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, and FOREST REALTY LLC,

Plaintiffs-Appellants,

against

(caption continued on inside cover)

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

SUPPLEMENTAL BRIEF FOR CITY APPELLEES

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CITY OF NEW YORK, RENT GUIDELINES BOARD, DAVID REISS, 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-Appellees,

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

Intervenors.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

State Regulations

ARGUMENT

Neither of the recent decisions of the Supreme Court discussed in Plaintiffs'-Appellants' Supplemental Brief ("Supp. Br.") supports Plaintiffs' facial taking challenges to the Rent Stabilization Law (RSL).

A. *Cedar Point* does not save Plaintiffs' physical-taking claim.

In *Cedar Point Nursery v. Hassid*, the Supreme Court considered a taking challenge to a state regulation granting labor organizations a right to access the premises of agricultural employers to meet with employees. 141 S. Ct. 2063, 2069 (2021). The Court held that the regulation "constitutes a *per se* physical taking" because it "grants labor organizations a right to invade" an owner's property. *Id.* at 2080. This holding did not disturb the controlling precedent that defeats Plaintiffs' physical-taking challenge to the RSL, and the Court's reasoning affirms the core reasoning of that prior precedent. Plaintiffs are mistaken in trying to draw a contrary lesson from *Cedar Point*.

1. *Cedar Point* reaffirms the core principles of precedent refuting Plaintiffs' claim.

Plaintiffs attempt to liken their physical-taking challenge to *Cedar Point*, asserting that the RSL "deprives owners of the right to

exclude" (Supp. Br. 6). But *Cedar Point* did not answer a question relevant to this case. It involved a regulation granting a right of access to individuals that a property owner did not want to admit. It did not consider a regulation governing an owner's ability to remove someone the owner had willingly invited onto its property as a part of its business, as occurs when landlords opt to rent their properties to tenants. The Court's discussion of the right to exclude thus is not directed to the questions presented by Plaintiffs' challenge to the RSL.

Nor does the decision just leave the governing case law intact. Rather, its reasoning reaffirms the principles that animate the Supreme Court's rejection of physical-taking challenges to rent regulations and this Court's rejection of such challenges to the RSL.

First, as Plaintiffs acknowledge (*id.* at 2), *Cedar Point* endorsed the longstanding distinction between "government-authorized invasions" of private property and regulations that "restrict an owner's ability to use his own property." 141 S. Ct. at 2071, 2074. That distinction underlies the Supreme Court's repeated admonitions that measures regulating the landlord-tenant relationship are not physical takings. *See Yee v. City of Escondido*, 503 U.S. 519, 528-29 (1992); *FCC*

v. Fla. Power Corp., 480 U.S. 245, 252 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 410 U.S. 419, 440 (1982). This Court has followed these authorities when confirming that the RSL does not work a physical taking. *See, e.g.*, *Fed. Home Loan Mortg. Corp. v. N.Y.S. Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 47-48 (2d Cir. 1996); *Harmon v. Markus*, 412 F. App'x 420, 422 (2d Cir. 2011).

Second, *Cedar Point* reaffirmed the distinction between invasions and invited occupancy. That distinction is key here. Indeed, plaintiffs themselves quote *Cedar Point*'s repeated use of the words "invade" and "invasion" (Supp. Br. 3, 8-9), but carefully avoid using either word when discussing the RSL.

The same distinction drove the Supreme Court's rejection in *Yee* of a physical-taking challenge to provisions governing the rents that mobile-home-park owners could charge and the grounds on which they could terminate a mobile-home owner's tenancy. 503 U.S. at 524. The Court explained that "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 (emphases added); *see also Fla. Power Corp.*, 480 U.S. at 252-53.

Cedar Point embraced this invasion-invitation distinction in its discussion of *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). *PruneYard* considered a taking challenge to a state constitutional provision "permit[ting] individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited." 447 U.S. at 76. Much like the property owner in *Cedar Point*, the plaintiff shopping-center owner in *PruneYard* asserted that the constitutional provision had taken its "right to exclude others." *Id.* at 82. The Court analyzed the claim as a regulatory taking. *See id.* at 83; *see Cedar Point*, 141 S. Ct. at 2076-77.

The Supreme Court has repeatedly confirmed that *PruneYard*'s analysis turned on the property owner's decision to open its property to invitees. *Yee* cited *PruneYard* in support of its statement that "[w]hen 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). And *Nollan v. California Coastal Commission*, in explaining why the access requirement in *PruneYard* was not a physical taking, noted that

"there the owner had already opened his property to the general public." 483 U.S. 825, 832 n.1 (1987); *see also Horne v. Dep't of Agric.*, 576 U.S. 351, 364 (2015) (explaining that *PruneYard* "held that a law limiting a property owner's right to exclude certain speakers from an already publicly accessible shopping center did not take the owner's property").

