No. 15-214

IN THE

Supreme Court of the United Stat

JOSEPH P. MURR, *et al.*,

Petitioners,

v.

STATE OF WISCONSIN AND ST. CROIX COUNTY,

Respondents.

On Writ of Certiorari to the Wisconsin Court of Appeals

BRIEF OF *AMICUS CURIAE* NATIONAL TRUST FOR HISTORIC PRESERVATION IN SUPPORT OF RESPONDENTS

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June 17, 2016

QUESTION PRESENTED

In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 130–31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

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INTERESTS OF *AMICUS CURIAE*[1]

The National Trust for Historic Preservation in the United States ("National Trust" or "Trust") is a federally-chartered charitable and educational organization. The Trust was established by Congress in 1949 to further the historic preservation policies of the United States and "to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest." 54 U.S.C. § 312102. The National Trust's mission is to provide leadership, education, and advocacy to protect America's diverse historic places and revitalize its communities.

The Trust works closely with hundreds of independent nonprofit preservation organizations at the state and local levels. The Attorney General, the Secretary of the Interior, and the Director of the National Gallery of Art are statutory *ex officio* members of the Trust's Board of Trustees. *Id.* § 312104(a). In turn, the Chair of the National Trust is an *ex officio* member of the Advisory Council on Historic Preservation, an independent federal agency that promotes the preservation, enhancement, and productive use of our nation's historic resources, and advises the President and Congress on national historic preservation policy. *Id.* § 304102(a).

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution towards the preparation or submission of this brief. All parties have filed with the Court written consent to the filing of *amicus curiae* briefs in support of either party or neither party.

With some 750,000 members and supporters nationwide, the National Trust carries out a wide range of programs and activities to advance the public's interest in historic preservation. These activities include the promotion of public policies, legal tools, and tax incentives that support the preservation of America's heritage. The National Trust frequently participates, both as a party and as *amicus curiae*, in legal proceedings that involve the enforcement and application of laws that promote the preservation of historic places. Regulatory takings cases are a prime example, as takings jurisprudence can directly affect preservation efforts. Indeed, the trust participated as an *amicus* in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), and numerous other takings cases in this Court.[2] The Trust brings a vital perspective to regulatory takings issues and has a strong interest in ensuring that takings jurisprudence remains appropriately tailored so that it does not undermine legitimate planning activities and other community protections.

SUMMARY OF ARGUMENT

The Court should not disturb the balance that has prevailed in takings jurisprudence since *Penn Central*

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[2] *Koontz* v. *St. Johns River Water Mgmt. Dist.,* 133 S. Ct. 2586 (2013); *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency,* 535 U.S. 302 (2002); *Palazzolo* v. *Rhode Island,* 533 U.S. 606 (2001); *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999); *Lucas* v. *S.C. Coastal Council,* 505 U.S. 1003 (1992); *Yee* v. *City of Escondido,* 503 U.S. 519 (1992); *Preseault* v. *ICC,* 494 U.S. 1 (1990); *First English Evangelical Lutheran Church* v. *Cty. of L.A.,* 482 U.S. 304 (1987); *MacDonald, Sommer* & *Frates* v. *Yolo Cty.,* 477 U.S. 340 (1986); *San Diego Gas* & *Elec. Co.* v. *City of San Diego,* 450 U.S. 621 (1981); and *Agins* v. *City of Tiburon,* 447 U.S. 255 (1980).

Transportation Co. v. *City of New York*, 438 U.S. 104 (1978). Thousands of local governments have enacted historic preservation ordinances in reliance on that decision and its progeny. Adopting Petitioners' position would disrupt those settled regimes, which have allowed historic preservation to thrive, and would give landowners incentives to manipulate lot lines to impact the takings analysis.

A. The preservation of America's historic sites, buildings, and neighborhoods is essential to maintaining the Nation's connection to our shared history and fostering our local and national senses of community. Historic preservation safeguards the physical manifestations of America's history, allowing us to share the spaces and environments in which the generations before us lived. Further, preservation enhances our quality of life by allowing us to live or work among buildings that are unique, distinctive, or simply beautiful. Preservation also offers environmental benefits, by conserving existing structures and resources and by using less energy than demolition and reconstruction. And it offers economic benefits, by maintaining or increasing property values, boosting investment and job creation, and driving tourist or consumer activity in historic districts.

B. Cities and towns across the country have adopted landmark preservation laws and have established historic districts. These laws, and other efforts by local, state, and national groups, have given a new lease on life to countless irreplaceable buildings over the past half-century.

