Not a Physical Taking: Defending Rent Control Against New Constitutional Challenges

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ABSTRACT

This note is the first to systematically analyze constitutional challenges to rent control law landlords sought to bring before the U.S. Supreme Court during the 2023-24 term. This note analyzes the constitutionality of rent control in the wake of the Court's 2021 decision in Cedar Point Nursery v. Hassid, focusing on the central argument of the landlord petitioners—that limitations on eviction in the rent control laws constitute per se physical takings. This note argues that rent control laws do not effect an unconstitutional taking of landlords' property. It departs from existing scholarship by focusing on the significance of Cedar Point—and its extension of the category of per se physical takings—for the constitutionality of rent control ordinances. This note proposes novel arguments to defend rent control in the face of the new takings clause challenges, arguments that have been raised neither in the briefs opposing Supreme Court review nor in existing scholarship. It articulates four arguments: (1) rent control laws affect no physical invasion of landlords' property; (2) striking down rent control law would place the Court on a slippery slope threatening both fair housing laws and basic features of landlord-tenant law; (3) the restrictions on eviction contained in rent control laws are fair conditions for landlords receiving the benefits of residential zoning; and (4) tenants, particularly low-income tenants, have a strong interest in remaining in their existing homes and preserving their communities.

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> Nay, take my life and all. Pardon not that.
> You take my house when you do take the prop
> That doth sustain my house; you take my life
> When you do take the means whereby I live.
> William Shakespeare, The Merchant of Venice act 4, sc. 1, ls. 390-393.

INTRODUCTION

It is likely that the Supreme Court will authorize the taking of someone's home, indeed the homes of many people across the country, if the Court restricts or nullifies rent control laws. While the Court has repeatedly upheld rent control ordinances against constitutional challenge for over a century, the Court is now poised not only to take up the question again, but quite possibly to strike down essential features of those laws.

The threat to rent control arises from developments in the Court's Takings Clause jurisprudence, culminating in *Cedar Point Nursery v. Hassid* in 2021.[1]

1. 141 S.Ct. 2063 (2021).

The looming threat to rent control is exemplified by the fact that at the start of the 2023-24 Supreme Court term four separate petitions for writs of certiorari were pending with the Court challenging rent control laws on takings grounds.[2] Three of the petitions sought review of Second Circuit decisions upholding New York State's (NYS) rent control law. The fourth petition sought review of a Ninth Circuit decision upholding Los Angeles' rent control ordinance. While the Supreme Court decided not to address the issue this term, the petitions suggest that recent Supreme Court jurisprudence under the Takings Clause has placed the constitutionality of rent control on the judicial agenda. The seriousness with which the Court considered the petitions is signaled by the fact that the Court relisted one of the petitions for consideration a record thirteen times and that Justice Thomas filed a separate Statement on the denials of certiorari, expressing his view that "the constitutionality of [rent control] regimes is an important question."[3] "[I]n an appropriate future case," Justice Thomas concluded, "we should grant certiorari to address this important question."[4] As one of the disappointed New York petitioner landlord trade associations told *The New York Times*, "We see the Supreme Court's decision not to take our case as a signal to bring more targeted challenges to specific provisions of the law illustrating direct impacts on housing providers. . . . This is not the end of the road."[5]

This note analyzes the constitutionality of rent control in the wake of *Cedar Point*, focusing on the central argument of the landlord petitioners—that limitations on eviction in the rent control laws constitute a *per se* physical taking. This note argues that rent control laws do not effect an unconstitutional taking of landlords' property.

Little has been written about the implications of *Cedar Point* for rent control. Only one piece, a student note, addresses the issue directly, and it was written before the Second Circuit's decisions.[6] Another student note addresses the implications of *Cedar Point* for fair housing laws, arguing that fair housing laws fall within one of the exceptions to *per se* physical takings doctrine recognized in *Cedar Point*, but it does not address whether extending *Cedar Point*'s holding to

2. Petition for Writ of Certiorari, Cmty. Hous. Improvement Program v. New York, 144 S. Ct. 264 (No. 22-1095) (2023); Petition for Writ of Certiorari, Kagan v. Los Angeles, 144 S. Ct. 71 (No. 22-739) (2023); Petition for Writ of Certiorari, 335-7 LLC v. New York, No. 22-1170 (Feb 20, 2024); Petition for Writ of Certiorari, 74 Pinehurst LLC v. New York, No. 22-1130 (Feb 20, 2024).

3. *See* Proceedings and Orders of the U.S. Supreme Court, 74 Pinehurst, No. 22-1130 (Aug. 30, Oct. 2, Oct. 10., Oct. 23, Oct. 30, Nov. 6, Nov. 13, Nov. 27, Dec. 1, 2023; Jan. 2, Jan. 8, Jan. 16, Feb. 9, 2024); Statement of Justice Thomas respecting the denials of certiorari, 74 Pinehurst, 2024 WL 674658 (Feb. 20, 2024).

4. Statement of Justice Thomas respecting the denials of certiorari, 74 Pinehurst, 2024 WL 674658 (Feb. 20, 2024).

5. Adam Liptak, *Supreme Court Turns Away Challenge to New York Rent Regulations*, THE N.Y. TIMES (Oct. 2, 2023), https://www.nytimes.com/2023/10/02/us/supreme-court-new-york-rent-regulation.html. [https://perma.cc/C7US-RZPZ]

6. Abigail K. Flanigan, *Rent Regulation After Cedar Point*, 124 COLUM. L. REV. 475 (2023).

strike down rent control would also threaten fair housing laws.[7] Several student notes discuss the implications of *Cedar Point* for pandemic-era eviction moratoriums, but like the fair housing note, none of them address the decision's implications for rent control.[8] A small group of scholars critique *Cedar Point*, but also without considering whether the decision threatens rent control.[9] Professor Aziz Huq, for example, argues that *Cedar Point* "prefigures a dramatic and destabilizing shift in the nature of constitutional property" and suggests an "absence of any stable limit on the Court's apparent reworking of the concept of constitutional property."[10] Interestingly, in light of the current Supreme Court majority's increasing reliance on Founding-era history and tradition,[11] Professor Bethany Berger persuasively argues the type of intrusion at issue in *Cedar Point* was common when the Takings Clause was drafted.[12] Finally, several scholars laud *Cedar Point* as a critical step in the defense of property rights, arguing, for example, that the decision constitutes a "'normalization' of property rights" and "illustrate[s] how constitutional recognition of property interests . . . can 'serve to protect the interests of the working and middle classes.'"[13]

An older literature addresses whether rent control is constitutional under the Court's regulatory takings doctrine,[14] a question raised in several of the recent petitions, but beyond the scope of this note. And there is an extensive theoretical and empirical literature addressing the impact of rent control on the availability

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7. Amy Liang, *Property Versus Antidiscrimination: Examining the Impacts of Cedar Point Nursery v. Hassid on the Fair Housing Act*, 89 U. CHI. L. REV. 1793 (2022).

8. Samuel J. Ciulla, *Putting a Moratorium on Moratoria: Avoiding an Unlawful Regulatory Taking While Preserving Safe Rental Housing During a National Crisis*, 52 STETSON L. REV. 507 (2023); Benjamin Alexander Morgan, *A New Takings Clause? The Implications of Cedar Point Nursery v. Hassid for Property Rights and Moratoria*, 31 WM. & MARY BILL RTS. J. 545 (2022). Several notes on this topic also preceded *Cedar Point*. *See* Meredith Bradshaw, *Going, Going Gone: Takings Clause Challenges to the CDC's Eviction Moratorium*, 56 GA. L. REV. 457 (2021); Paul J. Larkin, *The Sturm and Drang of the CDC's Eviction Moratorium*, 2021 HARV. J.L. & PUB. POL'Y PER CURIAM 18 (2021).

9. Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160 (2021) (arguing that *Cedar Point* threatens the principle of workplace democracy); Lee Ann Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, 17 DUKE J. CONST. L. & PUB. POL'Y 1, 3 (2022) (arguing that *Cedar Point* entrenches and maintains status quo patterns of property wealth); Aziz Huq, *Property Against Legality: Takings After Cedar Point*, 109 VA. L. REV. 233, 238 (2023).

