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 OF *AMICI CURIAE* OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, THE CATO INSTITUTE AND THE CHAPMAN CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

Karen R. Harned
Counsel of Record
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2048
Karen.Harned@nfib.org
Counsel for Amici Curiae

Luke A. Wake
Of Counsel
NFIB SMALL BUSINESS LEGAL CENTER
921 11th Street, Suite 400
Sacramento, CA 95814
(916) 448-9904
Luke.Wake@nfib.org
Counsel for Amici Curiae

Ilya Shapiro
CATO INSTITUTE
1000 Massachusetts Avenue, NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org
Counsel for Amici Curiae

John C. Eastman
Anthony T. Caso
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
One University Drive
Orange, CA 92886
(714) 628-2666
jeastman@chapman.edu
caso@chapman.edu
Counsel for Amici Curiae

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THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

QUESTION PRESENTED

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court repudiated the so-called Notice Rule, which held that post-enactment purchasers could not state a claim for a regulatory taking arising from restrictions adopted before they took title to their property. In this case, the Federal Circuit pronounced a categorical rule precluding landowners from prosecuting takings claims in almost any case in which the owner acquired title after the enactment of the Clean Water Act in 1972. Does the Federal Circuit's categorical rule revive the Notice Rule that *Palazzolo* unequivocally repudiated?

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INTEREST OF *AMICI CURIAE*[1]

Pursuant to Supreme Court Rule 37, the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center), the Cato Institute, and the Chapman Center for Constitutional Jurisprudence submit this brief *amici curiae* in support of Petitioner Mike Mehaffy.

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs

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[1] Counsels of record have expressly consented to the filing of this brief. *Amici* gave the parties timely notice of our intention to file in this matter and have provided the parties with an electronic copy of this filing. In accordance with Rule 37.6, *amici* state that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The NFIB Legal Center has filed in numerous other property rights cases in recent years, including in *Koontz v. St. Johns River Management Dist.*, 11-1447 (2013), *Arkansas Game & Fish Commission v. United States*, 133 S. Ct. 511 (2012), *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. __ (2010), *Kelo v. City of New London*, 545 U.S. 469 (2005), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). We seek to file here because the Federal Circuit has adopted a categorical bar on partial-takings claims from post-enactment purchasers—a rule that we believe imposes an inappropriate expiration date on the Takings Clause.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, Cato publishes the annual *Cato Supreme Court Review* and files *amicus curiae* briefs with the courts. This case is of central concern to Cato because it implicates Fifth Amendment protections from regulatory takings and is a departure from foundational Supreme Court decisions protecting those rights.

The Chapman Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose mission is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition expressed in the Fifth Amendment that private property can be taken only for public use, and then only upon payment of just compensation. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Kelo v. City of New London*, 545 U.S. 469 (2005), and *Rapanos v. United States*, 547 U.S. 715 (2006).

SUMMARY OF ARGUMENT

The Federal Circuit decided that the particular facts of this takings case were mostly unimportant. *Mehaffy v. United States*, 499 Fed. Appx. 18, 22-23 (Fed. Cir. 2012). The only relevant fact—according to that court—was the fact that Petitioner Mike Mehaffy acquired title to his land after the enactment of the Clean Water Act. *Id*. This fact alone was deemed fatal to his partial-takings claim. *Id*. But such a ruling creates an effective categorical bar on partial-takings claims from post-enactment purchasers, in contravention of Supreme Court precedent.

Specifically, this Court has been clear in stating that the partial-takings balancing test, set forth in *Penn Central Transportation Co. v. New York City*, is an *ad hoc* test, and that notice of an

existing regulatory regime should not be dispositive. 438 U.S. 104 (1978). The Federal Circuit's categorical rule contravenes that rule and an essential holding in *Palazzolo v. Rhode Island*, which unequivocally rejected the theory that mere notice of an existing regulatory regime defeats takings claims brought by a post-enactment purchaser. 533 U.S. 606, 626-29 (2001).

