No. 23-

IN THE

Supreme Court of the United States

CRANEVEYOR CORP.,
A CALIFORNIA CORPORATION,

Petitioner,

v.

CITY OF RANCHO CUCAMONGA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY V. KASSOUNI
Counsel of Record
KASSOUNI LAW
455 Capitol Mall, Suite 604
Sacramento, California 95814
(916) 930-0030
timothy@kassounilaw.com

Counsel for Petitioner

323174

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Should this Court overrule in its entirety, or reconsider parts of, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)?

2. Does the "economic impact" of a regulation on the subject property have to approach total loss of use and value to weigh in favor of a taking under *Penn Central*, as the District Court and Ninth Circuit held below?

3. Can a property owner ever have "distinct investment-backed expectations" for the beneficial use of property, for purposes of alleging a *Penn Central* taking, if restrictive downzoning is adopted before development of the property is undertaken?

4. Should the "character of the government action" prong of *Penn Central* be expunged from takings analysis as conflicting with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982) and *Lingle v. Chevron USA Inc.*, 544 US 528 (2005)?

5. Does a zoning regulation that places property in a zone for which no beneficial uses are authorized violate the categorical taking rule of *Lucas v. South Carolina*?

PARTIES TO THE PROCEEDING

Petitioner Craneveyor Corp. was the plaintiff-appellant below. Respondent City of Rancho Cucamonga was the defendant-appellee below. Inland Real Estate Group, LLC, et al., was listed on the caption as plaintiffs in the proceeding below.

CORPORATE DISCLOSURE STATEMENT (RULE 29.6)

Craneveyor has no parent corporation, and no publicly held company holds 10% or more of Craneveyor's stock.

STATEMENT OF RELATED PROCEEDINGS (RULE 14.1(B)(III))

The following proceedings are directly related to the above-captioned case in this Court.

Inland Real Estate Group, et al., v. City of Rancho Cucamonga, Case No. 5:21-cv-01656-SB-KK (Central District of California). Date of Judgment: March 30, 2022.

Craneveyor Corp., Plaintiff-Appellant, and Inland Real Estate Group, LLC; et al., v. City of Rancho Cucamonga, Case No. 22-55435 (United States Court of Appeals for the Ninth Circuit). Opinion issued April 20, 2023.

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OPINIONS BELOW

The opinion of the Ninth Circuit below is unpublished but can be found at *Craneveyor Corp. v. City of Rancho Cucamonga*, 2023 U.S. App. LEXIS 9429 (9th Cir. April 20, 2023), and at Petitioner's Appendix "A" at pp. 2a-5a. (9th Cir. Docket No. 37.) The District Court's Order on Motion to Dismiss is unpublished, but can be found at *Inland Real Estate Grp., LLC v. City of Rancho Cucamonga,* 2022 U.S. Dist. LEXIS 61631 (C.D. Cal., Mar. 30, 2022), and at Petitioner's Appendix "B" at pp. 6a-19a. (Trial Court Docket No. 36.)

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1). The Ninth Circuit Court of Appeals dismissed this federal constitutional case in an opinion issued on April 20, 2023. On July 12, 2023, Craneveyor's application for an extension of time to file the petition was granted by Justice Kagan, extending the time to file until August 18, 2023.

CONSTITUTIONAL PROVISIONS AND STATUTES 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.

The Etiwanda Heights Neighborhood and Conservation Plan (EHNCP or Plan), adopted by the City in 2019 via a General Plan Amendment, imposes the restrictions that have effected a taking of Craneveyor's property. This Plan

is contained in the operative trial court Second Amended Complaint (SAC) at Trial Ct. Docket 27, Ex. A.

INTRODUCTION

For more than a century, this Court has acknowledged that land use regulations can deprive an owner of the use and enjoyment of property as effectively as if the land were acquired or occupied by the government. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.") Yet incredibly, in all the intervening years this Court has been unable to formulate a clear, effective, predictable standard for determining whether, in a given case, liability for a taking has been triggered.

Justice O'Connor once described *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) as the "polestar" of the Court's regulatory takings doctrine. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J. concurring). But *Penn Central* offers no more than a non-exclusive grab bag of potentially "relevant factors" for courts to consider on an "ad-hoc, factual basis" to rule on takings claims – inquiries into the "economic impact" of a regulation, the extent of interference with a property owner's "distinct investment-backed expectations," and the "character of the governmental action." 438 U.S. at 124. Not only are *Penn Central*'s factors impossible to define with more than vague specificity, judges notoriously arrive at diametrically opposed outcomes when applying these standardless standards to a given set of facts. Indeed, going on 50

years since *Penn Central* was handed down, judges still cannot agree on whether the "relevant factors" are to be weighed against each other and balanced in arriving at a conclusion, or if the government automatically escapes liability if even one factor weighs in its favor. See Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or One Strike Rule?*, 22 Fed. Cir. B. J. 677, 678 (2013).

There is no other field in the Court's constitutional jurisprudence so lacking in consistency, predictability, and doctrinal coherence. The Court should take this opportunity to examine the deep flaws in *Penn Central* as applied in this case and set *Penn Central* aside in favor of a clearer, fairer, more predictable standard.

STATEMENT OF THE CASE

This is a Fifth Amendment takings case involving the complete regulatory deprivation of all use of one parcel of land, and the permanent partial taking of another. Because the Ninth Circuit's perfunctory application of this Court's precedent in *Penn Central Transportation Co. v. City of New York* highlights the doctrinal incoherence and indeterminacy of the supposed "*Penn Central* test," for regulatory takings, this case presents an ideal vehicle for the Court to reconsider or clarify *Penn Central*.

A. Factual Background

Petitioner Craneveyor Corp. (Craneveyor) owns two parcels of undeveloped land in rural San Bernardino County. [Second Amended Complaint (SAC) at ¶ 8, 27], Trial Ct. Docket 27]. The first, referred to herein as the

"Craneveyor #1 Parcel," comprises 22.52 acres. The second, referred to herein as the "Craneveyor #2 Parcel," comprises 7.71 acres. [*Id*. at ¶ 8.] Prior to October of 2019, Craneveyor's parcels were subject to the San Bernardino County Planning Code, which permitted the development of multiple single family residential homes and other economically viable uses under single family residential zoning designations, the number of which varied depending on the parcel size, but generally up to one residence per acre. (*Id.* at ¶ 18.) These parcels were obtained in 2012 as a component of a bankruptcy litigation settlement, which reduced the indebtedness of the bankruptcy debtor by over $400,000. [*Id.* at ¶ 8.]

In October of 2019, Respondent City of Rancho Cucamonga (City) adopted the Etiwanda Heights Neighborhood and Conservation Plan (EHNCP, or Plan), a Specific Plan and zoning ordinance regulating development over a large area, including Craneveyor's parcels. [SAC, at ¶¶ 13-14, Trial Ct. Docket 27.] The City simultaneously sought to annex more than 4,000 acres of land, including Craneveyor's parcels. This annexation was formally accomplished in July of 2020. [*Id*. at ¶ 17.]. Although California law requires notice by mail to the owners of property whose land may be subjected to downzoning to enable them effectively to oppose or prevent the change, no such notice was provided to Craneveyor. [*Id*. at ¶ 16.]

Following annexation, Craneveyor's parcels were designated as part of a Rural/Conservation Area (R/C/A). This R/C/A designation is meant to ensure that only limited quantities of rural housing in limited areas can be built in order to maintain rural open space and habitat conservation. [SAC, Trial Ct. Docket

27 at ¶ 18]. Development in the Rural/Conservation Area is stringently regulated and controlled, including requirements for archaeological surveys, biological resource studies, State and Federal permits, and possible annexation into a water district/utility agency. [*Id.* at ¶¶ 19-20]. The City assigned the Craneveyor #1 Parcel a "Fault Zone" designation for which no economically viable use is provided, and in the Plan the Craneveyor #2 Parcel is assigned a "Utility Corridor" designation that permits at most the construction of a single dwelling unit. [*Id.* at ¶¶ 23, 27].

