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Animas Valley Sand & Gravel, Inc v. the Board of County Commissioners of the County of La Plata, Colorado

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Brief *amicus curiae* in the Colorado Supreme Court on behalf of various Colorado conservation groups. The case involves a takings challenge to a river conservation district restricting sand and gravel operations.

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Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989)
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Several Colorado conservation groups [listed in Appendix A] submit this brief amicus curiae pursuant to Rule 29 of the Colorado Rules of Appellate Procedure in support of the respondent/cross-petitioner the Board of County Commissioners of La Plata County (the Board).

I. Issues Presented for Review

The issues presented for review are set forth in the brief for the Board.

II. Statement of the Case

The Colorado conservation groups adopt the statement of the case presented by the Board.

III. Summary of Argument

The Colorado conservation groups address two issues in this brief amicus curiae: the "property as a whole" issue and the so-called "partial taking" theory. In addressing these issues, the amici seek to assist the Court by explaining and seeking to harmonize the somewhat confusing and discordant pronouncements about regulatory takings by the U.S. Supreme Court.

First, the Court of Appeals erred in analyzing this taking claim exclusively in relation to the 33 acres of the property in the river corridor district while ignoring the petitioner's ability to make valuable commercial use of the other 8 acres of the property. This Court and the U.S. Supreme Court repeatedly have stated that a regulatory taking claim must be analyzed by looking at the "property as a whole." The Court of Appeals' failure to acknowledge, much less apply, the property as a whole rule constitutes plain legal error. The property as a whole rule also mandates that petitioner's claim of a taking of his sand and gravel mining interest be considered in the context of all of his other interests in the property. Following the property as a whole rule, this regulatory taking claim must be rejected.

Second, this Court must reject petitioner's proposal that this Court greatly expand current regulatory taking doctrine by ruling that a taking occurs whenever a regulation can be said to go

"too far." This Court and the U.S. Supreme Court repeatedly have affirmed that a taking requires a showing that a regulation eliminates essentially all of the property's value. While the U.S. Supreme Court's Lucas decision contains dictum that arguably might support a broader theory of regulatory taking, numerous other Supreme Court rulings, both pre- and post- Lucas, make reliance on the Lucas dictum unsupportable. Further, the established rule that a taking requires a showing that essentially all of the property's value has been eliminated is supported by the original understanding of the Takings Clause, the basic purposes of our constitutional system of separated powers, and sound legal policy considerations.

IV. Argument

A. The Court of Appeals Erred By Disregarding the "Property as a Whole" Rule.

The Court of Appeals erred by failing to apply the well-established rule that a taking claim must be evaluated, not in relation to the specific land area or property interest subject to the restriction being challenged as a taking, but in relation to the owner's property as a whole. The Court of Appeals proceeded on the erroneous assumption that this taking claim should be analyzed by focusing on the 33 acres of property in the river corridor district, rather than the entire 41 contiguous acres held by the petitioner. The court's assumption that the 8-acre portion of the property already dedicated to commercial gravel operations could be excluded from the analysis was contrary to this Court's governing precedents as well as a long line of decisions by the U.S. Supreme Court.

Colorado courts have repeatedly affirmed that an alleged taking must be analyzed in relation to the property as a whole. Central Colo. Water Conservancy Dist. v. Simpson, 877 P.2d 335, 347 (Colo. 1994) ("the impact of the challenged action on the property as a whole must be considered"); Williams v. City of Central, 907 P.2d 701, 704 (Colo. App. 1995) ("the interference with rights in the discrete segment of the property affected is measured against the value of the property as a whole").

The U.S. Supreme Court also applies the property as a whole rule. For example, in Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), the Court rejected the argument that the claim that the city effected a taking by prohibiting construction in the airspace above the historic railroad terminal should be considered without regard to the owner's ability to continue to operate the terminal on the rest of the property. The Court held:

Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole.

438 U.S. at 130-31. More recently, in Dolan v. City of Tigard, 512 U.S. 374 (1994), a case involving facts analogous to this case, the Court said that a prohibition on development adjacent to a river would have to be evaluated by looking not only at the restricted portion of the property, but at the entire property, which included a commercial business. 512 U.S. at 385 n.6.

At bottom, the property as a whole rule rests on the obvious fact that allowing a taking claimant to define the relevant unit of property as the restricted portion or interest would convert virtually every regulatory restriction into a taking. The economic impact of a regulation is critical in taking analysis, and the property as a whole rule helps to accurately define the actual effect of a regulation on a particular property. As the U.S. Supreme Court said in Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602 (1993):

To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.

Id. at 644.

In this case, the Court of Appeals, without any discussion of the property as a whole rule, simply assumed that the relevant property unit for the purpose of analyzing this claim was the 33 acres in the river corridor district, and that the remaining, unrestricted portion of the petitioner's property could be excluded from the analysis. In making this erroneous assumption the court below committed plain legal error and the court's ruling on this point should be reversed.