Moreover, the Federal Circuit's decision stands in tension with this Court's ripeness doctrine—such that most takings claims will be snuffed out upon transfer of title, before ever ripening. Such a precedent would cause significant manipulation of the real estate market, to the disadvantage of small business, ordinary landowners and—especially—the elderly. Accordingly, this case raises an issue of nationwide importance.

ARGUMENT

I. IN CONTRAVENTION OF AN ESSENTIAL HOLDING IN *PALAZZOLO V. RHODE ISLAND*, THE FEDERAL AND NINTH CIRCUITS HAVE JOINED TOGETHER IN REVIVING THE 'NOTICE RULE' FROM ITS GRAVE

1. With Exception to its Repeated Admonition Against Bright-Line Rules, The Supreme Court has Never Given Definitive Guidance on How the *Penn Central* Balancing Test Should be Weighed

In 1978, this Court held that there was no readily discernible line between a compensable regulatory taking and non-compensable land use restrictions.[2] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) ("[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and

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[2] *Amici* strongly believe *Penn Central* was wrongly decided and encourage this court to reconsider the idea that there can be no principled way for deciding partial-takings cases. *See* Patrick Wiseman, *May the Market Do What Takings Jurisprudence Does Not: Divide a Single Parcel Into Discrete Segments?*, 19 Tul. Envtl. L.J. 269, 288 (2006) (arguing that *Penn* Central lacks a principled foundation); Michael M. Berger, Tahoe-Sierra: *Much Ado About What?*, 25 U. Haw. L. Rev. 295, 310-12 (2003) (noting commentators of "divergent philosophies agree that the *Penn Central* formula is more trouble than it's worth.") That said, the Federal Circuit's categorical rule—barring post-enactment *Penn Central* claims—should be rejected because it inappropriately places an expiration date on the Takings Clause.

fairness' require that economic injuries caused by public action be compensated by the government."). Instead of offering a principled analytical framework for reviewing regulatory taking claims, *Penn Central* offered only an *ad hoc* balancing test, which considers several relevant factors: (1) the character of the state action; (2) the economic impact of the regulation; and (3) the owner's distinct investment backed expectations. *Id*. at 124. But *Penn Central* offered almost no guidance as to how these factors are to be weighed in practice, other than its insistence that no single factor is dispositive. R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central*, 38 Ecology L.Q. 731, 736 (2011) ("[*Penn Central*] is virtually silent as to what sort of considerations [the 'character of the government action'] was meant to encompass[,] is virtually silent as to how [the economic impact] prong should be evaluated and weighed [and] offers virtually no guidance as to precisely what counts as an investment-backed expectation…"); *see also* John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171, 171-72 (2005).

Unfortunately, the *Penn Central* balancing test offers us little more direction than Justice Holmes' tautological conclusion that "if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Not surprisingly, land-use attorneys, regulatory bodies and courts have struggled to make sense of *Penn Central*. Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. New York, 13

Wm. & Mary Bill Rts. J. 679, 682-83 (2005). Though, the Court has repeatedly referred to *Penn Central* as the "polestar" of the regulatory takings inquiry, *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J. concurring), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 336 (2002), it remains shrouded in a "formless, directionless haze." Radford & Wake, *supra* at 735.

In the absence of bright-line rules, the amorphous balancing test offers little more guidance than Justice Potter Stewart's "I know it when I see it" principle of constitutional construction. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989) (opining that a balancing test suggests "that uniformity is not a particularly important objective with respect to the legal question at issue."). In failing to offer a principled analytical framework for reviewing partial regulatory takings, however, the lower courts have been left to decide these cases in a doctrinal fog. Kanner, *supra* at 683 ("U.S. Supreme Court has refrained from articulating usable rules that might enable lower court judges and lawyers to make reasoned, analytical judgments about the merits of their cases in a consistent fashion."). The result—as illustrated in this case—is that the various courts have applied *Penn Central* in different ways, with an increasing tendency to ossify the factors and or to give dispositive weight to single factor. *See also CAA Assoc. v. United States*, 67 F.3d 1239, 1244 (Fed. Cir. 2011) (adopting a rule that effectively defeats all temporary takings claims

under *Penn Central*). Here the Federal Circuit, in an effort to bring some predictability to the amorphous *Penn Central* test, has quietly rejected this Court's repeated admonition against dispositive rules.

