No. _____

In the
Supreme Court of the United States

PACETTA, LLC, et al.,
Petitioners,

v.

TOWN OF PONCE INLET,
Respondent.

On Petition for a Writ of Certiorari
to the Florida Fifth District Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a regulatory takings claim ripe for review when the local government has made clear how it would apply land use regulations to the property at issue, or must a property owner submit multiple applications even when those applications are not necessary to prove that the local government would reject all economically viable development applications?

2. Does government effect a taking when it intentionally devalues private property because it plans to later purchase the property at a discount?

LIST OF ALL PARTIES

The parties to the judgment from which review is sought are the Petitioners Pacetta, LLC, Down the Hatch, Inc., Mar-Tim, Inc., and the Respondent Town of Ponce Inlet. All were parties in the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Pacetta, LLC, a Florida limited liability company, is the parent LLC for Down the Hatch, Inc., and Mar-Tim, Inc. No publicly held company owns 10% or more of these three entities' stock.

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PETITION FOR A WRIT OF CERTIORARI

Pacetta, LLC, Down the Hatch, Inc., and Mar-Tim, Inc. (collectively, Pacetta) respectfully request that this Court issue a writ of certiorari to review the judgment of the Florida Fifth District Court of Appeal.

OPINIONS BELOW

The opinion of the Fifth District Court of Appeal for the State of Florida is reported at *Town of Ponce Inlet v. Pacetta, LLC*, 226 So. 3d 303 (Fla. Dist. Ct. App. 2017), and is reproduced here as Appendix (App.) A. The opinion of the trial court finding liability for the taking is reported at 2012 WL 10688122 (Fla. Cir. Ct.), and is reproduced here as App. B. The trial court's amended order is reported at 2013 WL 8114486 (Fla. Cir. Ct.), and is reproduced here as App. C. The trial court's second amended final judgment is reproduced here as App. D. The order denying rehearing *en banc* is reproduced as App. E. The order by the Florida Supreme Court denying Pacetta's petition seeking that court's review is available at *Pacetta, LLC v. Town of Ponce Inlet*, No. SC17-1897, 2018 WL 507415 (Fla. Jan. 23, 2018), and is reproduced here as App. F.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). Pacetta filed an inverse condemnation lawsuit in Florida state court challenging the Town of Ponce Inlet's regulatory actions as violating the Fifth and Fourteenth Amendments, 42 U.S.C. § 1983, and a state statute. The trial court found that the Town's actions effected an uncompensated taking in violation of the Fifth Amendment. App. at B-66. On June 16, 2017, the Fifth District Court of Appeal overturned that decision and remanded the case to reconsider

whether the takings claim was ripe and whether the Town's actions effected a taking. *Id.* at A-18. The Supreme Court of Florida issued a decision on January 23, 2018, denying Petitioners' Notice to Invoke Discretionary Jurisdiction to review the decision of Florida's Fifth District Court of Appeal. This Court granted an extension to file the Petition for a Writ of Certiorari to and including June 21, 2018. *Pacetta v. Town of Ponce Inlet*, No. 17A996.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

INTRODUCTION

Simone and Lyder Johnson originally set out to build their dream home on two residential lots in the Town of Ponce Inlet (Town), Florida. App. at A-3. Government officials for the Town saw the Johnsons' interest in the area as a potential boon, and recommended the couple expand their project into a large, multi-use development and public pier that would benefit the community. App. at A-3, B-4, 31. At the Town's insistence, and through Pacetta, LLC, the couple spent millions of dollars to design and begin construction on this new 10-parcel planned development. App. at B-4. But after years of work, the composition of the Town Council changed, and the Town prohibited the plan and all other reasonable development. Intent upon subsequently purchasing the same property at a discount, the Town set out to devalue Pacetta's waterfront property. App. at B-55, 60-61.

The property owners—Pacetta—filed takings claims against the Town. The Takings Clause of the Fifth Amendment requires that government pay compensation when it goes "too far" in taking the use of land. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). A regulation goes "too far," constituting a per se taking, when it requires an owner to suffer a permanent physical invasion of his property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). A per se taking ("*Lucas* taking") also occurs if a regulation deprives an owner of "all economically beneficial use" of the property. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Outside of these two categories, courts apply "ad hoc, factual inquiries," based on the factors

listed in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), to determine whether a taking has occurred.

The trial court found that the Town's actions effected a *Lucas* taking of four parcels of Pacetta's land. App. at A-10. But Florida's Fifth District Court of Appeal reversed and remanded for a new trial, instructing the trial court to reconsider whether the claim was ripe and to look at all 10 parcels as a whole to determine whether the Town effected a taking under *Penn Central*. App. at A-18.

This case raises two important federal questions affecting property owners' ability to obtain compensation when land use regulations go too far in restricting the use of land and warrant review by this Court.

First, to what lengths must a property owner go to obtain a final decision from the government to sufficiently ripen a takings claim? A claim that a government regulation of land effects a taking is usually "not ripe until the government entity charged with implementing the [land use] regulations has reached a final decision" applying its regulations to the plaintiff's property. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). Some courts have adopted a rigid view of this final decision ripeness requirement, erecting hurdles that most property owners cannot overcome when the local government chooses to delay or complicate the permit application process. Such hurdles needlessly increase the costs of litigation, waste judicial resources, and make it more difficult if not impossible for property owners to vindicate their right to just compensation.

In this case, the trial court found that after six years of attempting to appease the Town, the Town rejected Pacetta's development plans and would block all economically viable development of Pacetta's property. App. at B-55–56. The appellate court did not contest that factual finding, yet nonetheless remanded for a new ripeness determination, asking the trial court to reconsider whether Pacetta's applications for development were "*meaningful*" and whether the government would have rejected "*any* other development of Pacetta's property." App. at A-19–20 (emphasis added). These rigid instructions—exemplifying lower courts' confusion on this question—doomed the case on remand and warrants review by this Court.

