No. 18-1429

In The
Supreme Court of the United States

STAHL YORK AVENUE CO., LLC,
Petitioner,

v.

THE CITY OF NEW YORK, et al.,
Respondents.

On Petition for Writ of Certiorari to the Appellate Division of the Supreme Court of New York, First Judicial Department

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a property owner suing an administrative agency for violating the Takings Clause of the Fifth Amendment is entitled to develop the facts supporting the claim in court, rather than being bound by fact-findings the agency itself made in the very proceeding in which it is alleged to have taken the property without just compensation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes and Regulations

Rules

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation (PLF) is the nation's oldest and largest nonprofit legal foundation that seeks to protect private property rights and related liberties in courts throughout the country. In pursuing its mission, PLF attorneys have participated as lead counsel in several landmark cases in defense of the right of individuals to make reasonable use of their property and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

Particularly relevant, PLF represents the Petitioner in *Knick v. Township of Scott, Pennsylvania*, No. 17-647 (reargued Jan. 16, 2019), challenging the continuing viability of the requirement that property owners must exhaust state procedures before bringing takings claims in federal court.

PLF believes its perspective and experience with property rights and takings litigation will aid this Court in the consideration of the issues presented in this case.

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[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief, and granted consent for the filing of this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

INTRODUCTION

This case involves the intersection of two misguided practices. First is the refusal by some courts to allow *de novo* factual development when considering a takings claim premised on an administrative agency's land use decision. Those courts instead defer to the agency's factual findings—even though those findings were integral to the government action that is alleged to violate the Constitution. Second is the recent and unjustified tendency of state and local historical preservation commissions to overdesignate property as "historical landmarks," often designating entire neighborhoods and thereby depriving owners of the right to use their property beneficially and productively.

Both practices threaten the rights of property owners. Moreover, the former issue is the subject of a marked division among the lower courts. *See* Pet. 29–32. Indeed, the split is even deeper than noted in the Petition, as the courts of both Maryland[2] and Washington[3] also follow a rule similar to that applied

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[2] *Poe v. City of Baltimore*, 216 A.2d 707, 709 (Md. 1966) (noting the need to defer to "the expertise of an administrative body … as to whether, on the evidence, the application of the [zoning] ordinance to the property involved deprives the owner of any reasonable use"); *see also Broadview Apartments Co. v. Comm'n for Historical & Architectural Pres.*, 433 A.2d 1214, 1217 (Md. Ct. Spec. App. 1981) (applying deferential "substantial evidence" standard in a takings challenge to a historical landmark designation).

[3] *Presbytery of Seattle v. King Cty.*, 787 P.2d 907, 916 (Wash. 1990) (holding that administrative agency fact-finding is "necessary in order for a court to have before it the facts necessary to make [a taking] determination"); *see also Conner v.*

by the New York courts in this case. "The rule of law requires neutral forums for resolving disputes." *Home Depot U.S.A., Inc. v. Jackson*, No. 17-1471, __ S. Ct. __, 2019 WL 2257158, at *6 (May 28, 2019) (Alito, J., dissenting). Yet under the deferential New York approach, property owners enter these supposedly neutral forums at a marked disadvantage—the government has already selected the set of facts that will determine if the owners have been deprived of their constitutional rights.

This Court should grant certiorari to resolve the split of authority. On the merits, it should require *de novo* factual development in takings cases premised on agency land use decisions and disapprove the practice of excessive and unjustified historical landmark designation.

SUMMARY OF ARGUMENT

The lower courts are divided as to whether they must allow *de novo* factual development when considering a takings claim premised on an administrative land use decision. This is an important issue that affects private property rights nationwide, and only this Court can provide a definitive resolution to the split of authority on this federal constitutional question.

The proper resolution is to require courts to allow *de novo* presentation of facts. Evidentiary standards in administrative land use hearings are simultaneously more lax (as to what is considered "evidence") and more restrictive (as to narrowness of

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City of Seattle, 223 P.3d 1201, 1204 (Wash. Ct. App. 2009) (reviewing a takings claim in a historical designation case based solely on the administrative record).

scope and in not allowing cross-examination) than are the standards applied in courts of law. Thus, what passes for a factual basis in the typical land use decision is woefully insufficient for deciding a takings claim.

