No. 12-1416

In the
Supreme Court of the United States

MIKE MEHAFFY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In 1970, the Army Corps of Engineers entered into an agreement that acknowledged the right of Petitioner Mike Mehaffy's predecessor-in-interest, Nomikano, Inc., to fill certain wetlands on its property in North Little Rock, Arkansas. The Corps obtained a flowage easement over a portion of the property in the bargain. Petitioner was Secretary-Treasurer of Nomikano during the negotiations with the Corps. He then acquired the property in 2000. Mr. Mehaffy sought a permit from the Corps in 2006 to fill wetlands in accordance with the 1970 agreement, but the Corps denied the application. Petitioner responded by filing a takings lawsuit against the United States because the Corps' permit denial prevented him from developing the property.

The United States Court of Appeals for the Federal Circuit affirmed dismissal of Petitioner's takings claim. The court held that Mr. Mehaffy lacked an investment-backed expectation to develop his property, merely because he acquired the property after Congress enacted the Clean Water Act (CWA), which established the Corps permitting process. The Federal Circuit concluded that this determination of Petitioner's investment-backed expectations, based only on his apparent knowledge of the CWA, constituted a proper regulatory takings analysis.

The questions presented are:

1. Notwithstanding this Court's contrary ruling in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), may a court dismiss a property owner's takings claim solely on the basis of a determination that the owner lacked

investment-backed expectations to develop his property?

2. Notwithstanding this Court's contrary ruling in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), may a property owner be found to lack investment-backed expectations and thus be barred from challenging a land use restriction as a regulatory taking solely because the restriction was enacted before he acquired the property?

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully files this amicus curiae brief in support of Petitioner Mike Mehaffy. [1]

Founded in 1973, PLF is the nation's most experienced public interest legal organization defending Americans' property rights. PLF attorneys have participated as lead counsel or amicus curiae in several landmark cases in this Court in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *E.g.*, *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). PLF attorneys have also served as counsel in important cases before this Court involving the scope of the Clean Water Act. *E.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013); *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009); *Rapanos v. United States*, 547 U.S. 715 (2006). Most recently, PLF attorneys served as lead counsel before this Court in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. ____ (2013), addressing the authority of

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[1] All parties have been given timely notice of PLF's intent to participate in this case as amicus curiae, and all parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court. PLF affirms under Rule 37.6 that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PLF, its members, or its counsel has made a monetary contribution to the brief's preparation or submission.

government to exact public benefits from property owners as part of the development process.

Because of its experience and familiarity with these issues, PLF believes that its brief will assist the Court in considering the Petition for Writ of Certiorari in this case.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision in this case threatens to unmake this Court's regulatory takings jurisprudence. This Court's precedent holds that courts must balance several factors to determine if government regulations place too great a burden on a property owner and require just compensation. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (holding that courts should examine factors such as economic impact, interference with investment-backed expectations, and character of government action). The decision below short-circuited this Court's *Penn Central* balancing test by exclusively focusing on the Petitioner's investment-backed expectations. The result is a new, one-factor takings test that will prevent property owners from prevailing on takings claims if a court finds that they have diminished investment-backed expectations, even if an owner suffers substantial impairment to the value of his property or is targeted for unfair treatment by the government.

Moreover, the Federal Circuit, in assessing Petitioner's investment-backed expectations, resurrected the unconstitutional "notice rule" that this Court expressly repudiated in *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-30 (2001). The notice rule

prevents property owners from challenging regulations that were enacted prior to their acquisition of property. *See* Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. Haw. L. Rev. 533, 537 (2002) (describing notice rule as "an unbounded subversion of property rights"). In this case, the lower court held that the Petitioner lacked investment-backed expectations to develop his property merely because he knew before acquiring the property that he would need to get a CWA permit to develop it. Pet. Cert. App. 9a-10a. The Federal Circuit's reasoning leads to the same problem that caused this Court to reject the notice rule in *Palazzolo*—it does not allow a property owner to challenge a regulation that preexisted his ownership as having effected a taking, even if that regulation deprives the owner of a substantial part of the value of his property.

If the Federal Circuit's decision stands, it will perversely encourage the government to enact the most intrusive regulations possible because doing so will destroy the investment-backed expectations of private property owners, and allow the government to avoid takings liability. The Court should also consider that the decision below, by its own terms, abrogates the development expectations of millions of Americans who own property that may come within the notoriously ambiguous jurisdiction of the CWA, stripping those people of their constitutional right to just compensation.