For the same reasons, the Court should reject the petitioner's argument that his interest in the sand and gravel deposits on the property should be considered separate and apart from the rest of the property. Applying the property as a whole rule, the relevant property consists of both the petitioner's mining interests in the property along with all his other interests in this 41-acre property. See Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987) (rejecting the argument that the "support estate" in coal should be analyzed separately from the rest of the taking claimant's property).

The property-as-a-whole issue, by itself, resolves this case in favor of the Board. Under the broadest possible regulatory taking theory—one that this Court must refuse to adopt, for many reasons discussed at length in IV(B) below—the claimant must at least show a "substantial" diminution in property value. See Florida Rock Indus. v. United States, 18 F.3d 1560, 1568 (Fed. Cir. 1994), discussed in Petitioner Brief at 24-27. The petitioner cannot meet this test because, considering the entire 41-acre property as a whole, the petitioner can make several valuable actual or potential uses of the property. At least 8 acres of the property already are devoted to a commercial sand and gravel operation; the river corridor district designation does not interfere with the operation's continuation. Furthermore, with respect to the remaining 33 acres, not all economically beneficial use is foreclosed; the petitioner is entitled to apply for a special exception to carry out several potentially remunerative land uses. In other words, given the substantial actual and potential uses the petitioner can make of his property as a whole, there is no taking in this case under any theory.

B. The Basic Test for a Regulatory Taking is Whether the Regulation Eliminates Essentially All of the Property's value.

Furthermore, regardless of how the relevant parcel is defined, the petitioner's "partial taking" theory is without foundation and should be rejected. Accordingly, even if the analysis were confined to the 33 acres in the river corridor district, the claim would still fail, as the Court of Appeals properly concluded.

1. Colorado Supreme Court and U.S. Supreme Court Decisions Require a Showing That A Regulation Eliminates Essentially All Value.

This Court and the U.S. Supreme Court have repeatedly stated that to establish a regulatory taking a claimant must demonstrate that the regulation eliminates essentially all of the property's value. See Jafay v. Board of County Comm'n'rs, 848 P.2d 892, 901 (Colo. 1993) ("the issue central to a takings inquiry is whether the governmental regulation as applied to the aggrieved landowner's property forecloses all reasonable use of property") (emphasis added); accord Van Sickle v. Bives, 797 P.2d 1267, 1271 (Colo. 1990) ("A land use regulation when applied to a particular property constitutes a taking . . . if it prevents all economically viable use of the property"); see also National Advertising Co. v. Board of Adjustment of City and County of Denver, 800 P.2d 1349, 1351 (Colo. Ct. App. 1990) ("Although a governmental regulation

prohibiting all reasonable use of private property constitutes a taking, property owners are not entitled to receive just compensation when an ordinance reasonably restricts, but does not prohibit, all reasonable use of their property").

The U.S. Supreme Court also has ruled that a taking requires the elimination of essentially all of the property's value. Beginning with Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the Supreme Court has defined regulatory takings doctrine narrowly, equating a regulatory taking with a complete expropriation of the property. The basic issue in a regulatory taking case, the Court said, is whether the regulation "has very nearly the same effect for constitutional purposes as appropriating or destroying it." 260 U.S. at 414. This definition of the basic inquiry in a taking case naturally focuses the analysis on whether the regulation has eliminated essentially all of the property's value.

In Agins v. City of Tiburon, 447 U.S. 255 (1980), the Supreme Court said that, at least when a regulatory taking challenge focuses on the economic burden imposed by a restriction¹, the single basic issue is whether the regulation "denies an owner economically viable use" of the property. 447 U.S. at 260. Likewise, in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), the Court rejected a taking claim, stating that the basic test for a taking based on economic impact is whether the regulation "denies an owner economically viable use of his land." 480 U.S. at 485 (quoting Agins, 447 U.S. at 260).

More recently, in City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999), the Court affirmed a finding of a taking based on jury instructions that read in part as follows:

For the purpose of a taking claim, you will find that the plaintiff has been denied all economically viable use of its property, if, as the result of the city's regulatory decision there remains no permissible or beneficial use for that property. In proving whether the plaintiff has been denied all economically viable use of its property, it is not enough that the plaintiff show that after the challenged action by the city the property diminished in value or that it would suffer a serious economic loss as the result of the city's actions.

526 U.S. at 700. While the parties did not specifically dispute the propriety of this jury instruction, the Supreme Court stated that "the trial court's instructions are consistent with our previous general discussions of regulatory takings liability." Id. at 704.

Equally telling is the Supreme Court's language in Dolan. The specific issue addressed by the Court was whether the city effected a taking by attaching to a land use permit a condition requiring the landowner to grant the public access to her property. In the course of the opinion, however, the Court observed that if the city had simply prohibited further development on the greenway, no taking would have resulted, given that the plaintiff could continue to operate her plumbing supply store on another portion of the property. The basic test for a taking based on economic impact, the Court reiterated, is whether the regulation "den[ies] an owner economically viable use of his land." Dolan, 512 U.S. at 384 (citing Agins, 447 U.S. at 260). Applying that standard, the Court said: "There can be no argument that the permit conditions would deprive petitioner of 'economically beneficial us[e]' of her property as she currently operates a retail store on the lot. Petitioner assuredly is able to derive some economic use from her property." 512 U.S. at 384 n.6 (emphasis added).