The second question asks whether government effects a taking when it intentionally devalues property with the intent of later acquiring it at a discount. The trial court found that the Town intended to devalue the land and drive Pacetta into financial distress to force a discounted sale of the vacant waterfront land desired by the Town. App. at B-60–61. The jury awarded Pacetta $30 million for the complete destruction of the value of four of its 10 parcels. App. at A-13. But the appellate court overturned that judgment, refusing to determine whether the Town effected a *Penn Central* taking. Instead the court remanded the case for a new trial. App. at A-20 n.6.

As often recognized, courts have so weakened the property rights protections articulated in *Penn Central* that no matter how egregious government regulation, owners have little hope of proving a regulatory taking unless they can remove the case from *Penn Central* analysis. *See, e.g.*, James E. Krier

& Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 Wm. & Mary L. Rev. 35, 64 (2016). Lacking sufficient guidance, the lower courts have failed to agree on any coherent standards under *Penn Central*, leaving property owners and regulators unable to determine, without litigation, when regulations go "too far" in imposing burdens on a property owner and thus when such takings require just compensation. *See* Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn. St. L. Rev. 601, 605 (2014).

Between the great difficulty in proving a takings claim is ripe, and the lower courts' failure to recognize meaningful protections under *Penn Central*, property owners' constitutional rights are routinely violated and, even when litigated, almost always lose. Krier & Sterk, *supra*, at 62-64. This Court should grant review to show by example that *Penn Central* offers meaningful protection and to make clear that courts must consider the burden on property owners when deciding whether a takings claim is ripe.

STATEMENT OF THE CASE

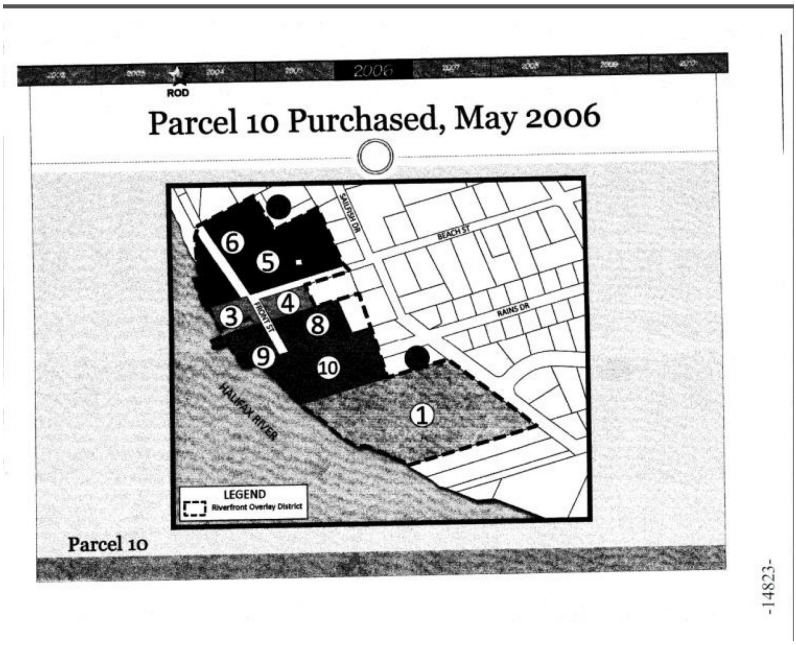
A. Pacetta Seeks To Develop Land in Ponce Inlet

In June 2004, Lyder Johnson, and his wife Simone, purchased six acres of land in the Town of Ponce Inlet for $4,100,000: parcel 1 situated in a riverfront commercial zoned area,[1] and parcel 2 located in an area zoned medium-density residential. App. at A-3, 42. At the time, the Johnsons intended to

[1] The Town rezoned the waterfront lots immediately adjacent to parcel 1 from commercial to residential. App. at B-22–23.

build a "dream home," along with some other residential development. App. at A-3, B-16.

"[A]t the insistence of the Town," App. at B-4, the Johnsons broadened their modest development plan into a "delightful mixed-use planned waterfront development" that would benefit the public and the Johnsons. App. at A-3, B-4–5, 19. The Town required that the Johnsons purchase additional properties before it would amend the Town's comprehensive land use plan to allow the full project. *Id.* at B-27, 31. To that end, in August 2005, the Johnsons, through Pacetta, purchased parcels 3 and 4 for $1,750,000, which were vacant. App. at A-4, B-43. In March 2006, they purchased parcels 5–9 for $7,000,000, which included a small residential property and commercial land with a small marina, dry slip boat storage business, and an aging restaurant called Down the Hatch. *Id*. at A-4, B-43. Finally, in May 2006, Pacetta purchased parcel 10 for $8,000,000, which was zoned multi-family and had a permit approved at the time of purchase for 19 townhouses and boat slips. *Id.* at A-4, B-43.



App. B-83.

Pacetta's 10 parcels were contiguous, encompassing 16 acres of land. *Id.* at A-4. Pacetta prepared a detailed plan to develop all 10 parcels as a waterfront multi-use development. *Id.* The project gave the Town everything it wanted: a public sunset pier and community fountain, a 1,300-foot public river walk, 500-foot nature walk, preservation of trees and archaeological land, and expansive public parking and public access—all at Pacetta's expense. App. at B-31–32.

In exchange, the Johnsons anticipated that Pacetta would build homes, renovate the restaurant and the marina, and build a dry slip stacked storage facility on the north end of the property in an area historically dedicated to boat building. *Id*. at A-4, B-32.

For four years, the Town and Pacetta worked together on the plan. *Id.* at B-43. Pacetta spent around $2.2 million in fees for architects, engineers, consultants, and lawyers in its attempt to design and implement the project, and another $1.5 million making initial (and permitted) improvements for the development, including sea walls and boat slips. *See* App. at B-43. The Town encouraged the development at every step. App. at A-3, 5, B-4, 20, 28, 32.

B. The Town Halts All Development of Pacetta's Land

After the Town preliminarily approved a modification to the Comprehensive Plan that would have allowed for the full development to proceed, three citizens who opposed the plan were elected to the Town Council. App. at A-6. On a second reading, the Town suddenly rejected an amendment to the Comprehensive Plan that would have allowed for Pacetta's development. *Id.* at A-6–7. But rather than require a more modest plan for Pacetta's development of its land, the Town went much further.

