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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's takings claim is unripe, given that it never applied for a permit to conduct hydraulic fracturing activities and did not show that such an application would be futile.

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BRIEF IN OPPOSITION

Since 2013, Illinois has regulated the conditions under which oil and gas mining companies like petitioner can conduct high-volume, horizontal hydraulic fracturing operations in the State. Illinois has not prohibited such operations. Instead, it allows an entity that wishes to engage in hydraulic fracturing activities to apply for and obtain a permit from the Illinois Department of Natural Resources. Petitioner holds oil and gas leases in Illinois and asserts that it wishes to extract these minerals using hydraulic fracturing. But it has never applied for a permit to do so. Instead, almost a year after the Department issued regulations that governed the permit issuance process, petitioner filed suit in state court, arguing that Illinois's regulation of hydraulic fracturing, as applied to petitioner's oil and gas leases, constituted a categorical (or total) regulatory taking. The state appellate court denied petitioner's takings claim in an unpublished opinion, reasoning (like the state trial court before it) that the claim was not ripe because petitioner never sought a permit from the Department and failed to show that it would have been futile to do so. Petitioner now asks this Court to grant certiorari and reach the merits of its takings claim.

The Court should deny the petition. Petitioner asks the Court to grant review in order to hold that Illinois's regulatory regime, at least as applied to petitioner's oil and gas leases, constitutes a regulatory taking. But the courts below never reached that question. Instead, they held that petitioner's takings claim is not ripe, because petitioner never applied for a permit that would have allowed it to engage in hydraulic

fracturing and failed to show that applying for such a permit would be futile. That holding is correct. And petitioner identifies no other reason to grant review. Petitioner does not identify any conflict among the lower courts as to the applicable legal principles; instead, it asks the Court to review the lower court's application of those principles to its own case. But the Court does not grant certiorari to determine whether a lower court erroneously applied settled legal rules to particular facts, and it certainly does not do so where, as here, *no* court has ever addressed the question the petitioner asks it to review. The Court should deny review.

STATEMENT

1. High-volume, horizontal hydraulic fracturing is a method for extracting minerals like natural gas and oil from rock. See U.S. Env't Prot. Agency, *Hydraulic Fracturing* (updated Jan. 4, 2021).[1] To use this method, an operator must drill a well into a rock formation—boring vertically first, then horizontally—and inject large quantities of water and other fluids at high pressure into the wells in order to "fracture" the rock and release the minerals. *Ibid.*; see also 225 ILCS 732/1-5. Hydraulic fracturing is a "relatively new" method for extracting minerals, but has been used with increasing frequency during the past decade to "open[] up new areas for oil and gas development." U.S. Env't Prot. Agency, *Hydraulic Fracturing*, *supra*. Hydraulic fracturing can pose health and environmental risks to surrounding

[1] https://www.epa.gov/uog/process-unconventional-natural-gas-production. All cited websites last visited April 19, 2021.

communities, U.S. Env't Prot. Agency, *Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States (Executive Summary)* 1-2 (2016),[2] and so many States and localities have imposed safety regulations on the practice, requiring operators to take certain precautions when drilling and cementing wells and in handling discharges, among other measures.

Illinois, like many other States, has comprehensively regulated the conditions under which operators can conduct hydraulic fracturing. In 2013, Illinois enacted the Hydraulic Fracturing Regulatory Act, which requires an entity that wishes to conduct hydraulic fracturing to obtain a permit from the Illinois Department of Natural Resources before doing so. 2013 Ill. Legis. Serv. Pub. Act 98-22 (S.B. 1715) (codified at 225 ILCS 732/1-1 *et seq.*); see 225 ILCS 732/1-30. The Act imposes substantive rules for well siting, construction, and operation, *id.* 732/1-70(a), and standards for the fracturing process itself, *id.* 732/1-75. And it authorizes the Department to promulgate administrative rules to carry out the Act's purposes. *Id.* 732/1-1, 732/1-130. The Act was passed on a bipartisan basis and was supported by the oil and gas industry, which argued that it would increase revenue and employment opportunities in the State. See

[2] https://www.epa.gov/sites/production/files/2016-12/documents/hfdwa_executive_summary.pdf.

