No. 08-668

In The Supreme Court of the United States

CHARLES A. PRATT CONSTRUCTION CO., INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, CALIFORNIA BUILDING INDUSTRY ASSOCIATION, BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AND HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to provide a national advocate for the housing and shelter industry. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 235,000 members are homebuilders and/or remodelers, and its members build about 80 percent of the new homes produced each year in the United States.

NAHB is also a vigilant advocate for homebuilders in the nation's courts, and it frequently participates as a party litigant and amicus curiae to protect the property rights and interests of its members. NAHB was a petitioner, for example, in *NAHB v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007). Attached as Appendix A to this brief is a list of cases in which NAHB has appeared before this Court as amicus curiae or "of counsel." A significant number of those cases involved landowners and other parties aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief. Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

The California Building Industry Association ("CBIA"), a state affiliate of NAHB, is a statewide trade association that represents approximately 5,600 members, including homebuilders, trade contractors, architects, engineers, designers, suppliers, and other industry professionals. CBIA members design and construct California's housing. CBIA's purpose is to advocate on behalf of the interests of its members, including representation in regulatory matters and in litigation affecting the ability of its members to provide housing, and office, industrial, and commercial facilities for residents of California.

Building Industry Legal Defense Foundation ("BILD") is a nonprofit, mutual benefit corporation and wholly controlled affiliate of the Building Industry Association of Southern California (BIA/SC). BIA/SC is a nonprofit trade association representing more than 1,700 member companies. The mission of BIA/SC is to promote and protect the building industry, and aid in its members' efforts to provide homes for all Southern California. BILD's purposes are to monitor developments in the law, to improve the business climate for the construction industry in Southern California, and to defend the legal rights of current and prospective home and property owners. To accomplish this mission, BILD participates in and supports litigation necessary for the protection of such rights, with special emphasis on cases having a regional or statewide significance.

Home Builders Association of Northern California ("HBANC") is a nonprofit association of more

than 800 members, representing the interests of homebuilders, home buyers, and thousands of employees throughout the San Francisco Bay Area. HBANC's members include builders, developers, contractors, sub-contractors, suppliers, architects, engineers, planners, and other professions and trades involved in providing housing opportunities for Californians in all income ranges, across a wide range of diverse communities.

Amici Curiae and the numerous homebuilders, land developers, and industry professional consultants that their respective organizations represent, are vitally concerned with providing much-needed housing to families in California and throughout the nation. To that end, homebuilders and land developers participate in and support intelligent and careful planning, involving local, regional, state, and federal agencies, to promote the approval of high-quality housing development.

The increasingly complex structure of the land use regulatory system stands as an obstacle to housing development. Against this backdrop, the holdings of this Court in *Penn Central Transportation Company v. City of New York,* 438 U.S. 104 (1978) and *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985), have led increasingly to harsh and unfair rulings by lower courts on claims of regulatory takings by homebuilders and land developers. Further, many local jurisdictions hide behind the rulings in those two cases to create administrative delay, spuriously justify denials of

projects, and impose unreasonable conditions even when approving a project, thus stifling the provision and increasing the costs of housing.

The uncertainty produced by the *ad hoc* fact-based approach of *Penn Central,* and the *Williamson County* "final determination" test for ripeness review, have resulted in crippling delays and, in some cases, the abandonment of otherwise well-conceived and badly needed development projects. As noted by Professor Eagle:

> In the very nature of things, the enjoyment of property rights through the development of land into socially useful projects such as residential subdivisions, stores, offices, and entertainment centers is fraught with risk. In particular, delay is potentially ruinous to developers, since interest charges and taxes tick away, attorney fees pile up, and risks of weather, strikes, and changing markets are ever present. On the other hand, planners and municipal attorneys are paid from tax revenues. While not downplaying the legitimate governmental concern about takings liability, in almost all cases municipalities have far superior resources to withstand delays than landowners. Institutions that promote delay, like both the "final determination" and "state compensation" prongs of *Williamson County*, inject a systematic bias in favor of the regulator and against the regulated in all their dealings. This is why administrative delay remains a powerful tool.

Steven J. Eagle, *Regulatory Takings* § 8-6(f) at 1112 (3d ed. 2005).

The potential delay and uncertainty created by the holdings in *Penn Central* and *Williamson County* (among other factors) in many cases substantially add to the cost of housing, putting houses and even rents out of reach for too many Americans. *See generally,* John M. Quigley & Larry A. Rosenthal*, The Effects of Land Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?*, 8(1) Cityscape: A Journal of Policy Development and Research 69 (2005).

