No. _____

In The
Supreme Court of the United States

JANICE SMYTH,

Petitioner,

v.

CONSERVATION COMMISSION OF FALMOUTH and TOWN OF FALMOUTH,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Commonwealth of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Penn Central Transp. Co. v. N. Y.*, 438 U.S. 104 (1978), this Court held that Fifth Amendment "regulatory takings" claims are governed by three factors: the "economic impact" of the challenged regulatory action, the extent of interference with a property owner's "distinct investment-backed expectations" and the "character of the governmental action." *Id.*

The Massachusetts Appeals Court applied the *Penn Central* factors to hold that Respondent Town of Falmouth (Town) did not unconstitutionally take Petitioner Janice Smyth's (Mrs. Smyth) property by denying a permit to build a home. Mrs. Smyth's parents purchased the lot in 1975 for $49,000 ($216,000 in today's dollars), but did not develop it. In the meantime, the entire subdivision was developed. When Mrs. Smyth inherited the lot and sought to build, the Town refused to grant a permit based on regulation post-dating her interest. The denial left Mrs. Smyth's lot without any possible use except as a "playground" or "park," and stripped it of 91.5% of its value. Yet, the court below held that none of the *Penn Central* factors weighed in favor of a taking under these circumstances.

The questions presented are:

1. Whether the loss of all developmental use of property and a 91.5% decline in its value is a sufficient "economic impact" to support a regulatory takings claim under *Penn Central*.

2. Whether a person who acquires land in a developed area, prior to regulation, has a legitimate "expectation" of building and, if so, whether that

interest can be defeated by a lack of investment in construction?

3. Whether the Court should excise the "character" factor from *Penn Central* regulatory taking analysis.

RULE 14.1(b)(iii) STATEMENT OF RELATED CASES

The proceedings in the Commonwealth of Massachusetts trial and appellate courts identified below are directly related to the above-captioned case in this Court.

Janice Smyth v. Conservation Commission of Falmouth, Case No. 2012-00687 (Mass. Supp.). Date of Judgment: Apr. 6, 2017.

Janice Smyth v. Conservation Commission of Falmouth, Case No. 17-P-1189 (Mass. App. Ct.). Date of Judgment: Feb. 19, 2019.

Janice Smyth v. Falmouth Conservation Commission, Case No. FAR-26693 (Mass.). The Supreme Judicial Court for the Commonwealth of Massachusetts denied Petitioner's Application for Further Appellate Review on May 9, 2019.

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Janice Smyth respectfully requests that this Court issue a writ of certiorari to review the judgment of the Massachusetts Appeals Court.

OPINIONS BELOW

The opinion of the Appeals Court is reported at and is attached here as Appendix (App.) A. The judgment of the Barnstable County Superior Court is unpublished. It is attached here as App. B.

JURISDICTION

The lower courts had jurisdiction over this case under the Fifth Amendment to the United States Constitution. The Appeals Court entered final judgment on May 9, 2019. App. C. This Court has jurisdiction under 28 U.S.C. § 1257.[1]

CONSTITUTIONAL PROVISIONS AT ISSUE

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

INTRODUCTION

This case presents the Court with the opportunity to clarify and recalibrate one of the most confused and rudderless constitutional tests in existence: the multi-factor regulatory takings framework set out in *Penn Central Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124

[1] On July 25, 2019, Justice Breyer granted Petitioner's request for a two-week extension on the time to file the Petition, extending the Petition due date to August 21, 2019.

(1978). The *Penn Central* approach is governed by inquiries into the "economic impact" of regulation, the extent of interference with a property owner's "distinct investment-backed expectations," and the "character of the governmental action." *Id.* This multi-factor approach applies whenever a takings claim challenges a land use regulation that does not prevent *all* productive use of property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). Since the "vast array" of land use regulations fail to destroy all use of property, the *Penn Central* test serves as the dispositive "polestar" in regulatory takings litigation. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1952 (2017) (Roberts, C.J., dissenting).

Unfortunately, the *Penn Central* test has "given rise to vexing subsidiary questions" that render it ill-suited to an exalted place in takings doctrine. *Lingle*, 544 U.S. at 539. Indeed, courts and commentators have long criticized the *Penn Central* inquiry as a collection of vaguely defined concepts, a scheme that imbues courts with almost limitless discretion in deciding the taking issue, while offering plaintiffs no clear path for securing just compensation. *See* R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731, 732 (2011) ("*Penn Central* enunciates at best a tenuous, ad hoc approach . . . which commentators have routinely denounced as an unworkable, if not incomprehensible, standard.); Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan. Envtl. L. J. 525, 528 (2009) (noting the "indeterminacy" of the *Penn Central* test); Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New*

Theory of Takings Jurisprudence, 40 Am. U. L. Rev. 297, 299-300 (1990) (regulatory takings law is a "chameleon of ad hoc decisions that has bred considerable confusion").

Penn Central's first, "economic impact," factor typically involves a comparison of the value of property before and after it is restricted. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 (1987). This approach has led to a generation of inconsistent and unprincipled regulatory takings decisions. "No one knows how much diminution in value is required," Richard A. Epstein, *From* Penn Central *to* Lingle*: The Long Backwards Road*, 40 J. Marshall L. Rev. 593, 604 (2007), and the Court's precedent offers no guidance, so lower court decisions lurch from one end of the "lost value" spectrum to the other trying to identify an "economic impact" that supports a taking. In the process, they ignore other relevant burdens on property, like impacts on the actual use of property. Here, the court below held that the destruction of almost all use of Mrs. Smyth's property, and the related elimination of 91.5% of its value, was not enough to support a takings claim because a bit of value remained.

The lack of consensus is just as stark with respect to the second, *Penn Central* factor: the inquiry into an owner's "distinct investment-backed expectations". Courts have failed to identify consistent guideposts for this "amorphous" standard, and "[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). The only predictable feature of the "expectations"

doctrine is that it tends to morph from case to case in ways that defeat takings claims. *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 886 (D.C. Cir. 1999) (Williams, J., concurring) ("Few regulations will flunk this nearly vacuous test."). Here, the court below concluded that Mrs. Smyth lacked legitimate building expectations—despite acquiring residential land in a developed subdivision prior to regulation—because she did not invest enough in development before the lot was restricted. App. A-13.

