No. 19-223

IN THE

Supreme Court of the United States

JANICE SMYTH,

Petitioner,

v.

CONSERVATION COMMISSION OF FALMOUTH and TOWN OF FALMOUTH,

Respondents.

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

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), established a fact-intensive, multi-factor framework for evaluating claims that government regulation goes so far as to warrant treatment as a compensable taking of private property under the Fifth Amendment. Courts presented with such claims consider "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as "the character of the governmental action." *Id.* at 124. The questions presented are:

1. Whether an intermediate state appellate court erred in its application of the *Penn Central* framework to conclude that local regulations did not effect a taking of petitioner's property.

2. Whether this Court should overrule *Penn Central* and its progeny and prohibit courts presented with regulatory-taking claims from considering the character of the governmental action, notwithstanding that petitioner did not raise that question in any fashion below, and in the absence of a credible claim that such a doctrinal modification would alter the result in this case.

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JURISDICTION

The rescript of the court of appeals issued on May 10, 2019. The petition for a writ of certiorari was filed on August 16, 2019, after Justice Breyer had extended the time within which to file a petition until August 21, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

STATEMENT

Petitioner inherited a vacant lot abutting coastal wetlands in the Town of Falmouth, Massachusetts. The combination of restrictive covenants in her deed of title, the lot's configuration and topography, and local laws creating a buffer around environmentally sensitive areas meant that, without variances granted by the Falmouth Conservation Commission, no residence could be built on the lot. After petitioner's request for variances was denied, she sued the Town and Commission in state court alleging, among other things, that application of the local regulations to her lot effected a taking compensable under the state and federal constitutions. The intermediate appellate court examined each of the factors set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), before concluding that, on balance, petitioner had not carried her burden to prove a taking by regulation.

1. The Commonwealth of Massachusetts and the Town of Falmouth have exercised "the power to forbid the filling, dredging, or excavating of coastal wetlands" since the 1960s. *Golden v. Bd. of Selectmen*, 265 N.E.2d 573, 574 (Mass. 1970). The Wetlands Protection Act, Mass. G.L. ch. 131, § 40, establishes basic wetlands-protection rules applicable statewide while affirming municipalities' authority to set additional standards tailored to local needs and conditions. See *Lovequist v. Conservation Comm'n*, 393 N.E.2d 858, 863 (Mass. 1979). The Town adopted its own

wetlands-protection bylaw in 1979, and the Commission promulgated implementing regulations in 1989. C.A. App. II:175 (stipulations of fact). Since at least 2008, the local bylaw and regulations have prohibited new residential construction, and presumptively prohibited new septic systems, within 100 feet of coastal banks, salt marshes, or land vulnerable to coastal flooding. See Mem. & Order on Pet.'s Mot. for J. on the Pleadings (MTJPL Order) at 2.

Petitioner owns a 0.37-acre lot bisected by a coastal bank that slopes down toward a frequently inundated salt marsh. Pet. App. B2. Her parents bought the lot in 1975 for $49,000. *Ibid.* Among the restrictive covenants in their deed of title were a minimum square-footage requirement and front-yard setback for any residence, both imposed by a homeowners' association. *Id.* at B3; C.A. App. II:179-180 (stipulations of fact).[1] Petitioner's parents "took no steps toward planning or building a home on" the lot, and the only "costs or expenses associated with their ownership" were homeowners' association dues and property taxes. Pet. App. A3. Property taxes were assessed based on the lot's "undeveloped state." *Id.* at A13.

Petitioner inherited her mother's half-interest in the lot in 2001 and became the sole owner upon her father's death in 2005. Pet. App. B2. In 2006, petitioner paid a consultant $600 "to perform a soil evaluation test for a proposed septic system on the property, and her husband (an architect) prepared two sketches for a potential house." *Id.* at A3; see also *id.* at A13. Between 2007 and 2012, alt-

[1] Petitioner's lot is zoned for houses with smaller footprints, see Pet. App. A3, but the homeowners' association refused to grant her relief from the restrictive covenants. C.A. App. II:180 (stipulations of fact). The Town imposes its own setback requirement, but petitioner did not seek a variance from that requirement. *Ibid.*

hough petitioner knew that she would need to obtain several variances from the Commission in order to build a house that comported with her title limitations, *id.* at A13 n.16, she "engaged various professionals to prepare formal plans for a house …, and to assist in the preparation of applications" for variances from the Commission and necessary approvals from other entities, *id.* at A3.

