No. 23-169

IN THE

Supreme Court of the United States

CRANEVEYOR CORP.,

Petitioner,

v.

CITY OF RANCHO CUCAMONGA, CALIFORNIA,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The Opposition Brief (Opp.) filed by Respondent City of Rancho Cucamonga (City) does not dispute the importance of the issue presented in the Petition: whether to jettison the confusing, unpredictable, and unworkable standards for finding a regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), by overruling that decision. Nor does the City really dispute that after 45 years, *no one* – not litigants, not attorneys, not judges – even knows what the "*Penn Central* test" means. At best, the City argues that individual courts in specific cases have groped toward some coherent interpretation of the "relevant factors" set forth in *Penn Central*. But what is not shown – and cannot be shown – is any systematic progress toward interpreting those factors in the uniform, consistent, predictable fashion required by any meaningful rule of law.

ARGUMENT

I. *PENN CENTRAL*'S OUTCOMES ARE ARBITRARY AND UNPREDICTABLE, NOT "FLEXIBLE."

The City attempts to turn a bug into a feature by arguing that *Penn Central*'s arbitrary and unpredictable outcomes are indicators of the case's "flexibility." Opp. at 7-9. A flexible doctrine is one capable of producing reasoned and predictable outcomes when applied in a variety of different factual settings. *Penn Central*, by contrast, yields radically different outcomes when applied by different judges to *the same* fact situations. That is not flexibility, it is doctrinal incoherence. The City's argument resonates with one previously presented by

a governmental entity to this Court: that no conflicts can possibly arise under *Penn Central* because "since each case is decided on its own facts, no decision has any bearing on the outcome of any other claim." 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, 177 (K. Padmaja, ed., 2007) (citing Respondent's Brief in Opposition to Petition for Certiorari, *Giovanella v. Town of Ashland Conservation Comm'n*, 549 U.S. 1280 (2007) (No. 06-972)).

After 45 years, *Penn Central* has still not yielded the clarity, stability, and workability this Court has often cited as the necessary conditions warranting preservation of precedent under stare decisis. (See, e.g., *Knick v. Township of Scott*, 139 S.Ct. 2162, 2178 (2019); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).)

II. THE OPPOSITION CONFIRMS THAT *PENN CENTRAL*'S "ECONOMIC IMPACT" PRONG IS UNDEFINED AND INCONSISTENT.

Like the court below, the City conflates the "economic impact" factor of *Penn Central* with the "deprivation of all economically viable use" standard of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Opp. at 4. After 45 years, no one has yet been able to determine how great an economic impact is required to count in favor of the plaintiff in a *Penn Central* claim. It is nonsensical to interpret this factor as requiring the loss of all use of the subject property, as does the City and the court below, since that is the standard for a categorical taking under *Lucas*. Why sue under *Penn Central* if the economic

impact of the regulation is so onerous as to state a claim under *Lucas*?

Yet the crucial point is, this interpretation can only be shown to be erroneous as a matter of logic and common sense. There is nothing in *Penn Central* itself that clearly states what the "economic impact" inquiry does or does not entail. The consequence has been radical case-by-case variations in the application of this prong, resulting in the arbitrary and unpredictable outcomes described in the Petition.

III. COURTS ARE HOPLELESSLY AT ODDS OVER WHAT CONSTITUTES "DISTINCT INVESTMENT-BACKED EXPECTATIONS."

The Opposition does not deny that no one knew what "distinct, investment-backed expectations" meant when *Penn Central* first advanced this as a "relevant consideration" in determining takings liability. However, the City argues that the term has been "defined over decades," such that a once amorphous and meaningless criterion has now become distinct and intelligible. Opp. at 9-12. This is wishful thinking.

The Opposition merely cites to a random scatter of decisions as "defining" investment-backed expectations. But in fact, the holdings in each of those cases were crafted on the fly, without significant guidance from any previous decisions, and provide only doubtful guidance for future litigants. How, for example, does the cited dicta from *Arkansas Game & Fish Commission v. United S*tates, 568 U.S. 23, 38 (2012) (investment-backed expectations are "often informed by the law in force in the State in

which the property is located") square with the holding of *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001), that "a law does not become a background principle for subsequent owners by enactment itself?" Does it matter that *Arkansas Game & Fish* was a physical invasion case, not a claim for a regulatory taking; or that the Ninth Circuit refuses to follow *Palazzolo*, having effectively overruled this Court on this aspect of investment-backed expectations? See *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1127-1132 (9th Cir. 2010) (Bea, J., dissenting).