C. It is vitally important for state and local governments to be able to pursue reasonable regulatory measures to ensure the preservation of historically significant buildings and places. As illustrated by this

Court's seminal decision in *Penn Central*, those efforts occasionally raise questions under the Takings Clause, if property owners contend that a historic preservation measure amounts to a regulatory taking. In *Penn Central*, this Court rejected the property owner's attempt to "divide" its property interest in Grand Central Terminal "into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130. On that basis, the Court held that New York City had not committed a taking by barring the owner from building an office tower in the air space above the Terminal pursuant to the City's "comprehensive plan to preserve structures of historic or aesthetic interest." *Id.* at 132.

In the decades since *Penn Central*, historic preservation efforts have flourished across the Nation, in large part because the Court's approach in that case struck a proper "balance between local control and individual rights that has nourished preservation." J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After Penn Central*, 15 Fordham Envtl. L. Rev. 313, 314 (2004). To be sure, *Penn Central* left some questions unanswered—including the precise application of the parcel-as-a-whole test to contiguous, jointly owned plots of land. But the lower courts, guided by *Penn Central*, have largely reached appropriate results by considering a variety of factors in such cases, without applying the rigid rules (or near-dispositive presumptions) urged by Petitioners here. Thousands of local governments have adopted historic preservation laws, relying on *Penn Central* and the cases applying it, and local historic preservation regulations have been repeatedly upheld by the courts in response to constitutional challenges.

D. The Court should not disrupt the equilibrium that has prevailed since *Penn Central*. It should therefore reject Petitioners' attempt to treat their jointly owned, contiguous parcels of land as separate. Adopting a rule—or even a strong presumption—that each separately recorded plot of land is a discrete "parcel" for takings purposes will skew the balance struck in *Penn Central* and its progeny against efforts to protect and preserve historic places. Accepting Petitioners' position would also encourage property owners to manipulate the takings analysis by subdividing their existing property into separate parcels, artificially increasing the likelihood that a court would find a taking as a result of a regulatory land use law. Cf. *Dist. Intown Props. Ltd. P'ship* v. *Dist. of Columbia*, 198 F.3d 874 (D.C. Cir. 1999).

Although the Court need not adopt a rule that separately recorded contiguous parcels should *always* be aggregated, it should reject Petitioners' effort to upset the "pragmatic workable constitutional context for landmark preservation" that has existed for almost four decades. *See* Byrne, *supra*, at 334.

ARGUMENT

TAKINGS JURISPRUDENCE SHOULD CONTINUE TO ENCOURAGE REASONABLE LAND USE REGULATION, WHICH PROTECTS HISTORIC PROPERTIES.

Historic preservation offers significant benefits, from the communal, to the aesthetic, to the environmental, to the economic. Over the past five decades, Congress, the States, and municipalities across the Nation have recognized the value of, and encouraged, historic preservation efforts. And Takings Clause ju-

risprudence, as developed in this Court and applied in the lower courts, has permitted those efforts to flourish. The Court should not disrupt that balance. And it should not adopt the rule urged by Petitioners, which would enable property owners to manipulate the takings analysis to subvert land use regulation.

Part A explains the aims, goals, and benefits of historic preservation and how regulatory takings affect historic preservation. Part B outlines the growth of historic preservation efforts by the Federal Government and State and local governments. Part C explains how *Penn Central* conclusively settled that historic preservation advances an important public interest and set forth an appropriate test for analyzing regulatory takings challenges as they affect preservation. Part D demonstrates that Petitioners' presumption would disrupt the balance struck by *Penn Central* and disrupt historic preservation efforts and its associated benefits.

A. Historic Preservation Provides An Important Link To Our National Heritage And Offers Significant Economic And Environmental Benefits.

1. In the Takings Clause context, the most relevant aspect of historic preservation is the regulation of private land use, in particular to protect older buildings and neighborhoods. In this arena, historic preservation focuses on "keeping buildings in current use (with adequate safeguards against damaging change), … rather than isolating them as objects of inspirational and antiquarian veneration." Nat'l Trust for Historic Pres., *With Heritage So Rich* 143 (Preservation Books 1999) (1966) (hereinafter "*Heritage*"). Consequently, the goal of most modern preser-

vation efforts is to give old buildings and places a new lease on life by providing them continued purpose.

To be worthy of protection, a building or neighborhood need not be "historically significant," in the sense that a major historical event occurred there or a famous person lived there: "the age and fame of a structure are only two among several elements, including scale, distinctiveness of design, and location, that should be considered in assessing a building's importance to the community." Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 Stan. L. Rev. 473, 491 (1981); see also *Heritage*, *supra*, at 143, 193.

