No. 22-872

In The

Supreme Court of the United States

EVANS CREEK, LLC,

Petitioner,

vs.

CITY OF RENO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should overrule *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), a 45-year-old precedent which this Court has repeatedly reaffirmed, despite Petitioner's failure to provide an alternative test that would be any less confusing for an alleged regulatory taking.

PARTIES TO THE PROCEEDING

Evans Creek, LLC, petitioner on review, was the plaintiff-appellant below.

The City of Reno, respondent on review, was the defendant-appellee below.

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INTRODUCTION

The Fifth Amendment's Taking Clause prohibits the taking of "private property for public use, without just compensation." U.S. Const. amend. V.

In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), this Court articulated three factors to ascertain whether a governmental regulation appropriated private property for public use, requiring the payment of just compensation under the Fifth Amendment; specifically:

> (1) the regulation's economic impact on the claimant;
>
> (2) the extent to which it interferes with investment-backed expectations; and
>
> (3) the character of the governmental action.

438 U.S. at 124.

This Court extended its holding in *Penn Central* in *Lucas v. South Carolina Coastal Council*, concluding that "where [a] regulation denies *all* economically beneficial or productive use of land," it constitutes a "categorical" taking. 505 U.S. 1003, 1015 (1992) (emphasis added).

In the decades since, this Court has regularly reaffirmed these holdings, explaining that the hallmark of *Lucas* is its bright-line total loss requirement, and the hallmark of *Penn Central* is its flexibility. *See*, *e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942–43 (2017).

Today, Petitioner Evans Creek, LLC ("Evans Creek") embarks on an entirely new legal stratagem. Discarding flawed arguments made below, Evans Creek asks this Court to reconsider and abandon *Penn Central* altogether.

Evans Creek's petition for certiorari should be summarily denied for the following reasons.

First and foremost, central to Evans Creek's request is the *bare, unproven allegation* that the City appropriated property for public use when it denied Evans Creek's application for annexation. App. D-19, ¶ 83. The allegation is all that Evans Creek can point to on appeal. The record itself is devoid of any real evidence. Procedurally, the Ninth Circuit affirmed the district court's dismissal because Evans Creek failed to adequately *plead* a regulatory taking claim under *Penn Central*. App. A-1–5. Evans Creek refused to amend its Complaint. App. B-1–3. Lacking a robust record, this case presents a poor vehicle for the Court to reconsider *Penn Central* or its progeny.

Second, Evans Creek does not assign error to the fact that the Ninth Circuit affirmed the district court's dismissal because Evans Creek failed to adequately *plead* a regulatory taking claim under *Penn Central*.

Third, there is no split between circuit courts of appeals, or between federal and state courts. S. Ct. Rule 10.

Fourth, Petitioner does not even attempt to demonstrate that any of the usual *stare decisis* factors warrant overturning this seminal precedent.

Fifth, Evans Creek fails to propose a viable alternative that it will prevail on the pleaded facts.

For these reasons, the petition for certiorari should be denied.

STATEMENT OF THE CASE

A. Factual Background

Evans Creek is the owner of certain property known as the Ballardini Ranch. App. D-5–6, ¶¶ 15, 18, 19. The property consists of approximately 1,000 acres, and is located on the south side of South McCarran Boulevard near Manzanita Lane, which is outside of the corporate limits of the City of Reno.[1] App. D-3, ¶ 6, App. D-7, ¶ 20, App. D-13, ¶ 43, App. D-18, ¶ 58(a). On January 27, 2020, Evans Creek applied to the City for annexation into the City. App. D-16, ¶ 53. At the May 27, 2020, City Council meeting, City Council denied the annexation application "primarily based on the following reasons: (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. D-23, ¶ 61.

[1] The property is within the City of Reno's sphere of influence ("SOI"), which refers to "an area into which a political subdivision may expand in the foreseeable future." NRS 278.0274(6).

Notably, this case does not involve a promulgation of a new ordinance governing the property, nor any change in status at all. Evans Creek requested annexation into the City, which the City declined at this time. Nothing changed with respect to Evans Creek's property; there was no reversion to a different type of use, the property remains private, and Evans Creek may still develop it or continue to use it for its livestock operations. (*See* App. D-25, ¶ 64.)