Moreover, deference to agency findings when considering a takings claim stacks the deck in favor of the very party that is alleged to have violated the plaintiff's constitutional rights. When the agency is a historic preservation commission, its members are typically architects or preservation advocates—not judges—and their focus is on designating landmarks rather than neutrally considering the facts. Therefore, when such a commission imposes restrictions on property, due process requires that affected owners bringing takings claims are entitled to *de novo* review by a disinterested judicial fact-finder, rather than deference to the agency doing the taking.

These concerns are particularly acute given the trend of overbroad and arbitrary use of historical designations to prevent development. Such use—or rather, misuse—of the zoning power not only harms property owners whose property is subject to the designation, but also has broader negative social consequences. That context makes this an ideal case for this Court to address the Question Presented.

ARGUMENT

I. The Court Should Grant the Petition and Require *De Novo* Judicial Review of Agency Factual Findings When a Taking Is Alleged

Deference to the factual findings of an administrative land use agency, when those findings were made in the very proceeding that is alleged to

violate the Takings Clause, jeopardizes the constitutional rights of property owners. In contrast to the deferential approach applied by New York, the District of Columbia, Maryland, and Washington, other courts have declined to accord such deference, holding instead that a takings claim requires *de novo* review by a neutral arbiter applying reliable evidentiary standards. *See* Pet. 29–32 (citing decisions from Connecticut, California, Minnesota, and the Court of Federal Claims); *see also Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 543 S.E.2d 844, 849 (N.C. 2001) (requiring *de novo* review of a takings claim challenging an agency's exercise of eminent domain); *City of Dallas v. Stewart*, 361 S.W.3d 562, 564 (Tex. 2012) ("[A] system that permits constitutional [inverse condemnation] issues … to be decided by an administrative board, whose decisions are essentially conclusive, does not correctly balance the [public interest] against the rights accorded to property owners ….").[4]

This Court should grant certiorari to resolve the split, provide guidance to the lower courts, and require *de novo* review.

A. Administrative land use proceedings do not follow evidentiary standards required in reviewing constitutional claims

Unlike judicial proceedings, administrative land use hearings lack many of the protections that are

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[4] In the words of one expert commentator, "[s]ince takings claims rest on constitutional foundations, their substance should be defined by court adjudication, not mere administrative proceedings." John Martinez, *Government Takings* § 4:18 (2006).

necessary when constitutional rights are in jeopardy. For example, as part of its decision-making process, New York's Landmarks Preservation Commission (LPC) may, "in its discretion, take the testimony of witnesses and receive evidence." N.Y.C. Admin. Code § 25-313(b). However, in coming to a decision, the LPC "shall not be confined to consideration of the facts, views, testimony or evidence submitted." *Id.* In other words, the LPC not only chooses *whether* to take evidence, but *need not base its decision* on such evidence.

There are other key evidentiary differences. Testimony before a land use agency like the LPC need not be given under oath. *See Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (N.Y. App. Div. 2005) ("Municipal land use agencies … are 'quasi-legislative, quasi-administrative' bodies, and the public hearings they conduct are 'informational in nature and [do] not involve the receipt of sworn testimony or taking of 'evidence' ….") (citations omitted). There is no requirement that an affected property owner be allowed to cross-examine those who provide testimony. *See Lutheran Church in Am. v. City of New York*, 316 N.E.2d 305, 309 n.2 (N.Y. 1974) ("The public hearing provided for in the Landmarks Law is not the sort of adversary hearing involving cross-examination and the making of a record ….") . And hearsay and lay opinion testimony is regularly considered. It appears in this case, for example, that members of the LPC relied on a wide range of opinions from individuals without direct knowledge, such as one commissioner's "friend in the fashion industry" who thought existing apartments in Petitioner's buildings could be effectively marketed, thereby boosting the buildings' economic value. Pet. 13–14.

The LPC is not unique in its loose approach to evidence; informal evidentiary standards are the norm in administrative land use proceedings, especially historic preservation hearings. *See, e.g.*, Annapolis Historic Preservation Commission Rule of Procedure 3.8(a) (Feb. 27, 2014),[5] (stating that "formal rules of evidence shall not apply" in hearings); Long Beach, Cal. Municipal Code § 2.63.075(C)[6] ("Hearings conducted by the Cultural Heritage Commission need not be conducted according to the technical rules of evidence."); *see also* Ross D. Netherton, *The Due Process Issue in Zoning for Historic Preservation*, 19 Urb. Law. 77, 94 (1987) ("Local zoning boards and commissions never have been obliged to apply the strict rules of evidence ...."). Thus, the "evidence" admitted in such hearings often includes "[l]ay opinions, such as those of owners of neighboring property." Netherton, *supra* at 95.