This aspect of preservation is perhaps most visible in the historic districts that were established in the mid-to-late Twentieth Century. Historic districts stop "the construction of incompatible new buildings, or alterations to existing ones, that would detract from the esthetic values of an area in which a large proportion of the buildings were constructed during a significant architectural period or have important associations with the history of the community, state or nation." *Heritage*, *supra*, at 149.

2. Historic preservation activities—and particularly the state and local legislative efforts that are relevant in takings cases—offer a number of important benefits.

First, preservation serves important communal and aesthetic purposes. Most obviously, old buildings are "physical manifestations of a shared history." Sara C. Galvan, *Rehabilitating Rehab Through State Building Codes*, 115 Yale L.J. 1744, 1749 (2006) (arguing that older buildings are a public good). Whether that history is our national history, our local history, or

our personal history, old buildings maintain our links to it. Indeed, old places create a sense of continuity that contributes to a sense of balance and stability; they embody our civic, state, and national sense of identity; they anchor individual memories and connect us with our heritage; they offer a first-hand view into our history; inspire creativity and entrepreneurship; and they create a shared sense of community. Thompson Mayes, *Introduction: Why Do Old Places Matter?*, 29 Forum J. 7, 8 (2015); see *Penn Cent.*, 438 U.S. at 108 (noting the "widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all").

Old buildings also are often more human-scaled and made with more natural materials than is modern construction, and their designs reflect the usage patterns (and the daily lives) of the generations before us. As this Court has aptly observed, "[n]ot only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today." *Penn Cent.*, 438 U.S. at 108.

Second, historic preservation offers environmental benefits. See Nat'l Trust for Historic Pres., Pres. Green Lab, *The Greenest Building: Quantifying the Environmental Value of Building Reuse* vii–xi, 61 (2011) (hereinafter "*Greenest Building*") ("[T]he renovation and reuse of existing buildings of comparable functionality and size, and equivalent energy efficiency levels, consistently yield fewer environmental impacts than demolition and new construction ...."). By definition, preserving an existing structure is a conservationist act, because it "prevents the demolition and waste of existing construction materials" used to build the original structure. See David A. Lewis,

Identifying and Avoiding Conflicts Between Historic Preservation and the Development of Renewable Energy, 22 N.Y.U. Envtl. L.J. 274, 290 (2015). In the same way, preservation "avoids destroying the 'embodied energy' of existing buildings"—that is, "the total of all energy necessary to construct an existing building (including the energy expended to create the building materials), which is lost when a building is destroyed rather than preserved." *Id.* at 290 & n.41; *Greenest Building*, *supra*, at 20. Further, preserving old buildings "capitalizes on traditional energy-efficient building materials and techniques." Lewis, *supra*, at 290 n.43 ("traditional building methods and styles are often environmentally superior and frequently should be revived because [they] account for local environmental issues, use local materials, and avoid wasting resources"). Finally, "[p]reservation also takes advantage of historic structures often being located in existing urban, walkable areas and not in far-flung, sprawling, auto-dependent 'greenfields.'" *Id.* at 290–91; see *Greenest Building*, *supra*, at 91.

Third, historic preservation offers concrete economic benefits:

> Designating a landmark or district as historical typically maintains if not boosts the value of the property, and as an economic development tool, historic preservation has proved its worth. Nearly any way the effects are measured, be they direct or indirect, historic preservation tends to yield significant benefits to the economy.

Randall Mason, *Economics and Historic Preservation: a Guide and Review of the Literature* executive summary (Sept. 2005); see generally Nat'l Trust for Historic Pres., Pres. Green Lab, *Older, Smaller, Better: Measuring how the character of buildings and blocks*

influences urban vitality (May 2014) ("hereinafter "*Older, Smaller, Better*"); Donovan D. Rypkema, *The Economics of Historic Preservation: A Community Leader's Guide* (3d ed. 2014); Donovan R. Rypkema & Caroline Cheong, *Measuring Economic Impacts of Historic Preservation* (2d ed. 2013).

