

No. 26-____

**IN THE
SUPREME COURT OF THE UNITED STATES**

RUBICON REAL ESTATE HOLDINGS, LLC, et al.,

Petitioners,

v.

CITY OF PONTIAC, MICHIGAN, et al.,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth
Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a grant of a writ of certiorari is warranted where decision of the United States Court of Appeals for the Sixth Circuit denies significant constitutional property rights.

Whether a grant of a writ of certiorari is warranted where the decision of the United States Court of Appeals for the Sixth Circuit conflicts with well-established principles regarding claims for denial of rights to procedural due process.

Whether a grant of a writ of certiorari is warranted where the decision of the United States Court of Appeals for the Sixth Circuit conflicts with well-established principles regarding claims for denial of rights to substantive due process.

Whether a grant of a writ of certiorari is warranted where the decision of the United States Court of Appeals for the Sixth Circuit conflicts with well-established principles regarding takings claims.

Whether a grant of a writ of certiorari is warranted where the decision of the United States Court of Appeals for the Sixth Circuit conflicts with well-established principles regarding First Amendment retaliation claims.

PARTIES TO THE PROCEEDING

Petitioners Rubicon Real Estate Holdings, LLC, Browne Design Consultants, LLC, and Joseph Brown were the plaintiffs/appellants below.

Respondents the City of Pontiac, Michigan and Garland S. Doyle were the defendants/appellees below.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Rubicon Real Estate Holdings, L.L.C. and Browne Design Consultants, L.L.C. are privately held Michigan Limited Liability Companies. No publicly held entity owns ten percent or more of either Rubicon Real Estate Holdings, L.L.C. or Browne Design Consultants, L.L.C.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit affirming the district court's decision granting respondents' motion for summary judgment is reported and is reproduced in the Appendix, App. A1-A42. The decision of the United States District Court for the Eastern District of Michigan granting respondents' motion for summary judgment is unreported and is reproduced in the Appendix, App. A43-A88.

STATEMENT OF JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit affirming the district court's decision was filed on June 18, 2026. This Court has jurisdiction to review this decision under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows, in pertinent part: “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

STATEMENT OF THE CASE

This petition seeks review of the decision of the United States Court of Appeals for the Sixth Circuit affirming certain the decision of the United States District Court for the Eastern District of Michigan regarding respondents’ motion for summary judgment.

A. Facts Of The Case

In 2008, Michigan voters approved the medical use of marijuana, which is now known as the Michigan Medical Marihuana Act (“MMMA”), M.C.L. 333.26421 *et seq.* The MMMA prompted the Michigan Legislature in

2016 to enact the Michigan Medical Marijuana Facilities Licensing Act (“MMFLA”), M.C.L. 333.27101, *et seq.*, which established procedures for regulating and licensing medical marijuana facilities, so that patients who were qualified under the MMMA could obtain safe medical marijuana for their treatments.

This case involves property in the City of Pontiac, Michigan that petitioner Rubicon Real Estate Holdings, L.L.C. (“Rubicon”)intended to develop and lease out for medical marijuana facilities. On March 29, 2019, Rubicon entered into a purchase agreement for 7 and 9 Glenwood Avenue, Pontiac, Michigan 48326 (“Glenwood Property”). Under the purchase agreement, Rubicon was to “undertake in good faith to take all such steps necessary to submit all required plans and applications to the City of Pontiac necessary for a marijuana license as soon as reasonably practicable.”

Rubicon submitted an application for a zoning map amendment on July 3, 2019. The Planning Commission of respondent the City of Pontiac, Michigan (“the City”) voted at a public hearing on December 18, 2019 to approve the zoning map amendment. The City Council adopted the Planning Commission’s recommendations on January 21, 2020, passing Resolution 20-29. Resolution 20-29 amended the City’s zoning map so that the Glenwood Property was now zoned C-3 Corridor Commercial and M-1 Light Manufacturing with CR Conditional Rezoning, which now allowed Rubicon to have medical marijuana facilities on the Glenwood Property.

