No. 19-1136

In the
# Supreme Court of the United States

CHONG and MARYILYN YIM, et al.,
*Petitioners*,

v.

THE CITY OF SEATTLE, WASHINGTON,
*Respondent.*

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

## BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

The City of Seattle has a uniquely intrusive and novel ordinance that declares it unlawful for a residential landlord to choose among qualified tenant applicants. Instead, the law grants the first qualified person to apply for a vacancy an exclusive right of first refusal. This "first-in-time" rule is vastly broader than civil rights laws, which are not challenged here, because it prohibits any discretion whatsoever, even for entirely legitimate reasons. The Supreme Court of Washington treated Seattle's ordinance in light of this Court's *regulatory* takings jurisprudence, but by forcing landlords to admit into physical occupation of their land a tenant they did not choose, the ordinance actually affects a physical taking.

The questions presented are thus:

1. Whether Seattle's First-In-Time ordinance amounts to a *per se* physical taking of the landlord's right to exclude, one of the most fundamental sticks in the bundle of the landlord's property right?

2. Even considered as a regulatory taking, should a regulation that deprives a property owner of the entirety of his right to exclude be deemed a compensable taking under the Fifth Amendment?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Constitutional Provisions**



**Statutes**



**Other Authorities**

**Rules**

## INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. Those principles include the idea, articulated in the Declaration of Independence and codified in the Takings Clause of the Fifth Amendment, that governments are instituted to protect the inalienable rights of citizens, including the right to acquire and use property. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance addressing the Constitution's protection of property rights, including *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmnt. Dist.*, 570 U.S. 595 (2013); *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012); and *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

## SUMMARY OF THE ARGUMENT

The "sticks" in the metaphorical "bundle" commonly said to be property are discreetly enforceable rights, and this Court has found the right to exclude to be both essential and fundamental. *Kaiser Aetna v.*

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[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made made a monetary contribution to fund the preparation and submission of this brief.

*United States*, 444 U.S. 164, 179 (1979). The City of Seattle, via its "First-In-Time" rule, has attempted to redefine property rights: it has taken from Seattle property owners the right to exclude by requiring them to accept as tenants applicants whom they have never met and did not choose. *See* Seattle Municipal Code 14.08.050(A)(1)–(4). Such a mandate imposes a permanent physical occupation that is a taking *per se*, and therefore either invalid or compensable under the Takings Clause of the Fifth Amendment (as made applicable to the States via the Fourteenth Amendment). The decision by the Supreme Court of Washington to uphold this derogation of the right to exclude physical occupation by a stranger tenant was not required under any antidiscrimination laws, and ran counter to precedent set by this Court in *Kaiser Aetna*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and even *Yee v. City of Escondido, Cal.*, 503 U.S. 519 (1992). The Court should grant certiorari to ensure that the City of Seattle is not permitted to rewrite property laws, and to clarify that a government mandate of physical occupation by a stranger tenant is a *per se* taking.

This case also, once again, brings to the fore the difficult conceptual and legal problems that have plagued regulatory takings analyses since this Court's decision in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Should Seattle's First-In-Time rule to be treated as a mere regulatory taking instead of a *per se* physical taking, the Court should take this opportunity to reconsider its approach to regulatory takings under *Penn Central*.

## REASONS FOR GRANTING THE WRIT

### I. The Court Recognizes Conceptual Severance In How It Treats The "Sticks" In The "Bundle," And The Right To Exclude Is Perhaps The Most Fundamental

For generations, private property rights have been metaphorically and rhetorically characterized as a "bundle of sticks" or a "bundle of rights." See John Lewis, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 43 (1888) ("The dullest individual among the people knows and understands that his *property* in anything is a bundle of rights"); *United States v. Craft*, 535 U.S. 274, 278 (2002) ("A common idiom describes property as a 'bundle of sticks'"). The idiom attempts to efficiently express what is one of the richest Anglo-Saxon social and legal concepts: property as a right, made up of distinct rights that are themselves complete.