To begin with, the "economics literature clearly comes down in favor of a positive effect of historic districting on property values." Mason, *supra*, at 7. Indeed, numerous studies have "demonstrated that local preservation measures provided an economic stimulus through increased property values." Hunter S. Edwards, *The Guide for Future Preservation in Historic Districts Using A Creative Approach: Charleston, South Carolina's Contextual Approach to Historic Preservation*, 20 U. Fla. J.L. & Pub. Pol'y 221, 224 (2009). For example, a study in New York City "found evidence of a statistically significant price premium associated with inclusion [of a property] in an historic district. The extent of the premium varied from year to year, ranging from 22.6% ... to 71.8%." Mason, *supra*, at 7 (alteration and omission in original). Likewise, a different study found a positive effect on property values in seven of nine Texas cities' historic districts (the other two were inconclusive), "increas[ing] property values in the range of 5–20 percent." *Id.*

The benefits of preservation go well beyond individual properties, however. Scholars have conducted a "significant number" of economic impact studies seeking to determine "what effect investment in historic preservation activity has on the economy of a particular region"—in other words, "'Does preservation pay[]' on more than a project-by-project basis"? *Id.* And "the answer to this question is a resounding

'yes'—historic preservation yields significant benefits to the economy." *Id.*; see also *id.* at 8–10 (collecting studies establishing "the overwhelmingly positive economic impacts that have been reported for historic preservation").

These "[o]ther economic benefits of local preservation ordinances include the protection of historic property owners' investments in these properties through an ordinance's maintenance of the community, the 'fiscal benefits' of reusing existing infrastructure, and an increase in tourism dollars spent within the community." Edwards, *supra*, at 224–25 (footnotes omitted); see also Megan M. Carpenter, *Preserving A Place for the Past in Our Future: A Survey of Historic Preservation in West Virginia*, 100 W. Va. L. Rev. 423, 432–33 (1997) (describing similar studies); Galvan, *supra*, at 1754 (noting the "economic benefits from the tourists [preservation] attracts, social benefits from a more heterogeneous population seeking a broader range of living environments, and cultural benefits from its enhanced setting of artistic activity.").

Many of the economic benefits of preservation can be seen in the National Trust's own Main Street America program, a national network of over 2,000 historic downtowns and neighborhood commercial districts.[3] Main Street America "aims to revitalize communities through the rehabilitation and adaptive reuse of older structures." Galvan, *supra*, at 1753. "Program data consistently report positive economic impacts in their communities." Mason, *supra*, at 10.

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[3] Main Street Am., *Welcome to Main Street America*, http://www.preservationnation.org/main-street/ (last visited June 15, 2016).

Indeed, between the early 1980s and 2005, Main Street America produced $17 billion in public and private reinvestment, averaging $9.5 million per community; a net gain of 57,470 businesses; a net gain of 231,682 jobs; and a total of 93,734 buildings rehabilitated. *Id.*; see also Galvan, *supra*, at 1753–54 & n.38 (reporting even higher figures from the National Trust's subsequent annual report). "All in all, the 'reinvestment ratio' (average number of dollars generated in a community per dollar used to operate the local Main Street program) is documented as $40.35 for every $1 spent." Mason, *supra*, at 10.[4]

In short, historic preservation offers a bounty of significant cultural, aesthetic, environmental, and economic benefits.

B. Local Governments, The States, And Congress Have Recognized The Value Of Historic Preservation.

Until the mid-Twentieth Century, formal historic preservation efforts in the United States were minimal, and focused largely on property already owned by the federal government.[5] See Antiquities Act of

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[4] Tax credits are yet another form of economically productive preservation measure. *See* Nat'l Park Serv., *Federal Tax Incentives for Rehabilitating Historic Buildings: Annual Report for Fiscal Year 2015*, at 1 (Mar. 2016), https://www.nps.gov/tps/tax-incentives/taxdocs/tax-incentives-2015annual.pdf (reporting over 41,250 completed projects since the Federal Historic Preservation Tax Incentives Program's inception in 1976, generating over $78 billion in the rehabilitation of income-producing historic properties).

[5] There were some exceptions, including sporadic preservation efforts undertaken by private groups—most notably, the preservation of Mount Vernon by the Mount Vernon Ladies' Associa-

1906, ch. 3060, §§ 1–2, 34 Stat. 225, 225 (prohibiting unauthorized removal or destruction of "any historic or prehistoric ruin or monument, or any object of antiquity" from, and authorizing the President to declare national monuments on, government land); Oscar S. Gray, *The Response of Federal Legislation to Historic Preservation*, 36 Law & Contemp. Probs. 314, 314–15 (1971). Over time, these programs expanded to allow the government to acquire historic and archaeological sites it did not already own, but "they did little to protect privately-owned properties from destruction in cases where the owners or governmental authorities desired to put the subjacent lands to other uses." Gray, *supra*, at 314. In fact, these laws did not even "restrain such destruction by the United States government itself." *Id.* at 315.

