No. 13-288

IN THE

SUPREME COURT OF THE UNITED STATES

MHC FINANCING LIMITED PARTNERSHIP AND
GRAPELAND VISTAS, INC.,
Petitioners,

v.

CITY OF SAN RAFAEL AND CONTEMPO MARIN
HOMEOWNERS ASSOCIATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CATO INSTITUTE, TEXAS PUBLIC POLICY FOUNDATION, AND PROFESSORS JAMES W. ELY, JR. AND DONALD J. KOCHAN AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the standard of review for an as-applied claim that a sovereign's public-use justification for a taking is pretextual? Namely, how can objective evidence of pretext ever establish a violation of the Takings Clause if the putative standard—whether the government's action is "rationally related to a conceivable public purpose"—is applied only in the theoretical realm rather than to actual facts, as the Ninth Circuit did here?

2. Do regulatory takings claims evaporate—and does the government get a windfall—when property subject to regulation changes hands, on the theory that the buyer takes the property subject to the regulation and therefore has diminished "investment-backed expectations" under *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978)?

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INTEREST OF *AMICI CURIAE*[1]

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

The Texas Public Policy Foundation is a non-profit, non-partisan research institute based in Austin, Texas. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise throughout Texas and across the nation by educating policymakers and the national public policy debate with academically sound research and outreach.

James W. Ely, Jr. is the Milton R. Underwood Professor of Law Emeritus and Professor of History Emeritus at Vanderbilt University, where he specialized in property law.

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[1] Pursuant to Rule 37.2(a), all parties were timely 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 *amici* made a monetary contribution to its preparation or submission.

This case is of central concern to *amici* because it implicates the power of local and state governments to effect an uncompensated regulatory takings for the purpose of benefiting a private party.

BACKGROUND[2]

The Contempo Marin mobile home park in San Rafael, California, does not fit the stereotype that typically comes to mind when a local government adopts a rent control ordinance in the name of "affordable housing." Contempo Marin sits on a prized location, less than two miles from the San Francisco Bay in Marin County. It was a desirable place to live even before the City of San Rafael rewarded Contempo Marin's residents by taking nearly $100 million in value from the owner of the mobile home park and giving it to the mobile home park residents.

In California, mobile-home residents lease plots of land from the owner of the underlying property, but they own their mobile homes. Like other states, California has a "must-rent" statute that effectively requires mobile-home park owners to lease spaces to new tenants who purchase mobile homes from existing tenants.[3] Residents can thus transfer their homes to buyers on the open market at a price that consists of (a) the going price of the mobile home and (b) the ground lease rate to the mobile home park

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[2] *Amici* incorporate by reference the description of facts outlined in the petition for writ of certiorari (Pet. Cert. at 3-12), but offers this statement for additional context.

[3] *See* CAL. CIV. CODE § 798.74. Other states have similar "must-rent" mobile home statutes. *See, e.g.*, N.Y. REAL PROP. LAW § 233; N.J. STAT. ANN. § 46:8C-3; 940 MASS. CODE REGS. 10.07; MD. CODE ANN., REAL PROP. § 8A-602.

owner. To the extent that (b) is depressed by rent-control regulation, as here, (a) increases correspondingly and continues growing according to the market for property near the Pacific Ocean. The common (and illegal) practice of renting rent-controlled apartments at grey-market prices is thus made perfectly legal in the mobile-home context.

So when the San Rafael City Council enacted a rent- and vacancy- control ordinance, its effect was to transfer to each Contempo Marin mobile-home owner an immediate *premium* of nearly $100,000 over and above their property's existing value. Pet. App. 46a-48a. This allocation of value to the mobile home owners has become far more valuable since the trial, as prices of homes near the ocean continue to climb.

Indeed, one recent listing for a unit at Contempo Marin provides valuable context for understanding this case. This lucky beneficiary of San Rafael's rent-control scheme hopes to sell their mobile home for the "affordable" price of $345,000. They describe their home (and Contempo Marin) as follows:

> Pristine home with 2-car garage in Contempo Marin. This cheerful home features vaulted ceilings throughout, gas fireplace, large open kitchen, formal dining area, ceiling fans in every room, and large, private back yard. Master suite has big walk-in closet and spacious bath with double vanities, jetted tub and separate shower. Contempo Marin is an all-ages, pet friendly community featuring a gorgeous pool, spa, clubhouse, sparkling lagoon.