B. Procedural Background

On December 30, 2020, Evans Creek filed a complaint in the United States district court for the District of Nevada, alleging 42 U.S.C. § 1983 claims for a violation of the Equal Protection Clause and for a violation of the Fifth Amendment Taking Clause. App. D-26 to D-30, ¶ 68–89. The City moved to dismiss the complaint. App. C-1. On September 14, 2021, the district court granted the City's motion to dismiss, and also granted Evans Creek's request for leave to amend the Complaint. App. C-1, C-23. On September 17, 2021, Evans Creek filed a Notice of Intent Not to File Amended Complaint, and on September 20, 2021, the district court granted Evans Creek's request to dismiss the action so that it could file an appeal to the Ninth Circuit. App. B-1–3.

On appeal to the Ninth Circuit, Evans Creek did not argue that *Penn Central* should be overturned, but rather that the district court erred in finding that Evans Creek had failed to meet the minimal standard for

asserting plausible allegations that would state a claim under *Penn Central*. *See* Opening Br., Case No. 21-16620, Dkt. 10 (Dec. 30, 2021). After briefing was completed in the Ninth Circuit, the court heard oral arguments on October 20, 2022, and filed its Memorandum of Judgment on October 26, 2022, denying the appeal and upholding the district court's determination that Evans Creek failed to adequately plead factual allegations sufficient to survive a motion to dismiss. App. A-1, A-4.

The panel, comprised of Justices Milan Smith, Sidney Thomas, and Michael McShane, the latter sitting by designation, concluded that Evans Creek had failed to meet the minimal pleading standards under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 570 (2007) to allege a regulatory taking under *Penn Central*. First, the court explained that Evans Creek failed to sufficiently plead the first *Penn Central* factor, the economic impact of the regulatory decision.

> In considering the economic impact of an alleged taking, we "'compare the value that has been taken from the property with the value that remains in the property.'" *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018) (*quoting Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)). As pleaded, 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. Accordingly, 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.

App. A-3.

Second, the panel concluded that Evans Creek had failed to allege facts that it had an objectively "reasonable investment-backed expectation" of being annexed into the City. "The principals' expectations that Evans Creek would be able to develop the property into a master planned community may well have been 'hardly unconventional.' But Evans Creek's '[u]nilateral expectations' about the mere possibility for future development were no more than speculative desires that cannot form the basis of a takings claim." App. A-3–4.

Evans Creek never raised—and neither the district court nor the Ninth Circuit addressed—the appropriateness of the *Penn Central* factors. App. A-1–5; App. C-1–23. Nor has Evans Creek provided a basis for this Court to do so.

SUMMARY OF THE ARGUMENT

The Ninth Circuit appropriately applied the three prongs set forth in *Penn Central* to determine that Evans Creek failed to plausibly plead facts under those factors that would have allowed the complaint to proceed. In fact, in dismissing the complaint, the district court provided a roadmap of factual allegations that would meet the pleading standard and gave Evans

Creek leave to amend its complaint. App. C-17–22. Evans Creek opted not to do so, instead challenging the district court's ruling in the Ninth Circuit. App. B-1–3.

Piggybacking on its failure to meet the pleading standard, Evans Creek now seeks to jettison the *Penn Central* factors altogether. Pet. 6. Its argument is that the factors are too difficult for plaintiffs to meet. Pet. 4. Just because a party must make a robust showing to meet the *Penn Central* factors does not justify overturning a standard repeatedly upheld by this Court. Indeed, because a regulatory taking does not physically appropriate private property to the government, the onus on the private property owner to demonstrate a taking should be difficult. The mere allegation that property owners do not prevail as frequently when *Penn Central* is applied is not a basis to overturn the case.

Evans Creek's inability to adequately plead factual allegations meeting the minimal standards set forth in *Iqbal* underscores why *Penn Central* should not be overturned. If every decision, including whether to expand the boundaries of a city's limits, were subject to a regulatory taking claim, every private property owner would have a taking claim just because he or she disliked the outcome of a discretionary decision. Surely, that would cause even greater confusion about what constitutes a regulatory taking than the application of the *Penn Central* factors, especially where

Evans Creek offers no clearer alternative to the *Penn Central* test.

ARGUMENT

A. Evans Creek fails to state a reason for overturning *Penn Central*.

"Overruling precedent is never a small matter. *Stare decisis*—in English, the idea that today's Court should stand by yesterday's decisions—is "'a foundation stone of the rule of law.'" *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015), *quoting Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014). This Court has recognized that the *stare decisis* doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991). "It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble*, 576 U.S. at 455.

