No. 25-91

IN THE

Supreme Court of the United States

RICHMOND ROAD PARTNERS, LLC, *et al.*,

Petitioners,

v.

CITY OF WARRENSVILLE HEIGHTS, OHIO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

FRANK H. SCIALDONE
Counsel of Record
JOHN D. PINZONE
EDMOND Z. JABER
MAZANEC, RASKIN & RYDER CO., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
(440) 248-7906
fscialdone@mrrlaw.com

Counsel for Respondents City of Warrensville Heights, OH; City of Warrensville Heights, OH Planning Commission; City of Warrensville Heights, OH Building Commissioner

131442

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

This Petition raises the following issue that the lower courts unanimously decided in favor of the Respondents and in accord with the well-established law of this Court and the overwhelming consensus of lower courts. In the Sixth Circuit's words, the issue is: "whether [Respondent] Warrensville's delay in granting the permit is extraordinary or routine." (Pet. at App. 8a.) Petitioners could not establish "extraordinary delay." In fact, there was no delay in the administrative process; let alone an extraordinary delay. The administrative proceedings, including the administrative appeal, concluded less than a year from the Petitioners' site-plan application. Petitioners did not allege bad faith in implementing the relevant zoning administrative proceedings. This was a routine proceeding that ultimately granted the permit that Petitioners sought.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Cited Authorities

Constitutional Provisions

Statutes and Rules

Page

Other Authorities

I. STATEMENT OF THE CASE

A. Introduction

This case arises out of Plaintiffs/Petitioners Richmond Road Partners, LLC, and Step Forward's attempt to establish a takings claim based on the delay caused by the administrative review of their request for approval of a site plan, which they ultimately obtained through the state-court administrative review process. Based on well-established law, the district court dismissed Petitioners' claims on the Warrensville Heights Respondents/Defendants' motion for judgment on the pleadings. Likewise, a unanimous Sixth Circuit panel in an unreported opinion affirmed that order.

Candidly, the issue is, as the Sixth Circuit put it, "whether Warrensville's delay in granting the permit is extraordinary or routine." (Pet. at App. 8a.) Petitioners could not establish "extraordinary delay." In fact, there was no delay in the administrative process; let alone an extraordinary delay. The administrative proceedings, including the administrative appeal, concluded less than a year from the Petitioners' site-plan application. Warrensville Heights did not act wrongfully or engage in bad faith by implementing these zoning administrative proceedings. Indeed, Petitioners did not allege that the City's actions were done in bad faith. Instead, the administrative proceedings were necessary to determine whether the site plan application submitted plans for a non-permitted use (daycare center) or a permitted use (a school/non-profit educational agency). Moreover, intervention by a neighboring property owner in the administrative proceeding further shows that

Warrensville Heights reasonably provided review of the site plan application. And the administrative proceedings were necessary to evaluate the site plan application to protect public health, safety, and welfare.

In sum, Petitioners do not demonstrate a "compelling" reason for review. As an initial procedural matter, the specific argument they now make and the authorities that Petitioners rely on were never articulated to the lower courts in any meaningful way, stripping the lower courts of an adversarial decision-making process and presenting issues of waiver/abandonment before this Court. Further, in its unreported decision, a unanimous Sixth Circuit panel affirmed the district court based on well-established law that overwhelmingly supported its decision. Outside of one state court decision and one federal circuit decision – both of which are distinguishable and/or do not establish a substantial conflict – four decision makers applied well established law that is routinely applied across the circuits. Petitioners' cases do not establish a "well-developed" split. To the extent that there is a conflict at all, it is inconsequential and undermined by the well-established law. The lower courts properly granted judgment on the pleadings in favor of these Respondents on the unique facts presented in this case.

This Court should deny this Petition.

