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 FOR 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?

PARTIES TO THE PROCEEDINGS

Respondents are the Tahoe Regional Planning Agency ("TRPA"), a regional planning and regulatory agency established by interstate compact, *see* Pub. L. No. 91-148, 83 Stat. 360 (1969); Pub. L. No. 96-551, 94 Stat. 3233 (1980), and the States of California and Nevada. This brief is a joint brief filed on behalf of all respondents. "TRPA" is used herein to refer to all respondents, except that references to regulatory actions of TRPA refer only to that agency.

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BRIEF FOR RESPONDENTS

INTRODUCTION

Because petitioners and their amici take such liberties with it, we begin by quoting the 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?" 121 S. Ct. 2589 (2001). This question—formulated by the Court—limits review to the holding below concerning the temporary moratorium, in

effect from August 1981 until April 1984. *See* Pet. App. 40. It does not encompass the other holdings below that petitioners sought to challenge, including those concerning the effect of the land use plans adopted in 1984 and 1987. In particular, the Question Presented presupposes that the case does in fact present the question of the constitutional implications of a *temporary* moratorium.

Yet much of what petitioners and their amici have to say explicitly (Pet. Br. 13) and implicitly fights the Question Presented. Thus, they repeatedly argue that what is at issue here is not a temporary moratorium at all, but a permanent ban on development—because of the effect of the 1984 and 1987 plans. *See* Pet. Br. 1, 2, 5, 7, 24. Petitioners *assume* that the 1984 and 1987 plans unconstitutionally deprived them of all use of their property and rendered that property valueless, *see id*. at 6-7, but that claim was rejected by both courts below on, respectively, causation and statute of limitations grounds, *see* Pet. App. 47, 56, and was not included in the Question Presented framed by this Court. Indeed, due to the statute of limitations bar, the record is devoid of any evidence regarding the 1987 Plan—and petitioners themselves made sure that evidence regarding the impacts of that plan was excluded from trial.

The only holding that is before this Court was clearly stated by the court of appeals: "Because the temporary development moratorium enacted by TRPA did not deprive the plaintiffs of all of the value or use of their property, we hold that it did not effect a categorical taking." Pet. App. 40 (footnote omitted). The holding was phrased in those terms because of two decisions petitioners made in bringing their takings claim: *First*, petitioners made "a calculated choice" to mount only a facial challenge to the temporary moratorium. *Id*. at 90; *see id*. at 19; J.A. 80. Such challenges "face an uphill battle" because the challenger must show that the "mere enactment" of the ordinance constitutes a taking. *Suitum* v. *TRPA*, 520 U.S. 725, 736 n.10 (1997).

Second, petitioners chose to base their facial takings claim on the sole ground that the temporary moratorium effected a *per se* taking under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), by denying "all economically beneficial or productive use of land." *See* Pet. App. 18. They expressly eschewed any claim under the more generally applicable test set forth in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), and accordingly declined to submit evidence concerning "specific factual situations" of the sort pertinent in applying the fact-intensive *Penn Central* analysis. *See* J.A. 80. As the court below explained, "the plaintiffs have stated explicitly on this appeal that they do not argue that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*." Pet. App. 19.

In short, the claim that the Ninth Circuit addressed—and the only claim properly before this Court—is that the mere enactment of *any* temporary moratorium, by denying the right to develop property for *any* length of time, *always* constitutes a taking for which compensation is required. That remains petitioners' position before this Court. *See* Pet. Br. 17 ("a freeze on use * * * is a taking for the duration of the freeze"); *id*. at 47 ("a moratorium that precludes, for whatever period of time the regulators wish, all economically productive use of land is a *per se*, or categorical, taking"). In particular, according to petitioners, the "temporary" aspect of the moratorium—the predicate to the Question Presented—is "beside the point" as a matter of law. *Id*. at 15. Petitioners' position has at least the benefit of clarity: a temporary moratorium on development, no matter how brief in duration, no matter how pressing the need for it, and no matter how insignificant its impact—if any—on the value of affected property, must be treated the same as a permanent ban on development—always a *per se* taking for which compensation is required.

What is more, petitioners' sole argument in support of this extreme position is that this Court has already adopted it—in *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987). As we explain below, *First English* did no such thing—the question whether a temporary moratorium constituted a taking was explicitly recognized by the Court as not being before it in that case. *See id*. at 313. The Court should be taken at its word.

While petitioners argue that the mere enactment of *any* temporary development moratorium is a *per se* taking for which compensation is *always* required, our position is that whether a particular temporary moratorium gives rise to a taking should be assessed, like most takings claims, under the traditional *Penn Central* factors. Because petitioners made a tactical decision in this case to waive any challenge to the moratorium under those factors, the judgment below should be affirmed.

STATEMENT OF THE CASE

1. Lake Tahoe and the Tahoe Regional Planning Agency. Lake Tahoe is an exceptionally pure and beautiful natural resource, the crown jewel of the Sierra Nevada mountain range. It is the largest alpine lake in the world based on all its dimensions, including a remarkable average depth of 1,027 feet and a maximum depth of 1,645 feet. At 6,229 feet above sea level the Lake stretches over 192 square miles, ringed by snow-capped peaks that soar thousands of feet higher. It contains enough water to flood the State of California to a depth of 14 inches.[1]

But such dry statistics do not tell the story. From the first recorded sighting of Lake Tahoe by John C. Fremont on February 14, 1844, visitors have been struck by its remark-

[1] Carl R. Payten & Cameron W. Wolfe, Jr., *Lake Tahoe: The Future of a National Asset*, 52 Cal. L. Rev. 563, 564 (1964); Douglas H. Strong, *Tahoe: An Environmental History* xiii (1984).

able beauty. John C. Fremont, I *Memoirs of My Life* 336 (1886). Mark Twain described the Lake as "a noble sheet of blue water lifted six thousand three hundred feet above the level of the sea * * * . [W]ith the shadows of the mountains brilliantly photographed upon its still surface * * * it must be the fairest picture the whole earth affords." Mark Twain, *Roughing It* 169 (1872), quoted in Pet. App. 60. The Supreme Court of Nevada proclaimed the lake "a national treasure," *Kelly* v. *TRPA*, 855 P.2d 1027, 1034 (1993), *cert. denied*, 510 U.S. 1041 (1994), while the California Supreme Court described the Lake Tahoe Basin as "an area of unique and unsurpassed beauty." *People ex rel. Younger* v. *County of El Dorado*, 487 P.2d 1193, 1194 (1971). In adopting the 1980 Tahoe Regional Planning Compact, the California and Nevada legislatures found that "[t]he region exhibits unique environmental and ecological values which are irreplaceable." J.A. 83; *see also* S. Rep. No. 91-510, at 3-4 (1969) (Lake Tahoe is "famed for its scenic beauty and pristine clarity. * * * Only two other sizable lakes in the world are of comparable quality—Crater Lake in Oregon, which is protected as part of the Crater Lake National Park, and Lake Baikal in the Soviet Union.").

Much of the Lake's storied beauty can be traced to its pristine waters. Lake Tahoe is "oligotrophic," possessing extraordinarily clear and high quality waters because of very low concentrations of sediments, nutrients such as nitrogen and phosphorus, and other contaminants. Pet. App. 62. To quote Twain once again, "I have fished for trout in Tahoe, and at a measured depth of eighty-four feet I have seen them put their noses to the bait and I could see their gills open and shut. I could hardly have seen the trout themselves at that distance in the open air." Mark Twain, *The Innocents Abroad* 144-145 (1869). The result of this "amazing clarity" is water of "an unusually beautiful cobalt blue color." Pet. App. 61.

Unfortunately, "the region's natural wealth contains the virus of its ultimate impoverishment." *County of El Dorado*, 487 P.2d at 1195. Popular with vacationers since the late 1800s, Lake Tahoe was catapulted into the national spotlight by the 1960 Winter Olympic Games, the first to be televised. Strong, *supra*, at 46. That prominence—and the addition of winter attractions to the already growing lure of summer activities—precipitated a dramatic rise in the number of subdivisions created to meet the ever-increasing demand for access to Lake Tahoe. Def. Ex. 86. This development boom led the California Supreme Court to warn as early as 1971 that "[t]oday, and for the foreseeable future, the ecology of Lake Tahoe stands in grave danger before a mounting wave of population and development." *County of El Dorado*, 487 P.2d at 1195; *see generally id.* at 1194-98.

The uncontrolled development in the Lake Tahoe Basin has caused an alarming increase in the levels of nutrients entering the Lake. Development entails covering terrain with impervious surfaces—buildings and asphalt where there had been meadow or field—with the inevitable consequence that run-off from rain or snow melt that previously would have entered the ground now flowed into the Lake. That run-off carries with it the sediment, nutrients, and contaminants that spur the growth of algae and cause eutrophication—a process which, if unabated, will cause levels of algae to continue to increase until the Lake's characteristic color turns "from clear blue to turbid brown." *Tahoe-Sierra Pres. Council* v. *State Water Res. Control Bd.*, 259 Cal. Rptr. 132, 135 (Ct. App. 1989). *See also* Pet. App. 62 ("unless the process is stopped, the lake will lose its clarity and its trademark blue color, becoming green and opaque for eternity").

A number of factors that make Lake Tahoe so extraordinary also make it uniquely vulnerable to this threat. The surrounding mountains enter the Lake at a dramatic slope, increasing the impact of run-off into the Lake and placing a premium on the limited opportunities for run-off to enter the

soil before reaching the Lake. Moreover, unlike most lakes, which can self-purify as fresh water flows in and contaminated water flows out, the amount of water entering and leaving Lake Tahoe is minuscule compared to the total volume of water in the Lake. If the Lake were drained, it would take approximately 650-700 years to be refilled—compared to, for example, 2.6 years for Lake Erie. *See* John Ayer, *Water Quality Control at Lake Tahoe: Dissertation on Grasshopper Soup*, 1 Ecology L.Q. 3, 8 (1971); Pet. App. 63. Thus, if allowed to continue, the eutrophication of the Lake would be irremediable.