10. Huq, *supra* note 9, at 238.

11. *See, e.g.*, New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

12. Bethany Berger, *Eliding Original Understanding in Cedar Point Nursery v. Hassid*, 33 YALE J. L. & THE HUMANITIES 307 (2022). Berger argues that, while the Court in *Cedar Point* "wraps itself in a façade of constitutional history," the decision is a break from the Court's originalist jurisprudence as early American law starting "with the Massachusetts Bay's 1641 Liberties Common" and "well into the nineteenth century . . . was full of formal, statutory entitlements to enter" private property like the California access regulation struck down in Cedar Point. *Id*. at 309.

13. Julia D. Mahoney, *Cedar Point Nursery and the End of the New Deal Settlement*, 11 PROP. RTS. J. 1, 3, 6 (2022). *See also* Sam Spiegelman & Gregory C. Sisk, *Cedar Point*: *Lockean Property and the Search for a Lost Liberalism*, 2020–21 CATO SUPREME COURT REV. 165 (2021).

14. *See, e.g.*, Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 925 (1989); Neal Stout, *Making Room at the Inn: Rent Control as a Regulatory Taking*, 38 WASH. U. J. URB. & CONTEMP. L. 305 (1990).

of affordable housing.[15] Here, the principal critic of rent control is the conservative legal scholar Richard Epstein. Epstein argues that all rent control statutes are *per se* unconstitutional under the Takings Clause because they "operate to take part of the landlord's interest in his reversion and to transfer it to the tenant."[16] Epstein and others have also argued that rent control is counterproductive because, by artificially limiting rent increases, the laws reduce the supply of housing.[17] The most compelling response to Epstein's free market critique is offered by Professor Margaret Radin.[18] That debate is also outside the scope of this note

15. This literature is summarized in Prasanna Rajasekaran et al., *Rent Control: What Does the Research Tell Us about the Effectiveness of Local Action?*, URB. INSTITUTE (Jan. 2019), https://www.urban.org/sites/default/files/publication/99646/rent_control._what_does_the_research_tell_us_about_the_effectiveness_of_local_action_1.pdf [https://perma.cc/U479-PHU3]; REBECCA DIAMOND, WHAT DOES ECONOMIC EVIDENCE TELL US ABOUT THE EFFECTS OF RENT CONTROL?, BROOKINGS (Oct. 18, 2018), https://www.brookings.edu/articles/what-does-economic-evidence-tell-us-about-the-effects-of-rent-control/ [https://perma.cc/TSB3-BMKQ] Edgar O. Olsen, Is Rent Control Good Social Policy?, 67 CHI.-KENT L. REV. 931 (1991). *See also* Rebecca Diamond et al., *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, 109 AM. ECON. REV. 3365 (2019); Robert C. Ellickson, *Rent Control: A Comment on Olsen*, 67 CHI.-KENT L. REV. 947 (1991).

16. Richard Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 744 (1988). *See generally* Richard Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN, 176-180, 186-188 (1985); Richard Epstein, *Yee v. City of Escondido: The Supreme Court Strikes Out Again*, 26 LOY. L.A L. REV. 3 (1992). Epstein filed a brief in support of the Petitioner in 74 Pinehurst.

17. Much of the traditional policy and economic literature finds that rent control is ineffective because, among other problems, it reduces housing supply. Paul Krugman asserts that it is common knowledge among anyone who has taken Economics 101 in college that rent control decreases housing supply: "The analysis of rent control is among the best-understood issues in all of economics, and – among economists, anyway – one of the least controversial. In 1992 a poll of the American Economic Association found 93 percent of its members agreeing that ''a ceiling on rents reduces the quality and quantity of housing." Paul Krugman, Editorial, *Reckonings; A Rent Affair*, THE N.Y. TIMES (June 7, 2000), https://www.nytimes.com/2000/06/07/opinion/reckonings-a-rent-affair.html [https://perma.cc/7SGV-27B8]. Almost every American freshman-level college economics textbook "contains a case study on rent control, using its known adverse side effects to illustrate the principles of supply and demand." *Id*. But the conventional wisdom that rent control reduces housing supply is not universally shared. Rutgers economist Mark Paul calls the argument "a neoliberal shibboleth." Mark Paul, *Economics Hate Rent Control. Here's Why They Are Wrong*., THE AM. PROSPECT (May 16, 2023). https://prospect.org/infrastructure/housing/2023-05-16-economists-hate-rent-control/ [https://perma.cc/XZ5F-BJD2]. A study of rent control in New Jersey found that for three decades rent control in fact increased housing supply. *See* John I. Gilderbloom & Lin Ye, *Thirty Years of Rent Control: A Survey of New Jersey Cities*, 29 J. URB. AFF. 207 (2007). Similar studies of rent control in New Jersey find the policy had no statistically significant impact on housing supply. *See* John D. Ambrosius et al., *Forty years of rent control: Reexamining New Jersey's moderate local policies after the great recession*, 49 CITIES 121 (2015). There are also arguments that rent control law limits rapid rent hikes and thus protects tenants from eviction, *supra*, note 15. Scholars find that "rent regulations that protect tenants from and limit egregious rent hikes" have "empirical backing." Letter from Academics to Sandra Thompson, Director of the Federal Housing Finance Agency, Re: Federal Housing Finance Agency Tenant Protections for Enterprise-Backed Multifamily Properties Request for Input (July 2023), https://peoplesaction.org/wp-content/uploads/2023/07/Academics-Sign-on-Letter_-FHFA-RFI-on-Tenant-Protections-1.pdf [https://perma.cc/PD9J-3XXC]. These economists find that rent control policies "are useful in helping tenants avoid de facto evictions caused by rising rents." https://prospect.org/infrastructure/housing/2023-05-16-economists-hate-rent-control/ [https://perma.cc/X3QJ-A3CL].

18. Margaret Jane Radin, *Residential Rental Control*, 15 PHIL. & PUB. AFF. 350, 351–52 (1986).

except where the note discusses possible policy arguments in support of rent control.

This note diverges from existing scholarship by focusing on the significance of *Cedar Point*—and its extension of the category of *per se* physical takings—for the constitutionality of rent control ordinances. The concern here is not with issues such as economic efficacy and regulatory takings, which have been dominant themes of the study of rent control policy. Rather, this note introduces a set of novel arguments to defend rent control in the face of the new Takings Clause challenges, arguments that have been raised neither in the briefs filed with the U.S. Supreme Court in the current litigation nor in existing scholarship.

The note proceeds as follows:

Part I examines rent control law and its constitutional history. It surveys the variety of rent control laws and then analyzes the Supreme Court's jurisprudence concerning rent control. In particular, it analyzes the Court's most recent decision upholding rent control in *Yee v. Escondido*.[19] *Yee* is a key foundation of the recent Circuit Court decisions upholding rent control.

Part II dissects the four recent rent control petitions and the opposing briefs. It begins by explaining how the Court's recent Takings Clause jurisprudence, in particular its *per se* physical takings decisions in *Loretto v. Teleprompter Manhattan CATV Corp*.[20] and *Cedar Point* form the basis for the constitutional attack on rent control.[21]

Part III argues that the Court should uphold rent control laws and reject the landlord petitioners' argument that rent control, specifically its restrictions on eviction, constitutes an unconstitutional taking of property. It explains the Respondents' primary arguments in the cases before the Supreme Court and their weaknesses. This Part then argues that neither the defenders of rent control nor scholars have adequately articulated four arguments in favor of rent control: (1) rent control laws affect no physical invasion of landlords' property; (2) striking down rent control law would place the Court on a slippery slope threatening both fair housing laws and basic features of landlord-tenant law; (3) the restrictions on eviction contained in rent control laws are fair conditions for landlords receiving the benefits of residential zoning; and (4) tenants, particularly low-income tenants, have a strong interest in remaining in their existing homes and preserving their communities.

I. RENT CONTROL AND ITS CONSTITUTIONAL HISTORY

Rent control laws, adopted at the state and local level, vary considerably in substance and scope. The laws also have a long constitutional history before the Supreme Court dating back to the early 20th century.

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19. 503 U.S. 519 (1992).

20. 458 U.S. 419 (1982).

21. While several of the petitions also make a regulatory takings argument, that argument is beyond the scope of this note.