Blackstone pointed to this rights-within-a-right conception when he wrote, "[An] absolute right, inherent in every Englishman, is that of property: which consists in 'the free use, enjoyment, and disposal of all his acquisitions.'" William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND § 134-35, 140-41 (William S. Hein & Co. ed., 1992). Since the method of conserving those rights in property were "entirely derived from society," each individual "resigned part of his natural liberty" to secure that civil advantage. *Id.* And because the individual gave up that measure of liberty for his rights in property, "[t]he laws of England [were] therefore . . . extremely

watchful in ascertaining and protecting [that] right." *Id.*

The American Framers imported such watchfulness into the Constitution, which, in addition to due process protections, provides, ". . . nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This Court has held that "the constitutional provision [of the Takings Clause] is addressed to every sort of interest the citizen may possess." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945). And in practice, the Court has recognized that the most fundamental sticks in the bundle are discreetly enforceable property rights.

The Court has recognized that a taking of the stick called *the right to use* is by itself a taking under the Fifth Amendment. In *United States v. Gen. Motors Corp.* the United States used its eminent domain powers to take over a leased space from lessee General Motors, but for a time shorter than the lease. *Id.* The Court found it was a taking, even though the government had not taken the entire leasehold from General Motors. *Id.* at 384. Thus, the Court recognized that when the government deprives a party of just the *use* of his property, without more, such deprivation can be constitutionally sufficient to trigger Fifth Amendment protections.

The Court has recognized that a taking of the stick called *the right to alienate* is by itself a taking under the Fifth Amendment. *Hodel v. Irving*, 481 U.S. 704 (1987). In *Hodel*, the Court invalidated a provision of the Indian Land Consolidation Act of 1983 that prevented the devise at death of fractional interests in

land. *Id.* Though Congress's purpose was "of high order," it was not enough to overcome the fact that "the right to pass on valuable property to one's heirs is itself a valuable right." *Id.* at 714, 715. The Court found this to be true, and sufficient to trigger Fifth Amendment protections, even though other sticks, like "full beneficial use" of the property during lifetime, remained in the bundle. *Id.*

And this Court has certainly recognized that a taking of the stick called *the right to exclude* is by itself a taking under the Fifth Amendment. Indeed, the right to exclude is perhaps the most quintessential right of property. James Madison, writing at the infancy of the new nation, opened his famous essay on property by defining it as "that dominion which one man claims and exercises over the external things of the world, *in exclusion of every other individual*." James Madison, *Property*, reprinted in 1 The Founders' Constitution Ch. 16, Doc. 23 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added). Decisions of this Court have upheld the importance of the right to exclude as fundamental to the protection of private property as an institution. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In *Kaiser Aetna*, this Court held that the federal government's requirement that the public be allowed physical access to a private marina constituted a taking, finding that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property" and that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation." *Id.* at 176, 179–80.

In fact, the government's taking of the right to exclude is so significant that this Court has analogized it to the allowance of a "permanent physical occupation" of property. *Nollan*, 483 U.S. at 832.

## II. When The Government Prevents A Property Owner From Excluding A Stranger Tenant, It Imposes A Permanent, Physical Occupation That Is A Taking *Per Se*

When the government, as in the case of Seattle's First-In-Time rule, strips a property owner of her discreetly enforceable right to exclude—particularly of a stranger—the government is functionally forcing a permanent physical occupation of her property. Therefore, such regulations should be analyzed as *per se* takings. This approach is compatible with *Loretto* and *Yee v. City of Escondido, Cal.*. Furthermore, this approach does not undermine, but instead is perfectly in line with, open housing and antidiscrimination laws.

### A. The decision by the Supreme Court of Washington upholding Seattle's derogation of the right to exclude physical occupation by a stranger tenant is contrary to this Court's precedent.

Under Seattle's First-In-Time rule, if the Yims want to rent their property, the City can force them to include those they would not otherwise *in good faith* choose to include. Essentially, the Yims are being forced to choose between renting their property at all, or acquiescing to a permanent physical occupation of their property by a stranger. Under this Court's precedent in *Loretto*, this is a taking *per se*, and certiorari

is warranted to address whether the decision below is simply incompatible with that decision.