In line with these precedents, the overwhelming majority of lower federal and state courts analyze regulatory takings claims by considering whether the regulation eliminates essentially all of the property's value. See, e.g., Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, Va., 135 F.3d 275, 286 (4th Cir. 1998) (rejecting takings challenge when regulation caused "only" a 50 percent diminution in value, because "a regulatory deprivation that causes land to

have 'less value' does not necessarily make it valueless"); Reahard v. Lee County, 968 F.2d 1131, 1135 (11th Cir. 1992) (overturning a finding of a taking where rezoning permitted construction of only one residence on 40 acres, observing that "the only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of the property"), cert. denied, 514 U.S. 1064 (1995); Zealy v. City of Waukesha, 548 N.W.2d 528, 531 (Wis. 1996) ("the rule emerging from opinions of our state courts and the United States Supreme Court is that a regulation must deny the landowner all or substantially all practical uses of a property in order to be considered a taking for which compensation is required"); Clajon Production Corp. v. Petera, 70 F.3d 1566 (10th Cir. 1995) (rejecting an owner's attempt to manufacture a taking claim by focusing on a regulation's impact on only one part of his property, and specifically disagreeing with the Federal Circuit's Florida Rock Industries decision, discussed below).

Despite this extensive precedent, petitioner contends that, even if a regulation does not eliminate essentially all property value, a taking may still be found if the regulation goes "too far." There is no convincing support for this theory, one which would radically expand the law of regulatory takings.

First, petitioner points to "two cases" decided by this Court which petitioner contends support the theory that a taking may be found when a regulation eliminates less than essentially all of the value of the property. See Petitioner's Brief at 17, citing State of Colorado v. The Mill, 887 P.2d 993 (Colo. 1995); Central Colorado Water Conservancy Dist. v. Simpson, 877 P.2d 335 (Colo. 1994). Neither decision, however, contains any holding endorsing this novel test. In The Mill, the Court simply held that a taking claim by the owner of property contaminated with radioactive waste was barred from pursuing his claim by a lack of reasonable investment-backed expectations. Because the Court resolved the case based on the expectations issue, it had no occasion to decide what level or levels of economic impact might support a finding of a taking. Nor did Central Colorado present the Court an opportunity to endorse petitioner's "partial" taking theory. The Court in that case concluded that the water-rights holders could not establish a taking on any possible theory because the evidence showed that the challenged law had a "minimal" effect on water flows and because "no evidence was introduced as to the relative economic values of any specific water rights before and after adoption of the challenged legislation." Central Colorado, 877 P.2d at 348.

Second, petitioner invokes an aberrant ruling by the U.S. Court of Appeals for the Federal Circuit to support its "partial" taking theory. In Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1568 (Fed. Cir. 1994), the court said that a regulation effects a taking if it "deprives the owner of a substantial part but not essentially all of the economic use or value of the property." The Federal Circuit provided little guidance on when a regulation would effect a taking under this "partial" taking test, stating only that it requires "a classic exercise of judicial balancing of competing values." 18 F.3d at 1570.

Apart from the fact that it represents a distinctly minority viewpoint, the Florida Rock ruling does not withstand reasoned analysis. As discussed in section IV(B)(2), immediately below, the partial taking theory is based on an erroneous reading of U.S. Supreme Court precedent. As discussed in section IV(C), the partial taking theory also is inconsistent with the original understanding of the Takings Clause, the basic design of our constitutional system of government, and sound legal policies.

2. Neither Lucas Nor Penn Central Supports the Partial Takings Theory.

Petitioner's "partial" taking theory rests on a superficially appealing, but ultimately unpersuasive, interpretation of two U.S. Supreme Court decisions, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

According to this viewpoint, Lucas established a two-tier regulatory takings test, with the first type of taking involving a "total" elimination of property value, and the second type involving a "partial" reduction in property value. In addition, according to this viewpoint, the Penn Central decision supplies the standards for evaluating a "partial" taking claim; these ostensible standards include the economic impact of the regulation, the owner's investment-backed expectations, and the "character" of the government regulation.

This interpretation—cobbled together from mere dictum and outdated standards—is flawed and should not be followed by this Court.

First and foremost, Lucas does not in fact establish a two-tier regulatory takings test. Lucas involved a prohibition on coastal development that, according to the undisputed findings of the trial court, reduced the value of the property to zero. The Court, by a margin of 6 to 3, with Justice Kennedy concurring, concluded that the South Carolina Supreme Court erred in rejecting the takings claim. The notion that Lucas establishes a two-tier takings test is based on almost offhand dictum in the majority opinion. In dissent, Justice Stevens, criticized the majority's ruling as "wholly arbitrary" on the ground that "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." Lucas, 505 U.S. at 1064. In response, Justice Scalia, speaking for the majority, responded to Justice Stevens by stating:

This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation [in Lucas], but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally.

Id. at 1019 n.8 (quoting Penn Central, 438 U.S. at 124).