SUMMARY OF ARGUMENT

This case vividly demonstrates why this Court should reexamine and provide guidance regarding the three-prong test enunciated 30 years ago in *Penn Central* for determination of whether a regulatory taking has occurred. Since that time, there has been confusion in lower court rulings as to how to properly apply the *Penn Central* standards. In addition, government agencies have exploited the confusion in order to unjustifiably deny development project applications, but avoid regulatory takings claims.

The instant case presents just the latest example of the misuse of *Penn Central* to deprive a landowner of the ability to obtain judicial relief from a regulatory taking. After an exhaustive and expensive permitting process (more than eight years to obtain

approvals from San Luis Obispo County), the California Coastal Commission ("Coastal Commission"), relying on the ***County's*** Local Coastal Program ("LCP"), reversed the County's approval of a coastal development permit needed for the project, after another ten months of delay.

The record reveals beyond reasonable dispute that the Coastal Commission will not approve the project in any form that would meet reasonable investment-backed expectations. But the lower courts would not permit Pratt to go to trial. If *Penn Central* is the obstacle, the Court should clarify how it applies in this all-too-common circumstance.

The *Williamson County* "final decision" standard is also in need of reexamination and clarification.

The land use regulatory process has become increasingly complex and time-consuming, especially where multi-jurisdictional approvals and permits are required. Pratt was subjected to an exhaustive, time-consuming and expensive land use approval process for 41 residential lots, spanning over nine years. The County approved the project after eight years, and the Coastal Commission reversed the County's approval of the Coastal Development Permit after another ten months, on grounds that preclude ***any*** development of the property that would meet Pratt's reasonable investment-based expectations.

Pratt made a meaningful application (*Williamson County*) for development of a very modest project. If Pratt's case is not ripe now, judicial relief for Pratt,

and all those in similar straits, will become little more than a vain hope. This Court's intervention is required to restore confidence in the efficacy of the judicial process.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE IN ORDER TO PROVIDE CLEAR GUIDANCE TO LOWER COURTS ON THE APPLICATION OF THE *PENN CENTRAL AD HOC* FACTUAL DETERMINATION TEST.

The first question presented by the Petition is whether the *ad hoc* factual determination required by *Penn Central* allows a California court to hold, as a matter of law, that land use regulations do not effect a regulatory taking if 20% of a parcel can be developed.

Under *Penn Central*, in order to determine whether a regulatory taking has occurred, where there is no physical invasion of property and the landowner is not otherwise deprived of all economically beneficial use, this Court established a three-prong test for engaging in an *ad hoc* factual inquiry that considers (1) the economic impact of regulation on the landowner, (2) the extent to which it has interfered with distinct investment-backed expectations, and (3) the nature of the governmental action. *Penn Central*, 438 U.S. at 124. Here, Pratt never got

to make its case factually, since the trial court denied all relief as a matter of law. The Court of Appeal affirmed, primarily on the ground that the claim was not ripe.

The lack of guidance and more definite standards have allowed local land use permitting jurisdictions to "just say no" to development applications, without providing guidance as to project revisions that would be acceptable and approvable, at the same time attempting to sidestep claims of regulatory taking. As a matter of policy, the landowner should be allowed to present those facts to a court for determination of whether, under *Penn Central,* a regulatory taking has occurred.

Pratt's county-approved development plan called for 100 of the 124 acres (approximately 80%) to be preserved from development, primarily because of the existence of an environmentally sensitive habitat area ("ESHA"). Pratt sought the development of only 41 homes on the remaining 24-acre parcel, a dramatic reduction from the 149 homes originally proposed in 1973. The Court of Appeal held, as a matter of law, that because 20% of the tract remained theoretically available for development, no regulatory taking could occur. The court implied moreover that the Coastal Commission might be amenable to approving a less intense project.

Pratt was therefore denied the right to prove at trial that, in effect, a regulatory taking had occurred: based upon certain of the Coastal Commission's

findings, no project of any type would be approved, as demonstrated below.

As asserted by Pratt, the Coastal Commission concluded, among other things, that the property could not be served by a local water service provider, which had provided a "can and will serve" letter. The Coastal Commission based its conclusion on the stated ground of LCP requirements that preclude water service to the property by off-site water sources because the property was outside the boundaries of an urban service line. As applied to the property, the LCP requirements bar the use of outside water sources, even though there is no available on-site source of water and Pratt was able to secure an off-site source.

