20-3366

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

COMMUNITY HOUSING IMPROVEMENT PROGRAM, RENT STABILIZATION ASSOCIATION OF N.Y.C., INC., CONSTANCE NUGENT-MILLER, MYCAK ASSOCIATES LLC, VERMYCK LLC, M&G MYCAK LLC, CINDY REALTY LLC, DANIELLE REALTY LLC, FOREST REALTY, LLC,

Plaintiffs-Appellants,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLANTS

ANDREW J. PINCUS
REGINALD R. GOEKE
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

TIMOTHY S. BISHOP
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

ROBERT W. HAMBURG
MAYER BROWN LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 506-2500

Attorneys for Plaintiffs-Appellants

—against—

CITY OF NEW YORK, RENT GUIDELINES BOARD, DAVID REISS, CECILIA JOZA, ALEX SCHWARZ, GERMAN TEJEDA, MAY YU, PATTI STONE, J. SCOTT WALSH, LEAH GOODRIDGE, SHEILA GARCIA, RUTHANNE VISNAUSKAS,

Defendants-Appellees,

N.Y. TENANTS AND NEIGHBORS (T&N), COMMUNITY VOICES HEARD (CVH), COALITION FOR THE HOMELESS,

Intervenors.

CECILIA JOZA, ALEX SCHWARZ, GERMAN TEJEDA, MAY YU, PATTI STONE, J. SCOTT WALSH, LEAH GOODRIDGE, AND SHEILA GARCIA, IN THEIR OFFICIAL CAPACITIES AS CHAIR AND MEMBERS, RESPECTIVELY, OF THE RENT GUIDELINES BOARD, AND RUTHANNE VISNAUSKAS, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF NEW YORK STATE HOMES AND COMMUNITY RENEWAL, DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendants-Respondents,

N.Y. TENANTS AND NEIGHBORS (T&N), COMMUNITY VOICES HEARD (CVH), COALITION FOR THE HOMELESS,

Intervenors.

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Pursuant to this Court's January 4, 2022, order (ECF No. 282), Plaintiffs-Appellants respectfully submit this brief addressing *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), and *Pakdel v. City and County of San Francisco*, 141 S. Ct. 2226 (2021).

ARGUMENT

I. *Cedar Point* And *Pakdel* Confirm That The RSL Effects A *Per Se* Physical Taking.

The RSL[1] inflicts a *per se* physical taking because it appropriates a property owners' right to exclude—the most fundamental characteristic of property ownership. Pl. Br. 27-30; Pl. Reply Br. 5-14. *Cedar Point* and *Pakdel* provide strong additional support for that conclusion.

A. The *Cedar Point* and *Pakdel* Decisions.

Cedar Point involved the constitutionality of a California regulation authorizing union organizers to enter growers' farms for up to three hours a day, 120 days a year. 141 S. Ct. at 2069. The Court explained that the "protection of private property is indispensable to the promotion

[1] Plaintiffs adopt the defined terms in their Opening Brief ("Pl. Br.") and Reply Brief ("Pl. Reply Br."). Defendants' briefs are cited as "City Br." (Doc. 148), "State Br." (Doc. 149), and "Inter. Br." (Doc. 147).

of individual freedom." *Id.* If the government physically appropriates private property, either "for itself or a third party," a "simple, *per se* rule" applies: "The government must pay for what it takes." *Id.*

By contrast, the multi-factor regulatory takings test articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), governs when a regulation "restrict[s] an owner's ability to use his own property" but does not appropriate a property right (such as the right to exclude). *Id.* at 2071-72. "The essential question" is "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." 141 S. Ct. at 2072.

Examples of laws subject to the *Penn Central* regulatory taking test are "zoning ordinances," "orders barring the mining of gold," and "regulations prohibiting the sale of eagle feathers." *Id.* at 2072. These regulations restrict owners' unfettered use of their property, but none gave a party other than the owner the right to use or occupy the property.

But when the government "appropriates for the enjoyment of third parties the owners' right to exclude," there is a *per se* physical taking; no balancing of factors or consideration of the government's goals is permissible. 141 S. Ct. at 2072; *see id.* at 2073 ("Given the central importance to property ownership of the right to exclude, it comes as little surprise that

the Court has long treated government-authorized physical invasions as takings requiring just compensation.").