2. Despite Implicit Rejection in *Nollan v. California Coastal Commission*, The Lower Courts Developed the 'Notice Rule' as a Categorical Bar

In the present case the Federal Circuit held that a takings claim will *necessarily* fail under the *Penn Central* balancing test if the landowner acquired his or her property after enactment of a regulatory regime—a regime which is only thereafter definitively determined to preclude development of the land. *Mehaffy v. United States*, 499 Fed. Appx. 18, 22-23 (Fed. Cir. 2012). The rationale is that the third prong of the *Penn Central* test—consideration of distinctive investment-backed expectations—must weigh against the claimant because one cannot reasonably expect to use property in contravention of enacted law. Yet the Federal Circuit offered no explanation as to why this consideration should be *dispositive*.

Of course, this is not the first time that lower courts have proclaimed a categorical bar of this nature. In the 1990s, the lower courts increasingly endorsed the so-called "Notice Rule," which held that whenever land is transferred from one owner to the next all conceivable takings claims are extinguished with passage of title. *See e.g.*, *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 715-17 (R.I. 2000). The

theory was based on the idea that "the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss." *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994).

Such a categorical bar not only establishes a bright-line rule in conflict with *Penn Central*, but also conflicts with the doctrinal underpinnings of other takings cases. *See Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592, 2601 (2010) ("States effect a taking if they recharacterize as public property what was previously private property."); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-65 (1980). For example, in *Nollan v. California Coastal Commission*, the Court held that the Takings Clause will not allow a regulatory agency to condition a development permit on a requirement that the landowner dedicate an interest in his or her property to the public. 483 U.S. 825, 839 (1987).[3] In that case, the challenged condition was administratively imposed as a requirement of the California Coastal Act. *Id.* at 860 (Brennan, J., dissenting). Nonetheless, the Court recognized that the Nollan's could successfully invoke the Takings Clause in challenge to the contested condition. It simply didn't matter that the family had acquired their property after the

[3] *Nollan* recognized a narrow exception for cases where the agency can establish that there is some nexus between the condition imposed and some adverse harm to be mitigated from the proposed project. *Id.* at 837. *Dolan v. City of Tigard* refined this test further, explaining that the condition imposed must also be "roughly proportional" to the harm to be mitigated. 512 U.S. 374, 391 (1994).

enactment of the Coastal Act. *Palazzolo*, 533 U.S. at 629 (quoting *Nollan* for the proposition that "the prior owners must be understood to have transferred their full property rights in conveying the lot.") (citing *Nollan*, 483 U.S. at 834, n. 2).

3. The *Palazzolo* Court Unequivocally Repudiated the 'Notice Rule'

In *Palazzolo v. Rhode Island*, this Court squarely considered and rejected the Notice Rule. 533 U.S. 606, 626-29 (2001). In no uncertain terms, *Palazzolo* held that "[A takings claim] is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Id*. at 630. Thus, the right to prosecute a takings claim inures in the title to the land, such that it transfers to the new owner. *Id*.

In repudiating the Notice Rule, this Court considered whether Anthony Palazzolo was categorically barred from prevailing in his takings claim simply because title had passed to him—by operation of law upon dissolution of his business—after the Rhode Island legislature enacted stringent wetland protections. *Id*. at 613-15. The Rhode Island Supreme Court held that a takings claim advanced by a post-enactment purchaser must fail because: (a) the new owner acquires the property without any reasonable investment-backed expectations; and, (b) an enacted restriction becomes a part of the background principles of property law, which necessarily precludes a successful takings claim. *Id*. at 626-27. This Court expressly rejected both of those theories and the "sweeping" rule that: "A

purchaser or a successive title holder . . . is deemed to have notice of an earlier-enacted restriction and is [therefore] barred from claiming that it effects a taking." *Id.*

The *Palazzolo* decision explained that the Notice Rule would inappropriately "put an expiration date on the Takings Clause." *Id.* at 627. That is so because it would "absolve the State of its obligations to defend any action restricting land use, no matter how extreme or unreasonable." *Id.* *Palazzolo* explained further that the Notice Rule would also work an injustice because it conflicts with the ripeness doctrine the Court enunciated in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which holds that the mere enactment of a regulatory restriction does not ripen a takings claim. *Palazzolo*, 533 U.S. at 628. *Williamson County* precludes a landowner from initiating a takings claim until after there is a final administrative decision making clear the extent to which the restriction applies to the land in question. "It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner." *Id.* at 628.

