# DAUNTING ODDS: REGULATORY TAKINGS CLAIMS IN THE UNITED STATES CIRCUIT COURTS OF APPEALS

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## INTRODUCTION

Since the latter half of the 20th century, the federal Circuit Courts of Appeals have ruled on numerous regulatory takings claims. The cases cover a diverse plethora of issues and industries allegedly affected by regulations, ordinances, and statutes passed by government entities throughout the country. While the factors surrounding the cases are different, the outcomes are shockingly parallel.

This paper aims to compile and compare the many cases under regulatory takings law. Part I establishes a strong foundation by providing a thorough background into Takings Law. This section not only describes regulatory takings but also introduces seminal cases such as *Penn Central Transportation Company v. City of New York*, which produced the standard test applied to regulatory taking claims today.[1]

Part II consists of a detailed overview of each circuit's approach to regulatory takings claims. Included in each analysis is a breakdown of how many regulatory takings claims have been decided by each court, how many times the courts have ruled in favor of the government entity compared to the claimant, the industries allegedly affected, reasoning commonly asserted by the courts as to why the regulatory taking claims have failed, and how the courts have applied the *Penn Central* test.

Part III then analyzes whether the courts have remained consistent, whether the courts seem to protect property rights or promote government intrusion, whether a prediction can be made on how the courts will rule on regulatory taking claims in the

[1] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 104-06 (1978).

future, and whether bringing a successful regulatory takings claim is equally as daunting in each circuit.

## I. TAKINGS LAW

An ever-controversial topic in property law is the government's power to take an individual's property and convert it for public use. When private land is converted for public use, the landowner is often left disgruntled and with massive disdain for the government. To the landowner, a conversion of property seems as if the government has imposed on his or her property rights by unsympathetically ripping the landowner's property right out from under him or her. While this action may initially seem like theft, a taking of this nature is well within the federal government's power to do so.

The federal government's ability to physically condemn a landowner's property to convert it for public use stems from the government's power of eminent domain. When the government utilizes this power to take someone's land, the landowner must be provided with just compensation. This requirement was made mandatory by the ratification of the Fifth Amendment of the United States Constitution, which includes the Takings Clause.

### *A. The Takings Clause*

The Takings Clause provides that a government entity is not authorized to take private property for public use without providing the property owner with just compensation.[2] Specifically, the Takings Clause states, "[N]or shall private property be taken for public use, without just compensation."[3] Prior to the Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*, the Takings Clause only provided protection against direct appropriation of physical property.[4] Now, property is not limited to real property; the Takings Clause protects "every sort of interest the citizen may possess."[5] Because of this development, the Takings Clause covers not only physical takings but also regulatory takings.

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[2] U.S. CONST. amend. V.

[3] *Id.*

[4] Horne v. Dep't of Agric., 576 U.S. 350, 360 (2015).

[5] United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945).

### *B. Regulatory Takings*

There are two forms of takings governed by the Takings Clause: physical takings and regulatory takings. Physical takings occur when the government utilizes its eminent domain powers to physically condemn a landowner's property in order to convert it for public use. While a physical taking involves the condemnation of actual property, a different classification of a taking occurs without the government physically acquiring property. This type of taking is referred to as a regulatory taking. A regulatory taking occurs when a body of government imposes a statute, regulation, or ordinance that not only restricts a landowner's ability to use his own property but also negatively impacts the economic value of the property.[6] While imposing and enforcing regulations that are detrimental to property values are well within the government's power, such regulations may only be enforced to a certain extent; regulations that go too far are considered regulatory takings.[7]

### *C. How Far is Too Far? The Penn Central Test*

To determine if a regulation goes too far, the United States Supreme Court applies the test developed in *Penn Central Transportation Co. v. City of New York*.[8] In *Penn Central*, New York City adopted the Landmarks Preservation Law, which aimed to preserve historic landmarks by placing restrictions on the development of historic buildings and "areas with historic or aesthetic importance."[9] Once a building or area was designated a landmark, the property owner's use of the site was restricted.[10] In 1967, the Grand Central Terminal, owned by Penn Central Transportation Company ("Penn Central"), was designated as a landmark.[11] The following year, Penn Central entered into a contract with Union General Properties to construct a multi-story office building directly above Grand Central Terminal.[12] Penn Central applied to have the decision to designate Grand Central

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[6] Cedar Point Nursery v. Hassid, 594 U.S. 139, 148 (2021).
[7] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
[8] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).
[9] *Id.* at 107-09.
[10] *Id.* at 111.
[11] *Id.* at 115-16.
[12] *Id.* at 116.

Terminal as a landmark altered; however, the commission that governed the application process denied Penn Central's application.[13] Subsequent to the denial, Penn Central brought suit against the City of New York, alleging "the application of the Landmarks Preservation Law had 'taken' their property without just compensation in violation of the Fifth and Fourteenth Amendments."[14]

To determine if the Landmarks Preservation Law went too far, the Supreme Court considered the following factors: 1) the economic impact of the regulation, 2) the extent the regulation interferes with reasonable investment-backed expectations, and 3) the character of the governmental action.[15] The Court held that the Landmarks Preservation Law did not interfere with Penn Central's use of the terminal; Penn Central maintained the ability to use the terminal as Penn Central had for sixty-five years.[16] Furthermore, the Court found that the Landmarks Preservation Law did not affect Penn Central's ability to profit from the terminal.[17] Penn Central failed to show that the property suffered a diminution in value.[18]

Since the Court first developed the *Penn Central* test in the 1978 opinion, the *Penn Central* test has been the standard test applied to almost all regulatory taking claims.[19] Supporters of the test have praised it for its flexibility.[20] This characteristic derives

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[13] *Id.*

[14] *Id.* at 119.

[15] *Id.* at 124.

[16] *Id.* at 136. Here, the Court provided a list of cases which involved governmental acts that interfered with the owner's use of the land. *See* Goldblatt v. Town of Hempstead, N.Y., 369 U.S. 590 (1962); *see also* Miller v. Schoene, 276 U.S. 272 (1928); United States v. Causby, 328 U.S. 256 (1946); Griggs v. Allegheny Cnty., Pa., 369 U.S. 84 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

[17] *Id.* ("More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal, but also to obtain a 'reasonable return' on its investment.")

[18] *Id.* at 131.

[19] Mark W. Cordes, *The Fairness Dimension in Takings Jurisprudence*, 20 KAN. J.L. & PUB. POL'Y 1, 3 (2010).

[20] Timothy M. Harris, *No Murr Tests: Penn Central is Enough Already!*, 30 GEO. ENV'T L. REV. 605, 609 (2018) (citing Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 633 (Minn. 2007) ("The Penn Central approach is flexible with the factors being balanced.")).

from the test's subjective standards,[21] which grants judges the opportunity to individually determine how much weight to apply to each of the test's three prongs, given the unique set of facts in each case.[22] Doing so allows judges to attempt to reach a "fair and just" accommodation between the government and landowners without interference from a rigid test.[23] After all, reaching a "fair and just" accommodation is the purpose of the *Penn Central* test and the Takings Clause.[24]

### *D. Exceptions to the Penn Central Test - Per Se Takings*

While courts apply the *Penn Central* test to determine the constitutionality of regulations that may violate the Fifth Amendment, the *Penn Central* test does not apply to claims in which the government physically appropriates property even if the physical appropriation was the result of a regulation, ordinance, or statute.[25] When a regulation results in a physical taking, that taking is referred to as a per se taking.[26]

There are two categories of *per se* takings. The first category involves a regulation that compels a property owner to suffer a physical invasion of his property.[27] The second category involves a regulation that denies all economically beneficial or productive use of land.[28] If a takings claim involves either of the two

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[21] Charles Kausen, *Taking One for the Team: COVID-19 Eviction Moratoria as Regulatory Takings*, 59 SAN DIEGO L. REV. 345, 387 (2022).

[22] Calvert G. Chipchase, *Lucas Takings: Why Investment-Backed Expectations are Irrelevant When Applying the Categorical Rule*, 24 UNIV. HAW. L. REV. 147, 156 (2001).

[23] Mark W. Cordes, *The Effect of Palazzolo v. Rhode Island on Takings and Environmental Land Use Regulation*, 43 SANTA CLARA L. REV. 337, 372 (2003).

[24] *Id.*

[25] Cedar Point Nursery v. Hassid, 594 U.S. 139, 148-50 (2021).

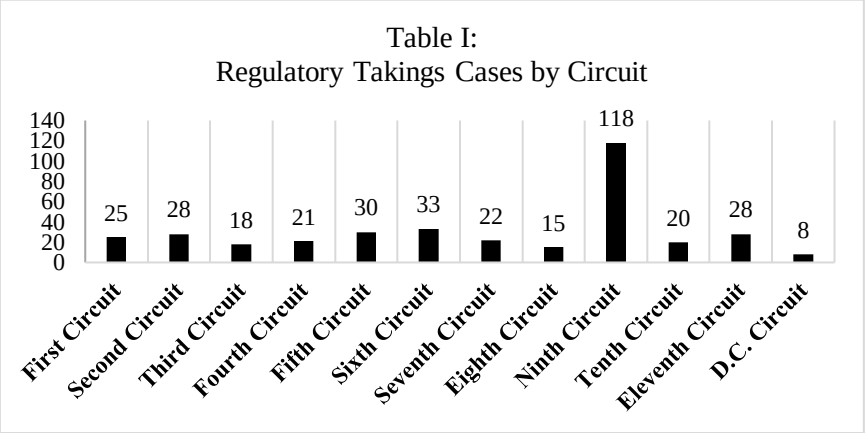
[26] *Id.* at 149 ("Whenever a regulation results in a physical appropriation of property, a per se taking has occurred, and *Penn Central* has no place.").

[27] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992). ("In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."); *see* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (installation of a cable box constituted a per se taking).

[28] In an attempt to justify this category of per se takings, the Lucas Court refers to Justice Brennan's dissent in San Diego Gas & Elec. Co. v. San Diego in which Justice Scalia, writing for the Court states, "Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1018.

circumstances, the property owner is entitled to compensation, regardless of the *Penn Central* factors.[29] The *Penn Central* test is a balancing test that weighs public and private interests.[30] One commenter explains the effects of the balancing test by stating, "in its simplest terms, *Penn Central* says: If the public interest outweighs the private, no taking is found; if the private outweighs the public, courts should find a taking."[31] *Per se* takings are not subject to a balancing test. Instead, they are considered "pre-balanced" because "they are categories of government action so extreme and intrusive that they always outweigh the public interest."[32]

## II. CONTRIBUTION: A BRIEF LOOK AT THE NUMBERS




[29] Kausen, *supra* note 21, at 364 ("If a court finds a per se taking, the government must compensate the property owner regardless of the other Penn Central factors."). (citing First Eng. Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987)).

[30] Angela Schmitz, *Taking Shape: Temporary Takings and the Lucas Per Se Rule in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Authority*, 82 OR. L. REV. 189, 193 (2003).

[31] *Id.* at 189-90.

[32] *Id.* at 190.

In total, the Circuit Courts of Appeals have decided 366 cases involving regulatory takings claims.[33] Excluding the Ninth Circuit, the average number of cases each circuit decides is twenty-one cases. As detailed in Table One, the Ninth Circuit is a clear outlier having decided a number of cases drastically above the twenty-one case average throughout the other circuits. This substantial difference in the number of regulatory takings cases is most likely due to the fact that the Ninth Circuit has consistently had a substantially higher number of cases commenced there, in general.[34] For example, in 2022, 42,900 total cases were filed in the Circuit Courts of Appeals; 9,018 of the 42,900 cases were filed in the Ninth Circuit alone.[35] The second highest number of cases were filed in the Fifth Circuit with 6,194 cases.[36] In 2023, 40,681 total cases were filed, and 7,911 of those were filed in the Ninth Circuit.[37] Furthermore, the Fifth Circuit once again had the closest number of cases filed with 5,736.[38]

[33] The data discussed in this article stems from the attached spreadsheet I created during the research process which is available here: https://perma.cc/4HE2-MT67. The spreadsheet is a compilation of regulatory takings cases I located on Westlaw. In order to locate these cases, I used "regulatory takings" as the search term and then filtered the results by jurisdiction to include only cases from the Circuit Courts of Appeals. Next, I analyzed each case in order to determine whether the court directly addressed a regulatory takings claim, what type of industry was allegedly affected, the court's decision, and the reasoning behind the court's decision. I did not include cases that merely mentioned regulatory takings claims but did not directly address a regulatory takings claim issue. In cases that involved the courts' application of the *Penn Central* test, I included the results of each test and which of the three prongs favored the claim.