Cedar Point's discussion of *PruneYard* confirms the vitality of the distinction between a government restriction that compels the entry of uninvited persons onto the owner's property and restrictions on a property owner's ability to exclude persons whom the owner has allowed entry as part of its business. In the view of the respondent and the dissent in *Cedar Point*, *PruneYard* called for evaluating the challenged access right as a regulatory taking. *Cedar Point*, 141 S. Ct. at 2076-77. The majority rejected this view, explaining that the regulation before it "grant[ed] a right to invade property closed to the public," while the state constitutional provision in *PruneYard* imposed "[l]imitations on how a business generally open to the public [could] treat individuals on the premises." *Cedar Point*, 141 S. Ct. at 2077. Although arising in a somewhat different context, this distinction squarely tracks *Yee*'s explanation of why a regulation limiting landlords' ability to choose or

remove tenants did not effect a physical taking. *See* 503 U.S. at 531 ("Because they 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.").

Plaintiffs miss the key point in dismissing *Cedar Point*'s discussion of *PruneYard* on the basis that apartment units regulated by the RSL are not open to the public (Supp. Br. 9-10). What matters is that in *PruneYard*, just as in *Yee*, the entry of invitees was a feature of the property owner's business, not the result of government compulsion. Neither case treated a limitation on when the owner could remove invited parties from its property as a potential physical taking. And *Cedar Point* confirms that such limitations do not constitute one.

2. *Cedar Point* does not support Plaintiffs' reading of prior precedent.

Plaintiffs labor to show that *Cedar Point* supports their view of prior precedent or its application to the RSL. The most basic problem with their arguments is that *Cedar Point* did not address the holding of *Yee*, on which this Court has repeatedly relied in rejecting physical-taking challenges to the RSL. *See Fed. Home Loan Mortg. Corp.*, 83

F.3d at 47-48; *Harmon*, 412 F. App'x at 422. And nothing in *Cedar Point* suggests that this Court's understanding of *Yee* was mistaken. Indeed, as just discussed, *Cedar Point* preserves the core principles of *Yee* and other governing case law.

Moreover, the various other aspects of *Cedar Point* that Plaintiffs highlight cast no doubt on this Court's decisions rejecting physical-taking challenges to the RSL. Those decisions did not turn on a distinction between "restrictions embodied in laws and regulations rather than individualized rulings" (Supp. Br. 7-8). They also did not invoke "'longstanding background restrictions on property rights'" or whether landlords provide access "'as a condition of receiving certain benefits'" (*id.* at 8-9 (quoting *Cedar Point*, 141 S. Ct. at 2079)). *Cedar Point*'s discussion of these issues therefore does not assist Plaintiffs in mounting a successful physical-taking challenge to the RSL.

Nor does *Cedar Point*'s conclusion that an intermittent invasion can be a physical taking undermine this Court's reliance on *Yee* (*Contra* Supp. Br. 7). *Yee*'s holding did not depend on a distinction between permanent and intermittent invasions. Instead, in dicta, it invoked the concept of permanency to refer to a different sort of regulation—one

that "compel[s] a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 503 U.S. at 528. The issue was not whether the presence of tenants was permanent or intermittent, but whether the regulation provided an option for owners who had invited tenants to change the use of their property.

Ultimately, *Cedar Point* "reinforces the line drawn" in *Yee*, as Plaintiffs assert (Supp. Br. 11)—just not in the way they mean. Their objections to the RSL's regulation of lease renewals and familial succession rights (Supp. Br. 6, 11) are foreclosed by *Yee*'s holding that similar protections in the scheme before it, including restrictions on landlords' ability to decline to renew leases without cause and to object to successor tenants, did not on their face amount to a "perpetual" tenancy. *See* 503 U.S. at 524, 527-28. Plaintiffs concede that *Cedar Point* does not overrule this holding and that this Court is therefore bound by it (Supp. Br. 11 n.4).

Yee also forecloses Plaintiffs' challenge to the RSL provisions governing when a property owner may decline to renew a lease to exit the rental market (Supp. Br. 6, 11). These provisions permit a property owner to recover a rent-stabilized unit for personal use, to convert rent-

stabilized units to a non-rental business, or to demolish or rehabilitate them. *See* 9 NYCRR §§ 2524.4, 2524.5.[1] This Court relied on *Yee* in rejecting a physical-taking challenge to such provisions. *See Harmon*, 412 F. App'x at 422; *see also Rent Stabilization Ass'n v. Higgins*, 83 N.Y.2d 156, 171-72 (1993).

