No. 18-394

IN THE

# Supreme Court of the United States

DENIS P. KELLEHER, et ux.,
*Petitioners*,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
*Respondent*.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT**

## BRIEF FOR RESPONDENT


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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this case presents any question about the legality of a categorical bar on regulatory takings claims by persons who purchased their property after the enactment of the relevant regulation, when the courts below did not apply any such categorical bar, and instead rejected petitioners' takings claim based on a fact-specific weighing of the evidence presented during a three-day trial.

2. Whether the courts below properly concluded that petitioners failed to prove their regulatory takings claim, where the trial evidence demonstrated that the New York State Department of Environmental Conservation allowed petitioners to build a dock, storage shed, and parking lot on their parcel, but declined to grant them extreme variances that substantially deviated from health-based regulations that require residences and sewage-disposal systems to be set back a minimum distance from tidal wetlands.

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## INTRODUCTION

To control flooding and pollution in areas near tidal wetlands, New York law requires persons who seek to undertake construction activities in those areas to comply with certain development restrictions. The New York State Department of Environmental Conservation (DEC) enforces the restrictions by means of a flexible permitting system that allows for variances where an applicant can show—among other things—that the variance would be consistent with the purposes of the development restrictions, and would not adversely impact public health and safety or the tidal wetlands. The permitting scheme allows construction of single-family residences and sewage-disposal systems on property adjacent to tidal wetlands, so long as such construction is set back a sufficient distance from wetlands to prevent fecal material and other contaminants from flowing into the wetlands. Petitioners Dennis and Carol Kelleher sought extreme variances from these health-based set-back requirements, asking to build a house and five cesspools less than half the distance from wetlands than the regulations allowed. DEC declined to grant those extreme variances based on its factual determination that petitioners' proposed construction would adversely affect public health and damage tidal wetlands. Petitioners then filed this lawsuit, which asserts that DEC's permit decision amounted to a regulatory taking requiring compensation.

Certiorari should be denied because this case does not present either of the legal questions petitioners submit for review. *First*, no entity in the proceedings below applied any categorical bar to petitioners' takings claim. DEC agreed with petitioners that

petitioners were not categorically barred from asserting a takings claim based on their purchase of property after the enactment of the set-back requirements. And the courts below did not apply any such categorical rule, instead rejecting petitioners' takings claim based on a fact-specific weighing of the evidence presented during a three-day trial. Certiorari is not warranted to review the legality of a categorical bar that no party sought and that no court applied below.

*Second*, contrary to petitioners' current representations, the decisions below were based on a weighing of evidence related to all three of the factors set forth in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). The trial court found that petitioners had conducted no due diligence prior to purchasing their parcel, and that if they had conducted an adequate inquiry, they would have learned that DEC was unlikely to allow them to build a house and sewage system so close to tidal wetlands because of the contamination risk that such building presented. The court then determined that the unreasonableness of petitioners' expectations and the reasonableness of the underlying government action outweighed the trial evidence about the economic impact on petitioners. These case- and fact-specific determinations do not raise any issues warranting certiorari.

## STATEMENT

1. In 1973, the New York Legislature enacted the Tidal Wetlands Act to protect New York's tidal wetlands from further "despoliation and destruction." Environmental Conservation Law (ECL) § 25-0102;[1] *see* Ch. 790, § 2, 1973 N.Y. Laws 2458, 2460. The Legislature found that New York's tidal wetlands serve the "essential" and "irreplaceable" public purposes of controlling floods, reducing pollution, providing wildlife habitat, and creating spaces for recreation. Ch. 790, § 1, 1973 N.Y. Laws at 2458-59. To protect this critical public resource, the Act authorized DEC to regulate and issue permits governing the allowable uses of tidal wetlands and areas adjacent to tidal wetlands. ECL §§ 25-0302 to 25-0403.

To implement the Tidal Wetlands Act, DEC promulgated land-use regulations for tidal wetlands and adjacent areas in 1977. *See* 6 N.Y.C.R.R. § 661.1 *et seq*. The regulations list activities permitted on tidal wetlands or adjacent areas with a tidal-wetlands permit, including constructing a new single-family dwelling. *See id.* § 661.5(a)(2), (b)(46); *id.* § 661.8. To obtain a tidal-wetlands permit, applicants must comply with development restrictions designed to ensure that development remains "compatible with the present and potential values of tidal wetlands." *Id.* § 661.2(*l*); *see id.* §§ 661.6, 661.9(c). As relevant here, the development restrictions require that a residence be set back at least seventy-five feet from any tidal wetlands, *id.* § 661.6(a)(1), and that a sewage disposal system be set back at least one hundred feet from any

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[1] The relevant statutory and regulatory provisions are reproduced in the Addendum to this brief.

tidal-wetlands boundary, *id.* § 661.6(a)(2). These set-back requirements protect the wetlands from "fecal coliform, viruses and other pathogens" that flow through sewage systems, and from surface-water runoff that can result from construction and thinned vegetation. (*See* N.Y. App. Div. Record ("R.") 321-322.)

DEC has discretion to grant variances from the development restrictions under certain conditions. To obtain a variance, an applicant must show that compliance with the development restrictions would be practically difficult, and that granting the variance would comport with the intent of the development restrictions, would be consistent with "public safety and welfare," and would "not have any undue adverse impact" on tidal wetlands. 6 N.Y.C.R.R. § 661.11(a); *see also id.* § 661.9(c). This system of permits, development restrictions, and variances creates a flexible, fact-bound approach to regulating tidal wetlands, which balances the protection of public health and welfare with "the reasonable economic and social development of the State." *Id.* § 661.1.

2. In 1999, petitioners purchased a small, undeveloped waterfront property in Southampton, New York ("Southampton Property"). (Pet. App. E-9.) The Southampton Property was subject to the Tidal Wetlands Act and tidal-wetlands permit requirements because tidal wetlands covered approximately twenty-five percent of the property. (Pet. App. B-7.)

