No. _____

In The

Supreme Court of the United States

MARYLAND RECLAMATION ASSOCIATES INC.,

Petitioner,

v.

HARFORD COUNTY, MARYLAND,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After a quarter century of continued litigation and a 2018 adjudication on the merits, a Maryland jury awarded petitioner $45,420,076. in damages for a regulatory taking that occurred under this Court's *Penn Central* analysis. The Maryland Court of Appeals vacated the jury's verdict holding that the landowner was required, decades prior, to raise that identical Takings Clause claim in an administrative variance proceeding, before resorting to a court. That variance proceeding asks only whether the regulatory action "substantially advances" a legitimate governmental interest and the administrative agency has no authority to award just compensation. Therefore, Maryland law determines whether there is a taking under the abandoned standard of *Agins v. Tiburon*, 447 U.S. 255 (1980) and denies the property owner access to a court to pursue an independent takings lawsuit in a court and before a jury. However, in *Lingle v. Chevron*, 544 U.S. 528 (2005), the "substantially advances" test was unanimously held not to be a valid method of identifying compensable regulatory takings and that it has no proper place in this Court's takings jurisprudence.

1. The question here is whether an administrative variance decision, that a regulation advances a legitimate government interest, precludes a subsequent independent Takings Clause lawsuit before a court pursuant to this Court's *Penn Central* three prong *ad hoc* factual inquiry. If so, are Maryland residents denied access to a court, by accident of their residence,

QUESTIONS PRESENTED—Continued

because of the preclusive effect of the underlying facts determined in the administrative variance proceeding. There is a split between courts of last resort on this significant Fifth Amendment question.

2. The corollary Fifth Amendment query, to question one, is once a court adjudication on the merits, thru a jury's verdict, has established a *Penn Central* taking has occurred, by an *ad hoc* factual inquiry into a government's conduct, can an expiration date be put on the Constitution's Takings Clause and its self executing demand that once a court establishes a taking occurred just compensation is required. If so, has the government taken private property by a shorter cut than the constitutional way of paying for it.

CORPORATE DISCLOSURE STATEMENT

Pursuing to Supreme Court Rule 29.6, Maryland Reclamation Associates, Inc. is a Maryland corporation duly incorporated under Maryland law. Richard Schafer, its president, states that the Maryland corporation has no parent corporation and that no publicly held company has an ownership interest in it.

RELATED CASES

Charles Holmes, et al. v. Maryland Reclamation Associates, Inc., 90 Md. App. 120, 600 A.2d 864 (1992)

Maryland Reclamation Associates, Inc. v. Harford County, 342 Md. 476, 677 A.2d 567 (1996)

Maryland Reclamation Associates, Inc. v. Harford County, 382 Md. 348, 855 A.2d 351 (2004)

Maryland Reclamation Associates, Inc. v. Harford County, Maryland, 414 Md. 1, 994 A.2d 842 (2010)

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PETITION FOR WRIT OF CERTIORARI

Maryland Reclamation Associates, Inc., a Maryland Corporation, by its president Richard Schafer, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The opinion of the Maryland Court of Appeals is reported at *Maryland Reclamation Associates, Inc. v. Harford County, Maryland*, 468 Md. 339 (2020), and is reproduced in Petitioner's Appendix Pet. App. at A. The decision of the Maryland Court of Special Appeals is reported at *Harford County, Maryland v. Maryland Reclamation Associates, Inc.*, 242 Md. App. 123 (2019), and appears at Pet. App. B. The Order denying Petitioner's Motion for Reconsideration is attached here as Pet. App. C. The Opinions of the trial court ordering Petitioner's *Penn Central* claim for a jury trial are attached as Pet. App. D and E.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). Petitioner, Maryland Reclamation Associates, Inc., by its president Richard Schafer, filed a lawsuit, against Harford County Maryland, challenging a newly enacted zoning ordinance, Bill 91-10, now found in the Harford County Zoning Code § 267-40.1, as

effecting a Fifth Amendment *Penn Central* regulatory taking of its private property without just compensation.

This petition is timely filed pursuant to Rule 13.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. This guarantee is made applicable to the states by the Fourteenth Amendment, which provides in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend., XIV § 1.

INTRODUCTION

This 30 year old litigation odyssey that saw the court below vacate a jury's *Penn Central* verdict and its $45,420,076 award of just compensation, following a two week jury trial, raises two significant questions concerning the Fifth Amendment's Takings Clause.[1]

[1] "It is perfectly clear that in the realm of taking without compensation, federal and state constitutional law are effectively the same. The Court of Appeals of Maryland has itself made that point in unmistakable terms on numerous occasions." *Donohoe Const. Co. v. Md. Nat. Capital Park & Planning Comm'n*, 398 F. Supp. 21 (D. Md. 1975).

The first involves a bright line *split* between state courts of last resort on whether a state may force a property owner's identical *Lucas* or *Penn Central* action into an administrative variance proceeding for a decision that is conclusive to and then bars a subsequent takings claim in a court. *See infra* p. 19. The Connecticut Supreme Court holds *no* and held that,

> "A deferential standard of review . . . is to accord preclusive effect to a board's findings . . . under such a regime a local [zoning] board would have the power to decide virtually all inverse condemnation actions that are predicated on a claim that the denial of a variance application constitutes a practical confiscation . . . [and] would be to vest the board with deciding the facts underlying a plaintiffs' constitutional claim."

Cumberland Farms v. Town of Groton, 262 Conn. 45, 62-65 (2002).

On *certiorari*, the Maryland Court of Appeals decision holds opposite, and vacated an adjudication on the merits because the identical *Penn Central* claim was not first decided in an administrative variance proceeding decades prior. *Maryland Reclamation Associates, Inc. v. Harford County, Maryland*, 468 Md. 339 (2020). Pet. App. A. Such duplication of procedure, after a trial on the merits, to accomplish what has already judicially occurred, is constitutionally unsatisfactory, inequitable, and capricious in result. It elevates

inefficiency of process over substance and the fairness expressed in the Fifth Amendment's Takings Clause that this court recognized would result from " . . . what is after all a practical matter and not a technical rule of law." *Dickinson, infra.* Furthermore, Maryland's intermediate Court of Special Appeals decision, 242 Md. App. 123 (2019), represents an internal split from the decision of the court below, as it *agrees* with the Connecticut Supreme Court opining, "To hold otherwise would contradict case law from the United States Supreme Court."[2] Pet. App. B at 123.

