No. 00-1167

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

TAHOE-SIERRA PRESERVATION COUNCIL, *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 *Amicus Curiae* of
American Association of Small Property Owners, *et al.*
in Support of PETITIONER
(Complete List of Amici Appears on the Inside Cover)

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Apartment Association of South Central Wisconsin
American Land Rights Association
Apartment Owners Association
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Berkeley Property Owners Association
Chicago Creative Investors Association
Genessee Landlord Association
Georgia Real Estate Investors Association, Inc.
Greater Dayton Real Estate Investors Association
Illinois Rental Property Owners Association
Ohio Real Estate Investors Association
Property Owner's Association of Greater Baltimore
Property Owning Women
Real Estate Investors Association of Cincinnati
Real Estate Investors Association of Toledo
Suncoast Real Estate Investors Association, Inc.

Motion for Leave to File Brief *Amicus Curiae* of American Association of Small Property Owners in Support of Petitioner Out of Time

Amici curiae American Association of Small Property Owners, *et al.* hereby move this Court for leave to file a brief *amicus curiae* in support of Petitioner out of time.

Amici expect to file their brief on September 19, 2001, one week after Petitioners' brief on the merits was due to be filed.

The delay in filing the brief of *amici* results from the tragic events of September 11, 2001, which has caused serious disruption to communications and the work of counsel for *amici*, who are located in New York City.

Wherefore, *amici curiae* move for permission to file their brief in support of Petitioner on or before September 20, 2001.

Dated: New York, New York
September 18, 2001

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INTEREST OF *AMICI*

Amici are organizations from throughout the United States whose purpose is to represent the interests of small property owners, through education, interaction with legislative and regulatory bodies, and through legal proceedings. They believe that this case is important to their constituents because it represents an opportunity for this Court to clarify the principles embodied in the Bill of Rights for the protection of the rights of individuals, specifically their right to use and enjoy their property. A description of each of them is found in the Addendum to this brief.

This brief is submitted in support of the petitioners, and we urge the Court to reverse the judgment of the Court of Appeals for the Ninth Circuit.[1,2]

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[1] Counsel for the parties have consented to the filing of *amicus* briefs by letter dated September 4, 2001, and filed with the Clerk of this Court.

[2] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that this brief was not prepared, written, funded or produced by any person or entity other than *amici curiae* or their counsel.

INTRODUCTORY STATEMENT

Amici believe that the facts of this case, as cogently stated by petitioner, demonstrate that there has in fact been a permanent ban on all productive use of petitioners' land.[3] *Amici* urge, however, that whether the cessation of development is characterized as "temporary" or "permanent" is immaterial, and that *all* regulations that prohibit otherwise lawful use of property (apart from "normal delays" inherent in threading through the land use regulatory process) are compensable takings under the Fifth Amendment.

Amici assume that the moratoria at issued were adopted for a genuine and sound public purpose. There is no dispute that TRPA had a legitimate concern, and that it was within its discretion to make a policy choice to halt all development in "sensitive" zones around Lake Tahoe to preserve the lake's "pristine" character.

The issue is simply whether a public agency, acting for the public benefit, may shift the financial burden of its decision to stop development to the shoulders of the property owners directly affected, or whether the public at large must pay the price of that policy choice.

Amici represent small property owners, who often suffer particularly harsh economic injury when prevented from using their property; in most cases they are too small, and with too limited

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[3] Petitioners demonstrate that they have been prevented from building on their properties by a series of rolling prohibitions imposed by the Tahoe Regional Planning Agency ("TRPA" or "respondent"); there were four formal "moratoria" and a number of informal ones, the effect of which has been a complete prohibition of any economic use of petitioners' land since 1981. TRPA has blocked petitioners' construction of homes for two decades and that prohibition in fact has become permanent. Petitioners' property cannot be used productively. The owners' "Hobson's choice" is to continue to pay taxes on their useless property or to sell at distress prices.

resources, to challenge governmental abuses of "temporary" moratoria; they are too closely held and too cash poor to spread the cost of, or wait out, "temporary" development bans which, as in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), last two years, let alone those which, as in this case, last two decades.

SUMMARY OF ARGUMENT

The use and enjoyment of private property is a fundamental right, and important to a democratic society. The takings clause was designed to protect this core value.

