No. 19-223

In The
Supreme Court of the United States

JANICE SMYTH,

Petitioner,

v.

CONSERVATION COMMISSION OF FALMOUTH and TOWN OF FALMOUTH,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Commonwealth of Massachusetts

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, SOUTHEASTERN LEGAL FOUNDATION, AND OWNERS' COUNSEL OF AMERICA IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.2(b), National Federation of Independent Business Small Business Legal Center, Southeastern Legal Foundation, and Owners' Counsel of America respectfully request leave of the Court to file the attached brief amicus curiae in support of the Petitioner, Janice Smyth.

The interest of each amici is set forth in the attached brief. Amici sought consent of the parties and provided counsel for each with more than ten days' notice of amici's intent to file the attached brief. Petitioner has filed a blanked consent with the Clerk of the Court, but Respondents did not respond to amici's request.

The proposed brief will aid the Court in its consideration of the case. Specifically, the brief explains how the *ad hoc Penn Central* test—the "default" test for a regulatory takings—has proven unworkable in practice over the last four decades. The brief demonstrates that the *Penn Central* test has been applied so inconsistently that it is nearly impossible for property owners and regulators to predict the outcome in any case. As a consequence, *Penn Central* has been severely criticized by the practicing bar and the legal academy.

For the foregoing reasons, the motion to file a brief amicus curiae should be granted.

Respectfully submitted,

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SEPTEMBER 2019.

QUESTION PRESENTED

1. Whether the loss of all developmental use of property and a 91.5% decline in its value is a sufficient "economic impact" to support a regulatory takings claim under *Penn Central Transp. Co. v. N.Y.*, 438 U.S. 104 (1978).

2. Whether a person who acquires land in a developed area, prior to regulation, has a legitimate "expectation" of building and, if so, whether that interest can be defeated by a lack of investment in construction?

3. Whether the Court should excise the "character" factor from *Penn Central* regulatory taking analysis.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES--Continued

Page

TABLE OF AUTHORITIES--Continued

Page

CONSTITUTIONS, STATUTES, AND RULES

TABLE OF AUTHORITIES--Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES--Continued

Page

TABLE OF AUTHORITIES--Continued

Page

INTEREST OF AMICI CURIAE[1]

NFIB Small Business Legal Center. The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses, including takings cases.

Southeastern Legal Foundation. Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise in the

1. Pursuant to this Court's Rule 37.2(a), all counsel of record for the parties received timely notice of the intention to file this brief. Petitioner has filed a blanked consent with the Clerk of the Court, but Respondents did not respond to amici's request. Amici certify that no counsel for any party authored any part of this brief; no person or entity other than amici made a monetary contribution intended to fund its preparation or submission.

courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates often before the Supreme Court. For over 40 years, SLF has advocated for the protection of private property interests from unconstitutional governmental takings. SLF regularly represents property owners challenging overreaching government actions in violation of their property rights. Additionally, SLF frequently files amicus curiae briefs in support of property owners. *See*, *e.g.*, *Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Owners' Counsel of America. Owners' Counsel of America (OCA) is a network of the most experienced eminent domain and property rights attorneys from across the country who seek to advance, preserve and defend the rights of private property owners and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right" and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (2d ed. 1998). OCA is a non-profit organization, organized under IRC § 501(c)(6) and sustained solely by its members. OCA member attorneys have been involved in landmark property cases in nearly every jurisdiction nationwide. OCA members and their firms have been counsel for a party or amici in many of the takings and eminent domain cases this Court has considered in the past forty years. OCA members have also authored treatises, books, and scholarly articles on takings, eminent domain, and compensation.

The brief will aid the Court in its consideration of the case. Specifically, the brief explains how the *ad hoc Penn Central* test—the "default" test for a regulatory takings—has proven unworkable in practice over the last four decades. The brief demonstrates that the

Penn Central test has been applied so inconsistently that it is nearly impossible for property owners and regulators to predict the outcome in any case. As a consequence, *Penn Central* has been severely criticized by the practicing bar and the legal academy.

Amici urge the Court to grant the petition to revisit this important issue.

SUMMARY OF ARGUMENT

Hic sunt dracones—"Here be dragons." Property owners and their lawyers view the *Penn Central* test much the same way that ancient mariners must have looked at the apocryphal designation on their maps—as a zone of mystery and inexplicable dangers.[2] Your case may run aground there, but you can't really explain why in rational terms. *Penn Central* told us to consider at least three factors—(1) the severity of the economic impact of the challenged restriction on the property; (2) the extent of the property owner's reasonable investment-backed expectations, and; (3) the character of the government's conduct—but provided little guidance what these factors mean and how litigants and the lower courts should apply them.

