No. 18-573

In the
Supreme Court of the United States

COLONY COVE PROPERTIES, LLC,

Petitioner,

v.

CITY OF CARSON, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Email: Bhodges@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTIONS PRESENTED

This Court held in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), that determining whether regulatory action constitutes a taking requires balancing the character and extent of economic impact of the regulatory action on a party, the extent of interference of the regulatory action with a party's distinct investment-backed expectations, and the character of the regulatory action. And the Court held in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), that the Seventh Amendment right to a jury applies to regulatory takings claims against municipalities.

The questions presented are:

1. Whether a regulation that causes a property temporary but substantial cash losses is immune as a matter of law from regulatory takings scrutiny if these substantial cash losses do not cause a dramatic decrease in the total value of the property.

2. Whether an appellate court reviewing a jury verdict in a takings case is required to view the evidence in the light most favorable to that verdict.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioner Colony Cove Properties, LLC.[1]

PLF was founded over 45 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel or amicus curiae in several landmark United States Supreme Court cases in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *See*, *e.g.*, *Knick v. Township of Scott*, No. 17-647; *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015); *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF has offices in Florida, California, Washington, and the District of Columbia, and regularly litigates matters affecting property

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

rights in state courts across the country. PLF believes its perspective and experience with property rights litigation will aid this Court in the consideration of the issues presented in this case.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Forty years ago, this Court explained that regulatory takings cases are "essentially ad hoc, factual inquiries" wherein courts are instructed to consider "the economic impact of the regulation on the claimant;" "the extent to which the regulation has interfered with distinct investment-backed expectations;" and "the character of the government action" among other case-specific factors.[2] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Despite being considered the "polestar" of regulatory takings jurisprudence,[3] this Court, has largely refrained from elaborating on those "ad hoc" factors or explaining how the test is to be applied. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942-43 (2017); *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 a

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[2] This Court has recognized two exceptions to this ad hoc test. The government is categorically liable for a taking where a regulation forces a property owner to suffer a permanent physical invasion of his property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982), or when it deprives the owner of all economically beneficial use of his property, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

[3] *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002); *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring).

regulatory taking."). This reluctance, although intended to preserve the flexibility necessary to respond to each case on its individual merits, has in turn "given rise to vexing subsidiary questions" regarding *Penn Central*'s application (*Lingle v. Chevron U.S.A.*, 544 U.S. 528, 539 (2005))—in particular, "the difficult, persisting question of what is the proper denominator in the takings fraction." *Palazzolo*, 533 U.S. at 631; *see also Keystone Bituminous Coal Association v. DeBenedictus*, 480 U.S. 470, 496 (1987) (The question "how to define the unit of property 'whose value is to furnish the denominator of the fraction'" is a critical threshold question that often determines a regulatory takings case.).

This Court's past preference for flexibility over clarity has, in practice, resulted in standards that are vague, impossible to apply in a consistent manner, and an invitation to judicial subjectivity.[4] This case provides an example of the confusion that has arisen from *Penn Central*'s multifactor test. Colony Cove Properties purchased a rent-controlled mobilehome park in Carson, California, for just over $23 million, of which $18 million was debt-financed. In making this investment, Colony Cove relied on Carson's longstanding policy of taking debt servicing into

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[4] John D. Echeverria, *Is the* Penn Central *Three-Factor-Test Ready for History's Dustbin?*, 52 Land Use L. & Zoning Dig. 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").

account when considering an application for a rent increase. But after Colony Cove acquired the property, Carson changed its policy toward debt servicing costs and denied Colony Cove the increases it had expected and needed to continue operating the park. As a result, the City's regulations forced Colony Cove to operate the rental property at a loss and pushed the owner to the brink of foreclosure. Colony Cove brought a temporary regulatory takings claim against the City on the theory that its changed policy toward debt servicing effected a temporary taking because it compelled Colony Cove to provide subsidized housing to the public with no return on its investment for the period of time that the new policy was in effect. Colony Cove prevailed on that theory before a jury, which awarded Colony Cove more than $7 million in compensation and fees.

