No. 18-573

In The
Supreme Court of the United States

COLONY COVE PROPERTIES, LLC,
Petitioner,
v.
CITY OF CARSON AND CITY OF CARSON MOBILEHOME PARK RENTAL REVIEW BOARD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE NFIB SMALL BUSINESS LEGAL CENTER, THE CATO INSTITUTE, AND THE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Karen R. Harned
Luke A. Wake*
Counsel of Record
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2061 (Telephone)
(615) 916-5104 (Facsimile)
luke.wake@nfib.org

Kimberley S. Herman
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Road, Suite 104
Roswell, Georgia 30075
(678) 269-4966
khermann@southeasternlegal.org

Ilya Shapiro
CATO INSTITUTE
1000 Massachusetts Avenue, NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amici Curiae

Dated: December 3, 2018

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTION PRESENTED

Whether a regulation that causes a property temporary but substantial cash losses is immune as a matter of law from regulatory takings scrutiny if these substantial cash losses do not cause a dramatic decrease in the total value of the property?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

RULE

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

The NFIB Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and

---

[1] In accordance with Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and no person or entity other than *amici* funded its preparation or submission. Both the Petitioner and Respondents have consented to this brief.

limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the protection of individual rights and the framework set forth to protect such rights in the Constitution. SLF regularly files amicus curiae briefs with this Court on property rights issues. Consistent with its mission, SLF has an interest in this case because it raises an important question under the Takings Clause.

SUMMARY OF ARGUMENT

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), this Court answered a narrow question—but raised another important and still unresolved issue of tremendous practical importance for regulatory takings claimants. *Tahoe-Sierra* held that there can be no per se taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), when regulation prohibits all use and development of property, if that regulation is temporary. The Court applied the "parcel-as-a-whole rule" including the property's temporal element—concluding that a landowner has not been deprived of *all* economically

productive uses if a regulatory restriction will be lifted in the future. Accordingly, *Tahoe-Sierra* directed that temporary takings claims are assessed under the balancing test in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). But the Court offered little guidance as to how the *Penn Central* factors should be applied. And, as demonstrated by the decision below, the courts have struggled with the question of whether temporary takings claims are viable under *Penn Central*, even where—as in the present case—the contested restriction imposed serious economic burdens and upset settled investment-backed expectations during the period of enforcement.

This petition presents an ideal vehicle for this Court to provide much needed guidance as to how the parcel-as-a-whole rule should apply when assessing temporary takings claims, and to provide direction as to how courts should approach the "economic impact" and "investment-backed expectation" prongs of the balancing test. Guidance is especially vital in cases of this sort where a business has invested limited capital on the expectation of earning a reasonable rate of return—which, if frustrated, may have calamitous financial consequences for the owner. Alternatively, this case presents an opportunity for this Court to clarify that the *Penn Central* factors—which are assessed and weighed on an ad hoc basis—may be appropriately resolved by a jury. Indeed, in the absence of more definitive guidance as to how courts should apply *Penn Central*, there is no basis for overturning a jury's findings as to whether a regulatory restriction has "gone too far." *Cf. Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

THIS COURT SHOULD PROVIDE GUIDANCE AS TO HOW THE *PENN CENTRAL* BALANCING TEST SHOULD APPLY IN REVIEW OF TEMPORARY TAKINGS CLAIMS

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), this Court held that a regulation that worked a taking could be withdrawn, but that a claimant would be entitled to just compensation for the period the regulation was in effect. Yet, *First English* addressed only temporary takings remedies and did not consider what constitutes a temporary taking. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), later explained that courts must resort to the ad hoc balancing test set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), to determine whether a temporary taking has occurred. But this has raised new and vexing questions as to whether *First English* remains viable—questions that require guidance as to how courts should apply *Penn Central* in review of a temporary takings claim.

A. Systemic Confusion Predominates as to Whether *Tahoe-Sierra* Vitiates *First English*

The bedrock of the regulatory takings doctrine has been that "the 'Fifth Amendment's guarantee… [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central*, 438 U.S. at 123 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). As such, the Court enunciated the "parcel as a whole" rule in *Penn Central*, stating that "[t]akings

jurisprudence does not divide a single parcel into discreet segments… [but instead looks to the impact of the regulation on] the parcel as a whole." *Id*. at 130-31. As explained in *Tahoe-Sierra*, the parcel-as-a-whole rule is necessary to ensure a fair analysis because otherwise property owners could claim a regulation has resulted in a complete devaluation of their property by "defining the property interest taken in terms of the very regulation being challenged." *Tahoe-Sierra*, 535 U.S. at 331. But concerns about litigants expediently defining the relevant parcel can cut both ways; it is just as true that "[t]he effect of a taking can obviously be disguised if the property at issue is too broadly defined." *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-319 (1991).