In 2012, petitioner asked the Commission to approve her plans to build a three-bedroom house. Pet. App. A3-A4. But those plans "did not comply with" the local "requirements covering coastal banks, salt marshes, or land subject to coastal storm flowage." *Id.* at A3. The Commission denied petitioner's variance requests after finding, among other things, that she "did not satisfy the requirements for a hardship." MTJPL Order at 10.[2]

2. Petitioner responded by suing the Town and the Commission. Counts I and II of the operative complaint alleged that the Commission erred by not granting variances from the local regulations. Count III alleged that those regulations effected a "taking" of her property compensable under the Fifth Amendment to the U.S. Constitution and the Massachusetts Declaration of Rights. Pet. App. A4.[3] After the trial court denied her motion for judg-

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[2] The Commission may, "in 'rare and unusual cases,'" grant a variance if a landowner proves a "hardship," *i.e.*, if applying local law "to a particular piece of property" would be "unduly oppressive, arbitrary or confiscatory and would involve substantial economic loss to the [landowner] … provided that the [c]onditions and characteristics of the property are not the result of the actions of the … owner[] or [her] … predecessors." MTJPL Order at 7 & n.1.

[3] Article 10 of the Massachusetts Declaration of Rights states, in relevant part: "[W]henever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

ment on the pleadings on Counts I and II, petitioner abandoned her challenge to the Commission's decision, *ibid.*, leaving only Count III, the "taking" claim, to be resolved.

a. The trial court denied respondents' motion for summary judgment. Pet. App. B1-B9. The court observed that petitioner "d[id] not allege a permanent physical intrusion onto the land …, nor that a regulation has deprived her of all economically beneficial use of the land." *Id.* at B5. Cf. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Accordingly, the determination whether a taking occurred under state or federal constitutional law called for "the three-part framework set out in *Penn. Central*." Pet. App. B5. See also, *e.g.*, *Blair v. Dep't of Conservation & Recreation*, 932 N.E.2d 267, 274-77 & n.14 (Mass. 2010) (applying the *Penn Central* framework to a claim of a taking under the state constitution, while reserving the possibility that the state constitution affords more protection than the federal constitution).

Penn Central identifies three factors of particular significance to the inquiry whether a valid regulation goes so far as to merit treatment as a Fifth Amendment "taking": (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation interferes with the owner's distinct investment-backed expectations; and (3) the character of the government action. See Pet. App. B6. The trial court found that factual disputes remained "with respect to two of [those] three 'guideposts' …, economic impact and investment-backed expectations." *Id.* at B9. The court then decided that a jury should weigh the *Penn Central* factors, over respondents' objection that the right to a jury trial under Massachusetts law does not attach to a regulatory-taking claim. See *id.* at A4.

At no point did petitioner ask the trial court to revisit its finding that her property retained economically beneficial use, necessitating application of the *Penn Central* framework. On the contrary, petitioner's counsel asserted that "[w]e're at the *Penn Central* analysis because this is not a per-se taking." C.A. App. IV:589. Nor did petitioner suggest that this Court had modified or should modify *Penn Central*'s consideration of the character of the government action (or that Massachusetts courts should do so, under the state constitution). Instead, petitioner proposed, and the trial court gave, this jury instruction:

> The third guidepost requires examination of the character of the government action in this case. You should consider what the government was trying to achieve through its action, and whether and to what extent the action as applied to this case meets that goal.
>
> You should consider evidence concerning the type of harm that the government action was intended to mitigate, whether the action in fact mitigates that harm, whether the action serves a substantial public purpose, whether the action is appropriately limited in scope, and whether the burden of the action is fairly borne by the public as a whole.

C.A. App. II:291; see also *id.* at IV:634-635.