This Court recently revisited another hastily-adopted regulatory takings shibboleth that shut property owners out of federal courts for decades. Like *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), the petition presents the opportunity to correct a longstanding—and unforced—error. *See* Gideon

2. *See* Robinson Meyer, *No Old Maps Actually Say 'Here Be Dragons' – But an ancient globe does*, The Atlantic (Dec. 12, 2013) (https://www.theatlantic.com/technology/archive/2013/12/no-old-maps-actually-say-here-be-dragons/282267/) ("Old maps—early modern European maps—contain uncharted territory, across which beasts rumble and serpents writhe. They have dragons.").

Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transp. Co. v. City of New York, 13 Wm. & Mary Bill of Rts. J. 679, 686 & n.34 (2005) (Why the Court addressed an issue "never litigated below," and "departed from its usual practice and noted probable jurisdiction to consider an issue that was never dealt with in the lower courts is a mystery."). This petition could be even more important because unlike *Knick* (which focused on unfair and illusory procedures), this is about righting the *substance* of takings law. *Knick*'s critical recognition that the federal courts should be open to protect the federal constitutional rights of property owners will have little impact if all it means in that owners can now go to federal court and invariably lose, simply because the prevailing standard is so open to interpretation that it can support any reason to deny a claim. That's a recipe for judicial fiat, not reasoned and uniform constitutional decisionmaking. *See* John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171, 174-75 (2005) ("If the *Penn Central* test is to serve as more than legal decoration for judicial rulings based on intuition, it is imperative to clarify the meaning of *Penn Central*."); David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 574 (1999) (concluding that "state (and some lower federal) courts are not hearing (or not wanting to hear) the U.S. Supreme Court," which leads to inconsistent and unpredictable results); William W. Wade, Penn Central*'s Ad Hocery Yields Inconsistent Takings Decisions*, 42 Urb. Lawyer 549 (2010) (an economist familiar with taking law writes, "The Supreme Court has

avoided articulating a coherent theoretical framework to replace the "ad hoc, factual inquiries"' of *Penn Central*") (footnote omitted).

Regulatory takings law, as Justice Thomas recently suggested, needs a "fresh look." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting). This case presents the opportunity to provide coherent guidance and to steer away from the figurative dragons by bringing some clarity, predictability, and balance to regulatory takings law. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) ("[L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions.").

ARGUMENT

This brief makes two main points. First, the *Penn Central* test has resulted in confusion, obfuscation, and unbalanced results in the lower courts. Second, we highlight examples of how the courts have misapplied each *Penn Central* factor.

I. *Penn Central* Is Doing An Awful Job As A "Polestar"

Penn Central's three-factor test has been described as the "polestar" in regulatory takings cases. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring). But for a test that is the default, and governs in an overwhelming majority of these cases, virtually no one defends it, even those who advocate for a deferential judiciary in takings cases. *See*, *e.g.*, John D. Echeverria, *Is the* Penn Central *Three Factor Test Ready For History's Dustbin?*, 52 Land Use L. & Zoning Dig. 3 (2000); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 Yale L.J. 203, 232 (2004) ("*Penn Central* hardly serves as a blueprint for a

municipality or a court seeking to conform to constitutional doctrine."). And that is putting it gently; others do not give it such soft treatment. *See*, *e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 93 (1986) (*Penn Central*'s "totality of the circumstances analysis masks intellectual bankruptcy"); Kanner, *Making Laws and Sausages*, 13 Wm. & Mary Bill of Rts. J. at 680 (the Court lacked jurisdiction in *Penn Central* and reached out to create a test that was of "dubious provenance and [was inconsistent] with the Supreme Court's preexisting taking jurisprudence"). *Penn Central* has also been described as "inconsistent," "unprincipled," and "amorphous." Economists find it baffling. *See*, *e.g.*, William W. Wade, *Theory and Misuse of Just Compensation for Income-Producing Property in Federal Courts: A View From Above the Forest*, 46 Tex. Envt'l L.J. 139, 142 & n.13 (2016) ("Thousands of words by hundreds of litigators, judges and scholars including the author have sought to explicate the *Penn Central* test."). No one, it appears, likes *Penn Central*. Except, perhaps, regulators who seem to win nearly every reported case.

