No. ____

In The
Supreme Court of the United States

DENIS P. KELLEHER and CAROL KELLEHER,
Petitioners,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Respondent.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1999, Denis and Carol Kelleher purchased an undeveloped lot in an established residential neighborhood with the intention of building a small summer home. After receiving local permit approvals, a New York agency denied the permits upon a determination that the creekside lot would provide more public benefits if it was kept in its undeveloped state. The Kellehers sued for a regulatory taking, presenting a "text book" and "persuasive" claim showing a 98 percent reduction in value. But a longstanding New York court rule holds that a landowner cannot, as a matter of law, establish a reasonable investment-backed expectation when a regulation in effect at the time of purchase requires the owner to secure a discretionary land use permit. *Matter of Gazza v. New York State Dep't of Envtl. Conservation*, 89 N.Y.2d 603, 615, *cert. denied*, 522 U.S. 813 (1997)). According to the New York courts, the existence of agency discretion "is dispositive" of a regulatory takings claim without regard to any of the other factors required by *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). *Gazza*, 89 N.Y.2d at 616.

The questions presented are:

1. Whether a property owner may be deemed to lack investment-backed expectations, and thus be barred from challenging a land use restriction as a regulatory taking, solely because the challenged restriction was enacted before he acquired the property notwithstanding this Court's contrary ruling in *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001); and

2. Whether any one factor of *Penn Central*'s multi-factorial regulatory takings test set is dispositive of a property owner's regulatory taking claim without regard to the remaining factors.

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PETITION FOR WRIT OF CERTIORARI

Denis and Carol Kelleher respectfully request that this Court issue a writ of certiorari to review the judgment of the Appellate Division of the New York Supreme Court.

OPINIONS BELOW

The opinion of the Appellate Division, Second Department, of the Supreme Court of New York is reported at *Kelleher v. New York Department of Environmental Conservation*, 69 N.Y.S.3d 832 (2018), and is reproduced in Petitioner's Appendix (Pet. App.) A. The decision of the New York Supreme Court for Suffolk County is available at *Kelleher v. New York Department of Environmental Conservation,* 2015 WL 4082786 (N.Y. Sup. Ct. June 24, 2015), and appears at Pet. App. B. The decision of the Court of Appeals of New York denying review is reproduced as Pet. App. C.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). Petitioners Denis and Carol Kelleher filed a lawsuit challenging the New York Department of Environmental Conservation's permit denial decision as effecting an uncompensated regulatory taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The Appellate Division of the Supreme Court of New York dismissed the Kellehers' federal constitutional claim and upheld the permit denial decision in its March 14, 2018, decision. The Court of Appeals of New York denied the Kellehers' motion for leave to appeal on June 27, 2018. This petition is timely filed pursuant to Rule 13.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. This guarantee is made applicable to the states by the Fourteenth Amendment, which provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises an important and unresolved question regarding the proper application of the multifactorial regulatory takings test established by *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). There, this Court held a partial regulatory taking must be determined based on all relevant circumstances, including the economic impact of the regulation on the landowner, the interference with the landowner's investment-backed expectations, and the character of the governmental action. *Id.* These factors are "designed to allow careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (internal quotation marks and citations omitted). The petition asks whether any one *Penn Central* factor—here, the owner's investment-backed expectations—can be dispositive of a regulatory takings claim without regard to the other factors. If so, the petition asks whether, and how, the existence of a restrictive regulation at the time of acquisition may be

considered when determining the extent of an owner's rights in his land.

In the decision below, a New York appellate court dismissed Denis and Carol Kelleher's regulatory takings claim under a state-court rule holding that a landowner cannot, as a matter of law, establish a reasonable investment-backed expectation when a regulation in effect at the time of purchase requires the owner to secure a discretionary land use permit. Pet. App. A-3, B-9 (citing *Matter of Gazza v. New York State Dep't of Envtl. Conservation*, 89 N.Y.2d 603, 615, *cert. denied*, 522 U.S. 813 (1997)). Because of the categorical nature of the New York rule, the court refused to consider the economic impact of the challenged regulation on the Kellehers' investment—estimated to be as high as 98 percent—or the character of the government action, despite the fact that they put on a "text book" and "persuasive" case on those factors. Pet. App. A-3, B-6, 9. The state court decision directly conflicts with this Court's decisions in *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-28 (2001), and *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017) ("[N]o single consideration can supply the exclusive test for determining [an owner's reasonable investment-backed expectations]."), and deepens an irreconcilable split of authority among the lower federal courts and state courts of last resort.

This case is particularly well-suited for this Court's review because the New York courts decided the takings claim as a matter of federal constitutional law. Thus, the case does not present any issues of fact or state law to distract from the important constitutional question. Moreover, resolution of this question is a matter of nationwide importance because

the New York rule is patently unreasonable in a regulatory environment where agencies like the state agency below ordinarily adopt blanket restrictions on development, requiring landowners to go through discretionary permit proceedings designed to address the range of potential impacts that any use or development may have on the environment. This process is intended to allow development while minimizing and/or mitigating adverse impacts—it should not be perverted to strip individuals of core constitutional rights.

STATEMENT OF THE CASE

A. Factual Background

1. The Kelleher Property

This case arises from a land use dispute in the Hamlet of Water Mill, Town of Southampton, New York. In 1999, the Kellehers purchased an undeveloped residential-zoned lot for $450,000 with the intention of building a small summer home. Pet. App. at B-2. The 0.39-acre lot can only be used for a single-family residence and is one of two vacant parcels in an established and otherwise fully-developed residential neighborhood, and is taxed for its value as a residential property.[1] Pet. App. at B-4, 6. But nearly two decades later, the lot remains undeveloped and the Kellehers' investment is unquestionably lost.

