *see Lingle*, 544 U.S. at 538-39 (discussing *Penn Central*). Nor do petitioners rely on the principle that a *per se* taking results when governmental action "completely deprives an owner of '*all* economically beneficial use' of her property," *Lingle*, 544 U.S. at 538 (quoting *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (alteration marks omitted)). The Harmons, of course, took ownership of their building—half by inheritance and half by purchase—with

full knowledge that three units within it were subject to the RSL. Moreover, a significant majority of the building is owner-occupied or otherwise unregulated, and the portion subject to regulation yields substantial rents. Petitioners thus do not contend here that the RSL prevents them from earning a reasonable return on their property.

Instead, petitioners rest their taking claim entirely on the principle, recognized in *Loretto*, that government regulation constitutes a *per se* taking when it forces a property owner to suffer a "permanent physical invasion" of his property, even if the degree of invasion is minimal. *See Loretto*, 458 U.S. at 438 (holding that statute effected a *per se* taking by requiring landlords to permit cable-television companies to permanently install a cable on their buildings). But the Harmons' contention that this principle applies here is directly refuted by *Yee v. City of Escondido*, 503 U.S. 519 (1992), which rejected a *Loretto*-style taking challenge to rent-control legislation. In *Yee*, this Court recognized a simple proposition that forecloses petitioners' claim: owners who make their property available for rental cannot then claim that the presence of tenants constitutes an uninvited permanent physical invasion. That is true regardless of whether the law restricts the owner's ability to choose the identity of the tenants or requires the owner to accept below-market rents.

In *Yee*, the plaintiffs challenged a city ordinance regulating rents in mobile-home parks, as it operated in conjunction with state laws restricting evictions. The regulations set rental rates for the "pads" under tenants' mobile homes, and prohibited park owners from evicting tenants except for nonpayment of rent, misconduct, or

the landlord's desire to change the use of the property. *Id.* at 523-25. The ordinance was unusual among rent-control regulations in that it permitted tenants to sell their mobile homes to buyers who would then be entitled to the regulated rent on and protections against evictions from the pads, thus permitting tenants to earn a premium on such sales. *Id.* at 527. And the tenants generally could effect such transfers without the park owner's consent. *Id.* at 524.[4]

The park owners claimed, much like petitioners here, that the laws effected a taking by "transferr[ing] a discrete interest in land—the right to occupy the land indefinitely at a submarket rent—from the park owner to the mobile home owner." *Id.* at 527. This Court concluded, however, that the laws "merely regulate[d] petitioners' *use* of their land by regulating the relationship between landlord and tenant." *Id.* at 528. The element of forced acquiescence necessary to sustain a physical-taking claim was lacking because the petitioners "voluntarily rented their land to mobile home owners." *Id.* at 527. A park owner who wished to change the use of his land could evict tenants on appropriate notice. *Id.* at 528.

The Court thus found no physical taking, and reaffirmed the principle that "[w]hen a landowner decides

4. Thus, although petitioners (Pet. at 29-31) suggest that the unusual nature of the relationship between park owners and mobile-home owners saved the regulation in *Yee*, in fact the petitioners in *Yee* rested their claim on the uniqueness of that relationship and the uncommon economic consequences entailed by the ordinance's response to these distinctive circumstances. 503 U.S. at 526-27. Indeed, the petitioners in *Yee* conceded that "ordinary" rent control does not effect a *per se* taking. *Id.* at 526.

to rent his land to tenants, the government may place ceilings on the rents the landowner can charge, or require the landowner to accept tenants he does not like, without automatically having to pay compensation." *Id.* at 529 (citations omitted); *see also FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) (finding no *per se* taking when statute reduced rent to one-fourth of the amount agreed to by the parties, and reaffirming that "statutes regulating the economic relations of landlords and tenants are not *per se* takings"); *Loretto*, 458 U.S. at 440 ("States have 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.").

2. No federal court of appeals or state high court has held, after *Yee*, that a rent regulation effects a *per se* physical taking. *See Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 47-48 (2d Cir. 1996); *Fed. Home Loan Mortg. Corp.*, 87 N.Y.2d at 334-35; *Rent Stabilization Ass'n of N.Y. City, Inc. v. Higgins*, 83 N.Y.2d 156, 171-72 (1994); *Margola Assocs. v. City of Seattle*, 121 Wash. 2d 625, 648-49 (1993); *Guimont v. Clarke*, 121 Wash. 2d 586, 607-08 (1993) (en banc). Nonetheless, petitioners (Pet. at 32-33) attempt to distinguish *Yee* based on dicta in that decision stating that "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 503 U.S. at 528. As the court of appeals concluded, however, this case does not present the issue the Court reserved in *Yee*.