176 Yosemite Rd., http://www.trulia.com/property/3129483570-176-Yosemite-Rd-San-Rafael-CA-94903 (last visited Oct. 3, 2013).

The district court found that the aggregate effect of the rent control regulation was to transfer more than $95 million of value from the park owner to the mobile home residents. Pet. App. 55a.

This gift was no mere accident. When so much money is at stake, political power coalesces. Indeed, the district court made an explicit finding of fact that the parties benefiting from the rent-control ordinance here were a politically powerful group—certainly more powerful with the San Rafael City Council than petitioner MHC. The political calculation was easy: Why not target out-of-town mobile home park owners in the name of "affordable housing" (at least by Marin County standards), especially if a block of voters can cash in?

The district court judge was attuned to the political ethic in Marin County, just a short drive across the Golden Gate Bridge from the San Francisco courthouse. After receiving testimony about the political process that resulted in this wealth transfer, Judge Walker blew the whistle on San Rafael's gambit. The district court concluded that the ordinance could not satisfy the Takings Clause's public use requirement because the "assertion of a public purpose [was] pretextual and without reasonable basis" and the ordinance was enacted "for the singular purpose of transferring the value of land from one private party to another."[4] Pet. App. 81a.

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[4] The district court's full pretext analysis is set forth at Pet. App. 64a-81a.

Even if it could, the court found, the ordinance constituted a regulatory taking under *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978). Pet. App. 50a-64a.

As shown below and in the Petition for Certiorari, the Ninth Circuit's dismissive treatment of the district court's findings after a full trial demonstrates the urgent need for review by the Court.

SUMMARY OF THE ARGUMENT

The Court has previously described, in *Yee v. Escondido*, 503 U.S. 519 (1992), the risk that rent control of mobile home park tenancies can operate to transfer wealth to mobile home owners in violation of the Takings Clause.[5] At the time, the Court decided not to address the merits of the regulatory takings claim, deferring in the interest of prudence until presented with "a case in which the issue was fully litigated below." *Id*. at 538. This case features the full litigation that was lacking in *Yee*. It squarely presents critical regulatory takings questions where conflicts have emerged since *Yee*. It also presents the important question, left unanswered in the wake of *Kelo v. City of New London*, 545 U.S. 469 (2005), on the means by which trial courts should evaluate claims that a local government's public use justification is a pretextual cover in violation of the public use requirement of the Takings Clause.

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[5] *Yee*, 503 U.S. at 526-27 (describing premium transfer mechanism), 530 (noting differences between rent control in mobile home context with a "must-rent" statute and "that of an ordinary apartment rent control" situation and the risk that the transfer in the former situation may constitute a regulatory taking).

Justice Stevens's majority opinion in *Kelo* and Justice Kennedy's concurrence both acknowledge that the government may not take private property under the pretext of a public purpose when its actual purpose is to confer a benefit on another private entity. 545 U.S. at 478 (maj. op.); *id.* at 490 (Kennedy, J., dissenting). Justice Kennedy wrote separately to emphasize the importance of pretextual takings claims, and to prescribe a standard of review for courts considering pretext claims. *Id.* at 491. Since *Kelo*, lower courts have grappled over the meaning of the Court's reference to pretext and what weight to give Justice Kennedy's opinion.

The Ninth Circuit's decision demonstrates why clarity is necessary. Even though the district court found, based on an extensive factual record, that San Rafael's public use justification was a pretext to transfer wealth from the property owner to the park's tenants, the Court of Appeals held that no taking occurred because rent control, in general, is rationally related to a conceivable public purpose. The effect is to eviscerate a landowner's ability to bring a pretext claim by insulating government action from objective judicial scrutiny.

