No. 18-394

IN THE

Supreme Court of the United States

DENIS P. KELLEHER AND CAROL KELLEHER,
Petitioners,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Respondent.

On Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a property owner may be deemed to lack investment-backed expectations—and thus be barred from challenging a land-use restriction as a regulatory taking—solely because the challenged restriction was enacted before he acquired the property, notwithstanding this Court's contrary ruling in *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001);

2. Whether any one factor of *Penn Central*'s multifactor regulatory-taking test set is dispositive of a property owner's regulatory-taking claim without regard to the remaining factors.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute ("Cato") is a nonprofit, nonpartisan public policy research foundation that advances 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. Toward 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.

This case concerns Cato because it provides the Court an opportunity to clarify the *Penn Central* test. The petitioners have suffered a near-total loss of the value of their property, but the lower court failed to give adequate constitutional scrutiny to that deprivation. If allowed to stand, the decision below will empower state agencies to deprive land owners of their property without compensation and encourage lower courts to apply unpredictable versions of the *Penn Central* test. The *Penn Central* factors were intended to give room for lower courts to apply the subjective facts of each case to a multi-factor analysis. As currently applied, however, the *Penn Central* factors have become muddled, inconsistent, and capricious. The Court has the chance to fully explain a test that has long been a source of confusion for lower courts and affirm that property owners will not be subject to takings without just compensation.

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[1] Rule 37 statement: All parties were timely notified of amicus's intent to file this brief and have consented. No counsel for either party authored any part of this brief. No person or entity other than *amicus* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The facts surrounding this case are central to the legal questions presented. In 1999, Denis and Carol Kelleher, spent $450,000 on a plot of land with plans to build a small summer home. Pet. App. Br. at 4. The plot was zoned and taxed as residential property in a neighborhood of similar homes. *Id.* A creek runs next to the property, so the Kellehers overhauled their design to make it more environmentally friendly to the creek and to meet the town conservation board's standards. *Id.* at 5–6. After the town granted the Kellehers approval to build the house, New York's Department of Environmental Conservation ("DEC") denied their application, citing the New York Tidal Wetlands Act of 1973 ("the Act"). *Id.* at 6–7. The DEC said that, under the Act, the Kellehers needed a 75-foot buffer between the house and the creek and a 100-foot buffer between the house's septic system and the creek. *Id.* The DEC concluded that, on a 0.39-acre lot, building a home was simply impossible. *Id.* at 4, 7. An administrative law judge agreed with the DEC's conclusion, reasoning that the proposed house would provide only private benefits, not public ones, and the "best use" of the Kellehers' property was to remain undeveloped. *Id.* at 8 (quoting the Application for a Tidal Wetlands Permit to Develop Property on Westminster Road in Water Mill, Town of Southampton, Suffolk County, Dep't of Envtl. Conservation of N.Y. (Dec. 24, 2008)).

At trial, the Kellehers argued that the DEC's decision was a regulatory taking, with their property having lost 98 percent of its value. Pet. App. Br. at 9. Although the court agreed that this was a "text book

case" of a regulatory taking, it ruled that the Kellehers had dispensed with their right to file a takings claim by purchasing the property after the aforementioned Act was passed. *Id.* at 10 (quoting *Matter of Kelleher v. New York State Dept. of Envtl. Conservation*, 2015 NY Slip Op 31099(U) at 6 (N.Y. Sup. Ct., June 24, 2015)). Since they were post-regulation purchasers, the Kellehers had the burden of proving a compelling reason for their expectation of building the house—which, according to the court, they did not meet. Pet. App. B. at 10. On this single factor, the court dismissed the takings claim.

On appeal, the Kellehers argued their claim under *Penn Central* and *Palazzolo*, but the court circumvented the *Penn Central* test entirely, instead applying New York's absolute-right rule, derived from *Gazza v. N.Y. State Dep't of Envtl. Conservation*. Pet. App. B. at 10-11. According to *Gazza*, a landowner needs to establish that he or she had the absolute right to build on the land without a variance at the time of purchase to establish a takings claim. *Gazza v. N.Y. State Dep't of Envtl. Conservation*, 89 N.Y.2d 603, 615, *cert. denied*, 522 U.S. 813 (1997). An absolute-right rule precludes a property owner's takings claim if a restriction that is the basis of the claim was enacted prior to their acquiring title.

The lower court ruling—along with the Appellate Division's application of the absolute-right rule—ignores Supreme Court jurisprudence, including the multi-factor *Penn Central* test. *Penn Central* has long served as the "polestar" of regulatory takings law, but its test has itself caused much of the confusion preceding this case.

