No. _____

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 Supreme Court

PETITION FOR A WRIT OF CERTIORARI

RODNEY V. TAYLOR*
**Counsel of Record*
HILARY A. BARNES
CHRISTOPHER & TAYLOR
1219 N. Delaware Street
Indianapolis, IN 46202
(317) 635-9000
rodtaylor@abatelegal.com

MORRIS LANE HARVEY
HARVEY & BAKER, P.C.
2029 Broadway
Mt. Vernon, IL 62864
(618) 244-9544
lharvey@lmh-law.net

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Petitioner, Next Energy, LLC, commenced acquiring blocks of five-year oil leases in 2011 to drill high volume horizontal hydraulic fracturing (horizontal hydraulic fracturing) wells to recover oil from shale formations. Shale oil leasehold interests, like all mineral interests, are separate, distinct leasehold interests from the surface of the land. Horizontal hydraulic fracturing is the only economically viable method to recover shale oil from Next's leases. The value of the shale oil constitutes the entire value of Next's leases. At the time the leases were acquired, Illinois law allowed the horizontal hydraulic fracturing process. In mid-2012, after the lease blocks were acquired but before permits could be obtained to drill such wells, Respondent the Illinois Department of Natural Resources (Illinois), commenced an unannounced, unauthorized moratorium on permits for such wells. In 2013, the Illinois legislature passed an Act governing the drilling of such wells. Illinois then took over a year to promulgate said regulations. To date, none of these wells have been drilled in Illinois since the moratorium.

The question presented is whether an unauthorized moratorium on permits needed by Next to drill its wells, together with the time required for onerous regulations and procedures which exceeded the term of Next's leases, effects a categorical regulatory taking of those leases under the Fifth Amendment.

PARTIES TO THE PROCEEDINGS

Next Energy, LLC was Plaintiff and Appellant below. Respondent, the Illinois Department of Natural Resources was Defendant and Appellee below.

RULE 29.6 DISCLOSURE

No parent or publicly owned corporation owns 10% or more of the stock in Next Energy, LLC.

RELATED CASES

Next Energy, LLC v. The Illinois Department of Natural Resources, Cause No. 2015-L-13, Circuit Court for the Second Judicial Circuit, Wayne County, Illinois, Judgement entered December 3, 2018.

Next Energy, LLC v. The Illinois Department of Natural Resources, Cause No. 5-18-0582, Appellate Court of Illinois, Fifth District, Judgement entered April 15, 2020.

Next Energy, LLC v. The Illinois Department of Natural Resources, Cause No. 5-18-0582, Supreme Court of Illinois, Motion for Leave to Appeal denied October 2, 2020.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

Next Energy, LLC respectfully petitions for a writ of certiorari to review the judgment of the Illinois Supreme Court in this matter.

OPINIONS BELOW

The decisions of the Illinois Supreme Court, the Illinois Appellate Court and the Wayne County Illinois Circuit Court are reprinted at Pet. App. 1-37.

JURISDICTION

The Supreme Court of Illinois entered its judgment on September 30, 2020 and denied a petition for leave to appeal from the Illinois Appellate Court pursuant to Illinois Supreme Court Rule 315. This Court has jurisdiction under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS

U.S. Const. Amendment V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be

> twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INTRODUCTION

In 1938, the Pennsylvania Coal Company asserted the Commonwealth of Pennsylvania promulgated regulations rendering its coal mines worthless. Next makes a similar claim here, but as to oil leases. Justice Oliver Wendall Holmes Jr. wrote for the Court and held when regulations go so far to deny the use of property, those regulations amount to a taking in violation of Amendment V of the Constitution. Those same considerations apply in this case.

In 2011, Next began acquiring lease blocks in Illinois with five-year primary terms to produce and sell oil from shale formations and intended to use the horizontal hydraulic fracturing process to recover the oil. That process is the only economical method of oil recovery for the shale formations. Pet. App. 33. Next commenced leasing subsurface mineral rights containing shale oil when horizontal hydraulic fracturing was allowed by Illinois. Pet. App. 33.

These leasehold interests are taxed and can be conveyed, owned, attached, foreclosed upon, and

transferred separately from the surface of the land. A lien on one does not encumber the other.

After Next acquired its lease blocks, but before it could apply for drilling permits, Illinois Department of Natural Resources instituted a moratorium of indeterminate length, beginning in mid-2012. Pet. App. 19. This moratorium was unauthorized by the legislature, and effectively prohibited the entire use of Next's leases. Pet. App. 19, 33, 34. Illinois neither published nor announced the existence or duration of the moratorium, nor did it ever supply a reason for this moratorium. Without the ability to apply for a permit, Next's leases were rendered worthless, as the leases could not be used for any purpose, assigned, or sold.

In 2013, Illinois enacted the Hydraulic Drilling and Fracturing Regulatory Act purporting to govern horizontal hydraulic fracturing operations. Eighteen months later, in 2014, Illinois finally promulgated regulations allegedly implementing the Act. Next suspected and asserted in its complaint that Illinois would never allow horizontal hydraulic fracturing. Pet. App. 19, 33, 34. Next would learn that the newly devised permit application process for horizontal hydraulic fracturing would take longer than the term remaining on Next's leases to prepare for and drill its numerous horizontal hydraulic fracturing oil wells. Pet. App. 22 and n. 2 therein. With the time expired or expiring on its leases, Next determined it would be futile to apply for permits for the scores of wells it planned for drilling on its blocks of leases.

Since the moratorium and expiration of Next's leases, no applicant has ever been granted an unconditional permit for these horizontal hydraulic fracturing wells. To date, not one horizontal hydraulic fracturing well has been drilled in Illinois since the passage of the new Act. *See n. 5 infra*.