B. Judicial Proceedings Below

Craneveyor and other property owners whose land had been annexed and downzoned by the City filed suit, alleging, inter alia, that the Plan effected a facial taking of their property for public use, without just compensation. [SAC, Trial Ct. Docket 27, at ¶¶ 25-28]. Craneveyor alleged that Parcel #1 had suffered a categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), since the Plan included no permitted uses for property designated as lying within a Fault Zone. Craneveyor further alleged that the impact of the regulations was sufficiently severe to effect a taking of Parcel #2 under the three-factor balancing test of *Penn Central*, as only one residence could be built.

On March 30, 2022, the Federal District Court for the Central District of California granted the City's motion to dismiss Craneveyor's SAC under Federal Rule of Civil Procedure 12(b)(6), with prejudice. [Appendix (App.) B at p. 19a.] The court found it "fatal" to Craneveyor's takings claim that the SAC did not "allege that the Plan

is invalid as to all of the property within the 4,393 acres governed by the Plan." [*Id.* at p. 12a.] The court also ruled against Craneveyor on all three prongs of the *Penn Central* analysis and dismissed the *Lucas* claim because the Plan would allow Craneveyor to build "at least one dwelling . . . on almost all of [Craneveyor's] properties." [Id. at pp. 14a -16a.] Craneveyor appealed this ruling to the Ninth Circuit.

On April 20, 2023, the Ninth Circuit filed a memorandum opinion affirming the dismissal of Craneveyor's complaint. [App. A at p. 2a.] With respect to Craneveyor's claim of a categorical taking of Parcel #1, the Court acknowledged that the Plan assigned the parcel to a Fault Zone, a classification for which no beneficial uses are authorized under the Plan. However, the court held that, because the plan does not include a specific prohibition of all development in a Fault Zone, Craneveyor cannot state a claim for a facial taking under *Lucas*. [*Id.* at pp. 4a-5a.]

Turning to Craneveyor's *Penn Central* claim, the Court held that none of *Penn Central*'s three "relevant factors" weighed in favor of a taking. The "economic impact" prong favored the City because "valuable uses remain on Craneveyor's land." [App. A at p. 4a.] This holding impermissibly conflates *Penn Central* with *Lucas*. The *Penn Central* inquiry turns on the value *that has been lost* as a result of a regulatory imposition, not whether any beneficial use of the property remains. By importing *Lucas* into the first prong of *Penn Central*, the court below effectively negates the distinction between partial and total regulatory takings.

The Ninth Circuit went on to find in favor of the City on *Penn Central*'s second factor, the degree of

interference with Craneveyor's distinct, investment-backed expectations. Ignoring the allegations of the complaint, the Court held that Craneveyor "cannot reasonably expect . . . property to be free of government regulations such as zoning," a claim that Craneveyor never advanced. [App. A at p. 4a.] The Court was silent on the allegation that was actually raised in the complaint – that the sudden switch from one zoning regime to another, without the legally required notice, destroyed Craneveyor's distinct expectations of development.

Finally, the Court found in favor of the City on *Penn Central*'s "character of the government action" prong because "zoning laws are . . . the classic example of permissible regulation." [App. A at p. 5a.] Apparently, the Ninth Circuit means to exempt all zoning regulations, as a matter of course, from takings liability. Even more disturbing is the implication that courts evaluating takings claims should sit in judgment on the legitimacy of regulatory objectives – a consideration that this Court expunged from the takings calculus nearly two decades ago.

Craneveyor now respectfully petitions this Court for a writ of certiorari to set aside the opinion of the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

I.

PENN CENTRAL IS DOCTRINALLY INCOHERENT, INDETERMINATE, AND UNWORKABLE, AND SHOULD BE OVERRULED OR SUPERSEDED.

A. *Penn Central* Easily Meets This Court's Criteria for Reconsidering Ill-Advised Precedent.

This Court does not overrule long-standing precedent lightly. But when the passage of time makes clear that an opinion is poorly reasoned and unworkable in practice, and there are no reliance interests favoring the continuation of the dubious precedent, then the interests of clarity and predictability of the law counsel in favor of overruling. *See Knick v. Township of Scott*, 139 S. Ct. 2162, 2166 (2019) (explaining the Court's decision to overrule *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)).

All these considerations forcefully militate in favor of overruling or superseding *Penn Central*. The decision was hastily drafted near the end of the 1977 term, and draws its explication of regulatory takings law not from any existing body of jurisprudence, but from a single law review article. *See Transcript, Looking Back on Penn Central A Panel Discussion with the Supreme Court Litigators*, 15 Fordham Envtl. L. Rev. 287, 305–309 (2004). The terminology in which the "relevant factors" for finding a taking are set out is so vague and ill-defined that even today, after 45 years of application, "Nobody—not States,

not property owners, not courts, nor juries—has any idea how to apply this standardless standard." *Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n,* 141 S. Ct. 731, 731 (2021) (Thomas, J. dissenting from denial of cert.). As one leading commentator has noted, *Penn Central* did not set forth a legal standard for identifying regulatory takings, so much as sketch:

> a vague delineation of an area in which individual judges of differing ideological persuasions can roam at will before rendering subjective decisions as to whether a taking has been shown.

Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 Wm. & Mary Bill Rts. J. 679, 690 (2005). *Williamson County* was a poorly thought-out opinion, but at least judges and practitioners could understand what its words meant. Not so, *Penn Central*. *See* William W. Wade, *Theory and Misuse of Just Compensation for Income-Producing Property in Federal Courts: A View from Above the Forest,* 46 Tex. Env't L.J. 139, 142 n.19 (2016) ("Thousands of words by hundreds of litigators, judges and scholars including the author have sought to explicate the *Penn Central* test.").

Perhaps the most important factor favoring the reconsideration of precedent is that the decision in question has proven practically unworkable over time. *Seminole Tribe of Florida. v. Florida*, 517 U.S. 44, 63 (1996) (reconsideration of precedent justified "when governing decisions are unworkable"). The unworkability of *Penn Central* in practice is most clearly illustrated by

the fact that different judges, applying *Penn Central* to the same facts, arrive at radically different outcomes. In *Bridge Aina Le'a, LLC v. Haw. Land Use Commission*, 950 F.3d 610 (9th Cir. 2020), after an 8-day trial, a jury determined that the evidence established a taking under *Penn Central*. 950 F.3d at 618. The District Court agreed that this finding was supported by the evidence. *Bridge Aina Le'a, LLC v. Haw. Land Use Commission*, Civ. No. 11-00414 SOM-KJM, 2018 WL 3149489, at *20. But on appeal, the Ninth Circuit reweighed the same facts, under the same legal standards, and ruled in favor of the government, reaching different results on all three of the *Penn Central* factors. 950 F.3d at 630-637. As Justice Thomas recognized:

> These starkly different outcomes based on the application of the same law indicate that we have still not provided courts with a "workable standard." . . . The current doctrine is "so vague and indeterminate that it invites unprincipled, subjective decision making" dependent upon the decisionmaker . . . . ***A know-it-when-you-see-it test is no good if one court sees it and another does not.***

Bridge Aina Le'a, LLC v. Haw. Land Use Commission, 141 S. Ct. 731, 731-732 (2021) (Thomas, J. dissenting from denial of cert) (emphasis added; citations omitted).

Even more striking, *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010) illustrates that different judges not only arrive at different outcomes when applying *Penn Central* to a given set of facts, they may apply *Penn Central* to the same dispute in completely different ways.

