No. 22-1095

IN THE
Supreme Court of the United States

COMMUNITY HOUSING IMPROVEMENT PROGRAM, ET AL.,
Petitioners,

v.

CITY OF NEW YORK, NEW YORK, ET AL.,
Respondents.

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

BRIEF OF PROFESSOR JAN G. LAITOS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*[1]

Professor Jan G. Laitos holds the Joe T. Juhan Endowed Professorship in Property Rights and Policy at the University of Denver Sturm College of Law. He is a regional board member of the Rocky Mountain Land Use Institute and a former Trustee of the Foundation for Natural Resources and Energy Law. He has authored several articles, books, and treatises, writing frequently on property rights and the Constitution.[2] He is also building the agenda and curriculum for the newly created Edward Juhan Program on Property Rights and Policy at the Denver Sturm College of Law.

Professor Laitos has an interest in this case because it is directly relevant to his scholarship and his endowed

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no party or party's counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of the filing of this brief.

[2] *See, e.g.*, Jan G. Laitos, *Law of Property Rights Protection: Limitations on Governmental Powers* (4th ed. 2023); Jan G. Laitos, *The Strange Career of Private Takings of Private Property for Private Use*, 5 Brigham Kanner Prop. Rts. Conf. J. 125 (2016); Jan G. Laitos, *Takings Law in Colorado*, *in Environmental Regulation of Colorado Real Property* 593 (Stephen A. Bain ed., 3d ed. 2021); Edward H. Ziegler & Jan G. Laitos, *Property Rights, Housing, and the American Constitution: The Social Benefits of Property Rights Protection, Government Interventions and the European Court on Human Rights'* Hutten-Czapska *Decision*, 21 Ind. Int'l & Comp. L. Rev. 25 (2011).

professorship at the University of Denver Sturm College of Law.

This case presents the question the Court declined to pass upon in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), but which Justices Scalia and O'Connor addressed in their partial dissent: Whether a city or state may force an unlucky set of property owners to bear the burden of a broad social welfare housing program. This question affects thousands of landowners, not only in New York but across the nation, as more cities have adopted or are considering adopting laws similar to New York's Rent Stabilization Law in light of the COVID-19 pandemic. Professor Laitos' scholarship has long considered the proper balance of private and public interests in Takings Clause analysis. His Takings Clause scholarship in particular has advocated for an increased focus on *causation* as a necessary component of the inquiry.[3] Professor Laitos therefore respectfully submits this brief *amicus curiae* in the hope that it assists the Court in its consideration of the important question presented in the petition.

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[3] Laitos, *Law of Property Rights Protection*, *supra* note 2, § 11.04, "Is the Plaintiff's Property the Cause of the Problem the Regulation Seeks to Correct?"; Jan G. Laitos & Teresa Helms Abel, *The Role of Causation When Determining the Proper Defendant in a Takings Lawsuit*, 20 Wm. & Mary Bill Rts. J. 1181 (2012); Jan G. Laitos, *Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard's Exaction Was a Taking*, 72 Denv. U.L. Rev. 893 (1995).

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should grant the petition for certiorari and reverse the judgment below, as it fundamentally misapprehends the essential role that causation plays in Takings Clause claims.

The Fifth Amendment's Takings Clause bars the government from taking private property for public use without just compensation. U.S. Const. amend. V. The Takings Clause ensures that the state may not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

What distinguishes a permissible land-use regulation from an unconstitutional taking? The *Armstrong* principle urges that "fairness and justice" should determine when public burdens should be borne by "some people" or the "public as a whole." This brief argues that the concept of fairness and justice is in large part coterminous with *causation*. If an owner's use of property is the cause of a social problem, then imposing limitations on the owner's use is fair and just, and thus generally not a taking of that property for public use. But, if the government uses land-use regulation as a tool to remedy more sweeping social ills for which the targeted landowner is not responsible, the government must compensate the targeted landowner for providing a larger public benefit. The cost of that land-use regulation should be borne by the "public as a whole"

ultimately benefitting from the regulation. The burden of correcting a social problem should not be the responsibility of just some people—unfortunate landowners whose property is being commandeered to provide a public good simply because it is convenient and "off-budget" for the regulator.

Justices Scalia and O'Connor recognized this critical point in their concurrence in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), and the full Court implicitly applied this principle in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). This case presents the Court with an opportunity to expressly hold, as Justice Scalia urged in his *Pennell* concurrence, that a land-use regulation is a taking unless it solves a problem caused by the regulated landowner.