Plaintiffs argue that "in effect" owners cannot exercise these options (Supp. Br. 11). But those two words are telling and, under *Yee*, decisive. Plaintiffs have brought only facial claims, yet they cannot show that every owner is foreclosed from changing the use of its property under the RSL. As we have explained (*see* City Br. 36-39), *Yee* forecloses a facial challenge in the absence of such a showing, 503 U.S. at 528; *see also Rent Stabilization Ass'n v. Dinkns*, 5 F.3d 591, 595 (2d Cir. 1993). Nothing in *Cedar Point* touched on this aspect of *Yee*.

Plaintiffs' further assertion that the RSL's exit options take owners' "separate right to determine the[ir] property's use" (Supp. Br.

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[1] The RSL also permits landlords to exit the rental market for any unit that has become vacant (*see* City Br. 14). Such an exit does not require landlords to hold the unit vacant, as Plaintiffs assert (Supp. Br. 7 n.3). All of the provisions that Plaintiffs cite concerning changing the use of rent-stabilized units apply only when a landlord wishes to terminate or not renew a lease, not when a unit has already been vacated. *See* 9 NYCRR §§ 2524.4, 2524.5.

11) is curious given their concession that *Cedar Point* reaffirmed that "regulations that restrict an owner's ability to use his own property" are evaluated as potential regulatory takings. 141 S. Ct. at 2071. *Cedar Point* thus lends no support to Plaintiffs' physical-taking claim.

B. *Pakdel* does not help Plaintiffs' case either.

The Court's per curiam opinion in *Pakdel v. City and County of San Francisco*, 141 S. Ct. 2226 (2021), is far afield of this case. The Court held that a regulatory-taking claim was sufficiently final because the relevant government agency had "firmly rejected [the challengers'] request for a property-law exemption." *Id.* at 2228. Plaintiffs' brief shows that the decision does not help their claims in the least.

Plaintiffs focus on a footnote stating that on remand the Ninth Circuit "may" consider petitioners' takings claims "in light of" *Cedar Point*. *Pakdel*, 141 S. Ct. at 2229 n.*. But the footnote referred to several taking claims (exactions, physical taking, and private taking) in addition to the regulatory-taking claim that the Court had addressed, so it is unclear which claim the Court thought *Cedar Point* might be relevant to. And the Court did not, as Plaintiffs contend, state that the lower court "should" consider *Cedar Point* (Supp. Br. 5). Nor did the

Court's terse statement suggest any change in the controlling law. Plaintiffs cite no authority for the idea that a remand permitting—but not requiring—consideration of an intervening decision shows that the decision governs the remanded case (*see* Supp. Br. 5, 10).

Additionally, the proper resolution of the claims in *Pakdel* has little bearing on this case. The ordinance at issue there, which required a landowner to offer an existing tenant a "lifetime lease," 141 S. Ct. at 2228, is unlike any provision of the RSL. Despite Plaintiffs' hyperbole (Supp. Br. 7), nothing in the RSL requires a landlord to offer a perpetual lease to a tenant. On the contrary, leases under the RSL are for one- or two-year periods, 9 NYCRR § 2522.5, and landlords retain the ability to terminate those leases for cause, *id.* § 2524.3, and to decline to renew them for a variety of reasons, *id.* §§ 2524.4, 2524.5. Even if the Supreme Court's footnote were fairly read to suggest a favorable view of merits of the *Pakdel*'s physical-takings claim (and it is not), that would say nothing about the validity of the RSL's provisions.

The actual holding of *Pakdel* also does Plaintiffs' claims no good. *Pakdel* reaffirmed that "a plaintiff must show that there is no question about how the regulations at issue apply to the particular land in

question." 141 S. Ct. at 2230 (quotation marks, ellipsis, and alteration omitted). Plaintiffs have never attempted to do that, even as they challenge multiple provisions of the RSL that include individualized consideration by regulators, such as the regulations allowing non-renewal of leases in order to remove a unit or building from the residential rental market (*see* City Br. 36-39). That failing dooms their facial challenge, as they must show that there is "no set of circumstances" in which the challenged regulations would be applied in a favorable way to at least some of the landlords of some of the City's rent-stabilized units (*see* City Br. 39-40).

Similarly, as we have explained (City Br. 47), the availability of hardship exemptions precludes Plaintiffs from showing on their regulatory-takings claim that the RSL has a uniform economic impact across all owners of rent-stabilized units. *Pakdel* does not help Plaintiffs establish, on a facial challenge, the economic impact of the RSL on the owners of every one of the nearly one million regulated units in New York City (JA26).

CONCLUSION

The judgment appealed from should be affirmed.

Dated: New York, NY
January 24, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies of this Court's order because it limited to twelve pages in length (ECF No. 282), not including the table of contents, table of authorities, this certificate, the cover, and signature block.

JESSE A. TOWNSEND