In 2003, petitioners applied to DEC for a tidal-wetlands permit and variances to construct a three-bedroom house and a sewage system with a one-thousand-gallon septic tank and five cesspools on the Southampton Property. (Pet. App. E-10 to E-11.) As DEC noted, petitioners' requested variances were

"quite substantial." (Pet. App. E-20.) They proposed to build their entire sewage system closer than one-hundred feet from the tidal-wetlands boundary, with one cesspool forty-six feet from the boundary; and they sought to build their house thirty-four feet from the wetlands. (Pet. App. E-11, E-20.)

Based on the evidence adduced at an administrative hearing, DEC denied petitioners' permit application to construct a house and sewage system "twice as close to the wetlands boundary as the development restrictions" allowed. (Pet. App. E-20.) As DEC explained, petitioners' requested variances would have "an undue adverse impact" (Pet. App. E-24) on the public health and tidal wetlands by increasing "the likelihood that fecal coliform, viruses and other pathogens would pass through the groundwater from the cesspools to the wetland" (Pet. App. E-25). (*See* Pet. App. E-24 to E-25 (constructing house close to wetlands would increase risk of surface-water runoff and contaminants entering wetlands).)

3. Petitioners then filed an action in New York State Supreme Court. They alleged, among other things, that DEC's permit decision constituted a taking without just compensation in violation of the federal and state Constitutions.[2] (*See* Pet. App. B-3 to B-4.) *See* ECL § 25-0404.

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[2] The petition also alleged that DEC's permit decision was arbitrary and capricious. The trial court transferred petitioners' challenge to the intermediate appellate court to determine whether substantial evidence supported DEC's permit decision. *See* C.P.L.R. 7804(g). Petitioners then abandoned their challenge to the propriety of the underlying permit decision. Accordingly, the appellate court remitted the proceeding to the trial court for further proceedings on petitioners' takings claim. *See* Decision &

The parties agreed that petitioners' purchase of the Southampton Property many years after the enactment of the tidal-wetlands regulations did not automatically bar them from asserting a takings claim. *See* Pet'rs' Post-Hearing Mem. of Law at 33; Resp.'s Post-Hearing Mem. of Law (Resp.'s Mem.) at 3, 14-15. (See Add. 5a.[3]) As the trial court made clear, "[n]o one [was] arguing that Petitioners are categorically barred from attempting to assert a takings claim by the mere fact that they purchased the property post regulation, and the DEC has never contended otherwise." (Pet. App. B-8 to B-9.)

The trial court therefore held a three-day evidentiary hearing to apply the multifactor test set forth in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 124 (1978), which requires regulatory takings claims to be evaluated under "the particular circumstances" presented, *id.* (quotation marks omitted). (*See* Pet. App. B-1, B-5 to B-6.) Under *Penn Central*, courts weigh three nonexclusive factors: (1) the extent to which the challenged regulation has interfered with the claimant's reasonable investment-backed expectations, (2) the character of the governmental action, and (3) the regulation's economic impact. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1949-50 (2017). The evidence developed at the hearing demonstrated the following facts.

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Order on Mot., *Matter of Kelleher v. New York State Dept. of Envtl. Conservation*, 2010 N.Y. Slip Op. 61387(U) (2d Dep't 2010) (No. 2009-09938).

[3] For the Court's reference, relevant excerpts of DEC's post-hearing memorandum of law and appellate briefs are reproduced in the addendum to this brief.

Before buying the Southampton Property, petitioners had purchased a house on Staten Island, a house in Ireland, and a house in Sagaponack, Long Island. (R. 107, 109, 119, 121.) After purchasing the Southampton Property, petitioners also bought property in Bridgehampton, New York, where they built a summer home. (R. 111-112, 119.) In 1994, petitioners obtained a DEC tidal-wetlands permit to restore a bulkhead on their waterfront property in Sagaponack. (R. 121, 123-125, 619-624.)

Despite their prior experience with real estate transactions and tidal-wetlands permits, petitioners did not meaningfully investigate whether tidal-wetlands regulations restricted their ability to build a sewage system and house on the Southampton Property. (*See* Pet. App. B-8.) Petitioners did not seek advice from an environmental consultant or anyone else who could have investigated the Southampton Property's proximity to tidal wetlands, such as the environmental consultant who testified for petitioners and explained that her company advises potential purchasers about wetlands and permits. (R. 45-46, 127-128.) Nor did petitioners hire an attorney with experience in real estate or land-use law. They instead hired their son, a criminal defense attorney, whose sole act of due diligence was to obtain a certificate of title for the Southampton Property. (Pet. App. B-8; *see* R. 116-117, 479-480.)

Petitioners further failed to speak with the seller of the Southampton Property, Calvin Frost. (R. 128.) Frost had previously owned the waterfront parcel directly adjacent to the Southampton Property, which he sold after he failed to obtain a tidal-wetlands permit to construct a residence and sewage system on the adjacent parcel—construction that would have

required substantial variances from the set-back requirements. (Pet App. B-7 to B-8; R. 228-229, 264-265.) Frost sold the adjacent parcel for $240,000 to a family that gained waterfront access through their purchase. The adjacent parcel remained undeveloped when petitioners purchased the Southampton Property for $450,000 without speaking to Frost, contacting the adjacent parcel's buyers, or researching public records about Frost's prior sale. (Pet App. B-7 to B-8; R. 66, 263-265.)

When asked if petitioners had undertaken any due diligence before purchasing the Southampton Property, Denis Kelleher testified that he had asked his real estate broker about building a house. According to Denis Kelleher, the broker replied that a Southampton town official had stated that petitioners "could probably build on [the] property." (Pet. App. B-8; *see* R. 117, 126-127.) Denis Kelleher testified that he had never spoken with the town official, and had not received any written assurances that petitioners could construct a house and sewage system on the Southampton Property. (R. 126-127.)