The jury returned a verdict for petitioner and awarded her $640,000—the difference, according to petitioner's appraiser, between the lot's "value, if buildable" despite the generally applicable restrictions on development adjacent to wetlands, and the lot's "value, … if unbuildable." Pet. App. A5. The trial court denied respondents' motion for judgment notwithstanding the verdict. C.A. App. IV:394.

b. The intermediate appellate court unanimously reversed. Pet. App. A1-A15.

The appellate court first held that the trial court had erred in allowing a jury to decide the merits of petitioner's regulatory-taking claim, because the jury right provided under Article 15 of the Massachusetts Declaration of Rights does not attach to such a claim. Pet. App. A5-A10. Petitioner does not seek further review of that holding.

The appellate court then held that, even when considered in a light favorable to petitioner, "the evidence presented at the trial did not, as a matter of law, support a claim of regulatory taking." Pet. App. A2. The court explained that where, as here, "the regulation at issue effects neither a permanent physical invasion of property nor a complete deprivation of all economically beneficial use," resolving a taking claim entails "a highly nuanced balancing of multiple factors" set forth in *Penn Central*. *Id.* at A8. The court described the three *Penn Central* factors as "guideposts," *id.* at A12, which, taken together, answer the "complex[] question" whether a valid government regulation must be treated as the constitutional equivalent of a taking, *id.* at A9.

The appellate court considered each *Penn Central* factor before determining that no taking occurred. As to economic impact, the court first compared "the value of the property with and without the regulation." Pet. App. A12. Viewing the facts in the light most favorable to petitioner, the court observed that "the regulation reduced the value of the property from $700,000 (if buildable) to $60,000 (if unbuildable)"—a "significant" diminution but not one that "necessarily" established a taking. *Ibid.* The court then observed that the remaining value of petitioner's lot exceeded in absolute terms the $49,000 her parents had paid

to purchase it. *Ibid.* The court acknowledged the likelihood that the present value of that purchase price would exceed $60,000, but it noted that petitioner had "presented no evidence at trial of the present value" on which a court could properly rest such a finding. *Id.* at A12 n.15.[4] Lastly, the court discussed as part of the economic-impact factor the "other uses to which the property might be put" notwithstanding the Commission's denial of variances for residential construction. *Id.* at A13. The court observed that the lot is zoned for use as, "among other things, … a park or a playground," and "that it would be attractive to abutting owners … either for privacy or for expansion of their respective properties." *Ibid.* See also *id.* at A3 n.5.

The appellate court did not reach a conclusion based solely on economic impact. Instead, it moved on to the next *Penn Central* guidepost: distinct investment-backed expectations. Here, the court credited petitioner with three investments in the property: the purchase price paid by her parents; property taxes for undeveloped land paid by petitioner and by her parents when they owned it; and the $600 cost of the 2006 soil-evaluation study. Pet. App. A13-A14.[5] As to the first two investments, the court recognized

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[4] Petitioner repeatedly asserts, without support, that the present value of her parents' purchase price is $216,000. Pet. i, 6, 19. Even assuming that petitioner could premise a taking claim on the vagaries of inflation in the price of real estate, but cf. *Andrus v. Allard*, 444 U.S. 51, 66 (1979), she cannot rely on extra-record suppositions in support of a request for further review, see *Russell v. Southard*, 53 U.S. (12 How.) 139, 159 (1851) ("This [C]ourt must affirm or reverse upon the case as it appears in the record.").

[5] The appellate court did not recite homeowners' association dues in its account of expenditures related to the property, but the petition does not mention them either, much less contend that their omission from the court's list was reversible error.

that "[t]he fact that a property owner acquired property by means of inheritance" is not a reason to disregard expenditures incurred by her predecessors in interest. *Id.* at A13 (relying on *Gove v. Zoning Bd. of App.*, 831 N.E.2d 865, 874-75 (Mass. 2005)). But the court again noted that the cost of acquisition—incurred at a time when state and local law already regulated wetlands development, see *supra*, page 1—did not exceed the value remaining in the lot after applying existing law. Pet. App. A14. The court did not credit petitioner's "investments" in variance applications because "by definition those fees were spent at a time when she knew her property could not be developed under applicable regulations." *Id.* at A13 n.16.