The corollary query is whether a state, after a court establishes a taking has occurred, " . . . is allowed, in effect, to put an expiration date on the

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[2] The intermediate Court of Specials Appeals (COSA), like the Connecticut Supreme Court, split with the Maryland Court of Appeals (COA) finding,

> "Moreover, the county presents us with no authority compelling a party to bring a claim for just compensation in an administrative forum before resorting to the courts . . . To hold otherwise would contradict case law from the United States Supreme Court. *See Suitum v. Tahoe Reg'l Planning*, 520 U.S. 725, 737 (1997), and in note 6 further explained what the Connecticut Supreme Court held, it is unclear how a claim for just compensation could ever get to a jury. Indeed, administrative rulings are subject to a deferential standard of review. Accordingly subjecting a just compensation claim to such a deferential standard would seem to conflict with Art.III sec.40 of the Maryland Constitution, [which] provides the landowner with the opportunity to have a jury award just compensation in [Takings] cases."

242 Md. App. 123 (2019).

Takings Clause," thereby allowing a government to take private property, by regulation, without paying just compensation. The trial court opinions *agree* with this Court's suggestion in *Palozzolo* that "This ought not be the rule." *See* Pet. App. E, at 190.

Each question, as instructed by this Court's Takings jurisprudence, was raised and relied on by Petitioner. And while the trial courts' opinions and order, scheduling Petitioner's *Penn Central* claim to be tried in court and before a jury, discussed the application of both *Lingle* and *Palozzolo,* ***neither*** appellate court below referred to or discussed either in its decision. The reason is constitutionally obvious: if this Court's Takings jurisprudence was discussed, then the court's result driven effort to aid local governments, from zoning ordinances that take property by a shorter cut than the constitutional way of paying for the "desired" public change, would have been constitutionally ***exposed,*** as " . . . once a court establishes that there was a regulatory taking, the constitution demands that the government entity pay just compensation . . . " *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 654 (1980), J. Brennan dissenting, J. Kennedy joining. Here a court trial and a jury's verdict establishes a "taking" occurred, thus compensation is required. *Id. Therefore*, it is more than curious why the court below sees justice in vacating an adjudication on the merits because respondent, sitting as an administrative agency, did not have an opportunity to decide if "its" regulatory enactment effected the identical Taking. Especially when the administrative authority in a variance proceeding

is "limited" to an exercise of its police power, an inappropriate takings test. *Lingle*, 544 U.S. at 536-548.

The trial court's discussion of this Court's takings jurisprudence was spot on in discerning the constitutional *difference* between a variance due process test and a Takings Clause test. The trial court made specific reference to *Lingle* and reasoned as did this Court,

> " . . . the due process review of the regulation [in a variance proceeding] reveals nothing about the magnitude or character of the burden that a particular regulation imposed upon private property rights or how any regulatory burden is distributed among property owners. Magnitude and the character of the burden of a particular regulation that is imposed on private property rights *is not* totally resolved by a due process finding. In other words a due process analysis assessing the vested rights of the plaintiff is not fit to identify regulations whose effects are comparable to a government appropriation."

Pet. App. D, at 156 (*see also* trial court opinion in Pet. App. D, at 152-153, 155-156, 161, 163, and Pet. App. E, at 188-196, 197-199, 201-203, 209, 211-214, 216, discussing *Lingle, Palazzolo, Penn Central, Lucas*).

The questions presented by this petition are particularly well suited for this Court's review because the Maryland court has set an administrative springe that when sprung snares a property owner's Fifth

Amendment right to seek just compensation in a piecemeal and otherwise unfair procedure that is result driven and outcome determinative. The result is a Catch 22 preclusion trap which denies "meaningful access" to a court. All such judicial review is limited by a "fairly debatable" standard, an even lesser standard than *Agins' abandoned* substantially advances formula.

At the bottom, the broader and literal constitutional query is whether a state may " . . . superimpose a state litigation requirement on the Fifth Amendment's Takings Clause [and thereby preempt a property owner's meaningful and realistic access to a court]," when that state entertains either a *Lucas* or *Penn Central* regulatory claim for just compensation in its courts. *Arrigoni, L.L.C. v. Durham*, 136 S.Ct. 1409 (2016). There, Justice Thomas noted in his dissenting opinion, J. Kennedy joining, for failure to grant *certiorari,* "[a]s members of this court have noted, the Constitution does not appear to require this additional step before a property owner may vindicate a Takings Clause claim." *Id*. And while the preclusion trap discussed there, and later in *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019), focused on the effect a state court decision had on subsequent Takings Clause claims in a federal court, the Constitutional Catch 22 effect is no different. As the state administrative litigation requirement is internally "superimposed" on the Fifth Amendment Takings Clause and denies a property owner access to its state court. There is logically no discernible difference between being denied

access to a state court or a federal court when the issue involved is whether a government regulatory action effected a Taking. The court below and its administrative and procedural " . . . gamesmanships, [to avoid this Court's takings jurisprudence equally] leaves plaintiffs with *no* court in which to pursue their claims despite . . . assurances that property owners are guaranteed [meaningful] access to a court at some point." *Id.* (italics in original) (*see also San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 660 (J. Brennan dissenting)), "The only constitutional requirement is that the landowner must be able *meaningfully* to challenge a regulation that allegedly effects a "taking" . . . He may *not be forced* to resort into piecemeal or otherwise unfair procedures in order to receive his due." *See United States v. Dickinson*, 331 U.S. 745, 749 (1947) (italics added). As Justice Black soundly reasoned, "If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should nearly as possible guarantee . . . complaints be carried to an adjudication on the merits." *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966).

Unless the Fifth Amendment and its meaning, as instructed by this Court's decisions, is equally applied to protect property owners alike in all states, its protection of private property is lost to *differing* state judicial rules of application that are "superimposed" on the Takings Clause. This cannot be the rule, if the bedrock provisions of the Constitution are to be given their self-executing meaning. Nor should it matter whether a jury, as here, sat in a state jury box as opposed to a

federal one, when the issue put before it is an application of the Takings Clause in a *Penn Central* claim for just compensation. For state imposed litigation rules are prudential, not jurisdictional, when the Constitution's meaning is involved, as this Court instructed. *Arrigoni, supra*.

