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 a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

How does the regulatory takings test set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), work in cases of extraordinary government delay?

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It has appeared as *amicus curiae* before this Court in important Fifth Amendment takings cases. See, e.g., *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019); *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003 (1992).

This case puts an infamous Supreme Court decision in touch with a notorious part of American homeownership. It asks what the impenetrably obscure regulatory takings test in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), has to say about the often long, arduous, and vexing process of obtaining a building permit from the local zoning authority. The answer, it turns out, is "very little." And that's a problem, because this Court has said that the lower courts *must* use *Penn Central* to assess whether the length of a permit delay has created a taking that requires just compensation.

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[*] No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, helped pay for the brief's preparation or submission. At least ten days before the brief was due, WLF notified each party's counsel of record of WLF's intent to file the brief. Each party's counsel of record has consented in writing to the brief's being filed.

Everyone is confused. Judges are applying *Penn Central* to delay cases in all sorts of inconsistent ways. WLF urges the Court to provide some clarity.

STATEMENT OF THE CASE

Frank and Nina Bottini bought a residential lot in La Jolla, California, in February 2011. Pet. App. 10. The house on the property had been built in 1894—ancient by California standards—and designed by Irving J. Gill. *Id.* at 9-10. The Bottinis asked the pertinent local authority, the Historical Resources Board, whether the house qualified as a historic monument worthy of preservation. *Id.* at 10-11. The Board's staff opined that the house was too altered from its original state to warrant protection. *Id.* After holding a hearing on the question in September 2011, the Board agreed. *Id.* at 11. The Bottinis then asked the City of San Diego to determine whether the house was structurally unsound, and thus a public nuisance. *Id.* at 12. The City decided that indeed it was, and directed the Bottinis to tear it down. *Id.* at 13. The Bottinis promptly did so. *Id.*

In August 2012 the Bottinis applied to build a single-family home on the now-vacant lot. *Id.* at 14. The question arose whether the building project had to undergo environmental review under the California Environmental Quality Act (CEQA). The construction of a "single-family residence" is typically "categorically exempt" from such review. See 14 Cal. Code Regs. §§ 15300, 15303(a). Accordingly, in January 2013 the City staff declared the Bottinis' building project exempt. Pet. Br. 9.

Two local preservation groups appealed the staff's decision to the San Diego City Council. Pet. App. 14. The appeal stood on two assumptions: (1) that the old house should have been incorporated into the project "baseline," and (2) that the old house was a "historic resource." *Id.* at 14-16. Each assumption was insupportable. A CEQA project "baseline" is simply "the environment's state absent the project," *N. Cnty. Advocates v. City of Carlsbad*, 241 Cal. App. 4th 94, 101 (2015)—in the Bottinis' case, an empty lot—and the Board had already said that the old house was of no historic value.

At a June 2013 City Council hearing, the deputy city attorney told the Council that the Bottinis had followed the municipal code "to the letter." Pet. Br. 10. The City staff recommended that the Council deny the appeal. *Id.* A councilwoman moved to grant it, however, and in a vote on her motion the Council deadlocked 4 to 4. *Id.* At a second hearing, in September 2013, the Council voted 5 to 3 to grant the appeal, one councilmember changing his vote simply to break the stalemate. *Id.* at 11. The Council then passed a resolution stating that the project could damage a "historic resource." *Id.* How could a "resource" that no longer existed be damaged? The Council simply declared, for purposes of setting a project baseline, that the old house still stood. Pet. App. 15. The Council directed the City staff to reassess the project with that assumption in place. *Id.*

The Bottinis promptly sued the City and the Council in state court. *Id.* at 16. About a year later, in December 2014, the trial court declared the

project exempt from CEQA review. Pet. Br. 12. It ordered the Council to vacate its resolution. *Id.*

The Bottinis' lawsuit included a cause of action for inverse condemnation, and the trial court had still to address that claim. *Id.* The Council submits that, having been ordered to set aside the resolution, it had either to ignore the order and risk contempt, or to comply with it and risk losing the right to challenge it on appeal. *Bottini v. City of San Diego*, 2016 WL 304682 *1 (Cal. Ct. App. Jan. 26, 2016). The City could simply have asked the trial judge to resolve this supposed concern. (The order set no deadline for compliance.) Instead the City lodged an appeal. A year later, in January 2016, the Court of Appeal stated the obvious: "the City's appeal violate[d] the one final judgment rule." *Id.* Appeal dismissed.