In addition to this unique environmental sensitivity, jurisdictional complications add to the challenge of protecting Lake Tahoe. Two States, five counties, a number of municipal governments, and the federal government all have jurisdiction over part of the Lake and the surrounding area. Pet. App. 65.

The first attempt to address environmental impacts to Lake Tahoe through coordinated land use planning came in 1969, when California and Nevada developed and Congress enacted the Tahoe Regional Planning Compact, which created TRPA. Pub. L. No. 91-148, 83 Stat. 360 (1969). In 1972, TRPA adopted, as the basis of its regulatory program, a land capability classification system for the development of property in the Basin. Pet. App. 66. This system classified areas into one of seven districts based on soil types, slope, and vegetation. Land capability districts 1, 2, and 3 are "high hazard" lands (steep, fragile lands), while districts 4 through 7 are "low hazard" lands (relatively flat, stable soils). *Id*. at 66-67. Stream environment zones (called SEZs) were also designated and placed in land capability district 1b. SEZs are areas near streams and similar features that naturally act as filters for much of the debris carried by run-off. *Id*. at 64, 67. This system established limits on the percentage of impervious surface or land coverage permitted in each of the seven land capability districts. *Id*. at 66-67.

There were, however, numerous exceptions to these limits, most significantly for new residential construction, which was allowed even on high hazard lands and SEZs. *Id*. at 67, 90-91. Over 1,600 residential units were approved in 1978 alone. *See* J.A. 106. Not surprisingly, the corresponding deterioration in the Lake's health continued unabated. By 1980, water quality in the Lake was rapidly declining; the rate of algal growth had doubled over the last 20 years, Def. Ex. 211 at 7, and water clarity had decreased between 6-13 percent in the preceding 10 years. Strong, *supra*, at 186-187. The growing tension between development pressures and heightened concern over the fate of the Lake gave rise to "a race-to-develop," Pet. App. 28 n.15, as landowners rushed to develop their property before the imposition of what were anticipated to be more stringent controls. *See id*. at 89 (referring to the "glut of construction in the years just before the Compact was amended in 1980").

2. The Regional Planning Process Instituted Under the 1980 Regional Compact. Dissatisfied with TRPA's ability to control land development under the 1969 Compact, California and Nevada acted to stem the alarming threat to the Lake by drafting amendments to the Compact, which Congress enacted in 1980. Pub. L. No. 96-551, 94 Stat. 3233 (1980) (reprinted at J.A. 83). Among its key provisions, the 1980 Compact required that TRPA, within 18 months, establish environmental threshold carrying capacities necessary to maintain the natural resources of the Basin.[2] The 1980 Compact also mandated that TRPA adopt, within one year following adoption of these thresholds, a new regional

[2] The Compact defined an "environmental threshold carrying capacity" as

> an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region. Such standards shall include but not be limited to standards for air quality, water quality, soil conservation, vegetation preservation and noise. [J.A. 87.]

plan that would ensure compliance with them. *See* J.A. 97, 98. Finding that "in order to make effective the regional plan as revised by the agency, it is necessary 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," the new Compact itself contained temporary restrictions on new subdivisions, limitations on new residential permits, limitations on new commercial development, and a prohibition on new apartments. *Id*. at 104-108.

Because these restrictions did not differentiate according to the location of the proposed development, however, TRPA went on to target the primary cause of eutrophication of the Lake: development on high hazard lands and SEZs. Pet. App. 86, 90-91. Therefore, on June 25, 1981, TRPA adopted Ordinance 81-5, which temporarily prohibited most residential and all commercial construction on high hazard lands and SEZs "pending adoption of a revised regional plan under the Tahoe Regional Planning Compact, as amended." J.A. 159; *see id*. at 163-178. Following adoption of Ordinance 81-5, TRPA turned to the task of establishing the required environmental thresholds. After a complex scientific inquiry and significant public debate, these thresholds were adopted on August 26, 1982. Pet. App. 74.

TRPA then had one year to adopt a new regional plan. That period proved inadequate to hammer out the numerous issues presented by the new regional plan and implementing ordinances. As one court summed up TRPA's plight: "Suffice it to say that the extensive public involvement, the numerous Governing Board debates, deliberations, and deadlocks, and the extent of TRPA staff involvement made the process of amending the regional plan an exceedingly complex task." *California* v. *TRPA*, 766 F.2d 1308, 1311 (9th Cir. 1985). Thus, it became clear in August 1983—one year after adoption of the environmental thresholds—that the new regional plan would not be completed by the deadline

mandated by the Compact. "Faced with an impossible deadline, and unsure whether it had the authority to approve any project in the region without the amended plan in place as contemplated by the 1980 Compact, TRPA therefore chose to temporarily suspend, for 90 days, further project approvals." *Id*. at 1311-12. It did so in Resolution 83-21. *See* Pet. App. 170. As debate continued over the new regional plan, Resolution 83-21—always intended to remain in effect until adoption of the regional plan, Pet. App. 33 n.19—was extended on November 17, 1983. J.A. 130.

Together Ordinance 81-5 and Resolution 83-21 constitute the temporary moratorium on development adopted by TRPA until it could complete the process leading to the new regional plan mandated by the 1980 Compact. By its terms this moratorium was to expire upon adoption of that plan and, in fact, TRPA's adoption of the 1984 Plan on April 26, 1984 "superseded" the 32-month moratorium. Pet. App. 106. On May 1, however, a federal district court enjoined implementation of the 1984 Plan and later issued a preliminary injunction barring the issuance of any development permits in the Basin. *Id*. at 76. As a result, TRPA never adopted ordinances to implement the 1984 Plan. *Id.* at 106.[3]

Despite TRPA's vigorous defense of its 1984 Plan, both in the district court and before the court of appeals, the appellate court upheld the preliminary injunction. Pet. App. 76-

[3] Although it was never implemented, the 1984 Plan contained a number of provisions that permitted development on environmentally sensitive lands in the Basin. As found by the district court in an earlier summary judgment decision, "on the face of the Regional Plan, options do exist for development in the Lake Tahoe Basin." *TSPC* v. *TRPA,* 638 F. Supp. 126, 133 (D. Nev. 1986), *aff'd in part and rev'd in part, TSPC* v. *TRPA*, 911 F.2d 1331, 1339 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991). Indeed, one reason the 1984 Plan was enjoined was because of the extent of development it did permit on environmentally sensitive lands—including of single family homes. *See California* v. *TRPA*, 766 F.2d at 1314-16.

77. TRPA thereupon embarked upon a consensus process to develop a successor regional plan. After literally hundreds of public meetings, substantial environmental review, and considerable public debate, that consensus process culminated in the adoption of the 1987 Regional Plan. *See* Def. Exs. 87, 88.

The 1987 Plan established a "markedly different" approach for permitting development, focusing not on land capability classifications but instead on the development potential of each individual lot in the Basin. *TSPC* v. *TRPA*, 34 F.3d 753, 755 (9th Cir. 1994), *cert. denied*, 514 U.S. 1036 (1995). Under this individual parcel evaluation system ("IPES"), lots were individually surveyed and assigned a number based on their suitability for development. *Kelly* v. *TRPA*, 855 P.2d at 1031. Under IPES, some parcels not immediately eligible for development could become eligible over time. *Id*. at 1034. The 1987 Plan also established a system of transferable development rights that created both the incentive to purchase development rights and a strong market for their sale. *Suitum* v. *TRPA*, 520 U.S. at 730, 741-742.

The efforts of TRPA, as well as state and local government, to control the impacts of development on the water quality of the Lake have broadly benefited property owners in the Basin. As the district court determined, if left unabated, the impacts of development on the Lake would have destroyed the very quality that makes the Tahoe Basin such a unique place to own property and to live. Pet. App. 62-63, 86. Without efforts such as these, continued deterioration in the Lake's fabled water quality would have adversely affected the value of property in the Basin. *See* Tr. 8:1534-36 (addressing impacts on adjacent property values of algal growth in lakes). "Faced with the responsibility for solving a serious problem, TRPA took the necessary steps to do so." Pet. App. 91.

3. Proceedings Below. Petitioners challenged each of the actions addressed above—the temporary moratorium, the 1984 Plan, and the 1987 Plan—and alleged that, on their face, TRPA's actions had resulted in a taking of their property. Throughout the litigation, the parties and the courts have consistently and without dissent separated these challenges into four separate time periods (*see* J.A. 74):

- Periods I and II (August 24, 1981 - April 25, 1984) covering the effective duration of Ordinance 81-5 and Resolution 83-21, which together provided for a moratorium on certain development approvals pending adoption of the 1984 Plan;
- Period III (April 26, 1984 - July 1, 1987) covering the period during which the United States District Court for the Eastern District of California enjoined implementation of the 1984 Plan that TRPA adopted pursuant to the 1980 Compact; and
- Period IV covering the time period after TRPA adopted the 1987 Plan on July 2, 1987.

At trial, petitioners made the "calculated choice" (Pet. App. 90) to limit their legal challenge to the claim that TRPA's action with respect to each period prevented any development of their property and therefore constituted, on its face, a *per se* taking under *Lucas*. TRPA argued that its moratorium on development and other actions had not resulted in a taking under either the fact-specific *Penn Central* test or the categorical *Lucas* test. TRPA presented extensive evidence regarding the necessity and importance of its actions to protect the Lake and the economic impact of those actions on properties in the Basin. For the most part, petitioners did not refute this evidence and, in fact, declined to offer any evidence regarding the economic impact of TRPA's regulations on their properties or any other properties in the Basin.