The dispute arises from regulations adopted under New York's State Tidal Wetlands Act of 1973, which require that owners of property adjacent to

[1] *See also* AR 380 (Kelleher property appraisal report), 519 (DEC property appraisal report).

wetlands set aside buffers of 75 feet for most structures and 100 feet for sewage disposal systems.[2] Pet. App. B at 7-8. Although the Kellehers' land is zoned for single-family homes (AR 89), the property is subject to state wetland regulations because it is located along a stretch of Calf Creek and a small portion of the lot contains a wetland. Pet. App. B at 2, 3. That, alone, did not render the Kellehers' lot unbuildable. After all, both sides of the creek are developed with single-family houses serviced by an on-site septic system.[3] And many of the Kellehers' neighbors along the creek received building permits in the decades since the state enacted the wetland regulations.[4] Nonetheless, because state and local regulations impose predetermined buffers, the Kellehers were required to secure variances adjusting the size and dimension of the mandatory buffers in order to accommodate the proposed house.

2. Permit Applications

Because the lot is located adjacent to a creek, the Kellehers were required to secure permit approvals from the Town of Southhampton Conservation Board, the Town of Southhampton Zoning Board of Appeals, the Suffolk County Department of Health, and the New York Department of Environmental Conservation (DEC) prior to making any improvements. Pet. App. B at 2. The location of the property posed no problem during the local permit proceedings. Between 2000 and 2004, the Kellehers successfully worked with the town to come up with a

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[2] 6 NY-CRR § 661.6(a).

[3] AR 66-67.

[4] AR 72, 346 (showing at least 18 waterfront homes permitted between 1977 and 2006).

project that would satisfy all local environmental requirements, including the town's buffer requirements. Pet. App. B at 2-3. In order to minimize any impact on the environment, the Kellehers proposed a small two-story, three-bedroom home with a footprint of 754 square feet.[5] They also agreed to locate the house on the far northeast corner of the lot and the septic system on the far northwest corner, just 15 feet from Westminster Road and as far away from the creek as possible.[6] The proposal included several design elements intended to minimize environmental impacts, including a pervious driveway and a dry well system sufficient to collect runoff from the roof and gutters.[7] In addition, the Kellehers agreed to set aside much of their remaining property as native vegetation area.[8]

In 2004, the Town Conservation Board and Zoning Board of Appeals approved the project, granting a variance to reduce its local wetland buffers to 34 feet for the house and 44 feet for the septic system based on the proposal's limited impacts and based on the fact that the lot is located in a fully developed residential neighborhood.[9] Pet. App. B at 2-3. Suffolk County then held approval of Kellehers' application, pending issuance of a permit from DEC. Pet. App. B at 3.

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[5] Pet. App. F at 3. The town varied a code provision requiring a minimum 800 square foot footprint to assist in minimizing any potential environmental impacts. Pet. App. H at 1.

[6] Pet. App H at 1. The town also varied the mandatory 50-foot front yard setback to allow construction.

[7] Pet. App. F at 3-4.

[8] *Id*.

[9] Pet. App. I at 3.

As the local process drew to a close, the Kellehers filed an application for a state wetlands permit with DEC, again seeking authorization to build a house, install a septic system, and a driveway. Pet. App. B at 3. The DEC, however, held firm to its mandatory buffers. *Id*. Even with all of the Kellehers' proposed mitigation and environmentally sensitive building features, the DEC, in 2006, denied the application because the house and septic system were within the required 75-foot and 100-foot creek buffers. Pet. App. D at 1-6. DEC also denied the Kellehers' request for a variance to reduce the buffer size, despite the town's conclusion that the proposed home would not significantly impact the environment, despite the fact that the neighborhood is fully developed with single-family homes and on-site septic systems (all of which are much closer to Calf Creek than the proposed home), and despite a DEC determination that application of the buffer requirement would render the property unbuildable for residential purposes. *Id.*

3. Administrative Appeal

The Kellehers appealed the DEC decision to an administrative law judge. The proceeding focused on whether the DEC decision was consistent with the buffer requirements of the New York State Tidal Wetlands Act. Pet. App. D at 2; Pet. App. E at 6. On that question, the judge concluded that "given the size of the Kelleher property and the location of the wetland boundary, one could not site a house on a footprint where compliance with [the 75-foot buffer] would be achieved." Pet. App. E at 17-18. The judge reached the same conclusion in regard to the buffers applicable to a septic system. *Id*. at 18. Thus, the administrative law judge concluded that the buffer

regulations barred any residential development of the lot. *Id*. at 19. The judge further determined that there was "no evidence about other allowable uses they could make of the project site." *Id*. at 18.

In regard to the Kellehers' variance request, the judge explained that the state's buffer regulations presume that any development adjacent to a wetland could potentially impact the environment in a variety of hypothetical situations (such as a septic system failure). *Id* at 19-20. Despite recognizing that the neighborhood is fully developed with single-family homes that have the same presumed impacts and that there was no showing that the Kellehers' home would "make a difference to the creek and bay ecology," the judge concluded that "the best use" of the lot would be to remain undeveloped to mitigate for community impacts. *Id*. at 21. In addition, the administrative law judge noted that the state's variance provision also requires the applicant to show that a decision will provide "social and economic benefits," among other requirements.[10] *Id*. On that factor, the judge concluded that the undeveloped lot provides aesthetic value to bird watchers, fishermen, and boaters. *Id*. at 14, 22. The judge then concluded that the Kellehers' desire to build a house on their property would provide only private benefits; "the house serves no public purpose, there is no public interest behind its construction." *Id*. at 22; AR 323. Thus, the judge concluded that DEC acted within its discretion when it denied the Kellehers' request to vary the buffers. *Id*. at 25.

