No. 15-1467

IN THE

# Supreme Court of the United States

STAHL YORK AVENUE CO., LLC.,
*Petitioner*,

*v.*

CITY OF NEW YORK AND
NEW YORK LANDMARKS PRESERVATION COMMISSION,
*Respondents.*

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

**BRIEF FOR THE CATO INSTITUTE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**


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July 6, 2016

## QUESTION PRESENTED

Does ownership of real property protect the owner from arbitrary deprivation of its use under the Due Process Clause of the Fourteenth Amendment, as the Third and Seventh Circuits have held, or must the owner show entitlement to the particular use of the property sought, as the First, Second, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits require?

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## INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan policy research foundation established in 1977 and dedicated to the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of 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*.

National Federation of Independent Business Small Business (NFIB) Legal Center is the voice for small businesses in the courts. Founded in 1943, NFIB is the nation's leading small business association, with members in all 50 states. NFIB protects its members' right to own, operate, and grow their businesses. NFIB represents 325,000 businesses nationwide, spanning the spectrum from sole-proprietor enterprises to firms with hundreds of employees.

This case concerns *amici* because it involves arbitrary and irrational restrictions on the rights of property owners, to the economic detriment of all.

## INTRODUCTION AND SUMMARY OF ARGUMENT

According to the Second Circuit, landowners lack due-process protections unless they show that they have a statutory "entitlement" to use their land. This is circular Humpty Dumpty logic. Indeed, that ap-

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[1] Rule 37 statement: All parties received timely notice of *amici*'s intent to file this brief; their consent letters have been lodged with the Clerk. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amici* funded its preparation or submission.

proach—joined by some other circuits—impermissibly presumes the legitimacy of restrictions, without considering whether they are lawfully applied.

*Euclid v. Ambler Realty* commands lower courts to examine whether a "substantial relation" exists between an imposed development restriction and "the public health, safety, morals, or general welfare." 272 U.S. 365, 395 (1926). That rule was reaffirmed most recently in *Agins v. City of Tiburon*, where the Court said that an imposed restriction must "substantially advance legitimate state interests." 447 US 255, 260 (1980). But the Second Circuit's approach subverts this test by flatly denying landowners due process protections unless they can first demonstrate that the authorities lack substantial discretion when reviewing a permit application. Accordingly, this petition for *certiorari* should be granted to clarify that due-process rights inure in the title of the land, and are not dependent on a legislative body's policy choices.

This case provides an ideal vehicle for the Court to consider this issue because Petitioner's application was denied for allegedly improper reasons. Nonetheless, the Second Circuit refused to consider Petitioner's due-process arguments because the company could not prove "entitlement" to an approval. It would be fitting to consider the issue in the context of this case because of the economic harms caused by the sort of historic-preservation programs at issue.

Empirical data on historic preservation in Manhattan shows that the regulator-friendly "entitlement" rule has lead to mass swaths of the borough being designated as landmarks. Moreover, comparing preservation data from the Third and Seventh Circuits (the owner-friendly approach), the Second and

Fourth Circuits (the regulator-friendly "entitlement" approach), and the Ninth and D.C. Circuits (the "control," as courts that have not spoken on the rule), it is readily apparent that various local "not in my back yard" (NIMBY) interests in large cities are abusing historic preservation to avoid development that otherwise satisfies applicable zoning laws. This over-preservation trend advances no legitimate state interest. Instead, it acts contrary to the public welfare—especially when invoked as mere pretext to block reasonable development plans.

## ARGUMENT

### I. THE PETITION SHOULD BE GRANTED TO RESOLVE AN INTRACTABLE CIRCUIT SPLIT AND RESTORE DUE PROCESS PROTECTIONS FOR LANDOWNERS ACROSS THE COUNTRY

#### A. The Due Process Clause Requires at Least Some Minimal Justification for Abrogating Common Law Property Rights

"Long before the original States adopted the Constitution, the common law protected an owner's right to decide how best to use his property." *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 513 (1977) (Stevens, J., concurring). Due process according to the "law of the land" requires that any deprivation of common law property rights must be founded in "legitimately enacted law." *See* Bernard H. Siegan, *Property Rights: From Magna Carta to the Fourteenth Amendment* 16-17 (2001); U.S. Const. amend. V; U.S. Const. amend. XIV, § 1. Accordingly, the government must offer some concrete basis for concluding that a restriction advances a legitimate state interest and is

imposed in accordance with the law of the land. *Euclid v. Ambler Realty*, 272 U.S. 365, 395 (1926).

