CASE NO. 20-3366

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COMMUNITY HOUSING IMPROVEMENT PROGRAM, ET AL.,
Plaintiffs-Appellants,

v.

CITY OF NEW YORK, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York, No. 19-4087
(Hon. Eric R. Komitee)

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case interests *amicus* because the right to exclude, perhaps the most fundamental among the strands in property's "bundle of rights," should be accorded the same protection from state interference as those of life and liberty, the other pillars of the Lockean philosophy at the heart of our nation's founding documents.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 2019, the New York legislature passed a series of amendments to its rent-stabilization laws (RSLs). These were not the first amendments to the still-controversial RSLs, though they are the most stringent in decades. New York originally enacted rent control and stabilization measures to contend with the emergency of a post-WWI housing shortage. *See* John W. Willis, *Short History of*

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

Rent Control Laws, 36 Cornell L.Q. 54, 69–70 (1951). During WWII, the federal government instituted further controls. *Id.* at 79. New York then introduced a set of rent-stabilization laws in 1969, which went into the Emergency Tenant Protection Act (ETPA) in 1974 to confront "spiraling rents and a severe housing shortage." Diane Ungar, *Emergency Tenant Protection in New York: Ten Years of Rent Stabilization*, 7 Fordham Urb. L.J. 305, 313 (1978). By then the guise of wartime or post-war emergency had receded, leaving the cure without its original illness.

Now the "emergency" isn't even just an apparent housing shortage but rather a myriad of half-thought references to socioeconomic inequality. Some lawmakers no longer hide the ball. State Senator Zellnor Myrie extolled the 2019 amendments to the ETPA as "a really big win for the tenants of this state," after "one side"—the evil landlords—"has been winning for decades." Kriston Capps, "Inside New York's Landmark Deal to Protect Renters," Bloomberg CityLab, June 13, 2019, https://bloom.bg/3smPQMk. Not that the most recent round of amendments has ameliorated this imbalance. *See* Complaint, *infra*, at 35–39.

Although the RSL amendments do not together work a permanent and continuous or total deprivation of all affected landlords' rights in fee simple, they do go far enough to deprive them of at least one fundamental attribute of ownership: the right to exclude. This Court should follow what the Supreme Court has already implied in several other contexts: that *any* interference with the "right to exclude,"

be it a small cable running through one's property or a regulation allowing tenants to overstay their welcome, is a taking of *that* fundamental attribute, regardless of the rights and interests that remain untrammeled.

ARGUMENT

I. THE RIGHT TO EXCLUDE IS A FUNDAMENTAL ATTRIBUTE OF OWNERSHIP, DEPRIVATIONS WHICH SHOULD BE TREATED AS PER SE TAKINGS

The right to exclude should not be as easily impaired as New York does here. The Supreme Court has said that the right to exclude is "so universally held to be a fundamental element of the property right," that "an actual physical invasion," even if "only an easement," nonetheless requires just compensation. *Kaiser Aetna v. United States*, 444 U.S 164, 180 (1979). The Court has recognized the harm such interferences inflict:

> [A]n owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property . . . since the owner may have no control over the timing, extent, or nature of the invasion.

Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419, 436 (1982). *Kaiser Aetna* and *Loretto* are just two among several modern opinions extolling the right to exclude as essential to the preservation of all other rights and interests attending ownership. *See*, *e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1044 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987). Although *Loretto* stands out for having introduced the modern conception of a per se taking:

> Our cases . . . establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. . . . When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.

458 U.S. at 426–27. This Court should apply the *Loretto* per se takings test to interferences with *any* fundamental attribute of ownership, regardless of their conceptual, durational, or physical extent.

A. There Are Only Two "Exceptions" to the Indivisibility of Fundamental Attributes of Property Ownership

There are two categorical "exceptions" to the absolute character of a fundamental attribute of ownership. "Exceptions" is in quotes because, while they exempt certain interferences from a direct-compensation requirement, these interferences either: (a) properly restrict the use of property within its common-law contours, or (b) are indirectly compensated through the benefit, or "reciprocity of advantage," the affected owners derive from the government's imposing the same restrictions on all who are similarly situated. *See* Richard A. Epstein, *Simple Rules for a Complex World* 134–37 (1995). *See also Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922) ("The exercise of [the police power without just compensation] has been held warranted in some cases by what we may call the average reciprocity of advantage."). In either exception, the public action only appears to be an interference. Courts have in the past misapplied these exceptions in order to shield inconvenient, but no less bona fide interferences, from takings analysis. *See* Brian

A. Lee, *Average Reciprocity of Advantage* 3, in *Philosophical Foundations of Property Law* (J.E. Penner & H.E. Smith eds., 2013) ("Judicial and academic discussions . . . have often appealed to the concept of average reciprocity of advantage. However, these appeals have frequently been cursory, leaving the concept unanalyzed and consequently failing to understand its limitations.").