Penn Central provides several factors for courts to consider when evaluating takings claims, including the economic impact of a regulation, the regulation's impact on investment-backed expectations, and the character of the government action. Although this test serves as a framework for takings claims, the Court has not indicated which factors are most important; whether one is dispositive; or what, specifically, would tip the scales in favor of a landowner plaintiff. Some courts, like the New York courts here, treat the investment-backed interests factor as dispositive of a plaintiff's rights to assert a takings claim.

This interpretation is faulty and allows lower courts to treat *Penn Central*'s test as a factor-shopping experience, where judges pick and choose which factors they want to apply and hand victories to the government. The test, in the absence of further clarity about its application, functions as a rubber stamp for regulatory takings without compensation. In its current form, the *Penn Central* test allows government defendants to win easily while making the path for landowner victory uncertain and elusive. Lower courts need clarification on how to apply this test in a consistent manner. Certiorari should be granted to provide that clarity.

ARGUMENT

I. THE *PENN CENTRAL* FACTORS ARE CONFUSING, INCONSISTENTLY APPLIED, AND HAND THE GOVERNMENT UNDESERVED VICTORIES

Forty years ago, this Court decided *Penn Central Transp. Co. v. City of New York*, establishing a test which determines whether a government action

constitutes a regulatory taking. 438 U.S. 104 (1978). That test consists of several factors: "[p]rimary 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.* (citation omitted). Another relevant factor is "the character of the governmental action . . . [a] 'taking' may more readily be found when the interference with 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.* (citation omitted). The multi-factor test, therefore, is composed of three considerations: first, the economic impact of government action; second, how the regulation affects investment-backed expectations; and third, the character of the government action. Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or a One Strike Rule?,* 22 Fed. Cir. B.J. 677, 677 (2013).

A. The Lower Courts Are Confused About How to Apply *Penn Central*

Although *Penn Central* provided a framework for takings claims, that rubric is bare-bones, vague, and causes both confusion and inconsistency as lower courts struggle to apply it. *See*, R.S. Radford, Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731 (2011). As petitioners correctly note, courts such as the Fifth Circuit, Ninth Circuit, and Montana Supreme Court have circumvented the full *Penn Central* analysis, instead preventing takings claims based on prior restrictions, echoing the sentiment of New York's

absolute-right rule. *See, e.g., In re Thaw*, 769 F.3d 366, 371–72 (5th Cir. 2014), *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010), *Prosser v. Kennedy Enterprises, Inc.,* 342 Mont. 209, 214 (2008). Texas courts, on the other hand, have held that "no single *Penn Central* factor is determinative; all three must be evaluated together, as well as any other relevant considerations." *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 840 (Tex. 2012). Finally, the Federal Circuit has even suggested that "it is possible for a single factor to have such force that it disposes of the whole takings claim." *Mehaffy v. United States*, 499 F. App'x 18, 22 (Fed. Cir. 2012). Nevertheless, the Federal Circuit also evaluates multiple sub-factors, something the New York Appellate Division's short, single-factor analysis did not even do. *See* Pet. App. B. at 24 (citing *Apollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004)).

Lower-court confusion has adversely affected the Kelleher family in this case. New York's absolute-right rule disposes of takings claims based on a single factor (investment-backed expectations), even though this Court found in *Palazzolo* that such an absolute rule puts an unacceptable limit on the Takings Clause. Yet lower courts such as the New York Appellate Division and the Fifth Circuit use them anyway. 533 U.S. 606, 613 (2001); *see also* Pet. App. B. at 10; *In re Thaw*, 769 F.3d at 371–72 (finding that *Palazzolo* is a "narrow exception").

With a clear split in approaches among different jurisdictions, the *Penn Central* test has become muddled. The only way to fix this misunderstanding is for the Court to re-examine the test and establish once and for all what it means. That requires a clear,

concise interpretation of the individual *Penn Central* factors, especially investment-backed expectations.

While the Court has at times discussed *Penn Central*, it has not elaborated the multi-factor test in a definitive opinion. *See, e.g., Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005). *Lingle* serves as a good example of how the Court has approached *Penn Central* in the past few decades. Although the majority opinion noted that the multi-factor test "has given rise to vexing subsidiary questions," the Court did not provide answers to these questions. *Id.* at 539. Instead, the Court restated the *Penn Central* factors without adding new information to clarify the confusing new set of concerns raised by the test. *See* Holly Doremus, *Takings and Transitions*, 19 J. Land Use & Envtl. L. 1, 7 (2003) ("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."). Decisions like *Lingle* have done little to alleviate the confusion in lower courts when applying the *Penn Central* test.

B. Landowners Are Unsure of How to Win under *Penn Central* as Currently Applied

In a scenario all too common for property owners, the petitioners fell victim to a selective reading of *Penn Central* that showed far too much deference to the government. They invested almost half a million dollars into their property, value that was undeniably lost due to government regulation. *See* Pet. App. B. The trial court admitted that this was a "text book" case of a government taking but refused to resolve it in favor of the Kellehers. *Id.* at 10.

