No. 19-223

In the
Supreme Court of the United States

JANICE SMYTH,
Petitioner,

v.

CONSERVATION COMMISSION OF FALMOUTH, *ET AL.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This Court's regulatory takings jurisprudence has had serious shortcomings since the decision in *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978), allowed the government to prohibit, by regulation, non-harmful uses of private property if the public benefit to be gained exceeded the purported investment-backed expectations of the property owner. That permitted governments to do the very thing the Takings Clause was designed to prevent, namely, force one individual "alone to bear the public burdens which in all fairness and justice should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) , did not remedy that conceptual problem, but merely carved out a small, "deprived of all economic benefit" safe harbor from *Penn Central's* operation. As a result, the inquiry into how large a percentage of one's property is affected by a regulation, which should be irrelevant to whether a taking has occurred, became even more significant. Amicus agrees with each of the three questions presented in the petition but, because the problem is ultimately with the *Penn Central* framework itself, urges the Court to consider the following question as a "subsidiary issue 'fairly comprised' by the question[s] presented," *Procunier v. Navarette,* 434 U.S. 555, 559-60 n.6 (1978):

1. Whether the *Penn Central* balancing test, when applied to regulations designed to grab public benefits from individual property owners, should be discarded because it permits takings without just compensation in violation of the Fifth and Fourteenth Amendments of the Constitution.

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. Those principles include the idea, articulated in the Declaration of Independence and codified in the Takings Clause of the Fifth Amendment, that governments are instituted to protect the inalienable rights of citizens, including the right to acquire and use property. In addition to providing counsel for parties at all levels of state and federal courts, the Center has represented parties or participated as amicus curiae before this Court in several cases of constitutional significance addressing the Constitution's protection of property rights, including *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmnt. Dist.*, 570 U.S. 595 (2013); *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012); and *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

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[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than amici, its members, or its counsel made a monetary contribution to fund the preparation and submission of this brief.

SUMMARY OF ARGUMENT

This case presents the perfect opportunity for the Supreme Court to revisit its regulatory Takings Clause jurisprudence. *Penn Central* is so conceptually flawed as to allow the very thing the Fifth Amendment was designed to prohibit, namely, impose on one or a few property owners the burden of providing a public benefit that, by rights, should be borne by all.

Amicus agrees with petitioner that each prong of the multi-factor *Penn Central* test creates interpretive problems. But the problem is much deeper that lack of clarity in the factors; it is the fact that the *Penn Central* factors are (or should be) irrelevant to the determination of whether a taking has occurred. Benefit-grabbing regulations should be viewed as a taking whether they take all or only a portion of a private owner's land. Conversely, nuisance-prevention regulations should *not* be treated as a taking no matter the percentage of the land affected. Finally, for regulations aimed, as here, at nuisance-like harms that exist only in the aggregate, regulations that target only one or a few property owners whose proposed development contributes no more to the aggregate problem than any of their neighbors, should likewise be viewed as benefit-grabbing (and hence a compensable taking) for anything above that individual's pro-rata share of the aggregate harm. Only by overruling the conceptually-flawed *Penn Central* test can the Takings Clause be restored to its original purpose, preventing governments at all levels from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

ARGUMENT

I. *Penn Central* Should Be Revisited Because It Allows the Very Taking of Private Property for Public Benefit that the Takings Clause Was Designed to Prevent.

Amicus agrees with Petitioner that the *Penn Central* test has "given rise to vexing subsidiary questions" which render it ill-suited to an exalted place in takings doctrine." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544 (2005). Amicus also agrees with Petitioner than each element of the *Penn Central* multifactor balancing test—described by the court below as a "highly nuanced balancing of multiple factors, Petn. App. A-9—gives rise to interpretative problems. But the problem is far deeper than the vagaries inherent in the balancing test factors. By focusing on matters that are (or should be) irrelevant to the determination of whether a taking has occurred, the test itself is fatally flawed. It poses "difficult conceptual and legal problems," as then-Justice Rehnquist, joined by Chief Justice Burger and Justice Stevens, acknowledged in dissent at the time. 438 U.S. at 150 n.13 (Rehnquist, J., dissenting).

One such problem is not the determination of how much diminution in value there has been, but the fact that the court looks at that calculation at all in determining whether a taking has occurred rather than as a measure of the amount of compensation that must be paid once a taking has occurred.