*Euclid* emphasized that an infringement on property rights "must find [its] justification in some aspect of the police power, asserted for the public welfare." *Id.* at 387. Justice Sutherland emphasized that, while a restriction may be lawfully imposed in one context, it may be deemed "arbitrary and oppressive" in another context. *Id.* at 387. Thus, the "line which . . . separates [a] legitimate from [] illegitimate assumption of power . . . varies with circumstances and conditions." *Id.* Sutherland reaffirmed that principle two years later in *Nectow v. City of Cambridge*, in holding that the Cambridge, Massachusetts had violated due process by "arbitrar[ily] and unreasonabl[y]" imposing restrictions that did nothing to address any public concerns. 277 U.S. 183, 188 (1928).[2]

This Court has since reaffirmed that the Due Process Clause imposes an affirmative burden on authorities to provide factual justifications for infringements of property rights in as-applied cases. For example, in *Goldblatt v. Town of Hempstead*, the Court explained that "[t]o evaluate the reasonableness [of a

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[2] *Nectow* was an as-applied challenge to a zoning rule that prevented an owner from using some of his land for industrial purposes. *Id.* at 442-46. The zoning code permitted residential development, but the record showed that the property was not well suited for that. For one thing, there was a railroad on the adjoining property, which would have made it an unattractive residential option. For another, the property was next to a Ford plant, which was said to be noisy at night, and within 750 feet of a soap factory that was smelly. *Nectow v. City of Cambridge*, 260 Mass. 441, 444 (1927). Still, the city banned industrial uses of the property at issue. In striking down the restriction, *Nectow* clarified that government bears a burden of demonstrating some factual basis to justify the abrogation of property rights.

restriction] [the court must] know such things as the nature of the menace against which it will protect, and the availability and effectiveness of less dramatic steps." 369 U.S. 590, 494-95 (1962). And again in *Agins v. City of Tiburon*, the Court restated *Euclid's* essential holding, explaining that "[t]he application of a general zoning law to a particular property effects a [constitutional violation] if the ordinance does not substantially advance legitimate state interests." 447 U.S. 255, 260 (1980) (citing *Nectow*, 277 U.S. at 188).

More recently, *Lingle v. Chevron U.S.A.* clarified that the "substantial advancement" formula, applied in *Agins*, was a due-process test, and therein expelled the test from this Court's regulatory takings jurisprudence. 544 U.S. 528, 540-41 (2005). *Lingle* affirmed that the Due Process Clause ultimately requires at least a minimal showing of the propriety of any imposed restriction. *Id.* Thus this Court has never backed away from the fundamental requirement that there must be a "substantial relation" between an imposed restriction and the public good it seeks to advance.

### B. A Majority of Circuits Now Subvert the Rule Set Forth in *Euclid* and *Nectow*

#### 1. Several circuits deny even minimal due-process protections, except where the owner can demonstrate a statutory entitlement.

Alhough this Court has never disavowed *Euclid's* "substantial relation" test, the lower courts are severely divided as to whether the test survives. *See* Nisha Ramachandral, *Realizing Judicial Substantive Due Process in Land Use Claims*, 36 Ecology L.Q. 381, 383 (2009) (explaining divergent views of the

federal circuits on the proper due process test).[3] Even more shocking, many courts now hold that a landowner must demonstrate an entitlement to engage in a specified use under the governing regulatory regime in order to even invoke due process protections. *Stahl York Avenue Co., LLC v. City of New York*, 2016 WL 860431 (2d Cir. 2016); *Macone v. Town of Wakefield*, 277 F.3d. 1, 9 (1st Cir. 2002); *Gardner v. City of Balt. Mayor & City Council*, 969 F.2d 63, 68-69 (4th Cir. 1992); *Silver v. Franklin Twp., Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992); *Bituminous Materials Inc. v. Rice Cnty., Minn.*, 126 F.3d 1068, 1070 (8th Cir. 1997); *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. Cir. 2000); *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989). By contrast, other courts (rightly) reject that requirement. *DeBlasio v. Zoning Bd. of Adjustment for Twp. Of W. Amwell*, 53 F.3d 592, 600-01 (3d Cir. 1995) (recognizing that the Due Process Clause protects property owners from arbitrary and irrational deprivations of their common law rights); *Polenz v. Parrot*, 833 F.2d 551, 556 (7th Cir. 1989) (same).