This commonplace form of injustice will continue to thrive if the Court does not define how a landowner might prevail under *Penn Central*. *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*."). In fact, landowners almost always lose in these types of cases. According to one empirical study, landowners are defeated in 90 percent of takings claims under the *Penn Central* test. *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). With the odds stacked so heavily, the Court must clarify how *Penn Central* should be applied to protect property rights and preserve the integrity of the Fifth Amendment.

II. THE COURT SHOULD GRANT CERT. TO CLARIFY THAT *PENN CENTRAL'S* "INVESTMENT-BACKED EXPECTATIONS" FACTOR IS NOT DISPOSITIVE

The Court has a chance to reduce confusion by clarifying that, when one *Penn Central* factor strongly favors the government, that does not, by itself, dispose of the property owner's entire claim. Since *Penn Central* provides an ad-hoc balancing test, property owners should have some chance to prevail when one factor weighs heavily in their favor. Alas that is not what currently happens when the test is applied. In takings claims where the *Penn Central* test is used,

landowners only win 9.8 percent of the time. *See* Hubbard, *supra*, at 141. These wildly disproportionate outcomes illustrate the need for clarity—especially on the question of whether the "investment-backed expectations" factor is dispositive.

A. The Court's *Palazzolo* Decision Affirms That Prior-Enacted Restrictions that Bar Takings Claims Are Unconstitutional and Wrongly Reduce *Penn Central* to a Single-Factor Test

In *Palazzolo v. Rhode Island,* the Court established that states cannot bar a property owner's takings claim merely because of a prior-enacted restriction. 533 U.S. 606 (2001). The state court in *Palazzolo* had declared that "property rights are created by the state . . . the state can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation." *Id.* at 613. The Supreme Court disagreed, holding that "the claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Id.* at 615. Justice O'Connor's concurrence further showed that one *Penn Central* factor should not dispose of a takings claim. *Id.* at 634 (O'Connor, J., concurring) ("The court erred in elevating what it believed to be '[petitioner's] lack of reasonable investment-backed expectations' to 'dispositive' status. Investment-backed expectations, though important, are not talismanic under *Penn Central*.") (citation omitted).

The Court said that, if allowed to stand, the state holding "would absolve the State of its obligation to defend any action restricting land use, no matter how

extreme or unreasonable." *Id.* at 613. Validating this rubber stamp of state action would "put an expiration date on the Takings Clause." *Id.* "Future generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Id.*

Moreover, putting an expiration date on the Takings Clause reduces *Penn Central* to a single-factor test and thus has dangers that extend beyond a single claim. Justice O'Connor's opinion recognized this threat to established jurisprudence: "The Takings Clause requires careful examination and weighing of all the relevant circumstances". *Id.* at 636 (O'Connor, J., concurring). Further, "[e]valuation of the degree of interference with investment-backed expectations instead is *one* factor." *Id.* at 634 (emphasis in original). *Penn Central* was not designed to be a one-factor test with investment-backed expectations as a dispositive factor. Instead, all factors must be applied to the particular facts of the case.

Although *Palazzolo* appears to be a clear affirmation that "notice" rules like New York's absolute-right rule are unconstitutional violations of the Takings Clause and reduce *Penn Central* to a single-factor test, lower courts have generally ignored the Court's decision. The Fifth Circuit, as a prime example, brashly circumvented *Palazzolo*, stating that it is a "narrow exception." *See In re Thaw*, 769 F.3d at 371–72. Likewise here, the New York Appellate Division did not even mention *Palazzolo* in its very short opinion, instead it simply applying New York's absolute-right rule. *See* Pet. App. B. at 10–11.

The New York courts should have employed *Palazzolo* and *Penn Central*, but instead side-stepped both. A proper application of the two holdings would

consist of a multi-factor analysis of the state action and its impact on the Kellehers' property, as provided in *Penn Central*, and to reject an absolute-right rule under *Palazzolo*. Put another way, *Penn Central* gives the courts direction on how to evaluate claims, while *Palazzolo* bars them from using single-factor tests as a means of rejecting takings claims.

A proper *Penn Central* analysis would involve first analyzing the economic impact of the regulation and its effect on investment-backed expectations. The Kellehers lost $450,000—98 percent of the property value—as a result of the prohibition on building a home on their property. Pet. App. B. at 4, 9. And, unlike the petitioner in *Palazzolo*, the Kellehers can't build even a modest residence. 533 U.S. at 622. Their loss of investment in the value of the property should weigh heavily in their favor. This deprivation should be analyzed along with the character of the government action. Here, the action is not a physical taking, but, as *Loretto* and *Lucas* provide, that fact does not dispose of the petitioners' claim.