Although the neighborhood surrounding the Southampton Property contained many single-family homes, the hearing evidence demonstrated that these houses were not comparable to the Southampton Property. As explained by the environmental consultant who testified for petitioners and a DEC employee who testified for DEC, most of the houses in the surrounding neighborhood had not required a tidal-wetlands permit because they had been built before the enactment of the tidal-wetlands regulations. (R. 66, 71-73, 77-78.) And the houses that had been built later did not require significant variances from the set-back requirements because they were located

on properties that were substantially larger than the Southampton Property. (*See* R. 79-80, 220-226.)

4. Based on the hearing evidence, the trial court determined that petitioners had failed to establish a takings claim. (Pet. App. B-6 to B-9.) The court recognized that petitioners were not "categorically barred from attempting to assert a takings claim by the mere fact that they [had] purchased" the Southampton Property after the enactment of the Tidal Wetlands Act and its implementing regulations. (Pet. App. B-8 to B-9.) The court further explained that petitioners' claim was thus subject to the *Penn Central* analysis, including "consideration of three main factors: economic impact, interference with investment-backed expectations, and the character of the governmental action." (Pet. App. B-5 to B-6.) The court applied the *Penn Central* test to the facts presented and found that petitioners had not proved that DEC's permit denial amounted to an unconstitutional taking. (Pet. App. B-5 to B-9.)

In conducting the *Penn Central* analysis, the trial court considered the evidence relating to all three *Penn Central* factors. *First*, the court considered petitioners' evidence that DEC's permit decision had significantly diminished the economic value of the Southampton Property. (Pet. App. B-6.) *Second*, the court considered the character of DEC's action: a decision not to grant "extreme variance[s]" from regulations tailored to allow development of land while protecting the public and tidal wetlands from "deleterious substances." (Pet. App. B-9.)

*Third*, the court determined that petitioners had failed to prove that they had any reasonable expectations of building a house and sewage system on the

Southampton Property. The court found that despite petitioners' experience with real estate purchases and tidal-wetlands restrictions, they had unreasonably failed to conduct even a minimal amount of due diligence to determine how tidal-wetlands regulations might affect their ability to develop the property. (Pet. App. B-8 to B-9.) As the court explained, petitioners had not spoken to an experienced attorney or environmental consultant, instead relying on a comment from a broker who had an economic "stake in seeing the transaction consummated." (Pet. App. B-9.) And the court further noted that petitioners should have been aware of Frost's prior sale of the adjacent property, which remained undeveloped after Frost failed to obtain a tidal-wetlands permit. (Pet. App. B-7 to B-8.)

Based on its factual findings, the trial court held that petitioners did not have objectively reasonable expectations of building a house and sewage-disposal system "on a parcel of land that was too small to meet health-based" set-back requirements. (Pet. App. B-9.) Nor could they have reasonably expected to obtain "an extreme variance from" regulations designed to protect the public and the tidal wetlands from "pathogens and other deleterious substances." (Pet. App. B-9.) The court explained that although plaintiffs' claims, standing alone, might have sounded "persuasive," the actual evidence presented demonstrated that petitioners had simply entered into a "very bad deal" with the seller of the Southampton Property. (Pet. App. B-6.)

5. On appeal, the intermediate appellate court affirmed in a unanimous decision. (Pet. App. A-1 to A-3.) The appellate court concluded that the trial court had "correctly determined" that DEC's permit denial had not resulted in an unconstitutional taking. (Pet.

App. A-3.) As the appellate court explained, the trial court had properly found that petitioners lacked any objectively reasonable expectations of developing the Southampton Property. (*See* Pet. App. A-3.)

The New York Court of Appeals denied petitioners leave to appeal to that court. (Pet. App. C-1.)

## REASONS FOR DENYING THE PETITION

### A. Because the Courts Below Did Not Apply Any Categorical Bar to Petitioners' Takings Claim, Certiorari Is Not Warranted to Review the Legality of Such a Bar.

Petitioners are incorrect in contending that the decisions below conflict with *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). (*See* Pet. 3, 12-13, 18-22.) In *Palazzolo*, this Court determined that a regulatory takings claim "is not barred by the mere fact that" a purchaser acquired title to property "after the effective date of" a challenged land-use law. 533 U.S. at 630. Here, the courts below did not hold that petitioners' purchase of property subject to tidal-wetlands regulations automatically precluded them from asserting a takings claim. This case thus does not actually present the legal question for which petitioners seek certiorari review.

The trial court in this proceeding expressly recognized that petitioners were not "categorically barred from attempting to assert a takings claim." (Pet. App. B-8 to B-9.) For this reason, the court held a three-day evidentiary hearing to address petitioners' takings claim. The court then issued detailed factual findings based on the specific evidence presented at trial, determining that petitioners' failure to conduct

any due diligence demonstrated the unreasonableness of their expectation that they could build a large house and multiple cesspools on a small parcel that could not accommodate such development absent extreme variances from the set-back requirements. (Pet. App. B-7 to B-9.)

The intermediate appellate court then affirmed the trial court's fact-bound determination as correctly decided (Pet. App. A-3), and the New York Court of Appeals declined to review the matter further (Pet. App. C-1). There is thus no holding from any of the courts below, let alone the State's highest court, precluding petitioners from bringing their claim. In urging otherwise, petitioners rely (Pet. 3, 11, 22) on the intermediate appellate court's single citation to *Matter of Gazza v. New York State Department of Environmental Conservation*, 89 N.Y.2d 603 (1997), a state court decision that predated *Palazzolo* by four years. But there is no indication that the court intended this citation to transform sub silentio its affirmance of the trial court's fact-bound determination into a sweeping legal rule that would resurrect the very categorical bar that this Court eliminated in *Palazzolo*—particularly when the trial court had already correctly applied *Palazzolo*.