The court then proceeded to the third *Penn Central* guidepost: the character of the government action. The court first recited petitioner's "admi[ssion]" that the Commission's denial of variances to build a residence "was clearly not like a physical invasion" of her property. Pet. App. A14. The court then observed that the local regulations "are of general applicability to all property in the town that has wetland resources and, by their terms, are designed to protect coastal and wetland resources generally." *Ibid.* The court noted that application of such laws "typically does not require compensation." *Ibid.* (citation omitted).

In a final paragraph entitled "Conclusion," the appellate court held that, "based on the undisputed facts in the record, viewed in the light most favorable to" petitioner, application of the wetlands regulations to her lot "did not effect a regulatory taking" compensable under the state or federal constitution. Pet. App. A14-A15.

c. Petitioner applied to the state supreme court for further appellate review. Her application made no reference

to the state constitution; it rested solely on the Fifth Amendment. Petitioner once again did not dispute that her lot retained economically beneficial use despite application of the local regulations. See Pet. Appl. for Further App. Rev. 10-11. Nor did she ask the state supreme court to ignore or modify the "character" strand of the *Penn Central* analysis, or suggest that the governing constitutional framework had been or should be altered due to intervening decisions of this Court. Petitioner continued to argue that the character of the regulations supported her claim. *Id.* at 19. Further review was denied. Pet. App. C1.

REASONS FOR DENYING THE PETITION

The intermediate state appellate court correctly stated and applied the *Penn Central* framework to hold that the application of local wetlands regulations to petitioner's property did not effect a regulatory taking. Contrary to petitioner's suggestion, the court below did not declare any single fact, or single factor, "insufficient" to support petitioner's claim. The *Penn Central* factors are "guideposts" in a holistic inquiry, Pet. App. A12, not elements of a landowner's cause of action. Accordingly, the appellate court examined all the facts and all three *Penn Central* factors before determining that, on balance, respondents' regulations did not go so far as to effect a taking of petitioner's property. That factbound determination does not warrant this Court's review.

The petition does not identify a true conflict between the decision here and that of any other court. The appellate court did not announce or follow a rule of decision that would dictate the outcome of any case presenting different facts. Petitioner asserts that lower "courts are all over the place" in their application of *Penn Central* factors, Pet. 16, but her cases reveal only that *the facts* are all over the

place, which is unsurprising given "the nearly infinite variety of ways in which government actions or regulations can affect property interests," *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 32 (2012). The absence of a conflict is strong reason to deny further review.

Petitioner also is wrong to argue (for the first time to this Court) that the character of a regulation is irrelevant to the question whether that regulation effects a taking for which the government must provide compensation. Case law does not bear out petitioner's accusation that the character factor is biased in favor of the government, and the decisions of this Court on which her argument rests expressly recognize the importance and continuing vitality of the character inquiry. In any event, the petition does not and cannot credibly claim that a different result would have obtained in this case had the court below ignored the character of respondents' regulations.

I. There Is No Conflict Between The Decision Below And The Decision Of Any Other Court.

Petitioner asserts that the appellate court below evaluated the first two *Penn Central* factors—economic impact and investment-backed expectations—in a manner that conflicts with a grab-bag of lower-court rulings, many of which were issued by trial courts and intermediate state appellate courts. Cf. this Court's Rule 10(b). All those asserted conflicts are illusory.[6]

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[6] The state appellate court conducted a *Penn Central* inquiry "[a]gainst th[e] background," Pet. App. A12, of the "undisputed facts," *id.* at A14, that petitioner's land was not physically occupied and retained economically beneficial use after application of respondents' regulations, see *id.* at A8, B5. Petitioner's *amici curiae* regret that she did not allege a total deprivation of economically beneficial use. Br. of Mtn. States Legal Found. & Cato Inst. 10

A. As to *Penn Central*'s economic-impact factor, each of the fact-intensive decisions in the petition's parade is consonant with the appellate court's decision in this case.