The Town revised its Town Charter to specifically prohibit Pacetta's development project, targeting Pacetta's property specifically, and removing any discretion for the Town Council to approve development. App. at A-7.[2] The Town Council also issued 46 months of moratoria on all development on the land it had encouraged Pacetta to purchase, App. at B-30, and it passed land use restrictions to block any economically viable development of Pacetta's

[2] The Charter amendment was later invalidated by the courts in response to a lawsuit by Pacetta. *See Town of Ponce Inlet v. Pacetta, LLC*, 63 So. 3d 840 (Fla. Dist. Ct. App. 2011).

land. App. at B-48, 55-56. Effectively, one parcel was rendered an undevelopable park. App. at B-65. The Town would not even approve Pacetta's rather modest application for parcel 10—to build 10 homes that conformed with all applicable regulations. *See* App. at B-25, 49 n.7.

C. Pacetta Seeks Relief in State Court

In May 2010, Pacetta filed the suit forming the basis for this Petition against the Town, seeking compensation for a regulatory taking. App. at A-9. After a 12-day bench trial, the court recognized the takings claim as ripe, holding that the Town would block any economic development of Pacetta's land. *Id.* at B-65.

The court found that even though it was "hard to believe" at first, the evidence showed the Town intentionally devalued Pacetta's property, App. at B-60, "to destroy the Pacetta Group so the property could be acquired by the Town at a fraction of its cost and worth." *Id.* at B-49–50. The Town expected that the regulations and moratoria[3] would cause such financial hardship to Pacetta and that the Town would have "practical immunity" from suit. *Id.* at B-51, 60. Indeed, the Town's scheme had its intended effect, as Pacetta struggled financially, even defaulting on an $11,000,000 loan. *See id.* at B-44.

The court considered Pacetta's 10 parcels and evaluated whether there had been a per se taking under *Lucas* of each individual parcel. App. at A-10. The court found a *Lucas* taking of parcels 1, 3, 4, and

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[3] The trial court specifically found the moratoria were intentionally used to cause financial harm to Pacetta. App. at B-49.

10, but concluded that there had been no taking of the remaining parcels, because they maintained some economic value. *Id.*

Pacetta also prevailed on a state statutory damages claim for the "inordinate burdening" of its real property by the Town's regulations pursuant to Florida's Bert J. Harris, Jr., Private Property Rights Protection Act (Harris Act), Section 70.001, Florida Statutes (2010). App. at A-9, B-1, 77. The trial court held that the Town's regulations "inordinately burdened" all 10 parcels and each individual parcel, requiring compensation under the Harris Act, because the regulations left the landowners with "a mere small shadow of those [uses] that would have been available based on the plaintiffs' established vested right." *Id.* at B-68.

The Town filed an interlocutory appeal of the Harris Act decision and won a judgment that the right to the full planned development had not vested under the Harris Act. *See Town of Ponce Inlet v. Pacetta, LLC*, 120 So. 3d 27 (Fla. Dist. Ct. App. 2013). After getting the Harris Act decision overturned, the Town moved the trial court for reconsideration of the takings decision. App. at A-12. The court denied the motion and held the original findings "are comprehensive, thorough and clearly establish sound support . . . in favor of the Plaintiff on the remaining counts." App. at C-3.

At a trial on damages for the remaining claims,[4] the jury awarded fair-market value—just

[4] Pacetta also raised state due process claims and reserved federal claims under the *England/Jennings* doctrine. Neither issue is raised by this Petition. *See England v. La. State Bd. of*

compensation—for the four taken parcels: $18 million for parcels 1 and 10, and $1.85 million for parcels 3 and 4. *Id.* After computing interest, the court entered a $30 million final judgment for Pacetta. *Id*

D. The Appellate Court Overturns the Ripeness and Takings Decisions

The Town appealed the judgment. Florida's intermediate appellate court overturned the takings decision and remanded for a new trial, because the trial court had not evaluated whether a *Penn Central* taking had occurred on the 10 parcels as a whole. App. at A-18. The court refused to apply the trial court's detailed factual findings to determine whether the Town effected a *Penn Central* taking. *See id.*

The appellate court also held that the trial court would have to reconsider whether the case was ripe. App. at A-19–20. The court instructed that a takings claim cannot be ripe unless the property owner submits at least one "meaningful application" and the government entity charged with implementing the regulations "arrive[s] at a 'final, definitive position' on the 'nature and extent' of the permitted development." App. at A-19 (quotation omitted). The court also instructed that "the trial court on remand should determine whether Town has effectively determined that *any other development* of Pacetta's property would be impermissible, thus causing any application by Pacetta for development or for an amendment to the plan to be futile." App. at A-20 (emphasis added).

Med. Exam'rs, 375 U.S. 411, 421-22 (1964); *Jennings v. Caddo Parish School Board*, 531 F.2d 1331, 1332 (5th Cir. 1976).

The lower court's rigid instructions doomed the case on remand to be found unripe.

REASONS FOR GRANTING THE PETITION

I

THIS COURT SHOULD SETTLE THE IMPORTANT FEDERAL QUESTION OF WHAT A PROPERTY OWNER MUST DO TO RIPEN A REGULATORY TAKINGS CLAIM

Like the appellate court in this case, many lower courts have erected inappropriate final-decision ripeness barriers for takings claims. Here, the lower court joined those jurisdictions that hold a property owner can only show applying for land use permits would be futile if the owner proves the local government would deny *all* permits. *See* App. at A-19–20. This requirement has the perverse effect of forcing property owners to prove something akin to a *Lucas* categorical taking in order to prove a *Penn Central* (partial) taking claim is ripe. *Thun v. City of Bonney Lake*, 265 P.3d 207, 214 (Wash. Ct. App. 2011) ("We cannot both acknowledge that partial takings claims are actionable, yet hold that they are unripe unless they are total takings.").