The Ninth Circuit, however, adopted a markedly different view of the *Penn Central* factors and reversed. Most notably, the Ninth Circuit held that the economic impact of a regulation under *Penn Central* can only be "determined by comparing the total value of the affected property before and after the government action." Petitioner's Appendix (App.) 11a. Thus, the court concluded that a loss of income that would have been generated by the property is irrelevant except to the extent it might impact the property's overall value. *Id.* at 11a-13a. Because the lifetime value of the property had declined by only 24.8% (under a sale-value methodology), the court found the economic impact was "far too small to establish a regulatory taking." *Id.* at 12a. Further, the Ninth Circuit held that Colony Cove had no legitimate investment-backed expectations because Carson was not required to adhere to its established policy of

accounting for debt servicing in rent increase applications—the City was free to change its mind at any time. *Id.* at 17a-18a. And finally, the court found that the character of the government action also weighed in favor of Carson, concluding that the rent-control program was more aptly characterized as an example of government "adjusting the benefits and burdens of economic life to promote the common good," than an act that shifts a public burden onto private owners. *Id.* at 19a (quoting *Penn Central*, 438 U.S. at 124).

The striking inconsistencies between the lower courts' understanding of what the *Penn Central* factors ask and how they are applied show the urgent need for this Court to clarify *Penn Central*. Review by this Court is additionally warranted because the Ninth Circuit's decision adds to an existing split of authority by refusing to consider projected rental income in the economic impact analysis in support of a temporary regulatory takings claim (which split of authority is set out in the Petition). The court's singular focus on the diminution of the property's *total value* as a result of the regulation places it in direct conflict with other courts, which consider a regulation's impact on an investment property. Compounding its mistake, the Ninth Circuit's decision threatens to erase this Court's temporary takings jurisprudence by adopting an inflexible rule that requires courts to set a lifetime-value denominator that does not take into account the temporary duration of the offending regulation. This too is contrary to the conclusions of other courts. The Petition warrants this Court's attention for these reasons alone. But there is more.

The Ninth Circuit's decision also illustrates the extent to which courts have misconstrued the final two *Penn Central* factors to ask questions that are inherently loaded against property owners. For example, the Ninth Circuit continued the disturbing trend among the lower courts of holding that notice of a regulation (or, more broadly, the government's authority to change its mind) will automatically defeat an owner's reasonable investment-backed expectations and defeat a *Penn Central* claim in direct contravention of *Palazzolo*, 533 U.S. at 626-28. If this trend continues, property owners will not even be able to rely on existing zoning and land-use laws when investing in property, which is antithetical to the most basic notions of property law. And finally, the Ninth Circuit's conclusion that the nature of rent control regulations do not warrant meaningful, case-specific scrutiny under *Penn Central*'s "character of the government action" inquiry conflicts with the very purpose of this Court's regulatory takings jurisprudence, which is to determine whether a lawful exercise of regulatory authority "go[es] too far" and effects a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"). These widespread and common misunderstandings of *Penn Central* add force to the Petition.

For reasons set forth more fully below, this Court should grant Colony Cove's Petition for Writ of Certiorari.

REASONS TO GRANT THE PETITION

I

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE DENOMINATOR QUESTION IN TEMPORARY TAKINGS CASES

A. The Ninth Circuit's Decision Conflicts With Decisions of This Court

In the decision below, the Ninth Circuit concluded that courts may only determine the economic impact of a regulation by measuring the pre-deprivation value of the real property against its post-deprivation value (*i.e.*, the property's "sale value"). App. 10a-14a. That conclusion conflicts with this Court's regulatory takings jurisprudence. First, this Court has repeatedly admonished that there is no "set formula" for determining whether a regulatory taking has occurred. *Penn Central*, 438 U.S. at 124; *Tahoe-Sierra*, 535 U.S. at 321 (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)). Instead, the *Penn Central* factors are intended to provide the flexibility necessary to respond to "the nearly infinite variety of ways in which government actions or regulations can affect property interests." *Arkansas Game & Fish Comm'n*, 568 U.S. at 31.