On the merits of MHC's regulatory takings claim, the Ninth Circuit held that because MHC purchased the mobile home park with rent control in place, it could have no investment-backed expectation of freeing the park from the ordinance. This directly conflicts with *Palazzolo v. Rhode Island*, where this Court held that purchasing property on "notice" of a regulation does not immunize the state from a takings challenge. 533 U.S. 606, 627 (2001). By shielding the state from a takings claim on the assumption that the purchase price reflected—and assumed the perpetual

validity of—the existing regulatory scheme, the lower court ignored this Court's admonition that an unreasonable regulation "do[es] not become less so through passage of time or title." *Id.* It privileged the local government's ability to regulate, whereas the Constitution assumes the primacy of a property owner's right to be compensated for a regulatory taking—and to transfer that right along with their property.

The Ninth Circuit's approach to the pretext issue and its flouting of *Palazzolo* demonstrate a haphazard disregard of the Fifth Amendment's guarantees. This Court must act to restore the Constitution to its rightful place.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to clarify the standard governing claims that a sovereign's public use justification for a taking is pretextual. While it is clear as a general proposition that the government may not "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit," *Kelo v. City of New London*, 545 U.S. 469, 478 (2005), the framework lower courts should use when evaluating a landowner's pretext claim remains unclear.

Moreover, the Ninth's Circuit's decision conflicts with this Court's holding in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), that purchasing property on "notice" of a regulation does not immunize the government from a takings challenge, and furthers a split of authority on that issue.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE STANDARD GOVERNING CLAIMS THAT A SOVEREIGN'S PUBLIC USE JUSTIFICATION IS PRETEXTUAL

This Court's Takings Clause cases uniformly affirm that the government may not "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo*, 545 U.S. at 478; *see also id.* at 490 (Kennedy, J., concurring) ("[T]ransfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause."); *accord Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) ("[T]he Court's cases have repeatedly stated that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.") (internal quotation marks and citation omitted).

Justice Kennedy, the fifth vote in *Kelo*, clarified how pretext claims should be reviewed. Specifically, they are not to be taken lightly: "A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." 545 U.S. at 491 (Kennedy, J., concurring). "A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits . . . ." *Id.*

The district court cited and applied those instructions. Meanwhile, the Ninth Circuit nodded to Justice Kennedy's opinion and then proceeded to ignore it.

A. By Disregarding The District Court's Pretext Findings, The Ninth Circuit Eviscerated Landowners' Ability To Bring Pretextual Takings Claims

The district court, relying on Justice Kennedy's opinion in *Kelo*, made an express finding that the local government's rationale for the rent and vacancy control ordinance was pretextual. The court:

1. Found that the City singled out MHC to bear a disproportionate and public burden, in that MHC is functionally the only landowner in San Rafael that could not obtain market value for its property, and the City offered no basis for singling out MHC. Pet. App. 61a-63a.

2. Found that the mobile home owners were politically connected and that this political power led directly to the ordinance. It acknowledged concerted effort between San Rafael and the residents, who wanted to purchase and operate the park themselves; the City supported the residents, and looked into whether it could exercise its eminent domain power outright to take the property directly. Pet. App. 79a-81a.[6] Rent and vacancy controls

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[6] A prime example of the tenants' political power: In 2001, San Rafael and MHC entered into a settlement agreement under which the city agreed to eliminate vacancy control. After encountering strong opposition from the residents, the City

were the next best thing: they allow residents to lock-in below-market rental rates and reap a windfall when they sell their mobile homes at a premium that reflects the rent savings.

3. Concluded that San Rafael's purported rationale for enacting the ordinance (*i.e.*, to stabilize rent and allow residents flexibility to sell mobile homes) lacked any factual basis. Pet. App. 40a, 71a-78a. "The Ordinance fails to create more affordable housing for incoming tenants. The court has found that the Ordinance creates a premium representing the capitalized value of transferable below-market rent. This means that incoming tenants will not receive any benefit from the rent control provisions. The benefit of a lower rent will be entirely offset by the need to pay a higher capital outlay upfront. Rather than create more affordable housing, the Ordinance creates *less* affordable housing." Pet. App. 76a (emphasis in original).