Every decision that petitioner cites, including the decision below, "begins," Pet. App. A12, its discussion of economic impact by "compar[ing] the value that has been taken from the property with the value that remains," *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). But the inquiry does not *end* there:

> [N]o percentage diminution in value necessarily results in a compensable regulatory taking, but that is not the same as saying that below a certain percentage diminution, a taking can never be compensable, or even that an assessment of the economic impact below that percentage can never favor a conclusion that compensation is merited.

Cienega Gardens v. United States, 331 F.3d 1319, 1345 (Fed. Cir. 2003) (emphasis omitted).

In this case, the purported diminution in value of petitioner's land from $700,000 to $60,000, while "significant," Pet. App. A12, was not dispositive in either direction. On the one hand, "even a substantial reduction in the value of property can occur without effecting a regulatory taking."

(arguing that "this case should be analyzed as a total taking under *Lucas*" (capitalization altered)). But this Court must consider the petition "under the same factual assumption[]" that informed the decision below, *Lucas*, 505 U.S. at 1020 n.9, namely, that economically beneficial use remains in petitioner's lot. Cf. *Turner v. Rogers*, 564 U.S. 431, 456-57 (2011) (Thomas, J., dissenting) ("[I]t is the wise and settled general practice of this Court not to consider an issue in the first instance, much less one raised only by an *amicus*. This is doubly true when we review the decision of a state court and triply so when the new issue is a constitutional matter." (citations omitted)).

Id. at A12 n.15. See, *e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (finding no per se taking where a regulation reduced the value of land by 94%, from $3,150,000 to $200,000); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (finding no taking where a regulation reduced the value of land by 93%, from $800,000 to $60,000). On the other hand, neither the decision here nor any other decision enlisted by petitioner imposed "an automatic numerical barrier preventing compensation, as a matter of law." *Yancey v. United States*, 915 F.2d 1534, 1541 (Fed. Cir. 1990). But see Pet. 19 (accusing the intermediate appellate court of "adopting an improperly high 'decline in value' bar").

Nor did the appellate court treat market value "as the exclusive method of determining 'economic impact.'" Pet. 13. The court went on to consider the "other uses to which [petitioner's] property might be put" notwithstanding the wetlands regulations. Pet. App. A13. Those uses included, "among other things, … parks; playgrounds; beaches; watershed; agriculture and floriculture; and common piers, floats, and docks." *Id.* at A3 n.5; see also *id.* at A13; Town Code §§ 240-20, 240-21. The court also mentioned another option available to petitioner: to sell the land for a higher price than her parents had paid to purchase it. *Id.* at A12-A13; see also MTJPL Order at 8 (noting that the Commission received evidence of a continuing market for the land whether or not a residence could be built on it).[7] Petitioner has never disputed that one or more of those remaining uses of her land is economically beneficial or productive.

[7] Notably, petitioner marketed the lot for sale at a list price of $1,000,000 long after the Commission denied her request for variances, and even while she sought compensation from respondents for "taking" her property. C.A. App. I-574 (petitioner's response to interrogatory); *id.* at III-023 (report of petitioner's appraiser).

Petitioner casts about (Pet. 15-17) for a conflict between the decision below and decisions of lower courts that have held governments liable for takings despite a percentage diminution in value less than that claimed here. But, like the appellate court in this case, petitioner's authorities did not treat diminution in value as a talisman. Rather, those decisions considered diminution in value along with other pertinent facts. For instance, the holding in *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980) (cited at Pet. 15), that a zoning law which reduced a parcel's value by 67% effected a taking, rested in substantial part on the character of the government action: Because it applied only to land in the vicinity of a public airport, the law did not amount to "an 'arbitration' of competing land uses but a regulation for the sole benefit of a governmental enterprise." *Id.* at 258. See *infra*, page 20.

Massachusetts courts fall well within the mainstream in considering valuation along with, not in lieu of, other facts relevant to economic impact and the *Penn Central* inquiry writ large. For example, the recent decision in *FBT Everett Realty, LLC v. Massachusetts Gaming Commission*, 35 Mass. L. Rptr. 191 (Super. Ct. 2018), held that a 53% diminution in value did not defeat a regulatory-taking claim where the government action allegedly had "singled out [the plaintiff] for economic disadvantage." *Id.* at 197.

