No. 22-1095

In The
Supreme Court of the United States

COMMUNITY HOUSING IMPROVEMENT PROGRAM, ET AL.,

Petitioners,

v.

CITY OF NEW YORK, ET AL.,

Respondents.

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

BRIEF FOR THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Founded in 1991, the Institute for Justice (IJ) is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, occupational and educational liberty, and the free exchange of ideas. As part of that mission, IJ has litigated cases challenging the use of eminent domain to seize an individual's private property and give it to other private parties. Among the cases that IJ has litigated are *Kelo* v. *City of New London*, 545 U.S. 469 (2005), in which this Court held that the U.S. Constitution allows government to take private property and give it to others for purposes of "economic development," and *City of Norwood* v. *Horney*, 853 N.E.2d 1115 (Ohio 2006), in which the Ohio Supreme Court expressly rejected *Kelo* and held that the Ohio Constitution provides greater protection for private property than does the U.S. Constitution. IJ also routinely represents Americans challenging the constitutionality of burdensome land-use restrictions.[2] IJ has a substantial interest in ensuring that courts respect the rights of owners to use their property as they wish, consistent with implied limitations on ownership as found in the common law, free

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[1] No counsel for a party authored this amicus brief in whole or in part; and no person other than the Institute for Justice, its members, or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record for all parties was given timely notice that the Institute for Justice would be filing this brief in support of Petitioners.

[2] See notes 10–13, *infra*.

from intrusive, ahistorical, arbitrary, or exploitative restrictions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel below assumed that constitutional attacks on land-use regulation fit in one of two buckets: (1) "regulatory takings" necessarily subject to an ad-hoc inquiry involving the extent of the claimant's economic losses and expectations and (2) "physical takings" subject to a *per se* rule. That assumption was mistaken.

As this Court has explained, there are at least two ways that a claimant may launch a constitutional attack on an interference with property: by pointing to the losses it places on the claimant, or by calling into question its "character." Characterizing the interference as a "physical invasion" is one way to invalidate it. But this Court has never suggested that that is the *only* way to impugn an interference's "character." Instead, as this Court has explained, character-based attacks on a property interference may succeed by alleging that it is (1) not historically rooted in traditional limitations on property or (2) qualitatively intrusive. If so, then government must pay for the property interest.

Cities across the country are acting contrary to this principle and are restricting private property interests as if they belonged to the government. This Court should grant certiorari in this case to remind them that Americans have a right to exercise property interests that belong to them, subject not to

governmental fiat but only to traditionally implied limitations. In short, if government wishes to enjoy a private property interest (or keep someone from exercising a property interest that she owns), it must pay for it.

This issue is particularly important as it restricts access to housing. When five members of this Court reluctantly upheld a rent-control scheme—justifying it specifically as a "temporary," "emergency" response to wartime conditions—the four dissenters wondered what the consequences would be of such a departure from traditional boundaries of governmental power. In the ensuing century, the consequences have been disastrous—as evidenced by ongoing housing shortages across the country that created and exacerbated by these sorts of land-use restrictions. This Court has expressed a concern with "chilling effects" on exercise of constitutional rights; the "chilling effects" of this issue upon the right to build and operate housing are as apparent as they are tragic, as it has directly led to fewer homes and higher rents.

ARGUMENT

I. This Court should clarify the scrutiny afforded to claims attacking the "character" of a land-use restriction.

"[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pa. Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). This Court has recognized multiple ways that an interference with private property can go "too far." It might unjustly frustrate the owner's expectations,

or it might unfairly affect the owner's economic interests. *Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104, 124 (1978). Alternatively, it might have an impermissible "character." *Ibid*. This "character" consideration is key to Petitioners' case and particularly warrants this Court's attention.

There are crucial distinctions between claims that attack a regulation for its financial impact on property holders and claims that attack it for its character. The former kind of claim must be limited in scope, as "[g]overnment hardly could go on" if it must compensate owners every time a regulation has the mere side effect of reducing the market value of a piece of property. *Pa. Coal*, 260 U.S. at 413. Such claims therefore require some sort of assessment of owners' reasonable expectations or economic losses, which might not lend itself to bright-line rules except for the most extreme of situations. See, *e.g.*, *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1020 (1992). Given such considerations, a facial analysis might be tricky—which is why the panel below dismissed Petitioners' challenge insofar as it would depend on an owner-by-owner analysis. See *CHIP* v. *City of New York*, 59 F.4th 540, 554–555 (2d Cir. 2023) (dismissing Petitioners' claim because they did "not plausibly allege[] that every owner of a rent-stabilized property has suffered an adverse economic impact that would support their facial regulatory takings claims").

