2011 WL 5909894 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

James D. HARMON, Jr. and Jeanne Harmon, Petitioners,
v.
Jonathan L. KIMMEL, in his official capacity as Member and Chair of the New York City Rent Guidelines Board, et al., Respondents.

No. 11-496.
November 21, 2011.

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

Brief Amicus Curiae of Atlantic Legal Foundation and Center for Constitutional Jurisprudence in Support of Petitioners

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***i** QUESTIONS PRESENTED

1. Does a permanent scheme of possessory rent regulation with no foreseeable end exceed the limits of the noncompensable exercise of the police power established in *Block v. Hirsh,* 256 U.S. 135 (1921), *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922) and other decisions of this Court, which upheld the constitutionality of rent regulation and tenant possession without an owner's consent, only as a temporary measure to address an "emergency" of limited duration?

2. Does the "explicit textual…constitutional protection" of the Fifth Amendment against government takings bar a substantive due process claim that possessory rent regulation is arbitrary in violation of the Fourteenth Amendment?

3. Does rent regulation that "compel[s] a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy" effect a taking proscribed by the Fifth Amendment as posited in *Yee v. City of Escondido,* 503 U.S. 519, 528 (1992)?

4. Prior to enactment of possessory rent regulation, does the Due Process Clause require that personal notice or notice by certified mail and a meaningful opportunity to be heard be provided to an owner whose property selectively is made subject to such rent regulation?

Amici curiae will address the third question.

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*1 INTEREST OF *AMICI CURIAE*[1]

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm. It provides legal representation, without fee, to scientists, parents, educators, other individuals, small businesses and trade associations. The Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating for limited and efficient government, free enterprise, individual liberty, school choice, and sound science. The Foundation's leadership includes distinguished legal scholars and practitioners from across the legal community.

Atlantic Legal Foundation has served as counsel for plaintiffs and *amici* in numerous "takings" cases, including: *Cole v. County of Santa Barbara,* 537 U.S. 973 (2002) (counsel for *amici* associations of small property owners in support of petition for certiorari in challenge to a state law procedural ***2** bar to claims for unconstitutional takings based on "ripeness"; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002) (counsel for real property owners' associations as *amici* in challenge to development moratoria); *Brody v. Village of Port Chester,* 345 F.3d 103 (2nd Cir. 2003) (co-counsel for plaintiff in challenge to taking of property for non-public use and inadequate notice of final decision to condemn under due process requirements of Fourteenth Amendment); and *Blecher v. Department of Housing Preservation and Development of the City of New York,* S.D.N. Y. 92 Civ. 8760 (CSH) (1992) (counsel for small residential property owners in Fourteenth Amendment challenge to New York City Senior Citizen Rent Increase Exemption ("SCRIE") program.

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute. Their mission is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition that private property can be taken only upon payment of just compensation. The Center

provides counsel for parties in state and federal courts and has participated as *amicus curiae* before this Court in several cases of constitutional significance, including: *Sackett v. Environmental Protection Agency,* No. 10-1062; *Stop the Beach Renourishment v. Florida Department of Environmental Affairs,* 560 U.S. ___, 130 S.Ct. 2592 (2010); ***3** *Rapanos v. United States,* 547 U.S. 715 (2006); and *Kelo v. City of New London, Connecticut,* 545 U.S. 469 (2005).

STATEMENT OF THE CASE

The Harmons own and reside in a five-story "brownstone" building on the Upper West Side of Manhattan in New York City. [2] The lot on which the building sits is zoned residential and is within the Upper West Side/Central Park West "Historic District." [Pet. 4].

The brownstone contains seven apartments, six are rented; three of the rental units are "rent-stabilized." [Pet. 5] and have been occupied by the same tenants for many years at rents that are substantially below the market rate. [Pet. 5].

The Harmons sued under 42 § U.S.C. 1983, alleging, *inter alia*, that the New York Rent Stabilization Law ("RSL"), as applied, violates their rights under the Fifth Amendment by taking their property for private use without just ***4** compensation. The district court dismissed the Harmons'claims. [App.B-25a]. The United States Court of Appeals for the Second Circuit summarily affirmed. *Harmon v. Markus,* 2011 WL 782233, 2011 U.S. App. LEXIS 4629, at *6-7.

New York City began regulating rent in 1962, when it enacted a rent control law, purportedly in response to the housing shortage following World War II. New York City Local Law No. 20 (1962).