A. Basic Features of Rent Control Laws

There is "considerable diversity among existing rent-regulation programs," according to a 2019 report from New York University's Furman Center.[22] There are multiple dimensions of this diversity. First, laws vary in "which properties [they] regulate."[23] The fraction of "all rental units that are rent-regulated varies considerably by city, from 45% of rental units in New York City to 80% of multi-family units in Los Angeles.[24] Second, some laws "condition the application of rent regulation on the tenant's income" to address the "public discomfort with wealthier households' benefiting from rent regulation."[25] Third, the process used to determine "allowable annual rent increases" varies,[26] and the bodies that make this determination vary as well.[27] Fourth, rent regulations "are often [but not always] coupled with protections for tenants."[28] Jurisdictions may "afford tenants in regulated units protections against eviction and harassment . . . ."[29] It is this last feature of many rent control laws that is the focus of this note.

B. Rent Control's Constitutional History

The Supreme Court has considered challenges to rent control laws, including New York's rent control laws, since the interwar period and has uniformly turned away such challenges.[30]

The first such challenge to reach the high court was in *Block v. Hirsh* in 1921.[31] In that case, Justice Holmes wrote for a five-Justice majority that upheld a federal law applicable in the District of Columbia that gave tenants a right to remain in occupancy, and pay the same rent, after their lease terminated, unless the landlords wished to occupy the property themselves and also gave the tenants 30-days' notice of eviction.[32] The law was enacted to address "emergencies growing out of the war, resulting in rental conditions in the District dangerous to the public health and burdensome to public officers, employees and accessories, and thereby embarrassing the Federal Government in the transaction of the public business."[33] Holmes stated that "[h]ousing is a necessary of life" and analogized rent control to other permissible forms of regulation of real property:

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22. Vicki Been et al., *Laboratories of Regulation: Understanding the Diversity of Rent Regulation Laws* 2 (NYU Furman Ctr., Working Paper, 2019). *See also* Nat'l Multifamily Hous. Council, *Rent Control Laws by State* (March 13, 2019).
23. Been, LABORATORIES, *supra* note 22, at 9.
24. *Id*.
25. *Id*. at 12.
26. *Id*. at 14.
27. *Id*. at 15.
28. *Id*. at 25.
29. *Id*. at 25–29.
30. *See generally* W. Dennis Keating, *The Courts and Rent Control*, *in* RENT CONTROL: REGULATION AND THE RENTAL HOUSING MARKET, 27–40 (W. Dennis Keating et al. eds., 1998); Abigail K. Flanigan, *Rent Regulations After Cedar Point*, 123 COLUM. L. REV. 475, 485–488 (1998).
31. 256 U.S. 135 (1921).
32. *Id*. at 153–54.
33. *Id*. at 154.

> These cases are enough to establish that a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. But if to answer one need the legislature may limit height to answer another it may limit rent.[34]

The only question, Holmes posited, "is whether the statute goes too far."[35] Because it was a temporary measure and assured landlords a reasonable rent, Holmes held it did not.[36]

A vigorous dissent anticipated many of the arguments that have gained increasing currency in the last several decades. The dissent distinguished other types of regulation of property on the grounds that they addressed uses that injured others. And it asked, ominously, whether "conditions" had come to the point "that [they] are not amenable to passing palliatives, and that Socialism, or some form of Socialism, is the only permanent corrective or accommodation?"[37] Presaging the argument now before the Court, the dissent asserted that "the effect and evil of the statute is that it withdraws the dominion of property from its owner."[38]

Only a year later, the Court again considered a New York rent control law in *Edgar A. Levy Leasing Co. v. Siegel*.[39] The Court's description of the problem underlying the law could apply to many large U.S. cities today: "The warrant for this legislative resort to the police power was the conviction on the part of the state legislators that there existed in the larger cities of the state a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the state."[40] In those circumstances, the Court again rejected the constitutional challenge, relying on *Block*.[41]

As late as 1983, the Court dismissed for lack of a substantial federal question a challenge to the rent control ordinance in Cambridge, Massachusetts by a landlord denied a permit by the Cambridge Rent Control Board to demolish a rent-controlled building to create a parking lot.[42] Only Justice Rehnquist dissented.

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34. *Id*. at 156.

35. *Id*. at 157–58.

36. *Id*. at 158. On the same day as *Block*, the Court issued a parallel decision upholding a New York rent control law, relying on its decision in *Block*. *See* Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921).

37. *Id*. at 162 (McKenna, J., dissenting).

38. *Id*. at 161.

39. 258 U.S. 242 (1922).

40. *Id*. at 245.

41. *Id*. at 249–50. The Court also sustained an order of the Administrator of the Office of Price Administration restraining rent increases under the Emergency Price Controls Act in Bowles v. Willingham, 32 U.S. 503 (1944). The Takings Clause was not at issue, but the Court did observe, "We are not dealing here with a situation which involves a 'taking' of property." *Id*. at 517. The Court again sustained rent control in Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948), but the sole question considered by the Court in that case was whether the federal government had authority to control rents in certain areas under its war powers.

42. Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875 (1983).

Anticipating the argument that is central to the recent petitions for Supreme Court review, and relying on the Court's decision from the year before in *Loretto,* Justice Rehnquist opined that the law "deprives [the landlord] of the use of its property in a manner closely analogous to a permanent physical invasion, like that involved in *Loretto*."[43] The property that was taken, according to Rehnquist, was "the reversionary interest retained by [the landlord]" at the end of the lease term.[44] Rehnquist acknowledged that the Court had rejected an identical challenge in *Block*, but suggested that the Court had "noted that '[a] limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change.'"[45] Rehnquist thus concluded, "the very fact that there is no foreseeable end to the emergency takes this case outside the Court's holding in *Block*."[46]

Four years later, the Court again took up a challenge to a rent control law—San Jose, California's—only to again dismiss the case without reaching the merits.[47] But Justice Scalia, who still exerts a formative influence on the current, conservative majority on the Court, dissented and would have held that the ordinance violated the Takings Clause based on its authorizing a hearing officer to deny a rent increase for a unit occupied by a "hardship tenant." Relying on the Court's statement in *Armstrong v. U.S.*,[48] that "the purpose of [the Taking Clause] is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," Justice Scalia would have held that the law effected a taking. The particular landlords whose rent was reduced under the San Jose ordinance, "namely, those who happen to have a 'hardship' tenant at the present time, or who may happen to rent to a 'hardship' tenant in the future, or whose current or future affluent tenants may happen to decline into the 'hardship' category" were "not remotely" responsible for the fact that those tenants could not afford the rent.[49] That specific provision of the ordinance therefore violated the principle announced in *Armstrong* and violated the Takings Clause in Justice Scalia's view.

The Court's most recent decision upholding rent control in *Yee* in 1992 is a key foundation of the recent Court of Appeals' decisions upholding the New York and Los Angeles rent control laws, and is central to the governments' defense of their laws. The petitioners in *Yee* owned mobile home parks in Escondido, California.[50] They alleged that a local rent control ordinance combined with a state law created "a physical occupation for their property, entitling them to

43. *Id*. at 877.
44. *Id*. at 878.
45. *Id*. at 878 (quoting Block, 256 U.S. at 157).
46. *Id*. at 878.
47. Pennell v. San Jose, 485 U.S. 1 (1988). Then Chief Justice Rehnquist, writing for the majority, found that the question was not ripe because the record did not reflect any reliance on the hardship provision to reduce rents. *Id*. at 10–11.
48. Armstrong v. U.S., 364 U.S. 40, 49 (1960).
49. Pennell, 485 U.S. at 21 (Scalia, J. dissenting).
50. *Yee*, 503 U.S. at 523.

compensation."[51] The provisions at issue were those that limited "the bases upon which a park owner may terminate a mobile homeowner's tenancy."[52] The laws permit a park owner to terminate a tenancy only for nonpayment of rent, the homeowner's violation of law or park rules, and the park owner's "desire to change the use of his land" (and then only with six- or twelve-months' notice).[53] The petitioners argued that "the mobile home owner is effectively a perpetual tenant of the park, and the increase in the mobile home's value thus represents the right to occupy a pad at below-market rent indefinitely."[54]

The Court unanimously rejected the park owners' claim on the grounds that the Escondido rent control ordinance does not effect a physical occupation of the owners' property as they "voluntarily rented their [property] to mobile home owners."[55] The Court found that "the state and local laws at issue . . . merely regulate petitioners' *use* of their land by regulating the relationship between landlord and tenant."[56] Additionally, the Court concluded that the rent control ordinance effects only a temporary limitation on the park owners' ability to evict tenants from their property.[57] For those reasons, the Court held the rent control law was not unconstitutional under the Takings Clause. But, the Court suggested, "A different case would be presented . . . were the statute, on its face or as applied, to compel a landowner over objection to rent the property or to refrain in perpetuity from terminating a tenancy."[58]

II. THE CURRENT ATTACK ON RENT CONTROL

Despite the Supreme Court's uniform line of precedent upholding rent control laws, the Court was again asked to strike down such laws during the 2023-24 term. Four petitions were filed with the Court and, while they were ultimately denied, Justice Thomas clearly signaled the Court's continued interest in accepting an appropriate challenge. This Part examines developments in the Court's Takings Clause jurisprudence that have motivated landlords to again seek high court review and then dissects the arguments in the petitions.