B. Background Facts

The Sixth Circuit put forth the basic background facts of this case. (Pet. at App. 2a-4a.) For this Court's convenience, the Sixth Circuit's statement of facts is presented below:

In 2022, Richmond Road [Partners, LLC] agreed to lease one of its properties to Step Forward, an Ohio non-profit school that provides Head Start early education services for low-income families in the Cleveland, Ohio area. The relevant property is zoned as U-7A, which permits "[p]ublic and private schools, universities, colleges, professional schools, vocational schools, and related education facilities" or "[n]onprofit educational and scientific research agencies." R. 1-1, PageID 9–10. Richmond Road submitted a site plan application to the Warrensville Planning Commission seeking a conditional use permit to open a Head Start "daycare" center. R. 11, PageID 66. The Planning Commission and the City Council denied the application because daycares are not a permitted use. Richmond Road then resubmitted its application for approval as a school and/or a non-profit educational agency. *Richmond Rd. Partners v. City of Warrensville Heights*, 2024 WL 2080737, at *1 (N.D. Ohio May 9, 2024). The Planning Commission also denied this second application. The Commissioners provided little explanation why, merely voicing that they did not think this was an appropriate location for a school (despite its being zoned as such). The City Council also denied Richmond Road's application. In March 2023, Richmond Road appealed the denial to the Cuyahoga County Court of Common Pleas ("state court") under Ohio Revised Code § 2506, which allows a party to appeal final decisions by political subdivisions to the local county court of common pleas. *Id.*

> Alongside its appeal, Richmond Road filed this complaint in state court. Richmond Road brought four claims: (1) seeking a declaration that Warrensville's permit denial was arbitrary; (2) arguing Warrensville violated the Fifth Amendment's Just Compensation Clause; (3) seeking a mandatory injunction directing Warrensville to start state appropriations proceedings to compensate Richmond Road for lost rents; and (4) a claim under 42 U.S.C. § 1983 for violation of the Fifth and Fourteenth Amendments and Article I § 19 of the Ohio Constitution. *Id.* at *2. Warrensville removed the case to federal court.
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> In October 2023, the state court resolved the administrative appeal, finding that the City Council's permit denial "was arbitrary, unreasonable, and unsupported by the preponderance of the submitted evidence." *Id.* at *1. The state court remanded the matter, directing Warrensville to grant Richmond Road its permit.

(Pet. at App. 2a-4a.) Warrensville Heights did not appeal the state court's decision.

C. The District Court's order granting judgment on the pleadings.

As noted, while the administrative appeal was pending before the court of common pleas, Plaintiffs/Petitioners filed the Complaint that is the subject of this Appeal in the state court of common pleas. These Respondents

removed the present case to the district court and filed a motion for judgment on the pleadings. On May 9, 2024, the federal district court granted Warrensville's motion for judgment on the pleadings and dismissed all claims. In pertinent part, the district court found that Richmond Road had not adequately alleged a cognizable property interest in the permit it sought and, even if it had, it failed to demonstrate a taking because it had not shown that the delay in getting the permit was extraordinary. (Pet. at App. p. 15a.)[1]

D. The Sixth Circuit in an unreported decision unanimously affirmed without oral argument

The Sixth Circuit Panel hearing the case determined that oral argument was not necessary and adjudicated the case on the briefing. In an unreported decision, a unanimous Sixth Circuit panel affirmed the trial court's dismissal of the Plaintiffs/Petitioners' claim. (Pet. at App. 1a.) In relevant part, the court found that: "Applying federal and Ohio takings precedent to Richmond Road's claims shows there was no taking here. There was a one-year delay between Warrensville's permit denial and the state Court ordering Warrensville to issue the permit to Richmond Road. In the bureaucratic world, such delays are not extraordinary." (Pet. at App. at 10a.)

1. On June 6, 2024, Plaintiffs/Petitioners filed a motion for reconsideration, or Fed. R. Civ. R. 59(e) motion for an order amending and reconsidering the district court's May 9, 2024 Judgment. They did not timely appeal that judgment to the Sixth Circuit.

II. REASONS FOR DENYING THIS PETITION

A. Petitioners have not articulated a "compelling reason" for review.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. This case poses no "compelling reason" for review.

