No. 19-1136

IN THE

Supreme Court of the United States

CHONG AND MARILYN YIM, ET AL.,
Petitioners,

v.

CITY OF SEATTLE, WASHINGTON,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Washington

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

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QUESTION PRESENTED

Whether the Court should, in view of precedent and longstanding principle, subject deprivations of "fundamental attributes" of ownership to a *Lucas*-style "per se takings" analysis, instead of the existing *Penn Central* "partial regulatory takings" test.

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INTEREST OF *AMICI CURIAE*[1]

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

Reason Foundation is a nonpartisan and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies. Reason supports dynamic market-based public policies that allow individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing research reports. To further its commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

This case interests *amici* because the "fundamental attributes" of property—its "bundle of rights"—should be accorded the same protection from state interference as those of life and liberty, the other two pillars of the Lockean political philosophy that is the foundation of our nation's formative documents.

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

INTRODUCTION AND SUMMARY OF ARGUMENT

The facts of this case are straightforward. Seattle now requires that residential landlords give potential tenants a 48-hour "right of first refusal" in the order in which they applied to lease a property. Several landlords—most of whom are ordinary people who "own[] and manage[] no more than a handful of rental housing spaces"—claim this limits their "fundamental" right to "alienate or lease property," and thereby effects a taking. Pet. Br. at 4, 14.

The Washington Supreme Court concluded that the "first-in-time" rule does not violate the Fifth Amendment's protection against the taking of private property without just compensation. As is common in recent "partial" takings jurisprudence, the court applied the *Penn Central* test, which holds that when a regulation results in anything less than a total diminution in value of the "parcel as a whole," whether a taking has occurred depends on the "investment-backed expectations" of, and "economic impact" on, the owner, in addition to the "character of the governmental action." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Courts often minimize the historical and philosophical importance of property rights to apply *Penn Central*'s balancing act—an ad hoc analysis of case-specific factors that too often results in economic considerations leading legal doctrine, rather than vice versa.

In view of lower courts' inconsistent treatment of *Penn Central*, the Court in *Ark. Game & Fish Comm'n v. United States* conceded that "[n]o magic formula enables a court to judge, in every case, whether a

given government interference with property is a taking." 568 U.S. 23, 31 (2012). But as the Court acknowledged in *Ark. Game & Fish Comm'n*, bright-line tests apply when (1) there is a physical invasion of property, however slight, and (2) a regulation effects a total loss of a property's use and value. *Id*. at 31–32 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) and *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

It makes some sense to apply the "total loss" standard to the type of economic diminution seen in *Lucas*. After all, government regulations affect the economic uses of a property in myriad, unquantifiable ways. Some are clear. Zoning regulations prevent a homeowner from building a McDonald's in a residential neighborhood, thereby possibly diminishing the economic value of the land. Yet compensation is not owed. Abridging the right to exclude unwanted tenants, however, is of a different and non-linear character. How many people must the government require a landowner to lease to before there is a "total loss" of the right to exclude unwanted occupants? The question is almost incoherent, but most property owners know the answer: one.

Amici ask the Court to narrow the *Penn Central* doctrine to find that deprivations of the fundamental attributes of ownership, such as the right to exclude unwanted lessees, should be analyzed using a bright-line test similar to those used in *Loretto* and *Lucas*.

ARGUMENT

The Washington Supreme Court held below that the "definition of regulatory takings set forth" in

Lingle v. Chevron U.S.A. Inc. guided its application of *Penn Central*. Specifically, "when regulations present such extraordinary circumstances that categorical rules are appropriate . . . *Chevron U.S.A* definitively held that there are only 'two relatively narrow categories' of 'regulatory action that generally will be deemed per se takings.'" *Chong Yim v. City of Seattle*, 194 Wn.2d 651, 689 (Wash. 2019) (quoting *Lingle*, 544 U.S. 528, 538 (2005)).

But this Court has indicated that it is open to exploring other categorical exceptions to ad hoc analyses of "partial regulatory takings" that "go[] too far." *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). These signals, coupled with the historical view of property on which they are based, suggest that the deprivation of any "fundamental attribute" of ownership is closer to a *Loretto*- and *Lucas*-style taking than a *Penn Central* one.