STATEMENT OF THE CASE

This action was commenced on November 9, 2015, when Next filed a Complaint in the Circuit Court of Wayne County alleging inverse condemnation and a regulatory total taking of its leasehold property. The Complaint alleged such leases could be economically produced only by horizontal hydraulic fracturing wells. Pet. App. 19, 33.

Next began acquiring its block of leases in 2011. Before Next or any potential assignees could apply for permits to begin drilling, Illinois imposed and enforced an unauthorized moratorium on the issuance of permits for horizontal hydraulic fracturing under existing laws. Pet. App. 19, 33. Despite existing laws and regulations allowing this method of oil extraction, applications for permits for these wells were not accepted by Illinois. In essence, Illinois imposed a *de facto* moratorium beginning in mid-2012. Pet. App. 19, 33.

After Next acquired its leases, the legislature passed Public Act 98-22 with an effective date of June 7, 2013, purportedly addressing horizontal hydraulic fracturing operations. Pet. App. 33. That statute is

referred to as the Hydraulic Drilling and Fracturing Regulatory Act and is found at 225 ILCS 732/1-1 *et seq*.

Although the statute was enacted in June of 2013, regulations implementing the statute, including regulations related to the application for permits, were not adopted until November 2014, nearly a year and six months after passage of the Act. Coupled with the moratorium, over three years of the term of Next's lease blocks had expired and during that time no such permits were accepted by Illinois. Pet. App. 33. From that time, the application process would require almost two more years. Pet. App. 22-24.

Because Illinois failed to adopt regulations until November 2014, Next could not effectively apply for a permit, sell, or sublet any of its leases prior to that time even if the regulations were workable. Pet. App. 33. Each one of Next's proposed horizontal hydraulic fracturing wells would require a separate permit and the time and effort associated with horizontal hydraulic fracturing permit applications.

Next's Complaint asserted that the conduct of Illinois amounted to a total regulatory taking and inverse condemnation of oil leases for which it was entitled to just compensation pursuant to 735 ILCS 30, the Illinois Eminent Domain statute, and Amendment V to the Constitution. The claims of the Next Complaint were restated on page 1 of the Order on Defendant's Motion For Judgment On The Pleadings. Pet. App. 13, 14. The Illinois Appellate Court Rule 26 Order reviewed those claims at Pet. App. 20 and Pet. App. 28

which affirmed the dismissal of the Amendment V claims. Pet. App. 36. Thereafter, the Illinois Supreme Court denied the Petition for Leave to Appeal the Illinois Appellate Court Rule 26 Order dismissing the Amendment V claims. Pet. App. 37.

Additionally, Next's Complaint alleged the application process was so onerous, ill-defined, and burdensome as to render application for such a permit economically prohibitive, impractical, and therefore futile. Pet. App. 21-22, 33. Further, Next argued that the regulations promulgated exceeded the authority delegated under the Act and were unworkable and overreaching, and that the regulations rendered the Next leases worthless. As such, Next is entitled to just compensation for its leases pursuant to Amendment V of the Constitution of the United States.

On January 19, 2015, Illinois filed a Motion to Dismiss, asserting Next had failed to plead facts stating a cause of action for inverse condemnation. Illinois claimed in the absence of a physical taking, no eminent domain proceeding could be maintained.

The trial court properly denied the Motion to Dismiss in its November 21, 2016 Order. Illinois then filed its Answer and Affirmative Defenses. Over a year and a half later, on August 1, 2018, Illinois filed a Motion for Judgment on the Pleadings. The motion mirrored the previous Motion to Dismiss and the trial court's order granting such motion was entered on December 3, 2018. The Order dismissed Next's Complaint, holding

the Complaint was not ripe as Next had not applied for a permit.[1]

Next appealed the trial court order granting the Judgment on the Pleadings to the Illinois Appellate Court. The court affirmed the trial court judgment on April 20, 2020. Pet. App. 13-14. Review of the decision was sought in the Illinois Supreme Court and was denied on September 30, 2020. Pet. App. 37. It is from that decision this Petition for a Writ of Certiorari is sought.

REASONS FOR GRANTING THE PETITION

The Illinois court decisions undermine and propagate confusion as to the rulings of this Court regarding both administrative taking jurisprudence and the futility doctrine. Allowing these decisions to stand encourages Illinois and other like-minded states to implement futile, repetitive, and unfair regulatory processes, as well as unauthorized moratoria thereby taking private property in violation of Amendment V. Allowing the Illinois decisions to stand contradicts this Court's precedent, and adversely impacts multiple "taking" lawsuits filed in several Illinois counties on

[1] For the purposes of evaluating a Motion for Judgment on the Pleadings, the allegations of fact must be taken as true, including Next's allegations the regulations were so onerous, ill-defined, and burdensome as to render application for the permit futile and impractical. Notwithstanding the allegations in Next's Complaint, the court granted the Motion for Judgment on the Pleadings.

behalf of thousands of shale oil owners. Those lawsuits have been stayed pending a decision of this Court.

Federal taking claims arise from Amendment V to the Constitution which provides: "[N]or shall private property be taken for public use without just compensation." The takings clause prevents the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Beginning with *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), this Court consistently recognized government regulation of private property may be so onerous its effect is tantamount to a direct appropriation or ouster. In *Pennsylvania Coal*, Justice Holmes observed that for the state " . . . To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. Thus, we think that we are warranted in assuming that the statute does." Justice Holmes' further observation was that a regulation that "goes too far" in restricting property rights effects a taking for which the government must compensate the property owner. *Pennsylvania Coal*, 260 U.S. at 414-415.

