No. 00-1167

In the Supreme Court of the United States

TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL.,
PETITIONERS

v.

TAHOE REGIONAL PLANNING AGENCY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution.

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INTEREST OF THE UNITED STATES

Various acts of Congress provide for a federal agency to regulate the permissible uses of privately-owned real property, or for States to carry out such programs pursuant to federal standards. See, *e.g.*, Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*; Clean Air Act, 42 U.S.C. 7401 *et seq.*; Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* The United States has a substantial interest in the proper application of the Fifth Amendment's Just Compensation Clause to those regulatory efforts. See, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-129 (1985) (rejecting takings challenge to Corps of Engineers permitting program under CWA). In addition, respondent Tahoe Regional Planning Agency was created by an interstate compact between California and Nevada that was approved by Congress. Act of Dec. 18, 1969, Pub. L. No. 91-

148, 83 Stat. 360; see also Act of Dec. 19, 1980, Pub. L. No. 96-551, 94 Stat. 3233 (amendments strengthening compact); Lake Tahoe Restoration Act, Pub. L. No. 106-506, 114 Stat. 2351.

STATEMENT

1. The parcels of land at issue in this case are located in environmentally sensitive areas around Lake Tahoe, an alpine lake of unique clarity and color, attributable in part to the low levels of nutrients that have historically been present in the water. Pet. App. 4; see *id.* at 60-61. Since the 1950's, however, substantial development in the region has created impervious surfaces such as roads and houses that accelerate the flow of nutrients into Lake Tahoe. *Id.* at 5, 63. Rising nutrient levels stimulate the growth of algae, which diminishes the lake's clarity, alters its color, and jeopardizes fish and other lake-dwelling animal species. *Id.* at 4, 63.

In 1969, in an effort to halt the accelerating environmental damage to Lake Tahoe, Congress approved the bi-state Tahoe Regional Planning Compact. Pub. L. No. 91-148, 83 Stat. 360; see Pet. App. 6, 65. The 1969 Compact set goals for the protection and preservation of the lake and its surrounding basin and created respondent Tahoe Regional Planning Agency (TRPA) as the "single agency to coordinate and regulate development in the Basin and to conserve its natural resources." *Lake Country Estates* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 394 (1979); see Pet. App. 6, 65. As required by the 1969 Compact, respondent classified lands in the Lake Tahoe Basin according to their environmental sensitivity; those lands most prone to erosion, because they are either steeply sloped or located near streams or wetlands, were designated as "high hazard," while all other lands were denominated "low hazard." *Id.* at 6, 66-67.

In 1980, Congress approved amendments to the Compact after it "had proven inadequate for protection of the lake and its environment." *Suitum* v. *Tahoe Reg'l Planning Agency*,

520 U.S. 725, 729 (1997); see Pub. L. No. 96-551, 94 Stat. 3233; Pet. App. 6-7, 68. The 1980 Compact directed respondent, within 18 months and in consultation with the States of California and Nevada and various interested agencies, to adopt "environmental threshold carrying capacities" for the region, including standards for air and water quality, soil conservation, vegetation preservation, and noise. Compact Arts. II(i), V(b); *Suitum*, 520 U.S. at 729 n.1; Pet. App. 7 n.3. The Compact further directed respondent to amend its regional plan within 12 months after adoption of the carrying capacities in order to achieve and maintain those capacities and air and water quality standards. Compact Art. V(c). The Compact also stated that it was necessary in the meantime to "halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan." *Id.* Art. VI(c). The Compact therefore imposed a moratorium on certain large-scale development and capped the number of building permits that could be issued. See *ibid.*; see generally Pet. App. 7, 69-70. At the same time it was implementing the Compact's new requirements, respondent was also charged with adopting a regional water quality plan under Section 208 of the Clean Water Act, 33 U.S.C. 1288. See Pet. App. 68-69.

While working toward completion of the environmental threshold carrying capacities, respondent adopted Ordinance 81-5 (see Pet. App. 168-169), which took effect on August 24, 1981. *Id.* at 7, 70. Subject to certain exceptions, Ordinance 81-5 temporarily prohibited most residential and all commercial construction on high hazard lands until a new regional plan was completed. *Id.* at 70-74. As directed by the 1980 Compact, respondent adopted threshold carrying capacities on August 26, 1982, approximately two months after the expiration of the 18-month deadline set forth in the Compact. *Id.* at 8, 74. Respondent began work on the new regional plan but soon recognized that it would be unable to complete

the plan within the prescribed 12 months. *Id.* at 8, 74-75. Consequently, on August 26, 1983, respondent enacted Resolution 83-21 (see *id.* at 170-171), which suspended project reviews and approvals and the acceptance of new permit applications "pending adoption of the new regional plan." *Id.* at 170. Resolution 83-21 was continued in effect until the new plan was adopted on April 26, 1984, 32 months after respondent had initially suspended most development on high hazard lands. *Id.* at 8, 75.

2. On the day the 1984 regional plan was adopted, California filed suit to block its implementation, arguing that the plan's land-use controls were not sufficiently stringent to protect the Lake Tahoe Basin. Pet. App. 8, 76. Shortly thereafter, the District Court for the Eastern District of California blocked implementation of the new regional plan, first with a temporary restraining order and subsequently with a preliminary injunction. *Id.* at 8-9, 76-77. The preliminary injunction was affirmed on appeal, see *California ex rel. Van de Kamp* v. *Tahoe Regional Planning Agency*, 766 F.2d 1308 (9th Cir. 1985), and it remained in place until a revised regional plan was adopted in 1987. See Pet. App. 9, 77.

