No. _____

In The
Supreme Court of the United States

EVANS CREEK, LLC,

Petitioner,

v.

CITY OF RENO,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a property owner states a valid takings claim by alleging that a regulation substantially deprives the owner of the right to use property, or must the owner satisfy each of the factors set out in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)?

PARTIES TO THE PROCEEDING

Petitioner Evans Creek, LLC, was the plaintiff and appellant below.

Respondent City of Reno was the defendant and appellee below.

CORPORATE DISCLOSURE STATEMENT

Evans Creek, LLC, is a privately held, limited liability corporation formed under the laws of the state of Minnesota.

RELATED PROCEEDINGS

Evans Creek, LLC v. City of Reno, No. 21-16620, 2022 WL 14955145 (9th Cir. Oct. 26, 2022). Judgment filed and entered October 26, 2022.

Evans Creek, LLC v. City of Reno, No. 3:20-cv-00724-MMD-WGC, Order (D. Nev. Sept. 20, 2021).

Evans Creek, LLC v. City of Reno, No. 3:20-cv-00724-MMD-WGC, 2021 WL 4173919 (D. Nev. Sept. 14, 2021).

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
CORPORATE DISCLOSURE STATEMENT ii
RELATED PROCEEDINGS ii
TABLE OF AUTHORITIES vi
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISION AT ISSUE 1
INTRODUCTION 2
STATEMENT OF THE CASE 7
A. The Property 7
B. History of Development Barriers 7
1. Early development attempts 7
2. The 2020 denial of annexation and development 10
C. Procedure Below 11
1. The district court litigation 11
2. The Ninth Circuit's decision 13
REASONS FOR GRANTING THE WRIT 16
I. THE *PENN CENTRAL* MULTIFACTOR "TEST" IS AN UNSOUND AND UNWORKABLE APPROACH TO DETERMINING IF A USE RESTRICTION CAUSES A TAKING 16

A. The Curious Origin of the *Penn Central* Test 17

B. The Three Factors Are Individually Unworkable 19

1. The "economic impact" factor fails to gauge whether property has been taken and should be excised from takings law 19

2. The "investment-backed expectations" factor is indecipherable and should be excised from takings law 22

3. The "character of the governmental action" factor is outdated and improper 25

II. THE COURT SHOULD REFOCUS TAKINGS ANALYSIS ON THE RIGHT TO USE PROPERTY 29

A. The Understanding That a Taking Can Arise from Burdens on the Right to Use Property Has Deep Constitutional Roots 29

B. Takings Analysis Should Focus on the Degree to Which Regulation Injures the Right to Use Property 32

CONCLUSION 36

Appendix

Memorandum Opinion (9th Cir. Oct. 26, 2022).....A-1

Order granting motion to dismiss
(D. Nev. Sept. 20, 2021).....B-1

Order granting in part and denying
in part the motion to dismiss
(D. Nev. Sept. 14, 2021).....C-1

Complaint
(D. Nev. Dec. 20, 2020) D-1

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2023 WL 2291511 (2d Cir. Mar. 1, 2023) 26

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Borough of Bernardsville,
608 A.2d 1377 (N.J. 1992)..... 20

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58 F.4th 807 (4th Cir. 2023)..... 4, 26, 28–29

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141 S.Ct. 731 (2021) 3, 5, 20, 34

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v. People ex rel. Tibbits,
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5 Ohio 391 (1832)..... 31

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2 Johns. Ch. 162 (N.Y. 1816)..... 31

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.....6, 12, 14, 19, 21, 25, 27–29, 32–34

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137 S.Ct. 1933 (2017) 5, 19, 34

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PETITION FOR A WRIT OF CERTIORARI

Evans Creek, LLC, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is unpublished, but can be found at 2022 WL 14955145 and in Petitioner's Appendix (App.) at A. The district court issued two orders. The final order is unpublished and found at App. B. The district court's initial opinion and order is found at 2021 WL 4173919 and attached here as App. C.

JURISDICTION

The lower courts had jurisdiction over this case under the Fifth Amendment to the United States Constitution and 42 U.S.C. § 1983. The Ninth Circuit entered final judgment on October 26, 2022. App. A. This Court has jurisdiction under 28 U.S.C. § 1257. Justice Kagan granted two extensions of time to file a Petition for Writ of Certiorari in this case, extending the time to file up to and including March 14, 2023.

CONSTITUTIONAL PROVISION AT ISSUE

The Fifth Amendment to the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

INTRODUCTION

The right to productively use private property has long been treated as an important and constitutionally protected property interest. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945). Therefore, since the beginning of the Republic, courts have recognized that an unconstitutional "taking" of property can occur when government deprives a person of the right to use their property. Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 Utah L. Rev. 1211, 1245 ("antebellum state courts took the final conceptual step and held takings of usage rights to be compensable"). In a series of cases culminating in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court confirmed that a regulation can cause a taking when it "goes too far" in restricting property use. *Id.* at 415.

More than fifty years later, in *Penn Central*, this Court attempted to articulate a more specific standard for determining when the regulation of property use causes a taking. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124–27 (1978). In considering whether a state historical preservation law took property rights by preventing the owners of Grand Central Terminal from building a high-rise office building, the *Penn Central* Court explained that there is no "set formula" for determining when land use regulation causes a taking. *Id.* at 124. Further declaring that the takings inquiry is "essentially ad-hoc," the Court set out three considerations to guide the inquiry. The Court stated that "[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 are, of course, relevant considerations. So, too, is the character of the governmental action." *Id.* (citation omitted).

This multifactor approach soon became the default "test" for determining when a taking arises from a restriction on the use of private property. However, in the last fifty years, it has become painfully and abundantly clear that the multifactor *Penn Central* test is utterly incapable of serving in its purported role as a constitutional test. As Justice Thomas put it, "nobody—not States, not property owners, not courts, nor juries—has any idea how to apply this standardless standard." *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 141 S.Ct. 731, 731 (Mem) (2021) (Thomas, J., dissenting from denial of certiorari).

