No. 12-1416

In the Supreme Court of the United States

MIKE MEHAFFY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner contends that the United States took his property by regulation in violation of the Just Compensation Clause of the Fifth Amendment. The questions presented are as follows:

1. Whether the court of appeals held, contrary to its own precedent and that of this Court, that a preexisting regulatory restriction on petitioner's use of his property *ipso facto* defeated his argument that he had a reasonable, investment-backed expectation of developing the property in a manner inconsistent with the restriction.

2. Whether the force of the reasonable, investment-backed expectations factor in the analysis under *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), can be so overwhelming as to defeat a claim of a partial regulatory taking.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-11a) is not published in the *Federal Reporter* but is reprinted at 499 Fed. Appx. 18. The opinion of the Court of Federal Claims (Pet. App. 12a-45a) is reported at 102 Fed. Cl. 755.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2012. A petition for rehearing was denied on March 7, 2013 (Pet. App. 47a). The petition for a writ of certiorari was filed on June 3, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2000, petitioner spent $10 to purchase 73 acres of predominantly wetland property abutting the Arkansas River in North Little Rock, Arkansas. Pet. App. 3a,

5a. Petitioner bought the property from Mehaffy Construction Company, Inc., which had acquired it in 1987 from Nomikano, Inc. "in a negotiated, arm's-length transaction for $75,000—the fair market value at the time of the sale." *Id.* at 17a. Nomikano had conveyed a flowage easement over the property to the United States in 1970. *Ibid.* The easement deed reserved to Nomikano "the right to place fill" in certain portions of the property. *Id.* at 15a.

In 1972 and 1977, after the flowage easement had been conveyed, Congress enacted the principal provisions of the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.* See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). In 1980, the United States Army Corps of Engineers (Corps) informed Nomikano and petitioner (an officer of Nomikano) that, under the CWA, wetlands on the property could not be filled without a permit from the Corps. Pet. App. 16a-17a; see 33 U.S.C. 1311(a), 1344.

In 2004, petitioner cleared nearly ten acres of the upland portion of the property to store construction equipment. Pet. App. 17a-18a. Two years later, he asked the Corps for a permit to fill 48 acres of wetlands on the property. *Ibid.* As the Corps summarized, petitioner's request contemplated placing "230,000 cubic yards of fill within a designated floodway of a major navigable river." *Id.* at 24a. Petitioner's "sparse" permit application declared that the "purpose" of his project was to exercise the "[r]ight" purportedly granted when Nomikano conveyed the flowage easement to the United States in 1970. *Id.* at 18a; see C.A. App. 842-843 (permit application).

The Corps provided public notice of the permit request and sought comments. Pet. App. 19a. In re-

sponse, federal, state, and local agencies expressed concern about the potential effects of petitioner's fill project on the local environment, erosion, and flood control. *Id.* at 19a-21a. In response to repeated requests for further details about the project and responses to the comments, petitioner simply "reiterat[ed] * * * his asserted right to fill the subject property as granted by the Easement Deed." *Id.* at 23a; see C.A. App. 854 (petitioner's letter to the Corps) ("We were granted the specific right to fill this property. There is no mention of having to get approval of any other State or Federal Agency. There is no mention of having to get alternate property, mitigation or hydraulic studies or anything else.").

"Given this obdurate behavior in the face of repeated requests for information," Pet. App. 42a, the Corps denied petitioner's permit application, concluding that it was unable to find that his proposed project complied with relevant regulations. *Id.* at 23a-24a. The Corps noted, in particular, petitioner's "failure to provide any information regarding the project's effect on the floodplain" and his unwillingness to examine practicable alternatives to the project or attempt to minimize adverse environmental impacts. *Id.* at 24a; see 40 C.F.R. 230.10(a) and (d). The Corps denied petitioner's administrative appeal, and he did not challenge the permit denial under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* See Pet. App. 25a.

2. Petitioner filed suit under the Tucker Act, 28 U.S.C. 1491, seeking $2.25 million in compensation for an alleged partial taking of his property. C.A. App. 32 (complaint). The Court of Federal Claims (CFC) granted summary judgment to the United States. Pet. App. 12a-45a. The court concluded that petitioner had not

carried his burden to demonstrate a regulatory taking under the factors set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). Without determining the precise economic impact of the permit denial on the value of petitioner's property (because that was the subject of a genuine factual dispute), the court held that petitioner's claim failed as a matter of law under the other *Penn Central* factors because (1) petitioner lacked a reasonable, investment-backed expectation of being able to fill wetlands on the property without a permit, and (2) the character of the government action weighed against a finding of a taking. Pet. App. 33a-44a.