And strikingly, "[m]embers of historic preservation zoning bodies may rely on their own knowledge of the property or circumstances" in reaching their decision, including knowledge gained "through inspection of the property in question while proceedings are pending." *Id.*; *see also, e.g.*, *McKenzie v. Shelly*, 362 P.2d 268, 269–70 (Nev. 1961) (concluding that the Board properly considered remarks of a Board member who "spent a lot of time down in the vicinity [of the property] …, at different times of the day, just to see what the traffic situation down there was").

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[5] https://bit.ly/2KsDiQ4.

[6] https://bit.ly/2MzHOin.

Whatever the wisdom of allowing this informal approach in administrative determinations, it does not adequately allow a reviewing court to rule on the property owner's right to not have his or her property taken without just compensation. *See Baltimore & O.R. Co. v. United States*, 298 U.S. 349, 368–69 (1936) (holding that with respect to a takings claim, "[t]he due process clause assures a full hearing[,] … includ[ing] the right to introduce evidence and have judicial findings based upon it") (footnote omitted). Property owners asserting takings claims are entitled to *de novo* factual review, premised on reliable evidence and constitutionally adequate procedures, including discovery, introduction of relevant evidence, and cross-examination of witnesses. Deference to agency findings deprives them of that right.

B. When the agency decision is itself the alleged taking, deference is particularly inappropriate

De novo judicial review is particularly important, and deference particularly inappropriate, when the government action that is alleged to be a regulatory taking is the land use proceeding itself. In that setting, at the administrative stage there has not yet been a taking, and the agency is therefore not conducting a takings analysis. There is thus little reason for the property owner to develop and present facts specifically relevant to a potential constitutional claim. Although such a claim will necessarily have some factual overlap with administrative issues before the agency, a takings analysis will involve unique factual questions. *See, e.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (holding that a regulatory takings analysis is an

"essentially ad hoc, factual inquir[y]" that should consider, among other things, the "economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action").

For example, in considering the "investment-backed expectations" prong of *Penn Central*, some courts look at factors such as

> (1) whether the plaintiff operated in a "highly regulated industry;" (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have "reasonably anticipated" the possibility of such regulation in light of the "regulatory environment" at the time of purchase.

Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (quoting *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1348 (Fed. Cir. 2001)). An administrative land use agency evaluating a request for a redevelopment permit or the suitability of property for historical designation would have no occasion to delve into these types of questions in reaching its decision.

Yet under New York's rule, property owners are forced to present, in the administrative hearing, *all* facts that might be relevant to *each aspect* of a takings analysis, in case those facts will later be part of a takings analysis in court. But administrative agencies are not competent to adjudicate such constitutional claims, and they may refuse the presentation of such

evidence. And even assuming they would allow the presentation of facts not directly related to the specific question before the agency, this approach is both inefficient and confusing. Furthermore, if (as seems likely) the agency declines to issue findings on such ancillary questions, that effort will have been wasted.

C. Administrative land use agencies are not reliably neutral arbiters of the facts

Additionally, there is a particular danger when courts defer to the factual findings of administrative agencies in land use proceedings because those agencies may not be composed of neutral and unbiased decisionmakers. As is typical for historic preservation commissions, the members of New York's LPC are not judges, but political appointees. *See* Commissioners, Landmarks Preservation Commission.[7] Although some members of a historic commission may happen to have legal experience, the vast majority are more likely to be architects, historians, or preservationists, without judicial training. *See, e.g.*, Historic Preservation Commission, City of Montrose, Colo.[8] (specifying that Commission members should have "expertise in a preservation-related discipline, including but not limited to history, architecture, landscape architecture, American studies, American civilization, cultural geography, cultural anthropology, planning or archaeology"); Historic Preservation Commission, City of Baton Rouge[9] ("[T]he majority of the members shall have

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[7] https://on.nyc.gov/2IxyeHx (last visited June 10, 2019).