The *Penn Central* factors are poorly defined, confusing, and untethered to the text and history of the Takings Clause. In practice, they are subjective and unworkable. Joseph L. Sax, *The Property Rights Sweepstakes: Has Anyone Held the Winning Ticket?*, 34 Vt. L. Rev. 157, 159 (2009) (describing *Penn Central* as an "open-ended, I-(hope)-I-know-it-when-I-see-it approach"); Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn. St. L. Rev. 601, 602 (2014) ("the [*Penn Central*] doctrine has become a compilation of moving parts that are neither individually coherent nor collectively compatible"). The indeterminacy of the *Penn Central* factors "invites unprincipled, subjective decision making," John D. Echeverria, *Is the* Penn Central *Three-Factor Test Ready for History's Dustbin?*, 52 Land Use L. & Zon. Dig. 3, 7 (2000), which generates

wildly inconsistent outcomes in lower courts. William W. Wade, Penn Central*'s Ad Hocery Yields Inconsistent Takings Decisions*, 42 Urb. Law. 549 (2010).

Bluntly put, the *Penn Central* framework is a "veritable mess," *Blackburn v. Dare County*, 58 F.4th 807, 813 (4th Cir. 2023), which (like many multifactor tests) substitutes "a serious constitutional inquiry with a guessing game." *Shurtleff v. City of Boston*, 142 S.Ct. 1583, 1610 (2022) (Gorsuch, J., concurring). The only constant in *Penn Central*-driven litigation is that property owners almost always lose—regardless of how oppressive a challenged property use restriction may be. *District Intown Properties Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 886 (D.C. Cir. 1999) (Williams, J., concurring) ("Few regulations will flunk this nearly vacuous test."); Daniel R. Mandelker, *Litigating Land Use Cases in Federal Court: A Substantive Due Process Primer*, 55 Real Prop., Trust & Estate L.J. 69, 96–97 (2020) ("a takings claim is almost impossible to win").

To make matters worse, the *Penn Central* approach is totally disconnected from the property right at issue: the right to use property. *Penn Central* is supposed to help determine when the regulation of property use "goes too far," 438 U.S. at 127; *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2071–72 (2021), yet, none of the *Penn Central* factors actually considers the degree to which regulation harms the right to use property. The test weighs the impact of regulation on property *values*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987), though "[n]o one knows how much diminution in value

is required,"[1] but it ignores the burden on an owner's right to use property.

Given the significant flaws in the *Penn Central* framework, it is not surprising that a Justice of this Court has called for its reevaluation. *Bridge Aina Le'a, LLC*, 141 S.Ct. at 731 (Thomas, J., dissenting from denial of petition for certiorari); *Murr v. Wisconsin*, 137 S.Ct. 1933, 1957 (2017) (Thomas, J., dissenting) ("it would be desirable for us to take a fresh look at our regulatory takings jurisprudence"). Lower courts and commentators have likewise showered *Penn Central* with criticism and urged the Court to reconsider it. *See Nekrilov v. City of Jersey City*, 45 F.4th 662, 681 (3d Cir. 2022) (Bibas, J., concurring); Michael M. Berger, Tahoe Sierra*: Much Ado About—What?*, 25 U. Haw. L. Rev. 295, 314 (2003) (The *Penn Central* inquiry is typically "so fraught with uncertainty that landowners must often litigate to the highest court that will hear them out to determine whether they have even properly stated a claim[.]").

This case presents the Court with an opportunity to engage in the long overdue reassessment of *Penn Central*, to give litigants and courts concrete and doctrinally appropriate "guidance" on when a regulation causes a taking. *Bridge Aina Le'a, LLC*, 141 S.Ct. at 732 (Thomas, J., dissenting from denial of certiorari) (quoting *Palazzolo v. Rhode Island*, 533

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[1] Richard A. Epstein, *From* Penn Central *to* Lingle*: The Long Backwards Road*, 40 J. Marshall L. Rev. 593, 604 (2007); *see also* Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, 334 (2007) ("The Supreme Court has never given us definite numbers—it has never said that a value loss less than a specified percentage of pre-regulation value precludes a regulatory taking, or that one greater than some threshold (short of a total taking) points strongly toward a taking.").

U.S. 606, 617 (2001)). For a quarter century, Evans Creek has been unable to proceed with development of a large parcel of land, one surrounded by development, because it is publicly desirable as "open space." The Ninth Circuit held that, "[a]ssuming, without deciding, that Evans Creek has plausibly pleaded that denying its 2020 application . . . effectively forecloses *any feasible development on the property*, Evans Creek has failed to plausibly plead a regulatory taking." App. A-2 (emphasis added). In the court's view, Evans Creek's allegation that its land must be left as open space was not enough to state a claim without an allegation of a specific amount of lost "property value" and valid "investment-backed expectations." App. A-3. This cannot be the law.

The Court should grant the Petition to reconsider *Penn Central* and to (1) excise the dysfunctional and doctrinally flawed "economic impact," "investment-backed expectations," and "character of the governmental action" factors from takings analysis, and (2) refocus the inquiry on the degree to which regulation burdens the right to use property. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (takings analysis focuses on "burdens" on legitimate property interests); *Nekrilov*, 45 F.4th at 681 (Bibas, J., concurring) ("The better solution is to go back to the Takings Clause's original public meaning. Under that standard, the government would have to compensate the owner whenever it takes a *property right*[.]").

STATEMENT OF THE CASE

A. The Property

This case arises from the regulation of a large parcel of land, often called the Ballardini Ranch, in Washoe County, Nevada. App. C-2. In 1997, Everest Development Company, LLC, entered into an agreement with the Ballardini family to purchase a portion of the Ranch. *Id.* Everest is a Minnesota company owned by the same principals as Plaintiff-Petitioner Evans Creek. In 1998, the Ballardini family sold 1,019 acres of the Ballardini Ranch ("the Property") to Evans Creek. *Id.* Evans Creek's principals intended to move to Nevada and develop a master-planned residential community on the Property. *Id.*

At the time of purchase, the Property was vacant and located in the unincorporated territory of Washoe County. App. C-2–3. The northern 419 acres of the property were located within the City of Reno's sphere of influence ("SOI")[2] and, thus, subject to City regulation. The remaining, southern 600 acres were not within the SOI at the time of purchase, but within Washoe County. The land surrounding the Property is developed. App. C-3.

