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 Writ of Certiorari to
the New York Supreme Court,
Appellate Division, Second Department**

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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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); and

2. Whether any one factor of *Penn Central*'s multi-factorial regulatory takings test set is dispositive of a property owner's regulatory taking claim without regard to the remaining factors. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

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INTRODUCTION

This case presents an obvious regulatory takings claim. Denis and Carol Kelleher secured local approvals to build a small house on a vacant lot, zoned and taxed for residential use, and located in a fully developed residential neighborhood. But when asked to vary its buffer setbacks in accordance with the local permits, the New York State Department of Environmental Conservation (DEC) refused, barring the Kellehers from building any residential structure on the property and reducing the value of the lot by upwards of 98%. Pet. App. B-6; Pet. App E-18-19. The DEC's decision was not supported by any evidence that the proposed home would "make a difference to the creek and bay ecology." Pet. App. E-21. Instead, it was based on a regulation that requires owners of property adjacent to wetlands to maintain their land in an undeveloped state in order to provide public benefits, such as mitigating for community impacts and providing aesthetic value to bird watchers, fishermen, and boaters. Pet. App E-14, 21-22.

Certainly, these uncontested facts warrant meaningful consideration under the multifactorial test established by *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). But the New York appellate court below summarily dismissed the Kellehers' takings claim under a rule holding that a landowner must show "an absolute right to build on his land without a variance" under all regulations in effect at the time of purchase to establish the reasonable investment-backed expectations necessary to advance a regulatory takings claim. Pet. App. A-3 (citing *Matter of Gazza v. New York State Dep't of Envtl. Conservation*, 89 N.Y.2d 603, 615-16 (1997);

Matter of Brotherton v. Department of Envtl. Conservation of State of N.Y., 675 N.Y.S.2d 121, 123 (N.Y. App. Div. 1998)). Since New York has decided to regulate the use of wetland-adjacent property via the variance procedure, the "absolute right" rule holds that landowners like the Kellehers have no right to make a residential use of their land and therefore cannot advance a takings claim, regardless of a regulation's economic impact or whether it shifts a public burden onto a private landowner. Pet. App. A-3; Pet. App. B-9.

The DEC agrees that *Gazza* conflicts with *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-28 (2001). Opp. at 12-13. Indeed, the DEC's appellate brief argued against a categorical notice rule, insisting—as did the Kellehers—that post-*Palazzolo* case law requires courts to evaluate several case-specific factors when determining the effect of a preexisting regulation on an owner's investment-backed expectations. Opp. at 12-13; Resp. App. 8a-9a. Regardless, the appellate court dismissed the Kellehers' takings claim under *Gazza*. Pet. App. A-3. And because New York case law holds that an adverse investment-backed expectations determination is dispositive of a *Penn Central* claim, the court rejected the appeal without regard to the remaining *Penn Central* factors. Pet. App. A-3. The decision below clearly raises the questions presented.

The DEC's arguments against review are without merit. The suggestion that the trial and appellate decisions could be read to have impliedly engaged in a full *Penn Central* analysis conflicts with the position that the DEC took below, where it argued that the trial court had rejected the Kellehers' takings claim

based on a single *Penn Central* factor and urged the appellate court to follow suit. *See* DEC Resp. Br. at 20 (Jun 24, 2016) (asking the appellate court to affirm the trial court decision based on a single *Penn Central* factor "as the [trial court] did here"); *id*. at 44 ("This Court should affirm the [trial court] determination based solely on petitioners' lack of reasonable investment-backed expectations."). That argument, therefore, does not bear on the advisability of review. *Perry v. Thomas*, 482 U.S. 483, 492 (1987) (The Court will not consider an argument that was neither raised to the lower courts nor addressed in the decisions below.).

The DEC's argument regarding the purpose of wetland buffers is similarly irrelevant. First, the administrative law judge found that there was no evidence that the Kellehers' proposed house would impact the environment. The DEC never challenged that finding. And second, the question whether a restriction advances a public purpose is not part of the takings inquiry because it "tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, [and] cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation." *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 543 (2005). Thus, this Court has recognized that "regulations that . . . requir[e] land to be left substantially in its natural state . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992).