The district court rejected petitioners' takings claim in part and upheld it in part. The court rejected petitioners' claim with regard to Period III (the 1984 Plan), because that Plan had been enjoined by the District Court for the Eastern District of California. "The reason a permit could not be obtained was the T.R.O. and the Preliminary Injunction, not the 1984 Plan." Pet. App. 106. The district court also rejected petitioners' takings claim with regard to Period IV (the 1987 Plan), on the ground that the claim was barred by the applicable statute of limitations. *Id.* at 128-155.

The district court further found that petitioners "did not have reasonable, investment-backed expectations that they would be able to build single-family homes on their land within the six-year period involved in this lawsuit" and had failed to introduce any "evidence * * * regarding the specific diminution in value of any of [their] individual properties." *Id.* at 89, 90. Instead, the court found that "none of the land is completely 'valueless' * * * ." *Id.* at 94. Based on these findings, the court determined that application of the factors set forth in *Penn Central*, 438 U.S. at 124, "clearly leads to the conclusion that there was no taking." Pet. App. 88. Notwithstanding this determination, the trial court felt compelled by this Court's decision in *Lucas* to find that the temporary moratorium in effect during Period I (Ordinance 81-5) and Period II (Resolution 83-21) *had* effected a categorical taking of petitioners' properties. Pet. App. 96-101.

Petitioners appealed the district court's finding that TRPA, through its enactment of the 1984 Plan, did not cause a taking of their property, and they also appealed the district court's finding that TRPA had not waived its statute of limitations defense to petitioners' facial challenge to the 1987 Plan. But while TRPA appealed the district court's finding that the agency's moratorium had resulted in a categorical taking under *Lucas*, petitioners did not appeal either the district court's legal conclusion, or the factual findings underlying the conclusion, that no taking occurred under the

standards set forth in *Penn Central*. Therefore, with respect to the constitutionality of TRPA's 32-month moratorium, the appellate court was presented only with the narrow question of whether TRPA's actions, on their face, resulted in a *per se* taking under *Lucas*.

The court of appeals reversed in part and affirmed in part. The unanimous panel reversed the district court's rulings that TRPA had taken petitioners' properties during Periods I and II; the court concluded that TRPA's reasonable, temporary moratorium on development, allowing the agency time to develop and adopt a regional plan, did not result in a *per se* taking of petitioners' properties. The appellate court upheld the trial court's finding that TRPA had not caused a taking during Period III, and agreed with the district court that the "law of the case" did not preclude TRPA from raising a statute of limitations defense to petitioners' challenge to the 1987 Plan (Period IV). *Id.* at 47-56. The appellate court went on to affirm the district court holding that the challenge was in fact time-barred, noting both that the challenge was filed years after the limitations period had run, and that "the plaintiffs affirmatively decline to argue on appeal that the district court's resolution of that question is incorrect." *Id*. at 56.[4] The court of appeals subsequently denied petitioners' request for rehearing en banc. *Id.* at 156.

In their petition for certiorari, petitioners requested that this Court grant certiorari as to all of the issues addressed in the court of appeals' decision: the temporary moratorium in place during Periods I and II, the Period III injunction on

[4] The court of appeals did not address several of TRPA's defenses that provide alternative bases for upholding the ruling in favor of TRPA: TRPA's actions could not have resulted in a taking under the nuisance exception to the takings doctrine; petitioners' claims are barred by the 60-day statute of limitations under the 1980 Compact; and petitioners could not demonstrate that TRPA took their properties because the agency permitted challenges to land capability designations which could have exempted petitioners' properties from the scope of TRPA's regulations.

implementation of the 1984 Plan, and petitioners' failure to file a timely challenge to the 1987 Plan in effect during Period IV. This Court, however, granted the petition on the sole question, drafted by the Court, of whether the court of appeals properly found that TRPA's temporary moratorium on development did not result in a taking of petitioners' properties. 121 S. Ct. 2589 (2001).

SUMMARY OF ARGUMENT

Nothing in this Court's takings jurisprudence supports the extreme position petitioners urge on this Court. According to petitioners, no matter how pressing the exigency that prompts the enactment of a temporary moratorium, no matter how reasonable the moratorium is in geographic scope, substantive terms, and temporal duration, and no matter how insignificant its impact on the value of affected property, the mere enactment of a temporary moratorium on development will always constitute a *per se* taking of private property under the Takings Clause. Ignoring this Court's repeated admonition that categorical treatment of takings claims is the exception, limited to "two discrete categories of regulatory action," *Lucas*, 505 U.S. 1015, and that, as a general rule, takings claims are instead evaluated under the more nuanced test articulated in *Penn Central*, 438 U.S. at 124, petitioners never explain the legal underpinnings of their theory. Rather, they claim that this Court has already answered the Question Presented in their favor, given its determination in *First English* that all takings of property—whether permanent or temporary—require compensation.

First English does not resolve the issues presented by this case. In *First English,* this Court repeatedly emphasized that it was not reaching the merits of the petitioner's takings claim. Rather, *First English* resolved a long-standing debate regarding the remedy for a regulatory taking. It held that once a court finds that government action *has* resulted in a taking, compensation is the constitutionally required remedy.

TRPA does not dispute, and has not disputed throughout this litigation, that compensation is required whenever a regulation—temporary or permanent—results in a taking. The issue in this case, however, is the logically antecedent one of whether TRPA's temporary moratorium on development resulted in a taking of petitioners' property in the first place. *First English* simply does not address this issue; given its reliance on *First English*, neither does petitioners' brief.

A temporary moratorium on development should not be treated the same as a permanent ban, and nothing in this Court's cases suggests that it should. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), for example, expressly distinguished temporary physical invasions from permanent ones, and held that only the latter gave rise to *per se* takings. The same distinction should be drawn with respect to the *Lucas* category of *per se* takings. A temporary moratorium is readily distinguishable from a permanent ban on economically viable use. As this Court emphasized in *Lucas*, a permanent ban might render the subject property "valueless," 505 U.S. at 1020; that is obviously not true with respect to a temporary moratorium, and petitioners do not contend that it is. Moreover, a permanent ban of the sort at issue in *Lucas* deprives property owners of the basic right to use their property; a temporary moratorium only limits the right to develop the property *immediately*, which has never been regarded as an interest absolutely protected by the Takings Clause. Petitioners' contention that a temporary moratorium is a *per se* taking under *Lucas* because it denies the owner all economically viable use assumes that the pertinent property interest is the right to develop the property *during the period of the moratorium*, but this Court has consistently rejected such efforts to redefine the affected property interest so that it is entirely taken by the challenged regulation.

Concluding that a temporary moratorium is different from a permanent ban on all economically viable use, and accord-

ingly is not a *per se* taking, does not mean that land use planners are free to abuse moratoria, unconstrained by the Takings Clause. Moratoria, like most land use regulations, should be analyzed under the traditional *Penn Central* test. That test mandates a fact-intensive inquiry into the "economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo* v. *Rhode Island*, 121 S. Ct. 2448, 2457 (2001). Under that test, some moratoria will be found to give rise to a taking, others will not. Those that are not linked to a comprehensive planning process, are more intrusive than required by the particular development pressures, single out particular landowners rather than apply more broadly, last longer than necessary in light of the planning challenges, or sharply diminish property values, may well be vulnerable to takings challenges. Others that are sensible in light of the particular circumstances giving rise to them, help facilitate a broader planning process, are reasonable in scope, duration, and terms, and do not significantly impact property values, do not trigger a requirement to pay compensation. Petitioners chose not to bring a *Penn Central* claim in this case, but instead to rest on their assertion that the mere enactment of any temporary moratorium was always a *per se* taking under *Lucas*. The court of appeals correctly rejected that contention, and its decision should be affirmed.

ARGUMENT

I. THE MERE ENACTMENT OF A TEMPORARY MORATORIUM ON DEVELOPMENT IS NOT A *PER SE* TAKING.

Petitioners' argument in favor of their claim that the mere enactment of any temporary moratorium is automatically a *per se* taking rests on a straightforward syllogism:

- *First English* established that a temporary taking requires compensation, just like a permanent taking.

- *Lucas* established that a regulation that denies all beneficial use of property is a *per se* taking.

- Therefore, a temporary moratorium on development is a *per se* taking for which compensation is required.

The flaw in this syllogism is readily apparent: at no point does petitioners' line of reasoning address the central question—the Question Presented in this case—of whether a temporary moratorium constitutes a temporary taking. Petitioners' logical leap is that because a permanent ban on development is a *per se* taking, a temporary moratorium on development—of one year, one month, or one week—must be so as well. That is an extraordinary assumption, and it is wrong as a matter of law and common sense.

The only support petitioners offer for their assumption is a startling misreading of both the express language and the rationale underlying this Court's opinions in *First English* and *Lucas*. Neither case supports the radical proposition that the mere enactment of a temporary moratorium is always a *per se* taking; indeed, neither case remotely considered the question. It is one thing to say that every time a court finds that government action *has* effected a taking, compensation is required; it is quite another to say that the takings analysis—the test that this Court applies to determine whether a taking has occurred in the first place—treats all government action the same, regardless of the character of the government action—in particular, without regard to whether it is temporary or permanent. That has never been and should not be the law.

A. Except In The Extraordinary Case, Regulatory Takings Claims Are Resolved By Subjecting The Factual Circumstances Of Each Particular Case To A Three-Factor Inquiry.

