No. 25-91

IN THE

Supreme Court of the United States

RICHMOND ROAD PARTNERS, LLC, *ET AL.*,
Petitioners,

v.

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

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE MANHATTAN INSTITUTE, ILLINOIS POLICY INSTITUTE, AND CITIZEN ACTION DEFENSE FUND IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The **Manhattan Institute** is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship and filed briefs supporting constitutional protections for property rights and meaningful judicial review of government actions that violate those protections.

The **Illinois Policy Institute** is a nonpartisan, nonprofit public policy research and education organization that promotes personal and economic freedom through free markets and limited government to ensure continued access to the American Dream. Headquartered in Illinois, the Institute's research areas include the effects of overregulation in housing policy on poverty in the state..

Citizen Action Defense Fund (CADF) is an independent, nonprofit organization based in Washington state that supports and pursues strategic, high-impact litigation to advance free markets, restrain government overreach, and defend constitutional rights. As a government watchdog, CADF files lawsuits, represents affected parties, intervenes in cases, and files *amicus* briefs when the state enacts laws that violate the state or federal constitutions, when government officials take actions that infringe upon the Fifth Amendment or other

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[1] Rule 37 Statement: No counsel for any party authored this brief in whole or part; no person or entity, other than *amici*, their members, or counsel, made any monetary contribution to its preparation or submission. All parties received timely notice of *amici*'s intention to file.

constitutional rights, and when agencies promulgate rules in violation of state law.

Amici are committed to the protection of property rights and are concerned that the abuses to which Petitioners and those similarly situated are exposed, if left unaddressed, will continue incentivizing local official abuse of the land-use permitting process. That dynamic would in turn contribute to the immense burdens owners continue to face in seeking to exercise their fundamental and constitutional property rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this brief, *amici* build on the Petitioners' arguments with a survey of the realities developers face every day in seeking to obtain permits for various land-use requests. Evidence varies from the high-altitude statistical to a rich collection of anecdotal cases that highlight the stratospheric numbers. The upshot: Endorsing Respondents' and other localities' use of permit conditions and delays to prevent owners' exercise of their fundamental constitutional property rights will reinforce a system of abuse that is as economically destructive as it is legally baseless. While not exhaustive, the specific spurious bases set forth below approximate the vast majority of bad-faith permit denials.

Argument I provides the framework, explaining what tends to motivate local officials to condition or delay land-use permits for ulterior—that is, non-"land-use-interest"-related—purposes. Argument II delves into the legal and statistical literature to gauge the prevalence of such practices and their adverse economic and constitutional implications for America's would-be developers, tenants, and aspiring

homeowners. Argument III explains that conditioning and delaying land-use permits is just one form of official abuse of discretionary powers—greatly accelerated during the Covid pandemic.

Given the long history and nationwide prevalence of permitting abuse, this is a particularly worthwhile subject for this Court's intervention.

ARGUMENT

I. Local Governments Often Condition or Delay Development Permits for Improper Purposes

Governance and politics are no strangers to corruption. Indeed, the two are practically synonymous; the Founders feared the power of "factions" (including special interests). *See* The Federalist No. 10, ¶16 (James Madison) ("Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people."). This was among the chief reasons for their construction of a federal government with sovereign powers divided across co-equal branches. *See generally* The Federalist No. 51 (James Madison). Yet in at least one corner of officialdom, no such barriers to corruption exist. With respect to land use, local boards and commissions have vast discretion to grant or deny applicants' the public's endorsement of a building project—be it residential, commercial, or industrial. On deeper reflection, what looks on paper to be a minor chink in the Takings Clause's armor is a hole wide enough to clear a fully-loaded Mack hauler.

