No. 20-54

In the

Supreme Court of the United States

BRIDGE AINA LE`A, LLC,
Petitioner,

v.

HAWAII LAND USE COMMISSION,
Respondent.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual right to ownership and use of private property. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmnt. Dist.*, 570 U.S. 595 (2013); *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012); and *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

SUMMARY OF ARGUMENT

The Takings Clause of the Fifth Amendment to United States Constitution is meant to protect a preexisting natural right to own and use property. If the decision in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), was meant to be one of the means by which the courts would implement this protection, it is a failed experiment. The *Penn Central* factors for determining when a regulation goes "too far" are unmoored from the basic liberty that the Takings Clause was meant to protect. Further, the factors are so uncertain that the lower courts cannot seem to agree on how to apply them to cases alleging a taking. Apparently, the only area in which lower

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[1] All parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

courts can find agreement is that the property owner should lose. *See* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM & Mary L. Rev. 35, 89 (2016) ("Fewer than 10 percent of regulatory claims are successful."); Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 Fed. Circuit B.J. 677, 692-93 (2013) (noting that only four out of forty-five cases prevailed under a *Penn Central* analysis). This Court should grant review in this case to overrule *Penn Central* and to return the law of Takings to its core purpose of protecting the individual right to own and use private property.

REASONS FOR GRANTING THE WRIT

I. The Takings Clause Was Meant to Protect an Individual Right to Own and Use Property

This Court has so often characterized the individual rights in property as "fundamental" that it is difficult to catalogue each instance. The Court has noted that these rights are among the "sacred rights" secured against "oppressive legislation." *Bartemeyer v. State of Iowa*, 85 U.S. 129, 136 (1873). These rights are the "essence of constitutional liberty." *Johnson v. United States*, 333 U.S. 10, 17 n.8 (1948). In a word, they are "fundamental." *In re Kemmler*, 136 U.S. 436, 448 (1890). Justice Washington noted that rights that are "fundamental" are those that belong "to the citizens of all free governments." *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823). He listed individual rights in property as one of the primary categories of fundamental rights. *Id.*

This Court has followed Justice Washington's view, noting that constitutionally protected rights in property cannot be viewed as a "poor relation" with other rights secured by the Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994); *see Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citing to John Locke, Blackstone, and John Adams, the Court noted that "rights in property are basic civil rights").

Moreover, the individual right in property is not in mere ownership. Instead, this Court has noted that the right in property is the right to use that property. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987); *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). This Court did not invent the idea of the ownership and use of private property as a fundamental right. The individual rights in private property are a cornerstone of the liberties enshrined in the Constitution.

Although there was little mention of a fear of federal confiscation of property during the ratification debates, James Madison included the Takings Clause in the proposed Bill of Rights based on the protections included in the Northwest Ordinance. *See* THE BILL OF RIGHTS, ORIGINAL MEANING AND CURRENT UNDERSTANDING, (Eugene W. Hickcok, Jr., ed.) (Univ. Press of Virginia 1991) at 233. The Northwest Ordinance of 1787 included the first analog of the Bill of Rights and it expressly protected property from government confiscation. Robert Rutland, THE BIRTH OF THE BILL OF RIGHTS (Northeastern Univ. Press 1991) at 102. The drafters of the individual rights provisions of the Northwest Ordinance took their cue from the 1780 Massachusetts Constitution. *Id.* at 104.

While Madison may have used the language of the Massachusetts Constitution in crafting protections for individual rights in property, those protections, were firmly grounded in the Founders' theory of individual liberty and government's obligation to protect that liberty. This is the theory of government that animates our Constitution.

One of the core principles of the American Founding is that individual rights are not granted by majorities or governments but are inalienable. Declaration of Independence ¶2, 1 Stat. 1. The Fifth Amendment seeks to capture a part of this principle in its announcement that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V.