The RSL was enacted in 1969 in response to "a serious public emergency … created by war, the effects of war and the aftermath of hostilities" and to "transition from regulation to a normal market of free bargaining between landlord and tenant" while encouraging new construction. *See* New York Local Law No. 16 (1969).

In 1974, the New York State Legislature changed the rationale for rent stabilization from the effects of war to a municipality's "vacancy rate": a municipality may declare a "housing emergency" if the vacancy rate is below five percent. New York Emergency Tenant Protection Act of 1974, §3(a). The New York City Council made such a declaration most recently in 2009, adopting Local Law No. 23. The vacancy rate has not exceeded five percent since 1969. [App. E-75a].

The district court found that the repeated "findings" and the renewal process are part of an "overarching scheme" to indefinitely continue rent stabilization [App. B-22a], which has been in effect for more than forty years.

***5** The stated goal of the RSL is to move from a rent regulated market to a free market and to encourage new residential construction. The RSL has failed to stimulate construction of non-luxury apartments or to lead to a transition from a regulated market to a free market: the housing shortage continues to exist and **"there has been a further decline in private residential construction…."** (New York City Local Law No. 23 of 2009, emphasis supplied). Approximately one million apartments, almost half of all the apartments in New York City, are rent-stabilized. [*See* App. E-59a].

Most significant for this case, the RSL gives the tenants permanent possession and lifetime tenure and succession rights, enabling them to pass on their RSL interests to others. 9 NYCRR § 2523.5(b)(1). Owners of rent-stabilized apartment buildings are required to offer renewal leases to rent-stabilized tenants, and to execute State-prescribed form leases with mandated rents and terms. [3] The RSL prohibits owners of ***6** stabilized apartments from withdrawing them from the rental market. [App. E-68a].

Owners of rent-stabilized apartments must comply with the RSL or risk monetary penalties, injunctive relief, and treble damages. [App. C-37a, E-68a].

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Leases between landlords and rent-stabilized tenants are not negotiated, and the transactions are not, on the landlords' part, in any sense "voluntary." [4]

The district court granted motions to dismiss the Harmons' Fifth Amendment, Contract Clause and injunctive relief claims on the merits, App. B-19a, rejecting their argument that the RSL was not a valid exercise of the police power and that in the ***7** absence of an emergency as this Court has defined it, the RSL is unconstitutional.

The district court found that only the owners of a building "who were parties to existing contracts" when the RSL was first enacted in 1969 had standing to assert a Contract Clause claim, [App. B-22a], that the Harmons' rights under existing contracts were not impaired since "there was no change in the law impairing any contractual relationship to which [the Harmons] were parties," [App. B-22a], and rejected the Harmons' contention that local law compelled them to renew statutory leases then in existence. [App. B-22a; App. E-62a, 69a, 70a].

The Court of Appeals held that "the RSL does not effect permanent physical occupation of the Harmons' property," [App. 5a], notwithstanding the Harmons' contention that the tenants' occupation and possession always has been due to the "legal coercion" of the RSL and "without [the Harmons'] consent." [App. E-61a-64a, 67a, 69a, 85a.]

SUMMARY OF ARGUMENT

The court below incorrectly relied on *Yee v. City of Escondido* in dismissing the Harmons' "physical takings" claim. First, the New York City Rent Stabilization Law compels an owner of rent-stabilized apartments to submit to non-consensual a permanent physical occupation of the rent-stabilized apartment units. Second, the decision in *Yee* was limited to the "unusual economic ***8** relationship between mobile home park owners and mobile home owners" which does not exist in the case of rent-stabilized apartments. Third, the relationship between rent-stabilized tenants and owners of rent-stabilized buildings presents the "Different case" contemplated in *Yee.*

The decision below is also in conflict with this Court's ruling in *Palazzolo v. Rhode Island.* The lower federal courts appear confused on the issue of when transfer of property after enactment of a regulation is sufficient to cut-off rights to claim that the regulations effect a taking without compensation. Based on the importance of individual right to own and use property to the overall scheme of liberty the Founders sought to protect, transfer of property should never be sufficient to authorize an uncompensated taking. That is indeed the lesson of this Court's ruling in *Palazzolo* and review should be granted in order to resolve the apparent confusion in the lower courts on this critical issue of fundamental liberty.