On January 23, 2020, Vern Gustafsson, the City Planning Manager, sent correspondence to Rubicon stating that the Pontiac City Council had approved the rezoning request at the January 21, 2020 meeting and that the City Attorney will obtain the City signatures on the Conditional Rezoning Agreement. The January 23, 2020 correspondence from Planning Manager Gustafsson stated that approved medical marihuana permits were required for each medical marihuana facility from the City. The parties later executed the Conditional Rezoning Agreement (“CRA”), which was effective as of January 21, 2020. Rubicon then closed on the Glenwood Property on February 27, 2020.

Upon approval of and in reliance on Resolution 20-29, and once its purchase of the Glenwood Property was completed, Rubicon entered into agreements to finance the development of the parcels and leases and letters of intent with tenants for portions of the Glenwood Property, including the planned anchor tenants of the Glenwood Property, Family Rootz, LLC (“Family Rootz”), Pharmaco, Inc. (“Pharmaco”) and HW Glenwood (“Hollywood Market”).

Pharmaco applied for its permit on August 8, 2019. Pharmaco had prequalified for a medical marijuana license from the State of Michigan. The first notice Pharmaco received that its grower and processor applications were allegedly deficient was not sent until July 15, 2020, almost a year after the applications were submitted. It took the City another five months, until January 29, 2021, before it issued second deficiency letters.

Family Rootz applied for its permit on July 20, 2020. The City did not send its first notice that the application was deficient until more than six months later, on January 29, 2021.

From 2020 forward, respondent City Clerk Garland S. Doyle made it clear that he would not issue permits for applicants on Rubicon's property because he claimed they were not permitted under the City's Zoning Ordinance.

On January 7, 2021, Rubicon's then-counsel sent correspondence to the City Council demanding that the City take action, citing the potential financial losses being caused by Doyle's position that there could not be any medical marijuana businesses on the Glenwood Property.

On February 16, 2021, the City Council held a meeting which included a discussion on the Glenwood Property. As part of Rubicon's presentation, conceptual drawings were shown that depicted what the project would look like once the development was completed. Doyle submitted a PowerPoint Presentation that confirmed that he refused to recognize that medical marijuana businesses were allowed on the Glenwood Property. The minutes of the City Council meeting state:

Interim City Clerk Garland Doyle informed the City Council that it would be illegal for him to issue a license to any medical marihuana grower or processor applicant at the Glenwood site. Ordinance 2363 does not permit

growers or processors to be licensed
outside of the Cesar Chavez or Walton
Blvd Overlay Districts.

The City Council took no action on the matter at the
February 16, 2021 meeting.

On March 15, 2021, Thomas Welch, President of HW
Glenwood, LLC, wrote to Rubicon expressing concerns
about the delays being caused by the City, and that if
the City continued to delay the project, then he would
have to withdraw Hollywood Market from being part of
the development.

On March 26, 2021, Rubicon and Family Rootz filed a
lawsuit in the Oakland County (MI) Circuit Court,
seeking mandamus and declaratory relief, as well as
other relief. On May 21, 2021, the state court granted
Rubicon's and Family Rootz' motion for declaratory
judgment, and ordered that the City and its officials
"shall forthwith implement the terms of the Conditional
Rezoning Agreement," "issue preliminary approval of
all pending Pharmaco, Inc and Family Rootz
applications for grower and processor licenses and
permits," and declared that Glenwood Property
"complies with the zoning ordinance...".

However, the City did not "forthwith" comply with the
May 21, 2021 order. Instead, on the very same day this
order was issued, respondents sent correspondence to
Family Rootz and Pharmaco that their applications
were deficient and did not issue the approvals as
required by the May 21, 2021 order.