[8] https://bit.ly/2HWZ8cL (last visited June 10, 2019).

[9] https://bit.ly/2wDENmr (last visited June 10, 2019).

qualifications that includes training or experience in architecture, archaeology, real estate development or landscape architecture."). Although such expertise may be relevant in the determination of the historical or aesthetic significance of a particular building, it does not qualify such individuals to decide constitutional questions. *See City of Dallas*, 361 S.W.3d at 568–69 ("We do not believe … that this matter of constitutional right may finally rest with a panel of citizens untrained in constitutional law.").

Moreover, preservation boards and commissions are inherently incentivized to rule in favor of preservation and against protecting private property from burdensome regulation. That is particularly true as to landmark commissions, who may consider it their mission to preserve historical buildings and restrict "incompatible" development wherever possible—and despite any associated costs to individuals or the community as a whole. After all, their mandate is not to neutrally evaluate the facts, but to find and designate property for protection. For example, New York's LPC is tasked with the "duty … to designate a landmark site for each landmark and to designate the location and boundaries of such site." N.Y.C. Admin. Code § 25-303(b). There is nothing in the Landmarks Law that requires the Commission to neutrally or impartially review a petition and, in practice, these agencies can be swayed by improper considerations.

Because of the incentives inherent in the historic preservation administrative process, a thorough, impartial, and *de novo* judicial review is required in the evaluation of constitutional claims arising from

that process. This Court should grant certiorari to ensure that these requirements are followed.

II. The Court Should Grant the Petition To Address the Widespread Abuse of Property Rights Through Arbitrary Historical Designations

The need for this Court's review is particularly keen given the often overzealous and arbitrary use of historical landmark designations. Beginning in the early twentieth century and bolstered by this Court's subsequently misinterpreted decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), both individual property rights and social equity have been forced to take a backseat to the power of communities to designate buildings—or even entire neighborhoods—as "historical landmarks." Even worse, these decisions are often based on arbitrary preferences and without even basic due process protections. This context presents an additional compelling reason for the Court to grant the Petition.

A. Subjective, aesthetics-based zoning laws are a stark departure from traditional respect for property rights

The rights to acquire, possess, and develop private property were recognized for hundreds of years before the founding of the American Republic. *See* Bernard H. Siegan, *Economic Liberties and the Constitution*, 1–9 (2d ed. 2006) (discussing Magna Carta); James W. Ely Jr., *Property Rights in American History*, 2 (explaining the views of John Locke);[10]

[10] https://bit.ly/2XAN5XQ (last visited June 10, 2019).

1 William Blackstone, *Commentaries on the Laws of England* 135 (1765, reprint 1979).

Based on these ancient principles, the Founding generation considered the preservation of property rights and individual liberty to be inherently intertwined. *See* James Madison, *The Papers of James Madison* (Mar. 29, 1792) ("[A]s a man is said to have a right to his property, he may be equally said to have a property in his rights.").[11] Property rights were thus a core concern undergirding the formation of the United States government, *see The Federalist No. 54* (James Madison) (J. Cooke ed. 1961) ("Government is instituted no less for the protection of the property, than of the persons, of individuals."), and arguably enabled its very creation, *see* Gordon S. Wood, *The Radicalism of the American Revolution* 234 (1991). Accordingly, strong property protections are included in both the original Constitution, *see* U.S. Const. art. I, § 9, cl. 3 (prohibiting Bills of Attainder); *id.* at art. I, § 10, cl. 1 (prohibiting impairment of contracts), and the Bill of Rights, *see* U.S. Const. amend. V (due process and just compensation guarantees for property deprivations).

States likewise guaranteed protection of property rights in their own constitutions. The original constitutions of Massachusetts, New Hampshire, Pennsylvania, and Virginia recognized that citizens possess the "natural, essential, and inherent" right of "acquiring, possessing and protecting property." Ely, *supra* at 3. And a total of five early state constitutions contained language directly from the Magna Carta

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[11] https://bit.ly/1Bxvhg3.

that no person could be "deprived of his life, liberty, or property but by the law of the land." *Id.*