B. *Loretto* and *Lucas* Show How *Penn Central* Can Be Favorable to Property Owners

The Court has consistently upheld *Penn Central* as a multi-factor test, yet when one factor of the analysis leans in favor of a property owner, it can be determinative. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court held that one factor, the character of the government action, could in fact lead to a victory for the property owner. 458 U.S. 419, 427 (1982) (when a government action "reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, 'the character of

the government action' not only is an important factor in resolving whether the action works a taking, but also is determinative.") (citations omitted). A decade later, in *Lucas v. S.C. Coastal Council*, the Court established that another factor, interference with economic expectations, can be decisive in favor of a property owner. 505 U.S. 1003, 1019 (1992) ("when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking.").

Although *Loretto* concerned a physical taking and *Lucas* centered around total deprivation of economic value, the underlying principles apply to this case and are in stark contrast to the Appellate Division's decision here. In both cases, instead of stating that one factor of *Penn Central* can dispose of a property owner's claim, the Court reached the opposite conclusion and ruled in favor of property owners.

Similarly, a single factor here should have tipped the analysis, but in favor of the Kellehers rather than the government. The Kelleher family had to sacrifice almost all of their property for a public purpose: the preservation of a creek. Pet. App. B. at 4, 9. An administrative law judge who initially evaluated their claim even went so far as to say that the "best use" of the property was to remain undeveloped, and that it could still serve aesthetic value to birdwatchers and fishermen. *Id.* While the Kellehers planned to use their property to build a home, the government decided to, in essence, redistribute it to birdwatchers who did not contribute so much as a cent to the purchase price. While the Kellehers' neighbors built much larger homes significantly closer to the creek,

this family was arbitrarily singled out and punished for daring to build a house at the wrong time. *Id.* at 4.

In other words, the Kellehers were deprived of the right to build a small home on their own property in the name of the common good: a pretty view for birdwatchers and fishermen. That fact should receive considerable, if not dispositive, weight.

C. "Investment-Backed Expectations" Is a Poorly-Worded Term and Should Be Simplified to Avoid Further Confusion

If a single factor is to determine a government victory in a takings case, it would be hard to imagine a worse factor than "investment-backed expectations." This loaded term creates complexities that leave lawyers, judges, and scholars scratching their heads. As Richard Epstein aptly notes:

> If "investment-backed expectations" is a term of art designed to convey the idea that property is protected only where it has been acquired by purchase or labor, then it is clearly inaccurate. The government cannot take property from a donee any more than it can take it from a buyer. If the term is instead designed to stress that protection of private property is granted solely to encourage investment, then its usefulness is still limited by a failure to delineate the nature and scope of the protection, given the apparent ease with which those expectations are so often defeated by a simple appeal to the common good. All in all, we should be deeply suspicious of the phrase "investment-backed expectations" because

> it is not possible to identify even the paradigmatic case of its use.

Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1370 (1993).

Although courts' use of the term "expectations" is often deferential to government action rather than private interests, this Court has maintained that property owners must be compensated where a regulation "unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992). Under *Yee*, "expectations" are not dispositive. Instead, if a property owner is forced to bear a burden, this can afford him a victory. This misunderstanding could be avoided simply by referring to an owner's "private property interest." *See* Epstein, *supra*, at 1370. ("[Nobody] offers any telling explanation of why this tantalizing notion of expectations is preferable to the words 'private property.'").

Property rights would be adequately protected if the Court simplified *Penn Central*'s "investment-backed expectations" factor to "desire to use the private property." Limiting the definition of property to mere investment runs counter to the constitutional goal of protecting property interests and ensuring that they are compensated for takings. Otherwise, lower courts like the New York Appellate Division can place a time limit or dollar figure on the Takings Clause. The Kellehers made a huge investment in their property, but the issue here is even more fundamental: New York prevented them from building a house and then denied that it owed them anything for that taking. If the Court truly intends to

enforce the Takings Clause through the *Penn Central* test, it should change the term "investment-backed expectations" to something that offers real protection for property owners like the Kellehers. And there's an easy place to find better words than "investment-backed expectations": "nor shall *private property* be taken for public use without just compensation." U.S. Const. Amend. V (emphasis added).

CONCLUSION

As lower courts currently evaluate regulatory takings, the scales of justice are tipped in favor of the government in takings cases. Petitioners here have suffered egregious losses and have spent almost two decades trying to achieve the simple goal of building a home. Yet property owners' constitutional rights to just compensation should be protected in such "text book" takings cases. The Court should grant the petition and clarify the *Penn Central* test so that the Fifth Amendment is applied in a manner more consistent with our founding principles and the Court's own jurisprudence.

Respectfully submitted,

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