[34] *See* Table B—*U.S. Courts of Appeals Federal Judicial Caseload Statistics*, U.S. CTS. (March 31, 2023), https://www.uscourts.gov/statistics/table/b/federal-judicial-caseload-statistics/2023/03/31 [https://perma.cc/TZ4B-T2Z9] (Table B dataset available at https://perma.cc/PU8Y-P27J).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

| **Table 2: Regulatory Takings Cases by State** | | | | | |
|---|---|---|---|---|---|
| **1st Circuit** | | **5th Circuit** | | **9th Circuit** | |
| MA | 8 | TX | 17 | CA | 72 |
| PR | 6 | LA | 10 | WA | 13 |
| RI | 5 | MS | 3 | OR | 12 |
| ME | 4 | **6th Circuit** | | NV | 8 |
| NH | 0 | OH | 15 | HI | 5 |
| **2nd Circuit** | | MI | 10 | AK | 3 |
| NY | 21 | TN | 5 | AZ | 3 |
| CT | 6 | KY | 3 | ID | 1 |
| VT | 0 | **7th Circuit** | | MT | 1 |
| **3rd Circuit** | | IL | 10 | **10th Circuit** | |
| NJ | 11 | WI | 9 | CO | 6 |
| PA | 5 | IN | 3 | OK | 5 |
| DE | 0 | **8th Circuit** | | UT | 4 |
| **4th Circuit** | | MN | 5 | NM | 3 |
| NC | 8 | IA | 4 | WY | 1 |
| MD | 7 | AR | 3 | KS | 1 |
| WV | 2 | MO | 2 | **11th Circuit** | |
| VA | 2 | SD | 1 | FL | 21 |
| SC | 2 | NE | 0 | GA | 4 |
| **D.C. Circuit** | | ND | 0 | AL | 3 |
| D.C. | 8 | | | | |

In addition, the population of states may also play a factor. In 2023, the states with the largest populations were California, Texas, Florida, and New York respectively.[39] Along with large populations, these states also had the largest number of regulatory cases that arose from their district courts.[40] Other than population, certain industries within each state could have an impact on the number of regulatory takings cases filed there. For example, states with more urban areas and higher populations are more likely to have a larger quantity of residential rental units, which are often the center of many regulatory takings claims and may lead to a higher number of regulatory takings cases filed in that state.[41]

| **Table 3: Regulatory Taking Cases and Outcomes** | | | |
|---|---|---|---|
| **Circuit** | **Number of Cases** | **Decisions in Favor of the Claimant** | **Success Rate** |
| First | 25 | 2 | 8.0% |
| Second | 28 | 1 | 3.6% |
| Third | 18 | 0 | 0.0% |
| Fourth | 21 | 1 | 4.7% |
| Fifth | 30 | 3 | 10.0% |
| Sixth | 33 | 2 | 6.1% |
| Seventh | 22 | 2 | 9.1% |
| Eighth | 15 | 1 | 6.7% |
| Ninth | 118 | 5 | 4.2% |
| Tenth | 20 | 1 | 5.0% |
| Eleventh | 28 | 6 | 21.4% |
| D.C. | 8 | 0 | 0.0% |
| All | 366 | 24 | 6.6% |

[39] *Resident Population of the U.S. in 2023, by State*, STATISTA, https://www.statista.com/statistics/183497/population-in-the-federal-states-of-the-us/ [https://perma.cc/FK5H-9WVT] (last visited Nov. 23, 2024).

[40] *See supra* note 33.

[41] *Id.*

Table 3 includes the total number of regulatory takings cases compared to the number of decisions the courts have rendered in favor of the claimants.[42] Out of the 366 total cases, only twenty-four decisions have been rendered in favor of the claimant throughout every circuit.[43] Twenty-four decisions favoring the plaintiff out of 366 total cases indicates that claimants have a 6.6 percent chance of successfully bringing a regulatory takings claim in a federal Circuit Court of Appeals. Individually, the success rates of almost every circuit are close, excluding the Eleventh Circuit. The Eleventh Circuit is a clear outlier with this circuit having a significantly higher success rate than the others. The reason behind this phenomenon is unclear. The abnormally high success rate may be due, in part, to the Eleventh Circuit being in a more conservative area of the United States. However, if this was the case, the Fifth Circuit, which is regarded as the most conservative circuit, should have a success rate proportionate to the Eleventh Circuit's success rate. While the success rate in the Fifth Circuit is the second highest, the difference is only slight, which is not enough to support this argument.

### *B. Analyses of Each Circuit's Approach to Regulatory Takings Claims*

The following analyses involve cases hailing from the Courts of Appeals in each federal circuit which directly address regulatory takings claims. The earlier decisions stem from the mid-1970s with the most recent decisions having been released in 2023. A near half century-span of decisions grants us the opportunity to identify the evolution of each court's approach to regulatory takings claims, determine whether the courts have remained consistent, predict how the courts will rule in the future, and speculate whether the courts have seemingly protected property rights or promoted government intrusion. Furthermore, the cases contained in the analyses consist of regulatory takings claims that allegedly impact not only individual real property but a diverse array of industries.

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[42] *See supra* note 33 for specific cases in each Circuit in which the court ruled in favor of the landowner. Decisions by the court that appear in favor of the claimant but were remanded on grounds of ripeness were not included as a decision in favor of the claimant. *See infra* notes 69-71 and the accompanying text.

[43] *See supra* note 33.

The breakdowns of each circuit include the total number of how many cases involving regulatory takings claims each circuit has addressed, which states the claims have originated from, which industries were allegedly affected, and reasons as to why the claims have failed.

### 1. First Circuit

The First Circuit Court of Appeals has decided on regulatory takings claims on twenty-five occasions from 1989 to 2023. The majority of these cases originated from the State of Massachusetts; however, the remaining states were not far behind, excluding New Hampshire. In total, eight cases arose from Massachusetts, six cases arose from Puerto Rico, five cases arose from Rhode Island, four cases arose from Maine, and none arose from New Hampshire.[44] Two cases, however, did not originate from within a state; one case came before the First Circuit from the United States Nuclear Regulatory Commission, and another case was appealed from the United States Tax Court.[45]

The twenty-five cases decided by the court contained claims involving arguably the most diverse array of industries. A non-exhaustive list of the industries includes oil and gas, property development, tobacco, pet stores, waste disposal, pharmacies, dairy farms, and milk processors.[46]

In this circuit, claimants have rarely received a favorable decision. Out of twenty-five cases, a claimant has prevailed on only two occasions, indicating that claimants have around an eight percent chance of receiving a favorable opinion.[47] In 2002, the court ruled in favor of tobacco companies who challenged a Massachusetts statute requiring disclosure of all ingredients contained in their tobacco products.[48] Seven years later, the court

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[44] *See supra* Table 2; *see also supra* note 33.

[45] *See generally* Citizens Awareness Network, Inc. v. U.S. Nuclear Regul. Comm'n, 59 F.3d 284 (1st Cir. 1995) (originating from the United States Nuclear Regulatory Commission); *see also* McMurray v. Comm'r, 985 F.2d 36 (1st Cir. 1993) (originating from the United States Tax Court).

[46] *See supra* note 33.

[47] *See infra* Table 3; *see also supra* note 33.

[48] *See* Philip Morris, Inc. v. Reilly, 312 F.3d 24, 26 (1st Cir. 2002).

once again ruled in favor of a claimant.[49] Here, the court rendered a decision in favor of industrial milk processors who challenged the regulatory scheme of a sub-entity of the Department of Agriculture that regulated Puerto Rico's milk industry.[50] Since 2009, the court has yet to render a decision in favor of a claimant.[51]

On twenty-three occasions, the First Circuit has ruled in favor of the government interest. The reasoning as to why the twenty-three claims have failed varies. The most common reason for failure is due to lack of ripeness.[52] Oftentimes, unripe claims are the result of claimants having failed to obtain a final decision from the government body on the matter before filing suit.[53] Likewise, claimants who failed to seek just compensation from adequate state procedures also end up seeing their claims stamped out by the ripeness requirement.[54] Another common reason claims failed involved the court's application of the *Penn Central* test.[55] The remaining claims failed for various other reasons such as res judicata, statutes of limitations, lack of property interests, and lack of standing.[56]

In regard to the *Penn Central* test, the court has applied the test to a handful of claims. Out of five claims that were subject to the court's application of the test, four failed; however, one survived. The surviving claim was not disposed of because the court found that all three factors weighed in the claimant's favor.[57] The court's reasoning for the failure of the other four claims was inconsistent. In two cases, the court rejected the claim because all three prongs weighed against a regulatory taking having occurred.[58] In the other two cases, the court axed the claim because one factor did not support a taking. The court affirmed that

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[49] *See* Vaqueria Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464, 467 (1st Cir. 2009).

[50] *Id.*

[51] *See supra* note 33.

[52] *See id.* for a complete list of cases involving unripe claims.

[53] *See generally* Haney v. Town of Mashpee, 70 F.4th 12. (1st Cir. 2023).

[54] *See generally* Downing/Salt Pond Partners, L.P. v. R.I. & Providence Plantations, 643 F.3d 16 (1st Cir. 2011).

[55] *See* Franklin Mem'l Hosp. v. Harvey, 575 F.3d 121, 126-29 (1st Cir. 2009); *see also* McAndrews v. Fleet Bank of Mass., N.A., 989 F.2d 13, 18-20 (1st Cir. 1993); Maine Educ. Ass'n Benefits Tr. v. Cioppa, 695 F.3d 145, 153-58 (1st Cir. 2012).

[56] *See supra* note 33.

[57] Philip Morris, Inc. v. Reilly, 312 F.3d 24, 34-46 (1st Cir. 2002).

[58] McAndrews, 989 F.2d at 17-20; Me. Educ. Ass'n Benefits Tr., 695 F.3d at 152-58.

disposing of a claim because one factor weighs against that claim is a common occurrence in regulatory takings cases.[59] In *Franklin Memorial Hospital v. Harvey*, the court determined that the first factor was not relevant to the analysis, and the second factor very well could have supported the claim; however, the third factor extinguished the claim.[60] Furthermore, in *In re Weinstein*, the court only analyzed the first factor and determined that it was enough to demolish the claim.[61] In doing so, the court opined that analyzing this economic impact factor is "fairly straightforward;" however, analyzing the reasonable investment-backed expectations prong was not.[62] The ambiguousness involved in analyzing the reasonable investment-backed expectations prong very well could explain the variety amongst the court's applications of the *Penn Central* test.

### 2. Second Circuit

The Second Circuit has addressed a similar number of cases as the First Circuit. In total, twenty-eight cases involving regulatory taking claims have been decided by the court. Oddly similar to the First Circuit, the Second Circuit heard its first regulatory takings case in 1989 and its most recent in 2023. Regarding origin, New York holds the overwhelming majority with twenty-one cases having originated from its district courts. Connecticut had six cases while Vermont only had one case.

Another similarity between the First Circuit and Second Circuit lies in the diversity of industries allegedly affected by statutes, ordinances, or regulations. These industries include property development, rental homes, condominiums, office rentals, nursing homes, amusement parks, mortgage companies, and restaurants.[63] The most common industry being property development.[64] Property development claims often involve zoning ordinances or regulations that prevent landowners from developing

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[59] Philip Morris, Inc., 312 F.3d at 36 (pointing to the Supreme Court's decisions in Hodel v. Irving, 481 U.S. 704 (1987); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)).

[60] *Franklin Mem'l Hosp.*, 575 F.3d at 127-29.

[61] *In re* Weinstein, 164 F.3d 677, 684-86 (1st Cir. 1999).

[62] *Philip Morris*, 312 F.3d at 41.

