No. 19-318

In the Supreme Court of the United States

FRANCIS A. BOTTINI, JR., ET AL.,
Petitioners,

v.

CITY OF SAN DIEGO, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

(1) Whether the "investment-backed expectations" prong of the *Penn Central* test is a workable means of determining, in part, whether a partial regulatory taking has occurred.

(2) Whether, in a case such as this, government action that stalls purchasers' intended use of their property is beyond the "normal delays" that the Court in *First English* believed not to require compensation under the Takings Clause.

Answering these questions is of vital and immediate importance. Confusion as to the meaning of "investment-backed expectations"—even with respect to its correct terminology—continues to cause confusion among courts and litigants alike, as does the location of the line between "normal" and abnormal delays in the exercise of land-use regulations.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because the Takings Clause of the Fifth Amendment, incorporated against the states by the Fourteenth Amendment, has always been difficult to define. The Court has several times endeavored to demarcate its boundaries, to extend it (without extending it too far) to those cases wherein, as Justice Oliver Wendell Holmes put it, a "*regulation* goes too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (emphasis added). In this case, the regulation has "gone too far," and rectifying it requires a reexamination of two of this Court's more wide-reaching precedents in Takings Clause jurisprudence: the "investment-backed expectations" prong of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), and the "normal delays" test first hinted at in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

The protection of property rights should generally conform with those of other natural and constitutional rights. Last term, in an opinion overruling precedent that required state-level exhaustion of takings claims before making a federal case, the Court held that

> fidelity to the Takings Clause and our cases construing it requires overruling *Williamson County* and restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights.

Knick v. Township of Scott, 139 S. Ct. 2162, 2170 (2019). Unfortunately, the Takings Clause has witnessed a gradual minimizing of its force in favor of ever-more intrusive governmental actions. One case in particular has haunted the clause for the better part of the past half-century.

In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), the Court set forth a three-pronged test that has perplexed courts, lawyers, and inquiring laymen ever since. One of the prongs—testing purchasers' "investment-backed expectations" to determine whether there has been a regulatory taking—has sparked significant confusion. Its vagueness belies a doctrinal weakness, one that has panned out in the hundreds, if not thousands, of opinions that have cited it to find in favor of a government action, often with only surface analyses of the motivation behind the action and its true economic impact.

It also rests on a partial mistake, or at least a careless oversight. The original *Penn Central* decision spoke of "distinct" investment-backed expectations. 438 U.S. at 124. One year after *Penn Central*, in *Kaiser Aetna v. United States*, "distinct" had turned into "reasonable." 444 U.S. 164, 175 (1979). In the legal lexicon, "distinct" and "reasonable" are different concepts. Yet even this Court made the mistake of citing *Penn Central* as the source of the "reasonable" language.

The (reasonable) "investment-backed expectations" prong of *Penn Central* and *Kaiser Aetna* has allowed federal, state, and local officials to take many actions that, under a more robust (and spelled out) doctrine, would not have made it past judicial scrutiny. Subsequent cases demonstrate that not only is the prong toothless, but even its terminology is often lost in its confused application.

For the Bottinis, there is more at stake than scholastic haranguing over terminology. This young couple wants the freedom to build a simple single-family residence in which to raise their children. Their modest American dream has turned into a nightmare, as for the better part of a decade the city of San Diego, goaded by local historical-preservationist groups, has denied them the necessary permits until they conduct an environmental-impact review of an action—the demolition of an old cottage on the property—that was already taken on separate public-nuisance grounds.

The city's stonewalling is more than just the "normal delays" inherent to the land-use regulation process. While the Court in *First English Evangelical Lutheran Church v. County of Los Angeles* suggested that "normal delays" cannot constitute a regulatory taking,

482 U.S. 304, 321 (1987), the motivations behind the city's actions appear driven by vindictiveness over the demolition of the old cottage—whether from city officials or the historical-preservationist groups egging them on. It was a lovely cottage, but it had fallen on hard times when the Bottinis purchased it. The couple thus sought, and quickly received, permission to demolish it as a public nuisance, thereby obviating the need for an environmental-impact review.

