# 20-3366

## 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*,

v.

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*,

(*caption continues inside front cover*)

On Appeal from the United States District Court for the Eastern District of New York

**SUPPLEMENTAL BRIEF FOR APPELLEE RUTHANNE VISNAUSKAS**

LETITIA JAMES
*Attorney General*
*State of New York*
Attorney for Appellee RuthAnne Visnauskas
28 Liberty Street
New York, New York 10005
(212) 416-6279

BARBARA D. UNDERWOOD
*Solicitor General*
STEVEN C. WU
*Deputy Solicitor General*
ESTER MURDUKHAYEVA
*Senior Assistant Solicitor General*
*of Counsel*

Dated: January 24, 2022

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

*Intervenors.*

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## PRELIMINARY STATEMENT

Plaintiffs assert that recent Supreme Court cases support their facial physical takings claims against New York's Rent Stabilization Law (RSL). They are wrong.

In *Cedar Point Nursery v. Hassid*, the Supreme Court concluded that a California regulation giving union organizers a "right of access . . . to the premises of an agricultural employer" constituted a physical taking. 141 S. Ct. 2063, 2069, 2072 (2021) (quotation marks omitted). Key to the Court's holding was its finding that the employer's property was "closed to the public," such that the California regulation was effecting an invasion of property that the employer had not held out for others to access. *See id.* at 2076-77. But nothing in *Cedar Point* called into question decades of precedent holding that landlord-tenant regulations like the RSL are subject to analysis as at most regulatory takings—and not physical takings—because they do not coerce an unwanted invasion, but rather regulate a voluntary relationship that landlords have entered into with third-party tenants.

The Supreme Court's subsequent decision in *Pakdel v. City and County of San Francisco* is also inapposite because it concerned the

finality requirement for a regulatory takings claim, which is not at issue here. *See* 141 S. Ct. 2226, 2231 (2021). The Court's recognition in a footnote that the U.S. Court of Appeals for the Ninth Circuit "may give further consideration" on remand to plaintiffs' physical taking claim "in light of" *Cedar Point* in no way indicates an endorsement of the merits of the underlying claim. *Id.* at 2229 n.1.

## ARGUMENT

### THE RSL DOES NOT CONSTITUTE A PHYSICAL TAKING

As explained in State Appellee's principal brief (Br. for Appellee RuthAnne Visnauskas ("State Appellee Br.") at 32-43), physical takings claims are generally limited to instances of "direct government appropriation or physical invasion of property." *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). *Cedar Point* presented exactly such a case. The challenged regulation granted a "right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support." Cal. Code Regs. tit. 8, § 20900(e). Specifically, the regulation authorized a labor organization to "take access onto the described property" for up to three hours per day over the course of four 30-day periods during a calendar year. *Id.*

§ 20900(e)(1)(A)-(B), (3). Furthermore, the regulation expressly allowed at least two organizers per work crew to "enter the property of an employer . . . to meet and talk with employees" before work, during lunch breaks, and after work. *Id.* § 20900(e)(3)(A)-(B), (4)(A). The Supreme Court concluded that the regulation was an archetypal physical taking because it "appropriate[d] a right to physically invade the growers' property—to literally 'take access.'" *Cedar Point*, 141 S. Ct. at 2074.

*Cedar Point* did not expand the class of "relatively rare" and "easily identified" physical takings beyond direct appropriations or physical invasions. *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002). It was in fact undisputed that the access regulation at issue in *Cedar Point* authorized a physical invasion. Instead, the Court rejected the Ninth Circuit's determination that a physical taking claim requires the government to grant "permanent and continuous access [for] 24 hours a day, 365 days a year" as unsupported by the Court's precedents. 141 S. Ct. at 2074 (quotation marks omitted). The Court explained that "a physical appropriation is a taking whether it is permanent or temporary," *id.*, "intermittent as opposed to continuous," *id.* at 2075, or

grants an access right "in a form that is a slight mismatch from state easement law," *id.* at 2076.