The Ninth Circuit's review demonstrates the need for clarity on the standard governing pretextual takings claims. Although the court acknowledged that the City would not "be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit," *MHC Financing Ltd. P'ship v. City of San Rafael,* 714 F.3d 1113, 1129 (9th Cir. 2013) (citing *Kelo*, 545 U.S. at 477-78), it completely ignored the district court's finding that, in fact, San Rafael's justification for the ordinance *was* pretextual. Moreover, though the court

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Council reversed course, abandoned the settlement agreement, and left vacancy control in place. Pet. App. 30a, 56a-57a.

purported to rely on Justice Kennedy's statement in *Kelo* that a rational-basis standard of review applies to pretext claims, it discarded his admonition that the "determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." 545 U.S. at 490.

Instead, the Ninth Circuit simply concluded that rent control in general is "rationally related to a conceivable public purpose." *MHC Financing*, 714 F.3d at 1129 (quoting *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir. 1993)).[7] That was enough for the ordinance to pass constitutional muster. *See id.*

This poses a rather obvious problem. Because any rent control ordinance could be, in theory, "rationally related to a *conceivable* public purpose," under the Ninth Circuit's rationale, it is no exaggeration to conclude that *every* rent control ordinance would be immune from judicial scrutiny and satisfy the public

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[7] Never mind that *Levald* was a facial challenge, and the court there expressly left open the door to an as-applied challenge. 998 F.2d at 690. The very portion of *Levald* quoted by the opinion below demonstrates the gross folly of the court's reasoning in this case: It speaks of what a "rational legislator *could have believed*" in enacting the ordinance at issue there. *MHC Financing*, 714 F.3d at 1129 (quoting *Levald*, 998 F.2d at 690). Here, of course, the district court found what the city *did believe*: that it had no basis for its purported public purpose, that the asserted purpose was pretextual, and that the purpose of the ordinance was to transfer the value of land from MHC to the tenants. Pet. App. 40a, 64a-81a.

use requirement.[8] Even where there is objective evidence of an illegitimate purpose, the landowner is left holding the bag: So long as it is conceivable that some legislator somewhere could conceive of a reason for a regulation, the sovereign is free to transfer some of one citizen's property to another, favored private party with impunity.

That cannot be the rule. If *Kelo*'s pretext language means anything at all, it means that what is plausible must give way to reality.

B. This Case Provides A Compelling Opportunity To Establish A Plain Standard For Deciding Pretext Challenges

The Ninth Circuit's decision demonstrates that certiorari is warranted to define the contours of judicial scrutiny for pretextual takings claims. Justice Kennedy's concurrence in *Kelo* called for a "meaningful rational-basis review," but the Court as a whole has not addressed the question of what standard of review applies.

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[8] In *Cnty. of Haw. v. C & J Coupe Family Ltd. P'ship*, 198 P.3d 615 (Haw. 2008), the Supreme Court of Hawaii rejected precisely this sort of logic. There, the dissent argued that the landowner's pretext claim failed because the stated purpose of the taking—the construction of a highway—was a "classic" public use. *Id.* at 647. "Plainly it was not the intention of this court in [*Haw. Hous. Auth. v. Ajimine*, 39 Haw. 543 (Haw.1952)] or of the [United States] Supreme Court in *Kelo* to foreclose the possibility of pretext arguments merely because the stated purpose is a 'classic' one." *Id.* "[E]ven where the government's stated purpose is a 'classic' one, where the actual purpose is to 'confer[ ] a private benefit on a particular private party[,]' the condemnation is forbidden." *Id.* at 648 (quoting *Kelo*, 545 U.S. at 477).