The Ninth Circuit had held in *Cedar Point* that the *per se* physical taking standard did not apply because the California law did not "allow for permanent and continuous access '24 hours a day, 365 days a year.'" *Id.* at 2074 (citation omitted). But the Supreme Court squarely rejected that narrow view of the *per se* standard, stating that "a physical appropriation is a taking whether it is permanent or temporary"; "[t]he fact that the [California] regulation grants access only to union organizers and only for a limited time does not transform it from a physical taking into a use restriction." *Id.* at 2075. The Court emphasized that the right to exclude "is 'one of the most treasured' rights of property ownership" and "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* at 2072 (citations omitted).

The Justices dissenting in *Cedar Point* argued that the challenged law merely regulated a property owner's right to exclude and therefore did not constitute a physical taking—asserting that "latitude toward temporary invasions is a practical necessity for governing in our complex modern world." *Id.* at 2077. The majority rejected that view, stating that it would turn "the right to exclude [into] an empty formality, subject to modification at the government's pleasure" and held instead that "it is a

'fundamental element of the property right' that cannot be balanced away." *Id.* (citation omitted).

The Supreme Court's subsequent decision in *Pakdel* further illuminates the ruling in *Cedar Point*. The *Pakdel* plaintiffs owned a San Francisco apartment building as tenants-in-common with others—an arrangement that gave them the right to occupy one of the apartments, which they leased to a tenant. When the plaintiffs and their fellow owners applied to the City for permission to convert the ownership structure into a condominium, the City required the plaintiffs to offer their tenant a lifetime lease. The plaintiffs requested a waiver of the lifetime-lease requirement or compensation for offering a lifetime lease, but the City refused both requests. *Id.* at 2229. The plaintiffs then brought a takings claim. The district court dismissed based on the exhaustion requirement later overturned in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019).

The Ninth Circuit affirmed on two grounds. It held that the plaintiffs "never obtained a final decision regarding the application of the Lifetime Lease requirement to their Unit," and that the claim therefore failed on failure-to-exhaust grounds. *Id.*

The Ninth Circuit also held that plaintiffs could not assert a *per se* physical taking claim because the lifetime-lease obligation was imposed by legislation and was not an individualized requirement "imposed as a

condition for approving a specific property development"; the plaintiffs "voluntarily applied for conversion under the" San Francisco law; and the plaintiffs could not bring a physical takings claim "[w]here . . . full possession of the property has not been seized." 952 F.3d 1157, 1162 n.4, & 1169. The plaintiffs sought Supreme Court review of both aspects of the Ninth Circuit's decision, arguing that the rejection of their claim for failure to complete the exemption process violated *Knick*, and that the court of appeals' substantive rejection of their physical taking claim was inconsistent with the Supreme Court's takings jurisprudence.

The Supreme Court reversed, holding that "administrative 'exhaustion of state remedies' is not a prerequisite for a takings claim" and there was no question that the City required a life tenancy in return for permitting the conversion to a condominium. 141 S. Ct. at 2231.

With respect to the court of appeals' substantive rulings, the Supreme Court stated that the Ninth Circuit should "give further consideration to these claims in light of" the Court's *Cedar Point* decision. *Id.* at 2229 n.1. The Ninth Circuit followed that instruction, remanding the case to the district court "for further proceedings consistent with the opinions of the Supreme Court in *Pakdel* and *Cedar Point Nursery*." *Pakdel v. City and County of San Francisco*, 5 F.4th 1009, 1009 (9th Cir. 2021).

B. Application of the Court's Decisions to the RSL.

The RSL deprives owners of the right to exclude by permitting a tenant to remain past the expiration of his lease and over the property owner's objection, allowing owners to terminate a tenancy only in narrow circumstances, all beyond the owner's control.[2] Owners also must offer renewals to broadly-defined "successors" of the original tenant—strangers to the owner, such as relatives, caretakers, friends, or room-mates invited by the original tenant. One successor tenant may invite another, creating a line of strangers whom the RSL allows to occupy the property even if the owner objects. Pl. Br. 23-24; Pl. Reply Br. 7.