REASONS FOR GRANTING THE PETITION

I. THE COURT BELOW INCORRECTLY RELIED ON *YEE v. CITY OF ESCONDIDO* IN DISMISSING THE HARMONS' "PHYSICAL TAKINGS" CLAIM.

The Second Circuit cited *Yee v. City of Escondido,* 503 U.S. 519, 529 (1992) for the proposition that when "a property owner offers ***9** property for rental housing, governmental regulation of the rental relationship does not constitute a physical taking," [App. A 4a.] This is an overly broad application of *Yee*, and fails to recognize the unique relationship between owners of mobile homes and owners of mobile home parks upon which *Yee* was decided.

A. The Rent Stabilization Law Compels A Property Owner To Submit To A Permanent Physical Occupation.

Property rights in a physical thing are the rights "to possess, use and dispose of it." To the extent that the government permanently occupies physical property, it effectively destroys each of these rights. *Loretto,* 458 U.S. at 435. [5] "The

power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of ***10** property rights." *Loretto,* at 458 U.S. 435-436 (citations and footnote omitted). "[I]t is a taking when a state regulation forces a property owner to submit to a permanent physical occupation." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.,* 560 U.S. ___, 130 S. Ct. 2592 at 2601 (2010) (citing *Loretto,* 458 U.S. at 425-426). *See also, FCC v. Florida Power Corp.,* 480 U.S. at 252 ("required acquiescence is at the heart of the concept of occupation.").

The RSL gives tenants in rent-stabilized apartments permanent possession - lifetime tenure, and succession rights enabling them to pass on their RSL interests to others. 9 NYCRR § 2523.5 (b)(1). The RSL prohibits the owner of the building from withdrawing these apartments from the rental market. [App. E-68a.] The owners of rent-stabilized buildings cannot choose to whom they want to rent, or whether they want to rent at all. Any sale of the Harmons' building would be subject to the statutory interests of the rent-stabilized tenants, which reduces the value of the building, App. E-69a; this is almost inevitable because, as this Court recognized, "the permanent occupation of that space by a stranger will ordinarily empty the right [to dispose] of any value." *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 436 (1982). [6]

***11** The RSL effects a physical taking because it compels a landlord, "over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Loretto,* 458 U.S. at 528. Government-compelled possession by a third party is a per se taking. We submit that there is no principled difference between installing television cables or telephone poles on another's property and installing human tenants on that property.

The Second Circuit, relying on *Yee*, held the "That a rent-regulated tenancy might itself be of indefinite duration - as has long been the case under rent control and rent stabilization - does not, without more, render it a permanent physical occupation of property." But what does "without more" mean? The Second Circuit does not say. What "more" was there in *Loretto*? In the case of rent-stabilization, there is much "more": the tenant's rights are not just for one lifetime, but for the lifetimes of successors and heirs, *ad infinitum.* [7]

***12** In *Yee*, Justice O'Connor attempted to take the Escondido law out of the physical takings line of authority by reasoning that

> The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land.... But the Escondido rent control ordinance, even when considered in conjunction with the California Mobile Home Residency Law, authorizes no such thing. Petitioners voluntarily rented their land to mobile home owners.... Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government.

Yee, 503 U.S. at 527-528.

Justice O'Connor's theory that mobile home park owners "invited" the tenants to stay beyond the term of the lease and that the landlord was not compelled by the government to permit them to stay beyond the lease term is, we respectfully submit, a fiction, without which her reasoning falls. The park owners's "invitation" was for a ***13** limited time, and the State of California, by enacting the Mobile Home Residency Law converted a term lease to a virtually endless occupation. [8] We also submit that the Court's decision in *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001) vitiates this fiction, as we explain in Point II, *infra.*

There is no logical difference between requiring a landlord to initiate a tenancy with a stranger (*see* *Seawall Assocs. v. City of New York,* 74 N.Y. 2d 92 (1989), *cert. denied,* 493 U.S. 976 (1989)) and requiring that same landlord, against her will, to extend a tenancy in perpetuity on terms dictated by the state. The notion that an original tenancy, commenced

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decades ago, perhaps between different persons, somehow creates a fee-like right to continue an unwanted occupation, is neither logical nor just. [9]

***14** A lease is a conveyance that allows the tenant to remain in exclusive possession of the premises for a finite period of time, at the mutual agreement of then parties to the lease. A "holdover" tenant has few rights at common law. The landlord can evict that tenant at any time after the lease expires, and the holdover tenant is usually required to pay during the holdover period "use and occupancy" at the prevailing market rate or an agreed rate that creates strong monetary incentives to prompt removal. The person who overstays his welcome is no better than a stranger who is trespassing.