The final *Penn Central* factor, the "character of the government action," may be the most questionable. The "character" factor is a test for whether the government physically invades property or simply advances a legitimate public goal. 438 U.S. at 124. But modern takings doctrine rejects both considerations as valid regulatory takings issues. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35(1982); *Lingle*, 544 U.S. at 538, 543. The "character" factor is accordingly a relic of defunct doctrine and superfluous in the modern takings framework. Dale A. Whitman, *Deconstructing* Lingle*: Implications for Takings Doctrine*, 40 J. Mar. L. Rev. 573, 574 (2007) ("if *Lingle* is taken seriously, it appears to destroy the "character of the governmental action" prong of the *Penn Central* takings test"); *see also* John D. Echeverria, *Is the* Penn Central *Three-Factor Test Ready for History's Dustbin*, 52 Land Use L. & Zoning Dig. 3, 5 ("[t]he difficulty with viewing [the character] factor as part of a three-factor test is that the Court subsequently transmuted it into a per se test" in *Loretto*). As such, it functions as an

illegitimate and unfair hurdle to regulatory takings claims.

The Court should grant the Petition to limit and modernize the *Penn Central* inquiry to ensure that it properly and fairly tests for compensable burdens on property. It can do so by (1) clarifying that a severe restriction on the use of property is an impact supporting a taking, even if the property retains minor residual value, (2) holding that one acquiring land in a developed area, prior to regulation, has legitimate building "expectations' and interests, without regard for the degree of personal investment in construction, and (3) by excising the obsolete "character" factor from the takings inquiry.

These modifications will focus the *Penn Central* test on the "effect" of regulation on property rights, *Lingle*, 544 U.S. at 543, remove subjectivity emanating from the current framework, and simplify regulatory takings adjudication.

STATEMENT OF THE CASE

This Petition arises from a dispute in the southern portion of Cape Cod, Massachusetts, over a local Conservation Commission's refusal to grant a permit for construction of a home. A jury concluded that the permit denial caused an unconstitutional regulatory taking of Petitioner Janice Smyth's land and awarded her $640,000 in damages. However, on appeal, the Massachusetts Court of Appeals held that the trial court should have granted judgment notwithstanding the verdict (JNOV) to the Commission, because (in its view) the permit denial could not cause a taking under *Penn Central* as a matter of law.

A. Factual Background

The Town of Falmouth, Massachusetts, is a coastal town located at the southwestern end of the Cape Cod peninsula. Janice Smyth owns an unimproved lot of land at 250 Alder Lane, Falmouth. App. A at 2. The property lies within a residential subdivision known as "Wild Harbour Estates." *Id.* at A-3.

The Wild Harbour Estates subdivision contains approximately 174 lots, *id.*, almost all of which have been developed with homes. Joint Appendix on Appeal (App. on Appeal), Vol. I at 651. The lots to the immediate right and left of Smyth's lot contain residences. *Id.* Mrs. Smyth's lot is zoned for residential use and similar in size to surrounding developed lots. *See* App. on Appeal, Vol. I at 634.

Mrs. Smyth's parents purchased the subject lot in 1975 for $49,000 (which equates to $216,000 in today's dollars). App. B-2. They did so with the intention of building a home on the parcel when they retired. App. A-3. At the time of the purchase, the lot was not restricted by Town wetlands regulations, as such regulations were not enacted until 1989. App. on Appeal Vol. 1 at 629. Over the years, hundreds of homes were built in the "Wild Harbour Estates" subdivision. App. on Appeal, Vol. I, at 651.

For nearly 40 years, the Town taxed the Smyth family lot as a "prime" building site, App. on Appeal Vol. II at 314, and the Smyth family dutifully paid the taxes every year to preserve its developmental value. App. A-3. Mrs. Smyth's parents were unable, however, to develop the lot themselves. *Id.* When Mrs. Smyth's

mother passed away in 2001, Mrs. Smyth acquired her half-interest in the lot. App. B-2. When her father died in 2005, Mrs. Smyth inherited the other half interest. *Id.* Soon after, she began to pursue plans to develop the lot with a 3-bedroom single-family dwelling, a state of the art "de-nitrifying" septic system, a driveway and native plants, all consistent with surrounding development. *Id.* Mrs. Smyth's husband (an architect) prepared sketches for the proposed project. Between 2006 and 2012, Smyth paid $70,000 dollars to various professionals to prepare plans and applications. App. A-13 n.16.

B. The Regulatory Framework and Permit Denial

For planning purposes, the critical features on Mrs. Smyth's lot are a salt marsh lying to the west of the parcel (and indeed, the entire subdivision), and a non-eroding "coastal bank" in the mid-section of her lot. App. B-3. This "coastal bank" separates lower areas of the property that are closer to the salt marsh and occasional storm surges from dry upland areas. Mrs. Smyth's building plans sought to position her home landward of the coastal bank on upland areas. App. on Appeal Vol. I at 653.

The primary hurdle to such development came from Falmouth Wetlands Protection Bylaw regulations that limit development on lots deemed to contain, or be near, environmental resources. App. B-3-4. 1998 rules implementing the Bylaw created (1) a 100 foot "no disturbance zone" extending inland from the salt marsh and (2) a separate 50-foot "no disturbance zone" extending inland from certain coastal banks. App. B-3. However, the 1998 rules, in

place when Mrs. Smyth first acquired an interest in the lot, applied only to "'eroding'" coastal banks, "not just any coastal bank." App. at B-4. The 1998 rules also contained a "flexibility" provision allowing the Commission to waive the no-disturbance zone.[2] *Id.*

In 2008, the Town removed the "flexibility" provision and applied the "no disturbance zone" to all coastal banks. *Id.* These changes meant that no permissible building area existed on Mrs. Smyth's lot except a small 115-square-foot area in the northeast corner, App. on Appeal Vol. I at 652-53, an area too small to develop. *Id.*

In 2012, Smyth filed an application (called a notice of intent) with the Commission to construct a residence. App. A-3-4. Her application included a request for variances from the Town's "no disturbance zones" that would allow her to use her land for a home like those on similar lots. *Id.* at A-4.

