No. 25-91

IN THE

Supreme Court of the United States

RICHMOND ROAD PARTNERS, LLC;
STEP FORWARD

Petitioners,

v.

CITY OF WARRENSVILLE HEIGHTS; CITY OF WARRENSVILLE HEIGHTS PLANNING COMMISSION; CITY OF WARRENSVILLE HEIGHTS BUILDING COMMISSIONER,

Respondents.

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

REPLY BRIEF

ANTHONY J. COYNE
DIANE A. CALTA
ADAM R. UTH
MANSOUR GAVIN LPA
North Point Tower
1001 Lakeside Avenue,
Suite 1400
Cleveland, OH 44114
(216) 523-1500

WENCONG FA
Counsel of Record
BEN STORMES
BEACON CENTER OF TENNESSEE
1200 Clinton Street,
Suite 205
Nashville, TN 37203
(615) 383-6431
wen@beacontn.org

Counsel for Petitioners

131568

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Rules

Other Authorities

Cited Authorities

Page

REPLY BRIEF

Petitioners ask this Court to address two important issues that have divided state and federal courts: Whether the extraordinary delay test applies in a retrospectively temporary takings case and whether the absence of extraordinary delay categorically defeats a takings claim. Pet. for Cert. at i. Respondents do not even address the second question presented and its efforts to oppose review of the first question fare no better.

First, Respondents all but concede the existence of a circuit split. Respondents complain that the split is longstanding. But they don't contend that any of the cases are no longer viable today and instead rely on many of the same cases in their opposition. Nor is there any merit to the argument that this case is unworthy of review merely because the court below chose not to publish it. This Court routinely reviews unpublished decisions and will do so many more times this Term. *Second*, Respondents fail to reconcile the decision below with this Court's precedents. Those cases explain that the government can't undo a taking that has already occurred and bad faith plays no role in the takings analysis. The decision below clashes with both those principles. *Third*, this case presents this Court with an excellent vehicle for addressing the questions presented—given that the Sixth Circuit's erroneous resolution of those questions formed the basis for its decision. And those questions could hardly be more important in light of the housing shortage plaguing the country today. In all, this Court's intervention would not only vindicate the rights of a local developer and a nonprofit school for disadvantaged children, but would also resolve a lingering split and provide all Americans with clarity on issues of unquestionable nationwide importance.

ARGUMENT

I. This Case Directly Implicates a Split among State and Federal Appellate Courts on Both Questions Presented

1. Respondents construe this case as one that's solely "based on delay." Opp. at 1. Yet Petitioners' primary contention is that individuals alleging a *retrospectively* temporary taking need not satisfy the extraordinary delay test at all. *See* Pet. for Cert. at 12–19; *id.* at 9 (distinguishing between retrospectively and prospectively temporary takings). The Sixth Circuit disagreed with that contention and, as a result, deepened a 5-2 split among federal courts of appeals and state courts of last resort. *See id.* at 12–16; App. 8a–10a (applying the extraordinary delay test to the retrospectively temporary takings claim here).

Respondents double down on cases entrenched on their side of the split. Opp. at 7–8. They cite the Fourth Circuit's decision in *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322 (4th Cir. 2005), Opp. at 7–8, and rely on a treatise citing all of the state supreme court decisions in their favor. Opp. at 8 (citing Edward H. Ziegler, First English *and normal delays—illegal permit denial and temporary takings*, 1 Rathkopf's The Law of Zoning and Planning § 6:28 (4th ed.) (relying on decisions from the supreme courts of California, New Hampshire, and Vermont)).

Respondents' misgivings about cases on Petitioners' side of the split are based on their misunderstanding of this Court's practice. As Respondents see it, the Federal

Circuit and Wisconsin Supreme Court did not create a split because neither rendered judgment for the property owner. Opp. at 12–14. But this Court's review isn't limited to conflicting judgments. *See* Sup. Ct. Rule 10.[1] Both the Federal Circuit and Wisconsin Supreme Court rejected the government's invitation to apply the extraordinary delay test to a retrospectively temporary takings claim and remanded for the lower court to determine whether the property owners could prove their takings claim. That's precisely what Petitioners ask this Court to do. *Cf. Sheetz v. County of El Dorado*, 144 S. Ct. 893, 902 (2024) (deciding the threshold question and remanding to state court to determine the ultimate validity of the fee).