Under common law, and under most statutes governing real property holding over is a trespass. *See* Richard A. Epstein, *Supreme Neglect: How to Revive Constitutional Protection for Private Property* 71 (Oxford University Press 2008). Upon expiration of the lease, by common law and state laws governing real property, the tenant is required to vacate the premises. *See, e.g.*, N.Y. Real Property Procedures Law § 232-c. [10]

***15** The RSL overturns this "almost universal" rule by allowing the tenant to stay after the lease expires while paying the same rent, or a rent adjusted according to a state-mandated formula, but less than the free market rental value. Richard A. Epstein, *Supreme Neglect: How to Revive Constitutional Protection for Private Property* 69-70. The RSL has converted a nominal term lease into a perpetual hold on the premises. The landlord's slender, contingent and ephemeral bundle of statutory rights is no substitute for his loss of the right to regain possession of the premises upon expiration of the lease.

The RSL has the effect of limiting the apartment building owner's ability to use the property and to transfer it to others. We suggest that Judge Kozinski's reasoning in *Hall v. City of Santa Barbara,* 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 458 U.S. 940 (1988), that this limitation is a physical invasion, is correct because it is faithful to common law principles, and to Constitutional bedrock principles of consensual contract. In *Hall,* the Ninth Circuit struck down a mobile home rent control measure similar to Escondido's, finding that the rent control ordinance worked an uncompensated taking of the mobile home park owner's property by applying established "physical takings" standards. *Id.* at 1279-80.

By preventing the landlord from retaking possession, the state (or city) takes the landlord's property. It is no different, in effect, than the government occupying the apartment and then ***16** transferring it to the tenant each time the government prescribed rent-stabilized "renewal lease" is signed, an act the landlord is compelled to do by the government.

B. The Decision In *Yee* Was Limited To The Unusual Economic Relationship Between Mobile Home Park Owners And Mobile Home Owners, Which Is Not Analogous to Rent-Stabilized Apartment Owners and Tenants.

Yee is distinguishable from this case. The Circuit Court inappropriately applied *Yee* outside of the mobile home park context, App. A 4a.

The issue in *Yee* was whether the local ordinance effected an unconstitutional taking when it prevented mobile park owners from evicting mobile home owners who leased "pads" from them after the termination of the leases. The Court in *Yee* based its decision on the "unusual economic relationship between park owners and mobile home owners." *Yee* at 526.

> The term "mobile home" is somewhat misleading. Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself. They are generally placed permanently in parks.... The park owner provides private roads within the park, common facilities such as washing machines or a swimming pool, and often ***17** utilities. The mobile home owner often invests in site-specific improvements such as a driveway, steps, walkways, porches, or landscaping. When the mobile home owner wishes to move, the mobile home is usually sold in place, and the purchaser continues to rent the pad on which the mobile home is located.

Id. at 523.

The Court noted that California sought to give mobile homeowners "*unique* protection from… eviction" because of the high costs of installation, landscaping, lot preparation and removing the mobile home. *Yee* at 524 [emphasis supplied]. Mobile home owners have an investment in their dwellings that equals or exceeds the pro rata investment of the park owner in the pad and attendant amenities.

"[T]he leverage held by mobile home park owners over their tenants, who are unable to transfer their homes to a different park except at great expense," *Eastman Kodak Company v. Image Technical Servs., Inc.,* 504 U.S. 451, 458 (1992), citing *Yee*, simply does not exist in rent-stabilized buildings. Indeed, in most cases of apartment dwelling rent control or rent stabilization, the tenant's "investment" is limited to personalty, such as furniture, small appliances and personal effects, whereas the landlord owns not only the land, but also all, or virtually all, improvements.

***18 C. The Relationship Between Rent-Stabilized Tenants And Owners Of Rent-Stabilized Buildings Presents The "Different Case" Contemplated in *Yee*.**

Yee contemplated

> A different case…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.

New York City's Rent Stabilization Law and regulations meet the criteria of that "different case." The RSL forbids building owner from withdrawing the rent-stabilized apartments from the market. N.Y. Comp. Codes R. & Regs. tit. 9 NYCRR 2524.5(a)(1)(i-ii) whereas the Escondido ordinance (Escondido Mobilehome Rent Control, art. V, § 29-101-108 (1988)) did not compel owners "once they have rented their property to tenants, to continue doing so." *Yee* at 527-528. The RSL requires rent-stabilized apartment owners to offer and execute lease renewals for as long as the tenant or the tenant's successors reside in the apartment.