Ten months later the trial court rejected the inverse-condemnation claim (along with other claims the Bottinis had raised in an amended complaint). Pet. Br. 13. Both sides appealed.

Another twenty months later, in September 2018, the court of appeal affirmed both the order invalidating the resolution and the order dismissing the Bottinis' inverse condemnation claim (as well as their other claims, which will receive no further attention).

To justify subjecting the Bottinis' project to CEQA review, the Council had cited two rules. A project is not exempt from review if (a) it "may cause a substantial adverse change" to a "historical resource," or (b) it will "have a significant effect on

the environment due to unusual circumstances." Pet. App. 29-30. The City, the court noted, in addressing the first rule, had *itself decided* that the old house was not a historic monument. The City could not, the court said, simply "turn back the clock"—by, say, setting a fantastical project baseline—and attaint the Bottinis' City-approved demolition of the old house. *Id.* at 28. And even if the old house *had* been a "historical resource," the court added, the project could "not cause a substantial adverse *change*" to a structure that had "*already* been demolished." *Id.* at 30.

"The City," the court observed, turning to the second rule, took "contradictory and confusing positions" on the Council's claims about "unusual circumstances." *Id.* at 30 n.9. At one point the City argued that "the Bottinis' self-serving actions" had "present[ed]" the "unusual circumstances" that justified subjecting their project to CEQA review. *Id.* Later, however, the City claimed that the Council had not invoked the "unusual circumstances" rule to begin with. *Id.* It is plainly vindictive and irrational to impose *environmental* review on an *empty* lot because one dislikes what happened to a building that *no longer* stands there. Perhaps the City came to understand how bad the Council's use of the "unusual circumstances" rule looked.

In all events, the court called the City on its revisionism, concluding that the Council "did in fact" invoke the "unusual circumstances" rule. *Id.* The City argued that the process leading to the old house's destruction was "unusual." Again, though, it was a non sequitur to cite the *way* the house came to meet its end as a ground for reviewing the project's

environmental impact *going forward*. *Id.* at 31. Moreover, the City's point failed on its own terms. Although the City claimed that the Bottinis had "pressured," "cajoled," "coerc[ed]," and "strong-armed" city employees into granting a demolition permit, the City cited no evidence to support any of its smears. *Id.* at 21-22. There was, quite simply, nothing "unusual" about the project. *Id.* at 31.

The discussion to this point *should* have told us a lot about the Bottinis' inverse-condemnation claim. The Bottinis contend that the City's extraordinary delay in granting a building permit amounts to a temporary regulatory taking of property without just compensation. As support for their claim that the delay has been "extraordinary," the Bottinis point to (among other things) the City's ex-post-facto contortion of the project baseline, its abuse of the "historical resource" and "unusual circumstances" rules, its personal attacks on the Bottinis themselves, and its exceedingly weak interlocutory appeal.

In considering the Bottinis' claim, however, the court of appeal never got that far. The court applied *Penn Central*, 438 U.S. 104, which, in its view, required the Bottinis to satisfy each prong of a multi-factor test to establish a temporary regulatory taking. Pet. App. 42-43, 47. The court focused on a single factor. The Bottinis were unsure, when they purchased the lot, what building would ultimately stand on it. *Id.* at 47. The court held that the Bottinis thus lacked a "distinct investment-backed expectation" (in *Penn Central*'s words) for the property. *Id.* at 43-46. The court treated this finding—along, perhaps, with the fact that the

government had not literally invaded the Bottinis' land—as fatal to the Bottinis' taking claim. *Id.* at 47. Their claim was a loser, in other words, no matter how long the delay dragged on, and no matter what the government might do to prolong it.

The California Supreme Court granted review. It later reversed course, however, and dismissed review as improvidently granted. *Id.* at 1.

SUMMARY OF ARGUMENT

The Bottinis own a plot of land, and they want to build a house on it. The land is of no use to them for any other purpose: it is zoned for residential use. One might think, therefore, that if the local government deprived the Bottinis of a building permit for years on end, the question would eventually arise whether the sheer length of the delay—especially if that delay came with signs that the government was acting in bad faith—constituted a temporary regulatory taking of the Bottinis' property. For a while, indeed, the Takings Clause seemed to work this way.