The importance of individual rights in property predated the Declaration of Independence and the American Constitution. Blackstone noted that property is an "absolute right, inherent in every Englishman … which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND Bk. 1, Ch. 1 at 135 (Univ. of Chicago Press 1979) (1765). From the pronouncement that "a man's house is his castle" (Sir Edward Coke, THIRD INSTITUTE OF THE LAWS OF ENGLAND at 162 (1644) (William S. Hein Co. 1986)) to William Pitts' argument that the "poorest man" in the meanest hovel can deny entry to the King (*Miller v. United States*, 357 U.S. 301, 307 (1958)), the common law recognized the individual right in the ownership and use of private property. Blackstone captures the essence of this right when he notes that the right of property is

the "sole and despotic dominion … over external things of the world, in total exclusion of the right of any other person in the universe." Blackstone, COMMENTARIES, *supra*, Bk. 2, Ch. 1 at 2. The individual rights in private property are part of the common law heritage that our Founders brought with them to America.

Alexander Hamilton argued that the central role of property rights is the protection of all of our liberties. If property rights are eliminated, he argued, the people are stripped of their "security of liberty. Nothing is then safe—all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, *The Defense of the Funding System*, in 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973). This idea was also endorsed by John Adams: "Property must be secured, or liberty cannot exist." John Adams, *Discourses on Davila*, in 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851). Our nation's Founders believed that all which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* (Oct. 10, 1787), *reprinted in* 1 THE FOUNDERS CONSTITUTION (Philip B Kurland and Ralph Lerner, eds., Univ. Chicago Press 1987) 597.

The problem is that the *Penn Central* test does not protect any of these values.

II. *Penn Central* Directs Courts to Examine Economic Impact Rather than Limitation on Use

Penn Central posits "economic impact of the regulation" as a factor for courts to consider whether a regulation has worked a taking. Economic impact might be relevant to property that only consists of an investment portfolio. *See Concrete Pipe & Prods. of Calif., Inc. v. Constr. Laborers Pension Tr. For S. Calif.*, 508 U.S. 603, 645 (1993). For regulation of real property, however, the relevant analysis is the restriction on use. As one court noted, focus on "'market value' allows 'external economic forces,' such as inflation, to artificially skew the takings inquiry." *Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1118 (Fed. Cir. 2015). But the Takings Clause was not designed solely to protect the "value" of real property.

The text of the Clause focuses on a taking for public *use*, and not simply a taking of value. When the regulation limits the use of the property, the focus of the inquiry ought to be on use, not value. The proper inquiry ought to be what uses of the property are permitted under the regulation, recognizing that the natural right at issue is that of the individual to use his property as he sees fit. Is the property required to be left substantially in its natural state? *Lucas*, 505 U.S. at 1018. Does the regulation permit the owner to change the use to one preferred by the owner rather than one preferred by the government? *Id*. The inquiry should be whether the property owner's desired use would injure the rights of other property owners (as in the case of a nuisance). The inquiry should never be how the community would prefer the prop-

erty to be used. If that is the question, then the Takings Clause provides a remedy to the community – they can pay for the property and then gain the right to its use.

Here, the property was zoned for agricultural uses – but no crops can be grown there. Whether or not some other party is willing to purchase the property on speculation of future permissions from the government, the current owner has been denied the right to use the property. *Penn Central* is ill-suited to adjudicate that claim.

III. The "Reasonable Investment-Backed Expectations" Factor Is too Uncertain to be Useful.

The second *Penn Central* factor is the extent of the property owner's "investment-backed expectations." *Penn Central*, 438 U.S. at 124. As this Court noted in *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, 38 (2012), this question often hinges on the "law in force in the State in which the property is located." The Court in *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-27 (2001), ruled that merely acquiring the property after the enactment of the challenged regulation is not sufficient to defeat a property owner's "reasonable investment-backed expectations." But the *Palazzolo* Court declined "to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law." The issue was left open for the lower courts.

If anything, the issue became murkier after this Court's ruling in *Murr*, 137 S.Ct. at 1945, where the courts are told to determine this question by consider-

ation of "state and local law" and "background customs and the whole of our legal tradition." As Chief Justice Roberts noted in his dissent in *Murr*, such uncertainty "allows the government's interests to warp the private rights that the Takings Clause is supposed to secure." *Id*. at 1957 (Roberts, C.J., dissenting).

It is no surprise that the lower federal courts are uncertain how to apply *Palazzolo*, if they consider that decision at all. *See Maine Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145, 154 (1st Cir. 2012) (noting that "'reasonable investment-backed expectations' is a concept that can be difficult to define more concretely."); J. David Breemer & R.S. Radford, *The (Less?) Murky Doctrine of Investment –Backed Expectations After Palazzolo, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre–Palazzolo Muck*, 34 S.W.U. L. Rev. 351, 409-17 (2005) (collecting cases noting that lower courts continue to apply the "notice rule" rejected by *Palazzolo*).