Penn Central gave little guidance as to how the courts should define the relevant parcel in regulatory takings cases; however, this Court provided some degree of guidance for determining the **physical parameters** of the relevant parcel in *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017). Even this guidance was of limited value since the court declined to provide a bright-line rule. *Id*. at 1935 ("[N]o single consideration can supply the exclusive test for determining the denominator."). Instead, *Murr* provided a flexible balancing test focused ultimately on "whether reasonable expectations about property ownership would lead a landowner to anticipate that the [estate] would be treated" as segmented or not. *Id*. at 1947-48. But the factors identified for consideration in *Murr* are of little

relevance when the question is how we should define the relevant parcel in a temporary takings case.[2]

Tahoe-Sierra observed that an estate in private property can be segmented not only by its metes and bounds, but also temporally. This means that courts need guidance as to how they should apply the parcel-as-a-whole rule when assessing temporary takings claims, and *Murr* simply does not speak to this vital question.

The parcel-as-a-whole doctrine remains particularly unsettled with respect to temporal segmentations because it is unclear whether *Tahoe-Sierra* was intended to vitiate temporary takings by conflating them with permanent takings. Much of the confusion turns on the fact that in *Tahoe-Sierra* the plaintiffs did not actually assert a partial regulatory takings claim that would have lead to the application of a *Penn Central* analysis. 535 U.S. at 334 (suggesting that the petitioners "might have prevailed under a *Penn Central* analysis," but declining to provide guidance when that theory had been "disavowed"). Instead, they asserted only a per se takings claim under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). This Court rejected that claim, stating that "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Tahoe-Sierra*, 535 U.S. at 332. But lower

[2] If the owner's "reasonable expectations" are relevant then the parcel-as-a-whole rule should focus the takings inquiry on the period during which the restriction was enforced because the courts would otherwise frustrate reasonable investment-backed expectations.

courts have since struggled in trying to determine the role the parcel-as-a-whole rule should play in a *Penn Central* analysis for temporary takings claims. Different courts have offered dramatically conflicting approaches.

For example, the Federal Circuit has taken conflicting approaches. In the immediate wake of *Tahoe-Sierra*, the Federal Circuit focused on the "total and immediate" impact of a federal statute that temporarily imposed massive financial liabilities for landowners. *Cienega Gardens v. United States*, 331 F.3d 1319, 1344 (Fed. Cir. 2003) (*Cienega VIII*). But four years later a different panel ruled that it was inappropriate to focus the temporary takings analysis on the timeframe for which the federal restrictions were imposed—holding that *Tahoe-Sierra* requires consideration "of the overall value of the property" over the course of its life. *Cienega Gardens v. United States*, 503 F.3d 1266, 1281 (Fed. Cir. 2007) (*Cienega X*). The difference between these two approaches is of tremendous practical importance, and it may literally make or break a temporary takings claim. *See CAA Assocs. v. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011) ("Ultimately, the difference between the *Cienega X* and *Cienega VIII* methodology is the difference between an 18% and 81% economic impact, a substantially different result stemming solely from [a] change [in the Court's application of the parcel-as-a-whole rule] in the economic impact analysis . . .").[3]

---

[3] *CCA* held it was "bound to apply the economic analysis outlined in *Cienega X*" in cases involving the federal Emergency Low Income Housing Preservation Act, and the Low-Income Housing Preservation and Resident

The problem in basing *Penn Central's* economic impact analysis on value remaining ***after a temporary restriction is lifted*** is that such an approach virtually guarantees that the economic impact prong will cut strongly against any finding of takings liability. Indeed, any value lost by imposition of a land use restriction will almost inevitably return as soon as the restriction is lifted. Such an approach merely insulates government from any possible takings liability as long as an expiration date is imposed on the contested regulation—regardless of how burdensome the regulation was during its imposition, or how severely it may have frustrated reasonable investment-backed expectations.