After initial Town hearings, Mrs. Smyth agreed to reduce the size of her home, making it about one-half the size of neighboring homes. Nevertheless, at a subsequent hearing held in September, 2012, the Town opted to strictly apply its regulatory "no-disturbance" zones. It accordingly denied her permit

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[2] Town zoning regulations and restrictive covenants applicable to the subdivision also require a 25-foot front yard set-back. Even with that restriction in place, Mrs. Smyth's lot contained enough room to build a home—if not for the Town's strict application of its no-disturbance zones. It is accordingly undisputed that the no disturbance zones rendered her property "unbuildable." App. on Appeal, Vol. I at 652-53, ¶¶ 105-07.

application and variance requests.[3] *Id.* The denial meant the property could not be used for anything except (maybe) a "playground," "park" or yard for a neighbor. App. A-13. A licensed appraiser testified that the result was a decline in the lot's value from $700,000 (as a buildable lot) to $60,000, *id.*, a 91.5% reduction in value. App. A-12.

C. State Court Procedure

Mrs. Smyth subsequently sued the Commission and Town in Barnstable County Superior Court, alleging in part that the Commission's permit denial amounted to a regulatory taking under the United States Constitution. App. B-2-3. The trial court later denied the Town's motion for summary judgment, holding that a jury decision was needed to resolve disputed fact issues pertaining to Mrs. Smyth's "investment-backed expectations" and the amount of economic loss she had suffered. *Id.* at B-2. After viewing Mrs. Smyth's lot, a jury found a taking and awarded $640,000 in damages. App. A-5. The Town moved for JNOV, but was denied. *Id.*

On appeal, the Massachusetts Appeals Court held, in a published opinion, that the trial court should have granted the Town motion for JNOV and found no taking. App. A-11. Applying *Penn Central*, it specifically concluded that the prohibition on building a home and 91.5% decline in Smyth's property value

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[3] Mrs. Smyth appealed the denial to the Massachusetts Department of Environmental Protection to the extent it rested on state wetlands law. The Department subsequently issued an order confirming Mrs. Smyth's development was consistent with state law, App. B-2, leaving the Town's "wetlands" regulations as the only basis for the permit denial.

was not a sufficient "economic impact" to support a taking under *Penn Central*. App. A-12-13. In so holding, the court observed that Mrs. Smyth's lot could still be used "as a park or a playground" or that it may be attractive to abutting owners for their "privacy." App. A-13. In rejecting Mrs. Smyth's claim of "investment-backed expectations," the Court of Appeals focused on the "lack of any financial investment toward development of the property, whether by the plaintiff or her parents, at any time over more than thirty years, including a substantial period within which it could have been built upon." App. A-13.

Finally, the Massachusetts Appeals Court held that the third *Penn Central* factor, the "character of the governmental action," weighed against a taking because the Commission's permit denial was not "like a physical invasion" and derived from reasonable wetlands regulations designed to mitigate perceived harm. App. A-14.

Following the Court of Appeal's decision, Mrs. Smyth filed an Application for Further Appellate Review with the Massachusetts Supreme Court. On May 9, 2019, that court denied the application. App. C.

REASONS FOR GRANTING THE WRIT

In *Penn Central*, the Court considered whether New York's Landmark Preservation Law took private property by preventing the owners of Grand Central Terminal from building a high-rise office building above the historic structure. The Court recognized that its previous decisions failed to establish a "set formula" for determining when regulation causes a taking. *Id.* at 124. The *Penn Central* Court declared, however, that several factors are significant in the "essentially ad-hoc, factual" takings inquiry. *Id.* "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action." *Id.*

This case raises three important questions related to the meaning of the *Penn Central* factors. First, it raises an important question, on which courts conflict, as to whether a severe burden on property use is a compensable impact, even if the property retains some minor residual value. Second, it raises an important question as to whether an owner of a parcel in a developed area has legitimate building expectations and if so, whether those expectations are defeated by a lack of investment in development. Again courts are in confusion on this issue. Third, the case raises the important question as to whether the "character of the governmental action factor" remains a viable takings consideration in light of post-*Penn Central* precedent casting significant doubt on its propriety. *See Lingle*, 544 U.S. at 539 (holding that takings analysis only

considers the regulatory "burden"); D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of* Lingle v. Chevron *and the Separation of Takings and Substantive Due Process*, 69 Alb. L. Rev. 343, 355 (2005) (*Lingle* indicates "that the character of the government act is largely irrelevant.").

The Court's intervention on these issues is sorely needed. As it stands now, the *Penn Central* inquiry is an "open-ended, I-(hope)-I-know-it-when-I-see-it approach" to takings adjudication. Joseph L. Sax, *The Property Rights Sweepstakes: Has Anyone Held the Winning Ticket?*, 34 Vt. L. Rev. 157, 157 (2009). This is a consequence of the "barely coherent potpourri of vaguely specified" *Penn Central* factors that drive the inquiry, Radford & Wake, *Deciphering and Extrapolating*, 38 Ecology L.Q. at 735, and this Court's failure to provide any meaningful guidance on the *Penn Central* test. The result is unprincipled, inconsistent and one-sided rulings in *Penn Central* cases. *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 886 (D.C. Cir. 1999) (Williams, J., concurring); James L. Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 Wash. L. Rev. 583, 613 (1981) (*Penn Central* "permits purely subjective results, with the conflicting precedents simply available as makeweights that may fit pre-existing value judgments.").

Penn Central was a never a model of clarity or fairness, as the haphazard and overwhelmingly government-friendly nature of lower court rulings demonstrates. Mark W. Cordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. Nat.

Resources & Envtl. L. 1, 35 (2006) ("[T]he Penn Central factors have rarely resulted in takings being found."). It has become even more questionable in light of *Lingle* and other modern precedent. This Court should grant the Petition to reassess and modernize the *Penn Central* factors.

I.