This Court has recognized that "[r]especting *stare decisis* means sticking to some wrong decisions" (*Kimble*, 576 U.S. at 455) because "it is usually 'more important that the applicable rule of law be settled than that it be settled right.'" *Id., quoting Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (dissenting opinion). Indeed, "'special justification'" beyond a mere belief that precedent was wrongly decided is

required to "justify scrapping settled precedent." *Kimble*, 576 U.S. at 455–56, *quoting Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). Especially in cases regarding property and contract rights, "considerations favoring *stare decisis* are 'at their acme.'" *Kimble*, 576 U.S. at 457, *quoting Payne*, 501 U.S. at 828. Evans Creek does not attempt to demonstrate that *Penn Central* was wrongly decided, and it fails to meet any of the five factors for overturning established precedent. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022) (factors that should be considered in deciding when a precedent should be overruled include: (1) the nature of the Court's error; (2) the quality of the reasoning; (3) workability of the rule imposed by the case; (4) effect on other areas of law; and (5) reliance interests).

1. Nature of the Court's error.

Penn Central is not a decision that "wrongly removed an issue from the people and the democratic process." *Id.* Instead, *Penn Central* proceeded from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), which *expanded* private property rights by recognizing that if a regulation goes too far, it could constitute a taking. *Id.* at 415. *See Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 537 (2005) (recognizing that only a direct appropriation or ouster was a taking prior to *Pennsylvania Coal*).

2. Quality of the reasoning.

Evans Creek does not identify any flaw in the Court's reasoning or attempt to show that it was incorrect as a matter of precedent. In fact, *Penn Central* followed from and was consistent with this Court's precedents. 438 U.S. at 124 ("[T]he Court's decisions identif[y] several factors that have particular significance" in determining whether a regulatory taking has occurred.). The *Penn Central* court noted that "the leading case," *Pennsylvania Coal*, 260 U.S. 393, recognized that a state statute that destroys an interest in property and contracts "may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Penn Central*, 438 U.S. at 127. The Court's decision in *Goldbatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) noted that "a comparison of values before and after is relevant," albeit not conclusive. Yet Evans Creek does not call for this Court to overrule those decisions.

3. Workability.

Evans Creek's only argument that even attempts to meet any of the five factors is that the *Penn Central* factors are unworkable. Pet. 3–4. Not only is this proposition wrong, as demonstrated by this Court's repeated affirmance of *Penn Central*, but courts around the nation have applied these factors for four and a half decades. As this Court has recognized, the hallmark of the *Penn Central* analysis is its flexibility. *Murr*, 137 S. Ct. at 1943 ("A central dynamic of the Court's regulatory takings jurisprudence, then, is its flexibility.").

While iron-clad rules are easy to apply, the nature of determining when a regulation "goes too far" inherently requires flexibility and taking into account nuanced factors. *Pennsylvania Coal*, 260 U.S. at 413, 415 (recognizing that whether a regulation effects a taking "depends on the particular facts"); *Goldblatt*, 369 U.S. at 594 ("There is no set formula to determine where regulation ends and taking begins."). Having to balance competing interests is at the heart of what courts do. *United States v. Place*, 462 U.S. 696 (1983) (balancing government's interest in preventing drug couriers with individual interest in being free from unreasonable search and seizure.); *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) ("We have described 'the balancing of competing interests' as 'the key principle of the Fourth Amendment.'"), *quoting Michigan v. Summers*, 452 U.S. 692, 700, n.12 (1981).

4. Effect on other areas of law.

No cases cited by Evans Creek demonstrate that application of the *Penn Central* factors has resulted in a "distortion of many important but unrelated legal doctrines." *Dobbs*, 142 S. Ct. at 2275. In fact, the *ad hoc* factual analysis afforded by *Penn Central* is unlikely to have an effect on unrelated legal doctrines precisely because it is so fact-specific.

5. Reliance interests.

"Considerations in favor of *stare decisis* are at their acme in cases involving property and contract

rights, where reliance interests are involved." *Payne*, 501 U.S. at 828; *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1436 (2020) (Alito, J., dissenting) (discussing "enormous reliance interests" of two states in conducting jury trials allowing non-unanimous verdicts because those states "face a potential tsunami of litigation on the jury unanimity issue"). Property rights are precisely the issue here. The Court has steadfastly upheld *Penn Central*. The reliance interests of the lower courts; federal, state and local governments; and private property owners alike on the *Penn Central* factors have increased over the last four decades. Thus, overturning those factors in favor of some nebulous use test would upend concrete reliance interests in property rights. *Payne*, 501 U.S. at 828. Indeed, if the fundamental decision regarding the extent of a local government's boundaries constitutes a compensable taking, there is virtually no land use entitlement or zoning decision that local governments could deny without compensating the landowner.