3. a. On June 25, 1984, petitioners filed parallel suits, which were subsequently consolidated in the District of Nevada, naming as defendants respondent TRPA, individual members of its governing board, and the States of California and Nevada. Pet. App. 9, 12, 77-78. Petitioners alleged violations of the Just Compensation, Due Process, Equal Protection, and Contracts Clauses, and they requested both monetary and equitable relief. *Id.* at 9, 78.

In the ensuing litigation, petitioners' claims were divided into four time periods: Period I (August 24, 1981, to August 26, 1983, when Ordinance 81-5 was in effect); Period II (August 27, 1983, to April 25, 1984, when Resolution 83-21 was in effect); Period III (April 26, 1984, to July 1, 1987, when the preliminary injunction against implementation of

the 1984 Plan was in effect); and Period IV (July 2, 1987, to the present, when the 1987 Plan has been in effect). Pet. App. 9-10. Most of the claims were dismissed on various grounds in a series of district court and court of appeals decisions. See generally *id.* at 79-81. However, the claims of some of the petitioners under 42 U.S.C. 1983 for just compensation, premised on the theory that the land-use restrictions in effect during the various periods had effected a taking of petitioners' property, remained pending. See Pet. App. 82.

b. The district court held that petitioners' claims regarding Period IV were barred by the applicable statutes of limitations. Pet. App. 128-155. In a subsequent opinion, the district court held that petitioners were entitled to just compensation for Periods I and II, when Ordinance 81-5 and Resolution 83-21 were in effect, but not for Period III. *Id.* at 57-127.

With respect to Periods I and II, the court first held that "[i]f * * * [respondent's] actions effected only a partial denial of economically viable use," then the test described in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), would apply and would "clearly lead[] to the conclusion that there was no taking." Pet. App. 88. Under that test, the court explained, given the temporary nature of the restrictions and the length of time property was typically held in the Basin prior to development, petitioners did not have reasonable investment-backed expectations in being able to build single-family homes on their land while the temporary moratorium was in effect. *Id.* at 88-90. The court further determined that the absence of any evidence "regarding the specific diminution in value of any of [petitioners'] individual properties," as well as the "character of the governmental action," weighed against finding a taking under *Penn Central*. *Id.* at 90. The court explained that respondent "took the necessary steps" to "solv[e] a serious problem," while petitioners "retained many important rights

of property ownership, such as the right to exclude others from their own land." *Id.* at 91.

The district court nevertheless held that Ordinance 81-5 and Resolution 83-21 had effected a taking of petitioners' property. The court concluded that *Penn Central* did not govern because the ordinance and resolution had foreclosed "all economically viable uses" of petitioners' property during the periods they were in effect and thereby resulted in a "total taking" of petitioners' property under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). Pet. App. 92-101. The court rejected respondent's contention that no taking had occurred because Ordinance 81-5 and Resolution 83-21 were "reasonable temporary planning moratoria." *Id.* at 109-115. Although the court observed that it "d[id] not see how TRPA could have reached agreement on a regional plan any sooner" than it did, *id.* at 115, it read this Court's decisions in *Lucas* and *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987), to require compensation, at least where the relevant moratoria did not provide for termination on a specified date. Pet. App. 113-115.

Finally, the district court held that petitioners were not entitled to compensation for Period III because the 1984 Regional Plan was not the "proximate cause" of petitioners' inability to develop their land during that interval. Pet. App. 101-108. Rather, the court explained, "[t]he real cause of [petitioners'] harm after the T.R.O. was entered was the effect of the T.R.O. and the Preliminary Injunction [see p. 4, *supra*], not the 1984 Plan." *Id.* at 106.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1-56.

a. The court of appeals reversed the district court's holding that petitioners were entitled to compensation for the restrictions on development during Periods I and II. Pet. App. 14-40. The court noted that "the only question"

before it was "whether a categorical taking occurred" under *Lucas*, because petitioners had disavowed any reliance on *Penn Central*'s ad hoc balancing approach. *Id.* at 18-19. The court explained that, except in cases involving physical occupation of real property, a landowner generally may not establish a taking by demonstrating an inability to use some discrete segment of the land, even if the effect of the restriction is to diminish the value of the property as a whole. *Id.* at 20-27. The court found "no plausible basis on which to distinguish a similar diminution in value that results from a temporary suspension of development." *Id.* at 27. The court also concluded that "[i]n several ways, temporary development moratoria promote effective planning," *ibid.*, and that courts should be "exceedingly reluctant to adopt rulings that would threaten the survival of this crucial planning mechanism," *id.* at 28.

b. The court of appeals affirmed the district court's holding that petitioners were not entitled to compensation for Periods III and IV. Pet. App. 40-56. With respect to Period III, the court determined (see *id.* at 40-47) that petitioners could not establish the requisite causal link between the 1984 Regional Plan and their inability to develop their properties because "the injunction issued [in the parallel lawsuit] effectively prohibited the implementation of the 1984 Plan." *Id.* at 43. With respect to Period IV, the court agreed with the district court that petitioners' takings claims were barred by the applicable statutes of limitations. *Id.* at 47-56.

c. Five judges dissented from the denial of rehearing en banc. Pet. App. 157-167. Those judges reasoned that "[t]he only difference between this case and *Lucas* is that the regulation here had a finite duration," and they construed this Court's decision in *First English* to require compensation in this setting. *Id.* at 159.

SUMMARY OF ARGUMENT

A. A characteristic feature of land-use regulation is the requirement that a property owner obtain affirmative government authorization, typically in the form of a building permit, before commencing substantial development. Such a generally applicable permit requirement, and the attendant inability to develop the land in the interim, are highly unlikely to eliminate the value of real property, do not impose inordinate burdens on isolated landowners, and are among the background legal principles that serve to define the landowner's interests. The application of such permitting requirements to a particular tract therefore does not raise any serious issue under the Just Compensation Clause.