"[I]t is a taking when a state regulation forces a property owner to submit to a permanent physical occupation." *Stop the Beach,* 130 S. Ct. at 2601 (citing *Loretto,* 458 U.S. at 425-426). *See also, FCC v. Florida Power Corp.,* 480 U.S. at 252 ("required acquiescence is at the heart of the concept of ***19** occupation."); *Yee,* 503 U.S. at 527 ("… the government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land....."). Owners of rent-stabilized apartments are required to "acquiesce" in the tenants' continued occupation of the rent-stabilized apartments only because the RSL compels them to sign "renewal" leases.

The rent-stabilized tenants have succession rights, thereby denying the building owner "[t]he power to exclude, [which] has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto,* 458 U.S. at 435 (citations omitted); *see also Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 539 (2005) (the "right to exclude others from entering and using her property [is] perhaps the most fundamental of all property interests"); *see also* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* at 66 (Harvard University Press 1985) ([P]rivate property gives the right to exclude others without the need for justification…which is the essence of freedom….")

The lower courts' suggestion that the Harmons can "easily escape" the strictures of rent stabilization [App. B-23a, 4a] by demolishing the building and replacing it with a non-residential building, or selling the building, ignores legal and financial reality. The lot on which the building sits is zoned residential, and is in an "Historic District" and cannot be

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used for non-residential building. Demolition and reconstruction for a ***20** different use, even if permitted, would be prohibitively expensive. In addition, as a condition of being allowed to terminate the rent-stabilized tenants, the landlord would be required to pay each tenant a cash stipend plus moving expenses, and to provide "an equivalent or superior housing accommodation at the same or lower regulated rent in a closely proximate area to the building." *See* New York State DHCR, Operational Bulletin 2009-1 (September 19, 2002). Given the shortage of affordable housing and the below-market rates for units in the Harmons' building resulting from rent stabilization, this is impossible. [11]

*21 II. LAWS REGULATING PROPERTY USE DO NOT BECOME "BACKGROUND PRINCIPLES" MERELY BECAUSE THE LAW WAS IN EXISTENCE AT THE TIME THE PROPERTY WAS ACQUIRED

A. The *Palazzolo* Decision Reflects The Importance Of An Individual's Property Rights Derived From The Founders.

This Court in *Palazzolo v. Rhode Island,* 533 U.S. 606, 629-30 (2001) held that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of passage of title." Rhode Island had argued for a rule denying property owners the right to challenge uncompensated takings that resulted from regulations in effect on the date of purchase. *Id.* at 613. This Court rejected that argument. States are not permitted "to put an expiration date on the Takings Clause." *Id.* at 627.

States and localities may not argue that the existence of the regulation is sufficient to put future purchasers "on notice." Notice cannot justify schemes that strip the "newly regulated landowner of the ability to transfer the interest which was possessed prior to the regulation." *Id.* A contrary rule "would work a critical alteration to the nature of property." *Id.*

In his concurring opinion, Justice Scalia answered the question of whether the Court's ruling creates a windfall for the later purchaser. What happens ***22** if the subsequent owner purchased at a discount because of the regulation? Does allowing this owner to challenge the regulation create the possibility of a windfall? As Justice Scalia noted, there may be something to be said for pursuing abstract notions of fairness.

> But there is nothing to be said for giving [the windfall] instead to the *government* -- which not only did not lose something it owned, but is both the *cause* of the miscarriage of "fairness" and the only one of the three parties involved in the miscarriage (government, naive original owner, and sharp real estate developer) which *acted unlawfully* -- indeed *unconstitutionally.*

Id. at 637 (Scalia, J., concurring) (emphasis in original).

The concern of the Court regarding "the nature of property" and the concerns voiced in Justice Scalia's concurrence arise from an understanding of the importance of property rights to American liberty. The *Palazzolo* decision sought to protect important principles of individual liberty that are enshrined in the Fifth Amendment. The Founders saw individual rights in property as the foundation for other individual liberties.