That changed with the passage of the National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915 (NHPA or Act). In the Act, Congress declared that "the spirit and direction of the Nation are founded upon and reflected in its historic past," and that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development." *Id.* at 915. In particular, Congress expressed concern that, "in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation." *Id.* Thus, Congress deemed it "necessary and appropriate" to "give maximum en-

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tion in 1852, after both the federal and Virginia governments declined to purchase the estate. *Heritage*, *supra*, at 132.

couragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities." *Id.*[6]

Congress's concerns were prompted by the Nation's unprecedented post-World War II growth, which saw the demolition of many historic structures. The development of the interstate highway system, suburban sprawl, and the proliferation of urban renewal programs in the 1950s and 1960s all contributed to the rapid destruction of historic buildings and even entire neighborhoods. See *Heritage*, *supra*, at 11; Rose, *supra*, at 475 ("During the 1950s, federal, state, and local governments embarked on urban renewal and highway projects that chewed up aging neighborhoods and distinctive old buildings ….").

Many of these issues were brought to the fore by *With Heritage So Rich*, a book released by the Special Committee on Historic Preservation of the U.S. Con-

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[6] This statement was updated in 2014. It now declares the government's policy to: "foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations"; "provide leadership in the preservation of the historic property"; "administer federally owned, administered, or controlled historic property in a spirit of stewardship"; "contribute to the preservation of nonfederally owned historic property and give maximum encouragement to organizations and individuals undertaking preservation by private means"; "encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment"; and "assist State and local governments, Indian tribes and Native Hawaiian organizations, and the National Trust" with their preservation activities. 54 U.S.C. § 300101.

ference of Mayors and the National Trust in early 1966. The book vividly illustrated the variety and beauty of America's culturally valuable buildings and places—and the rate at which they were being demolished. As Lady Bird Johnson wrote in the foreword, "almost half of the twelve thousand structures" in the National Park Service's Historic American Buildings Survey had "already been destroyed." *Heritage*, *supra*, at 17; see *id.* at 115–21. *Heritage* closed by recommending a "comprehensive national plan of action." *Id.* at 194.

Most of the measures recommended in *Heritage* were adopted in the NHPA later in 1966. In all, the Act "represented an unprecedented codification of the government's commitment—expressed in law and eventually backed up with procedures and regulations—to historic preservation as a matter of federal policy." *Id.* at 7.

Today, all fifty States participate in preservation efforts under the NHPA, such as by nominating properties for inclusion in the National Register of Historic Places or consulting with federal agencies, and many have their own preservation laws as well, often patterned after the Act. See 3 Patricia E. Salkin, *American Law of Zoning* § 27:5 (5th ed. 2016); Nat'l Trust for Historic Pres., *State Historic Preservation Acts*, http://www.preservationnation.org/information-center/law-and-policy/legal-resources/preservation-law-101/state-law/historic-preservation-acts.html (last visited June 14, 2016).

As awareness of historic preservation's importance was growing at the national and state level, local governments began to take action as well. "Starting with Beacon Hill in Boston in the early 1950s, the interest in creating historic districts and landmarks

commissions grew steadily in all parts of the country." *Heritage*, *supra*, at 10. That interest was further spurred by the 1965 demolition of New York City's Beaux-Arts-style Penn Station, built in 1910—"a building unmatched in grandeur by any in the country," *id.* at 114. Penn Station's demolition was a significant factor in the adoption of the New York City landmark law whose application was upheld by this Court in *Penn Central*. Now, "[l]ocal historic commissions and the regulations that they oversee often comprise the most important level of government in historic preservation law." 3 Salkin, *supra*, § 27:5; see *id.* § 27:6 (describing local preservation programs); see also *Penn Cent.*, 438 U.S. at 107 & n.1 (noting that, by 1978, over 500 municipalities had "enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance").

Some municipal preservation laws permit the designation of specific buildings as landmarks, some focus on the creation of historic districts encompassing multiple buildings or even entire neighborhoods, and many (like New York City's) do both. See, *e.g.*, N.Y.C. Admin. Code § 25-301 *et seq.* Such laws typically include restrictions on alteration, construction, or demolition that are designed to preserve the building's, or district's, historic character, *e.g.*, *id.* § 25-305, along with procedures to permit changes that are appropriate for the building or necessary for safety or financial reasons, *e.g.*, *id.* §§ 25-306 to -312. Overall, local preservation laws "demonstrate[] the effectiveness of … municipal program[s] that involve[] cooperation and support from both state governments and the Federal Government." Frank B. Gilbert, *Landmarks and City Hall: How Historic Preservation Contributes to Municipal Government*, 11 J. Nat. Resources &

Envtl. L. 211, 227 (1996) (lauding local preservation programs' "educational features," "the accountability to the public," and "the involvement of concerned citizens").