B. Temporary moratoria can serve an important function in land-use planning and protection of critical natural resources. Although a particular moratorium could give rise to takings concerns because of its scope, duration, purposes, or impact on certain landowners, the mere possibility of such effects provides no justification for a categorical rule. Even without announcing a formal development moratorium, a permitting agency could consider overall patterns of actual or anticipated development in ruling on individual permit applications, and it could defer action on individual applications pending clarification or amendment of the substantive permitting criteria. A formal, publicly-announced temporary moratorium simply increases the predictability and transparency of the land-management process. And like the requirement of prior government approval for development of an individual tract, the use of temporary moratoria covering a broader area is a land-management tool with a well-established tradition.

C. This Court's decision in *First English* does not support petitioners' claim of a per se taking. The Court in *First English* specifically disavowed any suggestion that its holding encompassed government efforts to preserve the status

quo pending a final decision as to the propriety of development. The Court's decision focused on a question of *remedy—i.e.*, whether the government is constitutionally required to pay compensation for a proven taking—rather than on the antecedent question whether a taking had occurred. Likewise, the moratorium at issue here differs sharply from the development ban in *Lucas*. The moratorium was temporary; it secured a reciprocity of advantage to a broad group of landowners rather than imposing disproportionate burdens on an isolated few; it did not effectively press private land into public service; and it was rooted in well-established background property-law principles.

ARGUMENT

A TEMPORARY DEVELOPMENT MORATORIUM, REASONABLY DESIGNED TO PRESERVE THE STATUS QUO PENDING COMPLETION OF A COMPREHENSIVE LAND-USE PLAN, DOES NOT EFFECT A PER SE TAKING OF PROPERTY

Until this Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (citations omitted). The Court has since concluded, however, that even where an owner is not divested of title to or possession of real property, land-use regulation may effect a compensable taking if it trenches too severely upon the prerogatives that have traditionally accompanied ownership. See *id.* at 1014-1019; *Palazzolo* v. *Rhode Island*, 121 S. Ct. 2448, 2457 (2001). In particular, regulation that permanently deprives the owner of all economically beneficial use of land typically requires the payment of just compensation even though it does not involve a "direct appropriation" of the property involved.

Lucas, 505 U.S. at 1015-1016; see *Palazzolo*, 121 S. Ct. at 2457.

Lucas does not support petitioners' claim that a per se taking occurs as a consequence of temporary development restrictions that are intended to preserve the status quo pending a final government decision regarding the permissible uses of the land. Significant development of real property typically requires the *prior* approval of some official body—most obviously in the form of a building permit—and government has never been thought to "take" property simply by requiring that it be kept in its present state during the pendency of a reasonable deliberative process. Although a temporary development moratorium to allow land-use authorities to determine appropriate permitting criteria is different in some respects from the delay attendant to a permitting process, there is no basis for petitioners' *categorical* claim that such a moratorium constitutes a taking per se.

Petitioners devote considerable rhetorical energy to the assertion that the development restrictions at issue in this case were in fact permanent. Those contentions disregard the rulings by both courts below, unchallenged here, that rejected petitioners' takings claims for any period after Resolution 83-21 expired in April 1984 (see pp. 5, 6, 7, *supra*), and they are simply unresponsive to the question presented as framed by this Court, which is expressly limited to whether a "temporary moratorium" is an ipso facto taking. See 121 S. Ct. 2589, 2589-2590 (2001). The Court's disposition of that question, moreover, will control future cases involving temporary moratoria, including those (presumably the vast majority) in which development is permitted to go forward after the moratorium expires. We therefore address the question on which this Court granted certiorari: whether the 32-month development moratorium imposed by Ordinance 81-5 and Resolution 83-21 effected a taking of property requiring payment of just compensation.

Petitioners do not contend in this Court that the process of developing the 1984 Regional Plan was unduly protracted, or that the development restrictions imposed by Ordinance 81-5 and Resolution 83-21 were more extensive than necessary to preserve the status quo pending respondent's development of the environmental threshold carrying capacities and completion of a new regional plan, as required by the 1980 Compact. Nor, more generally, do petitioners seek to establish a taking under the multi-factor test set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). The district court specifically found that respondent could not have completed its plan more quickly than it did and that there was no taking under *Penn Central*, and on appeal petitioners disavowed any claim of a taking under *Penn Central*. See pp. 6-7, *supra*. Petitioners raise instead the categorical claim that any and all temporary moratoria on the issuance of building permits are takings under this Court's decision in *Lucas*. In that context, the 32-month moratorium should therefore be assumed to have been reasonable in scope and duration, given its stated objective.[1]

A. Substantial Development Of Real Property Typically Requires The Prior Approval Of Land-Use Authorities, And Reasonable Delays In Development Resulting From The Permit Application Process Do Not Effect A Taking

1. "[T]he authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as [this Court's] decision in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926)."

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[1] The district court rejected as "completely meritless" petitioners' earlier claim that respondent had "acted in bad faith in complying with the [1980] Compact requirements." Pet. App. 68. The court found that respondent had "clearly approached its obligations under * * * the Compact * * * with good faith and to the best of its ability." *Id.* at 69.

Dolan v. *City of Tigard*, 512 U.S. 374, 384 (1994). A characteristic feature of land-use regulation is the requirement that a property owner obtain the affirmative approval of a designated governmental body *before* commencing substantial development. This Court has never suggested that a landowner's inability to develop his property during the permit application process presents a takings problem or requires the payment of just compensation. Indeed, such a claim runs counter to a number of this Court's precedents.

For example, in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985), which concerned permits issued by the Corps of Engineers for the filling of wetlands adjacent to navigable waters, the Court 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: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." The Court concluded that "[o]nly when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *Ibid.* That analysis is inconsistent with any claim that a permit requirement causes a temporary taking whenever its effect is to prevent economically viable use of land during the application process.