Indeed, neither the intermediate appellate court nor any of the courts below had any occasion to preclude petitioners from attempting to assert a takings claim because the parties agreed that this Court's decision in *Palazzolo* had eschewed any such rigid rule. DEC made clear to the trial court, intermediate appellate court, and the Court of Appeals that "*Palazzolo* rejected a 'single, sweeping rule' that would have categorically barred all takings claims brought by any post-regulation purchaser." Resp.'s App. Div.

Br. at 21 (quoting *Palazzolo*, 533 U.S. at 626-27) (see Add. 8a); *see* Resp.'s Mem. at 3, 14 (see Add. 5a); Resp.'s N.Y. Ct. App. Mem. of Law at 13-15 (see Add. 10a). (*See* Pet. App. B-8 to B-9 (trial court explaining that "DEC has never contended" that any categorical rule applied to petitioners' claim).)

Petitioners simply misconstrue the record in asserting (Pet. 9) that DEC sought to assign "determinative" status to petitioners' purchase of property after the enactment of the tidal-wetlands regulations in 1977. As the hearing transcript makes clear, DEC argued that petitioners' post-regulation purchase was simply one fact among many that was "relevant" to whether petitioners reasonably expected to build a house and septic system in close proximity to tidal wetlands (R. 39-40)—an argument that accords with this Court's established precedent. See *infra* at 19-20. The current case thus does not present any dispute between the parties about the effects of *Palazzolo*.

Petitioners are also incorrect in arguing (Pet. 22-23) that the decisions below illustrate how New York courts are consistently ignoring *Palazzolo*. Like the trial court here, a broad array of New York courts have expressly recognized *Palazzolo*'s holding and reasoning. *See, e.g.*, *Noghrey v. Town of Brookhaven*, 48 A.D.3d 529, 531 (App. Div. 2008) (relying on *Palazzolo* and explaining that this Court "has eschewed any set formula for determining whether a regulation constitutes a *Penn Central* taking"); *Matter of City of New York* (*New Creek Bluebelt*), No. 4018/07, 2018 N.Y. Slip Op. 50024(U), at *4 (Sup. Ct. Richmond County, Jan. 12, 2018) (explaining that *Palazzolo*

"rejected a per se notice rule").[4] Indeed, prior to affirming the trial court's decision in the current case, a different panel of the same intermediate appellate court explained that reading *Matter of Gazza* as "automatically barring a purchaser of regulated property from ever successfully raising a takings claim would be inconsistent" with *Palazzolo*. *Matter of New Creek Bluebelt, Phase 3* (*Baycrest Manor Inc.*), 156 A.D.3d 163, 171 (App. Div. 2017), *lv. dismissed*, 31 N.Y.3d 1132 (2018). There is no persuasive reason to conclude that the intermediate appellate court or any other New York state court is systematically ignoring this precedent.[5]

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[4] *See also, e.g.*, *Held v. State Workers' Compensation Bd.*, 85 A.D.3d 35, 42-43 (App. Div. 2011) (relying on *Palazzolo* and explaining that there is "no set formula to determine whether a statute goes too far and effects a regulatory taking" (quotation marks omitted)); *Middleland, Inc. v. City Council of City of New York*, No. 6281/2006, 2006 N.Y. Slip Op. 52546(U), at *15 (Sup. Ct. Kings County, Dec. 22, 2006) (relying on *Palazzolo* in explaining that property owners may assert takings claim to challenge zoning regulations that predate their ownership).

[5] Petitioners rely on inapposite cases in arguing (Pet. 22-23) that the New York courts have been improperly ignoring *Palazzolo*. Two of their cited decisions predate Palazzolo. *See Preble Aggregate, Inc. v. Town of Preble*, 263 A.D.2d 849 (App. Div. 1999); *Matter of Brotherton v. Department of Envtl. Conservation*, 252 A.D.2d 498 (App. Div. 1998). Two of their other cases postdate Palazzolo but did not concern a claimant's obtaining of property after the enactment of a regulation. *See New York Ins. Ass'n v. State*, 145 A.D.3d 80, 93-94 (App. Div. 2016) (state insurance statutes did not provide vested property interest in refund of monetary fees paid prior to end of fiscal year), *lv. denied*, 29 N.Y.3d 910 (2017); *Matter of Novara v. Cantor Fitzgerald, LP*, 20 A.D.3d 103, 108 (App. Div. 2005) (state workers compensation statute did not provide vested property interest in receipt of monetary benefits). And the remaining cases

Finally, petitioners misplace their reliance (Pet. 15) on this Court's statement in *Palazzolo* that it was not resolving "the precise circumstances when a legislative enactment can be deemed a background principle of state law" that might not be subject to challenge "by those who acquire title after the enactment." 533 U.S. at 629. DEC did not argue that the tidal-wetlands regulations were background principles of state law that might bar petitioners' takings claim, and the courts below did not rest their decisions on any such grounds. Certiorari is not warranted to resolve an issue that was not raised by the parties or the courts below.

### B. Certiorari Is Not Warranted to Review the Factual Determinations of the Courts Below, Which Held That the Trial Evidence Failed to Prove a Takings Claim Under the *Penn Central* Factors.

Because the parties agreed that petitioners were not categorically barred from asserting a takings claim, the only issue raised by the decisions below is whether petitioners carried their evidentiary burden to prove that DEC's regulatory action constituted a taking under *Penn Central*'s "ad hoc, factual" inquiry. *See* 438 U.S. at 124. But certiorari is not warranted to

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merely held that a particular claimant failed to prove a takings claim under the specific facts presented, such as by failing to prove that a challenged regulation deprived the claimant of all but a bare residue of the property's value. *See Linzenberg v. Town of Ramapo*, 1 A.D.3d 321, 323 (App. Div. 2003) (insufficient allegations of economic harm); *Planned Investors Corp. v. Incorporated Vill. of Massapequa Park*, No. 405/02, 2004 N.Y. Slip Op. 51174(U), at *2-3 (Sup. Ct. Nassau County, Aug. 5, 2004).

review such a straightforward, fact-specific application of *Penn Central*.