Across the country, day to day, week upon week, year after year, countless owners seeking to make

beneficial use of their private property find themselves thwarted. Not by dint of their own overly grand designs or safety-related shortfalls, but by bureaucratic caprice. After decades fighting to secure their rights at the federal and state levels, owners still find themselves in thrall to local officials who weaponize their discretionary land-use controls to secure from applicants fees and other exactions that are plainly unconstitutional, or to impose such delays as to wholly dissuade present and would-be applicants from moving forward. Indeed, it was only in the last decade that the Court confirmed that an owner need not exhaust state "remedies" before bringing their takings claim to a federal tribunal—*e.g.*, by bringing an inverse-condemnation suit first. *See generally Knick v. Township of Scott*, 588 U.S. 180 (2019) (overruling *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)).

The motives are varied, ranging from rank corruption to misplaced fears of development; from obsession with one aesthetic over others to outright rent-seeking on behalf of established interests. Examples abound across the country but are especially egregious in the Pacific Northwest. For example, Seattle's City Council have repeatedly proposed across-the-board transportation impact fees on future development, including in-fills. *See* Ryan Packer, *As Development Slows, Seattle Eyes Transportation Impact Fee Projects*, The Urbanist, Apr. 17, 2023, https://rb.gy/mj1xx6. But denser housing and mixed-use growth tends to reduce per capita road use. *See generally* Jeremy Mattson, *Relationships Between Density, Transit, and Household Expenditures in Small Urban Areas, Transp. Res. Interdisciplinary Perspectives* 8 (2020).

Once again empirical data takes a back seat to political expedience.

In Spokane, lawmakers this year increased impact fees for the first time in decades, a move the Spokane Association of Realtors estimates will halt 2,000 construction projects of varying sizes throughout the area. Emry Dinman, *After Passing Controversial Fee Increases for Developers, Spokane City Council Considers Plan B*, Spokesman-Review, Mar. 14, 2023, https://rb.gy/bszmw5. Officials in Yakima, in Washington's wine country, are also considering impact fees as a means to make up for their own budgetary mismanagement. Spencer Pauley, *Yakima Explores New and Increased Taxes Ahead of Expected Deficit, Mum on Cuts*, Ctr. Square: Wash., Oct. 12, 2023, https://rb.gy/rfcnr1. These and similar measures across the state inflict real costs— not just on individual builders and buyers—but on the state's general economic health. According to a Building Industry Association of Washington study, the state requires at least 250,000 new housing units to meet current demand, whereas only about 49,000 were built in all of 2022. Washington's Housing Supply Shortage, Build. Indus. Ass'n Wash., https://rb.gy/gt0etc.

Oregon's story is woefully similar to Washington's. Impact fees there are called "system development charges" ("SDCs")—though they are no less onerous despite the pseudonym. One recent study prepared for 20 the state's Housing and Community Services office found that SDCs "increase the cost of building new housing in ways that can skew housing development towards higher-cost homes and can impact buyers and renters," so not just the developers themselves. Elise Cordle Kennedy et al., *Oregon System Development Charges Study*, ECONorthwest, ii (2022). Though

developers also feel the pinch and reduce affordable projects as a result. *Id.* at iii ("SDCs on affordable housing development can increase the difficulty of securing adequate funding for the development and, even as a small percentage of total development costs, likely consume millions of dollars per year in funding for affordable housing statewide.") (emphasis added).

But those costs inevitably redound to renters and buyers anyway, since "investors, lenders, and developers are unlikely to absorb SDCs by accepting lower returns except in very unusual circumstances or when SDC costs increase unexpectedly during development and cannot be passed on to others." *Id.* at 10. These are hardly isolated incidents, nor are they limited to the West Coast. "Over the past three decades," one land-use scholar noted, "increasing numbers of local governments have turned to new methods of financing public works projects, especially land use exactions and impact fees." Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 Minn. L. Rev. 459, 480 (2005). *See also* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 206, 262 (2006) ("All evidence points to the rapid spread of land development impact fees throughout the nation making it a prevalent means of funding new growth.").