1. Throughout this case, petitioners have done little more than invoke this Court's decisions in *Lucas* and *First*

English as proof of their takings claims. These decisions, however, do not support petitioners' extreme theory. Neither case overruled the long standing doctrine articulated in *Penn Central*, and recently reaffirmed in *Palazzolo* v. *Rhode Island*, 121 S. Ct. 2448 (2001), which requires courts—except in "extraordinary circumstance[s]" presented only in "relatively rare situations," *Lucas*, 505 U.S. at 1017-18—to evaluate each takings claim based on its specific facts.[5]

Since *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 415 (1922), this Court has repeatedly opined that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." In applying this test, this Court acknowledged that "[i]n 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in * * * essentially ad hoc, factual inquiries.' " *Lucas*, 505 U.S. at 1015 (quoting *Penn Central*, 438 U.S. at 124).

The framework for those fact-specific inquiries was set forth most prominently in *Penn Central*, which articulated a three-part test focusing on "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo*, 121 S. Ct. at 2457 (citing *Penn Central*, 438 U.S. at 124). As the Court reiterated just last Term in *Palazzolo*, whether a taking has occurred typically depends "on a complex of factors" designed 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.' " *Id*. at 2457-58 (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). As Justice O'Connor put it, "*Penn Central* does not supply mathematically precise variables, but instead

[5] Amicus Institute for Justice is at least candid enough to acknowledge that its support for petitioners' position entails advocating that *Penn Central* be overruled. Br. 18.

provides important guideposts that lead to the ultimate determination whether just compensation is required." *Id*. at 2466 (concurring opinion).

The *Penn Central* test has been repeatedly cited as the "polestar" of takings analysis. *Id*. at 2466 (O'Connor, J., concurring). In fact, Justice Brennan's dissent in *San Diego Gas & Electric Co*. v. *City of San Diego*, 450 U.S. 621 (1981)—which receives such prominent billing in petitioners' brief—emphasizes the fact-intensive nature of takings analysis. As Justice Brennan explained, "[t]he determination of a 'taking' is 'a question of degree—and therefore cannot be disposed of by general propositions.' " *Id.* at 649 (quoting *Pennsylvania Coal*, 260 U.S. at 416). This Court, therefore—with only "discrete" and carefully circumscribed exceptions, *Lucas*, 505 U.S. at 1015—has repeatedly turned to the factual inquiry mandated by *Penn Central* when evaluating whether government regulation amounts to a taking. *See, e.g., San Diego Gas & Elec.*, 450 U.S. at 648-650 & n.15 (Brennan, J., dissenting).

2. In the face of last Term's reaffirmation of *Penn Central*'s multi-factor analysis, petitioners insist that the takings inquiry focuses on one factor, and one factor alone: "whether a taking has occurred * * * depends on the impact of the governmental action on the ability of the landowner to make economically productive use of the land." Pet. Br. 23. Regardless of the underlying circumstances, all takings are the same under what petitioners term the "unified field theory of takings jurisprudence." *Id*. at 15. *See id*. at 19-20 (existence of taking depends on impact on property; "nothing more or less is relevant") (citation omitted). In particular, petitioners reject the propriety of considering the character of the government action on a case-by-case basis: "The Fifth Amendment is not concerned with the propriety or virtue of the regulators' purpose in freezing the use of private property, or the exigency of the situation that gave rise to the perceived need for it." *Id*. at 39.

But this Court has carved out only two narrow exceptions to the fact-specific consideration set forth in *Penn Central*. First, regulations that result in a "*permanent* physical occupation" of property will be deemed to result in a taking, "without regard to other factors that a court might ordinarily examine." *Loretto*, 458 U.S. at 432 (emphasis added). Second, such "categorical treatment" is also appropriate "where regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015.

In explaining the rationale for its categorical approach, the Court in *Loretto* emphasized that the character of the government action is central to the takings analysis and that "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." 458 U.S. at 426-427. Moreover, because of the nature of the intrusion, a permanent physical occupation "presents relatively few problems of proof." *Id*. at 437. In view of the reasoning behind its categorical approach, the *Loretto* Court emphasized that its exception to the generally applicable takings analysis set forth in *Penn Central* was "very narrow." *Id*. at 441.

The categorical approach sanctioned in *Lucas* draws on this Court's ruling in *Loretto*: "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." 505 U.S. at 1017. In such a situation, this Court found that the fact-intensive approach of *Penn Central* was not appropriate because in "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life.' " *Id.* at 1017-18 (emphasis in original) (quoting *Penn Central*, 438 U.S. at 124). As in *Loretto*, the *Lucas* Court emphasized that this exception to the general balancing test of *Penn Central* would apply only in "relatively rare situations." *Id.* at 1018.

3. Consistent with the narrow approach embodied in these two *per se* rules, this Court has repeatedly and emphatically rejected attempts to expand either *Loretto* or *Lucas*. For example, in *Yee* v. *City of Escondido*, 503 U.S. 519 (1992), this Court rejected the claim that a mobile home rent control ordinance, which limited a landlord's ability to evict tenants and control the sale of mobile homes on its property, resulted in a *per se* taking under *Loretto.* Rather, the Court emphasized that "where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Id.* at 522-523 (citing *Penn Central*, 438 U.S. at 123-125).

Most recently, in *Palazzolo*, this Court rejected the claim that state regulations had effected a categorical taking under *Lucas*, because the property at issue retained some potential for development—albeit far more limited than the commercial development anticipated by the owner. 121 S. Ct. at 2465. The Court also, however, turned aside an effort by the *State* to establish a categorical rule in place of the traditional *Penn Central* analysis—a new rule that those who purchase property with notice of a particular regulation cannot bring a takings challenge based on the regulation. As the Court put it, "[a] blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *Id*. at 2463. *See also id*. at 2467 (O'Connor, J., concurring) ("The temptation to adopt what amount to *per se* rules in either direction must be resisted."). Instead, the case was remanded for consideration of the claim under the *Penn Central* factors. *Id*. at 2465.

"[T]oo blunt an instrument"—an apt characterization of petitioners' proposed rule that *any* temporary moratorium on

development, of whatever length and for whatever purpose, and regardless of its impact on property value, is a *per se* taking. And in fact nothing in *Loretto* or *Lucas* supports petitioners' claim that all temporary moratoria should be lumped with permanent physical invasions and bans on all use as categorical takings. Categorical treatment is a "very narrow" exception to the *Penn Central* fact-specific approach, applicable only in "relatively rare situations." *Loretto*, 458 U.S. at 441; *Lucas*, 505 U.S. 1018. A temporary development moratorium, however, is commonly used "to halt or slow growth until new growth management programs, new comprehensive plans and/or new zoning ordinances can be adopted and implemented." Julian C. Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* § 9.5 (1988); Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning & Zoning*, 49 J. Urban L. 65 (1971).

One of the oldest tools of land use regulation, a moratorium is designed to prevent, on an interim basis, development that would either exacerbate the problem that prompted the planning effort or that would be inconsistent with new regulatory controls once they are enacted. *See Miller* v. *Board of Public Works*, 234 P. 381 (Cal. 1925), *appeal dismissed*, 273 U.S. 781 (1927); *Downham* v. *City Council*, 58 F.2d 784 (E.D. Va. 1932). Even petitioners' amici recognize that such moratoria are "commonplace." Am. Farm Bureau Br. 11. *See Williams* v. *City of Central*, 907 P.2d 701, 706 (Colo. Ct. App. 1995) ("[I]nterim zoning moratoria * * * play an important role in land use planning and are commonly employed."). Expanding *per se* takings analysis to include temporary development moratoria would transform an approach designed to apply to only the most "extraordinary circumstance[s]," *Lucas*, 505 U.S. at 1017, to one that encompasses a well-established and widely used tool of land use planning.

Moreover, the very factor that petitioners contend is "beside the point" (Br. 15)—the fact that what is at issue here is "a *temporary* moratorium on land development," 121 S. Ct. 2589 (emphasis added)—was recognized as being determinative in limiting the scope of the *per se* rule adopted in *Loretto*. The *Loretto* Court specifically distinguished between permanent and temporary physical invasions of property when applying its categorical rule. The Court explained that the taking in *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), "was not considered a taking *per se*" because it involved an "easement of passage, not * * * a *permanent* occupation of land." 458 U.S. at 433 (emphasis added). The *Loretto* Court then discussed "[a]nother recent case underscor[ing] the constitutional distinction between a permanent occupation and a temporary physical invasion"—*PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74 (1980). 458 U.S. at 434. Again, even though that case involved a physical invasion, the takings claim was not subject to *per se* treatment (indeed, it did not succeed) in part because "the invasion was temporary and limited in nature * * * ." *Id*. *See also id*. at 428 (distinguishing "between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, * * * on the other").

