No. 19-223

In The
Supreme Court of the United States

JANICE SMYTH,

Petitioner,

v.

CONSERVATION COMMISSION OF FALMOUTH and TOWN OF FALMOUTH,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Commonwealth of Massachusetts

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

It is well-known amongst the Justices of this Court,[1] the lower courts,[2] and the legal profession[3] that the multi-factor approach to adjudicating regulatory takings claims set out in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 124 (1978), is vague, overly elastic, outdated, and difficult to satisfy. As one scholar, who generally supports land use regulation, put it:

> [T]he *Penn Central* test . . . is so vague and indeterminate that it invites unprincipled, subjective decision making by the courts. The [*Penn Central*] three-factor test (which may only be a two-factor test) does not provide any clear direction of how to decide regulatory takings cases, inviting judges to decide based on their own personal values.

John D. Echeverria, *Is the* Penn Central *Three-Factor Test Ready for History's Dustbin?*, 52 Land Use L. & Zoning Dig. 3, 7 (Jan. 2000).

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[1] *Eastern Enterprises v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring) ("[I]t is fair to say [regulatory takings doctrine] has proved difficult to explain in theory and to implement in practice. Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law" (citing *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123 (1976))).

[2] *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 886 (D.C. Cir. 1999) (Williams, J., concurring); *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 36 (1st Cir. 2002).

[3] *See* Petition (Pet.) at 2-3, 12.

Respondents Conservation Commission of Falmouth and Town of Falmouth (together, "the Town") do not deny the importance of questions about the meaning of the *Penn Central* factors. The Town does contend that there are few conflicts below on *Penn Central*, and that the issue of whether the "character" factor should be excised from regulatory takings law is not proper here because Petitioner did not contest the "character" test in state court. These contentions easily fail. The conflict on the meaning and role of the *Penn Central* factors is well-documented, Pet. at 14-16, 21-26, and the importance of the issues independently justifies review. Sup. Ct. R. 10(c). Moreover, Mrs. Smyth was not required to ask the state court to abrogate the "character of the governmental action" factor when it has no authority to do that, *United States v. Hatter*, 532 U.S. 557, 567 (2001), the court below passed on the inclusion of the "character" inquiry in taking analysis, and Mrs. Smyth's arguments are not a new claim. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 331 (2010) (request to overrule precedent permissible as a new argument).

Ultimately, the Town defends the status quo in regulatory takings law, arguing that there is nothing wrong with confusion on the "economic impact" factor, or with an amorphous "investment-backed expectations" inquiry that (in the Town's own view) requires lower courts to balance *four* separate criteria to arrive at a conclusion. Response at 16. It also argues that the "character of the governmental action" is a valid part of the *Penn Central* test, and should be retained, notwithstanding subsequent precedent

demonstrating that it is doctrinally improper, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005), and damaging to takings litigation. Pet. at 29-36.

The questions presented are accordingly postured for review on the merits. Since there is no real doubt that the issues are important and unsettled, the Court should grant the Petition.

ARGUMENT

I.

THE TOWN FAILS TO REFUTE THE IMPORTANCE OF THE *PENN CENTRAL* ISSUES PRESENTED BY THIS CASE

The Petition argues that the *Penn Central* issues raised by the decision below are important and unsettled and go to the heart of this Court's regulatory takings doctrine. The Town does not and cannot take issue with this position.

This Court has long recognized the *Penn Central* framework as the foundation of the regulatory takings doctrine. But it has also recognized that the *Penn Central* approach is troubled due to many unresolved, "vexing" questions about the meaning of the three criteria—the "economic impact" of regulation, the degree of interference with "investment-backed expectations," and the "character" of the government's action. *Lingle*, 544 U.S. at 539; *Eastern Enterprises*, 524 U.S. at 541 (Kennedy, J., concurring). Indeed, recent decisions suggest that the "character" factor is obsolete and improper. *Id.* Due to its infirmities and indeterminacies, the *Penn Central* approach is

perceived as an unwieldly dinosaur and enemy of property rights. *Koontz v. St. Johns River Water Mgmt. Dist.*, No. 11-1447, Oral Argument Transcript at 30:4-5 (Chief Justice Roberts observing that a taking under *Penn Central* "doesn't happen very often").

The Town declines to meet these points head-on, arguing instead that this Court can live with the confusion about the "economic impact" and "investment-backed expectations" factors and that it cannot address the propriety of the "character" factor because Mrs. Smyth did not ask the state court to overrule it. Each point fails.