B. Evans Creek fails to demonstrate that the district court or Ninth Circuit erred in concluding that it failed to plead a plausible taking claim under the *Penn Central* factors.

The district court correctly determined that Evans Creek failed to state a valid taking claim under the Fifth Amendment of the United States Constitution. "The Takings Clause of the Fifth Amendment states that 'private property [shall not] be taken for public

use, without just compensation.'" *Knick v. T'ship of Scott, Pa.*, 139 S. Ct. 2162, 2167 (2019) (substitution in original). Evans Creek's challenge of government action as an uncompensated taking of private property focused on a regulatory taking under *Penn Central*.[2] Despite the application of the *Penn Central* factors for nearly fifty years, and the district court's roadmap of what Evans Creek would need to allege, Evans Creek failed to allege facts that would support its claim under those factors. And instead of filing an amended complaint in line with the district court's order (App. C-21–22), Evans Creek chose to appeal the decision to the Ninth Circuit. App. B-1–B-3; App. A-1.

As recently as 2017, this Court has affirmed the *Penn Central* analysis for a regulatory taking. *Murr v. Wisconsin*, 137 S. Ct. at 1943. "[W]hen a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on 'a complex of factors,' including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Id.*, *quoting Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *see also Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063,

[2] Although Evans Creek alleged, without any supporting facts, that it had "been deprived of all or substantially all of the economic value or use of the land" (App. D-29, ¶ 83), which would be a categorical taking claim under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), it conceded that it was proceeding under a *Penn Central* regulatory taking claim. App. C-17, n.6.

2072 (2021) ("To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central*, balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action."); *Bridge Aina Le'a, LLC v. State Land Use Comm'n*, 950 F.3d 610, 630 (9th Cir. 2020); John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171, 174 (2005) (recognizing that "*Penn Central* is here to stay.") Indeed, this Court has upheld the *Penn Central* factors despite the criticisms "showered" upon *Penn Central* by "[l]ower courts and commentators." Pet. 5. Evans Creek offers no better test for determining a regulatory taking, and its invitation to do so should be denied.

1. No economic impact.

While application of the *Penn Central* factors requires an ad hoc balancing test by the judiciary, *pleading* sufficient facts to allege a taking does not. What is required is more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678–79, *citing Twombly*, 550 U.S. at 555. Legal conclusions couched as factual allegations "do not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678–79.

This Court has repeatedly held that the first factor, the economic impact of the regulation, requires a

comparison of the value before the regulation and immediately after the regulation was passed. "In considering the economic impact of an alleged taking, we 'compare the value that has been taken from the property with the value that remains in the property.' " *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018), *quoting Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). The plaintiff must demonstrate a high level of economic impact, for good reason:

> First, both the language and original understanding of the Takings Clause provide no direct support for the concept of a regulatory taking. This suggests, as the Court indicated in *Lingle*, that regulations can properly be viewed as takings only when they have such severe economic impacts that they are qualitatively similar to the kinds of direct appropriations within the core meaning of the clause. Second, a broad and uncertain rule of takings liability, especially applied to units of local government, would make it virtually impossible for government to function. Third, an expansive theory of regulatory takings would enmesh the courts in frequent review of executive and legislative policy making, pushing the courts beyond both their proper constitutional role and their institutional competence. Finally, the actual economic effects of regulations are often difficult to measure and indeed it may be impossible, outside of the extreme *Lucas*-type case, to determine whether the net

> economic effect of a regulation is positive or negative.

Echeverria, 23 UCLA J. Envtl. L. & Pol'y at 179.