1. Contrary to petitioners' contention, the courts below did not conclude that the "mere existence" of the tidal-wetlands regulations prior to petitioners' purchase of the Southampton Property rendered their expectations of building a house and septic system on the property objectively unreasonable as a matter of law. Pet. 19; *see id.* at 18-22, 24. The trial court instead analyzed the hearing evidence to determine whether the specific "circumstances" presented rendered petitioners' expectations "more or less reasonable." *Id.* at 22. (*See* Pet. App. B-5 to B-9.) The trial court acted properly in weighing the evidence, evaluating the witnesses' credibility, and concluding that no reasonable purchaser would have expected to obtain the extreme variances from the tidal-wetlands regulations that petitioners sought. And the State's appellate courts acted properly in concluding that the trial court "correctly determined" these fact-bound issues. (Pet. A-3.)

For example, the trial court appropriately relied on petitioners' failure to submit any evidence suggesting that any informed person—such as an attorney, environmental consultant, or DEC employee—told petitioners that they would likely obtain variances to build a sewage system and house closer than half the required distance from the wetlands. The trial court also committed no error in concluding that a reasonable investor would have conducted some due diligence, and would have learned through that due diligence about the set-back requirements and the likely problems those requirements presented for petitioners' planned construction. For instance, the hearing evidence demonstrated that

petitioners simply failed to: (1) contact an environmental consultant or building contractor; (2) consult with an attorney experienced in land-use law; or (3) inquire about the undeveloped parcel of land adjacent to the Southampton Property, which had been sold at a reduced price after its previous owner failed to obtain a tidal-wetlands permit. (*See* Pet. App. B-7 to B-9; R. 45, 127-128, 228-229, 631.)

The trial court was not required to accept petitioners' contrary arguments about the weight or import of various pieces of evidence. For example, the trial court had authority to conclude that a reasonable investor would not have expected to develop the Southampton Property based on an equivocal comment by a real estate broker, who had a financial stake in consummating the sale of the property. (Pet. App. B-9; *see* R. 117.) And the trial court could also properly conclude that the existence of residences in the surrounding neighborhood (*see* Pet. 5, 8) did not support the reasonableness of petitioners' expectations because those residences predated the tidal-wetlands regulations or had not required significant variances from the set-back requirements. (*See* R. 66, 71-73, 77-78, 220-221.) Far from turning on any "pure question of law" (Pet. 25), the decisions below centered on a fact-intensive determination that petitioners lacked *any* reasonable investment-backed expectations here. Certiorari is not warranted to review that determination.

2. Petitioners are likewise incorrect in contending (Pet. 24-27), that the courts below resolved their regulatory takings claim without even considering the other two factors identified in *Penn Central*: the economic impact of the governmental action and the character of the governmental action. Contrary to

petitioners' characterization of the proceedings below, the trial court considered evidence relating to those other factors. This case thus does not present the question of whether a court may properly conclude that one of the *Penn Central* factors is dispositive in a particular case without expressly discussing the other factors.

The record demonstrates that the courts below considered the economic impact of DEC's permit denial and the character of DEC's action. The parties submitted competing evidence and arguments about both of those factors during the trial. And in resolving petitioners' takings claim, the trial court explicitly observed that some of the hearing evidence, including the report and testimony of petitioners' appraiser, supported petitioners' view that "DEC's permit denial resulted in a severe economic impact." (Pet. App. B-6.) The trial court further recognized both parties' evidence and arguments about the character of the government action at issue. For example, the court considered that DEC had declined to grant extreme variances from set-back requirements aimed at balancing economic development with the need "to ensure that pathogens and other deleterious substances do not leech into wetlands." (Pet. App. B-9.) Moreover, the court acknowledged petitioners' contention that application of these public-health regulations to the Southampton Property "imposed a disproportionate burden on [p]etitioners." (Pet. App. B-6.) The court's rejection of petitioners' takings claim thus reflects its determination that the evidence related to the unreasonableness of petitioners' expectations outweighed the evidence related to the other *Penn Central* factors. This fact- and case-specific

application of *Penn Central* applied well-settled principles, and does not warrant further review.

3. In any event, even if the trial court had not expressly discussed the other two *Penn Central* factors, certiorari still would not be warranted to provide general guidance about the application of the reasonable investment-backed expectations factor in a specific case, or "whether, and how, the existence" of land-use regulations may affect the reasonableness of a particular claimant's expectations. *See* Pet. 2-3, 15-27.

This Court has repeatedly reaffirmed that the objective reasonableness of a claimant's expectations is a critical aspect of the *Penn Central* analysis. *See, e.g.*, *Murr,* 137 S. Ct. at 1945; *Palazzolo*, 533 U.S. at 617; *id.* at 633 (O'Connor J., concurring); *see also Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1350-51 (Fed. Cir. 2001). And the Court has made equally clear that the existence of land-use restrictions at the time property was acquired can be one objective factor, among others, "that most landowners would reasonably consider in forming fair expectations about their property." *Murr*, 137 S. Ct. at 1933; *see also Palazzolo*, 533 U.S. at 633 (O'Connor, J. concurring) ("[T]he regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.").

Moreover, this Court's established precedent provides that in applying *Penn Central*'s fact-intensive balancing test, a court may properly find that "the force" of one factor is "so overwhelming" that "it disposes of the taking question"—even where, unlike here, a court does not explicitly discuss the other factors. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). Contrary to petitioners' assertions (Pet.