Once one considers New York's Rent Stabilization Law ("RSL") through the prism of causation, the Second Circuit's error becomes clear. It cannot seriously be argued that the owners covered by the RSL have caused—or even meaningfully contributed to—the general socioeconomic hardship of their tenants. Tenants' difficulties in paying rent may create a social problem, but the government cannot solve that problem by quietly redistributing resources from select landlords to their indigent tenants. The government may limit rents only to the extent that the rents are unreasonable, and hence themselves contribute to a social ill. Because the RSL's limits are based not just on owners' costs and a reasonable return on capital, but also on tenant ability to pay, the RSL sweeps beyond what the Fifth Amendment permits.

The RSL effects a regulatory taking. This Court should grant the writ in order to clarify that some causal nexus is required between the property and the social ill being addressed before the government may lawfully restrict owners' enjoyment of their property.

ARGUMENT

I. Causation Is Essential To A Proper Takings Clause Analysis.

This Court's analysis of regulatory takings comes down to a central intuition: The government may not force one person, or a discrete group of persons, to foot the bill for general societal improvements. Indeed, "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was *designed* to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49 (emphasis added); *accord Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) ("While scholars have offered various justifications for [the just compensation requirement], we have emphasized its role in 'bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (citation omitted)); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321 (2002); *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 123-24 (1978).

This principle makes sense. As these cases recognize, it is inherently unfair to require an unlucky

few to bear costs that will redound to the benefit of many. And judicial enforcement of this principle is needed, given that the majority will tend to impose costs on a disfavored few rather than bear the burdens of a social program themselves. *See* Laitos, *Causation and the Unconstitutional Conditions Doctrine*, *supra* n.3, at 900-01; *see generally* Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985). This thumb on the scale in favor of overregulation of private property use requires an equally vigilant counterbalance, which the Constitution has provided.

To guard against the many unfairly imposing burdens on the few, the Court should require a cause-and-effect relationship between the social evil that the regulation seeks to remedy and the property use that is restricted by the regulation. Causation helps courts determine whether a government condition or restriction is a taking. If, on the one hand, an owner's use of property is the cause of a social problem, then government action conditioning or restricting that owner's use of the property will be appropriately linked to eradicating the problem, and it cannot be said that the property owner has been singled out unfairly. But if, on the other hand, the restraint is imposed on a property owner who has not caused the problem that the government action is designed to correct, then the owner is being singled out and should be compensated.

Justice Scalia's separate opinion in *Pennell* articulates this causation requirement, and *amicus* urges this Court to adopt Justice Scalia's analysis. *Pennell* concerned facts remarkably similar to the case before this Court. In *Pennell*, the Court considered a

San Jose rent control ordinance that mandated a hearing to determine whether a landlord's proposed increase was "reasonable under the circumstances," which included an analysis of certain specified factors. 485 U.S. at 5-6. Among those factors were not only the landlords' costs and returns, but also the hardship to tenants of a rent increase. *Id.* The petitioner alleged that this amounted to a taking, but the majority of the Court declined to reach the question and addressed only the petitioner's Due Process and Equal Protection Clause arguments. *Id.* at 15.

Justices Scalia, joined by Justice O'Connor, concurred in part and dissented in part, laying out this theory of causation to explain why San Jose's ordinance effected a taking. Justice Scalia observed that "[t]raditional land-use regulation … does not violate" the Takings Clause "because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy." *Id.* at 20 (Scalia, J., concurring in part and dissenting in part). Because "the owner's use of the property is … the source of the social problem, it cannot be said that he has been singled out unfairly." *Id.* Justice Scalia justified common measures such as zoning ordinances and emergency price regulations by noting the "cause-and-effect relationship" between the proposed property use and the social ill—excessive congestion, for the former, and exorbitant prices, for the latter. *Id.* For that same reason, Justice Scalia assumed that a city "may constitutionally set a 'reasonable rent'" according to factors geared to avoid exorbitant rents. *Id.* at 20-21. But once those factors have been

considered, the landlord "is receiving only a reasonable return," and as such "can no longer be regarded as a 'cause' of exorbitantly priced housing; nor is he any longer reaping distinctively high profits from the housing shortage." *Id.* at 21.

Rather, as Justice Scalia observed, the "hardship" provision took aim at a wholly distinct social ill: "the existence of some renters who are too poor to afford even reasonably priced housing." *Id.* Because that problem was not "distinctively attributable to landlords in general"—let alone "the *particular* landlords that the Ordinance singles out"—the ordinance became a tool to "establish a welfare program privately funded by those landlords who happen to have 'hardship' tenants." *Id.* at 21-22. That overt wealth transfer effected a taking of the landlords' property, precisely because it singled them out to bear the cost of a general social improvement scheme.

