No. 56PA14-2 TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

EVERETTE E. KIRBY and Wife, MARTHA KIRBY; HARRIS TRIAD HOMES, INC.; MICHAEL HENDRIX, as Executor of the Estate of Frances Hendrix; DARREN ENGELKEMIER; IAN HUTAGALUNG; SYLVIA MAENDL; STEVEN DAVID STEPT; JAMES W. NELSON and wife; PHYLISS NELSON; and REPUBLIC PROPERTIES, LLC, a North Carolina company (Group 1 Plaintiffs),	)	On Discretionary Review from N.C. Court of Appeals Case No. COA 14-184
Plaintiffs,	)	
v.	)	
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION	)	From Forsyth County
Defendant.	)	

BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
AND CENTER FOR LAW AND FREEDOM
IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTRODUCTION

Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, Pacific Legal Foundation (PLF) and Center for Law and Freedom (CLF) respectfully submit this brief amicus curiae in support of Plaintiffs-Appellees Everette E. Kirby and wife, Martha Kirby, Harris Triad Homes, Inc., Michael Hendrix, as Executor of the Estate of Frances Hendrix, Darren Engelkemier, Ian Hutagalung, Sylvia Maendl, Stephen Stept, James W. Nelson and wife Phyliss Nelson, and Republic Properties, LLC, a North Carolina company (Group 1 Plaintiffs) (collectively, Appellees or Plaintiffs). PLF and CLF's motion for leave to appear as amicus and file a brief on behalf of Plaintiffs-Appellees is pending before this Court.

PLF is a nonprofit, tax-exempt foundation incorporated under the laws of the State of California, and organized for the purpose of litigating important matters of public interest. PLF has numerous supporters and contributors nationwide, including in the State of North Carolina. Since 1973, Pacific Legal Foundation has litigated in support of property rights. PLF has participated, either through direct representation or as amicus curiae, in nearly every major property rights case heard by the United States Supreme Court in the past three decades, including *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Sackett v. U.S. Envtl. Prot. Agency*, 132 S. Ct. 1367 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF has also been involved in

cases raising similar questions to those presented in this case, including an appearance as amicus curiae before the Florida Supreme Court in the case of *Tampa-Hillsborough Cnty. Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994), which expounded upon *Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622 (Fla. 1990), one of the cases the lower appellate court relied on as persuasive authority for its decision in the instant case.

CLF is a conservative public interest law firm housed within the Civitas Institute in North Carolina. CLF provides free legal representation to North Carolinians in cases involving government overreach and constitutional freedoms. CLF also files amicus curiae briefs in state and federal courts for the purpose of advancing the principles of limited, constitutional government.

INTRODUCTION AND SUMMARY OF ARGUMENT

Nearly one hundred years ago, Justice Oliver Wendell Holmes emphasized that a "strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Here, North Carolina attempted to take *a shorter cut* toward improving the public condition—particularly, acquiring public land dedicated to transportation needs—than the Constitution allows. It did so by destroying the use of the plaintiffs' property, so as to create a stockpile of cheap land for future acquisition, without paying for the private owners' losses.

Specifically, the North Carolina Department of Transportation (DOT) created "transportation corridors" on private land pursuant to the state's Map Act. Within these corridors, "no building permits shall be issued for any building or structure or part thereof . . . nor shall approval of a subdivision . . . be granted." N.C. Gen. Stat. §§ 136-44.50 to 136-44.54 (2013). There is no time limit on the resulting, de facto moratoria imposed in the designated transportation corridors and, as a result, the DOT has been able to freeze large tracts of land for years without condemning them or paying compensation to their owners. The impact on the use and value of the owners' property amounts to an unconstitutional taking of that property, and for this reason, this Court should affirm the lower court's decision.