In *Guggenheim*, a three-judge panel of the Ninth Circuit found that a rent control ordinance effected a taking of property in a mobile home park. *Guggenheim v. City of Goleta*, 582 F.3d 996, 1030 (9th Cir. 2009) (vacated on reh'g en banc). The panel opinion examined each of *Penn Central*'s three factors in turn, weighing and balancing them against each other to conclude that, overall, the city had incurred liability for a taking. *Id.* at 1020-1030. When the decision was reviewed en banc, however, a majority of the en banc panel found a single fact dispositive – a version of the same ordinance was in existence prior to the plaintiffs' acquisition of their property. 638 F.3d 1111. According to the en banc opinion, this fact meant not only that the plaintiffs could have no investment-backed expectations that the enactment might be overturned, this single "primary" consideration was "fatal" to the entire *Penn Central* claim, rendering superfluous any consideration of the character of the regulations or their economic impact on the subject property. *Id.* at 1120. The two *Guggenheim* opinions starkly illustrate how some judges apply *Penn Central* as a three-factor balancing test, while others apply it as a "one-strike-you're-out" rule – and the choice of approach is determinative of the outcome. *See* Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or One Strike Rule?*, 22 Fed. Cir. B. J. at 678.

The practical unworkability of *Penn Central* has been a consistent and increasingly prevalent theme in legal commentary for decades. *See, e.g.*, Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 Pa. St. L. Rev. 601, 602 (2014) ("[T]he doctrine has become a compilation of moving parts that are neither individually coherent nor collectively compatible"). *Penn*

Central's three-part standard is so poorly defined and lacking in practical guidance that the decision has been seen as evidencing "intellectual bankruptcy," Thomas W. Merrill, *The Economics of Public Use,* 72 Cornell L. Rev. 61, 93 (1986), and even a "retreat from the rule of law." R. S. Radford, *Instead of a Doctrine Penn Central as the Supreme Court's Retreat from the Rule of Law*, in *Rule Of Law In New Millennium: Changing Scenario* 173 (K. Padmaja, ed., 2007).

It is time for this Court to recognize that *Penn Central* no longer meets even the minimum requirements of a clear, stable, predictable legal rule – and in fact, it never has.

B. *Penn Central*'s "Economic Impact" Prong Is Too Vague to Serve Any Useful Function As A Takings Test.[1]

It might seem that the first *Penn Central* factor – the economic impact of regulation – would be virtually determinative of whether property has been "taken" by the enactment in question. But because *Penn Central* provides no guidance as to how this factor is to be measured or evaluated, takings jurisprudence has sunk into a morass of conflicting and incompatible interpretations.

Many courts have held that an extreme loss of property value is necessary for the economic impact prong to weigh in favor of a taking. One line of decisions holds that even

1. The argument of Sections I.B, I.C, and I.D tracks that of *Smyth v. Conservation Commission of Falmouth, et al.,* No. 19-223, Petition for Writ of Certiorari (Aug. 16, 2019).

a decrease in property value of 90-95 percent is not a sufficiently extreme impact to weigh in favor of takings liability even on this one prong of the supposed balancing test. *See William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1120-21 (9th Cir. 1979) (holding a 95 percent diminution in value insufficient to carry *Penn Central*'s first prong); *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 under *Penn Central*'s first prong); *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).

These courts require a near complete loss in property value before ruling in favor of the property owner on *Penn Central*'s economic impact prong. *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. App. Div. 2008) (declaring that the economic impact factor "requires a loss in value which is 'one step short of complete.'" It is not enough if the value of the regulated property is "substantially reduced . . . [t]he proper inquiry is whether the regulation left only a 'bare residue' of value.") (Citations omitted). Tellingly, the District Court below relied on *William C. Haas & Co.* in ruling in favor of the City on this prong because Craneveyor's complaint did not allege that the property "has been reduced in value by more than 95%." [App. B at p. 15a.]

This line of decisions stands in clear conflict with those of other courts that have found a "serious" or "substantial"

reduction in value to be a sufficient economic impact to weigh in favor of a takings claimant under this prong. These courts generally consider a decline in property value in the range of 75%-90% as an impact that weighs in favor of 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); *Florida Rock Industries, Inc. v. United States*, 45 Fed. Cl. 21, 43 (1999) (73.1% loss). Still other decisions find a reduction in property value of less than 75% to be sufficient to weigh in favor of a takings claimant on the economic impact prong. *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).

These decisions are not only in conflict, they are irreconcilable. Worse, they are unpredictable. Far from fulfilling the basic purpose of the law in promoting stability and foreseeability in the resolution of legal disputes, *Penn Central*'s economic impact inquiry has created a situation wherein litigants have no realistic means of gauging the probable outcome of a takings claim until they receive the final judgment. This has accurately, if colorfully, been described as little more than engaging in a "high-stakes crapshoot." R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central*, 38 Ecology L.Q. 731, 735 (2011).

Unfortunately, this Court's post-*Penn-Central* precedents offer no guidance on this issue. *See* Robert Meltz, *Takings Law Today: A Primer for the Perplexed*,

34 Ecology L.Q. 307, 334 (2007) ("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, the Court held that government action depriving property owners of *all* economically beneficial use of their land is a per se taking, without regard to other factors. *Id.* at 1017-19. This implies that a total loss of property use and value is not necessary to prove a regulatory taking under *Penn Central.* Yet, while *Lucas* puts an upper limit on the level of economic loss needed to satisfy *Penn Central* (100%), it offers no guidance on the crucial question of what range of loss, less than total, is sufficient to prevail on the economic impact prong.

After 45 years, *Penn Central*'s reference to economic impact as a "relevant factor" in determining takings liability remains as opaque and indeterminate as the day it was penned. *See* Dale A. Whitman, *Deconstructing Lingle: Implication s for Takings Doctrine*, 40 J. Marshall L. Rev. 573, 582 (2007) (on the issue of what impacts cause a taking, "no one is sure where that line lies today"); Richard A. Epstein, *From Penn Central to Lingle: The Long Backwards Road*, 40 J. Marshall L. Rev. 593, 604 (2007) ("No one knows how much diminution in value is required."). It is time for this Court to reconsider the standardless standards of *Penn Central* and replace that decision's formless three-prong inquiry with a meaningful, understandable, and predictable guide for determining liability for partial regulatory takings.

C. *Penn Central*'s "Investment-Backed Expectations" Inquiry Is an Undefined Standard That Is Inconsistently Interpreted and Unfairly Applied.

The second *Penn Central* factor looks to "the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S. at 124. Yet after nearly half a century, "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).

The lower courts seemingly find this concept baffling. *See Philip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002) ("courts have struggled to adequately define" the concept); *see also* Daniel R. Mandelker, *Investment-Backed Expectations In Taking Law*, 27 Urb. Law. 215 (1995) ("federal and state courts divide on how to apply it"); Mark W. 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"). 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 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, in almost every instance, "the government wins." *District Intown Properties v. District of Columbia*, 198 F. 3d 874, 886 (D.C. Cir. 1999) ("Few regulations will flunk this nearly vacuous test.")

The investment-backed expectations inquiry normally begins with the court determining whether it deems the claimant's development expectations to be "reasonable," a term that does not appear in *Penn Central* itself. In making this threshold determination, many courts have concluded that the timing of the property's acquisition, relative to its restriction by regulation, is a critical gauge of the reasonableness – and hence the legitimacy -- of an owner's expectations of development. *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.")

This approach should imply that an owner who acquires property prior to the adoption of restrictive regulations will have reasonable expectations of development. Yet when that scenario arises, the expectations inquiry shifts focus, often becoming a test of whether the court deems the owner to have made a sufficient financial investment in development before restrictive regulations were enacted. *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").

In other *Penn Central* cases, courts measure the reasonableness of expectations, at least in part, by considering the nature of the land at issue. When property is in an undeveloped or environmentally sensitive area, courts typically conclude that the takings claimant lacks 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 riparian land"). But when property is located in a highly developed area, suggesting that development expectations may be more reasonable, the goalposts move again, with courts sometimes returning "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 reasonable expectations of development, even though the lot was surrounded by developed, similarly sized lots, because a restrictive regulation existed at the time of purchase); *Giovanella v. Conservation Comm'n of Ashland*, 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 a putatively insufficient personal investment).

The thrust of the "investment-backed expectations" inquiry is impossible to predict; it is only clear that, like the "economic impact" inquiry, it tends to assume the guise most favorable to the government in any given case.

