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,

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

Intervenors.

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

SUPPLEMENTAL BRIEF FOR INTERVENORS

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Pursuant to the Court's January 4, 2022 order (ECF No. 282), Intervenors respectfully submit this response to Plaintiffs-Appellants' ("Appellants") January 14, 2022 supplemental brief (ECF No. 289) addressing *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (June 23, 2021), and *Pakdel v. City & County of San Francisco*, 141 S. Ct. 2226 (June 28, 2021) (per curiam). Neither decision governs this case.

ARGUMENT

I. *Cedar Point* Does Not Support Appellants' Claims

A. The Challenged Law Granted Uninvited Strangers a Formal Right to Access Private Property over the Owner's Objection

Unlike this case, *Cedar Point* did not involve landlord-tenant laws. It instead concerned a California labor regulation granting uninvited union organizers a "right to take access" to an employer's property "for up to three hours per day, 120 days per year." 141 S. Ct. at 2069. The lower courts rejected the claims of two employers who argued that the regulation effected a *per se* physical taking, reasoning that the regulation instead was subject to the multifactor balancing test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), which the employers had not attempted to satisfy. *Cedar Point*, 141 S. Ct. at 2070.

The Supreme Court reversed, holding that the regulation effected a *per se* taking. *Id.* at 2080. The Court reasoned that "[t]he essential question" in determining whether a regulation effects a *per se* taking or should be subject to *Penn Central*'s balancing test "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. Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place." *Id.* at 2072. Because the regulation granted uninvited organizers "a formal entitlement to physically invade the growers' land" that did not arise from any "traditional background principle of property law" and was "not germane to any benefit provided to agricultural employers or any risk posed to the public," the Court concluded that it "amount[e]d to a simple appropriation of private property." *Id.* at 2079–80.

The Court supported its decision with analogous examples of "government-authorized physical invasions" that effected *per se* takings by appropriating rights to property. *Id.* at 2073. Flying military aircraft at low altitudes constituted a "direct invasion" of the private property below. *Id.* (quoting *United States v. Causby*, 328 U.S. 256, 265–66, 267 (1946)). Firing coastal defense guns over private land likewise effected a physical invasion. *Id.* (citing *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330 (1922)). Compelling public access to a private marina was deemed "an actual physical invasion" through "an easement." *Id.* (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979)). Requiring landlords to allow cable companies to install equipment on their buildings compelled the "permanent physical occupation of property." *Id.* (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982)). Requiring an easement as a

condition for granting a building permit was as unconstitutional as appropriating the easement directly. *Id.* at 2073–74 (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994)). So too was the "physical appropriation" of a raisin crop as a condition of doing business. *Id.* at 2074 (citing *Horne v. Dep't of Agric.*, 576 U.S. 350, 362 (2015)).

B. The RSL Follows Longstanding Caselaw Permitting States to Regulate the Landlord-Tenant Relationship

The RSL, by contrast, does not authorize physical invasion or appropriate property rights. Appellants do not dispute that they, like all landlords, voluntarily offer their properties for rent, inviting physical occupation by tenants. The RSL merely "regulates the terms under which the owner may use the property as previously planned." *Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 48 (2d Cir. 1996); *accord W. 95 Hous. Corp. v. N.Y.C. Dep't of Hous. Pres. & Dev.*, 31 F. App'x 19, 21 (2d Cir. 2002) (noting that "the RSL regulates land use rather than effecting a physical occupation"). The RSL also preserves landlords' statutory rights to recover possession, including through eviction. *Harmon v. Markus*, 412 F. App'x 420, 422 (2d Cir. 2011). Relying on these and other cases upholding prior versions of the RSL, the District Court correctly found that "[t]he incremental effect of the 2019 amendments … is not so qualitatively different from what came before as to permit a different outcome." JA-524–25.

The decision below is consistent with longstanding jurisprudence that laws regulating rents and evictions do not effect *per se* physical takings. For at least a century, the Supreme Court "has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular." *Loretto*, 458 U.S. at 440. For example, the Court held that a 1919 law granting holdover tenants in Washington, D.C., the unilateral option to remain in possession so long as they continued paying the regulated rent was a valid use restriction that did not effect a taking by going "too far." *Block v. Hirsh*, 256 U.S. 135, 153, 156 (1921). A 1920 tenant-protection law governing the New York City area was upheld against a taking challenge for the same reasons. *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 247 (1922). A 1942 federal rent-control law did not effect a taking because the law did not require any owner "to offer any accommodations for rent." *Bowles v. Willingham*, 321 U.S. 503, 517 (1944).