The *Loretto* categorical rule was expressly limited to "*permanent* physical occupation of property," and "*temporary* limitations on the right to exclude" were expressly distinguished. *Id*. at 434 & 435 n.12 (emphases added). As the Court explained, "temporary limitations [even if they result in a physical invasion of a property interest] are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not *absolutely* dispossess the owner of his rights to use, and exclude others from, his property." *Id.* at 435 n.12 (emphasis added).[6]

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[6] Petitioners' reliance (Br. 16, 22, 27) on *Hendler* v. *United States*, 952 F.2d 1364 (Fed. Cir. 1991), is misplaced. That case

The *Lucas* Court specifically analogized to *Loretto* when it found that a permanent restriction on development that rendered plaintiff's property "valueless" should be accorded "similar treatment" to the permanent physical invasion at issue in *Loretto*. 505 U.S. at 1020, 1029. In view of the fact that *Loretto* repeatedly emphasized that only permanent physical occupations are subject to its *per se* rule, there is no basis for assuming that the *Lucas* Court intended to ignore this distinction when addressing what it viewed as an analogous regulatory action.[7] There is simply no reason to extend the *Lucas* categorical approach, which applied to a permanent regulation that destroyed all the value of the subject property, to a temporary restriction on development that does not.[8]

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involved a physical invasion of property and the government's installation, with no indication that they would be removed, of wells "some 100 feet deep, lined with plastic and stainless steel, and surrounded by gravel and cement. Each well was capped with a cement casing lined with reinforcing steel bars, and enclosed by a railing of steel pipe set in cement." *Id*. at 1376. As the court concluded, "[t]here is nothing 'temporary' about the wells," which were "at least as 'permanent' in this sense as the CATV equipment in *Loretto*." *Id*. That was more than enough to satisfy the permanency requirement in *Loretto*; the *Hendler* court's further ruminations about the nature of that requirement were dicta inconsistent with *Loretto*. *See Juliano* v. *Montgomery-Ostego-Schoharie Solid Waste Mgmt. Auth.*, 983 F. Supp. 319, 326-327 (N.D.N.Y. 1997).

[7] To the contrary, the *Lucas* Court—citing *Loretto*—explained that "[w]here '*permanent* physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved * * * ." 505 U.S. at 1028 (emphasis added).

[8] Contrary to the implications in petitioners' brief (Br. 26), *City of Monterey* v. *Del Monte Dunes,* 526 U.S. 687 (1999), did not involve a temporary regulation, but rather a permanent denial of development. As the Court explained: "After five years, five formal decisions, and 19 different site plans [the developer concluded that] *the city would not permit development of the property under any circumstances*." *Id*. at 698 (emphasis added).

Nothing about the reasons this Court set forth as the "justification for [the *Lucas*] rule" suggests that the rule would apply to a temporary moratorium. *Lucas*, 505 U.S. at 1017. The first reason was that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Id*. As just explained, categorical treatment of physical occupation takings is expressly limited to *permanent* occupations. The second justification for the *Lucas* rule was that "in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned." *Id*. at 1017-18 (emphasis in original) (quoting *Penn Central*, 438 U.S. at 124, and *Pennsylvania Coal*, 260 U.S. at 415). That justification too is inapplicable in the case of a temporary moratorium, because a moratorium permits government to engage in a rational planning process that benefits the very owners subject to the moratorium. The third justification for the *Lucas* approach—that government would not be significantly affected because the situations in which government denies all economic use were "relatively rare," *id*. at 1018—does not apply to the relatively common use of temporary moratoria. *See supra* at 23.

Finally, the fourth justification for the *Lucas* rule—that leaving land "in its natural state" carries "a heightened risk that private property is being pressed into some form of public service," 505 U.S. at 1018—is also inapplicable here. Temporary moratoria do not require that land be permanently left in its natural state. Until the planning process is com-

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The taking that the Court found, based on the Court's view of the egregious nature of the City's actions, was converted to a temporary taking by virtue of the State of California's purchase of plaintiff's property during the pendency of the litigation. *See id.* at 700.

plete, and the range of future uses established, it cannot be said that an agency has opted to prohibit all use of affected properties. *See United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) ("the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking").[9]

B. Temporary Development Moratoria Neither Destroy All Economically Viable Use Of Property Nor Render Property Valueless, And Therefore Should Not Be Treated As Categorical Takings Under *Lucas*.

1. As recognized by Justice Holmes, the temporary nature of a regulation may be dispositive in assessing its validity: "The regulation is put and justified only as a temporary measure. A limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change." *Block* v. *Hirsh,* 256 U.S. 135, 157 (1921) (addressing constitutionality of temporary rent control measure). Petitioners are correct when they assert that "whether a *taking* is permanent or temporary is really not a valid constitutional distinction." Pet. Br. 24 (emphasis added). That is in essence what *First English* held. *See* 482 U.S. at 318, 321. Where petitioners err is in asserting the quite different proposition that whether a *regulation* is permanent or temporary is irrelevant in assessing whether it

[9] Although the impact of the 1984 and 1987 Plans is not before this Court, and is legally irrelevant given petitioners' facial challenge to the 32-month moratorium, petitioners nonetheless repeatedly characterize those plans as continuing a purported "rolling prohibition" on all economically beneficial use, as if—contrary to their theory—whether the *moratorium* effected a taking depends on the regional plans that followed it. *See*, *e.g.*, Pet. Br. 1, 2, 5, 7, 24. Neither court below ever addressed the merits of petitioners' takings challenge to the 1984 and 1987 Plans, and no record exists to assess such a challenge on the merits. In any event, what petitioners have to say about the 1984 and 1987 Plans—that they effected "a total prohibition of any use," Pet. Br. 2—is flat wrong. *See supra* at 10-11 & n.3.

gives rise to a taking in the first place. *See* Pet. Br. 14 ("the 'temporary' nature of the freeze is constitutionally irrelevant"); *id*. at 15 ("the concept of 'temporary' is doctrinally and constitutionally beside the point"). That is a different proposition altogether—one that flies in the face of *Penn Central*'s mandate to consider "the character of the government action"—and *First English* has nothing to say about that.

A temporary moratorium on development plainly does not render the subject property "valueless," as did the permanent prohibition at issue in *Lucas*. 505 U.S. at 1020. Rather, a development moratorium simply limits the landowners' ability to make present use of their property. At the risk of stating the obvious, property subject to a temporary moratorium retains value precisely because the moratorium is temporary. Pet. App. 37-38. Property that is worth $1 million because of the uses to which it may be put may become "valueless" when all those uses are permanently barred, *Lucas*, 505 U.S. at 1020, but that same parcel hardly suffers the same fate when uses are suspended for six months, or one year, or three years pursuant to a temporary moratorium. The market reflects the fact that the two situations are dramatically different, both in the character of the government action *and* in its impact on the property owner.[10]

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[10] *See*, *e.g.*, *The Appraisal of Real Estate* 137 (Am. Inst. Real Estate Appraisers, 7th ed. 1978) ("[P]urchasers of land will sometimes pay more for a parcel for its potential use than could be supported by a legally permitted present use. Such purchasers buy in anticipation of a reasonably expected change in the permitted use."); Leslie K. Beckhart, Note, *No Intrinsic Value: The Failure Of Traditional Real Estate Appraisal Methods To Value Income-Producing Property*, 66 S. Cal. L. Rev. 2251, 2287 (1993); *Effect Of Moratorium*, 51A *Fla. Jurisprudence 2d Tax'n* § 1168 (1999) ("The existence of a 'moratorium' is only one factor listed in the valuation statute. It should not be the sole consideration, absent any showing that the moratorium or delayed development is permanent."). *See also City of Newark* v. *Township of Hardyston*, 667 A.2d 193, 199 (N.J. Super. Ct. App. Div. 1995) (applying 10% discount to value of land subject to development moratorium),

Petitioners cannot and do not contend that a temporary moratorium renders the subject property "valueless," as did the ban at issue in *Lucas*. 505 U.S. at 1020. Their argument is instead the surprising one that "the 'value' of property is utterly irrelevant" in assessing whether a temporary moratorium gives rise to a *per se* taking. Pet. App. 92. Petitioners' claim is that *every* temporary moratorium on development is a *per se* taking because it bans all economically beneficial use—even if for only a short time, and even if the property actually *increases* in value because of the perceived benefits of the comprehensive planning facilitated by the moratorium.

This is a sharp departure from *Lucas*. It is true that the Court in that case spoke of regulation that "denies all economically beneficial or productive use of land." 505 U.S. at 1015. But the Court at least as often emphasized that the consequence of the regulation's denial of all economically viable use was to render the property valueless.[11] The fact that property subject to a moratorium retains value suffices to remove such cases from the *Lucas* categorical test.

In his separate concurring opinion in *Lucas*, Justice Kennedy made even more explicit the connection between the "economically viable use" inquiry and the "economic impact" inquiry. He stated that the trial court finding of no economically viable use "appears to presume that the property has no significant market value or resale potential." 505

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certification denied, 673 A.2d 277 (N.J. 1996); *Growth Properties, Inc.* v. *Klingbeil Holding Co.*, 419 F. Supp. 212 (D. Md. 1976) (land values *increased* during pendency of five-year moratorium on development); *Woodbury Place Partners* v. *City of Woodbury*, 492 N.W. 2d 258, 263 (Minn. Ct. App. 1992), *cert. denied*, 508 U.S. 960 (1993).

[11] *See*, *e.g.*, 505 U.S. at 1007 ("dramatic effect on the economic value"); *id.* at 1016 n.7 ("loss of value" and "diminution in (or elimination of) value"); *id.* at 1017 (" '[F]or what is land but the profits thereof[?]' ") (quoting 1 E. Coke, *Institutes*, ch. 1, § 1 (1st Am. ed. 1812); *id.* at 1019 n.8 ("a complete elimination of value"); *id*. at 1020 (subject property "rendered valueless").

U.S. at 1033-34. Here too, the touchstone of the judicial inquiry is "market value," including "resale potential," which is not eliminated for properties affected by reasonable, temporary moratoria. *See Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987) ("our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property"); *Suitum*, 520 U.S. at 731-732, 740-742 (determination as to whether property was deprived of all economically viable use could be made by testimony as to value).[12]

In short, the fact that property subject to a temporary moratorium retains value—unlike the property in *Lucas*, which was found to be "valueless," 505 U.S. at 1020—confirms that temporary moratoria are not subject to *per se* takings treatment under *Lucas*. A property's market value is, after all, a direct reflection of the valuable uses to which the property may be put. It is because of those potential uses that the property is valuable to prospective buyers.