One possible interpretation of this language is that even if essentially all property value is not eliminated, as in Lucas, a legitimate taking claim may still be asserted and such a claim would be governed by a distinct standard based on the factors discussed in Penn Central. Such an interpretation, however, represents a gross over-reading of Lucas.

First, Justice Scalia's description of this ostensibly separate Penn Central-test is purest dictum. Lucas involved a reduction in property value of 100% and the Court's decision ultimately rests on that critical fact. Justice Scalia's discussion of the standard that might conceivably apply when the property retains some economic value was obviously unnecessary to the resolution of the case. Thus, the Lucas dictum does not establish the existence of a two-tier test.

Second, while U.S. Supreme Court dictum sometimes has persuasive force, it certainly does not in this instance. Numerous U.S. Supreme Court decisions pre-dating and post-dating Lucas clearly articulate a single taking test based on the elimination of essentially all property value. These decisions simply cannot be squared with the suggestion that the dictum in Lucas created a novel two-tier takings test. Just two years ago, a majority of the U.S. Supreme Court commented in City of Monterey that district court jury instructions were "consistent with our previous general discussions of regulatory takings liability" when the court instructed:

[Y]ou will find that the plaintiff has been denied all economically viable use of its property, if, as the result of the city's regulatory decision there remains no permissible or beneficial use for that property. In proving whether the plaintiff has been denied all economically viable use of its property, it is not enough that the

plaintiff show that after the challenged action by the city the property diminished in value or that it would suffer a serious loss as the result of the city's actions.

526 U.S. at 700 (emphasis added). Neither the Supreme Court nor any lower court in the case suggested that an alternative "partial" taking theory might support recovery. The fact that the Supreme Court believed the jury instructions accurately stated the law indicates that the Court has not in fact embraced a two-tier taking test. Similarly, Dolan v. City of Tigard, another post-Lucas decision, also dispels the notion of a two-tier taking test. See 512 U.S. at 385 n.6 (fact that the owner was able "to derive some economic use from her property" precluded a finding of a taking).

Third, the "partial" taking theory misapplies Penn Central by ignoring the fact that the 3-factor analysis from that case has been completely subsumed by subsequent case law. Twenty-two years ago, in Penn Central the Court famously observed that defining a regulatory taking "has proved to be a problem of considerable difficulty," and, therefore, the Court had resorted to "essentially ad hoc, factual inquiries" to resolve specific cases. 438 U.S. at 124. Nonetheless, the Court continued, it had managed to identify "several factors that have particular significance" for resolving regulatory takings claims:

The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

Id. In petitioner's view, this enumeration of factors represents a separate, free-standing test of a regulatory taking which a court should apply when a claimant cannot meet the more exacting standards of the Lucas test. The Penn Central Court, however, did not describe this three-factor inquiry as a partial taking test and the decision does not support such a theory.

At the outset, the Penn Central Court likely never intended for the "ad hoc" factors described in that decision to serve as a free-standing test for determining whether a taking has or has not occurred. The three factors mentioned in Penn Central provide a judicial decision-maker little real guidance for resolving regulatory taking cases. While each of the enumerated factors appears self-evidently relevant for takings analysis, the Penn Central decision itself provides no clue about how these different factors might be weighted or combined to achieve a decision. As the Court stated, these factors do indeed appear to have "particular significance," but it is hard to arrive at the conclusion that the enumeration of these factors amounts to a determinative test.

Perhaps because of this inherent indeterminacy, the U.S. Supreme has never relied on the ostensible 3-factor Penn Central analysis to uphold a regulatory taking claim. While the Court has referred to the Penn Central 3-factor analysis frequently enough, it has treated this analysis as inadequate, by itself, to actually support a taking claim. Instead, every Supreme Court decision upholding a taking claim over the last several decades has relied on some special factor, such as the fact that: the regulation completely destroyed the value of the property, see, e.g., Lucas (total elimination of value of coastal lots) and Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (total destruction of economic value of trade secret); the regulation resulted in a physical occupation of private property, see, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (forced occupation of private property by cable television equipment),) (exaction resulting in a physical occupation), and Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (same), cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) (analogizing appropriation of a fund of money to a physical occupation); or the regulation abrogated a particularly fundamental type of property interest, e.g., the right to pass on property by inheritance, see Hodel v. Irving, 481 U.S. 704 (1987).

Whatever the Court's original intent in articulating the Penn Central 3-factor analysis over twenty years ago, this analysis has been effectively superseded by the Court's subsequent elaboration of definitive, bright-line rules addressing the key issues in takings analysis. For example, the Penn Central Court referred to the "character" of the regulation as one factor in taking analysis. By this term the Court meant:

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

Penn Central, 438 U.S. at 124. However, in the subsequent Loretto decision, the Court determined that a government-authorized physical invasion of private property always results in a taking. Because the physical-invasion "character" of a regulation, by itself, automatically leads to a finding of a taking, the "character" factor obviously no longer has any logical place, if it ever did, in the putative multi-factor Penn Central analysis.