This Court recognized the fundamental legitimacy of these laws in *Berman* v. *Parker*, 348 U.S. 26 (1954), which rejected a constitutional challenge to the condemnation of a commercial building by the District of Columbia Redevelopment Land Agency. See *id.* at 28–29. The plaintiff argued that "develop[ing] a better balanced, more attractive community" in a blighted area was not a valid public use. *Id.* at 31. The Court disagreed, explaining that the "concept of the public welfare is broad and inclusive, and the "values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.* at 33. *Berman*'s holding "is basic to the present wide acceptance of the preservation of historic districts by architectural control as a legitimate function of government." *Heritage*, *supra*, at 149.[7]

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[7] *See also City of Santa Fe* v. *Gamble-Skogmo, Inc.*, 389 P.2d 13, 18 (N.M. 1964) (citing *Berman* and holding that regulation of architecture in Santa Fe's historic area was permissible); *Opinion of the Justices to the Senate*, 128 N.E.2d 557, 562 (Mass. 1955) (same, as to creation of historic districts in Nantucket); *Maher* v. *City of New Orleans*, 371 F. Supp. 653, 661 (E.D. La. 1974) (collecting cases "sustain[ing] the validity of architectural control ordinances as police power regulation, especially when historic or touristic districts … are concerned"), *aff'd,* 516 F.2d 1051 (5th Cir. 1975).

C. *Penn Central* Reaffirmed The Legitimacy Of Historic Preservation And Struck A Successful Balance Between Regulation And Property Rights.

1. The conclusion that historic preservation laws are permissible exercises of the police power, however, does not resolve whether the application of such a law in a particular case constitutes a taking. That was the question presented in *Penn Central*. There, Penn Central Transportation Co., which owned Grand Central Terminal—"a magnificent example of the French beaux-arts style" and "an ingenious engineering solution to the problems presented by urban railroad stations"—sought to build a fifty-plus-story office tower in the air space atop the Terminal building. See 438 U.S. at 115–17. However, the Terminal had been designated as a landmark under New York City's landmark law. *Id.* at 115–16. The City's landmark commission denied Penn Central's proposals, explaining:

> The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way—with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it.

Id. at 118. Penn Central then filed suit, alleging an uncompensated taking. *Id.* at 119.

This Court rejected the claim. It began by reviewing the development of historic preservation laws, explaining that "[t]hese nationwide legislative efforts have been precipitated by two concerns": First, "large

numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways." *Id.* at 107–08 (footnotes omitted). Second, there is "a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all." *Id.* at 108. Thus, "[h]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people." *Id.* The Court then explained that New York's landmark law "is typical of many urban landmark laws in that its primary method of achieving its goals is … by involving public entities in land-use decisions affecting [historic] properties and providing services, standards, controls, and incentives that will encourage preservation by private owners and users." *Id.* at 109–10, 110–13 (detailing the operation of the law).

The Court next explained that its analysis of whether a government regulation required compensation under the Fifth Amendment was necessarily a case-by-case one, but "several factors … have particular significance," including "the extent to which the regulation has interfered with distinct investment-backed expectations" and "the character of the governmental action." *Id.* at 124. Turning to the merits of Penn Central's claim, the Court noted that it had "recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city," *id.* at 129 (collecting cases), and observed that there was no dispute that Penn Central was "capable of earning a

reasonable return" from the Terminal regardless of the landmark law's restrictions, *id.*

Penn Central nevertheless contended that the landmark commission's denial constituted a taking because it "deprived [the company] of any gainful use of the[] 'air rights' above the Terminal." *Id.* at 130. The Court disagreed:

> [T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. … *"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 and extent of the interference with rights in the *parcel as a whole*—here, the city tax block designated as the "landmark site."

Id. at 130–31 (emphases added). Because the permit denial restricted only the development of the air space above the Terminal, and not the use of the Terminal itself, it did not result in a taking.