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[3] Compare *Simi Inv. Co. v. Harris Cnty.*, 236 F.3d 240, 251 (5th Cir. 2000) (substantial relation test); *Equity Lifestyle Properties, Inc. v. Cnty. of San Luis Obispo*, 548 F.3d 1184, 1194 (9th Cir. 2008) (same); with *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 46 (1st Cir. 1992) (an abrogation of property rights must shock the conscience to violate due process); *O'Connor v. Pierson*, 426 F.3d 187, 204 (2d Cir. 2005) (same); *United Artists Theatre Circuit*, 316 F.3d 392, 400 (3d Cir. 2003) (same); *Geo. Wash. Univ. v. D.C.*, 318 F.3d 203, 209 (D.C. Cir. 2003) (using a "gravely unfair" standard); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992) (recognizing due-process violations only where restriction is inherently arbitrary); *New Burnham Prairie Homes, Inc. v. Vill. of Burnham*, 910 F.2d 1474 (7th Cir. 1990) (need to show separate constitutional violation to prevail in due-process challenge).

Unfortunately, the former view has become pervasive. A clear majority now holds that there are no due-process rights except those expressly conferred by lawmakers. But this improperly assumes that property rights are conferred by the government. In the words of Chief Justice Rehnquist, "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle." *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-27 (2001) (explicitly rejecting the notion that "property rights are created by the state[,]" and affirming that "[t]he right to improve property . . . [may only be restricted through] the reasonable exercise of state authority . . . [through] valid zoning and land-use restrictions.") (emphasis added).

**2. This approach presumes the validity of land-use restrictions and dispenses with the requirement that the government demonstrate that—as applied—they advance the public interest.**

Whereas the substantial relationship test set forth in *Euclid* and *Nectow* requires government to justify an imposed regulatory regime by demonstrating that it relates, in some rational way, to the advancement of a legitimate state interest, the Second Circuit dispenses with this requirement by assuming the validity of the regime. *Stahl*, 2016 WL at *1-2. Courts following the Second Circuit's approach hold that property owners hold *no due process rights* against a regulatory regime that vests any significant discretion in public officials to grant or deny permit applications.

In presuming the validity of the regime, the lower courts have turned first principles on their head. While a land-use restriction may advance a legitimate public interest in certain cases, *Euclid* and

*Nectow* make clear that even a generally valid ordinance cannot be presumed valid as applied in all cases. *Euclid*, 272 U.S. at 387 (explaining that "[a] regulatory zoning ordinance, which would be clearly valid as applied to great cities, might be clearly invalid as applied to rural communities."); *Nectow*, 277 U.S. at 188. The burden necessarily rests on the authorities to justify applying a restriction with regard to any given property. The Second Circuit's approach wholly rejects the notion the government bears any responsibility to justify the denial of common-law rights.

The Petitioner alleges that it was arbitrarily denied the right to redevelop its property. The company would have had every right to carry out those plans at common law. *Bove v. Donner-Hanna Coke Corp.*, 258 N.Y.S. 229, 231 (N.Y. App. Div. 1932) ("As a general rule, an owner is at liberty to use his property as he sees fit, without objection or interference from his neighbor, provided such use does not violate an ordinance or statute."). But the New York Landmarks Preservation Commission has deprived the company of its common-law rights—arguably without any basis in the law. Remarkably, the court below refused to even consider that possibility, holding that Stahl was not entitled to due-process protections because the Commission had some degree of discretion in reviewing Stahl's application. *Stahl*, 2016 WL at *1-2.

Yet the preservation law does not confer unfettered discretion to deny redevelopment rights for any reason whatsoever. Nor could the City legitimately enforce a regime that allowed for arbitrary and irrational abrogation of property rights. Such a regime would squarely violate the substantial-relation test. Nonetheless, the Second Circuit assumes that, so long as the authorities are conferred with *some* dis-

cretion, they may deny permits for any reason they like without giving rise to a due-process violation.

### 3. The Second Circuit's rule would allow arbitrary and irrational restrictions in the vast majority of permitting cases.

A majority of circuits now side with the Second Circuit—denying due process in cases where permitting authorities have been vested with any significant degree of discretion. Though public officials may have some legitimate degree of discretion in reviewing permit applications, the Second Circuit's rule would allow authorities to consider factors that may not legally justify a denial, or to take into account considerations that are expressly forbidden.

Without due-process protections, there is nothing preventing officials from ignoring the law altogether. The Second Circuit's approach would allow authorities to deny permit approvals with impunity for any capricious reason they might like—or without any reason at all. Public officials could deny a permit simply because they dislike the applicant, or to advance their own parochial pecuniary interests, or for blatantly nepotistic or protectionist reasons, or on grounds that go so far as to shock to the conscience. *See*, *e.g.*, *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 851 (6th Cir. 2012) (refusing to consider a due-process challenge where a permit was allegedly denied because the applicant refused "to donate $100,000 to a local retirement fund.").