This case centers on an inverse condemnation claim. Next asserts that Illinois has taken oil leases but has not instituted eminent domain proceedings to do so. Two kinds of inverse condemnation taking claims are implicated by Illinois' actions: (1) *per se* physical occupation claims, and (2) categorical claims, resulting from regulations which deprive the property

owner of all economically beneficial use of the property. *Per se* takings are best illustrated by *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 41 (1982), while categorical takings claims are best explained by *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). In categorical cases, the application of a regulation to property deprives the landowner of an entire property interest. *Lucas'* claims for just compensation under the Fifth Amendment breaks into two essential elements: (1) the imposition of a regulation totally depriving an owner of a right in property, and (2) the right deprived is recognized under state law and is not a nuisance. *Lucas*, 505 U.S. at 1019.

The classic "taking" requiring just compensation involves a direct government appropriation or physical invasion of private property. However, well-settled precedent also recognizes direct appropriation is not the only species of taking, and that regulatory taking is also a taking subject to Fifth Amendment protections. This Court's decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) attempted to define how far is "too far" for a regulation to go when "a less than a total taking" occurred. *Penn Central* guided lower courts to conduct an "ad hoc factual inquiry" into a regulation's economic impact, effect on the property owner's "reasonable investment backed expectations," and the "character of the governmental action." *Penn Central*, 438 U.S. at 124. But with a total (categorical) taking, a court does not apply the *Penn Central* inquiry. Sometime after generation of this "factual inquiry"

requirement, the Court recognized the character of certain impediments on property was so serious that this amounted to a total taking. Categorical total taking occurs where a regulatory use "completely deprives an owner of 'all economically beneficial use' of her property." *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 538 (2005) quoting *Lucas*, 505 U.S. at 1019.

Here, Next claims that the taking of its shale oil leases by Illinois is a total regulatory taking because Next's leases had five-year terms which expired without development due to the unauthorized moratorium, onerous regulations, and a repetitive permit process. As a result, Next's leases expired and are now worthless.

Illinois' action is a taking of Next's property as the value of the leases are based on the time remaining on such leases during which the leases can be developed. Each day, week, month, and year of a lease has a value. Ripeness or the requirement to apply for a permit is not an issue with a moratorium as no permits were accepted by Illinois during the unauthorized moratorium and the time that can be fairly coupled with the moratorium. *See n. 5*.

I. Illinois' Moratorium Constituted a Compensable Taking

When Next commenced purchasing leases in 2011, existing Illinois law allowed horizontal hydraulic fracturing wells. After Next leased thousands of acres and expended substantial funds in the pursuit of

these leases, Illinois instituted and enforced an unauthorized and unannounced moratorium on the issuance of permits for this type of well, resulting in a compensable taking of Next's property.[2] Pet. App. 19.

In 2013, the Illinois legislature passed the law it claimed authorized horizontal hydraulic fracturing wells. But since no permits would be issued until regulations were promulgated, more time and value were taken from the Next leases. Regulations for the Act were not promulgated until November of 2014. As a result, that time can be fairly described as part of a planned, ongoing, unauthorized moratorium on the drilling needed by Next. Adding the time for an applicant to get through the red tape to the stage of a permit, its leases had expired or were expiring, leaving no time to prepare for and drill its wells.[3] Next decided not to apply when applying for a permit was rendered futile by the impediments incorporated in the permitting process by Illinois, starting with the moratorium and concluding with the onerous permit application process.

The seminal case concerning temporary moratoria takings is this Court's decision in *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S.

---

[2] The moratorium continues to this day, as the permit process created by Illinois has resulted in no such permits pending, and no such wells drilled. *See n. 5.*

[3] The leases acquired under the previous law when horizontal hydraulic fracturing was permitted were of public record in the court houses in the counties involved. The act of recording those leases provides notice to Respondent of this leasing activity.

304 (1987), holding that temporary total land use restrictions depriving a property owner of all economically beneficial use of property requires payment of just compensation.[4] Consequently, the imposition of an unauthorized moratorium on drilling permits by the Governor of Illinois requires just compensation. Notably, moratoria claims are not subject to objections that the claims were not ripe or that the claimant should have pursued other relief because permits were not accepted by Illinois during the moratorium. Together, *Lucas* and *First Evangelical* require just compensation when a moratorium deprives a property owner of all economically viable uses of property.

Next alleged that none of the applications for the permits it needed would be accepted by Illinois during this time, even though the laws of Illinois allowed such drilling permits. Pet. App. 19. Each day, week, month, and year that passed in which Illinois, without legislative authority, would not issue a permit is a taking that eliminated all economic use of Next's leases during that time increment. Disallowing a permit is tantamount to disallowing drilling, and it follows that if drilling is disallowed, the leases are rendered worthless and therefore unsaleable for that time, leaving

---

[4] *Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency, et al.*, 535 U.S. 302 (2002) does not impact the analysis in this case as *Tahoe* concerned moratoria that were of a limited duration and not a total taking, especially when weighed against the span of time such property was held by the owners of the land. Here, Next held leases that were limited in time to 5 years, bringing Next clearly under the ambit of *First Evangelical*.

Next with worthless property. Without the moratorium, Next could have assigned or sold its leases to other oil operators but since it could not, its losses are allowed under *Lucas* and *First Evangelical*.

II. Illinois' Regulations and Process Constitute a Compensable Taking

Like with Next, *Sherman v. Town of Chester* 752 F.3d 554 (2d Cir. 2014) featured a moratorium, unfair regulations, and obstructions causing time delays designed to prohibit the real estate project of Sherman. *Sherman* recognizes that unfair regulations and the like excused Sherman from applying for a permit and deemed that action a futile act. The Town in *Sherman* created insurmountable barriers like the ones facing Next.