Given this foundational respect for property rights, the regulation of private non-agricultural real property based on aesthetic preferences would have been a foreign, unwelcome, and unconstitutional concept for the majority of American history.[12] In fact, the first true zoning ordinance in the United States was not enacted until 1885. James Metzenbaum, *The History of Zoning: "A Thumbnail Sketch,"* 9 Case W. Res. L. Rev. 36 (1957) (discussing an ordinance banishing washhouses in Modesto, California). Even then, with the subsequent rise of urban centers, land use regulations were primarily focused on mitigating nuisance claims by separating incompatible uses and protecting public health by establishing building and fire codes. *See, e.g.*, *Kroner v. City of Portland*, 240 P. 536, 538 (Or. 1925) (holding constitutional the prohibition of a dairy products store in a residential zone); *see also* Patricia E. Salkin, *American Law of Zoning*, §§ 1.13 and 1.16 (5th ed. 2011). This approach conformed to the long-held practice. *See Mugler v. Kansas*, 123 U.S. 623, 665 (1887) ("[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.").

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[12] While agricultural land uses were sometimes regulated under the police power during the pre- and post-Founding eras, these restrictions did not include the amorphous power to arbitrarily place private property beyond the possibility of future development. *See, e.g.*, Collin Fallat, *What role land use planning in the restructuring of American agriculture?*, 43 J. of Soil & Water Conservation 468–71 (Nov./Dec. 1988), https://bit.ly/2K6JPQQ.

But in 1926, this Court opened the zoning floodgates when it decided that the government has a general interest in maintaining the character of neighborhoods and in regulating specific land uses. *See Village of Euclid*, 272 U.S. 365. *Euclid* has been criticized as disregarding basic traditional notions of property rights, *see generally* Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 Yale J. on Reg. 91, 95 (2011), but it also has been widely misinterpreted. That is, the underlying principle in *Euclid* was not the enforcement of arbitrary community preferences, but rather avoiding nuisance. 272 U.S. at 387–88. Nonetheless, *Euclid* has been used to justify extensive and intrusive zoning laws that restrict the use of private property based on subjective aesthetic preferences.

B. Arbitrary historical designations now run rampant

Zoning laws have been particularly intrusive in the domain of historical preservation. The earliest historical preservations were the result of private citizens' efforts to preserve historically significant buildings from demolition or defacement. *See, e.g.*, Nathan G. Weinberg, *Preservation in American Towns and Cities*, 20 (1979) (discussing the preservation of Independence Hall). But in the decades following *Euclid*, local and state governments took over. *See* David B. Fein, Note, *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U. L. Rev. 64, 72–73 (1985). In 1965, New York became the first city to pass a full-blown "comprehensive landmarks and historic district scheme." *Id.* The federal government quickly followed suit. *See* National

Historic Preservation Act of 1966, 16 U.S.C. § 470, *et seq.* (codified as amended at 54 U.S.C. § 300101, *et seq.*). All 50 states now have operable historic designation regimes, and there are over 2,300 local historic districts. Elizabeth M. Tisher, *Historic Housing for All: Historic Preservation as the New Inclusionary Zoning*, 41 Vermont L. Rev. 603, 607 (2017). But whereas private preservation efforts involved voluntary transactions that respected the rights of property owners, public efforts are almost universally premised on limiting the rights of property owners without compensation.

Further, the once narrow exception for preventing demolition of historically important buildings now threatens to swallow many fundamental property rights whole. As discussed above, many historic preservation review bodies at the local level are made up of politically appointed volunteers. *See, e.g.*, Current Historic Preservation Review Board Members, Washington, D.C., Office of Planning.[13] While local community members could in theory lend an appreciable perspective on designation decisions, they can also subject property rights and desperately needed community development to the subjective whims of individuals whose overriding desire is to halt such development. *See* Pet. 13–14.

Further, many of the criteria employed by these boards are subjective, amorphous, and subject to abuse. Some of these criteria, like whether structures have "high artistic or aesthetic values," *Criteria for Designating Historic Properties in the District of*

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[13] https://bit.ly/2KIZ2XU (last visited June 10, 2019).

Colombia, District of Colombia Office of Planning,[14] have no relation to history or historical importance. For example, in Illinois, historical designations are evaluated in part based on vague assessments of "cultural, economic, social or historic heritage," including locations "likely to yield[ ] information important in prehistory or history." Ill. Admin. Code. tit. 17, ch. VI, § 4120.10. The New York criteria at issue in this case are similarly vague, asking whether a building or structure has a "special character" or "special historical or aesthetic interest or value." N.Y.C. Admin. Code § 25-301(a).