Unfortunately, the Second Circuit's rule denies due-process protections in the vast majority of permitting cases. To be sure, regimes governing land use almost inevitably confer a degree of discretion upon public officials to grant or deny permit applications.

*See* Note, *Administrative Discretion in Zoning*, 82 Harv. L. Rev. 668, 671 (1969); Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 Harv. J.L. & Pub. Pol'y 717, 734-35 (2008). For example, typical zoning codes preserve discretion for authorities to withhold permit approvals for any number of facially legitimate reasons—whether citing concerns over impacts on the environment, community aesthetics, traffic patterns, public parking, public infrastructure, affordable housing etc. For this reason, the permitting process can be long and arduous—as officials may threaten denial so as to compel owners into scaling back their plans time and again. *See e.g. Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 693-700 (1999) (owner sued after 19 different site plans were rejected).[4] But permitting regimes would be wholly despotic if landowners were denied all due-process protections.

### C. *Koontz* Flatly Rejects the Assumption That a Discretionary Permit Approval Is a Government-Conferred Benefit That May Be Withheld for Any Reason

The Second Circuit assumes that there can be no constitutional protection for a permit applicant if the authorities retain substantial discretion to deny a permit application. *Stahl*, 2016 WL at *1 ("If the de-

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[4] *See*, *e.g.*, Calif. Coastal Comm'n Public Meeting, Agenda Item 13c-h, Presentation of Don Schmitz 3:09:53-3:42:16 (recounting the history of a permit application in which development plans were "completely redesigned," in good faith and at great expense, multiple times: "[W]hen I came back and told [my clients] that they would have to spend another $100,000 [for a third redesign], this was not well received.") (June 16, 2011), *available* at http://bit.ly/29cwNeD; *see also* Martha Groves and Tony Barboza, *Coastal Commission Rejects U2 Guitarist's Malibu Development Plan*, L.A. Times (June 17, 2011).

ciding authority has discretion to deny an application for a benefit on non-arbitrary grounds, a plaintiff holds no legitimate claim to that benefit and, thus, no substantive due process interest."). In turn, this assumption is premised on the notion that a discretionary permit approval may be characterized as a government-conferred benefit that may be withheld for any reason that the sovereign might like. *Id*. But this is merely a repackaged version of an argument that this Court has repudiated time and again. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989) (explaining that the discretionary power to refuse conferral of a public benefit does not imply an absolute prerogative to withhold that benefit for any reason).

For example, the unconstitutional-conditions doctrine holds that government cannot condition the right to engage in economic activity on a requirement to surrender constitutional rights—despite the fact that the state retains the power to prohibit many commercial ventures outright. *See Southern Pacific Co. v. Denton*, 146 U.S. 202, 207 (1892) (rejecting the idea that a State may condition approval of a business license on a requirement to surrender a right or privilege secured by the Constitution); *Frost Trucking v. R.R. Comm'n of California*, 271 U.S. 583, 590, 593-94 (1926) (same); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512-13 (1996) (same); *see also Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963) (government lacks an absolute authority to impose conditions on the receipt of unemployment benefits); *Speiser v. Randall*, 357 U.S. 513, 535-36 (1958) (Congress cannot withhold tax benefits for unconstitutional reasons). This Court applies the same principles in land-use cases—regardless of whether the au-

thorities have discretion to approve or deny development permits. *See Koontz v. St. Johns River Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013). The Second Circuit's assumption—of the City's absolute prerogative—is foreclosed by established doctrine.

Permitting authorities cannot evade the law by simply characterizing permit approvals as discretionary government benefits. Even where vested with substantial discretion, authorities must still act within the scope of lawful discretion. It cannot be that constitutional rights attach only attach when a landowner can demonstrate an entitlement to a permit approval. If the Takings Clause protects landowners from the imposition of improper conditions under discretionary permitting regimes, there is no logical reason why the Due Process Clause should not likewise protect landowners in the permitting process.

## II. THE "ENTITLEMENT" APPROACH LEADS TO ABUSE OF HISTORICAL PRESERVATION, TO GREAT ECONOMIC HARM

The Petition properly notes that there is a "deep" and "mature" split among the circuits over the "entitlement" doctrine. Pet. at 12. Petitioner's case rests squarely upon this split. Were its buildings in Philadelphia rather than Manhattan, the Due Process Clause would protect against the arbitrary deprivation inflicted by the Second Circuit. This case is not only the perfect vehicle to address this issue, but is representative of a wider, disturbing national trend.