And this change of circumstances also had the effect of changing the Bottinis' investment-backed expectations, which the city argues should be measured at the time of purchase rather than at some point after the cottage demolition. That distinction is important. If investment-backed expectations are formed and fixed at the time of purchase without any consideration of subsequent events—such as a change in the interplay between state and local regulatory regimes—then the investment-backed expectations prong gives government officials carte blanche to throw whatever they can at purchasers whom they hope to thwart. It is an untenable prong, one which gives no real guidance to courts looking for a doctrine of uniform applicability, or to prospective purchasers forming expectations in the shadow of regulatory uncertainty.

This untenable application of the investment-backed expectation rule, when combined with a nebulous "normal delays" proviso, reveals a glaring defect of post-*Penn Central* takings jurisprudence. Having opened the federal courthouse door to takings claims in *Knick*, the Court should reformulate and clarify its regulatory-takings jurisprudence. Federal courts and litigants deserve a stronger "polestar."

ARGUMENT

I. *PENN CENTRAL*'S "INVESTMENT-BACKED EXPECTATIONS" PRONG PROVIDES LITTLE GUIDANCE ON WHETHER A REGULATORY TAKING HAS OCCURRED

In *Penn Central Transp. v. New York City*, 438 U.S. 104 (1978), the Court created a test that has become the "polestar" for analyzing whether a government action constitutes a partial regulatory taking. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001); *see also Lingle v. Chevron*, 544 U.S. 528, 539 (2005) ("The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings that do not fall within the physical takings or *Lucas* [total regulatory takings] rules."). The test is comprised of three prongs, which have been rehashed *ad infinitum* in subsequent cases. Two of these prongs are not pertinent here. The purchasers' "distinct investment-backed expectations," however, is pivotal to the petitioners' case.

Penn Central has engendered a wide array of judicial interpretations that, in the aggregate, provide no prescriptive guidance to those who hope to follow this precedent. It is especially confusing for property owners like the Bottinis, for whom on-the-ground conditions have changed to such a degree as to prevent their having formulated informed expectations at the time of purchase. These cases warrant a reexamination, if not a total revision of the expectations prong. At the very least, the prong's timing should be better defined.

Take this case. A husband and wife buy a long-abandoned cottage on a parcel surrounded, block after

block, by single-family residences. Upon the town's approval, they demolish the dilapidated structure. Once demolished, there is no actual need for a separate environmental-impact review of what the demolition would do to the property and surrounding parcels. It is, after all, already gone. The couple then applies for a permit to build a single-family dwelling of their own, without first undergoing a now-pointless environmental review. The town stonewalls them at every turn, deploying novel and often inappropriate tactics—such as filing an appeal of a court order out of turn—all in to appease local interests that did not want to see the old cottage destroyed. Pet. Brief at 7–13. The director of one such group, the "Save Our Heritage Organization," claims to have even "broach[ed] the idea of allowing the cottage to be relocated to another site," assuring that the group "would do everything it could to expedite the move and limit the owner's financial burden." John Bolthouse, *Windermere Cottage & Heritage Lost*, Save Our Heritage Org., https://bit.ly/2m2h117.

Even if they had a singular investment-backed expectation (despite the uncertainty of multiple, overlapping regulatory regimes), how would the Bottinis prove it? Must they memorialize their plan and give it to their lawyer for safekeeping? Should they apply for an exemption to the environmental-review statute immediately upon buying the property? Could they ensure that the town is aware of state environmental-review laws when submitting their nuisance-based request to demolish the decrepit cottage? As the petitioners put it, if rejecting a claimed investment-backed expectation is as simple as pointing to other possible plans the purchasers could have had as a result of foreseeable but unspecified post-purchase governmental

actions, "then *any* initial uncertainty about the future course of a profit-making sidesteps the *Penn Central* balancing test by requiring a summary judgment in favor of the local government." Pet. Brief at 21 (emphasis original). Even if the Bottinis had written down a series of plans to account for any number of potentialities, a fact-finder could easily look at these as having adulterated the "distinctness" of any one plan.

