No. _____

In the
Supreme Court of the United States

NINA M. BOTTINI, FRANCIS A. BOTTINI, JR., AND BERNATE TICINO TRUST DATED MARCH 2, 2009, TRUST "3",

Petitioners,

v.

CITY OF SAN DIEGO, A MUNICIPAL CORPORATION, AND CITY COUNCIL OF THE CITY OF SAN DIEGO,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *First English Evangelical Lutheran Church v. County of Los Angeles*, this Court held that the Takings Clause requires the government to compensate a landowner for the entire period when a regulatory taking effectively denied him "all use of his property." *See* 482 U.S. 304, 318 (1987). And in *Penn Central Transportation Co. v. City of New York*, the Court formulated a three-prong, *ad hoc* test for regulatory takings that requires consideration of whether the landowner had "reasonable and distinct investment-backed expectations" to justify compensation. *See* 438 U.S. 104 (1978).

Here, the landowners have endured an eight-year ordeal to apply for a permit from a city government to build a home on a lot zoned solely for single-family housing. After concluding that the city's denial of the building permit was unlawful, the California trial and appellate courts refused to find a taking notwithstanding the clear mandate in *First English* and *Penn Central*. And the California Supreme Court rescinded its initial grant of review. The questions presented in this petition are two-fold:

1. Should the investment-backed-expectations test of *Penn Central* be construed to totally bar recovery whenever the purchaser of a single-family lot is unable to learn, at the time of purchase, the exact path of allowable development under local law?

2. Should the "normal delay" exception to the total temporary takings rule of *First English* be construed so broadly as to allow for indefinite and calculated delays to bar recovery of any compensation?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are listed in the caption.

Petitioners are a married couple, Francis A. Bottini, Jr. and Nina M. Bottini, and their family trust, Bernate Ticino Trust Dated March 2, 2009, Trust "3", established to hold the title to the single-family lot at issue.

Respondents are the City of San Diego, a municipal corporation, and the City Council of the City of San Diego.

STATEMENT OF PROCEEDINGS

The proceedings in the California state courts are listed below:

- *Francis A. Bottini, Jr., et al. v. City of San Diego, et al.*, Case No. 37-2013-00075491-CU-TT-CTL (Cal. Super. Ct. Cnty. of San Diego);
- *Francis A. Bottini, Jr., et al. v. City of San Diego, et al.*, Case No. D067510 (Cal. Ct. App. 4th Dist.);
- *Francis A. Bottini, Jr., et al. v. City of San Diego, et al.*, Case No. D071670 (Cal. Ct. App. 4th Dist.); and
- *Francis A. Bottini, Jr., et al. v. City of San Diego, et al.*, Case No. 8252217 (Cal.).

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JURISDICTION

The judgment of the Court of Appeal of California was entered on September 18, 2018. App. 58. The Supreme Court of California, the highest court of the State, initially granted review by a December 19, 2018 order signed by the *en banc* court of six justices. On April 10, 2019, however, the Supreme Court of California dismissed the review as "improvidently granted." App. 1–2.

This Court has jurisdiction under 28 U.S.C. § 1257(a) because the California Court of Appeal's decision violates the Takings Clause of the United States Constitution by rejecting the Bottinis' claim for a regulatory taking, raised in their merits brief filed in that court on November 3, 2017 (*see* App. 92–107). *See First English Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 313 n.8 (1987) (exercising jurisdiction where petitioner had raised a takings claim under the United States Constitution in the California Court of Appeal).

On June 25, 2019, the Honorable Elena Kagan granted petitioners' application for a 30-day extension of time to file the petition extending their deadline to August 8, 2019.

On August 7, 2019, Justice Kagan granted petitioners' second application for a 28-day extension of time to file the petition extending their deadline to September 5, 2019.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V. App. 89.

Section 19 of Article 1 of the California Constitution states:

> Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

CAL. CONST. art. 1, § 19. App. 89.

STATEMENT OF THE CASE

I. The Bottinis' Plight — to Build a Home

For eight years and running, all that Frank and Nina Bottini, and their family trust (the "Bottinis") have wished to do is build a single-family home on an ordinary 7,000-square foot lot in La Jolla, California, in keeping with all their neighboring lots in the community.

At the time of their purchase of the lot, the land was occupied by a dilapidated house, which the City of San Diego (the "City") first deemed not historic, then declared unsafe and a public nuisance, then ordered demolished. In a reality-defying flip flop, only after the non-historic, dilapidated house was demolished and removed from the property did the City mandate, against professional staff recommendations, an infeasible time-traveling historical-resource review of the then empty lot.

Prior to demolition, the Bottinis offered to let any group or municipality, without charge, take the house off their land if the group wanted it for preservation. There were many loud and opinionated voices, but a distinct lack of active response. There were no takers, private or public, for the house. After lengthy proceedings, the house was adjudged a public nuisance, clearing the way for the construction of a new single-family home.

