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.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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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?

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Cases:

Page

Constitutional Provisions:

Miscellaneous:

Page

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters in all 50 states, including California and Nevada.[1] WLF regularly appears in legal proceedings before federal and State courts to defend the principles of free enterprise and limited government. WLF has appeared as *amicus curiae* before this and other federal courts in cases involving Fifth Amendment regulatory takings claims. *See, e.g.*, *Palazzolo v. Rhode Island*, 553 U.S. ____ (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

WLF is concerned that states not be permitted to circumvent Takings Clause constraints by characterizing their land use regulations as temporary in nature. *Any* land use regulation can be characterized as temporary, in the sense that there is always the possibility that the regulation will be lifted at some future date. Thus, WLF strongly believes that the approach adopted by the court below - whereby a land-use regulation labeled "temporary" cannot give rise to categorical takings analysis - is a recipe for emasculating the Takings Clause.

WLF submits this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court.

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[1] Pursuant to S. Ct. R. 37.6, WLF hereby affirms that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than WLF, its counsel, and their offices, contributed monetarily to the preparation or submission of this brief.

STATEMENT OF THE CASE

The Petitioners are individuals (or their heirs) who purchased home lots in partially developed residential neighborhoods around Lake Tahoe in the 1970s or earlier. Subsequent to their purchase, Respondents California and Nevada formed Respondent Tahoe Regional Planning Agency ("TRPA") with the charter to adopt land use regulations that would protect the scenic beauty of Lake Tahoe. Petition Appendix ("Pet. App.") 6. Pursuant to its enabling legislation, on August 24, 1981, Respondent TRPA issued a temporary ordinance prohibiting residential development of Petitioners' properties. Pet. App. 7. Development was prohibited in order to limit runoff into the lake, which was responsible for the decreasing clarity of the lake. Pet. App. 62-64. This ordinance did not affect existing homes. The enabling legislation provided that the interim regulations would end upon adoption of a permanent plan accomplishing the same goals. Pet. App. 7, 68.

The prohibition on development adopted in 1981 was extended (both through formal resolution of the TRPA board and by informal staff action, Pet. App. 75) and eventually replaced with another temporary ordinance prohibiting development, which was also extended. Pet. App. 8. Eventually, the temporary ordinances came to an end on April 26, 1984, two years and eight months after they began. *Id*. They were succeeded by permanent regulations based on the final plan, which prohibited all development on Petitioners' properties. Pet. App. 9. None of these regulations required that any existing residences or other habitable structures be demolished or otherwise curtailed.

Over the years Petitioners have continued to pay real estate taxes but have been and are still completely denied the use of their properties. Their sacrifice has not been in vain, however. The beauty and clarity of Lake Tahoe have been preserved, *see* Pet. App. at 59-61, vacationers flock to the homes, hotels and casinos on its shores, and real estate values for developed residential property by the Lake have soared. *See generally* United States Geological Survey, Lake Tahoe Data Clearinghouse, http://tahoe.usgs.gov/ (last visited August 27, 2001); www.tahoe.com (last visited August 27, 2001).

In an opinion written by Judge Reinhardt, the United States Court of Appeals for the Ninth Circuit held that the initial two-year and eight-month ban on development in this case did not constitute a taking because the property theoretically retained a residual value following the expiration of the ban. Pet. App. 37-38.

SUMMARY OF ARGUMENT

From the landowner's perspective, it little matters whether the government puts a fence around his land with a "Do Not Enter" sign on it, or takes title to a conservation easement over his property, or enacts regulations that require him to maintain his property as open land. The result in each case is the same – the landowner is deprived of a fundamental aspect of property ownership, the right to beneficial use of his land. Nor, from the landowner's perspective, is there any difference if the fence comes down, or title reverts, or the regulations expire after a few years. In any such case the landowner has suffered a loss from the

forced draft of his land into government service for which he deserves just compensation.

Requiring governments to pay just compensation for "temporary" takings will not in any way interfere with legitimate land use planning. Many alternatives short of complete prohibitions on use are available to slow down development where extensive changes to a zoning regime or regional plan are thought to be desirable or necessary. Moreover, complete prohibitions on use are readily distinguishable from the "normal delays" entailed in waiting for agencies to process applications for various kinds of land-use permits and approvals, which would not, absent bad faith or extraordinary delay, implicate the Takings Clause.

