No. 17-1698

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CATO INSTITUTE AND NFIB SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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July 25, 2018

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* SUPPORTING PETITIONERS

The Cato Institute ("Cato") and the National Federation of Independent Business ("NFIB") Small Business Legal Center hereby move, pursuant to Supreme Court Rule 37.2, for leave to file a brief *amici curiae* in support of the petition for a writ of certiorari to the Florida Fifth District Court of Appeal. All parties were provided with timely notice of intent to file this brief. The Petitioners consented. The Respondent declined to consent. A copy of the proposed brief is attached.

Cato is a nonprofit, nonpartisan public policy research foundation that was established in 1977 to advance the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Towards those ends, Cato conducts conferences; publishes books, studies, and the annual *Cato Supreme Court Review*; and files *amicus* briefs on a host of legal issues, including property rights.

The 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. 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. 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.

As further explained in the proposed brief's "Interest of *Amici Curiae*" section, *amici* are organizations

that frequently participate in cases raising significant constitutional issues, including cases involving property rights. *Amici* have a vital interest in this case because it affords the Court an opportunity to clarify the regulatory-takings muddle by providing guiding principles for how to weigh the *Penn Central* factors.

Amici have no direct interest, financial or otherwise, in the outcome of this case. Their sole interest in filing this brief is to ensure the availability of a remedy for Fifth Amendment takings. Accordingly, the Cato Institute and NFIB Legal Center respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Does government effect a taking when it endeavors to devalue private property and force the owners into financial distress so that it may acquire the property at a steep discount?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute ("Cato") is a nonprofit, nonpartisan public policy research foundation that was established in 1977 to advance the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Towards those ends, Cato conducts conferences; publishes books, studies, and the annual *Cato Supreme Court Review*; and files *amicus* briefs on a host of legal issues.

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 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. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs.

Amici are interested in this case because it provides the Court with an opportunity to clarify the *Penn Central* test. If the decision below stands, land owners like the Petitioners will continue to suffer uncompensated takings of their property. The law surrounding regulatory takings is an infamous muddle, and *amici*

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[1] Rule 37 statement: All parties were timely notified of *amici*'s intent to file this brief. Petitioners consented. Respondents withheld consent, so a motion for leave to file precedes this brief. No part of this brief was authored by any party's counsel; no person or entity other than *amici* funded its preparation or submission.

are particularly concerned with the inability of the Court's *Penn Central* factors—as lower courts currently apply them—to constrain abusive government behavior. Only this Court can provide the clarity that property owners, practitioners, and lower courts have been clamoring for. The petition presents an opportunity to affirm that the "polestar" of regulatory takings law provides some protection for property owners.

SUMMARY OF ARGUMENT

At the center of this case are parcels of property owned by Simone and Lyder Johnson in the town of Ponce Inlet, Florida, through their company Pacetta. The town persuaded the Johnsons to invest in the area and planned a development in concert with them. It then set out to devalue and cheaply acquire the same property through eminent domain. *See* Pet. App. B. The town's actions were so egregious that the trial judge remarked that "[a]t first blush . . . it's hard to believe that a government would act in such a way." *See* Pet. at B-60. But the state intermediate appellate court reversed the trial court's finding that a taking had occurred, despite the likelihood "that the elimination of all virtual uses on the Pacetta Group property was long planned and has been effectively executed by the Town expecting the practical immunity that would come from a financially troubled developer who could not respond." *Id.* The Johnsons' plight is all too familiar to property owners across the country.

More than half a century after the proclamation that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), this Court outlined the test for regulatory takings in *Penn Cent. Transp. Co. v. New York City*, 438

U.S. 104 (1978). Although often used, the *Penn Central* factors are notoriously confusing. Those factors—(1) the "character of the government action," (2) the regulation's economic impact, and (3) the regulation's interference with "reasonable investment-backed expectations"—are vague and difficult to apply to concrete property interests. *See*, R.S. Radford, Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731 (2011). As a result, courts have considered the individual inquiries very differently depending on the case.