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51. *Id*.
52. *Id*. at 524.
53. *Id*. at 524.
54. *Id*. at 527.
55. *Id*.
56. *Id*. at 528.
57. *Id*. at 527.
58. *Id*. at 528. Prior to the most recent cert petitions, a petition was filed in Harmon v. Kimmel, No 11-496 in 2011. The Petitioners were owner-occupants of a small, walk-up brownstone in Manhattan with three tenants. They asked the Court to grant cert in order to address the question of whether rent regulations that "compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy effect a taking under *Yee*?" Petition. Brief for Petitioner, Harmon v. Kimmel, 566 U.S. 962 (No. 11-496) (2012). But the Court denied cert.

A. Key Recent Developments in the Court's Takings Clause Jurisprudence

The recent challenges to rent control laws are rooted in the Court's jurisprudence concerning *per se* physical takings, culminating in *Cedar Point*. Specifically, in the last several decades, the Court has expanded what it considers a direct physical taking of property and thus a *per se* violation of the Taking Clause.

The Court's takings jurisprudence distinguishes between "regulatory takings" and "direct physical takings." As the Court explained in *Loretto*:

> . . . the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative.
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> When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.[59]

In other words, regulatory takings challenges are resolved using a balancing test, but "physical *invasion* cases are special and . . . the rule [is] that any permanent physical *occupation* is a taking."[60] And the rule applies "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[61]

The Court has long held that physical intrusions onto property by the government short of the actual taking of the property by eminent domain can constitute a taking, but until the past several decades, those intrusions had to be so extensive as to render the property useless.[62] More recently, however, the Court began to characterize the intrusions themselves as *per se* takings because they take the owner's right to exclude others, which the Court has characterized as a fundamental right of property ownership.

In 1979, in *Kaiser Aetna v. United States*,[63] the Court considered the federal government's assertion that the public gained a right of access to a previously private pond once it was connected to an ocean bay. The Court held "that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."[64] Notably, the Court cited as support for that critical proposition

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59. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426–27 (1982).
60. *Id*. at 432.
61. *Id*. at 434–35.
62. *See, e.g*., United States v. Causby, 328 United States 256 (1946); Portsmouth Land & Hotel Co. v. United States, 260 U.S. 327 (1922).
63. Kaiser Aetna v. United States, 444 U.S. 164 (1979).
64. *Id*. at 179–80 (footnote omitted).

two court of appeals decisions and a dissent by Justice Brandeis in a copyright case.[65] Nevertheless, the Court held that the "imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina" and that "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation."[66]

Kaiser was followed just three years later by *Loretto*, which has been cited by dissents in subsequent rent control cases as explained above. *Loretto* involved a challenge to a New York law that provided "that a landlord may not 'interfere with the installation of cable television facilities upon his property or premises,' and may not demand payment from any . . . [provider] 'in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable.'"[67] The Commission held that a $1 fee was normally all that a landlord could charge.[68] The Court held that this "minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due."[69]

Five years after *Loretto*, the Court decided *Nollan v. California Coastal Commission*.[70] In *Nollan*, the question was whether the California Coastal Commission could condition the grant of a permit to rebuild a beach-front home on the owners' grant of an easement to the public to cross over the beach in front of the home. Again starting with the owners' "right to exclude," the Court first held that a requirement that owners grant a public easement was a taking.[71] The Court further explained that "a 'permanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."[72] Even though the easement was not unilaterally imposed on the owners, but rather made a condition for receiving permission to rebuild their home, the Court held it to be a taking because the condition did not serve the same purpose as the development ban.[73]

The Court extended *Kaiser*, *Loretto* and *Nollan* in 2021 in *Cedar Point Nursery v. Hassid*.[74] In that case, the Court, in a 6–3 decision, struck down a regulation issued by the California Agricultural Labor Relations Board (CALRB) that required farmers to permit union organizers to enter the farm property for up to four 30-day periods in a year. During those periods, the union could send two organizers for each work crew onto the property for up to one hour before work,

65. *See id*. at 180 n.11.
66. *Id*. at 180.
67. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 423 (1982).
68. *Id*. at 423–24.
69. *Id*. at 421.
70. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).
71. *Id*. at 832.
72. *Id*.
73. *Id*. at 837.
74. 141 S.Ct. 2063 (2021).

one hour at lunch, and one hour after work. The organizers were permitted to talk to workers, but not to disrupt operations.[75]

Citing the owners' "right to exclude," the *Cedar Point* Court held that the CALRB regulation took the growers' property without just compensation because it gave the organizers "a right to invade the growers' property."[76] The regulation "appropriate[s] a right of access," the Court found, and it "is therefore a *per se* physical taking."[77] The Court also made clear that "Governmental action that physically appropriates property is no less a physical taking because it arises from a regulation."[78] And it also does not matter "whether the government has physically taken property for itself or someone else."[79] Finally, the Court held that it does not matter if the "physical appropriation . . . is permanent or temporary," continuous or intermittent, big or small.[80]

This line of cases, particularly the decision in *Cedar Point,* is central to the arguments against rent control now before the Supreme Court.

B. The Recent Challenges

In its 2023–2024 term, the Supreme Court considered four petitions in which landlords requested that the Court hold that rent control laws constitute an unconstitutional taking of property.[81] All four petitions focus centrally on portions of the laws that limit landlords' ability to evict tenants at the end of their lease terms, and all rely heavily on *Cedar Point*.

In *Community Housing Improvement Program v. New York* (*CHIP*), a group of trade associations representing owners of rent-stabilized apartments asserted that the NYS Rent Stabilization Law (RSL) is both a physical and regulatory taking on its face.[82] The Plaintiffs focused on the law's restrictions on eviction. They petitioned from a 2023 Second Circuit decision upholding the law.[83] The Second Circuit held that *Cedar Point* does not apply to the landlord-tenant context because the "Landlords voluntarily invited third parties to use their properties."[84] Moreover, the Second Circuit found that the law did not "compel the Landlords 'to refrain in perpetuity from terminating a tenancy,'" citing *Yee*.[85] The Court found that the statute "sets forth several grounds on which a landlord may terminate a lease," including "failing to pay rent, creating a nuisance, violating

75. *Id*. at 2069.
76. *Id*. at 2072.
77. *Id*. at 2074.
78. *Id*. at 2072.
79. *Id*.
80. *Id*. at 2074–75, 2077–78.
81. Petition for Writ of Certiorari, Cmty. Hous. Improvement Program v. New York, 144 S. Ct. 264 (No. 22-1095) (2023); Petition for Writ of Certiorari, Kagan v. Los Angeles, 144 S. Ct. 71 (No. 22-739) (2023); Petition for Writ of Certiorari, 335-7 LLC v. New York, No. 22-1170 (Feb 20, 2024); Petition for Writ of Certiorari, 74 Pinehurst LLC v. New York, No. 22-1130 (Feb 20, 2024).
82. Cmty. Hous. Improvement Program v. New York, 492 F.Supp.3d 33, 38 (E.D.N.Y. 2019).
83. Cmty. Hous. Improvement Program v. New York, 59 F.4th 540 (2d Cir. 2023).
84. *Id*. at 551.
85. *Id*. at 552 (quoting Yee v. Escondido, 503 U.S. 519, 528 (1992).

provisions of the lease, or using the property for illegal purposes" and concluded that it is "well settled that limitations on the termination of a tenancy do not effect a taking so long as there is a possible route to an eviction."[86] For those reasons, the Court concluded that *Yee* was controlling, and not *Cedar Point*.