This has left the lower courts without a consistent test when confronted by pretext challenges. *See* Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 Sup. Ct. Econ. Rev. 173, 176 (2009) ("The legislatures' lack of attention, coupled with the Court's lack of clarity, has created significant uncertainty for both litigants and lower courts."), *id.* at 184-96 (reviewing lower courts' experiences with fashioning a workable post-*Kelo* test for evaluating whether a taking is pretextual); Ilya Somin, *The Judicial Reaction to* Kelo, 4 Alb. Gov't L. Rev. 1, 3 (2011) ("[F]ederal and state courts have been all over the map in their efforts to apply *Kelo*'s restrictions on 'pretextual' takings."), *id.* at 24 ("Unfortunately, *Kelo* says very little about the question of how to determine whether or not a taking that transfer[s] property to a private party is in fact pretextual."), *id.* at 24-36 (reviewing post-*Kelo* pretextual taking case law); Lynn E. Blais, *The Problem with Pretext*, 28 Fordham Urb. L.J. 963 (2010). *See also*, *e.g.*, *Goldstein v. Pataki*, 516 F.3d 50, 60-63 (2d Cir. 2008) (quarreling with *Kelo*'s "passing reference to 'pretext'");[9] *Cnty. of Haw. v. C & J Coupe Family Ltd. P'ship*, 198 P.3d 615, 641-53 (Haw. 2008) (allowing pretext claim to proceed, but declining to adopt the test articulated by Justice Kennedy in *Kelo*); *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 169 n.8 (D.C. 2007)

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[9] In *Goldstein*, the Second Circuit refused to look into the motives of a condemning authority on the "mere suspicion" of pretext. 516 F.3d 60-63. It noted, however, "that a fact pattern may one day arise in which the circumstances of the approval process so greatly undermine the basic legitimacy of the outcome reached that a closer *objective* scrutiny of the justification being offered is required." *Id.* at 63 (emphasis in original).

(same); *Goldstein v. Pataki*, 488 F.Supp.2d 254, 288 (E.D.N.Y. 2007) ("Although *Kelo* held that merely pretextual purposes do not satisfy the public use requirement, the *Kelo* majority did not define the term 'mere pretext' or cite any case in which a taking was found to be unconstitutional on the ground that its purposes were merely pretextual.").

Admittedly, no court has pursued such an extreme departure from *Kelo* as the Ninth Circuit here, but state high courts and lower federal courts have seized on different language from *Kelo* in trying to fashion a test. Some courts have looked at whether there is evidence of a pretextual motive. *See C & J Coupe Family*, 198 P.3d at 647-49 (*Kelo* requires courts to consider evidence of an illegitimate purpose and determine whether the rationale was "a mere pretext for its actual purpose to bestow a private benefit"), *id.* at 647 ("where the actual purpose of a condemnation action is to bestow a benefit on a private party, there can be no rational basis for the taking.") (citing *Kelo*, 545 U.S. at 477-78); *accord Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 337 (Pa. 2007) ("In considering whether a primary public purpose was properly invoked, this Court has looked for the 'real or fundamental purpose' behind a taking."), *id.* at 338 ("This means that the government is not free to give mere lip service to its authorized purpose or to act precipitously and offer retroactive justification.") (applying Pennsylvania law as consistent with *Kelo*).[10]

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[10] A few lower court decisions that predate *Kelo* similarly looked into the motives of condemning authorities when considering whether a taking was pretextual. *E.g.*, *99 Cents Only Store v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) ("No judicial deference is required ... where

Three state supreme courts have looked to the extent of planning involved (*i.e.*, whether the taking was part of a comprehensive development plan) when evaluating pretext. *Middletown*, 939 A.2d at 338 (concluding that "evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking"); *Mayor & City Council of Balt. v. Valsamaki*, 916 A.2d 324, 351-53 (Md. 2007); *R.I. Econ. Dev. Corp. v. The Parking Co.*, 892 A.2d 87, 104 (R.I. 2006).

The District of Columbia Court of Appeals focused on a taking's projected economic benefits to the public. *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 173-74 (D.C. 2007) ("We conclude that a reviewing court must focus primarily on benefits the public hopes to realize from the proposed taking. If the property is being transferred to another private party, and the benefits to the public are only 'incidental' or 'pretextual,' a 'pretext' defense may well succeed.") (footnote omitted).