ARGUMENT

I

UNDER *PENN CENTRAL*, NORTH CAROLINA CROSSED THE LINE BETWEEN REGULATION AND A TAKING WHEN IT ADOPTED THE MAP ACT AND RECORDED RIGHTS-OF-WAY

A. The Takings Framework

The Fifth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897), provides that "private property [shall not] be taken for public use, without just compensation." The Supreme Court of the United States has

repeatedly observed that the purpose of this provision is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Of course, the essential question is when is this line crossed? The Court has set out the various ways that the government violates the Takings Clause of the Fifth Amendment by way of physical and regulatory takings.

First, the Takings Clause protects property owners from the physical confiscation or invasion of their land for public purposes, without just compensation. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2430 (2015); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982). The government also is automatically liable for a taking if a regulation deprives the property owner of *all* economically beneficial use. In such cases, the public purposes behind its actions are irrelevant. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992). But a taking may result even when there is no physical invasion and some developmental use remains possible on regulated property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). There is no "set formula" for determining when a taking has occurred due in this situation.

However, the Supreme Court in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 127-28 (1978), developed an analytical framework for courts to determine when the government used its regulatory powers to impose excessive and

uncompensated limits on the use, enjoyment, and value of private land. Using this framework, courts can apply the more general proposition that when the regulation of private property "goes too far," the government has effectively taken the property, even though it may never have physically invaded or occupied it. *Mahon*, 260 U.S. at 415 ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

Penn Central requires that courts considering whether land use restrictions cause a taking must weigh the economic impact of the regulation, the extent to which it has interfered with distinct investment-backed expectations, and the "character of the governmental action." *Penn Central*, 438 U.S. at 124; *Lingle*, 544 U.S. at 538-39; *see also Beroth Oil Co. v. North Carolina Dep't of Transp.*, 367 N.C. 333, 341, 757 S.E.2d 466, 473 (N.C. 2014). The *Penn Central* "inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Palazzolo*, 533 U.S. at 617-18 (2001) (quoting *Armstrong*, 364 U.S. at 49).

B. *Penn Central* Factors Applied to the Facts in This Case Demonstrate That the Government Has Taken Plaintiffs' Properties

In this case, the Map Act fails the *Penn Central* test, and rises to the level of an unconstitutional regulatory taking, because it has a severe economic impact on private property, interferes with reasonable investment-backed expectations, and has the character of a taking.

1. Designation of the Rights-of-way Destroyed the Economic Value of the Properties Owned by Plaintiffs

There is little doubt that the Map Act, and the development restrictions imposed on private property under its authority, have a significant economic impact on effected property owners. First, the restrictions severely limit the use of private property that can normally be put to productive use. The statute prohibits property owners in the protected corridor from obtaining building permits or subdividing property. N.C. Gen. Stat. § 136-44.51. The Department of Transportation expressly tells owners not to apply for building permits. R. at 19. The DOT made clear to owners of property covered by the Map Act corridors that they would not be permitted to make improvements or subdivide their property and that the government had insufficient funds to buy property for ten years. Affs. Clapp ¶ 8 p. 2420, Reynolds ¶ 11 p. 2523, Hriniak ¶ 16 p. 2555, Smith ¶ 8 p. 2494. Further, the DOT will not and has not allowed variances for properties within the corridors. M. Stanly dep. pp. 31-34. No

improvements have been built within the corridors since their designation. Ivey dep. pp. 67-70 87; Hatton dep. p. 54.

Second, the Act and its implementation have severely harmed the monetary value of properties, such as Plaintiffs', within the designated transportation corridors. The state's own expert admitted there was no market for unimproved land within the corridors and not enough sales of improved land in the corridors to even perform a market analysis. *See* Plaintiffs' Response to Petition for Discretionary Rev. at 12. This is consistent with the purpose of the Map Act: *to control the cost* of acquiring rights-of-way for the State's highway system." 1987 N.C. Sess. Laws 1520, 1538–42, ch. 747, § 19 (emphasis added). Simply put, the state intended to reduce the value of the plaintiffs' properties, and it succeeded. The first *Penn Central* factor therefore strongly weighs in favor of a taking. *See Cienega Gardens v. U.S.*, 331 F.3d 1319, 1341-43 (Fed. Cir. 2003) (holding that a substantial loss in property value weighs in favor of the property owner in making the *Penn Central* ad hoc inquiry); *Yancey v. U.S.*, 915 F.2d 1534, 1541 (Fed. Cir. 1990) (this factor weighs in favor of a property owner when the regulation causes a negative "severe economic impact" to the property owner).