THE DECISION BELOW RAISES AN IMPORTANT QUESTION, ON WHICH LOWER COURTS CONFLICT, AS TO WHETHER A LOSS OF DEVELOPMENTAL USE AND 91.5% IN PROPERTY VALUE IS ADEQUATE TO ESTABLISH A REGULATORY TAKING

The initial factor in the *Penn Central* test requires courts to consider "the economic impact of the [challenged] regulation on the claimant." 438 U.S. at 124. Although *Penn Central* does not elaborate on how this factor is to be applied, this Court subsequently explained that it involves a comparison of "the value that has been taken from the property" after implementation of regulatory restrictions, "with the value that remains in the property." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 487; *see also*, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

Lower courts have largely adopted this instruction as the exclusive method of determining "economic impact." Yet, while this approach seems straightforward on its face, it is "troubl[ing] in . . . application." Blaine I. Green, *The Endangered Species Act and Fifth Amendment Takings: Constitutional*

Limits of Species Protection, 15 Yale J. on Reg. 329, 355 (1998). Courts do not know when reductions in property value cross the "takings" threshold, leading to a stream of seemingly arbitrary decisions. Moreover, the value-centric approach has left important indicia of regulatory impacts, like harm to actual use of property, out of the equation, rendering the "economic impact" factor inadequate as a test for the "severity of the burden [on] property rights." *Lingle*, 544 U.S. at 539.

A. Courts Are in Conflict on the Level of Economic Harm Needed To Support a *Penn Central* Taking

Many courts hold that an extreme decline in property value is necessary before the impact of regulation supports a *Penn Central* claim. More precisely, a substantial group of decisions holds that even a decline in property value in the range of 90%-95% is not enough of an "economic impact" to create a taking. *See William C. Haas & Co., Inc. v. City and Cty. of S.F.*, 605 F.2d 1117, 1120-21 (9th Cir. 1979) (holding a 95 percent diminution in value insufficient); *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1386-90 (N.J. 1992) (90% diminution in value inadequate to state a claim); *Brotherton v. Department of Environmental Conservation of State of N.Y.*, 657 N.Y.S.2d 854, 856 (N.Y. Sup. Ct. 1997) (90-92% loss not sufficient). Such courts thus require a near complete loss in property value, *i.e.*, higher than 95%, before finding a taking. *See Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm'rs,* 38 P.3d 59, 67 (Colo. 2001) (*Penn Central* requires a showing that "land has [only] a

value slightly greater than de minimis."); *Noghrey v. Town of Brookhaven*, 48 A.D.3d 529, 532-33 (N.Y. Ct. App. 2008) (declaring that the economic impact factor "requires a loss in value which is 'one step short of complete,'" that it is not enough if the value is "substantially reduced." "The proper inquiry is whether the regulation left only a 'bare residue' of value"[citations omitted].).

In contrast are decisions that consider a "serious," *Cienega Gardens v. United States*, 331 F.3d 1319, 1340 (Fed. Cir. 2003), or "substantial" reduction in value as an "impact" that can cause a taking under *Penn Central*. *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1568 (Fed. Cir. 1994); *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980). These courts generally consider a decline in property value in the range of 75%-90% as an impact that supports a taking. *See Formanek v. United States*, 26 Cl. Ct. 332, 340 (1992) (88% loss); *1902 Atl. Ltd. v. United States*, 26 Cl. Ct. 575, 579 (1992) (88% loss); *see also Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 43 (1999) (73.1% loss); *Chase Manhattan Bank v. State of New York*, 103 A.D.2d 211, 223-24, 479 N.Y.S.2d 983 (86% reduction); *Yancey v. United States*, 915 F.2d 1534, 1539, 1541 (Fed. Cir. 1990) (a 77% diminution supported a takings claim); *see generally*, *Brace v. United States*, 72 Fed. Cl. 337, 357 (2006) (asserting that the Court of Federal Claims finds a taking when there is a loss of property value of 85% or more).

There are also decisions that find a reduction in property value of less than 75% to be sufficient to support a regulatory takings claim. *See Committee for*

Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, 311 F. Supp. 2d 972, 994 (D. Nev. 2004) (50% loss in value "stated an economic impact"); *FLCT, Ltd. v. City of Frisco*, 493 S.W.3d 238, 246 (Tex. App. 2016) (46% decline satisfied the "economic impact" factor).

The reality is that courts are all over the place when it comes to application of the *Penn Central* "economic impact" factor. This is not surprising since, as shown below, this Court's precedent provides no basis for identifying when lost value rises to the level of a compensable impact and there is no obvious reason for concluding that a certain percentage of loss is a taking and another is not. The current emphasis on property value has another troubling effect: it leads courts to overlook or misjudge the impact of regulation on other property rights, such as the right to physically *use* property. The right to put property to beneficial use is, of course, one the most established and important rights in the "bundle of sticks" we call "property." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78 (1945) "[P]revention of a legal and essential use,—an attribute of its ownership,—one which goes to make up its essence and value . . . is practically to take his property away." *Curtin v. Benson*, 222 U.S. 78, 86 (1911).

If the focus of the *Penn Central* factors is on the degree of the "burden [on] property rights," *Lingle*, 544 U.S. at 543, impacts on the right to use property must play into the inquiry. *See, e.g.*, *Golden Gate Hotel Ass'n v. City and Cty. of San Francisco*, 836 F. Supp. 707, 710 (N.D. Cal. 1993) (finding a *Penn Central* taking because the "economically viable uses of the

hotel owners' land have been significantly diminished"), *vacated on other grounds*, 18 F.3d 1482 (9th Cir. 1994). And yet harm to the right to physically use land is routinely minimized under current approaches to *Penn Central*'s "economic impact" factor. The ultimate consequence is decisions, like this one, that refuse to recognize (or remedy) the impact of an extreme restriction on property use simply because the property retains minimal residual value.[4] *Wyer v. Board of Environmental Protection*, 747 A.2d 192, 193-94 (Me. 2000) (limitation of property to "parking, picnics, barbecues and other recreational uses," did not give rise to a taking because $50,000 in value remained); *Pace Resources, Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1031 (3rd Cir. 1987) (rezoning of 37 acres of commercial land to agricultural use did not affect a *Penn Central* taking because the parcel retained about 10% of prior value).

B. This Court's Decisions Fail to Provide the Lower Courts with Guidance on the "Economic Impact" Issue

Unfortunately, the Court's current precedent offers no help on this issue. Indeed, this Court has never decided the "economic impact" issue in favor of a takings claimant, a step that would provide a baseline for understanding the level of loss needed to state a claim. Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, 334 (2007)

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[4] Indeed, a doctrine that allows government to avoid a taking based on existence of marginal residual value is a one of no practical effect "[s]ince land and buildings are assumed to have some transferable value." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 20 (1949).