The incentives for pursuing such measures are obvious. First, it is a means of raising funds without also raising public ire via statutory, "on-book" tax levies. Brad Charles, *Comment, Calling for a New Analytical Framework for Monetary Development Exactions: The "Substantial Excess" Test*, 22 W. Mich. U. Thomas M. Cooley L. Rev. 1, 2 (2005). Second, thus far neither voters nor the courts have done anything to stop it. Indeed, "[r]esidents now urge their elected

officials to adopt impact fees when the locality has not yet done so." Rosenberg, *supra*, at 262. Overtaxing developers does not, after all, tend to elicit great popular sympathy. Further, "[w]ithout having to face the opposition of future residents who do not currently live or vote in the locality," land-use officials "find impact fees an irresistible policy option." Id. Their mantra of "growth should pay for growth" should really be "growth should pay costs unrelated to the growth."

The direct and downstream effects these "irresistible" policies have on housing costs are substantial. In a detailed survey, real estate firm Duncan Associates noted that in California, impact fees on average add $37,471 to the price of a home. The story is the same in other states that liberally permit legislative exactions, including $16,079 per home in Washington and $21,911 in Oregon. Duncan Assocs., *National Impact Fees Survey*, at 4 (2019). These figures are especially egregious when the conditions imposed do not confer on the public the benefits its advocates tend to claim they will.

According to one land-use scholar, "[w]hen impact fees do not provide infrastructure or financing advantages worth their cost"—*i.e.*, conditions that are not roughly proportional to the external costs the target project will impose—"impact fees can be analogized to a one-time excise tax that produced no benefits to the taxpayer." Vicki Been, *Impact Fees and Housing Affordability*, 8 Cityscape 139, 150 (2005).

Owners have fought back, of course. And they have achieved some important victories. Given the vagaries of official professed "public purposes," for example, the Court has already clarified that a seizure or regulatory interference can constitute a taking

whether or not the governmental action "substantially advances legitimate state interests." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539–42 (2005) (overruling *Agins v. City of Tiburon*, 447 U.S. 255 (1980)). Still, though, the problem persists. "[O]verly burdensome fee programs can limit growth by impeding or disincentivizing new residential development, facilitate exclusion, and increase housing costs across the state." *See* Hayley Raetz et al., *Residential Impact Fees in California*, Terner Ctr. Hous. Innovation U.C. Berkeley, at 4 (2019*).* In no small measure, as well, to the choice of some courts to continue misapplying the highly burdensome "extraordinary delay" exception to *retrospectively* temporary takings—that is, a once-permanent taking that is "cut short" and rendered temporary via an overriding authority—*e.g.*, legislative repeal, judicial invalidation, etc.

This misinterpretation "metastasized" from earlier misreadings of a footnote in *Agins*, in which this Court merely surmised that "extraordinary delay" can support an otherwise meritless claim that "value fluctuations" "during the process of governmental decisionmaking" constitute takings instead of an expected "incidents[] of ownership." 447 U.S. at 263, n.9. Courts are split on the meaning and magnitude of the "extraordinary delay" proviso. *See* Pet. at 12–20. Confusion which commingles with a diversity of other doctrinal complications to broadly frustrate owners' rightful attempts to secure their fundamental and constitutional property rights from official obstruction. Based on a single footnote, in several jurisdictions entire categories of delay are essentially immune from the express factors for determining regulatory takings. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Beyond the

wholesale injustice entailed—ably detailed in the Petition—are the ubiquitous adverse social and economic impacts produced as a result. *Amici* discuss each of these in turn.

II. Improper Purposes Often Drive Undue Permitting Conditions and Delays

A. Local Officials Impose Conditions in Order to Extract Higher Fees or Benefits

Perhaps the most litigated form of permitting obstruction are "exactions"—impact fees and other conditions imposed for purposes unrelated to the public's land-use interests or at prices unjustified in light of actual expected effects. For worse, exactions are and have long been a central feature of American land-use regimes—despite their clear constitutional shortcomings (to put it mildly). Even four decades past, property-law scholars noticed that while "[t]raditionally, local government has financed public services through general revenues and the issuance of general obligation bonds . . .," a credit crisis in the 1980s led many local officials to embrace what are, essentially, cover charges to development. Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 L. & Contemp. Probs. 51, 51 (1987).