Most importantly, the RSL appropriates an owner's ability to refuse to renew a tenant's lease in order to regain possession of her property, with restrictions that essentially prevent her from reclaiming the property for her own use or for a family member; to change the property from residential rental to commercial rental or another use; or to renovate or demolish the existing structure or convert it to condominiums. Pl. Br. 22-26; Pl. Reply Br. 6-7.

[2] When the tenant fails to pay rent, violates a material lease term, creates a nuisance, or uses the apartment for unlawful purposes. Pl. Br. 22.

The combined effect of these restrictions is to force the property owner to allow tenants to occupy the property when a lease expires, even when the property owner wishes to exclude the tenant and end the use as rental property. Forcing the unconsented physical occupation of the owner's property—effectively in perpetuity, by strangers—constitutes a *per se* taking.[3]

The Supreme Court's decisions compel rejection of Defendants' contrary arguments—and confirm that the RSL effects a physical taking.

First, *Cedar Point* expressly rejects Defendants' contention (City Br. 23; Inter. Br. 19) that "a 'permanent physical occupation'" is required to prove a *per se* taking and tenant occupation of an apartment need not last forever. "[A] physical appropriation is a taking whether it is permanent or temporary." 141 S. Ct. at 2074.

Second, Defendants cannot argue that the *Penn Central* regulatory takings test applies because the RSL's restrictions are embodied in laws

[3] Defendants cannot avoid the fact that the RSL effects a *per se* taking by arguing that the law gives owners the option of keeping an apartment vacant when a tenant does not wish to renew the lease. That is a rare occurrence given the low rent fixed by the RSL and the ability of "successors" to renew. *See* Pl. Br. 7, 12-13, 22-26. Penalizing an owner who exercises her right to exclude—by eliminating the ability to earn any revenue from the property or devote the property to an alternative use—is a direct interference with that right amounting to a *per se* taking.

and regulations rather than individualized rulings imposing restrictions on particular properties. It does not matter whether "the government action comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree")—it constitutes a *per se* taking if "the government has physically taken property for itself or someone else." *Id.* at 2072.

Third, *Cedar Point* identified several situations in which physical taking analysis does not apply, but none are present here. For example, "government-authorized physical invasions will not amount to takings" if "they are consistent with longstanding background restrictions on property rights." 141 S. Ct. at 2079 (citing as examples common law privileges to access private property and common law prohibitions on nuisance). But the relevant background principle here is the owner's right to exclude a tenant upon expiration of the lease. *E.g.*, *MH Residential 1, LLC v. Barrett*, 78 A.D. 3d 99, 104 (1st Dep't 2010) (at common law, a tenant "does not have any entitlement to possession once his lease has expired.") (italics omitted); *Kennedy v. City of New York*, 89 N.E. 360, 361 (N.Y. Ct. App. 1909) (tenant who holds over after the expiration of lease term "may be treated by his landlord as a trespasser").

Defendants cannot argue that the RSL qualifies as a "longstanding background restriction[] on property rights" for additional reasons. The law was enacted in 1969, only a few years before the 1975 law held to

effect a *per se* taking in *Cedar Point*. 141 S. Ct. at 2082 (dissent). In New York City the RSL, by its terms, is a *temporary* measure (Pl. Br. 52), which must be reauthorized every three years based on current conditions. That is not a "longstanding background restriction" redefining owners' property rights.

Cedar Point also noted that "government may require property owners to cede a right of access as a condition of receiving certain benefits," such as a conditioning a permit on access for health and safety inspections. 141 S. Ct. at 2079. Property owners subject to the RSL receive no countervailing benefit. Pl. Br. 53-55; Reply Br. 29-30.

Fourth, Defendants rely (State Br. 42) on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), which involved a shopping center's takings challenge to a law requiring it to permit leafleting on its property. They contend that *PruneYard*'s application of the regulatory taking standard shows that the RSL does not effect a physical taking. But, *Cedar Point* explained in rejecting the same argument, "the [shopping center] was open to the public, welcoming some 25,000 patrons a day. Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade a property closed to the public." 141 S. Ct. at 2077.