The Plaintiffs asked the Supreme Court to grant review primarily to determine whether the holding in *Cedar Point* applies to the rent control law.[87] Pointing to the importance of the law, which governs half of all New York City apartments, the Petitioners acknowledge the importance of its objective—"providing affordable housing or low- and middle-income Americans"—but object to the fact that "[i]t imposed all of its costs on a select group of property owners."[88] On October 2, 2023, the Supreme Court denied cert.[89]

On the same day as the *CHIP* cert denial, the Court also denied cert in *Kagan v. Los Angeles*. The Plaintiffs in *Kagan* were the owners of a duplex who sought to evict a tenant from one of the two units to permit members of the owner's family to move in.[90] When the tenant claimed a right to remain in the unit under a Los Angeles rent control law, the Plaintiffs challenged the law as an unconstitutional taking. The Ninth Circuit upheld the law, disposing of the Takings Clause claim in a single paragraph in an unpublished decision, on the ground that the "claim is foreclosed by Supreme Court precedent."[91] Citing both the fact that the owners voluntarily rented the property and that the law gave the owners the right to end the tenancy on various grounds, the Court held that *Yee* controlled.[92]

The *Kagan* Plaintiffs petitioned for Supreme Court review. The petition asked the Supreme Court to answer the question of whether "a law that bars termination of a tenancy, and compels the occupation of property by an unwanted tenant, amounts to a *per se*, physical taking . . .?" [93] Unlike the Petitioners in *CHIP*, the *Kagan* petitioners argued specifically that "[t]he right to move one's family into a private home is a traditional right of property ownership."[94] But like the Petitioners in *CHIP,* the Kagans argued that *Cedar Point* compelled a decision in their favor. And like the petition in *CHIP*, the *Kagan* petition was denied on the first day of the 2023–24 term.[95]

The two other petitions challenging rent control, *74 Pinehurst LLC* and *335-7 LLC,* remained pending and were repeatedly relisted for consideration at

86. *Id*.

87. The Petitioners also asked the Supreme Court to decide whether the New York law's consideration of the means of tenants in setting rents was a taking under the reasoning of Justices Scalia and O'Conner in *Pennell*. Petition for Writ of Certiorari at i, Cmty. Hous. Improvement Program v. New York, 144 S. Ct. 264 (22-1095) (2023).

88. *Id*. at 1–2

89. *Cmty. Hous. Improvement Program*, 144 S. Ct. at 264.

90. Petition for Writ of Certiorari at i, *Kagan*, 144 S. Ct. 71 (No. 22-739) (2023).

91. Kagan v. City of Los Angeles, No. 21-55233, 2022 WL 16849064 at *1 (9th Cir. Nov. 10, 2022).

92. *Id*.

93. Petition for Writ of Certiorari at i, Kagan v. Los Angeles, 144 S. Ct. 71 (No. 22-739) (2023).

94. *Id*. at 2.

95. *Kagan*, 144 S. Ct. at 71 (No. 22-739).

conference until February 20, 2024, when they were both denied. Both challenged the same New York rent control law at issue in *CHIP*, and both focused squarely on the restrictions on eviction, and the holding in *Cedar Point*.

In *74 Pinehurst LLC*, the Petitioners sought review of a decision of the Second Circuit issued after the case was consolidated for argument with *CHIP*. The *74 Pinehurst LLC* Second Circuit decision relies on the circuit court's rejection of the landlord's facial challenge to the New York law in *CHIP*.[96] In their Petition, the landlords argue that the New York law causes a *per se* physical taking.[97]

Finally, in *335-7 LLC*, the landlords' challenge to the New York law was also rejected by the Second Circuit in an unpublished opinion largely relying on the earlier decision in *CHIP*.[98] In their Petition, the landlords argue that the rent control law causes a *per se* physical taking.[99] Petitioners derisively refer to the Second Circuit's "(over)reading of a few lines of . . . *Cedar Point* . . . and *Yee*" as creating "an 'open door' exception" to the Takings Clause, under which once landlords "opened their units for rent, there can be no per se physical taking by the government ever after."[100]

All the cert petitions credibly argue that there is a split in the circuits created by the Second and Ninth Circuits' decisions upholding rent control and an Eighth Circuit decision reversing the dismissal of a takings challenge to a Minnesota eviction moratorium.[101] The Eighth Circuit decision in *Heights Apartments, LLC v. Walz*[102] concerned an eviction moratorium imposed by the Governor of Minnesota during the recent COVID-19 pandemic. Finding that *Cedar Point* "controls," the Eighth Circuit held that the moratorium caused a direct physical taking.[103] It did not matter that the moratorium was an emergency, temporary

96. 74 Pinehurst LLC v. New York, 59 F.4th 557, 562 (2d Cir. 2023).

97. Petition for Writ of Certiorari at i, 74 Pinehurst LLC v. New York, No. 22-1130 (Feb 20, 2024). The Petitioners also argue that the law works a regulatory taking and that the Court's regulatory takings' jurisprudence "is a mess" and should be clarified. *Id*. at 24.

98. 335-7 LLC. v. New York, No. 21-823, 2023 WL 2291511 (2d Cir. Mar. 1, 2023).

99. Petition for Writ of Certiorari at i, 335-7 LLC v. New York, (No. 22-1170) (Feb 20, 2024). The Petitioner also argues that the rent control law is confiscatory because it does not permit a "just and reasonable return" as is required under decisions concerning public utilities. *Id*. Finally, the 335-7 LLC Petitioners argue the rent control law is an unconstitutional regulatory taking and urged the Court to clarify that branch of takings law, citing Justice Thomas' criticism that "nobody—not States, not property owners, not courts, nor juries—has any idea how to apply [the regulatory takings'] standardless standard." *Id*. at 31.

100. *Id*. at 4.

101. There is also a split among the courts on the constitutionality of state eviction moratoriums. *Compare* Heights Apartments, LLC v. Walz, 30 F.4th 720, 735 (8th Cir. 2022), *with* Williams v. Alameda Cnty., 642 F.Supp.3d 1001, 1007 (N.D. Cal. 2022); Gallo v. District of Columbia, 610 F. Supp.3d 73, 79 (D.D.C. 2022); Jevons v. Inslee, 561 F.Supp.3d 1082, 1112 (E.D. Wash. 2021). The Supreme Court struck down the federal moratorium imposed by the Centers for Disease Control and Prevention (CDC) as outside the CDC's statutory authority in Alabama Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S.Ct. 2485 (2021), noting "[P]reventing [property owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership – the right to exclude." *Id*. at 2489.

102. Heights Apartments, LLC v. Walz, 30 F.4th 720 (8th Cir. 2022).

103. *Id*. at 733.

measure, the Eight Circuit concluded, as under *Cedar Point* "[i]t is immaterial whether the physical invasion is 'permanent or temporary.'"[104] And, the Eighth Circuit concluded, the fact "that the tenancy began with a voluntary lease agreement is irrelevant . . . because the taking occurs at the point of forced *continuation* of the tenancy past the agreed term of the lease."[105] Because the landlords had sufficiently alleged that the moratorium deprived them of the "right to exclude existing tenants," the takings claim was permitted to proceed.[106]

The circuit split, the Court's lengthy consideration of two of the petitions, and Justice Thomas' separate statement all suggest that the Court is likely to revisit the takings question soon. Developing the strongest possible arguments for sustaining rent control is thus essential.

III. THE SUPREME COURT SHOULD UPHOLD RENT CONTROL

The Respondents in the Supreme Court and legal scholars make a convincing case that rent control is not a taking for four reasons: (1) because *Yee* is controlling; (2) because, unlike the farmers/owners in *Cedar Point* with respect to the union organizers, the landlords/owners invited the tenants onto the property; (3) because the landlords have opened their property to the public; and (4) because rent control is a long-standing restriction on owners' use of their property. But none of those arguments may be persuasive to the Supreme Court. Therefore, after addressing the Respondents' claims, this note will then advance four new arguments to support rent control laws.