("The Supreme Court has never given us definite numbers—it has never said that a value loss less than a specified percentage of pre-regulation value precludes a regulatory taking, or that one greater than some threshold (short of a total taking) points strongly toward a taking.").

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court held that government action depriving property owners of all economically beneficial use of property is a per se taking, without regard to other factors. 505 U.S. at 1017-19. This ruling implies that a total loss of property use and value is not necessary to prove a regulatory taking under *Penn Central*. Indeed, *Lucas* confirmed this view in noting that some claimants whose economic loss "is one step short of complete" would likely prevail under *Penn Central*. *Lucas*, 505 U.S. at 1019 n.8. Yet, while *Lucas* helps courts understand the level of economic loss *not* needed to satisfy *Penn Central*, it offers no guidance on the more common and difficult question of what loss *is* needed to state a takings claim under *Penn Central*.

This Court's subsequent decisions have not filled in the gap. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Court indicated that regulation that leaves a landowner with a "token interest" would likely cause a taking. But the *Palazzolo* Court did not explain what qualifies as a "token" interest. It did note that the ability to build "a substantial residence" left the owner with more than a "token interest." *Id.* But *Palazzolo* says nothing about whether an impermissible "token interest" exists when, as here, developmental use is forbidden and all that remains is residual value.

Dale A. Whitman, *Deconstructing* Lingle*: Implication s for Takings Doctrine*, 40 J. Marshall L. Rev. 573, 582 (2007) (stating that, on the issue of what impacts cause a taking, "no one is sure where that line lies today"); Epstein, *From* Penn Central *to* Lingle*: The Long Backwards Road*, 40 J. Marshall L. Rev. at 604 ("No one knows how much diminution in value is required.").

Certainly, from a property owner's point of view, elimination of a parcel's potential for physical use leaves nothing but a token interest. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 643-53 (1981) (Brennan, J., dissenting). This case illustrates. Mrs. Smyth's parents bought a residential lot in a desirable subdivision for $216,000 in today's dollars. App. B-2. If developable, it would be worth $700,000 today. App. A-12. But now Mrs. Smyth has no right in it but the right to turn it into a "park" or a "playground." App. A-13. That the useless lot may have $60,000 in residual value does little to lessen the impact, particularly when this value is based on the highly speculative possibility that Mrs. Smyth's neighbors may want to buy her now-useless parcel for open space (even though they enjoy that benefit now for free). For an ordinary person like Mrs. Smyth, this situation is a severe "impact" on her property rights. A jury certainly viewed it that way. But the court below overrode that judgment by adopting an improperly high "decline in value" bar for proving a compensable "impact" under *Penn Central*.

This Court should grant the Petition to clarify that a property owner need not present a near total decline in property value to satisfy *Penn Central*'s

"impact" factor. In weighing the regulatory "burden," 544 U.S. at 539, the established right to use property must be taken into account. The Court should recognize that a significant limitation on the use of property, like that here, is an impact supporting a regulatory takings claim, even if a few crumbs of property value (here, about 10%) remain. *San Diego Gas & Elec. Co.*, 450 U.S. at 643-53 (Brennan, J., dissenting). Re-calibrating the "economic impact" factor in this way would remove indeterminacy in the current value-based approach, and give courts much-needed guidance on the type of property burden that satisfies the "impact" factor.[5]

II.

THIS CASE PRESENTS AN IMPORTANT QUESTION AS TO WHETHER ACQUISITION OF A RESIDENTIAL LOT IN A DEVELOPED AREA GIVES RISE TO LEGITIMATE BUILDING EXPECTATIONS, REGARDLESS OF THE DEGREE OF INVESTMENT IN CONSTRUCTION

The second *Penn Central* factor focuses on "the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S. at 124. This consideration sometimes plays a pivotal role in the *Penn Central* inquiry. *Id.*; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-008 (1984).

[5] Requiring a court to consider whether regulation has substantially eliminated one or more of the traditional "sticks" (such as property use) in the bundle of property rights is simpler and less subjective than requiring them to decide which percentage of lost property value (in the wide spectrum of possible values) is or is not a taking.

Unfortunately, even after 40 years, "no one really knows what it . . . means." Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 Urb. Law. 307, 337-38 (1998).

Commentators have described the "expectations" concept as "hard to fathom"[6] "amorphous "with "uncertain parameters,"[7] "uncertain" in meaning, and "questionable at best."[8] Lower courts are also confused. *Philip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002) ("courts have struggled to adequately define" the concept); Daniel R. Mandelker, *Investment-Backed Expectations In Taking Law*, 27 Urb. Law. 215 (1995) ("federal and state courts divide on how to apply it"); Cordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. Nat. Resources & Envtl. L. at 35 ("courts and commentators have often puzzled over what 'interference with investments-backed expectations' means").

The vague and multi-faceted terms in the phrase "distinct investment-backed expectations" invite shifting and subjective interpretations of the concept. As a result, the inquiry regresses to a "lot-by-lot, fact-by-fact method of adjudication . . . so fraught with uncertainty that landowners must often litigate to the

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[6] William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. 1, 50 (1995).

[7] Meltz, *et al.*, *The Takings Issue* at 133-34.

[8] Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 Wash. L. Rev. 91, 107 (1995).

highest court that will hear them out to determine whether they have even properly stated a claim." Michael M. Berger, Tahoe Sierra*: Much Ado About—What?*, 25 U. Haw. L. Rev. 295, 314 (2003). The only real constant in this cauldron of unpredictability is that "the government wins." *District Intown*, 198 F.3d at 886 (Williams, J., concurring); David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 Stet. L. Rev. 523, 567 (1997) (noting that state courts find "no taking, generally on the legitimacy of the landowner's investment-backed expectations"); Daniel R. Mandelker, *et al.*, *Federal Land Use Law* § 2A.03(4) (1986) ("lower federal courts so far have applied it to uphold rather than strike down land use regulations").