And in one case the Third Circuit looked at whether the identities of private beneficiaries were known at the time of the taking. *Carole Media LLC v. N.J. Transit Corp.*, 550 F.3d 302, 311-12 (3d Cir. 2008).

In short, guidance is sorely needed to affirm that pretext claims remain viable and to clarify how such claims are to be litigated. Indeed, MHC's experience is

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the ostensible public use is demonstrably pretextual") (cited in *Kelo*, 545 U.S. at 487 n.17); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext.").

instructive and cautionary. If this Court does not explicitly affirm that property owners really do have an ability to prove pretext claims, the Court's seemingly plain statements in *Kelo* and elsewhere that such rights exist will be dismissed by local governments and lower courts as hollow maxims.

C. Guidance Is Also Needed To Clarify Lurking Uncertainty About The Application of Constitutional Provisions Outside The Takings Clause

Further compounding the confusion over the standards governing pretext challenges, the Court's cases have suggested that Constitutional guarantees separate and apart from the Takings Clause are implicated when local governments make outright transfers of property from one private group to another. Justice Kennedy's *Kelo* opinion highlighted the risk that such transfers violate the Due Process Clause. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) ("There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause."); *see also Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 548 (2005) (Kennedy, J., concurring) (*Lingle* "does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process.").

Justice Stevens's lead opinion in *Kelo* makes a similar point. *Kelo*, 545 U.S. at 487 ("Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion

that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise."), & n.17 ("Courts have viewed such aberrations with a skeptical eye. These types of takings may also implicate other constitutional guarantees.").

In this case, the district court held that *Lingle* appeared to open the door to a substantive due process challenge, but that existing Ninth Circuit precedent closed it. Pet. App. 81a-88a. The Ninth Circuit reached MHC's substantive due process claim, and rejected it with scant analysis. *MHC Financing*, 714 F.3d at 1130-31.

In short, this Court's cases have not established a clear line to distinguish between a sovereign's "arbitrary and irrational" action resulting in a deprivation of property in violation of due process, from what may constitute a pretextual taking.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE SPLITS OF AUTHORITY OVER THE APPLICATION OF *PENN CENTRAL* TO RENT CONTROL SCHEMES

Under this Court's regulatory takings jurisprudence, a landowner may challenge a regulation on the grounds that it "is so unreasonable or onerous as to compel compensation." Regulatory takings are analyzed under the framework set in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), which "is characterized by essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances." *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)

(internal quotation marks and citations omitted). This analysis looks to "a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).[11]

The Ninth Circuit decision raises questions concerning each of these factors. Most notably, it creates a clear conflict with this Court's decision in *Palazzolo* regarding the effect of a property transfer on a landowner's "reasonable investment-backed expectations," by holding that takings claims vanish when property changes hands.[12] More specifically, the Court of Appeals held that because MHC purchased the property subject to the original rent control ordinance it had no investment-backed expectation that "the rent control regime would disappear altogether." *MHC Financing*, 714 F.3d at 1128. In the Ninth Circuit's view, "the price [MHC] paid for the mobile home park doubtless reflected the burden of

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[11] Because the petitioners in *Yee* brought a physical takings claim, this Court did not consider whether the rent control ordinance in that case constituted a regulatory taking. 503 U.S. at 523, 537-38. And there, the Court noted that the wealth transfer from the park owner to the tenants "might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Id.* at 530 (emphasis omitted).

[12] *Amici* agree that the Ninth Circuit decision furthers conflicts of authority regarding the application of the remaining *Penn Central* factors (*i.e.*, the "economic impact of the regulation," and "the character of the governmental action"), and defer to Petitioners' arguments in favor of certiorari on those points. Pet. Cert. 16-18, 23-27.

rent control they would have to suffer." *Id.* (quoting *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010)).

That finding conflicts with *Palazzolo*, where this Court held that buying property on "notice" of a regulation does not immunize the state from a takings challenge. 533 U.S. at 627 (rejecting state's argument that post-enactment purchaser could not challenge a regulation because it would, "in effect, put an expiration date on the Takings Clause."); *accord Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 n.2 (maj. op.), 860 (Brennan, J. dissenting).