4. Without Regard to *Palazzolo's* Repudiation, the Federal Circuit and the Ninth Circuit Have Revived the 'Notice Rule'

In a wholesale circumvention of *Palazzolo's* essential holding, the Federal and Ninth Circuits have revived and reminted the Notice Rule. First in *CRV Enterprises, Inc. v. United States*, the Federal Circuit held that a landowner, acquiring title to a property after enactment of a regulatory restriction, lacks standing to bring a takings claim. 626 F.3d 1241, 1250 (Fed. Cir. 2010) ("Because the claim accrued and ripened before plaintiffs acquired the property, plaintiffs cannot state a regulatory takings claim.") (*certiorari* denied). Soon thereafter, in *Guggenheim v. City of Goleta*, the Ninth Circuit adopted a rule with nearly the same sweeping effect, in holding dispositive the fact that the contested ordinance was already in force when the Guggenheims had purchased their property. 638 F.3d 1111, 1120 (9th Cir. 2010) (*certiorari* denied).[4] And now the Federal Circuit has reinforced its sweeping rule by adopting the Ninth Circuit's

[4] The *en banc* decision sought to limit *Palazzolo* to its facts: "[E]ven though in *Palazzolo* title passed to the plaintiff after the land use restriction was enacted, he acquired his economic interest as a 100% shareholder in the corporation owning the land before the land use restriction was enacted, and title shifted to him because his corporation was dissolved, not because he bought the property." Of course, that is a distinction without a difference, as Judge Bea pointed out in dissent. *Id.* at 48-49 (Bea, J., dissenting) (the superficial distinctions that the majority sought to draw between *Palazzolo* and *Guggenheim* "are mere differences, no more significant than that the Palazzolo land was in Rhode Island and the Guggenheim land was in California.").

rationale that, even setting the standing question aside, a post-enactment purchaser must necessarily fail in any partial-takings claim because the new owner acquires the land without any reasonable investment-backed expectations. *Mehaffy*, 499 Fed. Appx. at 22-23.

In this case, the Federal Circuit relied on Justice O'Connor's concurrence in *Palazzolo*, where she stated that the date of acquisition may be relevant to the *Penn Central* inquiry. *Mehaffy*, 499 Fed. Appx. at 22. In making this one consideration dispositive, however, the decision ignores her essential guidance: "[W]e have eschewed '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." *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring); *see also Guggenheim*, 638 F.3d at 1125 (Judge Bea, dissenting). Justice O'Connor was clear in explaining that, "[i]nvestment-backed expectations, though important, are not talismanic under *Penn Central*." *Palazzolo*, 533 U.S. at 634.

II. THE FEDERAL CIRCUIT'S DECISION PRECLUDES ALMOST ALL TAKINGS CLAIMS PREDICATED UPON REGULATORY RESTRICTIONS IMPOSED PURSUANT TO THE CLEAN WATER ACT

1. All Economically Viable Takings Claims Against the Federal Government Must be Initiated in the Court of Federal Claims

The nationwide importance of this case is underscored by the fact that all economically viable takings claims must be initiated in the Court of Federal Claims, wherein Federal Circuit precedent is binding.[5] This is so because the Tucker Act "provides the Court of Federal Claims exclusive jurisdiction over takings claims for amounts greater than $10,000." *Morris v. United States*, 392 F.3d 1372, 1375 (Fed. Cir. 2004); Tucker Act, 28 U.S.C. § 1491(a)(1). This is why "the law of inverse condemnation [is] primarily developed in the [Federal Circuit]." *Lenoir v. Porters Creek Watershed Dist.*, 586 F.2d 1081, 1094 (6th Cir. 1978).