2. The Map Act Interfered with Distinct Investment-backed Expectations

Next, the Court must consider the extent to which the state's refusal to issue permits, variances, or improvements to properties within the corridors—indefinitely—interfered with the Plaintiffs' reasonable, investment-backed expectations about the use of their properties. The Supreme Court has repeatedly indicated that the expectations test is an important part of the inquiry into whether the government must compensate for the effects of a land use regulation. *See Lingle*, 544 U.S. at 538-39; *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("settled expectations should not be lightly disrupted").

As with the *Penn Central* inquiry as a whole, there is no single way to gauge the expectations factor. Courts often look to the surrounding legal and developmental terrain to determine whether property owners had reasonable expectations of putting their property to the uses impeded by the challenged regulations. *Palazzolo*, 533 U.S. at 634-35 (O'Connor, J., concurring). Here, the Plaintiffs had legitimate, objective reasons to believe they could use, improve, and sell their property; expectations destroyed by the state's implementation of the Map Act.

First, but for the Map Act, the Plaintiffs could develop their properties. There is no dispute that the properties exist within local jurisdictions that have basic land use permitting schemes and which grant land use permits. Indeed, many of the properties

in the transportation corridors, and around Plaintiffs' parcels, have been previously developed, improved, and subdivided with local permits. Based on this pattern, it would be normal and reasonable for the Plaintiffs to expect to engage in similar activities on their land. The Map Act destroyed these expectations by setting up a system in which the state intended to, and did, override local permitting to bar development.

Moreover, as a general matter, landowners do not reasonably expect, and should not be held to expect, that the state will freeze the use of their property for an indeterminate time to deliberately depress the value of property. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 636 (1961) (government action to depreciate property values to take advantage of the resulting lower prices and acquire land at such depressed levels would be unconstitutional). When the Map Act did exactly that, leaving the owners with nothing but a "token interest," *Palazzolo*, 533 U.S. at 631, and a hope that the state might make an offer to buy their land in the future, the state frustrated the reasonable investment-backed expectations of the Plaintiffs.

Plaintiffs James and Phyliss Nelson provide an apt example. They owned five acres—now within the beltway—that they intended to build homes upon and rent for retirement income. Since they also owned a nearby home in the area, they reasonably believed it would be possible to build homes on their other five-acre parcel. And

indeed they had the ability to seek and obtain the needed development permits until the Map Act effectively took that right away, thus frustrating their development expectations and retirement plans. *See* Plaintiffs'-Appellees' N.C. Court of Appeals Brief at 17-20.

In this case, the Act did not just destroy legitimate development expectations. It also interfered with reasonable expectations regarding the sale of property. The right to dispose of one's property is among the most basic of property rights. *See, e.g., Laurel Park Community, LLC v. City of Tumwater*, 698 F.3d 1180, 1192 (9th Cir. 2012) (identifying four "fundamental" property rights as including the rights of disposition and transmission) (citation omitted). Nothing in the Act explicitly eviscerated the right to sell private land in the corridors, yet this has been its effect. For instance, Plaintiff Harris Triad Homes, owned by Ben Harris, owns homes in the beltway that Mr. Harris has been unable to sell because of the beltway plans. Another plaintiff, the now-deceased Michael Hendrix, had a contract to sell eight of his twenty-four acres, but the state's plan for the beltway "killed the deal." *See* Plaintiffs'-Appellees' N.C. Court of Appeals Brief at 19.

Each of these plaintiffs, like the others, had a sound basis for reasonably expecting that they could develop, use, or sell their land but for the Map Act.[1]

[1] Moreover, that a few of the plaintiffs purchased their property with knowledge of the beltway plan (as the state says in its brief) does not, standing alone, frustrate their (continued...)