[63] *See supra* note 33 for a complete list of the industries involved in the cases decided by the Second Circuit.

[64] *Id.*

their properties.[65] This can occur in various ways; however, the most common occurrences involve zoning boards denying building permits to construct projects such as residential subdivisions, vacation homes, and rental units.[66]

Out of the twenty-eight claims argued in front of the Second Circuit, the court ruled in favor of the claimant on one occasion. In *Sherman v. Town of Chester*, a property developer filed suit against a town for implementing several unfair procedures that prevented him from developing his land.[67] The district court dismissed the developer's claim on grounds of ripeness; however, on appeal, the court of appeals found that the claims were, in fact, ripe for adjudication.[68] Furthermore, the court applied the *Penn Central* test and found that every factor weighed in favor of the claimant; therefore, a regulatory taking had occurred.[69]

Besides *Sherman*, the remaining twenty-seven cases ended in victory for the government entity. However, one may argue that the court's decision in *Martin v. Town of Simsbury* was a victory for the claimant. In *Martin I*, the court of appeals found the property owner's claim to be ripe for adjudication; therefore, the case was remanded back to the district court.[70] One may argue that this constitutes the court ruling in favor of the claimant because the claimant gets another chance to litigate the claim. While the claim may initially escape the executioner, it is almost certain to fall victim to the executioner's axe on remand. This argument is supported by the court's decision in *Martin II*. On remand, the property owner's claim in *Martin I* was defeated by summary judgment.[71] On appeal once more as *Martin II*, the claim failed because the court of appeals found that a taking did not occur.[72] This case is one of several throughout the circuits in which the case

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[65] *See generally* Sherman v. Town of Chester, 752 F.3d 554 (2d Cir. 2014); *see also* Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992); Martin v. Town of Simsbury, No. 20-4266, 2022 WL 244084 (2d Cir. Jan. 27, 2022).

[66] *See generally Sherman*, 752 F.3d 554 (subdivision); *see also Southview Assocs., Ltd.*, 980 F.2d 84 (vacation homes); Martin, 2022 WL 244084 (rental units).

[67] *See Sherman*, 752 F.3d at 558-60.

[68] *Id.* at 561-64.

[69] *Id.* at 565-66.

[70] *See* Martin v. Town of Simsbury, 735 F. App'x 750 (2d Cir. 2018).

[71] *Martin*, 2022 WL 244084, at *1.

[72] *Id.*

was remanded only for the claim to be placed right back on the chopping block. Therefore, having a case remanded cannot be considered much of a victory for the claimant with all things considered.

In regard to the remaining cases, the majority of claims failed due to ripeness; several claimants filed suit before their claims were ripe for review.[73] Many other claims failed due to the *Penn Central* test.[74] In fact, the Second Circuit axed every claim it analyzed under the *Penn Central* test, excluding *Sherman*.[75] When applying the test, the court often held that the claims failed because the claimant was unable to show that a single prong tipped the balancing scale in their favor.[76] In contrast, the court in *Santini v. Connecticut Hazardous Waste Management Service* held that while the first two prongs may have ruled in the claimant's favor, the third prong, which considers the character of the governmental action, carried more weight than the other two.[77] Overall, the court's application of the *Penn Central* test seemed to be the end of the line for claims subject to the court's wrath.

In all, the Second Circuit ruled in favor of the claimant once out of twenty-eight cases. One favorable decision out of twenty-eight cases indicates that claimants in this circuit have a 3.6 percent chance of having a decision rendered in their favor.[78] The success rate here is directly proportional to the success rates in almost every other circuit.

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[73] *See* 74 Pinehurst LLC v. New York, 59 F.4th 557 (2nd Cir. 2023); *see also* 335-7 LLC v. City of New York, No. 21-823, 2023 WL 2291511 (2d Cir. Mar. 1, 2023); Villager Pond, Inc. v. Town of Darien, 56 F.3d 375 (2d Cir. 1995); Monroe Equities LLC v. Village of Monroe, 419 F. App'x 112 (2d Cir. 2011); Progressive Credit Union v. City of New York, 889 F.3d 40 (2d Cir. 2018).

[74] *See supra* note 33 for a complete list of the cases in which the Second Circuit ruled against the claimant after applying the *Penn Central* test.

[75] *Id.*; *see* also Sherman v. Town of Chester, 752 F.3d 554 (2d Cir. 2014).

[76] *See* Buffalo Tchrs. Fed'n v. Tobe, 464 F.3d 362 (2d Cir. 2006); Cmty. Hous. Improvement Program v. City of New York, 59 F.4th 540, 553-56 (2d Cir. 2023); *335-7 LLC*, 2023 WL 2291511, at *3-4; Bens BBQ, Inc. v. County of Suffolk, 858 F. App'x 4, 8-9 (2d Cir. 2021).

[77] *See* Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 132 (2d Cir. 2003) ("Though the siting announcement no doubt had an economic impact on Santini's property, and interfered with his investment-backed expectations to some extent, the character of the governmental action is of principal importance here.").

[78] *See infra* Table 3; *see also supra* note 33.

### 3. Third Circuit

Compared to the majority of circuits, the Third Circuit has decided a similar number of cases involving regulatory takings claims. In total, the court has decided eighteen cases.[79] The majority of cases arose from the State of New Jersey; eleven cases originated there. Pennsylvania only had five cases. Meanwhile, Delaware had zero cases. Similar to the First Circuit, the Third Circuit had two cases arising from government agencies. One case made it to the court by a petition to review an order from the Federal Communications Commission.[80] The other case ended up in front of the court as an appeal from the Benefits Review Board of the United States Department of Labor.[81]

Similar to the Second Circuit, the most common industry allegedly affected in the cases before the Third Circuit is property development.[82] The remaining industries are as equally as diverse as the previous circuits.[83] Here, the industries include short-term rentals, insurance, credit card companies, concrete companies, poultry processors, off-track wagering facilities, water rights, and gun rights.[84]

The Third Circuit rendered its first decision regarding regulatory takings in 1987 and its most recent in 2023; however, the court has not rendered a single decision in favor of the claimant. In 2006, the court found that a concrete company's claim was ripe for review, so they remanded the case back to the district court.[85] Once again, one may argue that having the case remanded is a victory; however, the likelihood of the claim failing on remand contradicts this argument.[86] Regardless, claimants in this circuit find themselves facing seemingly insurmountable odds while bringing regulatory takings issues in front of this court.

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[79] *See infra* Table 1; *see also supra* note 33.

[80] Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004).

[81] B & G Const. Co. v. Dir., Off. of Workers' Comp. Programs, 662 F.3d 233 (3d Cir. 2011).

[82] *See supra* note 33 for a complete list of the industries involved in the cases decided by the Third Circuit.

[83] *Id.*

[84] *Id.*

[85] Cnty. Concrete Corp. v. Town of Roxbury, 442 F.3d 159 (3d Cir. 2006).

[86] *See supra* notes 70-72 and accompanying text.

Once more, the most common killer of claims in this circuit is ripeness.[87] The remaining claims were axed for various reasons, such as statutes of limitations, lack of property interest, or the court simply finding that no taking had occurred.[88] Furthermore, a few claims failed after the court applied the *Penn Central* test.[89] Compared to the other circuits, the court here has applied the test on fewer occasions; however, the claimants whose claims were subject to the court's application of the test met a similar fate as claimants in the other circuits. In total, the court has only applied the test to three claims. In two of these cases, the court found that a single prong failed to weigh in favor of the claimant.[90] In the remaining case, the court did not apply the test in full; the court only analyzed the investment-backed expectation prong and found that no regulatory taking occurred.[91] In this circuit, the court's application of the *Penn Central* test may have not extinguished as many claims as other circuits; however, 100 percent of the claims subject to the court's implementation of the *Penn Central* test were extinguished..

Zero decisions in favor of the claimant indicate that claimants have a zero percent chance of having a decision rendered in their favor. While this rate is the lowest success rate for regulatory takings claims amongst the circuits, the Third Circuit is not alone;

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[87] *See* Carroll v. Township of Mount Laurel, 315 F. App'x 402 (3d Cir. 2009); *see also* Carroll v. Township of Mount Laurel, 500 F. App'x 118 (3d Cir. 2012); Cowell v. Palmer Township, 263 F.3d 286 (3rd Cir. 2001); Lindquist v. Buckingham Township, 68 F. App'x 288 (3d Cir. 2003); River Valley Heights Corp. v. Township of West Amwell, No. 21-2042, 2023 WL 1433634 (3d Cir. Feb. 1, 2023).

[88] *See* 287 Corp. Ctr. Assocs. v. Township of Bridgewater, 101 F.3d 320 (3d Cir. 1996) (containing claim that was time barred by statute of limitations); *see also* In re Trs. of Conneaut Lake Park, Inc., 855 F.3d 519 (3d Cir. 2017) (involving a claim in which the court found that the claimant lacked a property interest); Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J., 910 F.3d 106 (3rd Cir. 2018); Empire Kosher Poultry, Inc. v. Hallowell, 816 F.2d 907 (3d Cir. 1987).

[89] *See generally* ACRA Turf Club, LLC v. Zanzuccki, 724 F. App'x 102 (3d Cir. 2018); *see also* B & G Const. Co. v. Dir., Off. of Workers' Comp. Programs, 662 F.3d 233 (3d Cir. 2011); Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff, 669 F.3d 359 (3d Cir. 2012).

[90] *See Zanzuccki*, 724 F. App'x 102; *see also B & G Const. Co.*, 662 F.3d at 259-63 (company claimed that it would suffer an economic impact of nearly $1 billion; however, the court held that the economic impact prong did not weigh in the company's favor because the prong analyzes proportionality between the liability and the obligations imposed by society, not the company being deprived of money).

[91] *See ACRA Turf Club, LLC*, 669 F.3d 359.

the success rate in most of the other circuits is not much higher.[92] Therefore, the difficulty of bringing a regulatory taking claim in this circuit is seemingly congruent with the majority of the other circuits; however, the Third Circuit is arguably one of the most difficult based on the fact that zero decisions have been rendered in favor of the claimant.

### 4. Fourth Circuit

The Fourth Circuit has also decided a number of regulatory takings cases in close proximity to the previous three circuits. In total, the Fourth Circuit has decided twenty-one cases involving regulatory takings claims.[93] North Carolina contains the majority of cases with eight cases. Maryland closely follows with seven cases. West Virginia, Virginia, and South Carolina all have had two cases a piece arising from their district courts. The first cases were decided in 1987, and the most recent case was decided in 2023.

The two most common industries in this circuit include property development and property rights.[94] In fact, claims involving these two industries constituted over half of the total claims brought in front of the Fourth Circuit.[95] The other industries consist of firearms, gaming, hotels, television, billboards, tennis clubs, and water services.[96]

Out of the twenty-one cases, the Fourth Circuit has ruled in favor of the claimant only once. In 2010, the court rendered a decision in favor of a landowner who challenged a county's rezoning of his property from single-family residential to rural residential.[97] This suggests that claimants in this circuit have a 4.7 percent chance of having the court rule in their favor.[98]

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[92] *See* Table 2; *see also supra* note 33.

[93] *See* Table 1; *see also supra* note 33.

[94] *See supra* note 33 for a complete list of the industries involved in the cases decided by the Fourth Circuit.

[95] *See* Table 1.

[96] *Id.*

[97] Acorn Land, LLC v. Baltimore County, Maryland., 402 F. App'x 809 (4th Cir. 2010).

[98] *See* Table 3; *see also supra* note 33.

