Nos. 24-757, 24-754

In the Supreme Court of the United States

THE GYM 24/7 FITNESS, LLC,
Petitioner,
v.
MICHIGAN,
Respondent.

MOUNT CLEMENS RECREATIONAL BOWL, INC., ET AL.,
Petitioners,
v.
ELIZABETH HERTEL, Director, Michigan Department of Health and Human Services, ET AL.,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978), should be clarified or overruled.

Amicus respectfully suggests that the Question Presented should be modified to add the question: "If overruled, what should replace the *Penn Central* test?"

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. § 501(c)(3). The Buckeye Institute files and joins amicus briefs that are consistent with its mission and goals.

Consistent with its mission, The Buckeye Institute seeks to promote the constitutional design of limited powers in the federal government, which preserves states' ability to develop and enact such policies. The Buckeye Institute is concerned by the ineffectiveness of the *Penn Central* test for determining what is a regulatory taking that entitles a property owner to just compensation under the Fifth Amendment. This case—arising as it does under a unique set of circumstances that used government regulation to temporarily deprive business owners of all economically viable use of their property—provides an excellent vehicle to reconsider how courts should

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

evaluate such claims. The Buckeye Institute submits this brief to urge the Court to grant certiorari to consider the question presented and invite the parties to present alternative frameworks for consideration.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Court's opinion in *Penn Central* is an excellent illustration of Justice Holmes' famous saying that "[g]reat cases, like hard cases make bad law." *Northern Securities Co.* v. *United States*, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting). "For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." *Id.* (Holmes, J., dissenting). Arriving at the Court through the now-obsolete appeal-as-of-right procedure, *Penn Central* involved an iconic New York City landmark, a limited record, and a dearth of lower court opinions applying the relevant constitutional provision. The resulting decision held together the Court's 6-3 majority but did little more to guide the federal judiciary in the wide range of cases that implicate the doctrine of regulatory takings.

Now, nearly half a century later, lower courts struggle to apply the *Penn Central* factors with any consistency, and this Court has developed a preference for expanding its "per se" physical taking jurisprudence over clarifying those *Penn Central* factors. *Penn Central* became a "great case" by "accident" but has done a poor job of "shaping the law." *Id.* (Holmes, J., dissenting). It is time to change the regulatory takings status quo. Amicus urges the court

to grant certiorari to consider alternative Takings Clause tests grounded in the Constitution. Amicus presents several possible analytical approaches for the Court's consideration.

ARGUMENT

I. The *Penn Central* test was born of happenstance, not reason.

A house built on sand shall fall. See *Matthew 7:26–27*.

Buildings, bridges, and roads require a solid foundation. Without one, sooner or later they will fall. Likewise, legal tests without solid foundations eventually crumble and fall. The regulatory takings test known as the *Penn Central* doctrine lacks such a foundation. It was born of expediency and without solid constitutional support.

Penn Central's history provides insight into its lackluster performance as "the" regulatory takings test. *Penn Central* came to the Court under 28 U.S.C. § 1257(a) as a mandatory appeal[2]—not a discretionary petition for certiorari. See J. Peter Byrne, Penn Central *in Retrospect: The Past and Future of Historic Preservation Regulation*, 33 Geo. Envtl. L. Rev. 399, 413 (2021). But for that statute, it is unlikely we would have the regulatory takings test known as "*Penn Central*." As Justice Powell's law clerk recognized in his jurisdictional memo, "It would be great if there were a way out of this appeal, so that the issue could percolate. Unfortunately, the court seems stuck." *Id.*

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[2] Mandatory appeals to the U.S. Supreme Court were eliminated in 1988. Act of June 27, 1988, Pub. L. 100-352, § 3, 102 Stat. 662 (1998).

at 413 (citation omitted). The jurisdictional memo lamented that "[i]f this case were here on cert, the paucity of relevant precedents would be one factor militating strongly in favor of a denial. However, because the issue is here on appeal, because the case raises issues of constitutional importance, and because the opinion below is . . . questionable," the memo recommended full briefing and argument on the merits. *Id.* Justice Powell himself seemed to agree with his clerk, writing, "Important const. issue and very little authority." *Id.* (quoting Lewis F. Powell Jr., Penn Central Transportation Company v. New York City at 9 (1977) (Powell Papers), https://tinyurl.com/mtc2cvuw). According to Justice Powell's papers, only five justices voted to note probable jurisdiction. *Id.*

When it came to reaching a decision on the merits, the Court struggled to find any constitutional underpinnings for the "rule" or "doctrine" that it ultimately formulated:

> While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain

> disproportionately concentrated on a few persons.

