No. 22-1130

In the Supreme Court of the United States

74 PINEHURST LLC, ET AL.,
Petitioners,

v.

STATE OF NEW YORK, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CATO INSTITUTE AND MANHATTAN INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Can the government legislate away an apartment owner's right to exclude without compensation?

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INTEREST OF *AMICI 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 was established in 1989 to promote the principles of limited 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.

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This case interests *amici* because it involves the application of the Takings Clause to government subsidy programs and implicates the right to exclude—arguably the most fundamental strand in property's "bundle of rights."

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

New York City subjects property owners to a thicket of regulations that affect their ability to rent, including strict limitations on their right to exclude. Over the years, New York has curtailed more and more of owners' liberty over their property, leading to several lawsuits throughout the decades. This Court's decision in *Cedar Point* warrants taking a fresh look at these impositions, which force one class of residents to shoulder costs that should rightfully be borne by the public. This case is an opportunity for the Court to take that fresh look.

Since the 1940s, New York City has maintained a system of rent control. The City's rent control regime currently consists of various statutes and administrative code provisions. The cornerstone of this regime, the Rent Stabilization Law, or RSL, was enacted in 1969 and has been amended on multiple occasions—most recently in June 2019.

The RSL specifically regulates owners of buildings constructed prior to 1974 and containing six or more units. There are approximately one million units under the purview of the RSL, comprising half of all New York City apartments. The RSL authorizes the Rent Guidelines Board (RGB) to set annual maximum rent increases for stabilized units. The RGB is required to consider factors related to owners' costs as well as housing affordability and tenants' ability to pay. According to the RGB's own data, factoring tenants' ability to pay into the calculation of allowable rent

increases has caused RGB-approved rents to increase at only half the rate of property owners' costs.

In addition to setting maximum allowable rents, the RSL severely limits the property owners' rights to exclude, occupy, use, change the use of, and dispose of their property. The RSL requires owners to renew tenants' leases in perpetuity unless a tenant 1) fails to pay rent; 2) materially violates the lease; 3) creates a nuisance; or 4) uses the apartment for an unlawful purpose. Additionally, tenants' rights under the RSL are heritable and may be passed on to any member of a tenant's family who has lived in an apartment for two years—or one year in the case of an elderly or disabled person. A "tenant's family" is defined broadly enough to encompass grandparents, grandchildren, and in-laws. These successorship rights are also granted to any other person living in the unit who is in "emotional and financial commitment and interdependence with the tenant."

Once a tenant occupies a stabilized unit, an owner may not retake possession of the apartment for personal use. Only upon a demonstration of "immediate and compelling necessity" may an owner reclaim just one of his or her units. However, if the tenant that the owner displaces is 62 or older, physically or mentally impaired, or has occupied the unit for at least 15 years, then the owner must find equivalent, nearby accommodations for the tenant. And buildings held in the name of a corporate entity have no personal use allowance at all.

The RSL also severely restricts owners' rights regarding the buildings themselves. Owners may not withdraw their buildings from residential use, leave their property vacant at the conclusion of a tenant's

lease term, or demolish their property. Nor may owners switch the designated use for a building from residential to commercial (or entirely withdraw the building from the rental market) unless the costs to make the unit habitable exceed its value. If an owner wishes to demolish a property, the owner must either find every single tenant comparable, rent-stabilized housing or pay the tenants a stipend which is predetermined by the city and multiplied by 72 months.

Further, owners may not dispose of their property by converting the buildings into cooperatives or condominiums unless that conversion receives the consent of a majority of the tenants. Tenants thus have a collective veto power, even though their perpetual renewal rights are not affected when a building is converted.

The RSL restrictions are triggered when the city council finds that there is a housing emergency in the City, which the RSL defines as a vacancy rate of 5% or less. In practice, this condition is always met; the City has regularly renewed its emergency declaration every three years for the last half-century.