Seattle's "first-in-time" rule is indeed a deprivation, and not merely an interference, with the right "to determine who will live on one's property." Pet. Br. at 13. The "first-in-time" rule prevents landlords from readjusting their pre-listing criteria once applications are submitted. The landlord is stuck with whoever accepts the listing offer within the 48-hour first-refusal period.

Once the listing is up, the landlord has no discretion to choose who occupies their property, whether the first-in-time is an avowed white supremacist or simply makes the landlord uncomfortable. And the restriction is not like pre-listing restrictions, such as prohibitions on race-based and family-status-based discrimination. Those

proscribe landlords' choosing based on specific criteria; they do not proscribe any choice whatsoever. Pre-listing restrictions do not totally interfere with owners' right to determine who will live on their property. Owners still retain discretion in choosing tenants based on their own personal criteria.

I. THIS COURT'S PRECEDENT AND TRADITIONAL LEGAL PRINCIPLES SUGGEST THAT DEPRIVING THE RIGHT TO CHOOSE TENANTS EFFECTS A TAKING

The Court here has an opportunity to clarify the ad hoc *Penn Central* test for going "too far" and explain that the taking of a "fundamental attribute" of property deserves a more bright-line rule. On one side of the line would be physical invasions and deprivations of any other fundamental aspect of ownership, analyzed by a new test combining *Loretto*, *Lucas*, and this case. On the other side are interferences that might (or might not) "go[] too far." *See Pennsylvania Coal*, 260 U.S. at 415.

A. The Court Has Subjected Fundamental Attributes of Ownership to a Bright-Line Rule Rather than *Penn Central's* Complex, Ad Hoc Test

Outside of *Penn Central* and its progeny, courts have relied on historical-philosophical conceptions of property in drawing the line between deprivations (the complete taking of a fundamental attribute of ownership, such as physical occupation) and mere interferences (adjustments to how a property can be used, such as zoning). Pre- and post-*Penn Central*

jurisprudence provides evidence of this reliance, and shows that *Penn Central* is not *the* benchmark for evaluating any and all cases outside the *Loretto* (physical) or *Lucas* (*per se* regulatory) exceptions.

Penn Central's "investment-backed expectations" and "economic interest" prongs, while meant to promote the "reciprocity of advantage" at the heart of a "law and economics" approach to property law, has some role in cases involving true "partial takings." Where the owner doesn't suffer a total interference (*i.e.*, a deprivation), it should not offend the Takings Clause to balance the costs he suffers against the benefits he derives, or the costs imposed on others similarly situated. But when the state destroys a "fundamental attribute" of ownership, questions of economic efficiency are of secondary concern, and it could hardly excuse a deprivation to argue that all similarly situated owners have suffered it.

Deprivations of fundamental property attributes, like the right to exclude unwanted tenants, merit something closer to a *Lucas* or *Loretto*, rather than a *Penn Central*, analysis. Unfortunately, since 1978 the Court has in several cases endorsed what might be called *Penn Central*'s "anti-segmentation" view of ownership. From this perspective, the logic behind the "parcel as a whole" theory is adapted to the "bundle of rights" theory, so that the destruction of some "sticks" in the bundle is not a taking unless it aggregately destroys the entire bundle. The Court in *Penn Central* even said that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130; *see also Andrus v. Allard*, 444 U.S.

51, 65–66 (1979) ("At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."). That shouldn't be true, and it often hasn't been true.

Both before and since *Penn Central*, the Court has hinted that the "strands" can be segmented to determine whether there has been a taking of discrete portions of a property. In *Palazzolo v. Rhode Island*, the majority admitted that "we have at times expressed discomfort with the logic of [the] rule" that "the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole." 533 U.S. 606, 631 (2001) (cleaned up). From this, Professor Eagle infers a "desire of a majority of the Justices to severely limit the application of the 'parcel as a whole' rule, without questioning whether the Court is involved in an effort to minimize the revolutionary change that repudiation of the 'property as a whole rule' would bring about." Steven J. Eagle, *Regulatory Takings*, 3d ed., 812 (2005).

