No. 23-1148

IN THE
Supreme Court of the United States

G-MAX MANAGEMENT, INC., ET AL.,
PETITIONERS,

V.

STATE OF NEW YORK, ET AL.,
RESPONDENTS.

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

Amicus Curiae Brief Of The
Small Property Owners of San Francisco Institute
Supporting Petitioners

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae The Small Property Owners of San Francisco Institute ("SPOSFI") is a California nonprofit corporation (Internal Revenue Code § 501(c)(3)) and organization of small property owners that advocates for home ownership and the rights of property owners in San Francisco. SPOSFI's members range from young families to the elderly on fixed incomes, and its membership cuts across all racial, ethnic, and socio-economic strata.

SPOSFI is also involved in education, outreach and research. Through education, it helps owners better understand their rights and learn how to deal with local government; through outreach to community groups and to the public, it demonstrates how restrictive regulations harm both tenants and landlords, and through research projects, it aims to separate hyperbole from fact on the effect of rent control on housing stock. Through legal advocacy, SPOSFI seeks to protect the rights of small property owners against unfair and burdensome regulations.

SPOSFI has filed amicus curiae briefs in this Court in other land use and rent control cases.

INTRODUCTION

Philosophical differences between landlords and tenants are hardly new. Nor are they strangers to this Court. However, the "solutions" now being

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[1] No counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission. The parties were timely notified.

devised by some government agencies (sometimes by state legislatures, sometimes by city councils, sometimes by voter initiative measures voted in by the tenants themselves) to perceived problems in the residential rental setting have gone beyond this Court's consistent teachings about property takings. Compulsory, uncompensated transfers of interests in property are becoming commonplace.

This case provides the Court with the opportunity to reexamine, revise, and enforce the standards for Fifth Amendment takings evaluation in the residential rental context. SPOSFI prays that the Court take the opportunity and rationalize this confused area of constitutional law.

SUMMARY OF ARGUMENT

Although this Court has permitted property and wealth redistribution schemes in the past, it has never done so unless the party whose property was being taken was compensated. Indeed, the presence of compensation has been the key to upholding such schemes. *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984); *Berman v. Parker,* 348 U.S. 26 (1954). As this Court put it in *Berman*, when explaining why it was permitting a forced transfer of property from one citizen to another through the government's coercive eminent domain power:

> "The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." 348 U.S. at 36.

The State, the City, and their allies focus on what they view as the needs and problems of lower income tenants. Indeed, the Second Circuit's opinion is based on its own recent opinion in which it discussed this rent regulation scheme as "part of a decades-long legislative effort to address the myriad problems resulting from a chronic shortage of affordable housing in the City." *Community Housing Improvement Program v. City of New York*, 59 F.4th 540 (2d Cir. 2023). New York's highest court considers this scheme a "local public assistance benefit" albeit provided by private property owners. *In re Santiago-Monteverde*, 24 N.Y.3d 283, 290 (2014). Neither the members of SPOSFI nor, we suspect, the New York landlords we are supporting, are unsympathetic to the problems of their tenants. The members represented by SPOSFI, for example, are not large, faceless, corporate bureaucracies out of touch with the real world. Most of them are small "mom and pop" operations.

Ends and means. As is so often true in constitutional litigation, that's what this case is about.

The problem arises when simplistic solutions are chosen for complex problems; when, in haste, one-sided "cures" are devised. The means chosen are now before this Court.

To meet perceived needs, New York has cast its net too broadly. It has transferred palpable interests in property from landlords to tenants. Without compensation. That, the constitution forbids.

ARGUMENT

I
"THE POLITICAL ETHICS REFLECTED IN THE FIFTH AMENDMENT REJECT CONFISCATION AS A MEASURE OF JUSTICE."[2]

It is hard to improve on this Court's vintage words.[3] However, what the Second Circuit has approved is the precise opposite of this Court's simple and fair summary of the Just Compensation Clause's mandate.

A.
A Complete Takeover of Property Would Unarguably be a Taking.

Perhaps, by contrast, a hypothetical can illustrate the reality facing owners of apartment buildings in New York today.

Suppose that the City of New York decided that a large set of apartment buildings housed the city's poorest citizens and, to protect them from joining the ranks of the homeless, the city decided to acquire all those apartment buildings to maintain as low-income housing. To accomplish that, the city assembled the apartments' owners and informed

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[2] *United States v. Cors,* 337 U.S. 325, 332 (1949).