A. Respondent's Arguments and Their Weaknesses

1. The Court's Unanimous Decision in *Yee* Controls

The Respondents' primary argument is that the Supreme Court's unanimous decision in *Yee* is directly on point and controlling.[107] Despite Petitioners' arguments to the contrary, the rent control law at issue in *Yee* involved *both* limits on rent increases *and* limits on evictions.[108] The California law at issue expressly explained, "because of the high cost of moving mobile homes, the potential for damage resulting therefrom, the requirements relating to the installation of mobile homes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobile homes occupied within mobile home parks be provided with the unique protection from actual or constructive eviction."[109] And the law accomplished those purposes by "limit[ing] the bases upon which a park owner may terminate a mobile home owner's tenancy" to "include the nonpayment

104. *Id.*
105. *Id.*
106. *Id.*
107. *See, e.g.*, Brief in Opposition for Respondents City of New York at 16–21, 74 Pinehurst LLC v. New York, No. 22-1130 (Feb 20, 2024).
108. Yee v. Escondido, 503 U.S. 519, 523-25 (1992).
109. *Id.* at 524 (quoting CAL. CIV. CODE § 798.55(a)).

of rent, the mobile home owner's violation of law or park rules, and the park owner's desire to change the use of his land."[110] Even if the owner wished to change the use of the land, six- or 12-months' notice was required to evict the tenants.[111] The owners expressly argued that, under the law, "Park owners may no longer set rents *or* decide who their tenants will be."[112] The owners argued that "the rent control ordinance has transferred 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," *i.e*., "that what has been transferred from park owner to mobile home owner is no less than a right of physical occupation of the park owner's land."[113] The Court rejected the owners' claim, holding that the rent control ordinance does not constitute a physical occupation of their property as the owners "voluntarily rented their [property] to mobile home owners."[114] The Court also found that the ordinance at most amounted to a temporary limitation on the owners' right to evict tenants from their property. Thus, *Yee* clearly involved limits on eviction and, nevertheless, the Court held that there was no physical taking.[115]

Like the statute at issue in *Yee*, rent control laws do not prevent all evictions. As the Second Circuit found in *74 Pinehurst*, the New York rent control law does not completely bar landlords from evicting their tenants.[116] The Second Circuit found that "the statute sets forth several bases on which a landlord may terminate a tenant's lease, such as for failing to pay rent, creating a nuisance, violating the lease, or using the property for illegal purposes."[117] Landlords thus have not been compelled "'over objection to rent [their properties] or to refrain in perpetuity from terminating a tenancy.'"[118] In order to hold that the rent control laws constitute a taking, the Court would either have to overrule *Yee* or conclude that it was overruled *sub silentio* by *Cedar Point*.

But while the argument that *Yee* is controlling is sound, an argument based on *stare decisis* may not be persuasive to the current majority on the Court, which has proved quite willing to overturn precedent, particularly precedent construing the Constitution.[119]

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110. *Id*.
111. *Id*. at 528
112. *Id*. at 526 (emphasis added).
113. *Id*. at 527.
114. *Id*.
115. *Id*. at 527–33.
116. 74 Pinehurst LLC v. New York, 59 F.4th 557, 563 (2d Cir. 2023).
117. *Id*.
118. *Id*. (quoting Yee v. Escondido, 503 U.S. 519, 528 (1992)).
119. *See, e.g.,* Students for Fair Admissions v. Harvard College; Students for Fair Admissions v. University of North Carolina, 600 U.S. 181 (2023); Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022). *See generally* Adam Liptak, *Precedent Meeting Clarence Thomas, You May Not Get Along,* THE N.Y. TIMES (March 4, 2019), https://www.nytimes.com/2019/03/04/us/politics/clarence-thomas-supreme-court-precedent.html (quoting former Justice Scalia stating about Justice Thomas, "He does not believe in stare decisis, period.")

2. Landlords Consented to Tenants' Occupation of Their Property

The government Respondents also argue that rent control laws do not constitute a physical taking of property because landlords initially consent to tenants coming onto their property.[120] *Yee* explains that rent control laws "merely regulate petitioners' use of their land by regulating the relationship between landlord and tenant" after the landlord has voluntarily admitted the tenant onto the property.[121] Rent control laws do not deprive landlords of the right to exclude others because the tenants given rights under the laws are already on the property pursuant to the landlords' consent.

But like the simple reliance on *Yee* and the principle of *stare decisis*, there are weaknesses to this argument. First, while landlords invite tenants onto the property, the invitation is limited. The invitation expires at the end of the lease term. At the end of the lease term, landlords would reacquire the right to exclude existing tenants but for the limits in the rent control laws.

Second, the rent control laws extend a right of access to a category of people larger than simply the original tenants. As the Petitioners in *CHIP* point out, the New York law permits current tenants to cede their apartment to "strangers"—family members who did not previously live in the apartment.[122] Thus, the law's limitation on eviction not only exceeds the temporal scope of the landlords' invitation but also extends to people that the landlords never invited onto the property.

3. The Landlords Have Opened Their Property to *the* Public

The government Respondents also rely on the *Cedar Point* Court's acknowledgement that there is an exception to its holding for property open to the public.[123] Specifically, the Court distinguished its earlier decision in *PruneYard Shopping Center v. Robins* upholding a state constitutional right of access to a shopping center to engage in expressive activity in the face of a federal constitutional takings challenge.[124] The *Cedar Point* Court explained that in *PruneYard* it "considered the status of a state constitutional requirement that a privately owned shopping center permit other individuals to enter upon, and to use, the property to exercise their rights to free speech and petition."[125] In *PruneYard*, the Court "held that this requirement was not a *per se* taking."[126] The Court concluded in *Cedar Point* that "[l]imitations on how a business generally open to the public may treat

120. *See, e.g.*, Brief in Opposition for State Respondents at 22, 74 *Pinehurst*. 120, 503 U.S. at 528.

121. 503 U.S. at 528.

122. Petition for Writ of Certiorari at 5, Cmty. Hous. Improvement Program v. New York, 144 S. Ct. 264 (No. 22-1095) (2023).

123. *See, e.g.*, Brief in Opposition for State Respondents at 21, 74 *Pinehurst*. This is also the primary argument in Flanigan, *Rent Regulation After Cedar Point*, at 501–04.

124. 447 U.S. 74 (1980). *See Cedar Point*, 141 S.Ct. at 2076–77.

125. Cedar Point, 141 S.Ct. at 2076-77.

126. *Id.*

individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public."[127]

Similarly, in *Yee*, the Court concluded that "[b]ecause [the park owners] 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."[128] The Second Circuit in *74 Pinehurst* relied on that reasoning, finding that the landlords "voluntarily elected to enter New York City's rental housing market."[129] Because these landlords "*voluntarily* invite [renters] to use their properties" the "regulations of these properties are 'readily distinguishable' from those that compel invasions of properties closed to the public."[130]

Here, the apartment buildings are not closed to the public like the fields in *Cedar Point*. They are publicly advertised for rent and continuously rented to members of the public like the trailer lots in *Yee*. Additionally, the fact that the buildings are subject to the anti-discrimination mandates of the federal Fair Housing Act, the New York State Human Rights statute, and New York City human rights law further supports this point. Rent controlled apartments that landlords hold open to the public fall into the *PruneYard* exception recognized in the Court's *Cedar Point* decision, according to the government Respondents.

But this argument also has weaknesses. While *Cedar Point* distinguishes cases involving property "open to the public," an apartment building may be more similar to the farms at issue in *Cedar Point* than the shopping center at issue in *PruneYard*.[131] Even the plaintiff farms that challenged the labor regulation at issue in *Cedar Point* permitted some members of the public onto their property: the employees they selected to harvest their crops. Those employees might thus be analogous to the tenants admitted onto the landlords' property to pay rent in exchange for a right of occupancy. The shopping center at issue in *Pruneyard*, by contrast, was open to the public to a much greater degree. As the *Cedar Point* majority points out, "[u]nlike the growers' properties [and the landlords' properties], the PruneYard was open to the public, welcoming some 25,000 patrons a day."[132]

Moreover, this argument suggests that merely using property in the market justifies government intrusion. But in *Cedar Point*, the Court stated that "'basic and familiar uses of property' are not a special benefit that 'the Government may hold hostage to be ransomed by the waiver of constitutional protection.'"[133]

4. Rent Control is a Long-Standing Restriction on the Use of Property

Finally, the government Respondents argue that rent control law constitutes the type of traditional restriction on landlord use of property that, under

127. *Id*. at 2077.
128. Yee v. Escondido, 503 U.S. 519, 531 (1992).
129. 74 Pinehurst LLC v. New York, 59 F.4th 557, 568 (2d Cir. 2023).
130. *Id*. at 563.
131. Cedar Point Nursery v. Hassid, 141 S.Ct. 2063, 2076–77 (2021).
132. *Id*. at 2076.
133. *Id*. at 2080 (quoting *Horne*, 576 U.S. at 366.)

longstanding precedent, does not constitute a taking of property.[134] In their brief opposing the writ of cert in *74 Pinehurst*, the New York State parties argue that "statutory rent regulation like the [the New York law] is also 'consistent with longstanding background restrictions on property rights' and thus would not effect a taking even if it involved a physical invasion (which it does not)."[135] The opposing parties explain that NY RSL has existed and withstood legal challenge for about a century and earlier laws have existed since World War II.[136]

But like the first three arguments, the final argument also has weaknesses. The *Cedar Point* majority cited three examples of the types of limitations on owners' dominion over their property that are "consistent with longstanding background restrictions on property rights," and thus do not constitute takings: nuisance law, "traditional common law privilege to access private property," and the "privilege to enter property to effect an arrest or enforce the criminal law under certain circumstances."[137] None of these examples is based on a statute and all are considerably more venerable than rent control laws.