ARGUMENT

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1033 (1992), Justice Kennedy wrote in a concurring opinion that petitioner would be entitled to relief if he were deprived by respondent's regulations of the use of his land for an interim period. Justice Kennedy thought this result mandated by the Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), writing that "[i]t is well established that temporary takings are as protected by the Constitution as are permanent ones." 505 U.S. at 1033. Unhappy with these precedents, the court below adopted a crabbed interpretation of *Lucas* and *First English*, limiting them to cases where regulations intended to be permanent are later repealed or invalidated. Ignoring this Court's admonition that "the Takings Clause of the Fifth Amendment [is] as much a part of the Bill of Rights as the First

Amendment or the Fourth Amendment," *Dolan v. Tigard*, 512 U.S. 374, 392 (1994), the Court of Appeals's construction relegates the Takings Clause to the status of a "poor relation," *id.*, and must be rejected.

I. GOVERNMENT REGULATIONS THAT SEVERELY IMPACT FUNDAMENTAL PROPERTY RIGHTS ARE COMPENSABLE TAKINGS WITHOUT REGARD TO THE DURATION OF THE REGULATION

The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." Since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), it has been applied to governmental regulations of land that go "too far." A long line of cases following *Mahon* has established that regulations that severely impact fundamental rights of property ownership must be compensated even if the impact on the total value of the landowner's property is relatively small. This principle applies with full force to regulations that severely impact property rights for a limited period.

To start with, the language of the Fifth Amendment does not say "unless the government only takes the property for a little while." In plain English, the Taking Clause requires just compensation for all takings of private property. This duty applies whether the government action affects all or a portion of the landowner's property and whether it lasts for a long or short time.

Indeed, the very distinction between "temporary" and "permanent" regulatory action, upon which the court below

placed such reliance, Pet. App. 37-38, is completely artificial. "All takings are 'temporary,' in the sense that the government can always change its mind at a later time, and this is true whether the property interest taken is a possessory estate for years of a fee simple acquired through condemnation, or an easement of use by virtue of a regulation." *Hendler v. United States*, 952 F. 2d 1364, 1376 (Fed. Cir. 1991). The government is always free to repeal a "permanent" regulation and to extend indefinitely a "temporary" regulation.[2]

This possibility of a change in regulatory environment accounts for the fact that property may retain some speculative value even after implementation of a "permanent" regulatory scheme that eliminates all commercial use. *See*, *e.g.*, *Florida Rock Industries v. United States*, 18 F.3d 1560, 1566 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995). However, the existence of some residual value following the termination of the government action, whether scheduled or speculative, does not make the landowner whole.

Moreover, allowing government to avoid the costs of regulatory action by labeling it "temporary" at the very least invites manipulation. It is an unfortunate fact that land use agencies often abuse their powers, *see generally* Cobb, *Land Use Law: Marred by Public Agency Abuse*, 3 Wash. U. J.L. 195, 196-198 (2000), including by the imposition of "severe

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[2] *See also Hendler,* 952 F.2d at 1377 ("If the term 'temporary' has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass *quare clausum fregit*").

regulations that do not allow development at all or to a small degree." *Id.* at 197. Allowing states or localities to impose temporary prohibitions on development without having to pay the landowner for the loss imposed opens the door to abuse. For agencies that are short on funds, the temptation to preserve open land at no cost by the expedient of stringing together or extending "temporary" moratoria may well prove overwhelming.

Nor is it an answer to say, as the court below said, that a taking might occur "were a temporary moratorium designed to be in force so long as to eliminate all present value of a property's future use." Pet. App. 38. Because undeveloped land has a perpetual lifetime, a "temporary moratorium" would have to be long -- decades long -- in order to "eliminate" the discounted present value of the residual interest following the expiration of the prohibition on use. The effect of the court of appeals's loophole for "temporary" takings would thus be to eviscerate the Takings Clause. Moreover, there is always the possibility that (as here) one "temporary moratorium" might be succeeded by another. Any attempt to fashion an exception for "temporary takings" measured by how much residual value the landowner retains would leave landowners with no practicable means for determining when the aggregate effect of such moratoria tip over into a compensable taking. The consequences of guessing wrong might well result in a failure to file suit within the applicable limitations period. In any event, the hostility with which many courts treat takings claims ensures that any such suit would face great obstacles. *Cf.* Pet. App. 49-56 (holding that statute of limitations bars certain of Petitioners' claims notwithstanding law of the case).