Ordinarily, the ripeness inquiry requires courts to evaluate "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Indeed, when zoning laws are challenged as violating *other* constitutional rights, courts often recognize the importance of these considerations when deciding ripeness. *See, e.g., Temple B'Nai Zion, Inc. v. City of*

Sunny Isles Beach, Fla., 727 F.3d 1349, 1357 (11th Cir. 2013). But when it comes to takings claims, instead of considering the burdens that failure to review imposes, lower courts have put a millstone around the neck of takings plaintiffs, requiring complex and sometimes multiple permit applications, no matter the cost or feasibility. *See, e.g., Gil v. Inland Wetlands & Watercourses Agency of Town of Greenwich*, 593 A.2d 1368, 1374 (Conn. 1991). Up until this point, this Court has provided only ambiguous guidance on this question. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 744 (1997) (considering but not answering whether *Abbott Labs* factors should guide ripeness decisions in takings cases).

Excessive ripeness barriers cripple and regularly defeat takings claimants from obtaining vindication of their constitutional rights. This Court should remedy this nationwide problem by settling the split among the lower courts and providing clear guidance about the requirements of final decision ripeness.

A. Final Decision Ripeness

1. Takings Claims and the "Final Decision" Ripeness Requirement

Courts cannot hear takings claims until the claim is ripe for review. *Suitum*, 520 U.S. at 735-38. And a takings claim is not ripe until the governmental action affecting the property rights is concrete and final. *Williamson County*, 473 U.S. at 186. The "basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Abbott*

Labs., 387 U.S. at 148-49. It is "also to protect [governmental] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.*

In *Williamson County*, this Court clarified that an as-applied regulatory takings claim is not ripe until "the government entity charged with . . . [the] decision regarding the application of the regulations to the property at issue" has reached a "final decision." 473 U.S. at 186. The Court in *Williamson County* held the plaintiff's takings claim was unripe because county officials had authority to approve the plaintiff's development through a variance, but the plaintiff had not applied for one. *Id.* at 190. Thus the Court could not tell whether the regulations prohibited the development until this process was utilized.[5]

In *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), the Court elaborated that a completed and denied application for development does not always ripen a takings claim. In that case, the government denied a landowner's application for a permit to develop 159 residential lots. *Id.* at 347. This Court held the claim unripe, stating, "Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *Id.* at 353 n.9. The

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[5] This first ripeness test of *Williamson County* is independent from the "exhaustion of state remedies" mandate challenged in *Knick v. Township of Scott*, 138 S. Ct. 1262 (2018). Pacetta satisfied that "exhaustion of state remedies" ripeness requirement by filing and litigating this claim in state court.

Court suggested that a "meaningful application" may not have been made. *Id.* at 352 n.8. This confusing distinction between a "grandiose" plan and a "meaningful application" has not been addressed by this Court. Nor is it clear why a plan that is consistent with zoning and satisfies regulations would be considered "grandiose." *See* Steven J. Eagle, *Regulatory Takings* § 8-6(c)(1) at 1188 (4th ed. 2009).

The Court rooted its "final decision requirement" in "the high degree of discretion" land use law often grants government officials, as well as the fact-specific nature of regulatory takings law. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001) (quotation omitted). The underlying rationale is that a court cannot know whether a regulation "goes too far" and causes a taking until it knows to a "reasonable degree of certainty" how officials will apply the subject regulation to the property. *Id.* This rationale gives rise to the default principle that a landowner must usually utilize available application processes and give the government a chance to exercise its discretion to permit the requested land use before asserting that land use restrictions deprive the owner of the use and value of property.

2. Finality Exists Whenever the Impact of Land Use Regulations Is Known to a Reasonable Degree

The need for one or more land use applications or a final decision on an application is truncated (1) where the impact of land use restrictions are already known to a "reasonable degree of certainty" or (2) where the government has no meaningful discretion to reduce a restriction's impact. *Id.*; *Suitum*, 520 U.S. at 726. Indeed, in these situations, a "final

decision" already exists, and a takings claim is ripe for review. *Id.* at 738; *Palazzolo*, 533 U.S. at 620.

The final decision ripeness rule also does not require that a property owner prove that the government will disapprove *all* land uses or any and all economic use. Whether the owner has alternative property use options is immaterial to whether a takings claim is ripe. Potential alternative uses can shed light on the *merits* of a takings claim, but it does not affect the *ripeness* of a takings claim. J. David Breemer, *Ripening Federal Property Rights Claims*, 10 Engage: J. Federalist Soc'y Prac. Groups 50, 51 (2009).

Whenever the reach of land use regulations becomes clear to a reasonable degree, a court can apply takings standards, and a challenge to the regulation is ripe. *Palazzolo*, 533 U.S. at 620; *see also MacDonald*, 477 U.S. at 359 (White, J., dissenting) ("Nothing in our cases, however, suggests that the decisionmaker's definitive position may be determined only from explicit denials of property-owner applications for development.").

3. A Landowner Need Not Apply for Any Permit When It Would Be Futile

A property owner need not submit any land use application when it would be futile. *Lucas*, 505 U.S. at 1012 n.3. The reason for this exception from the usual need for an application is obvious: requiring applications when they will not or cannot be approved would force landowners to go through meaningless procedures and would do nothing to crystalize a takings claim for the courts. *See Palazzolo*, 533 U.S. at 622.

B. The Lower Courts Are Confused About How To Apply This Court's Ripeness Precedent, Resulting in Inconsistent and Unjust Outcomes

1. The Courts Are in Disarray

Despite the final decision ripeness guidelines set out by this Court—or perhaps because of the murkiness of those requirements—the lower courts are confused about what landowners must do to ripen a takings claim. Thomas E. Roberts, *Facial Takings Claims Under* Agins-Nectow*: A Procedural Loose End*, 24 U. Haw. L. Rev. 623 (2002) (ripeness cases are a "confusing body of law"). This confusion has persisted even after this Court's welcome clarifications in *Palazzolo*.