Julie Wernau, *Bill To Regulate Fracking In Illinois Sails Through Committee*, Chicago Trib., May 21, 2013.[3]

The Department moved quickly to promulgate regulations to implement the Act. Consistent with the Illinois Administrative Procedure Act, the Department issued proposed regulations in October 2013, ten weeks after the Act's enactment. See Ill. Dep't of Nat. Res., *Hydraulic Fracturing Regulatory Act Administrative Rules: Response to Public Comment* 10-11.[4] The Department then conducted an extensive notice-and-comment process in which it held five public hearings across the State and received over 800 written comments on the proposed regulations. *Id.* at 1, 10-11. The Department issued final regulations implementing the Act in November 2014. 38 Ill. Reg. 22,052 (2014). The final regulations set out standards for well preparation and construction, water quality, the disclosure of chemicals, and fracturing operations and production, as well as other measures designed to ensure that hydraulic fracturing is conducted in a safe manner. See generally 62 Ill. Admin. Code pt. 245.

As relevant here, the Department's regulations also set out a process for entities to obtain hydraulic fracturing permits—a process that largely tracks the Act's own requirements. See 225 ILCS 732/1-30 to -65; 62 Ill. Admin. Code §§ 245.200-360. To obtain a permit, an operator must first register with the Department, 225 ILCS 732/1-

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[3] https://www.chicagotribune.com/business/ct-xpm-2013-05-21-chi-bill-to-regulate-fracking-in-illinois-sails-through-committee-20130521-story.html.

[4] https://www.dnr.illinois.gov/OilandGas/Documents/IDNR%20Response%20Document.pdf.

35(a), and then submit a permit application that includes, among other things, a "detailed description" of the proposed operations, *id.* 732/1-35(b). The applicant must submit a fee of $13,500, which helps fund the administration and enforcement of the Act. *Id.* 732/1-35(e). The submission of the permit application triggers a 30-day public comment period during which members of the public may file objections to the permit and request a public hearing. *Id.* 732/1-45, -50. Although the Department is required to consider any comments provided by members of the public, 62 Ill. Admin. Code § 245.300, it must issue a final decision on the permit application within 60 days of its submission unless the applicant agrees to extend the deadline, 225 ILCS 732/1-35(i). The Department may approve the permit application, reject it, or approve it "with any conditions the Department may find necessary." *Ibid.*

2. Petitioner is a limited liability corporation that acquired five-year oil and gas leases in Illinois before 2012. Pet. App. 14a-15a. Petitioner intended to extract oil from the properties using high-volume, horizontal hydraulic fracturing. *Ibid.*

Petitioner, however, never applied for a permit to conduct hydraulic fracturing, either before or after the enactment of the Act. Instead, years after it had acquired the leases in question and almost two and a half years after the Act's enactment, in late 2015, petitioner sued the Department in state court, arguing that its leases had been taken without just compensation in violation of the federal and state Constitutions. Pet. App. 19a-20a. Petitioner alleged that, beginning in mid-2012, in anticipation of the enactment of the Act, the Department had implemented a "moratorium" on the

issuance of permits to entities planning to engage in hydraulic fracturing. *Id.* at 19a. And although petitioner conceded that it could have applied for a permit at any point after November 2014, when the Department promulgated final rules governing such permits, it alleged that those rules were "so odious, ill-defined and burdensome as to render application for the permit economically futile and impractical." *Id.* at 34a. For these reasons, petitioner argued, it should be excused from having not applied for a permit. *Id.* at 21a-22a. Moreover, petitioner argued, the combined effect of the alleged "moratorium" and the burden of the rules ultimately promulgated constituted a categorical regulatory taking of its property rights. *Id.* at 20a.