Penn Cent. Transp. Co. v. *City of New York*, 438 U.S. 104, 123–24 (1978) (quoting *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962)). Ultimately, the Court examined its patchwork of "ad hoc" factual determinations in cases that allowed governments to take one or more sticks in the bundle of property rights without compensation and deduced a "several" factor test to explain when "regulatory" takings were just regulation and not really takings. The first and second factors[3] are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.* at 124. The third is "the character of the governmental action," because a "physical invasion" is more likely to be a "taking." *Id.*; see also *id.* at 128 (noting that government "acquisitions of resources" for uniquely public functions are "takings"). The analysis also seems to consider public benefit or harm avoided. See *id.* at 127.

Since deciding *Penn Central*, the Court has often avoided applying it. Justice Scalia distinguished between the "ad hoc, factual inquiries" promoted by *Penn Central* and the "categorical treatment

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[3] Some have questioned whether these are more accurately interpreted as a single factor, given the sentence structure. See Steven J. Eagle, *Regulatory Takings* 334 n.181 (4th ed. 2009) (citing *Paradissiotis* v. *United States*, 49 Fed. Cl. 16, 20 n.4 (2001)) ("That *Penn Central* encompasses three principal factors is not logically its only—or its preferred—reading. The extent of [interference with] an owner's 'investment-backed expectation' might be a subset of the 'economic impact' of [the] restrictions . . . .").

appropriate . . . where regulation denies all economically beneficial or productive use of land." *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Building permit conditions earned their own "rough proportionality" test. See *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Nollan* v. *Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (citing *Penn Central* favorably but not applying its factors). Similar ad hoc non-*Penn Central* treatment was afforded temporary flooding. *Ark. Game & Fish Comm'n* v. *United States*, 568 U.S. 23 (2012) (citing *Penn Central* favorably without analyzing the "factors"; on remand, the Federal Circuit ignored *Penn Central* altogether).

In recent years, the Court has increasingly gravitated toward finding per se physical takings whenever it finds for the property owner. See, *e.g.*, *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139 (2021) (declining to apply *Penn Central* and holding that a California regulation granting union organizers the right to access agricultural employers' property for up to three hours per day, 120 days per year effected a per se physical taking); *Horne* v. *Dep't of Agric.*, 576 U.S. 350 (2015) (holding that a regulation imposing a raisin reserve requirement was a per se physical taking not subject to the *Penn Central* analysis); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a regulation that required installation of a cable box on another's property was a permanent physical occupation that required compensation).

The closest the Court has come to applying the *Penn Central* factors in the past quarter century is to approve them at a high level or in passing. In one case,

the petitioners did not preserve any *Penn Central* argument, and the Court rejected the invitation to create any per se rules for temporary regulatory takings. *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Plan. Agency*, 535 U.S. 302 (2002). In another, the Court rejected the "substantially advances legitimate state interests" test and directed lower courts to apply *Penn Central* instead—but again, did not apply it. *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005). See also *Sheetz* v. *Cnty. of El Dorado, Cal.,* 601 U.S. 267, 274 (2024) (summarizing the *Penn Central* approach in passing); *Stop the Beach Renourishment, Inc.* v. *Fla. Dep't of Env't Prot.*, 560 U.S. 702, 716 n.6 (2010) (same). But see *Murr* v. *Wisconsin*, 582 U.S. 383, 405 (2017) (reducing the *Penn Central* analysis to a single alternative paragraph).