[10] AR 323 (citing 6 NY-CRR § 661.9(c)(3)).

B. Court Proceedings

In 2009, the Kellehers filed a lawsuit in a New York state trial court, arguing that the DEC's decision effected a regulatory taking under both the state and U.S. Constitutions. Pet. App. B at 5-6. The court analyzed the case under the multifactorial test set forth by *Penn Central*, because the parties disputed whether the lot had any residual value. The Kellehers' appraisal concluded that the DEC decision reduced the value of the property by 98 percent. *Id.* The DEC claimed that the economic impact of its decision could be mitigated if the Kellehers secured all of the condition approvals necessary to build a dock, driveway, and storage shed. *Id.*; *see* also AR 48 (acknowledging at the hearing that, in addition to local and state approvals, such a project would require approvals from U.S. Army Corps of Engineers). The trial court, however, did not evaluate the parties' arguments regarding economic impact based on a New York court rule that bars property owners from challenging the constitutionality of a discretionary permit decision. Pet. App. A at 3; Pet. App. B at 8-9.

At the outset of the hearing, both parties agreed that the propriety of the permit decision was not at issue.[11] The only question was whether the permit denial effected a taking.[12] And on that question, the DEC argued that the date that the wetland buffer regulations originally went into effect—1977—was determinative of the Kellehers' takings case under New York's "absolute right" rule.[13] Thus, the trial

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[11] Transcript of the Proceedings (Dec. 9, 2014) (Record on Appeal (RA) 32-33, 39-40).
[12] *Id.*
[13] *Id.*

court agreed to limit its inquiry to the question of whether a taking occurred, without considering the substance or correctness of the permit decision.[14]

After a three-day trial, during which the court heard evidence on all of the *Penn Central* factors, the trial court found that the Kellehers had "submitted a text book case proffering evidence as to every element of their taking claim," presenting evidence that the DEC's decision reduced the value of their residential-zoned property by an estimated 98 percent. Pet. App. B at 6. The judge noted that "[s]tanding alone, it appears that [the Kellehers] submitted a persuasive claim and a persuasive case." *Id.* The court, however, concluded that, "as post-regulation purchasers, [the Kellehers] bear the burden of proving that there was some compelling reason for them to expect that they could build a house on a parcel of land that was too small to meet the health-based septic system setback requirements, as well as other regulatory requirements." Pet. App. B at 9. Based on that single factor, the court held that the Kellehers had no reasonable expectation to build a home on their property and dismissed their takings claim. *Id.*

The Kellehers appealed the trial court's decision, arguing that, after *Palazzolo*, 533 U.S. at 626-28, the mere fact that a regulation was in effect at the time the owner acquired the property is not determinative of his or her expectations. Instead, *Penn Central* requires courts to meaningfully weigh all of the relevant facts and circumstances, which here included a determination that the buffer regulations barred any residential development of a lot that is zoned and

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[14] *Id.* at 42.

taxed for residential use, and a determination that the property should be kept in its undeveloped state to provide the public with environmental and aesthetic benefits.

The appellate division affirmed the trial court's decision without addressing *Palazzolo* or *Penn Central*. Pet. App. A at 2-3. Instead, the court relied on New York's "absolute right" rule which required that the Kellehers, as post-enactment purchasers, "demonstrate that, at the time they acquired title, they possessed the right to develop and use the property in the manner in which they proposed." Pet. App. A at 3. As authority for this proposition, the court cited the pre-*Palazzolo* decision *Gazza*, 89 N.Y.2d at 615. There, the New York Court of Appeals held that a plaintiff must show "an absolute right to build on his land without a variance" to advance a takings claim. *Id*. *Gazza* further concluded that the property owner must show this right based upon "those State laws enacted and in effect at the time he took title." *Id*. This inquiry, the court continued, "is dispositive" of a *Penn Central* takings claim without regard to any other factors of the multifactorial balancing test. *Id*. at 616. Thus, in the decision below, the appellate court upheld the trial court's decision without considering the Kellehers' "text book" and "persuasive" evidence on the remaining *Penn Central* factors. Pet. App. A at 3.

The Kellehers thereafter filed a motion for leave to appeal to the court of appeals, arguing that New York's "absolute right" rule conflicts with *Penn Central* and *Palazzolo*. The court denied the motion in late June 2018. This petition follows. Pet. App. C at 1.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE PROPER APPLICATION OF *PENN CENTRAL* AND TO RESOLVE CONFLICTS ON THIS ISSUE OF NATIONWIDE IMPORTANCE

The New York court decision directly conflicts with this Court's repeated admonition that a partial regulatory taking cannot be determined based on any "set formula."[15] *Penn Central*, 438 U.S. at 124; *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. at 326 (2002) (Courts must resist "[t]he temptation to adopt what amount to *per se* rules" in either direction.) (citing *Palazzolo,* 533 U.S. at 636 (O'Connor, J., concurring)). It also conflicts with *Palazzolo*, where this Court confirmed that a property owner's right to make reasonable use of his land does not evaporate simply because a restrictive regulation predates his acquisition. 533 U.S. at 626-28. Both of these conflicts implicate this Court's insistence that a partial regulatory taking be determined on the "essentially ad hoc, factual inquiries" set out by *Penn Central*. *Tahoe-Sierra*, 535 U.S. at 326; *Murr*, 137 S. Ct. at 1945 ("[N]o single

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[15] This Court has identified two situations where a regulation categorically goes "too far," constituting a per se regulatory taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). First, if government requires an owner to suffer a permanent physical invasion of his property, a taking occurs. *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982). Second, a taking also occurs if a regulation deprives an owner of "all economically beneficial use" of the property. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

consideration can supply the exclusive test for determining [an owner's reasonable investment-backed expectations]."). The proper application of this multifactorial test, however, is subject to conflicting opinions from this Court and an irreconcilable split of authority among the lower federal courts and state courts of last resort regarding the proper application of *Penn Central*'s multifactorial test.