The highly subjective nature of the "investment-backed expectations" doctrine is exacerbated by the Court's failure, in the 45 years since *Penn Central*, to identify the circumstances that create reasonable development expectations. Daniel A. Mandelker, *Investment-Backed Expectations in Takings Law*, 27 Urb. Law 215, 225 (1995) ("[T]here is [still] a paucity of clear landmarks that can be used to navigate the terrain" of expectations doctrine.). No majority decision from this Court constrains the lower courts' approach to "distinct investment-backed expectations," leaving them free to pick and choose from among the various available approaches, often seemingly intent on rejecting otherwise valid, fully formulated development plans.

D. *Penn Central*'s "Character" Prong Impermissibly Imports Substantive Due Process Into the Takings Calculus.

> "Compared with the economic impact and expectations factors, which present problems and uncertainties of their own, the definition of the term "character" is a veritable mess."

John D. Echeverria, *Making Sense of Penn Central*, 39 Envtl L. Rep. 10471, 10477 (2009).

The final consideration in the *Penn Central* framework is the "character of the governmental action." 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.

The only elaboration the *Penn Central* Court gave when discussing the character prong was that:

> a "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

438 U.S. at 124. Yet this example is more confusing than illustrative. Handed down just four years after *Penn Central*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) established *per se* takings liability for physical invasions of property, thereby placing them outside the *Penn Central* inquiry altogether. After *Loretto*, all that was left of the "character" prong was the implication that measures enacted to promote the common good will tend to survive takings scrutiny. But virtually every regulatory enactment in existence asserts, as boilerplate, that it was enacted to promote the common good and general welfare. Where did that leave courts trying to evaluate and apply the *Penn Central* factors?

In 2005, the Court disentangled regulatory takings law from substantive due process principles. *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 542-43 (2005) made it clear that whether a property restriction is a valid exercise of governmental authority – that is, whether it is a program "adjusting the benefits and burdens of economic life to promote the common good" -- is not a legitimate consideration in regulatory takings analysis, but is an issue reserved for due process litigation. 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.

Although this Court's modern precedent thus denies any role for evaluating physical invasions or the legitimacy of governmental interests in regulatory takings analysis, the lower federal and state courts – including the Ninth Circuit in the opinion below -- continue to inject both considerations into the *Penn Central* calculus. *See* 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."). Taking their cue from *Penn Central*'s reference to the "common good," many courts today simply apply the "character" factor as a test for whether the challenged regulatory action promotes a legitimate interest. *See 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.).

The "character" factor as it is applied today operates in direct opposition to the principles established in *Loretto* and *Lingle*. As a physical invasion test, the factor violates the clear line between physical and regulatory takings set out in *Loretto*, paradoxically making a regulatory taking contingent on whether there has been a physical taking. As a test of legitimate government interests, the "character" factor directly conflicts with *Lingle* and its mandate that takings tests focus only on the burden of regulation on property rights. The continuing application of *Penn Central*'s character prong 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." Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan. Envtl. L.J. 525, 529 (2009).

Moreover, as a measure of the legitimacy of regulatory action, the "character" test unfairly skews *Penn Central*'s multi-factor test against a taking. As noted in *Lingle*, a regulatory takings claim *assumes* that the challenged governmental action is rational and legitimate. *Florida Rock Industries, Inc. v. United States*, 18 F.3d at 1571; *see also Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring and dissenting in part). By automatically checking one of *Penn Central*'s three conceptual boxes in favor of the government,

the "character" factor distracts from and dilutes the actual impact of regulation on property rights, thereby undermining a claimant's ability to prove a regulatory taking based on that impact.

The doctrinally untenable and biased nature of the "character of the governmental action" prong has led to mounting calls for the Court to expunge this factor from regulatory takings analysis. *See* 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, 353 (2005) ("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"); R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central*, 38 Ecology L.Q. at 737 (following *Loretto* and *Lingle*, *Penn Central*'s "character" inquiry "seems temporally as well as conceptually isolated").

This case presents an ideal vehicle for the Court to jettison the "character" factor and the improper concerns it injects into the takings calculus. Elimination of the "character" inquiry would streamline regulatory takings adjudication by focusing courts' attention on the crucial issue – the impact of a regulatory regime on

constitutionally protected property rights. One-sided and irrelevant criteria from other doctrines would no longer complicate and distract from the takings analysis. The *Penn Central* inquiry would simply focus on the nature and legitimacy of the affected property interest, and the challenged regulation's impact on the private rights (like developmental use and economic value) that comprise that interest. *Lingle*, 544 US at 543; *Murr v. Wisconsin*, 582 U.S. 383, 415 (2017) (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"); Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan. Envtl. L.J. at 573-74 (with the "character" inquiry eliminated, courts can "focus exclusively [ ] on regulatory effects . . . [and] develop some rules or clear standard[s] with which to adjudicate disputes").

The Court should grant this petition to complete the process of clarifying regulatory takings doctrine it began in *Loretto* and *Lingle* by (among other steps) eliminating the "character" factor from the takings calculus. The most effective way to remedy the inequities and redundancies of the "character" prong, however, would be to overrule *Penn Central* in its entirety and replace it with a more modern, sharply focused test for regulatory takings that would make takings jurisprudence fairer, simpler, more predictable, and less ambiguous than it has become.

E. When the Government Deprives a Property Owner of a Discrete, Marketable Interest in Land, Just Compensation for the Taking Must Be Paid Irrespective of the *Penn Central* Factors.

The *Penn Central* experiment, if it can be called that, has reached a dead end. Courts and litigators today have no better idea how to interpret and apply the decision's poorly specified, largely undefined "relevant factors" than they had in 1978. Different judges reach wildly conflicting outcomes when applying *Penn Central* to a given set of facts, and cannot agree on how (*or even whether*) the three factors should be weighed and balanced against each other. *Penn Central* claims have been denied under the "character" prong because they failed to allege a *Loretto* taking, and they have been denied under the "economic impact" prong because they failed to allege a *Lucas* taking. They have even been denied, as was true here, because the court applied a due process analysis and determined that the challenged regulations advanced a legitimate public purpose, directly contrary to *Lingle*.

It is time to stop the madness.

At the time *Penn Central* was decided, the Court's takings jurisprudence had not yet undergone its schizophrenic schism into two completely disparate categories called "regulatory" and "physical" takings. The Court recognized that takings are takings; if the government deprives a property owner of a protected property interest, compensation is due under the Fifth Amendment, regardless of whether the interest taken is the right to exclude, or dispose, or devise, or develop. *Penn Central* proposed applying the amorphous "factors"

to determine liability for all varieties of takings – a task for which they have proven hopelessly inadequate. The *Loretto* Court carved out an exception for regulations that authorized third parties to physically occupy some part of another's property, holding that such measures are takings on their face, requiring no special analysis to determine liability. *Loretto*, 458 US at 441.

But why should the right to exclude be privileged in this way? A landowner whose development rights are extinguished by regulation has suffered a loss no less real and measurable than the loss of exclusive access, but compensation may be denied if courts feel the plaintiff lacked "distinct expectations" of development, or if the loss amounted to less than 95% of the property's value. Neither factor would be a consideration in a "physical taking" case. As a result of the Court's grab bag of different standards for different categories of takings, litigation often degenerates into a battle of pleadings, as the parties jockey to portray their case as falling into the most favorable category. See Robert H. Thomas, *Restatement (SCOTUS) of Property: What Happened to Use in Murr v. Wisconsin?*, 87 UMKC L. Rev. 891, 898 (2019) (highlighting competing litigation strategies of pushing a case to either "*Lucas*-land" or "*Penn Central*-ville," because "[a]nswering that question one way or the other would, most likely, resolve the dispute on the merits").

This Court could restore well defined and workable standards to takings law, while reunifying the disparate strands of takings jurisprudence, by applying one simple rule to every takings claim:

> When the government deprives a property owner of a discrete, marketable interest in land, just compensation for the taking must be paid irrespective of the *Penn Central* factors.