With respect to petitioner's expectations, the CFC observed that "[t]his case would seem to be the prototypical non-takings case," in which the $10 that petitioner paid for the property reflected "the risk of being unable to develop the property as desired." Pet. App. 39a-40a. The court concluded that petitioner had failed "to take the permit process seriously," and had never even "taken the steps of explaining why the wetlands portion of the subject property needs to be filled to effectuate his development plan or commissioning a survey to demonstrate the effects of this action." *Id.* at 41a-42a. With respect to the character of the government action, the court explained that the permitting process serves a valid public interest; that it did not operate retroactively in this instance; that the Corps' actions were not "particularly directed at" petitioner; and that, "on the facts presented," the regulation "does not go 'too far' and specifically impose * * * an unfair burden" on petitioner. *Id.* at 43a-44a.

3. Petitioner appealed, contending that genuine disputes of material fact existed with respect to his reason-

able, investment-backed expectations and the character of the government action. Pet. C.A. Br. 6, 15, 30-31. After both parties waived oral argument, 12-5069 Docket entry Nos. 28-29 (Fed. Cir. Oct. 26, 2012), the court of appeals affirmed in an unpublished disposition, Pet. App. 2a-11a.

The court of appeals recognized that, under *Penn Central*, several factors are generally considered in "determining whether a particular regulation has gone too far" and thus requires just compensation. Pet. App. 8a. The court also noted, however, that "it is possible for a single factor to have such force that it disposes of the whole takings claim." *Ibid.*

Turning to "the reasonable investment-backed expectations prong of the *Penn Central* analysis," the court of appeals found that the relevant date for evaluating such expectations was the date when petitioner acquired the property (in 2000), rather than the date when a previous owner had negotiated the flowage easement with the government (in 1970). Pet. App. 8a-9a. The court observed that petitioner had "purchased the property twenty-eight years after the passage of the [Clean Water Act] and thirteen years after the property had been sold to [Mehaffy Construction Company, Inc.,] in an intervening arms-length transaction." *Id.* at 9a. The court further found that petitioner "had both constructive and actual knowledge" of the regulatory restrictions on the subject property at least two decades before he acquired it. *Id.* at 10a. In rejecting petitioner's contrary argument, the court explained that Nomikano's reservation of the right to fill wetlands on the property in the 1970 easement deed did not "give Nomikano any new property rights" and did not give subsequent purchasers like petitioner a reasonable expecta-

tion that the United States would afford those wetlands special treatment under later-enacted laws. *Ibid.* Instead, the court concluded, petitioner is "in the same position as other property owners and has no expectation to fill his wetlands without first obtaining a permit." *Ibid.*

Finding that factor dispositive of the *Penn Central* analysis, the court of appeals affirmed the grant of summary judgment without "further discuss[ing] the character of the government action or the economic impact of the regulation." Pet. App. 11a.

ARGUMENT

The court of appeals' unpublished decision reaches the correct result and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. In the court of appeals, petitioner characterized this case as involving "a highly unique set of facts." Pet. C.A. Br. 13, 18; see *id.* at 25 ("this case presents a very unique set of facts"; "it appears that [petitioner] has a very unique property interest"); *id.* at 30 ("the current case * * * presents a unique circumstance"); Pet. C.A. Reply Br. 15 ("The unique facts presented in the current case * * * create material facts in dispute."). In petitioner's view, a clause in a 1970 easement deed that "reserved * * * the right to place fill" in certain portions of the relevant property (Pet. App. 4a) means that petitioner cannot be subjected to the CWA's subsequent requirement, applicable to all other landowners, that such wetlands be filled only after a permit is obtained. The court of appeals appropriately concluded that, under the facts of this case, the CWA's permitting requirement does not constitute a taking of petitioner's property that requires just compensation.

a. Petitioner contends (Pet. 9-13) that the decision below conflicts with *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001). In *Palazzolo*, this Court explained that a regulatory takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Id.* at 630. Justice O'Connor's concurring opinion, however, stressed that "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of [his] expectations." *Id.* at 633.