Worse, the actual process for arriving at designation decisions often has little to nothing to do with the provided criteria. *See, e.g.*, David Alpert, *Is anything old not "historic"? Preservation doesn't have a good answer*, Greater Greater Washington, Feb. 28, 2018.[15] Consider the public LPC hearings held for Petitioner's hardship application, which appear to have consisted of purely subjective evaluations, like whether the commissioners had friends who might like to live in the buildings or whether they appreciated the ways some tenants had decorated the apartments. Pet. 13–14.

From coast to coast, *see* Karina Brown, *Eastmoreland Resident Sues State to Block Historic District Designation*, Willamette Week, May 11, 2017,[16] town to metropolis, *see* Waveney Ann Moore, *Lawsuit filed to halt St. Peterburg's Driftwood*

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[14] https://bit.ly/2KAJCoI (last visited June 10, 2019).

[15] https://bit.ly/2I3P41t.

[16] https://bit.ly/2wMeI4k.

neighborhood from pursuing historic designation, Tampa Bay Times, Nov. 22, 2018,[17] and cottage to mansion, *see* John Rebchook, *Jefferson Park home faces 'hostile' historic designation*, Denver Real Estate Watch, Sept. 4, 2015,[18] controversy over allegedly arbitrary historical designations is a major problem. *See also* Valeria Ricciulli, *Strand Bookstore, six other Broadway buildings are now NYC landmarks*, Curbed, June 11, 2019[19] (discussing the LPC's controversial decision to landmark a famous bookstore over community opposition). While there can be no doubt that states and locales have an interest in preserving legitimate historical treasures for future generations, this power must be tempered by a consideration of property rights and basic due process guarantees. Unfortunately, such consideration is often lacking in preservation decisions.

C. Free and open property development generates economic, social, and cultural prosperity

Another fundamental problem with arbitrary or excessive historical designations is their interference with the natural process by which property is moved to higher and better uses. When property use is "frozen" in place through a historical designation, an artificial cap is placed on the potential wealth that is normally created through the natural urban processes of redevelopment of existing property. *See* Edward

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[17] https://bit.ly/2WpsFj9.

[18] https://bit.ly/2ZdztCo.

[19] https://bit.ly/2KL6Ecq.

Glaeser, *How Skyscrapers Can Save the City*, The Atlantic (Mar. 2011).[20] This has a number of deleterious effects, detailed below.

New York is a telling example. Its history is one of constant redevelopment of property to make way for new uses, and that redevelopment led to its booming growth. *See id.* (noting that tearing down older buildings to build skyscrapers "enabled New York to grow and industries to expand. [Skyscrapers] gave factory owners and workers space that was both more humane and more efficient"). This natural evolution of the city was the cause of unimaginable growth, wealth, and the ability of the city to continually meet the demands of new citizens—even as the population of New York increased exponentially throughout the twentieth century. Eighteenth century houses were routinely demolished to accommodate larger nineteenth century structures that were in turn destroyed to make way for the skyscrapers of the twentieth century. And throughout those periods, New York experienced an explosion of wealth and prosperity. *Id.*

In contrast, historical designation prevents landowners from investing in their property in order to meet new demands, causing substantial economic harm in "unseen" lost potential. *See generally* Frédéric Bastiat, *Selected Essays on Political Economy* (George B. de Huszar ed., Seymour Cain, trans., Irvington-on-Hudson: Foundation for Economic Education 1995) (1848) (Chapter 1, What Is Seen and What Is Not Seen). This destruction of potential wealth is to the

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[20] https://bit.ly/2qs8t4j.

detriment of both property owners *and* the City as a whole.

Historical designation also prevents the construction of new, modern architecture that could otherwise become the iconic buildings of the future. Ironically, in New York, buildings now designated as historic are often the same "soulless" modern architecture that spurred the onset of historic preservation in the first place, as eighteenth and nineteenth century structures throughout New York were cleared to make way for skyscrapers. *See, e.g.*, Belmont Freeman, *Unfinished New York*, Places J. (Oct. 2015);[21] Julie Zeveloff, *49 Beautiful Old New York Buildings That No Longer Exist*, Business Insider (Sept. 15, 2014).[22] Indeed, the Empire State Building itself required the destruction of the first Waldorf-Astoria Hotel. Freeman, *supra*.