A. Conflicts in This Court's Case Law

This Court's case law is conflicted on the question whether, and how, any one factor from the *Penn Central* test can be determinative of a regulatory takings claim without regard to the other factors. *Penn Central* directs courts to determine whether a regulation effects a taking of private property by evaluating "a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo*, 533 U.S. at 617 (citing *Penn Central*, 438 U.S. at 124).

Although the *Penn Central* test is considered the "polestar" of regulatory takings jurisprudence,[16] this Court has largely refrained from elaborating on those "ad hoc" factors or explaining how the test is to be applied in order to preserve the flexibility necessary to respond to each case on its individual merits. *Murr*, 137 S. Ct. at 1942-43; *see also Palazzolo*, 533 U.S. at 617 (The Court has "given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects

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[16] *Tahoe-Sierra Pres. Council*, 535 U.S. at 336; *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring).

a regulatory taking."); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012) ("In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area."). This reluctance, however, has "given rise to vexing subsidiary questions" regarding *Penn Central*'s application.[17] *Lingle*, 544 U.S. at 538-39.

One topic on which this Court has provided partial guidance is in regard to the so-called "notice

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[17] Scholars from both sides of the property rights debate have criticized the *Penn Central* framework as being vague, impossible to apply in a consistent manner, and an invitation to judicial subjectivity. *Compare* Gideon Kanner, *"Landmark Justice" or "Economic Lunacy"? A Quarter Century Retrospective on* Penn Central (decrying *Penn Central*'s "questionable provenance, destabilizing influence on the law, dubious status as precedent, and its substantive shortcomings"), *in Inverse Condemnation and Related Government Liability* 379, 381-82 (ALI-ABA Course of Study, Apr. 22-24, 2004), *available at* WL SJ052 ALI-ABA 379, *with* John D. Echeverria, *Is the* Penn Central *Three-Factor-Test Ready for History's Dustbin?*, 52 Land Use L. & Zoning Digest 3, 11 (2000) (declaring that the *Penn Central* framework "is not supported by current Supreme Court precedent, invites unprincipled judicial decision making, conflicts with the language and original understanding of the Takings Clause, would confer unjust windfalls in many cases, and creates seemingly insurmountable problems in terms of defining an appropriate remedy"); *see also* Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 Wm. & Mary L. Rev. 995, 995 (1997) (describing *Penn Central* as an "ill fitting piece [ ] left over from other puzzles long ago forgotten and now deserving abandonment"); *see also* Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or A One Strike Rule?*, 22 Fed. Cir. B.J. 677, 678 (2013) (surveying the divergent applications of the *Penn Central* factors among three federal circuits).

rule"—the assertion that "[a] purchaser or a successive title holder . . . is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Palazzolo*, 533 U.S. at 626. This Court rejected that rule as "quixotic" and "capricious in effect." *Id.* at 628. Thus, the mere fact that a restrictive land-use regulation is in effect at the time of acquisition cannot determine a regulatory takings case as matter of law. *Id.* at 627. On that basis alone, this Court should grant review and reverse the New York court decision.

However, the *Palazzolo* majority declined to answer the question of whether a court should consider restrictive regulations in effect at the time an owner takes title to his or her property, and, if so, how such an inquiry impacts the court's evaluation of the other *Penn Central* factors. *Palazzolo*, 533 U.S. at 629 ("We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here."). This unanswered question, and conflicts in this Court's case law, have resulted in widespread confusion among courts, litigants, and scholars regarding what the *Penn Central* factors actually require and how the test is to be applied.[18]

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[18] *See, e.g.,* J. David Breemer, *Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)Reasonable in State Courts?*, 38 Urb. Law. 81, 83-84 (2006) (*Penn Central*'s ad hoc balancing test focuses on investment-backed expectations); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1670 (2003) (suggesting modification of the balancing test); Eric R. Claeys, *The* Penn Central *Test and Tensions in Liberal Property Theory*, 30 Harv. Envtl. L. Rev. 339, 369 (2006); Mark Fenster, *The*

Early decisions from this Court disagree about whether any one *Penn Central* factor can be dispositive of a regulatory takings case. In *Andrus v. Allard*, for example, the Court stated that, for the purpose of the *Penn Central* analysis, an owner's property interest is the full bundle of rights inhering in property—an owner has no reasonable expectation in the individual "strands" that make up the bundle. 444 U.S. 51, 65 (1979). Thus, the claimant's failure to allege a total deprivation was fatal to his case. *Id.* But one month later, in *Kaiser Aetna v. United States,* the Court found that a regulatory action interfering with a marina owner's right to exclude—one "strand" from that bundle—impacted a right that is so fundamental to property that it effected a taking. 444 U.S. 164, 179-80 (1979). In *PruneYard Shopping Ctr. v. Robins*, however, the Court rejected a takings claim upon finding that a mall owner had no reasonable expectation to exclude others. 447 U.S. 74, 84 (1980) (defining "reasonable investment-backed expectations" as a right that is "essential to the use or economic value of the[] property."). Then, in *Ruckelshaus v. Monsanto Co.*, the Court concluded "that the force of [a single] factor [may be] so