B. History of Development Barriers

1. Early development attempts

The City's master development plan controls development within the City and its SOI. App. C-3. In November 1997, as Evans Creek was acquiring title,

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[2] "Sphere of influence" refers to "an area into which a political subdivision may expand in the foreseeable future." Nev. Rev. Stat. § 278.0274(6).

it asked the City to amend its master plan to include the southern 600 acres of the Property in the City's SOI, in anticipation of future annexation and development of the Property. *Id.* The request included a development plan anticipating 2,226 residential units. Evans Creek later withdrew this initial proposal due to "hostility and threats from community members and government officials from the City and Washoe County." *Id.*

In 2000, Evans Creek submitted a renewed application for a master plan amendment that would bring all its Property within the City's SOI and allow annexation and development. App. C-4. The City denied the request. That same year, Washoe County adopted a resolution to acquire the Property as part of its Open Space Plan. Evans Creek contends that the purpose was "to prevent all attempts to develop the Property." *Id.*

In 2002, a draft of a revised Regional Plan proposed including the southern portion (and thus all) of the Property within the City's SOI. Plaintiff soon filed an annexation application ("2002 Application"). App. C-4. Yet, Washoe County opposed the proposed inclusion of the southern 600 acres of the Property in the City's SOI, so as to preserve it as open space. Ultimately, the updated Regional Plan did not include that portion of the Property in the City's SOI. *Id.* In response, Evans Creek withdrew its 2002 Application. In 2003, Evans Creek filed another annexation application with the City. Again, Washoe County opposed the proposal, and the City then denied the application. *Id.*

In 2004, Washoe County initiated eminent domain proceedings to acquire the Property. Plaintiff

filed suit in response, and the parties reached an agreement in 2006. *Id.* As part of the settlement, Washoe County agreed not to oppose Evans Creek's future attempts to include all of the Property within the City's SOI. App. C-4–5.

The City then encouraged Evans Creek to apply for acceptance of the southern 600 acres in the City's SOI, thereby unifying it with the northern part. App. C-5. The City told Evans Creek that this step was needed before annexation and development could occur. *Id.* Indeed, Evans Creek was informed and understood that it would not be able to seek development permits from the City until annexation occurred. *Id.*; *see also* App. D-1, ¶ 1, D-2–3, ¶ 2, D-5, ¶ 12, D-15–16, ¶ 49, D-6, ¶ 18, D-25, ¶ 64.

Accordingly, in 2007, Evans Creek successfully applied to include the southern 600 acres of the Property in the City's Service Area and SOI. App. C-5. At that point, the entire Property was in the City's SOI. Annexation became the next step to development approval.[3] App. D-15–16, ¶ 49.

In 2014, the Reno Mayor encouraged Evans Creek to pursue annexation so that development might occur. Evans Creek accordingly again applied for annexation into the City. App. C-5. At the same time, Evans Creek submitted a master plan amendment that proposed rezoning the northern portions of its Property for mixed-residential and the southern portions for single-family residential use. City staff

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[3] Evans Creek could not apply to the *County* for permits once all of its Property was put into the City's SOI. To seek County permits, it would have to apply to "be removed from Reno's Sphere of Influence and Truckee Meadows Service Area." ECF No. 8 at 11–12, 15 (D. Nev. Jan. 27, 2021).

subsequently recommended that the City deny the 2014 Application, due to purported concerns about the impact of approval on "open space" and park availability. Evans Creek then voluntarily terminated the 2014 Application. *Id.*

Still, the City continued to tell Evans Creek that it "strongly encourage[s] [Evans Creek] to annex into the City." App. D-15–16, ¶ 49. It also made clear that "[n]o permits can be issued for this site if [it] has not applied for annexation." *Id.*

2. The 2020 denial of annexation and development

On January 27, 2020, Evans Creek submitted a new annexation application. App. C-6. The City staff recommended approval and the application was then considered at two public hearings. At the second hearing, the City Council stated that "[w]e are only addressing an annexation request but *annexation is the first step in development*." ECF No. 8-1 at 11 (emphasis added). The Council ultimately denied the 2020 Application, allegedly because "(i) Evans Creek did not submit a master plan amendment request; (ii) there is no demand for the mixture of land use types proposed on the Property; (iii) there are alleged private party water rights disputes on the Property; and (iv) fire danger." App. C-6.

Evans Creek alleges that the City's reasons for denying the 2020 Application were pretextual and designed to keep the Property in a natural state. App. D-23–25, ¶¶ 62–63. In any event, Evans Creek understood that the denial of annexation meant that it could not obtain the development permits it sought.

ECF No. 8-1 at 11 (D. Nev. Jan. 27, 2021); App. D-29, ¶ 83.

C. Procedure Below

1. The district court litigation

On December 30, 2020, Evans Creek filed a complaint in the federal district court for the district of Nevada. The complaint alleged, in part, that the City of Reno had deprived Evans Creek of "all or substantially all of the economic value or use of the land," App. D-29, ¶ 83. The complaint further asserted that the "City's conduct has restricted the use to which the Property may be put in order to obtain a public benefit (i.e. open-space preservation) without just compensation." *Id.* ¶ 84. Ultimately, Evans Creek asserted that the City violated the Takings Clause of the Fifth Amendment by forcing it to "maintain its Property as open space."[4] *Id.*

The City soon filed a motion to dismiss the takings claim on two grounds: (1) that the claim was unripe because the City believed the 2020 denial was not a "final decision," and (2) that the allegations failed to state a valid takings claim under *Penn Central*, 438 U.S. at 124. App. C-15–16.

The district court rejected the City's argument that Evans Creek's takings claim was not ripe. *See generally Pakdel v. City & Cnty. of San Francisco*, 141 S.Ct. 2226, 2228 (2021). The court concluded that Evans Creek "has plausibly pleaded that denying the 2020 Application effectively forecloses any feasible

[4] The complaint also alleged the City's actions violated the Equal Protection Clause of the Fourteenth Amendment. That claim is not raised here.

development on the Property." App. C-16–17. It also observed that "the City does not contest that by denying the 2020 Application, it has determined that Plaintiff cannot, in practice, develop the Property." *Id.* Therefore, the district court held that "[t]he decision not to annex the Property is, in effect, a final decision about what may or may not be developed on the Property." App. C-17.