The Bottinis have asked for no deviation whatsoever from current zoning requirements; they seek no special concessions, privileges, or favors; their proposed plans pose no peril to their neighbors. Their proposed home

imposes no harms to the environment. The Bottinis have scrupulously and timely complied with each and every arcane procedure needed to obtain a building permit. They have obtained the approval of all professionals on the City staff, only for the staff's expert judgments to be overridden by an overtly partisan City Council that forced the Bottinis to endure an exhaustive, expensive "review" under the California Environmental Quality Act (CEQA), even though they are entitled to an explicit, non-discretionary statutory "categorical exemption" for their single-family home.

But it only gets worse. After years of senseless delays, the Bottinis sought relief in the California courts. First the California trial court, and then the Court of Appeal acknowledged the administrative shambles in the San Diego City Council, which violated its own rules in overruling its own staff's expert report. Despite finding that the City Council acted unlawfully, both courts ruled against the Bottinis on their claim for a regulatory taking, including their takings claim under the United States Constitution, which was raised in their merits brief filed in the California Court of Appeal on November 3, 2017 (*see* App. 92–107).

In rejecting the Bottinis' takings claim under both the federal and California Constitutions, the California Court of Appeal utterly distorted this Court's test in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), by holding that the Bottinis could not have formed distinct investment-backed expectations in their particular project because they did not know — and could not have known — at the time of purchase whether they would be required either to fix up an old

home as a historical landmark or rip it down as a public nuisance. The Court of Appeal held that these uncertain expectations, wrought solely by government action, doomed the Bottinis' *Penn Central* claim.

The California Supreme Court granted review to the Bottinis to answer just this question. It received the Bottinis' brief on March 22, 2019. Less than three weeks later, on April 11, 2019, unanimously and without explanation, the California Supreme Court dismissed the review as "improvidently granted," and dismissed the case forthwith, without so much as requiring a brief from the City Council in defense of its unconstitutional actions. *See* App. 1–2.

The dismissal of the review reveals that the California courts, which have often deviated from this Court's takings jurisprudence, are restricted to issuing slap-on-the-wrist injunctions. After mangling the *Penn Central* test, the California Court of Appeal made a mockery of one other important precedent, *First English*, 482 U.S. at 304, which requires that full compensation be made for temporary total takings that are not justified by the "normal delays" inherent in the administrative process. The City did not, and could not, point to any other single-family residential lot in San Diego subjected to the delay occasioned by the failure to apply the Class 3 CEQA exemption, yet the California courts imply that this extraordinary delay is "normal." *First English* overruled the earlier California Supreme Court decision in *Agins v. City of Tiburon*, 24 Cal. 3d 266 (1979), but the tradition of California intransigence continues. Now under California law all delays are deemed "normal," no

matter how contrived, unreasonable, or unique to the property — for eight years and counting — so that the caveat of "normal delays" has swallowed the basic rule of *First English*.

The consequences are dire. The Bottinis' lot lays vacant. They have no way to recover their initial costs, and they have incurred enormous outlays in terms of cash and personal effort to obtain their building permit. Nothing has moved the needle.

In the meantime their lot, if they are allowed to build and complete a single-family home, will be worth an estimated $3,000,000 to $4,000,000. Without a building permit, the vacant lot is unusable and virtually unsalable, with a $500,000 assessed value. In the face of this provocation, the Bottinis do not seek a constitutional revolution. They do insist that the Takings Clause not be relegated "'to the status of a poor relation' among the provisions of the Bill of Rights." *See Knick v. Township of Scott*, 139 S. Ct. 2162, 2169 (2019) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)).

Yet just that has been done by the California courts. Their distorted readings of both *Penn Central* and *First English* make it impossible for citizens to have their day in court. Indeed, the shabby treatment given to the Bottinis has no doubt been given to countless California homeowners, and contributed to the state's epic housing shortages. *See* Gideon Kanner & Michael M. Berger, *The Nasty, Brutish, and Short Life of Agins v. City of Tiburon*, THE URBAN LAWYER, Vol. 50, No. 1, at 18 (Spring 2019) ("'[i]n California, the courts have elevated governmental arrogance to a fine art'")

(quoting RICHARD BABCOCK & CHARLES SIEMON, THE ZONING GAME REVISITED 293 (1985)).

California has strayed too far from established constitutional principles. The Court should grant certiorari so that the healing process can begin.

II. Background

A. The Bottinis' 2011 Purchase of the Lot — and the Dilapidated Cottage

In January 2011, the Bottinis paid $1.22 million for the 7,000-square-foot lot (the "Property"), in the Village of La Jolla in San Diego. App. 10. A lone dilapidated structure called Windemere Cottage (the "Cottage") sat on the Property. App. 4–5. The Property was zoned solely for single-family housing. App. 43. At the time of purchase, it was uncertain whether the Bottinis would preserve and renovate the Cottage for future use, or whether they would tear it down in order to make room for the construction of a new single-family home. Still, the Bottinis were prepared to deal with both situations.

B. The City's Refusal to Designate the Cottage as Historical

On August 1, 2011, the Bottinis applied to the City's Historical Resources Board ("HRB"), seeking a determination as to whether the Cottage was eligible for designation as a historical resource. App. 10–11.