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Stubborn Incoherence of Regulatory Takings, 28 Stan. Envtl. L.J. 525, 528 (2009) (noting the "indeterminacy" of the "ad hoc, multi-factor balancing test"); James R. Gordley, *Takings: What Does Matter? A Response to Professor Peñalver*, 31 Ecology L.Q. 291, 291 (2004) (*Penn Central* is an ad hoc balancing test); Gary Lawson et al., *"Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 Notre Dame L. Rev. 1, 30 (2005) ("[T]he validity of the regulation will depend on an examination and balancing of three elements . . . ." (quoting Appellees' Brief, *Penn Cent. Transp. Co. v. City of New York*, No. 77-444, 1978 WL 206883, at *16 (U.S. Mar. 2, 1978))).

overwhelming, . . . that it disposes of the taking question." 467 U.S. 986, 1005-06 (1984) (suggesting that the reasonableness of investment-backed expectations depends primarily on whether the owner knew of the challenged restrictions); *but see Hodel v. Irving*, 481 U.S. 704, 715 (1987) (finding a regulatory taking even where evidence of investment-backed expectations was "dubious," because the other factors weighed heavily in favor of the owner's claim). This line of cases is particularly relevant here because, as discussed in more detail below, the New York courts read *Ruckelshaus* as creating a per se defense to a regulatory takings claim. *See Gazza*, 89 N.Y.2d at 618 (citing *Ruckelshaus*, 467 U.S. at 1005); *see also Good v. United States*, 39 Fed. Cl. 81, 95 (1997), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999) (concluding that *Ruckelshaus* had implicitly adopted a categorical, single-factor defense to a regulatory takings claims).

Besides a footnote in *Nollan v. California Coastal Commission*, refusing to apply *Ruckelshaus* in the context of a land use decision, this Court has never addressed the circumstances in which a single factor can be dispositive of a partial regulatory takings claim. 483 U.S. 825, 833 n.2 (1987). Nor has this Court explained how any one factor can rise to determinative weight where "the *Penn Central* factors are completely incommensurate." John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171, 208 (2005).

Indeed, since *Palazzolo* this Court has consistently held that courts must "examine 'a number of factors' rather than a simple 'mathematically precise' formula" or a per se rule when determining whether regulation gave rise to a

taking in *Tahoe-Sierra*, 535 U.S. at 326. This is because "[t]he Takings Clause requires careful examination and weighing of all the relevant circumstances" and that "interference with investment-backed expectations is one of a number of factors that a court must examine." *Id.* at 326 n.23 (quoting *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring)).

Murr confirmed the modern view that the investment-backed expectations inquiry, alone, "should not necessarily preordain the outcome in every case." 137 S. Ct. at 1944. And in regard to that factor, the Court reiterated that an owner's expectations cannot be "shape[d] and define[d]" by reference to restrictive state and local laws. 137 S. Ct. at 1944-45; *see also Palazzolo*, 533 U.S. at 635 ("If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title.") (O'Connor, J., concurring). The Court explained that defining property by the terms of a restrictive regulation would leave "landowners without recourse against unreasonable regulations" and would "improperly . . . fortify the state law against a takings claim, because the court would look to the retained value in the property as a whole rather than considering whether individual holdings had lost all value." *Murr*, 137 S. Ct. at 1944-45.

With these principles in mind, *Murr* concluded that "courts must consider a number of factors" when determining an owner's property interest:

> These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that [the planned development may be permitted]. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition.

137 S. Ct. at 1945. *Murr*, thereafter, directed courts to "exercise care in this complex area." *Id*. at 1946.

The decision below plainly conflicts with the basic principles of takings law recognized by *Murr*, *Tahoe-Sierra*, and *Palazzolo* by giving the mere existence of a regulation determinative force without regard to the other *Penn Central* factors and subfactors. Indeed, the per se nature of New York's "absolute right" rule flouts the careful analysis envisioned by *Tahoe-Sierra* and *Murr* by absolving the government of its obligation to justify a regulation that outright prohibits residential development on a lot that is zoned and taxed for residential use. Pet. App. A at 3. That necessary analysis is particularly relevant here because New York courts have held that the buffers required by the state's wetland regulations do not constitute background principles of state law. *In re New Creek Bluebelt, Phase 3*, 65 N.Y.S.3d 552 (N.Y. App. Div. 2017); *see also Matter of City of New York*, 58 Misc. 3d 1210(A) (N.Y. Sup. Ct. 2018). ("[I]t is clear the New York State wetlands regulations did not simply make explicit a prohibition on activity that 'was always

unlawful', and therefore the wetland regulations are not background principles of New York property law.").