Before *Penn Central*, in *United States v. General Motors Corp.*, the Court proffered that the term "property" in the Fifth Amendment was employed "to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." 323 U.S. 373, 378 (1945). The "interest" in that property, the Court continued, "may comprise the group of rights for which the shorthand term is 'a fee simple' or it may be the interest known as an 'estate or tenancy for years.'" *Id.* But the Constitution protects all of it, the Court said: "The

constitutional provision is addressed to every sort of interest the citizen may possess." *Id.*[2]

Thus, *General Motors* speaks to the "pro-segmentation" view of property rights, whereby the destruction of one segmented "strand" in the bundle, while not destroying (or possibly even interfering with) the other strands, is still cognizable as a taking *of that segmented right*. The Court has at times "segmented" property along horizontal (adjacent lots), vertical (subterranean mining), and temporal (temporary moratoria) axes, even if at other times it has agglomerated abutting interests. *Compare Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) and *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) *with Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

The Court has struggled to reconcile the "parcel as a whole" rule with state actions against parcel portions that would effect a taking if aggregated but do not individually go too far. If a parcel worth $100,000 loses $10,000 annually from an onerous regulation, a *Lucas*-type taking occurs only in the tenth year. This example shows the wisdom of segmentation: once a parcel portion is interfered with, whether that "goes too far" questions interference with the "bundle of rights" *in that portion*. *See*

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[2] The *General Motors* majority concluded that "the Fifth Amendment concerns itself solely with the 'property,' *i.e.*, with the owner's relation . . . to the physical thing and not with other collateral interests which may be incident to his ownership." *Id.* at 378. Importantly, the Court was speaking to such "incidents" as "the expense of moving removable fixtures and personal property from the premises" and "the loss of good-will"—both far from the traditional "fundamentals" of ownership. *Id.*

DeBenedictis, 480 U.S. at 517 (Rehnquist, C.J., dissenting) ("[T]here is no need for further analysis where the government by regulation extinguishes the whole bundle of rights in an identifiable segment of property, for the effect of this action on the holder of the property is indistinguishable from the effect of a physical taking.").

In *Pruneyard Shopping Ctr. v. Robins*, the Court again endorsed the pro-segmentation view: "The term 'property' as used in the Takings Clause includes the entire 'group of rights inhering in the citizen's [ownership].'" 447 U.S. 74, 83 n.6 (1980) (quoting *General Motors*, 323 U.S. at 377–78). *Robins* is not an outlier in segmenting sticks from the bundle of rights. Several of this Court's majorities and (persuasive) dissents reflected the idea that "every regulation of any portion of an owner's 'bundle of sticks' is a taking of that particular portion considered separately." Margaret Jane Rudin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1676 (1988). *See also Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (state law effected a taking when it extinguished mortgagor's remaining debt to mortgagee, even though the mortgagee retained a right to "reasonable rent"); *Chippewa Indians of Minn. v. United States*, 305 U.S. 479 (1939) (Congress violated the Takings Clause when it converted tribal lands into a national forest, although the lands were to be held in trust and the tribe was to receive the proceeds from the sale of its timber); *United States v. Dickinson*, 331 U.S. 745 (1947) (taking occurred when gradual flooding of property "stabilized," even when the land, as a *whole*, was not condemned); *United*

States v. Pewee Coal Co., 341 U.S. 114, 116 (1951) (holding the federal government effected a taking when, in wartime, it "required mine officials to agree to conduct operations," i.e., retaining the right to manage, "as agents for the Government"); *Dugan v. Rank*, 372 U.S. 609 (1963) (suggesting that a requisition of a *portion* of owner's water rights merits compensation under the Tucker Act).

Among pro-segmentation cases, *Webb's Fabulous Pharmacies Inc. v. Beckwith* serves as a particularly stark example. There, the Court held that a county's siphoning of interest from an account meant to pay down the pharmacy's creditors once final judgment was entered constituted a taking because the county government was not entitled to the interest as a fee for services. "The usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." 449 U.S. 155, 162 (1980). It is immaterial that the creditors would eventually be made whole. The taking lay in the county's confiscation of *any* funds in which the creditors held an interest. The Court in *Pewee Coal* similarly held that it did not make a difference that the mining company would have suffered a greater profit loss had the federal government not intervened in its operations. 341 U.S. at 118.