A. The Town's Response Confirms That the "Economic Impact" Factor Is Rudderless and Often Arbitrary; The Court Should Modify It

Initially, the Town defends the current understanding of the "economic impact" factor, which requires a court to "compare the value that has been taken from the property with the value that remains." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 (1987). In so doing, it does not deny that lower court decisions are wildly inconsistent on the issue of what level of lost property value is an "economic impact" that supports a taking. Pet. at 14-16. Instead, it defends the confusion on the ground that the "economic impact" issue is only one part of the *Penn Central* test. It seems to argue that inconsistencies about how much decline in property value "goes too far" will be diluted by the courts' application of other *Penn Central* factors. Response at 11-12. But this is no answer when courts are just as

confused about the final two *Penn Central* factors as they are about the first. Pet. at 20-28. Hope that courts may stumble into the right regulatory takings result, even though they have no idea how to draw the line on the initial "economic impact" factor, is hardly a basis for leaving things the way they are.

The Town makes a half-hearted attempt to suggest that *Penn Central*'s "economic impact" factor is capable of reasonable application as a test for lost property value, relying on a statement in *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003). The statement declares:

> It is perfectly true that no percentage diminution in value *necessarily* results in a compensable regulatory taking, but that is not the same as saying that below a certain percentage diminution, a taking can never be compensable, or even that an assessment of the economic impact below that percentage can never favor a conclusion that compensation is merited.

Id. at 1345. This passage does not rebut the claim that *Penn Central*'s "economic impact" factor is rudderless and arbitrary; it *confirms* it. The "economic impact" factor makes "demands for calculations reeking of precision," but, lacking any principled cut-off point, it becomes a test that is actually "imprecise [and] subjective." Steven J. Eagle, *"Economic Impact" in Regulatory Takings Law*, 19 Hastings W.-N.W. J. Envtl. L. & Pol'y 407, 410 (2013).

The Court should grant the Petition to clarify and re-cast the "economic impact" factor. *Id.* at 441 (The

"'economic impact of the regulation on the claimant' test . . . is a prime example of the need for a fresh examination of *Penn Central*."); John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171, 172 (2005) ("The next 'big thing'—perhaps the last big thing—in regulatory takings law will be resolving the meaning of the *Penn Central* factors."). More specifically, the Court should reframe the factor in light of *Lingle*'s conclusion that regulatory takings analysis must focus on the "severity of the burden that government imposes upon private property rights," *Lingle*, 544 U.S. at 539. That is, the Court should convert the "economic impact" factor from a criteria focused solely on economic harm (property values) to one that also weighs burdens to traditional common law property rights, like the right to use property.[4] *United States v. Dickinson*, 331 U.S. 745, 748 (1947) ("Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired . . . ."). *Penn Central*'s "economic impact" factor should become a broader "impact (or burden) on property rights" factor. 544 U.S. at 539, 542.

Under this approach, a restriction that destroys almost all use and value of property causes an impact

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[4] The Town briefly suggests that courts applying *Penn Central* already weigh impacts besides lost property value, including harm to property use. The case law does not bear that out. The vast majority of courts focus solely on harm to property values, likely because *Penn Central* highlights "economic" impacts, and other precedent from this Court focuses the test on property values. *Keystone*, 480 U.S. at 487. This approach is flawed and unduly narrow, *Lingle*, 544 U.S. at 542, and the Court should reconsider it.

sufficient to support a takings claim, regardless of the existence of minor residual property value. Here, the parties agreed (in undisputed facts entered into at the trial court) that Town regulations rendered Mrs. Smyth's lot "unbuildable."[5] Appendix on Appeal, Vol. I at 652-53, ¶¶ 105-107. That impact should give rise to an inference that a taking of her property occurred, even if the parcel retains about 9% of prior monetary value.

B. The Town's Response Confirms That the Investment-Backed Expectations Factor Is Ill-Defined, Unwieldly, and in Need of Boundaries

The Town also does not deny that the "investment-backed expectations" question presented here is important. It appears to believe, however, that the "expectations" factor is sufficiently and fairly defined in existing case law. Its own argument undermines this view. For instance, the Town points out that the "investment-backed expectations" factor includes four overlapping inquiries:

> First, it asks what distinct expectations a landowner had for her property. Second, what investments backed those expectations. Third, the extent to which those investments were objectively reasonable when made. Fourth, the extent to which the government action has interfered with those distinct,

[5] The Town notes that Mrs. Smyth put her lot up for sale after the variance denial, but fails to clarify that she had no offers after that denial.

> reasonable, and investment-backed expectations.

Response at 16. The Town explains that "[t]he 'shifting' focus of the lower courts . . . is explained by courts shifting among these separate, but equally valid and relevant, inquiries." *Id.* at 17 (citation omitted). And thus, the Town concisely confirms the need for reassessment.