In *Loretto*, this Court found that a permanent physical occupation was a *per se* taking under the Constitution. Though that case involved government-forced access for inanimate objects (cables), the Court cited *Kaiser Aetna* for the proposition that government-forced access for *persons* can also constitute "actual physical invasions" for which the government must pay compensation. *Id.* at 433 (quoting *Kaiser Aetna* at 176). Permanent physical occupation is "perhaps the most serious form of invasion of an owner's property interests," the Court held, because it not only destroys the right to exclude ("one of the most treasured strands in an owner's bundle of property rights"), it also destroys the rights to possess, use, and dispose. *Id.* at 435-46. And, when it comes to strangers, the Court found the problem to be especially offensive: "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property." *Id.* at 436 (emphasis in the original).

This Court's subsequent decision *Yee v. City of Escondido, Cal.*, 503 U.S. 519 (1992), is not to the contrary. Although this Court rejected the challenge to a state law limiting a mobile park owner's ability to terminate mobile home owners' tenancy in the park, it did so in what it characterized as the "unusual economic relationship" between mobile home park owners and mobile home owners. *Id.* at 526-28. The Court found that the government had not required any physical invasion of the park owners' property because the park owners' tenants "were invited by petitioners, not

forced upon [the park owners] by the government." *Id.* at 528.

The circumstances here are materially different. Seattle's First-In-Time rule does not regulate the relationship between a landlord and a tenant already "invited" into a tenancy, but instead forces on that landlord an *uninvited* tenant. The *Yee* Court itself recognized that distinction. Citing *Kaiser Aetna*, it recognized that the right to exclude was "doubtless" essential, but found that the state and local laws at issue did not facially rob the park owners of their right to exclude, but instead "regulate[d] petitioners' *use* of their land by regulating the relationship between landlord and tenant." *Yee*, 503 U.S. at 528 (emphasis in the original). "A different case would be presented," the *Yee* Court noted, "were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Id.* This is exactly what the Seattle First-In-Time rule does. And it is no help to it that property owners have the "choice" to simply stop renting their property, since the Court found in *Loretto* that the choice to accept the permanent physical occupation or cease renting to tenants is no choice at all. *Loretto*, 458 U.S. 419, n. 17 ("[A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. . . . The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated.").

To be sure, *Yee* also stated that when a property owner decides to rent his land to tenants, the government "may require the landowner to accept tenants he

does not like." *Id*. at 529. But that statement relied on this Court's decision in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), which upheld civil rights laws prohibiting racial and other forms of invidious discrimination. As discussed more fully below, Civil Rights and open housing laws do not require that property owners *who do not discriminate* accept tenants they do not like, much less strangers who they haven't even met.

### B. The right to exclude physical occupation by a stranger tenant does not undermine general antidiscrimination laws.

Seattle's First-In-Time rule strips a Seattle property owner of her right to exclude stranger tenants. Justifying the rule based on a theory of bias (albeit bias that is unconscious, and therefore presumably unchangeable), the City appears to be framing the issue of the First-In-Time rule as one of civil rights. But absent invidious discrimination, the right to exclude stranger tenants does not undermine general antidiscrimination laws. The Civil Rights laws of the 1960's, including general antidiscrimination laws like state open housing laws and the federal Fair Housing Act of 1968, represented extraordinary measures taken to uproot an extraordinary problem: the intractable, "pervasive problem of segregated housing." *Fair Housing Act of 1967: Hearings on S. 1358, S. 2114, and S. 2280 Before the S. Subcomm. on Housing and Urban Affairs of the Comm. on Banking and Currency*, 90th Cong. 7 (1967) (statement of Ramsey Clark, Attorney Gen. of the United States). The problem was "encouraged and maintained" by affirmative discriminatory practices such as "redlining," "steering," and

the private use and state enforcement of restrictive racial covenants. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2515 (2015). Such practices were a special breed of public nuisance: they were discriminatory nuisances. As such, the state was justified in its regulation, just as it is in any case of public nuisance. A regulation that affects property rights—even in their entirety—is not a taking if it prevents nuisance, because no one has a right to use his or her property in ways that cause harm to another's lawful rights. *Sic utere tuo ut alienum non laedas*. Blackstone, 1 COMMENTARIES at § 306; *see also Camfield v. United States*, 167 U.S. 518, 522 (1897) ("His right to erect what he pleases upon his own land will not justify him in maintaining a nuisance").