In the same vein, the Court in *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), explained (in the context of municipal precondemnation activities) that "[m]ere 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.'" *Id.* at 263 n.9 (quoting *Danforth* v. *United States*, 308 U.S. 271, 285 (1939)).

Any theory under which a taking would be deemed to have occurred as a result of the time required for landowners and responsible governmental officials to comply with and

implement permit requirements would also be inconsistent with this Court's ripeness jurisprudence. A plaintiff who asserts a regulatory takings claim must generally "allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established." *Palazzolo*, 121 S. Ct. at 2459; accord *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-739 (1997). That analysis necessarily presumes that a permit requirement does not itself effect a taking, even when it temporarily prevents economically viable use of the land pending a final decision by the agency.

2. It follows *a fortiori* that a temporary prohibition on development pending completion of the permit application process does not constitute a per se taking under *Lucas*. The rationales on which the Court relied in *Lucas* are inapplicable in that context.

First, because "the very existence of a permit system implies that permission may be granted," *Riverside Bayview*, 474 U.S. at 127, a temporary bar on development for the duration of the permitting process leaves open the potential for future productive uses and is therefore exceedingly unlikely to eliminate the property's value, even on a temporary basis. Accordingly, in contrast to the permanent construction ban at issue in *Lucas*, which "rendered valueless" the plaintiff's beachfront lots, 505 U.S. at 1020, a temporary development ban incident to the permitting process cannot reasonably be regarded as the practical "equivalent of a physical appropriation," *id.* at 1017.

Second, the Court in *Lucas* emphasized that "in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted," development restrictions cannot reasonably be assumed to "secure[] an 'av-

erage reciprocity of advantage' to everyone concerned." 505 U.S. at 1017-1018 (quoting *Mahon*, 260 U.S. at 415). There is nothing in the least "extraordinary," however, about land-use regulation that requires everyone to obtain prior government authorization for significant development within a defined geographic area. Such generally applicable requirements do not remotely implicate "the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo*, 121 S. Ct. at 2457-2458 (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). Rather, the requirement of prior government approval secures a reciprocity of advantage to landowners within the relevant area by providing greater assurance that restrictions intended to further the interests of the community as a whole will be enforced in a consistent manner. Cf. *Agins*, 447 U.S. at 262 ("The zoning ordinances benefit the appellants as well as the public * * * in assuring careful and orderly development of residential property.").

Third, the Court concluded in *Lucas* that "the *functional* basis for permitting the government, by regulation, to affect property values without compensation"—that "Government hardly could go on" if it were required to pay for every diminution in value caused by regulation, see *Mahon*, 260 U.S. at 413—does not apply to the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses" of property on a permanent basis. 505 U.S. at 1018. That functional basis plainly does apply, however, to the effects of a prior-approval requirement that is applicable to all owners of property in the vicinity.

Fourth, a permit requirement does not "carry with [it] a heightened risk that private property is being pressed into some form of public service." *Lucas*, 505 U.S. at 1018. In particular, the general rule that land must remain undeveloped during the period necessary for compliance with the

permit process does not reflect a determination that any given parcel of land should be preserved in its natural state on a permanent basis to further a public interest. That rule serves instead to assure the integrity of the permitting process by maintaining the status quo until land-use officials have reached a final decision regarding the propriety of development on any particular tract.

Finally, even when land-use regulation prevents all economically beneficial use of a parcel on a permanent basis, the Fifth Amendment does not require the payment of just compensation if the pertinent restriction is derived from "background principles of the State's law of property and nuisance"—*i.e.*, "those common, shared understandings of permissible limitations derived from a State's legal tradition." *Palazzolo*, 121 S. Ct. at 2464; see *Lucas*, 505 U.S. at 1029-1031. The rule that significant development of real property requires prior government approval likewise constitutes an established background principle. "[A]bsent extraordinary delay" in that process, any economic loss that a landowner may suffer as a result of the temporary inability to develop his property while he is seeking a permit is simply an "incident[] of ownership." *Agins*, 447 U.S. at 263 n.9.

Significantly, moreover, a permitting system typically is subject to built-in protections against "extraordinary delay." Federal permitting agencies, for example, are subject to the requirement in the Administrative Procedure Act that, "[w]ith due regard for the convenience and necessity of the parties or their representatives and *within a reasonable time*, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. 555(b) (emphasis added). That duty is judicially enforceable under 5 U.S.C. 706(1), which authorizes a district court to "compel agency action unlawfully withheld or unreasonably delayed." What constitutes a "reasonable" time may vary from case to case and must take into account the steps the agency must take to assess the proposed development. But the existence of that statutory

protection and the right to enforce it essentially remove any basis for a takings claim resulting from the implementation of the permit process itself.

B. A Reasonable Moratorium On Development Pending Completion Of A Comprehensive Land-Use Plan Does Not Constitute A Per Se Taking Under *Lucas*

The question in this case is whether a temporary development moratorium intended to preserve the status quo pending the government's adoption of a comprehensive land-use plan constitutes a per se taking under *Lucas*. For a number of reasons, treatment of such moratoria as per se takings is unwarranted.[2]