Cowed by the "taxpayer revolts" of the age, these officials proved more than willing to transpose public costs onto recent or aspiring neighborhood entrants. *Id.* at 65 ("The surveys reported here reveal that reliance for financing capital costs of community facilities is increasingly being shifted from the general public tax base to a discrete segment of the public: those citizens buying and renting newly constructed housing."). Their predicted results fairly resemble the actual course of events—especially after 2008—with

the subsequent rising "trend toward economic balkanization among communities in America portend[ing] serious social problems and disjunctions . . .," causing the effective "zone out [of] increasing numbers of nonaffluent citizens." *Id.* In fewer words, local ladder-pulling run amok. Exactions are adverse local interests' readiest tool either to stop development outright or, short of this, to squeeze far more benefit therefrom than the expected impacts of the subject developments warrant.

To its credit, the Court last year clarified that "the Takings Clause does not distinguish between legislative and administrative permit conditions" and that a condition becomes unconstitutional when imposed "for reasons unrelated to" the government's "land-use interests"—*i.e.*, to mitigate the real impacts of development, like increased traffic and increased utilities use. *Sheetz v. El Dorado Cnty.*, 601 U.S. 267, 268 (2024). But what qualifies as a "land-use interest"? This remains a perennial question to be answered case-by-case; not every illegitimate condition is as clearcut as a "planning commission den[ying] the owner of a vacant lot a building permit unless* she allows the commission to host its annual holiday party in her backyard." *Id.* at 275. In practice, then, *Sheetz* offers small solace to those owners who must continue fighting each such offense. Battles made all the more challenging by the myriad of exceptions and carveouts that together confine the application of the *Penn Central* factors—a test that is already deeply flawed. *See generally* Sam Spiegelman, *Penance for* Penn Central*: How to Treat Property Rights Properly*, 20 GMU J.L. Econ. & Pol'y 472 (2025) (https://bit.ly/3JiakCY).

In order to effect real change away from spurious permit-conditioning practices—that is, in line with

the rules set forth in *Sheetz* and *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013) before it—this Court must also address those ancillary interpretive disagreements that, in aggregate, tend to dull officials' exposure to judicial reprimand. Duller still because *Sheetz* expressly withheld opinion on "whether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development." 601 U.S. at 280.

One scholar dove deep into the impact of *Koontz*'s similar failure to instruct lower courts on the class—if any—of monetary impositions that are per se subject to scrutiny under the *Nollan*/*Dolan* test. Timothy M. Mulvaney, *The State of Exactions*, 61 Wm. & Mary L. Rev. 169, 185 (2019) (discussing *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) ("rough proportionality"); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) ("essential nexus"). Mulvaney notes that "prior to *Koontz*, most monetary demands were not subject to *any* takings analysis at all." Mulvaney, *supra*, at 188 (emphasis original). But *subjecting* monetary demands to takings analysis did not seem to noticeably alter outcomes post-*Koontz*.

Justice Alito's majority opinion expressly disclaimed that the ruling should have impact on "the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners." 570 U.S. at 615. This "cloudiness," as Mulvaney called it—Who decides what constitutes a "tax," "fee," or "similar laws and regulations"?—allowed lower courts to "construe[] the class of financial burdens subject to *Nollan* and *Dolan* scrutiny very narrowly." Mulvaney, *supra*, at 190. Nor does *Sheetz* appear to have clarified

things, and so the post-*Koontz* trickle of owner victories will likely continue despite the Court's recent rigorous revival of the Takings Clause's expanse.