[3] Professor Michelman's classic expansion on that thought is worth noting, nonetheless: "any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all." Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165, 1181 (1967).

them that the city was taking them over. A sort of *coup de apartments*. In exchange for title to their properties, the owners would receive contracts to manage the new city-owned buildings and would be paid a salary based on a percentage of the rent collected. But the city would set the rent; the rental rates would change only when the city decided they could; funds for upkeep, insurance, and maintenance would have to come from the rents collected or money borrowed by the "managers," as the city would invest no money of its own; and the tenants could either remain in perpetuity or designate their successors in interest.

Had the City of New York actually commandeered title to the properties and placed it in the City's name, there is no doubt that a Fifth Amendment violation would have occurred. Property would have been taken for public use without any compensation changing hands. The acquisition of title would have made the taking obvious.

As this Court explained:

> "government action that works a taking of property rights *necessarily* implicates the 'constitutional obligation to pay just compensation.' [Citation.]" *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 315 (1987); emphasis added.

When legislation is enacted which takes property with no intent to provide compensation, the

legislation is invalid. *Hodel v. Irving,* 481 U.S. 704 (1987).[4]

How does the hijacking of title from the apartment owners in the hypothetical differ from what the New York law actually did to these apartment owners? In only one meaningful way: In the hypothetical, the owners would be relieved of the dubious honor of paying taxes on the property, as they would no longer hold title to it. As the New York Court of Appeals put it in its enduring exposition on the difference between overt and covert confiscation:

> "The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden." *Arverne Bay Constr. Co. v. Thatcher,* 15 N.E.2d 587, 592 (N.Y. 1938).

Aside from the taxation issue, the New York law has stripped apartment owners of all useful indicia of ownership. Hyperbolic as this may sound, it is the reality. The stringent New York regulations have reduced the ownership of an apartment building in New York to something akin to a public utility, where all decisions are made by the government and the titular owners of the properties have lost not

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[4] The statute in *Irving* was intended to solve a problem caused by intestate succession to miniscule Native American estates. In the process, however, the property right of devise and descent was taken from current owners without any intent to pay for taking that "stick" from the bundle of rights. As a result, this Court struck down the statute.

only control over what they can charge and who they can rent to, but have been compelled to transfer substantial property interests to their tenants with no compensation whatever.

B.
A Compelled Transfer of a Recognizable Interest in Property is a Taking.

As noted earlier, this Court approved Hawaii's plan for land reform and its use of the power of eminent domain to accomplish the breakdown of a feudal land tenure system (*Hawaii Housing Authority v. Midkiff*) and also approved the concept of urban redevelopment in the District of Columbia and its use of the power of eminent domain to assemble large tracts of land for resale to developers who would redevelop decayed city cores (*Berman v. Parker*).

In neither case, however, was there any doubt that compensation was a key element in the package. Indeed, the entire discussion in *Midkiff* was directed at the "public use" aspect of the Fifth Amendment because, as the unanimous opinion put it, "we assume for purposes of these appeals that the weighty demand of just compensation has been met …." 467 U.S. at 245. Absent this Court's ability to make that crucial assumption, the land title reform system which compelled the transfer of fee simple title from landlords to tenants could not have passed constitutional muster.

Nor is this surprising. The extent of the power of eminent domain has been described in terms more suited to breathless ingenues than judges:

> "The power of eminent domain, next to that of conscription of man power for war, is the most awesome grant of power under the law of the land." *Winger v. Aires,* 89 A.2d 521, 522 (Pa. 1952), quoted in *City of Oakland v. Oakland Raiders*, 174 Cal.App.3d 414, 419 (1985).

When recognized property interests are compulsorily transferred from a private citizen on orders from the government, compensation is mandated:

> "This Court has stated that a sovereign 'by ipse dixit, may not transform private property into public property without compensation …. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984), quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 161 (1980).

In the context at bar, there is no issue that such a transfer has taken place. Wordplay alone stands between these apartment building owners and the property right which has been taken from them and given to their tenants.

C.
A Taking Occurs When Government Commands a Property Owner to Stand Aside and Permit Physical Occupation of Property by Another.

1. The General Rule is That Physical Occupation is a Taking.

The New York scheme goes beyond mere wealth transfer. It commands property owners to permit permanent physical occupation of their property by strangers.