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[2] Courts have consistently held that development moratoria adopted by local governments pending study and formulation of land-use plans do not effect a taking. See, *e.g. Jackson Court Condominiums, Inc.* v. *City of New Orleans*, 874 F.2d 1070, 1080-1082 (5th Cir. 1989); *Mont Belvieu Square, Ltd.* v. *City of Mont Belvieu*, 27 F. Supp. 2d 935, 942-943 (S.D. Tex. 1998); *Zilber* v. *Town of Moraga*, 692 F. Supp. 1195, 1206-1207 (N.D. Cal. 1988); *Kelly* v. *Tahoe Reg'l Planning Agency*, 855 P.2d 1027, 1032-1035 (Nev. 1993), cert. denied, 510 U.S. 1014 (1994); *Long Beach Equities, Inc.* v. *County of Ventura*, 231 Cal. App. 3d 1016, 1035-1036 (1991), cert. denied, 505 U.S. 1219 (1992); *Tocco* v. *New Jersey Council on Affordable Housing*, 576 A.2d 328, 329-331 (N.J. Super. Ct. 1990), cert. denied, 499 U.S. 937 (1991); *First English Evangelical Lutheran Church* v. *County of L.A.*, 210 Cal. App. 3d 1353, 1372-1374 (1989), cert. denied, 493 U.S. 1056 (1990); *McCutchan Estates Corp.* v. *Evansville-Vanderburgh County Airport Auth. Dist.*, 580 N.E.2d 339, 342-343 (Ind. Ct. App. 1991); see also 83 Am. Jur. 2d, *Zoning and Planning* §§ 161-163 (1992 & Supp. May 2001). The courts have reached that conclusion even where development moratoria allegedly denied owners all economically viable use of their property for a temporary period, so long as the moratoria were of reasonable duration and reasonably necessary to further the public welfare. See, *e.g.*, *Santa Fe Vill. Venture* v. *City of Albuquerque*, 914 F. Supp. 478, 483 (D.N.M. 1995); *Williams* v. *City of Central*, 907 P.2d 701, 703-706 (Colo. Ct. App. 1995); *Woodbury Place Partners* v. *City of Woodbury*, 492 N.W.2d 258, 260-263 (Minn. Ct. App. 1992), cert. denied, 508 U.S. 960 (1993).

1. Temporary moratoria differ in certain respects from the postponement of development that necessarily results from the requirement of prior government approval of individual permit applications. Development moratoria typically are formally and publicly adopted by the legislature or responsible agency, and they apply generally and uniformly to a given category of property. They may serve a range of purposes, from affording time to study the impacts of anticipated development, to preparing new permitting criteria, to allowing for the installation of new infrastructure. Such temporary measures can promote responsible regulation and sound development in ways that the individualized permitting process sometimes cannot. See generally Pet. App. 27-28.

At the same time, because a moratorium (like the prohibition against development during the permit process) is designed to maintain the status quo for a temporary period pending the completion of governmental action, it typically does not interfere with any *existing* uses of property or with such essential aspects of the bundle of property rights as the right to exclude others, see *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987), to sell the property, see *Andrus* v. *Allard*, 444 U.S. 51 (1979), or to transfer it by devise or intestacy, see *Hodel* v. *Irving*, 481 U.S. 704 (1987). For these reasons, there is nothing inherent in the nature of a temporary moratorium on new development to suggest that *all* such moratoria should be held to be takings through an extension of *Lucas*'s per se rule.

2. The court of appeals judges who dissented from denial of rehearing en banc suggested that categorical treatment of temporary moratoria as per se takings is necessary to prevent land-use agencies from "enact[ing] one moratorium after another, perhaps indefinitely." Pet. App. 164. The *possibility* that a particular interim restriction might be abused or go "too far," *Mahon*, 260 U.S. at 415, however, provides no basis for a categorical rule covering all moratoria, regardless

of their scope, duration, and purpose, and the degree of development permitted at their conclusion. The per se rule announced in *Lucas* has never been invoked as a broad prophylactic, but instead has been reserved for the "extraordinary circumstance" (*Lucas*, 505 U.S. at 1017) in which land-use regulation operates as the functional equivalent of a direct appropriation of property.[3] Rather, an allegation that a particular moratorium is unreasonably protracted or unduly broad in scope—or that it is not justified by its stated objective or imposes inordinate burdens on isolated landowners—can be more appropriately and fully addressed under the *Penn Central* framework that governs regulatory takings claims generally. See *Palazzolo*, 121 S. Ct. at 2467 (O'Connor, J., concurring) ("The temptation to adopt what amount to *per se* rules in either direction must be resisted.").

3. Petitioners attempt to distinguish the temporary moratorium at issue here from the permit application process, on the ground that a landowner who seeks a development permit "is participating with the expectation—or at least the possibility—of obtaining development permission at the conclusion." Pet. Br. 28. But the same presumption should be accorded the moratorium in this case. Indeed, the process of fashioning the 1984 Regional Plan entailed "extensive public involvement," *California ex rel. Van de Kamp* v. *Tahoe Regional Planning Agency*, 766 F.2d 1308, 1311 (9th Cir. 1985), including participation by affected landowners. And the announcement of a *temporary* development

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[3] There is no basis, either in this case (see note 1, *supra*) or generally, for denying state and federal land-use regulators the "presumption of legitimacy," *United States Dep't of State* v. *Ray*, 502 U.S. 164, 179 (1991), that is generally accorded to the conduct of government officials. Takings claimants should, of course, be given an adequate opportunity to prove that particular governmental actions are abusive or irrational. But given the strong legitimate justifications for such temporary development moratoria, see Pet. App. 27-28, use of such planning mechanisms cannot fairly be *presumed* to reflect governmental bad faith.

ban certainly implied at least the possibility that petitioners and others could "obtain[] development permission at the conclusion." Pet. Br. 28; compare *Riverside Bayview Homes*, 474 U.S. at 127.

A temporary development moratorium may understandably be regarded by some property owners as increasing the burdens associated with the underlying permit requirement. Because a moratorium typically prevents the permit process from going forward at all, see Pet. App. 113, once the moratorium expires, a landowner will then confront whatever further delays the permitting process itself entails. In addition, the practical effect of a moratorium is to suspend the application of substantive criteria to potential development projects while it remains in effect; where (as here) it is contemplated that new criteria will be issued at the end of the moratorium, it may also introduce an added measure of uncertainty as to whether (or to what extent) development of any particular tract will be allowed. And, finally, because no land-use agency is likely to employ moratoria on a routine basis, the bases for challenging the agency's conduct of the permitting process may be more familiar and better established than the grounds for contesting a moratorium as arbitrary or factually unjustified. See 5 U.S.C. 706(2).