Similarly, in Ruckelshaus v. Monsanto, 467 U.S. 986 (1984), the U.S. Supreme Court converted the "distinct investment-backed expectations" factor into another automatic taking rule. The Court ruled that, even when the value of a property interest is entirely eliminated, a taking claim is precluded if the claim is barred by a lack of investment-backed expectations. Again, if a lack of investment-backed expectations, by itself, precludes a finding of taking, that factor has no coherent role to play in a putative multi-factor takings analysis.

Finally, Lucas and other cases illustrate the circumstances when "economic impact," the third factor mentioned in Penn Central, can actually result in a finding of a taking. As discussed above, both before and after the Court handed down its decision in Lucas, the Court repeatedly stated that a taking can be established only when a regulation eliminates essentially all of the property's value. In Lucas, where the property was actually reduced in value to zero, the Court was confronted with a case involving the kind of severe economic loss that met the Court's longstanding economic-impact test. Thus, Lucas simply reaffirms the Court's longstanding position that a regulation effects a taking only when it "denies an owner economically viable use" of the property. See Agins, 447 U.S. at 260.

In sum, in light of U.S. Supreme Court regulatory takings decisions over the last two decades, if there ever were a distinct Penn Central 3-factor taking analysis, that analysis has been completely subsumed by the Court's subsequent elaboration of regulatory takings doctrine. The basic rules of regulatory takings doctrine are now relatively clear. A physical occupation, for all intents and purposes, always results in a taking. A lack of investment-backed expectations always precludes a regulatory takings claim, no matter how stringent the regulation. And, a regulatory action that does frustrate an owner's distinct investment expectation, and does result in the elimination of all (or essentially all) value, generally will result in a taking. These individual tests refine and supersede the discussion of the "three factors" in Penn Central. Apart from these determinative tests, there is no separate Penn Central analysis to apply.

Finally, it has been contended that the Penn Central analysis survives Lucas on the theory that Penn Central calls for a distinctive type of analysis from that required under Lucas. Under Lucas, it appears clear, the weight of the public interest being served by a regulation should be irrelevant in the taking analysis. On the other hand, according to the proponents of the partial takings theory, in a taking case not covered by Lucas, the weight of the public interest must be "balanced" against the burden being imposed on the owner.

This attempt to resuscitate the Penn Central test also fails. A balancing of public and private interests cannot play a coherent role in a legitimate Fifth Amendment taking claim. Supreme

Court decisions indicate a valid taking claim presupposes that the government is acting for a legitimate public purpose. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) ("Th[e] basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking") (emphasis added). If a legitimate taking claim presupposes the government is acting for a legitimate public purpose, then the value or importance of the public purpose served by an alleged taking obviously can play no role in determining whether compensation is due under the Fifth Amendment.

This conclusion is supported by common sense as well. The government's liability for a classic taking of property, such as for a road or some other public facility, obviously does not vary with the importance of the public project. Indeed, it would be patently absurd to suggest that the government can deny its obligation to pay just compensation when it takes land for a new school, for example, based on the argument that the school will serve a pressing educational need. But the Fifth Amendment must mean the same thing whether the government initiates a condemnation or an owner brings an inverse condemnation action. First English, 482 U.S. at 315. Accordingly, the value of the public objective being served by a regulatory program cannot, consistently with the basic architecture of takings law, affect the government's alleged liability for a regulatory taking. Because the value of the public objective has no logical place in takings analysis, this Court must reject the idea that the Penn Central analysis somehow stands apart from a Lucas-type analysis because it offers an opportunity to weigh the value of the governmental purpose.

A. The Requirement that a Regulation Eliminate Essentially All Value is Consistent With the Constitution and Sound Legal Policies.

The conclusion of this Court and the U.S. Supreme Court that a regulatory taking requires the elimination of essentially all of a property's economic value is supported by (1) the language and original understanding of the Takings Clause; (2) the need for the judicial branch to defer to elected officials on matters of social policy; (3) the pervasiveness of governmental "givings" and the "reciprocal" benefits of regulations; and (4) the need for the clear and predictable legal rules.

1. The Original Understanding of the Takings Clause SUPPORTS USE OF A SINGLE BASIC TAKINGS TEST.

First, the conclusion that the Takings Clause is triggered only when regulation eliminates essentially all property value is supported by historical evidence concerning the original understanding of the Takings Clause, which was obviously the basic model for Article II, section 15 of the Colorado Constitution.

No less a supporter of property rights than Justice Scalia has acknowledged the narrow scope of the Takings Clause as a matter of original understanding. As he stated in Lucas: "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." 505 U.S. at 1028 n.15. This conclusion is supported by numerous scholarly investigations including, for example, John F. Hart, Land Use Law in the Early Republic and the Original Meaning of the Takings Clause, 94 Nw. U. L. Rev. 1099 (2000); John F. Hart, Colonial Land Use Law and its Significance for Modern Takings Doctrine, 109 Harv. L. Rev. 1252 (1996); William M. Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782 (1995). As these studies explain, there is little direct

evidence of the drafters' intentions in including the Takings Clause in the Bill of Rights. The provision was drafted by James Madison and included in the Bill of Rights at his instigation with no recorded debate.