Petitioners are individuals and business entities that own rent-stabilized apartment buildings in New York City. They filed suit against the City in the Eastern District of New York, challenging the RSL as an uncompensated taking. The district court granted motions to dismiss filed by the City and the State of New York. Pet. App. at 21a–54a. First, the court rejected Petitioners' claim that the RSL's deprivation of their right to exclude constitutes a *per se* physical taking under *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). And second, the court also rejected Petitioners' facial and as-applied regulatory takings challenges to

the RSL. On appeal, the Second Circuit affirmed. Pet. App. at 1a–20a.

In light of the Second Circuit's holding, this case presents several important issues under the Takings Clause. First, this Court's recent opinion in *Cedar Point* casts serious doubt on the constitutionality of the RSL, since the City has appropriated building owners' right to exclude and granted that right to third parties. As more cities and municipalities experiment with rent control, it is crucial that property owners know to what extent their property is protected from government appropriations of their core property rights. This Court's precedents addressing the constitutionality of rent-control statutes long predate the *per se* rule for physical takings articulated in *Cedar Point*, which calls for this Court to address how that *per se* rule applies in the rent-control context.

Second, there is a circuit split between the Eighth and Second Circuits over whether property owners can even claim that rent control constitutes a *per se* taking under *Cedar Point*. This circuit split affects millions of units and countless property owners, making it critically important that this Court clarify the boundaries of property owners' constitutional rights.

Finally, this Court should take this opportunity to reconsider its approach to regulatory takings. The test established in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), has proven to be unworkable by lower courts and lacks grounding in both the text and history of the Constitution. For all these reasons, this Court should grant certiorari.

ARGUMENT

I. THIS CASE PRESENTS THE OPPORTUNITY TO CLARIFY THE EXTENT OF THE RIGHT TO EXCLUDE

This Court has repeatedly and correctly acknowledged the centrality of the right to exclude as the fundamental element of property. However, the Court's key precedents addressing the constitutionality of rent control long predate the Court's recent decision in *Cedar Point*, which set down crucial guidelines for evaluating regulatory takings and restrictions on the right to exclude. This case presents the opportunity to provide vital guidance on the applicability of the Takings Clause to modern rent-control measures in light of *Cedar Point*.

The right to exclude is the *sine qua non* of property. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730–31 (1998). The rights to use, transfer, include, and dispose of property "are dependent upon and derive from the right to exclude, which is indispensable." Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 25 (2014) [hereinafter Merrill, *Right to Exclude II*]. 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." 2 WILLIAM BLACKSTONE, COMMENTARIES *2. 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.").

Put another way, the ancient and fundamental understanding of "the right to property" holds "[t]he notion of exclusive possession" to be "implicit in the basic conception of private property." RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 63 (1985). "Exclusion lies at the root of property because the institution of property is dependent on possession, and exclusion lies at the root of possession." Merrill, *Right to Exclude II*, *supra*, at 14. Thus, a physical taking "is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

This Court's Takings Clause cases have shown an increasing awareness of the vital nature of the right to exclude and the need to protect it. Over a century ago, this Court determined that regulations of property, in addition to confiscations, constitute takings if they "go[] too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Approximately half a century later, the Court held that whether a regulation went too far would be determined by an "essentially ad hoc, factual inquir[y]" that balances multiple factors. *Penn Central*, 438 U.S. at 124.

In the ensuing decades, this Court modified the *Penn Central* standard in *Loretto* and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). These decisions "carved out *per se* exceptions for permanent physical occupations and regulations resulting in total

value loss, respectively." Sam Spiegelman & Gregory C. Sisk, Cedar Point*: Lockean Property and the Search for a Lost Liberalism*, 2020–2021 CATO SUP. CT. REV. 165, 178 (2021). Most recently, in *Cedar Point*, the Court further protected the right to exclude when it determined that a state law requiring agricultural employers to allow union organizers onto their property for up to three hours per day for 120 days per year effected a *per se* physical taking. 141 S. Ct. at 2072.

Chief Justice Roberts, writing for the Court, clarified that "Government action that physically appropriates property is no less a physical taking because it arises from a regulation." *Id.* As a result, the "essential question" to determine whether a *per se* physical taking has occurred is "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Id.* The Chief Justice further explained that "[w]henever a regulation results in a physical appropriation of property a *per se* taking has occurred, and *Penn Central* has no place." *Id.*

Additionally, the duration and size of appropriations are not relevant to the determination of whether *per se* physical takings have occurred; they "bear[] only on the amount of compensation" due. *Id.* at 2074. The fundamental problem with the California access law was that "[r]ather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude." *Id.* at 2072.