Evans Creek's feeble effort to overturn the economic impact factor demonstrates that no facts existed upon which Evans Creek could plausibly allege any economic impact. Evans Creek's failure to allege any difference in economic value after the City Council's vote provides no basis to abandon the *Penn Central* factors. There was a simple reason that Evans Creek could not allege any diminution in value: no value has been taken from the property. Evans Creek's property enjoys the very same status it had before Evans Creek applied for annexation. "Property in an annexed area is subsequently treated as any other property within the municipality, including being subject to existing municipal ordinances and its zoning jurisdiction. Conversely, since a purpose of annexation is for the city to replace, at least in some respects, the county's government functions in the annexed area, a municipality's annexation of property extinguishes a property owner's obligation to comply with county zoning ordinances." 56 Am. Jur. 2d Municipal Corporations, Etc. § 37 (2020). Annexation would merely have extinguished Evans Creek's duty to comply with Washoe County zoning ordinances and might have allowed the property to be developed at a higher density under City code.[3] *Id.* The City's denial of annexation could not

[3] Because of the challenging topography of the site, it is difficult to determine to what extent the property could actually be developed. App. D-19, ¶ 58(c).

have reduced the property's value because it did not change the status of the property. Simply put, the application of county zoning ordinances has not been extinguished.

Even in *Bridge Aina Le'a, LLC v. State Land Use Commission*, 950 F.3d 610 (9th Cir. 2020) where the Hawaii Land Use Commission ordered the land's conversion from its conditional urban use classification to its prior agricultural use, the Ninth Circuit determined that the economic impact was not significant enough to constitute a *Penn Central*-type taking. *Id.* at 632. This Court declined to grant certiorari in that case. *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 141 S. Ct. 731 (2021). Here, Evans Creek did not allege a reversion or any change in status of the property. Instead, it alleged that it no longer has a pathway to commercial use. App. D-2, ¶ 2; App. D-29, ¶ 83. But unlike *Bridge Aina Le'a*, Evans Creek never had the right to become part of the City and to develop the property under the City's increased density standards. Since the status of the property has not changed and the pathway to development has not changed, there cannot be an economic impact from the denial of annexation.

"Under the *Penn Central* test, a property owner is not entitled to the most beneficial use of the property." *Comm. for Reasonable Regul. of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 365 F. Supp. 2d 1146, 1161 (D. Nev. 2005). Yet, that is precisely what Evans Creek argues: that denial of its 2020 annexation application has restricted the *most beneficial use* of its Property because it will not be able to develop it at the City's

density standard for residential development, which is higher than Washoe County's allowed density. App. D-19, ¶ 58(c). Nonetheless, that is not the rule as to whether a regulation operates as the functional equivalent of a physical taking.

Evans Creek would not prevail even under its proposal to focus on the *use* of the property because it never had the right to develop the property at the density allowed under the City's ordinances. The property has never been annexed by the City. Denial of annexation has not converted Evans Creek's private property into public property and "parkland." App. D-29, ¶ 84. It was private property and remains private property. Evans Creek continues to enjoy it for livestock purposes. App. D-25, ¶ 64. Furthermore, there is no statutory or regulatory prohibition against Evans Creek applying for development proposals even if its property has not been annexed.

2. No reasonable investment-backed expectations.

The Ninth Circuit and the district court correctly concluded that the City's denial of the annexation application has not interfered with Evans Creek's reasonable investment-backed expectations. "To form the basis for a taking claim, a purported distinct investment-backed expectation must be objectively reasonable." *Colony Cove Properties, LLC*, 888 F.3d at 452, *cert. denied*, 139 S. Ct. 917 (2019). That Evans Creek "may not be able to make the most profitable use of the

subject property is not sufficient to state a 'takings' claim." *Laurel Park Community, LLC v. City of Tumwater*, 790 F. Supp. 2d 1290, 1301 (W.D. Wash. 2011), *citing Goldblatt*, 369 U.S. at 592. As the Court in *Penn Central* noted, "the submission that appellants may 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 is quite simply untenable." *Penn Cent. Transp. Co.*, 438 U.S. at 130.

Like the situation in *Penn Central*, where the terminal was able to continue to operate "precisely as it has been used for the past 65 years," *id.* at 136, the property here can be used as it has been since 1997. *See* App. D-5, ¶ 15. Evans Creek has not alleged an investment-backed expectation "that is distinct, probable, or real beyond mere speculative desires." *Laurel Park Cmty., LLC*, 790 F. Supp. 2d at 1301, *aff'd*, 698 F.3d 1180 (9th Cir. 2012).