This Court has long recognized that limitations on the exercise of rights in private property are as much "takings" as are physical invasion of property. Government regulation tends to become ubiquitous, and government constantly develops new and artful ways to appropriate rights to use and enjoy private property for the "public good." Unless constrained by a requirement to compensate owners of private property, in a majoritarian system, government agencies will allocate disproportionate burdens of achieving public purposes to politically weak segments of the citizenry.

Temporary development moratoria, if not clearly and closely limited in duration, work significant hardships on those property owners prevented from developing the economic potential of their land, and this constitutes a taking as clearly as does a temporary physical taking.

Requiring compensation for temporary, but economically significant, restraints on use and enjoyment of private property will ensure that the burdens of achieving a socially desirable goal will be equitably allocated among all taxpayers, and it will ensure that the electorate makes informed decisions about policy choices and

priorities.

ARGUMENT

I.

REGULATORY LIMITS ON ECONOMIC USE OF PROPERTY ARE AS MUCH "TAKINGS" AS ARE PHYSICAL APPROPRIATIONS

A. Regulatory Limitations on Use of Property Are Takings.

The use and enjoyment of private property is a fundamental right, and important to a democratic society. The takings clause was designed to protect this core value.

Federal, state and local government agencies have developed new forms of regulation that make it difficult to discern clear boundaries between private property and what belongs to the community. Government entities constantly develop new and artful ways to appropriate rights to use and enjoy private property for the "public good."

The traditional common law distinctions between private property and state power have blurred as federal agencies, states, counties, cities and other local government units perform more functions -- many of them "proprietary" in nature -- to use property ownership to achieve governmental objectives, and to establish new forms of regulation through licenses, franchises, development subsidies, etc. Actions by government officials often cannot be separated from private sector interests. Indeed, every public act is, at least in part, a response to expressed desires of private individuals, and private actions often are a response to governmental institutions, rules or incentives.

Unless constrained by a requirement to compensate owners of private property, in a majoritarian system, government agencies will unfairly allocate disproportionate burdens of achieving public purposes to politically weak segments of the citizenry.

Justice Brennan recognized the ubiquitous nature of takings. He did this both in equating regulatory takings and physical invasion, and in equating "temporary" and "permanent" takings for purposes of compensation. His approach brings consistency to the interpretation of the takings clause. Government actors occasion losses in both regulatory and physical invasion cases, and the losses have the same effect on the property owner whether they are permanent or temporary, except, of course, for the quantum of damage caused.

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. . . .It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a de facto exercise of the power of eminent domain, when the effects completely deprive the owner of all or most of his interest in the property.

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652-53 (1981)(hereafter "*San Diego Gas & Elec. Co.*") (Brennan, J., dissenting).

Professor Richard A. Epstein argues, and *amici* urge on this Court, that nearly all regulatory restrictions on the use and disposition of private property should be seen as prima facie takings. R. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 57 (1985).

Ownership consists of three separate incidents: possession, use, and disposition. As the Court in *United States v. General Motors Corp.* expressed it:

> The critical terms [of the takings clause] are "property," "taken" and "just compensation." [These terms] have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.

323 U.S. 373, 377-378 (1945).

". . .[P]ossession, use and disposition do not form a random list of incidents; they form the core of a comprehensive and coherent idea of ownership." R. Epstein, *supra* at 60. If government removes or diminishes the rights of the owner in any of the incidents of ownership, "it has prima facie brought itself within the scope of the eminent domain clause, no matter how small the alteration and no matter how general its application." R. Epstein, *id.* at 57. In Professor Laurence Tribe's plain English statement, ". . . forcing someone to stop doing things with his property — telling him 'you can keep it, but you can't use it — is at times indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else." (L. Tribe, AMERICAN CONSTITUTIONAL LAW § 9-3 at 593 (2d ed. 1988)).

Property owners have a right to build on their property, subject only to reasonable regulation. "[T]he right to build on one's

own property--even though its exercise can be subjected to legitimate permitting requirements--cannot remotely be described as a "governmental benefit." *Nollan v. California Coastal Commission*, 483 U.S. 825, 845 n.2 (1987) (hereafter "*Nollan*").

One commentator summarized the difference between a "right" and a "benefit"in this context:

> If a benefit is merely a privilege, then it will continue only so long as government officials determine that continuance "serves the public interest." The recipient of a privilege faces substantial uncertainty and insecurity, and is at the mercy of government planners and administrators who base their authority on claims to expert objectivity. Moreover, the beneficiary knows that expert decisions are often more arbitrary than these claims would suggest.
>
> "[R]ight[s]" . . . are more certain and secure. Courts offer protection to holders of rights against arbitrary or otherwise unjust government actions . . . .As a practical matter, the government may be able to revoke established rights only if the political process devises some form of compensation; revocation without compensation may be considered a de facto "taking" of a private property right.