In simple economic terms, the cost of litigating a takings claim cannot be justified when the cost of attorney's fees—alone—would exceed the potential just-compensation award. *See* Damien M. Schiff and

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[5] It does not matter that this decision is "unpublished" because it can still be cited. *See* Federal Rules of Appellate Procedure, Rule 32.1. Moreover, the Federal Circuit's decision—reviving the Notice Rule in *CRV Enterprises*—remains a controlling precedent in the Court of Federal Claims.

Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 Tex. Rev. L. & Pol. 97, 112-13 (2012). With the staggering cost of legal representation, the costs of litigating a highly fact intensive *Penn Central* case will invariably exceed $10,000. Moreover, the cost of exhausting administrative procedures in order to attain a final administrative decision to ripen a takings claim can also exceed $10,000. This is certainly true in the context of a takings claim predicated upon Clean Water Act (CWA) restrictions because the landowner must first apply for—and be denied—a Section 404 dredge permit before it can be definitively said that the CWA forbids development of the land. On average, this process costs over $270,000. *See Rapanos v. United States*, 547 U.S. 715, 721 (2006).

Accordingly, since most any economically viable takings claim must be brought in the Court of Federal Claims—and because the Federal Circuit has revived the Notice Rule—landowners across the country are forever precluded from bringing a partial-takings claim seeking compensation for federal land-use restrictions enacted prior to acquisition of their land.

2. The *Mehaffy* Decision Categorically Absolves the Federal Government of the Duty to Defend Extreme Regulatory Restrictions Under the Clean Water Act, So Long as the Property Retains Some Minute Residual Value

Under the Federal Circuit's rule, any landowner who acquired title to a property after enactment of the Clean Water Act in 1972 is necessarily precluded from advancing a successful *Penn Central* takings claim. *Mehaffy*, 499 Fed. Appx. at 22-23. That fact is fatal in the Federal Circuit. *Id.* at 23 ("The CWA altered the expectation of this right for *all* landowners.") (emphasis added). Regardless of how burdensome the restriction may be, the Federal Circuit holds the federal government is completely immune from any partial takings claim, when advanced by a post-enactment purchaser. *Id.* This rule not only circumvents *Palazzolo*, but also conflicts with this Court's ruling in *Lingle v. Chevron U.S.A., Inc.*, which held that courts must reject any takings test that does not focus on the severity of the burden imposed on the landowner. 544 U.S. 528, 543 (2005) ("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.").

The doctrinal problem is apparent because the Federal Circuit's categorical rule results in an anomaly. The newly revived Notice Rule is tucked into the Federal Circuit's *Penn Central*

jurisprudence because *Penn Central* calls for consideration of the owner's investment-backed expectations; however, that consideration plays no role in the court's analysis when the landowner brings a takings claim under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992). Under *Lucas*, the owner is entitled to just compensation if the restriction deprives the property of all economically beneficial use. *Lingle*, 544 U.S. at 538 (describing *Lucas* as a *per se* test). The date of acquisition does not matter at all in such a case.

Thus, the reminted Notice Rule does nothing to preclude a takings claim where 100 percent of the property's economic value is lost. But, if any partial remnant of economic value remains, the takings claim will be reviewed under the *Penn Central* test—where it is doomed simply because of the date upon which title was transferred. *See Lingle*, 544 U.S. at 538-39 (explaining *Penn Central* applies whenever the property retains any economically beneficial use); *Mehaffy*, 499 Fed. Appx. at 22-23. Yet, it simply doesn't make sense that that this single consideration should be completely fatal where 99.9 percent of the property's value is lost, but entirely innocuous once the remaining .01 percent of value is destroyed. Viewed in this light, it is clear that the Federal Circuit's categorical rule is *not* focused on the actual burden imposed by the regulation, but instead represents an arbitrary means of disposing of what might otherwise be a worthy takings claim.