In his dissent in *DeBenedictis*, Chief Justice Rehnquist wrote that a regulation effects a taking if it "extinguishes the whole bundle of rights *in an identifiable segment* of property." 480 U.S. at 517 (Rehnquist, C.J., dissenting) (emphasis added). While Rehnquist was referring to separable estates, not rights, the *Lucas* majority arguably conceives of each

right in each estate or other interest as similarly separable from the "whole" bundle. In his influential Footnote 7, Justice Scalia surmised that the answer to the "denominator problem"—the difficulty in ascertaining the baseline property subject to a potential taking—"may lie in how the owner's reasonable expectations have been shaped by the State's law of property," *Lucas*, 505 U.S. at 1016, n.7, including common-law background principles and, presumably, traditional definitions of property rights. But because the question in *Lucas* was of a total *value* loss, the Court had no opportunity to consider other ownership attributes; the regulation had constructively extinguished nearly all of them at once.

Indeed, there are several other categories hidden between the lines. In *Hodel v. Irving*, the Court examined a law that "amount[ed] to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs" and described the government regulation as "extraordinary." 481 U.S. 704, 716 (1987). The Court concluded that, "[i]n one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times." *Id.* Even though the law sought to address the "fractionation of Indian lands" which the Court described as "a serious public problem," it was "not appropriate is to take the extraordinary step of abolishing both descent and devise of these property interests." *Id.* at 718.

In a similar vein as *Hodel*, Justice O'Connor, in her concurrence in *Palazzolo v. Rhode Island*, emphasized that "investment-backed expectations" in the property was not required to establish a taking.

The Court had never "held that a takings claim is defeated simply on account of the lack of a personal financial investment by a postenactment acquirer of property, such as a donee, heir, or devisee." 533 U.S. at 635 (O'Connor, J., concurring).

In *United States v. Causby*, the Court held that the state's interference with an air easement (through noisy flight paths) could alone effect a taking even though the "[owner] does not occupy [the air above his property] in a physical sense." 328 U.S. 256, 264 (1946). In the Court's estimation, "the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land [as a chicken farm] as a more conventional entry upon it," *id.*, even if the owner still possesses the land, and, perhaps as a last resort, may use the land for camping or other recreational activities. *See Lucas*, 505 U.S. at 1044 (Blackmun, J., dissenting) ("Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer.").

Finally, in *Loretto*, the Court took a categorical stance on permanent physical invasions, finding that they were different in kind than other types of takings. With a permanent physical occupancy, "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. The Court distinguished between temporary and permanent physical invasions and found the latter more problematic. But the Court was clear that past cases emphasized that "physical invasion cases are special," and that the relevant question is whether the invasion can be deemed permanent or temporary. *Id.* at 432.

The Court was right: physical invasions are special and deserve a clear rule rather than a complex balancing test. And because Seattle has extensive eviction protections for tenants—including a "Just Cause Eviction Ordinance" that provides only 18 "just causes" for terminating a lease, Seattle Mun. Code § 22.206.160(C)—the city has delivered landlords a one-two punch: forced to lease to unwanted tenants, then forced to keep them on.

B. The Right to Exclude Unwanted Tenants Is a Fundamental Ownership Attribute That Should Be Analyzed Categorically Rather Than Incrementally

The Court should reject a *Penn Central* analysis here because the moment the right to exclude is compromised, even in a leasing context, it has "gone too far." "[An] essential element of individual property is the legal right to exclude others from enjoying it." *Int'l News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). In *Kaiser Aetna v. United States*, the Court "[held] that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." 444 U.S. 164, 180 (1979).

If the government forced one person to live in your home, it would be absurd to subject that deprivation to an analysis of the extent to which a taking has occurred. The taking is total, even though you can still use the kitchen and even swim in the pool. The right to exclude is not subject to such linear scaling; it is a fundamental attribute of ownership.

The same holds true for a lessor. A landlord may want to rent his property, but not to just anyone. Even if a prospective tenant meets certain minimum requirements, something about the tenant may cause the landlord unease. Chong and MariLyn Yim, two of the petitioners here, rent out the other two apartments of the triplex where they live. Pet. Br. at 4. Because they have three small children, and the residents share a courtyard, the Yims are understandably concerned about the character of their tenants. The law is meant to stop the landlord from acting on those concerns, and in so doing compromises the right to exclude lessees based on any non-proscribed criteria. But, in some sense, that is the *sine qua non* of property ownership: my house, my rules. Perhaps you want to kick someone out of your party because you don't like the look on his face. You can do that, and you don't have to answer to anyone.