However, when a claimant alleges that an interference with property has gone "too far" because of its "character," the focus is the interference itself. For example, "when the interference with property can be characterized as a physical invasion by the

government," the rule is that compensation must be paid. *Penn Cent.*, 438 U.S. at 124 (citing *United States* v. *Causby*, 328 U.S. 256 (1946)). See also *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432–433 (1982). The character of the regulation itself is at issue, not the extent of economic losses it brings to any owner, and "'the character of the government action' not only is an important factor in resolving whether the action works a taking *but also is determinative*." *Id.* at 426 (emphasis added). The panel below held that "character" is not a problem here because the only basis for impugning a regulation's "character" is that it effects a physical invasion. See *CHIP*, 59 F.4th at 551–552.

But this Court has never suggested that "physical invasions" are the *only* basis for attacking a regulation's "character." This Court has given two ways that an interference with property can bear an impermissible "character": (1) it can be insufficiently "historically rooted" in implied limitations on property ownership rooted in the common law, or (2) it can be "qualitatively [] intrusive." *Loretto*, 458 U.S. at 441. Interferences that can be characterized as "physical" invasions violate both of these criteria, *ibid.*, but it does not follow that other interferences cannot fail scrutiny for likewise lacking historical analogues or being qualitatively intrusive to ownership. Indeed, this Court has repeatedly admonished lower courts to stop reading its Takings precedents as narrowly limited to their facts. See *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063 (2021); *Horne* v. *Dep't of Agric.*, 576 U.S. 350 (2015); *Ark. Game & Fish Comm'n* v. *United States*, 568 U.S. 23 (2012). The same principle should apply to analyses of how a given regulation's "character"

may appropriate a property interest demanding compensation.

This Court should grant certiorari to clarify how to scrutinize these sorts of "character" attacks on land-use restrictions. Some kinds of regulation presumably would fail scrutiny because they are not "historically rooted" implied limits to property ownership found in the common law, or because they are overly "intrusive." See *Loretto*, 458 U.S. at 441; *Pa. Coal*, 260 U.S. at 413; *Pumpelly* v. *Green Bay & Miss. Canal Co.*, 80 U.S. (11 Wall.) 166, 177 (1871) ("[The Takings Clause] protect[s] and secur[es] to the rights of the individual as against the government * * * [by] placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them."). See also *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111, 2126 (2022) (explaining, in the Second Amendment context, that "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation"). Other regulations would presumably be upheld if they do not intrude upon historical rights of ownership—for example, if the regulation merely prevents the owner from subjecting his neighbors to a nuisance. See *Mugler* v. *Kansas*, 123 U.S. 623 (1887). In any case, Americans' rights to use their property should be protected in a meaningful way. See *Nollan* v. *Cal. Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) ("[T]he right to build on one's own property * * * cannot remotely be described as a 'governmental benefit.'").

Meaningful protection is necessary here because landowners are especially vulnerable to intrusive,

abusive, or extractive regulation. They cannot take their property with them to a different jurisdiction, so they are at the mercy of whoever runs City Hall at the moment (which might, in effect, be a single person).[3] They are easy targets for offloading public burdens or siphoning public benefits—without needing to raise taxes. And they provide opportunities for planners to pick and choose, in effect, not the character of the *land* but the character of the *people* allowed to live or work there. None of this should be news to this Court, which has recognized such vulnerabilities—in the narrow context of land-use permit conditions. See *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604–605 (2013) (justifying heightened scrutiny because "land-use permit applicants are especially vulnerable to [governmental] coercion"). Similar considerations warrant judicial protection in the context of land-use regulations generally.[4]

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[3] See Nick Vadala, *Councilmanic prerogative in Philadelphia: What you need to know*, Phila. Inquirer (Mar. 21, 2022), https://www.inquirer.com/news/councilmanic-prerogative-philadelphia-city-council-20220321.html.

[4] In fact, the fundamental concern for these kinds of claims is much the same as this Court's exactions cases, which draw directly from *Pennsylvania Coal*. As in *Pennsylvania Coal*, a common theme is that if government wishes to enjoy the benefits of private property, then it may do so—by paying for the property interest. See *Nollan*, 483 U.S. at 841 ("California is free to advance its 'comprehensive program,' if it wishes, by using the power of eminent domain[.]"). See also *Dolan* v. *City of Tigard*, 512 U.S. 374, 396 (1994) ("A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (quoting *Pa. Coal*, 260 U.S. at 416)).