Few cases present constitutional conflicts that are so obvious, critical, and extensive. The Court should grant the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I

THE DECISION BELOW IS IN SEVERE CONFLICT WITH THIS COURT'S PRECEDENT ON PARTIAL REGULATORY TAKINGS

A. The Decision Below Creates a New *Per Se* Test for Partial Regulatory Takings Claims, Contrary to This Court's Consistent Rejection of *Per Se* Tests

One thing is clear about this Court's partial regulatory takings jurisprudence—the Court eschews *per se* tests. The Court has, instead, consistently affirmed that partial regulatory takings claims must be evaluated on the basis of ad hoc factual inquiries, grounded in the factors set out in *Penn Central*, including (1) the economic impact of the challenged regulation; (2) the extent to which it interferes with investment-backed expectations; and (3) the character of the government action. 438 U.S. at 124; *accord Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986); *see Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1191 (9th Cir. 2012) (weighing three *Penn Central* factors). The Court has hewed to this comprehensive, balancing approach for most regulatory takings claims because it accounts for the fact that there is a "nearly infinite variety of ways in which government actions or regulations can affect

property interests." *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012); *see Tahoe-Sierra Pres. Council*, 535 U.S. at 326 (explaining that no precise formula can tell courts when regulation goes "too far" and effects a taking); J. David Breemer & R.S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 Sw. U.L. Rev. 351, 398-99 (2005) ("[C]ourts must consider and balance all the relevant partial takings factors before determining whether a taking has occurred . . . ."); Calvert G. Chipchase, *From Grand Central to the Sierras: What Do We Do with Investment-Backed Expectations in Partial Regulatory Takings?*, 23 Va. Envtl. L.J. 43, 66-67 (2004) ("The investment-backed expectations factor must be weighed and balanced against the other two factors . . . .").

The Federal Circuit replaced this Court's multi-factor balancing test with a single-factor test that only examines a takings claimant's investment-backed expectations. But that new rule says little about the ultimate issue in a regulatory takings case, which is "the severity of the burden that government imposes upon private property rights." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). As this Court stated in *Lingle*: "A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation." *Id.* at 543. Absent from the Federal Circuit's analysis are two important considerations that determine when the government has unlawfully

taken property. First is the economic impact on the property owner, which is perhaps the most indispensable factor because it establishes the degree to which the challenged regulation interferes with the utility and value of the affected property. *Id.* at 540 ("[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."). Second is the character of the government action. Courts must consider this factor because it reveals whether the property owner has been unfairly singled out to "bear a public burden." *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) (explaining that compensation is required if the challenged regulation suggests that government unfairly targeted the property owner to bear a burden that should be borne by the public). A test that does not consider those factors is not consistent with this Court's takings precedent.

The decision below also stands in marked contrast with *Penn Central* cases from other circuits in which courts have properly stated the rules governing partial regulatory takings claims. In *Laurel Park*, for example, the Ninth Circuit set out and then applied all three prongs of the *Penn Central* test. 698 F.3d at 1188. The issue before the court in that case was whether a city ordinance that severely restricted the ability of manufactured home park owners to convert their properties to alternative uses effected a regulatory taking. *Id.* at 1183. The court walked through each *Penn Central* factor and drew a conclusion on each factor as to which party had the better position based on the evidence. *Id.* at 1189-91. On economic impact, the *Laurel Park* court held that this factor favored the government because the park

owners did not show substantial economic loss resulting from the ordinance. *Id*. at 1189. The court similarly concluded that the investment-backed expectations analysis favored the government, *id*. at 1189-90, but the court also concluded that the character analysis favored the park owners, because the ordinance effectively compelled the owners to continue to bear the burden of providing a public benefit (low-income housing) without distributing the costs of that benefit among the taxpaying public. *Id*. at 1190-91. The court then summarized its conclusion that no taking had occurred by expressly noting that the first two factors weighed against a taking and the third factored weighed in favor of a taking. *Id*. at 1191.

The *Laurel Park* opinion demonstrates how *Penn Central* is a balancing test under this Court's precedent, but the Federal Circuit's *Mehaffy* opinion represents only a truncated version of *Penn Central*. The decision below thus creates a conflict among circuits that should be resolved in line with this Court's partial regulatory takings cases, which speak to the necessity of examining all *Penn Central* factors to ensure that the true impact on the property owner is understood. Most disturbingly, the Federal Circuit's novel, one-factor rule means that property owners will never prevail on a partial regulatory takings claim if a court finds that they have diminished investment-backed expectations, *even* if the government's actions substantially reduce the value of the property or target the owner for unfair treatment, because those factors will not be considered.