Because the Map Act unsettled legitimate and normal property expectations, *Penn Central*'s investment-backed expectations factor weighs in favor of finding a taking here.

3. The "Character of the Governmental Action" Prong Weighs in Favor of a Taking, Because the State Action Amounted to the Use of the Power of Eminent Domain, Not Police Power

The "character of the governmental action" factor weighs in favor of a taking when the government singles out relatively few property owners to supply a public good. *See, e.g., Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998); *Ward Gulfport Properties, L.P. v. Mississippi State Highway Comm'n*, 2015 WL 6388832, *8 (Miss. Oct. 22, 2015) (character test supports a taking claim where property owners affected by the challenged regulatory scheme "shoulder a disproportionate burden of [a wetland protection plan] compared to others in the community"). This is what happened here.

The creation of North Carolina highways serves a generalized public need. Rather than forcing the public as whole to bear the burden and costs associated with the planning of public highways and acquisition of necessary land— such as through the taxation power or normal use of eminent domain—the state foisted the burden on

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[1] (...continued)
takings claim. *Palazzolo*, 533 U.S. at 626-30 (a takings claim is not precluded simply because the property owner was on notice of the complained-of regulation before acquisition of title).

individual landowners. The Map Act forces the Plaintiffs to forego their land rights, and their dreams, to effectively donate land for a transportation land bank, in order to advance a public highway goal. As such, it makes them "shoulder a disproportionate burden" compared to others in the community with respect to funding public transportation. The character of the government action weighs in favor of a taking.

Nevertheless, the state may argue that the "character" test tilts against a taking because (in its view) the Map Act was intended to promote traditional police power interests, i.e., public health, safety, welfare and morals. But this argument pushes the police power concept too far. Initially, and most obviously, the state fails to account for the Legislature's stated purpose for the Map Act. It was not enacted to protect the public from health or safety risk; it was passed to limit the price of the properties the State intends to buy at some time in the future for the beltway. *See* 1987 N.C. Sess. Laws 1520, 1538–42, ch. 747, § 19 (the Map Act was "an act to control the cost of acquiring rights-of-way for the State's highway system").

Moreover, it is impossible to see how imposition of the Map Act on the plaintiffs' properties serves legitimate police power interests. *Gordon v. City of Warren Planning & Urban Renewal Comm'n*, 199 N.W.2d 465, 469 (Mich. 1972) ("Zoning is justified under the police power, but, except in extraordinary circumstances, not present in this case, private property cannot be appropriated without compensation under the police power."). The placement of properties within

no-build corridors does not protect the public from a nuisance or some other risk. It does not even provide any immediate, tangible public "welfare" benefit. It simply benefits the state's pocketbook at the property owners' expense. Consequently, the "police power" argument cannot change or override the reality that the Map Act is forcing property owners to alone bear a public burden that should be borne by all. Therefore, the state actions in this case have the "character" of an unconstitutional taking.

Application of the three *Penn Central* factors in this case demonstrates that the Map Act and its land use restrictions effected a regulatory taking of the Plaintiffs' properties.

CONCLUSION

The purpose of the Map Act is to lower the costs of condemning land in the future. As Justice Holmes stated: "[T]he question at bottom is upon whom the loss of the changes desired should fall." *Mahon*, 260 U.S. at 416. Takings law and basic fairness indicate that North Carolina should bear the cost of depriving property owners of the use and value of their land for the purpose of stockpiling land that the state may want to use for highway construction.

The Court should affirm the decision of the lower court on appeal because it correctly concluded that society, and not just these landowners, should bear that cost.

DATED: November 6, 2015.

Respectfully submitted,

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N.C. App. R. 33(b) Certification:
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CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Rule 28(j) of the North Carolina Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CENTER FOR LAW AND FREEDOM IN SUPPORT OF PLAINTIFFS-APPELLEES was served on all parties by depositing true copies thereof with the U.S. Postal Service, first-class mail, postage prepaid, the 6th day of November, 2015, addressed to the following:

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