The potential negative economic, social, and cultural effects of historical designation are particularly acute in areas where subjective criteria allow for abusive "over-designation" of large swaths of a city. *See supra*, Part II-B. In New York in particular, up to one-third of all lots are designated as historical. *See* Ingred Gould Ellen, et al., *Fifty Years of Historic Preservation in New York City* 22 (Mar. 7, 2016);[23] Real Estate Board of New York, *An Analysis of Landmarked Properties in Manhattan* 4 (June 2013)

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[21] https://bit.ly/2ZpJ9dh.

[22] https://bit.ly/2wOJLfW.

[23] http://bit.ly/2930m6y.

(showing that 27.7% of all Manhattan properties are landmarked).[24]

Worse, historical designations are often used not to ensure that architectural treasures are preserved, but to prevent almost all new development. While the effects on property value may vary with historical designations, designation universally "has a significant negative impact on the amount of new housing construction." Vicki Been, et al., *Preserving History or Hindering Growth? The Heterogeneous Effects of Historic Districts on Local Housing Markets in New York City* 22 (National Bureau of Economic Research, Working Paper No. 20446) (Sept. 2014).[25] As former LPC Commissioner Margery Perlmutter admitted: "I have seen how community activists use historic preservation as a way to limit development." Real Estate Board of New York, *Landmarking, Housing Production and Demographics in NYC* 7 (2013).[26]

This type of "anti-development" abuse of historical designations has led to severe economic and social inequities. This includes increased gentrification of urban neighborhoods and displacement of minority populations, *see* Sarah N. Conde, *Striking a Match in the Historic District: Opposition to Historic Preservation and Responsive Community Building*, Historic Preservation Law Seminar (Apr. 30, 2007),[27] as well as the exacerbation of an already pressing

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[24] https://bit.ly/2EWOWiB.

[25] https://bit.ly/2WlTdSB.

[26] https://bit.ly/29poBbI.

[27] https://bit.ly/2QU4yIe.

housing shortage in many parts of the country, *see, e.g.*, Conor Dougherty, *In Cramped and Costly Bay Area, Cries to Build, Baby, Build*, N.Y. Times (Apr. 16, 2016).[28] For many, the power to designate historical landmarks is nothing more than a means to exclude low-income, multi-family development. *See, e.g.*, J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 Geo. Mason L. Rev. 665, 668 (2012). And discriminatory historical designations have arguably stifled the very economic development essential to aiding the most troubled neighborhoods. Conversely, because historical designations prevent the housing supply from freely growing to meet demand, housing prices will rise both within and without areas subject to such designation. Though this may artificially raise property values for some owners, it imposes large costs on many others—and often prices out lower income groups altogether. *See* Kriston Capps, *Why Historic Preservation Districts Should Be a Thing of the Past*, CityLab (Jan. 29, 2016).[29]

Arbitrary or excessive historical landmark designation also prevents the process of "filtering," whereby new, expensive housing units are constructed for wealthier individuals while their older, vacated units "filter down" to poorer individuals, until the least desirable units are destroyed to make way for new, higher cost units. Stuart S. Rosenthal, *Are Private Markets and Filtering a Viable Source of Low-Income Housing?*

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[28] https://nyti.ms/2kmANOG.

[29] https://bit.ly/2KHOnN0.

Estimates from a "Repeat Income" Model, 104 American Economic Review No. 2, 687 (Feb. 2014) (showing that the private market process of filtering is "a viable long run source of lower income housing" for most areas in the United States). New York's over-designation of historical buildings and districts exacerbates an affordable housing problem that Mayor Bill de Blasio has already identified as reaching a "crisis point." *Our current affordable housing crisis*, NYC Housing.[30]

In sum, in addition to the substantial burden on private propertyw rights, overuse and abuse of historical preservation laws has a broad negative impact on economic growth, stifles natural social evolution, and prevents new and valuable cultural developments in architecture. Those effects are most pronounced when the relevant laws incorporate criteria that are subjective, arbitrary, and prone to abuse.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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[30] https://on.nyc.gov/2BMkNkh (last visited June 10, 2019).