13, 16-17, 21), there is no conflict between *Ruckelshaus* and the Court's rejection of rigid legal rules to govern the takings analysis. *See generally Palazzolo*, 533 U.S. at 626-27. This Court's eschewal of *categorical* rules is in perfect accord with a court's ability to conclude that the expectations of a *particular* purchaser were so unreasonable that they outweighed other factors under the specific circumstances presented. *See, e.g.*, *Rith Energy*, 270 F.3d at 1350-51; *Good v. United States*, 189 F.3d 1355, 1363 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000); *Mehaffy v. United States*, 102 Fed. Cl. 755, 765-69 (Fed. Cl.), *aff'd*, 499 F. App'x 18 (Fed. Cir. 2012), *cert. denied*, 571 U.S. 1124 (2014).

There is no significant disagreement among the courts below, federal courts of appeal, or other States' highest courts (Pet. 23-24) about whether the evidence relating to one *Penn Central* factor may outweigh the evidence about other factors in a particular case. In the decisions relied on by petitioners, the Federal Circuit, Fifth Circuit, and Ninth Circuit each acknowledged *Palazzolo*, and determined that no taking had occurred under the facts presented—just as the trial court did here.[6] In *Edwards Aquifer Authority v. Day*,

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[6] *See In re Thaw*, 769 F.3d 366, 371-72 (5th Cir. 2014) (application of bankruptcy law provision did not amount to taking of non-debtor spouse's homestead exemption); *Mehaffy*, 499 F. App'x at 22-23 (no taking where claimant had actual notice of need to obtain permit before he purchased property); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118-21 (9th Cir. 2010) (considering claimant's lack of reasonable expectations and the character of the government's action, i.e., adherence to rent-control regulations), *cert. denied*, 563 U.S. 988 (2011). Petitioners incorrectly contend (Pet. 23-24) that in *Guggenheim*, the Ninth Circuit concluded that post-regulation purchasers lacked standing to bring a takings claim. In fact, the court in *Guggenheim*

the Texas court held that material issues of fact required a trial on the claimant's takings claim—a ruling in accord with the actions of the trial court here, which resolved petitioners' claim based on a three-day evidentiary hearing. 369 S.W.3d 814, 839-43 (Tex. 2012). And in *Prosser v. Kennedy Enterprises, Inc.*, the court rejected a regulatory takings claim where, inter alia, the plaintiffs had failed to assert any such claim and did not own the property at issue. 342 Mont. 209, 213-15 (2008). Ultimately, any differences in the courts' applications of the reasonable expectations prong to specific cases does not reflect disagreement or confusion among the courts (Pet. 20 n.19, 28-30), but rather the inherently flexible, fact-bound nature of the *Penn Central* analysis and each of its factors. *See Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 30 (2012) ("In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.").

4. For all of the reasons above, this case would be an exceedingly poor vehicle for the Court to provide further legal rules about the *Penn Central* analysis or the reasonable expectations prong. As explained, the current case did not turn on the absence of any such legal rules but rather on the trial court's detailed factual findings about petitioners' objectively unreasonable expectations to build a house and septic system extremely close to tidal wetlands.

Moreover, the evidence adduced at the hearing demonstrated that the other two *Penn Central* factors further supported the trial court's determination that

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concluded that the landowners had standing to assert their claim. 638 F.3d at 1116.

no taking occurred. First, although DEC's permit denial reduced the economic value of petitioners' property, both parties' real estate appraisers testified that the Southampton Property would have significant economic value to nearby homeowners who could gain waterfront access by purchasing the property. (R. 169, 173-174, 266.) And DEC informed petitioners that they could obtain a tidal-wetlands permit to construct a dock, storage shed, and parking facilities on the Southampton Property. (R. 95-99, 328.)

Second, the character of the government action here also weighs heavily against a finding of a taking. The tidal-wetlands regulations protect a critical natural resource and promote the health and welfare of communities throughout the State. See *supra* at 3-4. And the permit rules apply broadly to all similarly situated property owners, as opposed to singling out petitioners "to bear public burdens which, in all fairness, should be borne by the public as a whole," *Murr*, 137 S. Ct. at 1950. Indeed, although other property owners had built residences in the neighborhood surrounding the Southampton Property (*see* Pet. 5, 21), those residences predated the tidal-wetlands regulations or did not require extreme variances from the set-back restrictions. See *supra* at 8-9.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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# ADDENDUM

## ADDENDUM

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## N.Y. ENVIRONMENTAL CONSERVATION LAW

### § 25-0102. Declaration of policy

It is declared to be the public policy of this state to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of this state.

### § 25-0402. Application for permits

1. Any person proposing to conduct or cause to be conducted an activity regulated under this act1 upon any inventoried tidal wetland shall file an application for a permit with the commissioner, in such form and containing such information as the commissioner may prescribe. The applicant shall have the burden of demonstrating that the proposed activity will be in complete accord with the policy and provisions of this act . . . .

[*remainder of section omitted*]

### § 25-0403. Granting of permits

1. In granting, denying or limiting any permit under this act, the commissioner shall consider the compatibility of the proposed activity with reference to the public health and welfare, marine fisheries, shellfisheries, wildlife, flood and hurricane and storm dangers, and the land-use regulations promulgated pursuant to section 25-0302 of this act.

[*remainder of section omitted*]

### § 25-0404. Judicial review

Any person aggrieved by the issuance, denial, suspension, or revocation of a permit may within thirty days from the date of the commissioner's order

seek judicial review pursuant to article seventy-eight of the civil practice law and rules in the supreme court for the county in which the tidal wetlands affected are located. In the event that the court may find that the determination of the commissioner constitutes the equivalent of a taking without compensation, and the land so regulated otherwise meets the interest and objectives of this act,1 it may, at the election of the commissioner, either set aside the order or require the commissioner to acquire the tidal wetlands or such rights in them as have been taken, proceeding under the power of eminent domain.