*Cedar Point*'s evaluation of a claim involving an uncontested physical invasion does not transform plaintiffs' challenge to New York's rent regulations into a viable physical taking claim. *Cedar Point* did not cast doubt on, much less set aside, the Supreme Court's longstanding rule that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land"—a rule that does not apply to landlords who choose to make their properties available for third-party tenants to rent. *See Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (emphasis in original). Nor did *Cedar Point* displace the long line of cases, including *Yee*, that distinguish landlord-tenant regulations from physical invasions of property. Indeed, the Court favorably cited *Yee* without questioning its validity. *See Cedar Point*, 141 S. Ct. at 2072.

Plaintiffs' argument that the RSL constitutes a physical taking therefore remains foreclosed by binding precedent, which is unaffected by *Cedar Point*. Because the "element of required acquiescence is at the heart of the concept of occupation," *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987), the Supreme Court has long held that regulations govern-

ing the landlord-tenant relationship are not physical takings, and this Court and the New York Court of Appeals have both rejected physical takings challenges to the RSL, including challenges to the same limitations of which plaintiffs complain here. See State Appellee Br. at 32-35 (collecting cases). "When a landowner decides 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." *Yee*, 503 U.S. at 529 (citations omitted). Such regulations are subject to the "essentially ad hoc, factual inquiries necessary to determine whether a regulatory taking has occurred." *Id.* (quotation marks omitted). The RSL "does not constitute a physical taking" because it merely "regulates the terms under which the owner may use the property as previously planned." *Federal Home Loan Mortg. Corp. v. New York State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 48 (2d Cir. 1996); *see also Rent Stabilization Ass'n of N.Y. City v. Higgins*, 83 N.Y.2d 156, 171-73 (1993). Plaintiffs simply mischaracterize the RSL in contending that it compels property owners to participate or remain in the residential rental market. See State Appellee Br. at 40-43.

Moreover, the Supreme Court's analysis in *Cedar Point* supports rather than undermines State Appellee's defense of the RSL. For example, in distinguishing *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), which held that barring a shopping center from excluding protesters did not constitute a physical taking, the Court explained that "[l]imitations on how a business generally open to the public may treat individuals on the premises" can reasonably be treated differently "from regulations granting a right to invade property closed to the public." *Cedar Point*, 141 S. Ct. at 2076-77. Plaintiffs' assertion that "[t]he residential apartments governed by the RSL are homes . . . not open to the public" (Suppl. Br. for Pls.-Appellants ("Supp. Br.") at 10) disregards the undisputed fact that landlords offer their rental homes to the public for occupancy pursuant to residential leases. Once a landlord "voluntarily open[s] their property to occupation by others, [it] cannot assert a *per se* right to compensation based on [the] inability to exclude particular individuals."[1] *Yee*, 503 U.S. at 531.

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[1] Contrary to plaintiffs' suggestion (Supp. Br. at 12), neither *Cedar Point* nor the Court's earlier decision in *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), overruled *Yee*'s conclusion that a landlord's

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*Cedar Point* also recognized that, under certain circumstances, even undisputed "government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights." 141 S. Ct. at 2079. The RSL is not a government-authorized physical invasion, for the reasons explained above and in State Appellee's principal brief. But even if it were, plaintiffs are wrong to assume that the statute is an insufficiently historical restriction. *See* Supp. Br. at 8-9. Statutory rent regulation in New York dates to at least World War II (see State Appellee Br. at 5), and courts have imposed restrictions on the landlord-tenant relationship (including limitations on owners' ability to displace tenants) for hundreds of years, *see, e.g.*, Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. Rev. 503, 507 (1982) (noting that "even in the eighteenth century, courts were hesitant to subject a tenant to immediate dispossession unless it was clear that both parties had agreed to such an arrange-

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choice to allow the physical occupation of its property makes a physical taking claim unavailable. While a property owner might not acquiesce to a physical occupation by labor organizers in entering the agriculture market, a landlord by definition acquiesces to the physical occupation of its property by offering its premises for tenancy.

ment" and that, in the nineteenth century, "[l]ike the courts in Blackstone's day, state legislatures were concerned about the effects an abrupt termination could have upon a tenant").