"Takings law should be predictable … so that private individuals confidently can commit resources to capital projects." Susan Rose-Ackerman, *Against Ad Hockery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988). Ironically, *Penn Central* has made takings litigation *very* predictable, but not in a good way: unless a property owner can show a "categorical" taking such as a physical occupation or the total deprivation of some fundamental property right—situations that are outside of *Penn Central*'s reach—she is very likely destined to lose. *See* Sterk, *The Federalist Dimension*, 114 Yale L.J at 253 ("Whenever the Court conducts a *Penn Central*

analysis of a state or local regulation, the regulation stands."). Even where the trial judge or jury concluded after hearing evidence that compensation was owed, courts employ *Penn Central*'s vague factors to reverse. *See*, *e.g.*, *Colony Cove Prop., LLC v. City of Carson*, 888 F.3d 445 (9th Cir. 2018) (reversing district court's *Penn Central* verdict in favor of the property owner), *cert. denied*, 139 S. Ct. 917 (2019); *St. Bernard Parish Gov't v. United States*, 121 Fed. Cl. 687, 746 (2015) (Under *Penn Central*, "[w]eighing all the evidence in this case, the court has determined that Plaintiffs established that flooding on Plaintiffs' properties that effected a temporary taking under the Fifth Amendment to the United States Constitution."), *rev'd*, 887 F.3d 1354, 1366 & n.13 (Fed. Cir. 2018) (benefits from the regulation must be considered), *cert. denied*, 139 S. Ct. 796 (2019).

That the government nearly always wins may be by design. If so, the Court should say so and be done with it, even though courts for centuries have recognized what we now call regulatory takings by applying a more straightforward analysis. *See*, *e.g.*, *Gardner v. Vill. of Newbergh*, 2 Johns. Ch. 162, 164-65 (N.Y. 1816) (Chancellor Kent enjoined a municipal regulation that would have diverted water from plaintiff's property, because "there is no provision for making compensation"); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (noting plaintiff's argument that city's diversion of water pursuant to ordinance away from plaintiff's wharf was a Fifth Amendment claim); *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1871) (rejecting argument that no taking was possible because defendant did not exercise eminent domain power and was acting pursuant to the state's regulatory power). For nearly a century, this Court has held out the

promise that if a regulation goes "too far," it will be a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). But the Court never answered the question: goes "too far" in what way? In abrogating a common law or state law-recognized property interest? In the motivations behind the regulation? In interfering with the owner's use? All the Court could later say was this was a "storied but cryptic formulation." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). *Penn Central*'s amorphous three-factor test has been the only guidance the Court has provided since 1922, other than to carve out some very narrow categorical rules.[3]

But if "goes too far" is the takings equivalent of knowing it when you see it, then factors like economic impact, *distinct* investment-backed expectations (later morphed to "reasonable" expectations without explanation), and the character of the government action are woefully inadequate, lacking in any judicially-manageable standard. *See* Luke A. Wake, *The*

3. This Court has held that regulation effects a per se taking if it effects physical invasion of property, the deprivation of a fundamental "stick," or a loss of use so severe that it is the economic equivalent of an exercise of eminent domain and the owner is left with little but bare title. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982) ("In short, when the 'character of the govern-mental action, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.") (citing *Penn Central*, 438 U.S. at 124); *Hodel v. Irving*, 481 U.S. 704, 716-17 (1987) (a complete abrogation of the rights of descent and devise was a taking without regard to *Penn Central*'s factors); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (regulation is a per se taking if it results in wipeout of economically beneficial use of property).

Enduring (Muted) Legacy of Lucas v. South Carolina Coastal Council*: A Quarter Century Retrospective*, 28 Geo. Mason U. Civ. Rts. L.J. 1, 6 (2017) (analogizing the *Penn Central* test to Justice Stewart's nebulous, and quintessentially subjective, obscenity test in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)).

A standard that invites subjectivity by eschewing "any 'set formula' for determining how far is too far, instead preferring to 'engag[e] in ... essentially ad hoc, factual inquiries," is of little practical use. *See Lucas*, 505 U.S. at 1015 ("In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula'") (quoting *Penn Central*, 438 U.S. at 124). Although apparently designed to throw resolution of takings issues to trial courts—where they belong—*Penn Central* has instead ironically become a tool that gives appellate courts an infinite arsenal of reasons to second-guess a trial court's view of the evidence. The latest example is *Love Terminal Partners v. United States*, 126 Fed. Cl. 389, 428-29 (2016) (owners proved they possessed a reasonable, investment-backed expectation), *rev'd*, 889 F.3d 1331, 1345 (Fed. Cir. 2018) ("The reasonable, investment-backed expectation analysis is designed to account for property owners' expectation that the regulatory regime in existence at the time of their acquisition will remain in place, and that new, more restrictive legislation or regulations will not be adopted."), *cert. denied*, 139 S. Ct. 2744 (2019). As a consequence, takings litigation often devolves into a pleadings game, not the fact-intensive inquiry the Court apparently contemplated in *Penn Central*.