Later, Doyle sent “Conditional Approval” letters to Family Rootz on May 27, 2021, and to Pharmaco on June 3, 2021. The conditional approvals were contingent upon approval by the regional Fire Department and the City’s Building & Safety Department, which could not be obtained until Rubicon could secure the financing to construct the buildings and actually construct the buildings.

Unwilling to wait any longer, on June 18, 2021, Pharmaco terminated its lease with Rubicon. Family Rootz terminated its lease with Rubicon on September 11, 2021. Hollywood Market refused to proceed further with its lease, and the remaining tenants terminated their leases or refused to proceed further under their letters of intent.

After Rubicon had filed the state court lawsuit, SK Properties retained petitioner Browne Design Consultants, L.L.C. (“Browne Design”) to provide design and other services for a project it was developing in the City. SK Properties’ principal, Tzvi Koslowe, met with then-Mayor Tim Greimel, Councilwoman Melanie Rutherford and then-City Planning Manager Vern Gustafsson to discuss the project. Mayor Greimel told Koslowe that if SK Properties wanted to obtain approval for its development, Shores at Crystal Lake, then it needed to terminate its relationship with Browne Design, because petitioner Joseph Brown, a principal of Rubicon, had sued the City. Councilwoman Rutherford did not contradict or oppose this statement. Koslowe then advised Brown that he had to terminate his agreement to retain Brown and Browne Design because of the mayor’s statement.

**I. THIS COURT SHOULD GRANT
CERTIORARI BECAUSE THE DECISION
BELOW DENIES SIGNIFICANT
CONSTITUTIONAL PROPERTY RIGHTS**

The United States Court of Appeals for the Sixth Circuit (hereafter, “Sixth Circuit”) ruled that Rubicon did not have a property right to have medical marijuana facilities on its property, despite the fact that Rubicon owned the property and had the property re-zoned for such uses, because the City retained discretion whether to approve medical marijuana licenses to Rubicon’s tenants, Pharmaco and Family Rootz.

The Sixth Circuit relied on its own decision in *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031 (6th Cir. 1992), to conclude that a plaintiff was not entitled to a zoning change when such a change was made contingent on subjective findings about the desirability of the proposed use. As the Sixth Circuit stated,

neither Rubicon nor its potential tenants possessed a “legitimate claim of entitlement” in using the Glenwood site for medical marijuana cultivation or processing prior to when its injuries were inflicted in May 2021.

Contrary to the Sixth Circuit’s conclusion, Rubicon already had the zoning change approved by the City which allowed using the Glenwood site for medical

marijuana cultivation and processing *prior to May, 2021*. Having ownership in the property and possessing the CRA gave Rubicon its property rights which the City could not deny or revoke without due process. The rezoning was completed before any tenant applied for a license, and was not made contingent on any factor, as the City's documents reflected.

In its decision, the Sixth Circuit focused on Rubicon's tenants' license applications to assert that Rubicon did not have a property right. However, as the record reflected, Rubicon's tenants were able to obtain approval of their license applications. While the Sixth Circuit asserted that neither Rubicon nor its tenants had a legitimate claim of entitlement to the licenses because the City's code did not provide an "explicit guarantee" to the benefit, the Sixth Circuit ignored its earlier statement of fact that noted that "the city clerk is tasked with assessing any permit application and 'shall award a permit to any applicant' who provides a completed application, receives the necessary approvals, and otherwise satisfies the City's many rules for medical marijuana growing and processing facilities."

The use of the word "shall" means that the award of a permit is mandatory. Both Family Rootz and Pharmaco had satisfied all the necessary requirements to obtain a license, and could have done so much earlier had Doyle processed the applications when they were first submitted, instead of insisting that he could not issue licenses because Rubicon's property was not zoned for such uses. The

Michigan state court recognized this when it issued its decision.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH WELL-ESTABLISHED PRINCIPLES REGARDING CLAIMS FOR DENIAL OF RIGHTS TO PROCEDURAL DUE PROCESS

The Due Process Clause provides that a holder of a property right or liberty interest may not be deprived of that interest without the government affording the interest holder adequate and proper procedural rights - notice and an opportunity to be heard by an impartial decision-maker. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). This Supreme Court has held that as a component of the “impartial decision-maker” element of a procedural due process claim, “the decision maker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.” *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (internal citation omitted).