On its face, the RSL does not compel property owners to open their property to tenants or keep the property

open to tenants, but rather imposes conditions on the use of property that owners have voluntarily held out for rental. Owners may remove property from the rental market by establishing that they wish to use the property for a business they own, 9 N.Y.C.R.R. § 2524.5(a)(1)(i), or by showing a good-faith intention to use the property as their own primary residence or the primary residence of an immediate family member, *id.* § 2524.4(a); *see also Pultz v. Economakis*, 10 N.Y.3d 542, 548 (2008) (holding that the RSL permits an owner to withdraw all units in a building from the rental market upon demonstrating a good-faith intention to use the space as a primary residence). Property owners may also remove property from the rental market when building-code violations would be impracticable to correct, 9 N.Y.C.R.R. § 2524.5(a)(1)(ii), and when DHCR approves a demolition of the building, *id.* § 2524.5(a)(2).

Consequently, there are many bases on which an owner may change the use of his property, and accordingly this case is governed by the principle that laws restricting rents and evictions do not effect a physical taking because the "tenants were invited by [the landlords], not forced upon them by the government." *Yee*, 503 U.S. at 528; *see Florida Power*, 480 U.S. at 252-53 ("The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license."); *Bowles v. Willingham*, 321 U.S. 503, 517 (1944) (finding no taking where a rent control statute did not "require any person . . . to offer any accommodations for rent").[5]

5. Petitioners cite then-Justice Rehnquist's dissent from the Court's dismissal for want of a substantial constitutional question in *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875

Nor does the RSL effect a *per se* taking as applied to petitioners. Because the tenants in two of petitioners' regulated units are now senior citizens, petitioners focus on the RSL's protections for senior-citizen tenants. Pet. at 34. But petitioners have never shown that they desire to stop renting the apartment units in their building, including the two units occupied by senior citizens, but have been thwarted in doing so by the RSL.[6] Petitioners therefore cannot claim that the RSL has forced them to accept the presence of tenants on their property against their will. Petitioners' building is in an area that is zoned residential and designated a historic district. *Id.* at 4. Petitioners challenge neither of those classifications. They have not identified anything that they wish to do with

(1983), a case arising a decade before *Yee*. But eight Justices found no arguable constitutional issue in *Fresh Pond*, and in any event the case differed sharply from this one. *Fresh Pond* involved a corporate property owner that sought to demolish an existing building to create a shopping-center parking lot, but could not do so because a holdout tenant in one of the six units was protected from eviction. The rent-control ordinance in *Fresh Pond* provided only two bases on which to evict a tenant, and neither was available to the owner. The first basis, occupying the property for personal use, could not be used because the owner was a corporate entity. The second basis, demolition, had been sought by the owner, but denied by the rent-control board. *Id.* at 876-77 (Rehnquist, J., dissenting). The RSL is not similarly restrictive, either on its face or as applied to petitioners.

6. Petitioners also miss the mark in their discussion of the RSL's successorship provisions. Pet. at 33. Petitioners have not alleged that any of their tenants live with relatives who may possess succession rights. In any event, the successorship provisions do not effect a permanent physical occupation, since successor tenants are subject to removal on the same terms as any other tenant.

their property, consistent with its zoning status, other than occupy or rent the property—both uses that the RSL permits.[7] Indeed, petitioners are currently renting the three units in their building that are not regulated by the RSL.

Petitioners' real complaint is not that they are being required to suffer an uninvited permanent physical invasion, but rather that they are unable to earn market rents on three of their apartment units. But that consequence inheres in all rent control, and this Court has repeatedly affirmed that ordinary rent-control statutes do not effect *per se* takings. *Pennell*, 485 U.S. at 12 n.6; *see also Yee*, 503 U.S. at 526 (noting that the petitioners did not contend that "ordinary rent control" statutes effected a *per se* taking, but rather premised their claim on "the unusual economic relationship between park owners and mobile home owners"). As the Court observed in *Yee*, 503 U.S. at 530, the economic consequences of rent control are not relevant to determining whether a property owner has suffered an unwanted permanent physical invasion. Such economic consequences might appropriately be considered in assessing whether a regulatory taking has occurred under the *Penn Central* factors, *see id.*, but petitioners do not assert, and could not successfully assert, any such claim. See *supra* at 13-14.