B. They Delay as a Means to Dissuade

It is a legal primitive: justice delayed is justice denied. *See, e.g.*, *Pirkei Avot* 5:8 (c. 1st cent. BCE – 2d cent. CE) ("Our Rabbis taught . . . [t]he sword comes into the world, because of justice delayed and justice denied."). *See also Magna Carta*, cl. 40 (1215) ("To no one will we sell, to no one will we refuse . . . or delay, right or justice.") and Dr. Rev. Martin Luther King, Jr., *Letter from a Birmingham Jail* (1963). Betraying this timeless maxim, local American land-use officials too often prolong the permitting process specifically in order to prevent a disfavored project's fruition and, ideally, without ever producing a "final" decision that could ripen into litigation.

The California Coastal Commission ("CCC") is notorious for using such stalling tactics, with delays over the last nine years or so costing the few hundred applicants who even bothered to challenge them upwards of $57 million in aggregate. *See* Mitchell Scacchi, Keelyn Gallagher, and Jeremy Talcott, *Appealing to Itself: Land Use, Permitting, and the California Coastal Commission*, Pac. Leg. Found., at 5 (2025), https://bit.ly/4mmZOsL. So are New York City's land-use authorities, who regularly bemoan high rents and supply shortages yet continue to impede growth at every turn. *See* Arpit Gupta, *New York City's Permitting System Is a Disaster*, City J., Mar. 20, 2025, https://bit.ly/3Jkgqmf.

Notwithstanding the economic and opportunity costs produced—which are substantial—delays to dissuade should be of particular judicial concern because they are often so easy to hide in plain sight.

Especially in those states renowned (or reviled) for their Byzantine land-use regimes, the sheer number levers available to officials often transform otherwise straightforward litigation into trench warfare.

Suspensions of the most onerous of land-use controls during or in the immediate aftermath of bona fide emergencies are sure signs that much of these regulations are not necessary—and that many of their proponents know this. Earlier this year, wildfires in California destroyed over 5,000 homes within the CCC's jurisdiction. *See* Sean Greene et al., *Mapping the Damage from the Eaton and Palisades Fires, L.A. Times*, Jan. 16, 2025, http://bit.ly/4mHAflH. In response, Governor Gavin Newsom—ironically using his emergency powers—suspended the California Environmental Quality Act ("CEQA") and the California Coastal Act ("CCA") for any fire-related rebuilds, declaring "delay is denial." *See* Jaweed Kaleem, *Newsom Suspends Landmark Environmental Laws to Speed Up Wildfire Prevention Efforts*, L.A. Times, Mar. 1, 2025 http://bit.ly/4oFbGHS.

Skeptics have long doubted whether most CCC delays are necessary to fulfill the agency's environmental mission—especially given the wide disparity in successful appeals of "findings of substantial issue" inside the CCC (97.1%) and outside tribunals (40.3%). Scacchi et al., *Appealing to Itself*, *supra*, at 4. *See also* J. David Breemer, *What Property Rights? The California Coastal Commission's History of Abusing Land Rights and Some Thoughts on the Underlying Causes*, 22 UCLA J. Envtl. L. & Pol'y 247, 24–49 (2004) (surveying critics of CCC practices). The same goes for other such agencies.

The bottom line—land-use agencies and officials cannot be trusted to stipulate legitimate grounds for obstructing the permitting process. That is, not without robust judicial pushback. In several forms, but in this context by expanding the "extraordinary delay" exception to more than plainly bad-faith feet-dragging as a first salvo in a broader, long-past-due campaign to rein in state and local officials who continue to exploit apparent gaps in the *Nollan*/*Dolan* test, left largely unaddressed in both *Koontz* and *Sheetz*.

C. And We Can't Forget NIMBYISM

Perhaps the most insidious cause for unjustified conditions and delays are those imposed through officialdom at the often implicit (though sometimes explicit) *direction* of established interests. While bribery itself is illegal, politicians and their less savory benefactors have forever found ways to secure such *quids pro quo* without eliciting much, if any, legal liabilities. Land-use controllers are not immune. *See, e.g.*, Anastasia Boden et al., *The Land Use Labyrinth: Problems of Land Use Regulation and the Permitting Process*, Reg. Trans. Proj., Fed. Soc., 24–31 (2020), http://bit.ly/4oGWVnW (surveying the causes of "regulatory uncertainty" in land use, including issues of capture).