This would mean that when a complaint adequately alleges the loss of such an interest due to restrictive regulations, it may not be dismissed under Rule 12(b)6. The facts supporting the allegations must be evaluated through summary judgment or at trial, but the property owner's state of mind, or the extent of the loss relative to the owner's holdings, would no longer be at issue for any category of takings, whether "regulatory" or "physical." See Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in Murr v. Wisconsin*, 11 N.Y.U. J.L. & Liberty 151, 186-89 (arguing that *Penn Central* should be overruled, so that just compensation can be determined instead by the fair market value of the rights taken as is done for physical takings).

II.

IF THE COURT DECLINES TO OVERRULE OR SUPERSEDE *PENN CENTRAL*, THE PETITION SHOULD NEVERTHELESS BE GRANTED TO INSTRUCT THE LOWER COURTS IN HOW TO APPLY *PENN CENTRAL* WHILE AVOIDING ABSURD RESULTS SUCH AS THOSE REACHED BY THE NINTH CIRCUIT BELOW.

A. The Court Should Grant the Petition to Clarify That *Penn Central*'s "Economic Impact" Prong Does Not Require a Near-Total Wipeout of All Use or Value to Weigh in Favor of a Taking.

As noted above, the Court has never – not even in *Penn Central* itself – set forth any objective, measurable standards to determine when the economic impact of a regulation is sufficiently severe to count in the property owner's favor in determining takings liability. As a result, every court that adjudicates a *Penn Central* claim applies a different standard than any other court, resulting in doctrinal opacity, unpredictability, and confusion.

In the case at bar, the Ninth Circuit held that a complete regulatory wipeout of all beneficial use is required to find that *even this one factor* weighs in favor of a *Penn Central* taking. Disposing of the "economic impact" prong in a single sentence, the appellate panel found it dispositive that "[v]aluable uses remain on CraneVeyor's land." [App. A at p. 4a.] But a regulation that eliminates *all* valuable uses of property is a categorical taking under *Lucas*. 505 U.S. at 1017-1019. In effect, the Ninth Circuit below held that a property owner must prove a *Lucas*

taking as just the first step toward proving a *Penn Central* taking. This cannot possibly be the law. But unfortunately, this Court has never provided clear guidance as to exactly what sort of economic impact – either in degree or kind – is sufficient to prevail on *Penn Central*'s first prong.

Assuming the Court does not overrule *Penn Central* and replace it with a clearer, less equivocal standard, Craneveyor's petition should be granted to clarify that a property owner need not suffer a near total loss of a property's use or value to satisfy *Penn Central*'s economic impact factor. The Court should make explicit that a significant limitation on the use of property, as here, is an impact supporting a regulatory takings claim, even though some non-trivial residual of use and value remain. Recalibrating the economic impact factor in this way would remove at least some indeterminacy in the current wide-open interpretive approach, and give courts much needed guidance on the type and degree of burden on property rights that satisfies this factor.

B. The Court Should Grant the Petition to Clarify That Distinct Investment-Backed Expectations Are Not Extinguished Simply By a Change in the Regulatory Regime, Nor Do They Expire If the Property Owner Fails to Bring Them to Fruition Promptly.

The court below held that "the regulation does not interfere with distinct investment-backed expectations." [App. A at p. 4a]. What the court meant, however, is that Craneveyor's expectations for making beneficial use of its property *simply don't count* in the Ninth Circuit's interpretation of the *Penn Central* calculus. Craneveyor's

complaint alleges that its property, that was purchased in the reasonable expectation that it could be developed for "multiple single family residential homes and other economically viable uses" under San Bernardino County's planning code [SAC ¶ 18, Trial Ct. Docket 27]), was suddenly, without the notice required by law, reclassified to "preclude[] residential development and other economically viable use." (*Id.* at ¶ 21]. These allegations of drastic reduction in development opportunities caused by the stated provisions of the Specific Plan, which must be accepted as true for purposes of a Rule 12 b(6) motion to dismiss, convey the "reasonable inference" of a corresponding deprivation of Craneveyor's distinct, investment-backed expectations. *Hi-Tech Pharm., Inc. v. HBS Int'l Corp.,* 910 F.3d 1186, 1196 (11th Cir. 2018).

Yet the Ninth Circuit held that these allegations are inadequate *even to state a claim* for a deprivation of investment-backed expectations, because "a property owner 'cannot reasonably expect that property to be free of government regulation such as zoning.'" [App. A at p. 4a.] The significance of this statement is inexplicable, given that the complaint alleges the property was already subject to zoning under the preexisting county regulations, which would have permitted Craneveyor to proceed with its development plans. Being free of zoning regulations was never part of the expectations that Craneveyor alleged were thwarted.

The court below added that Craneveyor's development expectations also didn't count, for purposes of *Penn Central*, because "[t]he company took no steps to pursue development in the seven years that it owned the parcels before the city adopted the plan." [App. A at p. 4a.]

Nothing in *Penn Central* suggests that a property owner's distinct development expectations, once established, can be extinguished by the mere passage of time. As noted above, however, this is another common theme courts have developed out of whole cloth to justify denying *Penn Central* claims. *See* Section I.C, *supra.*

Assuming the Court does not overrule or supersede *Penn Central* in its entirety, the Petition should be granted to clarify the investment-backed expectations doctrine in two important ways. First, it should make clear that acquisition of land in an area in which development of the sort contemplated by the purchaser is expressly permitted under existing regulations, gives rise to a *legally cognizable expectation* of using the property for a such a purpose. Second, the Court should clarify that the level of financial commitment already devoted to development does not affect the legitimacy of otherwise valid expectations. Protected 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); *see also* Richard A. Epstein, *From Penn Central to Lingle: The Long Backwards Road*, 40 J. Marshall L. Rev. 593, 603 (2007) (Investment-backed expectations "surely cannot . . . mean that the only property rights that are protected are those that have already been utilized."). These steps would help clarify and narrow the "expectations" factor, paving the way for more consistent and fair application of *Penn Central*.

C. The Court Should Grant the Petition to Clarify That *Penn Central*'s Reference to the "Character of the Government Action" Cannot Mean That Zoning Ordinances Are *Ipso Facto* Immune From Takings Liability.

Turning finally to the "character" prong of *Penn Central*, the court below, as countless other courts have done, first observed that the Plan does not effect "a physical invasion by government," [App. A at p. 5a], without considering that if the Plan *did* comprise a physical invasion, Craneveyor would have sued for a physical taking under *Loretto* – not a regulatory taking under *Penn Central.* The decision below then smoothly shifts into a due process, "legitimate state interests" interpretation of the character prong, noting that "'Zoning laws are, of course, the classic example' of permissible regulation." *Id.* It seems unlikely that the *Penn Central* Court intended to exempt zoning laws altogether from the takings calculus, since that would have resulted in a much shorter opinion. (The regulation challenged as a taking in *Penn Central* was a zoning law.) Moreover, Justice Brennan, who wrote the majority opinion in *Penn Central*, also observed that:

> Police power regulations *such as zoning ordinances* and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property.

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting) (emphasis added).

But most important, after *Lingle* there is simply no place in this Court's takings jurisprudence for consideration of the legitimacy of a challenged enactment, or the extent to which it "promotes the common good." [App. A at p. 4a.]. Assuming the Court does not overrule *Penn Central* or excise the "character of the government action" from the list of factors relevant to a takings analysis, the Court should grant Craneveyor's petition to clarify that the mere fact that a zoning ordinance promotes the common good carries no weight in determining whether it effects a regulatory taking of property.

As one commentator has put it, "If everything the Ninth Circuit says in [*Craneveyor*] is accurate, there's no way to ever draft a complaint alleging a facial *Penn Central* regulatory taking that will survive a 12(b)(6) motion to dismiss for failure to state a claim." Robert Thomas, Inverse Condemnation Blog, April 25, 2023. The Court should grant Craneveyor's petition to reconsider or supersede *Penn Central*, or, in the alternative, use this case to clarify how the *Penn Central* factors should be applied to arrive at outcomes that are fair to property owners and local governments alike.