Physical invasion has always been viewed by this Court as a particularly obnoxious form of governmental intrusion, one which can more readily be seen as a Fifth Amendment violation. *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 122 (1978); *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 436.

"Property" consists of many things. Indeed, the concept is so complex that this Court has repeatedly used the bundle of sticks analogy to help illustrate it, concluding that either the taking of an entire "stick" from the "bundle" or the taking of a part of all "sticks" in the "bundle" violates the Just Compensation Clause of the Fifth Amendment.[5]

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[5] E.g., *Kaiser Aetna v. U.S.,* 444 U.S. 164, 176 (1979); *Loretto*, 458 U.S. at 433, 435; *U.S. v. Security Indus. Bank,* 459 U.S. 70, 76 (1982); *Ruckelshaus v. Monsanto Co.,* 467 US 986, 1011 (1984); *Hodel v. Irving,* 481 U.S. 704, 716 (1987); *Nollan v. California Coastal Commn.,* 483 U.S. 825, 831 (1987).

The "sticks" obviously affected here are the right to exclude others from one's property, the right to possession of one's

One "stick" which has received special protection from this Court has been the right of property owners to exclude others from their property. This Court has repeatedly referred to the right to exclude others as "one of the most essential"[6] and "most treasured strands in an owner's bundle of property rights."[7]

Moreover, the Court has been particularly protective against governmental actions which permit strangers to invade the property of others:

> "This is *not* a case in which the Government is exercising its regulatory power in a manner that will cause an *insubstantial devaluation* of petitioners' private property; rather, the imposition of the navigable servitude in this context will result in *an actual physical invasion* of the privately owned marina." *Kaiser Aetna*, 444 U.S. at 180 (emphasis added); see also *Loretto*, 458 U.S. at 436.

Like *Kaiser Aetna*, this case does not involve "insubstantial devaluation" of property. The actual physical transfer of interests effected by the law causes injury to the apartment owners which is evident and substantial.

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property and, because of the wealth transfer aspects of the ordinances, the right to alienate one's property.

[6] *Kaiser Aetna*, 444 U.S. at 176; *Loretto*, 458 U.S. at 433, *Ruckelshaus*, 467 U.S. at 1011, *Irving*, 481 U.S. at 716; *Nollan*, 486 U.S. at 831.

[7] *Loretto*, 458 U.S. at 435.

This Court later explained its rule as affording protection to a property owner against "an interloper with a government license." *FCC v. Florida Power Corp.,* 480 U.S. 245, 253 (1987).[8] That analogy seems apt here, where the New York law permits—or, more properly, requires—an unending stream of strangers to occupy the apartment units.

Coerced acceptance of physical invasion is enough—by itself—under this Court's precedents to find a taking. However, the New York intrusion may be qualitatively worse than the others already condemned by this Court. For here we are not talking about boats on a waterway (*Kaiser Aetna*) or strollers on a beach (*Nollan*) or wires in a building (*Loretto*). Here, we are talking about living quarters. The landlords have lost all ability to determine who will live in their buildings. That control has shifted to their tenants.

2. *Yee v. City of Escondido* Is Not Compatible With Settled Law.

The Second Circuit thought that *Yee v. City of Escondido*, 503 U.S. 519 (1992), a mobile home rent control case, compelled its action. That conclusion is in error. *Yee* was, in fact, an aberration that ought to be recognized as such and discarded.

Yee was based on two concepts that are antithetical to this Court's takings jurisprudence, both past and present. First, it is based on the idea that only coerced physical occupation offends the

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[8] Or, as Professor Tribe colorfully expressed it, "government-invited gatecrashers." Laurence Tribe, American Constitutional Law § 9-5 at 602 (2d ed 1988).

Fifth Amendment; and second, it relies on the fact that the regulation did not completely eliminate the property owner's interests. This Court's cases are contrary on both counts.

First, the Court's physical takings jurisprudence is not limited to coerced physical occupation. The Court's physical takings cases are based on facts on the ground. In *United States v. Causby*, 328 U.S. 256 (1946), for example, the taking was caused by overflights. In *Pumpelly v. Green Bay Co.*, 13 Wall. (80 U.S.) 166 (1872), the taking was caused by unintended flooding. *Nollan* authorized casual beach use. Although, to be sure, some physical takings cases are based on coerced physical occupation, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), plainly all are not. The question is whether there was a sufficient physical invasion to compromise property rights.