## N.Y. CODES, RULES & REGULATIONS
## 6 N.Y.C.R.R.

### § 661.1. Purpose of This Part

It is the public policy of the State, as set forth in the Tidal Wetlands Act, to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of the State. It is the purpose of this Part to implement that policy by establishing regulations that allow only those uses of tidal wetlands and areas adjacent thereto that are compatible with the preservation, protection and enhancement of the present and potential values of tidal wetlands (including but not limited to their value for marine food production, wildlife habitat, flood and hurricane and storm control, recreation, cleansing ecosystems, absorption of silt and organic material, education and research, and open space and aesthetic appreciation), that will protect the public health and welfare, and that will be consistent with the reasonable economic and social development of the State.

**§ 661.6. Development Restrictions**

(a) No person shall undertake any new regulated activity on any tidal wetland or on any adjacent area except in compliance with the following development restrictions:

(1) The minimum setback of all principal buildings and all other structures that are in excess of 100 square feet (other than boardwalks, shoreline promenades, docks, bulkheads, piers, wharves, pilings, dolphins, or boathouses and structures typically located on docks, piers or wharves) shall be 75 feet landward from the most landward edge of any tidal wetland . . .

(2) The minimum setback of any on-site sewage disposal septic tank, cesspool, leach field or seepage pit shall be 100 feet landward from the most landward edge of any tidal wetland.

[*remainder of section omitted*]

**§ 661.8. Permit Requirements**

No person shall conduct a new regulated activity on or after August 20, 1977 on any tidal wetland or any adjacent area unless such person has first obtained a permit pursuant to this Part. Regulated activities for each type of tidal wetland zone and for adjacent areas include, but are not limited to, all types of uses specifically listed in section 661.5 of this Part as generally compatible use—permit required (GCp), presumptively incompatible use (PIp), and incompatible use (I) for the type of area involved.

**§ 661.11. Variances**

(a) Where there are practical difficulties in the way of carrying out any of the provisions of section 661.6 of this Part or where in the department's judgment the strict application of the provisions of section 661.6 of this Part would be contrary to the purposes of this Part, the department shall have authority in connection with its review of an application for a permit under this Part to vary or modify the application of any provisions in such a manner that the spirit and intent of the pertinent provisions shall be observed, that public safety and welfare are secured and substantial justice done and that action pursuant to the variance will not have an undue adverse impact on the present or potential value of any tidal wetland for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research, or open space and aesthetic appreciation. Any person wishing to make application for a variance shall do so in writing in conjunction with his application for a permit under this Part and shall specify the proposed variance, which elements of section 661.6 Development Restrictions, relief is sought from, the minimum relief that is necessary, the practical difficulties claimed, a discussion of alternate site possibilities, a discussion of change of project objective possibilities and a discussion of environmental impact reduction or mitigation measures to be employed. The burden of showing that a variance to such provisions should be granted shall rest entirely on the applicant.

[*remainder of section omitted*]

## EXCERPTS FROM RESPONDENT'S STATE COURT BRIEFINGS

### Excerpts from Respondent's Post-Hearing Memo of Law

Petitioners do not challenge the constitutional validity of the tidal wetlands regulations or the rationality of the health-driven concerns underlying DEC's denial of their permit application and variance requests, but claim, pursuant to ECL § 25-0404, that DEC's refusal to allow them to build a house and septic system on this small parcel resulted in an unconstitutional taking of their property under the New York State and United States Constitutions. Whether a taking occurred is essentially a fact-specific inquiry, into such relevant factors as "[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." *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 124 (1978) (emphasis added).

Petitioners are not categorically barred from attempting to assert a takings claim by the mere fact that they purchased the property post-regulation, and DEC has never contended otherwise. But as post-regulation purchasers, petitioners bear the burden of proving that there was some compelling reason for them to expect that they could build a house on a parcel of land that was too small to meet health-based septic system set-back requirements, as well as other regulatory requirements, or that DEC would grant them an extremely rare variance from a regulation it promulgated to ensure that pathogens and other deleterious substances do not leach into the wetlands from the septic system leach field and

contaminate the creek, the bay, and the shellfish that live there. Here, rather than proving the reasonableness of their investment-backed expectations, petitioners, through their testimony, established precisely the opposite -- that they never looked at the regulations, or hired an environmental consultant, or consulted with DEC. . .

In 1997, the New York State Court of Appeals in *Gazza v. New York State Department of Environmental Conservation,* 89 N.Y. 2d 603, 616 (1997), held that a post-regulation purchaser "cannot base a taking claim upon an interest he never owned" -- in that case, as here, the right to build a house on land whose uses had already been restricted by New York's tidal wetlands regulations. However, the United States Supreme Court in *Palazzolo v. Rhode Island,* 533 U.S. 606, 630 (2001), held, in a five to four decision, that a takings claim is not categorically barred by the "*mere* fact" that the claimant acquired title to property "after the effective date of the state-imposed restriction." (Emphasis added).

A. Palazzolo Did Not Displace, But Affirmed the Principles Established by *Penn Central*

By removing the categorical bar to a post-regulation takings claim, *Palazzolo* did not alter, but affirmed, the fundamental principle that a post-regulation purchaser must still prove the reasonableness of his investment-backed expectation in order to succeed on his *Penn Central* takings claim. Because "reasonableness" will be evaluated by "the *regulatory regime in place*" at the time he acquired the property, *Id.* at 633, it is exceedingly hard for a claimant to prove that it was reasonable to expect that regulatory restrictions would not apply. For

example, in *Mehaffy v. United States,* 102 Fed. Cl. 755, 765 (2012), *aff'd,* 499 Fed. Appx. 18 (Fed. Cir. 2012), *cert. denied,* 134 S. Ct. 897 (2014), a post-regulation purchaser was denied a permit under the Clean Water Act to fill wetlands on his property. While acknowledging Palazzolo's holding that a post-regulation purchaser is not categorically barred from advancing a taking claim, the court noted that:

'[I]t is particularly difficult to establish a reasonable investment-backed expectation' in those situations where the party had constructive or actual knowledge of the restriction. *Id.* (quoting *Norman v. United States,* 429 F.3d 1081, 1092-93 (Fed. Cir. 2005) (emphasis added)).