The decisions in *FBT Everett* and this case are not "inconsistent and unprincipled," Pet. 3; they simply reflect the "highly nuanced" nature of the *Penn Central* inquiry, Pet. App. A8, in which courts must consider "a complex of factors" before determining whether applications of particular regulations to specific pieces of property "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,"

Palazzolo, 533 U.S. at 617-18 (citation omitted). Indeed, petitioner's assertion (Pet. 14-16) that decisions of multiple courts within the same state (New York) or federal circuit (Ninth Circuit) embody divergent approaches to economic impact underscores that her cases reflect not a split of authority, but factbound applications of *Penn Central*.

The petition heaps academic criticism on *Penn Central*, but it offers no streamlined, objective "rudder[]" to steer the judicial inquiry into a regulation's economic impact. Pet. 1. Petitioner decries "the value-centric approach," *id.* at 14, yet "a 91.5% decline in [land] value" is the factual premise of the question she asks this Court to decide, *id.* at i. And, when it comes to her preferred metric for evaluating economic impact—the uses remaining in the property—petitioner offers nothing but abstractions: "a significant limitation on … use," *id.* at 20; "a severe restriction on … use," *id.* at 5; "an extreme restriction on … use," *id.* at 17; or perhaps "the destruction of almost all use," *id.* at 3. None of those formulations would lessen any "indeterminacy" in regulatory-taking jurisprudence. *Id.* at 20.

In sum, the state appellate court's treatment of *Penn Central*'s first factor does not conflict with any decision invoked by petitioner and does not merit further review.

B. Petitioner next asserts (Pet. 22) that lower courts "unpredictab[ly]" apply *Penn Central*'s second factor—the extent to which a regulation interferes with distinct, reasonable, and investment-backed expectations—and posits that "[t]he only real constant" is "that 'the government wins.'" But the authorities she collects do not bear out that assertion. *E.g.*, *Cienega Gardens*, 331 F.3d at 1353 (cited at Pet. 15) (holding that an Act of Congress effected a taking in part because it "frustrated [plaintiffs'] reasonable investment-backed expectations that they

would be entitled to prepay" residential mortgages without obtaining the approval of the government). Nor do any of petitioner's authorities conflict with the decision below.

Petitioner's cardinal error, once again, is to presume that each *Penn Central* guidepost must yield a yes-or-no answer to the question whether private property has been taken by regulation. The constitutional analysis is more nuanced, as is the appellate court's decision in this case.

The court readily acknowledged that, since petitioner had inherited her property, she could rely on reasonable investments made by her parents to support her claim of a taking. Pet. App. A13.[8] But, beyond the price her parents paid to purchase the lot, "the record show[ed] a distinct lack of any financial investment toward development of the property" until 2006, when petitioner paid $600 for a soil-evaluation study. *Ibid.* The court reiterated, based on the only evidence in the record, that the lot "is worth more now" than her parents paid. *Id.* at A14. Furthermore, petitioner could not bootstrap herself into a cognizable investment-backed expectation based on expenses incurred in pursuit of permits and other approvals, because she knew of the myriad barriers to residential construction at the time she incurred those expenses. *Id.* at A13 n.16. Cf. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211,

[8] Petitioner's second question presented misaligns with the facts: No "person" in this case "acquire[d] land in a developed area prior to regulation." Pet. i. When petitioner acquired an interest in her lot, there already were pertinent "regulation[s] in effect." Pet. App. B3. And, to the extent the question refers to her parents, the record is bereft of evidence that the "area" in which the lot is located already was "developed" when they acquired the property. Although petitioner may rely on certain of her parents' investments in support of her taking claim in this case, that is not a license to pretend that she and her parents are a single "person."