After three months of hearings and reviews, the HRB denied historical designation of the Cottage over the objections of powerful local groups, including the La

Jolla Historical Society ("LJHS") and the Save Our Heritage Organisation ("SOHO"). App. 11. The Bottinis repeatedly offered to donate the Cottage to the LJHS if the group would move it off the Property. Declining these offers, the LJHS persisted in its efforts to force the Bottinis to maintain the dilapidated, unsafe structure on their Property.

C. The City's Declaration of the Cottage as a Public Nuisance and Issuance of a Demolition Order

In November 2011, the Bottinis requested that the City's Neighborhood Code Compliance Division ("NCCD") evaluate the Cottage to determine whether it was a dangerous and unsafe structure. App. 63–64. The NCCD reviewed an exhaustive written opinion from a structural engineer concluding that the Cottage lacked structural integrity and was thus unsafe for human habitation. App. 64. A Senior Civil Engineer from the NCCD inspected the Cottage. Following the inspection, on December 21, 2011, the NCCD declared the Cottage a public nuisance and ordered the Bottinis to obtain a demolition permit. App. 4. In compliance with the City's order, Bottinis timely applied for and obtained a demolition permit from the City. App. 13–14. The demolition was thereafter completed.

Despite the City's nuisance determination, the controversy over the demolition of the Cottage persisted. On the one hand, the local incumbents, represented by powerful groups, such as the LJHS and SOHO, deemed the Cottage a historical resource and resented its demolition, even though they failed to persuade the HRB. On the other hand, the City

agencies and engineers declared the Cottage a public nuisance and required its demolition to keep the public safe.

Caught in the middle of this controversy were the Bottinis, who had, as the City concluded, followed the law "to the letter" in their quest to build a single-family home. App. 15. They then needed to apply to the City for a building permit, called a Coastal Development Permit ("Permit"). App. 14–16.

III. The City Council's Unlawful Conduct Effectively Denying the Bottinis a Permit — and All Use of the Property

On August 22, 2012, over eight months after the demolition of the Cottage, the Bottinis applied to the City's Development Services for a Permit to construct their single-family home. App. 14. On January 11, 2013, the City staff made its environmental determination that the issuance of the Permit was "categorically exempt" under the applicable guidelines promulgated pursuant to CEQA, CAL. PUB. RES. CODE § 21000 *et seq*., pertaining to the construction of a single-family residence (CEQA Guidelines § 15303). App. 14.

To revenge its loss before the HRB to designate the Cottage as a historical resource, the LJHS banded together with the La Jolla Community Planning Group and filed CEQA administrative appeals on February 4, 2013. *See* App. 14–15. Their appeals alleged that the City staff's environmental determination relied on an improper baseline (urging for applying a baseline predating the demolition of the Cottage), that the

demolition of the Cottage was part of the "whole of the action," and that substantial evidence established that the demolition of the Cottage and the construction of a single-family home (the "Project") would have a significant negative effect on a historical resource, requiring the preparation of an environmental impact report ("EIR").

On March 15, 2013, the City's staff issued a detailed Staff Report to the City Council recommending denial of the appeals because the Project was indeed categorically exempt from CEQA review and because the proper date for that analysis was August 12, 2012, at which time the Project was a vacant residential lot following the proper issuance of the demolition permit in December 2011. App. 14, 64.

On June 3, 2013 — nine months into the Permit-application process — the City Council held a public hearing regarding the appeals, at which the City staff reiterated its position that its report showed that the demolition permit was validly issued. Specifically, the City staff testified that, throughout the permitting process, the Bottinis "followed [the City's laws and regulations] to the letter." App. 15. Members of the public spoke for and against the appeals.

Against the advice of City staff, one Councilwoman (a former member of LJHS's board of directors) moved to grant the appeals. *See* App. 48 n.11. The City Council deadlocked on the motion on two separate four-to-four votes and, thereafter, voted to continue the consideration of the appeals.

On September 23, 2013, the City Council considered the appeals for a second time. The City Council again deadlocked on a four-to-four vote. But the City Council was required by law to reach a decision, so that somehow the tie had to be broken then and there. *See* App. 15, 64. Then one Councilman who had previously voted against the appeals, switched his vote solely to allow the City Council to reach a decision. With this vote switch, the City Council granted the appeals — contrary to the recommendation of its professional staff.

On that same day, the City Council adopted the resolution that "there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances and may cause a substantial adverse change in the significance of a historic resource" (the "Resolution"). *See* App. 15, 31.

The Resolution remanded the Project to the City's staff with instructions to reevaluate the environmental determination with a baseline in 2010 — before the Bottinis even owned the Property. *See* App. 15.

The Resolution reopened two issues that had been exhaustively reviewed and properly decided — the HRB's refusal to designate the Cottage as a historical resource, and the validity of the demolition permit, without offering any explanation why a single-family home on a lot specifically zoned for that purpose posed a threat to the environment. *See* App. 43, 63–64. In essence, the Resolution forced the Bottinis to do the impossible: engage in the time-consuming, expensive process of preparing an EIR with a baseline that

incorporated the Cottage, which no longer existed, and which had been found ineligible for designation as a historical resource.