A. Regulatory Takings and Futility

In *Sherman*, laws allowed development when Sherman acquired his property, but the Town of Chester had second thoughts when Sherman planned to develop his subdivision. As a result, the Town of Chester kept altering zoning requirements thereby denying Sherman's development plans. Getting the hint, Sherman abandoned the zoning process claiming futility. In response, the Town alleged that Sherman's case was not ripe. In his decision, Circuit Judge Staub used as an analogy the experiences of Hungry Joe in Joseph Heller's *Catch-22*. Upon reaching 23 missions, Hungry Joe packed his bags and wrote to his mother

that he would be coming home after 25 missions. Sadly, he had to rewrite his letter and unpack when the Colonel raised the number of missions to 30, then to 35. But when Hungry Joe was just three missions away, the Colonel increased the number to 40, and then to 45. At 44 missions, the Colonel set the number at 50, and then 55. When Hungry Joe reached 51, he got the hint and knew the Colonel would just "raise them" again. Hungry Joe appealed to his squadron commander, who speculated, "Perhaps he won't this time." *Sherman*, 752 F.3d at 557. Sherman, after experiencing more fees over ten years and more red tape, had run out of time, money, and life. *Sherman*, 753 F.3d at 563. Under those circumstances, the Court held Sherman's estate was not required to apply for a final decision since to do so would be futile. Judge Staub ruled that no final decision was required as the claim was ripe and required no further compliance. Next asks for no less in its case with similar impediments as found in *Sherman*, 753 F.3d at 566.

Next concedes it never applied for a horizontal hydraulic fracturing permit for its wells and asserts it should be excused for the same reasons expressed in *Sherman* and asserts that it was futile to apply during the moratorium. Takings jurisprudence recognizes two exceptions in which lack of a final decision is excused: futility and unfair/repetitive procedures. *Sherman*, 752 F.3d at 561. Although distinct concepts, the analyses for the two are identical and both are present in Next.

Next has shown its claim was ripe and demonstrated evidence of such futility of further pursuit, namely that: no unconditional permit has ever been granted by Illinois, the expiration of its leases, and the unfair and repetitive procedures preceded by an unauthorized moratorium during which permit applications were not accepted. These impediments resulted in not a single horizontal hydraulic fracturing well being drilled in Illinois under the Hydraulic Fracturing Act. Almost a decade has passed since Next began acquisition of leases in 2011.

While Next is claiming a total (categorical) regulatory taking, this Court has found a *per se* taking with only a partial, nominal taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). A categorical taking occurs, however, when an owner has been deprived of all beneficial use of its property as with Next. *See*, *e.g.*, *Lucas*, 505 U.S. at 1019. Regarding this form of taking, Next stands in the same shoes as the regulation plagued parties in *Lucas* and *Sherman*.

The failure of Next to obtain a permit is excused under the futility exception for good reason. This exception arises, as in *Sherman*, where a governmental entity makes clear that pursuing remaining administrative remedies would not result in a different outcome especially when a governmental entity burdens property by imposing repetitive or unfair procedures. Governmental entities are prohibited from taking property without compensation in the name of political expediency. Here, Illinois manipulated the application

and permitting process to ensure the time for oil leases would expire before Next or any other oil production company could obtain permits and drill scores of horizontal hydraulic fracturing oil wells. And to date, none have.

B. Onerous and Repetitive Regulatory Process

This type of horizontal hydraulic fracturing has been stopped in Illinois since 2012 using onerous and repetitious regulations coupled with a moratorium. As a result, taking without compensation is the law of Illinois and the rights of shale oil owners to extract oil which can be safely and economically produced using the horizontal hydraulic fracturing process have been disregarded. Illinois courts have allowed barriers of the permit process and impediments that created futility and an impossibility for Next.

1. The Regulatory Scheme

The onerous regulations implemented by Illinois were detailed in Next's Complaint. The Illinois Appellate Court Rule 23 Order, Pet. App. 33, 34, emphasizes those factual allegations, stating:

> Next Energy made the following factual allegations in its complaint: (1) that it acquired five-year oil and gas leases for the specific purpose of developing the leaseholds through horizontal drilling and high-volume fracturing in accordance with the then-existing law; (2) that no other feasible basis existed for

> extraction of oil from those leaseholds; (3) that, after acquiring the leaseholds, the Department imposed a moratorium on the issuance of permits for fracturing for an indefinite period of time; (4) that the legislature passed Public Act 98-22, effective June 17, 2013, which set out the application procedures for the permit process; (5) that the Department did not adopt regulations related to the issuance of the permits until November 2014; (6) that it was impossible to apply for a permit between June 2012 and November 2014 because it was well known that the applications would not be reviewed; and (7) that the statutory and regulatory provisions were so odious, ill-defined, and burdensome as to render application for the permit economically futile and impractical. Next Energy then identified the relevant provisions in the statute and regulations that it considered ambiguous and burdensome. The complaint also contended that the futility exception applied to excuse Next Energy's failure to seek a final decision for the above-stated reasons.

These allegations, to be taken as true for the purposes of a judgment on the pleadings, demonstrate the existence of the futile process Illinois insists Next undergo.

The Second Circuit in *Anaheim Gardens v. United States*, 444 F.3d 1309 (2d Cir. 2006) observed this Court has excused the failure to show finality in the face of "administrative futility" citing *Palazzolo v. Rhode Island*, 533 U.S. 620 (2001) and noting that the

ripeness doctrine does not require a landowner to apply for its own sake. *Anaheim Gardens*, 444 F.3d at 1316. But that is what the Illinois Courts are requiring Next to do in this case. In essence, Illinois courts are complicit in the unconstitutional actions of Illinois by ignoring well-pleaded facts coming within the long-established futility doctrine set out by this Court and recognized by the various Circuits.