New York's "absolute right" rule renders the takings inquiry circular and meaningless. *Murr*, 137 S. Ct. at 1944 (citing *Tahoe-Sierra*, 535 U.S. at 331). As adopted, the investment-backed expectations inquiry asked only whether the plaintiff had invested resources in pursuit of some "distinctly perceived, sharply crystallized" expected use of the property.[19]

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[19] Legal scholars have long decried the lack of clear guidance on what the investment-backed expectations factor requires as an "amorphous" standard, noting that "[i]ts parameters remain uncertain even today." Robert Meltz, et al., *The Takings Issue: Constitutional Limits on Land-Use Control and Environmental Regulation* 134 (1999); *see also* 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."); Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 Urb. Law. 735, 758 (1988) ("[I]n no case has the Court made any effort to either define these terms or to give guidance to lower courts in determining their meaning."); R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzalo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. Envtl. L.J. 449, 449 (2001) ("Although more than two decades have elapsed since *Penn Central*, neither courts nor commentators have been able to agree on the meaning or applicability of investment-backed expectations in takings law."); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I – A Critique of Current Takings Doctrine*, 77 Cal. L. Rev. 1299, 1324 (1989) ("It is not at all clear . . . what role 'interference with reasonable expectations' plays in the Court's takings analysis."); Zach Whitney, Comment, *Regulatory Takings: Distinguishing Between the Privilege of Use and Duty*, 86 Marq. L. Rev. 617, 650-

See Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 Harv. L. Rev. 1165, 1233 (1967), *cited by Penn Central*, 438 U.S. at 128. Under that understanding, there can be no doubt that the Kellehers invested in their property in the expectation that it might one day build a small summer home on the residential-zoned lot (just like several of their neighbors had). The outcome of permitting might vindicate this expectation, or extinguish it. But the ultimate outcome of the Kellehers' plans cannot, in itself, determine whether their investment-backed expectations were sufficiently reasonable or distinct to warrant a full evaluation of the *Penn Central* factors.

B. The Question Whether Any One *Penn Central* Factor Can Dispose of a Takings Claim Is Subject to a Deep Split of Authority

The lack of guidance from this Court regarding whether (and how) a court should consider restrictive regulations in effect at the time an owner takes title to his or her property, when combined with the conflict between *Ruckelshaus* and this Court's post-*Palazzolo* case law, has given rise to an irreconcilable split of authority among the lower federal courts. Karen M. Brunner, Note, *A Missed Opportunity:* Pallazzolo v. Rhode Island *Leaves Investment-Backed Expectations Unclear as Ever*, 25 Hamline L. Rev. 117, 146 (2001) (noting the difficulty courts have evaluating an owner's investment-backed expectations against a backdrop of regulation); *see also 1256 Hertel Ave. Assocs., LLC v. Calloway*, 761 F.3d 252, 267 n.10 (2d

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51 (2002) ("The notion of investment-backed expectations is confusing, misunderstood, and often irrelevant.").

Cir. 2014) (This Court has not "clarified how long a legislative enactment must remain in force before it becomes . . . sufficiently embedded in a state's legal tradition that it defines property holders' rights and investment-backed expectations."). All too often, in the absence of guidance, courts give excessive weight to a regulation in place at the time of purchase. *Columbia Venture, LLC v. Richland Cty.*, 413 S.C. 423, 449 (2015), to the extent that many jurisdictions simply readopt the notice rule repudiated by *Palazzolo*. *See*, *e.g.*, *In re Thaw*, 769 F.3d 366, 371-72 (5th Cir. 2014).

New York's "absolute right" rule, for example, holds that a landowner cannot, as a matter of law, establish a reasonable investment-backed expectation when a regulation in effect at the time of acquisition requires him to secure a discretionary land use permit. Pet. App. A at 3 (citing *Gazza*, 89 N.Y.2d at 616-18). The rule does not take into account any of the circumstances that could render a person's expectation that a discretionary approval will issue (such as a history of approvals or the nature of the agency proceeding) more or less reasonable. *Gazza*, 89 N.Y.2d at 618 ("[T]he mere fact that an agency may take such action does not necessarily give rise to a reasonable expectation when the agency chooses not to so act.") (citing *Ruckelshaus*, 467 U.S. at 1005). New York courts have applied this rule to bar regulatory takings claims for decades and continue to do so without regard to this Court's decisions in *Palazzolo* and *Murr*. *See New York Ins. Ass'n, Inc. v. New York*, 41 N.Y.S.3d 149, 159 (N.Y. App. Div. 2016), *leave to appeal denied*, 29 N.Y.3d 910, (2017); *Novara ex rel. Jones v. Cantor Fitzgerald, LP*, 795 N.Y.S.2d 133, 138 (2005); *Linzenberg v. Town of Ramapo*, 766 N.Y.S.2d

217, 218-19 (2003); *Preble Aggregate, Inc. v. Town of Preble*, 694 N.Y.S.2d 788, 793 (1999); *Brotherton v. Dep't of Envtl. Conservation of N.Y.*, 675 N.Y.S.2d 121, 122-23 (1998); *see also Planned Inv'rs Corp. v. Inc. Vill. of Massapequa Park*, 798 N.Y.S.2d 712 (N.Y. Sup. Ct. 2004).

Like New York, several other jurisdictions continue to enforce versions of the "notice rule" to defeat takings claims without meaningful consideration of all of the *Penn Central* factors. For example, the Fifth Circuit has held that *Palazzolo* is a "narrow exception" and does not apply where a purchaser has actual knowledge of restrictions on property. *In re Thaw*, 769 F.3d at 371-72. The Montana Supreme Court similarly holds "that a party cannot complain regarding alleged diminution in value caused by a government action when she purchased the property after the government action." *Prosser v. Kennedy Enterprises, Inc.*, 342 Mont. 209, 214 (2008). The Ninth Circuit holds that post-enactment purchasers lack standing to challenge the application of a preexisting regulation to their property: "whatever unfairness . . . might have been imposed by [the regulation], it was imposed long ago, on someone earlier in the . . . chain of title."[20]

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[20] Writing in dissent, Judge Bea noted that determining a regulatory takings case on a single factor conflicts with *Penn Central* and *Palazzolo*: "The majority opinion holds that the determinative *Penn Central* factor must be the extent to which the regulation has interfered with the claimant's distinct investment-backed expectations; and that factor 'is fatal to the Guggenheims' claim.' . . . In addition to avoiding the question of how a single factor in a three-factor test could be 'fatal' without consideration or balancing of the other factors, this holding is

Guggenheim v. City of Goleta, 638 F.3d 1111, 1121-22 (9th Cir. 2010); *see also Equity Lifestyle Props., Inc. v. County of San Luis Obispo,* 548 F.3d 1184, 1190 & n.11 (9th Cir. 2007) (holding that the owner lacked standing to challenge the application of a restrictive ordinance that went into effect prior to acquisition).