II. This issue is of exceptional importance, particularly as it restricts housing.

Inadequate judicial scrutiny over land-use restrictions is encouraging governments across the country to burden property owners with exploitative, ahistorical, or intrusive regulation. The human cost of this is particularly apparent in housing shortages that directly and inevitably result from these kinds of regulations.

The essence of property ownership is dominion over its use—that is, who will be using it, and how. See *United States* v. *Gen. Motors Corp.*, 323 U.S. 373, 378 (1945) (Takings Clause considers "property" to include "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it"). See also *Pa. Coal*, 260 U.S. at 413 ("'For practical purposes, the right to coal consists in the right to mine it." (citation omitted)). The framers viewed the protection of private property as crucial to safeguarding liberty; the very purpose of the Takings Clause is "for protection and security to the rights of the individual as against the government, * * * [by] placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them." *Pumpelly*, 80 U.S. at 177. Yet many Americans are learning that, according to City Hall, they do not *really* own their property. Here is a small sample of what, in IJ's experience, a city might do:

- Make it illegal for you to stop operating a gas station on your property.[5]

- Prohibit you from parking your own pickup truck on your own land, even for one night, "unless parked in an enclosed garage."[6]

- Require that you obtain a permit before using a room in your own house as a "home office" (even if no customers visit that office).[7]

- Prevent you from opening a convenience store on your (mixed-use zoned) property, absent a special exception (which might take years).[8]

- Price you out of living on your own property—by requiring that your home have a minimum-square-footage of 2,000 sq. ft.[9]

- Prevent you from living in your RV, on your own property, after your home burned down

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[5] *Petworth Holdings, LLC* v. *District of Columbia*, 531 F. Supp. 3d 271 (D.D.C. 2021).

[6] *Kuvin* v. *City of Coral Gables*, 62 So. 3d 625, 628 (Fla. Dist. Ct. App. 2010).

[7] Sacramento Code § 17.228.210.

[8] See Jake Blumgart & Ryan W. Briggs, *One of the biggest roadblocks to construction in Philly? The board that approves the projects*, Phila. Inquirer (Feb. 27, 2023), https://www.inquirer.com/real-estate/zoning-board-of-adjustment-small-business-pandemic-virtual-work-20230227.html.

[9] Andrew Wimer, *Rules Requiring People to Buy Big Homes Are Pricing Americans Out of the Housing Market*, Forbes (May 17, 2022), https://www.forbes.com/sites/instituteforjustice/2022/05/17/rules-requiring-people-to-buy-big-homes-are-pricing-americans-out-of-the-housing-market/.

(because the area where RV people are supposed to live is across town).[10]

- Prevent you from allowing guests to visit your (lawful) animal sanctuary on your own property.[11]

- Prevent you from operating a food truck on your own property.[12]

- Prevent you from cutting people's hair, or recording music, in your own home.[13]

- Require that you refuse to continue serving one of your motel guests, who is otherwise homeless, solely because she has stayed in your motel for longer than 29 days (the homeless woman subsequently committed suicide).[14]

But nowhere is the tragedy of government's heavy-handed regulation of property more readily apparent than in housing access. Cities across the country, by restricting owners' ability to build and offer housing on the market, have created and are perpetuating severe housing shortages. Comprehensive studies

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[10] https://ij.org/case/sierra-vista-zoning/.

[11] https://ij.org/case/north-carolina-animal-sanctuary/.

[12] https://ij.org/case/north-carolina-food-trucks/.

[13] https://ij.org/case/nashville-home-based-business/.

[14] Conor McCormick-Cavanagh, *Stay Away: Greenwood Village Motel Ordinance Shut the Door on Sue Sanders*, Westword (Nov. 15, 2022) https://www.westword.com/news/homeless-colorado-greenwood-village-motel-suicide-15414806.

repeatedly demonstrate this.[15] In fact, studies suggest that the *only* people to benefit from these schemes are people lucky enough to find themselves tenants in a rent-controlled unit (and it often is sheer luck, unmoored from need), while everyone else suffers.[16] Rent-control laws have been shown to reduce a city's housing supply by double-digit percentages.[17] At the same time, these laws severely undermine property values for no good reason.[18] For this and more, virtually every economist of any stature, across the political spectrum, recognizes that these laws are counterproductive at best.[19]

Notwithstanding all of this evidence, cities show no sign of stopping. In fact, they have begun

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[15] Konstantin A. Kholodin, *Rent Control Effects through the Lens of Empirical Research: An almost Complete Review of the Literature*, DIW Berlin Discussion Paper No. 2026 (Dec. 5, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4298178.