Predictably, such lack of guidance has resulted in widespread confusion as to how *Penn Central* applies. Is it a balancing test, a totality of the circumstances test, or a required checklist? See, *e.g.*, Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or A One Strike Rule?*, 22 Fed. Circuit B.J. 677, 678–80 (2013) (discussing alternative approaches to applying *Penn Central*). How many factors are there, really? See, *e.g.*, *Kavanau* v. *Santa Monica Rent Control Bd.*, 941 P.2d 851, 860 (Cal. 1997) (identifying ten additional relevant considerations from the Court's precedents); Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Dick. L. Rev. 601 (2014) (interpreting *Penn Central* with four factors instead of three).

Jurists and legal commentators alike concur that *Penn Central* raises more questions than it answers. See, *e.g.*, *Nekrilov* v. *City of Jersey City*, 45 F.4th 662, 682 (3d Cir. 2022) (Bibas, J., concurring) (observing that "the lack of rules and guidance" regarding how to apply the *Penn Central* factors "invites chaos"); *Philip Morris, Inc.* v. *Reilly*, 312 F.3d 24, 36 (1st Cir. 2002) ("[T]he jurisprudence in this area is convoluted and subject to various interpretations."); Eagle, *The Four–Factor* Penn Central *Regulatory Takings Test*, *supra*, at 605 ("[T]he *Penn Central* doctrine, with its lack of objective criteria, does not impart knowledge of the legal rights and obligations of either property owners or public officials, resulting in protracted litigation and arbitrary outcomes." (footnotes omitted)).

II. *Penn Central* has been applied inconsistently at best.

Amicus recognizes that the Court typically awaits adequate percolation in the lower courts before addressing thorny issues like the question presented. But here, percolation is not the answer. *Penn Central* was born out of limited percolation, see Byrne, *supra*, at 413, and—of course—no hindsight. Since then, even when courts have puzzled over the proper application of *Penn Central* and recognized that it is the opposite of clear, they lack authority to create alternatives while *Penn Central* (and subsequent decisions endorsing it) remain good law. *E.g.*, *Blackburn* v. *Dare Cnty.*, 58 F.4th 807, 813 (4th Cir. 2023) ("Combine an ad hoc balancing test with an open-ended factor and you're left with doctrine that is a 'veritable mess.' But we must do our best." (citation omitted)), *cert. denied*, 144 S. Ct. 277 (2023). It is thus not surprising that few

jurists have suggested alternatives. They likewise lack the liberty of considering alternatives suggested by commentators. The best the Court will get with the benefit of time is more of the same uncertainty.

That is what *Penn Central* has given the regulatory takings doctrine: uncertainty. That uncertainty plays out in the analysis under each of the factors.

1. Investment-Backed Expectations. For this factor, having obtained similar permits in the past may not be enough; if the plaintiff knew that regulatory approval was required, a court may still hold that he lacks "reasonable, investment-backed expectations." See, *e.g.*, *Good* v. *United States*, 189 F.3d 1355, 1361–62 (Fed. Cir. 1999) ("In view of the regulatory climate that existed when Appellant acquired the subject property, Appellant could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land."). And the Seventh Circuit (applying federal law to interpret the Wisconsin constitution) disregarded a plaintiff's investment-backed expectations in being able to maintain his business, long-permitted by local zoning, merely because he had no right to transfer the business. *Bettendorf* v. *St. Croix Cnty.*, 631 F.3d 421, 425 (7th Cir. 2011) ("Bettendorf knew the conditional language of the ordinance restricted his ability to recoup the value of his commercial investments when he was ready to sell."); see also *id.* at 431 (Hamilton, C.J., dissenting in relevant part) (comparing the majority's decision to forcing "a widow with a life estate in her residence" to leave her property).