The Federal Circuit stakes out the middle ground between *Ruckelshaus* and this Court's post-*Palazzolo* cases, holding that, "[w]hile evaluation of the *Penn Central* factors 'is essentially an "ad hoc, factual" inquiry,' it is possible for a single factor to have such force that it disposes of the whole takings claim." *Mehaffy v. United States*, 499 F. App'x 18, 22 (Fed. Cir. 2012). But even when a single-factor approach may be warranted, the Federal Circuit requires courts to go beyond the mere existence of a regulatory restriction, directing courts to evaluate multiple sub-factors related to the reasonableness of an owner's investment-backed expectations. *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004).

The Texas courts meanwhile hold that "no single *Penn Central* factor is determinative; all three must be evaluated together, as well as any other relevant considerations." *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 840 (Tex. 2012); *see also Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 139 (Tex. Ct. App. 2013).

This deep and irreconcilable split of authority is firmly entrenched, and it cannot be resolved without this Court's clarification. This case is particularly well-suited for this Court's review because the New

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incorrect for three reasons." *Guggenheim*, 638 F.3d at 1127 (Bea, J., dissenting)

York court decided the takings claim as a pure question of law. Thus, the case does not present any issues of fact or state law to distract from the important constitutional question presented. Moreover, the case demonstrates how confusion among the lower federal courts and state courts of last resort regarding the proper application of the *Penn Central* test causes injustice by categorically barring the trial court from considering the Kellehers' "text book" and "persuasive" regulatory takings claim on its merits. It is time for this Court to resolve the confusion among the lower courts and provide takings litigants with a meaningful opportunity to vindicate the rights guaranteed by the Takings Clause.

II

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE PROPER APPLICATION OF THE INVESTMENT-BACKED EXPECTATIONS PRONG OF THE *PENN CENTRAL* TEST

Review is additionally warranted because a rule that elevates the investment-backed expectations factor to dispositive weight frustrates the purpose of the regulatory takings doctrine.[21] In *Lingle,* this Court explained that the ultimate issue in a partial

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[21] Of all the *Penn Central* factors, the investment-backed expectations inquiry is the most criticized. This is largely due to the fact that "different members of the Court use the term 'investment-backed expectations' to refer to different standards in regulatory takings." Kraig Odabashian, Comment, *Investment-Backed Expectations and the Politics of Judicial Articulation: The Reintegration of History and the Lockean Mind in Contemporary American Jurisprudence*, 50 UCLA L. Rev. 641, 647 (2002).

regulatory takings case is "the severity of the burden that government imposes upon private property rights." 544 U.S. at 539. Thus, this Court explained that "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. This determination cannot be reached unless the court considers the economic impact of the regulation on the owner's total interest in the property. *See Murr*, 137 S. Ct. at 1945 (measuring the value of the property by the terms of the challenged regulation unfairly distorts the takings equation in favor of the government).

Evaluating the character of the government action also is necessary to the takings analysis because courts must "strive for consistency with the central purpose of the Takings Clause: to 'bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Murr*, 137 S. Ct. at 1950 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1963)); *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 512 (1987) (Rehnquist, C.J., dissenting) (The *Penn Central* factors assist courts in determining whether the regulation in reality is an attempt to load "upon one individual more than his just share of the burdens of government."). Thus, even where an owner's expectations are questionable, compensation may be required if the challenged regulation is determined to have unfairly targeted the property owner to bear a burden that should be borne by the public. *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992); *Hodel*, 481 U.S. at 715. Again, the court cannot reach questions

concerning the central purpose of the Takings Clause if it evaluates only the owner's investment-backed expectations.

Here, for example, the fact that a regulation required the Kellehers to apply for a variance alongside their building permit application, standing alone, does not speak to the fact that the DEC's application of its regulations wiped out their entire investment of $450,000 in a residential-zoned lot. Nor does it speak to the state's conclusion that keeping the lot in its undeveloped state would provide the public with aesthetic and environmental benefits. As *Lingle* cautioned, a test that "tells [the courts] nothing about the actual burden imposed on property rights, or how that burden is allocated," "cannot tell [the courts] when justice might require that the burden be spread among taxpayers through the payment of compensation." *Lingle*, 544 U.S. at 543. New York's "absolute right" rules is just such a test and cannot be allowed to bar a property owner from advancing a regulatory takings claim. The interests of fairness and justice—which are at the heart of the regulatory takings doctrine—demand that the Kellehers' claim be evaluated on its "text book" and "persuasive" merits and in a manner consistent with the purpose of the Takings Clause.