The trial court granted the Department judgment on the pleadings, holding that petitioner's takings claim was not ripe, Pet. App. 12a, and the Illinois Appellate Court affirmed in an unpublished opinion, *id.* at 13a-14a. The court explained that, under this Court's precedents, "[a] regulatory takings claim is not ripe until the government entity charged with implementing the regulations has reached a final, definitive decision concerning the application of the regulations to the particular property at issue," and that, because petitioner had never applied for a permit, its takings claim was unripe unless it could show that it fell within an exception to the final-decision rule. *Id.* at 29a. Here, the court held, no such exception applied: Although petitioner argued that it would have been futile for it to apply for a permit, that argument failed because petitioner "had not alleged sufficient facts" to explain why it had not applied for a permit after November 2014, at which point three years remained on many of its

leases. *Id.* at 34a. Petitioner, the court observed, not only "ha[d] not applied for a fracturing permit under the Act," it "ha[d] not even contacted the Department to inquire about its likelihood of success in obtaining such a permit." *Id.* at 34a-35a. Petitioner, reasoned the court, "asks us to hold that a plaintiff can show futility without ever trying to seek a permit from the regulatory agency or without a history of engaging with that agency regarding the regulations at issue." *Id.* at 35a. But without any such attempt, the court explained, "it is impossible for the trial court to determine the full extent to which the Department's fracturing rules would have burdened [petitioner's] lease or whether its permit application would have been automatically rejected." *Ibid.* The court thus held that petitioner's takings claim was not ripe.

The Illinois Supreme Court denied petitioner's petition for leave to appeal. Pet. App. 37a.

REASONS FOR DENYING THE PETITION

This case does not warrant the Court's review, for at least three reasons. First, although petitioner asks the Court to decide whether the Department's regulation of high-volume, horizontal hydraulic fracturing constituted a categorical regulatory taking of its oil and gas leases, the lower courts' decisions rest on a different and independent ground: that petitioner's takings claim was not ripe. Indeed, no court has *ever* reviewed petitioner's takings claim on the merits. This Court does not ordinarily grant certiorari to hear questions not addressed by the lower courts, and petitioner

identifies no sound reason it should do so here. Second, petitioner does not identify any conflict among the lower courts as to any aspect of this Court's jurisprudence; rather, it asks the Court to apply settled legal principles to the facts of its case. But the Court does not grant certiorari to engage in error correction. Finally, and most straightforwardly, the lower court correctly held that petitioner's takings claim is not ripe. Petitioner never applied for the very permit that would have allowed it to conduct hydraulic fracturing activities and failed to show that such an application would have been futile. Absent such an application, petitioner cannot show that any aspect of the Department's regulatory regime constitutes a taking.

I. Petitioner Asks The Court To Answer A Question The Courts Below Did Not Address.

Petitioner asks the Court to review whether Illinois's regulation of high-volume, horizontal hydraulic fracturing within the State, as applied to its oil and gas leases, constitutes a categorical regulatory taking. Pet. i. But the courts below did not address that question, instead rejecting petitioner's takings claim on the separate ground that it is not ripe. Because this is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the Court can deny the petition for this reason alone.

Petitioner seeks certiorari on a single question: whether Illinois's regulation of hydraulic fracturing, as applied to Petitioner's oil and gas leases, "effects a categorical regulatory taking of those leases." Pet. i. Petitioner contends that, under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the combination of the

Department's alleged "moratorium" on the issuance of new oil and gas extraction permits between 2012 and 2014 and the "onerous and repetitious regulations" issued by the Department in 2014 to govern issuance of permits constitutes a regulatory taking. Pet. 16.