As a result, interpreters of the Takings Clause have been forced to interpret the meaning of the clause by investigating historical antecedents in colonial charters, the Northwest Ordinance and various state constitutions, as well as by studying contemporary understandings of the scope of government authority to regulate the use of land and other property. The basic conclusion of all this research has been that "the Takings Clause was originally intended and understood to refer only to the appropriation of property." Hart, 94 Nw. U. L. Rev. at 1103.

Since the early part of this century and the U.S. Supreme Court's decision in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), it has been clear that, notwithstanding the original understanding, some regulations are so economically burdensome that they will be deemed takings. Thus, U.S. Supreme Court precedent, at present, forecloses a strict adherence to the original understanding.

Nonetheless, in weighing petitioner's argument for a further expansion of takings doctrine, the original understanding is surely relevant. It is one thing to recognize that a regulation can effect a taking if it "has very nearly the same effect for constitutional purposes as appropriating or destroying it," Mahon, 260 U.S. at 414; it would be quite another to divorce takings law from the original understanding altogether and conclude that a regulation that leaves an owner some economic use of the property also effects a taking. The regulatory takings doctrine already has a questionable constitutional foundation. Petitioner's proposed expansion of the doctrine would rob it of any constitutional legitimacy whatsoever.

In advocating continued respect for the original understanding of the Takings Clause, the conservation amici are, of course, urging the Court to pursue a decidedly conservative course. No less a leader of conservative legal thought than Robert Bork has attacked radical new takings theories, such as that presented by the petitioner in this case, as illegitimate on the ground that they are not supported by the original understanding. See Robert Bork, The Tempting of America: The Political Seduction of the Law 230 (1990) (criticizing the efforts of fellow "conservatives" to promote expansive readings of the Takings Clause on the ground that "these conclusions are not plausibly related to the original understanding of the takings clause").

2. A balance BETWEEN Democratic Governance and the Judiciary SUPPORTS USE OF A SINGLE BASIC TAKINGS TEST.

Petitioner's expansive theory of regulatory takings also must be rejected because it would improperly aggrandize judicial power at the expense of the other branches of government.

Petitioner's broad "partial" taking theory threatens to intrude upon and, taken to an extreme, could literally destroy the other branches of government. As Justice Oliver Wendell Holmes famously remarked:

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Mahon, 260 U.S. at 413. In another case, the U.S. Supreme Court expanded on this theme:

[G]overnment regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase.

Andrus v. Allard, 444 U.S. 51, 64 (1979). In short, an expansive regulatory takings theory would interfere with the ability of the people's elected representatives to pass legislation as they deem necessary and appropriate to address new and emerging social problems.²

Petitioner's expansive regulatory taking theory also conflicts with the general presumption in favor of the constitutionality of legislative action, a presumption rooted in the doctrine of separation of powers and the general rule that matters of social policy should be decided by government representatives directly elected by the people. In a famous commentary on the judiciary's use of constitutional checks on majoritarian decision-making, Supreme Court Justice Robert Jackson wrote:

[Electoral majorities] should, of course, be so restrained when [their] program violates clear and explicit terms of the Constitution, such as the specific prohibitions in the Bill of Rights. But to use vague clauses to import doctrines of restraint, such as "freedom of contract," is to set up the judiciary as a check on elections, a nullification of the process of government by consent of the governed.

Robert H. Jackson, The Struggle for Judicial Supremacy 319 (1941). More recently, Justice Scalia described the dangers of what he termed an "Imperial Judiciary" making constitutional decisions about abortion based on "philosophical predilections and moral intuitions" about issues properly left to the political process. He concluded:

[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by

banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 1002 (1992) (dissenting, J.).

The tradition of judicial deference to the democratic branches and the presumption in favor of the constitutionality of legislation both support a restrained reading of the Takings Clause. Economic legislation of all kinds, including environmental regulation, inevitably alters and adjusts

property interests. But, as the U.S. Supreme Court has said, "legislative [a]cts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality." Eastern Enters. v. Apfel, 524 U.S. 498, 524 (1998) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976)).

This Court also, of course, has a long tradition of according a strong presumption to the constitutionality of statutes. See City of Greenwood Village v. Petitioners for the Proposed City of Centennial, 3 P.3d 427, 440 (Colo. 2000); The People v. Unruh, 713 P.2d 370, 373 (Colo. 1986).

In sum, the petitioner's expansive theory would require this Court to routinely second-guess the fairness of legislation enacted by state and local governments. This vision of the judicial role in enforcing the Takings Clause also cannot be squared with the traditional function of the judicial branch under our system of separation of powers. The Court, therefore, must reject the petitioner's view.

3. "Givings" and "Reciprocity of Advantage" SUPPORT USE OF A SINGLE BASIC TAKINGS TEST

The partial regulatory taking theory also must be rejected because it fails to take into account how regulatory programs confer a "reciprocity of advantage" upon property owners and fails to account for governmental "givings." Consideration of these factors demonstrates, at a minimum, that the partial regulatory taking theory is unnecessary to correct systematic unfairness inflicted upon landowners by government programs. Consideration of these factors also demonstrates that, at worst, a partial taking theory could result in significantly unfair windfalls to landowners at taxpayer expense.