But this Court later decided that it's not so simple. The Court ruled that a plaintiff seeking to show that extraordinary government delay has caused a temporary regulatory taking must satisfy a multi-factor test built around *Penn Central*, 438 U.S. 104. The Court did not explain *how* the *Penn Central* test works in delay cases, however, and the lower courts have been hopelessly lost in trying to work it out for themselves. It appears, for instance, that the court below failed to let the government's delay play *any* real role in its *Penn Central* analysis.

The lower courts cannot figure out how extraordinary delay fits into the *Penn Central* test, or how bad-faith conduct by the government fits into an assessment of extraordinary delay. They take differing stances on whether any specific length of delay is presumptively extraordinary. They cannot agree on whether the *Penn Central* factors are considered in a certain order or all at once. They are not even sure what those factors *are*.

This area of law is a mess. Property owners across the nation need this Court to step in and sort it out.

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD GRANT REVIEW TO CLARIFY HOW THE *PENN CENTRAL* TEST WORKS IN CASES OF EXTRAORDINARY DELAY.

We will first explain how the *Penn Central* test arose, where the concept of a delay-based temporary taking comes from, and how the Court came to apply the *Penn Central* test to cases of extraordinary delay. We will then turn to the lower courts' ongoing struggle to apply the *Penn Central* test when a plaintiff alleges that an extraordinary delay has caused a temporary regulatory taking.

A. How We Got Here.

1. *Penn Central*.

The Fifth Amendment's Takings Clause (applied to the states through the Fourteenth Amendment's

Due Process Clause) requires the government to pay "just compensation" for "private property" it takes for "public use." For a long time "it was generally thought" that the Takings Clause applied only to the "direct appropriation" of property or the "practical ouster" of a property owner. *Lucas*, 505 U.S. at 1014. In 1922, however, the Court acknowledged that the Takings Clause must impose *some* limit on a government's ability to qualify property rights through regulation. Otherwise the government, acting in accord with "human nature," would extend its power "more and more until at last private property disappears." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Regulation that "goes too far" must, therefore, be "recognized as a taking." *Id.*

Saying what "goes too far" has caused the Court "considerable difficulty." *Penn. Cent.*, 438 U.S. at 123. In *Penn Central*, decided in 1978, the Court tried to offer some definitive guidance. New York City declared Grand Central Terminal a historic landmark. One effect of that declaration was to bar the property's owner, the Penn Central railroad, from building anything above the station. The railroad argued that this bar qualified as a taking. On its way to disagreeing, the Court noted that the analysis of regulatory takings claims is generally "ad hoc." *Id.* at 124. Still, the Court said, a few factors "have particular significance." A regulation that disrupts a property owner's "distinct investment-backed expectations," for example, is more likely to constitute a taking. *Id.* So is a regulation that costs the property owner a lot of money, or one that interferes with the property itself (by allowing the government to "invad[e]" it, for instance). *Id.*

Each of the *Penn Central* factors, the Court later conceded, has produced "vexing subsidiary questions." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005). Other thinkers have been a little less charitable. One scholar questioned whether *Penn Central* offers anything more than "legal decoration for judicial rulings based on intuition." John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171, 175 (2005). Janice Rogers Brown, for her part, called the *Penn Central* test "squishy," "amorphous," and "intractably complex." *Landgate, Inc. v. Cal. Coastal Comm'n*, 17 Cal. 4th 1006, 1036 (1998) (Brown, J., dissenting).

It's not even clear what one is to *do* with *Penn Central*. Does the decision create a formulaic multi-factor test (step 1: look for investment-backed expectation; step 2: look for government interference; etc.)? That's what the court below assumed. Pet. App. 42-47. But other courts see *Penn Central* as calling for a free-wheeling assessment of the totality of the circumstances. See, e.g., *Bass Enter. Prod. Co. v. United States*, 381 F.3d 1360, 1370 (Fed. Cir. 2004). We will return to this tension. For now it suffices to note that, however it is applied, the *Penn Central* test is a malleable one. It arguably lets a judge reach "virtually any result" he wants. *Landgate*, 17 Cal. 4th at 1036 (Brown, J., dissenting).

2. Government Delay.

As with *regulation* that "goes too far," so with *delay* that "goes too long." An indefinite wait for a land-use permit must at some point trigger a taking. Otherwise the state could dither "until at last

private property disappears." *Mahon*, 260 U.S. at 415.