Problems with *Penn Central* persist despite decades of scholarship and cert. petitions pleading for clarity. Not only is the "polestar" decision lacking in true guiding principles, but the Court has yet to articulate how a property owner might go about winning under its test. *See*, *e.g.*, 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, 6 (2017) ("[W]hile styled as a test sounding in equity under which a landowner might conceivably win, the reality is that government defendants almost invariably prevail under *Penn Central*.").

The Court has made several attempts at clarifying *Penn Central*. *See*, *e.g.*, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005). Those efforts have fallen short of clarifying the meaning of each factor or explaining how each should be weighed. The petition here presents an opportunity to begin clearing up this confusion by confirming that when one of the *Penn Central* inquiries tips strongly in favor of the property owner—whether because the government action is egregious in nature or causes extreme results—a taking has occurred and the owner is due just compensation.

Where the character of the government action is nefarious, as here where Petitioners were targeted and forced "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), *Penn Central*'s government-action prong should count heavily in favor of the property owners as to outweigh any other considerations.

The Court's takings decisions formulating categorical rules after *Penn Central* illustrate the same thing: when any one factor weighs heavily in favor of the property owners, they can and should win under the factual, ad hoc balancing test. The bright-line rules fashioned in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), illustrate the extremes of this framework. Yet, as the Petitioners' story demonstrates, lower courts frequently fail to approach the *Penn Central* factors as if they provide any real protection. Simone and Lyder Johnson invested millions of dollars and years of their lives planning and beginning a development that they had devised together with Ponce Inlet. Years into the project, the town changed its mind, decided that it should own the land, and set out to devalue the Petitioner's property and acquire it cheaply through eminent domain. *See* Pet. App. B. Yet the intermediate appellate court could not say that a taking had occurred.

This is all too common. Landowners rarely prevail in these cases; one empirical study found that landowners lose 90 percent of regulatory takings claims. *See* F. Patrick Hubbard, et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of* Penn Central Transportation Company?, 14 Duke Envtl. L. & Pol'y F. 121, 141 (2003).

The impact of such losses can be staggering, with landowners losing almost all the value in their properties. But lower courts frequently find that no taking occurred in circumstances that render the protections of *Penn Central* meaningless and seem to fly in the face of even the categorical rules created in *Loretto* and *Lucas* while leaving regulators free to eliminate reasonable uses of property. Contextualizing the categorical rules within the *Penn Central* factors would do much to clarify how those factors should be applied.

Since the Court has been unwilling to repudiate *Penn Central* as unworkable, it must give life to the idea that it represents the "polestar" of regulatory takings. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002) (O'Connor, J., concurring) ("Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings."). Guiding principles are needed by the lower courts who are responsible for administering the "essentially factual, ad hoc inquiries." This case presents the perfect opportunity to clarify regulatory takings by evaluating the Johnsons' claim under *Penn Central* and finding that a taking occurred. Doing so would confirm *Penn Central*'s position as the North Star of regulatory-takings law and give property owners confidence in the protection of their fundamental rights.

The difficulties with this Court's regulatory-takings jurisprudence are well known, and Petitioners have thoroughly explained the many ways this case is an excellent vehicle for clarifying the surrounding law. *Amici* thus write to address but one aspect of the question presented and to suggest a way this Court might address *Penn Central*'s role within the broader regulatory-takings framework.

ARGUMENT

I. THE *PENN CENTRAL* FACTORS ARE A MUDDLED MESS THAT OPERATE TO BAR PROPERTY OWNERS FROM RECOVERING FOR REGULATORY TAKINGS

Penn Central was this Court's first foray into regulatory takings after Justice Holmes's pronouncement more than fifty years earlier that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," *Mahon*, 260 U.S. at 415. Forty years later, regulatory-takings cases are typically governed by the test set out in *Penn Central*. *See*, *e.g.*, *Lingle*, 544 U.S. at 539. That test eschews a "set formula" and instead relies on "several factors that have particular significance." *Id.* (quoting *Penn Central*, 544 U.S. at 124). "Primary among those factors are '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Id.* (quotations omitted). Another inquiry is into the "'character of the governmental action'—for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Id.* (quoting *Penn Central*, 544 U.S. at 124).