But the takings question was not addressed by the courts below. Instead, those courts rejected petitioner's takings claim on an antecedent ground: Petitioner failed to apply for a permit to conduct hydraulic fracturing, as required by this Court's precedent. Under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and its predecessors, "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186; see also, *e.g.*, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). Here, the lower courts rejected petitioner's takings claim not on the merits, but based on petitioner's refusal to even "try[] to seek a permit from" the Department, Pet. App. 35a—that is, petitioner's failure to comply with the final-decision rule set out in *Williamson County* and its predecessors.[5]

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[5] In *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), this Court overruled *Williamson County*'s separate requirement that a takings claimant exhaust its remedies in state court before filing suit in federal court. *Id.* at 2167-2168. But *Williamson County*'s final-decision rule was "not at issue" in *Knick*, as the Court

The fact that no court has *ever* addressed the question on which petitioner seeks certiorari—the question whether Illinois's regulatory regime, as applied to petitioner's oil and gas leases, constitutes a taking—is, standing alone, sufficient reason to deny review. As noted, this is "a court of review, not of first view," *Cutter*, 544 U.S. at 718 n.7, and the Court frequently denies certiorari where, as here, a petitioner asks the Court to answer a question that the courts below did not address. See, *e.g.*, *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., concurring in the denial of certiorari) (certiorari not warranted where decision below did not "turn[] on" questions on which petitioner sought review); *Perez v. Florida*, 137 S. Ct. 853, 854 (2017) (Sotomayor, J., concurring in the denial of certiorari) (certiorari not warranted "because the lower courts did not reach the . . . question" on which petitioner sought review). The same result is appropriate here.

Indeed, it would be particularly unusual for this Court to grant certiorari and hear petitioner's takings claim on the merits, given the vital role that the final-decision rule plays in regulatory takings cases. As this Court has explained, the final-decision rule "responds to the high degree of discretion characteristically possessed by land-use [regulators] in softening the strictures of the general regulations they administer." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001). Thus, a property owner must allow the relevant agency to exercise its "full discretion in considering development

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observed, *id.* at 2169, and so remains binding law. Petitioner does not contend otherwise.

plans for the property," because until the agency has had the chance to review the plaintiff's plans, "the extent of the restriction on property is not known and a regulatory taking has not yet been established." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 (2002). A takings claim that is premised on the application of a regulatory scheme to a land parcel, like petitioner's, "simply cannot be evaluated until the [agency] has arrived at a final, definitive position regarding how it will apply the regulations at issue to the land in question." *Williamson Cnty.*, 473 U.S. at 191. And the final-decision rule applies no less to claims for categorical regulatory takings, such as petitioner's, so as to "inform[] the constitutional determination whether a regulation has deprived a landowner of 'all economically beneficial use' of the property." *Palazzolo*, 533 U.S. at 618 (quoting *Lucas*, 505 U.S. at 1015); see *id*. at 618-626 (concluding that categorical regulatory takings claim was ripe where agency considered and rejected plaintiff's permit applications). It would thus be particularly inappropriate to grant certiorari to review the merits of petitioner's takings claim, given this Court's consistent admonition that such a claim *cannot* meaningfully be reviewed absent a final decision by the relevant agency.

II. Petitioner Identifies No Division Of Authority On Any Legal Question Relevant To The Petition, Nor Any Other Reason To Grant Review.

Even setting aside the vehicle issue, the Court's review is not warranted. The unpublished decision below does not implicate any division of authority on any aspect

of this Court's jurisprudence, a point petitioner does not meaningfully contest. Petitioner instead asks the Court to grant certiorari to review the factbound question whether Illinois's regulation of high-volume, hydraulic horizontal fracturing constitutes a taking as applied to its own oil and gas leases. But the Court does not grant certiorari to review the alleged "misapplication of a properly stated rule of law," S. Ct. R. 10, and petitioner identifies no other compelling need for the Court's review.

a. To begin, there is no division of authority on the ripeness question. As explained, this Court has for decades required a property owner alleging a regulatory taking to seek a "final decision" from the regulatory agency before bringing a takings claim in court. *Williamson Cnty.*, 473 U.S. at 186; see *supra* pp. 9-11. And it has explained that a property owner's failure to seek such a decision will be excused only where the owner shows either that exhaustion would be futile or that the relevant agency has imposed "repetitive or unfair land-use procedures in order to avoid a final decision." *Palazzolo*, 533 U.S. at 621. The court below stated these legal principles correctly and applied them faithfully to the facts of petitioner's case. Pet. App. 28a-36a. It held that petitioner had never applied for a permit, and so its takings claim was not ripe under *Williamson County*. *Id.* at 29a. And it held that petitioner had failed to adequately plead futility, given that it had never "even tr[ied] to seek a permit from" the Department and had no "history of engaging with [the Department] regarding the regulations at issue." *Id.* at 35a.