Lower courts disagree whether the final decision requirement and futility exception are narrow and rigid, flexible, or discretionary. *Compare, e.g., Lilly Investments v. City of Rochester*, 674 Fed. App'x 523, 527 (6th Cir. 2017) (finality doctrine is flexible because "rigid application . . . would allow states to avoid the strictures of the Takings Clause"), *with County of Alameda v. Superior Court*, 34 Cal. Rptr. 3d 895, 902 (Cal. Ct. App. 2005) (futility exception is extremely "narrow"), *and Sherman v. Town of Chester*, 752 F.3d 554, 563 (2d Cir. 2014) (finality ripeness is prudential and futility exception applies when government will use "repetitive and unfair procedures"), *and Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 980 (9th Cir. 2011) ("The Supreme Court has treated the final decision requirement . . . as a matter of prudential ripeness . . . . Nonetheless, our circuit continues to treat

ripeness in . . . takings cases—as a matter of both Article III and prudential concern.").

Courts also do not know what constitutes a "meaningful" application. Some require the application to be formal, while others do not. *Compare, e.g., Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872 (9th Cir. 1988) (must be formal), *with Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir. 1989) (informal suffices). Nor can they agree whether a minimum of one, two, or more applications are required to satisfy final decision ripeness, or whether the number depends upon the facts. *See, e.g.*, *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987), *amended*, 830 F.2d 968 (9th Cir. 1987) (property owner must file "at least two decisions": "(1) a rejected development plan, and (2) a denial of a variance"); *Taylor v. City of Riviera Beach*, 801 So. 2d 259, 263 (Fla. Dist. Ct. App. 2001) (one "meaningful" application required); *Killington, Ltd. v. Vermont*, 668 A.2d 1278, 1282 (Vt. 1995) (no set number); *Gil*, 593 A.2d at 1374 (no set number but four was insufficient). Some jurisdictions even rigidly require a property owner to submit at least one "meaningful" application to prove that any permit applications would be futile. *See, e.g., DLX, Inc. v. Kentucky*, 381 F.3d 511, 525 (6th Cir. 2004); *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990) ("futility exception does not alter an owner's obligation to file one meaningful development proposal"); *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 915 F. Supp. 2d 574, 601 (S.D.N.Y. 2013) (same).

In some cases, courts make it so difficult to ripen a takings claim that property owners must submit

numerous modest applications, or wait for years on pending applications before they may enforce their right to just compensation. *See, e.g.*, *Gil*, 593 A.2d at 1374-75 (lack of finality even though property owner submitted four permit applications for a residence, including one application for a home of only 1,500 square feet). In *Good v. United States*, 39 Fed. Cl. 81, 101-03 (1997), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000), the property owners submitted eight applications to build a subdivision over a nine-year period. The U.S Army Corps of Engineers denied the application for a wetlands permit, but according to the court the decision was not "final" under *Williamson County* because "neither the Clean Water Act nor Corps regulations limit plaintiff's ability to submit a new application reflecting a different, less intensive plan." *Id.* at 102.

Some jurisdictions essentially require a property owner to prove the merits of a *Lucas* categorical takings claim in order to prove any takings claim is ripe. In *Adrian v. Town of Yorktown*, No. 03 Civ. 6604 (MDF), 2007 WL 1467417, at *8 (S.D.N.Y. May 16, 2007), the court held that "[i]n order for a decision to be deemed final, the decision must deny Plaintiffs 'all reasonable beneficial use of [their] property.'" (Quoting *Williamson County*, 473 U.S. at 194). *See also Gil*, 593 A.2d at 1374-75.

Courts also disagree about whether the ripeness doctrine requires a permit application when the only land uses the local government would permit are not economically viable. *Compare Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932 (Tex. 1998) ("The ripeness doctrine does not require a property owner

. . . to seek permits for development that the property owner does not deem economically viable."), and *Beuré-Co. v. United States*, 16 Cl. Ct. 42 (1988) (additional applications would be futile because the projects may be uneconomic), *with County of Alameda*, 34 Cal. Rptr. 3d at 896 (futility exception doesn't apply just because allowable uses are not economically viable), *Daddario v. Cape Cod Comm'n*, 681 N.E.2d 833, 838 n.4 (Mass. 1997) (same), *and Accent Group, Inc. v. Village of North Randall*, No. 85757, 2005 WL 2467388, at *4-5 (Ohio Ct. App. Oct. 6, 2004) (requiring application where only allowable use would fall $1,800 short of monthly mortgage and tax payments).

Similarly, in this case, the trial court held that the only uses of Pacetta's property that the Town would allow were not economically viable. App. at B-55–56. Thus the court recognized Pacetta's takings claims was ripe. *See id.* at B-72. But the appellate court reversed, instructing that Pacetta would have to prove that its permit applications were "meaningful" or that the Town would deny *all* uses of the property in order to prove the claim ripe under the futility exception. App. at A-19–20. This futility ripeness requirement is nonsensical—exceeding even what is necessary to prevail on the merits in a *Lucas* categorical taking, which requires only showing the government took all economically viable uses of land (not *all* uses). *See Lucas*, 505 U.S. at 1015.

The lower courts' wide-ranging conflict and confusion about ripeness can only be resolved by this Court. Whether the courthouse doors are open to a takings litigant is a basic question of fundamental

fairness that courts should answer the same way, and this Court should resolve the conflict.

2. The Confusion About Ripeness Causes Needless Delay and Injustice

True ripeness does not require applications for their own sake. *Palazzolo*, 533 U.S. at 622. Unfortunately, the contrary rule employed by many jurisdictions invites long, costly application processes, with unstable requirements. William M. Hof, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After* Palazzolo v. Rhode Island, 46 St. Louis U. L.J. 833, 857 (2002). As a result of these inappropriate ripeness barriers, "planning administrators and local legislatures do not want to make final decisions, since advising applicants to try again avoids giving them a ticket to federal court." Steven J. Eagle, Penn Central *and Its Reluctant Muftis*, 66 Baylor L. Rev. 1, 57-58 (2014); *see also Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 284 (4th Cir. 1998) (the reapplication process causes landowners to "pass [ ] through procedural purgatory" only to "wend[ ] [their] way to procedural hell").