In the end, however, those differences in the nature or perception of a moratorium as compared with the ordinary operation of a permitting process either are differences in degree or reflect merely an unsettling of unilateral or subjective expectations concerning possible future development that are not in themselves protected by the Just Compensation Clause. Those generalizations do not justify categorical treatment of development moratoria as per se takings.

Agency permitting processes (and the experience of different landowners in seeking permits under them) will themselves vary widely in their duration and complexity. The fact that a particular application process (or a particular landowner's invocation of that process) lasts longer—per-

haps even much longer—than the average does not necessarily mean that the relevant agency has behaved unreasonably under the circumstances or that a taking has occurred. The per se rule described in *Lucas* applies by its terms "where regulation denies all economically beneficial or productive use of land," 505 U.S. at 1015; the burden on the landowner that in extreme cases justifies a categorical approach is the inability to develop the property, not the inability to have a permit application accepted for processing. If a particular moratorium significantly increases the total period during which a landowner is unable to develop his property, that difference in degree may be relevant to the *Penn Central* analysis, but it does not amount to a difference in kind warranting application of a per se rule. In fact, the agency's resolution of recurring factual and policy issues during a planning moratorium may expedite its subsequent processing of individual permit applications.

Because a land-use agency's consideration of individual permit applications cannot be accomplished overnight, any legal regime that requires *prior* government approval has the necessary practical effect of temporarily foreclosing significant development during the application process. The requirement of prior government authorization thus reflects a "conscious governmental decision to freeze temporarily all use of property" (Pet. Br. 12) until the government has reached a final decision, even though the postponement of development is simply a means of preserving the status quo rather than an end in itself. Similarly here, the freeze on processing permits for new development was not imposed for its own sake, but was instead the byproduct of the complex and time-consuming nature of the planning process that was required before development could proceed. Although respondent's decision to postpone processing of development permits until it completed the regional plan required by the Compact may have been more definitive and extensive than is typically the case when a land-use agency takes a particu-

lar permit application under advisement, that is scarcely a reason to treat the moratorium as a per se taking. Indeed, the features of a moratorium that might cause it to strike some landowners as unfair might also be seen as characteristics of orderliness, regularity, and equality of treatment in a planning process that will affect the entire community. In particular, the moratorium prevents the possibility that some landowners will be able to proceed in ways detrimental to remaining landowners.

4. In determining whether proposed construction should be permitted on an individual parcel, a land-use agency implements broader policy goals. See, *e.g.*, *Suitum*, 520 U.S. at 738 (noting "the high degree of discretion characteristically possessed by land-use boards"). A rational system of land-use regulation seeks to ensure that similarly-situated property owners are treated equitably, and that permitting decisions on individual tracts reflect an awareness of actual or anticipated development in the surrounding area. A permitting agency that is simultaneously considering several development applications for tracts in close proximity to each other would be expected to assess the likely cumulative impacts of the various proposals, and might reasonably decline to render a final decision on any of the applications until it had determined the appropriate disposition of them all. If a significant change in the applicable development criteria was known to be imminent, a rational agency could take that fact into account as well in ruling on a pending permit application.[4]

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[4] As one commentator has explained, "[t]he courts have long upheld the right of a municipality to deny administratively a building permit to a developer where the use would conflict with a proposed change in the zoning ordinance which has been aired at public hearing or published in a newspaper of general circulation." Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. Urb. Law 65, 86 (1971).

By the same token, if significant doubt exists as to what substantive land-use standards will be adopted in the near future, a rational permitting agency would certainly consider delaying action on a pending application until the new standards were adopted. A contrary approach would simply exacerbate the risk that owners of adjacent parcels will be subject to substantially different long-term use restrictions based on the fortuity that one owner submits a development application slightly before the other. That result would be at odds both with sound land-management principles and with the values that the Just Compensation Clause is intended to protect.

Thus, with or without the use of formal temporary development moratoria, land-management agencies could legitimately defer action on individual permit applications pending clarification or amendment of the substantive permitting criteria. Indeed, in a variety of situations, the courts have recognized the authority of federal administrative agencies to suspend action on permit requests or similar applications pending consideration of possible changes to the governing standards. See, *e.g.*, *Western Coal Traffic League* v. *Surface Transp. Bd.*, 216 F.3d 1168, 1172-1176 (D.C. Cir. 2000) (discussing cases). Moreover, this Court has long recognized that "[i]n performing its important functions * * *, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947); see, *e.g.*, *Mobil Oil Exploration & Producing S.E., Inc.* v. *United Distribution Cos.*, 498 U.S. 211, 228 (1991); *Heckler* v. *Campbell*, 461 U.S. 458, 461, 467-468 (1983); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974).

The Just Compensation Clause does not deprive a land-use agency of that flexibility and require it to adopt a system of case-by-case adjudication rather than rulemaking—or case-by-case deferral of individual permit applications rather

than a moratorium of general applicability—when the agency considers a problem that relates to a number of separate parcels. A formal, publicly-announced temporary moratorium while the agency develops criteria of general applicability increases the predictability and transparency of the land-management process, and it provides an opportunity for broad public input that would be lacking if the agency sought to resolve recurring factual or legal issues in the ad hoc process of individual permit processing. Treatment of express development moratoria as per se takings would create perverse incentives for land-use agencies to perform their functions in a less systematic and accountable way.