The Court should grant certiorari because the Federal Circuit's opinion creates a *per se* rule of

investment-backed expectations that dismantles the careful framework this Court established in *Penn Central*, to the detriment of property owners.

B. The Decision Below Revives the "Notice Rule," Which This Court Rejected in *Palazzolo*

The decision below warrants review for an additional reason—*i.e.*, the decision below establishes the unconstitutional "notice rule" as the touchstone for determining whether a property owner has investment-backed expectations in the first place. *See Palazzolo*, 533 U.S. at 626-30.

In *Palazzolo*, the Court expressly rejected the "notice rule," which bars a property owner from prevailing on a takings claim if the challenged regulation was enacted prior to his acquisition of the property. *Id.*; *see* Eagle at 533 ("[T]he 'notice rule' is the doctrine limiting the regulatory takings claim of property owners who acquire their interest after governmental restrictions are promulgated or deemed foreseeable."). The Court gave three reasons for rejecting the notice rule. First, the notice rule allows the government to put an "expiration date" on the Takings Clause, since transferring title from one owner to another would deprive the new owner of the ability to bring a takings claim and thereby validate any unconstitutional regulations that affect his property. *Palazzolo*, 533 U.S. at 627. Second, the notice rule prejudices current owners because it deprives them of the ability to transfer the full property interest they owned prior to the enactment of the challenged regulation. *Id.* at 627-28. This is because the current owner—who could bring a takings claim and has a

right to just compensation—would be transferring to the new owner property encumbered by regulations for which the new owner could not be compensated. *Id*. Third, the Court held that the transfer of title does not convert an existing regulation into a "background principle" of state law that will prevent a new owner from bringing a takings claim. *Id*. at 629-30 (citing *Lucas*, 505 U.S. at 1029-30). In sum, the Court held that a property owner is not barred from prevailing on a takings claim merely because he acquired the property after the challenged regulation went into effect. *Palazzolo*, 533 U.S. at 630.

Nevertheless, the Federal Circuit concluded that Mr. Mehaffy could not prevail on his takings claim because he must have taken possession of the property with knowledge of the CWA and all of the associated "risks." Pet. Cert. App. 9a-10a. The court determined that this fact alone prevented the Petitioner from establishing that he had investment-backed expectations because he was "on notice" of the CWA. Pet. Cert. App. 9a-10a. Such reasoning runs counter to this Court's rejection of the notice rule in *Palazzolo*. The Court should grant certiorari and reaffirm that a property owner is not barred from prevailing on a partial regulatory takings claim just because the challenged regulation was put into place before he acquired the property.

C. The Decision Below Creates a Strange Incentive Structure That Encourages Government To Avoid Takings Liability by Enacting the Most Intrusive Regulations Possible

The Federal Circuit's opinion also creates the perverse incentive for over-regulation of private

property. The clear goal of this Court's takings jurisprudence is to prevent the government from over-regulating without compensating the landowner, because the Takings Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). A doctrine so fundamental to takings law should not be twisted to allow the government to avoid liability by enacting more restrictive regulations. But the decision below encourages the government to do exactly that. The Federal Circuit determined that Mr. Mehaffy lacked investment-backed expectations—and therefore could not prevail on his takings claim—because he knew that the CWA applied to his property. Pet. Cert. App. 9a-10a. The lesson for government is that it can avoid takings liability by enacting as many property regulations as possible, since those regulations destroy owners' investment-backed expectations, and that makes it impossible for property owners to win takings cases. *See* Breemer & Radford at 375 (" 'If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights . . . .'") (quoting *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring)).

The Federal Circuit's distortion of this Court's takings precedent is the result of the court adopting the unconstitutional notice rule and presuming that the regulations which applied to the Petitioner's property defined the scope of his investment-backed expectations. Members of this Court have warned

against measuring a property owner's investment-backed expectations by reference to the regulations which are alleged to cause a taking. Justice Scalia in his concurring opinion in *Palazzolo* argued that a court should give no weight to a pre-existing regulation that is alleged to effect a taking when determining whether the owner has investment-backed expectations: "The 'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional." *Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring). Even Justice O'Connor's concurrence in *Palazzolo*, on which the decision below relied, does not support the lower court's decision. Justice O'Connor allowed that courts may consider the effect of pre-existing regulations when determining the extent of investment-backed expectations, but not to the exclusion of all other considerations, as in the decision below. *See id*. at 633 (O'Connor, J., concurring) (arguing that regulatory regime in place at the time claimant acquires the property is only one of several factors courts should consider in *Penn Central* analysis).