Second, the Ninth Circuit rule conflicts with this Court's conclusion that the "Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.*, 482 U.S. 304, 318-19 (1987)

(emphasis added); *cf. Kimball Laundry Co. v. United States*, 338 U.S. 1, 8 (1949) (finding that proper measure of compensation for government's temporary use of laundry facility was rental profits likely to have been earned, rather than difference between property's market value on date of taking and date of return); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 328 (1893) (holding that when taking of tangible property deprives owner of ability to earn profit from collecting tolls on railroad franchise, just compensation requires payment to cover loss in profits). Indeed, the rate of return methodology is also appropriate in cases alleging a taking of commercial property. *See Penn Central*, 438 U.S. at 129, 136 (absolving the local government of takings liability in part because of its evaluation that the plaintiffs' railroad terminal could "be regarded as capable of earning a reasonable return" on the owners' investment); *Federal Power Commission v. Hope Natural Gas*, 320 U.S. 591 (1944) (recognizing a lost rent or return on equity approach to economic impact analysis); *see also Cienega Gardens v. United States*, 331 F.3d 1319, 1343 (Fed. Cir. 2003) (initially finding that plaintiffs suffered a taking when they sustained a 96 percent diminution in their expected return during the period of time the offending regulation was in force). Clearly, there are circumstances that warrant a return on investment analysis when evaluating takings claims. *See Galland v. City of Clovis*, 24 Cal. 4th 1003, 1021-22 (2001) (recognizing that landlords are entitled to a fair return on their investment); *Besaro Mobile Home Park, LLC v. City of Fremont*, 204 Cal. App. 4th 345, 357 (2012) (recognizing a "constitutionally protected right" to "receive a fair return on one's property"). The Ninth

Circuit's adoption of an invariable rule barring courts from considering this methodology was wrong and warrants review.

The Ninth Circuit decision also warrants review because its inflexible approach to the economic impact inquiry attempts to force one answer to "the difficult, persisting question of what is the proper denominator in the takings fraction" in every potential circumstance. *Palazzolo*, 533 U.S. at 631. This Court, however, has admonished that "no single consideration can supply the exclusive test for determining [an owner's reasonable investment-backed expectations]." *Murr*, 137 S. Ct. at 1945. This Court's commitment to a case-specific "expectations" inquiry is important because the question "how to define the unit of property 'whose value is to furnish the denominator of the fraction'" is a critical threshold question that often determines a regulatory takings case. *Keystone Bituminous Coal Association*, 480 U.S. at 496 (quoting Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967)); *see also Lost Tree Village Corp. v. United States*, 707 F.3d 1286, 1292 (2013); *see also District Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999) (The "definition of the relevant parcel profoundly influences the outcome of the takings analysis."). Such a critical determination cannot be made subject to an inflexible rule that does not take into account the applicable takings theory and circumstances of each case.

B. The Ninth Circuit's Decision Undermines This Court's Temporary Takings Jurisprudence

Review by this Court is especially warranted because, if the Ninth Circuit's decision is allowed to stand, its rigid answer to the denominator question will effectively erase this Court's small but important body of temporary regulatory takings jurisprudence. Since recognizing the viability of temporary regulatory takings claims in *First English*, this Court has not taken the opportunity to explain how such a claim is to be proven under *Penn Central*. 482 U.S. at 318-19. Thus, without guidance, the lower federal courts and state courts of last resort frequently make the mistake of relying on the inapposite decision in *Tahoe-Sierra* to fill this Court's silence on the topic.[5] *See* App. 13a (citing *Cienega Gardens v. United States*, 503 F.3d 1266, 1282 (Fed. Cir. 2007) (*Cienega X*)). *Tahoe-Sierra*, however, concerned the very different question of whether a development moratorium effected a per se taking under the deprivation of "all economically viable use" test established by *Lucas*, 505 U.S. at 1015. Answering that narrow question, the Court held that a temporary restriction could not effect a total taking under *Lucas* because "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Tahoe-Sierra*, 535 U.S. at 332. Although that

[5] In *Cienega Gardens*, the Federal Circuit misconstrued *Tahoe-Sierra* to "explicitly confirm[]" that courts must consider "the overall value of the property" when determining the economic impact of a temporary regulation. This obvious mistake is now a per se rule in the Federal Circuit. *Id.* at 1281; *see also CCA Assocs. v. United States*, 667 F.3d 1239, 1244 (Fed. Cir. 2011).

explanation is responsive only to the *Lucas* test, many courts, like the Ninth Circuit below, have mistakenly extended *Tahoe-Sierra* to effectively bar temporary takings claims asserted under *Penn Central* by requiring that owners show that a temporary restriction resulted in such a substantial deprivation of the property's lifetime value before the government will be required to pay just compensation. App. 10a-14a.