The Court has recognized the difficulty in assessing whether the government has effected a regulatory taking. *See Palazzolo v. Rhode Island*, 511 U.S. 606, 617 (2001) ("[W]e have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking."); *Lingle*, 544 U.S. at 529 (noting the *Penn Central* factors have "given rise to vexing subsidiary questions."); *Tahoe-Sierra*, 535 U.S. at 322

(explaining the *Penn Central* analysis "is characterized by 'essentially ad hoc, factual inquiries.'") (citation omitted). *See also* Holly Doremus, *Takings and Transitions*, 19 J. Land Use & Envtl. L. 1, 7–8 (2003) ("Faced with the Court's obscure pronouncements on regulatory takings, lower courts could surely be forgiven for throwing up their hands in despair [and] [l]itigants would be hard-pressed to distill from the cases any principles that explain the distinctions.").

Scholars have also lamented the ambiguities and vagaries of the *Penn Central* analysis, and the Court's failure to fix it. *See, e.g.*, Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1555 (2003) ("[M]odern regulatory takings law is widely recognized to be a 'muddle.' This muddle has become especially severe in recent years. Cases like *Lucas*, *Tahoe-Sierra*, and *Palazzolo v. Rhode Island* have exposed serious conceptual tensions in contemporary regulatory takings doctrine."); Lise Johnson, *After* Tahoe-Sierra*, One Thing Is Clearer: There Is Still a Fundamental Lack of Clarity*, 46 Ariz. L. Rev. 353, 378 (2004) ("The Court has let the regulatory taking genie out of the bottle, and it cannot now refuse to discipline it.") (citation and quotation marks omitted).

Missteps administering *Penn Central* have been attributed to everything from the ambiguities of the factors themselves to the lack of precise direction from this Court on how the test is to be applied. Is one factor dispositive? Are courts to weigh each equally when determining if a regulatory taking has occurred? *See* Doremus, *supra*, at 7 ("The Court has many times repeated the list of *Penn Central* factors, but has never refined the meaning of those factors, or explained how they should be weighted."). "The persistence of incoherence, instability and incomplete explanations in

this area of the law suggests that the Court itself is dissatisfied with the tests it has developed." *Id.* at 2.

Over a decade ago, this Court inched towards clarity by unwinding substantive-due-process inquiries from takings analyses. *Lingle*, 544 U.S. at 540–543. It acknowledged that asking if a regulation is effective does nothing to help determine the magnitude of the burden it creates or how that burden is "distributed among property owners." *Id.* at 540–42. This is a welcome affirmation that property rights are not based on the outcome of a means-end test applied to the burdensome government action. But the Court's concurrent instruction that takings claims are to be considered in light of the "fairness and justice" underlying the purpose of the Takings Clause does little to clarify how the *Penn Central* factors should be applied in cases that fall short of categorical rules. *See id.* at 537, 543.

Fairness and justice sound great, but the words alone provide no additional guidance for parties seeking direction on how to apply a nebulous test. *See* Mark W. Cordes, *The Fairness Dimension in Takings Jurisprudence*, 20 Kan. J.L. & Pub. Pol'y 1, 4–5 ("[B]oth the *Penn Central* test itself, as well as notions of 'fairness and justice,' are hardly meaningful guideposts to assess whether a restriction constitutes a regulatory taking. . . . When is it fair to require individual landowners to shoulder costs, and when do costs become disproportionate enough to shift the regulatory burden to the government?") (citation omitted). The Court had already admitted as much when it said, three years before *Lingle*, that the concepts of fairness and justice were themselves indeterminate and instructed reliance on *Penn Central* and its application to the factual circumstances of each case. *See Tahoe-Sierra*, 535 U.S. 302, 321–23.