To prevail on a claim of procedural due process, a plaintiff must establish three elements: (1) the plaintiff has a life, liberty, or property interest protected by the Due Process Clause of the Fourteenth Amendment; (2) the plaintiff was deprived of this protected interest within the meaning of the Due Process Clause; and (3) the state did not afford the plaintiff adequate procedural rights prior to depriving the plaintiff of their

protected interest. *Med Corp. v. City of Lima*, 296 F.3d 404, 409 (6th Cir. 2002) (quoting *Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000)).

"Due process is flexible and calls for such procedural protection as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Factors balanced to determine what process is due are: 1) the private interest affected by the action; 2) the risk of an erroneous deprivation of such interest through the procedures used and the value of additional procedural safeguards; and (3) the government's interest involved, including fiscal and administrative burdens. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Furthermore, procedural due process requires a state actor to "provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest." *Warren v. City of Athens, Ohio*, 411 F.3d 697, 708 (6th Cir. 2005) (citing *Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001)). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

It is undisputed that Rubicon owned the Glenwood Property. Upon the City Council's approval of the resolution and execution of the CRA, the Glenwood Property was zoned C-3 Corridor Commercial and M-1 Light Manufacturing with CR Conditional Rezoning, which now allowed Rubicon to have

medical marijuana facilities on the Glenwood Property. Thus, the first factor of a procedural due process claim was easily met.

The record demonstrated that Doyle refused to process the applications of Rubicon's tenants because he believed they were "illegal." Despite Rubicon's property and liberty interests in using its land for the purpose for which it had been re-zoned, Doyle's refusal to recognize that re-zoning and his actions and statements to Rubicon's tenants and developers and investors deprived Rubicon of that property interest. While the District Court found that Doyle's interpretation of the zoning ordinances was "reasonable," this was a question of fact which a jury should have decided, not a determination to be made on a motion for summary judgment. Further, the District Court held that there was no deprivation because the City never formally denied the applications of Rubicon's tenants.

This Supreme Court has not decided whether an unreasonable delay in processing a license application can constitute a denial for purposes of due process. However, the Sixth Circuit has held that unreasonable delays can constitute a denial. *See e.g., Byrd v. Haas*, 17 F.4th 692, 698 (6th Cir. 2021); *Overlook Mutual Homes, Inc. v. Spencer*, 415 F. App'x 617, 622 (6th Cir. 2011); *Americans United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303 (6th Cir. 1990). Other circuits have come to the same conclusion. *Env't Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970) ("[W]hen administrative inaction has precisely the

same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief.”); *Groome Res. Ltd., L.L.C. v. Par. of Jefferson*, 234 F.3d 192, 199 (5th Cir. 2000) (concluding that defendant's failure to act for over three months on an application for an accommodation constituted a constructive denial of the accommodation request, and that the issue therefore was ripe for review); *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, 765 F.3d 1277, 1286–87 (11th Cir. 2014) (finding six-month delay in responding to request may amount to a constructive denial); *Austin v. Town of Farmington*, 826 F.3d 622, 629 (2d Cir. 2016) (a constructive denial may occur where a “request for accommodation is met with indeterminate delay instead of outright denial”); *Friedman v. Fed. Aviation Admin.*, 841 F.3d 537, 541 (D.C. Cir. 2016)

In the case at bar, Rubicon’s tenants decided to terminate their leases due to the delay and uncertainty caused by respondents, as Doyle would not process and approve the license applications of Family Rootz and Pharmaco. Thus, while not a formal denial, Doyle’s inaction and the City’s failure to take action constituted a constructive denial of the applications, which caused harm to Rubicon, as it could not proceed with its development until the license applications of its tenants had been acted upon. Rubicon thus has met the second element of the claim.