Contrary to the sanguine view of the Opposition, the doctrine of investment-backed expectations remains "a mess." Sara Feldschreiber, *Fee At Last? Work Release Participation Fees And The Takings Clause*, 72 Fordham L. Rev. 207, 220 (2003). After nearly half a century, it is time for the Court to admit its mistake and repudiate this ill-conceived "test" for takings liability.

IV. THE CITY OFFERS NO REASON TO RETAIN *PENN CENTRAL'S* "CHARACTER" PRONG, WHICH SERVES ONLY AS A RITUAL CHECK MARK IN FAVOR OF THE GOVERNMENT IN TAKINGS CASES.

The Opposition Brief seeks to breathe new life into *Penn Central*'s reference to the "character of the government action" by citing to one case, in the past 45 years, in which this inquiry has focused on something other than whether the regulation effects a physical invasion. Opp. at 15-16, citing *Hodel v. Irving*, 481 U.S. 704 (1987). But *Hodel* is the exception that proves the rule. First, the effect of the regulatory scheme at issue in *Hodel* was expressly likened to a permanent physical

invasion. See *Hodel*, 481 U.S. at 761, citing to *Kaiser Aetna v. United States*, 444 U. S. 164 (1979). Second, while the *Hodel* Court employed the word "character" in describing the law's virtual "abrogation of the right to pass on a certain type of property . . . to one's heirs," 481 U.S. at 761, what the Court found decisive was actually the law's depriving the owners of fractional estates of all use of their property. If the case were brought today, the claimants would prevail under *Lucas* – a case that was decided five years after *Hodel*, without reference to the "character" prong of *Penn Central.*

Following the language of *Penn Central* itself, virtually all courts – like the court below – have applied the "character" prong as a simple conceptual toggle – either a regulation effects a physical invasion, which would weigh in favor of the plaintiff, or it does not, in which case the government automatically wins on this one of the three factors. Since no rational plaintiff will sue under *Penn Central* if a regulation effects a physical invasion in violation of the per se rule of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the government prevails on this prong 100% of the time. Not only are all duly enacted regulations *presumed* to "adjust[] the benefits and burdens of economic life to promote the common good," but takings claimants are foreclosed from arguing to the contrary by *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005).

The *Lingle* Court unequivocally banished from the takings calculus any inquiry into the legitimacy or efficacy of regulation. 544 U.S. at 540-545. It is true, as the Opposition points out, that earlier in the same decision the *Lingle* Court recited *Penn Central*'s inquiry into the

"character" of a challenged regulation, seemingly without realizing it was about to prohibit any such inquiry. *Id*. at 539. This contradiction was noted at the time, and has been frequently remarked since. See, e.g., Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan. Envtl. L.J. 525, 545 (2009) ("Perhaps the [*Lingle*] Court failed to notice that *Penn Central* appears to require courts to consider how the government acted . . . .")

In any case, the rote recitation of *Penn Central*'s three prongs cannot negate *Lingle*'s central holding:

> "Whether 'character' encompasses the public interest, bad faith, or 'substantially advances' definition, it is clear that the factor relies on a means-ends analysis, which *Lingle* appears to have relegated to due process inquiries."

Joshua P. Borden, *Derailing Penn Central: A Post-Lingle, Cost-Basis Approach to Regulatory Takings*, 78 Geo. Wash. L. Rev. 870, 884 (2010).

V. *PENN CENTRAL* MEETS OR EXCEEDS ALL OF THIS COURT'S CRITERIA FOR OVERRULING UNSOUND PRECEDENT.

Ironically, the Opposition Brief argues that *Penn Central* should not be overruled because the doctrine of stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles . . . ." Opp. at 17, quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Yet this is precisely what *Penn Central* has failed to do, throughout its 45-year history. Far from being evenhanded, *Penn Central*'s application consistently

favors the government defendants in takings claims, both by giving the government an automatic win on the character prong and by the tendency of many courts to apply a "one-strike-you're-out" rule, finding for the government if it prevails on any of the *Penn Central* factors. Pet. at 11. The unpredictability of outcomes has become the primary hallmark of *Penn Central* in practice. And rather than promoting consistent development of takings doctrine, decisions under *Penn Central* have been random and haphazard, leaving each new litigant guessing as to how the next court will interpret and apply its vague mandates.