Everything was back to square one. The Bottinis were effectively denied a building permit — 12 months after filing their application, 18 months after complying with the demolition order, and 33 months after purchasing the Property.

IV. Proceedings in California Courts

A. The Superior Court of California denied any compensation to the Bottinis even after finding that the City acted unlawfully.

On November 13, 2013, nearly three years after the Bottinis purchased the Property, they sued the City and the City Council (sometimes collectively referred to as the "City") in the Superior Court of California, County of San Diego. The Bottinis sought a writ of mandamus to set aside the Resolution, and brought an action for damages for inverse condemnation.

On December 15, 2014, the trial court granted the petition, concluding that the City Council abused its discretion in determining — without substantial evidentiary support — that the Project was not categorically exempt from CEQA review. App. 69. The court directed the City Council to set aside its Resolution. On January 26, 2015, the court issued the peremptory writ of mandamus, without setting a date for the City to comply. App. 60. The December 15, 2014 order did not rule on the second cause of action seeking damages for inverse condemnation.

In a transparent attempt to stall the Bottinis' case, the City prematurely appealed the trial court's writ order while the case remained pending — before final judgment could be entered. The premature and, indeed, meritless appeal delayed the case for almost a year, until it was dismissed for lack of jurisdiction in January 2016. *See Bottini v. City of San Diego*, No. D067510, 2016 Cal. App. Unpub. LEXIS 629, at *2 (Cal. Ct. App. Jan. 26, 2016).

On June 7, 2016, the Bottinis amended their complaint to add due-process and equal-protection claims. On October 21, 2016, upon the City's motion, the trial court granted the City summary judgment with respect to the Bottinis' second (inverse condemnation), third (due process), and fourth (equal protection) causes of action. App. 5–6.

B. The Court of Appeal of California misapplied *Penn Central* and rejected the Bottinis' takings claim.

On January 5, 2017, the City filed its second notice of appeal from the trial court's order granting the writ of mandate. The Bottinis cross-appealed the trial court's summary-judgment rulings. In their November 3, 2017 merits brief, the Bottinis squarely raised a claim under the federal Takings Clause (*see* App. 94 (citing U.S. CONST. amend. V)), arguing that the trial court erred in granting summary judgment to the City because sufficient factual issues existed with respect to *Penn Central*'s investment-back-expectations factor (*see* App. 102–105).

On September 18, 2018, the California Court of Appeal affirmed in a published decision, *Bottini v. City of San Diego*, 27 Cal. App. 5th 281 (2018). App. 3–58. The court held that the City unlawfully ordered the evaluation of a single Project going back to 2010, because there was no evidence showing that the Bottinis' construction of a single-family home could cause any significant environmental change, and because the Resolution employed an improper baseline for such evaluation. *See* App. 31–32.

But in the second portion of the decision, the Court of Appeal concluded that the three-part test in *Penn Central* governed the Bottinis' inverse condemnation claim. App. 34–42. Affirming the trial court's summary judgment ruling, the Court of Appeal denied the Bottinis any compensation for their losses. The court reasoned, erroneously, that the Bottinis had not established at the appropriate point in time — in its view, the original acquisition of the Cottage in January, 2011 — that they had sufficiently distinct investment-backed expectations necessary to support a claim for compensation in a regulatory-takings case. App. 43–46. More concretely, the court found "no basis" to support "a reasonable expectation" on the part of the Bottinis "that they would be permitted to engage in such conduct without undertaking any form of environmental review." App. 45.

At no point in its *Penn Central* discussion did the Court of Appeal evaluate the environmental concerns that might be invoked to justify denying the Bottinis a Permit. *See* App. 43–46. But the Court of Appeal turned to those issues briefly in its rejection of the

equal-protection claim on the ground that "a legislative classification does not deny equal protection if the 'distinctions drawn by a challenged [act] bear some rational relationship to a conceivable legitimate state purpose.'" App. 53. Thus, "[a] distinction … is not arbitrary if any set of facts reasonably can be conceived that would sustain it." *Id*. Consistent with this standard, the Court of Appeal did not consider any evidence of possible adverse consequence, and refused to remand the case for further consideration of that point, holding the existence of an actual stated basis for decision was always irrelevant. App. 52–57.

C. After granting review, the Supreme Court of California dismissed the review as improvidently granted

The Bottinis petitioned for review in the Supreme Court of California, which was granted on December 19, 2018. On March 22, 2019, the Bottinis filed their merits brief in the Supreme Court of California.

Three weeks later, on April 10, 2019, the Supreme Court of California dismissed review as "improvidently granted." App. 1.

* * *

To date, over eight years after the Bottinis purchased the Property, nearly six years after the Bottinis commenced action in the Superior Court, four and a half years after the issuance of the writ of mandate, and almost a year after the affirmance of the writ order, the City has not complied with the order that requires the unlawful Resolution be set aside. The Bottinis still do not have a Permit to build their home.