The Court should grant review of this case as it presents the opportunity to consider whether state courts of last resort may superimpose state litigation requirements on the Takings Clause and procedurally force a property owner's *Penn Central* or *Lucas* Takings Clause claim into a variance proceeding that by preclusive effect of an administrative decision denies meaningful access to a court. And this Court's decisions in *United States v. Dickinson* and *Palozzolo v. Rhode Island* further reason the Fifth Amendment's expression of fairness in the Takings Clause is not subject to a lapse in time created by a government's bad faith and legislative gamesmanship, where delay in commencing a takings action is caused by the conduct of the government. Furthermore, a lapse in time *cannot* change the fact that a taking of private property has occurred without the required just compensation due, as the Constitution demands. In *Palazzolo* this Court, citing *Monterey v. Del Monte Dunes Ltd*., *infra*, held " . . . Government authorities, of course, may not burden property by imposition of repetitive or unfair land use procedures." 533 U.S. at 698. Nor can " . . . state court opinions be read as indicating that a *Penn Central* claim was not properly presented from the outset of the litigation . . . " *id.* at 624.

The particular history set out below, like that in *Del Monte Dunes, Ltd.*, demonstrates this Court's "polestar" principles in *Penn Central*, as a jury found, require just compensation for respondent's bad faith regulatory actions in bringing about desired public changes. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922).

STATEMENT OF THE CASE

A. Factual Background[3]

1. MRA's property purchase

MRA contracted to purchase 62-acres on Gravel Hill Road on August 31, 1989, to operate a rubble landfill. The Property was an abandoned gravel pit with varying topographical elevations resembling a moonscape of craters.

2. The County's Policy of Reclaiming Gravel Pits as Rubble Landfills

The 1988 Harford County Solid Waste Management Plan ("SWMP") stated "the County would use abandoned gravel pits . . . as rubble landfill sites so as to fill in those gravel pits and reclaim the land."

MRA's proposed rubblefill also was classified as a principal permitted use under the existing Zoning Code.

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[3] Throughout this statement Petitioner is referred to as MRA and Respondent as the County.

3. The County Amended Its SWMP to Include MRA's Rubble Landfill

On November 14, 1989, after several public hearings, the County's Council agreed to include the Property in the SWMP, and approved MRA's site plan.

Thereafter, MRA purchased the Property on February 9, 1990 and spent nearly $5 million on experts, engineers, and consultants to develop the rubblefill consistent with the County's policy of reclaiming abandoned gravel pits as rubble landfills.

B. The County's Thirty-Year Regulatory Assault on MRA

1. The County Passes an Illegal Resolution to Stop MRA's MDE Permit

On February 12, 1990, *just three days after MRA purchased the Property*, the newly appointed County Council president publicly stated he would take steps to remove MRA's rubblefill from the Solid Waste Management Plan. *The next day*, he introduced Resolution 4-90, removing MRA's Property from the SWMP. MRA immediately challenged it in court. A challenge that continually evolved into three decades of litigation.

The court held Resolution 4-90 was illegal and the Maryland Department of the Environment ("MDE") resumed processing MRA's permit application. *Holmes v. Md. Reclamation Assocs., Inc*., 90 Md. App. 120 (1992). The County's illegal resolution stopped review of MRA's MDE permit application for eight

months. After 4-90 was held illegal, the County simply *started over again*, it changed the zoning—Bill 91-10.

2. The County's Use of "Emergency" Zoning to Interfere with MRA's MDE Permit

On February 12, 1991, the County Council introduced Bill 91-10 as "emergency" legislation creating new zoning requiring a 100 acres for rubblefills. *Prior to* Bill 91-10 *there was no minimum* acreage requirement and *the county knew* MRA's property, it just included in its SWMP, was only 62 acres. Historically, no prior or existing rubble landfill was 100 acres. This ordinance ensured MRA could not operate a rubblefill on its 62 acre property without a variance. A variance the legislative body who enacted Bill 91-10, the County Council, would decide to grant or deny, as it *also* sat as the zoning board of appeals.

James Vannoy, drafter of Bill 91-10, admitted that "he was told [by the County] to draft Bill 91-10 as an emergency ordinance so that it could take affect [sic] before MDE issued a permit to MRA." And, the County then advised the MDE Bill 91-10 applied to MRA, and again requested MDE to stop processing MRA's permit application.

3. The County's Secret Memo

As the County's continued legislative assault was unfolding, the County Council secretly circulated a draft of its letter to the MDE with a cover memo

stating the letter must "have all the appearance of business as usual with no special emphasis."

The County's actions were anything but "business as usual." Bill 91-10 only applied to rubblefills that *did not* have an MDE permit before February 12, 1991. MRA's Property was the *only* planned rubblefill *without* such a permit. Had the County not interfered with MRA's permit application, MRA's permit would have been issued *timely* in late 1990, and Bill 91-10 would not have applied to MRA's property, ***and*** this 30 year taking litigation *would not have been necessary.*

4. The County Enacts Another New Ordinance

Having delayed MRA's permit by eight months and changed its zoning law to prevent a rubblefill on the property, the County passed yet another "emergency" ordinance on April 2, 1991, Bill 91-16. This new ordinance removed any property from the SWMP that *had not* received its MDE permit *within* 18 months of inclusion in the County's SWMP. MRA's Property was the *only* property that met this *new* requirement. And if not for the County's interference, which delayed MRA's MDE permit, MRA's property would have complied with Bill 91-16's 18-month requirement. Astonishingly, on May 14, 1991, ***18 months to the day***, from when MRA's Property had been added to the County's SWMP, the Council passed Resolution 15-91 (later declared illegal), to once again remove MRA's Property from the SWMP.

As the late Justice Scalia remarked in *City of Monterrey, infra*, "After a while one begins to smell a rat." And one can only imagine how he and the Justices there would've reacted if there was, as here, also overt threats, *e.g.*, on September 18, 1991, MRA entered into a contract with Crouse Trucking, Inc. regarding its property. Upon learning of the contract, the County threatened to cancel its contract with Crouse if it delivered anything to MRA's property. This threat prevented Crouse from executing on the contract which caused financial harm to MRA.