This case, like many others, has several moving parts. Such is the nature of property ownership and development. It should not be left to the courts to determine what people may have been thinking when they bought a property, especially where post-acquisition events fundamentally muddle a buyer's initial valuation. Investment-backed expectations change, and in such cases the benchmark for measuring *when* they were formed ought to change along with them.

A. Subsequent Cases Demonstrate the "Investment-backed Expectations" Prong's Fatal Flaws

The *Penn Central* test was designed to answer, "essentially ad hoc, factual inquiries." 438 U.S. at 104. It makes sense that the end product is to a certain degree vague, or, more forgivingly, malleable. But subsequent courts have stretched the test too far, especially considering some insider revelations as to its intended scope. As one of Justice Rehnquist's law clerks during the *Penn Central* term put it:

> [B]ecause it was written to try to hold a majority, it sets out a test which is appealing to a large number of judges. And so it's not at all surprising that as courts have wrestled with takings issues and found them as difficult as

> they are, they frequently find themselves coming back to *Penn Central*[,] which appears to offer a refuge for virtually everyone—and in the process maybe doesn't say anything at all.

Transcript, *Looking Back on* Penn Central*: A Panel Discussion with the Supreme Court Litigators*, 15 Fordham Envtl. L. Rev. 287, 308 (2004) (remarks of Professor Barton H. "Buzz" Thompson Jr.). One scholar who has investigated the origins of the test ponders if Justice Brennan, who penned the majority opinion in *Penn Central*, ever even "intended the 'investment-backed' phrase to have precedential value, or whether the phrase was adopted as a rhetorical device to adorn the [separate] 'economic impact' factor." Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn St. L. Rev. 3, 620 (2014).

Justice Rehnquist added to the confusion in an opinion published the year after *Penn Central*, referring to the prong as bearing on the "reasonable," rather than "distinct," investment-backed expectations of purchasers. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Rehnquist had "no discernible legal or linguistic purpose" for replacing "distinct" with "reasonable," and "this change has confounded subsequent courts' views of reasonable profit expectations with plaintiffs' reasonable notice of regulatory prohibitions." William W. Wade, *Sources of Regulatory Takings Economic Confusion Subsequent to* Penn Central, 41 Envtl. L. Rep. 10936, 10938 (2011). Whether intentional or not, the replacement of "distinct" with "reasonable"—although plenty of courts have used "distinct"—reveals a prong too vulnerable to adulteration.

This Court has also occasionally adopted the *Kaiser Aetna* misdescription of the rule, without ever expressly stating that "reasonableness" would replace *Penn Central*'s literal standard. Indeed, the Court has tended to interchange the two terms without comment. Compare *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) ("reasonable investment-backed expectations") and *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980) (same) with *Lingle*, 544 U.S. at 539 ("distinct investment-backed expectations") and *Kirby Forest Indus. v. United States*, 467 U.S. 1, 14 (1984) (same). These departures revealed, even at an early stage, how susceptible the "investment-backed expectations" prong could be to mischaracterizations at best and misinterpretations at worst. Indeed, "it is not clear that 'investment backed expectations,' whether unembellished or styled 'crystalline' or 'reasonable,' has any intrinsic meaning at all." Steven J. Eagle, *Regulatory Takings* 926–27 (3d ed. 2005). Further, as leading property-rights scholar Richard Epstein has argued: "All in all, we should be deeply suspicious of the phrase 'investment-backed expectations' because it is not possible to identify even the paradigmatic case of its use." Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1370 (1993).

Courts around the country have analyzed the issue in different ways, with varying levels of coherency. For example, the Texas Supreme Court found that "no reasonable investor would purchase" a property that the owners wanted to "up-zone" for residential development but had no real reason to think the town would approve. In that case, the purchasers had no "reasonable investment-backed expectation to lose." *Mayhew*

v. Town of Sunnyvale, 964 S.W.2d 922, 936 (Tex. 1998). The First Circuit, meanwhile, held that among *Penn Central*'s "clear contours" is that "[c]ourts protect only *reasonable* expectations." *Philip Morris v. Reilly*, 312 F.3d 24, 36 (1st Cir. 2002) (emphasis original). The Federal Circuit also looks to reasonable expectations, misciting to *Penn Central* to have included a "reasonable investment-backed expectations" prong. *Florida Rock Indus. v. United States*, 45 Fed. Cl. 21, 24 (Fed. Cl. 1999).