1. Waiver/abandonment issues exist.

The developed argument that Petitioners make to this Court was never articulated in any meaningful or developed way to the lower courts in this case. This is important in our adversarial system where arguments must be fully developed in the lower courts to be presented to higher courts for pointed review. Specifically Petitioners did not make the argument that the Sixth Circuit should follow the Wisconsin supreme court or the D.C. Circuit or articulate the questions they now present in any developed way. For all intents and purposes, neither the district court nor the Sixth Circuit had a meaningful opportunity to consider and rule upon this argument. (See generally Pet. at App. 1a. and 15a.) Further, the novel argument that Petitioners make is not supported by prevailing law and presented no real issue for the Sixth Circuit. This Court generally does not decide issues unaddressed on first appeal. See *Bank Markazi v. Peterson*, 578 U.S. 212, 225 (2016). Contrary to the Petitioners' representation, this case as a procedural matter is not a good platform to address any of the incorrect contentions that Petitioners make because they were not fully briefed in the lower courts.

2. The Sixth Circuit's unanimous opinion is consistent with Supreme Court precedent and circuit courts.

No compelling reason exists for review also because the Sixth Circuit applied well-established law that is consistent with precedent. Despite Petitioners' arguments, there is no "deepening" conflict. The Sixth Circuit's opinion is in accord with prevailing law. Indeed, that is apparent, by even the primary cases that Petitioners cite, which are few (two) and are more than two decades old without generating any substantial conflict or debate among courts.

The Sixth Circuit properly observed in its opinion that, "When deciding whether a taking occurred under the Fifth Amendment, federal courts regularly apply *Agins'* "extraordinary delay" standard to administrative decisions." (Pet. at App. 8a., citing: *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 334–35, 341–42 (2002) (rejecting arguments that a temporary moratorium on development was a regulatory taking because the delay was "not unreasonable"); *Mich. Chrome & Chem. Co. v. City of Detroit*, 12 F.3d 213 (Table), at *9 (6th Cir. 1993) (applying the "extraordinary delay" standard to a master airport plan); *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 618, 631 (9th Cir. 2020) (applying the "extraordinary delay" standard to the reversion of zoning classifications from urban back to agricultural); *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 330 (4th Cir. 2005) (applying the "extraordinary delay" standard to the issuance of building permits).

The Sixth Circuit also noted the historical recognition by this Court that routine delays generally do not constitute takings without "extraordinary delay." The Sixth Circuit here explained that this Court "has been careful to distinguish, however, between extraordinary delay, which may constitute a taking, and "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." (Pet. at App. at 8a., citing *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 321 (1987).) Despite Petitioners' argument to this Court, courts and legal authorities have consistently found that routine delay does not constitute a taking. (See Pet. at App. at 8a., citing Edward H. Ziegler, Jr., First English and Normal Delays—Illegal Permit Denial and Temporary Takings, 1 Rathkopf's The Law of Zoning and Planning § 6:28 (4th ed.) (When, as in this case, "a development permit ... is denied in a land use regulatory process, but that denial is later held invalid by a reviewing court," courts "generally have rejected" the claim that the delay amounted to a "compensable [] regulatory taking" under the Fifth Amendment.); and citing e.g., *Smith v. City of Brenham*, 865 F.2d 662, 663 (5th Cir. 1989) (holding that a four-year delay in granting a permit was not sufficient for a taking); *Sunrise*, 420 F.3d at 330, *supra* ("As a general rule, a delay in obtaining a building permit is not a taking but a non-compensable incident of ownership.").

This well-established law is rooted in the common-sense proposition that if this were not the case, "[a] rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty

decisionmaking." *Tahoe-Sierra*, 535 U.S. at 335. Petitioners here take an unviable position that courts properly reject.

The primary issue before this Court – far from an issue of significant legal dispute or confusion – really presented a factual issue to the lower courts about extraordinary or routine delay that did not favor the Petitioners. The Sixth Circuit in this case candidly stated the limited nature of the dispute: "So the issue here is whether Warrensville's delay in granting the permit is extraordinary or routine." (Pet. at App. at 8a.)