227 (1986) (refusing to credit property owners for investments made at a time when "[p]rudent" owners "had more than sufficient notice" of applicable law); C.A. App. II:289, IV:632-633 (jury instruction proposed by petitioner, and given by trial court, that "[a] property owner's investment-backed expectations must be … predicated on existing conditions," "including then-current regulations").[9]

Petitioner grossly mischaracterizes the court of appeals' treatment of this *Penn Central* factor. The court did not "ignore[] the state of the regulatory regime at the time of [her] acquisition" of the land, Pet. 26; had it done so, the court would not have credited the petitioner for the $600 that she paid for the soil study. Nor did the court determine that petitioner "had no legitimate development interests," *ibid.*; rather, the court compared her investment-backed expectations to the value remaining in her land subject to respondents' regulations. That comparison was appropriate because *Penn Central*'s second factor asks not merely whether a landowner has distinct investment-backed expectations at all, but also the extent to which the government interfered with those expectations.

The second *Penn Central* factor is multifaceted. First, it asks what distinct expectations a landowner had for her property. Second, what investments backed those expectations. Third, the extent to which those investments were objectively reasonable when made. Fourth, the extent to which government action has interfered with those distinct, reasonable, and investment-backed expectations.

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[9] Petitioner and her parents also were (at least constructively) aware of coastal development restrictions dating back more than a half-century, see *supra*, page 1, and which, in conjunction with the limitations in her deed of title, arguably barred residential construction even before she took title to the lot, see Pet. App. B6-B8.

The "shifting" focus of the lower courts that Petitioner disparages, Pet. 21, is explained by courts shifting among those separate, but equally valid and relevant, inquiries.

For example, in *Giovanella v. Conservation Commission*, 857 N.E.2d 451 (Mass. 2006) (cited at Pet. 25), cert. denied, 549 U.S. 1280 (2007), the court considered the regulatory-taking claim of a plaintiff who purchased two contiguous lots prior to adoption of a local wetlands bylaw that had the effect of barring residential construction on one of them. The court credited the plaintiff with a distinct investment-backed expectation of building a house. *Id.* at 461. But, when considering the extent to which the regulation interfered with the expectation, the court observed that the plaintiff still was able to "more than recover[]" his total investment. *Ibid.* The court did not conclude that the plaintiff's investment-backed "expectation was not *protected*," Pet. 25 (emphasis added), only that it was not "impermissibly interfere[d] with" by the government action, *Giovanella*, 857 N.E.2d at 461. In any event, the court considered all three *Penn Central* factors before determining that no taking occurred. *Giovanella*, 857 N.E.2d at 461-62.

Likewise, the court in *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083 (9th Cir. 2015) (cited at Pet. 23), acknowledged that the plaintiff mobile-home park owner had a reasonable, investment-backed expectation of earning a fair return on its property, but the court determined that a rent-control ordinance did not interfere with that expectation, as it allowed the owner to continue to earn a fair return. *Id.* at 1091. The court also observed that it was objectively *un*reasonable for a park owner to expect that its property would be perpetually unencumbered by rent regulation of any stripe. *Id.* at 1090. But the court's analysis did not end there. It further considered that the ordi-

nance reduced the park's value by only 28%, *ibid.*, and was "much more an 'adjustment of the benefits and burdens of economic life to promote the common good' than a physical invasion of property," *id.* at 1091 (citation omitted). Only then did the court conclude that no taking occurred.

Neither these decisions nor the others enlisted by petitioner contravene the precedents of this Court addressing *Penn Central*'s second factor and, more importantly, none of petitioner's authorities conflicts with the decision below. Further review is not warranted.

II. The Question Whether To Retain *Penn Central*'s Character Factor Was Not Pressed Or Passed Upon Below, And Review Of That Issue Is Unwarranted.

Petitioner's third question presented invites this Court to overrule *Penn Central*, its predecessors, and its successors by "excis[ing] the character factor from regulatory takings analysis." Pet. i. Yet Petitioner "never … raised or addressed" that issue in the courts below, "and none of the opinions … give any indication that [it] was considered." *Illinois v. Gates*, 462 U.S. 213, 220-21 (1983). Petitioner did not preserve the issue even in a perfunctory manner. Instead, she fully embraced the character factor and affirmatively argued to the state trial court, appellate court, and supreme court that it tipped the case in her favor. See *supra*, pages 5 & 9; Pet. C.A. Br. 39-40, 61.