Even if it made sense to consider a separate category of "temporary" takings, there is no plausible distinction between physical occupations and regulatory takings of equal duration. The government's duty to compensate landowners for temporary or partial occupations of land is uncontroversial. Generally speaking, any physical occupation of any portion of a property, no matter how small the portion affected or short-lived the governmental use, or how pressing the government's need, is treated as a taking requiring just compensation under the Fifth Amendment. *See, e.g*, *United States v. Petty Motor Co.*, 327 U.S. 372 (1946) (taking of leaseholds during wartime emergency); *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (taking of portion of a leasehold interest during wartime emergency); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (temporary occupation of private property during wartime emergency). Similarly, it is commonly accepted that temporary easements, *e.g.*, *Wray v. Parsson*, 101 Ohio App.3d 514, 520 (Ct. App. 1995) (in some cases, the value of a temporary easement may exceed the value of the fee); *Beardmore v. Town of Ellington*, 1991 Conn. Super. LEXIS 341 * 6 (1991) (value of a temporary easement is measured in same way as value of partial taking, comparing value of entire parcel before with entire parcel after); *Traendly v. New York*, 51 A.D.2d 489 (N.Y. 1976) (awarding damages for taking of temporary easement), *aff'd*, 43 N.Y.2d 804 (1977), as well as occupations of a portion of a parcel, *see Florida Rock Industries*, 18 F.3d at 1569, require just compensation.

Here, what TRPA imposed over Petitioners' properties was in effect a conservation easement of unlimited scope but limited duration. Conservation easements are widely

recognized interests in land in which the property owner promises for the benefit of a private party or the government not to develop the land. *See*, *e.g.*, National Lands Trust, Inc., *The Conservation Easement: A Flexible Tool For Preserving Family Lands*, http://www.natlands.org/library/consease.html (last visited August 23, 2001); Landtrust, *What is a Conservation Easement*, http://www.landtrust.org/ltc/easement.htm (last visited August 23, 2001); Thomas, *What You Need to Know About Conservation Easements*, http://www.nodarbyrefuge.org/conservation_easements.htm (last visited August 23, 2001).

A conservation easement can prohibit any and all development or preserve some rights for the landowner (such as the right to grow crops or maintain existing residences), *see The Conservation Easement: A Flexible Tool For Preserving Family Lands*, *supra*, at 1, and may be for limited or unlimited duration. Uniform Conservation Easement Act § 2(c) (1981). Conservation easements represent valuable interests, *e.g.*, Environmental News Network, *Maine Celebrates Largest U.S. Conservation Easement*, April 4, 2001, http://www.enn.com/enn-news-archive/2001/04/0402001/maine_42776.asp (last visited August 23, 2001) ($28 million paid for conservation easement), and if granted to a charitable organization in perpetuity may entitle the donor to a tax deduction for the value of the interest, *see The Conservation Easement: A Flexible Tool For Preserving Family Lands*, *supra*, at 3.

There is no logical basis to distinguish between a temporary easement to facilitate construction of a road, *e.g.*, *Parsson*, 101 Ohio App.3d at 520, for which compensation

is unequivocally required, and a temporary conservation easement to protect the environment, as TRPA imposed here. In each case the landowner's land is impressed into public service and the landowner is deprived of the use of the land for a limited period. The presence of physical occupation in the one case and its absence in the other does not matter to the landowner, for from his point of view, "it matters little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting).

II. RESPONDENTS' PROHIBITION OF ANY BENEFICIAL USE OF PETITIONERS' LAND CONSTITUTED A TAKING WITHIN THE MEANING OF *LUCAS*

Lucas announced a categorical rule for certain types of regulatory takings, holding that regulations that deny the property owner "all economically beneficial or productive use of his land" constitute compensable takings under the Fifth Amendment without further inquiry into the public purpose of the regulation or the impact on the landowner. 505 U.S. at 1015 & 1019. The regulations at issue here fall squarely within the ambit of *Lucas*.