Moreover, empirical studies have shown that landowners lose over 90 percent of their takings claims under the *Penn Central* analysis, *see* Hubbard, *supra*, at 141, making the test a poor protector of landowner rights. Examination of a random sampling of 133 of the 1329 cases citing *Penn Central* shows that owners prevailed in a mere 9.8 percent of all cases, and in 13.4 percent of cases in which courts reached the merits. *Id.*[2] Many lower court decisions since *Penn Central* have not found a taking even when the property suffered an extreme diminution in value. *See, e.g.*, *Walcek v. United States*, 303 F.3d 1349, 1357 (Fed. Cir. 2002) (a 59.7 percent diminution in value is not a taking); *Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1031 (3d Cir. 1987) (a 89.5 percent diminution in value is not a taking); *Nasser v. City of Homewood*, 671 F.2d 432, 435, 438 (11th Cir. 1982) (a 52.6 percent diminution in value is not a taking); *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1386, 1388–90 (N.J. 1992) (a 92 percent diminution in value is not a taking). Landowners are increasingly being conscripted into bearing a significant amount of our regulatory costs, despite the fact that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation 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 a whole." *Armstrong*, 364 U.S. at 49.

While the *Penn Central* test is muddled, "the muddle never quite seems to stop the government from

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[2] On August 23, 2002, the study's author used Westlaw's Keycite feature to generate a list of all cases citing *Penn Central*; from this list of 1329 cases, one-tenth were randomly selected for review. Hubbard, *supra*, at 141.

winning." Claeys, *supra*, at 1644. The inherent ambiguity involved in attempting to apply *Penn Central* and the Court's subsequent decisions contribute to the dramatically different rates of success between property owners and government. This case provides an opportunity to emphasize that, consistent with the Court's precedents, one of *Penn Central*'s prongs may weigh so heavily in favor of the property owner that other considerations implicated by the traditional ad hoc inquiries are of little or no importance. Explaining how the categorical rules created by *Loretto* and *Lucas* interact with the *Penn Central* factors, while simultaneously placing those rules within the larger regulatory-takings framework, would be a helpful first step.

A. Contextualizing *Loretto*'s Categorical Rule Within the *Penn Central* Factors Would Provide Necessary Clarity

Decided only four years after the Court provided the *Penn Central* factors to evaluate regulatory takings, *Loretto v. Teleprompter Manhattan CATV Corp.* involved the installation of cable wires and boxes to provide cable tv access to renters. 458 U.S. 419, 421–25 (1982). A New York statute required landlords to permit community access television (CATV) facilities on their properties and prevented them from extracting any payment beyond a one-time $1 fee because that is what the state commission determined was reasonable. On behalf of a class of similarly situated New York City landlords, Jean Loretto sued for damages and injunctive relief arguing that the statute requiring landlords to provide access for CATV installations and equipment effected an uncompensated taking.

The government argued that the statute requiring landlords to permit a physical occupation of their property was a "justifiable exercise of the police power of the State," *Loretto v. Teleprompter Manhattan CATV Corp.*, 415 N.Y.D.2d 180, 181–82 (1979). There was no question "that the obvious public advantage sought to be served by the legislation under attack greatly outweighs the insignificant nature of the physical use of private property permitted by the statute." *Id.* at 182. Moreover, "it is not contended that such use has an adverse economic impact on the income-producing potential of rental premises." *Id.* Those arguments were adopted by the trial court in an extremely short opinion granting summary judgment to New York City and Teleprompter, which was then affirmed by the appellate division without opinion. *Loretto v. Teleprompter Manhattan CATV Corp.*, 422 N.Y.S.2d 550 (1979).