Today, the cost of even a routine land use application (with the attendant engineering and architectural submissions) is substantial. *See, e.g.*, *Bassett, New Mexico LLC v. United States*, No. 16-709L, 2018 WL 577036, at *8 (Fed. Cl. Jan. 26, 2018) (right-of-way permit application would cost "tens of thousands"). Indeed, the cost of pursuing a development application may exceed the value of the property itself. *See, e.g., McKee v. City of Tallahasse*e, 664 So. 2d 333, 334 (Fla. Dist. Ct. App. 1995) (cost of

"complete development plan, $28,000 to $50,000" may exceed property's value).

It can take years—sometimes decades—to secure a final decision on permit applications. *See, e.g., Corn v. City of Lauderdale Lake*s, 95 F.3d 1066, 1067 (11th Cir. 1996) (19-year takings dispute over permit denial for warehouse, including 10 years to secure ripeness holding); *Beyer v. City of Marathon*, 37 So. 3d 932, 933-34 (Fla. Dist. Ct. App. 2010) (nine years to receive a final decision on an application to ripen claim); *Villas of Lake Jackson, Ltd. v. Leon County*, 796 F. Supp. 1477 (N.D. Fla. 1992) (17 years trying to secure permits for a multi-family housing project).

The high costs of development, combined with the difficulty of getting a final application decision and judicial review, converts the application process into high-stakes gambling, sufficient to cause many property owners to abandon their property rights at the first sign of resistance. Patrick Maraist, *The Ripeness Doctrine in Florida Land Use Law*, The Florida Bar Journal, 58, 61 (Feb. 1997); *see also* Roger Marzulla, et al., *Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 Admin. L.J. Am. U. 253, 269 (1995) (a "typical regulatory takings case . . . takes a decade or more to litigate and costs hundreds of thousands or even millions of dollars to pursue"). The costs and delays resulting from a strict ripeness rule generally precludes anyone but the wealthiest landowners from persevering long enough to bring a regulatory taking claim. *See* Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 43 (1995); *see also* Maraist, *supra*, at 61 (landowners are forced to leave property unused "while mortgage or

other overhead expenses accumulate"). The long delays in litigating whether a claim is ripe also raises the stakes for the government. Stein, *supra*, 48 Vand. L. Rev. at 5. A prompt takings decision would allow government to quickly reverse the offending decision, rather than accrue takings liability for years. *Id.*

In light of the heavy expense and difficulty of applying for development permits, courts should consider the unreasonable burden these ripeness requirements impose on property owners. Decisions, like that issued by the court below, force landowners to submit applications, when the regulatory effect on their land is already clear. As a result, many valid regulatory takings claims are never heard, and constitutional rights are denied. Hof, *supra*, at 856.

3. This Case Is a Good Vehicle To Provide Guidance to Lower Courts About Final Decision Ripeness

This case demonstrates how the lower courts' confusion about final-decision ripeness—and their failure to consider the burden to the parties—causes injustice and drains judicial resources.

Pacetta developed and presented a specific site plan proposal for the 10-parcel mixed use development, investing millions of dollars on architects, lawyers, and preliminary and permitted improvements to the land. *See* App. at B-24–25. After years of encouragement, the Town reversed course and withdrew the comprehensive land use plan amendment necessary for the development. The Town then amended the Town Charter to ban development, imposed years of serial moratoria, and ultimately adopted a different Comprehensive Plan that severely

restricted development of Pacetta's waterfront property. This political reversal, moratoria, and new stifling regulations plainly rejected Pacetta's application for the 10-parcel development.

To avoid foreclosure, Pacetta pursued a significantly more modest development—a detailed set of plans to build 10 homes on parcel 10, which had previously been permitted for 19 townhomes. *See* App. at B-25, 49 n.7. The trial court found that these costly plans were submitted and wrongfully rejected by the Town at a time when no moratorium was in force. *Id.* The court further found that the Town's response to Pacetta's development applications and cumulative regulatory action had, by 2010, made clear "to a reasonable degree of certainty" that the Town would block *any* economic use of Pacetta's stretch of riverfront. App. at B-72. Despite these clear findings of fact, the appellate court held it an open question as to whether Pacetta had ripened its claim. App. at A-19–20.

The lower court, like so many other courts, has lost its bearings when it comes to analyzing takings ripeness. This court should grant review to clarify that courts must consider the burden to property owners when deciding whether a case is ripe. Once the allowable use becomes reasonably certain to the factfinder, a landowner need not continue to submit applications. *Palazzolo*, 533 U.S. at 621.

Nor should a landowner have to prove—like the lower court required—that all developments would be denied in order to ripen a claim. *See* App. at A-18–19. Property owners should not be forced to prevail on the merits to prove that a takings claim is ripe. The factual findings in this case are detailed and allow this

court to settle multiple questions—whether ripeness is rigid or flexible, jurisdictional or prudential; whether a plaintiff must prove the merits of a takings claim just to ripen the claim; whether a meaningful application is formal or informal, satisfies zoning requirements or political whims; whether a plaintiff must prove all applications would be denied to prove a land use application would be futile.

Improper ripeness tests have sidelined far too many takings claimants, and repeatedly prolonged and complicated otherwise straightforward takings claims—like Pacetta's claims below. *See Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50, 63 (Tex. 2006) (Hecht, J., dissenting) (ripeness doctrine can "whipsaw a landowner" and destroy property rights). It is time for this Court to resolve the confusion among the lower courts and provide takings litigants with a meaningful opportunity to vindicate their rights.

II

THIS COURT SHOULD GRANT REVIEW TO CORRECT LOWER COURT MISCONCEPTIONS ABOUT THE *PENN CENTRAL* TAKINGS TEST

This case also raises a question of whether government effects a taking when it intentionally devalues part of a landowner's property in hopes of later acquiring those lots at a drastic discount. In this case, the trial court found that the Town intentionally tried to drive Pacetta into a forced sale. App. at B-55, 60-61. The jury awarded Pacetta compensation for those parcels that were deprived of all reasonable use by the offending regulations. App. at A-13.