The Petitioner alleged that the government's enforcement of the CWA caused a taking of his property without just compensation, but the Federal Circuit held that he had not suffered a taking, merely because he knew that the CWA applied to his property. Pet. Cert. App. 9a-10a. The Federal Circuit's opinion deprives the Takings Clause of any force because it allows the Clause to be undercut by the very regulations it was designed to guard against. PLF respectfully urges the Court to grant the Petition and rule that the existence of regulations which are alleged

to cause a taking must not be considered when determining whether a takings claimant has investment-backed expectations to develop his property.

II

THE DECISION BELOW MEANS THAT ANY PERSON WHOSE PROPERTY MAY BE SUBJECT TO THE VAGUE JURISDICTIONAL REACH OF THE CLEAN WATER ACT IS BARRED FROM PURSUING A PARTIAL REGULATORY TAKINGS CLAIM

The Federal Circuit stated that its opinion was not limited to the Petitioner or his property. Instead, the court held that the CWA altered the development expectations of "*all* landowners" whose properties may be affected by the CWA. Pet. Cert. App. 10a (emphasis added). Thus, any property owner whose land comes within the CWA's jurisdiction lacks a reasonable expectation to develop his property, and therefore cannot prove at least one of the elements of a partial regulatory takings claim. This is a sweeping rule which this Court has never endorsed, and which will have dire consequences for property owners nationwide.

In the first place, this Court is keenly aware that the CWA has a nearly limitless reach. The plurality opinion in *Rapanos* reported that the federal agencies which administer the CWA have "interpreted their jurisdiction . . . to cover 270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States." *Rapanos v. United States*, 547 U.S. 715,

722 (2006) (plurality). The CWA covers a vast amount of land because the Corps and EPA have failed to develop any "notion of an outer bound to the reach of their authority." *Id.* at 758 (Roberts, C.J., concurring). The result is that,

> The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to [develop] a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy . . . . [T]he precise reach of the Act remains unclear.

Sackett v. EPA, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

The CWA's expansive scope, in combination with the Corps and EPA's failure to recognize meaningful limits on their authority, creates a perfect storm for government overreach. But the decision below makes matters worse because it means that anyone whose property falls under the CWA's purview will not be able to pursue a partial regulatory takings claim if CWA regulation goes too far, since applying the CWA to private property deprives the owner of investment-backed expectations. The decision below strips millions of people of the ability to seek just compensation for takings of their property.

Finally, it must be emphasized that the decision below will apply to almost every takings claim brought against the federal government. The Tucker Act, 28

U.S.C. § 1491, provides jurisdiction in the United States Court of Federal Claims for any claim against the federal government to recover damages founded on the Constitution, a statute, a regulation, or an express or implied-in-fact contract. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11-12 (1990). Takings claims come within the jurisdiction of the Court of Federal Claims under the Tucker Act. *Id*. at 12 (citing *United States v. Causby*, 328 U.S. 256, 267 (1946)). The Federal Circuit's opinions—including *Mehaffy*—are authoritative in the Court of Federal Claims; therefore, the impact of the opinion below is widespread and should not be underestimated. [2]

[2] PLF understands that the Federal Circuit did not elect to publish the *Mehaffy* opinion. Nevertheless, Federal Rule of Appellate Procedure 32.1 provides that a court may not prohibit or restrict the citation of federal judicial opinions that have been designated as unpublished and which issued on or after January 1, 2007. Fed. R. App. P. 32.1. This Court must presume that lower courts may adopt the reasoning of *Mehaffy* in future cases.

CONCLUSION

The Federal Circuit's decision cannot be reconciled with this Court's precedent on partial regulatory takings. The lower court adopted an unrecognizable and unconstitutional takings test that will preclude any person who owns property within the CWA's expansive jurisdiction from prevailing in a takings challenge. This unfortunate result for property owners is now preordained, even where an owner suffers a substantial loss of value or is singled out for unfair treatment by the government. PLF urges this Court to grant the Petition for Writ of Certiorari.

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Respectfully submitted,

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