That conclusion, however, conflicts with *First English*, which measures liability for a temporary taking based on the period of time that the government restricts the use of property.[6] It also finds no support in *Tahoe-Sierra*, which concluded that "claims that a regulation has effected a temporary taking 'require[] careful examination and weighing of all the relevant circumstances'" under the *Penn Central* test. *Tahoe-Sierra*, 535 U.S. at 334-35; *see also Loretto*, 458 U.S. at 436 n.12 ("[T]emporary limitations are subject to a more complex balancing process to determine whether they are a taking."). Importantly, this Court noted that the temporary nature of a regulation, itself, cannot preclude a finding that it effected a regulatory taking asserted under a *Penn Central* theory. *Tahoe-Sierra*, 535 U.S. at 336-37. Thus, there is nothing in *Tahoe-Sierra* that limits

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[6] Like *First English*, this Court's physical invasion cases confirm that the government can be liable for a temporary taking despite the fact that the government restored the property in full to its owners after a period of time. *See*, *e.g.*, *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951); *Kimball Laundry Co.*, 338 U.S. at 1-3, 7, 16; *Petty Motor Co.*, 327 U.S. 372, 380-81 (1946); *United States v. General Motors Corp.*, 323 U.S. 373, 375 (1945); *International Paper Co. v. United States*, 282 U.S. 399, 407-08 (1931).

the methodologies a court may consider when evaluating economic impact in a temporary taking claim under *Penn Central*. And rule requiring courts to consider the effect of a temporary restriction against the lifetime value of the property is contrary to the principle that the government is obligated to pay just compensation to the extent its actions actually interfere with an owner's rights in his or her property. *See Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1871).

C. The Ninth Circuit Rule Deprives Owners of Meaningful Consideration of Takings Claims on Their Individual Merits

Without guidance from this Court, the lower courts frequently look to other lower court decisions to find some talismanic threshold for finding a taking, without engaging in a meaningful analysis of the *Penn Central* factors. Thus, in the decision below, the Ninth Circuit rejected Colony Cove's temporary takings claim upon the observation that the court had previously rejected takings claims where the "diminution in property value because of governmental regulation rang[ed] from 75% to 92.5%." App. 12a (citing *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013)). The Ninth Circuit further observed that "the Federal Circuit has noted that it is 'aware of no case in which a court has found a taking where diminution in value was less than 50 percent.'" App. 12a (quoting *CCA Assocs.*, 667 F.3d at 1246). Based on those figures, and without considering the actual effect that the City's debt servicing policy had on Colony Cove's investment, the Ninth Circuit simply held that the

percentage of depreciation could not support a takings claim. App. 12a.

This superficial conclusion, however, short circuits the substantive analysis required by *Penn Central*. *Tahoe-Sierra*, 535 U.S. at 326 n.23 ("The Takings Clause requires careful examination and weighing of all the relevant circumstances.") (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)). Indeed, *Penn Central* forbids this type of analysis, instructing courts to "examine 'a number of factors' rather than a simple 'mathematically precise' formula" when determining whether regulation gave rise to a taking. *Tahoe-Sierra*, 535 U.S. at 326.

The Ninth Circuit's focus on the percentage ranges reported in other decisions furthermore masks that the degree of economic impact can be grossly under- or over-stated simply by changing the denominator. *Lucas*, 505 U.S. at 1066 (observing that it would be all too easy for courts to avoid or distort the Court's takings jurisprudence by "alter[ing] the definition of the 'denominator' in the takings 'fraction'") (Stevens, J., dissenting). For example, in *CCA Assocs.*, the court applied the two methodologies at issue here to find that the same regulation diminished the owner's investment by 81.25% (rate of return while regulation in effect) and 18% (lifetime sale value). 667 F.3d at 1244. The court, however, concluded that a Circuit rule bound it to consider only the sale value figure, which resulted in a vastly distorted view of how a temporary restriction actually impacted the owner's investment in property.[7] *Id*. ("In

[7] *CCA Assocs.*, 667 F.3d at 1247 ("If the net income over the entire remaining life of the mortgage is the denominator there is no way that even a nearly complete deprivation (say 99%) for 8 years

Cienega X, however, we held that any economic impact must be evaluated with respect to the value of the property as a whole, and not limited to the discrete time period that the taking was in force."); *see also* William W. Wade, *Federal Circuit's Economic Failings Undo the* Penn Central *Test*, 40 Envtl. L. Rep. News & Analysis 10914, 10920 (2010). Thus, the rule adopted by the Federal and Ninth Circuits turns what was supposed to be a flexible, case-specific inquiry into a categorical barrier for property owners seeking compensation for a temporary taking.