If the time of transfer of title determines the validity of a takings claim, then the government earns a "commission" on every transfer of property - gaining more power at the expense of individual liberty every time property changes hands. This ***23** Court in *Palazzolo* rejected such a "critical alteration to the nature of property." *Palazzolo,* 533 U.S. at 627. Yet the lower courts continue to acquiesce in takings of private property simply on the basis that the owner took title after enactment of the regulation. Because of the importance of the individual rights in property to our system of liberty, it is especially critical for this Court to review Circuit Court of Appeals' decisions that depart from the critical rule announced in *Palazzolo.*

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The Founders believed liberty was a fundamental law of nature and allowed individuals to control their own lives. James Madison, "Property," (1792) in 1 *The Founders' Constitution* 515 (Univ. of Chicago Press 1987); James Madison, "Sovereignty" (1835), in 9 *Writings of James Madison* 570-71 (Galliard Hunt ed. 1910; John Adams, "Defence of the Constitution of the United States," in 1 *The Founders' Constitution* 591 (Univ. of Chicago Press 1987); Gouverneur Morris, "Political Enquiries," (1776) in 1 *The Founder's Constitution* 587 (Univ. of Chicago Press 1987); Timothy Sandefur, *Cornerstone of Liberty: Property Rights in 21st Century America* 52 (2006). Private property ownership is essential to liberty because it is a direct manifestation of a person's ability to pursue their goals. Adams, *supra.*

To maintain this inherent right, the role of government envisioned by the Founders was to protect an individual's life, liberty and property. *See* Declaration of Independence, ¶ 2, 1 Stats 1. ***24** Since the government was created to protect liberty and the property that flows from it, it is contradictory to then allow the government to take the private property it was meant to protect. The Fifth Amendment was a way to guard against this possibility. As noted by Sir William Blackstone, whose views on compensation for takings arguably influenced James Madison's in drafting the Fifth Amendment: "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community." William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* at 135 (1979); *see also* Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 Am. U. L. Rev. 181, 223 (1999). Blackstone maintained the importance of law to *protect* private property and reasoned that any violation of that law, including a taking by the government, required consent and compensation. *Id.* Madison emulated Blackstone's idea when he remarked that an individual's liberty is secured by his property and a government that takes this property without compensation is not a "just government." Madison, "Property," *supra*, at 598, 599.

Although the Fifth Amendment seems to maintain the government's role in protecting property rights, broad exceptions to the duty to pay compensation threaten to transform the government's role from protector to thief. Property ***25** is in danger of becoming more of a privilege than a fundamental right and this privilege is revocable at the whim of the government. Such an "attitude leaves us at the mercy of lobbyists and politicians - and transforms government from a peacekeeper into a real estate agent. That was not what American's Founding Fathers had in mind." Sandefur, *supra*, at 49.

B. The Second Circuit's Decision Is In Direct Conflict With *Palazzolo.*

The Second Circuit noted that the Harmons purchased their property "with full knowledge that it was subject to the" Rent Stabilization Law. This was sufficient for the lower courts to conclude that such knowledge amounted to an acquiescence in the property's "continued use as rental housing," thus absolving the State of New York from any takings liability for the effect of that property regulation. The Second Circuit did not attempt to distinguish its ruling from this Court's decision in *Palazzolo.* Indeed, the lower court did not even cite *Palazzolo.*

The Rent Stabilization Law cannot become a background principle of New York law. A state regulation that permits permanent occupation of another's property does not become less objectionable simply because the property owner was on notice of the law at the time of purchase. *Palazzolo,* 533 U.S. at 627.

The Takings Clause protects against regulations that compel property owners to suffer permanent ***26** occupation of their property - no matter how slight. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 434-35 (1982). This Court has long noted that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979).

There is, of course, one difference between the takings claim at issue in *Palazzolo* and the one at issue in this case. In *Palazzolo*, the property owner's claim was dependent on a regulatory takings theory -- that is, a claim that a state regulation rendered some or all of the property valueless. *Palazzolo,* 533 U.S. at 617. In this case, by contrast, the claim

is that state law in effect requires the owner to suffer a permanent occupation of the property. Yet such a claim has always been thought to be a clearer example of an unconstitutional taking. *Id.* (citing *Loretto,* 458 U.S. at 427). This Court in *Loretto* noted that a government regulation imposing a permanent physical occupation "is perhaps the most serious form of invasion of an owner's property interest." *Loretto,* 458 U.S. at 435.