In *Lucas*, the State of South Carolina had enacted legislation that prohibited any construction by petitioner on his beachfront property. The Court conceded the valid purposes of the legislation but, addressing the question left open by *First English*, held that such a prohibition on any economically viable use of property constituted a taking unless such construction could have been prohibited under

the State's common law of nuisance. 505 U.S. at 1027-1031.

The Court in *Lucas* gave four reasons for this rule. First, it suggested that "total deprivation of beneficial use is, from the landowner's perspective, the equivalent of a physical appropriation," 505 U.S. at 1017, even though the landowner retains other indicia of property ownership such as the right to exclude others from the property, the right to transfer the property, and the right to use the property in non-economic ways. In the Court's view, these other elements of ownership paled before the ability to use the property for economic purposes, citing Coke's view that "'what is property by the profits thereof[?]'" *Id*.

Second, the Court stated that the potential for reciprocal benefits provides a justification for many land-use regulations that adversely affect an owner's ability to use his property, *see, e.g.*, *Mahon*, 260 U.S. at 415; *cf. Martin v. District of Columbia*, 205 U.S. 135 (1907)(Holmes, J.) (cost of widening alley cannot be imposed solely on adjoining landowners where such cost greatly exceeds the benefit conferred by the widening), but a complete prohibition on use makes it unlikely that the landowner would ever receive any reciprocal benefits from the regulations. 505 U.S. at 1017-1018.

Third, the Court reasoned that the rarity of complete prohibitions on use rendered inapplicable the concern that Government would grind to a halt if it had to pay for every regulation. *Id*. at 1018.

Last, the Court expressed concern that regulations requiring that land be left in its natural state "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating harm." *Id.* The Court cited with approval Justice Brennan's dissent in *San Diego Gas*, 450 U.S. at 652, for the proposition that "[f]rom the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation."

The *Lucas* Court acknowledged that regulations that prohibit a nuisance would not constitute a taking, nor would other limitations that "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029. However, the Court expressed skepticism that the law of nuisance would ever support prohibition of the "'essential use'" of land, *id.* at 1031 (citing *Curtin v. Benson*, 222 U.S. 78, 86 (1911)), in this case, the construction of houses or other productive improvements.

Here, TRPA's regulations – requiring that Petitioners' land be kept in its natural state in order to protect Lake Tahoe – fit precisely *Lucas*'s concern with "private property being pressed into some form of public service under the guise of mitigating harm." There is no plausible claim here that the regulations sought to prevent Petitioners from engaging in noxious or harmful activities, and the District Court did not so find. Were it otherwise, were human habitation on the shores of Lake Tahoe in fact a nuisance, the regulations would have required some mitigation of similar harms flowing from already existent houses and other

buildings near Lake Tahoe. This did not happen. Instead, these regulations were intended to preserve (and happily succeeded in preserving) the values of homeowners and commercial operators who built before the regulators arrived as well as the interests of the greater public in the scenic beauty and clarity of Lake Tahoe.

In a similar vein, it is obvious that the Petitioners did not derive any "reciprocal benefit" from these regulations, *Lucas*, 505 U.S. at 1017-1018, apart from the joy of involuntarily contributing to the success of the tourist industry in the Lake Tahoe Basin. In *Mahon*, Justice Holmes distinguished a prior case that had upheld a requirement that a pillar of coal be left along the line of an adjoining property as based on the need to preserve the safety of the miners in both the instant and adjoining mines; the regulation thus "secured an average reciprocity of advantage." 260 U.S. at 415. Some degree of mutual benefit, which need not be precisely measured, is required to justify burdensome regulations which would otherwise "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). It is this expectation of widely shared benefits that justifies zoning ordinances that may in fact burden some landowners more than others. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

In the instant case, speculation that Petitioners might have benefitted from the moratorium following its expiration, *e.g.*, Note, *Lake Tahoe's Temporary Moratorium: Why a Stitch in Time Should Not Define the Property Interest in a Takings Claim*, 28 Ecology L. Q. 399, 418 (2001), is

unjustified particularly in view of the fact that the initial prohibition on development was authorized by legislation that contemplated permanent restrictions, which were in fact adopted. Pet. App. 7, 9, & 68. In any event it is surely stretching the notion of reciprocal benefits – which may justify residential zoning or setback and height restrictions – too far to say that a landowner compelled to maintain his property as open space for a substantial period of time might somehow benefit from a similar imposition on other landowners.