[16] See *ibid*. See also Lisa Sturtevant, *The Impacts of Rent Control: A Research Review and Synthesis*, NMHC Research Foundation (May 2018), https://www.nmhc.org/globalassets/knowledge-library/rent-control-literature-review-final2.pdf.

[17] Rebecca Diamond et al., *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, 109 Am. Econ. Rev. 3365 (2019), https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20181289.

[18] See David H. Autor et al., *Housing Market Spillovers: Evidence from the End of Rent Control in Cambridge, Massachusetts*, 122 J. Poli. Econ. 661 (2014), https://dspace.mit.edu/bitstream/handle/1721.1/104081/Autor_Housing%20market.pdf?sequence=1. See also *Koontz*, 570 U.S. at 614 (key concern of Takings doctrine is that government will "diminish[] without justification the value of [] property").

[19] See Blair Jenkins, *Rent Control: Do Economists Agree?*, 6 Econ. J. Watch 73, 106 (2009). See also U. Chi. Kent A. Clark Center for Global Markets, *Rent Control* (Feb. 7, 2012), https://www.kentclarkcenter.org/surveys/rent-control/.

implementing more clever restrictions—often seemingly designed specifically to evade this Court's exactions scrutiny. One such innovation is "inclusionary housing," which requires that owners agree to rent or sell their units to certain people at certain prices as a condition of obtaining a permit to build housing.[20] So far, courts have upheld these schemes under *Pennsylvania Central*'s ad-hoc multifactorial standard, refusing to apply exactions precedent (or a "character" assessment).[21] The eminently predictable result? Fewer homes built and higher rents.[22]

When five members of this Court first upheld a rent-control scheme, they did so reluctantly. Specifically, this Court caveated its holding as dependent on a state of emergency arising from war. *Block* v. *Hirsh*, 256 U.S. 135, 157 (1921) ("The regulation is put and justified only as a temporary measure. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." (citations omitted)). See also *Pa. Coal*, 260 U.S. at 416 (describing the rent-control laws in *Block* as "to the verge of the law" but "intended to meet a temporary emergency"). Even then, this Court's decision met a vigorous dissent from four of its members. *Block*, 256 U.S. at 158–170 (McKenna, J., dissenting). Those dissenters could not contemplate that government in the United States may restrict private property use in

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[20] See *Cal. Bldg. Indus. Ass'n* v. *City of San Jose*, 351 P.3d 974, 983 (Cal. 2015). See also Emily Hamilton, *Inclusionary Zoning and Housing Market Outcomes*, 23 Regulatory Reform & Affordable Housing 161 (2021), https://www.jstor.org/stable/26999944.

[21] See, *e.g.*, *Cal. Bldg. Indus. Ass'n*, 351 P.3d 974.

[22] *See* Hamilton, *supra* note 20.

such a manner, and they wondered what the consequences would be of holding otherwise:

> If such power exist what is its limit and what its consequences? And by consequences we do not mean who shall have a cellar in the City of Washington or who shall have an apartment in a million-dollar apartment house in the City of New York, but the broader consequences of unrestrained power and its exertion against property, having example in the present case, and likely to be applied in other cases.

Id. at 165–166.

One hundred years later, one "consequence" of this Court's jurisprudence is readily apparent: Government regulations are placing untenable chilling effects on Americans' rights to build and operate housing, resulting in widespread shortages and unaffordable rents. This Court has stated that Americans possess a right to use their property, including to build housing upon it. *Nollan*, 483 U.S. at 833 n.2 ("[T]he right to build on one's own property * * * cannot remotely be described as a 'governmental benefit.'"). Moreover, this Court has repeatedly castigated the notion that protection over these kinds of rights is less deserved than other rights. See, *e.g.*, *Dolan*, 512 U.S. at 392 ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."). In context

of other rights, this Court has expressed a concern for "chilling effects" imposed on exercises of the right. See, *e.g.*, *Ams. for Prosperity Found.* v. *Bonta*, 141 S. Ct. 2373, 2389 (2021) ("The risk of a chilling effect on association is enough[.]"). This Court should grant certiorari to stop the ongoing "chilling effects" that land-use regulations place on the building and provision of housing. The stakes could not be higher.

CONCLUSION

For the reasons expressed above, this Court should grant Petitioners' request for certiorari.

Respectfully submitted,

June 9, 2023

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