"Men must turn square corners when they deal with the Government." *Rock Island A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920) (Holmes, J.). No one expects the local zoning board to move quickly. Nor is it required to do so. The Court said as much when it first hinted that, nonetheless, some outer boundary for delay must exist. "Mere fluctuations in value during the process of governmental deicisionmaking," the Court explained in 1980, are, "*absent extraordinary delay*," simply "incidents of ownership" that do not trigger the Takings Clause. *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980) (emphasis added), overruled on other grounds by *Lingle*, 544 U.S. 528, as we will see.

A few years later, in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Court confirmed that the state must pay for a temporary taking no less than for a permanent one, *id.* at 318. The Court reiterated, however, that the delay must be extraordinary. Temporary takings do not arise from "normal delays in obtaining building permits." *Id.* at 321.

But how long is too long? *First English* provides "no basis for distinguishing a 'normal' delay from an excessive one." Note, *The Supreme Court, 1986 Term: Leading Cases*, 101 Harv. L. Rev. 240, 246 (1987). *Lucas*, decided in 1992, holds that when the state tells a person "to leave his property economically idle," he "has suffered a taking." 505 U.S. at 1019. So for a time we seemed at least to

know, from combining *First English* (long delay = taking) and *Lucas* (forced idleness = taking), that an unreasonable wait for a building permit is a taking. See *id.* at 1011-12; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 228 F.3d 998, 999-1000 (9th Cir. 2000) (Kozinski, J., dissenting from denial of rehearing *en banc*). The only question was when the wait becomes unreasonable.

Not so. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Court considered whether a years-long building moratorium around Lake Tahoe qualified as a *per se* taking. The *Tahoe* plaintiffs wanted to build houses on residential lots. That's exactly what the *Lucas* plaintiff had wanted to do. But *Tahoe* distinguishes *Lucas* as a case confined to permanent takings. *Id.* at 330-31. (Said another way, *Tahoe* guts *Lucas*. See Echeverria, supra, 23 UCLA J. Envtl. L. & Pol'y at 173.) What matters when the pertinent state action is temporary, *Tahoe* says, is whether the plaintiff can pass the *Penn Central* test. 535 U.S. at 342. When a court assesses a temporary regulatory taking claim, the length of a delay is just "one of the important factors" it should consider. *Id.*

B. But Where Are We?

It has been remarked that the "exact role of an 'extraordinary delay'" in a proper takings analysis is now "somewhat confusing." Daniel L. Siegel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 Vt. J. Envtl. L. 479, 486 (2010). That understates things. Government delay was not remotely an issue in *Penn Central*,

and the *Penn Central* test, unfruitful even in its native soil, fares worse yet when uprooted.

Courts cannot even agree on how government delay and *Penn Central* connect. Some say that extraordinary delay sits *within* the *Penn Central* test—it is a factor to be considered, alongside others, holistically. See *State ex rel. Duncan v. Village of Middlefield*, 898 N.E.2d 952, 956-57 (Ohio 2008); *Byrd v. City of Hartsville*, 620 S.E.2d 76, 81 (S.C. 2005). Others treat it more as sitting *in front* of the test—a plaintiff must show extraordinary delay, considered by itself, and *then* satisfy *Penn Central*. See *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351-52 (Fed. Cir. 2004); *Aloisi v. United States*, 85 Fed. Cl. 84, 93 (2008); see also Siegel & Meltz, supra, 11 Vt. J. Envtl. L. at 492 (arguing that a plaintiff must show extraordinary delay to "ripen" her claim and get to the *Penn Central* test). At least one court has suggested that a plaintiff can still skip *Penn Central* altogether if she has suffered extraordinary delay plus bad-faith government conduct. See *Wild Rice River Estates, Inc. v. City of Fargo*, 705 N.W.2d 850, 859 (N.D. 2005). This position is not necessarily foreclosed by *Tahoe*, which declines to consider a forfeited bad-faith theory. 535 U.S. at 333-34.