Turning to the merits, the district court concluded that "courts determine whether a regulatory action is functionally equivalent to the classic taking using 'essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances.'" App. C-18 (quoting *Bridge Aina Le'a*, 950 F.3d 610, 625 (9th Cir. 2020) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002))). The district court emphasized that such review requires a court to weigh the *Penn Central* factors, and that "[t]he first and second *Penn Central* factors are the primary factors." *Id.* (quoting *Bridge Aina Le'a*, 950 F.3d at 625 (citing *Lingle*, 544 U.S. at 538–39)).

As to the "economic impact" factor, the district court stated that courts must "compare the value that has been taken from the property with the value that remains in the property." App. C-19 (quoting *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018) (quoting *Keystone Bituminous Coal Ass'n*, 480 U.S. at 497)). Concluding that Evans Creek's complaint "lacks any information about the value of the Property when the 2020 Application was submitted or its value after the 2020 Application was denied," the court held that "it is not possible for the Court to determine what the economic impact to the

Property is." *Id.* It therefore held that the "economic impact" factor did not support Evans Creek.

Turning to the second, "investment-backed expectations" factor, the district court observed that "[t]o form the basis for a taking claim, a purported distinct investment-backed expectation must be objectively reasonable." App. C-20 (quoting *Colony Cove*, 888 F.3d at 452). In the court's view, "[d]istinct investment-backed expectations implies reasonable probability, like expected-rent to be paid, not starry eyed hope of winning the jackpot if the law changes." *Id.* (quoting *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010)). "'[U]nilateral expectation[s]' or 'abstract need[s]' cannot form the basis of a [takings] claim." *Id.* (quoting *Bridge Aina Le'a, LLC*, 950 F.3d at 633–34).

The district court went on to hold that Evans Creek's complaint "does not plausibly allege that [the developer] had objectively reasonable expectations that the 2020 Application would be approved," and that it failed to satisfy "prong two of the *Penn Central* analysis." App. C-20. The court finished its analysis by concluding that it did not need to reach the third, "character of the governmental action" factor, "[b]ecause the 'primary factors' [were] insufficiently pleaded." App. C-21. The court therefore dismissed Evans Creek's takings claim. *Id.*

2. The Ninth Circuit's decision

On appeal, the Ninth Circuit affirmed the district court's judgment. App. A. The court below declined to address the district court's conclusion that Evans Creek's allegations satisfied the final decision ripeness requirement.

Instead, the court below proceeded to apply the *Penn Central* test, App. A-2–3, agreeing with the district court that "[t]he first and second *Penn Central* factors are the primary factors." App. A-3 (citing *Lingle*, 544 U.S. at 538–39). It then observed that the "economic impact" factor "compare[s] the value that has been taken from the property with the value that remains in the property." *Id.* (quoting *Colony Cove Props.*, 888 F.3d at 450 (quoting *Keystone Bituminous Coal Ass'n*, 480 U.S. at 497)).

The Ninth Circuit subsequently concluded that the "economic impact" factor failed to support Evans Creek's claim because "the complaint lacks any information about the value of the property when the 2020 Application was submitted or its value after the 2020 Application was denied." App. A-3. The court below stated: "it is not possible for this Court to determine what the economic impact to the property is, even taking the allegations in the complaint as true." *Id.*

As to the "investment-backed expectations" factor, the Ninth Circuit concluded that a property owner cannot "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." App. A-3 (quoting *Penn Central*, 438 U.S. at 130). Instead, a takings claimant must demonstrate "a purported distinct investment-backed expectation" that is "objectively reasonable." *Id.* (quoting *Colony Cove*, 888 F.3d at 452).

The court below held that Evans Creek's plan to develop a master planned community was a "'[u]nilateral expectation[]' about the mere possibility for future development," and nothing more than "speculative desires that cannot form the basis of a takings claim." App. A-3–4 (citing *Bridge Aina Le'a*, 950 F.3d at 633–34). Additionally, the Ninth Circuit observed that "Evans Creek knew or should have known—especially after several failed requests for annexation—that the 2020 Application might be denied." App. A-4.

Having concluded that Evans Creek failed to allege an "economic impact" or reasonable "expectation" that supported a *Penn Central* takings claim, the court below affirmed that the "district court properly granted the motion to dismiss." App. A-4. The court below summarized its holding as follows: "Assuming, without deciding, that Evans Creek has plausibly pleaded that denying its 2020 application for annexation . . . effectively forecloses any feasible development on the property," Evans Creek still "failed to plausibly plead a regulatory taking." App. A-2.

Evans Creek now petitions for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE *PENN CENTRAL* MULTIFACTOR "TEST" IS AN UNSOUND AND UNWORKABLE APPROACH TO DETERMINING IF A USE RESTRICTION CAUSES A TAKING

The Takings Clause protects "private property" from being taken without just compensation. For purposes of the Clause, "property" "denote[]s the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *General Motors*, 323 U.S. at 377–78.

One strand of this Court's Takings Clause jurisprudence—the so-called "regulatory" takings doctrine—addresses the question of when a restriction on the right to use property rises to the level of a "taking." *Cedar Point*, 141 S.Ct. at 2071–72. Although *Penn Central*'s multifactor approach is the leading "test" in this area, it has failed to provide a workable and doctrinally justifiable method for addressing takings claims. R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731, 735–36 (2011) (comparing litigation under *Penn Central* to a "high-stakes" game of craps). The Court should abrogate the *Penn Central* approach and replace it with a standard that weighs the burden of government action on the owner's right to use property.

A. The Curious Origin of the *Penn Central* Test

In *Penn Central*, the Court considered whether New York's Landmark Preservation Law caused a unconstitutional taking by preventing the owners of Grand Central Terminal from building a high-rise office building above the terminal. Reviewing prior decisions, the Court concluded that, when a claim challenges a use restriction, takings analysis is "essentially ad hoc, factual." 438 U.S. at 124. But, in a now-infamous passage, the *Penn Central* Court went on to identify several considerations in the "ad-hoc" inquiry. *Id.*

The Court stated that "[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 are, of course, relevant considerations. So, too, is the character of the governmental action." *Id.* (citation omitted). The Court provided no explicit instruction on the meaning or application of these factors. The *Penn Central* decision suggests that the "economic impact" factor should include an inquiry into whether regulation interferes with "distinct investment-backed expectations." *Id.* Yet, the opinion does not define this concept or explain its relevance to "economic impacts."