The DEC's concern that factual disputes pertaining to the *Penn Central* claim may complicate review misconstrues the questions presented. The petition does not ask this Court to resolve the *Penn Central* claim on its merits. It asks the Court to invalidate *Gazza*, clarify how lower courts should apply the *Penn Central* factors, and remand the matter for a determination under all three factors of *Penn Central*. The posture of this case is identical to *Palazzolo*, where the Rhode Island Supreme Court had declined to address the merits of Palazzolo's takings claim under an identical notice rule. *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 717 (R.I. 2000) (holding that the notice rule is dispositive of a *Penn Central* claim). The decision below clearly raises a question of law that is appropriate for this Court's review. *Palazzolo*, 533 U.S. at 611; *Perry*, 482 U.S. at 492 (arguments not addressed in the decision below are properly decided on remand).

ARGUMENT

I

THE DECISION BELOW CONFLICTS WITH *PALAZZOLO*

Having admitted that *Gazza* conflicts with *Palazzolo*, the DEC attempts to avoid review by suggesting that the appellate court did not actually rely on *Gazza*. Opp. at 12-13. This argument is baseless. By its plain terms, the decision affirmed the trial court's order of dismissal because the Kellehers "failed to demonstrate that, at the time they acquired title, they possessed the right to develop and use the property in the manner in which they proposed." Pet. App. A-3 (citing *Gazza*, 89 N.Y.2d at 617; *Brotherton*,

675 N.Y.S.2d at 122-23). The court's pinpoint citations are conclusive that it applied the "absolute right" rule.[1] *Brotherton*, 675 N.Y.S.2d at 122-23.

The DEC tries to diminish the lower court's reliance on the *Gazza* rule by characterizing the citation as a passing reference. Opp. at 12. But *Gazza* and *Brotherton* are the only authorities cited in the decision below. Pet. App. A-1-3. The fact that the court addressed the "absolute right" rule in a summary manner illustrates two key points militating in favor of review: (1) the *Gazza* rule is categorical, and (2) the New York courts treat the investment-backed expectations analysis as a determinative of a takings claim without regard to the remaining factors. *See Monroe Equities, LLC v. State*, 43 N.Y.S.3d 103, 106 (N.Y. App. Div. 2016) (citing *Gazza* for the proposition that the investment-backed expectations inquiry as a dispositive threshold question, rather than part of the *Penn Central* multifactorial inquiry).

Alternatively, the DEC tries to insulate the decision from review by arguing that, even if the appellate court wrongly applied *Gazza*, the trial court's decision could nevertheless be upheld based on its conclusion that the Kellehers failed to provide a "compelling reason" why they should expect to build a house on a lot that is subject to large buffers, or why they should be entitled to a variance. Pet. App. B-9. That conclusion, however, merely restates the *Gazza*

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[1] Notably, the state court decision invalidated by *Palazzolo* relied on the same page in *Brotherton* as standing for the rule that an owner cannot establish "reasonable investment-backed expectations" where a restrictive regulation predates his acquisition of property. *See Palazzolo*, 746 A.2d at 716 (quoting *Brotherton*, 675 N.Y.S.2d at 122-23).

rule, which accepts, as matter of law, that a regulatory restriction in effect at the time of acquisition extinguishes the owner's right to use the property. *Gazza*, 89 N.Y.2d at 616 ("The relevant property interests owned by the petitioner are defined by those State laws enacted and in effect at the time he took title and they are not dependent on the timing of State action pursuant to such laws."); *but see Murr v. Wisconsin*, 137 S. Ct. 1933, 1944-45 (2017) (An owner's investment-backed expectations cannot be "shape[d] and define[d]" by reference to restrictive state and local laws.").