In *Anaheim Gardens*, plaintiff proved its claim was ripe regarding regulatory taking with evidence of the futility of further proceeding for a permit through the administrative process. *Anaheim Gardens*, 444 F.3d at 1315. The Illinois Appellate Court Rule 23 Order and the Illinois Supreme Court failed to give any precedential weight to that ruling.

Next asserted sufficient evidence exists demonstrating its claim was ripe on the regulatory taking claim and it need not have filed a permit request for its oil wells because of the moratorium and onerous regulations. In further support of its claim of onerous regulations, Next cited the experience of the Woolsey Company, the only company that applied for a permit for a horizontal hydraulic fracturing well. As required, Woolsey began the application to apply for a permit on August 1, 2015.[5] It would not receive its conditional

[5] 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

permit for over two more years – on September 1, 2017.

Next argued the practical exhaustion of its five-year leases rendered any such application to Illinois futile when it considered the time taken for Woolsey just to get to the application point, and later, the time needed by Woolsey to submit its application consisting of 348 pages.

Next's judgment was validated when the Woolsey application was the only one ever partially processed by Illinois (HVHHF-000001). The Woolsey application was processed only in part, as Woolsey was only granted a permit with 86 additional conditions (the 87th was a correction to the permit). The permit with 86 conditions demonstrated that not even Illinois was able to determine whether the application complied with the regulations because they were so burdensome, repetitive, and ill-defined. The Illinois Oil Basin covers over 59,000 square miles, and not one well of the type Next needed has been drilled since the imposed moratorium in 2012. *See n. 5.* Pet. App. 22-25.

Woolsey gave up the permit process after over two years of trying and received no refunds of the thousands of dollars expended in the process. Illinois' application process became the perfect roadblock for any oil company seeking a horizontal hydraulic fracturing permit.

In its response to the Judgment on the Pleadings, Next pointed to the failed Woolsey application experience which was (and still is) the only application for a

horizontal hydraulic fracturing oil well submitted in Illinois after passage of the 2013 Act. This aborted application attempt demonstrated that the process imposed by Illinois was unworkable, unreasonable, futile, costly, unfair, repetitive, and time-consuming and would take more time than the Next leases allowed. That only one aborted application for a permit for horizontal hydraulic fracturing wells supports the futility of the application process. *See n. 5.*

Even though the specifics of the Woolsey application process occurred after the filing of Petitioner's Complaint but before the trial court's ruling, it follows that Next could expect the same treatment as was afforded Woolsey. The Woolsey application experience sheds light on Illinois' intentions regarding its application requirements just to get to the point where Woolsey gave up.

It is unknown, except to Illinois, how many more months or years it would have taken Woolsey to complete the application with conditions – if ever. Even considering the time taken by the moratorium, the promulgation of regulations, and the time required for the Woolsey aborted permit process, the Illinois Courts held Next was required to apply for a permit. Applying would have been a futile act because those planned delays exceeded the term of the Next leases and left no time for the preparation and drilling of numerous, horizontal hydraulic fracturing oil wells.

2. A Closer Look at the Woolsey Application Process considering *Palazzolo*

The *Palazzolo* court opined that, "Our 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." "The ripeness doctrine does not require a landowner to submit applications for their own sake." *Palazzolo*, 533 U.S. at 622. The saga of the Woolsey application demonstrates that an application by Next would have been an application without purpose, an application for the sake of application. And it defines "how far the regulation(s) go."

Illinois imposed even more barriers. After Woolsey was approved to apply for a permit (apply to apply), it had to renew the purchase of a five-million-dollar liability insurance policy for the required "application to apply," with such policy effective immediately. This policy was required even though there was no Woolsey operation on the proposed permit site causing any possible liability exposure. Pet. App. 22.

After Illinois approved Woolsey to register to apply, Woolsey could then, and only then, apply for a permit. Registration was, in effect, only an application for an application. Later, while Next was still applying to apply for a permit, Illinois demanded Woolsey renew the same five-million-dollar liability insurance policy it had previously required, before it would accept the application to apply for an application for a permit. Pet. App. 22. Liability insurance renewal and its cost

were required, even though there was nothing to insure. But it made no difference to Illinois as insurance was just one of the moving walls confronting Woolsey and other would-be applicants.

Illinois finally acknowledged receipt of the Woolsey permit application by letter on May 26, 2017 and Illinois began the permit process by scheduling a public hearing. Prior to and adding to the barriers, on June 5, 2017, Illinois had alleged ten deficient areas in the permit application. Pet. App. 23. Woolsey labored through those alleged ten deficient areas and submitted a supplemental application which consumed more time and required more fees, even though Woolsey is an experienced oil company with numerous oil permit applications under its belt. Pet. App. 23. *See also n. 5.*

Then, Illinois extended the public comment time so those who lived far away could comment. Comments were submitted from entities with offices in Beijing, China, New York, and other areas outside of Illinois. Pet. App. 23. More delay happened as Illinois scheduled another public hearing for August 2, 2017 and required yet another public comment period beginning August 4, 2017. Pet. App. 23. On August 14, 2017, Illinois required a second supplemental application (at this point, there had been an original application, a first supplemental application and now a second multipage supplemental application), and then demanded Woolsey respond to more issues raised by out-of-state and out-of-country entities. Pet. App. 23. Shockingly, this application would grow to 348 pages for one well. All required by Illinois. *See also n. 5.*

After that, the out-of-country entities, like China, wanted even more information from Woolsey than was required on the application, but it made no difference to Illinois as Woolsey had to comply or else. On August 28, 2017, Illinois now required a third supplemental permit application. The supplemental application required more fees and more time. Pet. App. 23. *See n. 5.*