Courts' analyses in takings cases typically include both (1) purely legal and (2) economic (or "law and economics") considerations. The two will often inform one another, but takings analysis shouldn't rely too much on complex economic analysis. Property, after all, is a legal concept that has economic effects, and it was deeply rooted in our nation's history and traditions before the modern concept of "economics" was even conceived.

As in *Lucas*, the primacy of legal considerations can sometimes cause "unfair" results. There, the majority conceded that its reasoning meant that a total (100 percent) loss of a property's value was a "per se taking," whereas a loss of anything less (even 99 percent) would be subject to *Penn Central*'s "partial takings" test. *Lucas*, 505 U.S. at 1016 n.7. But, to

ensure uniform application, a legal test must at some point categorize analyzed objects, and Justice Scalia's line at 99.9 percent is in this vein. Discussing *Penn Central*, Professor Eagle wrote that "the creation of tautologies is a game that two can play":

> In response to the government's assertion that the landowner claims that "anything is 100% of itself," the landowner might with equal plausibility state that "almost anything is but a small percentage of something almost infinitely larger."

Eagle, *Regulatory Takings*, at 807.

Diminution in value—and the debates over how to measure the denominator—is not the end of all takings-clause analysis, as those earlier cases show. Other, purely legal, concerns do arise, and the potential difficulty in measuring value in such cases should not limit the application of bright-line rules, where appropriate. Just because the dollar-value of the "right to exclude others" from a vacant lot is not as easy to determine as the fair market value of the "parcel as a whole" does not mean that this right is no less deserving of takings-clause protection. *Hodel* and *Kaiser Aetna* speak to the primacy of legal concerns over "balancing" purely economic considerations, such as the reciprocity of advantage.

In *Tahoe-Sierra*, the majority followed the *Lucas* total-loss approach, finding that a temporary moratorium on development was not a taking because it did not cause a permanent deprivation of all value. 535 U.S. at 334–35. The Court then repeated *Andrus*'s admonition that "where an owner possesses a full 'bundle' of property rights, the destruction of one

'strand' of the bundle is not a taking." *Id*. at 327 (quoting *Andrus*, 444 U.S. at 65–66). But *Tahoe-Sierra* involved only the right to develop, which, as in *Lucas*, elicits a primarily value-driven analysis. That is unlike *Hodel*'s right to devise, which includes more cultural considerations, such as the "the right to pass on valuable property to one's heirs," which "is itself a valuable right." *Hodel*, 481 U.S. at 715. The right to exclude unwanted tenants is much more like the right to devise than the right to develop.

The key lesson from *Tahoe-Sierra* and *Lucas* is that the state's interference must be total in order to effect a taking of the interest residing in the interfered-with right. Put a different way, some rights can be more easily measured incrementally, such as the right to develop. Throughout the country, there are myriad restrictions on the right to develop, and those affect the value of millions of parcels of land. In order to avoid complex and unwieldy line-drawing problems, it makes some sense to have a version of the "total taking" standard for the right to develop. The right to exclude unwanted tenants, however, is very different than the right to develop. It should be looked at categorically rather than incrementally. In the words of Professor Eagle:

> [T]here is no precise way that the value of a given set of restrictions to society might be determined. There is no way, other than accepting inherently self-serving testimony, that the value of property to the present owner could be determined. Absent these things, 'too far' has to be expressed either in terms of diminution in value from a specified baseline or in terms of violation of the natural

> law (as expressed in the idiom—either substantive due process or fundamental fairness—of the decision maker's choice).

Eagle, *Regulatory Takings*, at 822–23.

The Court's several nods to the conceptual segmentation of property into individually protected elements suggest it is receptive to treating the deprivation of such "fundamental attributes" as per se takings. *Amici* urge the Court to formally adopt this line of reasoning, so that it analyzes any *total* interferences—deprivations, really—with any segment of the bundle of rights under a *Loretto* or *Lucas*, rather than *Penn Central*, framework.