For example, the nearly-impossible-to-overcome *Penn Central* test incentivizes both sides to put the cart before the horse. Instead of focusing on the

question at hand (what evidence supports a taking, and if there's been a taking, what compensation must be provided?), the key battle in many takings cases is which narrative governs: the owner searches for a discrete property interest that has been rendered categorically useless so she can convince the court to treat it as a *per se* taking under one of the carve-outs, while government counsel advocates for a much broader view of the owner's expectations at stake (also known as the property interest) in order to water down the economic impact of the regulation. *See*, *e.g.*, *Katzin v. United States*, 908 F.3d 1350, 1362 (Fed. Cir. 2018) (federal government asserting ownership of plaintiff's property was not a physical taking). *See also Alimanestianu v. United States*, 888 F.3d 1374, 1382-83 (Fed. Cir. 2018) (rejecting plaintiffs' efforts to characterize the regulation as effecting a physical invasion of property), *cert. denied*, 139 S. Ct. 1164 (2019); *Himsel v. Himsel*, 122 N.E.3d 935, 947-48 (Ind. App. 2019) (same); *Cranston Police Retirees Action Comm. v. City of Cranston*, 208 A.3d 557, 582 (R.I. 2019) (same), *cert. pet. filed*, No. 19-286 (U.S. Sep. 4, 2019). In *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017), this Court considered a case that in this exact posture, and as a consequence issued an opinion that, like *Penn Central*, provided little guidance and indeed made the analysis even more *ad hoc* and complex. *Id.* at 1945 (to determine the owner's reasonable investment-backed expectations, courts apply a nonexclusive list of four additional factors). *See* Robert H. Thomas, *Restatement (SCOTUS) of Property: What Happened to Use in* Murr v. Wisconsin*?*, 87 UMKC L. Rev. 891, 898 (2019) (highlighting competing litigation strategies of pushing a case to either "*Lucas*-land" or "*Penn Central*-ville," because "[a]nswering that question one way or

the other would, most likely, resolve the dispute on the merits"). For a "polestar" to actually deserve that label, however, it should provide guidance on how to resolve disputes on the merits, not make things even more confusing and be the basis for wasteful pleadings gamesmanship. And most importantly, it should not simply be a cover for the "judicial thumb firmly on the governmental side of the balance." Gideon Kanner & Michael M. Berger, *The Nasty, Brutish, and Short Life of* Agins v. City of Tiburon, 50 Urb. Lawyer 1, 34 n.34 (2019).

II. Lower Courts Are All Over The Map on How To Consider The *Penn Central* Factors

This section highlights brief examples of how lower courts have applied *Penn Central*'s factors. It is not a pretty picture. But we should not be surprised they are all over the figurative map. *See Ganson v. City of Marathon*, 222 So.3d 17, 20 (Fla. Dist. Ct. App. 2016) (Shepherd, J., dissenting) ("Regrettably, regulatory takings jurisprudence is cryptic and convoluted."); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1557 (2003) ("The *Penn Central* approach is admittedly standardless."). Some courts do not consider the factors as true factors to be balanced—where more evidence about one element may offset lesser evidence of another—but as a conjunctive "and" test where a property owner must show all three. What one commentator has called a "one strike rule." *See* Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or A One Strike Rule?*, 22 Fed. Circuit B.J. 677, 680 (2013) (empirical study found that most courts do not discuss all three *Penn Central* factors, but that those that do are more likely to engage in a true balancing