* * * *

'*To hold otherwise would turn the Government into an involuntary guarantor of the property owner's gamble that he could develop the land as he wished despite the existing regulatory structure.*'

Indeed, in *Good v. United States,* 189 F.3d 1355, 1361-62 (Fed. Cir. 1999), *cert. denied,* 529 U.S. 1053 (2000), the court held that even if an owner might have had a reasonable expectation that he could develop his property under the wetlands regulations existing at the time of his purchase, his expectations became unreasonable when he waited seven years before taking steps to obtain the regulatory approvals, and during that time, more stringent regulations were enacted resulting from increased public concern about the environment. The court concluded that the claimant was not oblivious to the trend of ever-tightening land use regulations and that he "must also have been aware that standards

could change to his detriment, and that regulatory approval could become harder to get." *Id.* at 1363.

**Excerpts from Respondent's Appellate Division Brief**

Contrary to petitioners' contention (Br. at 3, 67–69), the U.S. Supreme Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) does not alter the analysis. *Palazzolo* rejected a "single, sweeping rule" that would have categorically barred all takings claims brought by any post-regulation purchaser, *i.e.*, a purchaser who buys property after enactment of the regulation claimed to have effectuated an unconstitutional taking of that property. 533 U.S. at 626-27. But that case's eschewal of an *automatic* bar in no way prevents courts from concluding that the expectations of a *particular* post-regulation purchaser were unreasonable under the specific circumstances presented. *See Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1350–51 (Fed. Cir. 2001).

As Justice O'Connor's concurring opinion in *Palazzolo* makes clear, "the regulatory regime in place" at the time that a claimant acquired property continues to play a critical role in shaping "the reasonableness of" the claimant's expectations. 533 U.S. at 633 (O'Connor, J., concurring). Accordingly, even after *Palazzolo*, courts have routinely found that a particular claimant's expectations were unreasonable because he expected to use property in a certain way despite well-settled regulatory restrictions prohibiting or limiting that use. *See, e.g.*, *Norman v. United States*, 429 F.3d 1081, 1092–93 (Fed Cir. 2005); *Held v. State Workers' Compensation Bd.*, 85 A.D.3d 35, 43–44 (3d Dep't 2011); *cf.*

*Monroe Equities LLC v. State*, 47 Misc. 3d 747, 755–59 (Ct. Cl. 2014) (analyzing *per se* takings claim). And courts have continued to hold that, in a particular case, "a strong showing that [the] plaintiff lacked reasonable investment-backed expectations [can be] sufficient by itself for a determination that no taking has occurred." *Mehaffy*, 102 Fed. Cl. at 765; *see, e.g.*, *Page v. United States*, 51 Fed. Cl. 328, 336–40 (Fed. Cl. 2001), *aff'd*, 50 F. App'x 409 (Fed. Cir. 2002).

Footnote 3:

Contrary to petitioners' assertions (Br. at 67), DEC never argued that petitioners' status as post-regulation purchasers automatically prohibited their claim (*see* R. 9). *See also* Respondent's Post-Hearing Mem. of Law ("Post-Hearing Mem.") at 17–31.

**Excerpts from Respondent's Mem. of Law in Opp'n to Motion for Leave to Appeal to N.Y. Court of Appeals**

Leave Is Not Warranted to Review the Application of a Categorical Bar to Petitioners' Claim Because the Courts Below Did Not Apply Any Such Bar.

Petitioners urge this Court to grant leave to review whether the courts below erred in applying *Matter of Gazza v. New York State Department of Environmental Conservation*, 89 N.Y.2d 603 (1997). Contrary to petitioners' assertions, those courts did not hold that petitioners were barred from bringing a takings claim because they purchased property after the establishment of the tidal-wetlands permit regime. *See* Mot. at 19-33. This case thus does not actually present the legal question that petitioners seek leave to address.

Neither the Appellate Division nor Supreme Court held that petitioners' purchase of property subject to the tidal-wetlands regulations automatically precluded them from asserting a takings claim. Rather, Supreme Court expressly recognized that petitioners were not "categorically barred from attempting to assert a takings claim." *Id.* Ex. 1, at 7. For this reason, Supreme Court held a three-day pevidentiary hearing to address petitioners' takings claim. The court then issued factual findings based on the specific evidence presented, determining that petitioners could not have reasonably expected to build a large house and multiple cesspools on property that could not accommodate such development absent extreme variances from the set-back requirements. *Id.* at 6-7. The Appellate Division affirmed Supreme Court's fact-bound determination as correctly decided. *Id.* Ex. 3.

Indeed, the courts below had no occasion to preclude petitioners from attempting to asset a takings claim because the parties agreed that the Supreme Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), had eschewed any such rigid rule. Specifically, DEC made clear to both the Appellate Division and Supreme Court that "*Palazzolo* rejected a 'single, sweeping rule' that would have categorically barred all takings claims brought by any post-regulation purchaser." Respondent's Br. at 21 (quoting *Palazzolo*, 533 U.S. at 626-27); *see* Respondent's Mem. At 3, 14; Mot. Ex. 1, at 7 (Supreme Court explaining that "DEC has never contended" that any categorical rule applies). The current case thus does not present any dispute between the parties about whether *Palazzolo* eliminated such a blanket rule.