Because the Civil Rights laws were addressing affirmative, discriminatory nuisance-like conduct, the state was justified in allowing an exception to the fundamental rule that a property owner has the right to exclude. Here, no affirmative, deeply rooted, extraordinary discriminatory nuisance is proved or even alleged by the City. As such, antidiscrimination laws would not in any way be undermined by the Court's invalidation of Seattle's First-In-Time law.

Additionally, Seattle's First-In-Time rule goes beyond antidiscrimination laws that only partially abrogate the right to exclude. Under antidiscrimination laws, the Yims may exercise their discretion and choose who to include as their tenant neighbors as long as they do not do so on the basis of discrimination against a protected class. *See, e.g.* 42 U.S. Code § 3604. But under Seattle's First-In-Time rule, the

Yims and other landlords are forced to include those they would not otherwise in good faith choose to include—they are quite literally forced to include utter strangers, if they are going to include anyone at all. Invalidating the First-In-Time rule as a *per se* taking will not undermine common antidiscrimination laws.

## III. This Case Also Exposes, Once Again, The Fundamental Problems In This Court's Regulatory Takings Jurisprudence Under *Penn Central*

Even were Seattle's First-In-Time rule to be treated as a mere regulatory taking instead of a *per se* physical taking, the Court should take this opportunity to reconsider its approach to regulatory takings. *Penn Central* has been conceptually flawed from its inception and should be overturned. As shown above, this Court has held that the taking of *one* right in a property, without requiring the taking of *all* rights in that property, can absolutely be a taking compensable under the Fifth Amendment. This reality—that one larger property interest can be segmented into discreet property interests—is what academic literature has described as "conceptual severance." *See*, *e.g.*, Margaret Jane Radin, "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings," 88 Colum. L. Rev. 1667, 1676 (1988). And it should be as applicable in the regulatory takings context as it is in the physical takings context.

*Penn Central* held otherwise, of course. Without citation, this Court noted 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. "In deciding whether a particular governmental action has effected a taking," the majority added, still without citation, "this Court focuses rather both on the character of the action *and on the nature and extent of the interference with rights in the parcel as a whole*." *Id*. at 130-31 (emphasis added). Dissenting, then-Justice Rehnquist (joined by Chief Justice Burger and Justice Stevens), described the *Penn Central* majority's "rule that a taking occur only where the property owner is denied all reasonable return on his property" as posing "difficult conceptual and legal problems." 438 U.S. at 150 n.13 (Rehnquist, J., dissenting). Indeed it did, and it is well past time for this Court to reconsider, and reject, *Penn Central*'s holding on that score.

## CONCLUSION

This Court has rightly held that "the government does not have unlimited power to redefine property rights." *Loretto*, 458 U.S. at 439. The City of Seattle has redefined property rights by extinguishing one of the Yims' discreet property interests—the right to exclude. It has done so by going far beyond the requirements of general antidiscrimination laws, and by imposing the most offensive kind of physical invasion: that of a stranger. The Court should grant certiorari to clarify that when the government prevents a property owner from excluding a stranger tenant, it imposes a permanent, physical occupation that is a taking *per se* and therefore is either invalid or compensable under the Takings Clause of the Fifth Amend-

ment. And even were this case to be considered as involving merely a regulatory taking, certiorari is still warranted to revisit this Court's regulatory takings jurisprudence that would allow such a thing. "That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest." James Madison, *Property*, *supra.*

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Respectfully submitted,

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