Finally, after months of trying, on September 1, 2017 Woolsey received an answer, but not the one that it needed to drill a well as Illinois issued only a conditional permit with 86 conditions before drilling could commence. Woolsey had never seen these conditions before then.[6]

Illinois gave Woolsey no objective criteria to judge how long, if ever, it would take to satisfy Illinois regarding those newly presented conditions, nor if there would be additional conditions imposed after the 86. Time was running. Would Illinois move the wall again and require compliance with more pages of red tape? It took considerable time and the expenditure of significant company resources for Woolsey to get to that point for a single application. Would this process be required for each of the scores of wells it intended to drill? How much longer would be required? Presumably only Illinois knew. Next, as well as other oil companies, could watch this process which is of public record.

---

[6] *See* https://www2.illinois.gov/dnr/OilandGas/Documents/Corrected%20HVHHF-000001%20PERMIT%20and%20Cover%20Letter%209-1-2017.pdf, at pp. 3-13.

Upon receipt of the newly minted 86 conditions, after months of trying, and after expending funds for a single well permit attempt containing 348 pages, (it would need scores more) Woolsey gave up and requested a release from the conditional permit. Thereafter on November 1, 2017, Illinois promptly released Woolsey from any permit requirements and would not refund the thousands of dollars in permit fees. Woolsey left Southern Illinois and took with it the hopes of thousands of tax paying property owners with shale oil unrecovered below their property. Pet. App. 24. *See also n. 5.*

Confronted with those multiple barriers, Woolsey withdrew its application and abandoned its leases. That fact, ignored by all courts below, underscored the futility of the application process still enforced to this day. Like in *Sherman*, there was no evidence as to how much time was required to complete the additional tasks needed for a permit. But even the time it took Woolsey to get to the point of exhaustion for one permit was more time than Next had to do what was needed. *Sherman* holds a property owner will be excused from obtaining a final decision if pursuing a final decision would be futile. Futility is self-evident when oil leases are expired or expiring and especially so when the application experience of the only known applicant is considered.[7]

---

[7] Besides disregarding the facts of Next's complaint, the Illinois Appellate Court incorrectly determined three years remained on Next's leases. Only a year-and-a-half to two years remained on its leases after the promulgation of the Regulations

Even after a permit is authorized, an oil company must schedule the drilling and completion of the well. It follows that no such well could be drilled on land for which the lease had expired, or for which insufficient time remained to allow the proper preparation of and completion for the drilling operation.

Almost a decade has passed since Illinois imposed the unauthorized moratorium and other barriers against horizontal hydraulic fracturing permits. And since then, no horizontal hydraulic fracturing well has been drilled in Illinois. Using time-limited leases, moratoria, and onerous regulations, Illinois has effectively barred such wells and taken with it the shale oil of thousands of owners in violation of the law. Attempting an application in Illinois with these facts would have been futile and as such is not required by *Sherman, Palazzolo* or *Lucas.*

3. Implications of the Woolsey Experience

The experience of the Woolsey application process is important because it confirms the allegations of Next's Complaint and shows that the Illinois permit process would take longer than the term the Next leases then allowed without considering the time

---

in 2014. Based on the Woolsey permit experience, nearly two more years would be needed for just one permit to get to the point where Woolsey gave up and left town. Next correctly had concluded that Illinois could simply out-wait it. Illinois did. Significantly, Next need not show the futility of making an application during the moratorium as Illinois would not accept application for these permits then.

needed to prepare for and drill horizontal hydraulic fracturing wells.[8]

Nevertheless, the trial court's order granting Illinois' Motion for Judgment on the Pleadings asserts Next's futility argument is belied by its own submission of documents showing Woolsey applied for and received a permit to conduct horizontal hydraulic fracturing in Illinois. Tellingly, the Illinois court did not mention the amount of time, money and effort Woolsey spent applying for a single permit requiring 348 pages, nor that no one else bothered to apply, nor that no one, including Woolsey, has ever drilled a horizontal hydraulic fracturing well in Illinois after passage of the Hydraulic Fracturing Regulatory Act in 2013. Interestingly, the court incorrectly calculated the time left for Next to practically prepare for and drill its planned wells.[9] Thereafter the Illinois court completely ignored

---

[8] Granting of a permit does not mean drilling can begin immediately. Among many requirements, drilling contractors must be identified, and contracts negotiated, materials ordered, county road commissioners consulted, and arrangements must be negotiated with individual surface owners regarding access and egress rights, as well as land and crop damages. This process could take several months or more, depending on weather, before drilling may commence after the permit is granted. It is not unusual for county road commissioners to prohibit heavy traffic on secondary roads during the fall, winter, and spring months. No drilling could occur then because of the heavy equipment loads required. *See* 625 ILCS 5/15-316. Per Illinois requirements, permits expired in 12 months.

[9] Besides disregarding the facts of Next's complaint, the Illinois Appellate Court incorrectly determined three years remained on Next's leases. There were only 18 to 24 months remaining on its leases after the promulgation of the Regulations

Illinois' imposition of 86 conditions that Woolsey was required to fulfill before drilling could begin and be completed. We now know "how far the regulations go" and the Illinois courts failed to notice.

A review of the sequence of events surrounding Next's lease acquisitions and Woolsey's application process is instructive.