5. MRA Received Its MDE Permit

On February 28, 1992, the MDE, during ongoing litigation, granted a state permit to MRA to operate its rubble landfill. The permit was granted after several public hearings and the state-mandated scientific investigations were conducted to ensure MRA's rubble landfill would not endanger the public's health, safety or welfare.

C. Procedural History

1. The Board of Appeals' Decision

MRA challenged newly enacted zoning Bill 91-10. The County Council, sitting as the Board, not surprisingly upheld the validity of its Bill and determined that it applied to MRA's Property on June 5, 2007. MRA immediately challenged the Board's decision pursuant to the Harford County Zoning Code and Charter. That Zoning Code specifically provides that "Decisions

of the Board *shall be* subject to appeal in accordance with the Charter," and "[a]n appeal *stays all proceedings* in furtherance of the action appealed from . . . ," the board's decision. Code § 267-9(H)(J). (Italics added). The Harford County Charter states that, "Any person aggrieved by any final decision in a zoning case shall have the right to appeal that decision to the Circuit Court for Harford County and shall have the further right of appeal to the Court of Appeals of Maryland." Harford County Charter § 709.

2. MRA sought judicial review of the Board's decision.

Ultimately, MRA's appeal reached the court below, where it determined, in a 5-2 split decision, on March 11, 2010 that Bill 91-10 was *valid* and applied to MRA's Property, declined to apply the doctrine of zoning estoppel, and held that there was sufficient evidence, under a deferential standard of review, to uphold the Board's denial of MRA's variance requests. *Md. Reclamation Assocs., Inc. v. Harford Cty.*, 414 Md. 1 (2010). A forceful dissent began with unusually blunt words stating,

> "the Court of Appeals again wimps out on adopting the doctrine of zoning estoppel . . . the contours are well-established in a number of our sister states . . . I would hold the county is estopped from applying the provisions of Bill 91-10 to MRA's proposed rubble landfill based on the County's prior approvals . . . and the official assurances it gave to MRA that construction could proceed."

Harrell, J., joined by Bell, C. J. 414 Md. 1, 31. This 2010 decision resolving Bill 91-10's validity was the *very* issue MRA initially raised 19 years earlier in its 42 U.S.C. § 1983 action.

3. MRA is Denied Renewal of its MDE Permit and the County Refuses to Permit MRA to Use its Property as a Rubblefill

After the court below made its March 11, 2010 decision, the MDE refused to renew MRA's permit and the county removed MRA's property from its SWMP. The property has remained economically idle, as without reclamation as a rubblefill the abandoned gravel pit is valueless.

4. MRA Brings a Constitutional *Lucas* and a *Penn Central* Regulatory Takings Claim

After the court below made its determination that Bill 91-10 was valid and applied to MRA, MRA timely brought its inverse condemnation claim. Although the circuit court dismissed MRA's *per se* takings claim under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992),[4] it ordered MRA's *Penn Central* claim to be scheduled for trial. The trial court relied on this Court's decision in *Palozzolo v. Rhode Island*, 533 U.S. 606, 627 (2001), noting that after 30 years of litigation,

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[4] At trial the only expert testimony was because of Bill 91-10 MRA's land had no beneficial or productive use other than a rubblefill as it had a negative value of between 1.7 and 2.0 million dollars, the cost of reclaiming the abandoned gravel pit.

this Court opined that it ought not be the rule that the government can put an expiration date on the Takings Clause. Pet. App. E, at 190.

5. The Trial and Jury's Verdict

Based on the totality of the evidence, the jury agreed with MRA and its experts and awarded just compensation for the taking was $30,845,553, plus 6% interest, totaling $45,420,076. Pet. App. G at 236 (Verdict).

6. The County Appeals

The intermediate appellate court, *supra*, stated it could find *no case* that required a Takings claim to be decided in an administrative variance proceeding before filing a Takings Clause claim in court, as it would conflict with "United States Supreme Court" case law.[5] However, confusing ripeness with accrual and ignoring the Zoning Code's automatic stay of the board's June 5, 2007 decision, it held that limitations ran from that date.

7. MRA Requests Certiorari

The court below on *certiorari* reversed the intermediate appellate court and held MRA was required to raise the identical Takings Clause claim in its prior variance requests decades earlier.

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[5] *See* footnote 2.

8. MRA Files a Motion to Reconsider

On May 4, 2020, MRA filed a Motion for Reconsideration arguing the court failed to discuss or to consider this Court's decisions in *Lingle, Penn Central, Palozzolo, Dickinson* and *Armstrong.* Without explanation the Motion was summarily denied. Pet. App. C at 146.

REASONS FOR GRANTING THE WRIT

I. THE MARYLAND COURT'S DECISION FORCES A MARYLAND PROPERTY OWNER'S *LUCAS* OR *PENN CENTRAL* TAKINGS CLAIM INTO A CATCH 22 PRECLUSION TRAP

The Maryland court decided, by a rule of judicial application, that a Maryland property owner, unlike a Connecticut property owner, is *required* to administratively pursue an identical *Lucas* or *Penn Central* takings action in a variance proceeding, before bringing that identical Takings lawsuit in a court. The constitutional effect of this decision reaches *far beyond* the boundary of Maryland. Indeed, it is an immediate conflict between two state courts of last resort, Connecticut and Maryland, on whether a Fifth Amendment Takings Clause claim can be forced into an administrative variance proceeding where just compensation cannot be awarded, but its police power decision bars access to a court, as respondent admits,

> "The Court: what about [petitioner's] point about *res judicata?* Is [it] correct . . . if MRA had brought a constitutional takings claim into the administrative proceeding that decision would have *preclusive effect* on the merits such that a jury couldn't consider it?"
>
> "[Respondent]: Well . . . if MRA lost before the Board . . . if MRA takes a petition for judicial review, goes up the ladder, and at the end of the day, the court upholds the Board's decision that it [sic] was ***no taking, that is conclusive. Yes that is conclusive of its takings claim***." (italics and bold added).