With respect to the "character of the governmental action" factor, the *Penn Central* Court noted that

> [a] "taking" may more readily be found when the interference with property can be characterized as a physical invasion by

> government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. (citation omitted). The *Penn Central* opinion does not explain how the "character" and other factors are to be weighed or balanced against each other.

The precedential basis for the factors is equally opaque in *Penn Central*. The Court pointed to *Mahon* as the "leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Id.* at 127 (citing 260 U.S. 393). But *Mahon* never uses the term "expectations." Similarly, the Court cited *United States v. Causby*, 328 U.S. 256 (1946), as the basis for the "character of the governmental action" factor, *Penn Central*, 438 U.S. at 128, but *Causby* is a straightforward physical takings case. *Cedar Point*, 141 S.Ct. at 2073. It does not apply a "character"-like balancing approach to the takings issue. *Id.*

The truth is that the *Penn Central* multifactor approach was hurriedly adopted, *see* Transcript, *Looking Back on* Penn Central*: A Panel Discussion with the Supreme Court Litigators*, 15 Fordham Envtl. L. Rev. 287, 301–02 (2004), and based largely on a law review article. *Penn Central*, 438 U.S. at 128 (citing Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967)); *see generally*, 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, 691 (2005) ("There is now

good reason to believe that in deciding the *Penn Central* case, the Supreme Court misapprehended the importance of the issues before it as well as of its decision, and it simply did not understand the revolutionary impact of its holding."). Despite its unorthodox birth, the *Penn Central* multifactor test quickly became the centerpiece of this Court's takings jurisprudence. *Lingle*, 544 U.S. at 539 (*Penn Central* supplies "the principal guidelines"); *Palazzolo*, 533 U.S. at 632 (O'Connor, J., concurring). It is now clear that the *Penn Central* inquiry is woefully inadequate.

B. The Three Factors Are Individually Unworkable

All three of the factors that make up the *Penn Central* test are unworkable and unsupportable as a takings test.

1. The "economic impact" factor fails to gauge whether property has been taken and should be excised from takings law

In *Keystone*, this Court made clear that the *Penn Central* approach requires a court "to compare the value that has been taken from the property with the value that remains in the property," 480 U.S. at 497. With this, the Court cast *Penn Central*'s "economic impact" factor as an inquiry into the degree to which regulation harms property values. *Murr*, 137 S.Ct. at 1943. But this hardly provided the "economic impact" factor with the clarity and specificity needed to make a useful standard. After all, without guidance on how much damage must be done to property values before an "impact" is a taking, a "loss in value" approach remains indeterminate and unworkable. This Court

has not provided such guidance, other than making clear that a loss of "*all* value" supports a taking claim, *Tahoe-Sierra Pres. Council*, 535 U.S. at 330, a scenario that rarely occurs. *Bridge Aina Le'a, LLC*, 141 S.Ct. at 731 (Thomas, J., dissenting from denial of petition for certiorari).

As a result, since *Penn Central*, lower courts have wandered in the valuation wilderness, guessing, as best they can, as to what kind of damage to property values will support a taking. Not surprisingly, many courts have staked out extreme positions and are generally in disarray on the issue. *See, e.g.*, *William C. Haas & Co., Inc. v. City & Cnty. of San Francisco*, 605 F.2d 1117, 1120–21 (9th Cir. 1979) (a near total prohibition on developmental use did not state a takings claim because the loss in value was "only" 95%); *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1386–90 (N.J. 1992) (a 90% diminution in value held inadequate to state a claim); *Brotherton v. Dep't of Envtl. Conservation of State of N.Y.*, 657 N.Y.S.2d 854, 856 (N.Y. Sup. Ct. 1997) (a 90–92% loss in value held insufficient); *see generally*, Dale A. Whitman, *Deconstructing* Lingle*: Implications for Takings Doctrine*, 40 J. Marshall L. Rev. 573, 582 (2007) (on the issue of what economic impact causes a taking, "no one is sure where that line lies today"); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, 334 (2007) ("The Supreme Court has never given us definite numbers—it has never said that a value loss less than a specified percentage of pre-regulation value precludes a regulatory taking, or that one greater than some threshold . . . points strongly toward a taking.").

The "economic impact" factor is not only dysfunctional, it lacks any principled doctrinal or logical foundation. *Nekrilov*, 45 F.4th at 687 (Bibas, J., concurring). After all, "[t]he Fifth Amendment to the U.S. Constitution protects 'private property,' not 'economic value.'" Eagle, 118 Penn St. L. Rev. at 617. Indeed, in *Lingle*, this Court made clear that doctrinally correct takings tests focus on the extent to which regulation burdens "legitimate property interests," *Lingle*, 544 U.S. at 539–40, not on how badly the regulation harms the owner's economic status.

Of course, diminution in property value is pertinent to the calculation of "just compensation" for a taking. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979). And, on the liability side, it is conceivable that damage to property values may provide *evidence* of the extent of harm to legitimate property rights. But there is no basis in takings doctrine for making economic loss itself into a takings determinant. Eagle, 118 Penn. St. L. Rev. at 617 ("the size of the [value] loss should not determine if there is a taking"). Yet, this is exactly what has happened under *Penn Central*'s "economic impact" test. The test ignores the burden of government action on protected private property *rights*, in favor of requiring courts to engage in the impossibly subjective task of deciding whether a regulation has caused enough economic pain to be a "taking." *Leading Cases*, 116 Harv. L. Rev. 321, 328 (Nov. 2002) (The effect of the regulation on property values should not be relevant to the "takings question, where the focus should be the rights that have been taken[.]").

The Court should reexamine and abrogate *Penn Central*'s "economic impact" test for a taking. John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. Cal. L. Rev. 1003, 1034 (2003) ("If the regulatory takings doctrine is based on the theory that property usage rights may not be eliminated without compensation, the degree of economic impact should not affect whether a government has taken private property. It should only affect the amount of compensation due in the event of a taking.").

2. The "investment-backed expectations" factor is indecipherable and should be excised from takings law

The second *Penn Central* factor focuses on "the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S. at 124. In *Kaiser Aetna v. United States*, this Court further qualified this factor with the term "reasonable," converting it into the "reasonable investment-backed expectations" inquiry. 444 U.S. 164, 175 (1979).