In contrast to its current argument that the reasonable investment-backed expectations factor should be overturned, Evans Creek argued to the Ninth Circuit that its investment-backed expectations should be measured at the time of acquisition in 1997, without considering any subsequent circumstances over the last 25 years (Opening Br. 33, Case No. 21-16620, Dkt. 10 (Dec. 30, 2021)). Both the district court and the Ninth Circuit properly rejected this argument. The Ninth Circuit concluded that:

> Evans Creek's takings claim also fails prong two of the *Penn Central* analysis. As the Court in *Penn Central* noted, an appellant 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." 438 U.S. at 130. Instead, "a purported distinct investment-backed expectation must be objectively reasonable." *Colony Cove*, 888 F.3d at 452. Here, the principals' expectations that Evans Creek would be able to develop the property into a master planned community may well have been "hardly unconventional." But Evans Creek's "[u]nilateral expectations" about the mere possibility for future development were no more than speculative desires that cannot form the basis of a takings claim. *Bridge Aina Le'a*, 950 F.3d at 633–34. Additionally, the City's decision to annex property is subject to the City's discretion based on multiple statutorily prescribed factors. *See* Reno Mun. Code § 18.04.301(d). Nevada law grants cities discretion to annex property when a property owner requests it. *See* Nev. Rev. Stat. § 268.670. Therefore, Evans Creek knew or should have known—especially after several failed requests for annexation—that the 2020 Application might be denied.

Now, however, Evans Creek argues that this factor is confusing and too difficult to plead, so the Court should send it to the scrap heap. Pet. 22–24. There is no basis to do so.

This Court has long recognized that the inquiries under *Loretto*,[4] *Lucas*, and *Penn Central* share a common goal. "Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights." *Lingle*, 544 U.S. at 539. In particular, "the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.* at 540.

The second *Penn Central* factor requires a multifaceted analysis. The analysis begins with what distinct expectations a landowner had for his property; then, it asks what, if any, investments supported those expectations; next, it queries whether those investments were *objectively* reasonable; and finally, it examines the extent to which government action has interfered with those distinct, reasonable, and investment-backed expectations. The "shifting and inconsistent" focus of the lower courts that Petitioner disparages, Pet. 23, is explained by courts necessarily shifting the focus of their inquiry, as the individual facts of the case may warrant, on each of those relevant inquiries.

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[4] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982).

For example, in *Philip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002), cited by Evans Creek (Pet. 23), the First Circuit acknowledged that "courts have struggled to adequately define this term." *Id.* at 36. Nonetheless, the First Circuit utilized the history of confidentiality of trade secrets under Massachusetts law to conclude that Philip Morris had reasonable investment-backed expectations in the confidentiality of its ingredient list and ultimately concluded that the Disclosure Act at issue constituted a regulatory taking of Philip Morris' trade secrets. *Id.* at 43–44, 57; *see also Rith Energy v. United States*, 270 F.3d 1347, 1350 (Fed. Cir. 2001), cited at Pet. 22, (recognizing that "the role of investment-backed expectations in regulatory takings cases is well settled").

More importantly, none of the decisions cited by Evans Creek conflict with this Court's precedents addressing *Penn Central*'s second factor. Nor do any of the authorities conflict with the decision below. Further review is not warranted.

3. The character of government action does not favor Evans Creek.

Although the district court declined to address the third prong of the *Penn Central* factors, Evans Creek seeks to have this factor overturned as well, precisely because the character of the government action weighs against Evans Creek. The denial of the annexation application was not "confiscatory or physically invasive." *Laurel Park Community, LLC*, 790 F. Supp. 2d at

1301–02. Evans Creek's private property remains private. Denial of annexation does not give the public lawful access to Evans Creek's property without Evans Creek's consent. The City Council's determination that its fiscal resources would suffer too much impact if it were required to be solely responsible for fire protection for the property is precisely the kind of "public program adjusting the benefits and burdens of economic life to promote the common good" that does not amount to a taking. *Penn Cent.*, 438 U.S. at 124.

The City's determination whether to approve or deny an annexation application is a discretionary function. The statute allowing for voluntary annexation by a property owner, Nevada Revised Statute ("NRS") 268.670, is not mandatory. Not once, but twice, it specifies that the City Council *may* annex property:

> 1. As an alternative to the procedures for initiation of annexation proceedings set forth in NRS 268.610 to 268.668, inclusive, the governing body of a city *may*, subject to the provisions of NRS 268.663 and after notifying the board of county commissioners of the county in which the city lies of its intention, annex:
>
> (a) Contiguous territory owned in fee by the city.
>
> (b) Other contiguous territory if 100 percent of the owners of record of individual lots or parcels of land within such area sign a petition requesting the governing body to annex such area to the city. If such petition is

> received and accepted by the governing body, the governing body *may* proceed to adopt an ordinance annexing such area and to take such other action as is necessary and appropriate to accomplish such annexation.