Beyond these exceptions, the right to exclude is essential to the preservation of private ownership. Property implies the right to exclude; indeed, it demands it. Blackstone described the "right of property" as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." William Blackstone, *Commentaries on the Laws of England* *2 (1768). Blackstone's definition traces its lineage to Roman conceptions of the right. *See* Juan Javier Del Granado, *The Genius of Roman Law from a Law and Economics Perspective*, 13 San Diego Int'l L.J. 301, 316 (2011) ("Roman property law typically gives a single property holder a bundle of rights with respect to everything in his domain, to the exclusion of the rest of the world."). This ancient understanding of the "right to property" as, essentially, the right to exclude others from possession or use carries to the present day. As Richard Epstein put it, "[t]he notion of exclusive possession" is "implicit in the basic conception of private property." Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 63 (1985).

B. The Right to Exclude Is the "Sine Qua Non" of Property

In the words of one eminent scholar, the right to exclude is the "*sine qua non*" of property, and, without it, all other property rights are "purely contingent." Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730–31 (1998). This reflects Blackstone's rationale that the right serves, perhaps foremost, as incentive to produce and maintain the "things" of life—shelter, clothing, foodstuffs, etc. Blackstone, *supra*, at *3.

From Blackstone to Epstein, this conception of the right permeates scholarship and jurisprudence. In *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, Justice Scalia found that "[t]he hallmark of a protected property interest is the right to exclude others." 527 U.S. 666, 673 (1999). He continued: "That is why the right that we all possess to use the public lands is not the 'property' of anyone—hence the sardonic maxim, explaining what economists call the 'tragedy of the commons,' *res republica*, *res nullius*." *Id.* A healthy, non-parasitic relationship between the public and private realms depends, in no small measure, on the robustness of the right to exclude. The flimsier the right, the greater the imbalance in the public's favor—and the greater the tragedy of the commons.

In other words, the right to exclude is essential to the survival of an efficient, self-perpetuating system of property:

> [T]he right to exclude captures the central features of common-law property that make it such a valuable social institution. Property is

> sovereignty, or rather, thousands of little sovereignties parceled out among the members of society . . . It [] makes it relatively easy to identify with whom one must deal to acquire resources, thereby lowering the transaction costs of exchange, and allowing resources to move to their highest and best use. The right to exclude others . . . diffuses power in society, thus helping to preserve liberty.

Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 973 (2000).

C. From the Framers Until Now, The Balancing of Public and Private Rights Has Required Compensating Takings of the Right to Exclude

The Framers recognized the dangers even their balanced form of republicanism posed to property rights. *See* Federalist No. 10 (Madison), in *The Essential Debate on the Constitution: Federalist and Antifederalist Speeches and Writings* 125 (Robert J. Allison & Bernard Bailyn eds., 2018) (1787) ("Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property."). But they also knew that majoritarian needs would often supersede individual liberties, including property rights. *See* William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 699–701 (1985) (discussing the balancing of public and private rights, including the insight that "a major strand of republican thought held that the state could abridge the property right in order to promote common interests"). Requiring compensation offered a compromise: allowing public needs to be fulfilled, with just

payment ensuring that the only intrusions made into the private realm were indeed necessary. *See* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 825–34 (1995) (discussing the growing support for "just compensation" among colonial thinkers).

The post-Founding generation of jurists and scholars continued to elevate the right to exclude as one of the boundary stones protecting the private realm from unnecessary public invasions. In *Wynehamer v. People*, the New York Court of Appeals held that "[m]aterial objects . . . are property . . . because they are impressed by the laws and usages of society with certain qualities, among which are, *fundamentally*, the right of the occupant or owner to use and enjoy them exclusively." 13 N.Y. 378, 396 (1856) (emphasis added). "When a law annihilates the value of property and strips it of its attributes, *by which alone it is distinguished as property*, the owner of it is deprived of it according to the plainest interpretation." *Id.* at 398 (emphasis added).