The "investment-backed expectations" factor is so multi-faceted, and so devoid of parameters, that courts can use it any way they want. They can apply it to the facts of a case based on any, or some, or all of the four elements noted by the Town, stripping the factor of any definite meaning, and leaving claimants without any clear path to satisfy it. *See* Robert M. Washburn, *"Reasonable Investment-Backed Expectations" as a Factor In Defining Property Interest*, 49 Wash. U. J. Urb. & Contemp. L. 63, 63 (1996) (Since *Penn Central*, "courts have varied in their interpretation of the reasonable investment-backed expectations doctrine, resulting in a lack of clear direction as to its meaning and importance."); Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 Urb. Law. 215, 215 (1995) ("[T]he Court is confused about the meaning of this term, federal and state courts divide on how to apply it, and its role in taking law remains a puzzle.").

The Town makes no argument that this Court's current precedent adequately defines the "expectations" factor or contains sufficient guidance to constrain the factor. *See generally* Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use*

Planning, 20 Urb. Law. 735, 765 (1988) ("[T]he High Court has provided scant guidance as to the meaning and application of this term."); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 Wm. & Mary Bill Rts. J. 679, 767-68 (2005) (noting "no attempt by the Court to explain what it intended this phrase to mean, how it fits into the scheme of constitutionally protected property rights, or how it is to be applied"). The Town takes issue, however, with the notion that the chameleon-like "expectations" factor is unfair to property owners, citing a single decision in favor of the claimant. Response at 14. It is true that there are a few cases in the last 40 years in which the expectations factor tilts toward a taking. But the fact that a mean old dog may lie down once in a while doesn't mean it is safe to play with. Until the Court applies the expectations factor in favor of a property owner, or identifies obtainable goalposts, it will function as a test capable of swallowing takings claims in (at least) four ways. Response at 16.

The Court should take this case to clarify and cabin the expectations doctrine. In particular, it should confirm that "expectations" analysis properly focuses on the "degree to which [regulation] interferes with legitimate property interests." *Lingle*, 544 U.S. at 540; Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1370 (1993) ("Neither [Justice Brennan] nor anyone else offers any telling explanation of why this tantalizing notion of expectations is preferable to the words 'private property . . . .'"). As such, the extent of the owner's

investments are irrelevant. The primary concern is the history and nature of the property at issue. A person that, like Mrs. Smyth, acquires a parcel that is developable as a practical matter, and which is not burdened by long-standing, shared restrictions at the time of acquisition, has legitimate property interests and use expectations. *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001).

C. The Town Offers No Reason for Retaining the Character Factor, and the Issue Is Properly Before the Court

The third question presented invites the Court to expunge *Penn Central*'s "character of the governmental action" factor from regulatory takings analysis. In her Petition, Mrs. Smyth showed that the "character" consideration is incompatible with modern regulatory takings precedent, and that it accordingly "insert[s] antiquated and unwarranted criteria into regulatory analysis," to the detriment of claimants. Pet. at 29-33.

The Town does not argue that the "character" factor can be reconciled with decisions like *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which carved out physical invasions from regulatory takings law, and *Lingle* which clarified that the burden of regulation, and not its character, is what matters in takings cases. Pet. at 29-32. Instead, the Town seeks to avoid a reckoning on the issue on the ground that Mrs. Smyth did not raise the question of excising the "character" factor from regulatory takings analysis in state court. This is a futile contention.

This Court can review "'an issue not pressed [below] so long as it has been passed upon . . . .'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). In this case, the state courts held that regulatory takings analysis includes consideration of "the character of the governmental action." App. A-8; *see also* App. B-6. Since the courts passed on the issue of whether the "character" prong is part of takings analysis, the issue is before the Court. Even if this were not so, Mrs. Smyth's challenge to the "character" factor is a permissible new argument in support of a takings claim she has consistently advanced. *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). Finally, state courts have no authority to modify this Court's precedent. Mrs. Smyth did not have to make an abrogation request that the state court could not grant to raise the issue here.

When it finally touches on the merits of the "character" issue, the Town argues that *Lingle* "reaffirmed the importance and continuing vitality of *Penn Central*'s inquiry into the character of the governmental action." Response at 20. The parties are in clear disagreement on the merits of the presented "character" question then, for Mrs. Smyth contends that *Lingle* removed any latent doctrinal support for weighing regulatory "character" in takings analysis. Pet. at 35.

Finally, the Town argues that the "character" factor is an even-handed consideration in takings cases, pointing to this Court's decision in *Hodel v. Irving*, 481 U.S. 704 (1987). Yet, while the *Hodel* Court used the term "character," it actually focused on the burden on property rights in holding that a regulation stripping away the right to devise property was a taking. *Hodel* is an example of where the *Penn Central* test should go—toward a framework that focuses on the regulatory impact on the property owner, especially on the bundle of rights that make up "property," rather than one that wrongly focuses on the legitimacy of regulation through the "character" factor.

CONCLUSION

The Court should grant the Petition.

DATED: October 2019.

Respectfully submitted,

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