Nelson, "Private Rights to Government Actions: How Modern Property Rights Evolve," 1986 U. ILL. L. REV. 361, 364.

B. Regulatory Takings Require Compensation.

In economic terms, requiring compensation is a way to force public policymakers to consider the opportunity costs of their

proposed actions. Policies that "take" private property would then have concrete budgetary impacts that would be immediately reflected in tax bills or municipal borrowing capacity. If the regulatory action does not have a cost to the government (and thus to the public at large) regulators will believe that if they use a regulatory scheme to stop development, they need not pay for the impact on the owners, and will thus not be accountable to the citizenry at large.

Economically efficient takings rules will also affect the behavior of private citizens. Public choices are the result of the competition of various groups for political benefits. Powerful groups may not need a constitutionally mandated takings doctrine to protect their interests; they will be able to ensure that the overall legislative package is beneficial to them. Politically ineffective individuals or groups, however, may be severely injured by some public policy. Efficiency and fairness require that their costs be taken into account. The operation of the political process may not incorporate these costs, and thus compensation should be paid for these losses to force politicians to recognize the existence and rights of such small, powerless groups. *Amici* submit that the location of the takings clause in the Bill of Rights evidences a clear intent that the requirement of just compensation is designed to protect those with insufficient political power to protect their interests.

When public policies have unpredictable or disproportionate impacts on small groups, the legitimacy of government depends on the payment of compensation to mitigate the arbitrary distributive consequences of many public policies. Citizens whose assets have been taken are unlikely to be satisfied with the argument that the system, "over all," is fair.

Private property and its protection are important building blocks of democracy. Private property helps distinguish individuals' interests from those of the state, and thus acts as a limit

on state power.[4]

In a typical regulatory takings case, a government agency adopts a measure that severely restricts the ability of the landowner to productively use her land, whether by rezoning, denials of permits or variances, density limitations, etc. *See*, *e.g.*, *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). When the effect of such regulations is to deny private landowners economically productive use of their land, compensation must be paid. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). When a government agency imposes a moratorium on development, the *sole* purpose of that action is to foreclose the landowner's ability to make *any* economic use of his land, either for a finite or an indefinite period.[5] Without an economic cost to government -- and

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[4] For the central importance of private property to the creation and preservation of democracy in the inevitable tension between the individual and government, *see* John Locke, OF CIVIL GOVERNMENT ¶¶ 135, 138 (1690); Max Weber, "Politics as a Vocation" in H. H. Gerth and C. Wright Mills, eds., FROM MAX WEBER, ESSAYS IN SOCIOLOGY 78 (Galaxy ed. 1958).

[5] The moratorium may be to permit local planners to study the potential uses of land in the area without having development take place during their study, or it could be to delay development until public facilities are adequate to serve it, or it could be to preclude development indefinitely. Sometimes moratoria are abused by local agencies, mouthing the words of planning propriety while intending all along to prevent use forever — or at least as long as possible. *See*, *e.g.*, Wendy U. Larsen & Marcella Larsen, "Moratoria as Takings Under Lucas," 46 Land Use Law & Zoning Dig., no. 6, p. 3 (1994). As Judge Kozinski noted in his dissent from the denial of rehearing en banc:

> Why would a government enact a permanent regulation-and risk incurring an obligation to compensate-when it can enact one moratorium after another, perhaps indefinitely? Under the theory adopted by the panel, it's hard to see when a property owner would ever state a takings claim against such a scheme.

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the public -- such actions will not stop. Taxpayers should be able to decide whether they need or want to impose severe restrictions so much that they are willing to pay a price to do so, rather than imposing the cost on private landowners. As this Court perceived in *Lucas*:

> regulations that leave the owner of land without economically beneficial or productive options for its use--typically, as here, by requiring land to be left substantially in its natural state--carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

505 U.S. at 1018. To similar effect, this Court held in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) that private property cannot cavalierly be commandeered without payment simply "because the public wanted it very much." As that Court perceptively stated it, "[T]he question at bottom is upon whom the loss of the changes desired should fall." *Id.*, at 416.

The Court can anticipate that TRPA and its *amici curiae* will claim that moratoria are necessary for an effective planning process.[6]

F.3d 998, 1001 (9th Cir. 2000).