Finally, the Court dispensed with Penn Central's argument that the landmark law "effect[ed] a 'taking' because its operation has significantly diminished the value of the Terminal site." *Id.* at 131. Prior cases had rejecting takings claims premised on mere "diminution[s] in property value," and the Court was unpersuaded by Penn Central's effort to distinguish those cases on the ground that landmark laws (unlike

zoning or historic-district legislation) "apply only to selected parcels" and are "inevitably arbitrary or at least subjective." *Id.* at 131–33. The Court pointed out that the landmark law was neither discriminatory nor arbitrary; instead, it "embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city." *Id.* at 132. And the Court concluded that the landmark law's restrictions were not sufficiently severe to require compensation, because they "not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties." *Id.* at 136–38.

2. By reaffirming that "States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city," *id.* at 129, "*Penn Central* settled conclusively that historic preservation advances … an important public interest and thus fall[s] within the police power," Byrne, *supra*, at 317. And the Court's flexible, fact-specific analysis, focused on the impact of government regulations on the "parcel as a whole," 438 U.S. at 131, has permitted historic preservation ordinances like New York City's landmark law to thrive. "*Penn Central* was understood at all times to be a crucial constitutional test for historic landmark protection laws and for historic preservation as land regulation more generally," and thus the Court's decision "constituted a great victory for historic preservation." Byrne, *supra*, at 314–15. Most importantly, "it provided courts a basic approach to regulatory takings claims," which has allowed "historic preservation law [to] come of age in many cities, providing a strong and pervasive regula-

tory system for knitting together existing buildings and new development." *Id.* at 315.[8]

Penn Central has not only produced a doctrinal environment that has well-served preservation efforts, but also crafted the incentives for the drafters of historic preservation laws and the regulators who enforce them. In reliance on the Court's approach in *Penn Central* (and the subsequent cases applying it), cities and towns have structured their preservation laws "to find a compromise that preserves the essentials of a historic resource while permitting adaptation for a remunerative use." *Id.* at 330. Under these regimes, "developers interested in developing landmarks have an incentive to propose developments that have some chance of approval," whereas municipalities "have an incentive to approve responsible proposals, because doing so enhances the political acceptability of preservation review, eases opposition to expansion of the system from additional designations, and allows the municipality to avoid costly and embarrassing takings losses." *Id.* at 333. "Historic preservation law has matured under these conditions to provide significant control over design and scale for much urban development." *Id.* at 334.

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[8] That is true not only because the Court set the federal constitutional standard, but also because *Penn Central* has proven highly influential in state courts' interpretations of their own constitutions. Byrne, *supra*, at 315; *e.g.*, *United Artists Theater Circuit, Inc.* v. *City of Phila.*, 635 A.2d 612, 619 (Pa. 1993) (noting *Penn Central*'s "widespread acceptance" among state high courts as a reason to follow its analysis).

D. Petitioners' Rule Would Disrupt The Post-*Penn Central* Balance And Enable Property Owners To Manipulate The Takings Analysis.

1. The Court should not disrupt the balance that has prevailed in takings jurisprudence since *Penn Central*. That balance has permitted historic preservation efforts to thrive while ensuring compensation to landowners where such measures go too far. To be sure, *Penn Central* (and other decisions applying it) left certain questions unanswered, including the "denominator" question in the "parcel as a whole" inquiry. See *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987); *Dunes W. Golf Club, LLC* v. *Town of Mount Pleasant*, 737 S.E.2d 601, 614–15 (S.C. 2013). But, even in the absence of guidance from this Court on that question, many lower courts have maintained the appropriate balance struck in *Penn Central* by resolving the "denominator" issue with "a flexible approach, designed to account for factual nuances." *Forest Props., Inc.* v. *United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999); see also *Dist. Intown Props.*, 198 F.3d at 880 (considering "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot"); *Ciampitti* v. *United States*, 22 Cl. Ct. 310, 318–19 (1991) (similar); *LaSalle Nat'l Bank* v. *City of Highland Park*, 799 N.E.2d 781, 793 (Ill. App. Ct. 2003), *as modified on denial of reh'g* (Oct. 31, 2003) (similar).[9]

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[9] Although the approach applied in these cases differs from Respondent Wisconsin's proposed rule, which focuses on a landowner's objectively reasonable expectations, see Br. for Respondent State of Wisconsin 27–37, the Trust believes that the