II

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE PROPER APPLICATION OF THE REMAINING *PENN CENTRAL* FACTORS

Review is additionally warranted to provide much needed guidance on how to apply the remaining *Penn Central* factors in a manner that ensures "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 v. Wisconsin*, 137 S. Ct. at 1950 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *see also Keystone Bituminous Coal Ass'n*, 480 U.S. at 512 (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."). Put simply, *Penn Central* cannot be transformed into a gauntlet of inflexible rules or

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would amount to a severe economic deprivation when compared to our prior regulatory takings jurisprudence.").

presumptions in favor of the government (as the Ninth Circuit decision below suggests)—instead, each factor must be evaluated on its individual merits to determine "the severity of the burden that government imposes upon private property rights."[8] *Lingle*, 544 U.S. at 539-40 ("[T]he *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.").

A. Reasonable Investment-Backed Expectations

While the Petition focuses the Court's attention on the economic impact prong of *Penn Central*, the decision below also demonstrates the need for clarification of the "distinct investment-backed expectations" factor.[9] *Penn Central*, 438 U.S. at 124.

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[8] Indeed, this Court's case law demonstrates that takings can occur even where evidence in support of one or more *Penn Central* factors weigh against the property owner. *See*, *e.g.*, *Hodel v. Irving*, 481 U.S. 704, 715 (1987) (finding a taking even though the evidence of reasonable investment-backed expectations is "dubious" because the other factors weigh heavily in favor of the owner's claim); *see also Murr*, 137 S. Ct. at 1945 (measuring the value of the property by the terms of the challenged regulation, for example, unfairly distorts the takings equation in favor of the government); *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) (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).

[9] Legal scholars have noted 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

Although this Court has repeatedly held that the existence of a restrictive regulation, alone, cannot determine an owner's reasonable expectations in property,[10] the lower federal courts and state courts of last resort continue to adopt rules shielding regulations from meaningful scrutiny.[11] For example, in the decision below, the Ninth Circuit held that Colony Cove could not, as a matter of law, form a reasonable investment-backed expectation based on the City's past practices in regard to debt servicing

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UCLA L. Rev. 641, 647 (2002); *see also, 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 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*, 438 U.S. 104 (1978) (No. 77-444), 1978 WL 206883, at *16)).

[10] *Palazzolo*, 533 U.S. at 626-28; *Murr*, 137 S. Ct. at 1945 ("[N]o single consideration can supply the exclusive test for determining [an owner's reasonable investment-backed expectations].").

[11] *See, e.g.*, *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1121-22 (9th Cir. 2010) (en banc) (no investment-backed expectations as a matter of law for landlord purchasing mobilehome park already subject to rent-control regulations).

where it was on notice that the City may change its policy. App. 14a-16a. According to the lower court, the City's authority to change its mind will defeat any expectation based on the status quo. App. 14a-18a. That conclusion renders the takings inquiry circular and meaningless. *Murr*, 137 S. Ct. at 1944 (citing *Tahoe-Sierra*, 535 U.S. at 331).

Moreover, the Ninth Circuit's deference to the government's regulatory authority is nothing more than an outgrowth of the repudiated "notice rule," which asserted that "[a] purchaser or a successive tile 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," holding that 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 628; *see also id.* at 635-36 (O'Connor, J., concurring). For takings jurisprudence to have any integrity, the same rule must apply to future regulations. *See Guggenheim*, 638 F.3d at 1123-24 (Bea, J., dissenting) (criticizing the majority for "ignor[ing] [the Supreme Court's] recent holding in *Palazzolo* that an investor can validly expect that a land control measure, in place when he invests, is not necessarily eternal and therefore does not disqualify his claim of regulatory taking").