Palazzolo teaches that it is important to prevent government from cutting off regulatory takings challenges because of the mere transfer of property from one owner to another. It is even more important to prevent such a transfer from insulating government from a challenge to a law that imposes a permanent physical occupation. "To allow people to vindicate their rights in federal ***27** court, judges must be required to consider the justice, not the timing, of a challenged regulation." Sandefur, *supra*, at 123.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Footnotes

1 Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Copies of those consents have been lodged with the Clerk. *Amici* provided the notice of intent to file to all parties as required by Rule 37.2.
Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

2 The lower courts' assertion that the Harmons acquired the property long after rent stabilization was adopted is dubious. The Harmon family has owned the building since 1949, twenty years before rent stabilization was enacted, when Mr. Harmon's grandparents bought it. Mr. Harmons' parents bought the building from the grandparents in 1953, sixteen years before rent stabilization. In 1994 Mr. Harmon and his brother inherited the building, also inheriting the three tenants who were and remain, seventeen years later, in possession of rent-stabilized apartments. Mr. Harmon purchased his brother's interest in 2005. [Pet. at 4-5.]

3 Pursuant to the RSL, the City established the Rent Guidelines Board to review and adjust annually the percentage increase of the rent that landlords of rent-stabilized apartments may charge their tenants. In establishing the maximum rent increase, the Guidelines Board must consider:
(1) the economic condition of the residential real estate industry in the city of New York, including such factors as the prevailing and projected (a) real estate taxes and sewer and water rates, (b) gross operating and maintenance costs… (c) costs and availability of financing… and (d) overall supply of housing accommodations and overall vacancy rates;
(2) relevant data from the current and projected cost-of-living indices for the New York metropolitan area;
(3) such data as may be available from the conciliation and appeals board…and such other information and data as may be made available to it.
New York City Local Law No.23 (2009).

4 A sale of the Harmons' building would be subject to the statutory rights of the rent-stabilized tenants, reducing the value of the building. *See* App. E-69a.

5 The Court in *Loretto* aptly described the situation:
The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, cf. *Andrus v. Allard,* 444 U.S. 51, 65-66 (1979), 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, 458 U.S. at 435-436.

6 In *Loretto* the Court made it clear that permanent physical invasions were per se unconstitutional. The installation of cable TV facilities on an apartment building was deemed to be such a permanent invasion, primarily because of the nature of the invasion, not the economic magnitude of the burden placed on the landlord. *Loretto,* 458 U.S. at 434-35.

7 Justice O'Connor's majority opinion noted that the essential feature of a *Loretto-style* taking is that the government "requires the landowner to submit to the physical occupation of his land" -- a situation which the Court did not find to exist in *Yee.* We

respectfully submit that the virtually permanent presence of a tenant is a "physical occupation." The fact in *Yee* that sometime in the past the mobile home park owner had "invited" the mobile home owners to use the pads is (503 U.S. at 528-529), we submit, no justification for converting a consensual contractual relationship into an involuntary permanent relationship. We submit that this conversion is inconsistent with the Court's reasoning in *Fla. Power Corp.,* 480 U.S. at 252 ("This element of required acquiescence is at the heart of the concept of occupation.").

8 The Escondido ordinance limited rent increases the mobile home park owner could charge and California state law limited park owner's ability to terminate a mobile homeowner's tenancy, Cal.Civ.Code § 798.56 (West Supp.1992), or to prevent the tenant from selling or assigning his or her leasehold interest in the mobile home. Cal.Civ.Code §§ 798.71-798.79 (West 1982 & Supp.).

9 The limited rights of the owner of a rent-stabilized apartment building to terminate a rent-stabilized tenant under exigent circumstances does not vitiate this principle. Presumably in *Loretto* the building owner could terminate the cable company's right to maintain equipment on the building owner's property if the cable company refused to pay rent, created safety hazards because of defective equipment or otherwise, or created a nuisance.

10 Section 232-c provides: "In the case of such a holding over by the tenant, the landlord may proceed, in any manner permitted by law, to remove the tenant, or, if the landlord shall accept rent for any period subsequent to the expiration of such term, then, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term."

11 The possibility the landlord could recover the premises for the purpose of demolishing the building, so long as the new construction was not for housing accommodations, is not a viable option, particularly in the Harmons' case, since one of the apartments in the building is their principal residence, and what sane person would destroy his own home to evict a tenant who has overstayed his welcome? Indeed, given one of the overall purposes of the RSL - to create more housing - it is irrational.

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