But on appeal, the appellate court remanded for a new trial based on its determination that the trial court used the wrong parcel as a whole to evaluate whether a taking occurred. App. at A-18. Assuming the appellate court was correct about the parcel as a whole, the court should have still affirmed the finding of a taking. The character of the Town's action was so offensive that using the larger parcel as a whole should not save it from the finding of a taking.

Like Florida's intermediate appellate court, the lower courts have largely rendered the property rights protections arising from the Takings Clause so feeble that owners have virtually no hope of proving a regulatory taking unless they can show a categorical taking under *Lucas* or *Loretto*.

This Court should grant review to provide guidance to the lower courts and make clear that *Penn Central* offers meaningful protection. When, as happened here, the character of the government action is to target property with oppressive regulatory actions in order to devalue it for cheaper acquisition later—and the action successfully decreases the value of that property—the court should find a taking.

A. Takings Law

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation."[6] The Clause "was designed 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

[6] The Takings Clause is made applicable to the states through the Fourteenth Amendment. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017).

a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). It requires that government pay just compensation when it physically appropriates or invades property or when its restrictions "go too far" in taking the use of property. *Pennsylvania Coal Co.* 260 U.S. at 415.

The Supreme Court has identified two situations where a regulation categorically goes "too far," constituting a per se regulatory taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). First, if government requires an owner to suffer a permanent physical invasion of his property, a taking occurs. *Loretto*, 458 U.S. 419. Second, a taking also occurs if a regulation deprives an owner of "all economically beneficial use" of the property. *Lucas*, 505 U.S. at 1015.

Outside of these "per se" categories, courts apply "essentially ad hoc, factual inquiries," based on the factors listed in *Penn Central* to determine whether a taking occurs. *Lingle*, 544 U.S. at 538-39. *Penn Central*, 438 U.S. at 124, listed three of those factors: the economic impact of the regulation on the landowner, the interference with the landowner's investment-backed expectations, and the character of the governmental action. *See also Palazzolo*, 533 U.S. at 617.

These factors are "designed to allow careful examination and weighing of all the relevant circumstances." *Tahoe–Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (internal quotation marks and citations omitted). A court must balance the character of the government's actions with the relative weight of other factors—the investment-backed expectations and loss of economic

value. *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1282 (Fed. Cir. 2009). Logically that should mean that if one factor weighs overwhelmingly in favor of the property owner, then the weight of the other factors must weigh powerfully in favor of government in order for the property owner to lose.

The *Penn Central* factors 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 (quoting *Armstrong*, 364 U.S. at 49); *see also Murr*, 137 S. Ct. at 1943. These factors assist in determining whether the regulation in reality is an attempt to load "upon one individual more than his just share of the burdens of government." *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 512 (1987) (Rehnquist, C.J., dissenting).

B. Confusion Among the Lower Courts Has Turned *Penn Central* into a Nearly Insurmountable Presumption Against Property Owners

Penn Central has been called the "polestar" of this Court's takings jurisprudence. *Tahoe-Sierra Pres. Council*, 535 U.S. at 336; *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring). But in the 40 years since that decision, the lower courts, landowners, lawmakers, litigators and scholars alike remain confused about how to apply its principles. Michael M. Berger, *Tahoe Sierra: Much Ado About–What?*, 25 U. Haw. L. Rev. 295, 314 (2003) (*Penn Central* test is an "unworkable . . . lot-by-lot, fact-by-fact method of adjudication . . . fraught with uncertainty"); Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part*

Balancing Test or a One Strike Rule?, 22 Fed. Cir. B.J. 677, 678 (2013) (*Penn Central* still provides no "workable standard"); Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn. St. L. Rev. at 605 (*Penn Central* and its progeny fail to "impart knowledge of the legal rights and obligations of either property owners or public officials, resulting in protracted litigation and arbitrary outcomes."); Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1088 (1993).

The lower courts' confusion has resulted in a scale tipped overwhelmingly in favor of the government. Luke A. Wake, *The Enduring (Muted) Legacy of* Lucas v. South Carolina Coastal Council*: A Quarter Century Retrospective*, 28 Geo. Mason U. Civ. Rts. L.J. 1, 7 (2017) ("government-defendants almost invariably prevail under *Penn Central*"). Most courts do not engage in any sort of balancing implied in *Penn Central*, and instead "almost always defer to the regulatory decisions made by government officials, resulting in an almost categorical rule that *Penn Central*-type regulatory actions do not amount to takings." Krier & Sterk, *supra*, at 62.

Fewer than 10% of *Penn Central* regulatory takings claims are successful in state or federal courts, "and the percentage is even smaller for those claims that do not involve interference with an existing use of land." *Id.* at 77, 88-89 (finding less than 10% succeed in state court and out of 290 federal decisions involving alleged takings by states or municipalities, only 13 resulted in a finding that a taking had occurred, and more than half of those were overturned on appeal); Pomeroy, *supra*, 22 Fed. Circuit B.J. at 687 (empirical study finding less than 10% of *Penn Central* claims in the First, Ninth, and Federal Circuits

succeed at any level and only four out of 162 cases in the three appellate courts actually prevailed).

The appellate court's decision in this case exemplifies the confusion among lower courts. The trial court held a 12-day trial and issued a detailed decision. The appellate court did not dispute any of the facts found by the trial court, instead refusing to engage in any *Penn Central* analysis. Even though the court acknowledged the years of litigation and appeals already endured by Pacetta, it remanded for a new trial instead. This was unnecessary, unjust, and demonstrates the need for guidance from this Court.