III.

THE WRIT SHOULD BE GRANTED TO CLARIFY THAT A ZONING REGULATION THAT PLACES PROPERTY IN A ZONE FOR WHICH NO BENEFICIAL USES ARE AUTHORIZED VIOLATES THE CATEGORICAL TAKING RULE OF *LUCAS*.

The Ninth Circuit dismissed Craneveyor's categorical takings claim under *Lucas* because "the plan, on its face, does not prohibit all development in fault zones." [App. A at p. 3a.]. This holding conflicts with other lower courts around the country, that have found a *Lucas* taking when the *effect* of a regulation would be to foreclose all economically viable use of property, regardless of its stated intent.

In *State ex rel. R.T.G., Inc. v. State,* 780 N.E.2d 998 (Ohio 2002), a mining company owned or leased some 500 acres of property with the expectation of mining coal. When the State of Ohio adopted regulations designating a substantial portion of this property as unsuitable for mining ("UFM"), the property owner sued and was awarded compensation for a *Lucas* taking. *Id.* at 1011. The regulations did not expressly state that no beneficial use of the property would be permitted, but the court reasonably concluded that this would be the effect of the UFM designation. This outcome is in stark conflict with the holding of the Ninth Circuit below, that assigning Craneveyor's land to a category in which no beneficial use was authorized did not state a claim for a *Lucas* taking because the regulations did not expressly foreclose all uses.

Similarly, in *City of Sherman v. Wayne*, 266 S.W.3d 34 (Tex. App. 2008), a property that had been used as an armory and for vehicle storage under then-existing zoning was rezoned for residential use. *Id.* at 39. The owner sued and was awarded compensation for a *Lucas* taking on the grounds that the cost of converting the property to residential use would leave it with a negative value. The court awarded compensation of $250,000, the difference in the market value of the property prior to and after it was rezoned for residential use. *Id.* at 40. The new zoning classification did not specify that it prohibited all beneficial use of the land; indeed, it expressly provided for the construction of residences. However, the *effect* of the new zoning classification on Wayne's property was to foreclose any economically viable use. *Id.* This outcome is wholly at odds with the holding below, where Craneveyor could not state a claim for a *Lucas* taking simply because the Plan did not expressly state that no uses would be allowed.

The Court should grant the writ to establish uniformity across jurisdictions on the necessary elements of a *Lucas* taking.

CONCLUSION

This case provides an ideal vehicle for the Court to reconsider or clarify *Penn Central*, which after 45 years still fails to provide courts and litigators with a "workable standard" for determining liability for a partial regulatory taking. At the same time, the Court can resolve a split of authority on the necessary elements of a facial claim for a *Lucas* categorical taking. For all the foregoing reasons, the Petition should be GRANTED.

Respectfully Submitted,

TIMOTHY V. KASSOUNI
Counsel of Record
KASSOUNI LAW
455 Capitol Mall, Suite 604
Sacramento, California 95814
(916) 930-0030
timothy@kassounilaw.com

Counsel for Petitioner

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED APRIL 20, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CRANEVEYOR CORP., A CALIFORNIA CORPORATION,

Plaintiff-Appellant,

and

INLAND REAL ESTATE GROUP, LLC; *et al.*,

Plaintiffs,

v.

CITY OF RANCHO CUCAMONGA,

Defendant-Appellee,

and

DOES, 1-10, INCLUSIVE,

Defendant.

No. 22-55435

Appendix A

D.C. No.
5:21-cv-01656-SB-KK

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California.
Stanley Blumenfeld, Jr., District Judge, Presiding.

April 13, 2023, Argued and Submitted,
Pasadena, California;
April 20, 2023, Filed

Before: MILLER and MENDOZA, Circuit Judges, and MOSKOWITZ,** District Judge.

CraneVeyor Corporation appeals from the district court's order dismissing its complaint against the City of Rancho Cucamonga for failure to state a claim. The complaint asserts a facial takings challenge under 42 U.S.C. § 1983 to a city zoning plan that allegedly restricts development on two parcels of land owned by CraneVeyor. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We accept the factual allegations in the complaint as true and review the dismissal of the complaint de

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

novo. *Doe v. Regents of Univ. of Cal.*, 23 F.4th 930, 935 (9th Cir. 2022). A facial takings challenge asserts that "the mere enactment of a statute constitutes a taking." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686 (9th Cir. 1993) (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987)).

1. The city has filed a motion for judicial notice (Dkt. No. 18) of a county map showing the location of CraneVeyor's first parcel. We may take judicial notice of a fact only if it is "not subject to reasonable dispute." Fed. R. Evid. 201(b). But the county, which produced the map, disclaims its accuracy. Because the map is subject to reasonable dispute, and because we "rarely take judicial notice of facts presented for the first time on appeal," we deny the motion. *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1193 (9th Cir. 2011).

2. CraneVeyor asserts that the city's plan effected a facial taking of its first parcel under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). Under *Lucas*, a regulation effects a taking when it "deprives land of all economically beneficial use." *Id.* at 1027. CraneVeyor alleges that its first parcel is in a fault zone. But CraneVeyor acknowledges that the plan, on its face, does not prohibit all development in fault zones. Thus, CraneVeyor has not stated a claim for a facial *Lucas* taking.

3. CraneVeyor also asserts that the plan effected a facial taking of both its parcels under *Penn Central*

Transportation Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). We "assume, without deciding, that a facial challenge can be made under *Penn Central*." *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 (9th Cir. 2010) (en banc). The *Penn Central* analysis considers three factors: (1) the "economic impact of the regulation" on the property owner, (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) the "character of the governmental action." *Penn Cent.*, 438 U.S. at 124. Those factors do not support CraneVeyor's claim.

First, the economic impact is insufficient. Valuable uses remain on CraneVeyor's land. According to the city, CraneVeyor could build up to two residential units on its first parcel. And the plan permits livestock and poultry keeping on the second parcel. *See MacLeod v. Santa Clara Cnty.*, 749 F.2d 541, 547 (9th Cir. 1984) (rejecting a *Penn Central* claim when the landowner "was free to continue to raise cattle or to lease out the property for grazing lands").

Second, the regulation does not interfere with distinct investment-backed expectations. CraneVeyor maintains that it expected to use its land for residential development. But a property owner "cannot reasonably expect that property to be free of government regulation such as zoning." *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1091 (9th Cir. 2015). And CraneVeyor "pursued [its] alleged expectation . . . with something less than speed or vigor." *Dodd v. Hood River Cnty.*, 136 F.3d 1219, 1230 (9th Cir. 1998). The company took no steps to pursue development in the seven years that it owned the parcels before the city adopted the plan.

Third, the character of the city's plan is an "interference aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good," not "a physical invasion by government." *Penn Cent.*, 438 U.S. at 124. "Zoning laws are, of course, the classic example" of permissible regulation. *Id.* at 125. CraneVeyor objects that the city failed to provide statutorily required notice of a hearing about the plan. *See* Cal. Gov't Code §§ 65854, 65091. But the failure to notify an affected property owner does not prevent the plan from promoting the common good. The city adopted the plan after several years of consultations with agencies and public meetings with residents. Even if the plan did not strike the optimal balance between property rights and conservation interests, "the imbalanced distribution of the benefits and burdens resulting from such an ordinance did not mean that the law effected a taking." *MacLeod*, 749 F.2d at 546. The district court correctly rejected the *Penn Central* claim.

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DATED MARCH 30, 2022

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

5:21-cv-01656-SB-KK

INLAND REAL ESTATE GROUP, LLC *et al.*,

v.

CITY OF RANCHO CUCAMONGA.

March 30, 2022, Decided;
March 30, 2022, Filed

Present: The Honorable **STANLEY BLUMENFELD, JR., United States District Judge.**

Proceedings: **ORDER GRANTING MOTION TO DISMISS [Dkt. No. 33]**

Plaintiffs own land in the City of Rancho Cucamonga (the City) and challenge restrictions imposed on their land use as part of a plan adopted by the City in 2019. In their Second Amended Complaint (SAC), Plaintiffs allege claims under 42 U.S.C. § 1983 for a taking without just compensation in violation of the Fifth Amendment and for denial of substantive due process. Dkt. No. 27. The City moves to dismiss the SAC for failure to state a claim. Dkt.