test). Other courts adopt their own categorical rules within the *Penn Central* framework. *See*, *e.g.*, *Love Terminal Partners*, 889 F.3d at 1343-44 (a property owner that isn't making a profit cannot prove a taking, notwithstanding their reasonable investment-backed expectations); *Diversified Holdings, LLP v. City of Suwanee*, 807 S.E.2d 876, 887 (Ga. 2017) (zoning is not a "fertile ground" for takings claims). Others pay lip service to the *Penn Central* factors but apply it incorrectly. *See*, *e.g.*, *Florida v. Basford*, 119 So.2d 478, 481 (Fla. Dist. Ct. App. 2013) (applying *Penn Central* to "take into consideration everything"); *In re New Creek Bluebelt, Phase 3*, 65 N.Y.S.3d 552 (App. Div. 2017) (applying only two of the three *Penn Central* factors). Still other courts—finding the *Penn Central* factors inadequate, confusing, or not compatible with their state constitution's purpose—chart a different course, abandoning entirely the *Penn Central* framework to apply their own standards for state law regulatory takings. *See*, *e.g.*, *Dep't of Soc. Svcs. v. City of New Orleans*, 676 So.2d 149, 154 (La. App. 1996) (taking when regulation destroys a "major portion" of the property's value); *Am. W. Bank Members LC v. Utah*, 342 P.3d 224, 235-36 (Utah 2014) (a taking occurs "when there is any substantial interference with private property which destroys or materially lessens its value, or by which the owner's rights to its use and enjoyment is in any substantial degree abridged or destroyed").

Legal scholars fare no better in describing the takings landscape and how to navigate it. *See*, *e.g.*, Kanner, *Making Laws and Sausages*, 13 Wm. & Mary Bill Rts. J. at 683 ("[The] U.S. Supreme Court has refrained from articulating usable rules that might enable lower court judges and lawyers to make reasoned,

analytical judgments about the merits of their cases in a consistent fashion."); *see also* R.S. Radford, Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731, 732 n.8 (2011) (cataloguing at least a dozen articles over a five year period with various scholars attempting to decipher *Penn Central's* meaning); Steven J. Eagle, *The Four Factor* Penn Central *Regulatory Takings Test*, 118 Penn. St. L. Rev. 601, 617-18 (2014) (observing that "it is unclear what burdens can be considered under the economic impact factor[,]" but that "Justice Brennan … focused on whether *Penn Central* was allowed a 'reasonable return' on its investment."). As one legal scholar put it:

> The final issue is how the three *Penn Central* factors are supposed to be considered together in resolving specific cases. The Court has provided no meaningful guidance on this point. Sometimes the *Penn Central* analysis has been described as a "balancing test," but this seems nonsensical because the *Penn Central* factors are completely incommensurate. Furthermore, the *Penn Central* analysis is more accurately described as a framework for analysis rather than as a "test" yielding determinative legal answers. The *Penn Central* analysis cannot be applied by mechanically toting up a "score" under each factor to arrive at an overall evaluation. Rather, the Court appears to have in mind a more flexible approach in which the persuasive force of each factor will vary with the facts of each case. While a takings claim will presumably fail if all three factors point in favor of the government, a takings claim can apparently succeed, depending upon the facts, even if less than all of the factors point in favor of the plaintiff.

Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y at 208.

A. Economic Impact

While *Penn Central* acknowledged the need for landowners to make a "reasonable return" on their investments, it did not define that term. *Penn Central*, 438 U.S. 104 at 149 (Rehnquist, J., dissenting); Radford & Wake, *Deciphering and Extrapolating:*, 38 Ecology L.Q. at 738–39 (observing that "the decision is virtually silent as to how [the economic impact] prong should be evaluated and weighed[,]" but suggesting that "[t]he most straightforward application of the economic impact prong as it was originally conceived would cut in favor of finding liability when regulation substantially impairs an income property's rate of return"). Justice Rehnquist noted in dissent that this Court would eventually need to define what constitutes a "reasonable return" for various types of property, and that the Court must further "define the particular property unit that should be examined…." *Penn Central*, 438 U.S. at 149. But the Court has never done so. Thus, many lower courts—the Massachusetts court included—treat the economic impact prong as an all-or-nothing proposition: either you meet the *Lucas* wipeout threshold (at which point it is a categorical taking), or you don't (which means you lose, even if the economic impact is massive). Under this view, *Penn Central* is rendered dead: there is no possible partial takings claim.

For example, Janice Smyth suffered a 91% reduction in value of her property—an economically-devastating regulation by any reasonable measure—yet the court below held this wasn't enough impact. Property owners like her need guidance from this Court in order to

decide whether to move forward with a development, or a purchase, or about whether to sink more money into a lawsuit pursuing a takings claim. Some, like Ms. Smyth have no choice because they inherit the property. Similarly, regulators need guidance as to how courts should apply the economic impact factor so they can understand how far regulations may go.