Pet. App. F at 234-235, Official transcript.

By accident of residence then, Maryland property owners are denied "meaningful" access to a court and the equal ability to pursue their Takings claim before a court. Maryland's decision is a procedural roadmap for other states to subordinate and to circumvent this Court's unanimous decision in *Lingle* and procedurally revitalize the first prong of *Agins'* substantially advances formula by forcing regulatory taking actions into an administrative variance request. This attempt at revitalizing *Agins* sees the court with but a *singular* reference to the vault of this Court's regulatory takings jurisprudence. That *singular* reference explains "the exercise of a local legislature's police power [to adopt a zoning regulation] [sic], is not absolute . . . and, if it goes too far, it may constitute a regulatory taking of land." While that reference is correct, the court's next sentence, *post Lingle*, is incorrect—"*Penn. Cent. Trans.*

Co., 438 U.S. at 127" ("A use restriction on real property may constitute a taking if not reasonably necessary to the effectuation of a substantial public purpose"). Pet. App. A at 64. Incorrect, because its result driven effort to shield local governments from regulatory takings could not succeed had the court below acknowledged this Court abandoned *Agins'* substantially advances formula, in *Lingle's* landmark course correction, as " . . . an inappropriate test for determining whether a regulation effects a Fifth Amendment taking." 544 U.S. Pp. 536-548. For the only authority exercisable in a variance proceeding is *Agins'* substantially advances formula.

This reveals why the court's decision did not discuss the constitutional significance of a unanimous *Lingle* Court, 544 U.S. at 539, concluding, " . . . *Agins'* substantially advances formula is not a standalone regulatory taking test wholly independent of *Penn Central* or any other test [and] . . . [w]e conclude that this formula prescribes an inquiry in the nature of due process, not a takings test, and it has no proper place in our taking jurisprudence." 544 U.S. Pp. 536-548. In accord, the Connecticut Supreme Court soundly rejected a variance proceeding's deferential standard of review and its preclusive effect on inverse condemnation actions. 262 Conn. at Pp. 62-65. *Lingle* further reasoned, as did the trial court, "Instead of addressing a challenged regulations effect on private property, the substantially advances inquiry probes

the regulation's underlying *validity*. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking . . . " 544 U.S. at 543 (italics added). Validity was the foundation issue raised by Petitioner's 1993 42 U.S.C. § 1983 suit challenging respondent's newly enacted Bill 91-10. However, Petitioner was incorrectly held administrative hostage for nearly a quarter of a century. Despite Petitioner correctly arguing its federal § 1983 action was not subject to exhaustion of state administrative remedies, and in any event exhaustion would be an exercise in futility, because the ultimate decision maker in the variance proceedings was the respondent's county council who enacted Bill 91-10. The court nonetheless required Petitioner to exhaust state administrative remedies failing to, curiously, apply its own decision in *Clark v. Wolman*, 243 Md. 597, 600 (1966) that "The law in its majesty is not designed to require *futile* actions or idle jesters." It strains objectivity well beyond its constitutional point of breaking to believe it would not be an exercise in futility to have a property owner seek a variance from the legislative body who enacted the new regulation and later sits (as the local zoning board) in judgment of its regulatory action.

The decision is an over exacting litigation rule of judicial origin and application superimposed on the Takings Clause. It then prematurely forces a property owners' identical regulatory takings claim into an unfair outcome determinative preclusion trap, a Catch

22. This procedural springe snares the facts underlying a Takings Clause action into a variance process, where they are decided by an exercise of a local government's police power, a due process test. This unfair procedure has a clear *chilling effect* on the exercise of the Fifth Amendment's Takings Clause. And the unnecessary administrative delay and its substantial expense, to determine an identical Takings claim by a due process test, cannot pass the constitutional muster of this Court's taking jurisprudence. As "[a] federal [constitutional] right cannot be defeated by the forms of local practice." *Brown v. Western Railway of Alabama*, 338 U.S. 294, 296 (1949). If it is otherwise, the broader and literal constitutional reach of the Maryland court's decision is a state may by administrative rule *preempt* the Fifth Amendment's Takings Clause when entertaining a *Lucas* or *Penn Central* regulatory taking action in its courts.

A. The Piecemeal and Unfair Administrative Process Denies Meaningful Access to this Court's Takings Jurisprudence

The administrative board which makes factual findings, again, is the respondent's county council that enacted the challenged regulation, which admittedly has a vested bias. *Gibson v. Berryhill*, 411 U.S. 564 (1973), n.14. If the board finds all beneficial use was not taken and denies a landowner's variance application, it has decided, by *Agins'* due process test, no Fifth Amendment regulatory taking occurred. The board's decision then sets in motion yet another piecemeal and

circular administrative review process outlined below. Applying *post hoc* these unnecessary and otherwise unfair procedures to a Maryland landowner's Fifth Amendment regulatory taking action, when a merit trial decided a taking occurred, is an obvious attempt of judicial gamesmanship to stockade the constitutional reach of *Lingle* that jettisoned the substantially advances formula as an " . . . invalid method of identifying compensable regulatory takings." 544 U.S. at Pp. 536-548. And as the intermediate Special Court of Appeals correctly held there "is no authority compelling a party to bring a claim for just compensation in an administrative forum before resorting to the courts." Pet. App. B at 123. The reason is, it's a preclusion trap that bars a subsequent claim before a court.

B. The Administrative Appeal and Judicial Review of the Board's Decision

First, if the board determines other beneficial uses of the property are available, a landowner would have the right to appeal the board's decision to a trial court and ultimately the appellate courts. ***However***, each court's review, in this administrative appeal process, is limited by a deferential standard of review, whether the board's decision was supported by substantial evidence *i.e.*, is the board's decision fairly debatable. It strains objectivity beyond recognition to envision any legal decision that is not "fairly debatable" in an advocacy system. Parenthetically, an agency's fairly debatable standard is not only an invalid Takings test, it

arguably subjects a Fifth Amendment Takings Clause claim to even a lesser standard than the substantially advances test of " . . . whether a regulation of private property is *effective* in achieving some legitimate public purpose." 544 U.S. at Pp. 540-545 (italics in original). Clearly, this limited judicial review of the board's variance decision under a lesser standard than a substantially advances test is not "meaningful" access to a court.