In *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Supreme Court squarely rejected an argument nearly identical to the one Appellants press here: that a state law regulating rents and the grounds for eviction on its face effects a *per se* physical taking by "[f]orcing the unconsented physical occupation of the owner's property—effectively in perpetuity, by strangers." Suppl. Br. 7; *cf. Yee*, 503 U.S. at 526–27 ("Because under the [challenged law] the [landowner] cannot evict a [tenant] or easily convert the property to other uses, the argument goes, the [tenant] is effectively

a perpetual tenant of the [property] ….”). *Yee* explained that “[t]his argument, while perhaps within the scope of [the Supreme Court’s] regulatory taking cases, cannot be squared easily with [its] cases on physical takings” where, as here, landlords “voluntarily rented their land” and the law provides means for eviction. 503 U.S. at 527–28. The District Court properly held that *Yee*, among other cases, supports dismissal of Appellants’ *per se* taking claim. JA-526.[1]

C. Appellants’ Arguments to the Contrary Are Unavailing

Appellants’ contention that a physical occupation or appropriation may effect a *per* se taking even if it is temporary or embodied in generally applicable laws and regulations, Suppl. Br. 7–8, ignores the District Court’s conclusion that the RSL does not compel physical occupation at all but rather restricts land use, *see* JA-525. This conclusion also precludes Appellants’ reliance on *Horne*, which held that government may not condition a property owner’s market access on the owner’s acquiescing to a taking. Suppl. Br. 12. Appellants’ physical-taking claim fails not because

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[1] Appellants’ claim that “*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,” Suppl. Br. 11 n.4, ignores both *Yee*’s express recognition that “the ‘right to exclude’ is doubtless … ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property,’” and *Yee*’s express holding that the right to exclude was not taken from the landowners “on the mere face of the [challenged law],” 503 U.S. at 528 (quoting *Kaiser Aetna*, 444 U.S. at 176). The same is true here. In any event, as Appellants rightly acknowledge, any departure from *Yee* “is a question for the Supreme Court,” not this one. Suppl. Br. 11 n.4.

the RSL's restrictions are temporary, because they are embodied in laws and regulations, or under an acquiescence theory. Rather, they fail because "no physical taking has occurred in the first place," as the District Court correctly found. JA-526.

Appellants' argument that the government's ability to restrict an "owner's right to exclude a tenant upon expiration of the lease" is not a "background principle" of property law, Suppl. Br. 8, conflicts with a century of New York law. "The regulation of rental housing, including restrictions on rents and evictions, has long been upheld by … the New York Court of Appeals as a valid exercise of the government's police power to protect the public health, safety and general welfare." *Sobel v. Higgins*, 590 N.Y.S.2d 883, 884 (1st Dep't 1992). The New York Court of Appeals rejected a taking claim against a 1920 law "protect[ing] unobjectionable tenants, ready and willing to pay reasonable rents, from wholesale evictions," reasoning that the law was "analogous to the abatement of a nuisance or to the establishment of building restrictions." *People ex rel. Durham Realty Corp. v. La Fetra*, 130 N.E. 601, 606–07 (N.Y. 1921). The Court of Appeals applied similar "police power" reasoning to reject a taking claim against a 1948 law restricting evictions. *Loab Ests., Inc. v. Druhe*, 90 N.E.2d 25, 27 (N.Y. 1949). And the Court of Appeals has rejected taking challenges against the RSL. *Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 662 N.E.2d 773, 777 (N.Y. 1995); *Rent Stabilization Ass'n of N.Y.C., Inc. v. Higgins*, 630 N.E.2d 626, 632–33 (N.Y. 1993).