III

ADHERENCE TO THIS COURT'S HOLDINGS IN *PENN CENTRAL* AND *PALAZZOLO* IS EXCEEDINGLY IMPORTANT FOR PRIVATE PROPERTY RIGHTS AND ECONOMIC FAIRNESS

A. Confusion Among the Lower Courts Has Turned *Penn Central* into a Nearly Insurmountable Presumption Against Property Owners

Confusion among the lower federal courts and state courts of last resort regarding the property application of *Penn Central*'s multifactorial test has tipped the scales of justice overwhelmingly in favor of the government. Luke A. Wake, *The Enduring (Muted) Legacy of* Lucas v. South Carolina Coastal Council*: A Quarter Century Retrospective*, 28 Geo. Mason U. Civ. Rts. L.J. 1, 7 (2017) ("government-defendants almost invariably prevail under *Penn Central*"). Indeed, empirical studies show that most courts do not engage in any sort of balancing of the *Penn Central* factors, and instead "almost always defer to the regulatory decisions made by government officials, resulting in an almost categorical rule that *Penn Central*-type regulatory actions do not amount to takings." James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 Wm. & Mary L. Rev. 35, 62 (2016).

Because most decisions are based on individual *Penn Central* factors, fewer than 10 percent of regulatory takings claims are successful in state or federal courts, "and the percentage is even smaller for those claims that do not involve interference with an

existing use of land." *Id.* at 77, 88-89 (finding less than 10 percent succeed in state court, and, out of 290 federal decisions involving alleged takings by states or municipalities, only 13 resulted in a finding that a taking had occurred, and more than half of those were overturned on appeal); Pomeroy, *supra*, at 687 (empirical study finding less than 10 percent of *Penn Central* claims in the First, Ninth, and Federal Circuits succeed at any level and only four out of 162 cases in the three appellate courts actually prevailed).

The state court decisions in this case exemplify this trend of using a single factor to dismiss regulatory takings claims. Despite the fact that the Kellehers "submitted a text book case proffering evidence as to every element of their taking claim," presenting "a persuasive claim and a persuasive case," showing a reduction of 98 percent of the land's value, the court dismissed their claim based on the conclusion that the buffer regulations predated their acquisition of the lot. Pet. App. B at 6. Thus, the court held that, as a matter of law, the Kellehers could have no reasonable investment-backed expectation to build a home on a lot that is zoned and taxed for residential use. This conclusion is unjust, and demonstrates the need for guidance from this Court.

B. Uncertainty Regarding the Impact of Preexisting Regulations on Property Rights Threatens the Real Estate Market

Environmental statutes, like New York's Tidal Wetlands Act, are commonplace across the nation and typically operate by imposing broad restrictions on the use of private property based on a presumption that new development may impact the environment. Owners subject to those regulatory regimes must go

through a discretionary permitting process in which they can secure approvals by showing that a proposed use will not impact the environment (or that the impacts can be mitigated). That process is ubiquitous to the modern regulatory environment and does not strip an owner of his or her rights in property. *See*, *e.g.*, *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 600 (2013) (A state agency's decision to deny a permit application based on the requirements of a preexisting state wetland protection statute violated the doctrine of unconstitutional conditions.); *Palazzolo*, 533 U.S. at 614, 626-28 (existence of a state statute restricting development of property containing wetlands did not bar owner from challenging the application of the law as a regulatory taking); *Lucas*, 505 U.S. at 1007-08, 1019 (denial of building permit based on the buffer requirements of the state's coastal protection regulations effected a taking of the owner's property).

This Court's longstanding recognition that an owner's rights in property are not defined by the terms of increasingly restrictive regulations, *Nollan*, 483 U.S. at 833 n.2, is essential to the inherent value of property. The resurgence of the "notice rule" in jurisdictions like New York threatens to undo this fundamental understanding by insulating a wide swath of potentially unconstitutional regulations from challenge, thereby awarding governments unlawful windfalls at the expense of property owners.

Because the "absolute right" rule bars postenactment purchasers from challenging land use regulations under the Takings Clause, "no matter how extreme or unreasonable," New York's rule leads to harsh and unjust results to property owners

throughout the state (and throughout the jurisdictions that have adopted a variation of the notice rule). *Palazzolo,* 533 U.S. at 627. As this Court noted in *Palazzolo*, the rule is "capricious in effect," because "[t]he young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions." *Id.* at 628. For example, if a land use regulation deprives a landowner of her only means of livelihood, she may not have the resources to engage in a protracted legal battle with the state government. But she will be unable to recover anything close to the full value of the property in the private market, no matter how obvious it is that the regulation qualifies as a taking under *Penn Central*, because potential purchasers will know that they will be unable to prevail on a takings claim. The holding below thus "would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation." *Id.* at 627.

Moreover, the New York rule would preclude challenges to regulations that have become compensable takings over time due to changes in market conditions. For example, a wetland buffer might not be sufficiently onerous at the time of enactment to qualify as a taking under *Penn Central*, if the agency is staffed by individuals who readily exercise their discretion to vary the buffer dimensions in order to allow for residential development (as the town did with the Kellehers' application). But as the years go by, and the agency makeup changes, the same regulations may be enforced in a manner that effectively appropriates the residential-zoned and taxed property for public use. If the property changes

hands in a market transaction during that time, the New York rule would bar a challenge that the later application of the statute effects a taking. And relatedly, the decision creates an incentive for state and local governments to keep in place regulations that have outlived their usefulness or have become unduly confiscatory because the adoption of new regulations could trigger the right of new owners to challenge them.

Perhaps of most broad consequence, the decision below threatens to slow activity in the local real estate market whenever a potentially unconstitutional ordinance is enacted, because both purchasers and sellers will know that any takings claim will be extinguished if subject property is sold before the matter is resolved in court. The time value of the mutual gains from the delayed transactions will therefore be permanently lost. There is no sound reason for such a waste of resources in the purpose or history of the Takings Clause, this Court's precedents, or common sense.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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