Although it assures the nation's property holders that "justice will be best served" by applying "the familiar *Penn Central* approach" to cases of delay, *id.* at 342, *Tahoe* says precious little about how the *Penn Central* test will *work* in such cases. The Court declined to apply the test to the dispute before it. *Id.* at 334. "It *may* well be true," the majority suggested, in its only real stab at guidance, that "any

moratorium that lasts for more than one year should be viewed with special skepticism." *Id.* at 341 (emphasis added). At least one judge has taken this aside seriously. See *Ecogen, LLC v. Town of Italy*, 438 F. Supp. 2d 149, 162 (W.D.N.Y. 2006). Usually, however, it is ignored. See, e.g., *Appolo Fuels*, 381 F.3d at 1351-52 ("The eighteen-month delay here is far short of extraordinary.").

It was sorely neglected in the case at hand. The court below assumed that, under *Penn Central*, it must look at (1) "the economic impact of the regulation on the claimant," (2) the regulation's effect on "the claimant's reasonable, distinct investment-backed expectations," and (3) "the character of the government action." Pet. App. 42-43. The court acknowledged, when considering the first factor, that government delay has harmed the Bottinis, who "have had to pay a mortgage for . . . an empty lot" while waiting for a permit. *Id.* at 43. But when it turned to the second and third factors, the court stopped talking about time. The second factor, it said, "weighs strongly against the Bottinis," because, when they bought the property, they were not sure (a) what *kind* of house would ultimately be there (the old one or a new one) or (b) whether the property would need to undergo an environmental review. *Id.* at 43-45. The third factor supposedly cut against the Bottinis, meanwhile, because "the City did not physically invade or appropriate the Bottinis' property." *Id.* at 47.

The court flirted with sophistry when, in its analysis of the second factor, it contended that although someone who wants a home on his lot has takings protection, someone who wants a home,

either home A or home B, does not. More to our point, the court missed that someone who invests in land has a "reasonable" and "distinct" expectation that the government will not deliberately impose extraordinary delays, such as by ordering environmental reviews of vanished buildings or taking frivolous interlocutory appeals. As for the third factor, it is true that, over the many years the Bottinis have been chasing a permit, the City has not invaded or seized ownership of the property. But time is a long thing, and at some point the "character" of government *in*action over a piece of land must equal "appropriation" of it. "Governmental policy is inherently temporary while land is timeless." *Tahoe*, 228 F.3d at 1001 n.1 (Kozinski, J., dissenting from denial of rehearing *en banc*). There is therefore "no clear-cut distinction between a permanent prohibition and a temporary one." *Id.* The court failed to account for this.

Penn Central, by the way, happens to mention one "government action," the "character" of which suggests a taking: "interference with property" that resembles "a physical invasion." 438 U.S. at 124. The proffering of this one example seems to have convinced many courts, including the court below, that "the character of the government action" factor really just asks, "Did the government invade or seize the property?" It's not at all obvious that that's right. Other courts use the third factor to assess *the character of the government action*, including, in a case such as this one, "the nature of the permitting process" and the government's "reasons for delay" in issuing a permit. *Cooley v. United States*, 324 F.3d 1297, 1306-07 (Fed. Cir. 2003). Some courts take "character of the government action" literally, in

other words, while others don't. *Id.* As usual in this area, disorder reigns.

At any rate, the court below thought itself entitled to "dispose of a takings claim" based on just "one or two" of the *Penn Central* factors. Pet. App. 47. Tracking this assumption, it rejected the Bottinis' claim "in particular" for want of a proper investment-backed expectation—the second factor. *Id*. What the court did, in effect, was divide the *Penn Central* factors into three discrete boxes, place government delay in box 1, and then decide the case based on the content of box 2 (and perhaps box 3). To be left in box 1, when the case turns on box 2 (and maybe box 3), is to be discarded. The court's disjointed approach removed government delay from the equation.

The court below followed other California Courts of Appeal in concluding that its keyhole version of *Penn Central* is blessed by *Ruckelshaus v. Monsanto, Co.*, 467 U.S. 986 (1984), in which this Court disposed of a regulatory takings claim while looking only at investment-backed expectations, *id.* at 1005. Contrast California's constricted approach with the Federal Circuit's "gestalt approach"—an open-ended "review of all relevant circumstances surrounding the alleged taking by the Government." *Bass*, 381 F.3d at 1370. This approach finds support in Justice O'Connor's concurrence in *Palazzolo v. Rhode Island*, 533 U.S. 606, 633-34 (2001), and in her opinion for the Court in *Lingle*, 544 U.S. 528, which says that the *Penn Central* test is a general appraisal of "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests," *id.* at 540. Then again, as we've

seen, the Federal Circuit elsewhere appears to assume that a plaintiff must establish extraordinary delay and *then* proceed to the *Penn Central* test. And *this approach too* finds support in the Court's case law. *Agins*, the very case that introduces the concept of delay to the Takings Clause, suggests that *only* extraordinary delay can turn a change in a property's value pending permit approval from an "incident of ownership" into a taking. 447 U.S. at 263 n.9. By this logic, an extraordinary delay is just a ticket to Takings-Clause scrutiny.