The answer to that issue was clear. Petitioners could not seriously claim "extraordinary delay." In fact, there was no delay in the administrative process; let alone an extraordinary delay. The administrative proceedings, including the administrative appeal, concluded less than a year from the Petitioners' site-plan application. Warrensville Heights did not engage in bad faith by implementing these zoning administrative proceedings. Indeed, Petitioners did not allege that the Respondents' actions were done in bad faith. Instead, the administrative proceedings were necessary to determine whether the site plan application submitted plans for a non-permitted use (daycare center) or a permitted use (a school/non-profit educational agency). Moreover, intervention by a neighboring property owner in the administrative proceeding further shows that Warrensville Heights did not act in bad faith by reviewing the site plan application. And the administrative proceedings were necessary to evaluate the site plan application to protect public health, safety, and welfare.

Importantly, Petitioners' conduct in initially presenting an application that designated the Head Start program as a non-permitted daycare center warranted the administrative review of the subsequent application. In short, almost immediately after the conditional use request for a Head Start daycare center was denied, Petitioners submitted a second site plan application for the Head Start program; but the new application now designated the use as a permitted school and/or non-profit education agency. In light of Petitioners' contrasting uses for the same Head Start programs, Warrensville Heights reasonably employed its administrative process to review Petitioners' second site plan application, which now designated the same Head Start program as a permitted use. Petitioners' own conduct necessitated implementation of the administrative review.

Four separate decision makers (the district court judge and the three-judge panel) all found no merit to Petitioners' argument. The Sixth Circuit unanimously held: "Applying federal and Ohio takings precedent to Richmond Road's claims shows there was no taking here. There was a one-year delay between Warrensville's permit denial and the state Court ordering Warrensville to issue the permit to Richmond Road. In the bureaucratic world, such delays are not extraordinary." (Pet. at App. at 10a.) The Sixth Circuit explained that numerous courts find that these types of delays are not extraordinary. *Id.* citing e.g., *Wyatt v. United States*, 271 F.3d 1090, 1098 (Fed. Cir. 2001) (gathering cases showing that much longer delays were not extraordinary). The Sixth Circuit noted that the bulk of the delay that Petitioners claim was a result of a separate appeal of the decision. "In fact, Richmond Road may even have contributed to the delay by first submitting its application as a "daycare" facility and submitting the

corrected application only on its second try. (Pet. at App. at 10a.) The Sixth Circuit also observed that some of the delay was out of the control of Respondents and there has never been an allegation of bad faith made against them. (*Id*.)

That aside, the Sixth Circuit applied this Court's general precedent in the present case. Petitioners are naturally unhappy with the unfavorable ruling below. But that displeasure does not transform this case into a compelling case for review or generate a legitimate or compelling conflict. See *N.L.R.B v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951)(explaining that the Supreme Court "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.").[2] Rather, the Sixth Circuit and the district

2. Amici Curiae Manhattan Institute, Illinois Policy Institute, and Citizen Action Defense Fund jointly express factual concerns that bear no resemblance to the present case, essentially suggesting that some "improper purpose" existed in the Respondents' ordinary review process. Warrensville Heights did not engage in bad faith by implementing these zoning administrative proceedings. Indeed, Petitioners did not even allege that the City's actions were done in bad faith. They were not and it is not part of this case. Nevertheless, Petitioners' amici curiae parade allegations that have no basis in the present dispute, claiming "weaponizing discretionary land use controls," "corruption," "fears of development" and generally that land use "agencies and officials cannot be trusted." (See generally Amici Curiae Br. and at 3, 4, 14, etc.) Simply put, despite amici curiae's brief suggesting factual concerns that do not exist here and a general adoption of Petitioners' legal position, not every delay in evaluating land use constitutes a taking or that the delay is somehow corrupt. Respondents here acted appropriately and in accord with well-established prevailing law.

court both found in accord with prevailing law that there was not taking.

3. There is no substantial conflict.

Petitioners' basis for a conflict is not substantial. Petitioners argue that the Sixth Circuit's unpublished decision in this case purportedly conflicts with *Seiber v. United States*, 364 F.3d 1356, 1364–65 (Fed. Cir. 2004) and *Eberle v. Dane County Bd. of Adjustment*, 595 N.W.2d 730, 747 (Wis. 1999), cases that are more than two decades old.