Similar to the Second and Third Circuits, the Fourth Circuit remanded a handful of cases back to the district courts. In total, five cases were remanded for further review.[99] Two cases were remanded because the claims were found to be ripe for adjudication.[100] Two of the other cases were remanded because the claims were wrongly dismissed.[101] The remaining case was remanded in order for the district court to canvass facts necessary for analysis under the *Penn Central* test.[102] Again, to some, an order remanding the case may appear as a favorable decision for the claimant; however, such an order should not suggest an expected victory for the claimant.[103] For example, in *Georgia Outdoor Advertising (II)*, the court rendered a judgment in opposition to the claimant after the case had been previously remanded to the district court, which had ruled in favor of the claimant.[104] In contrast to the previously discussed circuits, ripeness was not the main reason for the failure of claims in the Fourth Circuit. While at least three claims were unsuccessful due to ripeness,[105] many more claims were futile because they could not survive the court's application of the *Penn Central* test. While applying this three-pronged test, the court continuously found that claimants failed to satisfy even one prong to support their claim.[106] In one case, the court held that the third prong, involving the character of the

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[99] *See generally* Clayland Farm Enters. v. Talbot County, Maryland, 672 F. App'x 240 (4th Cir. 2016); *see also* Sansotta v. Town of Nags Head, 724 F.3d 533 (4th Cir. 2013); Ga. Outdoor Advert., Inc. v. City of Waynesville, 833 F.2d 43 (4th Cir. 1987); Town of Nags Head v. Toloczko, 728 F.3d 391 (4th Cir. 2013); Naegele Outdoor Advert., Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988).

[100] *See Clayland Farm Enters.*, 672 F. App'x 240; *see also Sansotta*, 724 F.3d 533.

[101] *See Ga. Outdoor Advert.*, 833 F.2d 43; *see also Toloczko*, 728 F.3d 391.

[102] *See Naegele Outdoor Advert.*, 844 F.2d at 178.

[103] *See supra* notes 70-72 and accompanying text.

[104] *See* Ga. Outdoor Advert., Inc. v. City of Waynesville, 900 F.2d 783 (4th Cir. 1990); *see also* Georgia Outdoor Advert., Inc. v. City of Waynesville, 690 F. Supp. 452 (W.D.N.C 1988).

[105] *See* Greenspring Racquet Club, Inc. v. Baltimore County, Maryland, 232 F.3d 887 (4th Cir. 2000); *see also* Henry v. Jefferson Cnty. Plan. Comm'n, 34 F. App'x 92 (4th Cir. 2002); Holliday Amusement Co. of Charleston v. South Carolina, 493 F.3d 404 (4th Cir. 2007).

[106] *See* Quinn v. Bd. of Cnty. Comm'rs for Queen Anne's Cnty., Md., 862 F.3d 433, 442-443 (4th Cir. 2017); *see also* Pulte Home Corp. v. Montgomery County, Maryland, 909 F.3d 685, 695-97 (4th Cir. 2018); Adams v. Village of Wesley Chapel, 259 F. App'x 545, 549-50 (4th Cir. 2007); Henry v. Jefferson Cnty. Comm'n, 637 F.3d 269, 276-77 (4th Cir. 2011).

government action, weighed in favor of the claimant; however, the first two prongs supported the government action, which outweighed the third prong.[107] In another case, the court found only the second prong to weigh in the claimant's favor; however, this prong also failed to outweigh the other two prongs.[108] In all, the Fourth Circuit's application of the *Penn Central* test proved fatal for the claimant even when the claimant was able to prove an economic impact consisting of a 35 percent diminution in property value.[109]

The difficulty of finding success as a claimant in the Fourth Circuit is directly proportional to the previously discussed circuits. The near five percent success rate in this circuit falls just shy of the median success rate of all circuits.

### 5. Fifth Circuit

The Fifth Circuit currently sits in third place of circuits with the most cases concerning regulatory takings. Altogether, the Fifth Circuit has ruled on thirty regulatory takings claims between 1975 and 2023.[110] The majority of these claims arose from Texas; seventeen claims originated from the state's district courts.[111] Louisiana follows closely with ten claims; however, Mississippi is far behind with only three claims originating there.[112]

Unlike the Fourth Circuit, the Fifth Circuit has a more diverse array of industries allegedly affected. The most common industries are property development, property rights, low-income housing development, and restaurants and bars.[113] Other industries include pensions, short-term rentals, insurance, gaming, mining, taxicabs, tanning salons, and motels.[114]

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[107] Clayland Farm Enters. v. Talbot County, Maryland, 987 F.3d 346, 353-56 (4th Cir. 2021).

[108] Blackburn v. Dare County, 58 F.4th 807, 812-14 (4th Cir. 2023).

[109] *Henry*, 637 F.3d at 277.

[110] *See* Table 1; *see also supra* note 33.

[111] *See* Table 1; *see also supra* note 33.

[112] *See* Table 2; *see also supra* note 33.

[113] *See supra* note 33.

[114] *See* the attached spreadsheet for a complete list of the other industries involved in the cases decided by the Fifth Circuit.

Out of the thirty cases involving regulatory takings, the court has ruled in favor of the claimant three times.[115] In 2000, the court ruled in favor of workers' compensation insurers who filed suit against state officials, alleging that a Louisiana statute effected a regulatory taking.[116] The next year, the court found for a public interest group who brought suit against Texas Supreme Court justices, alleging that the state's Interest on Lawyers Trust Accounts program effected a violation of the Fifth Amendment.[117] Three years later, the court once again ruled in favor of a limestone quarry operator who sued the City of Tehuacana, Texas, challenging an ordinance that banned mining within the city limits.[118] Since 2004, the court has yet to render another decision in favor of the claimant.

Many claims failed for reasons similarly found in the previously discussed circuits. These reasons include ripeness,[119] no deprivation of all economically viable uses of the property,[120] and

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[115] *See generally* U.S. Fid. & Guar. Co. v. McKeithen, 226 F.3d 412 (5th Cir. 2000); *see also* Wash. Legal Found. v. Tex. Equal Access to Just. Found., 270 F.3d 180 (5th Cir. 2001); Vulcan Materials Co. v. City of Tehuacana, 369 F.3d 882 (5th Cir. 2004).

[116] *McKeithen*, 226 F.3d at 420.

[117] *See generally Wash. Legal Found.*, 270 F.3d 180 (court found that the program effected a per se taking).

[118] *See generally Vulcan Materials Co.*, 369 F.3d 882. Even though the court found that the regulation effected a regulatory taking, the court remanded the case back to the district court to determine whether the mining operations constitutes a nuisance. *Id.* at 896.

[119] *See generally* Urb. Devs. LLC v. City of Jackson, Mississippi, 468 F.3d 281, 292 (5th Cir. 2006); Beach v. City of Galveston, Texas, No. 21-40321, 2022 WL 996432, at *2-3 (5th Cir. Apr. 4. 2022); Gulf Park Water Co. v. Miss. Dep't of Env't Quality, No. 94-60693, 1995 WL 413105, at *2 (5th Cir. June 16, 1995); Dahl v. Vill. of Surfside Beach, Tex., No. 22-40075, 2022 WL 17729411, at *2-3 (5th Cir. Dec. 16, 2022); Tex. Off. of Pub. Util. Couns. v. FCC, 183 F.3d 393, 428-29 (5th Cir. 1999); John Corp. v. City of Houston, 214 F.3d 573, 580-81 (5th Cir. 2000).

[120] *See generally* Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975); *see also* Sakla v. City of New Orleans, 216 F.3d 1079 (5th Cir. 2000) (unpublished table decision); Kamman, Inc. v. City of Hewitt, 31 F. App'x 159 (5th Cir. 2001) (unpublished decision); Persyn v. United States, 138 F.3d 951 (5th Cir. 1998) (unpublished decision); Golden Glow Tanning Salon, Inc. v. City of Columbus, Mississippi, 52 F. 4th 974 (5th Cir. 2022) (case involving per se taking); Da Vinci Inv., LP v. City of Arlington, Texas, 747 F. App'x 223 (5th Cir. 2018); Van Way v. City-Par. Council of Lafayette, 67 F. App'x 251 (5th Cir. 2003) (unpublished decision); Maloney Gaming Mgmt., LLC v. St. Tammany Parish, 456 F. App'x 336 (5th Cir. 2011); Nat'l W. Life Ins. Co. v. Commodore Cove Improvement Dist., 678 F.2d 24 (5th Cir. 1982).

the *Penn Central* test.[121] While these three reasons make up the majority of reasons, the court finding that claimants were not deprived of all economically viable uses of the property accounted for the most failures.[122] In this situation, the court looks at whether or not the regulation "substantially advance[s] a legitimate state interest" and "denies an owner all economically viable use of the property."[123] The court has stated that a regulatory taking occurs only if the property owner suffers a complete deprivation of the "economically viable use of his property" at the hands of the regulation.[124] In these cases, the claimants were unable to show that they were completely deprived of all economically viable use of the property; therefore, their claims were rejected by the court.[125]

Furthermore, a handful of claims failed due to the court's application of the *Penn Central* test. In some instances, the court found that all three factors weighed against the claimants.[126] On the other hand, in *Matagorda County v. Russell Law*, the court found that the first factor alone was enough to invalidate the claim.[127] Additionally, in a rare occurrence, the court in *Yur-Mar, LLC v. Jefferson Parish Council* seemingly applied only a partial analysis of the test.[128] While these claims failed because of the court's application of the *Penn Central* test, the claim survived the

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[121] Degan v. Bd. of Trs. of Dall. Police & Fire Pension Sys., 956 F.3d 813, 815-16 (5th Cir. 2020); Hackbelt 27 Partners, LP v. City of Coppell, 661 F. App'x 843, 850 (5th Cir. 2016); *Da Vinci Inv., LP*, 747 F. App'x at 228-29; Matagorda County v. Russell L., 19 F.3d 215, 223-25 (5th Cir. 1994); Yur-Mar, LLC v. Jefferson Par. Council, 451 F. App'x 397 (5th Cir. 2011).

[122] *Maher*, 516 F.2d at 1066; *see also Sakla*, 216 F.3d 1079; *Kamman, Inc.*, 31 F. App'x 159; *Persyn*, 138 F.3d 951; *Golden Glow Tanning Salon, Inc.*, 52 F.4th at 981 (case involving per se taking); *Da Vinci Inv., LP*, 747 F. App'x at 223; *Van Way*, 67 F. App'x 251; *Maloney Gaming Mgmt. LLC*, 456 F. App'x at 344; *Commodore Cove Improvement Dist.*, 678 F.2d at 28.

[123] *Persyn*, 138 F.3d 951.

[124] *Id.*

[125] *See generally* Carroll v. Township of Mount Laurel, 315 F. App'x 402 (3d Cir. 2005); see also Carroll v. Township of Mount Laurel, 500 F. App'x 118 (3d Cir. 2012); Cowell v. Palmer Township, 263 F.3d 286 (3d Cir. 2001); Lindquist v. Buckingham Township, 68 F. App'x 288 (3d Cir. 2003); River Valley Heights Corp. v. Township of West Amwell, No. 21-2042, 2023 WL 1433634 (3d Cir. Feb. 1, 2023).

[126] *Degan*, 956 F.3d at 815-16; *Hackbelt 27 Partners, LP*, 661 F. App'x at 850; *Da Vinci Inv., LP*, 747 F. App'x at 228-29.

[127] Matagorda County v. Russell L., 19 F.3d 215, 223-25 (5th Cir. 1994).

[128] Yur-Mar, LLC v. Jefferson Par. Council, 451 F. App'x 397 (5th Cir. 2011) (the court only addressed the economic impact factor).

court's use of the test in one of three cases in which the claimant proved victorious.[129] The other two cases involved the court finding a categorical taking and a per se taking.[130] While the court's application of the *Penn Central* test may not spell an instant death for regulatory taking claims, claims are more likely to be extinguished than to survive the test's implementation.

Three favorable decisions out of thirty cases indicate that the claimant has a 10 percent chance of receiving a favorable decision from the court. Compared to the majority of other circuits, this percentage is slightly higher than average. However, having a decision rendered in your favor as a claimant in this circuit remains nearly unattainable.

### 6. Sixth Circuit

There is a slight increase in the number of cases decided by the Sixth Circuit compared to the others. Since its first case in 1984, the Sixth Circuit has decided thirty-three cases involving regulatory takings claims with the most recent case having been decided in 2023.[131] The State of Ohio holds the majority of cases having originated from its district courts with fifteen cases.[132] Michigan follows close behind with ten cases.[133] Tennessee produced the third most with five cases, and lastly, Kentucky lays claim to only three cases.[134]

The Sixth Circuit resembles the Fourth Circuit in regard to the most common industry allegedly affected. The majority of claimants here alleged that government actions negatively affected either property development or their property rights.[135] Besides these two industries, the other industries are diverse and include

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[129] U.S. Fid. & Guar. Co. v. McKeithen, 226 F.3d 412, 416-20 (5th Cir. 2000) (all three factors weighed in claimant's favor).