Pratt should be allowed to prove at trial that the Coastal Commission will allow no development of the property, thus constituting a taking, because of (1) a regulation precluding the importation of water to the property, where the property could not otherwise generate a water supply, (2) other preclusive findings related to aesthetics and views, (3) the establishment of an ESHA on 80% of the property, and (4) the preservation of the property for an endangered species. Petition at 8-9.[2]

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[2] As this Court stated in *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001), "once it becomes clear that the agency lacks the discretion to permit any development, or the permissible

(Continued on following page)

Pratt was barred from presenting evidence of a taking under *Penn Central*, taking into consideration the economic impact of the regulation on Pratt, the extent to which it had interfered with its reasonable investment-backed expectations, and the nature of the governmental action. Landowners need further guidance from this Court on *Penn Central* review, or they will be faced with takings that are, in fact, total, but for which there is no hope of effective relief in the courts.

II. THE *WILLIAMSON COUNTY* RIPENESS STANDARD MUST BE REFINED TO ACCOUNT FOR THE COMPLEXITY OF THE LAND USE REGULATORY PROCESS.

In this case, the trial court granted judgment as a matter of law to the Coastal Commission, on the ground that Pratt's claim was not ripe for adjudication. The Court of Appeal affirmed. Pursuant to the first prong of the *Williamson County* ripeness test, a regulatory takings claim is not ripe until the governmental entity implementing the regulation has reached a final decision. *Williamson County*, 473 U.S. at 16. The finality requirement has been interpreted as requiring at least one meaningful development proposal. *See Carson Harbor Vill. LTD. v. City of Carson*, 37 F.3d 468, 474 (9th Cir. 1994); *see also*

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uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."

Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1455 n.6 (9th Cir. 1986) (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n.8 (1986)). Under *MacDonald, Sommer & Frates*, rejection of "exceedingly grandiose development plans" does not imply that less ambitious plans will also be denied; therefore, a proposal for a particularly intense use of property does not constitute a meaningful application for *Williamson County* purposes. *MacDonald, Sommer & Frates*, 477 U.S. at 353 nn.8-9. It cannot be reasonably disputed that Pratt submitted a meaningful, not a "grandiose," application.

As stated in the Petition, Pratt submitted to the County a proposal for 41 residential lots, reduced from the 149 residential lots originally proposed in 1973, to be developed on only 20% of its acreage. Thereafter, Pratt worked with the County for more than eight years, finally receiving approval from the County Board of Supervisors. An Environmental Impact Report ("EIR") under the California Environmental Quality Act ("CEQA") was prepared for the project,[3] which, according to the Petition, included

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[3] Cal. Pub. Res. Code §§ 21000-21177 (CEQA); Cal. Code of Regs. tit. 14, §§ 15000-15387 (CEQA Guidelines). As noted in Stephen L. Kostka & Michael H. Zischke, *Practice Under the California Environmental Quality Act* § 1.1 at 2 (2nd ed. 2008):

> CEQA applies to most public agency decisions to carry out, authorize, or approve projects that could have adverse effects on the environment. Unlike most environmental laws, CEQA does not regulate project implementation through substantive regulatory standards

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extensive analysis of ten different alternative development proposals.[4] The Coastal Commission, however, not only denied the Coastal Development Permit for the County-approved project, but also impliedly

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> or prohibitions. Instead of prohibiting agencies from approving projects with adverse environmental effects, CEQA requires only that agencies inform themselves about the environmental effects of their proposed actions, carefully consider all relevant information before they act, give the public an opportunity to comment on the environmental issues, and avoid or reduce significant environmental impacts when it is feasible to do so.

For purposes of CEQA and the CEQA Guidelines, the County acted as the "Lead Agency" since it had primary responsibility for carrying out or approving the project. Cal. Code Regs. tit. 14, § 15367. The Coastal Commission acted as a "Responsible Agency" since, although not having primary responsibility for carrying out or approving the project, nevertheless had discretionary approval powers over the project through the Coastal Development Permit process. *Id.* § 15381. Other governmental agencies which may have approval or permitting authority over the project are additionally deemed to be Responsible Agencies for the purposes of CEQA.

[4] It is an essential policy of CEQA that Public Agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures which substantially lessen the significant environmental effects of such projects. Cal. Pub. Res. Code § 21002. The term "feasible" is defined to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors." *Id*. § 21061.1. CEQA Guidelines § 15126.6 provides the standards for considering a reasonable range of alternatives to the project, or the location of the project, which would feasibly attain most of the project's basic objectives, but would avoid or lessen significant effects of the project.

rejected all the ten alternatives analyzed in the EIR, stating that it could not modify the project (including altering any of the alternatives), because "revisions that would be necessary . . . are so extensive . . . denial . . . is the only appropriate course. . . . " Pet. at 23-24 (citing AR 3176).