In addition, *Cedar Point* acknowledged that "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking." 141 S. Ct. at 2079. Plaintiffs are simply incorrect to assert that "[p]roperty owners subject to the RSL receive no countervailing benefit." *See* Supp. Br. at 9. Thousands of landlords are subject to the RSL as a condition of receiving tax benefits or government-funded loans, including many members of the plaintiff organizations. *See, e.g.*, N.Y. Real Property Tax Law §§ 421-a, 489; N.Y. Private Housing Finance Law § 804. The value of these benefits is substantial; New York City estimated losing $1.4 billion in property tax revenues in the 2017 fiscal year from participation in just one tax benefit program. *See* Geoffrey Propheter, *How Much Do Yesterday's 421-a Tax Exemptions Cost Us Today?*, N.Y.C. Indep. Budget Off. (Sept. 14, 2016), https://ibo.nyc.ny.us/cgi-park2/2016/09/how-much-do-yesterdays-412-a-tax-exemptions-cost-us-today/. Even if plaintiffs were correct in characterizing the RSL as granting rights of access akin to physical invasions

(which they are not), plaintiffs fail to account for the fact that the RSL grants substantial public benefits to many landlords in exchange for such limitations.

Finally, plaintiffs are entirely misguided in relying on the Supreme Court's decision in *Pakdel*, where the Court held that strict compliance with state administrative procedures was not necessary to satisfy the finality requirement for a regulatory taking claim, so long as "the government has reached a conclusive position" as to the application of the underlying regulation. *See* 141 S. Ct. at 2231. *Pakdel* is entirely irrelevant to this case, which presents only facial challenges to the RSL and does not implicate the finality requirement for as-applied regulatory takings challenges.[2]

The Court in *Pakdel* also acknowledged that plaintiffs had pleaded a physical taking claim in the alternative to their principal regulatory

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[2] Plaintiffs are wrong to argue (Supp. Br. at 11-12) that *Pakdel* excuses property owners from compliance with state administrative procedures, such as the process for obtaining a hardship exemption under the RSL. *Pakdel* made clear that "failure to properly pursue administrative procedures may render a claim unripe if avenues still remain for the government to clarify or change its decision." 141 S. Ct. at 2231. Accordingly, an owner's failure to apply for a hardship exemption could bar an as-applied claim (which has not been raised here).

taking claim, and observed that, on remand, lower courts "may give further consideration" to the physical taking claim "in light of" *Cedar Point*. 141 S. Ct. at 2229 n.1. Contrary to plaintiffs' assertion (Supp. Br. at 10), the Court's observation in no way indicates its view on the merits of the claims in *Pakdel*, which are based on a local law that requires applicants for an expedited condominium conversion program to offer lifetime leases to existing tenants. As explained above, nothing in *Cedar Point* displaced longstanding precedent holding that regulations of the landlord-tenant relationship (including regulations implicating the right to exclude) are subject to regulatory takings analysis rather than physical takings challenges.[3] The Court's mere reference to the consideration of intervening case law on remand warrants no inference about the merits of the

[3] Plaintiffs are likewise misguided in relying on *Alabama Association of Realtors v. Department of Health and Human Services*, where the Supreme Court observed that certain limitations on evictions might implicate a right to exclude. *See* Supp. Br. at 10 (citing 141 S. Ct. 2485, 2489 (2021)). *Alabama Association of Realtors* had nothing to do with the Takings Clause and instead involved a challenge to a federal agency's statutory authority to promulgate a nationwide eviction moratorium. Nothing in that case purports to alter precedent holding that restrictions on evictions are not physical takings.

underlying claim, much less the inference plaintiffs ask this Court to adopt.

## CONCLUSION

The district court's judgment should be affirmed.

Dated: New York, New York
January 24, 2022

Respectfully submitted,

LETITIA JAMES
*Attorney General*
*State of New York*
Attorney for Appellee RuthAnne Visnauskas

By: */s/ Ester Murdukhayeva*
ESTER MURDUKHAYEVA
Senior Assistant Solicitor General

28 Liberty Street
New York, NY 10005
(212) 416-6279

BARBARA D. UNDERWOOD
*Solicitor General*
STEVEN C. WU
*Deputy Solicitor General*
ESTER MURDUKHAYEVA
*Senior Assistant Solicitor General*
*of Counsel*