2. Petitioners' repeated assertion that a development moratorium deprives property of all economically viable use is based not on sound economic theory, but rests instead on two erroneous suppositions: an equation of "economically viable use" with the ability *immediately* to develop property,

[12] Lower courts that have considered this issue likewise have found that the *Lucas per se* rule only applies to regulations that render property valueless. *Florida Rock Indus*. v. *United States*, 18 F.3d 1560, 1565 (Fed. Cir. 1994) (whether a categorical taking occurred depended upon property's "residual fair market value," not extent to which property could be developed), *cert*. *denied*, 513 U.S. 1109 (1995); *Stern* v. *Halligan*, 158 F.3d 729, 735 n.7 (3d Cir. 1998) (denial of all economically viable use under *Lucas* requires the "total destruction of value"); *Mock* v. *Department of Envtl. Res.*, 623 A.2d 940, 946 (Pa. Commw. Ct. 1993) (applying the absolute deprivation rule), *aff'd,* 667 A.2d 212 (Pa. 1995), *cert. denied*, 517 U.S. 1216 (1996); *Zealy* v. *City of Waukesha*, 548 N.W.2d 528, 532 (Wis. 1996) (holding that no taking can occur absent denial of all or substantially all value).

and a conceptualization of the affected property interest as corresponding precisely to the duration of the temporary moratorium. Under petitioners' view, if a property owner cannot develop his property *right now*, it has "no economically viable use." *Lucas*, 505 U.S. at 1020. But nothing in this Court's cases or the economic literature equates economically viable use with *immediate* use.

To put it another way, petitioners' theory that a temporary moratorium on development is a *per se* taking under *Lucas*, because it deprives the landowner of all economically viable use, necessarily assumes that the affected property interest is the right to develop the property *during the period of the temporary moratorium*. Only if the property interest is so defined can the temporary moratorium be said to have rendered *that* interest valueless, triggering coverage under *Lucas*. If the affected interest is viewed as normal fee ownership, a temporary moratorium obviously does not render that interest valueless, or take away all economically viable use—just immediate use.

This Court, however, has rejected the circular notion that, in assessing takings claims, the affected property interest can be defined by reference to the challenged regulation itself. As this Court made clear in *Penn Central*, " '[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130. The Court reiterated that view in *Keystone Bituminous Coal*, 480 U.S. at 496-502, which involved a takings challenge to a statute requiring a certain amount of coal to be kept in place to support the surface. The Court refused to regard the coal required to be left in place as the pertinent property interest in assessing whether the statute denied the owners of coal rights all economically viable uses. *See also Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) ("At least where an owner possesses a full 'bundle' of property rights, the

destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.").

More recently, in *Concrete Pipe & Products* v. *Construction Laborers Pension Trust,* 508 U.S. 602, 645 (1993), this Court rejected a severance argument substantively indistinguishable from the one petitioners press here. The case considered the claim of an employer that the imposition of liability for withdrawing from a pension plan was a taking, and the employer—like petitioners here—sought to avoid *Penn Central* and treat its case as a categorical taking under *Lucas*. The Court's analysis in turning aside that effort is worth quoting at length:

> We reject Concrete Pipe's contention that the appropriate analytical framework is the one employed in our cases dealing with permanent physical occupation or destruction of economically beneficial use of real property. * * * While Concrete Pipe tries to shoehorn its claim into this analysis by asserting that "[t]he property of [Concrete Pipe] which is taken, is taken in its entirety," we rejected this analysis years ago in *Penn Central*, 438 U.S. at 130-131, where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. [*Id*. at 643-644 (citations omitted).]

A contrary approach would result in finding a taking in virtually every case, because the property interest can always be defined so that it is completely obliterated by the regulation. Some cases posing this so-called "denominator" problem may be more difficult than others, *see generally Palazzolo*, 121 S. Ct. at 2465; *Lucas*, 505 U.S. at 1016-17 n.7, but there is no support for viewing the pertinent property

interest in *this* case as the right to develop the land during the particular period the moratorium was in effect.[13]

3. Petitioners' assumption that property owners have a right immediately to develop their property is inconsistent with the long line of cases finding that reasonable delays in the development process do not result in a taking. In *Agins* v. *Town of Tiburon*, 447 U.S. 255 (1980), for example, this Court applied well-established precedent to determine that, without evidence of unreasonable government conduct, "[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)). The *Agins* plaintiffs argued that their alleged inability to use or sell their property during the pendency of the city's unsuccessful condemnation proceedings constituted a regulatory taking. In rejecting this argument, this Court relied on the fact that the restriction on the property's use caused by the city's "good faith planning activities" was temporary in nature: "Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended." *Id.*

The holding in *Agins* is consistent with this Court's determination in *Riverside Bayview Homes*, 474 U.S. at 127, that the requirement that a property owner obtain a permit "before engaging in a certain use of his or her property does not itself 'take' the property in any sense." Implicit in such a finding,

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[13] Petitioners' analogy to cases involving the condemnation of leaseholds is inapt. What was temporarily barred was development, and while a leasehold is a familiar property interest, *see Lucas*, 505 U.S. at 1017 n.7, the right immediately to develop property is not, and it is *that* right that was affected by the moratorium in this case.

of course, is the premise that the process necessary to obtain a permit does not itself result in a taking.

This line of authority was reaffirmed in *First English*—the basket into which petitioners put all their eggs. We explain below how petitioners misread that case, which did not consider whether a temporary regulation constituted a taking, but rather whether a temporary taking triggered a requirement of compensation. But even in addressing the latter question the Court was careful to note that

> We limit our holding to the facts presented, and of course do 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.]

Under petitioners' bedrock view that duration is irrelevant, however, they have no explanation for why such "normal delays" present "quite different questions." For what is a delay in obtaining a building permit or a variance but a temporary freeze on development? Petitioners' theory of the case affords no basis for distinguishing a temporary moratorium from the sort of delays the Court carefully set apart in *First English*. Why should a four month moratorium automatically give rise to a *per se* taking, while a six month delay in obtaining a permit not do so? All petitioners have to say is that each of the delays referenced by the Court "illustrates a process in which a landowner is participating with the expectation—or at least the possibility—of obtaining development permission at the conclusion." Pet. Br. 28. But that is certainly the case with respect to temporary moratoria as well. Landowners are typically active participants in the planning process facilitated by such moratoria—petitioners certainly were here, *see* Def. Ex. 320 at 7—and there is no basis for assuming—particularly on this facial challenge—

that any plan adopted after a moratorium would violate the Constitution by prohibiting all use by the owner.[14]

In sum, petitioners are quite wrong in maintaining that "the 'temporary' nature of the freeze is constitutionally irrelevant." Pet. Br. 14. It is relevant in removing temporary moratoria from the carefully circumscribed scope of *per se* takings, and it is relevant on each of the three *Penn Central* factors—the impact on the owner, the reasonable investment-backed expectations of the owner, and the character of the government action. Just as this Court in *Loretto* expressly recognized that a temporary physical invasion was not the same as a permanent physical invasion, and did not trigger the same *per se* treatment under the Takings Clause, so too a temporary development moratorium is not the same as a permanent ban on development, and should not trigger the same *per se* treatment under *Lucas*.[15] Petitioners' sole

[14] Several of petitioners' amici would draw the line between "normal delays" of the sort referred to in *First English* and moratoria that give rise to *per se* takings based on the length of the delay. *See*, *e.g.*, Small Property Owners Br. 18-19 (need not decide distinction; two decade delay here is excessive); Defenders of Property Rights Br. 16 (arguing, on the same page, that "extraordinary delays" may give rise to a taking, and that "The key question * * * should not be how long a regulation is imposed"); Institute for Justice Br. 5 ("Even if these moratoria were covered [by the 'normal delays' provision], in this instance, the delays in question surely count as 'excessive' and not 'normal' "). If they are correct that whether a moratorium gives rise to a taking depends on its duration, petitioners' *per se* takings claim must fail.

[15] *See*, *e.g.*, *Williams* v. *City of Central*, 907 P.2d at 704 ("a temporary limitation on property use, resulting from otherwise good faith, reasonable institution of a moratorium to bring about effective governmental decision making does not result in a categorical taking"); *Woodbury Place Partners*, 492 N.W.2d at 263 ("The three-factor inquiry of *Penn Central*, rather than the categorical rule of *Lucas*, applies to determine whether a compensable taking occurred" from temporary moratorium.); *Kelly* v. *TRPA*, 855 P.2d at 1033-34 (same); *Santa Fe Village Venture* v. *City of Albuquerque*, 914 F. Supp. 478, 483 (D.N.M. 1995) (same); *Zilber* v. *Town of Moraga*, 692 F. Supp. 1195, 1202-05 (N.D. Cal. 1988) (same); *Tocco* v. *New Jersey Council on Afford-*

response is that this Court has already ruled otherwise in *First English*. It is to that contention that we now turn.

C. Contrary To Petitioners' Assertions, *First English* Does Not Hold That A Temporary Development Moratorium Is A *Per Se* Taking.

Nothing in *First English*, or, for that matter, Justice Brennan's dissent in *San Diego Gas & Electric*, 450 U.S. 621, requires or even suggests that a temporary moratorium on development be treated as a *per se* taking. Indeed, notwithstanding petitioners' repeated and profound misreading of the Court's holding in *First English,* the Court never reached the merits of the takings issue, even in dictum. In *First English*, the California appellate court had affirmed the trial court's

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able Housing, 576 A.2d 328, 330 (N.J. Super. Ct. App. Div. 1990) (same), *certification denied*, 585 A.2d 401 (N.J.), *cert. denied,* 499 U.S. 937 (1991).