The fact that other state appellate and trial courts that have refused to apply *Gazza*'s "absolute right" rule does not advise against certiorari—it compels it. Opp. at 13-14. Those decisions highlight the remarkable lack of uniformity across the lower courts on this critical, often determinative, question. A year prior to the *Kelleher* decision, for example, a New York appellate court held that a landowner can form reasonable investment-backed expectations where (1) a restrictive regulation in effect at the time of acquisition does not embody a background principle of property law, and (2) there is a reasonable likelihood that the regulation may effect a taking. *See*, *e.g.*, *In re New Creek Bluebelt, Phase 3*, 65 N.Y.S.3d 552, 559 (N.Y. App. Div. 2017) (reasoning that a "knowledgeable buyer would be willing to pay a premium for the probability of a successful judicial determination that the regulations were confiscatory"). But then, in the decision below, a different panel from the same court summarily dismissed the Kellehers' regulatory takings claim under *Gazza*, without regard to the fact that New York's wetland regulations do not embody background

principles of property law (Opp. at 15), and without regard to the trial court conclusion that the Kellehers had otherwise submitted a "text book" and "persuasive" case "as to every element of their takings claim," showing as much as a 98% reduction in the value of their residential property. Pet. App. B-6.

Until this Court clarifies how a preexisting regulation is to be evaluated under *Penn Central*, an individual's right to have a takings claim heard on its merits will vary from court to court.[2] Indeed, the facts of this case would compel an evaluation of all three *Penn Central* factors in those jurisdictions that focus the expectations inquiry on factors such as (1) whether neighboring development suggests that development will be possible on the subject parcel,[3] (2) whether the owner paid taxes based on a high-market (developable) value for the property,[4] (3) whether the landowner can obtain a reasonable rate of return on the property,[5] and (4) whether the

[2] Where courts have rejected *Gazza*, they have readily found that similarly situated, post-enactment purchasers have reasonable investment-backed expectations. *See*, *e.g.*, *New Creek Bluebelt*, 65 N.Y.S.3d at 561 (an 88% diminution of value, together with a prohibition on development, established a reasonable probability that the wetlands regulations would be found to constitute a regulatory taking); *Matter of New Cr. Bluebelt*, *Phase 4*, 997 N.Y.S.2d 447 (N.Y. App. Div. 2014) (where an 82% diminution in value caused by wetlands regulations prohibited development, there was a reasonable probability of a taking).

[3] *Cooley v. United States*, 324 F.3d 1297, 1306 (Fed. Cir. 2003).

[4] *Arnell v. Salt Lake County Bd. of Adjustment*, 112 P.3d 1214, 1225 n.14 (Utah Ct. App. 2005).

[5] *Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal. App. 3d 892, 912 (1986); *Gardner v. N.J. Pinelands Comm'n*, 593 A.2d 251, 259 (N.J. 1991).

challenged restriction strips a property owner of a nonessential stick in the bundle of property rights.[6]

Review of this case is necessary because there is a high likelihood that other courts will rely on the "absolute right" rule to summarily dismiss meritorious takings claims—indeed, the petition cites several jurisdictions that have adopted variations of the notice rule since *Palazzolo*. The risk of repetition is particularly high in New York, where the state's highest court has repeatedly declined to review the legitimacy of *Gazza*'s "absolute right" rule, leaving that objectionable decision on the books. *See*, *e.g.*, 2 N.Y. Law & Practice of Real Property § 31:3 (2d ed. 2018) (reporting that *Gazza*'s "absolute right" rule is binding law in New York); 51 N.Y. Jur. 2d Eminent Domain § 94 (2018) (same); 108 N.Y. Jur. 2d Water § 262 (2018) (same).

II

THE DECISION BELOW RAISES THE QUESTION WHETHER ANY ONE FACTOR OF *PENN CENTRAL* IS DISPOSITIVE

The DEC attempts to avoid the *Penn Central* question by arguing that both the trial court and appellate court engaged in a full analysis of all three *Penn Central* factors. Opp. at 15-20. Not true. The DEC's appellate brief confirmed that the trial court had dismissed the Kellehers' case based on a single factor (DEC Resp. Br. at 20), and argued that the appellate court "should affirm the [trial court] determination based solely on petitioners' lack of reasonable investment-backed expectations." *Id.* at

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[6] *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 730 (Wyo. 1985).