[130] Vulcan Materials Co. v. City of Tehuacana, 369 F.3d 882, 888-91 (5th Cir. 2004) (finding a categorical taking because claimant had been denied all economically viable uses of property); *see generally* Wash. Legal Found. v. Tex. Equal Access to Just. Found., 270 F.3d 180 (5th Cir. 2001) (finding that a per se taking had occurred).

[131] *See infra* Table 1; *supra* note 33.

[132] *See infra* Table 2; *supra* note 33.

[133] *See infra* Table 2; *supra* note 33.

[134] *See infra* Table 2; *supra* note 33.

[135] *See supra* note 33 for a complete list of the industries involved in the cases decided by the Sixth Circuit.

the following: scrap metal dealers, dental clinics, mining, nightclubs, dance studios, liquor stores, hotels, sewage companies, landfills, chemical companies, bowling alleys, and skating rinks.[136]

The Sixth Circuit has ruled in similar fashion compared to the other circuits. Out of thirty-three cases, the court has ruled in favor of the claimant only twice.[137] The court first ruled in favor of the claimant in a 1984 case involving a bank, which was the successor in interest of developers, that brought suit against a planning commission for preventing development of the property.[138] 38 years later, the court ruled in favor of another claimant in a 2021 case involving a landowner who challenged an ordinance that required permits and payments of fees for the removal of trees.[139]

Once again, one finds that claimants face overwhelming odds while attempting to receive just compensation that they claim they are owed. The Sixth Circuit's history of ruling in favor of a regulatory taking suggests that claimants within this circuit have only a 6.1 percent chance of succeeding.[140] Furthermore, the list of cases from this circuit contains at least four cases in which the court found that the claims were ripe; therefore, they were remanded to the district court.[141] In one of the four cases, the Sixth Circuit did indeed find that the takings claim was ripe for adjudication and remanded the case back to the district court; however, the court's purpose in remanding the case was for the district court to enter judgment in favor of the government entity.[142]

In regard to the unsuccessful claims, the majority of failures were once again due to ripeness and their inability to overcome the court's application of the *Penn Central* test.[143] Except for the two

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[136] *Id.*

[137] *See generally* Hamilton Bank of Johnson City v. Williamson Cnty. Reg'l Plan. Comm'n, 729 F.2d 402 (6th Cir. 1984); *see also* F.P. Dev., LLC v. Charter Township of Canton, Michigan, 16 F.4th 198 (6th Cir. 2021).

[138] *See generally Hamilton Bank*, 729 F.2d 402.

[139] *See generally F.P. Dev., LLC*, 16 F.4th 198.

[140] *See* Table 3; *see also supra* note 33.

[141] *See generally* Barber v. Charter Township of Springfield, Michigan, 31 F.4th 382 (6th Cir. 2022); *see also* Lilly Invs. v. City of Rochester, 674 F. App'x 523 (6th Cir. 2017); Crosby v. Pickaway Cnty. Gen. Health Dist., 303 F. App'x 251 (6th Cir. 2008); Lackey v. Meriwether Lewis Elec. Coop., 181 F.3d 101 (6th Cir. 1999).

[142] *See generally Lackey*, 181 F.3d 101.

[143] For cases that failed on grounds of ripeness, *see generally* Tri-Corp Mgmt. Co. v. Praznik, 33 F. App'x 742 (6th Cir. 2002); *see also* Beech v. City of Franklin, Tennessee,

cases in which regulatory takings were found, the court's application of the *Penn Central* test was a near-certain pitfall for claimants. Similar to the Fourth Circuit's application of the balancing test, the Sixth Circuit's application of the *Penn Central* test resulted in claims failing because the claims were unable to satisfy a single prong.[144] On the other hand, the court in one case found that the first two factors weighed in favor of the claimants while the third prong weighed in favor of the government action, and the court further found that the third prong outweighed the first two prongs.[145] Accordingly, the Sixth Circuit's application of the *Penn Central* test is in congruence with how the majority of the other circuits applied the test to regulatory takings claims.

### 7. Seventh Circuit

In 1981, the Seventh Circuit decided its first case involving a regulatory takings claim.[146] Since then, the court has rendered decisions in 22 total cases with the most recent case having taken place in 2022.[147] Out of the twenty-two cases, an overwhelming majority arose from Illinois and Wisconsin. Illinois holds a slight majority with ten cases originating from its district courts, and Wisconsin followed closely with nine cases.[148] Lastly, Indiana holds the clear minority with only three cases.[149]

In regard to the industries allegedly affected by the claims, the Seventh Circuit appears to be arguably the least diverse circuit. An overwhelming majority of the claims involved the claimants' property rights.[150] The remaining claims involve industries such as

687 F. App'x 454 (6th Cir. 2017); Buckles v. Columbus Mun. Airport Auth., 90 F. App'x 927 (6th Cir. 2004); Mich. Chrome & Chem. Co. v. City of Detroit, 12 F.3d 213 (6th Cir. 1993); Insomnia Inc. v. City of Memphis, Tennessee, 278 F. App'x 609 (6th Cir. 2008); Village of Maineville, Ohio v. Hamilton Twp. Bd. of Trs., 726 F.3d 762 (6th Cir. 2013); Shelly Materials, Inc. v. Bd. of Zoning Appeals, 160 F. App'x 443 (6th Cir. 2005); Braun v. Ann Arbor Charter Township, 519 F.3d 564 (6th Cir. 2008).

144 *See generally* Tenn. Scrap Recyclers Ass'n v. Bredesen, 556 F.3d 442 (6th Cir. 2009); *see also* Oberer Land Devs. Ltd. v. Sugarcreek Township, Ohio, No. 21-3834, 2022 WL 1773722 (6th Cir. June 1, 2022).

145 *See generally* Bojicic v. DeWine, No. 21-4123, 2022 WL 3585636 (6th Cir. 2022).

146 *See generally* Devines v. Maier, 665 F.2d 138 (7th Cir. 1981).

147 *See* Table 1; *see also supra* note 33.

148 *See* Table 2; *see also supra* note 33.

149 *See* Table 2; *see also supra* note 33.

150 *See supra* note 33.

bars, taxis, pensions, small businesses, non-essential businesses, slaughterhouses, white lead carbonate manufacturers, and garden rental apartments.[151]

Regarding how the Seventh Circuit has ruled, a claimant in the Seventh Circuit has a similar success rate as he would in the previously discussed circuits. In total, the court has rendered a decision favorable to the claimant on two occasions. The first decision in favor of the claimant was rendered in the court's first review of a regulatory takings claim. In this 1981 case, tenants brought suit against the city, challenging the enforcement of the city's housing code which required the tenants to be evicted from substandard housing.[152] The court found that the tenants possessed the right to occupy the rentals, and the city's enforcement of the housing code destroyed those rights, which effected a regulatory taking.[153] Unfortunately, this victory was short-lived. Three years after *Devines I*, the matter was once again under review by the Seventh Circuit.[154] This time around, the court found that the city's enforcement of the housing code did not constitute a regulatory taking due to recent Supreme Court decisions that intervened with the court's decision in *Devines I*.[155]

After *Devines I*, a claimant in this circuit did not receive a favorable decision until 2002. In this case, landowners brought suit against the county's area plan commission after it vacated a subdivision's restrictive covenant that allowed only residential use, rezoned the area for commercial use, and approved a development plan for a shopping center.[156] The court ruled in favor of the landowners after finding that the government action effected a public taking for a private purpose.[157] Since then, twenty years

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[151] *Id.*

[152] *See generally* Devines v. Maier, 665 F.2d 138 (7th Cir. 1981) [hereinafter *Devines I*].

[153] *Id.* at 144.

[154] *See generally* Devines v. Maier, 728 F.2d 876 (7th Cir. 1984) [hereinafter *Devines II*].

[155] *Id.* at 887. In *Devines II*, the Seventh Circuit based its decision to reverse their finding in *Devines I* on two Supreme Court cases—Texaco, Inc. v. Short, 454 U.S. 516 (1982) and Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). *See Devines II*, *supra* note 154, at 887.

[156] Daniels v. Area Plan Comm'n of Allen Cnty., 306 F.3d 445, 449-50 (7th Cir. 2002).

[157] *Id.* at 469.

have passed since the court has rendered a decision in favor of the claimant.

Once again, the majority of the failed claims were extinguished due to ripeness issues.[158] On several occasions, the claimants failed to bring inverse condemnation suits in state courts before filing in federal court.[159] Other claims failed for different reasons, such as, the property not being rendered practically useless, the claimant lacking property rights in the allegedly affected property, and the fact that the furtherance of a duty to protect the general welfare of the public does not a constitute a taking.[160]

Furthermore, several claims were found to be futile based on the Seventh Circuit's application of the *Penn Central* test. While applying the test, the court found that several claims failed all three prongs.[161] In one case, the court found that the third prong involving the character of the government action single-handedly soiled the claim.[162] Illustrated by the decisions rendered in the aforementioned cases, this court's approach to applying the *Penn Central* test once again seems to tip the balancing scale in favor of the government action rather than the claimant.

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[158] *See generally* Biddison v. City of Chicago, 921 F.2d 724 (7th Cir. 1991); *see also* Everson v. City of Weyauwega, No. 12-C-0857, 2014 WL 197905 (7th Cir. Jan. 15, 2014); Willan v. Dane County, No. 21-1617, 2021 WL 4269922 (7th Cir. 2021); Estate of Himelstein v. City of Fort Wayne, Indiana, 898 F.2d 573 (7th Cir. 1990); Black Earth Meat Mkt., LLC v. Village of Black Earth, 834 F.3d 841 (7th Cir. 2016); Hager v. City of West Peoria, 84 F.3d 865 (7th Cir. 1996).

[159] *See Biddison,* 921 F.2d at 727; *Everson*, 2014 WL 197905, at *3; *Estate of Himelstein*, 898 F.2d at 576; *Black Earth Meat Market*, 834 F.3d at 846.

[160] *See generally* Bettendorf v. St. Croix County, 631 F.3d 421 (7th Cir. 2011) (involving property that was not rendered practically useless); *see also* RDB Props., LLC v. City of Berwyn, 844 F. App'x 878 (7th Cir. 2021) (involving a claimant lacking a property right); Hawkeye Commodity Promotions, Inc. v. Vilsack, 486 F.3d 430 (8th Cir. 2007) (finding that the furtherance of a duty to protect the general welfare of the public could not constitute a taking).

[161] Cent. States, Se. and Sw. Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 807-10 (7th Cir. 1999); *see also* Vasquez v. Foxx, 895 F.3d 515, 522-24 (7th Cir. 2018); Nowlin v. Pritzker, 34 F.4th 629, 634-36 (7th Cir. 2022) (involving a claimant that alleged all three factors weighed in his favor but failed to support these conclusions with facts); Goodpaster v. City of Indianapolis, 736 F.3d 1060, 1073-76 (7th Cir. 2013) (finding that claimants established that their businesses suffered negative economic impact in support of the first prong but the mere loss of future profits is not sufficient to establish a regulatory taking claim).

[162] Squires-Cannon v. Forest Pres. Dist. of Cook Cnty., 897 F.3d 797, 802 (7th Cir. 2018).

Two decisions in the claimants' favor out of twenty-two cases indicate that claimants in the Seventh Circuit have a 9.1 percent success rate.[163] Such a low rate of success directly lines up with the majority of the other circuits. Therefore, claimants in this circuit face similar unsettling odds when pitted against a government interest.