Although the "reasonable expectations" consideration often plays a critical role in *Penn Central* analysis, *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1350 (Fed. Cir. 2001), "no one really knows what [it] . . . means." Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 Urb. Law. 307, 337–38 (1998). The terms that comprise the phrase "reasonable investment-backed expectations" are subjective and inconclusive. Mark W. Cordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. Nat. Resources & Envtl. L. 1, 35 (2006) ("courts and

commentators have often puzzled over what 'interference with investments-backed expectations' means"); *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 37 (1st Cir. 2002) ("[T]here is [still] a paucity of clear landmarks that can be used to navigate" the "expectations" doctrine.). Furthermore, this Court's post-*Penn Central* cases have never identified a property "expectation" sufficient to support a takings claim. Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, 27 Urb. Law. 215, 225 (1995) (The Court "has concentrated almost entirely on deciding when investment-backed expectations do not exist rather than on deciding when they can" support a claim.).

Left to fend for themselves, lower courts have adopted shifting and inconsistent understandings of what constitutes a reasonable or unreasonable "expectation." *Philip Morris*, 312 F.3d at 36–37 ("courts have struggled to adequately define" the concept); Mandelker, 27 Urb. Law. at 215 ("federal and state courts divide on how to apply it"). Many courts have adopted a circular understanding of the concept, concluding that the mere existence of a challenged regulation prevents the formation of reasonable property use "expectations," which in turn defeats the takings claim. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring in the judgment). The "expectations" factor accordingly operates as a vacuous and impossible to satisfy test in most cases. Commentators have rightly condemned it "as an unworkable, if not incomprehensible, standard," Radford & Wake, 38 Ecology L.Q. at 732, and called for it to be excised from takings doctrine. Joshua P. Borden, *Derailing* Penn Central*: A Post-Lingle, Cost-Basis Approach to*

Regulatory Takings, 78 Geo. Wash. L. Rev. 870, 907 (2010) ("[T]he Court should altogether abandon the *Penn Central* balancing test and embrace a new doctrine of regulatory takings jurisprudence.").

The concept of "investment-backed expectations" is an inherently improper basis for weighing a takings claim. *Nekrilov*, 45 F.4th at 687 (Bibas, J., concurring). The Takings Clause protects "property" not "expectations." Gauging the state of a property owner's "expectations" (whether they are reasonable, "investment-backed," etc.) does nothing to answer the question of whether *property* has been taken. Indeed, the only question that has been answered by the application of the investment-backed expectations concept over the last four decades is whether it has any useful role in takings law. The answer is a resounding "no." Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1370 (1993) ("[W]e should be deeply suspicious of the phrase 'investment-backed expectations' because it is not possible to identify even the paradigmatic case of its use.").

The Court should grant the Petition to reconsider and jettison "investment-backed expectations" as a consideration in the inquiry into whether a use restriction is a taking. *Nekrilov*, 45 F.4th at 687 (Bibas, J., concurring).

3. The "character of the governmental action" factor is outdated and improper

The final *Penn Central* consideration is the "character of the governmental action." 438 U.S. at 124. This factor is just as improper as the other two, because it is incompatible with post-*Penn Central* takings doctrine and biased toward the government.

In *Lingle*, this Court emphasized that takings tests must "focus[] directly upon the severity of the burden that government imposes upon private property rights." 544 U.S. at 539. Applying this principle, the *Lingle* Court concluded that a means-end test, known as the "substantially advances a legitimate state interest" test, was not a valid takings standard because it "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights." *Id.* at 542. The "substantially advances" test failed because it did not gauge the "effect" of regulation on property rights. *Id.* at 543.

After *Lingle*, *Penn Central*'s "character of the governmental action" factor is highly questionable on its own terms. What matters in takings cases challenging use regulations is the "burden" or "effect" of property regulation, *id.* at 542–43, not its nature or "character." *See* D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of* Lingle v. Chevron *and the Separation of Takings and Substantive Due Process*, 69 Alb. L. Rev. 343, 353 (2005) ("the analysis in *Lingle* illustrates why the character of the government act generally should have no role").

There are deeper problems with the "character" factor. *Penn Central* states that it weighs whether a regulation causes "a physical invasion" or only "adjust[s] the benefits and burdens of economic life to promote the common good," 438 U.S. at 124. Most lower courts apply the "character" factor according to this guidance. *See* Thomas W. Merrill, T*he Character of the Governmental Action*, 36 Vt. L. Rev. 649, 661 (2012) ("[T]he character factor simply incorporates a distinction between governmental invasions and use regulations."); Meltz, 34 Ecology L.Q. at 342 ("This physical/regulatory [taking] distinction remains the most important element of the character factor.").[5]

The problem is that this Court's post-*Penn Central* jurisprudence has repudiated both physical invasion and "legitimate public interest" considerations from regulatory takings law. A few years after *Penn Central*, the Court held in *Loretto* that a physical invasion is always a taking, "*without regard to other factors*." *Horne v. Dep't of Agric.*, 576 U.S. 350, 360 (2015) (emphasis added) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458

[5] *See, e.g.*, *335-7 LLC v. City of New York*, No. 21-823, 2023 WL 2291511, at *4 (2d Cir. Mar. 1, 2023) (under the "character" factor, "[t][he existence of a broader regulatory regime" that advances health and safety "weighs against finding a regulatory taking"); *Sadowsky v. City of New York*, 732 F.2d 312, 318 (2d Cir. 1984) (character weighed against a taking because the law "as a whole has a valid, even admirable, purpose"); *Quinn v. Board of Cnty. Comm'rs for Queen Anne's Cnty.*, 862 F.3d 433, 443 (4th Cir. 2017) ("Regulations that control development" are "the paradigm" of a program that promotes the common good.). Of course, some "courts have treated this [character] factor as an open-ended inquiry into whatever considerations they think are most relevant" *Blackburn v. Dare County*, 58 F.4th 807, 813 (4th Cir. 2023).

U.S. 419, 426, 441 (1982)). *Loretto* initiated the now well-known distinction in takings law between physical invasions of property and regulatory actions that limit the private use of property. *Cedar Point*, 141 S.Ct. at 2071–72. Since *Loretto*, physical invasions of property are analyzed separately from regulatory takings claims challenging use restrictions. *Id.*; *see also*, *Tahoe-Sierra Pres. Council*, 535 U.S. at 324.