Unable to meaningfully dispute the existence of a split, Respondents complain that some of the precedents are over two decades old, Opp. at 7, and the panel below issued an unpublished decision. *Id.* at 12. But they barely explain why that matters. The fact that the split presented here is longstanding and entrenched is a reason for review. Courts in the Federal Circuit, for example, recognize that

1. Respondents don't contend that the fact that the Wisconsin Supreme Court decided *Eberle* under the Wisconsin Constitution makes any difference here. Opp. at 13. Applying a state-litigation exhaustion requirement subsequently overturned by this Court, *Knick v. Twp. of Scott*, 588 U.S. 180, 194 (2019), the Wisconsin Supreme Court saw no reason to distinguish between state and federal protections for property owners and relied heavily on this Court's precedents in reaching its decision. *See Eberle v. Dane County Bd. of Adjustment*, 595 N.W.2d 730, 741–43 (Wis. 1999); *see also Eternalist Found., Inc. v. City of Platteville*, 593 N.W.2d 84, 89–90 (Wis. App. 1999) ("[A]lthough terminology may sometimes differ, the standards by which [Wisconsin courts] determine whether government action constitutes a taking of property are the same under each of these provisions.").

jurisdiction's well-established rule that the extraordinary delay test is inapplicable in a retrospectively temporary takings case. *See Resource Investments, Inc. v. United States*, 85 Fed. Cl. 447, 482–83 (2009); *see also* Opp. at 10 (citing the Federal Circuit's precedent in *Wyatt v. United States*, 271 F.3d 1090, 1097 (Fed. Cir. 2001), which distinguishes between retrospectively and prospectively temporary takings). Far from contending that the cases forming the split are no longer viable, Respondents eagerly rely on them in their opposition. *See* Opp. at 7–8. If anything, the fact that the split has persisted over decades shows that additional percolation wouldn't aid this Court's resolution of the questions presented. It presents no obstacle to this Court's review. *Cf.* Pet. for Cert., *Cedar Point Nursery v. Hassid*, No. 20-107, at 13–17 (obtaining review to resolve the split between the Ninth Circuit's decision below and a then nearly 30-year-old decision from the Federal Circuit).

There's also no merit to Respondents' suggestion that this Court's review is unwarranted merely because the panel below chose not to publish its decision. "[T]he fact that the Court of Appeals' order . . . is unpublished carries no weight in [the Court's] decision to review the case." *Comm'r of Internal Revenue v. McCoy*, 484 U.S. 3, 7 (1987). Thus, although parties opposing review have routinely pressed the unpublished nature of a decision as reason for denying certiorari, this Court has granted review in several unpublished cases it will hear in this Term alone. *See The GEO Group v. Menocal*, No. 24-758; *First Choice Women's Resource Centers v. Platkin*, No. 24-781; *Berk v. Choy*, No. 24-440; *Olivier v. City of Brandon, Mississippi*, No. 24-993.

2. Respondents offer no response to the second question presented in the petition. Yet the decision below joined the Federal Circuit and split with the supreme courts of Ohio, South Carolina, and North Dakota on the critical question of whether the lack of a delay that a court considers extraordinary categorically defeats a takings claim. Pet. for Cert. at 20–22. This Court should also review that question.

II. The Sixth Circuit's Resolution of the Questions Presented Contravenes this Court's Precedents

The Sixth Circuit's resolution of the questions presented contravenes this Court's decision. *See* Pet. for Cert. at 16–19, 23–24. Respondents fail to grapple with the arguments in the petition and press arguments that Petitioners have already debunked.

1. Respondents offer little to rebut Petitioners' contention that the decision below erred in applying the extraordinary delay test to a retrospectively temporary taking arising from a permit denial. As Petitioners explained, a takings claim accrues with a "final decision by the responsible state agency," like Warrensville's permit denial here. Pet. for Cert. at 17 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001)). Subsequent events, such as a court's reversal of the denial, can convert a permanent taking into a temporary one, but it cannot transform a completed taking into one that never occurred. *Id.* at 17–18 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1010–13 (1992)). Respondents don't even cite those cases.