Petitioner argues at length that the lower court misapplied *Palazzolo* in holding that it had not adequately pled futility. Pet. 13-32. That argument is incorrect. *Infra* pp. 16-20. But regardless, it amounts to no more than a request for error correction of an unpublished and fact-dependent opinion of a state intermediate appellate court. That request does not meet the Court's criteria for certiorari. See S. Ct. R. 10.

Petitioner also makes a half-hearted attempt to show that there is disagreement among lower courts with respect to the rules governing ripeness and futility. On this front, petitioner appears to argue that the decision below conflicts with two federal appellate court opinions, *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014), and *Anaheim Gardens v. United States*, 444 F.3d 1309 (Fed. Cir. 2006). Pet. 13-18. But there is no conflict between the decision below and these opinions. For one, as noted, the decision below is unpublished and nonprecedential, and so does not contribute to any division of authority, at least not one with any forward-looking consequences.

But even apart from that, there is no conflict between the decision below and either of the cases that petitioner identifies. These opinions simply applied *Palazzolo*'s futility exception to the facts before them and reached different conclusions on the basis of those facts. In *Sherman*, on which petitioner principally relies, the plaintiff spent a decade engaging with the relevant regulatory agency, applying on at least five occasions for approval of a redevelopment project. 752 F.3d at 557-560. But the agency repeatedly "changed its zoning regulations" just as the plaintiff "submitted or was about to submit" a proposal, "sending him back to the drawing board"—a practice the

Second Circuit characterized as an effort to "obstruct[]" the plaintiff personally. *Id.* at 562-563. This case is nothing like *Sherman*: Not only has petitioner never applied for a permit from the Department, there is no plausible allegation (nor could there be) that the Department has adopted rules for the express purpose of stymying petitioner's efforts to conduct hydraulic fracturing in Illinois. *Anaheim Gardens* is equally far afield: The plaintiffs there, too, sought relief from the relevant agency and sued only after the agency failed to respond within a statutory deadline. 444 F.3d at 1313-1314. And the Federal Circuit, far from holding that the plaintiffs had shown that exhaustion would be futile, reversed on the ground that the lower court had erred in "dismiss[ing] [plaintiffs'] complaints *sua sponte*," before the parties had briefed the futility question. *Id.* at 1314. Here, the lower court engaged in a thorough analysis of petitioner's allegations and held that it had failed to show that applying for a permit would be futile. Pet. App. 35a. There is no conflict between that holding and the cases petitioner identifies, nor any broader disagreement regarding the legal rules governing ripeness in the takings context, for this Court to resolve.

b. Petitioner likewise identifies no division of authority on the legal rules governing a regulatory takings claim—the issue on which it seeks the Court's review, Pet. i. This Court has held that "a regulation [that] 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (quoting *Palazzolo*, 553 U.S. at 617). Petitioner argues that the Department's regulation of high-volume, horizontal

hydraulic fracturing, as applied to its oil and gas leases, constitutes such a taking. Pet. 10-13, 32-35. But petitioner does not claim that the lower court's decision contributes to any division of authority over the governing legal rules regarding regulatory takings—nor could it, given that the lower court did not reach this question. Indeed, petitioner does not identify the existence of *any* conflict among the lower courts regarding the application of this Court's regulatory takings jurisprudence that warrants the Court's attention. Its sole argument on the merits is that Illinois's regulatory scheme for hydraulic fracturing, as applied to its oil and gas leases, constitutes a taking. But that claim, again, amounts to no more than a request for factbound error correction of an unpublished opinion issued by a state intermediate court—on an issue that court did not reach—and so does not merit the Court's review.[6]

c. Finally, there is no other compelling reason to grant review. Petitioner briefly argues that the decision below implicates takings cases pending in Illinois state