This Court itself has at least once miscited *Penn Central* as the original source of the "reasonable" version of the prong. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015) (reading *Penn Central* as having required "considering such factors as . . . [the regulation's] interference with *reasonable* investment-backed expectations") (emphasis added).

Penn Central's "investment-backed expectations" prong is too abstract where it needs more definition and too defined where it requires greater abstraction. At bottom, the "distinctness" element of the prong is quite susceptible to bastardization because some courts have simply mischaracterized it, while most appear to hold it against the purchaser.

A useful starting point is the Ninth Circuit case of *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010), which stands in contrast to those cases in which the distinct expectations of the purchaser were whatever the court thought they should have been. The court held that "distinct" investment-backed expectations "implies reasonable probability." *Id.* at 1120. This description suggests that certain distinct expec-

tations of a return on investment cannot be entertained because they are factually implausible. Note that this view would not invalidate the buyers' claim in *Mayhew* of a regulatory deprivation based on an unrealized expectation that the zoning laws would change to accommodate their plans. "Speculative possibilities of windfalls do not amount to 'distinct investment-backed expectations' unless they are shown to be probable enough materially to affect the price." *Id.* at 1120–21. "The idea, after all, of the constitutional protection we enjoy in the security of our property against confiscation is to protect the property we have, not the property we dream of getting." *Id.* at 1121.

In *Guggenheim* there is a hint of a new prong to replace *Penn Central*'s "investment-backed expectations"—if the Court is so amenable. Instead of determining whether a particular expectation was "distinct" or "reasonable," it could simply ask whether a use the purchaser now claims as an ex ante expectation was *plausible* at the time the purchaser formed it. That would allow plaintiffs like the Bottinis to claim that, in purchasing property in a suburban community, they had a plausible investment-backed expectation of using it for a habitable single-family residence.

Not all courts employ *Guggenheim*'s logic. In *Loveladies Harbor v. United States*, the Federal Circuit held that "interference with distinct investment-backed expectations was a way of limiting takings recoveries to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." 28 F.3d 1171, 1177 (Fed. Cir. 1994). But what if, as in this case, the relevant interplay between regulatory regimes arises *after* the purchase of the property? In

Creppel, an opinion filed the same year as *Loveladies*, the same court elaborated that "the extent to which the regulation interferes with the property owner's expectations . . . limits recovery to owners who can demonstrate that they bought their property in reliance on the nonexistence of the challenged regulation." *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994) (cleaned up).

Should the measure of an expectation, as the court in *Creppel* suggests, be between simply the existence and nonexistence of an intruding regulation? What about the interplay between state and local regulations that, ex ante, gives no real sense of the probability of one outcome over another? As the petitioners explain, "the proper application of [the] rule takes into account the uncertainties at the time of the taking. … In this case, the actual odds of a wrecked building being declared a historical landmark were exceedingly small." Pet. Brief at 23. Once the existing structure was deemed a public nuisance, the need for an environmental-impact review became, at the very least, a secondary concern to the Bottinis and any "reasonable" purchaser in similar circumstances.

Unlike in *Mayhew*, the Bottinis did not purchase property with a mind to develop the land in contravention to existing zoning laws. Nor did they seek a public-nuisance declaration with the true purpose of avoiding an environmental-impact review. At the time of purchase, they could not have known that, after applying to demolish the existing structure as a public nuisance, their plans for a single-family home would face administrative obstacles relevant only to the state of affairs before the demolition. Under existing case law, the regulatory regime the Bottinis now challenge could

not have existed when the old cottage was still in place—that is, when they could have formulated "investment-backed expectations." Present conditions emerged as a result of the demolition, itself the result of a local governmental process separate and distinct from the state environmental-review regime.