5. Landowners who had not already obtained a building permit at the time the temporary moratorium went into effect would not have had any reasonable expectation that they would be able to develop their property *immediately*. Any such "unilateral expectation" on a landowner's part would have been inconsistent with the established requirement that a landowner obtain a permit before commencing construction. Compare *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005-1008 (1984). Moreover, although zoning or other laws in effect prior to the temporary moratorium might have allowed the landowners to obtain a permit for certain development if they had applied for one, the landowners had no *property* interest in being able to do so, and the responsible legislatures and land-use agencies were free to amend the applicable laws, regulations, and plans.

Under the law of both California and Nevada, as under the law of many States, a landowner ordinarily attains a "vested right" to proceed with development despite an intervening change in the law only if he has already received a permit and committed substantial resources in reliance thereon. See, *e.g.*, *Avco Cmty. Developers, Inc.* v. *South Coast Reg'l Comm'n*, 17 Cal. 3d 785, 791 (1976), cert. denied, 429 U.S. 1083 (1977); *American W. Dev., Inc.* v. *City of Henderson*, 111 Nev. 804, 807 (1995). Only at that point does a landowner

have distinct investment-backed expectations, and a distinct *property*-type interest (beyond his ownership of the land itself) in being able to proceed immediately with development. Compare *Penn Central*, 438 U.S. at 127-128; *Mahon*, 260 U.S. at 412, 414. These longstanding state-law principles are entitled to substantial weight in applying the Just Compensation Clause to this setting. See *Dolan*, 512 U.S. at 388-391.

6. As the court of appeals recognized, temporary development moratoria represent "an important land-use planning tool with a well-established tradition." Pet. App. 27; see *id.* at 109 ("[z]oning boards, cities, counties, and other agencies [have historically] used [interim planning moratoria] all the time to maintain the status quo pending study and governmental decision making") (internal quotation marks omitted). As early as 1925, the California Supreme Court sustained the validity of an emergency interim ordinance that prohibited the construction of multi-family dwellings in part of Los Angeles while a comprehensive zoning plan was contemplated. *Miller* v. *Board of Pub. Works of City of L.A.*, 195 Cal. 477, 496-497 (1925), error dismissed, 273 U.S. 781 (1927). The court explained:

> It is a matter of common knowledge that a zoning plan of the extent contemplated in the instant case cannot be made in a day. Therefore, we may take judicial notice of the fact that it will take much time to work out the details of such a plan and that obviously it would be destructive of the plan if, during the period of its incubation, parties seeking to evade the operation thereof should be permitted to enter upon a course of construction which might progress so far as to defeat in whole or in part the ultimate execution of the plan.

195 Cal. at 496. Other courts of the same era likewise upheld the validity of interim land use planning ordinances. See, *e.g.*, *Downham* v. *City Council*, 58 F.2d 784, 788 (E.D. Va. 1932); *Fowler* v. *Obier*, 7 S.W.2d 219, 226 (Ky. 1928); *Mc-*

Curley v. *City of El Reno*, 280 P. 467, 469-472 (Okla. 1929); *City of Dallas* v. *Meserole*, 155 S.W.2d 1019, 1022-1023 (Tex. Civ. App. 1941). In 1953, the California Legislature enacted a law that essentially codified the principles of the *Miller* rule. Cal. Gov't Code § 65806 (West 1955), superseded by Cal. Gov't Code § 65858 (West 1997 & Supp. 2001).

The moratorium at issue in this case, and the moratorium imposed by the Compact itself, were intended "to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan." 1980 Compact, Art. VI(c). The challenged moratorium therefore fits comfortably within an established land-management tradition. The potential application of interim development restrictions designed to maintain the status quo pending completion of a comprehensive plan—like the requirement of affirmative government authorization as a precondition for significant development of an individual tract (see pp. 11-16, *supra*)—is among the "background principles" (*Palazzolo*, 121 S. Ct. at 2464) that have long served to define the property interests of landowners within the Lake Tahoe region. So long as the 32-month moratorium at issue here was reasonable in scope and duration—a proposition that petitioners do not here contest—it did not give rise to a taking, even if it foreclosed immediate economically beneficial use of some parcels during the period that it was in effect.

C. This Court's Decision In *First English* Does Not Suggest That A Temporary Development Moratorium Effects A Per Se Taking Of Property

1. The Court in *First English* specifically noted that its decision "d[id] not deal with 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 which are not before us." 482 U.S. at 321 (em-

phasis added). The Court thus disavowed any suggestion that its holding encompassed government efforts to preserve the status quo pending a final decision as to the propriety of development. The underscored language, moreover, indicates that the Court did not distinguish between delays resulting from the government's application of existing permitting standards to individual permit applications and delays resulting from actual or anticipated changes to the standards themselves.

2. In *First English*, the Court held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 482 U.S. at 321. In holding that the case was ripe for decision, the Court emphasized that the California Court of Appeal had assumed the existence of a taking, but had nevertheless affirmed the trial court's dismissal of the landowner's claim for damages on the ground that the remedy for any taking was limited to equitable relief. *Id.* at 311. This Court found that "[t]he [state court's] disposition of the case on these grounds isolates the remedial question for our consideration." *Ibid.* The holding of *First English* was thus limited to the appropriate *relief* for an established (or assumed) taking; the Court did not decide the antecedent question whether a taking had occurred.

3. The Court in *First English* framed the question presented as whether the Constitution "require[s] compensation as a remedy for 'temporary' regulatory takings—those regulatory takings which are ultimately invalidated by the courts." 482 U.S. at 310. The Court thus focused on development restrictions that are "retrospectively temporary," Pet. App. 111—*i.e.*, that are intended when adopted to be permanent and are "rendered temporary only when an ordinance that effects a taking is struck down by a court," *id.* at 30. Absent a requirement to pay compensation in that setting, a governmental body could impose draconian con-

straints on development, defend against the ensuing takings claims in court, and simply rescind the offending regulation without financial liability if the litigation terminated unfavorably. A development moratorium that is intended from the outset to remain in effect only for a limited period raises no comparable danger of manipulation.