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[6] In any event, petitioner's arguments on the merits are ill-founded. Petitioner claims, for instance, that an alleged "moratorium" the Department implemented between mid-2012 and 2014 constituted a taking of the value of its leases during that period. Pet. 12. But this Court has flatly rejected the argument that a temporary moratorium implemented during the development of permanent land-use policies constitutes a categorical taking. See *Tahoe-Sierra*, 535 U.S. at 321; see also *id.* at 337-338 (moratoria are "an essential tool of successful development" that "facilitat[e] informed decisionmaking by regulatory agencies"). Petitioner attempts to derive a contrary rule from the Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), *see* Pet. 12 & n.4, but, as the Court in *Tahoe-Sierra* explained, *First English* "expressly disavowed any ruling on the merits of the takings issue" in that case, instead addressing only a "remedial question" about how to compensate a party who *has* demonstrated the existence of a regulatory taking, 535 U.S. at 328-329.

court brought by other property owners to challenge the Department's regulation of hydraulic fracturing. Pet. 36-37. But the lower court's decision does not address any legal question that could govern future cases in this area. The opinion does not rest on any categorical holding as to the legality of the Department's regulation of hydraulic fracturing; instead, it rests on facts peculiar to petitioner's own case—specifically, its refusal to apply for a permit or even engage with the Department either before or after the implementation of the Hydraulic Fracturing Regulatory Act. See Pet. App. 34a-36a. Any takings cases brought by claimants that, unlike petitioner, actually sought a permit to conduct hydraulic fracturing thus would not be affected by the decision below. And to the extent petitioner's argument is that takings claimants that did *not* seek permits with the Department might be harmed by the decision below, the fact that the opinion is unpublished defeats that argument as well.

In the end, the petition asks the Court to address the merits of a takings claim that no court has yet reviewed, and in the absence of any division of authority over the governing legal principles. That request plainly does not meet this Court's criteria for certiorari, and the petition should be denied.

III. The Decision Below Is Correct.

Finally, the Court's review is unwarranted because the court below correctly held that petitioner's takings claim was not ripe. As noted, a property owner alleging a regulatory taking must permit the relevant agency an opportunity to apply the regulations in question to the owner's property, and a takings claim premised on such

a regulation "is not ripe until the [agency] has reached a final decision regarding the application of the regulation[] to the property." *Williamson Cnty.*, 473 U.S. at 186. A property owner's failure to seek such a decision will be excused only where the owner shows either that exhaustion would be futile or that the relevant agency has imposed "repetitive or unfair land-use procedures in order to avoid a final decision." *Palazzolo*, 533 U.S. at 621. Applying these basic principles, the lower court held that petitioner's regulatory takings claim was not ripe and that petitioner had not established that an exception to the final-decision rule applied. Pet. App. 34a-36a.

That conclusion is correct. Petitioner "concedes" that it never applied for a permit to conduct hydraulic fracturing, either before the Department promulgated regulations implementing the Act or after it, Pet. 14, and so its claim is not ripe absent an exception to the final-decision rule, see *Williamson Cnty.*, 473 U.S. at 186. And petitioner's only argument on that issue is that it "should be excused" from seeking a permit because the Department allegedly implemented a moratorium on the issuance of new permits between mid-2012 and November 2014, and then promulgated "onerous and repetitious regulations" to govern permit issuance thereafter. Pet. 14, 16. As the lower court observed, however, petitioner identifies no case in which a court has excused a property owner from pursuing administrative remedies "without *ever* trying to seek a permit from the regulatory agency." Pet. App. 35a (emphasis added). For good reason: As this Court has repeatedly explained, the takings question "simply cannot be evaluated until the administrative agency has arrived at a final, definitive

position regarding how it will apply the regulations at issue to the particular land in question." *Williamson Cnty.*, 473 U.S. at 191. And although a property owner may be excused from obtaining a final decision where doing so would be futile, see *Palazzolo*, 533 U.S. at 621, such a claimant must show *why* compliance would be of no use. Petitioner has no made no genuine effort to do so here.