Second, *Yee* found no taking because the owners retained significant value. The courts below magnified this holding by undermining the "bundle of sticks or rights" concept that this Court has consistently used. According to them, a physical taking cannot occur unless government action takes "the entire bundle" of rights. *Community Housing*, 59 F.4th at 547. But that has never been the test. This Court has viewed each of the component sticks in the bundle as being property protected by the Takings Clause. See, e.g., *Kaiser Aetna*, 444 U.S., at 176, describing the right to exclude as "*one of* the most essential sticks" in the bundle (emphasis added); *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (same); *U.S. v. Security Indus. Bank*, 459 U.S. 70, 76 (1982) (security interest); *United States v.*

General Motors Corp., 323 U.S. 373, 378 (1945) (rights "to possess, use and dispose"); *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510, 528 (1941) (rights of bondholders in bankruptcy); *Babbitt v. Youpee*, 519 U.S. 234, 242 (1997) (right of devise; "completely demolish *one* of the sticks") (emphasis added); *Loretto*, 458 U.S. at 533 ("*one of* the most essential sticks") (emphasis added); *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2069 (2021) ("*one of* the most important sticks") (emphasis added); *Ruckelshaus*, 467 U.S. 986, 1011 (1984) (trade secret); *Stewart v. Abend*, 495 U.S. 207, 253 (1990) (right to prevent derivative publication); *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 143 S.Ct. 1258, 1261 (2023) (right to derivative works).

If there were any doubt, the Court swept it away in *Horne v. Department of Agriculture*, 576 U.S. 350, 362-63 (2015), where the Court held that leaving the property owner with one stick out of the bundle is not sufficient to avoid a taking: "Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion. The answer is no." Leaving property owners with one (or more) of the sticks in the bundle they began with does not immunize the government from takings liability. *See* Richard A. Epstein, *The Unfinished Business of Horne v. Department of Agriculture*, 10 NYU J.L. & Liberty 734, 758-61 (2016).

In short, the underpinnings of *Yee* have been done away with by more recent decisions, to the extent they had validity in the first place.

In 2019, the Court did not shy away from overruling another aberrant Takings Clause ruling from that developing era in this field of the law, i.e., *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), overruled in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). *Knick* discarded *Williamson County* because it was "not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence." *Knick*, 139 S.Ct. at 2178. So, too, with *Yee*.

II.
Good Intentions Are Constitutionally Irrelevant.

This brief does not challenge the good intentions of the New York government to care for lower income residents. The question, however, is should their good intentions count for anything in this constitutional analysis, as the Second Circuit believed (App. 9)? In a word, no.

That New York professes to be seeking to do good is beside the point. It proceeds as though recognition of a legitimate governmental *goal* validates whatever *solution* is chosen. And the Second Circuit bought into that. (App. 9; *Community Housing Improvement Program*, 59 F.4th 540.) Not relevant. Determination of a legitimate governmental objective is the first, not the last, step. We distinguish between means and ends, and the means

chosen to achieve the objective must survive Constitutional scrutiny the same as the ends.

Good intentions are constitutionally irrelevant, although they may be legally and morally necessary. For the proper exercise of any governmental power, the underpinning of such a beneficent purpose must exist. That much was settled no later than 1922, when this Court examined a statute designed to stop land subsidence caused by underground coal mining and concluded that the prerequisites for exercise of *both* police power *and* eminent domain were present:

> "We assume, *of course*, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of the power of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall."[9]

More recent authority echoes that conclusion: "the Takings Clause *presupposes* that the government has acted pursuant to a valid public

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[9] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (emphasis added). *See also Florida Rock Indus, Inc. v. United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994): "It is necessary that the Government act in a good cause, but it is not sufficient. The takings clause already assumes the Government is acting in the public interest …." More than that, it assumes that the Government is acting pursuant to lawful authority. If not, the action is *ultra vires* and void. Compare *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (unlawful wartime seizure voided) with *United States v. Peewee Coal Co.*, 341 U.S. 114 (1951) (compensation mandatory after lawful wartime seizure).

purpose." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 543 (2005) (emphasis added).

Once it is determined that the government action is done to achieve a legitimate goal, then the means chosen must be examined against the constitutional matrix to ensure that private rights have not been violated. Governmental power is not permitted to run roughshod over the constitutionally protected rights of individuals. That is what the Court was talking about when it concluded in *First English* that:

> "many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them." 482 U.S. at 321.