C. The Catch 22 Preclusion Trap

Second, if the board's administrative decision is affirmed on judicial review, the board's administrative factual findings are given preclusive effect and bars a property owner's subsequent regulatory takings claim. *Exactly* what the Maryland court affirmed, as respondent's argument admits,

> "The Court: What about [petitioner's] point about *res judicata?* Is [it] correct . . . if MRA had brought a constitutional takings claim into the administrative proceeding that decision would have *preclusive effect* on the merits such that a jury couldn't consider it?"
>
> "[Respondent]: Well . . . if MRA lost before the Board . . . if MRA takes a petition for judicial review, goes up the ladder, and at the end of the day, the court upholds the Board's decision that it [sic] was ***no taking, that is***

> ***conclusive. Yes that is conclusive of its takings claim.***" (italics and bold added).

Pet. App. F at 234-235, Official transcript.

Therefore, a Maryland landowner, unlike a Connecticut landowner is, by accident of residence is denied access to a court because his or her Fifth Amendment takings claim was decided in an administrative variance proceeding, by a due process analysis. Query, has the court below eliminated a *Penn Central* taking if "all beneficial use" is the administrative test to grant a variance?

Thus, the abandoned substantially advances formula this Court held," . . . was not an appropriate test for identifying and determining whether a regulation effects a Fifth Amendment taking [because that] inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes on private property rights . . . ," the court below now circumvents *Lingle* and administratively bars a Fifth Amendment *Lucas* or *Penn Central* action before a court. 544 U.S. at 542 (*italics in original).* This is as the Connecticut Supreme Court correctly held,

> " . . . to accord preclusive effect to the board's findings . . . vests the board with the responsibility of deciding the facts underlying the plaintiff's constitutional claim and, in effect, would give the board the authority to settle the issue raised by that claim. Under such a regime, local zoning boards would have the power to decide virtually all inverse condemnation actions that are predicated on a claim

> that the denial of a variance application constitutes a practical confiscation [of private property]."

262 Conn. at 63. When the Takings Clause is at issue, Maryland landowners have a right to expect equal treatment under the Constitution and equal access to a court, as does a Connecticut landowner.

D. Remand Back to the Board for a Second Variance Decision

Third, if the landowner establishes on judicial review, contrary to the board's decision, there are no other beneficial uses for his or her property, the court is *required to* remand the case back to the board for further action, because the court *does not* have the judicial authority to order the board to grant a variance and alleviate the unconstitutional regulatory taking. Pet. App. A at 97. However, on the circular remand, the board has the authority to yet again *decline* to grant a variance and prevent an "otherwise unconstitutional" regulatory taking.

E. The Board is not Empowered to Grant Just Compensation

Finally, if on remand the board (the county council who enacted the regulation) *again* declines to grant a variance, and prevent the unconstitutional regulatory taking, the landowner sojourns back to court to proceed with a jury trial to determine what just compensation may be due. A monetary decision the board

lacked the authority to make from the beginning of this expensive piecemeal and otherwise unfair *circular* procedure. However, as noted above, the local government will again contend, as it did, the doctrine of *res judicata* collaterally bars the landowner's claim for just compensation because the underlying facts determined in the variance proceeding must be given preclusive effect by the court. The Catch 22 and yet another expensive trial and appellate court review begins anew. As Justice Scalia, *infra*, opined "after a while you begin to smell a rat."

To this "forced" and "otherwise unfair" procedural chaos, the court below remarkably held, " . . . simply because the board has the authority to alleviate what would otherwise be an *unconstitutional taking* by granting a variance *it is not* required to grant it." (*italics added).* Pet. App. A at 98. Plainly said, such unconcerning judicial logic to this Court's long-established decisions that " . . . [a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures," demonstrates the unfairness and inadequacy of this piecemeal proceeding. *MacDonald, Sommer & Frates v. Yolo*, 477 U.S. 340, 350, n.7 (1986), *citing Williams Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 205-206 (1985) (Stevens, J., concurring in judgment) (*United States v. Dickinson*, 331 U.S. 745, 749 (1947). It also ignores the distinct *chilling* effect that such an exponential increase in legal expense has on the initial decision whether to bring a regulatory Takings Clause claim for just compensation. Indeed the expense of such piecemeal litigation may

well exceed the value of the property taken in some cases. It also has no regard for constitutionally protected property interests and for the contemporaneous gainful use taken from private property during this legally inefficient and financially burdensome administrative process. "For what is land but the profits thereof"[?] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992).

F. This Court's Precedents Recognize Broad Sets of Circumstances Where the Interests of the Individual Weigh Heavily Against Requiring Administrative Exhaustion

Here, both the nature of the constitutional claim and the character of the particular administrative process weigh heavily against requiring administrative exhaustion, even assuming the process to be fair, and it is not. Nonetheless, practicality and this Court's decisions reason " . . . exhaustion has not been required where the challenge is to the adequacy of the agency procedure itself, such that 'the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [plaintiff's] lawsuit." *Barry v. Barchi*, 443 U.S. 55, 63, n.10 (1979) (quoting *Gibson v. Berryhill*, *supra*), *see also McCarthy v. Madigan*, 503 U.S. 140, 147-148 (1992). Indeed, vacating a jury's verdict and a merit trial because Petitioner did not raise the "identical takings claim" in a variance proceeding a quarter of a century earlier, where a local zoning board lacked the authority to

award just compensation, demonstrates the constitutional inadequacy of such a piecemeal and unfair procedure.

Certainly, the fact that it *culminates* with the very legislative body who enacted the zoning ordinance alleged to effect a taking stretches the credulity of the court below beyond a point of breaking in permitting such undue prejudice to exist in response to a Takings claim. *Houghton v. Shafer*, 392 U.S. 639, 640 (1968). This unfair procedure travels far beyond governmental bad faith, as it makes a landowner's constitutional property rights ultimately dependent on his legal adversary's decision.