Petitioner characterizes (Pet. 11) the court of appeals' opinion as establishing "a new categorical rule" that, "when a landowner has knowledge of a regulation that predates his acquisition, he has no reasonable investment backed expectations." But the court below did not announce such a rule. Instead, in a brief but fact-intensive opinion, the court held that a reservation in an easement did not give petitioner a reasonable, investment-backed expectation of filling wetlands on his property where: (1) the deed did not grant Nomikano or its successors-in-interest any new rights or purport to immunize the property from subsequent regulation; (2) petitioner had actual and constructive knowledge as of 1980 that the CWA applied to the property, irrespective of the 1970 reservation; (3) Nomikano sold the property to an unrelated third party in a negotiated, arms-length transaction 15 years after Congress passed the CWA; and (4) the third party sold it to petitioner 13 years later for $10 (petitioner's only demonstrated investment in the wetlands on his property). Pet. App. 9a-10a. Just as Justice O'Connor's *Palazzolo* opinion anticipated, the preexisting regulatory regime "help[ed] to shape" the analysis of petitioner's reasonable, investment-backed expectations (533 U.S. at 633), but it was

not the court of appeals' only consideration. Accordingly, there is no merit to petitioner's suggestion that the decision below effectively revives the categorical notice rule that this Court rejected in *Palazzolo*.

b. Contrary to petitioner's contention (Pet. 17), there is no "[c]onflict [a]mong the [c]ourts of [a]ppeals" about how to apply the *Penn Central* factors. The allegedly conflicting decision from the First Circuit (see Pet. 17-18, 21) did not deny altogether the relevance of an intervening statute requiring disclosure of product ingredients. Instead, it merely found that the new statute needed to be considered in a broader context, including the fact that state law had "long protected trade secrets." *Philip Morris, Inc.* v. *Reilly*, 312 F.3d 24, 41, 45 (1st Cir. 2002) (en banc).

Petitioner identifies no decision from another circuit that articulates the *per se* rule that he attributes to the court below. And even if the unpublished decision below had announced such a rule, the Federal Circuit itself has recognized, in published opinions, that knowledge of a preexisting regulation "is not per se dispositive" of a claimant's reasonable, investment-backed expectations. *Schooner Harbor Ventures, Inc.* v. *United States*, 569 F.3d 1359, 1366 (Fed. Cir. 2009); see *Appolo Fuels, Inc.* v. *United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (considering the regulatory regime as part of its analysis of the landowner's reasonable, investment-backed expectations), cert. denied, 543 U.S. 1188 (2005); *Rith Energy, Inc.* v. *United States*, 270 F.3d 1347, 1350-1351 (Fed. Cir.) (same), cert. denied, 536 U.S. 958 (2001); see also Pet. 18-20. Of course, any intra-circuit conflict between the decision below and those decisions would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

2. Petitioner further contends (Pet. 14-17) that the decision below conflicts with this Court's decision in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Petitioner views that decision as buttressing his reasonable, investment-backed expectations because the Court observed that "the very existence of a permit system implies that permission may be granted." Pet. 14 (quoting *Riverside Bayview Homes*, 474 U.S. at 127) (emphasis omitted). The point of the Court's observation was that, because permit applications may be granted, a permit requirement cannot be equated, for takings purposes, with a categorical ban on the use of property for specified purposes. See 474 U.S. at 127. The Court further observed that the denial of a permit application would not "necessarily constitute[] a taking" because "even if the permit is denied, there may be other viable uses available to the owner." *Ibid.*

Petitioner's current constitutional argument stands *Riverside Bayview Homes* on its head. Petitioner does not contest the CFC's conclusion that he "was, at best, uncooperative with the Corps" and did not "take the permitting process seriously." Pet. App. 42a. It therefore is simply unclear what restrictions would have been placed on his proposed development activities if petitioner had attempted in good faith to obtain a CWA permit. Cf. *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985) ("[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."). For that reason, petitioner's takings claim depends on the proposition that the mere existence of

the permit requirement effects a taking of his property. The Court in *Riverside Bayview Homes* explicitly *rejected* that proposition.

Petitioner has taken the position that he did not have to comply with the regular permitting process because the 1970 easement deed "granted the specific right to fill this property" without any "mention of having to get approval of any other State or Federal agency." C.A. App. 854. Any dispute as to the proper construction of the easement deed would raise no issue of widespread or continuing importance warranting this Court's review. In any event, petitioner's argument lacks merit.

In the 1970 easement deed, Nomikano conveyed to the United States, in exchange for a payment of $16,500, a flowage easement and certain attendant rights for federal personnel "to clear and remove any brush, debris, and natural obstructions" that might interfere with the Arkansas River project. C.A. App. 216. The easement deed "reserv[ed], however, to the landowner, its successors and assigns, all such rights as may be used and enjoyed without interfering with the use of the project for the purposes authorized by Congress or abridging the rights and easement [being] conveyed," including "the right to place fill in the area of said tract" above a certain elevation. *Id.* at 216-217. Read in the context of the easement deed as a whole, that reservation is best understood as simply making clear that the *deed itself* did not divest Nomikano of the right to fill wetlands at the site. The reservation is not naturally understood to support the extravagant conclusion that, in negotiating the easement deed, federal officials conferred a blanket and perpetual legal immunity on all activities at the site that do not interfere with the Arkansas River project or abridge the easement.