In sum, the "investment-backed expectations" test has been, from its outset, either a blank slate or an empty vessel. It provides support for whatever a court wants to do and is most often perfunctorily held against the purchaser claiming a taking. These are not the marks of a durable precedent. If *Penn Central* is to remain the sine qua non of partial regulatory taking analysis, it requires clarification. Besides clearing up the reasonable/distinct interchange, the Court should flesh out the prong with a set of precise factors that serves to define "investment-backed expectations."

B. "Investment-Backed Expectations" Should Be Plausible and Courts Should Understand That Expectations Can and Should Change with Different Circumstances

In *Walcek v. United States*, the Court of Federal Claims partially fleshed out the temporal aspect of "investment-backed expectations," but in a way that left a glaring oversight. "This factor," the court held, "encompasses two related elements: first, the extent of the plaintiff's investment in reliance on the regulatory scheme in place at the time of the purchase; and second, the extent to which the regulation of the property was foreseeable." 49 Fed. Cl. 248, 268 (Fed. Cl. 2001). But what about those cases where the plaintiff bought the property in reliance on a regulatory scheme that proved not to *operate* in a foreseeable way? What if the

interplay between regulatory regimes at the time of purchase had since changed so fundamentally that the expectations at the time of purchase could not be logically applied to subsequent circumstances?

In such cases, the concepts of "fairness and justice" animating modern takings jurisprudence, *Penn Central*, 438 U.S. at 123–124, require that the "economic injuries caused by public action be compensated by the government, rather than remaining disproportionately concentrated on a few persons." *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). The Bottinis followed the law "to the letter" in their demolition of the old cottage. Pet. Brief at 9. The city approved of the action, whether informed of the need for an environmental-impact review or not. But that is not the Bottinis' concern, and it does not bear upon their subsequent investment-backed expectations, including the investment they put into the demolition of the cottage with the cognizable expectation of constructing a single-family residence in its place. When a government action changes on-the-ground circumstances to make expectations at the time of purchase obsolete, it defies "fairness and justice" to disproportionately concentrate the economic costs on anybody, not least the individuals who followed the law to the letter during the demolition and subsequent approval process.

Of course, almost any regulatory action can stifle a purchaser's investment-backed expectations, but that doesn't mean a taking has occurred. Courts should not entertain, for example, "an expectation that zoning laws will remain unchanged during the life of [the purchasers'] property ownership." *Laurel Park Cmty., LLC v. City of Tumwater*, 790 F. Supp. 2d 1290, 1301 (W.D. Wash. 2011). *See also Pa. Coal*, 260 U.S. at 413

("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."). But all possible regulations, and the interactions between them, can't be expected ex ante.

In *Mayhew*, *Guggenheim*, and *Laurel Park*, the courts were correct to reject an expected use that would have directly violated a rule that was already on the books when the claimants purchased the property. Such "starry eyed hope[s] of winning the jackpot if the law changes" ought not be grounds for a successful inverse condemnation claim. *Guggenheim*, 638 F.3d at 1120. But that is not the case here.

Challenges should not be easily dismissed where (1) the totality of circumstances reveals an obvious investment-backed expectation at a relevant point in time, and (2) regulatory impediments were not foreseeable at the time of purchase. The Bottinis obtained a separate approval to demolish the cottage, not to construct a new home. The cottage was deemed uninhabitable and risked collapse during an earthquake. They could not have known the property would *still* need to undergo an environmental-impact review, despite the obvious fact the cottage had already been destroyed.

The Bottinis now find themselves in a bizarre situation—"forced to do the impossible: engage in the time-consuming, expensive process of preparing an [environmental-impact review] with a baseline that incorporated the [c]ottage, which no longer existed, and which had been found ineligible for designation as a historical resource." Pet. Brief at 11–12. The "expensive process" of an environmental-impact review was foreseeable and reasonably baked into the Bottinis'

plans at the time of purchase. It is no longer a part of their investment-backed expectations. Nor should it be, because now it is axiomatically unnecessary.

If the Bottinis are left uncompensated, future purchasers in La Jolla might forego actions that benefit the broader public, such as the demolition of public nuisances. Or, more likely, knowing they might have to bear the costs of both a public-nuisance demolition and an environmental-impact review, many prospective buyers would simply avoid La Jolla in favor of a town with less zealous officials and fewer busybodies.