The arguments that Respondents do advance only highlight how far the decision below strayed from this

Court's precedents. Respondents cling to the fact that Petitioners "did not allege that the Respondents' actions were done in bad faith," Opp. at 9, but they fail to explain why Petitioners should be forced to prove an allegation that's unnecessary to establish a takings claim. The proper inquiry in a takings case isn't on whether the government acted with pure or malicious motives, but on the "*magnitude or character of the burden* a particular regulation imposes upon private property rights." Pet. for Cert. at 10 (quoting *Lingle v. Chevron*, 544 U.S. 528, 542 (2005) (emphasis in original).[2]

Invoking this Court's decision *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 342 (2002), Respondents assert that Petitioners' argument would "require[] compensation for every delay." Not so. Although Respondents fail to distinguish between the two, a decision holding that the extraordinary delay test is inapplicable to *retrospectively* temporary takings wouldn't apply to cases, like *Tahoe-Sierra*, that involve *prospectively* temporary takings. *See* Pet. for Cert. at 9 (distinguishing between the two types of temporary takings); *see also infra* at II.2 (noting that Respondents are also wrong to suggest that Petitioners' rule would lead to a compensable taking in all prospectively temporary takings cases).

---

2. To be sure, that the government's motives are not considered in a takings case isn't proof that the government "did not engage in bad faith." *But see* Opp. at 11, n.2. It may be that, despite a conclusory statement that its actions were "necessary . . . to protect public health, safety, and welfare," intervention "by a neighboring property owner" drove the government to deny the permit, *id.*, and "provide[] little explanation why" it did so. App. 3a.

2. In any event, the Sixth Circuit erred in holding that the absence of extraordinary delay categorically defeats a takings claim. As this Court noted in *Tahoe-Sierra*, "the duration of the restriction" is not dispositive, but one of many relevant considerations in the analysis it set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Declining to even cite *Penn Central* in its opposition, Respondents fail to defend the Sixth Circuit's decision to end its analysis based on extraordinary delay alone. *See* App. 10a. And there's no support for Respondents' contention that conducting a *Penn Central* analysis in temporary takings cases would require government to provide compensation for every delay. Opp. at 8 (citing *Tahoe-Sierra*, 535 U.S. at 335). If there were, it would be hard to explain how courts, after applying *Penn Central*, could nonetheless render judgment for the government. *See* Pet. for Cert. at 21–22 (citing decisions from supreme courts of Ohio, South Carolina, and North Dakota). A proper application of the *Penn Central* test wouldn't require the government to provide compensation whenever a property owner alleges a taking. It would instead prevent the government from using the duration of delay (or the government's good faith) as a safe harbor, even where its actions would otherwise be "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539; Pet. for Cert. at 23–24.

III. This Case Presents an Excellent Vehicle to Resolve Issues of Nationwide Importance

1. Respondents devote a single paragraph to support their attempt to create "waiver/abandonment issues."

Opp. at 6. But Petitioners have consistently raised their takings claim at each stage of litigation. From the start, Petitioners based that claim on Warrensville's denial of their permit. *See* Complaint, ECF No. 1-1, *Richmond Road v. City of Warrensville*, 23-cv-1662, at ¶¶ 23, 25 (N.D. Ohio, Aug. 25, 2023). Respondents moved for judgment on the pleadings after a state court later reversed their permit denial, arguing (for the first time) that Petitioners couldn't plead a takings claim absent extraordinary delay. *See* App. 22a–23a (citing Defs.' Mot. for Judgment on the Pleadings, 23-cv-1662, ECF No. 13, at 13-14 (Jan. 30, 2024)). In response, Petitioners argued that they are "entitled to be compensated for the temporary taking of their property," which began when the City Council denied their permit. *See* Pltfs' Opp. to Mot. for Judgment on the Pleadings, 23-cv-1662, ECF No. 13, at 13–14 (Feb. 29, 2024) (citing *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621, 658 (1981) (Brennan, J., dissenting)). Petitioners also preserved an alternative argument that even if delay were relevant, "extraordinary delay is but one factor that may be considered under the *Penn Central*" analysis. *See id.* at 16–18. And although the district court ultimately sided with Respondents, it understood Petitioners to argue a temporary taking "based upon [Respondents'] denial of their site plan application prior to the State Court Order directing [Respondents] to approve it." App. 23a.

Petitioners pressed the same arguments on appeal. They asserted that Warrensville's denial of their permit "was a taking, regardless of the length of time before that denial was overruled on appeal." Appellants' Br. at 14, No. 24-3502 (6th Cir. Sept. 16, 2024); *see also* Appellants' Reply Br. at 4–6 (arguing that Warrensville's permit denial constituted a final decision despite the availability

of judicial review by a state court) (citing *Knick v. Twp. of Scott*, 588 U.S. 180 (2019)); App. 5a, n.2 (agreeing with this argument). And they asked the Court not to fixate "on duration," but to apply *Penn Central*. *See* Appellants' Reply Br. at 6.