None of the cases cited by petitioners for the proposition that temporary development moratoria can result in a taking supports their *per se* rule. *See* Pet. Br. 25 n.30. Rather, for the most part, these cases either did not involve temporary development moratoria or, where they did, the courts evaluated the moratoria at issue under the *Penn Central* balancing test. *See*, *e.g.*, *Eastern Minerals Int'l, Inc.* v. *United States*, 36 Fed. Cl. 541 (1996) (relying on *Penn Central* to evaluate takings claim); *Schiavone Constr. Co.* v. *Hackensack Meadowlands Dev. Comm'n*, 486 A.2d 330 (N.J. 1985) (constitutionality of temporary development moratorium turns on its reasonableness); *Lomarch Corp.* v. *Mayor of Englewood*, 237 A.2d 881 (N.J. 1968) (requiring payment of compensation where city land use maps identified plaintiff's property for purchase as public park); *Corn* v. *City of Lauderdale Lakes*, 95 F.3d 1066 (11th Cir. 1996) (remanding for consideration of constitutionality of temporary development moratorium under *Penn Central* factors), *cert. denied*, 522 U.S. 981 (1997); *Steel* v. *Cape Corp.*, 677 A.2d 634 (Md. Ct. Spec. App. 1996) (evaluating permanent zoning ordinance); *Keshbro, Inc.* v. *City of Miami*, ___ So. 2d ___, 2001 WL 776555 (Fla. July 12, 2001) (finding taking by virtue of closure of apartment building but distinguishing the closure from TRPA's moratorium because the moratorium involved regulation of land use, not denial of the dedicated use of property).

dismissal, at the pretrial stage, of the plaintiff's claims for monetary compensation on the ground that California law did not provide for monetary damages for a regulatory taking. In reaching this conclusion, the California courts did not reject the allegation in plaintiff's complaint that its property had been taken, but found that under California law, even if such an allegation were true, the only available remedy was to strike down the challenged regulation. *See First English*, 482 U.S. at 311-312.

Thus, the issue presented to this Court was not what constitutes a taking, but the "remedial question" of whether, *once a taking is established*, compensation can be avoided by the government's "[i]nvalidation of the ordinance * * * [and] converting the taking into a 'temporary' one." *Id.* at 311, 319. The Court had attempted to address this very issue on four previous occasions, but each time finality considerations with respect to the merits of the takings claim had prevented the Court from reaching the remedy issue. *Id.* at 311.[16] In *First English*, however, the California courts had ruled on the available remedy for a taking *assuming* that the complaint's allegations were true, and this Court found that in this procedural posture the remedy issue was at last properly presented. *Id*. at 311-313.

Notwithstanding petitioners' repeated attempts to convey the impression that the Court actually determined that a taking had occurred in *First English,* this Court specifically declined to review the merits of the takings claim. The Court expressly "reject[ed] [the] suggestion that * * * we must * * * resolve the takings claim on the merits before we can

[16] In *San Diego Gas & Electric*, for example, the majority determined that no final decision had been rendered by the California courts on the merits of plaintiff's takings claim, and that therefore the remedy issue was not properly presented. 450 U.S. at 633. In his dissent, Justice Brennan argued that the remedy issue was properly presented, but similarly declined to address the merits of the takings claim. *Id.* at 646, 661 n.27.

reach the remedial question." *Id*. at 312-313. Leaving no question as to the scope of its holding, this Court stated "[w]e merely hold 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." *Id.* at 321 (emphasis added). The Court, accordingly, expressly stated that it had "no occasion to decide whether the ordinance at issue actually denied appellant all use of its property * * * . These questions, of course, remain open for decision on the remand we direct today." *Id.* at 313.

Indeed, on remand, the California court of appeal explicitly found that the regulation at issue did *not* result in a taking of property, even though it prevented the construction of any structures on the plaintiff's property for a period of two and one-half years.[17] 258 Cal. Rptr. 893, 906 (Ct. App. 1989) ("We do not read the U.S. Supreme Court's decision in *First English* as converting moratoriums and other interim land use restrictions into unconstitutional 'temporary takings' requiring compensation unless, perhaps, if these interim measures are unreasonable in purpose, duration, or scope."), *cert. denied*, 493 U.S. 1056 (1990). That ruling, of course, would not have been possible had this Court already held that the temporary moratorium was in fact a taking.

Petitioners thus confuse this Court's ruling that compensation is the required remedy once a regulatory taking has been found with a ruling on the merits of a takings claim. *First English* simply rejected the doctrine previously adhered to by California that invalidation of an ordinance that had resulted

[17] Contrary to petitioners' claim that the temporary regulation in *First English* was in effect for only two years and therefore was consistent with the time limit on certain types of moratoria in California (Pet. Br. 26), the interim ordinance was in effect for a total of two years and seven months—just one month less than the TRPA moratorium. *See* 258 Cal. Rptr. at 903-904 (interim ordinance adopted January 11, 1979, permanent ordinance adopted August 11, 1981).

in a taking provided a constitutionally sufficient remedy. Although a government agency responsible for a taking may limit its damages by invalidating a regulation, it cannot avoid its constitutional obligation to pay just compensation for the period the restriction was in effect.

That is, however, not to say that *all* temporary restrictions on development result in a temporary taking, regardless of their purpose, length, terms, or impact. At most, the decision in *First English* supports the far narrower proposition that a temporary restriction on development *may* constitute a taking in certain circumstances—a proposition that we do not and the court of appeals below did not dispute. *See* Pet. App. 38, 40. *First English* is properly silent as to the circumstances under which a regulation, including temporary restrictions, goes so far as to result in a taking, explicitly noting that its decision did not address 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 * * * ." 482 U.S. at 321. In view of this express statement from the Court, the effort of petitioners and virtually every amici to transform the limited ruling in *First English* into the broad proposition that temporary restrictions on development are the equivalent of a temporary taking must be rejected.

D. Petitioners Themselves Betray Their Discomfort With The Categorical Rule They Urge Upon This Court.

In the end, even petitioners themselves cannot bear the weight of their extreme argument. Although they stress that time does not matter in takings analysis and, likewise, that the factors leading to the moratorium are wholly irrelevant, petitioners undercut their own theory of the case. They do so by repeatedly mischaracterizing the TRPA moratorium as an unduly long series of rolling prohibitions (Pet. Br. 1, 2, 5, 13-14, 24), as unnecessarily stringent because it is stricter than

the limitations set forth in the Compact itself (*id*. at 3-4), and otherwise unreasonable in contrast to a typical moratorium that they acknowledge might serve legitimate planning purposes, such as a "time out" needed for comprehensive planning (*id*. at 4-5 & n.5). We strongly disagree with these characterizations but, more fundamentally, they are all irrelevant under petitioners' own *per se* takings analysis. Petitioners made "a calculated choice" to pursue only a facial *Lucas* claim, Pet. App. 90, and have made clear that the length of a moratorium or its purpose simply do not matter under their theory. Pet. Br. 17, 43, 47. Moreover, the district court made findings supporting the reasonableness of TRPA's moratorium, including its purpose, scope, and duration. Pet. App. 83-92. Petitioners never challenged those determinations, *id*. at 18-19, and it is simply too late in the day to assert such fact-specific claims before this Court.

Finally, petitioners implicitly acknowledge the radical nature of their argument when, in the closing pages of their brief, they make the half-hearted suggestion that this Court develop yet another test (the "substantial adverse impact" test) to evaluate their takings claim. *See* Pet. Br. 46-49. As long as this litigation has been pending, petitioners have never before raised this "alternative test," and it is too late to do so now. *See*, *e.g.*, *United States* v. *United Foods, Inc.*, 121 S. Ct. 2334, 2341 (2001) ("Although in some instances we have allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below, it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it.") (citation omitted). What is more, petitioners fail to identify the precedential support or doctrinal rationale for this seat-of-the-pants test, or to explain how it would be applied to the facts of this case, or to any other case. Their "substantial impact rule" (Pet. Br. 49) would appear to

elevate one factor in the *Penn Central* analysis above all others, even though this Court recently rejected such an attempt just last Term in *Palazzolo*. *See* 121 S. Ct. at 2463; *id*. at 2465-66 (O'Connor, J., concurring). For the same reasons that petitioners cannot revive the *Penn Central* claim they strategically waived before the district court and court of appeals, *see infra* at 45-47, they also cannot mount a bob-tailed *Penn Central* claim tailored to their particular facts or—more accurately—their particular version of "facts" they elected not to litigate below.

II. THE FACT-SPECIFIC INQUIRY SET FORTH IN *PENN CENTRAL* AND SUBSEQUENT SUPREME COURT PRECEDENTS PROVIDES THE APPROPRIATE TEST FOR EVALUATING TEMPORARY DEVELOPMENT MORATORIA.

The conclusion that the mere enactment of a temporary moratorium does not always constitute an automatic taking is sufficient to dispose of petitioners' facial claim of a *per se* taking—the only claim at issue here. But contrary to petitioners' assertions, that does not mean that temporary moratoria are somehow immune from constitutional scrutiny under the Takings Clause. That was not the position of the court below, *see* Pet. App. 38, 40, and is not and never has been our position. What it means is that temporary moratoria—like the vast range of regulatory actions—are subject to scrutiny under the generally applicable *Penn Central* test. Whether a *particular* moratorium gives rise to a taking "depend[s] on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo*, 121 S. Ct. at 2457 (citing *Penn Central*, 438 U.S. at 124). That is a sufficient "constitutional counterweight" (Pet. Br. 38) to constrain government officials in all but the "relatively rare situations" subject to *per se* analysis, *Lucas*, 505 U.S. at 1018, and it is sufficient here.