A. Courts Inconsistently and Unfairly Apply the Expectations Factor

1. Some Courts Focus on the Regulatory Regime—When It Favors the Government

Most courts begin the "investment-backed expectations" inquiry by focusing on whether a claimant's development expectations are "distinct" or "reasonable." Under this light, many courts have concluded that the timing of the property's acquisition, relative to its restriction by regulation, is a critical gauge of an owner's interests—at least when regulation predates property acquisition. *Broadwater Farms Joint Venture v. United States*, 45 Fed. Cl. 154, 156 (Fed. Cir. 1999) (a "regulatory structure can

thoroughly abrogate a property owner's investment-backed expectations"); *District Intown*, 198 F.3d at 883. "A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights." *Claridge v. New Hampshire Wetlands Board*, 485 A.2d 287, 291 (N.H.1984); *see also*, *Forest Props., Inc. v. United States*, 177 F.3d 1360 (Fed. Cir. 1999); *Brunelle v. Town of South Kingston*, 700 A.2d 1075 (R.I. 1997).

The regulatory timing approach implies that one who acquires property *prior* to regulation should have distinct, protected expectations. *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994). And yet, when courts confront this scenario, the "investment-backed expectations" doctrine shifts focus, often becoming a test for whether the owner made enough financial investments in development (beyond property acquisition) before regulation of the property. *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1091 (9th Cir. 2015) (holding that acquisition of property prior to regulation "does not give [the plaintiff] a valid investment-backed expectation . . . [because] when buying a piece of property, one cannot reasonably expect that property to be free of government regulation"); *Good v. United States*, 189 F.3d 1355, 1362-63 (Fed. Cir. 1999); *McNulty v. Town of Indialantic*, 727 F. Supp. 604, 611 (M.D. Fla 1989) (finding no distinct expectations, despite pre-regulation acquisition, because the owner "attempted no use for 15 years. . . . Any expectations he may have regarding use of the land are not backed

by any investment."); *Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 678 (Tex. 2004) ("Sheffield's expectations were certainly reasonable," but "the investment backing Sheffield's expectations at the time of rezoning. . . was minimal."); *W.R. Grace & Co. v. Cambridge City Council*, 779 N.E.2d 141, 155 (Mass. App. Ct. 2002) (noting a property owner expecting to build "consistent with a[] [permissive] existing zoning framework had best get its shovel into the ground").

2. Other Courts Focus on the Nature of the Property at Issue—When It Favors the Government

In other *Penn Central* cases, courts measure the legitimacy of expectations, at least in part, by considering the character of the land at issue. *See Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring) ("the nature and extent of permitted development under the regulatory regime vis-a-vis the development sought by the claimant may also shape legitimate expectations."). When property is in an undeveloped or environmentally sensitive area, courts typically conclude that the takings claimant lacked reasonable development expectations. *Mock v. Dep't of Envtl. Res.*, 623 A.2d 940, 949 (Pa. Commw. Ct. 1993) (claimant "could not reasonably expect to develop their land free from government regulation because it is [regulated] riparian land"); *McNulty*, 727 F. Supp. 612 (no reasonable expectations because structures like that which plaintiff expected to build "were constructed . . . before beach ecology became an issue"); *Rowe v. Town of North Hampton*, 553 A.2d 1331, 1336 (N.H. 1989) (plaintiff had no "justified"

expectation of building a home on land in an "inland wetland conservation area"); Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. Rev. 77, 87-88 (1995) (noting that in sensitive areas, courts typically reject regulatory takings claims).

But when property is located in a highly developed area, suggesting that development interests may be legitimate, the "expectations" goalposts move again, often circling back to "to the timing of the acquisition relative to regulation," or other considerations. *LaSalle Nat'l Bank v. City of Highland Park*, 799 N.E.2d 781, 797-98 (Ill. Ct. App. 2003) (finding that the plaintiff lacked legitimate development expectations, even though the lot was surrounded by developed, similarly sized lots, because a restrictive regulation existed at the time of purchase); *Sherrill v. Town of Wrightsville Beach*, 344 S.E.2d 357, 361 (Ct. App. N.C. 1986) (prospective builder of a duplex did not have reasonable expectations, even though the government permitted half of the neighborhood to be developed with duplexes, because the property was acquired after a single-family home restriction was in place); *Giovanella v. Conservation Comm'n of Ashlan*d, 857 N.E.2d 451, 461 (Mass. 2006) (claimant "may [ ] have [reasonably] relied on his ability to build . . . based on its similarity to the [developed] surrounding lots" but expectation was not protected because of an insufficient personal investment).

The thrust of the "investment-backed expectations" factor is impossible to predict; it is only clear that it tends to assume a guise unhelpful to takings claims. Again, this case demonstrates.

Mrs. Smyth's family bought a lot of residential property in a developed subdivision expecting "to build a home." App. B-2. Mrs. Smyth acquired an interest in the land in 2001, when the regulatory regime still allowed residential construction. App. B-4, B-7. In applying the "investment-backed expectations" factor, the trial court focused on the "regulatory regime in place at the time" of Mrs. Smyth's acquisition. *Id.* at B-6. Under this approach, it concluded that there was a material factual dispute as to whether she had protected expectations. *Id.* at B-8. A jury subsequently found that the Commission had indeed taken legitimate property interests.

The Massachusetts Appeals Court went a different way. It ignored the state of regulatory regime at the time of Mrs. Smyth's acquisition and focused on the "investment" side of the equation. App. A-13. The court held that Mrs. Smyth had no legitimate development interests due to a perceived "lack of any financial investment toward development of the property . . . at any time over more than thirty years." *Id.* Neither of the lower courts in this case considered the developed nature of the lots adjacent to Mrs. Smyth's property, an approach that would have bolstered her expectations. *See Lucas*, 505 U.S. at 1031 ("that other landowners, similarly situated, are permitted to continue the use denied to the claimant" suggests the claimant has a valid interest in the use of property).

B. This Court's Precedent Offers Little Guidance for the "Expectations" Inquiry

The subjective nature of the "distinct investment-backed expectations" doctrine is exacerbated by this Court's failure to identify the circumstances that create legitimate expectations. 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."). In cases subsequent to *Penn Central*, the Court "has concentrated almost entirely on deciding when investment-backed expectations do not exist rather than on deciding when they can provide a basis for a taking claim." Mandelker, *Investment-Backed Expectations in Takings Law*, 27 Urb. Law at 225. "[T]here is [still] a paucity of clear landmarks that can be used to navigate the terrain" of expectations doctrine. *Phillip Morris*, 312 F.3d. at 37.