2. Economic Impact. How lower courts will approach the economic impact factor is also uncertain. Diminution of value up to 92% was insufficient to effect a taking in *Appolo Fuels, Inc.* v. *United States*, 381 F.3d 1338, 1348, 1351 (Fed. Cir. 2004). See also *Colony Cove Props., LLC* v. *City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018) ("Thus, we have observed that diminution in property value because of governmental regulation ranging from 75% to 92.5% does not constitute a taking."); *Warren Tr.* v. *United States*, 107 Fed. Cl. 533, 569 (2012) ("[A]n 82% diminution of value would not be a sufficient economic impact" even under a *Penn Central* analysis.). Temporary takings make the analysis even harder: The Federal Circuit looks at the economic impact not only during the taking period but as compared to the value of the property as a whole after the taking period ended. *CCA Assocs.* v. *United States*, 667 F.3d 1239, 1246–47 (Fed. Cir. 2011); see also *First Eng. Evangelical Lutheran Church of Glendale* v. *Los Angeles Cnty., Cal.*, 482 U.S. 304, 318–19 (1987) (recognizing that temporary takings are compensable); *Tahoe-Sierra*, 535 U.S. at 323 (drawing a hard distinction between physical takings and regulatory takings). But property owners claiming diminution of value to their property from the loss of parking spaces they did not own still received a full *Penn Central* analysis in *RDB Properties, LLC* v. *City of Berwyn*, 844 F. App'x 878, 881–82 (7th Cir. 2021) (affirming dismissal of the claims).

3. Character of the Government Action. Apart from the physical intrusion and appropriation that earn per se treatment, it is likewise not clear what "character of the government action" weighs in favor of finding a taking. Especially in the context of unprecedented pandemic regulations, courts applying *Penn Central* have contorted themselves to conclude that no compensable taking occurred. One county passed an ordinance that barred property owners from entering their property for 45 days, with only 4 days' notice. *Blackburn*, 58 F.4th at 814. The Fourth Circuit held that was not "functionally equivalent to an ouster" because property owners could have entered their property before the ordinance took effect, and they also retained the right to rent to anyone already inside the county. Another case applied *Penn Central* to a Covid-business-shutdown takings claim: The Sixth Circuit affirmed dismissal at the pleadings stage solely because the action was a temporary response to protect public health—despite acknowledging that the first two factors weighed in the plaintiffs' favor and despite rejecting the district court's per se rule that "no state response to a public-health emergency could be a taking." *Bojicic* v. *DeWine*, No. 21-4123, 2022 WL 3585636, at *9 (6th Cir. Aug. 22, 2022).

Even in the few cases where property owners prevail, application of the factors is not consistent. The First Circuit has described the "character of the government action" factor as dispositive even when the other two factors were met. *Philip Morris, Inc.*, 312 F.3d at 45 (explaining that "different factors can be dispositive" in different cases). Another case found a taking even when the "investment-backed expectations" element was "not implicated." *Youpee* v.

Babbitt, 67 F.3d 194, 199–200 (9th Cir. 1995), *aff'd*, 519 U.S. 234 (1997). And in a third case, the Federal Circuit affirmed the Claims Court's finding of a taking without even explicitly considering the "character of the government action" factor. *Yancey* v. *United States*, 915 F.2d 1534, 1540–42 (Fed. Cir. 1990) (noting only that "the nature of governmental activity" does not "conclusively foreclose[ ] all claims for just compensation").

Many more examples of inconsistent and confusing treatment exist where those come from. The only gain from waiting is more confusion. A better solution is to grant the petition for certiorari to solicit and consider alternatives.

III. If the Court grants certiorari, it can consider existing alternatives and invite others.

With the lower courts currently bound by *Penn Central*, regulatory takings litigation provides little opportunity for interested parties and jurists to propose and advocate for alternative frameworks for takings claims. A grant of certiorari here would provide a new opportunity for ideas and analyses outside the *Penn Central* framework. The Buckeye Institute has identified the following four tests for determining whether regulation rises to the level of a "taking" and suggests that the Court invite discussion of these and others.