Under the *Pennell* concurrence, then, rent controls can indeed play an important social role without running afoul of the Fifth Amendment. Excessive rents do indeed create a social ill, making housing less available, and they can likely be fairly attributed to the landlords' conduct and use of their property. They "can … be regarded as a 'cause' of exorbitantly priced housing." *Id.* at 21. Rent control measures that look to factors that would restrict such exorbitance—landlords' costs, reasonable return on capital, etc.—therefore bear the requisite cause and effect relationship. But measures that look beyond those factors, such as the one in *Pennell*—and the one here, which even more drastically limits landlords' options—stray from the causal

relationship and instead force landlords to subsidize general social welfare initiatives.

As noted above, the majority in *Pennell* decided the case on unrelated grounds. Moreover, no other decision of this Court has expressly addressed Justice Scalia's causation analysis. However, several of this Court's cases have implicitly conducted such an analysis, indicating that Justice Scalia's view of the law is correct. In *Dolan*, this Court considered a challenge to the City of Tigard's decision to condition a building permit on the dedication of a portion of the property in question for flood control and traffic improvements. 512 U.S. at 377. The Court held that the requirement was a taking. *Id.* at 396. In so doing, the Court noted that the outcome would have been different if "petitioner's proposed development had somehow encroached on existing greenway space in the city," because if it had then "it would have been reasonable to require petitioner to provide some alternative greenway space for the public." *Id.* at 394. But because there was no evidence that petitioner's property was itself *causing* the problem—lack of green space—the government condition sought to address, the government could not appropriate petitioner's property. *Id.*

Indeed, *Dolan* went even further: When it came to the city's desire to set aside part of the development as a pedestrian or bicycle easement, the Court conceded that "the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets," crediting the city's estimate that it would "generate roughly 435 additional trips per day." *Id.* at 395. But the city's permit condition was still

unconstitutional, this Court held, because "the city ha[d] not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement." *Id.* The city had merely asserted that the pathway could "offset some of the traffic demand." *Id.* This vague conclusion was not enough to satisfy the Court—because it did not sufficiently balance the imposition on the property-owner against the harm the property-owner herself caused.

The Court applied a similar analysis in *Nollan v. California Coastal Commission*, 483 U.S. 825, 835-36 (1987). There, the Court considered whether a permit condition on a coastal development was an unconstitutional taking. The Court assumed, without deciding, that if the development "would substantially impede" the public's ability to see or enjoy the beach, then the denial of a permit, or the imposition of reasonable conditions related to that problem (such as a height limit) would be constitutional provided they did not interfere drastically with the Nollans' use of their property. *Id.* at 834-37. But if the permit condition was not related to the government purpose, and not related to the harm caused by the construction, then the condition was unconstitutional. *Id.* at 837. As applied to the Nollans, the Court rejected a requirement that the Nollans provide an easement across their property to the beach. The Commission had argued that the house was a barrier to accessing the beach—but as the Court noted, "[i]t is quite impossible to understand how a requirement that people already on the public beaches

be able to walk across the Nollans' property reduces any obstacles to viewing the beach *created by the new house*." *Id.* at 838 (emphasis added). Nor did it "help[] to remedy any additional congestion on [the beaches] *caused by* construction of the Nollans' new house." *Id.* at 838-39 (emphasis added).

State and lower federal courts, too, have looked to causation when analyzing takings claims. In *Knight v. Metropolitan Government of Nashville & Davidson County*, for example, the Sixth Circuit invalidated an ordinance that required landowners seeking to build homes in designated areas to build a sidewalk *on* their lot that complied with the city's design standards. 67 F.4th 817, 819 (6th Cir. 2023). Although the Sixth Circuit acknowledged that the government could legitimately—and appropriately—impose conditions on a permit that would "forc[e] an owner to internalize the costs (the 'negative externalities') that a development will impose on others," the court also warned that "the government might try to leverage its monopoly permit power to pay for unrelated public programs on the cheap. *Id.* at 824-25. When the government made demands on permit-seekers that "ha[d] no connection to the project's harmful social effects," it violated the Takings Clause's prohibition on "forcing a few people to bear the full cost of public programs." *Id.* at 825 (quoting *Armstrong*, 364 U.S. at 49); *see also Charter Twp. of Canton v. 44650, Inc.*, No. 354309, __ N.W.2d __, 2023 WL 2938991, at *13 (Mich. Ct. App. Apr. 13, 2023) (invalidating ordinance requiring payment into municipal tree fund as "extortion[]" disproportionate to the harm caused by the development); *Luxembourg Grp., Inc. v. Snohomish*

County, 887 P.2d 446, 448 (Wash. Ct. App. 1995) (a "dedication requirement [that] would not remedy any problem caused by the … subdivision … [r]equiring [the subdivider] to dedicate property … amounts to an unconstitutional taking"); *Castle Homes & Dev. v. City of Brier*, 882 P.2d 1172, 1178 (Wash. Ct. App. 1994) (fee exaction invalid when city did not show that fee would pay for improvements necessary "as a direct result of the proposed development" (quotation marks omitted)); *see generally* ; J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here*, 59 Wash. & Lee L. Rev. 373 (2002).