Throw temporary takings into the mix, and it becomes even more obtuse. For example, in a series of decisions, the Federal Circuit focused on the "total and immediate" impact of a federal statute that temporarily imposed massive financial liabilities for landowners. *Cienega Gardens v. United States*, 331 F.3d 1319, 1344 (Fed. Cir. 2003) (*Cienega VIII*). But four years later a different panel ruled that it was inappropriate to focus the temporary takings analysis on the timeframe for which the federal restrictions were imposed—holding that *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Plan. Agency*, 535 U.S. 302 (2002), requires consideration "of the overall value of the property" over the course of its life. *Cienega Gardens v. United States*, 503 F.3d 1266, 1281 (Fed. Cir. 2007) (*Cienega X*). The difference between these two approaches is of tremendous practical importance—which may literally make or break a temporary takings claim. *See CAA Assocs. v. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011) ("Ultimately, the difference between the *Cienega X* and *Cienega VIII* methodology is the difference between an 18% and 81% economic impact, a substantially different result stemming solely from our change in the Court's application of the parcel as a whole rule in the economic impact analysis."). The Federal Circuit stated: "If the net income over the entire remaining life of the mortgage is the denominator there is no way that even a nearly

complete deprivation (say 99%) for 8 years would amount to a severe economic deprivation when compared to our prior regulatory takings jurisprudence." *CAA*, 667 F.3d at 1247. Since an understanding of the right of reasonable economic returns is fundamentally vital to two of the three *Penn Central* tests—the "economic impact of the regulation on the claimant," and also "the extent to which the regulation has interfered with distinct investment-backed expectations"—this issue is of nationwide importance. *See Penn Central*, 438 U.S. at 124.

B. "Distinct" Or Reasonable" Expectations?

There is huge difference between "distinct" expectations (which focus on the property owner), and "reasonable" expectations (which focus on a court's view of the circumstances). In *Penn Central*, this Court held that "the extent to which the regulation has interfered with *distinct* investment-backed expectations" is one of the factors. *Penn Central*, 438 U.S. at 124 (emphasis added). Yet somehow, just a short time later, the Court was speaking of "reasonable" expectations. *See Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). "Reasonable" mostly stuck. *See*, *e.g.*, *Love Terminal Partners*, 889 F.3d at 1344 & n.3. Most critically, this has allowed lower courts to ignore this Court's ruling in *Palazzolo* that acquisition of the property after the allegedly unconstitutional restrictions were applied to it is not categorically fatal to a taking claim. *See Palazzolo*, 533 U.S. at 626-27. By concluding it is not "reasonable" for a property owner to expect to be free of even highly restrictive regulations, these courts have turned the investment factor into bootstrap logic, and another "one strike" rule. *See*, *e.g.*, *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1091 (9th Cir. 2015) (loss of a

"mere" $4.7 million not a taking because "when buying a piece of property, one cannot *reasonably* expect that property to be free of government regulation such as zoning, tax assessments, or, as here, rent control") (emphasis added); *Cienega Gardens v. United States*, 503 F.3d 1266, 1289 (Fed. Cir. 2007) ("The plaintiffs could not reasonably have expected the change in regulatory approach."). *See also* Wade, *Theory and Misuse of Just Compensation*, 46 Tex. Envt'l L.J. at 142 n.21 ("This change [from distinct to reasonoable] has confounded subsequent courts' views of reasonable financial expectations with plaintiffs' reasonable notice of regulatory prohibitions. Conversion of *Penn Central*'s distinct investment-backed expectations to reasonable notice of rules eviscerated the evaluation of severity of economic impact.").

C. Character Of The Government Action

Two points on this final factor. First, if it is simply a recasting of the categorical rules of *Loretto*, *Lucas*, and *Hodel*, it serves no distinct purpose as a separate item to be considered. In other words, what's the point of this factor if there's already a separate rule that if the character of the government action is a physical invasion, a wipeout of economically beneficial uses, or a deprivation of a fundamental "stick," it is a categorical taking without regard to the remaining factors? If so, the "character" factor simply sows confusion and provides even more opportunities for intellectual mischief.

Second, if this factor means more than that, then what does it mean? It cannot mean that courts look to the government's reason or purpose supporting the regulation. In takings claims, the reason behind the regulation—and whether it serves a public purpose—it is meaningless. In order to be a taking for which

compensation must be provided, a regulation must serve a public purpose. If it does not, the regulation is invalid as a matter of due process of law, and isn't compensable as a taking, as Justice Kennedy pointed out. *See Lingle*, 544 U.S. at 548-49 (Kennedy, J., concurring). In short, in order to plead a regulatory takings claim, the owner must concede that the regulation serves a valid public purpose.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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