A. Lower Courts Have Traditionally Applied The *Penn Central* Factors To Assess Temporary Moratoria.

1. In evaluating the character of a government action, *Penn Central* emphasizes that a regulatory program designed to adjust "the benefits and burdens of economic life to promote the public good" is much less likely to result in a taking than government actions that single out an individual property owner to bear a burden that should be shared by the public as a whole. 438 U.S. at 123-124. While recognizing that land use regulation will inevitably burden some property owners more than others, the *Penn Central* Court expressed a strong reluctance to find a taking with respect to regulations that are broadly applied, are part of a comprehensive planning program, and promote the general welfare of the community. *Id.* at 133-135.

A reasonable temporary moratorium designed to facilitate comprehensive planning should fit comfortably within this class of regulations, *see* Robert H. Freilich, 49 J. Urb. L. at 66-67; Elizabeth Garvin & Martin Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, Land Use L. Zoning Dig. 3 (June 1996), and in fact courts considering the character of government action in assessing temporary moratoria under *Penn Central* have frequently noted that forestalling a rush to develop to facilitate a rational planning process carries significant benefits for all affected landowners. *See*, *e.g.*, *Kelly* v. *TRPA*, 855 P.2d at 1035. Conversely, moratoria that are not reasonably related to efforts to establish a comprehensive land use plan may be more likely to be found to give rise to a taking. *See*, *e.g.*, *Q.C. Const. Co.* v. *Gallo,* 649 F. Supp. 1331, 1337-38 (D.R.I. 1986) (finding that an unreasonable moratorium on sewer connections that was not part of a plan to remedy the town's sewer problems and that substantially reduced the value of plaintiffs' property resulted in a taking), *aff'd*, 836 F.3d 1340 (1st Cir. 1987).

The scope of any moratorium is also pertinent in assessing the character of the government action. A moratorium that applies broadly over a large geographic area so that an agency may develop a land use plan to serve an entire community is less likely to present the risk that a small group of individuals is being forced to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong,* 364 U.S. at 49. *See* Garvin & Leitner, *supra*, at 4; Pet. App. 86 ("TRPA's actions had wide-spread application, and were not aimed at an individual land-owner"). Conversely, a more focused moratorium or one with a more discrete impact may be more likely to be found to constitute a taking.

The tailoring of the development restrictions in a moratorium is also pertinent in weighing the character of the government action under *Penn Central*. A moratorium should correspond to the interim development threat creating the need for it. *See* Garvin & Leitner, *supra*, at 4 (identifying type of development and geographic area as key considerations in crafting effective interim development controls). Here TRPA adopted limits on the precise type of development that most threatened the Lake. As the district court specifically found: "Lake Tahoe was losing its clarity due to increased development in the Basin, especially in high hazard lands. Thus limiting development on high hazard lands is a direct and reasonable way to combat the problem." Pet. App. 90-91. *See id*. at 86 ("it is difficult to see how a more proportional response could have been adopted"). A moratorium on types of development that do not threaten the integrity of the pending planning process would be more likely to give rise to a taking.

And, of course, the duration of any temporary moratorium is an important factor in assessing the character of the government action, as well as the economic impact on property owners. *See*, *e.g.*, *Schiavone Const. Co.*, 486 A.2d at 333 ("courts should consider the reasonableness of the

duration of any moratorium on development"). The complexity of the underlying planning issues is pertinent in weighing the reasonableness of the duration—three years may be reasonable in some cases; six months may be too long in others. Certainly we agree with petitioners (Pet. Br. 37) that temporary planning moratoria that are *not* tied to an ongoing planning process, or that are abused to block development indefinitely, should be more likely to give rise to a taking. We doubt the instances of such abuse are as widespread as petitioners seem to suppose, but the *Penn Central* analysis certainly is flexible enough to smoke out instances in which the land use planning process has gone awry and a permanent ban masquerades as a temporary moratorium, while at the same time affording adequate time for situations such as this case, where underlying scientific complexity, multiple jurisdictional interests, the need for broad public participation (including by affected property owners themselves), and the high environmental stakes combine to pose a more involved planning challenge. *See* Pet. App. 74.

2. Courts also have no difficulty assessing the economic impact on property owners caused by temporary moratoria. As noted, an important consideration in weighing this aspect of the *Penn Central* test is the recognition that a moratorium's impact on value is mitigated by its temporary nature. *See Williams*, 907 P.2d at 704; *Kelly*, 855 P.2d at 1034. Temporary development limitations imposed by a moratorium do not prohibit all development, but merely delay it pending adoption of a plan or other land use regulation. That delay may result in a diminution in the value of the property, *see City of Newark*, 667 A.2d at 199, and such diminution is a pertinent factor in the *Penn Central* analysis. In certain circumstances, the delay may have a significant adverse impact on value. *See*, *e.g.*, *Eastern Minerals Int'l,* 36 Fed. Cl. at 550 (finding taking under *Penn Central* when "[t]he Government delayed consideration of plaintiff's permit application for an extraordinary length of time"). At the

same time, the prospect of future orderly development within the framework of a comprehensive land use plan may increase the value of property subject to a temporary moratorium. In particular, a moratorium that halts a chaotic race to develop—a race in which not all property owners will be winners—and allows the substitution of a more coherent process of controlled growth, could well increase property values across the board. Again, the *Penn Central* test allows consideration of each unique situation on its own facts.

Courts have also considered the impact of temporary moratoria on reasonable investment-backed expectations. Excessive delays in the development process may interfere with a property owners' reasonable, investment-backed expectations, but property owners have no right to *immediate* development of their property. Normal fluctuations in value during the planning process are "incidents of ownership," and do not give rise to a taking. *Agins*, 447 U.S. at 263 n.9; *Riverside Bayview*, 474 U.S. at 127. Here again what is reasonable will vary from case to case. In this case, for example, the district court found that property owners in the Tahoe Basin held their property for an average of 25 years prior to development. In light of that fact, the 32-month delay caused by Ordinance 81-5 and Resolution 83-21 did not unduly interfere with any reasonable investment-backed expectations the owners might have had. Pet. App. 88-89.

B. Petitioners Cannot Pursue A *Penn Central* Takings Claim Before This Court.

1. Having relied exclusively on the facial claim that TRPA's actions resulted in a categorical taking of their property under *Lucas* and *First English,* petitioners never contended that TRPA's actions resulted in a taking under *Penn Central.* Petitioners claimed in their trial briefing that the balancing test articulated in *Penn Central* did not apply to this case and they therefore affirmatively declined to address the *Penn Central* factors. Plaintiffs' Trial Br. at 13-14.

In contrast, TRPA specifically argued that *Penn Central* was controlling, and that under that analysis no taking had occurred. Defendants' Trial Br. at 38-45. TRPA produced extensive factual evidence concerning the factors relevant under *Penn Central*, including expert testimony demonstrating that properties affected by TRPA's moratorium retained economic value during the pendency of the moratorium (*see*, *e.g.*, J.A. 131-134), extensive (and unchallenged) evidence concerning the harm to the Lake that would occur without limits on the spiraling race to develop pending adoption of a regional plan (Pet. App. 28 n.15, 81-82, 89), and evidence demonstrating that petitioners did not have a reasonable, investment-backed expectation that they would be able to develop their properties during the 32-month period the moratorium was in effect. *Id*. at 88-89.

After due consideration of this evidence, the district court found that TRPA's actions did not result in a taking under *Penn Central.* In reaching this conclusion, the court specifically considered and made findings with respect to each of the *Penn Central* factors. *Id*. at 88-93.

2. On appeal, TRPA challenged the district court's ruling that its moratorium resulted in a *per se* taking under *Lucas,* but petitioners chose not to challenge the lower court's adverse *Penn Central* ruling. The court of appeals expressly acknowledged petitioners' failure to appeal the district court's ruling under *Penn Central*: plaintiffs "stated explicitly on this appeal that they do not argue that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*." Pet. App. 19. Relying on petitioners' express disclaimer, the appellate court focused primarily on the sole issue on appeal—the district court's determination that TRPA's actions resulted in a *per se* taking. *See id*. at 3 ("The principal question on this appeal is whether a temporary planning moratorium, enacted by TRPA to halt development while a new regional land-use plan was being devised, effected a taking of each plaintiff's property

under the standard set forth in *Lucas*"). Although the court of appeals did not conduct an extensive analysis of the *Penn Central* factors—the issue was not pertinent given petitioners' tactical litigating decision—it did find that the district court's conclusions in this regard were clearly correct. *Id*. at 40.

3. Petitioners' failure to address *Penn Central* at trial and on appeal carried through to its petition for certiorari, which did not even cite the decision. Likewise, petitioners' opening brief before this Court cites *Penn Central* only once in passing (Pet. Br. 36) and—consistent with their decision not to present a *Penn Central* claim—does not attempt to address the applicability of the *Penn Central* balancing test to temporary development moratoria. The question whether the particular moratorium at issue in this case gives rise to a taking under *Penn Central* is therefore not before the Court. *See NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 140 (1998) (declining to consider antitrust claim under rule of reason based on particular facts when questions presented "were limited to the application of the *per se* rule"). Also not before the Court is petitioners' hastily-cobbled "substantial adverse impact" test (Pet. Br. 47-49), a variant of the *Penn Central* test raised for the first time in petitioners' opening brief before this Court.

This Court's practice is to "deal with the case as it came here and affirm or reverse based on the ground relied on below." *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988). *See Heller* v. *Doe*, 509 U.S. 312, 319 (1993) (Court should "decide this case as it has been presented to the courts whose judgments are being reviewed"). All that is before this Court, and all that was before the courts below, is petitioners' facial claim of a categorical taking. Because the mere enactment by TRPA of its temporary moratorium was not a *per se* taking, the judgment of the court of appeals should be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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