REASONS FOR GRANTING THE PETITION

I. The California Courts Have So Gutted the *Penn Central* Test That It No Longer Places Any Constitutional Restraint on the Denials and Delays of Building Permits in California

A. *Penn Central* sets forth a balancing test, including consideration of investment-backed expectations.

The California Court of Appeal has so twisted the *Penn Central* balancing test for regulatory takings that it no longer imposes any restraint against the arbitrary and capricious behavior of local governments during the permitting process. To set the stage, *Penn Central* first distinguishes physical from regulatory takings. As the law has developed, physical takings are governed by the *per se* compensation rule of *Loretto v. Teleprompter CATV Corp.* which holds that "a permanent physical occupation [of private land] authorized by government is a taking." 458 U.S. 419, 426 (1982). But this Court has adopted a radically different standard to deal with "regulatory takings" that leave a landowner in full possession of the property but still impose restrictions on its use or disposition. In these cases, this Court has instructed all lower courts to balance the inconvenience or loss of the regulated landowner against the justifications, often couched in environmental terms, for imposing the challenged restrictions. The famous formulation of that test reads:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Cent., 438 U.S. at 124 (citations omitted).

In dealing with this balance, Justice William J. Brennan, Jr. first looked at the nature of the government intrusion, and then turned to its asserted public justifications. On these private losses, he wrote:

> [T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that [landowner] may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as [landowner's] primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting [the

> landowner] not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Id. at 136.

The phrase "investment-backed expectations" derives from the key finding that the ongoing operations of *Penn Central* are sufficient to allow it to obtain a reasonable rate of return on its invested capital. In essence, the Court approaches the case as if *Penn Central* were a public utility that was allowed a reasonable rate of return on its invested capital. It then further holds that the air rights to build above the terminal did not have to receive any independent valuation, even though they were fully vested and protected rights under New York State law, which could be, like other forms of property, sold, mortgaged, leased, or given away.

B. The California Court grievously misinterpreted accepted law on the status of investment-backed expectations.

One key gap in the *Penn Central* formulation stems from its failure to address the pivotal case of vacant land, where by definition the property owner receives no current revenues, and indeed suffers a negative rate of return on the property, given that it is obligated to pay taxes and to incur heavy expenses in an effort to lift the restrictions that have been so imposed on the property. In this case, Justice Brennan's notion of investment-back expectations cannot be applied in any straightforward fashion when there is no going-concern that generates a positive rate of return on the property

owner's investment. At this point, the *Penn Central* test necessarily becomes otiose if it values at zero all future development rights, as was done credibly in *Penn Central* itself.

Hence, it becomes imperative to develop some formula that allows courts to steer a troubled path between a legal regime that allows for no development at all and one that strips local governments of all power to regulate the new construction of vacant land. Nothing in *Penn Central* itself addresses, let alone answers, this challenge. Nor have lower courts been able to offer any clear guidance as to how this might best be done.

The intellectual gap in the *Penn Central* formula is most evident in the grotesque transformation of "investment-backed expectations" in petitioners' case decided over 40-years after *Penn Central*. The Bottinis bought the land for one and only one purpose: to build or renovate a single-family home in keeping with the neighborhood for either sale or use. Clearly, their $1.22 million investment was made to obtain a return on capital either through sale, lease, or use. Taken together, the full range of options rested on their investment-backed expectations.

But this sensible interpretation of the requirement received a back-of-the-hand rejection by California courts. Now the California Court of Appeal has given the words "distinct" or "particular" investment-backed expectations a tortured reading that is at odds with *Penn Central*. The relevant time for analyzing "distinct" expectations, according to the court in *Bottini,* was when the land was acquired and when

logically the Bottinis could not know whether they would be forced to preserve the dilapidated structure as an historical monument, or rip it down as a public nuisance. They were prepared to do either, and when the time came they properly dismantled the derelict structure. The California Court of Appeal held that the Bottinis were not, *as a matter of law*, entitled to just compensation for a taking under *Penn Central* because they could not establish that they had reasonable investment-backed expectations solely by pointing to a true representation made by the prior owner to the Bottinis that the Property "could either be renovated or demolished and replaced." App. 44–45. The Court of Appeal held that this statement of intention was insufficient:

> Mr. Bottini's declaration does not state that, at the time the Bottinis purchased the [Property], they intended to demolish the [Cottage] and construct a residence on the lot. Thus, the Bottinis' expectations are not distinct and concrete, but are instead vague and abstract.

App. 44.

That point proved dispositive because, based on the "the lack of a distinct investment-backed expectation," the California Court of Appeal affirmed the trial court's grant of summary judgment for the City on the Bottinis' inverse-condemnation claim. App. 47. But the California courts completely missed the point that the proper expectation to consider is the *use* of the property (here, as a single-family residence), not the *manner* in which the owner achieves the use

(renovation versus new construction). If this logic remains unchallenged, 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. Neither side of the *Penn Central* test matters. It is irrelevant that the government action is devastating to the property owner. It is equally irrelevant that the private project has trivial or even positive environmental impacts. Given the complexity of the land-use approval process, any local government has it within its power to find or create some residual level of uncertainty sufficient to neutralize *Penn Central*. The misapplication of the reasonable-investment-backed-expectation test has become the death knell to any landowner objection to any unlawful permitting process.