As to the third element of Rubicon's claim, the facts show that Rubicon was afforded no procedural rights before being deprived of its property interests. The City took no action to rein in Doyle or force him to recognize the rezoning which it had approved. There was no hearing at which Rubicon's re-zoning was revoked. There was no impartial decision maker. Yet when the City Council on February 16, 2021 faced Rubicon's assertion that it had been deprived of its property interest in the Glenwood Property being zoned for medical marijuana facilities, a deprivation to which Doyle freely admitted at that same meeting, the City Council and its administration took no action to stop the deprivation. Rubicon was compelled to file suit to obtain a declaratory judgment on May 21, 2021 that the City must comply with the CRA and that Rubicon's property complied with the zoning ordinance as to medical marijuana facilities, an order with which respondents still did not immediately comply. But by that time, almost a year and a half after the execution of the CRA, the irreversible damage to Rubicon had already been done.

Rubicon thus had met the three elements of a procedural due process claim – it had a property interest of which it was deprived without being afforded procedural rights. Since this Supreme Court has not decided whether constructive delay in a license application constitutes a denial, Rubicon respectfully requests that this Supreme Court grant its petition for writ of certiorari.

III. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH WELL ESTABLISHED PRINCIPLES REGARDING CLAIMS FOR DENIAL OF RIGHTS TO SUBSTANTIVE DUE PROCESS

The Fourteenth Amendment's Due Process Clause guarantees that property and liberty interests may not be taken away by a governmental entity without due process. *Ludwig v. Board of Trustees of Ferris State Univ.*, 123 F.3d 404, 409 (6th Cir. 1997); *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989). Substantive due process involves “the right not to be subject to arbitrary or capricious action.” *Buckeye Comm. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 641 (6th Cir. 2001). The Due Process Clause bars arbitrary, wrongful government actions “regardless of the fairness of the procedures used to implement them.” *Zinnermon v. Birch*, 494 U.S. 113, 125 (1990) (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

The District Court ruled that Rubicon had a protected property interest in the rents which its tenants would pay under their leases. Respondents deprived Rubicon of its property interests when they refused to allow medical marijuana businesses on that property because Doyle decided, notwithstanding the evidence to the contrary, that having medical marijuana businesses on the Glenwood Property would be illegal. Respondents’ actions in refusing to recognize that medical marijuana businesses could be located on the Glenwood Property were arbitrary and capricious, considering the City Council approved the CRA

allowing such businesses to be located on that property. Rubicon requested that the City take action, but the City did nothing in the months following the February 16, 2021 presentation. Instead of taking action to rectify the situation, the City sat on its hands, thereby evidencing that it too was taking the position that medical marijuana businesses could not be located on Rubicon's property.

The District Court held that the respondents' conduct did not "shock the conscience." First, Rubicon submits that an elected official that deliberately defied a rezoning agreement and a City Council resolution, as well as a state court declaratory judgment, should, in fact, shock the conscience. Respondents' wrongful actions were not in pointing out deficiencies in the applications of Rubicon's tenants; it was everything that Doyle himself set forth in his presentation to the City – that there could not be any medical marijuana businesses on Rubicon's property. This flagrant flouting of the CRA by the City should shock the conscience.

Second, the Sixth Circuit in *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992), recognized that "applying the 'shock the conscience' test in an area other than excessive force is problematic." Other circuits have questioned applying the "shock the conscience" test outside of law enforcement matters. *See, e.g., Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir.1999);

Moreland v. Las Vegas Metro. Police Dep't, 159 F.3d 365, 372 (9th Cir.1998).

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Supreme Court noted the need for flexibility in what is considered “conscience shocking” regarding substantive due process claims, defining such behavior as “conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level. See *Daniels v. Williams*, 474 U.S., at 331, 106 S.Ct., at 665 (‘Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property’ (emphasis in original)).”