Amicus thus urges the Court to update *Penn Central*'s "investment-backed expectations" prong to account for the inherent uncertainty in property ownership and development, and to ensure that purchasers like the Bottinis are accorded the legal protections their constitutional property rights deserve.

II. THE CITY'S RESPONSES TO PETITIONERS' REQUESTS TO BUILD A NEW DWELLING IS NOT A "NORMAL DELAY" UNDER *FIRST ENGLISH* AND ITS PROGENY

San Diego officials have tried at every turn to outlast the Bottinis in their nearly decade-long bid for a home in the suburbs. The tactics that the city has deployed are not "normal" workaday delays, necessary considering the character of the regulation. Instead, these delays are meant to stonewall the Bottinis into counting their losses and moving on.

In *First English Evangelical Lutheran Church v. County of Los Angeles*, the Court first suggested that "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" were not

to be considered takings. 482 U.S. 304, 321 (1987). But those words are not meant to excuse *any* such delays, and, as the petitioners argue, "inordinate delays in land-use proceedings are not 'normal' just because they have become commonplace." Pet. Brief at 29. The frequency of a constitutional violation will never serve to normalize it. If anything, it makes this Court's intervention more urgent. It is more than plausible that the Bottinis' plight has and continues to play out for other purchasers across the country.

In *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, the Court clarified that abnormal delays—those that do not fall within *First English*'s "normal" carve-out—will not be recognized as takings if a temporary deprivation of the use of one's property is intended to regulate a private use rather than to impose upon the property a public purpose. 535 U.S. 302, 323–24 (2002) ("Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford."). The delay must also be in good faith and not mere subterfuge. *Id*. at 333.

But what about *First English* "normal delays" that are in *bad* faith? In *Tahoe-Sierra*, "the longer delay under conditions of complexity did not work with any disguised or illicit wealth transfers as all landowners within the region were in the same basic position." Pet. Brief at 32. That is not the Bottinis' situation. And, by all indications, something less than a good faith effort is afoot in the City's *eight-year* stonewall.

For one thing, the City has not imposed a moratorium on the issuance of all building permits for some specified reason but has merely refused on several occasions to issue it to the Bottinis. Second, because it is not a moratorium but rather a targeted delay, the costs in time-value for the non-use of the petitioners' property is not shared by others initiating the normal building-permit process. This is not only bad-faith behavior, but it also violates the economic justification underlying *Tahoe-Sierra*: "with a moratorium there is a clear 'reciprocity of advantage,' because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted." 535 U.S. at 341 (internal citations omitted). And not only are the city's delays not part of a regulation-based moratorium, it is also not based on any future project. In short, there is no legitimate reason for it. There are only the outside pressures of local interest groups, and passive municipal staff willing to do their bidding.

In *Landgate, Inc. v. Cal. Coastal Comm'n*, the California Supreme Court held: "It would be, of course, a different question if, even though the [government's] position . . . advanced a legitimate state interest, that position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it." 17 Cal. 4th 1006 (Cal. 1998).

There is ample evidence in this case that the city acted inappropriately in continually denying the Bottinis their request for a permit. *See* Pet. Brief at 7–15. These tactics, taken together, provides an ideal chance for this court to pinpoint a more precise location for the

First English/*Tahoe-Sierra* line. This is especially important for the Bottinis of the world, who lose all economically viable use of their property as a result of such delays. In this sense, the Bottinis' plight is similar to that of the plaintiff in *Lucas v. S.C. Coastal Council*, except here it is slightly worse because the deprivation is impliedly temporary as it lacks the finality and concordant remedies of a *Lucas* per se taking. 505 U.S. 1003 (1992).

Without a court's intervention, the city will likely continue to stonewall the Bottinis until the couple concedes defeat and accepts the extraordinary expense of environmental-impact review—for a demolition that is a literal *fait accompli*—the baseline for which ignores everything that happened between the time of purchase and the present.

CONCLUSION

For the foregoing reasons, and those expressed by the petitioner, the Court should grant certiorari.

Respectfully submitted,

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