NEXT TIMELINE

September 27, 2011	Next Energy begins acquiring first block of leases.
Mid-2012	Illinois DNR imposes an unannounced, unauthorized "moratorium."
June 17, 2013	Hydraulic Fracturing Regulatory Act – New permits need to conform to regulations not yet promulgated.
November 2014	Illinois adopts regulations allegedly implementing the Hydraulic Fracturing Regulatory Act.
August 1, 2015	Woolsey Operating Company begins the registration process by

---

in 2014 for Next to complete its application and the items described in n. 3 above. The Woolsey application experience shows that it would take nearly two years for Next to get to the point where Woolsey gave up. Next was out of time, as Illinois planned.

	purchasing the required Liability Insurance Policy.
February 2, 2016	Woolsey Operating Company is permitted to register for permit.
August 24, 2016	Woolsey Operating Company re-registers for permit with updated forms.
April 17, 2017	Woolsey Operating Company submits notice of intent to submit permit application.
May 17, 2017	Woolsey Operating Company submits complete permit application.
May 26, 2017	Illinois DNR notifies Woolsey that the public comment period would begin on May 29, 2017 and end on June 27, 2017.
June 5, 2017	Illinois DNR sends Woolsey Operating Company deficiency letter advising ten (10) areas in which the Department required additional information or documents for application HVHHF-000001 to be complete.
June 15, 2017	Woolsey Operating Company submits extension of time to respond to deficiency letter.
June 26, 2017	Woolsey Operating Company waives 60-day deadline on Illinois DNR's response to application. Illinois DNR's new deadline

	to approve or deny Woolsey's application is extended to August 31, 2017.
June 26, 2017	Woolsey Operating Company submits updated application for HVHHF-000001. The public comment period is extended because of this supplemental application.
August 2, 2017	Public hearing held on application HVHHF-000001. A second public comment period is set to begin August 4, 2017. Illinois DNR receives various written comments about the proposed permit, one such written comment was from the Natural Resources Defense Council, an environmental action group with offices in New York, Washington D.C., Chicago, and Beijing.
August 14, 2017	Illinois DNR sends Woolsey Operating Company deficiency letter advising the amended application for HVHHF-000001 is incomplete. Advises Woolsey they are required to respond to the issues raised in the public comment period and to provide additional documentation.
August 25, 2017	Woolsey Operating Company submits second updated application for HVHHF-000001.

August 28, 2017	Illinois DNR sends Woolsey Operating Company deficiency letter advising the second amended application for HVHHF-000001 is incomplete.
August 29, 2017	Woolsey Operating Company submits revised plans in response to Illinois DNR's deficiency letter dated August 28, 2017.
September 1, 2017	Illinois DNR grants permit for HVHHF-000001 so long as eighty-six (86) conditions are met.
October 30, 2017	Woolsey Operating Company requests release of its permit and Injection Well Permit Application withdrawn.
November 1, 2017	Illinois DNR releases permit number HVHHF-000001. Illinois DNR advises Woolsey Operating Company in permit release letter, "should you decide to pursue further development in Illinois, including the drilling of the Woodrow #1H-310408-193 well that was the subject of HVHHF-000001 or any new wells, or perform HVHHF activities, you will be required to submit new permit application including any applicable, non-refundable fees. Next leases had expired."

To date, no permits are pending, and no horizontal hydraulic fracturing wells have been drilled in Illinois since the 2013 Act.[10]

After reviewing the Woolsey permit and 62 Ill. Adm. Code 245.100 *et seq.*, the Illinois court decided the regulations are not so onerous and overreaching that they support Next's claim of the futility exception. Pet. App. 11. The ruling is based on the characterization that Permit No. 000001 was granted by Illinois. But that Permit No. 000001 came with 86 complicated conditions, many of which are impossible to understand or accomplish as alleged in Next's Complaint. No unconditional permit allowing such wells has been granted by Illinois since the enactment of regulations in 2014, supposedly allowing horizontal hydraulic fracturing wells, including the Woolsey aborted application. The trial court wrongfully found that the issuance to Woolsey of a conditional permit was an unconditional permit. And the Court did not mention that the permit came with conditions that surfaced for the first time on September 1, 2017,[11] another moving barrier as in *Sherman*. The Court ignored the fact that only a month after issuance, Woolsey requested release from conditional Permit No. 000001 and abandoned its oil operations in Illinois. The Illinois courts also failed to mention no such well has ever been drilled in Illinois

---

[10] *See* https://www2.illinois.gov/dnr/OilandGas/Pages/PendingPermitApplications.aspx.

[11] *See* https://www2.illinois.gov/dnr/OilandGas/Documents/Corrected%20HVHHF-000001%20PERMIT%20and%20Cover%20Letter%209-1-2017.pdf.

since passage of the new Act in 2013 or since the unauthorized moratorium in 2012.

C. Illinois' Onerous and Repetitive Regulations Resulted in Next's Loss of All Economic Benefit

Next's lawsuit alleged Illinois deprived it of "all economically beneficial use" of its property, resulting in a total categorical taking requiring compensation. This is supported by *Lucas* which holds that the Takings Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment, citing *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897), and that the Takings Clause prohibits the government from taking private property for public use without just compensation. Next argues when regulations go so far as to cause barriers consuming the time allowed for oil leases, a categorical taking occurs.

This is especially true when entities like Next rely on the existence of laws and regulations in effect when the term limited oil leases are obtained and compares favorably with the facts in *Sherman*. Sherman relied on the zoning uses permitted for the land at the time of purchase. *Id.* at 558. He did not anticipate a delay/denial for the use of his property. The Town erected hurdles commencing with a moratorium on development, just as Illinois did in this case.

The ink on Next's oil leases had barely dried when Illinois issued a moratorium unauthorized by its legislature. Unlike the moratorium which stymied Next,

the moratorium in *Sherman* at least appeared to have been authorized. Since the application was of public record, Next watched the Woolsey application process with interest, knowing whatever happened to Woolsey was likely to have happened to it when it would have applied. As in *Sherman*, hindsight should have sounded a lot like: "Perhaps he (the Colonel) won't raise the number this time." Or perhaps Illinois will not require more time than Next leases allowed.