Cedar Point's reasoning demonstrates why rent-control laws effect *per se* physical takings when they appropriate the right to exclude. Fundamentally,

"[r]ent control statutes operate to take part of the landlord's interest in his reversion [at the expiration of a lease] and transfer it to the tenant." Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 744 (1988) [hereinafter Epstein, *Rent Control*]. The laws accomplish this by "compelling the landlord, usually in the context of a lease renewal, to convey an additional term of years for the benefit of the tenant, at a price demanded by the state." *Id.* "That renewed lease is an interest in property, just like the original lease. Its transfer deprives the landlord of the immediate right to possession [and thus the right to exclude] that was reserved in the original conveyance." *Id.* at 744–45. As a result, "[t]he standard rent control statute gives the tenant the identical private ownership that any other tenant enjoys under an ordinary lease. There is a naked transfer from A to B that the Constitution prohibits regardless of the details of the compensation system that is provided." *Id.* at 746.

New York's RSL takes this dynamic to extreme lengths, in ways that clearly transgress this Court's holding in *Cedar Point*. In addition to setting the maximum rent an owner may charge, the RSL requires owners to renew tenants' leases in perpetuity. This requirement has only a few exceptions, and all of them are entirely beyond the owners' control. Pet. App. at 191a–192a. In addition, these perpetual leases are heritable and may be passed to "any member" of a "tenant's family" who has lived in an apartment for two years (or one year if the current tenant is a senior citizen or disabled). Eligible successors encompass grandparents, grandchildren, and in-laws, as well as "[a]ny other person" living in the apartment in

"emotional and financial commitment and interdependence" with the tenant. Pet. App. at 137a, 184a, 190a.

The RSL's appropriation of the right to exclude is so severe that owners do not even have a presumptive right to reclaim an apartment for their own personal use. An owner may only reclaim possession of a unit if he demonstrates an "immediate and compelling necessity" for it. Pet. App. at 125a, 179a, 185a. And even upon such a showing, there are several circumstances in which the owner must bear the cost of finding the tenant an equivalent accommodation with an identical stabilized rent. Pet. App. at 186a. Further, an owner of multiple units is only permitted to make a showing of necessity related to one of his units. And if a building is held in the name of a corporate entity, as many buildings in the City are, there is no personal use allowance. Pet. App. at 183a–184a.

Finally, the RSL restricts owners' ability to withdraw their properties from the residential rental market, leave their properties vacant, or convert their units to commercial rentals, cooperatives, or condominiums. Pet. App. at 127a–128a. Owners who wish to demolish their property are required to relocate their current tenants to comparable rent-stabilized housing or pay them a stipend for six years. Pet. App. at 194a–195a.

Taken together, the various provisions of the RSL: enable continuous physical occupation of an owner's unit at the expiration of an agreed-upon lease; further extend the unwanted physical occupation by enabling tenants to assign successors to their lease; prevent owners from possessing and using their property for their own purposes; prevent owners from changing

how their property is used; and prevent owners from disposing of their property. The RSL "appropriates for the enjoyment of third parties the owners' right to exclude" to a far greater degree than the access regulation at issue in *Cedar Point*. 141 S. Ct. at 2072. And to say that the RSL "'does not constitute a taking of a property interest but rather . . . a mere restriction on its use, is to use words in a manner that deprives them of all their ordinary meaning.'" *Id.* at 2075 (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987)).

The extreme nature of the City's regulatory scheme and its incompatibility with *Cedar Point* calls for this Court's intervention. The Court should grant the petition and vindicate Petitioners' right to exclude.