Of course, it makes sense to consider the remaining value in a fee simple property after a restriction has been lifted if the claimant has alleged a "total taking" under *Lucas*. That is because a total takings claim requires a showing that the government has so severely regulated the property as to eliminate all economically beneficial uses, or all value, in perpetuity (or through the remainder of a leasehold). *Tahoe-Sierra*, 535 U.S. at 332. By contrast, a partial takings claim requires a more flexible form of analysis under *Penn Central*. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring) (emphasizing the need for a "careful examination and weighing of all the relevant circumstances").

Homeownership Act. 667 F.3d at 1245. But the panel voiced concern that *Cienega X*'s approach "would virtually eliminate all regulatory takings" if extended "beyond ELIHPA and LIHPRHA cases…" *Id*. at 1247. Thus, *CCA* emphasized that it would not extend *Cienega X*'s rationale in review of "temporary regulatory restrictions on fee simples…" *Id*.

Where a partial takings claim alleges that *permanent restrictions* have effected a taking then it makes complete sense to consider the impact those restrictions may have on the prospective value of the property. But in the context of a *temporary takings claim* the analysis must focus instead on the economic impact of the contested restriction during the imposition. Any contrary rule, focusing on the retained value of the property over its full life, would completely vitiate *First English*.

While *Tahoe-Sierra* made clear that there can be no viable temporary takings claim under *Lucas*, the Court held out the possibility—consistent with *First English*—that a litigant might prevail under *Penn Central's* flexible balancing test. *See Tahoe-Sierra*, 535 U.S. at 337 (emphasizing that the Court was only rejecting petitioners' per se *Lucas* claim, and that the Court was not "hold[ing] that the temporary nature of a land-use restriction precludes finding that it effects a taking."). But under the Ninth Circuit's approach there are no viable temporary takings claims, and *First English* is dead letter. As such, this Court should grant *certiorari* to confirm that *First English* remains viable and that a litigant may prevail in a temporary takings claim under *Penn Central* if the restriction imposed serious economic harms during its enforcement, in frustration of the owner's investment-backed expectations.

Specifically, this Court should clarify that, in defining the relevant parcel, for the purposes of the parcel-as-a-whole rule, courts should focus on the period in which the contested restrictions were in

force.[4] This approach is consistent with the "flexible approach" courts have traditionally taken in applying the parcel-as-a-whole rule, "to account for factual nuances in determining the relevant parcel."[5] *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *see also* Dwight H. Merriam, Rules for the Relevant Parcel, 25 U. Haw. L. Rev. 353 (2003); Keith Woffinden, *The Parcel as a Whole: A Presumptive Structural Approach for Determining When the Government Has Gone Too Far*, 2008 B.Y.U.L. Rev. 623.

B. In the Wake of *Tahoe-Sierra*, this Court Should Clarify *Penn Central's* Requirement that Owners Must be Allowed a "Reasonable Return"

While *Penn Central* discussed the need for landowners to obtain a "reasonable return" on their investments, it did not define that term. *Penn Central*, 438 U.S. at 149 (Rehnquist, J., dissenting); R.S. Radford & Luke A. Wake, *Deciphering and*

---

[4] "[T]he temporary nature of a land-use restriction . . . should not be given exclusive significance one way or the other [under *Penn Central*]." *Tahoe-Sierra*, 535 U.S. at 337. Instead, the length and duration should be considered as part of the *Penn Central* equation, such that a longer and more oppressive restriction is more likely to amount to a taking.

[5] What is more, there is no opportunity for gamesmanship under this approach because the owner has no control over whether or when the land use authority will lift its restriction. But for the reasons outlined already, gamesmanship is a problem under the Ninth Circuit's approach. If the parcel-as-a-whole rule requires consideration of ***resurgent value***, after the restriction is lifted, then the authority may defeat a temporary takings claim for even the most draconian regulation by placing an expiration date on the restriction—even up to the moment the suit is filed.

Extrapolating: Searching for Sense in Penn Central, 38 Ecology L.Q. 731, 738–39 (2011) (observing that "the decision is virtually silent as to how [the economic impact] prong should be evaluated and weighed[,]" but suggesting that "[t]he most straightforward application of the economic impact prong as it was originally conceived would cut in favor of finding liability when regulation substantially impairs an income property's rate of return."). Justice Rehnquist noted in his dissent that this Court would eventually need to define what constitutes a "reasonable return" for various types of property, and that the Court must further "define the particular property unit that should be examined…" *Penn Central*, 438 U.S. at 149.