Indeed, petitioner's futility argument at bottom rests on its assertion that the regulations the Department has promulgated to govern the issuance of fracturing permits are "onerous and repetitious." Pet. 16. But this Court has observed that "[a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985). And courts have uniformly rejected the argument that the burden of complying with a permitting process can, by itself, excuse compliance with that process. See, *e.g.*, *Martin v. United States*, 894 F.3d 1356, 1363 (Fed. Cir. 2018) (rejecting futility argument premised on "cost of complying with a valid regulatory process"); *Guatay Christian Fellowship v. City of San Diego*, 670 F.3d 957, 981-982 (9th Cir. 2011) (same); *Morris v. United States*, 392 F.3d 1372, 1375-1379 (Fed. Cir. 2004) (same). "[T]he very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." *Riverside Bayview*, 474 U.S. at 127. Petitioner thus cannot evade its obligation to seek a final decision from the Department simply by asserting that the regulations in question are "onerous."

In an effort to substantiate its claim regarding the burdensome nature of the Department's regulations, petitioner argues at length that the experience of another mining company, Woolsey Energy, shows that compliance with the permitting process would have been futile. Pet. 18-32. But Woolsey's experience shows no such thing: Woolsey *obtained* a permit from the Department to conduct hydraulic fracturing, thus establishing that it would not have been futile for Petitioner to apply for one. "The potential for such administrative solutions confirms the conclusion that the taking issue . . . simply is not ripe for judicial resolution." *Hodel*, 452 U.S. at 297. Petitioner raises various concerns with Woolsey's application process, arguing that it was too time-consuming given the duration of petitioner's leases, Pet. 25-26, or that the permit the Department issued Woolsey included conditions on its activities that petitioner sees as unwarranted, *id.* at 23.[7] But petitioner identifies no non-speculative reason to think that its own experience would be identical to Woolsey's. And even if there were some reason to believe that petitioner would be granted only a conditional permit, or that

[7] Petitioner's complaints regarding Woolsey's application process are, in any event, unfounded. As petitioner's chronology reflects, Pet. 27-30, the Department issued a final decision on Woolsey's permit application within three and a half months, not "nearly two years," *id.* at 27 n.9. And the permit conditions that Woolsey "had never seen," *id.* at 23, were taken almost entirely from the Act, the Department's rules, and plans submitted by Woolsey itself. Compare, *e.g.*, Ill. Dep't of Nat. Res., *Combined Permit* 2-12 (Aug. 31, 2017), https://www2.illinois.gov/dnr/OilandGas/Documents/HVHHF-000001%20Permit%20-%20Woolsey%20Operating%20Company,%20LLC.pdf, *with* 225 ILCS 732/1-25, 1-35(b); 62 Ill. Admin. Code § 245.210; *see also* 225 ILCS 732/1-55(a) ("All plans submitted with the application . . . shall be conditions of the permit.").

the licensing process would take longer than petitioner would prefer, the uncertainty regarding these issues is precisely the reason that this Court requires takings claimants to seek a final decision by the relevant agency before proceeding to court. Petitioner may believe that the Department would have imposed "complicated conditions" on its proposed fracturing activities, Pet. 31, but absent a final decision from the Department actually imposing such conditions—or not—petitioner's takings claim "simply cannot be evaluated," *Williamson Cnty.*, 473 U.S. at 191.

The lower court correctly rejected petitioner's takings claim on the ground that it was not ripe. Petitioner's effort to reverse that decision in this Court amounts to no more than a request for factbound error correction of an unpublished decision that carries no consequences beyond this case. There is no need for the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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