II. A CIRCUIT SPLIT EXISTS OVER WHETHER PARTIES MAY STATE A CLAIM THAT RENT CONTROL CONSTITUTES A *PER SE* PHYSICAL TAKING

The Eighth and Second Circuits are split over whether, under *Cedar Point*, parties may allege that rent control constitutes a *per se* physical taking. The Eighth Circuit, consistent with this Court's reasoning in *Cedar Point*, concluded that parties challenging rent control laws may allege a *per se* taking. But the Second Circuit here concluded that they may not. If allowed to stand, the Second Circuit's reasoning would effectively eliminate any Takings Clause limitations on government regulation of rental apartments, significantly undermining the right to exclude. This Court should grant the petition to resolve this vital issue.

In *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), the Eighth Circuit considered a

challenge brought by an owner of residential rental units in Minnesota. The owner challenged executive orders issued by the governor of Minnesota during the COVID-19 pandemic mandating a statewide residential eviction moratorium. These executive orders "forbade the nonrenewal and termination of ongoing leases, even after they had been materially violated, unless the tenants seriously endangered the safety of others or damaged property significantly." *Id.* at 733. The owner argued that the orders functionally "turned every lease in Minnesota into an indefinite lease, terminable only at the option of the tenant." *Id.* (internal quotations omitted).

In evaluating this claim, the Eighth Circuit rightly acknowledged the rigorous protections that the right to exclude is afforded under *Cedar Point*. The court explained that the *Cedar Point* approach applies whenever a regulation results in a physical appropriation of property. For that reason, the court concluded that the owner had sufficiently alleged a deprivation of the right to exclude existing tenants without just compensation. *Id.* Additionally, the court correctly distinguished *Yee v. City of Escondido*, 503 U.S. 519 (1992), when it noted that "[t]he rent controls in *Yee* limited the amount of rent that could be charged and neither deprived landlords of their right to evict nor compelled landlords to continue leasing the property past the leases' termination" whereas the Minnesota executive orders "forbade nonrenewal and termination" of the ongoing leases. *Id.*

By contrast, the Second Circuit here affirmed the dismissal of Petitioners' *per se* takings claims, and in doing so misapplied *Cedar Point* and *Yee*. The court's key distinction was that here, "the [Petitioners]

voluntarily invited third parties to use their properties, and as the Court explained in *Cedar Point*, regulations concerning such properties are 'readily distinguishable' from those compelling invasions of properties closed to the public." Pet. App. at 6a (quoting *Cedar Point*, 141 S. Ct. at 2077). The court also invoked *Yee* to conclude that no taking had occurred because eviction is theoretically possible under the RSL. Pet. App. at 7a.

Each of the Second Circuit's conclusions were error. First, and most significantly, the mere fact that a property owner decides to rent his or her property to another person does not make the property open to the public. A landlord only consents to the use of the premises by the tenant(s) and their guests, not the general public. In fact, this Court specifically addressed that distinction in *Cedar Point*, distinguishing the agricultural property at issue in the case from a public shopping mall at issue in a prior case. The Court explained that "[u]nlike the growers' properties, the [shopping mall] was open to the public, welcoming some 25,000 patrons a day. Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public." 141 S. Ct. at 2076–77. Cedar Point Nursery employed over 400 seasonal workers and 100 full-time workers, none of whom resided on the property, and yet the Court rightly characterized the nursery itself as unquestionably closed to the public. *Id.* at 2070. The rental apartments at issue in this case are thus also unquestionably closed to the public, since they are only leased out to individuals who reside in them. No unit is open to the general public for business and no unit encounters traffic anywhere close to 25,000 patrons

per day. The Second Circuit's interpretation of what constitutes property "open to the public" would virtually eliminate the right to exclude from every owner of rental property.

Because of its erroneous conclusion that rental properties are "open to the public," the Second Circuit misapplied *Cedar Point* and failed to recognize a *per se* taking. This Court was clear that "[w]henever a regulation results in a physical appropriation of property a *per se* taking has occurred." *Id.* at 2072. Here, it is ineluctably clear that RSL "appropriates for the enjoyment of third parties the owners' right to exclude." *Id.* The law requires owners to continue leasing their premises beyond the agreed upon term, prevents owners from taking possession of their own property, and prevents owners from altering the designated use of their properties. In each instance, the owners' right to exclude is severely inhibited by the actions of the state or persons empowered by the state. Consequently, under *Cedar Point*, a taking has occurred, and no further inquiry is necessary.