G. If All Else Fails, Merely Amend The Regulation and Start Over Again

Justice Brennan's widely cited dissent in *San Diego Gas & Power*, 450 U.S. 621, 655 (1980), at note 22, cut surgically to the issue. In reasoning rejection of what occurred here, he posited invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government. Justice Brennan then quoted a City Attorney giving advice to his gathered fellow City Attorneys—"if you try the case and lose don't worry about it. All is not lost. **IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN"** (bold and caps in original). In context remember, *prior to* newly enacted Bill 91-10, respondent passed Resolution 4-90, tried the

case and lost, then enacted 91-10 and "*started over again*."

This case presents a history that is not unlike that in *City of Monterey v. Del Monte, Inc*., 526 U.S. 687 (1999), and objectively viewed perhaps much worse. There the importance of and unfairness in that case history caused Justice Scalia to remark, during oral argument,

> "The landowner here essentially thinks that it was getting jerked around, that basically the city didn't want this land used for anything[6] . . . after a while . . . you begin to smell a rat . . . and at some point you can say, this simply is unreasonable."

Official Transcript, Supreme Court at p.17.

It additionally saw the Chief Justice, as well as Justices Kennedy and Breyer each to generally inquire, as did Justice Souter specifically,

> " . . . the history of the zoning and the previous attempts are relevant are they not . . . but if you look at the *Penn Central* multi-factor formulation . . . isn't the issue of bad faith something that we may consider right up front under that particular heading? . . . [T]hat's why there has been a taking because

[6] On February 4, 1992, 17 months after Bill 91-10 became law, Respondent's County Council President officially and publicly stated, *inter alia*, the council has made a clear declaration that the era of private landfills should be forever at an end, i.e., the shortcut to paying for the regulatory taking of Petitioner's land and its use as a rubble landfill.

you have not used a fair procedure." Pp. 5, 17 and 28.[7]

That same history of governmental bad faith and the otherwise unfair and forced piecemeal procedure, outlined above, is present here. It likewise resulted in a regulatory taking. A taking a local jury's verdict determined *its* government's actions went "too far" and just compensation was due. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

H. Once a Taking Has Occurred, the Takings Clause Requires Just Compensation Must be Paid

Thus, the decision of the court below and its timing, approximately three decades after Petitioner's § 1983 action, to determine the validity of newly enacted Bill 91-10, has all the appearance of a *result driven opinion* in aid of government to shield it from the financial impact of its regulatory actions that went too far. As Justice Holmes warned, against a save government from itself logic, opining " . . . courts [are] in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant

[7] Petitioner is not unaware that these remarks were made 6 years before this Court stepped away from the first prong of the *Agins'* test, the substantially advances formula. Nonetheless, the Court's inquiry there remains valid 21 years later, " . . . if you look at the *Penn Central* multi-factor formulation . . . isn't the issue of bad faith something we may consider right up front under that heading? . . . [T[hat's why there has been a taking because you have not used a fair procedure . . . " For this case was submitted to the jury and decided under a *Penn Central* instruction.

achieving the desire by a shorter cut than the constitutional way of paying for the desired change." *Pennsylvania Coal*, 260 U.S. 393, 416 (1922). He then made clear, "But that cannot be accomplished in [that] way under the Constitution of the United States." *Id.*

The decision of the court below then results in a constitutional *non sequitur*, a state court may procedurally vacate the self-executing character of the Fifth Amendment's Takings Clause where a landowner was factually proven to have suffered a *Penn Central* taking by a court trial and a jury's verdict. If so, cherished constitutionally protected property rights are obscured in and lost to judicially created piecemeal litigation procedures, that force the Takings Clause into an administrative variance proceeding, where just compensation cannot be determined or awarded, and the bulwark right of access to a court is lost.

Here the court below sees fairness not in the impartiality of a court trial and a jury's verdict that decided a taking occurred, but rather in requiring an unfair and inadequate variance proceeding where the legislative body who enacted the challenged regulation sits in judgment of the Takings Clause. In context of what has already judicially occurred here, it is a Constitutional *non sequitur* to permit a government to take private property because an identical Takings claim was not first raised in an unfair and inadequate administrative variance procedure. The fairness expressed in the Fifth Amendment strongly reasons, at a constitutional minimum, the court below should have stayed its hand and yielded to the jury's verdict. For

this court has " . . . consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a "taking" compensation must be awarded." 450 U.S. at 654 (Brennan, J. dissenting) (supporting citations omitted). Of significance, the jury of local residents understood its award would come from its public purse, but it also understood justice required it. Their common sense understood the constitution is concerned with means as well as ends. And while the government has broad powers, the means it uses to achieve its ends must be "consistent with the letter and spirit of the constitution." *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L. Ed. 579 (1819). The means used by the Maryland court to vacate a jury's verdict is inconsistent with the Fifth Amendment's expression of fairness and this Court's Takings jurisprudence. It is a procedural bridge too far that affects the fundamental right of access to a court to secure just compensation and the equal protection of the Takings Clause after 25 years of litigation in response to respondent's bad faith regulatory actions:

> "The Fifth Amendment is not to be considered some sort of poor relation . . . the reason is people like this developer need to know that when they are dealing with their local government agencies that their rights are protected, that they can't be simply strung along and abused at the city's whim." Closing remarks of counsel for *Del Monte Dunes Ltd*., Official Transcript of proceedings before this Court at page 54. True there and a jury found it true here.

II. IT OUGHT NOT BE THE RULE THAT THE FIFTH AMENDMENT'S TAKINGS CLAUSE IS SACRIFICED TO A LAPSE OF TIME

Over 120 years ago, Oliver Wendell Holmes Jr. asked "what is the justification for depriving a man of his rights . . . in consequence of the lapse of time"? The Path of the Law, 10 Harv. L. R. 457, 476 (1897). A quarter of a century later Justice Holmes of this Court answered that query observing, "when a defendant has notice from the beginning . . . because of specific conduct [of a defendant] the reasons for the statute of limitations do not exist." *New York Cent. & H. R. R. Co. v. Kinney*, 260 U.S. 340, 346 (1922).

There is no dispute that respondent, from the beginning, knew if Petitioner was unsuccessful in its § 1983 litigation to determine the validity of newly enacted Bill 91-10, just compensation for the regulatory taking of its property would occur. Specifically, in a January 22, 1993 memo, the county council was advised,

> "As for the possibility of MRA seeking damages from the county in reliance on the case of *Lucas v. South Carolina*, Mr. Eyler and Mrs. Miller [outside counsel] stated flatly MRA does not have the money to pursue a federal claim. . . ."