In the wake of *Tahoe-Sierra*, the lower courts are struggling with this very issue. For example, the Federal Circuit stated: "If the net income over the entire remaining life of the mortgage is the denominator there is no way that even a nearly complete deprivation (say 99%) for 8 years would amount to a severe economic deprivation when compared to our prior regulatory takings jurisprudence." *CAA*, 667 F.3d at 1247. Since an understanding of the right of reasonable economic returns is fundamentally vital to two of the three *Penn Central* tests—the "economic impact of the regulation on the claimant," and "the extent to which the regulation has interfered with distinct investment-backed expectations"—this issue is of nationwide importance. *See Penn Central*, 438 U.S. at 124.

C. This Court Should Either Provide Guidance as to How the *Penn Central* Factors Should be Evaluated and Weighed, or Clarify that these "Ad Hoc" Factors may be Appropriately and Definitively Resolved by a Jury

Nearly a century ago this court said that regulation effects a taking if it goes "too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). But this Court has only vaguely expounded upon this enigmatic standard. *Penn Central*, 438 U.S. at 124 ("[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government…"). Instead, *Penn Central* directed that courts should engage in an entirely ad hoc balancing test that considers (1) the economic impact of the restriction; (2) the owner's investment-backed expectations, and; (3) the character of the government's conduct. *Id*. at 124-27. But scholars of all ideological stripes have criticized *Penn Central* because it offers virtually no guidance to anyone. *See, e.g.*, John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. Envtl. L. & Pol'y, 171 (2005); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 Wm. & Mary Bill of Rts. J. 679 (2005).

It is therefore curious that the Ninth Circuit concluded that the district court had abused its discretion in allowing a jury to weigh the *Penn*

Central factors in favor of the Petitioner, Colony Cove LLC. This Court has never given significant guidance as to what showing is necessary to satisfy the *Penn Central* factors, or how heavily the factors should be weighed in the equation.[6] *See* Radford & Wake, 38 Ecology L.Q. at 732, 735-36 (concluding that *Penn Central* amounts to a high-stakes game of craps). To the contrary, this Court has repeatedly affirmed that *Penn Central* is an ad hoc test—one that requires a judgment, but without concrete rules guiding the analysis. *See Murr*, 137 S. Ct. at 1942; Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1557 (2003) ("The *Penn Central* approach is admittedly standardless.").

Accordingly, this Court should grant *certiorari* either to provide greater direction and predictability in regulatory takings cases or to affirm that the *Penn Central* factors may be evaluated and weighed by a jury. This Court has already held that the Seventh Amendment's right to a jury trial attaches in regulatory takings cases. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999). And the *Penn Central* factors present mixed questions of fact-and-law of which

---

[6] "[W]e are not likely to see teeth—much less principled decision-making—in our regulatory takings jurisprudence unless and until the Supreme Court should endeavor to provide more concrete guidance as to how the *Penn Central* test should be assessed in the context of a successful partial takings claim." 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, 41 (2017).

juries are uniquely capable of resolving. *See United States v. Gaudin*, 515 U.S. 506, 512–13 (1995) ("[T]he application-of-legal-standard-to-fact sort of question[s] ha[ve] typically been resolved by juries."); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976) (recognizing that a jury is well suited to weigh the "delicate assessments of the inferences a 'reasonable [decisionmaker]' would draw from a given set of facts…").

No one is better suited to judge whether regulation has "gone too far" in abrogating common law property rights than a jury of one's peers—drawn from the community, and knowledgeable as to the reasonable expectations of landowners in the area. Jurors were historically presumed to have special knowledge, which is vital in resolving land disputes. *See* Renée Lettow Lerner, *The Uncivil Jury, Part 2: The Unromantic Origins and Continuous Need for an Alternative*, Wash. Post: Volokh Conspiracy, (May 27, 2015); *see also* Theodore F.T. Plucknett, A Concise History of the Common Law 1130 (5th ed. 1956) (summarizing the early history of juries). Simply put, in the absence of any definitive legal standard directing the regulatory takings analysis, there is no basis for concluding that this jury was wrong in its approach to the *Penn Central* factors here.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be granted.

Respectfully submitted,

Karen R. Harned
Luke A. Wake*
Counsel of Record
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2061 (Telephone)
(615) 916-5104 (Facsimile)
luke.wake@nfib.org

Ilya Shapiro
CATO INSTITUTE
1000 Massachusetts Avenue, NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Kimberley S. Herman
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Road, Suite 104
Roswell, Georgia 30075
(678) 269-4966
khermann@southeasternlegal.org