Thus, each of the arguments advanced by the government Respondents in defense of rent control laws has serious weaknesses. Additional arguments are needed and are available as described in the next subpart.

B. Additional Arguments in Defense of Rent Control

Because each of the principal arguments advanced by the Respondents in the Supreme Court has weaknesses, additional arguments should be advanced. This subsection proposes four. The first provides a further rationale bolstering the consent argument. The second extends an argument only alluded to by the defenders of rent control. The third is entirely novel. And the fourth is a bolstering policy argument.

1. A *Per Se* Physical Taking Requires a Physical Intrusion

A close reading of the Court's jurisprudence concerning *per se* physical takings makes it clear that the essential element of such a taking is a physical intrusion onto private property. That is why it is significant that landlords consent to allow tenants onto the property and why it does not matter that the permission expires at the end of the lease term. Protecting existing tenants from eviction does not cause a physical invasion. The government Respondents fail to emphasize that a physical invasion is essential for a *per se* physical taking to occur.

The Court's holding in *Cedar Point* is replete with the language of affirmative invasion. The Court characterized the California provision as a "regulation[]

134. This is also the second argument advanced in Flanigan, *Rent Regulation After Cedar Point*, at 504–06.

135. Brief in Opposition for State Respondents at 21 n.12, 74 Pinehurst LLC v. New York, No. 22-1130 (Aug. 21, 2023) (citing Cedar Point, 141 S.Ct. at 2079).

136. *Id*. at 4-5.

137. 141 S.Ct. at 2079.

granting a right to invade property closed to the public."[138] The regulation "appropriates a right to physically invade" the property.[139] And the Court explains, "government-authorized invasions of property … are physical takings."[140] Similarly in *Loretto*, the Court emphasized that "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property."[141]

It was partly on these grounds that the *Yee* Court distinguished *Loretto*. There was no "compelled physical invasion," the Court found, because "Petitioners voluntarily rented their land to mobile home owners."[142] The Court continued that "Petitioner's tenants were invited by petitioners, not forced upon them by the government."[143] The same is true with regard to tenants protected by the challenged rent control ordinances.

Because categorizing a regulation as a physical taking makes it *per se* subject to the Takings Clause, the category should be narrowly construed to require a physical invasion and thus to exclude limitations on eviction contained in rent control laws.[144]

2. A Contrary Holding Would Place the Court on a Dangerous Slippery Slope

The landlords argue that any limitation on a property owner's core right to exclude others is a *per se* physical taking. But accepting that position would suggest that fair housing laws and many common aspects of landlord-tenant laws constitute unconstitutional takings.[145] The Court should not accept the landlords' argument because of its radical implications.

The landlords argue that *Cedar Point* establishes the right to exclude as a central property right that cannot be limited without violating the Takings Clause. *Cedar Point*, in turn, together with *Loretto*, establishes that even a very modest infringement of the right to exclude, physically and temporally limited, constitutes a *per se* taking. And the landlords argue that *Cedar Point* extends the right to exclude others to those who are already on the property by consent of the

138. *Id*.

139. *Id*. at 2074.

140. *Id*.

141. 458 U.S. at 436. The Petitioners in *CHIP* may have been aware of this potential argument because they emphasized that the New York law permits current tenants to cede their apartments to family members who did not previously live in their apartments. Petition for Writ of Certiorari at 5, Cmty. Hous. Improvement Program v. New York, 144 S. Ct. 264 (No. 22-1095) (2023).

142. Yee v. Escondido, 503 U.S. 519, 527 (1992).

143. *Id*. at 528.

144. Admittedly, this argument does not reach those aspects of the laws that permit existing tenants to pass their rent controlled apartment on to others, members of their family for example, who have not previously lived in the unit. But that is also consistent with the policy argument presented in §III(B)(4) *infra*.

145. *See generally* Amy Liang, *Property Versus Antidiscrimination: Examining the Impacts of Cedar Point Nursery v. Hassid on the Fair Housing Act*, 89 U. CHI. L. REV. 1793 (2022). The Petition in 74 Pinehurst denies that this is the logical implication of its position, but without presenting any suggestion of why it is not the case. Brief of Petitioner at 21 n.4, 74 *Pinehurst*.

owner, *i.e.*, tenants. The landlords further argue that the *Cedar Point* holding vests the right to exclude in landlords who have opened their property to the public by offering it for rent. Accepting these essential steps in the landlord's argument would require courts to hold that fair housing laws, along with common features of landlord-tenant codes, are unconstitutional.

Fair housing laws, like the federal Fair Housing Act (FHA),[146] restrict landlords' right to exclude others to a much greater degree than rent control laws. The FHA makes it unlawful for a landlord:

> To refuse to . . . rent after the making of a bona fide offer, or to refuse to negotiate for the . . . rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.[147]

Landlords who desire to exclude a prospective tenant or evict a current tenant based on any of those protected characteristics cannot do so, and, if the landlords act anyway, they can be ordered not only to pay damages but to rent the apartment to the excluded individual.[148] Accepting the landlords' argument that rent control is a *per se* taking would require a holding that the FHA is similarly unconstitutional. While it might be possible to argue that federal prohibitions on discrimination on the basis of race in housing implement the provisions of the Fourteenth Amendment via its Section Five enforcement power[149] and thus cannot constitute takings, that reasoning would not save prohibitions on other forms of discrimination such as discrimination on the basis of sex or disability or prohibitions in state fair housing laws.

Similarly, accepting the landlords' arguments would call common features of landlord-tenant law into constitutional question. The landlord's argument, combined with the categorical holding in *Cedar Point*, would render even simple tenant protection provisions unconstitutional because they deprive landlords of the absolute right to exclude. For example, many state and municipal landlord-tenant laws provide that landlords must give tenants notice before evicting them or not renewing their lease. In New York, for example, the required notice ranges from 30 to 90 days depending on how long the tenant has occupied the unit.[150] If the landlords' argument that *Cedar Point* and *Loretto* apply to restrictions on

146. 42 U.S.C. § 3601 *et seq*.

147. 42 U.S.C. § 3604(a).

148. 42 U.S.C. § 3613(c)(1) (authorizing injunctive relief).

149. Exploration of the constitutional basis of the FHA is beyond the scope of this note as is whether a Fourteenth Amendment basis would insulate the law from challenge under the Taking Clause. But there is evidence that the Act was based both on the Commerce Clause and the Reconstruction Amendments. *See* Brief of the U.S. *Amicus Curiae*, Grome Resources v. Jefferson Parish (No. 99-1401) (E.D. La.) (reviewing legislative history), https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-192#:~:text=Congress%20in%20fact%20relied%20on,of%20the%20Fair%20Housing%20Act [https://perma.cc/A99U-S5VE].

150. N.Y. Sess. Laws, chp. 50, art. 7 § 226-C (McKinney 2010).

eviction, then certainly a 30 or 90-day prohibition on eviction without timely notice is as significant an intrusion on the right to exclude as placing a small cable box on top of a building or allowing union organizers limited and temporary access to nonwork areas of farms.