Among the most transparent is the not-in-my-backyard ("NIMBY") phenomenon, in which homeowners across the country continually pressure their local leaders against okaying development that does not fit existing residents' aesthetic or socioeconomic preferences. Most experts agree that NIMBYism slows development, with one scholar beseeching courts that are "suspicious" that "upzonings signal undue developer influenced" to give

due consideration to the flipside hypothesis—borne out in much of the literature—that the real major culprit is "neighborhood opposition to land-use change." Vicki Been, Josiah Madar, and Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. Empirical Leg. Stud. 227, 260 (2014), http://bit.ly/3Jj0EYV. Though at least a handful suggest that more NIMBYism might actually *accelerate* development. *See, e.g.*, Allison K. Cuttner, Ryan Hubert, and B. Pablo Montagnes, *The Public Meeting Paradox: How NIMBY-Dominated Public Meetings Can Enable New Housing*, Pol. Econ. Hous. Conf., Price School at Univ. So. Cal. (prelim. draft) (2024), http://bit.ly/3UycVuL.

NIMBYism has proven one of the most pervasive impediments to much-needed housing development. *See* Edward Pinto & Tobias Peter, *How Government Policy Made Housing Expensive and Scarce, and How Unleashing Market Forces Can Address It*, 25 Cityscape: J. Pol'y Dev. & Res. 123, 134 (2023) ("Although policymakers have recognized the immense affordability challenges facing the United States, they have often drawn entirely wrong conclusions from the past 100 years. Policymakers blame markets for the lack of affordable housing when, in fact, the culprit is government regulatory failure. In doing so, many cities and states have historically relied on top-down solutions that placate NIMBY homeowners, such as exclusionary zoning, housing subsidies, inclusionary zoning with cross-subsidies, income limits, rent caps, and complex regulations, failing to address housing unaffordability over the past 70 years.").

III. The Court Should Grant Cert. to Prevent Public Officials From Abusing Their Delegated Powers

There is far more at stake than the immediate controversy suggests. Abuse of the permitting process constitutes but one among many systemic corruptive forces in American governance today—especially at the local level. Implicit endorsement of such practices in as dire a sector as land use invites officials to push envelopes in other contexts as well.

Just at the federal level, "[t]he United States currently has 148 distinct statutory provisions giving the executive extraordinary emergency powers covering public health, land management, federal employees, asset seizure, control and transfer, criminal prosecution, detention, and international relations." Elena Chachko & Katerina Linos, *Emergency Powers for Good*, 66 Wm. & Mary L. Rev. 1, 3 (2024). The sheer number of like statutes and ordinances at the state and local levels are impossible to quantify with any precision. There are simply too many avenues for emergency overrides of "ordinary" police-power limitations, especially given that what even counts as "discretionary" executive (and by extension, agency) power varies markedly across fact-patterns and the particular laws and regulations in question.

Despite its prevalence, groundless conditioning or delaying of land-use permits do not capture our immediate attention. Why? Unlike bona fide emergencies—disease, war, conflagration (*i.e.*, those that *do* warrant immediate executive action in areas normally reserved for legislative deliberation)—the strains of land-use abuse come in very small waves

but build to a tsunami nonetheless. It is a slow burn, to be sure, but one that has long passed its boiling point. As such, the Court would do well to remind the Sixth Circuit and like jurisdictions that the immediacy of an official sin is not always a proper measure of their constitutional import—nor of the urgency of remediation.

CONCLUSION

For the foregoing reasons and those set forth by the Petitioners and other *amici*, the Court should grant certiorari, reverse the court below, and remand the case for further proceedings in accordance with the proper understanding of "extraordinary delay" as but one among several factors to consider in determining whether a specific permitting process worked a taking, regardless of its final disposition. America's owners—and would-be homeowners—deserve clarification.

Respectfully submitted,

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