The term "reciprocity of advantage," coined by Justice Holmes, refers to the benefits that landowners receive from regulatory programs, both in their status as regulated owners and as members of society as a whole. Zoning laws represent an obvious example of how reciprocity of advantage helps explain why even stringent regulatory restrictions do not result in takings. As the Supreme Court stated in Agins:

[land owners subject to a comprehensive zoning scheme] share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the [owners] might suffer.

447 U.S. at 262.³

The U.S. Supreme Court also has used the term "reciprocity of advantage" to refer more generally to the benefits that property owners receive from government regulations of all kinds. Some regulations may produce economic losers, but other regulations may produce economic winners, and over the long-term a rough "reciprocity of advantage" is secured for all. For example, in Andrus v. Allard, the Court rejected a takings challenge to a statutory prohibition on the sale of feathers of protected birds, including feathers acquired prior to the statute's

passage. The Court said that the taking claim failed in part because the restriction was "a burden borne to secure the advantage of living and doing business in a civilized community." 444 U.S. at 67 (internal quotations omitted).

Similarly, in Keystone Bituminous Coal, the Court rejected a taking challenge to a law requiring coal miners to leave coal in the ground in proximity to certain surface structures. The Court explicitly relied on the concept of reciprocity of advantage to explain why regulations that eliminate only a part of the value of the property do not result in a taking:

Under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.

480 U.S. at 491.

Finally, in Lucas, Justice Scalia indirectly recognized how reciprocity of advantage helps explain the narrow scope of the regulatory taking doctrine. He stated that when a regulation eliminates all economically beneficial use, as in the Lucas case, "it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' . . . in a manner that secures an average reciprocity of advantage to everyone concerned." 505 U.S. at 1017-18 (quoting Penn Central, 438 U.S. at 124, and Pennsylvania Coal, 260 U.S. at 415). Scalia's description of the Court's "usual assumption" implicitly acknowledges that, outside the Lucas-type total taking case, the concept of reciprocity of advantage justifies denying relief under the Takings Clause.

In addition to the phenomenon of reciprocity of advantage, governmental "givings" also have to be considered in weighing the ostensible fairness arguments on behalf of the partial regulatory taking theory. Public funding of construction of roads, sewers, and other public facilities, agricultural and other subsidies, and other government tax and spending programs contribute significantly to the value of land. Many empirical studies have documented the large size of these givings. A number of these studies are summarized in C. Ford Runge, The Congressional Budget Office's Regulatory Takings and Proposals for Change: One-Sided and Uninformed, 7 *Envtl. L. & Prac.* 5 (1999).

A simple example illustrates the significance of governmental givings. Unzoned agricultural land on the distant urbanizing fringe of a major city has a value of \$10,000 per acre. A major new public highway is constructed adjacent to the property, and the improved access increases the fair market value of the property to \$60,000 per acre. If the county then zones the property for agricultural/low density residential uses, and "reduces" the value of the property to \$30,000, has the owner suffered a compensable taking? Common sense suggests that because the taxpayers created the lion's share of the property's value, the owner cannot properly demand "compensation" for the public's refusal to allow the owner to fully exploit the property's value.

In sum, awarding compensation based on partial reductions in value would run a high risk of "compensating" an owner for an injury that, in a fundamental sense, did not occur, given regulation's reciprocal effects and the pervasiveness of governmental takings. Advocates of an expansive view of takings often rest their arguments on notions of fundamental "fairness." However, a comprehensive and accurate picture of how governmental actions actually affect property values rebuts this argument.

4. THE NEED FOR Bright-line Rules SUPPORTS USE OF A SINGLE BASIC TAKINGS TEST.

Finally, petitioner's "partial" taking theory must be rejected because of the need for the law to draw clear and predictable lines in order for the rule of law to be able to function at all. The rule that a regulation must eliminate essentially all of the property's value satisfies this need because it identifies a relatively discrete and easily identified set of cases. If the law were otherwise, and if a taking could be established merely by showing that a regulation has gone "too far," or that the owner has suffered a "substantial" loss, the law of takings would be a highly unpredictable morass, for landowners and government officials alike.

The importance of bright line rules to the architecture of regulatory takings doctrine is demonstrated by the Supreme Court's decision in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). In that case, the Court justified the adoption of a "per se" rule for "permanent physical occupations" of private property on the ground that it "avoids otherwise difficult line-drawing problems." 458 U.S. at 436. The Court stated: "Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking." *Id.* Implicit in this statement is a recognition that the modest cable television junction box installed on Mrs. Loretto's property did not produce the same visceral reaction. The Court's point is that a per se physical-occupation takings rule, even if somewhat over-broad, is justified because it "presents relatively few problems of proof," *id.* at 437, and avoids the need for intensive examination of the facts of each particular case.