The residential apartments governed by the RSL are homes, they plainly are not open to the public, and *PruneYard* therefore is also inapposite here. Indeed, the state law at issue in that case did not apply to homes or even to an "individual retail establishment." 447 U.S. at 78. Moreover, the question here is whether a property owner who wishes to end a tenancy can be forced to continue renting her property once the lease has expired, and prohibited from excluding third parties (tenants).

Fifth, Defendants argue that once a property owner accepts a tenant, no government regulation of the rental property can ever constitute a *per se* physical taking—and all such rules must be assessed under the regulatory taking standard. City Br. 25-32; State Br. 32-35; Inter. Br. 21.

But there is no landlord-tenant exception to the Takings Clause's protection of the right to exclude. *Pakdel* confirms that fact, because it directed the lower courts to apply *Cedar Point* in this precise context—a government requirement that owners give the tenant a life-long right to access and occupancy notwithstanding the owners' desire to terminate the tenancy and regain possession of the apartment. *See also Alabama Ass'n of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485, 2489 (2021) ("preventing [property owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude").

Cedar Point thus, at a minimum, reinforces the line drawn by the Supreme Court in *Yee v. City of Escondido*, 503 U.S. 519 (1992). If the government imposes regulations that, in effect, prevent the owner—upon expiration of the lease—from withdrawing the property from the rental market and reclaiming the property for herself or her family, or changing the property's use or ownership structure, or demolishing it, the government has effected a physical taking, because it has taken the owner's right to exclude third parties and her separate right to determine the property's use. Pl. Br. 29-30; Pl. Reply Br. 9-11.[4]

II. *Cedar Point* and *Pakdel* Undermine Other Arguments Advanced By Defendants.

Defendants disclaim any argument that Plaintiffs' claims are not ripe. *E.g.*, ECF No. 279 at 2-3. *Pakdel* undermines Defendants' suggestions that the putative existence of purported "hardship exemptions" in the RSL might foreclose Plaintiffs' takings claims—the Supreme Court

[4] *Cedar Point*'s emphasis on the right to exclude undermines *Yee*'s conclusion that unless an owner removes property from the rental market she can be forced to renew unwanted tenancies or accept tenants who are strangers (because they are selected by the prior tenant without the owner's involvement or approval). *See* 503 U.S. at 532. But the continued viability of that aspect of *Yee* is a question for the Supreme Court. There can be no doubt that, as explained in the text, *Cedar Point* strongly supports *Yee*'s recognition that a *per se* taking is effected by interference with the owner's right to repossess the property or change its use.

confirmed that plaintiffs need not exhaust state administrative processes. 141 S. Ct. at 2230-31. That is especially true here, where the Complaint's allegations make clear that Plaintiffs' harms are not "hypothetical," and the putative existence of remote, rarely awarded "hardship exemptions" do nothing to ameliorate the taking of rent-stabilized properties. Pl. Reply Br. 24 (citing JA-132-37 ¶¶ 332-50).

Cedar Point also reinforces the holding of *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), that a participant who knowingly enters a regulated market neither acquiesces to an unconstitutional taking nor waives a takings claim. Pl. Br. 32-33; Pl. Reply Br. 11-12. The property owners *Cedar Point* could have regained their right to exclude if, for example, they simply left the market (*e.g.*, by no longer growing crops). But that theoretical possibility did not prevent the Court from concluding that the access regulation effected a physical taking. *Cedar Point* forecloses Defendants' arguments that Plaintiffs cannot state a takings claim because they "acquiesced" to the destruction of their right to exclude when they entered the New York rental market.

CONCLUSION

For the reasons explained above and in Plaintiffs' opening and reply briefs, the District Court's judgment should be reversed.

Dated: January 14, 2022 Respectfully submitted,

/s/ *Andrew J. Pincus*

Andrew J. Pincus
Reginald R. Goeke
MAYER BROWN LLP
1999 K Street, NW
Washington DC 20006
(202) 263-3000

Timothy S. Bishop
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

Robert W. Hamburg
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of this Court's order because it is limited to twelve pages in length (ECF No. 282), exclusive of the parts of the brief excluded by Fed. R. App. P. 32. This brief complies with the typeface and typestyle requirements of Fed. R. App. P. 32 because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook and 14 point font.

Dated: January 14, 2022 /s/ *Andrew J. Pincus*