This Court should follow its usual practice and decline review of issues not raised or resolved by the courts below. Had petitioner urged the state court of last resort to "excise the 'character' factor from … regulatory takings analysis," Pet. i, and were that court persuaded, it could have "rest[ed] its decision on an adequate and independent state ground," *Gates*, 462 U.S. at 222, namely, that the state constitution offers more protection to landowners

than the Fifth Amendment. Cf. *Blair*, 932 N.E.2d at 275 n.14. But petitioner dropped her state constitutional claim altogether and then argued to the state supreme court that federal law mandates consideration of the character of the government action as part of the *Penn Central* analysis. Indeed, petitioner's decision to abandon her state constitutional claim is good reason for this Court to deny further review of *all* her questions presented, any one of which, if properly preserved, the state supreme court would have been free to consider and, if appropriate, resolve in a "less intrusive" and "more appropriate" manner than overturning a foundational precedent of this Court. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988).

In any event, the petition does not adduce any "special justification" to overrule *Penn Central* and prevent courts from considering the character of the government action alleged to effect a taking. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). Her chief contention is that "retention" of a character factor "wrongly tilts the *Penn Central* test in favor of the government." Pet. 29. Yet the *Penn Central* cases in which this Court has found character most probative were decided *against* the government. Thus, in *Hodel v. Irving*, 481 U.S. 704 (1987) (cited at Pet. 27), the Court held that a federal statute that eliminated inheritability of minor fractional interests in Indian trust land effected a taking of the interests. The Court "might well [have] f[ou]nd [the statute] constitutional" based on the other two *Penn Central* factors. *Id.* at 716. But "the character of the Government regulation" was "extraordinary," *ibid.*, insofar as "descent and devise" of the property interests were "completely abolished," *id.* at 717. After Congress amended the statute, this Court struck it down again on the same grounds, and its holding

again "rested primarily" on the law's character. *Babbitt v. Youpee*, 519 U.S. 234, 244 (1997). Under the crabbed regime that petitioner proposes, the government likely would have prevailed in *Hodel*, *Babbitt*, and a host of lower-court cases like *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980), discussed *supra*, page 13.

Petitioner contends (Pet. 34) that *Penn Central*'s character factor is a sham because, in order to claim a taking, a landowner must accept that the government's action was "rational and legitimate." In this case, for example, petitioner must accept that the Commission acted properly in denying her request for variances. But the "*character of the burden* a particular regulation imposes upon private property rights," *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005), is not simply a function of whether that regulation is rational or legitimate. Regulations that target only a small number of property owners, or that are designed primarily to further a government-owned enterprise, may well be valid, but they also merit closer scrutiny under the Takings Clause than regulations like those at issue in this case, which simply adjust the benefits and burdens of economic life in order to prevent harm to the common good. Hence, in *Lingle v. Chevron U.S.A. Inc.*, a unanimous Court recognized that "the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose," 544 U.S. at 543, yet at the same time reaffirmed the importance and continuing vitality of *Penn Central*'s inquiry into the character of the government action as part of the determination whether that action has effected a taking, *id.* at 539.[10]

[10] Petitioner erroneously cites (Pet. 31) the *Lingle* syllabus for the proposition that "the only concern in a takings dispute is 'the severity of the burden' that an otherwise valid regulatory action

Even if petitioner's argument had been preserved, and even if it had merit, this case would not be a good vehicle for this Court to consider it because nothing in the appellate court's decision indicates that the character of the government action was the deciding factor in the analysis. The court did observe that generally applicable regulations like those at issue here do not "typically" work regulatory takings. Pet. App. A14 (quoting *Gove*, 831 N.E.2d at 875). But that unremarkable observation does not mean that the court found the character factor dispositive or more probative than the other *Penn Central* factors that the court elsewhere addressed. This Court should not grant review to address, in the first instance, whether to overrule a precedent where it is not clear that doing so would in any way affect the outcome of the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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'imposes upon private property rights.' [544 U.S.] at 529." A syllabus "is not the work of the [C]ourt, nor does it state its decision." *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906). The *decision* clarifies that the character of the burden is also relevant to the constitutional analysis. *Lingle*, 544 U.S. at 539.

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