In the same fashion, confining regulatory takings doctrine to the total-loss case also avoids difficult line-drawing problems. For the reasons discussed, a theory of regulatory takings doctrine which excludes so-called "partial" takings is not only consistent with the language and design of the Constitution but will yield results that are consistent with our sense of fundamental fairness. But even if there were some occasional alleged "partial" takings that seem to call out for a judicial remedy, the natural judicial impulse to address these claims would have to be considered in light of the clear advantages, for the regulated and the regulating alike, of a clear and well-defined legal line. Just as the Court's rule for physical occupations is somewhat over-inclusive, the requirement that a regulation eliminate essentially all economic value is arguably under-inclusive. But for the rule of law to prevail, the law needs to speak in clear and unmistakable terms. *See generally* Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989); *cf.* National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 477 (1985) (observing that the Constitution does not require that Congress "select the scheme that a court later would find to be the fairest").

In advocating that the Court adopt the "partial" taking theory, petitioner suggests that the Court could apply a meaningful legal standard simply by applying Justice Holmes' famous "too far" language from the Mahon case. But momentary reflection demonstrates how completely inadequate this phrase is for the purpose of judicial decision-making. The term "too far" is inherently subjective and offers the courts no real guidance in deciding actual cases. So far as we are aware, no court has ever ruled that the "too far" language, by itself, offers a meaningful legal

standard for applying the Takings Clause. This Court should reject the petitioner's invitation to start down that hazardous path.

Finally, Professor Frank Michelman's seminal article, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1196 (1967), contains language which powerfully and eloquently speaks to the need for takings doctrine to include clear legal rules. In his article, which probably has been cited more frequently by the U.S. Supreme Court than any other work on this subject, Michelman surveyed at great length the various factors that he thought relevant to analyzing the fairness issues at the heart of a taking case. In the concluding section of his article, however, Professor Michelman cautioned that a free-wheeling analysis of fairness was unlikely to supply a suitable judicial standard. In a passage strikingly relevant to the issue now before this Court, he wrote:

Our question about fairness as an apt standard for judging thus reflects not a suspicion that judicial personnel are less able than other men to understand or apply the content of the standard, but doubt stemming from a judicial predilection—one which we normally applaud because we deem it healthily responsive to limits we wish to keep in place around the judicial province—to seek an articulate doctrinal packaging for all judgments. The problem is that fairness resists being cast into a simple, impersonal, easily stated formula.

This is not to say that courts cannot usefully be put to work deciding at least some compensability issues. It is rather to suggest abandonment of any idea that courts can or will decide each compensability case directly in accordance with the precept of fairness. Hence, we need to search instead for some workable, impersonal rule believed to approximate in a useful proportion of cases the same result that fairness would dictate. But if that is our choice (or our preferred description of what actually takes place) it is of the utmost importance that we clearly and frankly acknowledge it. The danger here is one of behaving as if courts were doing the whole job when the truth is that they are attentive only to "hard core" or "automatic" cases. To illustrate: a utilitarian approach to the problem might suggest a judicial rule that compensation is due only when there has been either (a) a physical occupation or (b) a nearly total destruction of some previously crystallized value which did not originate under clearly speculative or hazardous conditions. Such a rule would be workable; it would be internally consistent; and it would be ethically inoffensive as far as it goes. True, its cut-off points are arbitrary, and it completely disregards some significant but less discussable dimensions of fairness. But these attributes in the rule would merely reflect its function as a rule for courts to use in the partial performance of a task for which judicial capabilities are not fully adequate.

80 Harv. L. Rev. at 1250-51. Michelman articulates a practical understanding of how the law must translate notions of fairness into a bright-line test and provides powerful support for the basic taking test that requires the elimination of essentially all of the property's value.

V.conclusion

For the foregoing reasons, the Colorado conservation groups urge the Court to reverse the Court of Appeals on the definition of the relevant parcel and affirm the Court of Appeals' rejection of the so-called partial taking theory.

End Notes:

¹ The Agins Court also said that, in the alternative, a regulation may effect a taking if it "does not substantially advance legitimate state interests." 447 U.S. at 260. On its face, this means-ends test is similar to the traditional means-ends inquiry under the Due Process Clause. In light of the latest Supreme Court pronouncements on the issue, it is debatable whether this type of means-ends claim can properly be grounded in the Taking Clause as opposed to the Due Process Clause. See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 732 n.2 (1999) (Scalia, J., concurring in part and concurring in the judgment) (observing that "petitioner forfeited any objection" to the use of the substantially advance standard, and expressing "no view as to its propriety"); see also *id.* at 753 n.12 (Souter, J., concurring in part and dissenting in part) ("I offer no opinion here on whether Agins was correct in assuming that this prong of liability was properly cognizable as

² It is sometimes asserted that an expansive reading of the Takings Clause does not

³In economic terms, a regulated property owner will benefit in either of two ways from the application of the same restrictions to his neighbors. First, restrictions on the use of neighboring properties can protect so-called amenity values, such as quiet and green open space, which benefit the owner and enhance the value of his property. Second, regulatory restrictions can limit the available development opportunities and thereby increase the value of the development opportunities remaining to the restricted owner. See generally C. Ford Runge, *The Congressional Budget Office's Regulatory Takings and Proposals for Change: One-Sided and Uninformed*, 7 *Envtl. L. & Prac.* 5 (1999).