### 8. Eighth Circuit

The Eighth Circuit paints a similar picture as the previously discussed circuits. Excluding the D.C. Circuit, the Eighth Circuit has decided the fewest number of cases. In total, this circuit has decided only fifteen cases.[164] The first case was decided in 1989, and the most recent cases were decided in 2022.[165] Further, no state in this district holds a clear majority of cases originating from within.[166] The most cases originated from Minnesota, which had five total cases.[167] Iowa had four cases, Arkansas had three cases, Missouri had two cases, and South Dakota had one case.[168] Neither Nebraska nor North Dakota had a case rise to the Court of Appeals.[169]

Although the Eighth Circuit has the fewest cases excluding the DC Circuit, the Eighth Circuit has arguably one of the most diverse arrays of industries involved in the claims. Here, the court addressed claims involving mining, mini-golf, rental apartments, video lottery machines, race car storages, hospice care facilities, railroads, firework tents, billboard companies, the right to smoke in public, all-male private religious high schools, and property rights.[170]

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[163] *See infra* Table 3; *see also supra* note 33.

[164] *See infra* Table 1.

[165] *See generally* Glosemeyer v. Mo.-Kan.-Tex. R.R., 879 F.2d 316 (8th Cir. 1989); *see also* Heights Apartments, LLC v. Walz, 30 F.4th 720 (8th Cir. 2022); Glow In One Mini Golf, LLC v. Walz, 37 F.4th 1365 (8th Cir. 2022); 301, 712, 2103 & 3151 LLC v. City of Minneapolis, 27 F.4th 1377, 1384 (8th Cir. 2022).

[166] *See infra* Table 2.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *See supra* note 33.

Claimants in the Eighth Circuit have also found similar levels of success as complaints have in the previously discussed circuits. Out of the fifteen cases, the court rendered a decision that favored the claimant only once in a recently decided case.[171] In 2022, the court held that a residential unit owner plausibly stated both a per se takings claim and an ordinary regulatory takings claim after challenging an order mandating a statewide residential eviction mortarium.[172] However, the court's review was limited to plausibility, not claim resolution, so the claims may not even survive further proceedings.[173] Because the claim was not resolved in the claimant's favor, the argument that decision was not much of a victory for the claimant rises once again.[174] However, considering this decision a victory for the claimant indicates that claimants in the Eighth Circuit have a 6.7 percent chance of having a decision rendered in their favor.[175]

In the remaining cases, the claims failed for similar reasons as the claims that failed in other circuits. However, no singular reason carries the most weight compared to the other reasons. Here, claims failed for familiar reasons, such as ripeness, the availability of adequate remedies, and qualified immunity.[176]

Likewise, multiple claims failed for being unable to pass the court's application of the *Penn Central* test. As in other circuits, various claims lacked support from one prong.[177] While other claimants were able to show the support of one or more of the

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[171] *See generally* Heights Apartments, LLC v. Walz, 30 F.4th 720 (8th Cir. 2022).

[172] *Id.*

[173] *Id.* at 733 ("While both types of takings claims may not ultimately survive, at this stage of the proceedings, our review is limited to plausibility, not claim resolution.").

[174] *See supra* notes 69-71 and accompanying text.

[175] *See infra* Table 3; *see also supra* note 33.

[176] For claims having failed on grounds of ripeness, *see* Dakota, Minn. & E. R.R. Corp. v. South Dakota, 362 F.3d 512, 520-21 (8th Cir. 2004); *see also* Cormack v. Settle-Beshears, 474 F.3d 528, 532 (8th Cir. 2007); Willis Smith & Co. v. Arkansas, 548 F.3d 638, 639-40 (8th Cir. 2008); Johnson v. City of Shorewood, Minnesota, 360 F.3d 810, 817-18 (8th Cir. 2004) (claims were unripe because the claimants failed to pursue state post deprivation remedies). For a claim having failed due to the availability of adequate remedies, *see* Glosemeyer v. Mo.-Kan.-Tex. R.R., 879 F.2d 316, 323 (8th Cir. 1989). For a claim having failed due to qualified immunity, *see generally* Glow In One Mini Golf, LLC v. Walz, 37 F.4th 1365 (8th Cir. 2022).

[177] *See* 301, 712, 2103 & 3151 LLC v. City of Minneapolis, 27 F.4th 1377, 1384 (8th Cir. 2022); *see also* Outdoor Graphics, Inc. v. City of Burlington, Iowa, 103 F.3d 690 (8th Cir. 1996).

prongs, this effort proved to be insufficient. In one case, the court found that the claimant suffered a "devastating economic impact" under the first prong; however, the second prong and third prong favored the government action.[178] In the end, the court ruled that the second and third prongs outweighed the first even though the claimant's loss was extensive.[179] On the other hand, the Eighth Circuit weighed in favor of the claimant in a case in which the claimant was arguably victorious. In *Height Apartments, LLC v. Walz*, the court found that the claimants sufficiently pleaded the first two prongs but struggled with the third prong.[180] Despite the claimant's struggle to show the third prong weighing in his favor, the court affirmed that the claim survived the *Penn Central* test, and the claimant's damages were "sufficient to plausibly give rise to a Fifth Amendment takings claim."[181] This decision serves as a mere glimmer of hope for future claimants.

### 9. Ninth Circuit

The Ninth Circuit has addressed the most regulatory taking issues by a staggering majority of 118 cases. [182] The majority of claims (seventy-two total) arose from the State of California.[183] The second and third highest number of claims originated from Washington (thirteen) and Oregon (twelve), respectively.[184] Nevada followed closely with eight cases.[185] Hawaii had five, Arkansas and Arizona both had three, and Idaho as well as Montana both had one case.[186]

Regarding industries, most cases involved mobile home parks; however, other common industries cases included property development, hotels, and lumber companies.[187] Other industries

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[178] Hawkeye Commodity Promotions v. Vilsack, 486 F.3d 430, 442 (8th Cir. 2007).
[179] *Id.*
[180] Heights Apartments, LLC v. Walz, 30 F.4th 720, 730-31 (8th Cir. 2022).
[181] *Id.* at 735.
[182] *See infra* Table 1; *see also supra* note 33.
[183] *See infra* Table 2; *see also supra* note 33.
[184] *See infra* Table 2; *see also supra* note 33.
[185] *See infra* Table 2; *see also supra* note 33.
[186] *See infra* Table 2; *see also supra* note 33.
[187] *See supra* note 33.

included technology, mining, mortgage lending, oil and gas, rental homes, and legal arbitration appointment systems.[188]

Out of 118 cases, the court ruled in favor of the claimant only five times. The cases in which the court ruled in favor of the claimant involved gasoline service stations, hotels and casinos, and rental homes. In *Chevron USA, Inc. v. Bronster*, an oil company challenged a Hawaii statute "proscrib[ing] the maximum rent that oil companies [could] collect from dealers who lease[d] company-owned service stations."[189] In order to determine if the statute effected a regulatory taking, the court applied the "substantially advances" test in which the court determines whether the legislation "substantially advances a legitimate state interest" and found that the statute constituted a regulatory taking.[190] In *Richardson v. City and County of Honolulu*, several landowners brought suit against the City and County of Honolulu, alleging that rent control ordinances effected a regulatory taking.[191] The court applied the same test as in *Chevron USA, Inc. v. Bronster* and found that one of the ordinances did constitute a violation of the landowners' Fifth Amendment rights.[192] Furthermore, in *Vacation Village, Inc. v. Clark County, Nevada*, landowners near an airport alleged that zoning ordinances that imposed height and use restrictions violated the Takings Clause.[193] The court found that the ordinance imposing use restrictions did not constitute a taking; however, the ordinance imposing height restrictions did effect a per se regulatory taking.[194]

While the claimants in five cases undoubtedly received a favorable decision, eight cases are subject to the argument that

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[188] *See supra* note 33.

[189] Chevron USA, Inc. v. Bronster, 363 F.3d 846, 848 (9th Cir. 2004).

[190] *Id.* at 852 (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 334 (2002)); *see also* Yee v. City of Escondido, California, 503 U.S. 519 (1992).

[191] *See generally* Richardson v. City & County of Honolulu, 124 F.3d 1150 (9th Cir. 1997).

[192] *Id.* at 1165-66.

[193] *See generally* Vacation Vill., Inc. v. Clark County, Nevada, 497 F.3d 902 (9th Cir. 2007).

[194] *Id.* at 919. For other cases in which the claimant received a favorable decision, *see generally* Cashman v. City of Cotati, 374 F.3d 887 (9th Cir. 2004); Cashman v. City of Cotati, 415 F.3d 1027, 1028 (9th Cir. 2005) (withdrawing its opinion in *Cashman I* due to the Supreme Court's decision in Lingle v. Chevron USA, Inc., 544 U.S. 528 (2005)); Thomas v. Anchorage Equal Rts. Comm'n, 165 F.3d 692 (9th Cir. 1999).

having claims remanded back to the district court for further review does not mean the claimant was victorious.[195] Five of these cases were remanded because the court found that the district court wrongly dismissed the claims as being unripe, and two cases were remanded because the court determined that the claimants raised triable facts to constitute a takings claim; therefore, the district court wrongfully dismissed the claim.[196] This argument is supported by *Dodd I* and *Dodd II*. In *Dodd I*, the Ninth Circuit found that the district court wrongly dismissed the claim on ripeness grounds; therefore, the case was remanded back to the district court.[197] On remand, the district court once again entered judgment in favor of the government interest, and in *Dodd II*, the Ninth Circuit held that a regulatory taking did not occur.[198]

With five decisions in favor of the claimant, claimants have only a 4.2 percent chance of having the Ninth Circuit rule in their favor.[199] There are numerous reasons why so many claims failed, including res judicata, statutes of limitations, and lack of property interests; however, the majority of claims failed due to either ripeness or failing the *Penn Central* test.[200]

In applying the *Penn Central* test, the Ninth Circuit seemed to apply the test in a manner consistent with the other circuits. The Ninth Circuit ruled that several claims failed mainly due to the investment-backed expectations prong.[201] In one case, the claimant was able to show that the reasonable investment-back expectations prong supported a decision in his or her favor; however, the claim

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[195] *See supra* notes 69-71 and accompanying text.

[196] For cases in which the claims were found to be ripe, *see generally* Del Monte Dunes, Ltd. v. City of Monterey, 920 F.2d 1496 (9th Cir. 1990); *see also* Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995); Kime v. County of Riverside, 889 F.2d 1095 (9th Cir. 1989); Hoehne v. County of San Benito, 870 F.2d 529 (9th Cir. 1989); Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001). For cases in which the claimant raised triable facts, *see generally* McDougal v. County of Imperial, 942 F.2d 668 (9th Cir. 1991); *see also* Lockary v. Kayfetz, 917 F.2d 1150 (9th Cir. 1990).

[197] *Dodd*, 59 F.3d at 864.

[198] Dodd v. Hood River County, 136 F.3d 1219, 1230 (9th Cir. 1998).

[199] *See infra* Table 3.

[200] *See supra* note 33.

[201] *Dodd*, 136 F.3d at 1230; Sierra Medical Servs. All. v. Kent, 883 F.3d 1216, 1225-26 (9th Cir. 2018); Chessen v. City of San Rafael, No. 22-15615, 2023 WL 1879502, at *1 (9th Cir. 2023); Guggenheim v. City of Goleta, 638 F.3d 1111, 1120-22 (9th Cir. 2010).

failed because the other two prongs did not support a regulatory taking.[202]

Furthermore, the Ninth Circuit distinguished claims because the claimant was not deprived of all economically beneficial use of property. In *Hoeck v. City of Portland*, the court ruled that a building owner was not deprived of all economically beneficial use of his property when his vacant building was destroyed by the city because "the lot remains and is suitable for appropriate development."[203] The Ninth Circuit's decision in *Hoeck* is similar to the Fifth Circuit's finding in *Golden Glow*; however, this ruling in favor of the government action seems even more unfathomable.[204] In another case with an outcome difficult to grasp, the Ninth Circuit disregarded the severity of the economic loss suffered by the claimant and held that a diminution in value from $120 million to $23 million was not to constitute a taking.[205]

Once more, the 4.2 percent chance of success for claimants in the Ninth Circuit illuminates the level of difficulty that claimants face in this jurisdiction. With one of the lowest rates of success, the Ninth Circuit has proven to be one of the most difficult circuits for claimants litigating regulatory takings claims.