C. Despite the Presumption in Favor of the Government, the Lower Courts Have Generally Recognized a Taking When Government Intentionally Devalues Property

Despite the abysmal success rate of regulatory takings claims, courts generally favor property owners when government intentionally devalues land for the public's benefit. When government imposes land use regulations to devalue land for cheaper acquisition later, courts recognize that it effects a taking of the targeted land, regardless of the size of the parcel as a whole. *See, e.g.*, *Jefferson Street Ventures, LLC v. City of Indio*, 236 Cal. App. 4th 1175 (Cal. Ct. App. 2015) (taking where city stopped development on 11 acres "to preserve it in an undeveloped state for possible future acquisition by the City"—without regard to remaining economic uses or investment-backed expectations of entire 26 acre parcel as a whole); *Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622 (Fla. 1990) (uncompensated regulatory land-banking of targeted future rights-of-way constituted a facial

taking violation); *Morton Thiokol, Inc. v. United States*, 4 Cl. Ct. 625, 630-32 (1984) (no need to decide whether the parcel as a whole is the 350-foot piece of regulated land, or the whole parcel because the purpose of the regulation was to benefit the government in a manner that it would ordinarily have to pay for). *See also Johnson v. City of Minneapolis*, 667 N.W.2d 109, 116 (Minn. 2003) (acting in bad faith and specifically targeting certain properties constituted a taking under state constitution).

This outcome is supported 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." *see Armstrong,* 364 U.S. at 49; *Murr*, 137 S. Ct. at 1943. "[T]he question at bottom is upon whom the loss of the changes desired should fall." *Mahon*, 260 U.S. at 416.

Likewise, the character of the government action prong of the *Penn Central* analysis supports recognizing that when government regulates with such ulterior motives, it effects a taking. The "character of the governmental action" factor weighs in favor of finding a taking when the government acts in bad faith or singles out relatively few property owners to supply a public good. *See, e.g., Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998) ("character of the government action" factor supports property owner when the action targets a particular individual); *Tahoe-Sierra*, 535 U.S. at 334 (listing governmental "bad faith" as grounds for recovery under a takings theory); *Ward Gulfport Properties, L.P. v. Mississippi State Highway Comm'n*, No. 2014-CA-01001-SCT, 2015 WL 6388832, at *8 (Miss.

Oct. 22, 2015) (character test supports a taking where property owners affected by the challenged regulatory scheme "shoulder a 'disproportionate burden' of [a wetland protection plan] compared to others in the community"); *see also, e.g.*, R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731, 737-38 (2011) (*Penn Central*'s character of government action prong is likely a "smell test," grounded in fairness).

The more troubling the character of the government action, the more powerfully the other factors must favor government for the property owner to lose. *See Rose Acre Farms*, 559 F.3d at 1282. In some cases, it is possible for the character of the government action to be so egregious that the court need not even determine the extent of the economic harm caused by the regulation—it is enough that the action caused any economic harm at all. *See, e.g.*, *Jefferson Street*, 236 Cal. App. 4th at 1203 (city effected taking where it stopped development on 11 acres to preserve it in an undeveloped state for the benefit of the government—remaining economic uses or investment-backed expectations of entire 26 acre parcel as a whole were irrelevant).

Despite the near unanimity on this issue, the lower court refused to consider whether the character of the government's action demands the finding of a taking regardless of whether the court should consider just the four parcels targeted, or the full 10-parcels. That court's failure to find a *Penn Central* taking demonstrates the need for clarity that only this Court can provide.

D. This Case Is the Right Case To Provide the Lower Courts with Clarity About *Penn Central* and the Character Prong

Scholars have surmised that one reason why lower courts have struggled to apply *Penn Central*, and instead morphed it into a presumption against property owners, is that this Court has never found a *Penn Central* taking.[7] *See, e.g.*, Krier & Sterk, *supra*, at 87.

Therefore, this case is the ideal vehicle to provide clarification about *Penn Central*. The trial court made detailed findings of the facts. Weighing the trial court's findings—*regardless of the parcel as a whole*—should result in the finding of a taking. The character of the government action here is so egregious that the government cannot overcome liability even by using a much larger parcel as a whole. This analysis will show the lower courts how to weigh *Penn Central* factors and provide them with an example of what a successful *Penn Central* claim may look like.

Here, the trial judge found that, even though it sounded beyond belief "at first blush," the evidence indeed showed the Town intentionally devalued the property so that the Town could acquire the property at a steep discount. App. at B-49–51, 60. The Town intentionally and disproportionately burdened Pacetta's property in order to benefit the public when

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[7] In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Court cited *Penn Central*, but the Court did not engage in a *Penn Central* analysis, instead relying solely on the physical invasion involved. This Court shortly thereafter held physical invasions constitute a per se taking. *Loretto*, 458 U.S. at 441.

it purchased or condemned it later. *See id*. This is a taking.

The trial judge also found Pacetta had reasonable expectations for at least some single-family and multi-family residential development on the targeted parcels. The Town's stifling new regulations that deprived Pacetta of all economically viable development of four of the vacant parcels substantially interfered with reasonable, investment-backed expectations of at least residential development of those parcels. These regulations did not improve the value of Pacetta's remaining parcels. *See* App. at B-65–66, 68.

That the regulation caused economic harm should be sufficient to find a taking—regardless of whether the "parcel as a whole" was all 10 parcels, or only the four vacant parcels that the trial judge found were taken without just compensation. Any contrary holding would empower any government to avoid the "just compensation" mandate of the Takings Clause by intentionally devaluing land for cheaper subsequent acquisition.

If the parcel as a whole matters, the government would simply target individuals who own larger contiguous pieces of land, or devalue the desired portions of a parcel, rather than the whole parcel. *Cf. State v. Gurda*, 243 N.W. 317, 320 (Wis. 1932) ("The zoning power . . . is a power which may be greatly abused if it is to be used as a means to depress the values of property which the city may upon some future occasion desire to take under the power of eminent domain."); *Grand Trunk W. R.R. Co. v. City of Detroit*, 326 Mich. 387, 396-97, 400 (1949) (government action is unconstitutionally confiscatory

when government uses its land use powers to devalue property for cheap acquisition later).

The heart of the Takings Clause consists in requiring that the government pay for property when fairness and justice require the public to bear a financial burden, rather than the individual. Targeting property with land use regulations so that government can more affordably acquire it later should weigh so heavily in favor of a property owner that any demonstrable loss in value because of the targeting should require just compensation. The answer in this case should be obvious, but the lower court's confusion about *Penn Central* was typical. This Court should provide much needed guidance for the benefit of all.

CONCLUSION

The Court should grant the Petition to answer the two important federal questions this case presents.

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