No. 28 (Motion). The Court finds this matter suitable for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15. Because Plaintiffs have not alleged facts sufficient to support plausible claims, the Court **grants** the Motion.

I. BACKGROUND

Plaintiffs[1] own a total of approximately 65 acres of land in the City, which they purchased between the 1980s and 2016. Dkt. No. 27 ¶¶ 1-8. In October 2019, the City adopted a General Plan Amendment that incorporated the Etiwanda Heights Neighborhood and Conservation Plan (the Plan) into the City's land use policies and zoning designations. *Id.* ¶ 13. The Plan regulates development in a 4,393-acre area, the majority of which was annexed into the City through a July 2020 resolution adopted by the Local Agency Formation Commission for San Bernadino (LAFCO). *Id.* ¶¶ 13, 15, 17. Plaintiffs allege that they did not receive formal notice of hearings related to the City's adoption of the Plan or the LAFCO's annexation of the land, in violation of California Government Code §§ 65854, 65090, and 65091. *Id.* ¶¶ 16-17.

The Plan, which Plaintiffs attached as an exhibit to the SAC, states that its purpose is "to predictably

1. Plaintiffs are Inland Real Estate Group, LLC; Sheng Chang and Min Chang as Trustees of the Sheng and Min Chang Lifetime Trust Dated 1982; Maricic Family Limited Partnership; Anthony Maricic as Trustee of the MFL Land Trust #1; Anthony Maricic as Trustee of the MFL Land Trust #2; Constance Bredlau and Roy Bredlau as Trustees of the Bredlau Revocable Family Trust; Anthony Maricic; Christine Maricic; and Craneveyor Corp.

implement a community-based vision for the future of the uniquely valuable foothill area of the City of Rancho Cucamonga." Dkt. No. 27-1 at 5 of 16. Its "Community Vision" is "for large quantities of conserved rural and natural open space in the northern portion of the Plan Area, underwritten by and in balance with high quality neighborhood development in the southerly areas already surrounded by existing neighborhoods." *Id.* at 12 of 16. The Plan states that "[c]ommunity sentiment clearly favors conserving as much of the Plan Area as rural open space and habitat conservation as feasible." *Id.* at 15 of 16.

Before the annexation, San Bernadino County allowed for the development of multiple residences—generally up to one per acre—on Plaintiffs' properties. Dkt. No. 27 ¶ 18. After annexation, Plaintiffs' properties have been designated as part of a Rural/Conservation Area (RCA), which under the Plan limits the quantity of housing that can be built on the properties. *Id.* Plaintiffs also allege that several of their parcels have been designated as "Utility Corridors," which precludes residential development and requires that the land be maintained as open space. *Id.* ¶ 21. However, property privately owned as of the effective date of the Plan may be developed with one dwelling unit for each ten acres of land. *Id.* Two of the Plaintiffs' properties are less than ten acres, which they allege precludes utilization of this exception. *Id.* Several of the Plaintiffs' properties are also subject to an "Open Space" sub-zone designation that mandates that at least 95% of land must be dedicated to open space, but Plaintiffs are permitted to build one dwelling unit for each ten acres, including one dwelling unit on parcels of less than ten

acres. *Id.* ¶ 22. Finally, one of Plaintiffs' parcels—the "Craneveyor #1 Parcel"—has been designated a "Fault Zone." *Id.* ¶ 23.[2] The Plan allegedly "does not provide for any economic use for parcels within this designation, and it is not recognized as a sub-zone within the R/C/A." *Id.*

The Plan includes a "Transfer Development Rights (TDR) program" that allows owners of property in the RCA to voluntarily give up their rights to build in the RCA in exchange for financial compensation, but it provides that "[n]othing in this Plan commits or obligates the City, TDR Authority, or the Master Developer/Builder to buy any development credits at any time." *Id.* ¶ 24; Dkt. No. 27-14 at 3 of 23 to 4 of 23.

Plaintiffs filed suit in September 2021 and filed a First Amended Complaint (FAC) in December 2021. Dkt. Nos. 1, 13. After the City moved to dismiss the FAC, the

2. Plaintiffs ask the Court to take judicial notice of a document accessed from the City's website showing the "FAULT ZONE" designation for the parcel. Dkt. No. 32. The City also requests that the Court take judicial notice of four documents from its public records reflecting Plaintiffs' written objections to the Plan and the meeting minutes showing the participation of some Plaintiffs. Dkt. No. 29. Neither side objects to any of these requests or challenges the authenticity or accuracy of the documents, and although the exhibits are not essential to the Court's analysis, the Court grants the parties' requests for judicial notice. *Cf. Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010) ("It is appropriate to take judicial notice of [information on school district websites], as it was made publicly available by government entities (the school districts), and neither party disputes the authenticity of the web sites or the accuracy of the information displayed therein.").

Court observed that "[t]he City raises serious challenges to the viability of Plaintiffs' claims" but granted Plaintiffs' request for leave to file the SAC so that Plaintiffs would have "the opportunity to clarify their allegations and add any facts on which they wish to rely." Dkt. No. 24. Plaintiffs' SAC, like their earlier pleadings, alleges § 1983 claims against the City for (1) taking of private property without just compensation in violation of the Fifth Amendment and (2) denial of substantive due process. Dkt. No. 27. The City again moves to dismiss for failure to state a claim. Dkt. No. 28.

II. LEGAL STANDARD

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

In resolving a Rule 12(b)(6) motion, a court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678. That is, a pleading must set forth allegations that have "factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged." *Id.* Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (quoting *Twombly*, 550 U.S. at 555). Assuming the veracity of well-pleaded factual allegations, a court next must "determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. There is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Id.*

III. DISCUSSION

A. Takings Claim

Plaintiffs' first cause of action alleges that the Plan "has deprived the properties of all or substantially all economically viable use which has resulted in a categorical taking under *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798" or alternatively that "the economic impact of the [Plan], the character of the City's actions, and the deprivation of Plaintiffs' reasonable, investment-backed expectations has effected a taking under *Penn Central Transportation Co. v. City of New York* (1987) 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631." Dkt. No. 27 ¶ 26. In response to the City's ripeness challenge, Plaintiffs disavow any as-applied takings claim and clarify that they bring only a facial takings claim. Dkt. No. 31 at 13-14. The City argues in its reply that the Court should not consider Plaintiffs' facial claim because it is not clearly identified in the SAC. Dkt. No. 34 at 7-8. The Court declines to adopt this approach. Although the SAC contains some allegations that suggest an as-applied challenge, it also purports to challenge the

City's adoption of the Plan "on its face." Dkt. No. 27 ¶ 26. The Court therefore accepts Plaintiffs' position that they seek to pursue only a facial challenge and analyzes their claim as such.

To prevail on a facial takings claim, Plaintiffs must show that "the mere enactment of [the Plan] constituted a taking" and that "no set of circumstances exists under which the [Plan] would be valid." *Duncan v. Bonta*, 19 F.4th 1087, 1111 (9th Cir. 2021) (citations omitted). Thus, on a facial challenge, the application of the Plan to particular parcels of land is not before the Court. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987).

Notwithstanding their insistence that they bring only a facial challenge, Plaintiffs devote much of their pleadings and briefing to the effects of the Plan on specific parcels of land belonging to Plaintiffs. They do not allege that the Plan is invalid as to all of the property within the 4,393 acres governed by the Plan. This is fatal to Plaintiffs' facial takings challenge. *See Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1204 (N.D. Cal. 1988) ("In every area but the crests of 'minor ridgelines' and certain slopes, development remains permissible, albeit limited. Thus, at least in those areas where development is only limited, permissible beneficial uses remain and the statute therefore is not subject to facial attack.").