The part that bad faith plays in temporary regulatory takings is another potent source of confusion. Some judges treat bad faith as something like a *necessary* condition just for getting to the *Penn Central* test. See *Cooley*, 324 F.3d at 1307. Others, as we noted earlier, suggest that bad faith, when coupled with extraordinary delay, is a *sufficient* condition for establishing a taking. See *Wild Rice*, 705 N.W.2d at 859.

It *seems* obvious that bad faith must play some role in the *Penn Central* analysis. *Penn Central* says, after all, that a property holder's "investment-backed expectations" matter. What expectation could be more fundamental than that your government—a government of the people, by the people, for the people—will not treat you like a serf? Perhaps a citizen cannot reasonably expect efficient, or even helpful, government. But he *can* reasonably ask that his government not attack him, vilify him, and take "contradictory and confusing positions" in a by-any-means-necessary approach to opposing his modest efforts to make his way in the world. Pet. App. 21-22, 30 n.9. "Whatever it takes," "throw out the

rulebook," and "no holds barred" are improper mantras for a government bent on getting what it wants from people. Some limit must exist on how much the government may force a property owner to "dance" to its "tune." *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). Some limit must exist on the government's ability to jerk around a permit seeker.

There is, however, some doubt about whether the *Takings Clause* ever provides the right avenue for challenging bad-faith conduct by the government. *Agins* declares that a property regulation that "does not substantially advance legitimate state interests" qualifies as a taking. 447 U.S. at 260. *Lingle* disagrees. "Instead of addressing a challenged regulation's effect on private property," it observes, "the 'substantially advances' inquiry probes the regulation's underlying validity." 544 U.S. at 543. But a regulation can be invalid without much burdening a person's property rights. *Id.* at 542. A complaint about irrational government conduct, *qua* irrational government conduct, has the ring of a due-process claim rather than a takings claim. *Id.* And what can be said of irrational state conduct can equally be said of bad-faith state conduct. If the government denies you a permit in bad faith, but the denial has little effect on the value of your land, it's unclear what the bad faith has to do with the *Takings* Clause. In such a case, the government hasn't *taken* anything.

Lingle was issued after *Tahoe*. But *Tahoe*, unlike *Lingle*, directly addresses extraordinary delay. And in doing so, *Tahoe* suggests that bad faith is relevant to a takings analysis. "Were it not for the findings of

the District Court that [the government] acted diligently and in good faith," the Court wrote, "we might have concluded that [it] was stalling." *Tahoe*, 535 U.S. at 333. That conclusion, in turn, "arguably could [have] support[ed]" a takings claim. *Id.* So we have an older, on-point case that implies, without explanation, that bad faith is part of the *Penn Central* test; and a newer, off-point case, the logic of which excludes bad faith from that test. Which case are the lower courts to apply?

Of course, such quandaries are only to be expected when a test is used so far from the conditions that produced it in the first place.

* * *

When a plaintiff tries to establish a temporary regulatory taking, is extraordinary delay an antecedent to, or rather a part of, the *Penn Central* test? Is that test a three-part "if-then" test, or a many-factor "totality of the circumstances" test? Does the test view delays of more than a year with special skepticism? Do the test's investment-backed-expectations and character-of-government-action prongs encompass only the kinds of expectations or actions explicitly discussed in *Penn Central*? And is bad-faith government conduct integral to, merely useful in, or utterly irrelevant to establishing that a temporary regulatory taking has occurred?

These questions are not creating problems because the lower courts are misunderstanding or defying this Court's precedents on extraordinary delay and temporary regulatory takings. They are creating problems, rather, because those precedents

are confused and confusing. Only this Court can clear up what it means to say in this area. It should do so.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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