II. THIS CASE IS AN EXCELLENT VEHICLE FOR REMOVING FUNDAMENTAL-ATTRIBUTE TAKINGS FROM *PENN CENTRAL*'S ANALYTICAL FRAMEWORK

This case offers the Court an excellent opportunity to draw a line between deprivations and interferences with "fundamental attributes" of ownership. First, the "right to lease" is a non-possessory interest that, if the Court agrees with *amici*'s proposal, will properly expand the "per se takings" concept beyond *Lucas*. Second, unlike in many takings cases, the facts here are not fairly in dispute.

The relevant statute—Seattle Mun. Code § 14.08.050(A)(4) states that it is "unfair practice for a person to fail to . . . offer tenancy . . . to the first prospective occupant meeting all the screening criteria[.]" The only exceptions from this rule is if the unit is "legally" or "voluntarily" "set aside . . . to serve vulnerable populations." *Id*. The SMC limits the

"screening criteria" to those that do not offend its list of "unfair practices." Seattle Mun. Code § 14.08.030. Therefore, the "screening criteria" used once the listing is up will already embody Seattle's public-policy choices. While the purpose behind the "first-in-time" rule is commendable—to further reduce discrimination in housing—its rigidity is *too limiting*. It does not allow landlords *any* flexibility in making reasonable post-listing judgments.

The court below relied on *Tahoe-Sierra*, finding it "unlikely that *Tahoe-Sierra* would recognize extraordinary circumstances"—"such as when a permanent regulation provides that 'no productive or economically beneficial use of land is permitted'—are present whenever a regulation limits 'the right to choose to whom one will rent their property.'" *Chong Yim*, 194 Wn.2d at 669–70 (cleaned up).

But unlike in *Tahoe-Sierra*, the legislation here does not provide that the interference is temporary. *Tahoe-Sierra* might be an appropriate analogue if Seattle's Office of Civil Rights required a "first-in-time" rule with exemptions from specific applications. The city would also have the burden to prove its rejection of an exemption was not capricious or arbitrary. But the city instead saves itself significant time and cost by permanently imposing on landlords the burdens of its public-policy choices. Even under *Penn Central*'s forgiving treatment, the "character of the governmental action" "goes too far."

In reviewing this case, the Court should also consider the social and economic costs of rejecting the petition. As housing regulations become more onerous and complex, it will prove more difficult for small

landlords to keep up. Urban real estate markets will become even more dominated by large, commercially sophisticated landlords who can afford to navigate the regulatory environment. Costs of living will increase, pushing out lower-income residents. This in turn will reduce economic and cultural diversity. If other cities are given the green light to replicate Seattle's efforts, they will likely experience similar losses.

Even for commercially sophisticated landlords, compliance costs would remain high, and would be reflected in ever-increasing rents. In cities where such increases are limited by rent controls, the profit crunch could thus reduce real-estate competition, reducing the quality of construction, maintenance, and amenities to the absolute regulated limit.

CONCLUSION

When this Court decided *Penn Central*, historic preservation laws were still in their infancy. Now they have become a national trend and have led to a host of ancillary legal controversies. *See*, *e.g.*, J. Peter Byrne, *Historic Preservation and Its Culture Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, Geo. Pub. L. and Legal Research Paper No. 12-021 (2012). Some of these might have been avoided had New York City's restrictions on Penn Central's construction been subjected to a bright-line test.

Lucas, in turn, involved a problem of a different sort. It is rare, and obviously difficult, for governments to totally diminish the value of land through regulation. Instances of less-than-total diminutions abound and remain subject to *Penn*

Central's confusing directives. *See generally* Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan. Envtl. L.J. 525 (2009).

If ever the chance and need for a narrowing of *Penn Central* arose, the Court would be remiss to ignore it. This case presents a total deprivation of a property right that cannot be as easily measured as a total loss (as in *Lucas*), and should not be tested using primarily economic metrics (as in *Penn Central*). But the logic underlying *Lucas* remains, and ought to apply in equal measure to a total deprivation of a non-possessory property right as it does to one that is more conventionally valuable—*e.g.*, the "parcel as a whole."

In addition to the important legal questions here, an adverse outcome could impose huge social and economic costs. *Amici* thus urge the Court to grant certiorari and protect the "fundamental attributes" of ownership from state overreach, to ensure that a regulation that "goes too far" cannot go national.

Respectfully submitted,

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