Historic preservation is supposed to be used to ensure the survival of architecturally, culturally, or historically important buildings. But when it is abused to the extent found in the Second and Fourth Circuits—up to one-third of lots in New York and Balti-

more have been designated—preservation chokes off urban economic development, particularly when compared to the Third and Seventh Circuits (the owner-friendly approach), and the Ninth and D.C. Circuits (the "control," where courts have not spoken). The "entitlement" approach is destroying the very cities it is supposed to protect by driving up the costs of economic revitalization. This effect is not isolated to one city and will spread if the Court does not intervene.

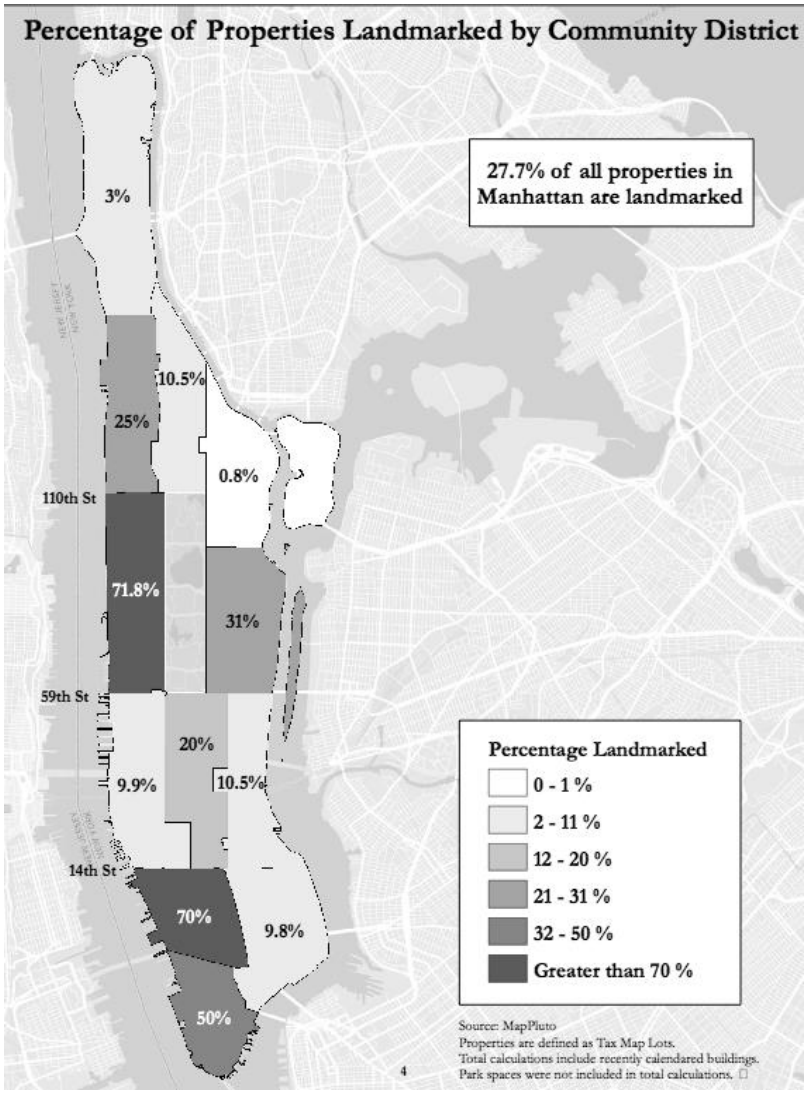
### A. Historical Preservation Abuse in Manhattan Due to the Second Circuit Rule

The leading experts on New York's historic districts are at NYU's Furman Center. A 2016 Furman Center report on historic preservation looked back on 50 years of historic preservation in the city. Ingred Gould Ellen et al., Fifty Years of Historic Preservation in New York City 22, 25-26 (2016), *available at* http://bit.ly/2930m6y. Twenty-seven percent of Manhattan lots are designated as historic by the city's Landmarks Preservation Commission. *Id.* New York also uses a special class of "interior landmarks" subject to further building and remodeling restrictions. These make up 1.6 percent of lots, accounting for 5.2 percent of built square footage. *Id.* at 19.

This over-preservation problem disproportionately affects buildings like Stahl's: multi-family units. The Furman study finds that historic districts are not neutral in regard to the use of buildings or their size compared to non-designated lots. Multi-family walk-ups account for 34 percent of buildings in historic districts while accounting for only 15 percent of city buildings. *Id.* at 24-25. Measured in building size, such buildings make up 18 percent of built space in historic districts while accounting for 11 percent of

overall square footage. *Id.* at 22. As of 2010, more than 500,000 people lived in a census tract where a building lies in a historic district. *Id.* at 53.