Both the *Yee* and *Cedar Point* decisions suggest that the Supreme Court will not accept these radical implications of the landlords' argument. Both decisions cite with approval the Court's landmark decision in *Heart of Atlanta Motel, Inc. v. U.S.*[151] In *Yee*, the Court cited *Heart of Atlanta* when it observed "[w]hen a landlord decides to rent his land to tenants, the government can . . . require the landowner to accept tenants he does not like."[152] Indeed, the *Yee* Court referenced *Heart of Atlanta* several times when it upheld the California law protecting mobile home tenants from eviction, quoting the Court's statement in the fair housing case: "'[A]ppellant has no 'right' to select its guests as it sees fit, free from governmental regulation.'"[153] Similarly, in *Loretto*, the Court cites *Heart of Atlanta* with approval.[154] Even the *Cedar Point* Court cites *Heart of Atlanta*, distinguishing, if rather obliquely, the union access regulation from the 1964 Civil Rights Act's prohibitions on racial discrimination in public accommodations.[155] When rebutting the argument that *PruneYard* is controlling, the Court first explains that "[a]pplying the *Penn Central* factors, we held that no compensable taking had occurred" in *PruneYard*, and it then cited *Heart of Atlanta*, explaining that the case "reject[ed] [a] claim that provisions of the Civil Rights Act of 1964 prohibiting racial discrimination in public accommodations effected a taking."[156] But if the Court strikes down rent control on the grounds that any limit on the right to exclude constitutes a taking, it will place fair housing laws into constitutional jeopardy.

Because the owners' takings arguments have unacceptable implications, the Court should reject them.

3. Limitations on Eviction Are a Reasonable Condition of Receiving the Benefits of Residential Zoning

A final legal argument in favor of rent control laws is based on another exception to *per se* physical takings doctrine recognized in *Cedar Point*, but it is not relied on by any of the Respondents or pointed to in any existing scholarship. The Court in *Cedar Point* recognized that "the government may require property

151. 379 U.S. 241, 261 (1964).

152. Yee v. Escondido, 503 U.S. 519, 529 (1992).

153. *Id*. at 531 (quoting *Heart of Atlanta,* 379 U.S. at 261).

154. *See Loretto*, 458 U.S. at 440.

155. Cedar Point Nursery v. Hassid, 141 S.Ct. 2063, 2076 (2021) (citing *Heart of Atlanta Motel,* 379 U.S. at 261).

156. *Id*. But *Heart of Atlanta* did not even consider whether Title II of the 1964 Civil Rights Act effected a *per se* physical taking by requiring that the motel accept guests it wished to exclude. Rather, the Court in that case disposed of the takings claim in a single, conclusory sentence followed by citation to three cases, all of which were treated as regulatory takings cases. *See* 379 U.S. at 261.

owners to cede a right of access as a condition of receiving certain benefits, without causing a taking."[157] Relying on that permissible bargain, rent control can be reconceptualized as a concession by landlords made in return for the protection of their property that attaches to it being in a residential zone. Residential zoning provides landlords with the valuable government benefit of protection against uses of neighboring properties that would lower the value of the landlord's property or make it harder to rent.[158] Thus, rent control is distinguishable from *Cedar Point* because it conditions a benefit—the protections of residential zoning—on compliance with a law that limits rent increases and thus preserves the character of the neighborhood.

The Court in *Cedar Point* cited *Nollan v. California Coastal Commission*[159] and *Dolan v. City of Tigard*[160] to describe the contours of this exception to its takings' holdings. Those cases hold that even consent to a permanent physical occupation can be required if it bears the proper relationship to a government benefit. *Nollan* explains:

> the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end.[161]

Nollan and *Dolan* require that the access "condition bear[] an 'essential nexus' and 'rough proportionality' to the impact of the proposed use of the property."[162] In *Dolan*, the Court explained:

> We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the [government] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.[163]

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157. Cedar Point, 141 S.Ct. at 2079.

158. Of course, not all rent controlled units are in residential zones and sometimes the residential classification prevents owners from making the most profitable use of their property.

159. 483 U.S. 825 (1987).

160. 512 U.S. 374 (1994).

161. 483 U.S. at 836.

162. *Cedar Point*, 141 S. Ct. at 2079.

163. 512 U.S. at 391.

Here, the use of the property that triggers the access requirement is not (or might not be in a reconceptualized rent control law) its leasing alone, but rather its leasing in an area zoned residential. The limitations on landlords' right to evict current tenants clearly would have an "essential nexus" to and be "rough[ly] proportional" to the protection of the property accorded by the residential zoning because, like residential zoning, the restrictions on eviction are intended to preserve the character of a residential community. In this way, rent control is clearly "germane to any benefit provided to" the landlords, and meets *Dolan*'s "rough proportionality" requirement.[164]

4. The Unique Interest in Staying in One's Home and Preserving Residential Communities Justifies Limits on Eviction

The legal argument set out immediately above is supported by one of the most articulate scholarly defenses of rent control: Margaret Jane Radin's *Residential Rent Control*.[165] Without conceding the free market attacks on rent control, Radin asks whether "some rights of tenants 'trump' the utility analysis."[166] Radin posits that one such right is precisely the right at issue in the takings cases—the right to remain in one's home. She suggests that "the real purpose of rent control is to make it possible for existing tenants to stay where they are" and she argues for giving weight to "a tenant's interest in continuing to live in an apartment that [the tenant] has made home for some time."[167] The interest protected by rent control laws is the interest in "preservation of one's home."[168] In other words, apartments are not fungible. Tenants, in aggregate, are not better off if apartment stock goes up at the expense of significant dislocation, because tenants have a strong interest in their "*established* home."[169]

Radin's theoretical argument also supports the claim that limits on eviction are constitutional because they are proportional to the benefits of residential zoning. She recognizes not only the value of individuals continuing to live in their established homes, but also within an established community, which reinforces strong communities. She suggests that "a predominantly tenant community is justified in enacting rent control to avoid dispersion of the community to other cheaper markets."[170] The arguments for "preserving community," she suggests, may be "strong enough to hold up against some extent of wealth loss from market

164. *See Cedar Point*, 141 S. Ct. at 2080.
165. Radin, *supra* note 19.
166. *Id*. at 352.
167. *Id*.
168. *Id*. at 352–53, 359, 360. And there is empirical evidence that rent control laws accomplish that purpose. Economists Rebecca Diamond, Franklin Qian, and Timothy Quade find in a quasi-experimental study of rent control in San Francisco that "the beneficiaries of rent control are between 10 and 20% more likely to remain at their 1994 address [in 2016] relative to the control group." Rebecca Diamond et al., *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, *supra* note 15, at 3393 (2019).
169. Radin, *supra* note 18, at 362.
170. *Id*. at 369.

distortion."[171] Those arguments rest on both the utility of "living in an established close-knit community" and the fact that "personhood is fostered by living within an established community of other persons."[172] The "case of elderly people on fixed incomes being squeezed out of their long-term homes by younger, wealthier people is especially sympathetic."[173]

Radin specifically argues that provisions in rent control laws limiting eviction are "a device to protect the personhood interest of the tenant and the value of community."[174] And she suggests that people living in poverty, both as individuals and as communities, are the primary beneficiaries of this aspect of rent control. "In a rising market," Radin argues, "a poor person stands to lose her home without rent control. . . . Communities of poor individuals are not likely to be able to regroup elsewhere."[175]

Radin provides a powerful policy argument supporting the precise element of rent control laws likely to soon again be challenged in the Supreme Court: their limits on eviction. And her argument specifically undergirds the contention that limitations on eviction are a reasonable condition on landlords receiving the benefits of residential zoning.

CONCLUSION

After extended deliberation, the Supreme Court decided not to take up the question of rent control in its 2023-24 term. The taking challenge that will surely return to the Court soon poses legal, moral, and policy questions. While a majority of the Justices are, no doubt, not reluctant to overturn the unanimous, three-decade old precedent of *Yee* in order to vindicate both free market orthodoxy and owners' absolute dominion over their property, they might still be reluctant to place over a century of civil rights law in question, and to cause both the rapid dislocation of thousands of poor and moderate-income tenants and the splintering of long-standing residential communities. This note has sought to offer new arguments that may give the Court some pause before it doth authorize the taking of so many homes.

171. *Id*.
172. *Id*. at 370.
173. *Id*.
174. *Id*. at 372.
175. *Id*. at 379.