Pennsylvania Coal was merely one in a long line of decisions in which this Court—speaking through various voices along its ideological spectrum (*Pennsylvania Coal* having been authored for the Court by Justice Holmes)—patiently, and consistently, explained to regulatory agencies that the general legal propriety of their actions and the need to pay compensation under the Fifth Amendment present different questions, and the need for the latter is not obviated by the virtue of the former.

The Second Circuit, however, seems not to have gotten the message. Its opinion in an earlier rent control opinion relied on below in this case opens by explaining that the regulations before it were "part of a decades-long legislative effort to address the myriad problems resulting from a chronic shortage

of affordable housing in the City." *Community Housing Improvement Program*, 59 F.4th at 543. As if that justified the severe regulations adopted here by the city. Emphasizing the point, the dissenting opinion in *Pennsylvania Coal* had argued the absolute position that a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking."[10] Eight Justices rejected that proposition.

In *Loretto*, New York's highest court upheld a statute as a valid exercise of the police power, and therefore dismissed an action seeking compensation for a taking. This Court put it this way as it reversed:

> "The Court of Appeals determined that § 828 serves [a] legitimate public purpose … and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid*."[11]

Similarly, in *Kaiser Aetna*, the Corps of Engineers decreed that a private marina be opened to public use without compensation. This Court disagreed, and explained the relationship between justifiable regulatory actions and the just compensation guarantee of the Fifth Amendment:

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[10] 260 U.S. at 417 (Brandeis, J. [Holmes' usual constitutional soulmate], dissenting).

[11] 458 U.S. at 425 (Marshall, J.) (emphasis added).

> "In light of its expansive authority under the Commerce Clause, there is *no question* but that Congress *could* assure the public a free right of access to the Hawaii Kai Marina if it so chose. *Whether a statute or regulation that went so far amounted to a taking, however, is an entirely separate question*."[12]

Or, as the Court put it in *Nollan*:

> "That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose.'"[13]

That is why the Court concluded in *First English* that the Fifth Amendment was designed "to secure *compensation* in the event of *otherwise proper interference* amounting to a taking."[14] This bedrock principle of the law of constitutional remedies goes back to the unanimous decision in *Hurley v.*

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[12] 444 U.S. at 174 (Rehnquist, J.) (emphasis added).

[13] 483 U.S. at 841 (Scalia, J.).

[14] 482 U.S. at 315 (Rehnquist, C.J.) (first emphasis, the Court's; second emphasis added).

Kincaid,[15] where the Court held that the basic remedy for a taking resulting from valid governmental action is just compensation, not judicial second-guessing of governmental policies and decisions through disruptive injunctions.[16]

In a similar vein are cases like *Preseault v. I.C.C.*,[17] *Ruckelshaus v. Monsanto Co.*,[18] *Dames & Moore v. Regan*,[19] and the *Regional Rail Reorganization Act Cases*.[20] In each of them, the Court was faced with the claim that Congress, in pursuit of legitimate objectives, had taken private property without just compensation. The goal in each was plainly legitimate (respectively, the creation of recreational trails over abandoned railroad right-of-way easements; obtaining expert input prior to licensing pesticides, dealing with the issue of compensation in the aftermath of the Iranian hostage crisis; and widespread railroad bankruptcy). Nonetheless, the Court did not permit those virtuous legislative goals to trump the constitutional need for compensation when private property was taken in the process. In each, the Court directed the property owners to the Court of Federal

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[15] 285 U.S. 95 (1932) (Brandeis, J.).

[16] Justice Brandeis' opinion for the Court in *Hurley* shows his acceptance of the Court's holding in *Mahon* that takings require compensation. Justice Brandeis had been the lone dissenter in the latter case, expressing the belief (abandoned in *Hurley*) that valid regulation does not require compensation.

[17] 494 U.S. 1 (1990) (Brennan, J.).

[18] 467 U.S. 986 (1984) (Blackmun, J.).

[19] 453 U.S. 654 (1981) (Rehnquist, J.).

[20] 419 U.S. 102 (1974) (Brennan, J.).