Petitioners emphasize that they inherited their building with rent-stabilized tenants already in place

7. As discussed above (see *supra* at 7), petitioners brought an action to evict one of their tenants so that their granddaughter could live in the tenant's unit, as the RSL expressly allows. The case was recently dismissed after the granddaughter decided that she no longer wanted to live in the unit.

(Pet. at 4-5), but that distinction makes no difference. It remains true that petitioners have voluntarily held the property open for rental. Moreover, petitioners do not dispute that they took ownership of the property in 1994 knowing that it was being put to rental use and that it had been subject to the RSL since 1969. *See id.* at 4. More than ten years later, they bought out a relative's fifty-percent interest in the property (*id.* at 5), thereby confirming their willingness to own the building subject to the RSL. Therefore, petitioners are situated no differently from other property owners whose property is subject to the RSL.

3. Moreover, even if the petition presented a question warranting this Court's review as to the takings claim—and it does not—this case would be a poor vehicle for deciding that question because the claim is unripe, given that petitioners have not sought just compensation in an action filed in the New York courts, as permitted by New York law. This Court has emphasized that the Takings Clause "does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County*, 473 U.S. at 194; *see also Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 & n.8 (1997). Accordingly, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County*, 473 U.S. at 195. Just compensation need not be paid "in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for

obtaining compensation exist at the time of the taking." *Id.* (quotation marks omitted).[8]

New York law offers a procedure for seeking just compensation from the City and the State. Like the federal Constitution, the New York State Constitution prohibits the taking of private property for public use without just compensation. N.Y. Const. art. I, § 7(a). A property owner aggrieved by a government action that he believes to have effected a "*de facto* appropriation" may bring an action for inverse condemnation. *See O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981). The State has waived its sovereign immunity as to compensation actions in the New York Court of Claims. *See* N.Y. Em. Dom. Proc. L. § 501(A).

Petitioners did not seek compensation in the New York courts before bringing their taking claim in federal court. Their failure to ripen their claim would preclude this Court from reaching any cert-worthy question on the claim's merits, even if one were present.

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8. Although *Williamson County* involved a claimed regulatory taking under the *Penn Central* framework, a physical-taking claim is also unripe until the property owner has sought and been denied compensation through state procedures, as the courts of appeals have recognized. *See Severance v. Patterson*, 566 F.3d 490, 496-97 (5th Cir. 2009); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91-92 (1st Cir. 2003); *Daniel v. County of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002); *Arnett v. Myers*, 281 F.3d 552, 563 (6th Cir. 2002); *Forseth v. Village of Sussex*, 199 F.3d 363, 372-73 (7th Cir. 2000); *McKenzie v. City of White Hall*, 112 F.3d 313, 316-17 (8th Cir. 1997); *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 379-80 (2d Cir. 1995).

C. Petitioners' Procedural Due Process Claim Fails Under the Established Principle That Legislative Bodies May Make Policy Judgments Without Affording Individualized Notice To Affected Persons.

Petitioners contend that New York City denied them due process of law by failing to provide individualized notice of the public hearings held by the City Council in 2006 and 2009 to consider whether to reauthorize the RSL. Pet. at 36-37. Although this claim is asserted only against the City, the State respondent addresses it briefly to show that the claim does not warrant this Court's review because it lacks merit under long-established law.

Petitioners' procedural due process claim runs afoul of the settled principle that a legislative body is not required to afford individualized notice or opportunity to be heard before it enacts legislation. *See Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 283 (1984) ("The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy."); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915) (Holmes, J.) ("General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard."). As this Court has made clear, "[d]isagreement with public policy . . . is to be registered principally at the polls," not through individualized proceedings. *Minn. State Bd.*, 465 U.S. at 285; *see also Bi-Metallic Inv. Co.*, 239 U.S. at 446 (stating that the rights of persons affected by legislation "are protected in the only way that they can be in a complex society, by their power, immediate or remote,

over those who make the rule"). Here, too, petitioners' real objection to the RSL reflects a disagreement about economic policy, not any constitutional infirmity.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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