3. The *Mehaffy* Decision Forever Snuffs Out Regulatory Takings Claims That Have Yet to Ripen

i. Federal Agencies Now Have an Incentive to Run Out the Clock

The federal government has a "self-executing" duty to compensate a landowner when a regulatory restriction amounts to a taking. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304 (1987); *United States v. Clarke*, 445 U.S. 253, 257 (1980). But *Williamson County*'s ripeness doctrine holds that this duty is not triggered until a restriction is definitively imposed. *Williamson County*, 473 U.S. at 186. Indeed, *Palazzolo* made clear that the purpose of the *Williamson County* test is to determine the extent to which an enacted land use restriction actually forecloses development opportunities. *Palazzolo*, 533 U.S. at 625-26. As the Court explained there, it would be inappropriate to preclude a takings claim on the sole ground that the post-enactment purchaser was on notice that a regulatory regime was already in effect at the time of acquisition because a takings claim does not ripen until there is an administrative decision that definitively applies the restriction to the land in question. *Id*. at 628.

In a case like this, a takings claim cannot ripen until there is a final decision from the Army Corps of Engineers (Army Corp.) and or the Environmental Protection Agency (EPA). *Cooley v.*

United States, 324 F.3d 1297, 1301-1302 (Fed. Cir. 2003) ("To be ripe, a taking claim based on a § 404 permit denial must spring from a final decision."). Specifically, in the CWA context, the final decision must (a) determine that the property contains jurisdictional wetlands, (b) delineate the portion of the property subject to CWA regulation, and (c) definitively deny a permit to use that portion of the land. *Palazzolo*, 533 U.S. at 620 (a takings claim only becomes ripe "once ... the permissible uses of the property are known [by the court] to a reasonable degree of certainty."). So until a landowner applies for—and is denied—a costly 404 wetlands fill permit, there is no ripe takings claim. *Cooley*, 324 F.3d at 1302.

But, with the Federal Circuit's reminted Notice Rule, only landowners, who acquired their property prior to 1972, could ever successfully advance a partial-takings claim. This means that for those few landowners with potentially viable (but unripe) claims remaining, the federal government need only sit out the clock until these owners either sell their property or bequeath the land to another party. This invites the government to play new and ingenious games of cat-and-mouse through the administrative process. *See* William M. Hof, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After* Palazzolo v. Rhode Island, 46 St. Louis U. L.J. 833, 855-58 (2002) (explaining how difficult it can be for landowners to obtain a final decision to ripen a takings claim).

ii. It is Exceedingly Difficult to Know When a Property is Subject to Regulation Under the CWA in the First Place

The doctrinal conflict between the Notice Rule and the *Williamson County* ripeness test is especially problematic when we are dealing with the regulatory impositions of the CWA. That is because "[t]he reach of the Clean Water Act is notoriously unclear." *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1375 (2012) (Alito, J. concurring); *see also* Jonathan H. Adler, *Wetlands, Property Rights, and the Due Process Deficit*, 2011-2012 Cato Sup. Ct. Rev. 139, 141 (2012). In his concurrence in *Sackett*, Justice Alito noted how exceedingly difficult it is to delineate protected wetlands. *Sackett*, 132 S. Ct. at 1375. Indeed, on two separate occasions this Court has tried to make sense of the CWA's jurisdictional provisions. *See Rapanos*, 547 U.S. at 732-39 (plurality opinion); *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers,* 531 U.S. 159, 167-74 (2001). But ultimately, as Justice Alito noted, Congress must act to provide greater clarity for the benefit of both the regulators and the regulated community. *Sackett*, 132 S. Ct. at 1375.