Without explicitly citing this Court's decision in *Penn Central*, the New York courts still addressed Loretto's takings claim through that lens. The trial court determined that the character of the government action was acceptable—cable access served an important public interest and the physical intrusion on private property was minor. *Loretto*, 415 N.Y.D.2d at 181–82. Likewise, the intrusion did not significantly impact the value of the property or interfere with any investment backed expectations. *Id.* at 182 ("[I]t is not contended that such use has an adverse economic impact on the income-producing potential of rental premises"). The New York Court of Appeals also affirmed, holding that the statute was within the state's police power because it served an important purpose. *Loretto v. Teleprompter Manhattan CATV Corp.*, 423 N.E.2d 320, 327–29 (N.Y. 1981).

On appeal, this Court came to the contrary and correct conclusion: "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 426. Nevertheless, the decision failed to crystalize the new rule's place in the Court's developing regulatory takings jurisprudence. It's still unclear whether and how *Loretto* fits with *Penn Central*, further contributing to the *Penn Central* "muddle." *See, e.g.*, Radford & Wake, *supra*, at 736–37 ("It must therefore be the case that either the character prong [of *Penn Central*] was intended to incorporate a broader array of considerations, or it was rendered superfluous by *Loretto*.").

Justice Marshall's majority opinion in *Loretto* cites *Penn Central* approvingly and alludes to the fit between its multi-prong framework and the reasons for the Court's announcement of the categorical rule for physical takings. 458 U.S. at 426–35. As he wrote,

> In *Penn Central Transportation Co. v. New York City*, the Court surveyed some of the general principles governing the Takings Clause. The Court noted that no 'set formula' existed to determine, in all cases, whether compensation is constitutionally due for a government restriction of property. Ordinarily, the Court must engage in 'essential ad hoc, factual inquires.' But the inquiry is not standardless. The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance. 'So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with the property can be

> characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.'

Id. at 426 (citations omitted).

Justice Marshall gives different weight to part of the *Penn Central* test. Sometimes, the "character of the governmental action" can be so extreme that the it amounts to a taking apart from any public interests it may serve and despite its minimal economic impact on the property owner. *Id.* at 426, 434–35. The remaining *Penn Central* factors are of no consequence to determining whether a taking occurred when the character prong tips so heavily in favor of the property owner.

In summarizing the Court's precedents on the matter of physical invasions of property, Justice Marshall again cites *Penn Central* and places the *Loretto* per se rule in the context of its inquiries. *Loretto*, 458 U.S. at 434–35 ("In short, when the character of the governmental 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.") (citations omitted). This assessment led the Court to fashion its first categorical rule in regulatory takings: "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 426.

Loretto illustrates that it is possible for the nature of the government-action prong to weigh so heavily in favor of the property owner as to marginalize the relative importance of the other considerations in *Penn*

Central's "essentially ad hoc, factual inquiries." 438 U.S. at 124. What the Court fundamentally acknowledged in *Loretto* is also what Petitioners request here: affirmation that one of the "inquiries" in *Penn Central*'s ad hoc analysis can tip so heavily in favor of the property owner as to render the other inquiries moot. This Court would aid litigants and lower courts if it were to clarify this premise and acknowledge that here, where Respondents set out to deliberately devalue and later acquire Petitioners' property, a taking occurred based on the "character of the governmental action" alone. It would be particularly helpful if the Court did so while placing *Loretto*'s per se rule within the larger *Penn Central* framework. *See, e.g.*, *Kirby v. N.C. Dep't of Transp.*, 786 S.E.2d 919 (N.C. 2016) (holding that a transportation plan that restricted the landowners' rights to improve, develop, and subdivide their property for an indefinite period of time was outside the scope of the police power).

B. Contextualizing *Lucas*'s Categorical Rule Within the *Penn Central* Factors Would Provide Needed Clarity

A decade after it created a per se rule for physical occupations of property, this Court decided another important takings case and created another categorical rule. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). Like the per se physical takings rule in *Loretto*, *Lucas* announced that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019. And, like *Loretto*, this per se rule was borne of the *Penn Central* framework but has never been properly placed within the Court's regulatory takings jurisprudence.