### 10. Tenth Circuit

In almost every aspect, the Tenth Circuit is seemingly indistinguishable from the previous circuits. The Tenth Circuit has rendered decisions in twenty cases spanning from 1989 to 2023.[206] The majority of these cases originated from the State of Colorado, which had six cases arise from its district courts; however, the remaining states are not far behind.[207] Five cases originated from within Oklahoma, four cases originated from within Utah, three

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[202] Killgore v. City of South El Monte, 860 F. App'x 521, 523 (9th Cir. 2021).

[203] Hoeck v. City of Portland, 57 F.3d 781, 789 (9th Cir. 1995).

[204] *See generally id.*; *see also* Golden Glow Tanning Salon v. City of Columbus, Mississippi, 52 F.4th 974, 981 (holding a tanning salon owner to not be deprived of all beneficial use of the property when an order prevented the salon from operating).

[205] *See* MHC Fin. Ltd. v. City of San Rafael, 714 F.3d 1118, 1127 (9th Cir. 2013).

[206] *See infra* Table 1; *see also supra* note 33.

[207] *See infra* Table 2.

cases originated from within New Mexico, and one case originated from both Wyoming and Kansas each.[208]

In regard to the diversity of allegedly affected industries, the Tenth Circuit is competing against the Seventh Circuit for the least diverse array of industries.[209] The majority of the claims in these cases involved either property rights or property development.[210] The other claims involved commercial hunting services, mining, billboard companies, dairy farms, and landfills.[211]

While analyzing the cases from this circuit, the court has seemingly ruled in favor of the claimant only once. In *United States v. Hardage*, property owners were deprived of using forty acres of land, which was normally utilized for growing feed for the cows on their dairy farm.[212] The court found that the property owners suffered a temporary regulatory taking and therefore should be compensated; however, the district court's order was not a final order, so the court did not have jurisdiction over the appeal.[213] Some may argue that this holding prevents the decision from being a victory for the claimant; however, even though the court did not have jurisdiction, the conclusion that the court came to on the regulatory takings matter still favored the claimant.

Considering this a victory, a claimant in this circuit has a five percent chance of the court ruling in his or her favor.[214] The majority of the failed claims were extinguished on grounds of ripeness.[215] In fact, ten claims failed because they were unripe.[216] Other claims failed due to res judicata, collateral estoppel, qualified immunity, and the court finding the landowner to have not been deprived of all beneficial use of the landowner's property.[217]

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[208] *See infra* Table 2; *see also supra* note 33.

[209] *See supra* note 33.

[210] *See supra* note 33.

[211] *See supra* note 33.

[212] United States v. Hardage, 996 F.2d 312, 1993 WL 207380, at *1 (10th Cir. 1993).

[213] *Id.*

[214] *See infra* Table 3.

[215] *See supra* note 33.

[216] *See generally* N. Mill St., LLC v. City of Aspen, 6 F.4th 1216 (10th Cir. 2021); *see also* Alto Eldorado P'ship v. County of Santa Fe, 634 F.3d 1170 (10th Cir. 2011); Bateman v. City of West Bountiful, 89 F.3d 704 (10th Cir. 1996).

[217] *See generally* Wilkinson v. Pitkin Cnty. Bd. of Cnty. Comm'rs, 142 F.3d 1319 (10th Cir. 1998) (holding that a claim failed due to res judicata and collateral estoppel); *see also* Clajon Prod. Corp. v. Petera, 70 F.3d 1566 (10th Cir. 1995) (holding that a claim

Compared to the other circuits, the Tenth Circuit has applied the *Penn Central* test the second-fewest number of times. In *Ramsey Winch, Inc. v. Henry*, the court applied the test and found that the claim did not have the support of a single prong.[218] In *Smith v. City of Wellsville, Kan.*, the court attempted to apply the test but was unable to because the claimant made no attempt to apply the prongs to her claim.[219] Based on the lack of cases containing the court's application of the test, it is difficult to determine whether or not the Tenth Circuit's approach to applying the *Penn Central* test is similar to the other circuits. However, the success rate indicates that bringing a claim in this circuit is equally as harrowing as the others.

### 11. Eleventh Circuit

While the previously discussed circuits are hardly distinguishable, the Eleventh Circuit serves as the only outlier. The Eleventh Circuit does not differ from other circuits in regard to the number of cases involving regulatory takings claims. In total, the court has decided twenty-eight cases spanning from 1987 to 2023.[220] Florida holds a formidable majority, with twenty-one of those cases originating from the state. Only four cases have originated from Georgia while just three cases have originated from Alabama.[221]

While most claims involve property development, the remaining array of industries is rather diverse.[222] The industries include wood-chipping, insurance, waste disposal, farming, adult entertainment, and liquor stores.[223]

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failed due to property owner not being deprived of all beneficial use of property); Hinkle Fam. Fun Ctr., LLC v. Grisham, No. 22-2028, 2022 WL 17972138 (10th Cir. Dec. 28, 2022) (holding defendants were protected against liability by qualified immunity).

[218] Ramsey Winch Inc. v. Henry, 555 F.3d 1199, 1209-10 (10th Cir. 2009).

[219] *See generally* Smith v. City of Wellsville, Kansas, No. 20-3240, 2021 WL 6124214 (10th Cir. Dec. 28, 2021).

[220] *See infra* Table 1; *see also supra* note 33.

[221] *See infra* Table 2; *see also supra* note 33.

[222] *See supra* note 33.

[223] *See supra* note 33.

Out of the twenty-eight cases, the Eleventh Circuit ruled in favor of the claimant on six occasions.[224] The most common industry that received favorable decisions was property development.[225] Wood-chipping also saw a favorable decision.[226] There is room for debate on whether or not six is an accurate number of favorable decisions granted by the court. For example, various cases reappeared before the court twice; however, *Wheeler II* was primarily an issue of damages.[227] Furthermore, at least three decisions involved the court finding that summary judgment was not proper, and two decisions involved the court finding that the district court wrongly dismissed the property owner's claim on grounds of ripeness.[228] Case law in the Eleventh Circuit that supports this argument consists of *New Port Largo I* and *II*. The court in *New Port Largo I* remanded the case because the claim was wrongfully dismissed on grounds of ripeness.[229] Three years later, the court addressed the matter once again in *New Port Largo II* and found that a regulatory taking did not occur because the claimant was deprived of all economically viable uses of the property.[230]

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[224] *See generally* S. Grande View Dev. Co. v. City of Alabaster, Alabama, 1 F.4th 1299 (11th Cir. 2021); *see also* Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987); Wheeler v. City of Pleasant Grove, 896 F.2d 1347 (11th Cir. 1990); A.A. Profiles, Inc. v. City of Ft. Lauderdale, 850 F.2d 1483 (11th Cir. 1988); A.A. Profiles, Inc. v. City of Ft. Lauderdale, 253 F.3d 576 (11th Cir. 2001); Resol. Tr. Corp. v. Town of Highland Beach, 18 F.3d 1536 (11th Cir. 1994).

[225] *See generally S. Grande View Dev. Co.*, 1 F.4th 1299; *see also Wheeler*, 833 F.2d 267; *Resol. Tr. Corp.*, 18 F.3d 1536.

[226] *See generally A.A. Profiles, Inc*., 253 F.3d 576 (focusing on claims involving wood-chipping).

[227] *See generally Wheeler*, 833 F.2d 267 (occurring in 1987); *Wheeler*, 896 F.2d 1347 (occurring in 1990); *see also A.A. Profiles, Inc.*, 850 F.2d 1483 (occurring in 1988); A.A. *Profiles, Inc.*, 253 F.3d 576 (occurring in 2001); New Port Largo, Inc. v. Monroe County, 985 F.2d 1488 (11th Cir. 1993); New Port Largo, Inc. v. Monroe County, 95 F.3d 1084, 1089 (11th Cir. 1996); Corn v. City of Lauderdale Lakes, 816 F.2d 1514 (11th Cir. 1987); Corn v. City of Lauderdale Lakes, 904 F.2d 585 (11th Cir. 1990); Agripost, Inc. v. Miami-Dade County, 195 F.3d 1225 (11th Cir. 1999); Agripost, LLC v. Miami-Dade County, Florida, 525 F.3d 1049 (11th Cir. 2008).

[228] *See generally* Vesta Fire Ins. Corp. v. Florida, 141 F.3d 1427 (11th Cir. 1998); *see also* Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp., 878 F.2d 1360 (11th Cir. 1989) (remanding both cases because summary judgment was not proper); *Corn*, 816 F.2d 1514; *Corn*, 904 F.2d 585 (remanding both cases on grounds of ripeness).

[229] *See generally New Port Largo, Inc.*, 985 F.2d 1488.

[230] *See New Port Largo, Inc.*, 95 F.3d at 1089.

Therefore, one may inject the argument that the decision in *New Port Largo I* was not favorable to the claimant.

Six favorable decisions out of twenty-eight cases indicate that claimants have a 21.4 percent chance of receiving a favorable decision by the court. Even though more than seventy-five percent of the claimants who bring a regulatory taking claim in front of the Eleventh Circuit will end up in defeat, the odds of being successful are significantly higher in this circuit than any other. The claims that failed did so for the same reasons as the failed claims in the other circuits. Most claims failed because they were not ripe.[231] At least three claims failed because the claimant was not deprived of all economically beneficial uses of the property,[232] and the other claims failed because of res judicata and issue preclusion.[233]

Another significant manner in which the Eleventh Circuit differs from the other circuits involves the *Penn Central* test. The Eleventh Circuit has applied the test the fewest times; the court has not applied the test on a single occasion. Similar to the Tenth Circuit, it is difficult to compare and contrast how the court applies the test when the court has not done so.

### 12. D.C. Circuit

Compared to the other circuits, the D.C. Circuit has heard the fewest number of cases. In total, the court has decided only eight cases.[234] Even though the case law is small, the industries involved are fairly diverse. These industries include property development,

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[231] *See generally Agripost, Inc.*, 195 F.3d 1225; *see also* Executive 100, Inc. v. Martin County, 922 F.2d 1536 (11th Cir. 1991); Howard v. Country Club Ests. Homeowners Ass'n, 468 F. App'x 48 (11th Cir. 2012); Baytree of Inverrary Realty Partners v. City of Lauderhill, 873 F.2d 1407 (11th Cir. 1989); Top Sales & Servs., Inc. v. City of Forest Park, Georgia, 487 F. App'x 489 (11th Cir. 2012); Warner v. City of Marathon, 718 F. App'x 834 (11th Cir. 2017); Reahard v. Lee County, 30 F.3d 1412 (11th Cir. 1994).

[232] *New Port Largo, Inc.*, 95 F.3d at 1089; *see also* Mohit v. West, No. 21-12483, 2023 WL 239992 (11th Cir. Jan. 18, 2023); Mohit v. City of Haines City, 845 F. App'x 808 (11th Cir. 2021).

[233] *See generally* Bohdzuin v. Florida Lake County, 143 F. App'x 288 (11th Cir. 2005) (res judicata); *see also* 126th Ave. Landfill, Inc. v. Pinellas County, Florida, 459 F. App'x 896 (11th Cir. 2012) (res judicata); Agripost, LLC v. Miami-Dade County, Florida, 525 F.3d 1049 (11th Cir. 2008) (issue preclusion).

[234] *See infra* Table 1; *see also supra* note 33.

finance, satellite broadcasting, student loan companies, data service providers, and telecommunications carriers.[235]

Out of the eight cases, the court has ruled in favor of the government action in every case. Some claims failed for familiar reasons, such as ripeness and the *Penn Central* test;[236] however, other claims failed for reasons uncommon in other circuits. In three cases, the claims failed because the benefits of the regulation were equivalent in value to the burden that regulation imposed.[237] Additionally, in *National Lifeline Association v. F.C.C.*, the court found that no regulatory taking occurred because the claimant voluntarily participated in a regulated market, and in doing so, additional regulations could not constitute a taking.[238]

When it comes to analyzing the court's application of the *Penn Central* test, there is limited sample size. The court has only applied the test in two cases. In both of the cases, the court ruled that not even one prong weighed in favor of a regulatory taking.[239] Because of this, it is difficult to argue that the D.C. Circuit applies the test in a similar or different manner than the other circuits.