Some of the Court's decisions do suggest that legitimate property interests do not depend on the level of personal financial investment in the property. 533 U.S. at 635 (O'Connor, J., concurring) (noting that "a takings claim is [not] defeated simply on account of the lack of a personal financial investment by a postenactment acquirer of property"); *Hodel v. Irving*, 481 U.S. 704, 714-718 (1987) (inherited property interests are constitutionally protected). Decisions, like that below, which reject property use expectations based on a lack of investment appear to be at odds with Court precedent. And yet, no majority decision from this Court constrains the courts' approach to

"distinct investment-backed expectations," leaving them free to pick and choose from among the various concepts to reject otherwise concrete development interests.

The Court should grant the Petition to clarify the "investment-backed expectations" doctrine in two important ways. First, it should make clear that acquisition of a lot in a developed area, prior to significant restriction, gives rise to a legitimate interest in using the property for a similar developmental purpose. This will provide courts and litigant with a much-needed example of the property expectations protected under *Penn Central*. Second, it should clarify that the level of financial investment in building does not affect the legitimacy of otherwise valid property interests. Property interests depend on objective criteria related to the property, not on whether one is fortunate enough to be able to rush into construction. *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring); Epstein, *From* Penn Central *to* Lingle *The Long Backwards Road*, 40 J. Marshall L. Rev. at 603 ("Investment-backed expectations" "surely cannot refer to the notion that property is unprotected if it is acquired by gift. Nor could it mean that the only property rights that are protected are those that have already been utilized."). Such steps will clarify and narrow the "expectations" factor, paving the way for more consistent and fair application.

III.

THE CASE RAISES THE IMPORTANT QUESTION OF WHETHER THE COURT SHOULD EXPUNGE THE "CHARACTER" FACTOR FROM *PENN CENTRAL* TAKINGS ANALYSIS

The final consideration in the *Penn Central* framework is the "character of the governmental action." 438 U.S. at 124. This factor may be the most troubling of all because it is incompatible with the purpose of modern regulatory takings doctrine and with post-*Penn Central* precedent demarcating the limits of that doctrine. Its retention wrongly tilts the *Penn Central* test in favor of the government.

A. Post-*Penn Central* Precedent Renders the "Character" Factor Obsolete and Harmful

1. The "Character" Factor Is Inconsistent with *Loretto*, *Tahoe-Sierra*, and *Lingle*

When this Court considered the issues in *Penn Central*, regulatory takings doctrine was in its infancy. Distinctions between regulatory takings and physical takings and between takings and due process principles had yet to be fleshed out. The *Penn Central* Court thus drew from a mix of (then) overlapping constitutional doctrines in articulating the multi-factor regulatory takings test. *Lingle*, 544 U.S. at 541-42.

The landscape of takings law has changed dramatically, however, since the 1970's. Just four years after *Penn Central*, this Court held in *Loretto*,

458 U.S. at 426, 441, that "a physical appropriation of property gave rise to a per se taking, *without regard to other factors*." *Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2427 (2015) (emphasis added). *Loretto* initiated a distinction in takings law between physical invasions of property which destroy the owner's fundamental right to exclude strangers, and regulatory actions that limit the owner's private use of the property. While the former intrusions were classified as a separate category of per se, physical takings, 135 S. Ct. at 2427, restrictions on the use of property generally remained subject to the *Penn Central* test.[9]

Decisions subsequent to *Loretto* reinforced the separation of "physical" and "regulatory" takings law. In 2002, this Court would declare that the "longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking.'" *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002). The Court elaborated: "neither a physical appropriation or public use [of property] has ever been a necessary component of a 'regulatory taking'" under *Penn Central*. *Id.* at 322.

A few years later, the Court disentangled regulatory takings law from substantive due process principles. *Lingle*, 544 U.S. at 542-43. The Court's

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[9] The one exception occurs when regulation destroys "all" economically productive use of land. *Lucas*, 505 U.S. at 1017.

2005 decision in *Lingle* made clear that whether a property restriction is legitimate or valid is not a factor in regulatory takings analysis, but an issue reserved for due process litigation. *Id.* A takings claim presupposes that the governmental action advances a legitimate interest and serves a public good, *id.* at 541, and thus the only concern in a takings dispute is "the severity of the burden" that an otherwise valid regulatory action "imposes upon private property rights." *Id.* at 529.

2. The "Character" Factor Injects Outdated and Improper Criteria Into Takings Law

Although this Court's precedent denies a role for "physical invasion" and "legitimate governmental interest" testing in regulatory takings analysis, *Penn Central*'s "character" factor injects both considerations into the analysis. 438 U.S. at 124. After all, *Penn Central* plainly indicated that the "character" factor considers whether the regulation causes "a physical invasion" or only "adjust[s] the benefits and burdens of economic life to promote the common good." Lower courts have dutifully followed *Penn Central*'s description of the "character" factor, treating it primarily as a test for whether a challenged governmental action causes a physical invasion of property. *See Rancho de Calistoga*, 800 F.3d at 1091; *Bottini v. City of San Diego*, 27 Cal. App. 5th 281, 314 (2018); *Strode v. City of Ashland*, 886 N.W.2d 293, 309 (Neb. 2016); *Embassy Real Estate Holdings, LLC v. Dist. of Columbia Mayor's Agent for Historic Preservation*, 944 A.2d 1036, 1052 n.18 (D.C. 2008); *see generally*, Thomas W. Merrill, *The Character of the*

Governmental Action, 36 Vt. L. Rev. 649, 661 (2007) ("the most common theme is that the character factor simply incorporates a distinction between governmental invasions and use regulations."); Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, 343 ("This physical/regulatory [taking] distinction remains the most important element of the character factor.").