Examining the historical-preservation power in New York reveals that this phenomenon is a product of pure NIMBY-ism. Take a look at the landmarking map generated by the city's own real-estate board:



Real Estate Board of New York, *An Analysis of Landmarked Properties in Manhattan* 4 (2013), *available at* http://bit.ly/1mQKrVp.

As the above map shows, SoHo, TriBeCa, the Upper West Side, and the Upper East Side have astronomically high preservation rates—30-70 percent of lots—while lower-income neighborhoods like East Harlem, Harlem, the East Village, and Lower East Side have comparatively low rates of preservation, 0.8-10.5 percent of lots. It strains credulity to claim that less than one percent of East Harlem is worth preserving, but 31 percent of the neighborhood directly to the south is of dire historical importance. Certainly the Financial District, White Hall, Wall Street, and Midtown cannot possess fewer architecturally unique and culturally significant buildings than the Upper West Side, SoHo, or TriBeCa—not by a factor of 20-50 percent! It is likely that this variance is mostly explained by anti-development citizens seeking to use permissive historical designation rules to foreclose alterations to their neighborhoods, a.k.a. NIMBYs. As Landmarks Commissioner Margery Perlmutter put it "I have seen how community activists use historic preservation as a way to limit development." Real Estate Board of New York, *Landmarking, Housing Production, and Demographics in New York* 7 (2013), *available at* http://bit.ly/29poBbI.[5]

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[5] She went on to say:

> That's not what historic preservation is for, that's called zoning. What I'm seeing more and more, which I think is a very unfortunate trend in sort of the historic preservation movement . . . is that people will see that designating a Historic District or designating a building can actually be a speedier way to eliminating a devel-

Under the Second Circuit's interpretation of due-process protections, owners are powerless to challenge the arbitrary deprivation of their ability to put property to beneficial use. In Manhattan, courts' failure to uphold property rights has lead to much of the borough being frozen from development, to the particular economic harm of its poorer citizens.

### B. Empirical Comparison Shows That This Trend Extends Across Other Circuits That Adhere to the "Entitlement" Approach

This economically disastrous trend is not isolated to the island of Manhattan. Using data from a 2014 study by the National Trust for Historic Preservation and Urban Land Institute[6]—supplementing where necessary—*amicus* Cato examined over-preservation nationwide. Rather than being a Big Apple quirk, the trend extends to cities that follow the Second Circuit rule—but not elsewhere. Restricting the data set to cities with populations over 300,000 and where at least 60 percent of the buildings were built before 1945 (urban areas where preservation, development, and population density come into conflict), we found:

- In the Second Circuit, the only city meeting the criteria was New York. In Manhattan, *27.7 percent* of lots are designated historic by the city's Landmarks Preservation Commission.[7]

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opment possibility than convincing the City Planning Commission that it would be a wise planning move.

[6] The Partnership for Building Reuse, *Building on Baltimore's History* (2014), *available at* http://bit.ly/29by8Sy (last visited Jul. 3, 2016).

[7] Real Estate Board of New York, *supra* text accompanying note 5, at 9. Percentages of area preserved for the city as a whole are lower—3.3 percent—in part due to minimal designations in largely suburban Staten Island. *Id.* That said, compar-

Over 85 percent of Manhattan buildings for which age records exist were built before 1945 according to data from the New York City Planning department's PLUTO database.[8]

- In the Fourth Circuit, the only city which met the criteria was Baltimore.[9] In Baltimore, *more than one third* of Baltimore's buildings are part of the National Register, while another 5.8 percent were locally designated. 72.3 percent of Baltimore buildings were built before 1945.[10]

- In the Third Circuit, the only city that met the criteria was Philadelphia.[11] There, *only 4.4*

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ing Manhattan to other cities is a better proxy, because suburban parts of comparable cities typically lie outside of city limits—such as Baltimore County, Maryland, and Bucks, Chester, and Delaware counties outside of Philadelphia.

[8] Cato Institute calculation. 2513 buildings do not have records of year built. *See generally* Dep't of City Planning, MapPLUTO, http://on.nyc.gov/29ffpb2 (last visited June 29, 2016).

[9] While Charlotte has a large enough population to meet the 300,000-residents criterion, there is not enough reliable data on building ages to asses whether it meets the 60-percent criterion. Because Charlotte's population has increased ten-fold since 1940, however, we can infer that it is highly unlikely that 60 percent of its buildings were built pre-1945. The Census Bureau lists a population of 134,042 in 1950, rising to 735,770 by 2010. U.S. Census Bureau, Quick Facts: Charlotte City, North Carolina, http://1.usa.gov/292VyJM (last visited June 26, 2016).

[10] The Partnership for Building Reuse, *supra* note 6, at 11.

[11] While Pittsburgh meets the 300,000-residents criterion, there is not enough reliable building-age data to asses the 60-percent criterion. Still, only 2,806 of the city's 143,256 parcels lie in historic districts. (Cato Institute calculation based on Geographic Information Systems maps provided by Pittsburgh Historic Commission. Parcels data provided by the Pittsburgh Department of Geographic Information Systems. Correspondence on file with counsel.) This amounts to 1.95 percent of city parcels. The National Register lists 177 buildings in the city, or 0.1

*percent* of lots are part of the National Register and a further 2.2 percent are locally designated, where 68.5 percent were built before 1945.[12]

- In the Seventh Circuit, the only city that met the criteria was Chicago.[13] There, *merely 0.4-0.5 percent* of lots are designated and just under 63 percent of buildings date to pre-1945.[14]
- In the Ninth Circuit, the only city that met the criteria was San Francisco. There, despite 71.2 percent of buildings dating to pre-1945, *only 0.8 percent* are part of the National Register

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percent of city parcels. In other words, if the second criterion is met, Pittsburgh would be consistent with the results described here—but we still exclude it for the sake of empirical rigor.

[12] The Partnership for Building Reuse, *supra* note 6, at 11.

[13] While Indianapolis meets the 300,000-residents criterion, it, like Charlotte and Pittsburgh, also lacked reliable building-age data. Still, like Pittsburgh, the preservation levels are consistent with the above results: 1.2 percent of properties lay in historical districts (4,262 out of 343,044 lots) and 0.6 percent of lots are listed in the National Register. (Cato Institute calculation based on Geographic Information Systems maps provided by Indianapolis Historic Preservation Commission. Total number of parcels and historic parcels provided by the City of Indianapolis. Correspondence on file with counsel.).

[14] Chicago lists 820,606 buildings. *See generally*, City of Chicago, Buildings Footprint, http://bit.ly/292OMUy (last accessed June 26, 2016). Records of the year built do not exist for 373,921 of these buildings. *Id.* Of the 446,685 buildings for which records exist, 280,884 date to before 1945. *Id.*; Cato Institute calculation based on the same. The city lists 317 landmarks, or 0.4 percent of all buildings. City of Chicago, Individual Landmarks, http://bit.ly/295CrR3 (last accessed June 26, 2016). A search of the Interior Department's National Register of Historic Places yields 400 listed buildings, or 0.5 percent of city buildings. Nat'l Register of Historic Places, NPGallery Digital Asset Search, http://npgallery.nps.gov/nrhp (last accessed June 26, 2016).

and 1.4 percent more are locally designated.[15] San Francisco is known as one of the most restrictive cities regarding zoning—but apparently not with respect to historic preservation.

- The only city in the D.C. Circuit, Washington, met the criteria. 18.7 percent of D.C. buildings are historically landmarked.[16] 61.4 percent of Washington buildings were built before 1945.

The data clearly show that in circuits where the entitlement approach is followed—the Second and Fourth—there are much higher rates of preservation than in circuits that follow an owner-friendly approach or that have not spoken on the question. It is doubtful that *a third* of Baltimore and *more than a quarter* of Manhattan are worthy of preservation yet less than 5 percent of Philadelphia—where our nation was formed—and less than 1 percent each of Chicago and San Francisco are preservation-worthy.

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[15] The Partnership for Building Reuse, *supra* note 6, at 11.

[16] *Id.* Washington, D.C. is an exceptional case. The city, being the seat of the federal government, would be expected to hold more historic land than most cities, and indeed has 56 historic districts: 32 residential and commercial neighborhood districts, 15 government and institutional districts, and nine park and parkway districts. The city also holds many areas as landmarked—such as Rock Creek Park, East Potomac Park, and the Fort DuPont Park—that may not be so designated elsewhere. Notably, New York's Central Park is not in a historic district. Of Washington's 61 square miles, Rock Creek Park composes 3.1 square miles, while Potomac and Fort Dupont Parks together make up 1.68 square miles. These three parks alone compose more than 7.8 percent of city land area, leaving a particularly high percentage of the city as historic. (Cato Institute calculation based on data published by the National Parks Service and Recreation.gov, *available at* http://1.usa.gov/299ryh6 (Rock Creek Park), http://1.usa.gov/297ZpHH (Fort DuPont Park), and http://bit.ly/29bFkkY (East and West Potomac Park)).