A. Petitioners' "Reasonable Rate of Return" Test

Petitioners have proposed a "reasonable rate of return" test for evaluating when a regulation's effect on property rights rises to the level of a "taking." See

Pet. for Cert. at 28–32 (filed Jan. 14, 2025). This proposed test has the benefit of using a common economic concept that courts and jurors would be familiar with from other contexts. See, *e.g.*, *United Gas Pipe Line Co.* v. *FERC*, 618 F.2d 1127 (5th Cir. 1980) (utility rates); *Yellow Cab Co.* v. *City of Chicago*, 938 F. Supp. 500 (N.D. Ill. 1996) (taxicab rates); *Meyer* v. *Amerada Hess Corp.*, 541 F. Supp. 321 (D.N.J. 1982) (gas station franchise); *Resolution Tr. Corp.* v. *Town of Highland Beach*, 18 F.3d 1536 (11th Cir.) (real property; affirming jury verdict based in part on expert testimony on the reasonable rate of return), *reh'g en banc granted, opinion vacated*, 42 F.3d 626 (11th Cir. 1994). Petitioners' briefs speak well for themselves and need no elaboration here.

B. The *Penn Central* Dissent Test

The *Penn Central* dissent proposed a general rule that any destruction of the right to possess, use, or dispose of the physical property can constitute a taking. *Penn Cent. Transp. Co.*, 438 U.S. at 142–143 (Rehnquist, J., dissenting). Joined by Chief Justice Burger and Justice Stevens, then-Justice Rehnquist first broadly defined "property" as "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it . . . every sort of interest the citizen may possess." *Id.* (Rehnquist, J., dissenting) (quoting *United States* v. *Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945)) (emphasis omitted). "Taking," he reasoned, refers to "the deprivation of the former owner," the "destruction of property" rights. *Id.* at 143–44 (Rehnquist, J., dissenting).

In practice, a taking might be conceptualized as "nonconsensual servitude not borne by any neighboring or similar properties." *Id.* at 143 (Rehnquist, J., dissenting). "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired." *Id.* at 146 (Rehnquist, J., dissenting) (quoting *United States* v. *Dickinson*, 331 U.S. 745, 748 (1947)). Justice Rehnquist also looked at the investment return on the property, explaining, "The Court has frequently held that, even where a destruction of property rights would not *otherwise* constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment." *Id.* at 149 (Rehnquist, J., dissenting) (emphasis in original). However, he went on to explain that

> the converse is not true. A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some "reasonable" use of his property. "[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

Id. (Rehnquist, J., dissenting) (quoting *United States* v. *Cress*, 243 U.S. 316, 328 (1917)). Justice Rehnquist noted that in conducting the analysis, the "Fifth Amendment must be applied with 'reference to the uses for which the property is suitable, having regard

to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." *Id.* at 143 n.6 (Rehnquist, J., dissenting) (emphasis omitted) (quoting *Boom Co.* v. *Patterson*, 98 U.S. 403, 408 (1879)).

The only exceptions he recognized were for nuisance—if "the forbidden use is *dangerous* to the safety, health, or welfare of others"—*id.* at 145 (Rehnquist, J., dissenting) (emphasis added), and regulations with broad application that "secure[ ] an average reciprocity of advantage," such as zoning regulations, *id.* at 147 (Rehnquist, J., dissenting). Zoning regulations are not a taking because they do not single out one property, and because those who are restricted benefit from the restrictions on others. See *id.* at 138–42, 147–48 (Rehnquist, J., dissenting). The nuisance exception recognizes that prohibiting uses that are "*injurious to the health, morals, or safety of the community*, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id.* at 144 (Rehnquist, J., dissenting) (quoting *Mugler* v. *Kansas*, 123 U.S. 623, 688–689 (1887)). If the government is preventing a noxious use, it is not relevant that it is singling out a piece of property. *Id.* at 145. In this conception, the nuisance exception "is not coterminous with the police power itself. The question is whether the forbidden use is *dangerous* to the safety, health, or welfare of others." *Id.* (Rehnquist, J., dissenting) (emphasis added).

C. Judge Bibas's Test

In response to Justice Thomas's recent invitation, see *Bridge Aina Le'a, LLC* v. *Haw. Land Use Comm'n*, 141 S. Ct. 731, 731 (2021) (Thomas, J., dissenting from denial of cert.) (describing *Penn Central* as a "standardless standard"), Third Circuit Judge Stephanos Bibas recently proposed another alternative in his concurring opinion in *Nekrilov*, 45 F.4th 662. Returning to the text of the Fifth Amendment, Judge Bibas focused on the Founding-era understanding of three separate concepts: "taking," "private property," and "for public use, without just compensation." *Nekrilov*, 45 F.4th at 683 (Bibas, J., concurring).