That analysis should be applied to this case. While the City claimed that the delays were caused by the deficiencies in the applications of Pharmaco and Family Rootz, the evidence demonstrated that Doyle sat on those applications for almost a year before issuing any notice that the applications were allegedly deficient. The City offered no explanation why it took so long between the time Rubicon’s tenants submitted their applications and the time Doyle sent a letter asserting deficiencies in those applications. However, Doyle himself explained why there was a delay, claiming that he could not issue licenses because the property was not properly zoned, when in fact he knew it was properly zoned.

Doyle’s persistent refusal to issue permits despite the clear language in the CRA, followed by continued

delays even after the state court ordered him to issue the permits, demonstrates arbitrary action that goes beyond mere error. The City had no interest in denying Rubicon from having medical marijuana facilities on its property, since the City approved such uses for the Glenwood property. The deliberate obstruction of a development project that had received formal approval through a CRA with the City, causing its ultimate collapse, is precisely the type of arbitrary government action against which substantive due process protects.

Rubicon submits that the District Court and the Sixth Circuit applied the “shock the conscience” standard too rigidly, since zoning, land use and licensing issues rarely, if ever, involve the sort of egregious conduct that is seen in cases involving law enforcement matters. In some respects, the actions of Doyle and the City are similar to the death of Eric Garner in New York City in 2014, who was slowly strangled by a police officer applying a chokehold, a neck restraint banned by the New York Police Department, while others stood by and did nothing to stop it. It is the deliberate indifference of the City that caused Rubicon to lose its property. Therefore, Rubicon respectfully requests that this Supreme Court grant its petition for writ of certiorari.

IV. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH WELL-ESTABLISHED PRINCIPLES REGARDING TAKINGS CLAIMS

The Takings Clause, which applies to the individual states via the Fourteenth Amendment, provides that the government may not take citizens' private property without just compensation. A regulatory taking, such as the one implicated here, "occurs when the Government prevents a [property owner] from making a particular use of the property that otherwise would be permissible." *McKay v. United States*, 199 F.3d 1376, 1382 (Fed. Cir. 1999) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992)).

This Supreme Court has developed two tests to determine whether a regulatory taking has occurred. The first requires courts to assess whether a regulation "denies *all* economically beneficial or productive use" of the plaintiff's land. *Lucas*, 505 U.S. at 1015 (emphasis added) (citations omitted). The second requires courts to examine: (1) the "economic impact of the regulation on the [plaintiff];" (2) "the extent to which the regulation has interfered with [the plaintiff's] distinct investment-backed expectations[;]" and (3) "the character of the governmental action"—for example, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (internal citation omitted).

The Sixth Circuit purportedly relied on this Supreme Court's decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) to state that governmental decision-making takes time, so that delays in governmental decision-making need to be extraordinary. However, the footnote relied on by the Sixth Circuit says nothing of the kind. Footnote 9 states:

“Appellants also claim that the city's precondemnation activities constitute a taking. The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are ‘incidents of ownership. They cannot be considered as a ‘taking’ in the constitutional sense.” [citations omitted]

There is nothing in Footnote 9 that states a delay must be extraordinary in order to constitute a taking. The Sixth Circuit then cited *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan Agency*, 535

U.S. 302 (2002) as further support that delays in governmental decision-making need to be extraordinary in order to be compensable. That was not the holding in *Tahoe*. *Tahoe* recognized that “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like,’ as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee” are not considered a taking. *Id.* at 335.