Claims[21] to determine whether these exercises of legislative power, *though substantively legitimate*, nonetheless required compensation.[22]

This consistent teaching probably explains why the Court of Appeals for the Federal Circuit (forum for takings cases against the United States), has had no trouble recognizing that the Just Compensation Clause operates against proper governmental action:

> "In such cases the characteristic feature is the defendant's use of rightful … regulatory rights to control and prevent exercise of [private] ownership rights the defendant is unwilling to purchase and pay for."[23]

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[21] When litigation is brought in that court, the Court of Appeals for the Federal Circuit has consistently affirmed judgments making the United States liable for takings that precluded development in order to further proper environmental goals. E.g., *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1990) (surface coal mining); *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed Cir. 1994) (limestone mining); *Creppel v. United States*, 41 F.3d. 627 (Fed. Cir. 1994) (dredging and filling wetlands).

[22] To this end, the Fifth Amendment's just compensation guarantee has been held self-executing. The availability of compensation validates and constitutionalizes the otherwise wrongful government action. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 714-15 (1999) (Kennedy, J.); *United States v. Clarke*, 445 U.S. 253, 257 (1980) (Rehnquist, J.).

[23] *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 899 (Fed. Cir. 1986) (quoting with approval; emphasis the Court's). *See also Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1177 (Fed. Cir. 1991); *Skaw v. United States*, 740 F.2d 932, 939 (Fed. Cir. 1984).

In sum, for a taking to occur, it matters not whether the regulators acted in good or bad faith, or for good or bad reasons. What matters is the impact of their acts, not the purity *vel non* of their motives. Indeed, if their motives are benign—or done for the best of reasons—that only fortifies the need for compensation required by the Just Compensation Clause of the Fifth Amendment.[24]

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and of the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more than mediocre ones."[25]

Thus, it is not enough to conclude that it is a good thing to radically reorganize our system of property ownership. As a matter of Constitutional policy, severe invasions of protected property rights cannot occur unless compensation is paid. Such radical change cannot be accomplished with the stroke of a word processor. If New York believes that the idea is

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[24] *See Hughes v. Washington*, 389 U.S. 290, 298 (1967): "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." (Stewart, J., concurring) (emphasis original).

[25] *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (footnote omitted.) See also *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

otherwise worthwhile then, as this Court put it in *Nollan*, "it must pay for it." 483 U.S. at 842.

III.
THERE IS CONFLICT AND CONFUSION ON HOW TO APPLY *PENN CENTRAL*—THE CASE THIS COURT CALLS ITS "POLESTAR" IN REGULATORY TAKINGS.

It would be easy to cite treatises and law reviews attesting to the absence of standards in regulatory taking law and the need for guidance from this Court.

Easy, but not necessary. The Court's own opinions make the point clearly, and decisions like the one below show the current need for pragmatic and comprehensive guidance.

> "In Justice Holmes' well-known, if less than self-defining, formulation, 'while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.'" *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) [quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)].
>
> "The rub, of course, has been—and remains—how to discern how far is 'too far.'" *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005).
>
> "[W]e have 'generally eschewed' any set formula for determining how far is too far, choosing instead to engage in 'essentially ad hoc factual inquiries.'" *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan.*

> *Agency*, 535 U.S. 302, 326 (2002) (quoting *Lucas*, 438 U.S. at 1005 which, in turn, quoted *Penn Central*, 438 U.S. at 124).
>
> "Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking." *Palazzolo*, 533 U.S. at 617.
>
> "Indeed, we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine 'a number of factors" rather than a simple 'mathematically precise' formula." *Tahoe-Sierra*, 535 U.S. at 326.
>
> "Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings." *Tahoe-Sierra,* 535 U.S. at 326, n.23 (quoting with approval from *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring)).

The Court has created a "rule" that provides no guidance to those who either have to live with it or apply it. There has been enough litigation of this sort during the last four decades for the law to have developed meaningful guidelines.

And, yet, we have none. This case is an exemplar. Despite detailed allegations about the severe impact of the regulations at issue, the District Court found nothing that could even be subject to factual inquiry at trial. The Second Circuit compounded the injury

by applying the inapplicable *Yee* decision and then refusing to consider the directly applicable decisions in *Cedar Point* and *Horne* on the spurious ground that they were not rent control cases. They were, however, Fifth Amendment cases, and this Court's analysis warranted serious consideration. Something is wrong with this picture, and only this Court can fix it.

CONCLUSION

Certiorari should be granted.

Respectfully Submitted,

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