(Emphases added.) NRS 0.025(1) defines the term "may" as follows: "[e]xcept as otherwise expressly provided in a particular statute or required by the context: (a) "May" confers a right, privilege or power. The term "is entitled" confers a private right." Thus, NRS 268.670 conferred a right, privilege or power to the City to annex certain property contiguous to the City's boundary brought by the property owner. Importantly, it does not mandate that the City Council approve a voluntary annexation application. Instead, it specifically contemplates that the City Council will exercise its discretion to determine whether to approve or deny an annexation application. This is reiterated in the City's Charter. Section 1.040 provides that "The City *may* annex territory by following the procedure provided for the annexation of cities in those sections of chapter 268 of NRS, as amended from time to time, which apply to a county whose population is less than 700,000." (Emphasis added.) The City's ability to control its boundaries by annexing territory is a singularly discretionary function.[5]

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[5] Reno Municipal Code section 18.08.401(c)(4) (previously cited in the Complaint as RMC 18.04.301(d)) sets forth ten factors that City Council was required to consider in reviewing Evans Creek's annexation application:

It would defeat the very purpose of discretionary decision-making if every denial of a land use application could result in a constitutional claim against the City. Inherent in the right to annex property under the City Charter and NRS 268.670 is the right *not* to annex

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> **Review Considerations.** When considering an application for annexation submitted under NRS 268.670, the city council shall consider the following factors in making a decision on the application:
>
> (a) Location of the property to be considered for annexation;
>
> (b) The logical extension or boundaries of city limits;
>
> (c) The need for the expansion to accommodate planned regional growth;
>
> (d) The location of existing and planned water and sewer service;
>
> (e) Community goals that would be met by the proposed annexation;
>
> (f) The efficient and cost effective provision of service areas and capital facilities;
>
> (g) Fiscal analysis regarding the proposed annexation;
>
> (h) Whether Washoe County has adopted a community management plan for the proposed annexation area;
>
> (i) Whether the annexation creates any islands; and
>
> (j) Any other factors concerning the proposed annexation deemed appropriate for consideration by the city council.

(Ord. No. 5417, § 2, 1-28-03; Ord. No. 6041, § 2, 7-16-08). How those factors are utilized and weighed are based on City Councilmembers' individualized, subjective assessments and discretion.

property. "[T]he power of political subdivisions of states, such as municipalities and water districts, to alter their boundaries, is almost absolute as far as the federal Constitution is concerned." *Jimenez v. Hidalgo Cty. Water Improvement Dist. No. 2*, 68 F.R.D. 668, 672 (S.D. Tex. 1975), *aff'd*, 424 U.S. 950 (1976) (implicitly overruled as to justiciability of political gerrymandering as recognized by *Mahone v. Addicks Util. Dist. of Harris Cty.*, 836 F.2d 921, 929, n.5 (5th Cir. 1988)).

More importantly, denial of annexation does not preclude development of the property. Evans Creek may apply to the Regional Planning Commission or local governing body, such as the City, to be removed from Reno's Sphere of Influence and Truckee Meadows Service Area. NRS 278.0272(7); *see also* Truckee Meadows Regional Planning Governing Board Regulations on Procedure, Section II.B (allowing for private property owners to apply for Regional Planning Commission sponsorship of amendment of Truckee Meadows Service Area or Future Service Area boundaries). If such application were approved, Evans Creek's property would then be subject to Washoe County's planning ordinances and zoning. Or Evans Creek can still apply to the City for a development conforming to County Code. But the inability to develop at the higher density allowed in City code does not mean that the denial of annexation was a regulatory taking.

As Evans Creek concedes, the City based its denial upon: Evans Creek's failure to submit a Master Plan amendment; the lack of demand for the mixture of land

use types that would be constructed on Evans Creek's property; water rights disputes; and fire danger. App. D-23, ¶ 61. The minutes of the May 27, 2020 City Council meeting[6] reveal that the City Council members were concerned with: the financial and other resources needed to serve this area, for which there have been historical fires; fire access concerns; water and sewer service concerns; that it was located in Tier 2, which is not a priority area for investment of infrastructure; and that no master plan amendment or slope analysis had been provided that would allow the Council to evaluate the density of future development. App. C-12–13. The Council members believed that because this area had not been prioritized for investment of infrastructure, it would be too costly to annex because the City would then bear the entire responsibility for fire protection for the area, as opposed to the current situation where fire protection services are shared with county government. App. C-12–13.