As an initial matter, the purported conflict with the present unreported case – even if correct – would not be so compelling as to warrant review. *Sheets v. Moore*, 97 F.3d 164, 167 (6th Cir.1996) (Stating that unpublished opinions "carry no precedential weight ... [and] have no binding effect on anyone other than the parties to the action."), *Crump v. Lafler*, 657 F.3d 393, 405 (6th Cir. 2011)(unpublished decisions not binding precedent on subsequent panels). The few cases that Petitioners point to vaguely endeavor to argue that there is a "deepening" circuit split. Yet, Petitioners' two cases not only do not present a substantial conflict, but are more than two decades old without any notable confusion among courts.

To the extent that there is a conflict at all, it is inconsequential because the present case in unreported and undermined by the well-established application of the extraordinary delay rule.

The first of the two cases Petitioners point to suggest a purported "deepening" split is the 1999 Wisconsin supreme court case *Eberle v. Dane County Board of Adjustment.*

In *Eberle v. Dane County Board of Adjustment*, property owners alleged that a county improperly denied a permit for a driveway needed to access their property. *Eberle v. Dane Cnty. Bd. of Adjustment*, 595 N.W.2d 730, 742 n.25 (Wis. 1999). A trial court subsequently ordered the county to issue the permit. *Id.* at 734. Over the strong dissent of its chief justice, Wisconsin's high court held that these facts stated a temporary taking claim under the Wisconsin Constitution. *Id.* at 735. Critically, the *Eberle* court did not, however, address *First English's* "normal delay" language. Further, after the state court decided *Eberle*, this Court emphasized in *Tahoe-Sierra* that *First English* only addressed the remedy for a temporary taking (compensation); it did not determine the merits. In other words, the Court did not determine what constitutes a temporary taking. *Tahoe-Sierra* affirmed the Ninth Circuit's decision, including its reasoning, that "*First English* concerned the question whether compensation is an appropriate remedy for a temporary taking and not whether or when such a taking has occurred." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 319 (2002). Petitioners argue that the, "Wisconsin Supreme Court also saw no need to require property owners to show extraordinary delay before they can state a valid temporary taking claim based on a permit denial that is later invalidated by a court." (Pet. at 16.) But, as noted above, *Eberle* is distinguishable.

The second of the two cases is the 2004 case *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004). In *Seiber*, the Federal Circuit did not find that a taking had taken place. As an initial matter, the *judgment* does not conflict with the present case. That is, the *Seiber* court found that that the litigant in that case did not state a federal takings

claim of any kind. *Id*. Similarly, the Court in the present case found no takings claim. At best, the statement that Petitioners attempt to tether a "deepening" circuit split is illusory. Petitioners argue that in *Seiber*, "The court held that the property owners were not required to show extraordinary delay because that showing is not required of plaintiffs (like the Seibers) alleging a cut-short takings claim based on the eventual grant of a permit that was initially denied." (Pet. at 15.) But, the court ultimately found, "that the Court of Federal Claims properly granted the government summary judgment on this issue because there has been no showing of economic injury caused by the temporary taking." *Seiber v. United States*, 364 F.3d 1356, 1371 (Fed. Cir. 2004). The case here falls under *Tahoe-Sierra*'s provision that normal delays in obtaining building permits, changes in zoning ordinances, variances, and similar land-use devices are considered permissible exercises of police power. As *Tahoe-Sierra* reminds, "a rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision making." Here, this case presents nothing more than a routine delay that does not warrant further consideration.

III. CONCLUSION

This Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

FRANK H. SCIALDONE
Counsel of Record
JOHN D. PINZONE
EDMOND Z. JABER
MAZANEC, RASKIN & RYDER CO., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
(440) 248-7906
fscialdone@mrrlaw.com

Counsel for Respondents
City of Warrensville Heights, OH; City of Warrensville Heights, OH Planning Commission; City of Warrensville Heights, OH Building Commissioner