The percentage of one's property that is necessary for a regulation to qualify as a taking—whether it be all of the property's economic use (*Lucas*) or the owner's significant, investment-backed expectations

(*Penn Central*)—should be immaterial to the takings analysis. As Professor Richard Epstein has correctly noted, "the ratio between retained and taken property, is irrelevant" to whether a taking has even occurred or to the amount of compensation that must paid for a regulatory taking. Richard A. Epstein, "*Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations," 45 Stan. L. Rev. 1369, 1376 (1993).

A. *Penn Central* erroneously treats nuisance-prevention regulations and benefit-grabbing regulations equally.

By failing to distinguish between nuisance-prevention regulations and benefit-grabbing regulations, *Penn Central* allows the government to take private property for public benefit without any, much less a just, compensation. Indeed, under *Penn Central*'s balancing test, the greater the public benefit, the more likely it is that a "no taking" conclusion will be made.

Amicus does not dispute that the government has regulatory authority to prevent nuisances caused by noxious uses of private property. Indeed, despite this Court's holding in *Lucas,* a regulation that affects even the entire property should not be viewed as a taking if it prevents nuisance, because no one has a right to use his property in ways that cause harm to another's lawful rights. *Sic utere tuo ut alienum non laedas.* William Blackstone, 1 Commentaries § 306; *see also Camfield v. United States*, 167 U.S. 518, 522 (1897) ("His right to erect what he pleases upon his own land will not justify him in maintaining a nuisance"); *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be

injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit"); Steven J. Eagle, "The Four-Factor *Penn Central* Regulatory Takings Test," 118 Penn St. L. Rev. 601, 617 (2014) ("Because landowners do not have a property right in maintaining a nuisance or other condition inimical to the public health, safety, or welfare, even a large loss resulting from termination of such activity is not compensable").

Conversely, a regulation that affects even a small portion of the parcel *is (or should be) a taking* if it restricts non-nuisance private use in order to derive a benefit for the public. As this Court has long recognized, the Fifth Amendment "bar[s] 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." *Armstrong,* 364 U.S. at 49; *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (Holmes, J.) ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change").

In fact, treating benefit-grabbing regulations that fall short of a complete deprivation as subject only to the *Penn Central* balancing test turns the Takings Clause on its head. That test balances the property owner's investment-backed expectations against the public purpose to be served by the regulation and holds that no taking occurs (and hence no compensation is due) whenever the regulation serves "a substantial public purpose" that outweighs the property

owner's investment-backed expectations. *Penn Central*, 438 U.S. at 127. The Takings Clause, which was designed to prevent the majority from benefiting itself at the expense of individual property owners, requires just the opposite result. Indeed, the greater the benefit to the public, the greater the temptation of a government responsive to majority rule to avoid the costs by "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong,* 364 U.S. at 49; *see also* Richard Epstein, "Nuisance Law: Corrective Justice and Its Utilitarian Constraints," 8 The Journal of Legal Studies 49, 63 (Jan. 1979) (describing the "problem of tyranny by the majority" in the Takings context).

B. Even regulations aimed at preventing harms that only arise in cumulative effect can, as here, amount to a taking, at least in part.

Even nuisance-prevention regulations can result in a compensable taking when the regulation targets only a subset of property owners whose proposed property use is indistinguishable from that of neighboring property owners, and the "harms" the regulation seeks to avoid only arise in the aggregate. As this case demonstrates, the distinction is important because Ms. Smyth is being unfairly singled out for seeking to use her property in a way that is no different than the use of neighboring property owners.

As the following hypothetical demonstrates, Takings Clause jurisprudence should acknowledge that regulations which seek to mitigate harm but that apply only to some property owners when the harm at issue is one to which everyone in the neighborhood

contributes should also be treated as a taking of private property for public benefit. Assume that excess development in an area with 10 residential lots causes beach erosion. Assume further that 10% of the total acreage needs to be set aside to prevent such erosion. If the first 9 owners develop 100% of their property, the only way to meet the overall 10% set-aside requirement is to forbid development on the last lot entirely. The result: that unfortunate owner is not only contributing her 10% toward mitigation of the problem, but everyone else's as well. The remaining 90% must therefore be a taking because the regulation aims not at preventing her share of the cumulative harm but at grabbing her property for the benefit of the others. While it may look like nuisance prevention, it is a form of benefit grabbing.