Other cases from this period show that the Framers' search for a compromise between the common law's reverence for the private realm and the needs of the public remained alive and well into the late 19th century. *See Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887) ("A prohibition upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot be deemed a taking or an appropriation of property for the

public benefit."). The anti-harm principle that undergirds *Mugler*-style police powers, and the reciprocity of advantage (though those courts did not yet call it that), figured prominently in 19th-century courts' drawing the line between private and public rights. *See* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1585–1605 (2003) (surveying 19th-century eminent domain case law). The default view was that property conferred absolute use and dominion up to the border of a superseding public need. *Id.* at 1597 ("If the people vest their equal property rights in a commons . . . a neighboring private owner becomes subject to a duty not to use his own in a manner that interferes with the purposes of the public domain.").

As today, however, courts then over-relied on the reciprocity of advantage, often ruling that interferences with, and thus takings of, fundamental attributes of ownership were "compensated" through the general good the interferences conferred. *Id.* at 1587–89 (discussing two right-of-way cases, representative of then-prevailing jurisprudence, in which the claimants' consolation for public interferences with their private property was "what Frank Michelman and Richard Epstein have described as an 'implicit in-kind compensation' justification for a restraint on private property").

The Supreme Court has not been immune to using one or both of the categorical exceptions to avoid providing a clear resolution to what remains a

doctrinal cliffhanger This has only exacerbated the confusion of the lower courts. *See* Laura S. Underkuffler, *On Property: An Essay*, 100 Yale L.J. 127, 130–31 (1990) ("Various tests—such as the 'ordinary understanding' approach, the 'reasonable expectations' approach, the 'functional' approach, the 'bundle of rights' approach, and others—have been used. . . . The resulting incoherence is profound.").

No amount of reciprocal advantage should compensate for a bona fide interference with a fundamental attribute of ownership. The right to exclude germinates from the same Anglo-American tradition as other fundamental property rights, such as the right to devise property to family, and it deserves a similar treatment. *See Hodel v. Irving*, 481 U.S. 704, 716 (1987) ("[T]he right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times.").

The Framers for the most part read this tradition to accord absolute protection to rights in private property except when certainly necessary for the common good—e.g., to address the exigencies of war. *See*, *e.g.*, *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 155–56 (1952) (holding that the state's necessary destruction of private property to prevent its falling into enemy hands "must be attributed solely to the fortunes of war, and not to the sovereign," and therefore is noncompensable). *See generally* Ilya Somin, *The Grasping Hand:* Kelo v. City of New London *and the Limits of Eminent Domain* 36–39 (2015) (discussing early post-ratification cases,

including *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (1795), in which Justice William Patterson held that the state's eminent domain power can be used only "in urgent cases, or cases of the first necessity").

D. Supreme Court Jurisprudence Suggests That Interferences with Fundamental Attributes of Ownership Are Different Than "Partial" Regulatory Takings

The Supreme Court has repeatedly broadcast its desire to hold interferences with fundamental attributes of ownership to a higher standard than "partial" regulatory takings, essentially of a portion of the value of a property, which are governed by the *Penn Central* test. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (holding that whether a regulation effects a partial taking involves "essentially ad hoc, factual inquiries," including the regulation's "economic impact," "the extent to which the regulation [interferes] with distinct investment-backed expectations," and "the character of the governmental action").

In *Pumpelly v. Green Bay Co.*, the Court early on clarified that "a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken." 80 U.S. 166, 179 (1872). Since *Pumpelly*, the Court has many times endorsed the pro-segmentation view of the bundle of property rights, which holds that "every regulation of any portion of an owner's 'bundle of sticks' is a taking of that particular portion considered separately." Margaret Jane

Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1676 (1988). *See*, *e.g.*, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 593, 601–02 (1935) (state law effected a taking when it extinguished mortgagor's remaining debt to mortgagee, even though the mortgagee retained a right to "reasonable rent"); *Chippewa Indians of Minn. v. United States*, 305 U.S. 479, 481–82 (1939) (Congress violated the Takings Clause when it converted tribal lands into a national forest, even though the lands were to be held in trust and the tribe was to receive the proceeds from the sale of its timber); *United States v. Dickinson*, 331 U.S. 745, 749 (1947) (a taking occurred when gradual flooding of property "stabilized," even when the land, as a whole, was not condemned); *United States v. Pewee Coal Co.*, 341 U.S. 114, 116 (1951) (holding that the government effected a taking when it "required mine officials to agree to conduct operations," *i.e.*, retaining the right to manage, "as agents for the Government"); *Dugan v. Rank*, 372 U.S. 609, 625 (1963) (suggesting that requisition of part of owner's water rights merits compensation under the Tucker Act).