Appellants' effort to distinguish *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), also fails. *See* Suppl. Br. 9–10. *PruneYard* held that a state restriction on the right of a privately owned shopping center to exclude individuals on its premises who were engaged in leafletting did not effect a taking under the multi-factor *Penn Central* standard. *Cedar Point*, 141 S. Ct. at 2076. As explained in *Cedar Point*, "[l]imitations 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 property closed to the public." *Id.* at 2077. The former are assessed under *Penn Central*, while the latter may be deemed *per se* takings. *Id.*

Appellants contend that the *per se* test should apply to the RSL because regulated apartments "are not open to the public." Suppl. Br. 10. That is wrong. "Because they voluntarily open their propert[ies] to occupation by others," Appellants "cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Yee*, 503 U.S. at 531 (citing, *inter alia*, *PruneYard*, 447 U.S. at 82–84). Whether the law overly restricts landlords' ability to evict tenants or convert their properties to non-rental use are factual inquiries to be assessed under the *Penn Central* standard, not the *per se* test. *Yee*, 503 U.S. at 527–31.

Appellants' contention that the RSL compels landlords to offer renewal leases to "strangers," including mere "friends" and "roommates," Suppl. Br. 6, is legally incorrect and irrelevant. Under the challenged regulations, a "family member

entitled to noneviction protection must have occupied the apartment with the tenant of record in a long-term, committed relationship," and the owner may "request, when offering a renewal lease, the names of all co-occupants and whether they qualify as family members." *Higgins*, 630 N.E.2d at 633, *cited in Harmon*, 412 F. App'x at 422. Even "a close friend and roommate" is "not entitled to succession rights" unless the relationship is "characterized by the requisite emotional and financial commitment and interdependence connoting a family relationship." *Seminole Realty Co. v. Greenbaum*, 209 A.D.2d 345, 345, 619 N.Y.S.2d 5, 6 (1994). The Complaint in this case does not allege that any Appellant was required over objection to accept a successor tenant. In any event, restricting landlords' choice of incoming tenants "has nothing to do with whether [a law] causes a physical taking," *Yee*, 503 U.S. at 503.

Appellants' further suggestion that affirming the decision below would preclude *per se* physical-taking claims "once a property owner accepts a tenant," Suppl. Br. 10, fails because landlords continue to retain statutory rights to evict tenants and recover possession, which was dispositive in *Harmon*, 412 F. App'x at 422. The continuing existence of these rights also defeats Appellants' contention that the RSL transgresses "the line drawn by the Supreme Court in *Yee*." Suppl. Br. 11. Because

the RSL preserves landlords' eviction rights, it does not on its face compel them to "refrain in perpetuity from terminating a tenancy." *Yee*, 503 U.S. at 528.[2]

II. *Pakdel* Is Inapposite Because It Turned Solely on the Ripeness of an As-Applied Claim, Which Appellants Do Not Assert

The Supreme Court's decision in *Pakdel* concerned a single issue not presented in this case—whether *de facto* administrative finality is sufficient to ripen an as-applied taking claim. 141 S Ct. at 2230. The plaintiffs in *Pakdel* were non-occupant owners of a tenancy-in-common interest in a residential building who sought to convert their interest into individual ownership of units in the building. *Id.* at 2228. A municipal ordinance required non-occupant owners seeking such a conversion to offer each existing tenant a lifetime lease. *Id.* After the city approved the plaintiffs' conversion application but indicated it would deny their request for

[2] Appellants state that "the low rent fixed by the RSL" makes it "a rare occurrence" for landlords to exercise their "option of keeping an apartment vacant when a tenant does not wish to renew the lease" because it would be difficult "to earn any revenue from the property." Suppl. Br. 7 n.3. Although such economic effects may be relevant to the *Penn Central* analysis, they have no bearing on whether the RSL effects a *per se* taking by compelling physical occupation. *See, e.g.*, *Yee*, 503 U.S. at 527–29 (distinguishing standards). Appellants are also factually incorrect, as an average of twelve percent of rent-stabilized tenancies city-wide—and up to thirty-two percent in some neighborhoods—terminate naturally each year. *See* Intervenors' Br. 23 n.17 (ECF No. 212). In any event, the RSL provides numerous separate means to end unwanted tenancies, *see id.* at 23–25, which defeated an identical claim in *Harmon*, 412 F. App'x at 422. Appellants' further suggestion that the RSL makes it difficult to "devote [a] property to an alternative use," Suppl. Br. 7 n.3, fails because Appellants do not claim to have attempted to do so, and the Court must "confine [itself] to the face of the statute," *Yee*, 503 U.S. at 528.