There is no decision from this Supreme Court that held that a delay in governmental decision-making must be extraordinary in order to constitute a taking. The Sixth Circuit cited *Wyatt v. United States*, 271 F.3d 1090, 1098 (Fed. Cir. 2001), which stated that this Supreme Court has condoned delays up to “approximately eight years.” However, review of the history behind this purported legal conclusion demonstrates that the Sixth Circuit distorted what this Supreme Court’s ruling truly way. The *Wyatt* Court cited *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1233 (9th Cir. 1994), which in turn cited *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 n.5 (9th Cir.), *amended*, 830 F.2d 968 (9th Cir. 1987), which in turn cited *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). But the delay by the City in the case at bar is not the type of “delay” to which was before this Supreme Court in *Williamson County*. The *Kinzli* Court at footnote 5 states as follows:

In this case, an application by the Kinzlis would not be futile under the

Norco “delay” analysis, since there is no showing that an application would take an “excessive” amount of time. An excessive amount of time would have to be considerable, since the Supreme Court has held a claim to be unripe even where the application process covering a development project required approximately eight years. *See Hamilton Bank*, 105 S.Ct. at 3112–14.

In *Williamson County*, a landowner wanted to develop a tract of land as a residential subdivision. Its predecessor submitted a preliminary plat in 1973, which was approved. The developer then constructed a golf course, roads and utility lines, and some sections had been given final plat approval. However, the county changed its ordinance in 1977, but continued to apply the ordinance in effect in 1973 to the project. In January, 1980, the county requested the developer submit a revised plat before obtaining final approval for the remainder of the development. The county disapproved the plat, but on appeal to the Zoning Board of Appeals (“ZBA”), the ZBA decided that the zoning ordinance in effect in 1973 should apply. However, by November, 1980, Hamilton Bank acquired the remaining undeveloped property through foreclosure, and in June, 1981, the county denied the final plat based on the amended zoning ordinance.

This Supreme Court held that the landowner’s claim was not ripe, as it never sought a variance from the ZBA, 473 U.S. at 188-94, and because the landowner did not seek compensation through the procedures

that the state provided, *Id.* at 194-97. Thus, this Supreme Court's holding in *Williamson County* was not that a delay in governmental decision-making must be extraordinary in order to constitute a taking, or that eight years was not extraordinary, but that the landowner's Takings claim was not ripe for judicial review even after eight years from the initial submittal of the preliminary plat.

In this case, Pharmaco submitted its application on August 8, 2019, and Doyle did not issue his conditional approval letter until June 3, 2021. The delay in this case was 20 months, 26 days, simply to process an application. The District Court excused the delay as "sloppy administration," while the Sixth Circuit considered it reasonable. Neither description is accurate, as the record reflects that Doyle intentionally did not process the applications. The City never stated any reason why Doyle took almost a year to send his first deficiency letter to Pharmaco, or why it took another five months before he sent a second deficiency letter to Pharmaco. Thus, even if this Supreme Court requires a delay in governmental decision-making to be extraordinary in order to state a takings claim, Rubicon submits that it was a question of fact whether a delay of almost 21 months to have "conditional" approval of a license application is an extraordinary delay, which was for a jury to decide, not the District Court on a summary judgment motion.

Accordingly, Rubicon respectfully requests that this Supreme Court grant its petition for writ of certiorari

so that these important questions of law can be ruled upon.

**V. THE SIXTH CIRCUIT'S DECISION
CONFLICTS WITH WELL-ESTABLISHED
PRINCIPLES REGARDING FIRST
AMENDMENT RETALIATION CLAIMS**

As noted in the Statement of Facts, after Rubicon had filed the state court lawsuit, SK Properties retained Browne Design, a company owned by Joseph Brown, who is also Rubicon's principal, to provide design and other services for a project it was developing in the City. SK Properties' principal, Tzvi Koslowe, met with Pontiac's then-Mayor Tim Greimel, Councilwoman Melanie Rutherford and then-City Planning Manager Vern Gustafsson to discuss the project. Mayor Greimel told Koslowe that if SK Properties wanted to obtain approval for its development, then it needed to terminate its relationship with Browne Design, because Brown had sued the City. Koslowe then told Brown that he had to terminate his agreement with Browne Design because of the mayor's statement.