Nor is there any merit to the argument that Petitioners did not suffer a taking under the categorical rule of *Lucas* because they retained some theoretical residual value in their land, Pet. App. 38-39. Nothing in *Lucas* requires the complete and permanent deprivation of all strands of one's rights in property in order for a regulation to be deemed a categorical taking. The *Lucas* Court relied in part on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), where regulations requiring apartment owners to provide access for television cable companies to install cable facilities were held to constitute a taking under the Fifth Amendment. The Court described *Loretto* as involving regulations that "compel the property owner to suffer a physical 'invasion' of his property" which was compensable even though the intrusion was "minute." 505 U.S. at 1015. Here, the impact of TRPA's regulations on Petitioners' property rights – the complete denial of any commercial or residential use of the land for a substantial period of time – was far more than "minute."[3]

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[3] The appeals court's reliance on *Andrus v. Allard,* 444 U.S. 51 (continued…)

Indeed, *Lucas* made clear that the landowner would have been entitled to compensation even if South Carolina land-use regulations had not been deemed permanent. South Carolina argued that the landowner's takings claim was not ripe because in 1990 (during the course of litigation) the regulations had been amended in a manner that might have permitted some development; South Carolina argued that the claim would not be ripe unless and until the landowner sought and was denied permission to build under the 1990 regulations. 505 U.S. at 1011. The Court rejected that argument. Citing *First English,* the Court said that regardless whether the landowner might still be permitted to develop his property under the 1990 regulations, his claims nonetheless were ripe because he would still be permitted to seek compensation for having been temporarily denied all use

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[3](...continued)
(1979), was misplaced. *See* Pet. App. 23-24. In *Andrus,* the Court rejected a takings claim brought by an owner of eagle feathers following adoption of federal regulations prohibiting feather sales. The appeals court cited *Andrus* for the proposition that this Court has "rejected the conceptual disaggregation of property rights" as the basis for Takings Clause claims; the court asserted that government destruction of one strand of the bundle of rights that constitutes "property" does not constitute a categorical taking if other strands remain. Pet. App. 24. Not only does the appeals court's reading of *Andrus* fail to explain *Loretto,* it is directly contradicted by *Lucas*. *Lucas* distinguished *Andrus* on the ground that government regulation of personal property (such as eagle feathers) is subject to less exacting Takings Clause scrutiny than is regulation of real property. The Court explained that because of "the State's high degree of control over commercial dealings," an owner of personal property - in sharp contrast to owners of real property - "ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." 505 U.S. at 927-28.

of his property during the 1988-1990 period. *Id.* at 1011-12. Similarly, Petitioners' categorical takings claims are in no way undermined simply because the challenged land-use regulations were nominally "temporary" in nature.

III. THE COURT OF APPEALS ERRED IN CONCLUDING THAT *FIRST ENGLISH* IS LIMITED TO REGULATIONS INTENDED TO BE PERMANENT AND LATER WITHDRAWN OR INVALIDATED

The question presented in *First English* was "whether the Just Compensation Clause requires the government to pay for 'temporary' regulatory takings." 482 U.S. at 313. Although the Court stated its holding in narrow terms, nothing in the Court's reasoning supports the lower court's conclusion that *First English* is limited to regulations that are by their terms permanent and which are later rescinded or struck down. On the contrary, the better reading of *First English* is that just compensation is required for any "temporary" regulation that completely deprives a landowner of the use of his property.

In *First English*, the County of Los Angeles adopted an "Interim Ordinance" prohibiting construction on a portion of Angeles National Forest threatened by flooding. The interim ordinance was adopted in order to preserve "public health and safety," 482 U.S. at 307, and prevented petitioner from reconstructing a camp that had been destroyed by the flood. The petitioner sued the County in inverse condemnation, claiming that the ordinance denied it all use of its property. The state court held that whether or not a "taking" had occurred, under the ruling of the California Supreme Court

set forth in *Agins v. Tiburon*, 24 Cal.3d 266 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980), petitioner could not recover any damages until the ordinance "has been held excessive in an action for declaratory relief or a writ of mandamus and the government has nevertheless decided to continue the regulation in effect." 482 U.S. at 308-309; *see also id.* at 311-312. This Court noted probable jurisdiction.