Equally without dispute, the reasons *underlying* limitations are to prevent surprise in the revival of stale claims where evidence has been lost, memories have faded and witnesses have disappeared. (citations

omitted). After a quarter of a century of litigation with respondent and its knowledge in 1993 that a regulatory takings suit was on the legal horizon, it cannot be said that Petitioner's claim was stale or it slumbered on its constitutional right to seek just compensation. These reasons address whether a trial on the merits of a case is fair to a defendant. And if witnesses and the evidence are no more because a plaintiff has slumbered on his or her rights, a trial can be said to be without merit and with prejudice to a defendant. However whereas here, the government is the repository of the evidence, records and witnesses were available, it understandably failed to call, but yet relies on limitations, the prejudice is inverted and a plaintiff is denied a trial on the merits. This ought not be the rule. For without prejudice, facts and their merit are time neutral as to both a plaintiff's case and a defendant's defense of it. To conclude otherwise permits a procedural shield to be forged into a sword and wielded to cause prejudice and not prevent it. As this court held in *Dickinson, supra*, "The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate and when they die . . . [limitations] is after all a practical matter and not a technical rule of law."

Judicial rules of application superimposed on the Takings Clause should not be allowed to preempt the fundamental purpose of the Takings Clause, just compensation, by putting an expiration date on it, particularly when a taking was proven to a jury. The

supremacy of the Constitution and its *equal* application to private property owner's in all states *cannot* be diminished by *varying rules* of state created procedure that alleviates its fundamental and self-executing purpose.

A. The 2007 Decision of the Board of Appeals was Stayed

To hold limitations was triggered by the Board of Appeal's (respondent's) June 5, 2007 decision, is incorrect for two distinct reasons. First, as noted, the respondent's unambiguous zoning code and its governing Charter provides, "Decisions of the Board shall be subject to appeal in accordance with the Charter" [and] "an appeal *stays* all proceedings in furtherance of the action, [the Board's decision], appealed from." *Supra.* at p. 19. Appeal of the Board's decision and the validity of it was not determined until March 11, 2010. The court *confused* ripeness with accrual. As to hold an administrative agency's stayed decision can trigger limitations is to determine whether a taking has occurred before the validity of that decision has been judicially decided as respondent's zoning code specifically provides. In support, " . . . an inverse condemnation action, at a minimum, requires a taking by a government entity, and regardless of what the plaintiff knows or should know, the statute of limitations on an inverse condemnation cause of action does not begin to run until a taking has occurred." *Litz v. Dept. of Environment*, 434 Md. 623, 653 (2013). Unless reason is inverted, if on appeal the Board's decision was reversed, a taking

could not occur and limitations was not triggered. Save result driven reasoning, a taking cannot occur and limitations cannot begin to run if a Board's administrative decision is either stayed or invalidated. To hold otherwise is to deny a property owner access to a court and deny the specific right of appeal respondents' zoning code prescribes. And the administrative agency's variance decision becomes a stand-alone takings test independent of this Court's takings jurisprudence in *Penn Central* and its later unanimous decision in *Lingle*.

The court decision also forgot, pass limitations, that when the public benefits a great deal from the pursuit of important public goals, *it is fair*, not less fair, to ask the public to redistribute the gains to those who have been burdened in the process. The jury understood not a single person was burdened here except Petitioner and its property which remained "economically idle" for three decades. (*See Lucas*, 506 U.S. at 1019 that when a property is economically idle it is more likely a taking has occurred and if a taking occurred just compensation is required).

III. AN ADMINISTRATIVE VARIANCE PROCESS IS INADEQUATE TO DETERMINE A TAKING

This Court's decisions involving regulatory takings jurisprudence rest firmly on the economic impact a regulation has on the property owner's distinct investment backed expectations and the character of a government's actions, not the legitimacy of its public

purpose. For a taking may arise from "a regulation that *effectively* serves a legitimate state interest . . . as to the owner of a property subject to an *ineffective* regulation." 544 U.S. at 543. (*italics in original).* To hold contrary permits an agency, such as a local zoning board, to drift into the constitutional waters of this Court's regulatory takings decisions far from the shores of its delegated police power and replace a court.

Plainly said, the decision of the court below has all the appearance of a decision concerned *not* with the Fifth Amendment's expression of fairness or who is burdened by the economic impact of a regulation, but rather an elevation of procedure over a property owner's constitutional bundle of property rights in an effort to relieve local governments from their desire to bring about public change by a shorter cut than the constitutional way of paying that change. 260 U.S. at 415-416,

> "Police power regulations such as zoning ordinances can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it . . . the Constitution measures a taking of property not by what a state says, or by what it intends, but by what it *does*."

450 U.S. at 652-653 (J. Brennan dissenting) (*Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J. concurring) (emphasis in original).

The decision of the court below fails to understand that what a legislature *cannot do directly it cannot do indirectly*, as the Constitution protects against insidious approaches as well as an open and a direct attack on private property rights. And unless illegal resolutions, newly enacted zoning ordinances, secret memos, inconsistent policy and actual threats are "business as usual" exceptions to the fairness expressed in the Fifth Amendment's Takings Clause*, and they are not*, the procedural decision of the court below cannot withstand the constitutional fairness of the Takings Clause and this Court's Takings jurisprudence. Once a court establishes a regulatory taking occurred the Constitution demands the government pay just compensation. 450 U.S. at 654. And this Court should so advise state courts of last resort.

IV. THERE IS A CLEAR SPLIT OF AUTHORITY BETWEEN THE CONNECTICUT SUPREME COURT AND THE MARYLAND COURT OF APPEALS ON WHETHER A *PENN CENTRAL* TAKINGS CLAIM CAN BE DETERMINED UNDER *AGINS* SUBSTANTIALLY ADVANCES FORMULA AFTER *LINGLE*

This irreconcilable split between state courts of last resort and the disparate and unequal treatment their residents encounter when seeking the protection

of the Takings Clause to obtain just compensation for a regulatory taking cannot be resolved without this Court's review and clarification.

CONCLUSION

This petition for writ of certiorari should be granted.

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Respectively submitted,

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