The Second Circuit also erred when it took *Yee* to hold that no physical taking has occurred so as long as eviction is theoretically possible. In fact, although the Court found that the particular regulations at issue in *Yee* were not takings, the Court explained that "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property *or* to refrain in perpetuity from terminating a tenancy." 503 U.S. at 528 (emphasis added). The Second Circuit disregarded the pivotal "or" in this sentence. The RSL, on its face, puts owners in a position where they are required to rent their properties over objection each time a tenant stays

beyond the original lease term. And unlike the law in *Yee*, owners regulated by the RSL may not simply evict tenants upon 6 or 12 months' notice. *See id*. Owners of RSL-controlled apartments may evict tenants only for a narrow set of reasons that are entirely outside the owners' control.

The Second Circuit's conclusion that the owners of one million RSL-regulated apartments have little to no recourse under the Takings Clause for government intrusion upon their right to exclude warrants correction by this Court. This Court should grant the petition and reverse the Second Circuit before the owners of millions of additional units in New York and cities across the country have their most fundamental property rights regulated away.

III. THE COURT SHOULD TAKE THIS OPPORTUNITY TO RECONSIDER *PENN CENTRAL*

The *Penn Central* balancing test provides little guidance to the lower courts on how to identify and weigh its factors. The test's inherent lack of clarity has the practical effect of providing little meaningful protection of property rights from burdensome government regulations while also lacking any foundation in the text and history of the Constitution. The Court should take this opportunity to replace *Penn Central* with a clearer standard that is consistent with the Constitution and will better protect property rights.

A. *Penn Central*'s three-factor test is unclear and applied inconsistently by the lower courts.

Penn Central's lack of clarity is inherent in the ad hoc factual inquiry it requires. As Third Circuit Judge Bibas recently observed in a discerning concurrence,

lower courts have difficulty applying the *Penn Central* factors because "they are hard to define and thus hard to meet," and "[judges] do not know how much weight to give each factor." *Nekrilov v. City of Jersey*, 45 F.4th 662, 682–83 (3d. Cir. 2022) (Bibas, J., concurring).

This doctrinal murkiness should not come as a surprise, however, since "no reference to balancing can be found in the [*Penn Central*] opinion itself, which can easily be read not as a balancing test but as a general call for courts to consider the totality of the circumstances of the case." Adam R. Pomeroy, Penn Central *after 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 FED. CIR. BAR J. 677, 678 (2013). Justice Brennan's opinion "does not even describe [the] three factors as exclusive; they are merely *relevant considerations*." *Id.* at 679 (emphasis in original). And further, even if Justice Brennan intended to articulate a balancing test, it is unclear whether he "intended the 'investment-backed' phrase to have precedential value, or whether the phrase was adopted as a rhetorical device to adorn the 'economic impact' factor." Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 620 (2014). The opinion can be fairly read to identify only two factors. *Id.*

Critically, "[d]espite the academic consensus that *Penn Central* sets forth a balancing test," there is strong evidence that "no such consensus exists in the lower federal courts." Pomeroy, *supra*, at 679. A comprehensive study of cases citing *Penn Central* in the First, Ninth, and Federal Circuits revealed that *Penn Central* is not applied as a balancing test. *Id.* at 680. Most opinions did not discuss the three *Penn Central* factors, and those that invoked the factors did not

apply them as a balancing test. *Id.* The study found that, on average, "the courts of appeal utilized three factors slightly more than one-third of the time and utilized fewer than three factors nearly two-thirds of the time." *Id.* at 689. Ultimately, the actual practice of both district and circuit courts is to consult the *Penn Central* factors "as a checklist" and resolve regulatory takings claims "relying solely on one or two factors." *Id.*

Once the already murky *Penn Central* balancing test is watered down to only one or two factors, it also comes as no surprise that plaintiffs in regulatory takings cases have a dismal win rate. The study found that, on average, the success rate for plaintiffs in the federal courts of appeals is 8.9%. *Id.* at 696. This finding paints an even gloomier picture than prior efforts to analyze how the federal courts apply *Penn Central*. *Id.* at 698 (citing F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing under the Ad Hoc Regulatory Takings Test of* Penn Central Transportation Company, 14 DUKE ENVTL. L. & POL'Y F. 121, 141 (2003)). Tellingly, "the courts of appeals have found regulatory takings under *Penn Central* only when a claim falls barely short of being a taking under one of the categorical rules" announced in *Loretto* and *Lucas*. *Id.* at 696. This suggests that whatever balancing the lower courts engage in, it provides little meaningful constitutional protection to property owners.