The City asserts that "Craneveyor does not argue that *Penn Central* was . . . poorly reasoned." Opp. at 17. Yet the core of Craneveyor's argument was that *Penn Central*'s "test" for regulatory takings wasn't reasoned at all. As has often been noted, the majority opinion simply cut and pasted a selection of vague, undefined aphorisms from a single law review article, Frank Michelman's *Property, Utility and Fairness*, 80 Harv. L. Rev. 1165 (1967). Pet. at 8. The Petition cites to a small selection of the many authorities who have observed that "*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,' and even a 'retreat from the rule of law.'" Pet. at 11-12 (citations omitted). The Petition further pointed out that while *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* was poorly reasoned, "at least judges and practitioners could understand what its words meant. Not so, *Penn Central*." Pet. at 9.

The Opposition cites to *Penn Central* itself for the proposition that the three-factor analysis somehow flowed organically from the Court's previous decisions. Opp. at 18. But the fact that terms like "economic impact" and "investment-backed expectations" can be retroactively applied to describe the holdings in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922) and *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), does not mean that those standards were actually employed in those cases (they were not), or that the same results would have been reached if they had been. The argument is similar to a statistician claiming that an economic model must have predictive value because it fits past data so well.

> "If judicial opinions are to promote certainty and predictability in the law, they must rest upon reasoned distinctions and intelligible principles. *Penn Central*, by contrast, serves up a barely coherent potpourri of vaguely specified considerations, grounded in the facts and circumstances of each case."

R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central*, 38 Ecology L.Q. 731, 735 (2010.) Nothing in the Opposition Brief suggests that *Penn Central* has established the sort of stable, predictable, workable doctrine that merits preserving in the name of stare decisis. The decision should be overruled.

VI. THE DISTINCTION BETWEEN A FACIAL AND AS-APPLIED CHALLENGE HAS NO BEARING ON THE SUITABILITY OF THIS CASE AS A VEHICLE TO OVERRULE *PENN CENTRAL*.

The Opposition Brief argues that this case is not a suitable vehicle to overrule *Penn Central* because it is a facial challenge to the Etiwanda Heights Neighborhood and Conservation Plan, rather than an as-applied challenge. Opp. at 20-22. This issue is not before the Court because it played no part in the decision below. As was pointed out in the Petition, the trial court ruled against Craneveyor on the erroneous grounds that a facial *Penn Central* claim requires a showing that all property subject to the Plan, not just Craneveyor's property, was taken by the enactment of the regulations. Pet. at 5-6. The Ninth Circuit wisely ignored this holding and applied a straightforward, albeit deeply flawed, interpretation of *Penn Central* to the facts of the case. Whether Craneveyor raises a facial or as-applied challenge has no bearing on the decision below, which highlights the shortcomings of *Penn Central* and cleanly presents this Court with an opportunity to correct 45 years of confused and garbled takings doctrine by overruling that decision.

VII. THE RULE CRANEVEYOR SUGGESTS IS SIMPLE, CLEAR, AND PREDICTABLE, IN CONTRAST TO THE RUDDERLESS, CONFUSED, AND CAPRICIOUS STANDARDS ESTABLISHED BY *PENN CENTRAL* .

In response to the Petition's proposed new rule for takings liability, the Opposition advances the normal parade of horribles public entities inevitably fall back on

when it is suggested that the Takings Clause be given meaningful content. Opp. at 22-26.

> "Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest."

Arkansas Game & Fish Commission v. United States, 568 U.S. at 36-37 (citing *United States v. Causby*, 328 U.S. 256, 275 (1946) (Black, J., dissenting); *Loretto*, 458 U.S. at 455 (Blackmun, J., dissenting)). Obviously, the takings standard advanced by Petitioner would be applied subject to a rule of reason, including due regard for the government's legitimate police powers. Nevertheless, a rule creating a presumption that compensation is required when landowners are deprived of discrete, marketable property interests would be simple, clear, and predictable – desirable qualities in any rule of law, all of which are notably absent from the hazy doctrinal miasma created by *Penn Central*.

CONCLUSION

For all the reasons set forth above, the Court should grant the Petition.

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Respectfully submitted,

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