With this backdrop, the Army Corps and EPA are currently working to finalize a highly controversial guidance, for delineating regulated wetlands, which critics contend will lead to new and more expansive assertions of CWA jurisdiction. *See* Clean Water Act Definition of "Waters of the United States", Environmental Protection Agency (March

13, 2013).[6] The point in case is that a property that might have been viewed as non-jurisdictional prior to adoption of this guidance could very well be deemed jurisdictional under the new approach. *See* Jeff Kray, *Draft EPA/Corps Guidance Seeks to Expand Federal Jurisdiction Over Wetlands, as Congress, Courts Question Agency Authority* (March 11, 2011).[7] In such a case, the owner of this newly-regulated property would be in an impossible situation if he or she acquired the property after 1972 because the Federal Circuit's reminted Notice Rule holds that the right to initiate a takings claim in challenge to a CWA restriction was already extinguished with passage of title. *See Mehaffy*, 499 Fed. Appx. at 22-23. Of course, the landowner from 1972 never came close to having a ripe takings claim. *See Palazzolo*, 533 U.S. at 625-26.

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[6] Available online at http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm (last viewed June 10, 2013).

[7] Available online at http://www.martenlaw.com/newsletter/20110311-federal-jurisdiction-over-wetlands (last viewed June 10, 2013).

III. THE 'NOTICE RULE' DISRUPTS THE REAL ESTATE MARKET TO THE DISADVANTAGE OF SMALL BUSINESS, ORDINARY LANDOWNERS, AND THE ELDERLY

1. Modest Landowners Usually Lack the Resources to Ripen a Takings Claim Predicated Upon CWA Restrictions, But the 'Notice Rule' Prevents them From Passing a Potential Takings Claim to Anyone Else

Mike and Chantell Sackett, the Petitioners in *Sackett*, "could have been anyone—your neighbors, friends, or relatives." Schiff and Wake, *supra* at 108. They were ordinary individuals, caught up in an ugly jurisdictional dispute with the EPA. They were lucky enough to retain *pro bono* counsel in taking their case to the Supreme Court, where they finally obtained a judgment enabling them to challenge EPA's assertion of CWA jurisdiction over their property in Preist Lake, Idaho. *Sackett*, 132 S. Ct. at 1374. Without *pro bono* representation, it is doubtful that they would have been able to vindicate their right to contest EPA's assertion of jurisdiction. Schiff and Wake, *supra* at 102. Even now it is highly unlikely that they could afford to continue to litigate against EPA, to prove that their property is *not* a jurisdictional wetland, without continuing *pro bono* counsel.

For most individuals of modest means, an assertion of CWA jurisdiction is as good as an

uncompensated taking of their land because they simply lack the resources to ever contest jurisdiction or to apply for a costly 404 permit. There are many thousands of ordinary landowners who, like the Sacketts, might potentially be swept into Army Corps or EPA jurisdiction under the CWA—depending on how aggressively the agencies assert their regulatory reach. *Sackett*, 132 S. Ct. at 1375 ("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 assuming jurisdiction, a small business struggling to keep its doors open, a homeowner living paycheck-to-paycheck, and especially an impoverished family or elderly couple, will have no means of ever ripening a potential takings claim—or for that matter pursuing such a claim in court.[8]

For these modest landowners an assertion of CWA jurisdiction presents an impossible catch-22. The owner cannot make any economically viable use of the portion of land purported to contain jurisdictional wetlands, without risking ruinous daily fines. *Sackett*, 132 S. Ct. at 1368 (2012) (the Sacketts faced daily penalties of $75,000).[9] But without the resources necessary to ripen and litigate a takings claim, the owner has no potential recourse in an inverse condemnation action. The owner's only

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[8] To ripen a takings claim, the owner must first "spend thousands of dollars on permit-processing fees and for numerous environmental studies." Schiff and Wake, *supra* at 111.

[9] The CWA allows for penalties for up to $37,500 daily, and double penalties when the violation persists after issuance of a cease and desist order. *Id*.

choice is to let the property sit idle and unused, without any hope of recouping the money invested in its acquisition. The Federal Circuit's reminted Notice Rule only exacerbates the problem because the owner cannot sell the property without extinguishing any potential takings claim that he or she might have been able to pursue if granted sufficient resources. *Mehaffy*, 499 Fed. Appx. at 22.