While zero decisions in favor of the claimant indicate that claims have a zero-percent survival rate, the limited sample size once again makes it difficult to argue that bringing a claim in this circuit is equally as difficult in other circuits. However, the information that is available allows one to predict that future regulatory takings claims will be shot down by this circuit.

### *A. Have the Courts Remained Consistent?*

The courts have remained consistent throughout the numerous cases involving regulatory takings for the most part. With the older cases stemming from the mid-1970s and the most recent case being from 2023, one can analyze a span of cases

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[235] *See supra* note 33.

[236] *See generally* Full Value Advisors, LLC v. SEC, 633 F.3d 1101 (D.C. Cir. 2011) (ripeness).

[237] Colo. Springs Prod. Credit Ass'n v. Farm Credit Admin., 967 F.2d 648, 655-58 (D.C. Cir. 1992); Student Loan Mktg. Ass'n v. Riley, 104 F.3d 397, 402 (D.C. Cir. 1997); Cellco P'ship v. FCC, 700 F.3d 534, 550-51 (D.C. Cir. 2012).

[238] Nat'l Lifeline Ass'n v. FCC, 983 F.3d 498, 515 (D.C. Cir. 2020).

[239] Allen v. District of Columbia, 969 F.3d 397, 405-06 (D.C. Cir. 2020); Dist. Intown Props. Ltd. P'ship v. District of Columbia, 198 F.3d 874, 884 (D.C. Cir. 1999).

covering nearly half a century. This analysis allows one to identify periods in which the courts' consistency seemingly wavered.

In total, claimants across the circuits received twenty-four favorable decisions.[240] The courts were consistent throughout the 1980s and the 1990s.[241] In the 1980s, claimants received four favorable decisions,[242] and in the 1990s, claimants received five favorable decisions.[243] However, this consistency wavered in the 2000s. From 2000 to 2009, claimants received ten favorable decisions.[244] Eight of these decisions were rendered between 2000 and 2004,[245] but the courts' consistency resumed with only two decisions rendered in favor of the claimants from 2005 to 2009.[246] This period of consistency lasted throughout the 2010s as well. During this decade, claimants received two favorable decisions.[247]

In regard to this current decade, it is difficult to argue whether or not the court has remained consistent. Since 2020, the Circuit Court of Appeals have ruled in favor of the claimants in three

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[240] *See infra* Table 1; *see also supra* note 33.

[241] *See supra* note 33.

[242] *See generally* Hamilton Bank of Johnson City v. Williamson Cnty. Reg'l Plan. Comm'n, 729 F.2d 402 (6th Cir. 1984); *see also* Devines v. Maier, 665 F.2d 138 (7th Cir. 1981); A.A. Profiles, Inc. v. City of Ft. Lauderdale, 850 F.2d 1483 (11th Cir. 1988); Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987).

[243] *See generally* Richardson v. City & County of Honolulu, 124 F.3d 1150 (9th Cir. 1997); *see also* Thomas v. Anchorage Equal Rts. Comm'n, 165 F.3d 692 (9th Cir. 1999); United States v. Hardage, 996 F.2d 312, at *1 (10th Cir. 1993); Wheeler v. City of Pleasant Grove, 896 F.2d 1347 (11th Cir. 1990); Resol. Tr. Corp. v. Town of Highland Beach, 18 F.3d 1536 (11th Cir. 1994).

[244] *See generally* U.S. Fid. & Guar. Co. v. McKeithen, 226 F.3d 412 (5th Cir. 2000); *see also* Wash. Legal Found. v. Tex. Equal Access to Just. Found., 270 F.3d 180 (5th Cir. 2001); A.A. Profiles, Inc. v. City of Ft. Lauderdale, 253 F.3d 576 (11th Cir. 2001); Philip Morris, Inc. v. Reilly, 312 F.3d 24 (1st Cir. 2002); Daniels v. Area Plan Comm'n of Allen Cnty., 306 F.3d 445, 449-50 (7th Cir. 2002); Vulcan Materials Co. v. City of Tehuacana, 369 F.3d 882 (5th Cir. 2004); Chevron USA, Inc. v. Bronster, 363 F.3d 846, 848 (9th Cir. 2004); Cashman v. City of Cotati, 374 F.3d 887 (9th Cir. 2004); Vacation Village, Inc. v. Clark County, Nevada, 497 F.3d 902 (9th Cir. 2007); Vaqueria Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464 (1st Cir. 2009).

[245] *See generally U.S. Fid. & Guar. Co.*, 226 F.3d 412; *see also Wash. Legal Found.*, 270 F.3d 180; *A.A. Profiles, Inc.*, 253 F.3d 576; *Philip Morris*, 312 F.3d 24; *Daniels*, 306 F.3d 445; *Vulcan Materials Co.*, 369 F.3d 882; *Chevron USA, Inc.*, 363 F.3d 846; *Cashman*, 374 F.3d 887.

[246] *See generally Vacation Village, Inc.*, 497 F.3d 902; *see also Vaqueria Tres Monjitas, Inc.*, 587 F.3d 464.

[247] *See generally* Acorn Land, LLC v. Baltimore County, Maryland, 402 F. App'x 809 (4th Cir. 2010); *see also* Sherman v. Town of Chester, 752 F.3d 554 (2d Cir. 2014).

cases.[248] One could argue that three cases in favor of the claimant before the turn of the decade suggest that the 2020s could be a period in which the courts' consistency could waiver as well. However, this argument proves difficult to make based on the incredibly low success rate of claims throughout the circuits.

### *B. Can One Predict How the Courts Will Rule on Future Regulatory Takings Claims?*

The number of cases addressing regulatory takings compared to the overall low success for regulatory taking claims allows for one to predict with relative ease how the court will rule on future regulatory taking claims. Over the almost fifty-year span since the courts first began deciding regulatory taking issues, the courts have rendered decisions in 366 cases.[249] In 342 of those cases, the court ruled in favor of the ordinance, regulation, or statute.[250] On the other hand, the court ruled in favor of the claimant in only twenty-four cases.[251] These figures indicate that a claimant has a 6.6 percent chance of bringing a successful regulatory taking claim in front of a federal circuit court of appeals.[252] Considering this low success rate and the courts' level of consistency, excluding the 2000s, it is relatively convenient to assume the courts will continue to rule against the complaint in future regulatory taking claims.

Furthermore, as long as the *Penn Central* test remains unaltered and the standard in evaluating regulatory taking claims, claimants can expect the courts to rule in favor of the government action. While some praise the *Penn Central* test for its flexibility, others believe the test is "maddeningly unpredictable" and "favor[s] the government in most situations."[253] The purpose of the *Penn Central* test is to "reach a 'fair and just' accommodation between the rights of the public and the rights of individual landowners."[254]

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[248] *See generally* F.P. Dev., LLC v. Charter Township of Canton, Michigan, 16 F.4th 198 (6th Cir. 2021); *see also* S. Grande View Dev. Co., Inc. v. City of Alabaster, Alabama, 1 F.4th 1299 (11th Cir. 2021); Heights Apartments, LLC v. Walz, 30 F.4th 720 (8th Cir. 2022).

[249] *See infra* Table 3; *see also supra* note 33.

[250] *See infra* Table 3; *see also supra* note 33.

[251] *See infra* Table 3; *see also supra* note 33.

[252] *See infra* Table 3; *see also supra* note 33.

[253] Harris, *supra* note 20, at 609.

[254] Cordes, *supra* note 23, at 372.

How is this test capable of doing so when it is so heavily protective of the governmental entity's interests?[255] The protectiveness of government interest carried out through the application of the *Penn Central* test will only lead to the courts finding that a taking occurs less and less over time.[256] Therefore, claimants can expect to receive decisions that are unfair and unjust.

### *C. Do the Courts Seem to Protect Property Rights or Promote Government Intrusion?*

Based on the courts' consistency in ruling in favor of the regulation, the courts have seemingly promoted government intrusion rather than protected property rights. It would be rather difficult to argue that the courts have protected property rights when claimants have only received twenty-four decisions out of 366 cases. The low quantity of decisions rendered in favor of the claimant is quite concerning, especially for those whose main source of income derives from the use of their property, such as homeowners who use their homes as short-term rentals or business owners who run their businesses on their property. Take, for example, the Fifth Circuit's decision in *Golden Glow*. In this case, the court found that a taking did not occur when an ordinance prevented the salon from operating.[257] The court's reasoning behind this decision was that the salon owner's property was not rendered valueless.[258] However, the court stated that the claimants alleged that they experienced "enormous economic damage" because the ordinance shut the salon down.[259] While the court's finding that the property was not rendered valueless may be true, the court failed to reason that the ordinance effectively left the business valueless. Sure, the owner could sell the salon, but the price the owner would receive for the business would likely not provide just compensation for the loss of future income the owner expected to earn from operating the business. Not to mention, the owner would also not be compensated for any emotional value or injuries to the owner's

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[255] *Id.* at 340.

[256] *Id.*

[257] *See generally* Golden Glow Tanning Salon v. City of Columbus, Mississippi, 52 F.4th 974 (5th Cir. 2022).

[258] *Id.* at 981.

[259] *Id.* at 976-77.

business reputation.[260] With that being said, in decisions similar to *Golden Glow*, the courts seem to promote government intrusion while discarding property rights in order to promote the government's interest.[261]

### *D. What Can Be Done?*

While there may be no replacing the *Penn Central* test, the test is in dire need of improvement in an effort to alleviate the test's partiality toward government intrusion. One way of leveling the playing field could be to revisit the economic impact prong. This prong should be altered to strictly weigh in favor of a regulatory taking when the claimant is forced to endure the brunt of a severe economic impact. In determining what constitutes a severe economic impact, the courts should implement a threshold of fifty-percent diminution in value. If the diminution in value were to exceed fifty percent, the economic impact prong should strictly weigh in favor of the claimant, and the outcome would then rely on the distinct investment-backed expectations prong and the character of the government action prong. Doing so would prevent the courts' application of this prong from shocking the conscience of the ordinary property owner when dealing with claims involving severe economic impact, and the precedent that a diminution of value alone is insufficient to establish a taking would not be disrupted.[262] While implementing a threshold into the economic impact prong is not a cure-all for the impartiality of the *Penn Central* test, this revision could be a step in the right direction of fairness and less daunting odds.

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[260] Cynthia J. Barnes, Just Compensation or Just Damages: The Measure of Damages for Temporary Regulatory Takings in Wheeler v. City of Pleasant Grove, 74 IOWA L. REV. 1243, 1246 n.33 (1989) (citing Wheeler v. City of Pleasant Grove, 833 F.2d 267, 271 (11th Cir. 1987) and pointing out how the Wheeler court upheld the district court's refusal to award the claimant damages for emotional distress and injury to the claimant's business reputation).

[261] *See generally Golden Glow Tanning Salon*, 52 F.4th 974; *see also* Hoeck v. City of Portland, 57 F.3d 781, 789 (9th Cir. 1995); Clayland Farm Enters. v. Talbot County, Maryland, 987 F.3d 346, 353-56 (4th Cir. 2021) (forty percent diminution of property value not enough to constitute a regulatory taking).

[262] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978).

## CONCLUSION

Over the last half-century, the federal courts of appeals have decided numerous regulatory taking claims throughout the country. The claims brought before the court allege that regulations, ordinances, or statutes enforced by government entities have impacted a wide variety of industries, such as property development, short-term rentals, and numerous others. In many of these cases, the court applies the current standard for analyzing regulatory taking claims – the *Penn Central* test. Regardless of whether the *Penn Central* test is applied or if a court is able to render a decision without the test, the circuit courts of appeals have consistently ruled in favor of the government entity over the claimant. This consistency alongside incredibly low success rates for regulatory taking claims allows us to predict that bringing a future regulatory taking claim in front of any of the circuit courts of appeals will almost certainly result in failure. Furthermore, the courts will find that less and less regulatory takings occur as long as the *Penn Central* test is the standard used to determine what is "fair" and "reasonable" when analyzing government action. Lastly, the disturbingly low success rate for regulatory taking claims paired alongside the courts' acts of ruling in favor of regulations that have economically devastating effects on property owners supports the finding that the courts have promoted government intrusion.