The pro-segmentation view argues for a categorical approach to per se takings analysis, in which the magnitude of the interference—for example, whether it is permanent and continuous or total—is irrelevant when a quintessential element of ownership is involved. Where the common-law "exception" discussed above is present, there is no bona fide interference because the intrusion does not abrogate an

actual element of ownership. The bar for this ostensible exception is much higher than some misguided rulings suggest. *See Rent Stabilization Ass'n v. Higgins*, 83 N.Y.2d 156 (1993).

The recent RSL amendments are much closer to a *Loretto*-style interference, which is always a taking, than to *Mugler*-style regulations that are often protected under the state police power's anti-harm justification. This Court ought not wait any longer to extend *Loretto*'s logic to rent regulations that interfere with a fundamental attribute of ownership even if they're not permanent and continuous or total.

II. THE RECENT AMENDMENTS TO NEW YORK'S RENT STABILIZATION LAWS DO NOT MITIGATE HARM OR CREATE A RECIPROCAL ADVANTAGE AND THUS ARE A PER SE TAKING OF THE FUNDAMENTAL RIGHT TO EXCLUDE

The recent amendments to New York's RSLs clearly interfere with plaintiff-appellants' right to exclude and neither of the "exceptions" laid out in Part I are applicable. The RSLs do not mitigate any cognizable harmful use of property, and they do not create a reciprocity of advantage that commonly benefits similarly situated property owners. They effect a per se taking because the RSLs violate the fundamental right to exclude.

A. The Rent Stabilization Laws Do Not Mitigate a Legally Cognizable Harm

The RSLs do not simply contour landlords' rights within their common-law boundaries, which is one exception to finding a per se taking. Charging rent—even high rent—in accordance with market forces is not and has never been recognized

at common law a harmful use of property. ("Harm" here is defined according to the "background principles" of state property and nuisance law. *See Lucas*, 505 U.S. at 1029.) The Supreme Court limits these "background principles," to "a law or decree with such an effect" that it "do[es] no more than duplicate the result that could have been achieved in the courts . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally[.]" *Id.* It would be a stretch to suggest that the arguable adverse economic effects of residential rental prices are in this sense harmful.

Moreover, even if a court were to construe systemic socioeconomic inequities as common-law public nuisances, the RSL amendments do not, in practice, ameliorate these harms. As the plaintiff-appellants argue, the "RSL is not rationally related to promoting socio-economic or racial diversity," or to "increasing the supply of housing." Complaint at 3, *Cmty. Hous. Improvement Program v. City of New York*, 2020 U.S. Dist. Lexis 181189 (E.D.N.Y. Sept. 30, 2020) (19-cv-4087). Through a combination of administrative convenience and historical happenstance, the RSLs and their amendments are limited to units sharing a discrete set of characteristics that have little or nothing to do with alleviating the targeted harms.

For example, there is no connection between "promoting socio-economic or racial diversity" and limiting the 2019 RSL amendments to "pre-1974, six-unit-plus building[s]." Complaint at 64. The amendments cannot plausibly be said to alleviate

systemic harms, only to redistribute wealth haphazardly. Beyond the obvious, there is a "mountain of scholarly evidence" pointing to this random redistribution, which the plaintiff-appellants have well catalogued. *See* Complaint at 35–39.

If a government seeks to mitigate systemic socioeconomic disparities it should pursue overt wealth transfers: taxation and subsidization. This policy would restrict redistributions to those that are arguably necessary and tailored to the common good. But politicians beholden to a scrutinizing public are apt not to push for redistributions that carry more political risks than rewards. *See Pennell v. San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., dissenting) ("The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget,' with relative invisibility and thus relative immunity from normal democratic processes.").