That the State did not put up a "brick wall" between plaintiff and the finish line is not the deciding factor. *See Sherman*, 752 F.3d 554 at 563. Rather, what Illinois would do to Next, and as happened in *Sherman*, was to continuously move the finish line one step further away with a moratorium, onerous regulations, excessive time for application processing, hearings, rehearings, requirements for supplementing applications, and responses needed for questions from persons from China and the like. Eventually, both got the hint and gave up. Next just gave up earlier, once it understood the regulations to be so onerous, ill-defined, and repetitive and knew the permit process would reflect the same. Yet even had the regulations been workable, the repetitive and burdensome nature of the process would take too long. Next leases would expire before the applications could be completed.

Sherman teaches each regulatory taking claim is unique and fact specific, and that claim must be determined on its own facts. Here, the facts demonstrate a taking from Next as much as or more so than they did in *Sherman, Lucas, Palazzolo* and *Anaheim Gardens.*

The Illinois process constitutes a taking and is evidenced by the fact that no unconditional horizontal hydraulic fracturing well has ever been permitted nor has one ever been drilled in Illinois since the moratorium in 2012. Those facts are compelling and exceed the circumstances demonstrating a taking in each of the above referred cases.

The inference no permit will ever be issued by Illinois is reasonable, especially considering the passage of time. Next made a commonsense decision when it recognized its efforts were hopeless. That Woolsey tried and gave up justified Next's decision not to apply for a permit. The passage of time with no permits and no horizontal hydraulic fracturing wells in Illinois confirms the futility of applying.

The Illinois court rulings should be reversed, and this petition granted because the futility doctrine does not require Next to perform a worthless act. The height of impossibility/futility is to require an application for a permit when a valid lease is required before a permit will be granted. Expiration of Next's leases together with the onerous and repetitious regulations made successful application for a permit futile, if not impossible.

Tellingly, none of the lower court rulings in this case addressed the circumstances surrounding the issuance of the conditional permit to Woolsey, an experienced oil company. None of those courts mentioned neither Woolsey nor any other company, has ever been

granted an unconditional permit allowing the drilling of a horizontal hydraulic fracturing oil well.

III. The Illinois Cases Cited Are Inapposite and Offer No Precedential Value

In support of its decision, the Illinois Appellate Court pointed to *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227,1232 (9th Cir. 1994) to say that Next was required to apply for a permit for its claim to be ripe. In *Kawaoka*, which involved a substantive due process claim and not a takings claim, Plaintiffs were owners of the surface rights to the land, not lessees of the mineral rights. Unlike with Next, there was no time limit regarding Kawaoka's ownership, as was also true in *Palazzolo* and *Sherman.*[12]

The Illinois Appellate Court also relied on *LaSalle Bank National Ass'n v. City of Oakbrook Terrace*, 393 Ill. App. 3d 905, 911 (2009) for the proposition that the claim was not ripe because it had never sought approval for any development on the subject property. However, in *LaSalle Bank*, the movants were seeking relief on a zoning issue, the procedure for which included the ability to petition for a variance of the zoning for the property. Also, as owners of the property, the *LaSalle Bank* plaintiffs did not face the time limits inherent in expiring leases as faced by Next. *See LaSalle*, 393 Ill. App. 3d at 906. Moreover, where a

[12] The Next leases were negotiated and executed in 2011 and 2012. The common practice in the oil industry is such leases are granted for a term of five years.

regulatory scheme offers the possibility of a variance, the property owner "must go beyond submitting a plan for development and actually seek such a variance to ripen his claim." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736-737 (1997).

As a result, *LaSalle Bank* can only be read to say that when a government entity has discretion to vary from the established conditions (as in the granting of a variance of zoning requirements), a plaintiff would be required to pursue its application to finality. Since the regulations here were not discretionary Illinois could not deviate from those requirements. As a result, *LaSalle Bank* is inapposite and unpersuasive. The *LaSalle Bank* opinion, decided in 2009, contravenes *Lucas, Palazzolo* and *Sherman*, which hold a plaintiff does not have to pursue a futile course of action to finality to have the taking claim deemed ripe for decision. To the extent *LaSalle Bank* disagrees with Lucas and Palazzolo, those cases are controlling, and *LaSalle Bank* offers no precedential value in this case.

IV. Allowing the Lower Court Rulings to Stand Adversely Impacts Numerous Other Shale Oil Property Owners in Southern Illinois

This Petition should be granted because relief is needed by Next and other owners of shale oil. Illinois has been a significant oil producing state. If Illinois has its way, shale oil will remain unrecovered denying thousands the economic use of their property in violation of the most basic property right.

Lawsuits have been filed on behalf of shale oil owners in Southern Illinois in Clay, Edwards, Hamilton, Wabash, Wayne, and White counties alleging Illinois has implemented regulations and other barriers to stop the drilling of horizontal hydraulic fracturing oil wells in Illinois. These lawsuits claim onerous regulations and other barriers imposed by Illinois have taken property in violation of Amendment V of the Constitution.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

RODNEY V. TAYLOR*
*Counsel of Record
HILARY A. BARNES
CHRISTOPHER & TAYLOR
1219 N. Delaware Street
Indianapolis, IN 46202
(317) 635-9000
rodtaylor@abatelegal.com

MORRIS LANE HARVEY
HARVEY & BAKER, P.C.
2029 Broadway
Mt. Vernon, IL 62864
(618) 244-9544
lharvey@lmh-law.net