Judge Bibas reasoned that the right to property "extended beyond physical possession" to include "free use enjoyment, and disposal of all of [one's] acquisitions, without any control or diminution." *Id.* (Bibas, J., concurring) (quoting 1 William Blackstone, *Commentaries* 134 (1765)). He further reasoned that founding-era uses of the term "take" and the concept of "taking" likewise include "both physical seizure and non-physical deprivation." *Id.* at 684 (Bibas, J., concurring) (citing historical sources). From these observations, Judge Bibas concluded that a taking includes any deprivation of a property right, "regardless of whether they involved physical intrusions." *Id.* at 684 (Bibas, J., concurring).

Judge Bibas then turns to the phrase "for public use." *Id.* (Bibas, J., concurring). Citing a contemporary dictionary, he concluded that the term "means pressing property into a government-approved use," but would not include "bans or limits." *Id.* (Bibas, J.,

concurring) (citing Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1114–18, 1150 (1993)). This component supports the distinction between compensable takings and merely "preventing a nuisance." *Id.* (Bibas, J., concurring). Judge Bibas proposed relying on "the historical common law" for the scope of permissible regulations to "forbid[ ] nuisances and impose[ ] regulatory burdens on land use." *Id.* at 686 (Bibas, J., concurring).

D. Professor Epstein's "Bundle of Rights" Test

A fourth alternative, proposed by Professor Richard Epstein, focuses on protecting property rights as a "bundle of rights." Every law student learns that real property rights consist of a bundle of sticks, with each stick representing a right; the bundle is equivalent to owning the entire property. Each stick or even twig can be transferred or conveyed. The "bundle of sticks" or "bundle of rights" test is "one of strict proportion: the greater the taking, the greater the restriction, then the greater the compensation that must be paid." Richard A. Epstein, Lucas v. South Carolina Coastal Council*: Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner*, 25 Loy. L.A. L. Rev. 1233, 1243 (1992). This theory does not distinguish between physical takings and regulatory takings. It asks only whether one of the rights has been burdened.

The "bundle of rights" test rejects *Penn Central*'s "investment-backed expectations" factor and *Lucas*'s all-economically-beneficial-uses test. See Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369

(1993). The present owner's expectation neither increases nor decreases the number or nature of the rights in the bundle. And a "landowner's predictions of impending regulation hardly amount to an acceptance of the risk of the economic consequences." *Id.* at 1385. Expectations may depend on many things, including when and how the landowner acquired the property. But those expectations should not matter. "Only one thing is relevant: The greater the taking, the greater the payment. What is taken is what counts; what is retained, or the ratio between retained and taken property, is irrelevant [to whether the taking is compensable] (except for determining any potential severance damages)." *Id.* at 1376. Thus, Epstein argued in his *Lucas* amicus brief that "government takings of any sort constitute a transaction. . . . The Fifth Amendment allows the government to compel a landowner into the "sale" but then mandates just compensation for that transaction." Epstein, *Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner*, *supra*, at 1242. Allowing the taking is enough to protect the public interest; the government need not also have the power "to compel the surrender . . . without payment of any compensation." *Id.*

However, Professor Epstein's theory still anticipates "regulatory" takings without compensation when the restriction is "inherent in the law of nuisance." *Id.* Nuisance law emanates from both statutory and common law. And looking at the laws of nuisance, "[w]hatever land uses may be forbidden by neighbors under nuisance law without compensation may similarly be forbidden by the state

without compensation." Epstein, *A Tangled Web*, *supra*, at 1389.

* * *

Penn Central need not dictate the state of Takings Clause jurisprudence indefinitely. Its origin is unmoored from the text and history, and its application is inconsistent and uncertain, but alternatives exist. A grant of certiorari here would invite the analysis needed to rebuild the law of regulatory takings on the solid foundation of the Constitution.

CONCLUSION

The Buckeye Institute therefore urges the Court to grant the petition for certiorari.

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