The decision of the California Court of Appeal might be thought to have some superficial credibility from the general rule cited by Justice Brennan in *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 654 (1981). "As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion or *regulation*, the landowner has already suffered a constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered." *Id.* (emphasis added, internal quotations and citations omitted). The same thought was expressed in *Meriden Trust & Safe Deposit Co. v. Federal Deposit Insurance Corp.*: the landowners "of course are correct that the critical time for considering investment-backed expectations is the time a property

is acquired, not the time the challenged regulation is enacted." *See* 62 F.3d 449, 454 (2d Cir. 1995) (citing *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990)).

The error in the holding of the California Court of Appeal was to assume that at the time of purchase the Bottinis' investment-backed expectation had to be worthless because they did not know the *manner* in which that expectation would be achieved. *See* App. 44–45. Thus this case presents several related, but unresolved challenges for the *Penn Central* test. First, what are the distinct investment-backed expectations of the Bottinis, or any purchaser, of vacant land? Second, when and how are those expectations measured? If, as the evidence presented below indicates, the investment was made with the sole expectation of being able to maintain a single-family home on a residential lot, then the "when" answer requires a similar measurement whether it is measured at time of purchase or at the subsequent time of a permit application. The method of achieving the expectation (either remodel or build a new home) does not change with the time that expectation is measured. It is positive, not zero, in both cases.

Certiorari should be granted to clarify just what these important propositions mean for the *Penn Central* test. In ordinary private transactions, the risk of gain or loss transfers to the buyer at the conclusion of the voluntary transaction. The same rule applies in takings cases as well. Once the government has taken title, it gets all the upside and downside of the transaction. The former owner in turn has a fixed

claim for the value of the property at that time, plus the interest that accrues between the time of the taking and the time of payment. Put otherwise, the taking makes the former owner a creditor of the government entitled to interest payments for the period that the underlying obligation remains unpaid.

One consequence of this rule is that subsequent changes in the general law that occur after the taking do not affect the amount of compensation. There was, however, no change in the general law in the Bottinis' case. There was only a misapplication of the relevant standard. Applied to the Bottinis' case, therefore, the proper application of that rule takes into account the uncertainties at the time of the taking. Thus, if there is a probability, "p", that the Property will be declared a historical landmark, the first component of value is pV_L for the landmarked status ("V_L" refers to the Property's value following historical designation). Since there are only two choices, the second component of value is $(1\text{-}p)V_N$—the value of the Property if the structure on the Property is indeed a public nuisance. The total is the sum of these two numbers, $pV_L + (1\text{-}p)V_N > 0$.

In this case, because the actual odds of a wrecked building being declared a historical landmark were exceedingly small, most of the value inhered in the second term ($(1\text{-}p)V_N$). What the California Court of Appeal did was breathtaking in its sheer audacity. It pointed to the initial uncertainty and assumed that the total value was zero — the one answer that is totally wrong. The gross deviation from accepted principles cries out for correction by this Court.

C. The California Court of Appeal grievously exaggerated the City's environmental interest.

One further reason to grant certiorari is to correct the serious misinterpretation of the second prong of the *Penn Central* test occasioned by the California Court of Appeal's kid-glove treatment of the City's asserted environmental interest. There is no doubt that the state has large powers to respond to any possible externalities, but the decision below goes far beyond those broad boundaries. One clear case for government regulation arises from the construction of any new building. The most obvious externalities are nuisance-like activities: noises, smells, vibrations, leakages, of which there is not a whisper here or in *Penn Central*. But *Penn Central* established conclusively that modern takings law does not treat nuisance control as setting the outer limits of the police power. Building a Breuer tower on top of Grand Central Station was not enjoined because it created a public nuisance. Instead, New York used the Grand Central Terminal's unique location along Park Avenue as a defense for its refusal to grant a permit. Thus, Justice Brennan wrote:

> Because this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city, appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or

> cultural significance is an entirely permissible governmental goal.

Penn Cent., 438 U.S. at 129 (citations omitted).

Yet the decision below goes far beyond the proposition that Justice Brennan announced in *Penn Central*. The clear negative implication from Justice Brennan's quoted passage is that the case would have come out the other way if the proposed development was, as is the case with the Bottinis, consistent with the character of the neighborhood and imposed no special burdens on any party. Thus the *Bottinis* case falls at that opposite pole from *Penn Central*. The Bottinis present no risk of a common-law nuisance. Nor does the construction of single-family home in keeping with the neighborhood offend any special historic, architectural, or cultural standard. Nonetheless, the California Court of Appeal refused to even look at the second-half of the *Penn Central* balancing test. *See* App. 47. As far as it was concerned, no balancing was needed at all, because local government control becomes total when any court can decide wrongly that the Bottinis could not meet the "distinct" expectations test. That one determination cuts off any review of the environmental issues at all. Accordingly, the Court of Appeal found "no basis" to support "a reasonable expectation" on the part of the Bottinis "that they would be permitted to engage in such conduct *without undertaking any form of environmental review*." App. 45 (emphasis in original).