After confirming that the government retains a whole range of options to avoid having to pay for the full value of the property once a court has determined that regulations have effected a taking, this Court reversed the state court's holding: "[W]here 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." *Id.*

The *First English* Court relied in large part on analogy to the cases where the government has temporarily occupied or used private property, reasoning "that 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." 482 U.S. at 318. Accordingly, just as the government may be required to compensate property owners when it takes leasehold interests of relatively short duration, so must it compensate property owners when by regulation it prevents all use for a limited period. The Court rejected Justice Stevens's argument (and no other Justice joined in this part of his dissent) that it was improper in a regulatory takings case to consider the impact of the regulations on only a portion of the entire fee simple interest, in this case a time-limited

period of use, without considering the rights left to the landowner for future use. 482 U.S. at 330-333 (Stevens, J., dissenting).

Although the holding was narrowly stated, the *First English* Court did not address only regulations intended to be permanent but subsequently withdrawn or invalidated; indeed, the regulation at issue there was itself only an "Interim Ordinance." 482 U.S. at 307. By making clear that the government could not avoid liability for regulations that take "all use of the property" by repealing or otherwise ending the applicability of the regulation, *id.* at 321, the Court did not imply that government regulations that were the equivalent of physical occupation were exempt from the Takings Clause if limited in duration. *See also Lucas*, 505 U.S. at 1014 n.3 (upholding claim for just compensation based on complaint which sought damages for "temporary taking" of property from time of enactment of legislation through trial).

IV. UPHOLDING PETITIONERS' CLAIMS TO JUST COMPENSATION WILL IN NO WAY JEOPARDIZE THE ABILITY OF STATES AND MUNICIPALITIES TO ENGAGE IN SENSIBLE LAND USE PLANNING

The heart of the lower court's decision was its fear that upholding Petitioners' constitutional claims here might jeopardize the ability of states and municipalities to engage in sound land use regulation: "[T]he widespread invalidation of temporary planning moratoria would deprive state and local governments of an important land-use planning tool with a well-established tradition." Pet. App. 27. This

argument assumes erroneously that municipalities need to be able to prohibit any development of undeveloped land in order to "preserve the status quo during the planning process." *Id.* In fact there are many kinds of interim development ordinances available to slow down development and "prevent land development that would conflict in any way with the permanent legal controls that will ultimately be adopted." Garvin & Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, Land Use Law and Zoning Digest, June 1996, at 3. For example, municipalities can temporarily restrict the rezoning of new land or issuance of new subdivision approvals, *id.*, or decline to issue permits for "tear-downs" and construction of new, larger houses. Such moratoria would continue to be evaluated under the *ad hoc* balancing test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *but see* Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1388 (1993). Prohibitions on all use of undeveloped land are only one subset of the types of moratoria in use and present issues dramatically different from land use regulations that permit some beneficial use.

More importantly, requiring just compensation for the imposition of a complete prohibition on use does not "invalidate" anything. Any state or local government that seeks to preserve open space through the imposition of a conservation easement (however styled) is free to do so, for any period that it desires; however, it cannot constitutionally force the landowner to bear solely a burden that benefits that entire community.

Nor would a requirement that agencies pay just compensation when they impose "temporary" moratoria on all productive use of land have any impact on "good-faith planning activities." *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980). While extraordinary or bad-faith delays in governmental decision making could give rise to a taking claim, the normal delays in processing applications for permits or variances are "'incidents of ownership [that] cannot be considered as a 'taking' in the constitutional sense.'" *Id.* The intentional imposition of draconian regulations, even if limited in duration, cannot be confused with the day-to-day, good faith activities of zoning boards and planning agencies.

Normal delays in processing a development application are not compensable because an estate in real property has never been understood to include the right to develop the property without prior government review; such rights are "not part of [the landowner's] title to begin with." *Lucas*, 505 U.S. at 1027. The Court's takings jurisprudence "has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the bundle of rights that they acquire when they obtain title to property." *Id.* Because it is well understood by property owners that regulatory authorities need a reasonable amount of time to ensure that development plans conform with existing, valid zoning regulations, the Takings Clause does not require compensation for losses caused by such delays. But should a jurisdiction desire to delay development plans that conform fully to existing zoning restrictions, basic fairness requires that the cost of those delays be borne by the citizenry as a whole rather than by the individual property owner.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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