Other courts take their cue from *Penn Central*'s reference to the "common good" and apply the "character" factor as a test for whether the challenged regulatory action promotes a legitimate interest. *See Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1370 (Fed. Cir. 2004); *Sadowsky v. City of New York*, 732 F.2d 312, 318 (2d Cir. 1984) (character weighed against a taking because the law "as a whole has a valid, even admirable, purpose"); *Quinn v. Board of Cty. Comm'rs for Queen Anne's Cty., Maryland*, 862 F.3d 433, 443 (4th Cir. 2017) ("Regulations that control development based 'on density and other traditional zoning concerns' are the paradigm" of a program that promotes the common good.); *City of Minot v. Boger*, 744 N.W.2d 277, 283 (N.D. 2008); *City of Houston v. Trail Enters., Inc.*, 377 S.W.3d 873, 879-80 (Tex. App. 2012);

Thus, the "character" factor operates in opposition to the principles established in *Loretto*, *Tahoe-Sierra*, and *Lingle*. As a "physical invasion" test, the factor violates the clear line between physical and regulatory takings set out in *Loretto* and *Tahoe-Sierra*, paradoxically making a regulatory taking contingent on whether there was a physical taking. *Tahoe-Sierra*, 535 U.S. at 322-24. Radford & Wake,

Deciphering and Extrapolating, 38 Ecology L.Q. at 737 (suggesting the "character" factor was "rendered superfluous by *Loretto*."). As a legitimate government interest test, the "character" factor conflicts with *Lingle* and its conclusion that takings tests focus only on the "burden" of regulation on property rights. It allows the "very concerns that the [*Lingle*] Court attempted to expunge from regulatory takings analysis . . . back into that analysis via the *Penn Central* balancing test."[10] Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan. Envtl. L.J. at 529.

The "character" factor's tendency to insert antiquated and unwarranted criteria into regulatory takings analysis has real practical consequences. Most importantly, it creates a biased framework for takings litigation. *Id.* After all, by definition, regulatory takings claims do not allege a physical appropriation. *Tahoe-Sierra*, 535 U.S. at 321-24. If there is a physical invasion, the claimant has a physical takings claim under *Loretto*, not a regulatory takings claim under *Penn Central*. Thus, in its common guise as a test for a physical invasion, the "character" factor does not measure *anything* in regulatory takings cases; it simply gives the government a freebie.

As a measure of legitimate regulatory action, the "character" test also unfairly skews *Penn Central*'s

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[10] While some courts occasionally look beyond "physical invasion" or "regulatory validity" concerns when applying the "character" factor, these alternative approaches are generally also inconsistent with *Lingle*. Whitman, *Deconstructing* Lingle, 40 J. Mar. L. Rev. at 581.

multi-factor test against a taking. This is because a regulatory takings claim also assumes that the challenged governmental action is rational and legitimate. *Florida Rock Industries, Inc. v. United States*, 18 F.3d at 1571; *see also E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring and dissenting in part). So once more, the doctrinally flawed "character" factor distracts from, and dilutes, the impact of regulation on property rights, thereby handicapping a claimant's ability to prove a regulatory taking based on that impact. Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan. Envtl. L.J. at 574 ("If courts consider regulatory purpose as well as regulatory effects . . . they will engage in more case-by-case adjudication of takings claims, because even when the impacts are significant, the government can still identify the exceptional harm" that a regulation addresses.).

Here, the court below applied the "character" factor in both of its illegitimate manifestations—as a "physical invasion" test and as a measure of the legitimacy of wetlands regulation. App. A-14. Of course this inquiry did not support Mrs. Smyth's claim. Pet App. A-14. Her *regulatory* takings claim presupposes that the Town's action caused a *regulatory*, not a physical, burden on her property rights and serves a valid public purpose. The "character" factor stacked the *Penn Central* deck against Mrs. Smyth before she sat down at the table. *Cf. Reagan v. County of St. Louis*, 211 S.W.3d 104, 110 (Mo. Ct. App. 2006) ("Clearly, this third factor is favorable to the County. The County did not physically invade Landowner's property.").

B. The Court Should Take This Case To Expunge the "Character" Test from Regulatory Takings Analysis

The doctrinally untenable and biased nature of the "character of the governmental action" factor has led to increased calls for the Court to expunge the factor from regulatory takings analysis. *See* Barros, *At Last, Some Clarity*, 69 Alb. L. Rev. at 353 ("the analysis in *Lingle* illustrates why the character of the government act generally should have no role"); Eric Pearson, *Some Thoughts on the Role of Substantive Due Process in the Federal Constitutional Law of Property Rights Protection*, 25 Pace Envtl. L. Rev. 1, 32 (2008) (*Lingle* "effectively eviscerates the 'character of the government action' factor"); Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law* § 10.6, at 430 (2d ed. 2007) (*Lingle* "eliminates evaluation of the legitimacy of the regulation.").

The Court should grant the Petition to adopt this position. Jettisoning the "character" factor and the improper concerns it inserts into takings law would go a long way toward cleaning up the remaining doctrinal confusion in regulatory takings doctrine. Barros, *At Last, Some Clarity*, 69 Alb. L. Rev. at 343. On a practical level, elimination of the "character" factor would streamline regulatory takings adjudication in a beneficial manner. One-sided and improper criteria from other doctrines would drop out and no longer muddy up the analysis. The *Penn Central* inquiry would simply focus on the nature and legitimacy of the property interest, and the challenged regulation's "effect" on the private rights (like

developmental use and economic value) that comprise that interest. *Lingle*, 544 US at 543; *Murr*, 137 S. Ct. at 1933 (Roberts C.J., dissenting) (regulatory takings law is designed to weigh "the effect of a regulation on specific property rights as they are established at state law"); Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan. Envtl. L.J. at 573-74 (noting that with "character" out of the way and with the "focus exclusively [ ] on regulatory effects, the[] courts [can] . . . develop some rules or clear standard with which to adjudicate disputes").

Indeed, the *Lingle* Court seemed to foresee that elimination of the "character" factor was the next step toward a workable and logically coherent regulatory takings doctrine when it described the "economic impact" and "expectations" factors as the "primary" *Penn Central* factors and noted only that the "character" test "*may* be relevant." *Lingle*, 544 U.S at 539 (emphasis added); *see also, id.* ("the *Penn Central* inquiry turns in large part . . . upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests,"); *Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445, 454 n.9 (9th Cir. 2018) (after *Lingle*, "the first two *Penn Central* factors are the most important").

The Court should take this case to complete the process of clarifying regulatory takings doctrine it began in *Lingle* by (among other steps) eliminating the "character" factor. This modification would modernize and focus the *Penn Central* test, ultimately making it fairer, "simpler and less ambiguous than

before." Whitman, *Deconstructing* Lingle, 40 J. Mar. L. Rev. at 582.

CONCLUSION

The Court should grant the Petition.

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