### C. Over-Preservation Is Economically Harmful to Urban Areas

Historic preservation is not harmless; it has direct and substantial economic costs. "[E]xpansive historic districts undercut zoning and significantly limit development potential by eliminating the potential use of as-of-right zoning height and density, by preventing demolition for new construction, and by using the [Landmarks Preservation Commission] process to prevent construction that is not 'contextual.'" Real Estate Board of New York, *supra* text accompanying note 5, at 7. Excessive preservation has negative effects on property values, tax revenues, affordable housing, rents, maintenance costs, and the environment.[17]

An oft-cited Furman Center study published by the National Bureau for Economic Research concludes that historic-district designation "has a significant negative impact on the amount of new housing construction." Vicki Been et al., Preserving History or Hindering Growth?: The Heterogeneous Effect of Historic Districts on Local Housing Markets in New York City 22 (National Bureau of Economic Research, Working Paper No. 20446) (Sept. 2014), *available at* http://www.nber.org/papers/w20446. It also suggests that such districts see less investment in the long

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[17] It is also important to recognize that historical preservation laws—as with ordinary zoning restrictions—can contribute to regional housing shortages. And according to recent studies, "increased constraints to housing supply in high productivity cities" has an adverse impact on America's GDP. See Chang-Tai Hsieh and Enrico Moretti, Why Do Cities Matter? Local Growth and Aggregate Growth, Apr. 2015, available at http://faculty.chicagobooth.edu/chang-tai.hsieh/research/growth.pdf.

run. *Id.* at 26. And the effects of designation are not limited to the districts themselves; as one might expect given the laws of supply and demand, designation increases property values in neighboring areas. *Id.* at 22. This dynamic implies that district-designation can affect third parties by raising rents even for people who do not live in historic districts.

The effect on housing production also translates into an impact on affordable housing. The Real Estate Board of New York concluded in a white paper that "housing production—and especially affordable housing production—is markedly lower on landmarked districts than in similar but non-landmarked areas." Real Estate Board of New York, *supra* note 5, at 2. And a 2010 study by the Manhattan Institute concludes that "[r]estricting new construction in historic districts drives up the price of housing . . . . This, in turn, increasingly makes those districts exclusive enclaves of the well-to-do, educated, and white." Edward L. Glaser, Preservation Follies, *City Journal* (Spring 2010), *available at* http://bit.ly/299s5mt.

In fact, as it relates to this case, "[w]ith some neighborhoods in Manhattan approximately 70 percent landmarked, and others in Brooklyn more than 25 percent landmarked, large swaths of the City effectively have their development potential curtailed." Real Estate Board of New York, *supra* text accompanying note 5, at 7. Stahl even notes this concern as it relates to its *two* buildings in Manhattan: "Absent the designation, the properties, if redeveloped pursuant to Stahl's plan, are worth up to $200 million, and would provide the City with much-needed housing, jobs, tax revenues, and economic development. But the landmark designation has gutted the value of the

properties, leaving Stahl with two antiquated buildings and a negative economic return." Pet. at 55a.

Designation also foists significant costs onto landlords, inflating rents to keep up with increased costs of preserved-property maintenance and making environmentally friendly improvement near-impossible:

> In addition to the soft costs associated with processing the permits, there are added hard costs associated with complying with landmarks standards. While landmark designation is forever, many of these buildings, especially 1920's masonry construction and mid-century glass curtain wall construction, were never intended to last forever. Structural materials that were used at the time of construction present new physical problems that may be incompatible with contemporary practices, and play a considerable role in owners' decisions to upgrade a building. Inherent vice in older buildings threatens a building's integrity and has the potential to destroy the economic basis of its use. Building materials for landmarked buildings, such as windows, can be 30 percent more expensive as regular windows. And in some cases, the method for installation can require more extensive work that can triple the cost beyond what would be required in a standard window replacement. Landmarks affect sustainability efforts, as well. As aging landmarked buildings attempt to increase energy efficiency, it is becoming harder to find affordable fixtures that also comply with landmarks standards. LPC imposes regulations that are largely unsubsidized, and not all buildings have populations whose incomes can

> support the added cost of complying with landmark standards.

Real Estate Board of New York, *An Analysis of Landmarked Properties*, *supra* at 3.

In an era where people are flocking to cities, swelling their population and straining the housing supply, over-preservation acts as a black death to affordable housing and new construction. Zoning laws provide a flexible approach to this problem; but they are being thwarted. Preservation is an extreme measure that essentially freezes a property in time and for all time. The simple truth is that cities grow and contract over time; they cannot be frozen or they will collapse. The economic impact revealed by this case is reflected in a disturbing national trend.

## CONCLUSION

For the foregoing reasons, and those stated by the petitioners, the Court should grant the petition.

Respectfully submitted,

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July 6, 2016