These courts attempt to "identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment," *Giovanella* v. *Conservation Comm'n of Ashland*, 857 N.E.2d 451, 457 (Mass. 2006) (quoting *Ciampitti*, 22 Cl. Ct. at 318–19), in accord with *Penn Central*'s admonition that the broader takings analysis involves "essentially ad hoc, factual inquiries," 438 U.S. at 124. This Court should likewise decline to adopt a categorical rule (or an effectively categorical presumption) that would disrupt the existing balance and depart from the Court's prior focus on "the interest in 'fairness and justice.'" *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002) (applying "the familiar *Penn Central* approach" because a "new categorical rule" would be "too blunt an instrument"); see also *Dunes W. Golf Club*, 737 S.E.2d at 616–17 (noting this Court's practice of "eschewing a 'set formula' for determining when compensation is due" and suggesting that this "flexibility [could] extend[] to the process of determining the relevant parcel"). This approach not only would be consistent with the Court's analysis in prior regulatory takings cases, but also would recognize that cities, towns, and states have drafted their historic preservation laws in reliance on the current doctrinal environment. See *supra* pp. 21–23. Disrupting that *status quo* by adopting a categorical rule of the sort the Court has previously

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two approaches will often lead to similar results, as the factors considered by the lower courts in these cases will also impact whether a certain expected use is objectively reasonable, cf. *id.* at 43–47. In this inquiry, it is the Trust's view that state law, while surely relevant, is not dispositive of the federal constitutional question. The point for present purposes, however, is that the Court should not disrupt settled expectations by departing too far from the prevailing approach.

avoided, see *Tahoe-Sierra Pres. Council*, 535 U.S. at 342, could upend settled expectations in unpredictable ways.

2. Adopting a rigid rule (or a strong presumption), as urged by Petitioners, would also permit landowners to manipulate the takings analysis. The D.C. Circuit's decision in *District Intown Properties*, 198 F.3d 874, aptly illustrates the importance of the "parcel as a whole" question in this regard. *District Intown* involved an apartment complex across Connecticut Avenue from the National Zoo. *Id.* at 876. The apartment building was originally built in 1922,[10] with a large landscaped lawn between the building and Connecticut Avenue. For several decades, the entire property occupied one undivided parcel. In 1998, however, the property owner, District Intown, subdivided the property into nine contiguous lots: one for the apartment building, and eight parcels that divided the lawn into roughly even slices. *Id.* at 877. The company planned to build a row of townhouses on the eight lawn parcels, see *id.*, destroying the landscape and blocking portions of the historic building from view. At the same time, however, local residents petitioned to designate the entire property as a historic landmark under the District of Columbia's historic preservation laws. *Id.*; see D.C. Code § 6-1101 *et seq*. The petition was granted, and the District denied construction permits for the townhouses, explaining that "'any construction destroying the lawn' would be incompatible with its landmark status." 198 F.3d at 878.

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[10] S. Cathedral Mansions, *History*, http://www.southcathedralmansions.com/history/ (last visited June 15, 2016).

District Intown sued the District, claiming an uncompensated taking. *Id.* at 876. The district court and the court of appeals both held that no taking had occurred. The court of appeals recognized that, as in this case, "[t]he definition of the relevant parcel profoundly influences the outcome of a takings analysis." *Id.* at 880. There, the (ultimately dispositive) question was whether "the relevant parcel consist[ed] of the property as a whole"—including the apartment building—or each of "the eight lots for which construction permits were denied." *Id.* at 879. After considering a number of factors, including that all of the lots were "spatially and functionally contiguous," the court held that the relevant parcel was the property as a whole. *Id.* at 880–82. On that basis, the court found that no taking had occurred, because the parcel as a whole was not rendered valueless (as required by *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003 (1992)) and the owner could not show a sufficient intrusion on its economic interests and reasonable investment-backed expectations (under *Penn Central*'s *ad hoc* test).

District Intown illustrates the risks posed by Petitioners' position. If the Court were to adopt an ironclad rule—or even just a strong presumption, see Petitioners' Br. 24–29—that the takings denominator is each separately recorded "parcel," a landowner in District Intown's position would be able to manipulate the takings analysis by subdividing existing lots in an effort to ensure that the portions of their property subject to historic preservation laws or other land use restrictions are "completely taken," requiring compensation. Cf. *Giovanella*, 857 N.E.2d at 459 (a flexible approach properly "minimizes the significance of lot lines in defining the boundaries of the denominator").

CONCLUSION

Since *Penn Central*, takings jurisprudence has struck an appropriate balance between individual property rights and the historic preservation policies of state and local governments. The Court should decline Petitioners' attempt to disrupt this balance with a categorical rule (or presumption) that contiguously owned parcels are always analyzed separately for takings purposes.

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June 17, 2016