As tenants have become a more visible voting bloc in recent years, rental-housing issues have become part of the national discussion, morphing the legal questions involved from what the government can and must do to what it can get away with doing in order to curry favor with a growing base of affordable-housing voters. *See* Emily Badger, "Renters Are Mad. Presidential Candidates Have Noticed," N.Y. Times, Apr. 23, 2019, https://nyti.ms/2Lt9Ps5.

Without an obvious need for continuing "off-budget" rent stabilization measures where "on-budget" subsidization would do as well if not better, New York

City ought to bear the burden of demonstrating the RSL amendments' service to the public weal. Municipal authorities have consistently failed to meet this burden: "The New York City Council has made its every-three-years emergency determinations without any meaningful support for or analysis of whether a housing emergency actually exists." Complaint at 4. There is simply no room for a court to find that the city and state may justify new (and some old) RSL amendments as a mere contouring of landlords' property rights within their proper common-law boundaries.

B. The Rent Stabilization Laws Do Not Create a Reciprocity of Advantage

Nor are the affected landlords compensated though a reciprocity of advantage. Beyond the amendments' arbitrariness, they only apply to a small subset of property owners, violating the Supreme Court's admonition that government cannot "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Even before the recent amendments, New York's high court held that "the rent-stabilization laws . . . provide a benefit conferred by the government through regulation aimed at a population that the government deems in need of protection," paid for through "a unique regulatory scheme applied to private owners of real property." *Santiago-Monteverde v. Periera*, 22 N.E.3d 1012, 1016 (N.Y. 2014).

The likelihood that there are reciprocal advantages to a regulation is greatly reduced when many similarly situated owners, making the same categorical uses of

their land, are *not* burdened with those regulations. The RSL amendments are applied haphazardly. Given the arbitrary unit-types to which the RSLs are limited, the majority of New York property owners (both inside and outside the city) who are otherwise situated similarly to the affected landlords are not so burdened. Theoretically, at least according to the government, all similarly situated landowners share responsibility for the apparent housing shortage, especially those that have empty units and simply opt not to rent them out. Regulations applied unequally are good evidence against the existence of genuinely reciprocal advantages. In such cases, as here, not only do "formally neutral rule[s]" hide a wealth transfer, but they are also not truly neutral. Richard A. Epstein, *Simple Rules*, *supra*, at 135 (1995).

C. The Rent Stabilization Laws Effect Per Se Takings That Require Just Compensation

With neither exception applicable, the recent RSL amendments are nothing more than uncompensated takings of an ancient property right. Absent common-law limitations or indirect compensation through reciprocal advantages, several of the recent RSL amendments bear striking similarity to the regulation the Supreme Court confronted in *Loretto*. Under several of the amendments "the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space." *Loretto*, 458 U.S. at 435. These include a "cap on the number of units landlords can recover for personal use at one unit per building (and only upon a showing of immediate and compelling necessity)," and an

"increase [in] the fraction of tenant consent needed to convert a building to cooperative or condominium use." *Cmty. Hous. Improvement Program v. City of New York*, 2020 U.S. Dist. Lexis 181189, at *8–9 (E.D.N.Y. Sept. 30, 2020) (citing N.Y. Reg. Sess. § 6458 (2019)). This on top of the pre-amendment RSL right of tenants to convey their lease, in perpetuity, to family members who have themselves resided in the unit for a set amount of time. Complaint at 66.

All these reflect "perhaps the most serious form of an invasion" of which government is capable. *Loretto*, 458 U.S. at 435 (citing *Andrus v. Allard*, 444 U.S. 51, 66 (1979), in which the Court held that when the government initiates or permits a physical invasion of property, it "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand"). While none of the new regulations effect *total* deprivations of the right to exclude—as the lower court explained, the landlords "continue to possess the property (in that they retain title)," *Cmty. Hous.*, 2020 U.S. Dist. Lexis 181189, at *17—the Supreme Court affords this fundamental attribute of ownership its own "bundle of rights," not just a strand within a generalized bundle. And to the lower court's insistence that retention of title equals possession, *Loretto* answers that "even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale," though the RSLs limit even this right, "the permanent occupation

of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." 458 U.S. at 436.

Interference with any fundamental attribute of ownership is all or nothing. The preservation of private property requires that they each be considered absolute. There is no such thing as "the right to exclude everybody but XYZ." If the owner loses his power to exclude others for even a moment, in that moment he has lost the power completely. Otherwise, public officials can conceivably pile easement upon easement without pecuniary consequence, provided a mere second is left for the owner to exercise his rights. This is the spirit of *Loretto*, and ought to be mimicked regardless of the extent of a fundamental-attribute interference.