In sum, the importance of causation has been a consistent through-line in this Court's cases and in the decisions of lower courts applying them. Permitting the government to restrict property usage only to the extent proportionate to problems *caused* by that property usage is the only way to ensure that the government not abuse its power and force landowners to bear the costs of general social programs. Rent control measures that prevent landlords from charging exorbitant or excessive rents may be validly tied to a problem the landlords cause; but rent control measures that tether rent to general tenant hardship seek to remedy a social ill far removed from landlords' own conduct. They are not related to the landlords' use of their property, and instead are simply a general social welfare program. Such forcible subsidizing of welfare programs violates the Fifth Amendment.

II. New York Landlords In No Way Cause The Problem The RSL Addresses.

Once one views this case through the lens of causation, the RSL can only be understood as a blatant taking of New York's landowners' private property.

New York's RSL, which applies in the event of a housing "emergency" (a condition that has been declared every three years for the last half century), directs New York City's Rent Guidelines Board to set annual maximum rent increases for a subset of rent stabilized units: those in pre-1974 buildings with 6 or more rental units. *See* Pet. 4-7. The Board is required to consider several factors, including not only the property owners' costs and return, but also the current and projected cost of living indices for the affected area, as well as the tenants' ability to pay. Pet. 7. Because the RSL requires consideration of tenant ability to pay, permissible rent increases have trailed behind the changes to owner costs and regulated rents. Between 1999 and 2018, as petitioners note, the operating costs for property owners increased twice as much as did the permissible rent increases.

New York's highest court has candidly admitted that the RSL is a "[r]ent stabilization" measure, designed to "provide[] assistance to a specific segment of the population that could not afford to live in New York City without a rent regulatory scheme." *Santiago-Monteverde v. Pereira (In re Santiago-Monteverde)*, 22 N.E.3d 1012, 1016 (N.Y. 2014). For that reason, the New York Court of Appeals dubbed the program a "local public assistance benefit." *Id.* at 1015.

It is doubtless true that the poverty rates in New York City are alarmingly high, and that New York city faces a dire housing shortage. These two social challenges combine to create a significant number of tenants who simply do not have the income needed to access housing in New York. This is a pressing problem, and one that the government would do well to address. But when stated in these terms, it is plainly not a problem caused by the owners regulated by the RSL. There are no allegations in this case that the landlords have contributed to housing shortages in New York City, just as there were no allegations in *Dolan* that the property inhibited access to greenway spaces. There are no allegations that the landlords' use of their property is contributing to general income inequality—indeed, it would be difficult to conceive of how the specific landlords who own apartments pre-1974 buildings could be *uniquely* contributing to these social ills. Moreover, there is certainly no evidence that the New York City legislature made any kind of individualized finding with respect to the class of covered property owners before imposing this significant restriction on their enjoyment of their property, nor that the cost imposed on them is in any way proportional to the purported harm being addressed, as this Court required in *Nollan*.

Indeed, the conditions addressed by the RSL most closely resemble San Jose's ordinance, which similarly required consideration of tenant hardship. *See Pennell*, 485 U.S. at 6-7. But the RSL goes even *further* than the ordinance Justice Scalia critiqued in *Pennell*—there, each rent was subject to an individualized hearing, at which the adjudicator may or may not have considered

tenant hardship. *Id.* Here, New York has empowered a board to set a blanket maximum rent increase, and has paired it with other draconian limitations on landlords' ability to dispose of their property. *See generally* Pet. 4-7. Among those is essentially a prohibition on the landlord's ability to evict their tenants and reclaim the property for their own use. *Id.* Thus, not only can a landlord not charge a reasonable rent—they cannot make any *other* use of their property, either.

In short, landlords are being forced to the foot the bill for a general housing shortage and income inequality. But plainly the people being forced to pay to remedy the social problem—the landlords—did nothing to cause that social problem in the first place. The RSL already requires the board to consider factors that would limit rent to non-excessive levels, which is likely permissible as causally linked to the landlords' use of their own property. Requiring consideration of tenant hardship on *top* of those factors, however, forces landlords to pay for a problem they in no way created. Instead, the RSL's hardship provision is a paradigmatic example of blameless private owners being forced to shoulder the financial cost of a social welfare program. But this is precisely the kind of unfair singling out of individuals for costs appropriately borne by the public that this Court's Takings Clause jurisprudence rejects over and over again.

The Second Circuit erred in brushing aside Justice Scalia's concurrence in *Pennell* as not reflecting the holding of this Court. To the contrary, this Court's cases repeatedly suggest that causation is a necessary component of a fair and just Takings Clause analysis.

This Court should grant certiorari to clarify this important question and give force yet again to the Fifth Amendment's protection of private property.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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