exemption from the lifetime-lease requirement, they brought claims in federal court under 42 U.S.C. § 1983 alleging, among other things, that the lifetime-lease requirement effected an unconstitutional regulatory taking under *Penn Central*. *Id.*

The district court dismissed the claim as unripe because the owners had not obtained a final agency decision on exemption or exhausted state-court remedies, as required under then-existing Supreme Court precedent. *Id.* at 2228–29. While the owners' appeal was pending, the Supreme Court overruled the exhaustion requirement but left the finality requirement in place. *Id.* at 2229. The Ninth Circuit subsequently affirmed for lack of administrative finality alone because, although the agency had twice denied the owners' exemption request, the agency retained discretion to change its mind. *Id*.

The Supreme Court vacated the Ninth Circuit's decision, holding that the finality requirement calls for "nothing more than *de facto* finality." *Id.* at 2230–31. The Supreme Court rejected the view that finality requires compliance with all administrative requirements and instead held that "[a]ll a plaintiff must show is that there is no question about how the regulations at issue apply to the particular land in question." *Id.* at 2231 (cleaned up). In other words, a dispute becomes ripe "[o]nce the government is committed to a position." *Id.*

Pakdel has no bearing on this appeal because the ripeness of Appellants' facial claims is not contested. *See* Suppl. Br. 11. Nor is it contested that "there is no

landlord-tenant exception to the Takings Clause's protection of the right to exclude," as Appellants' claim, so their argument that "*Pakdel* confirms that fact" attacks a straw man. *Id.* at 10.[3]

Appellants' argument that "*Pakdel* undermines Defendants' suggestions that the putative existence of purported 'hardship exemptions' in the RSL might foreclose Plaintiffs' takings claims," *id.* at 11, mistakes *Pakdel*'s reasoning, the facts of this case, and the applicable law. In *Pakdel*, the owners had applied for an exemption from the challenged regulation, and the agency had both reached a "definitive position on the issue" and communicated its denial on two occasions. 141 S. Ct. 2228, 2230. Here, Appellants' own allegations confirm that hardship exemptions to the RSL's rent limits are sometimes granted. *See* Suppl. Br. 11; JA-132–33 ¶¶ 332–33. Whether they are so "rarely awarded" as to make application futile, as Appellants suggest, Suppl. Br. 11, is a question for individual as-applied cases. This Court rejected a prior facial taking challenge to the RSL because those "unable to remedy the [purportedly] confiscatory results of the [RSL's] basic provisions" may seek

[3] Appellants' passing reference (at 10) to *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), is improper because Appellants did not obtain leave to brief the case, which was issued after briefing in this appeal was completed. In any event, *Alabama Association* is inapposite for the reasons set forth in Intervenors' Rule 28(j) letter dated January 12, 2022, and submitted in *74 Pinehurst LLC v. New York*, Nos. 21-467 and 21-558.

relief through the available hardship exemptions. Intervenors' Br. 30 (quoting *Dinkins*, 5 F.3d at 595). The same outcome is warranted here.

Appellants' further suggestion that the challenged regulation in *Pakdel* resembles the RSL is mistaken. *See* Suppl. Br. 10–11. Although Appellants correctly note that "*Pakdel* directed the lower courts to apply *Cedar Point*," *id.* at 10, they ignore that *Pakdel* did not suggest a particular outcome. Appellants also fail to distinguish between the express government-compelled lifetime lease requirement at issue in *Pakdel* and the RSL's eviction regulations. Unlike the *Pakdel* plaintiffs, Appellants do not allege that the RSL on its face mandates lifetime leases. As discussed above, the RSL gives landlords many options to end tenancies. *See Harmon*, 412 F. App'x at 422. Appellants' claim that such options are "in effect" impracticable, Suppl. Br. 11, does not change "the face of the statute," *Yee*, 503 U.S. at 528.

CONCLUSION

For the foregoing reasons and those set forth in Intervenors' opening brief, the judgment of the District Court should be affirmed.

Dated: January 24, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of this Court's January 4, 2022 Order (ECF No. 282) because it is limited to twelve pages in length, 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 was prepared in a proportionally spaced typeface using Microsoft Word for Microsoft Office 365 in 14-point Times New Roman.

Dated: January 24, 2022 /s/ *Caitlin J. Halligan*