The California Court of Appeal's objection to the Bottinis' claim wholly misconceives the case. The Bottinis rightfully expected, when they invested $1.22

million dollars in their Property, to be able to construct or renovate a single-family home in the same manner and time frame as other similarly situated property owners in San Diego, all of whom are and have been categorically exempt by Class 3 from CEQA review. They did, and do, claim and expect a hearing that satisfies the mandate of *Penn Central*, which would require at a minimum presentation of evidence demonstrating the amount of just compensation for the regulatory taking caused by the City's denial of a "Coastal Development Permit" that normally issues as of right to owners of vacant lots zoned for single-family homes.

And so *Penn Central* is turned upside down. *Penn Central* pitted a strong property-rights claim against a strong environmental claim. The property rights claim there was rejected because the property retained a current use that guaranteed it a reasonable rate of return on its original investment. The Bottinis have no permitted use, and a huge negative rate of return. The environmental claims in *Penn Central* were also found to have great weight because of their distinctive impact on the Manhattan landscape. *See* 438 U.S. at 110 & n.8, 115. In contrast, here the Bottinis are ruined financially without any perceivable environmental risk from their intention to build an ordinary single-family home. *See* App. 28–31. No lower court should have discretion to rig the test for investment-backed expectations to deny a building permit for no good reason. Certiorari must be granted to correct this perverse and indefensible application of the *Penn Central* case.

II. The California Court of Appeal Misread the "Normal Delay" Exception of *First English* by Allowing It to Deny Any Compensation in All Claims for Total Temporary Takings

In *First English*, the church operated its Lutherglen campsite on twelve acres of property on the banks of Middle Forks of Mill Creek in Los Angeles County. *See* 482 U.S. at 307. After major fires denuded lands upstream from the camp, the County imposed a temporary but total moratorium on new construction at the location of the former site. *Id.* The only issue before this Court was whether that regulation itself generated a *prima facie* obligation to compensate the owner for its loss of use during the designated period. As in the Bottinis' case, the church's claim in *First English* only arose under California law but the Court in *First English* perceived no difficulty for certiorari jurisdiction, *see id.* at 313 n.8, because, as is the case here, the City conceded below that "this [California Supreme] Court has held that the takings clause in the California Constitution should be construed 'congruently' with the federal takings clause, with minor differences that are not applicable here." *See* App. 42.

With the issue properly before it, this Court held that *prima facie*, such compensation was required, and remanded the case back to the California courts for further consideration to determine whether the local government offered some sufficient police power justification for its decision. *See First English*, 482 U.S. at 311, 322. On remand, the California Court of Appeal held that such a police-power justification was present given the need to protect young campers from

the potential risk of death or personal injury from flooding. *First English Evangelical Lutheran Church v. County of Los Angeles,* 210 Cal. App. 3d 1353, 1372 (1989).

Under *First English*, this Court also announced another qualification to the temporary-total-takings rule that this Court has not revisited in 32 years:

> We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of *normal delays* in obtaining building permits, changes in zoning ordinances, variances, and the like, which are not before us.

482 U.S. at 321 (emphasis added). Regrettably, the Bottinis' plight illustrates the way in which lower courts can degrade the notion of "normal."

The decision here is even in tension with California law — *Landgate, Inc. v. California Coastal Commission,* 17 Cal. 4th 1006 (1998), which held that, doubtfully, an incorrect assertion of jurisdiction that denied a landowner all use of his property for two years counted as a "normal delay" that took the case out of the *First English* rule. But even that court held that: "It would be, of course, a different question if, even though the [government's] 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. Such a delaying tactic would not advance any valid government objective." *Id*. at 1024. The repeated stalling tactics of the San Diego City Council show how

this principle has been flouted in the very jurisdiction that announced that rule. *See* App. 12–16, 74–75. Certiorari is needed to avoid the absurd result that makes *all* delays normal, and so that the important constraint that this Court imposed on government misbehavior does not become dead letter law.

The phrase "normal delays" has an irreducible normative component. Individual landowners may be able to predict that they will be ill-treated, but that knowledge should not be used to strip them of all procedural protections. Inordinate delays in land-use proceedings are not "normal" just because they have become commonplace. Justice Ming W. Chin of the California Supreme Court made this forceful observation about the "normal delay" exception to *First English* in his dissent in *Landgate*:

> When a regulatory agency prohibits all use of a particular property, and the property owner is forced to sue the agency to get it to change its position, its stonewalling is not fairly characterized as a "normal delay" in the permit approval process.