By shielding the state from a takings claim on the assumption that the purchase price reflected—and assumed the perpetual validity of—the existing regulatory scheme, the Ninth Circuit ignored this Court's admonition that an unreasonable regulation "do[es] not become less so through passage of time or title." *Palazzolo*, 533 U.S. at 627. The court affords primacy to the local government's ability to regulate, whereas the Constitution assumes the primacy of a property owner's right to be compensated for a regulation that amounts to a taking—and to transfer that right along with their property.

An example illustrates the problem. Imagine that Rufus owns a mobile home park. He's retired, and the rents from the park are his primary source of income. The city passes a rent control ordinance; though the ordinance does not immediately decrease his revenues, it changes his long-term view of the property as an investment. He has neither the resources nor the desire to enter into a protracted

battle with the city to challenge the ordinance.[13] So he puts the park on the market.

Harlan sees the listing. He has resources, and is willing to fight. Rufus and Harlan negotiate a purchase price that reflects the value of the park with rent control in place, the burden of challenging the ordinance, and the risk that the challenge will fail. But if Rufus cannot transfer his full interest in the park, including his right to bring a takings challenge—if Harlan can have no "investment-backed expectation" of freeing the park from an unconstitutional restriction—then the transaction falls apart. The city has averted a potentially meritorious takings claim—and thereby obtained a windfall—merely by outlasting the landowner.

Palazzolo affirmed that the Takings Clause is meant to be a bulwark against this sort of forfeiture: The State "may not . . . secure a windfall for itself" by "stripp[ing]" a landowner "of the ability to transfer the interest which was possessed prior to the regulation." 533 U.S. at 627. As Justice Scalia put it:

> In my view, the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The "investment-backed expectations" that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional.

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[13] This case is a perfect example. MHC and San Rafael have locked horns for nearly two decades, and each side has spent several million dollars in attorney's fees.

Id. at 637 (Scalia, J., concurring) (internal citation omitted); *accord Guggenheim v. City of Goleta*, 638 F.3d 1111, 1127-32 (Bea, J., dissenting). To borrow a phrase from Judge Easterbrook, the government cannot evade the operation of the Takings Clause through this sort of "disappearing-value trick."[14]

The decision below deepened a split between the Ninth and the First, Seventh, and Federal Circuits on *Palazzolo*'s reach. *Compare MHC Financing*, 714 F.3d at 1128, and *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010), with *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359, 1366 (Fed. Cir. 2009) (citing *Palazzolo* and observing that "knowledge of the regulation is not *per se* dispositive [to a regulatory takings claim], although it is a factor that may be considered, depending on the circumstances."). Other circuits have also acknowledged that precedent. *Phillip Morris, Inc. v. Reilly*, 213 F.3d 24, 37 (1st Cir. 2002) (*Palazzolo* holds that "whether property is acquired before or after a regulation is enacted does not completely determine the owner's reasonable investment-backed expectations"); *Abbott Labs. v. CVS Pharmacy, Inc.*, 290 F.3d 854, 860 (7th Cir. 2002) (citing *Palazzolo* for the proposition that "a takings claim survives transfer of the property to a new owner").

As two scholars have observed: "The Supreme Court's regulatory takings jurisprudence is one of the most heatedly divisive topics in contemporary constitutional law. One point, on which all sides agree, however, is that the meaning and significance of

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[14] *See Abbott Labs. v. CVS Pharmacy, Inc.*, 290 F.3d 854, 860 (7th Cir. 2002).

'investment-backed expectations' is among the most baffling elements of this confusing" doctrine. J. David Breemer & R.S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After* Palazzolo*, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre*-Palazzolo *Muck*, 34 S.W.U. L. Rev. 351, 352 (2005).

The petition should be granted to, at least, clarify that transferring a property saddled by a regulatory taking does not provide an escape hatch for the regulating government body under *Penn Central*'s "reasonable investment-backed expectations" prong.

CONCLUSION

For these reasons, and those stated by petitioners, the petition for writ of certiorari should be granted.

Respectfully submitted,

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