Although Evans Creek argues that the City's stated reasons for denial were "pretextual," such characterization is belied by the record. Evans Creek did not contend that the City Council's asserted reasons were false, just that the City gave them undue weight. As the district court stated in its order,

> [Evans Creek's] allegations that the City's reasoning was "objectively false" is conclusory

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[6] The district court took judicial notice of these minutes pursuant to the City's request, which was not opposed by Evans Creek. App. C-13, n.5.

> and lacks factual support. Plaintiff does not assert that the area is not in a high hazard area, that the annexation request did not provide a master plan amendment, or that there are unresolved water rights issues, as the City indicated in the Meeting Minutes. (ECF No. 8-1 at 11–12.) Instead, Plaintiff argues that these facts carried an outsized weight and were used to justify an otherwise arbitrary decision. (ECF No. 1 at 17.)

App. C-14–15.

4. Even under Evans Creek's proposed alternative standard, Evans Creek cannot prevail.

It is not clear that Evans Creek could even allege a regulatory taking under some alternative test, because it does not propose one that is any clearer than the *Penn Central* test. Neither does the amicus. Does Evans Creek think the first *Penn Central* prong should be subject to some specific percentage-threshold, as suggested in its brief? Pet. C-19–20. Evans Creek's proffered test of weighing the "degree to which the regulation burdens the right to use property" (Pet. 34) is as ambiguous as it sounds, and does not lend any more certainty to a regulatory taking analysis than the existing *Penn Central* factors. Even using that test, Evans Creek could not prevail, because it never had the right to develop its property under the City's increased density standard. Its property remains private; Evans Creek retains the right to exclude others

from it; and Evans Creek retains the right to use it for livestock. Evans Creek even has the ability to develop the property, just not at the density that it desires. In short, City Council's denial of Evans Creek's annexation request changed nothing about the use allowed on Evans Creek's property.

Moreover, even scholars cannot agree on what test should replace the *Penn Central* factors. *Compare, e.g.*, Kenneth Miller, Penn Central *for Tomorrow: Making Regulatory Takings Predictable*, 39 ELR 10457, 10457 (2009) (proposing two-prong test, which collapses the first and second *Penn Central* factors into one, and adds sub-prongs to the third factor); *with* Lise Johnson, *Note, After* Tahoe-Sierra*, One Thing Is Clearer: There Is Still A Fundamental Lack of Clarity*, 46 Ariz. L. Rev. 353, 376 (2004) (proposing a due process-oriented approach that "gives more deference to the decisions of legislatures and zoning boards"), and Echeverria, 23 UCLA J. Envtl. L. & Pol'y at 210 (proposing that courts should use a cost basis analysis in addition to the value of the property with and without the regulation to assess economic impact and discussing additional analyses for investment-backed expectations and the character of the government action factors). *See also Nekrilov v. City of Jersey*, 45 F.4th 662, 685 (3d Cir. 2022) (Bibas, Circuit Judge, concurring in the judgment) ("Courts must identify both a property right that has been taken and a public use into which that right has been pressed. If we look at takings that way, only the [character of the government action] *Penn Central*

factor aligns closely with the original meaning of the Takings Clause.").

Evans Creek hopes this Court will replace *Penn Central*, long recognized as the "polestar" of its taking jurisprudence (*Tahoe-Sierra Preservation Council, Inc. vs. Tahoe Regional Planning Agency*, 535 U.S. 302, 336 (2002)), with an analysis of the "degree to which regulation burdens the right to use property." Pet. 6. Its proposal would only further muddy the taking waters. Evans Creek proposes no coherent way to analyze the impact on the right to use property. Indeed, the factors in *Penn Central* are aimed at evaluating this very question. The economic impact factor, for instance, necessarily takes into account the impact of devaluation based on a limit imposed on the use of the property. The investment-backed expectations factor looks at whether the property owner's perception of how it could use the property is reasonable. The character of the government action prong evaluates what type of restriction, such as a physical invasion, has been placed on the property. The *Penn Central* factors are the way to evaluate a regulation's impact on the use of the property. There is no need for further review.

CONCLUSION

The Court should deny the Petition.

DATED this 26th day of April, 2023.

Respectfully submitted,

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