The Sixth Circuit ruled that Brown and Browne Design could not establish a First Amendment retaliation claim because the Mayor was not a final decision-maker, citing this Supreme Court's decision in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986). Yet, according to the City's ordinances, the Mayor "shall have the primary responsibility for overseeing the day-to-day administrative and

executive functions of the City.” Pontiac (MI)
Municipal Ordinance §2-71.

Further complicating matters is that the Mayor caused a third-party to take the retaliatory action against Brown and Browne Design. The facts in this case make clear that Koslowe believed that the Mayor, as the head of the City, had the apparent authority to follow through on his threat to deny approval of SK’s development in the City unless Koslowe terminated his business relationship with Brown. Thus, the question is whether the City can escape liability where its head officer, along with other City officials, induces a third-party to take a retaliatory action against a party who exercised his First Amendment right to seek redress of grievances by suing the City?

Agency law provides some guidance to answer this question. Almost 150 years ago, this Supreme Court stated with respect to an agent:

The law is equally plain, that special instructions limiting the authority of a general agent, whose powers would otherwise be coextensive with the business intrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to the same extent as though such special instructions were not given. Were the law otherwise, the door would be open to the commission of gross

frauds. Good faith requires that the principal should be held by the acts of one whom he has publicly clothed with apparent authority to bind him.

S. Life Ins. Co. v. McCain, 96 U.S. 84, 86 (1877). Over 100 years later, this Supreme Court restated the doctrine that a principal is liable for the acts of its agent, even when the agent commits fraud, as long as the agent had apparent authority:

[A] principal is liable for an agent's fraud though the agent acts solely to benefit himself, if the agent acts with apparent authority. Similarly, a principal is liable for an agent's misrepresentations that cause pecuniary loss to a third party, when the agent acts within the scope of his apparent authority. Also, if an agent is guilty of defamation, the principal is liable so long as the agent was apparently authorized to make the defamatory statement. Finally, a principal is responsible if an agent acting with apparent authority tortiously injures the business relations of a third person.

Am. Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 565–66 (1982) (citations omitted).

Since *Pembaur*, this Supreme Court has grappled with the question of when municipal liability exists for the acts of high officials. For example, Justice

Stevens in his dissent in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), noted the difference between a high official as opposed to a lower level official:

But when one remembers that the real question in cases such as this is not “what constitutes city policy?” but rather “when should a city be liable for the acts of its agents?”, the inclusion of single acts by high officials makes sense, for those acts bind a municipality in a way that the misdeeds of low officials do not.

Every act of a high official constitutes a kind of “statement” about how similar decisions will be carried out; the assumption is that the same decision would have been made, and would again be made, across a class of cases. Lower officials do not control others in the same way. Since their actions do not dictate the responses of various subordinates, those actions lack the potential of controlling governmental decisionmaking; they are not perceived as the actions of the city itself.

Id. at 171.

In the case at bar, while the Mayor did not have actual final decision-making authority whether SK’s development would be approved, the fact that he brought with him to the meeting with Koslowe a

member of the City Council and the then-City Planning Manager was meant to give Koslowe the appearance that the Mayor was indeed acting on behalf of the City. Neither the Mayor, the City Council member nor the Planning Manager expressed to Koslowe that the Mayor had no authority to make the statements he was making. Instead, their silence gave credence to the deception that the Mayor was the person vested with the authority to deny SK's development if Koslowe did not give in to the Mayor's demands that he end his business relationship with Brown and Browne Design.

The decision of the Sixth Circuit gave the City a free pass where three of its high officials engaged in a deliberate ruse to cause a third-party to terminate a business relationship with Brown and Browne Design, all because Brown's other business entity, Rubicon, sued the City in an effort to have its tenants' license applications approved. Such a ruling gives other municipalities a roadmap on how to avoid liability when they want to violate someone's constitutional rights, by cloaking a high official with apparent authority to act on behalf of the City when in fact the high official had no such authority. Therefore, appellants submit that this Supreme Court should grant their petition for writ of certiorari, and hold the City liable for the deceptive acts of its high officials.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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