Regardless, even if the Court's analysis were restricted to Plaintiffs' land, they have not alleged facts to state a plausible takings claim under *Lucas* or *Penn Central*. The

Supreme Court has emphasized that a categorical taking under *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), requires that the government action deprive the landowner of *all* value of the land:

> The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of "*all* economically beneficial uses" of his land. Under that rule, a statute that "wholly eliminated the value" of Lucas' fee simple title clearly qualified as a taking. But our holding was limited to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." The emphasis on the word "no" in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a "complete elimination of value," or a "total loss," the Court acknowledged, would require the kind of analysis applied in *Penn Central*.

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 330, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (citations omitted). Here, Plaintiffs allege that the Plan allows at least one dwelling to be built on almost all of their properties. This necessarily defeats a facial takings claim based on *Lucas*. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 631, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001) (*Lucas* claim failed where regulation allowed

construction of a residence on 18-acre parcel).[3] Plaintiffs' reliance in their opposition on *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), to bolster their *Lucas* claim is unavailing, as those cases provide alternative tests. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (explaining that *Penn Central*'s standards govern regulatory takings challenges that do not fall within *Lucas*'s narrow scope).

Under *Penn Central*, a regulatory takings claim is evaluated by considering three primary factors: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *Id.* at 538-39. This test involves "essentially ad hoc, factual inquiries." *Penn Cent.*, 438 U.S. at 124. As such, "[i]t is not clear that a facial challenge can be made under *Penn Central*." *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1188 (9th Cir. 2012) (holding that no taking occurred even if a facial challenge was appropriate). Plaintiffs cite no authority addressing this problem, and indeed focus their arguments on the impact of the Plan on specific parcels of land, which is inconsistent with a facial challenge.

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3. The City argues that the TDR program provides an additional economically beneficial use for Plaintiffs' properties by allowing them to sell their development rights. Plaintiffs argue extensively that the TDR program is a sham and that the Court should not consider it. It is unnecessary to resolve this dispute because even without the TDR program, no categorical taking has occurred.

Even if their claim were otherwise proper, Plaintiffs have not alleged facts to support a regulatory takings claim. The first *Penn Central* factor, the economic impact of the Plan, "favors the City because Supreme Court cases 'have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.'" *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1090 (9th Cir. 2015) (quoting *Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993)). Indeed, the Ninth Circuit has rejected takings claims even where the value of property is diminished by 95%. *William C. Haas & Co. v. City & Cty. of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979). The SAC neither quantifies the alleged loss of value to Plaintiffs' properties nor alleges any facts plausibly showing that any property (much less all property subject to the Plan, as would be necessary for a facial claim) has been reduced in value by more than 95%.

Nor do the Plaintiffs allege that the City interfered with any of their reasonable investment-backed expectations. "It is well established that there is 'no federal Constitutional right to be free from changes in the land use laws.'" *Bowers v. Whitman*, 671 F.3d 905, 915 (9th Cir. 2012) (quoting *Lakeview Dev. Corp. v. City of S. Lake Tahoe*, 915 F.2d 1290, 1295 (9th Cir. 1990)). "Simply put, when buying a piece of property, one cannot reasonably expect that property to be free of government regulation such as zoning . . . ." *Rancho de Calistoga*, 800 F.3d at 1091. Here, the SAC does not allege that the City's adoption of the Plan frustrated the specific plans to

develop the land of any Plaintiff—much less all Plaintiffs (and all landowners subject to the Plan).

Finally, the character of the action undermines Plaintiffs' *Penn Central* claim. The Court in *Penn Central* itself identified zoning laws as "the classic example" of land-use regulations that are permissible despite prohibiting the most beneficial use of the property. 438 U.S. at 125. In contrast, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." *Id.* at 124. Here, Plaintiffs allege no such physical invasion and instead challenge only what they themselves characterize as a zoning ordinance. For all these reasons, Plaintiffs have not alleged a plausible takings claim.

B. Substantive Due Process

Plaintiffs' second claim consists entirely of the allegation that "[t]he actions of the City, including the adoption of the [Plan] without requisite notice to Plaintiffs, have been arbitrary, capricious, unreasonable, and pretextual, and part of a concerted effort to prevent Plaintiffs from development of their property rights." Dkt. No. 27 ¶ 30. Despite their references to notice deficiencies, Plaintiffs in their opposition insist that they allege a violation of substantive, not procedural, due process. Dkt. No. 31 at 28-29.

To establish a violation of their right to substantive due process, Plaintiffs must prove that the City's actions were "clearly arbitrary and unreasonable, having no

substantial relation to the public health, safety, morals, or general welfare"—in other words, that "the government body could have no legitimate reason for its decision." *Dodd v. Hood River Cty.*, 59 F.3d 852, 864 (9th Cir. 1995) (articulating the applicable standard in land-use case). The SAC does not allege, and Plaintiffs do not suggest in their briefing, that the City lacked any legitimate reason for adopting the Plan. Instead, Plaintiffs focus on the City's alleged failure to provide the formal notice that they claim was statutorily required. Specifically, the SAC alleges that the City violated California Government Code §§ 65854, 65090, and 65091. Dkt. No. 27 ¶ 16.[4] The parties dispute whether these or other provisions required formal notice to be delivered to Plaintiffs. But even if Plaintiffs have plausibly alleged that they were entitled to formal notice and did not receive it, they cite no authority suggesting that the City's failure gives rise to a substantive due process claim. The harm that Plaintiffs allege is the diminution in value to their land, which was caused by the City's adoption of the Plan, not by any lack of formal notice about a meeting. Indeed, the SAC does not allege that any Plaintiff was harmed in any way by the City's alleged failure to provide formal notice, nor does any Plaintiff allege lack of actual notice. *Cf. Karst Robbins Coal Co. v. Dir., Off. of Workers' Comp. Programs*, 969 F.3d 316, 329 (6th Cir. 2020) ("[E]ven after . . . a procedural failure, a party must show that it was prejudiced in order to succeed on a due process claim."). Plaintiffs have not alleged a plausible claim for violation of their substantive due process rights.

4. Plaintiffs also allege that LAFCO failed to comply with notice requirements for its July 2020 meeting. Dkt. No. 27 ¶ 17. LAFCO is not named as a Defendant in this action.

C. Leave to Amend

In a single conclusory sentence, Plaintiffs state that "if the Court should choose to grant the Motion in whole or in part, Plaintiffs respectfully request leave to amend." Dkt. No. 31 at 30. Although "[t]he court should freely give leave [to amend a pleading] when justice so requires," Fed. R. Civ. P. 15(a)(2), leave to amend may be denied for such reasons as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment," *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962).

Plaintiffs have already pleaded their claims three times. The City's motion to dismiss their FAC raised the same arguments it raises now in its challenge to the SAC, and Plaintiffs' amendment did not meaningfully address the deficiencies in their claims. Moreover, when the Court allowed Plaintiffs to replead and dismissed the City's first motion to dismiss as moot, it stated: "**Plaintiffs are cautioned that if the City moves to dismiss Plaintiffs' Second Amended Complaint for failure to state a claim, the Court does not expect to allow Plaintiffs again to amend their pleading to add allegations that could have been included in their Second Amended Complaint**." Dkt. No. 24 at 2 (emphasis in original). Plaintiffs do not address this admonition, nor do they identify any new allegations they would allege in a third amended complaint that would cure the deficiencies in the SAC, much less any such allegations that could not have been included in the

SAC. Thus, it appears that amendment would be futile. Plaintiffs' request for leave to amend is denied.

IV. ORDER

Plaintiffs plausibly allege that they are frustrated with the restrictions imposed on their use of their land by the City's adoption of the Plan. But, after multiple amendments, they still have not alleged plausible claims for an unlawful taking in violation of the Fifth Amendment or a violation of their substantive due process rights. The City's motion to dismiss the SAC is therefore **GRANTED**, and Plaintiffs' claims are **DISMISSED** on the merits with prejudice.

A final judgment will be entered separately.