17 Cal. 4th at 1205 (Chin., J., dissenting).

As Justice Chin further noted, the California Supreme Court incorrectly adopted the exact meaning of the phrase "normal delay" that Justice John Paul Stevens offered in his *First English* dissent, namely this: "Litigation challenging the validity of a land-use restriction gives rise to a delay that is just as 'normal' as an administrative procedure seeking a variance or an approval of a controversial plan." *First English,* 482

U.S. at 334–35, cited in *Landgate*, 17 Cal. 4th at 1033. But Justice Stevens's formulation makes it appear as though all delays initiated by the local government are "normal," which in turn invites any local government to file pointless motions and frivolous appeals solely to avoid issuing a permit. Like the term reasonable investment-backed expectations, the term "normal" has an implicit normative component. Not every delay is normal, for many delays are both excessive and unprincipled, so some guidance is imperative as to its proper use.

The situation here has an eerie resemblance to the exhaustion of state remedy requirement under Section 1983, which this Court overturned in the last term in *Knick*, 139 S. Ct. at 2162. It is important to remember that opportunism in land-use cases is not limited to crafty property owners. All too often local hostility to new development gets explicit voice in hearings before local governments, and those senseless delays, both *before and after* a final administrative determination is made, constitute infringement of property rights every bit as much as the misplaced exhaustion of remedy requirement struck down in *Knick*. *See id*. at 2168.

There are, moreover, good political economy reasons why only exceptional, not normal, delays *should* generate takings claims. The point here goes back to the provocative observation by Justice Oliver Wendell Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1923), when he observed that cash compensation is not required for the imposition of general land use regulations that produce an "average reciprocity of advantage." *Id*. at 415. The notion of a "normal delay"

is meant to capture just this idea. In contrast, abnormally long delays are outside the set of forced exchanges that produce an average reciprocity of advantage, and hence the economic imbalances have to be compensated in cash. Since all property owners have to go through normal procedures, it becomes unduly burdensome to hold that all such small delays should generate an obligation to compensate. Instead, each landowner now understands that it receives a *quid pro quo* for the loss of compensation under normal delay, by not having to pony his or her share of taxes to fund payments to all other applicants before a local land use board. The relevant notion is one of "implicit-in-kind compensation," which applies not only in this case, but in all instances of small but widespread invasions of property rights. For explication and examples, *see* RICHARD A. EPSTEIN, TAKINGS PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 195–205 (1985). The removal of the large administrative costs generates savings that are shared by all property owners, without working a transfer of wealth to some politically favored class — the very political risk that has been imposed on the Bottinis as outsiders to the local politics. So long as the size of the delay is proportionate, every landowner from the *ex ante* position benefits from the elimination of the compensation requirement. In more technical language, allowing an exemption for normal delays works a Pareto improvement, while privileging excessive delay works an illicit wealth transfer from privileged insiders to vulnerable outsiders.

The power of this distinction is illustrated by *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional*

Planning Agency, 535 U.S. 302 (2002), which is readily distinguishable from the Bottinis' case. The issue in *Tahoe-Sierra* was whether the decision by the Tahoe Regional Planning Agency to impose a general moratorium on development in order to take time to prepare a comprehensive land-use plan constitutes a *per se* taking that requires full compensation. In that instance, the delay was 32 months, and was issued in two separate stages as work progressed. *See id*. at 306. This Court held that the *per se* rule did not apply. *See id*. at 342. The simple explanation is that the time allocated for this comprehensive effort could easily have been needed to coordinate all the moving parts in a major decision that could not easily be reversed after it was made. 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.

Accordingly, *Tahoe-Sierra* stands in sharp contrast with the Bottinis' unhappy predicament. The City's endless series of maneuvers have consumed over eight years with no end in sight. But far from seeking to implement any comprehensive development plan for a large and complex region, the City's sole objective is to prevent the Bottinis, by hook or crook, from building an ordinary single-family residence indistinguishable from neighboring houses. Any comprehensive zoning ordinance may well need the approval of a majority of the community. But unlike here, the burden of public delay does not fall on a single landowner to bear the brunt of any new decision. The oft-quoted remark in *Armstrong v. United States* is most applicable:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

364 U.S. 40, 49 (1960).

If excessive delays are impermissible, just what counts as a normal delay? One good reference point is found in legislation that applies specific limits for specific moratoria, all of which are far shorter than the many years involved in this case. Thus, in his dissent in *Tahoe-Sierra*, Chief Justice William H. Rehnquist emphasized the majority's recognition that permissible moratoria are limited in duration — commonly ranging between 45 days and two years:

> As the Court recognizes, … state statutes authorizing the issuance of moratoria often limit the moratoria's duration. California, where much of the land at issue in this case is located, provides that a moratorium "shall be of no further force and effect 45 days from its date of adoption," and caps extension of the moratorium so that the total duration cannot exceed two years …. Another State limits moratoria to 120 days, with the possibility of a single 6-month extension …. Others limit moratoria to six months without any possibility of an extension.

535 U.S. at 353–54.

The inordinate delays in this case — eight years and counting — far exceed these common time limitations, without a semblance of justification. A proper valuation of the losses from government action should include all the economic losses that arise when the government immobilizes land use, for eight years and counting. There are always line-drawing problems between normal and extraordinarily long delays, but this case is not one of them. This Court needs to respond firmly to the epidemic of abuse wrought by intransigent local governments, and should grant the writ of certiorari.

CONCLUSION

For all the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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