44. Accordingly, the decision below contains no mention of *Penn Central* and no discussion of the economic impact or character of the government action. Pet. App. A-1-3; *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326 n.23 (2002) (requiring that courts engage in a "careful examination and weighing of all the relevant circumstances" to satisfy *Penn Central*). The DEC's lengthy and self-serving recitation of arguments that are not addressed by the decision below is irrelevant to this petition. Opp. at 15-20; *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) ("Consistent with the relevant jurisdictional statute, 28 U.S.C. § 1257, the Court's jurisdiction to review a state-court decision is generally limited to a final judgment rendered by the highest court of the State in which decision may be had.").

III

THE DEC FAILS TO REFUTE THE SUBSTANTIAL REASONS FOR REVIEWING THE CONFLICTS CREATED BY NEW YORK'S SINGLE FACTOR RULE

The DEC does not dispute that the question whether, and in what circumstance, a single factor *Penn Central* factor can be determinative of a takings claim is subject to a longstanding split of authority among the lower federal courts and state courts of last resort. Opp. at 20-21 (dismissing conflict as not "significant"). Nor does DEC meaningfully address the conflicts in this Court's case law on that question. Opp. at 19-20 (dismissing the petition's discussion of the conflicts created by *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984), without analysis).

The DEC fails to acknowledge that this Court has refused to apply *Ruckelshaus* in the context of a land use decision that destroys a fundamental attribute of real property (*i.e.*, the right to exclude). *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987). Indeed, this Court has consistently held that a regulation cannot deprive an owner of a legal use of real property that is essential to its value without payment of just compensation. *Curtin v. Benson*, 222 U.S. 78, 86 (1911); *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980), *abrogated on different grounds by Lingle*, 544 U.S. 528 ("Although the ordinances limit development, they [may] neither prevent the best use of appellants' land . . ., nor extinguish a fundamental attribute of ownership."). Thus, in *Penn Central*, this Court engaged in a full analysis of all three factors before concluding that a restriction on the right to build did not effect a taking because it authorized the owner to transfer those development rights to other holdings. *Penn Central*, 438 U.S. at 113-14, 137; *id.* at 142-43 (the right to build is a "substantial" and "valuable property right") (Rehnquist, J., dissenting).

As owners of property zoned and taxed for residential use, the Kellehers have a fundamental right to develop the land for non-nuisance, residential use—*i.e.*, to build a house. *Nollan*, 483 U.S. at 833 n.2 ("[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'"); *Burrows v. City of Keene*, 432 A.2d 15, 21 (N.H. 1981) ("Although there may undoubtedly be some uses of the land which are sufficiently injurious to others that their use may be prohibited, the normal development of the land for residential purposes is not one of them."); *Rideout v.*

Knox, 148 Mass. 368, 372, 374 (1889) (The right to build a house is "an incident of property which cannot be taken away even by legislation.") (Holmes, J.).

The Kellehers are entitled to a decision that is consistent with the "central purpose of the Takings Clause [which is] 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.'" *Murr*, 137 S. Ct. at 1950 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Thus, at the very least, any inquiry into the date that a restrictive regulation went into effect must also consider whether the government enacted its restrictions after the property had been zoned for the burdened use, and whether the law was enacted after the neighboring parcels had been improved, "throwing the whole burden of the regulation on the remaining [undeveloped] lots." *Lucas*, 505 U.S. at 1035-36; *Lingle*, 544 U.S. at 543 (*Penn Central* analysis must evaluate "the actual burden imposed on property rights, . . . how that burden is allocated, [and] when justice might require that the burden be spread . . . through the payment of compensation."). New York's adoption of a rule that treats a single factor of *Penn Central* as dispositive of the takings question conflicts with this Court's case law and warrants review.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: December, 2018.

Respectfully submitted,

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