Given the nearly plenary power of local government to regulate land use, the rule adopted by the Ninth Circuit threatens to eviscerate *Penn Central* altogether by shielding restrictive land-use regulations from constitutional scrutiny. *But see Palazzolo*, 533 U.S. at 627 ("The Takings Clause . . .

allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation."). It also turns the very concept of "reasonable investment-backed expectations" on its head. Investors, at the very least, must be able to base their decisions on the past practices of a government entity, especially when those practices are published or directly communicated to the property owner. *See Sheffield Development Corp. v. City of Glenn Heights*, 140 S.W.3d 660, 677-78 (Tex. 2004) (investment-backed expectations were reasonable when "zoning had been in place for ten years before [the developer] acquired the property" and re-zoning was contrary to representations made by City officials to the developer and thus "blindsided" the developer). Such reasonable reliance on past practices is the very definition of a "reasonable" expectation. The Ninth Circuit's rule to the contrary threatens to significantly reduce the scope of *Penn Central* and embolden local governments to place more demanding regulations on property owners. It also deepens the existing confusion over the application of *Penn Central* as a whole. Only this Court's intervention can change the course of the law in this area.

B. Character of the Government Action

Finally, any consideration of *Penn Central* must include the "character of government action" inquiry. Commentators have called this final *Penn Central* prong "the most confused and confusing feature of regulatory takings doctrine." R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731, 736 (2011) (quoting John D. Echeverria, *The*

"Character" Factor in Regulatory Takings Analysis, SK081 A.L.I.-A.B.A. 143, 145 (June 9-10, 2005)). This Court has explained this inquiry in seemingly divergent terms over the years. In *Penn Central*, for example, the Court stated that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124. But later, in *Lingle v. Chevron U.S.A. Inc.*, this Court explained that the takings inquiry does not turn on questions regarding purpose of the government action, but rather on its effect. 544 U.S. at 540. Such questions "reveal[] nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights." *Id.* at 542 (emphasis in original). Nor does that inquiry "provide any information about how any regulatory burden is *distributed* among property owners." *Id.* (emphasis in original). This type of inquiry "does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property." *Id.*; *see also Pennsylvania Coal Co.*, 260 U.S. at 416 ("[A] strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change.").

Over the years, the lower courts have split on whether the character of the government action inquiry focuses on the purpose of the regulation, or the whether the regulation places a public burden on property owner. In the decision below, for example, the Ninth Circuit concluded that the character of governmental action weighed in favor of the City

based solely on the observation that low-income housing regulations aim to "adjust[] the benefits and burdens of economic life to promote the common good." App. 19a (quoting *Penn Central*, 438 U.S. at 124). The Court of Federal Claims, by contrast, holds that the character prong "focuses not only on the intended benefits of the governmental action, but also on whether the burdens the action imposed were borne disproportionately by relatively few property owners." *CCA Assocs. v. United States*, 75 Fed. Cl. 170, 188 (2007), *aff'd in part, vacated in part, remanded*, 284 F. App'x 810 (Fed. Cir. 2008) (citing *Armstrong*, 364 U.S. at 49). The different approaches adopted by the Ninth Circuit and the Court of Federal Claims, unsurprisingly, compel very different results. In the decision below, the Ninth Circuit concluded that the character of a regulation forcing Colony Cove to operate its rental property at a loss in order to provide the public with low-cost housing weighed in favor of the government simply because it "promoted the common good." App. 19a. The Court of Federal Claims, however, reached the opposite conclusion when asked to review a statute requiring owners to preserve low-income housing for a period of time. *CCA Assocs.*, 75 Fed. Cl. at 188-91. The reason for the different outcomes is because the Court of Federal Claims did not focus solely on the purpose for the regulation; it also asked whether the affordable housing law placed a severe public burden on the individual owner—which is the touchstone of takings law. *Lingle*, 544 U.S. at 539.

Clarification of the character of the government action factor is a matter of utmost importance in those areas of the nation, like California, that are experimenting with regulatory solutions to the

affordable housing crisis. *See*, *e.g.*, *California Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 441 (2015). A regulation that denies a landlord a fair return as part of a regulatory program designed to provide the public with low-cost housing is clearly confiscatory of the owner's rights in his or her property. *Galland*, 24 Cal. 4th at 1021. But without a clear indication how courts are to apply the character of government action factor, both property owners and regulators are left to guess whether and in what circumstances such a demand will "go[] too far." *Pennsylvania Coal Co.*, 260 U.S. at 415 ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"). This case, which involves a plainly confiscatory rent-control regulation, provides the Court with an appropriate vehicle to further explain the character of governmental action prong of *Penn Central*. Such clarity would benefit property owners, government, and courts nationwide.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Email: Bhodges@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation