No. 20-885

In The
Supreme Court of the United States

NEXT ENERGY, LLC,

Petitioner,

v.

ILLINOIS DEPARTMENT OF NATURAL RESOURCES,

Respondent.

On Petition For A Writ Of Certiorari To The Illinois Appellate Court

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Next is about to celebrate the 10th anniversary of the acquisition of its first lease of its block of leases. Since January 2014, Texas has permitted 63,721 horizontal wells,[1] and those numbers are significant in other states. Illinois is the exception. Its number is zero.

This petition presents an important question concerning regulatory takings on which there is growing inconsistency in applying a framework for determining when a regulatory taking has occurred, and within that broader issue is the question of when the futility exception applies making a case ripe for adjudication.

Here, lower courts concluded that Next's claims were not ripe because it did not apply for a drilling permit, and in assessing that question those courts also addressed the merits of Next's regulatory taking claim. The futility exception is at issue, namely, whether a case is ripe for adjudication when Next has alleged that it would have been futile to apply for a permit because it was first barred from doing so by an unauthorized moratorium ("moratorium") and then further barred due to the passage of the onerous act and repetitive and unfair regulations. Coupled together, the moratorium instituted in mid-2012 followed by the Act in June 2013 and Regulations in November 2014, have to date barred the permitting of any High Volume Horizontal Hydraulic Fracturing ("HVHHF") wells in the

[1] See http://webapps2.rrc.texas.gov/EWA/drillingPermitsQueryAction.do.

State of Illinois. HVHHF wells account for most new wells drilled and have made the U.S. oil independent.[2]

Next alleged these regulations were prima facie unworkable, irrespective of time, but considering the time left on Next's leases, even if the regulations had been workable, there was insufficient time after the moratorium and promulgation of regulations to go through the application process before the leases expired. While Illinois would prefer to frame this as only a ripeness issue, it is much more. When leases are time-limited, and Illinois' actions consume the time of the leases, that property has been taken.

Inherent in the question presented by Next is whether any state should be allowed to concoct or devise a regulatory scheme designed to take property and avoid "just compensation" for that taking in violation of Amendment V. As of the day of filing this Reply, not a single HVHHF well has been drilled in Illinois, nor has a permit been requested by anyone since Woolsey, nor are any permits pending.[3] That will be true a decade from now unless Illinois is required to comply with the obligations of Amendment V. So far, its regulatory scheme has worked perfectly, as planned.

[2] See https://www.eia.gov/todayinenergy/detail.php?id=34732.

[3] The Woolsey application and subsequent proceedings as noted by the trial court are a matter of public record and can be found at: https://www2.illinois.gov/dnr/OilandGas/Pages/ApprovedPermits.aspx.

ARGUMENT

I. Illinois Courts Addressed The Merits Of Next's Taking Claim And There Are No Obstacles To This Court's Review.

To throw everyone off the scent of the issue in this case, Illinois claims the regulations in question were never reviewed by the lower courts and this should relieve them from the obligation of "just compensation" to Next. This claim is false as a casual reading of the Illinois court decisions reveal. The Illinois courts evaluated the moratorium and regulations and concluded that Next's claim was not ripe with the circuit court stating, "From the issuance of the Woolsey permit and the Court's review of 62 Ill. Admin. Code 245.100, et seq., for the purposes of Defendant's Motion, the Court finds the regulations are not so onerous and overreaching that they support the Plaintiff's invocation of the futility exception." Pet. App. 11. When Illinois courts reached this conclusion, nearly a decade had passed since Next commenced leasing for its hoped-for wells, yet not a single HVHHF well had been drilled in Illinois. It was as if the courts were numbed to the fact that Next's leases contained five-year terms.

Even the Illinois court decisions acknowledge the following factual findings, which must be taken as true for purposes of this Petition: (1) that Next acquired five-year leases for the purpose of developing the leaseholds through HVHHF under then-existing laws; (2) that no other feasible basis existed for extracting the oil and gas from those leaseholds; (3) that, after acquisition, Illinois imposed a moratorium on the

issuance of permits for HVHHF wells for an indefinite period of time; (4) that the Act was passed on June 17, 2013; (5) that the regulations were adopted November 2014; (6) that it was impossible to apply for a permit between June 2013 and November 2014 because it was well known applications would not be reviewed; and (7) that the statutory and regulatory provisions were so ill defined and burdensome as to render application for the permit economically futile and impractical. Pet. App. 33-34 ¶40. These findings support Next's claim for a regulatory taking.

A review of just some of the regulations show their unfair and repetitive nature. For example, requiring an applicant "to apply to apply" for a permit is repetitive. This needless repetition causes delay and loss of vital time. Per *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014), an unfair example is requiring liability insurance to apply for permission to apply when there is no liability exposure. These examples are among the many impediments imposed by Illinois to ensure that no applicant would ever make it through the gauntlet of onerous regulations.

Illinois concocted a scheme by combining an unauthorized moratorium, an overreaching statute, and unfair, repetitive regulations to create delays for five-year leases. The delays were part of the scheme guaranteeing Illinois avoidance of "just compensation" required by Amendment V of the Constitution.

The epitome of unfairness is Illinois' failure to disclose its plan for a moratorium, the disallowance of

permits under existing law, an overreaching statute, and unfair and repetitive regulations, while allowing companies such as Next to commence its leasing program. This scheme was implemented when Illinois knew that Next was relying on existing laws allowing HVHHF wells. Without the ability to obtain a permit, Next's leases were rendered worthless and as such could not be assigned, sold, or used for any purpose. Illinois was aware of the damage the scheme would cause and that it would discourage others to follow.

a. Moratorium And Temporary Takings

While *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), concerned the question whether compensation is an appropriate remedy for a temporary taking, that case did not foreclose the question whether a temporary restriction denying the property owner of all economic value could be a categorical temporary regulatory taking. *Id.* at 315, 318, 321. Here, Next was the owner of leases with five-year terms beginning in 2011. The moratorium totaled 29 months. By definition, five-year leases contain 60 months. Accordingly, the moratorium consumed nearly half of the lease time, before considering the time required for the application process, which took another two-and-a-half years.

While *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) declined to find a taking when a 32-month moratorium was imposed on fee simple interests, it does make the

point that both dimensions of a real property interest—the metes and bounds describing its geographic dimensions and the term of years describing its temporal aspect—must be considered when viewing the property as whole. *Id*. at 304. In *Tahoe-Sierra Preservation Council*, this Court was dealing with a moratorium on fee simple interests, not one that consumed nearly half of the time-limited leases. The saving grace in *Tahoe*, was that the value of the property owners' fee simple interest was restored after the moratorium was lifted, whereas Next's leasehold interests were expired or expiring so there was no value to restore.

b. Application Process

The Woolsey application experience taking over two years confirmed what everyone who studied the regulations already knew—that they were impossible and not intended to permit HVHHF drilling in Illinois. Rather, what Illinois intended and accomplished was to impose a moratorium to prevent HVHHF drilling until it could pass a law so technical and arbitrary that it was too expensive, time consuming, and risky to pursue. This was the scheme implemented by Illinois to prevent HVHHF drilling, and thus far, it has succeeded.

II. The Futility Question Is Squarely Presented In The Petition For Certiorari.

In the Petition for Certiorari, the issue of ripeness is addressed at length and there is no obstacle barring

this Court's consideration of that question contrary to the Brief in Opposition. Inherent in the Question Presented is the issue of futility.

The Petition directly addresses the exceptions to the final decision requirement of the ripeness doctrine, namely, that a final decision will not be required if claimant shows that it would be futile to apply or that there are repetitive and unfair procedures in place preventing a final decision. Next has alleged both in the lower courts and in its Petition. All are present here.

Per *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985), the rule for determining whether a federal takings claim is ripe for federal court adjudication has two prongs. The first prong requires that a takings claimant obtain "a final, definitive [decision from the Government agency] regarding how it will apply the regulations at issue to the particular land in question." The second requires a claimant to exhaust state court possibilities of obtaining "just compensation" before filing a takings claim in court and is not relevant here.

The rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967). Imposing ripeness rules that are too rigid invite

government agencies to concoct insurmountable and interminable conditions to finality. This Court's Takings Clause decisions repudiate such "gimmickry." *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994). This Court in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 350 n.7 (1986), cautioned that the ripeness doctrine does not require a property owner to resort to "unfair procedures" to bring a takings claim.

a. It Was Futile For Next To Apply For A Permit During The Moratorium.

When Next started assembling its block of leases in 2011, the laws and regulations of Illinois permitted HVHHF wells through a standard and straightforward permitting process allowing their economic development. When Illinois implemented the moratorium in mid-2012, the then-Governor halted all HVHHF activities, and no permits were accepted. Illinois closed the doors for that business.

Supreme Court Rule 15(2) requires Illinois to correct any misstatement of fact or law properly before the Court. While Illinois addresses the moratorium, at no point does it challenge the fact that a moratorium on the issuance of permits was implemented in mid-2012, nor could it since it was common knowledge as alleged in Next's Complaint. Pet. App. 33-34. And, in fact, no permits for HVHHF wells were issued during its existence. Pet. App. 33. Furthermore, Illinois does not contest that no HVHHF wells have been drilled in Illinois since the moratorium. Even more applications

for HVHHF wells would not be accepted during the period of the moratorium until the regulations were promulgated in November 2014. Pet. App. 33, ¶40(5)(6). Next further alleges, and Illinois does not dispute, that HVHHF wells are the only economically viable method of oil recovery for these leases.

Considering the "ripeness doctrine does not require a landowner to submit applications for their own sake," Next should not have been required to apply for the sake of applying during the moratorium because there was no uncertainty as to permitted uses. *Palazzolo v. Rhode Island*, 533 U.S. 606, 622 (2002). Illinois implemented a total ban on HVHHF activity even though Illinois law allowed such permitting. Pet. App. 33, ¶40. A petitioner is required to explore development opportunities on his parcel if there is uncertainty as to the land's permitted use. *Id*. at 623. No uncertainty faced Next as it was confronted with a ban on HVHHF permit applications.

The Illinois Circuit Court held that Next still had an obligation to apply for a permit during the moratorium. Pet. App. 7. Not only was application futile but was impossible as Illinois would not review nor accept any such applications. Pet. App. 33-34, ¶40. And that court failed to recognize Next's time-limited leases. Unlike in *Sherman*, Next's property was a lease, not a fee simple. Since Illinois would not accept permits for any HVHHF wells during the moratorium there was no other approval for Next to seek.

The lower courts held that the futility exception was unavailable to Next because it did not apply during the moratorium and could not show that anyone else had applied. However, the whole point of the futility exception is to excuse a claimant from having to apply for the sake of applying. Allowing the Illinois lower court decisions to stand effectively nullifies the futility exception. That is not the intention of this Court and as such this Court should give clear direction to Illinois.

As alleged, no one, including Next, applied for a permit during the moratorium because no permits would be accepted during that time. Accordingly, ripeness cannot be an issue during the moratorium and Illinois should be charged for that taking.

b. Unfair And Repetitive Regulations Barring All HVHHF Drilling To Date Prove The Regulations Have Gone Too Far.

In November 2014, Illinois extended the moratorium by adopting regulations so onerous, repetitive, and unfair, that no HVHHF well has been drilled to date. Next demonstrates the impossible nature of the regulations by citing provisions causing the permit process to be economically unviable. This was proven by Woolsey, an experienced applicant, who spent over two years applying for one well, only to later withdraw. That permit application had grown to an astonishing 348 pages in length. See footnote 2. The conditional permit issued to Woolsey required 86 conditions before drilling could commence. Woolsey gave up and never drilled that well.

Understandably, ripeness jurisprudence imposes obligations on landowners because "[a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." *Palazzolo*, at 622 citing *MacDonald et al. v. County of Yolo*, 477 U.S. 340, 348 (1986). Here, this Court knows precisely how far the regulations go without requiring an application for an HVHHF permit. Futility rescues Next from going through the same process as did Woolsey and demonstrates the regulations have gone too far.

Next's claim for a regulatory taking is ripe because it has shown that it was futile to apply during the moratorium, and that repetitive and unfair procedures made it impossible and economically prohibitive to obtain a permit in the time Next had remaining on its leases. Those regulations prevented all HVHHF drilling in Illinois.

III. Inconsistent Application Of This Court's Decisions Warrant Direction To States With Such A Regulatory Scheme.

Even recognizing the financial impact that a decision in favor of Next may have on Illinois, it must follow the law of this Court without resorting to a regulatory scheme that denies "just compensation" for taken property. So far that scheme has worked in the Illinois courts. Unless the law of this Court is required for all, states like Illinois will continue to press its no HVHHF scheme until it is required to honor the obligations of "just compensation." This is especially true

when Illinois had the figurative "open for business sign" in place when Next commenced leasing its block of leases relying on the existing laws of Illinois allowing drilling of HVHHF wells. Illinois was on notice of Next's leasing activity but chose not to disclose that it would not permit such wells.

This Court has never explicitly adopted the futility exception to the ripeness doctrine, but a plethora of other courts have done so. But see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012-1013 n.3 (1992). Illinois should not be able to dodge this well-established exception to the ripeness requirement. Other federal courts have provided guidance for the futility exception but not clearly enough for Illinois. See *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990); see also *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014). Next should only be required to establish the scheme planned by Illinois and that time is the ultimate proof of how far the regulations go to show ripeness per the futility exception. Most courts excuse an application requirement especially when it is clear such an application would not be granted. The passage of a decade with no permits pending or HVHHF wells drilled in Illinois proves that for Next.

When an approved procedure was designed to keep "aggrieved landowners on ice indefinitely" or longer than was reasonably required to make a decision, futility has been established. *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1338 (9th Cir. 1990); see also *Landmark*

Land Co. of Oklahoma, Inc. v. Buchanan, 874 F.2d 717, 721 (10th Cir. 1989). In this case a decade should be enough to tell "how far the regulation goes" or the effectiveness of the scheme. That Illinois has put aggrieved owners like Next on ice is clear with the passage of time and no HVHHF permits pending, granted, or wells drilled in Illinois. Illinois should be accountable for its taking under Amendment V. This case is a reason we have a Supreme Court.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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