2. The 'Notice Rule' Manipulates the Real Estate Market and Forces Modest Landowners to Sell at a Starkly Depreciated Rate

The Notice Rule creates perverse incentives to manipulate the real estate market because any potential partial-takings claim is effectively extinguished with transfer of title. For this reason, as explained by Professor Richard Epstein in an *amicus* filing in *Palazzolo*, the Notice Rule will discourage socially beneficial transactions because a knowledgeable seller may seek to "postpone an otherwise beneficial transfer in order to" first litigate a takings claim. Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 7 n. 2, *Palazzolo v. Rhode Island ex rel.*, 533 U.S. 606 (2001) (No. 99-2047). Conversely, a buyer may forgo a socially beneficial transaction out of concern that the property would be rendered near valueless if the potential takings claim is extinguished on transfer of title. *Id*. at 8.

Such a system works to the particular detriment of small business and ordinary individuals. Whereas major developers and large

corporations can afford "high-powered legal counsel" that might be able to arrange complex transactions—which may conceivably work around the Notice Rule—modest business owners and ordinary individuals will more likely lack the wherewithal to structure deals in such a sophisticated manner.[10] Brief for W. Frederick Williams, III, and Louise A. Williams on the Merits in Support of Petitioner at 9, *Palazzolo v. Rhode Island ex rel.*, 533 U.S. 606 (2001) (No. 99-2047). As a practical matter, most landowners will have no choice but to sell their property at a greatly depreciated value once a new restrictive land use regime is enacted. *Id.* at 13-14.

3. Elderly Landowners Are Particularly Disadvantaged by the 'Notice Rule'

Any rule that effectively extinguishes a takings claim, on transfer of title, inappropriately places an expiration date on the Takings Clause. *Palazzolo*, 533 U.S. at 608-09. Such a rule takes away the historically recognized common-law right to pass all property rights to another party through sale or any other disposition. *See* Robert C. Ellickson, *Property in Land*, 102 Yale L.J. 1315, 1368-69 (1993). This is particularly problematic for elderly landowners who may not have the time—let

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[10] A hypothetical work around would require the buyer to arrange "for the pre-enactment owner to retain [technical] legal ownership of the property and [to] act as a figurehead by applying for all permits under his own name until after the property has been completely developed," and or to prosecute a takings claim on behalf of the purchaser. *Id.*

alone the resources—to ripen and prosecute a takings claim.

The governmental defendant need only run out the clock on the pre-enactment owner to extinguish any potential liability for a partial-taking. Such a strategy gives mechanical operation to President Regan's prescient observation that "[f]reedom is never more than one generation away from extinction." Ronald Reagan, Encroaching Control: The Peril of Ever-Expanding Government, in A Time For Choosing: The Speeches of Ronald Reagan, 1961-1982, at 19, 38 (Alfred A. Baltizer & Gerald M. Bonetto eds., 1983). Indeed, with every successive generation those property rights retained by the people would successively, and permanently, be chipped away until there were virtually no common-law property rights left.[11]

CONCLUSION

This Court should grant *certiorari* to make clear that there is no categorical bar on post-enactment purchasers obtaining just compensation for a severely burdensome regulatory restriction.

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[11] At that point, all "property rights" would be characterized as a positive law. *But see Palazzolo*, 533 U.S. 606, 626-627 (rejecting the Hobbesian idea that "[p]roperty rights are created by the State… [and that the State can] … by prospective legislation… shape and define reasonable investment-backed expectations… [such that] subsequent owners cannot claim any injury from lost value.").

Respectfully submitted,

Karen R. Harned
Counsel of Record
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2048
Karen.Harned@nfib.org

Luke A. Wake, *Of Counsel*
NFIB SMALL BUSINESS LEGAL CENTER
921 11th Street, Suite 400
Sacramento, California 95814
(916) 448-9904
Luke.Wake@nfib.org

Ilya Shapiro
CATO INSTITUTE
1000 Massachusetts Avenue, NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

John C. Eastman
Anthony T. Caso
CENTER FOR CONSTITUTIONAL
JURISPRUDENCE
c/o Chapman U. Sch. of Law
One University Drive
Orange, CA 92886
(714) 628-2666
jeastman@chapman.edu
caso@chapman.edu