3. Finally, petitioner contends (Pet. 21-30) that the court of appeals erred by resolving his regulatory takings claim without expressly balancing all three factors identified in *Penn Central*.*

This Court, however, has already made it clear that the analysis under *Penn Central* need not always address all three factors. In *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984), the Court held that "the force of [the reasonable, investment-backed expectations] factor" may be "so overwhelming" in certain cases that it "disposes of the taking question" without regard to the other two *Penn Central* factors. Relying on *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987), petitioner says (Pet. 26-27) that *Monsanto*—a case involving trade secrets—has no application in the land-use context. But *Nollan* was an unconstitutional-conditions decision that did not discuss the *Penn Central* factors. See *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2602 (2013). Petitioner offers no principled justification for his position that the reasonable, investment-backed expectations factor can be dispositive for certain types of compensable property interests but not for others.

There is no disagreement in the courts of appeals about petitioner's methodological contention. Petitioner identifies decisions that recite the three *Penn Central*

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*Although the CFC's own analysis did not reach a conclusion about all three of the *Penn Central* factors (Pet. App. 34a-35a), petitioner argued in the court of appeals only that there were disputed questions of fact with respect to the two factors the CFC did address (reasonable, investment-backed expectations and the character of the government action). See Pet. C.A. Br. 6, 15, 30-31. Petitioner did not contend, as he does now, that it was legal error to reach a decision without addressing all three factors.

factors (Pet. 28-29), but those decisions did not address whether (much less hold that) every factor must be considered in every case. One decision on which petitioner relies disposed of a regulatory-takings claim without reaching a conclusion about all three factors. See *Santini* v. *Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 132 (2d Cir. 2003) ("[W]hatever the economic impact * * *, no compensable taking occurred."), cert. denied, 543 U.S. 875 (2004). And the First Circuit decision that petitioner elsewhere identifies as conflicting with the decision below (Pet. 17-18, 21) acknowledged that "different factors can be dispositive" and found it necessary to "proceed to the other elements of the *Penn Central* inquiry" only after finding it could not "hold that the [claimants] have no reasonable investment-backed expectation." *Philip Morris*, 312 F.3d at 41, 45. There is accordingly no conflict with the decision below, or with the decisions of other courts of appeals (see Pet. 29) that have followed *Monsanto*'s lead in according dispositive weight to a claimant's reasonable, investment-backed expectations in particular instances.

4. In any event, petitioner does not contend that the other *Penn Central* factors would outweigh the court of appeals' finding with respect to his lack of reasonable, investment-backed expectations. The CFC correctly determined that the character of the government action here weighs against a finding of a regulatory taking. Pet. App. 42a-44a. And even if petitioner had properly assessed the economic impact of the Corps's permit denial, the "mere diminution in the value of [his] property" would not suffice to establish a taking. *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2013

Karen L. Johnston

From: Incoming Lit
Sent: Tuesday, November 26, 2013 8:20 AM
To: Kiren Mathews; Karen L. Johnston; Suzanne M. MacDonald
Subject: FW: Mehaffy
Attachments: 11.25.13 Mehaffy_Govt Response.pdf

From: Daniel A. Himebaugh
Sent: Tuesday, November 26, 2013 8:19:35 AM
To: Incoming Lit
Cc: RS Radford
Subject: FW: Mehaffy
Auto forwarded by a Rule

12-631 incoming

From: Ward, Thomas [mailto:TWard@nahb.org]
Sent: Tuesday, November 26, 2013 8:16 AM
To: Daniel A. Himebaugh; Wake, Luke; 'Karen.Harned@NFIB.org'
Subject: RE: Mehaffy

Just got it.

Tom Ward
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From: Daniel A. Himebaugh [mailto:dah@pacificlegal.org]
Sent: Tuesday, November 26, 2013 11:15 AM
To: Ward, Thomas
Subject: RE: Mehaffy

Hi Tom,

Do you have a copy?

Thanks,

Daniel

From: Ward, Thomas [mailto:TWard@nahb.org]
Sent: Monday, November 25, 2013 7:58 AM
To: Daniel A. Himebaugh; 'Karen.Harned@NFIB.org'; Wake, Luke
Cc: Janardan, Devala
Subject: Mehaffy

All:
We should get a copy of the gov'ts brief either today or tomorrow—I can't wait to see it. We will forward it along once we get it.
Again, thank you so much for your support with this case.

Tom

Tom Ward
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