The Federal Circuit has ruled that investment-backed expectations are set by the law in effect at the time of purchase – the property owner must establish that the law did not include the challenged regulation. *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1345 (Fed. Cir. 2018). Similarly, the Ninth Circuit has ruled that there can be no "investment-backed expectations" where the law in place at the time of purchase has already cut off the property right sought to be enforced. *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010). As the dissent noted in that case, the Ninth Circuit simply ignored the Court's ruling in *Palazzolo* and reduced the *Penn Central* analysis from a "three-factor balancing test

into a 'one-strike-you're-out" checklist." *Id.* at 1123 (Bea, J. dissenting).

The current state of the law on "investment-backed expectations" remains murky at best. As Breemer and Radford noted, without some further definition it operates as little more than a "doctrine of assumption of the risk" and has no foundation in the natural right to own and use property that was meant to be protected by the Takings Clause. Breemer and Radford, *supra* at 425.

IV. The "Public Interest" Cannot Justify an Uncompensated Taking

The third *Penn Central* factor is the "character of the governmental action." *Penn Central*, 438 U.S. at 124. As used in *Penn Central*, this factor was meant to distinguish per se takings from regulations that adjust "the benefits and burdens of economic life to promote the public good." *Id.* In later cases, the courts began to analyze the "character" factor by asking whether the regulation serves a public interest. But using *Penn Central* to permit regulations that restrict a non-nuisance use of private property in order to advance some public benefit turns the protections of the Takings Clause on their head.

As this Court has repeatedly recognized, including in *Penn Central* itself, 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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Penn Central*, 438 U.S. at 123-24; *see also id.* at 139 (Rehnquist, J., dissenting) ("The question in this case is whether the cost associated with the city

of New York's desire to preserve a limited number of 'landmarks' within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties"). This aspect of the Takings Clause was meant to provide protection of individual rights from raw majoritarian rule.

The *Penn Central* three-factor test severely undercuts that protection. *Penn Central* was not meant to have such a sweeping reach. As Justice Brennan's own lead law clerk on the case, David Carpenter, has acknowledged, the opinion was meant to be narrow, "making modest efforts to bring a little content to an area of law that was . . . then quite formalist and in disarray." David Carpenter et al., *Looking Back on* Penn Central: *A Panel Discussion with the Supreme Court Litigators*, 15 FORDHAM ENVTL. L. J. 287, 307-08 (2004).

Justice Brennan's "modest" effort to bring some content to regulatory takings has taken the lower courts down irrelevant and pernicious paths of inquiry. The economic impact of the regulation to the private property owner, and particularly the extent to which the regulation has interfered with his investment-backed expectations, when considered apart from whether a particular regulation is designed to prevent harmful uses of the private property, is really more relevant to damages and therefore the "just compensation" prong of the Takings analysis than the initial inquiry into whether a taking has occurred at all.

When those economic impacts are balanced against the benefit that the government will derive from its regulations, the *Penn Central* test lends itself

to the very abuse that the Fifth Amendment was designed to protect against. Indeed, the larger the benefit to be gained for the public the more tempted government will be to impose economic impacts on individual property owners through regulations designed to grab that benefit without having to pay for it.

Because *Penn Central*'s ad-hoc, three-factor balancing test can be used to uphold the very abuses that the Fifth Amendment was designed to prohibit, it is well past time to put an end to this failed experiment. Granting certiorari in this case would provide that much needed opportunity.

CONCLUSION

Instead of protecting use, *Penn Central* only asks what "value" was taken and even then, offers no protection unless all or nearly all value is stripped from the land. Instead of looking on the restrictions imposed by the government regulation, it allows courts to rule that the rights to use the land were lost when prior regulations were enacted, so the current owner no longer has an "investment-backed expectation." Instead of looking at how the regulation disrupts use, courts now look whether the regulation serves a public interest. *Penn Central* does not implement the Fifth Amendment's protections for the individual right to own and use property – it facilitates the destruction of those rights. The Court should grant review for the purpose of overruling *Penn Central*.

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