Under modern takings doctrine, *Penn Central* analysis "has no place" when a regulation causes a physical invasion, *Cedar Point*, 141 S.Ct. at 2072. Yet, the "character" factor continues to inject physical takings rules into regulatory takings analysis. 438 U.S. at 124.

The "character" factor is also doctrinally improper when applied as a test for whether a regulation "adjust[s] benefits and burdens" to achieve a public good. *Penn Central*, 438 U.S. at 124; Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan. Envtl. L.J. 525, 529 (2009) (The character test allows the "very concerns that the [*Lingle*] Court attempted to expunge from regulatory takings analysis . . . back into that analysis via the *Penn Central* balancing test."). As noted above, *Lingle* held that the validity of a property restriction is not pertinent to whether it is a taking. 544 U.S. at 539–42. Thus, in its guise as a "public good" test, *Penn Central*'s "character" factor conflicts with *Lingle*. Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law* § 10.6, at 430 (2d ed. 2007) (*Lingle* "eliminates evaluation of the legitimacy of the regulation.").

The "character" factor's tendency to insert antiquated and inappropriate criteria into takings analysis is not only doctrinally unsound; it tilts the takings inquiry to the government. *Id.* As noted above, a regulation limiting the private use of property does not cause a physical invasion of property. *Cedar Point*, 141 S.Ct. at 2071. Thus, as a physical invasion test, the "character" factor simply puts one *Penn Central* notch in the government's belt before litigation begins. The same thing occurs when the "character" factor is a public good-based test. A takings claim "*presupposes* that the government has acted in pursuit of a valid public purpose." *Lingle*, 544 U.S. at 543 (emphasis added). Thus, when the "character" factor tests for regulatory legitimacy, it also tilts takings analysis toward the government. *See* Fenster, 28 Stan. Envtl. L.J. at 574 ("If courts consider regulatory purpose as well as regulatory effects," the government can undermine claims by "identify[ing] the exceptional harm" that a regulation addresses.). The Court should grant this Petition to eliminate *Penn Central*'s "character of the governmental action" factor from the inquiry into whether a land use restriction causes a taking. Eric Pearson, *Some Thoughts on the Role of Substantive Due Process in the Federal Constitutional Law of Property Rights Protection*, 25 Pace Envtl. L. Rev. 1, 32 (2008) (*Lingle* "effectively eviscerates the 'character of the government action' factor").

In sum, each consideration in the *Penn Central* multifactor framework is ill-defined, amenable to conflicting interpretation, and untethered to the text of the Takings Clause or modern takings doctrine. Moreover, "[j]ust as there is no clear guidance on what exactly the *Penn Central* factors encompass, there is no hard and fast way to weigh them." *Blackburn*, 58

F.4th at 815; *Nekrilov*, 45 F.4th at 683 (Bibas, J., concurring) ("[W]e do not know how much weight to give each factor."). Even if courts could apply each factor in a meaningful way, they have no idea how to weigh them against each other to decide whether a taking has occurred. *Blackburn*, 58 F.4th at 815.

The *Penn Central* approach is a failed experiment. The Court should reevaluate it and consider articulating a doctrinally proper and functional takings test.

II.

THE COURT SHOULD REFOCUS TAKINGS ANALYSIS ON THE RIGHT TO USE PROPERTY

If the Court repudiates the *Penn Central* multifactor test (and it should), the next question is what should take its place as the test for determining whether a property use restriction is a taking? History, precedent, and logic indicate that the analysis should focus on the degree to which regulation burdens the right to use property. *See Lingle,* 544 U.S. at 539.

A. The Understanding That a Taking Can Arise from Burdens on the Right to Use Property Has Deep Constitutional Roots

"Property" has long been recognized to refer to a group of rights in a thing, such as the ability to productively use something. 1 William Blackstone, Commentaries *134 ("[P]roperty . . . consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."). The term "property" is not defined differently in the constitutional context;

there too, the term encompasses a right of use. *See* John Lewis, *A Treatise on the Law of Eminent Domain*, § 55, at 43–44 (1st ed 1888) (noting that the term "property" in the Constitution refers to "*rights in things*, as the right to dispose of a thing in this way or that, the right to use a thing in this way or that, the right to compel a neighbor to desist from doing this or that, etc."); *Gen. Motors Corp.*, 323 U.S. at 377–78 (holding that "property" within the meaning of the Takings Clause includes certain rights, including a right of use).

Given the deep roots of the right to use property, it should not be surprising that, since the early days of the Republic, courts have recognized that a taking can arise from a substantial restriction on the use of property. *See* Thomas M. Cooley, *Treatise On the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 544 (3d ed. 1874) (Anything "which deprives the owner of the ordinary use of [property] is equivalent to a taking, and entitles him to compensation."); Kobach, 1996 Utah L. Rev. at 1259 ("[N]umerous state courts recognized devaluative takings to be compensable at an early stage in American legal history. Both regulatory takings and consequential takings were acknowledged."); David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. Colo. L. Rev. 497, 545 (2004) ("The notion that compensation could be made only for actual appropriations of the land itself is not found in the historical record, but is merely a modern judicial and scholarly fiction."); Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 Am. U. L. Rev. 181,

182 (1999) ("[C]ommentators have declared that the original understanding of the Takings Clause only covered 'direct, physical takings.' In fact, this 'direct, physical takings' thesis lacks historical support."); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1553 (2003) ("Early state eminent-domain opinions did not organize takings cases under the same categories that we apply now, but it is still possible to identify a series of decisions that closely resemble modern regulatory takings cases.").