To be sure, a less than stellar win rate by plaintiffs raising regulatory takings claims is not necessarily indicative of an underlying constitutional infirmity. But the fact that plaintiffs only rarely prevail in these challenges is striking considering that the Takings Clause uses absolute terms. This Court's historical emphasis

on concepts of fairness, public burdens, and disproportionality in regulatory takings cases results in a means-end analysis akin to substantive due process claims. Such analyses are "quite different in tenor from the language of the Takings Clause, which emphasizes that 'nor shall private property be taken . . . without just compensation.' There, all of the emphasis is on the 'property,' with none on the owner." Eagle, *supra*, at 614. As a result, this Court should grant review and replace the *Penn Central* test with a more workable standard that is consistent with the text of the Takings Clause.

B. This case presents the opportunity to ground the regulatory takings doctrine in constitutional text and history.

This case presents the chance to answer Justice Thomas's call to "take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment." *Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n*, 141 S. Ct. 731, 731 (2021) (Thomas, J., dissenting from denial of certiorari) (internal quotations omitted). *Amici* will not restate here all of Judge Bibas's compelling survey of the textual and historical basis for regulatory takings claims. *See Nekrilov*, 45 F.4th at 683–85. Instead, *amici* wish to slightly refine his suggestion for a regulatory takings test based on originalism and recent holdings of this Court.

Judge Bibas suggests that "the Takings Clause, [as] originally understood, would have allowed regulatory-takings claims for regulations that take a state law property right and press it into public use." *Id.* at

683. He notes that to determine whether a taking has occurred, courts should look to state law to define the property right in question prior to conducting a historical inquiry similar to the one this Court announced in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2127 (2022), "[t]o draw the line between impermissible deprivations and permissible regulations." *Id.* at 686. There is much to be commended in Judge Bibas's approach, but a stronger formulation may entail explicitly defining the property right against a *common law* backdrop as opposed to state law. There are at least two advantages to this approach.

First, this approach better captures the understanding of takings law from the Founding through the antebellum period. *See* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1229–1265 (1996). In the early days of the republic, "[t]he absence of compensation clauses in several early state constitutions did not significantly impair the recognition of compensable takings." *Id.* at 1230. "When there were no specific constitutional principles to invoke, most state courts afforded property interests the protection of the common law." *Id.* at 1232. Beginning in the 1810s and continuing through the Civil War, state courts extended this common law protection to encompass what we would now recognize as "regulatory and consequential takings." *Id.* at 1259. The most prominent principle to emerge during this period was "the strong version of the bundle-of-sticks understanding of property, which awarded compensation for the taking of any discrete property right." *Id.*

Notably, the antebellum doctrine did not include any requirements that a landowner must lose all

productive use of his property or hit some threshold diminution of value. *Id.* This expansive view of property rights would have been vital to understanding the Fourteenth Amendment's Privileges or Immunities Clause which sought to protect "basic common law rights—including the rights of private property." Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729, 752 (2008).

Second, in *Tyler v. Hennepin County*, this Court observed that state law cannot serve as the only source of property rights because "[o]therwise, a State could sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate." No. 22-166, slip op. at 5 (May 23, 2023) (internal quotations omitted). Adopting the common law understanding of the scope of property rights for regulatory takings would prevent property rights from being "so easily manipulated" by enterprising state regulators. *See Cedar Point*, 141 S. Ct. at 2076.

Grounding regulatory takings in analogous common law understandings of compensable takings would be more consistent with the original meaning of both the Takings Clause and the Fourteenth Amendment and would also provide a better standard for lower courts to apply in regulatory takings cases.

CONCLUSION

For the foregoing reasons, and those described by the Petitioners, this Court should grant the petition.

Respectfully submitted,

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