In order to properly analyze whether Pratt submitted a meaningful application (***approved*** by the County after eight years), it is important to consider the context in which development projects are processed in highly regulated states like California. This is not a case where a permitting agency has denied a development application but states that the project could be approved if certain modifications are made.

Rather, in 1990, Pratt submitted an application for a vesting tentative tract map pursuant to provisions of the California Subdivision Map Act.[5] As stated above, an EIR was prepared pursuant to

[5] Cal. Gov't Code §§ 66410-66499.37. The Subdivision Map Act authorizes the legislative bodies of local agencies, defined as cities, counties, and cities and counties to regulate and control the design and improvement of the subdivision of land, and additionally mandates the performance of certain functions. A "vesting tentative tract map" is a particular type of subdivision map which provides a vested right to develop land subject to the map for a specified period of time after a "Final Map" is filed for record in accordance with only those ordinances, policies and standards of the local agency in effect on the date the application for the vesting tentative tract map is deemed complete. *Id*. §§ 66498.1-66498.9.

CEQA, fully analyzing all of the potential significant adverse environmental impacts of the proposed project, as well as a wide range of feasible alternatives to the project. Under CEQA, as a general rule, the environmentally superior feasible alternative must be selected by the approving body.[6] Thus, after an extensive and exhaustive process of analyzing the project's impacts, and refining the development proposal in collaboration with the County, the County finally approved the project more than eight years after application had been made.

The County, as a part of its land use regulatory permitting process, also approved a Coastal Development Permit for the project, finding the project consistent with the governing LCP, as required by the California Coastal Act.[7] However, the approval of that Coastal Development Permit was appealed to the Coastal Commission, which ultimately denied approval of the EIR-preferred alternative, as well as all of the alternatives included in the EIR. The Commission denied the application on the grounds that project revisions would be so extensive as to render denial the only appropriate remedy. Pet. at 23-24 (citing 19 AR 3176).

Under the Coastal Act, Pratt is not able to simply reapply directly to the Coastal Commission for a

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[6] Cal. Pub. Res. Code §§ 21002, 21081; *see also* Cal. Code Regs. tit. 14, §§ 15091, 15126.6.

[7] Cal. Pub. Res. Code §§ 30000-30900.

Coastal Development Permit; rather, Pratt is required to begin the process anew with the County by filing a new application for the project, including a Coastal Development Permit, processing it in accordance with applicable California land use statutes and regulations, including CEQA and the Subdivision Map Act, as well as with County land use regulations and ordinances, and thereafter again face the possibility of an appeal to the Coastal Commission, and another denial for some or all of the same reasons (e.g., lack of water on-site, views and aesthetics) the application for Coastal Development Permit was originally denied. It would be unfair and unjust to preclude Pratt from presenting and trying his regulatory taking claims.

Nine years and a categorically preclusive "no" is long enough and clear enough for ripeness. No good purpose could be served by sending Pratt back for another nine years and the same answer.

CONCLUSION

Pratt's situation, all too familiar to far too many of amici's members, demands relief. This case is ripe for review, and the Court is asked to grant Pratt's petition.

Respectfully submitted,

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APPENDIX A

Cases in which NAHB has appeared as an amicus curiae or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido,* 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council,* 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.,* 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey Ltd.,* 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States,* 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528

(2005); *Kelo v. City of New London,* 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.* 547 U.S. 370 (2006); *Rapanos v. United States,* 547 U.S. 715 (2006); *John R. Sand and Gravel Co. v. United States* 128 S.Ct. 750 (2008); *Winter v. Nat. Res. Def. Council,* No. 07-1239, 2008 WL 4862464 (U.S. Nov. 12, 2008); *Summers v. Earth Island Inst.,* 490 F.3d 687 (9th Cir. 2007), *cert. granted,* 128 S. Ct. 1118 (2008) (No. 07-463); *Entergy Corp. v. Envtl. Prot. Agency,* 475 F.3d 83 (2d Cir. 2007), *cert. granted,* 128 S. Ct. 1867 (2008) (consol. with Nos. 07-589 and 07-597); and *Coeur Ala., Inc. v. S.E. Ala. Cons. Council,* 486 F.3d 683 (9th Cir. 2007), *cert. granted,* 128 S. Ct. 2995 (2008) (No. 07-984, consol. with 07-990).