In *Yee v. City of Escondido*, the Supreme Court rejected a claim that an effective wealth transfer through the maintenance of tenancies at sub-market rates was a per se taking, stating that "government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." 503 U.S. 519, 527 (1992) (emphasis original). *Yee* was following *Loretto*'s lead, while clarifying that wealth transfers from landlords to tenants were not sufficient to trigger per se takings coverage. But the RSL amendments do not stop at mere wealth transfers. Their redistribution scheme is not achieved, as in *Yee*, through the "home owner's ability to sell [their] home . . . at a premium" while it happens to be situated on land rented from the plaintiff. *Id.* at 529. "[T]he existence of the transfer [of

wealth] in itself does not convert a regulation into physical invasion." *Id.* at 529–30. But when the interest conveyed is not a monetizable premium but an essential right in property—the right to exclude—*Yee* packs the same doctrinal punch as *Loretto*.

Indeed, the Supreme Court has soundly rejected the idea that a physical occupation must be permanent and continuous or total in order to qualify as a per se taking. *See*, *e.g.*, *Loretto*, 458 U.S. at 433 (citing *Kaiser Aetna*, 444 U.S. 164, for the proposition that a trespassory easement, while "not being a permanent occupation of land," can be a taking because "a physical invasion is a government intrusion of an unusually serious character"). If the physical occupation works even a slight interference with the right to exclude, the pro-segmentation view urges application of a *Loretto*-style per se takings test.

Even if per se takings were limited to permanent and continuous or total invasions, the new restrictions (on top of a previous amendment's difficult removal of successor tenants), inch the RSLs closer toward "perpetual tenancy" than ever before. Indeed, close enough that the New York Court of Appeals' definition of a per se taking in *Seawall Assocs. v. City of New York* appears almost to describe the 2019 amendments, rather than an earlier RSL regime:

> [The law in issue] requires the owners to rent their rooms or be subject to severe penalties; it compels them to admit persons as tenants . . .; it compels them to surrender the most basic attributes of private property, the rights of possession and exclusion.

74 N.Y.2d 92, 102 (1989). The *Seawall* court disagreed with the city's theory "that a physical taking must entail the kind of palpable invasion involved" in cases like *Loretto*, or "that the deprivation of intangible property rights alone, such as that resulting from coerced tenancies, is not enough." *Id.* at 103. It was enough for *Seawall* and ought to be enough now—especially since the right to exclude is far from "intangible."

The Supreme Court has clearly protected the right to exclude in *Loretto* and *Yee*, as well as in their pro-segmentation progenitors, from *Pumpelly* to *Dugan* and beyond. The RSLs of today are more onerous than those that the court faced in *Higgins* (if not yet perfectly aligned with the facts in *Loretto*). The Takings Clause cannot serve its prophylactic purpose if the courts wait until a physical occupation is permanent and continuous or total before it undertakes per se takings analyses.

For the Takings Clause to confer the same degree of protection as the Constitution affords other enumerated rights, courts must draw categorical, and not fact-intensive lines. The search for a permanent and continuous invasion akin to *Loretto* will miss interferences with fundamental attributes of ownership against which the Takings Clause was clearly designed to protect. Indeed, even *Loretto* did not involve a truly permanent and continuous or total invasion; the incursion was made pursuant to a regulatory regime that is ultimately impermanent, susceptible as it was to legislative revision. This argument demonstrates the constitutional

insufficiency in drawing the line only at physical invasions purported to be permanent and continuous or total.

Courts drawing the line, instead, at *any* interference with a fundamental attribute of ownership will capture a host of oft-overlooked takings, without casting the clause's prophylactic net too widely. The common-law and reciprocal-advantage "exceptions" to this categorical rule will continue to prevent courts from invalidating regulations that are clearly within a government's *Mugler*-style police powers.

CONCLUSION

For the reasons stated above, and those offered by plaintiff-appellants, the court should reverse the lower court's ruling with respect to plaintiff-appellant's per se takings claim.

Respectfully submitted,

DATED: January 22, 2021

/s/ Ilya Shapiro

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 5,326 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

/s/ *Ilya Shapiro*
January 22, 2021

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Ilya Shapiro*
January 22, 2021