Respondents fault Petitioners for not specifically arguing that the Sixth Circuit should follow the Federal Circuit or Wisconsin Supreme Court in their appeal. Opp. at 6. But a split of authority is an important factor only for obtaining *this* Court's review, *see* Sup. Ct. Rule 10, and it's hardly surprising that Petitioners chose to focus their efforts at the Sixth Circuit by relying on binding precedents from this Court rather than persuasive authority from other jurisdictions. A party doesn't waive its claims merely by refining its arguments. Petitioners preserved their takings claim at every stage of litigation and may "make any argument in support of that claim." *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992); *see also Mills v. Barnard*, 869 F.3d 473, 483 (6th Cir. 2017) ("An argument is not forfeited on appeal because a particular authority or strain of the argument was not raised below, as long as the issue itself was properly raised.").

Respondents are also wrong to suggest that the issues presented were unaddressed on appeal. Opp. at 6. Although the Sixth Circuit framed the relevant issue as whether the delay here was "extraordinary or routine," App. 8a, that framing was necessitated by its view that (1) the extraordinary delay test applies in retrospectively temporary takings cases, and (2) property owners could not prove a taking without an extraordinary delay—no matter how the other *Penn Central* factors come out.

If the panel below sided with Petitioners on either of those questions, it would not have affirmed judgment for Respondents. *See* Pet. for Cert. at 25. A litigant seeking review of a properly preserved claim "generally possesses the ability to frame the question to be decided in any way he chooses." *Yee*, 503 U.S. at 535. The questions presented to this Court were not just addressed by the court below but central to its disposition.

2. Respondents are misguided in their attempt to create vehicle problems by misrepresenting the record. Most significantly, Respondents suggest that Petitioners didn't take a timely appeal of the district court's judgment. *See* Opp. at 5, n.1. That's false. Although the Sixth Circuit declined to consider Petitioners' motion for reconsideration, App. 4a, n.1, there's no doubt that Petitioners timely appealed the district court's *judgment*. *See id.*; Pltfs' notice of appeal, 23-cv-1662, ECF No. 21 (N.D. Ohio, filed June 7, 2024). Respondents also focus on the delay between Petitioners' first and second permit applications. Opp. at 10–11. Yet, as Petitioners explained, Warrensville's denial of Petitioners' second permit application forms the basis for their takings claim. *See* Pet. for Cert. at 4–5 & n.1. This case presents this Court with an ideal vehicle to address the questions presented.

3. Respondents don't dispute that the petition presents this Court with issues of nationwide importance. *See* Pet. for Cert. at 26–27. There's a significant shortage of affordable housing in the United States today, and permit delays are perhaps the top contributor to that problem. As the U.S. Chamber of Commerce recently observed, "[a] severe shortage of over 4.7 million homes has created cascading economic and social challenges,

from skyrocketing prices to reduced workforce mobility." Makinizi Hoover and Isabelle Lucy, *The State of Housing in America*, U.S. Chamber of Commerce, September 3, 2025.[3]

The decision below forces property owners who can't satisfy the extraordinary delay test to bear the costs of wrongful government denials and delays. And all agree that the test forces property owners to endure many years of delay before they may prevail on a takings claim. *See* Pet. for Cert. at 10–11; Opp. at 10. Without this Court's intervention, the decision below and those of its side of the split will incentivize "abuse of the land-use permitting process," Amicus Br. of Manhattan Institute, et al., at 2, at the expense of all Americans. This Court's intervention is needed to reconcile a split among state and federal courts on questions of undeniable importance in principle and in practice.

3. https://www.uschamber.com/economy/the-state-of-housing-in-america.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: October 2025

Respectfully submitted,

ANTHONY J. COYNE
DIANE A. CALTA
ADAM R. UTH
MANSOUR GAVIN LPA
North Point Tower
1001 Lakeside Avenue,
Suite 1400
Cleveland, OH 44114
(216) 523-1500

WENCONG FA
Counsel of Record
BEN STORMES
BEACON CENTER OF TENNESSEE
1200 Clinton Street,
Suite 205
Nashville, TN 37203
(615) 383-6431
wen@beacontn.org

Counsel for Petitioners