That concept of aggregate harm was missing from this Court's analysis in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). The argument there was that a development moratorium was necessary to prevent the increase in impervious coverage of land in the Lake Tahoe basin that was causing harmful runoff into the lake and threatening its pristine beauty. But the landowner plaintiffs in the case sought to do nothing more with their property than what other property owners had already done, namely, build vacation homes. The "nuisance" to the Lake was therefore not theirs alone, but only the result of the cumulative impact on the lake caused by all development in the basin. A development ban that operated only against them (rather than one that limited the amount of impervious development on all land in the basin to the scientifically sustainable level) should therefore have be viewed as grabbing a benefit (in the form of excess development)

for the majority of the property owners in the basin at the expense of those few affected by the ban.

That same aggregate harm concept is exactly what is at issue in this case. The wetlands regulation at issue here was ostensibly designed to protect environmental resources from the cumulative effects of development, not just by Ms. Smyth but by the 173 other property owners in her subdivision. At yet the burden of the regulation falls entirely on Ms. Smyth, despite the fact that her proposed home construction would contribute no more to the overall problem (even assuming there is one) than any of the neighboring properties. The effect of the regulation is that Ms. Smyth is not only contributing her part toward mitigation of any aggregate problem but everyone else's part as well. In other words, at least with respect the portion of underdevelopment that exceeds here own pro-rata share of the aggregate problem, Ms. Smyth is being compelled to provide a public benefit that by rights should be shared by everyone in the subdivision. Treating that as a taking, subject to the requirement of just compensation, is the only way that the overall burden can be shared rather than foisted entirely onto Ms. Smyth.

Eliminating the conceptually flawed *Penn Central* balancing test would not mean that compensation must be paid to every property owner whose property suffers a diminution in value as the result of some government regulation. Regulations designed to prevent nuisance would not, in most circumstances, qualify as a taking at all.

That was the significance of at least two of the three cases on which the majority in *Penn Central* relied (albeit contrary to the majority's characterization

of those cases). There was no "taking" in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), because the regulation at issue in that case prohibited a brickyard from operating in a residential area where the dust from its operations caused a nuisance. Nor was there a taking in *Miller v. Schoene*, 276 U.S. 272 (1928), which involved a Virginia statute requiring the destruction of cedar trees that were infected with a communicable plant disease known as cedar rust and therefore "declared to be a public nuisance." *Id.* at 277.[2]

Nor would eliminating *Penn Central*'s balancing test undermine the "average reciprocity of advantage" exception to regulatory takings. *See, e.g.*, *Pennsylvania Coal*, 260 U.S. at 415. On the contrary, eliminating the *Penn Central* balancing test would restore the "average reciprocity of advantage" exception to its original purpose and reconcile it with the original purpose of the Takings Clause itself. As this Court noted in *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893), the average reciprocity of advantage "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

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[2] The third case, *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), which involved a prohibition on sand and gravel excavation below the water table line, can also be viewed as preventing a harm rather than grabbing a public benefit, even if, as the Court claimed, it was "arguably not a common-law nuisance." *Id.* at 593.

But neither the nuisance exception nor the average reciprocity exception applies to the Town of Falmouth's restriction of development on the Ms. Smyth's property. Ms. Smyth would not be causing a nuisance should she develop her parcel in the same manner as nearly all other parcels in the vicinity have been developed. And the changing nature of the regulation at issue does not allow the County to be flexible in its' application. Quite simply, there is no "reciprocity" for Ms. Smyth, but great advantage for everyone else. If the rest of the owners in the neighborhood have a "strong public desire to improve the public condition" of the area by keeping the Ms. Smyth's property vacant, they cannot "achiev[e] the desire by a shorter cut than the constitutional way of paying for" it. *Pennsylvania Coal,* 260 U.S. at 416.

CONCLUSION

The decision of the Appellate Court of Massachusetts rejecting Mrs. Smyth's regulatory takings claim is based on the conceptually flawed holding in *Penn Central.* The petition for writ of certiorari should be granted so that *Penn Central* can be revisited and overturned.

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Respectfully submitted,

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