Lucas involved a claim brought by the owner of beachfront property in South Carolina when he discovered a newly passed "Beach Management Act" prohibited any development or economically beneficial use of property previously zoned as suitable for building. *Lucas*, *Id.* at 1007–10. Justice Scalia's majority opinion announcing the "total taking" standard made it clear that, when government action destroys all beneficial use of property, there is no need for balancing the other prongs of *Penn Central*'s ad hoc inquiries to know a taking has occurred. *Id.* at 1015. With *Loretto* and *Lucas*, there were "at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint . . . regulations that compel the property owner to suffer a physical 'invasion' of his property … [and] where regulation denies all economically beneficial or productive use of land." *Id.*

Lucas illustrates again how one of the *Penn Central* factors may sometimes weigh so heavily in favor of property owners that a taking has occurred. The complete destruction of all economically beneficial use of the property was sufficient to set aside the character of the government action responsible for that destruction. Indeed, Mr. Lucas conceded that the Beach Management Act was likely a valid exercise of police power because preventing erosion and preserving beachfront were legitimate state goals. *Id.* at 1009–10. Nevertheless, because Lucas had purchased the property before it was within a "critical area" coastal zone and had invested over $1.2 million planning to build a home on each lot—a purpose permitted by the applicable zoning laws at the time of purchase—the laudable goals of the Beachfront Management Act didn't prevent its operation from effecting a taking. *Id.* at 1007–08, 1018–21.

A total deprivation of economically beneficial use can allow a property owner to win due to interference with investment-backed expectations. As Justice Scalia explained, "there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019 (emphasis in original).

Prior arguments and decisions in the South Carolina state courts in *Lucas* also showcase the influence of *Penn Central*. The South Carolina Court of Common Pleas, where Lucas filed suit when all plans for use of his property were brought to a halt, found that the Beachfront Management Act's prohibition on construction was a taking because it "'deprived Lucas of any reasonable economic use of the lots . . . eliminated the unrestricted right of use, and rendered them valueless'" *Id.* at 1010 (citing Pet. at A-37). The trial court therefore held that the economic consequences for the property owner were so severe as to mitigate any consideration of the nature of government action.

Reversing that holding, the Supreme Court of South Carolina hung its hat on a different consideration within *Penn Central*'s "essentially ad hoc, factual inquiries." *See*, *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 896–99 (S.C. 1991). Rather than place primary importance on the Act's interference with Lucas's investment-backed expectations, or the regulation's economic impact, the South Carolina Supreme Court focused on the nature of the government action, finding that the prohibition on development was "to prevent serious public harm" and required no compensation regardless of impact on a property's value. *Id.* at 898–99.

On review, this Court established the "total takings" rule, 505 U.S. at 1030–31, and it was hailed as a win by property rights advocates. But lack of grounding relative to *Penn Central* has rendered its perceived protections hollow. *Lucas* introduced new ambiguities about residual versus economically beneficial value that encouraged the *Penn Central* test to operate to the detriment of property owners. After *Lucas*, "some courts have held that a finding of any residual value cuts against the landowner under the *Penn Central* balancing test." Wake, *supra*, at 23

Failure to treat situations in which an owner is deprived of all economically beneficial use of land as a total taking has encouraged government defendants to find any number of creative ways to escape takings liability. For example, many jurisdictions have opted for the use of "transferable development rights" (TDRs) which are awarded to owners who are left unable to develop or make any use of their land due to ever-tightening restrictions on use. Courts are then free to find that the potential value of the TDRs, in a market that may or may not exist, leaves some residual value remaining in the property. On that basis, no taking occurs. This is the case even when the government action prevents the real property from being put to *any* beneficial use. *See*, *e.g.*, *Ganson v. City of Marathon*, 222 So.3d 17 (Fla. Dist. Ct. App. 2016) (finding no taking where owners were prohibited from using their land for anything that altered the natural state of the property in any way because they had been awarded Rate of Growth Ordinance points that could theoretically be sold to a different party who planned to collect enough points to develop in a different, allowable location).

Only this Court can bring clarity to the mire that is regulatory takings. Emphasizing that one *Penn Central* factor may be dispositive and placing its earlier categorical rules within a broader regulatory takings framework would be an excellent way to exit the bog.