4. In discussing the remedial issue in *First English*, the Court observed, by way of analogy, that "[t]he United States has been required to pay compensation for leasehold interests of shorter duration than" the period (slightly less than seven years) between the effective date of the challenged land-use restriction and the California Supreme Court's denial of review. 482 U.S. at 319. As the district court in this case pointed out, at least two of the cases on which the *First English* Court relied "involved appropriations of property that *were* prospectively temporary—the government had appropriated leasehold interests with fixed termination dates." Pet. App. 114. The district court believed that analogy in *First English* supported the finding of a taking here. *Ibid.*

The district court was mistaken for two reasons. First, this Court has distinguished for takings purposes between a permanent physical occupation and a temporary physical invasion of real property. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428, 433, 444 (1982); *Lucas*, 505 U.S. at 1015, 1028-1029. Any analogy between physical and regulatory takings therefore does not support the view that a temporary ban on economically productive uses of land effects a per se taking. Cf. *Block* v. *Hirsh*, 256 U.S. 135, 157 (1921) (Holmes, J.) ("A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.").

Second, in the cases involving leasehold interests to which the district court referred—*United States* v. *Petty Motor Co.*, 327 U.S. 372 (1946), and *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945)—the governmental action

ousted the private occupant in favor of the government's occupying and using the property for its own purposes It therefore would have constituted a taking if the property had never been leased. Here, by contrast, the moratorium resulted in no interference with petitioners' right to exclude others from their property, no occupation or use of the property by the government for its own purposes, and no deprivation of any other fundamental "stick" in the bundle of rights associated with property.

The Court may nevertheless assume, arguendo, that there could be circumstances in which even land-use regulation that was intended from the outset to be temporary should be analyzed under the *Lucas* per se takings approach, rather than under *Penn Central*. That would be so, however, only if the regulation precluded all economically viable use of property during the period it was in effect *and* also shared the other characteristics of the regulation that was found in *Lucas* to be a per se taking—*i.e.*, if the regulation imposed markedly disproportionate burdens on isolated landowners rather than securing a reciprocity of advantage to a broad community, effectively pressed private property into public service (albeit for a finite period), and represented a significant departure from background property-law principles. Compare *Lucas*, 505 U.S. at 1017-1018, 1029-1031. That test is not satisfied in this case. Although the district court found (and the court of appeals assumed for purposes of its decision) that petitioners' tracts were insusceptible of any economically beneficial use during the 32-month period the moratorium was in effect, see Pet. App. 96-101, 33-34 n.20, in all other respects the moratorium differs sharply from the prohibition involved in *Lucas*.

As the district court found, the temporary development restrictions at issue in this case "had wide-spread application, and were not aimed at an individual landowner." Pet. App. 86; compare *Lucas*, 505 U.S. at 1008 (noting that the plaintiff's "intention with respect to the lots was to do what

the owners of the immediately adjacent parcels had already done: erect single-family residences").[5] The moratorium secured a reciprocity of advantage to landowners in the Lake Tahoe area. Because the value of petitioners' tracts is ultimately dependent on the preservation of the region's natural beauty, respondent's efforts to prevent unconstrained development on a temporary basis during an orderly planning process thus benefited petitioners as well as other landowners and the general public. See *Kelly* v. *Tahoe Reg'l Planning Agency*, 855 P.2d 1027, 1035 (Nev. 1993), cert. denied, 510 U.S. 1041 (1994).

The moratorium did not reflect a final determination that maintenance of the relevant lands in their natural state was necessary or desirable for its own sake. It was instead adopted simply to preserve the status quo pending completion of a comprehensive regional plan. Its promulgation therefore creates no "heightened risk that private property is being pressed into some form of public service." *Lucas*, 505 U.S. at 1018.

Finally, requiring a landowner to defer development for a reasonable period, while government officials determine whether improvement of the land is consistent with criteria

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[5] The 32-month moratorium affected approximately 8000 to 9000 undeveloped single-family lots in the Lake Tahoe Basin in the early 1980's. See J.A. 74-75. Less than half of the acreage zoned for residential development in the Basin was actually developed when the TRPA moratorium was instituted. See Tahoe Regional Planning Agency, *Environmental Impact Statement for Adoption of a Regional Plan for the Lake Tahoe Basin* 11 (Feb. 1983). The fact that the moratorium was limited to new development, and did not require the destruction of existing buildings, is neither anomalous nor unfair. Respondent's decision not to disturb existing uses of land in the Basin was consistent with traditional regulatory practice. See, *e.g.*, *Penn Central*, 438 U.S. at 125 ("Zoning laws generally do not affect existing uses of real property."). A requirement that existing homes be leveled, moreover, would have destroyed *distinct* property interests of their owners—*i.e.*, the houses themselves—that the owners of undeveloped parcels did not have.

that are necessary to protect vital natural resources, fully accords with applicable background property-law principles—"those common, shared understandings of permissible limitations derived from a State's legal tradition." *Palazzolo*, 121 S. Ct. at 2464. The requirement of prior government authorization of significant development was "a preexisting limitation upon the landowner's title." *Lucas*, 505 U.S. at 1028-1029. Respondent might have deferred ruling on any particular permit application for a reasonable period of time pending completion of the 1984 Regional Plan, without effecting a taking of the parcel for which development authorization was sought. The formal announcement that a temporary development ban would also apply to other parcels benefits rather than injures the parcel owner, and it provides no basis for triggering a per se constitutional rule.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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