Many early state court decisions found that a significant prohibition on the use of property is a taking. For instance, in *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. 162 (N.Y. 1816), a town's diversion of water deprived a property owner of water he had previously used for agriculture, a brickyard, a distillery, and a mill. The owner challenged the diversion on the basis that it would "greatly injure if not render the works useless," and cause a taking. *Id.* at 163. The court agreed, finding the impact on property use to be an uncompensated taking. *Id.* at 166. Many other early state courts also concluded that action harming a citizen's use of property is a taking. *See People v. Platt*, 17 Johns. 195 (N.Y. Sup. Ct. 1819) (laws regulating milldams by requiring them to be constructed a certain way took property by forcing an owner of already-built dam to drastically alter it or lose its use); *Canal Appraisers of State of New York v. People ex rel. Tibbits*, 17 Wend. 571 (N.Y. 1836) (a taking arose when a public canal caused the water level of a tributary to change so that "the interest of the relator in the fall or mill site [] has been destroyed as to any future beneficial use"); *Cooper v. Williams*, 5 Ohio 391, 391–92 (1832) (finding a taking where

government interfered with a property owner's right to use water); *Patterson v. City of Boston*, 20 Pick. 159 (Mass. 1838) (finding a taking where a street-widening project removed a storefront wall and destroyed a store lessee's right of use under his lease); *Old Colony & Fall River R.R. v. Inhabitants of Cnty. of Plymouth*, 14 Gray 155, 161 (Mass. 1859) (a taking arises when the legislature deprives the owner "of the possession or some beneficial enjoyment" of property).

B. Takings Analysis Should Focus on the Degree to Which Regulation Injures the Right to Use Property

This Court's 1922 decision in *Mahon* is often characterized as the first case from this Court recognizing that a property use restriction can cause a taking. *See, e.g.*, *Lingle*, 544 U.S. at 537. But this is historically inaccurate. Kobach, 1996 Utah L. Rev. at 1223. In 1911, a decade prior to *Mahon*, this Court held that "prevention of a legal and essential use—an attribute of its ownership,—one which goes to make up its essence and value[ ] . . . is practically to take his property away." *Curtin v. Benson*, 222 U.S. 78, 86 (1911). Even before that, in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908), the Court recognized that a building height restriction that made a building "wholly useless" would cause a taking. Some consider the Court's even earlier decision in *Yates v. City of Milwaukee*, 77 U.S. (10 Wall.) 497 (1870), to be the first "regulatory" takings decision. In *Yates*, the Court held that a restriction on an owner's right to build a wharf out to the edge of a stream was a compensable taking. *Id.* at 504. In any event, in *Chicago, R. I. & P. Ry. Co. v. United States*, 284 U.S. 80 (1931), the Court confirmed the core

principle underlying its earlier takings cases, stating that "[c]onfiscation may result from a taking of the *use of property* without compensation quite as well as from the taking of the title." *Id.* at 96 (emphasis added).

The *Penn Central* Court seemed to recognize that prior precedent held that a taking could occur when regulation "has an unduly harsh impact upon the owner's use of the property." 438 U.S. at 127. But *Penn Central* left this use-focused test out of the multifactor inquiry, and it has never returned. To this day, none of this Court's takings tests focus on whether a regulation has "an unduly harsh impact upon the owner's use of the property." *Id.*

To be sure, in the 1992 *Lucas* decision, the Court attempted to focus regulatory takings analysis on whether regulation denies an owner "*all* economically beneficial uses" of property. 505 U.S. at 1019. But, ten years later, in *Tahoe-Sierra*, the Court construed *Lucas* to establish only that total loss of economic *value* is a taking. 535 U.S. at 330. *Lingle* soon confirmed this, stating that "[i]n the *Lucas* context, . . . the complete elimination of a *property's value* is the determinative factor." 544 U.S. at 539 (emphasis added).

Since *Tahoe-Sierra* and *Lingle*, lower courts have consistently construed *Lucas* to establish a "loss of all economic value" test, rather than as a test for whether government has taken the owner's right of use. Property owners rarely litigate, much less prevail, under the *Lucas*' "loss of all economic value" standard. If the *Lucas* Court originally hoped to re-center the regulatory takings inquiry on the effect of property restrictions on an owner's right of use, the effort

failed. John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171, 173 (2005) ("The effort to construct a more rule-based takings doctrine has plainly faltered, returning *Penn Central* to the forefront."). As a result, the "vast array" of takings claims is governed by *Penn Central*, *Murr*, 137 S.Ct. at 1952 (Roberts, C.J., dissenting), which, again, does not consider whether and how a challenged regulation harms the owner's right of property use.

The *Penn Central* approach may be dominant, but it remains unworkable and disconnected from traditional notions of property rights as well as modern doctrinal understandings. *Lingle*, 544 U.S. at 539. This Court should therefore (1) reconsider and abrogate the *Penn Central* factors and (2) adopt an analytical approach that focuses on the right to use property. If the property right at issue in "regulatory" takings cases is the right to productively use property (and it is), *Penn Central*, 438 U.S. at 127, and sound tests weigh the "burden [on] property rights," *Lingle*, 544 U.S. at 543, regulatory takings analysis must revolve around the degree to which regulation burdens the right to use property. *Nekrilov*, 45 F.4th at 681 (Bibas, J., concurring); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting).

The Court should specifically grant the Petition to hold that a substantial deprivation of the right to use property is a taking. *Bridge Aina Le'a, LLC*, 141 S.Ct. at 732 (Thomas, J., dissenting from denial of petition for certiorari) ("[W]e should make clear when [a regulatory taking] occurs."). The qualifying term "substantial" accounts for the fact that government cannot escape a taking premised on a denial of

property use by leaving the owner with a "token" use interest. *Palazzolo*, 533 U.S. at 631; *San Diego Gas & Elec. Co.*, 450 U.S. at 653 (Brennan, J., dissenting) (observing that government action can be a taking "where the effects completely deprive the owner of all *or most of his interest* in the property") (emphasis added); *see also, Annicelli v. Town of South Kingstown*, 463 A.2d 133, 139 (R.I. 1983) (a taking occurs when "the restriction practically or substantially renders the land useless for all reasonable purposes.") (quoting *Just v. Marinette County*, 201 N.W.2d 761, 767 (Wis. 1972)).

This case is an excellent vehicle for the reformation of *Penn Central* and regulatory takings law. Evans Creek's claim rests on the allegation that the City's refusal to annex the Property and open a path to development has "so restricted the permissible uses of the Property," App. D-29, ¶ 83, that it has "been deprived of all or substantially all of the economic value or use of the land," and forced to "maintain its Property as open space." *Id.* ¶¶ 83–84. Applying *Penn Central*, the Ninth Circuit concluded that this was not enough to state a takings claim. The Court should correct the lower court's understanding of takings law.

CONCLUSION

The Court should grant the Petition.

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Respectfully submitted,

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