II. THE COURT SHOULD TAKE THIS CASE TO SHOW WHAT A *PENN CENTRAL* WIN LOOKS LIKE AND BRING CLARITY TO REGULATORY-TAKINGS LAW

Loretto demonstrates that when the nature of the government action—in that case, a permanent physical invasion—is extreme, a taking occurs. *Lucas* provides another extreme example of one of *Penn Central*'s ad hoc inquiries—the total deprivation of all economically beneficial use of land is a taking. The Court should accept this case and find that the predatory behavior exhibited by Ponce Inlet tips the "character of the government action" factor so heavily in favor of Petitioners that a taking has occurred and just compensation is due.

Recall the detailed steps that led to the taking here. After devising "a delightful mixed-use planned waterfront development . . . that had been developed in conjunction with and at the insistence of the Town," Pet. at B-4, Petitioners Lyder and Simone Johnson invested millions of dollars and years of their lives in the project, only to have the town do an about-face and put a halt to the plans after a lengthy "harmonious convivial relationship that might even be described as pacesetting." *Id.* at B-19. The trial court determined that Ponce Inlet had planned to devalue Petitioners' property, drive them into financial ruin, and immunize the town from potential consequences. *Id.* at B-60. Ulti-

mately finding that "[w]hen state and city officials employ every means available to restrict the private development of a capital center in order to keep its acquisition prices low for eminent domain, there is a taking." *Id.* at B-60. The trial judge determined that the petitioners were due compensation. Pet. at D-1–D-3.

On review, Florida's intermediate appellate court acknowledged that Petitioners had worked with Ponce Inlet while planning the development, describing them as "amenable" to requirements the town had for the project. *Ponce Inlet*, 226 So. 3d at 307. The court noted that the Johnsons had purchased the parcels over several years and at great expense in tandem with their work with the town. *Id.* But, despite the town's eventual egregious behavior, the fact that the town council passed legislation prohibiting any further development, and the detailed factual findings of the trial court that the town had intentionally set out to drastically devalue and acquire the property, the court remanded the case with instructions to reconsider whether the claim was ripe and to reevaluate the economic impact of the town's actions on the parcel as a whole. *Id.* at 313–15.

A takings claim should be ripe for review under *Williamson County*'s finality requirement when, as here, a city council sets out to intentionally devalue the property, retracts approval for development plans, and goes so far as to codify a prohibition on any development on the land. *See, generally,* Pet. App. B.; *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."). Petitioners certainly made a "meaningful attempt" to put their property to beneficial use, but the Town refused to permit any such use. Pet. at B-72 (The "decisions were final as to the Pacetta property and entitled the plaintiffs to proceed . . . There is no doubt that by 2010, the government had made it clear by legislation, acts and conduct . . . that by a reasonable degree of certainty, the property could not be used as vested and the matter was legally ripe for a challenge."). Any suggestion that Petitioners should make additional futile and costly attempts before vindicating their constitutional rights is offensive to the Fifth Amendment.

As the Petitioners note, even if there was some question as to the proper "parcel as a whole," the appellate court should have reviewed the trial court's factual findings and applied a *Penn Central* inquiry to find that a taking had occurred based on the character of the government action alone. Pet. at 27. The Fifth Amendment's promise that "private property shall not be taken for public use, without just compensation" prevents Ponce Inlet, or any other government entity, from intentionally setting out to devalue and acquire private property without paying for the privilege.

Unfortunately, "we are not likely to see teeth—much less principled decision-making—in our regulatory takings jurisprudence unless and until the Supreme Court should endeavor to provide more concrete guidance as to how the *Penn Central* test should be assessed in the context of a successful partial takings claim." Wake, *supra*, at 33. This case provides an opportunity to clarify *Penn Central* by showing what a win for the property owner looks like under the ad hoc inquiries, and to do so in a way that further clarifies this Court's broader regulatory-takings jurisprudence.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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