For a description of the subtlety of land use planners in devising methods to prevent development without incurring the obligation to pay compensation, *see* Robert S. Freilich & Elizabeth A. Gavrin, "Takings After *Lucas*" in David L. Callies, ed., AFTER *LUCAS*: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION (American Bar Ass'n Section of Urban, State and Local Government Law (1993)).

[6] In an *amicus curiae* brief filed in *First English* on behalf of nearly half the states (Alaska, Arkansas, California, Florida, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New York, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, Wyoming, and Puerto Rico) argued that "Adoption of appellant's radical reformulation of takings jurisprudence

would cripple amici's ability to perform regulatory functions upon which their citizens' health, safety and welfare quite literally depend." States' *amicus* brief in *First English* at 1-2. The states argued further that "Compelled payment of interim damages. . . would . . . carry the risk of financial chaos for state and local governments; and . . . have a major chilling effect on the regulatory process." *Id.* at 2, and that "[T]he rule urged by appellant could undermine the fiscal well-being of state and local governments. Judicially compelled damages in this context could have major adverse fiscal consequences. *Id.* at 23. The award of damages against government entities predicated on a "temporary taking" theory, they urged, would have "a major chilling effect upon essential governmental functions." *Id.* at 25.

Similar arguments were advanced by the State and Local Legal Center in its *amicus* brief on behalf of the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the National Governors' Association, the American Planning Association and others in *First English*: "such a decision could paralyze governmental efforts to regulate land use to protect the public health and safety from a host of...injuries....In the wake of such a decision, claims for compensation [would] overload[ ] court dockets and threaten[ ] bankruptcy for state and local governments. Brief of State and Local Legal Center at 3.

The same types of arguments were made to this Court in *Nollan* by the County Supervisors Association of California, six counties and 46 cities in California: "the Court's decision in this case may affect *amici curiae's* continued ability to regulate land use for the benefit of the public. . . . A finding by this Court that dedication requirements are either permanent physical occupations or lesser physical invasions subject to stricter scrutiny than other regulatory actions is legally insupportable and would have drastic implications." California entities brief at 2.

These arguments simply ignore the point that "Once a court determines that a taking has occurred, the government retains the whole range of options already available--amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *First English*, 482 U.S. at 321.

Rather than being a limitation on the ability of government to act in the public interest, compensation is a substitute for imposing severe restrictions on the ability of public officials to adopt policies that are deemed desirable by the political class or a majority of the political unit. The Fifth Amendment is designed to

> prevent the public from placing upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

Monongahela Navigation Company v. United States, 248 U.S. 312, 325 (1893). As Chief Justice Rehnquist put it in *First English*:

> It is axiomatic that the Fifth Amendment's just compensation provision is "designed to bar 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."

First English, 482 U.S. at 318-319 (citations omitted). He recognized the need to balance the needs of governments to protect the public interest and the Constitution's overarching purpose in protecting the rights of individuals *as against* government power:

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth

> Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S., at 416, 43 S.Ct., at 160.

First English, 482 U.S. at 321-322.

Justice Scalia, in finding that a taking had occurred in *Nollan,* argued that even if the California Coastal Commission's policy was sound, it does not follow that coastal residents "can be compelled to contribute to its realization . . . . [I]f [the Commission] wants an easement across the Nollans' property, it must pay for it." *Nollan*, 483 U.S. at 841.

II.

TEMPORARY TAKINGS REQUIRE COMPENSATION

The fact that a moratorium may be characterized as "temporary" should have no bearing on the property owner's entitlement to compensation, if the limitation on her use of her property is significant and endures for more than a de minimis time.[7]

Justice Brennan analyzed the legal principles succinctly when he wrote:

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[7] Chief Justice Rehnquist set out practical parameters in *First English*: "We. . .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.

> "The fact that a regulatory 'taking' may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional 'taking.' Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory 'taking' render compensation for the time of the 'taking' any less obligatory. This Court more than once has recognized that temporary reversible 'takings' should be analyzed according to the same constitutional framework applied to permanent irreversible 'takings.' "

San Diego Gas & Elec. Co., 450 U.S. at 657 (1981) (Brennan, J., dissenting). In his opinion in *San Diego Gas*, Justice Brennan expounded a unified theory of takings. In Justice Brennan's view, derived from the conviction, which *amici* share and urge here, that the Bill of Rights is an individual's fundamental protection against governmental overreaching, all the many divergent types of limitations on private property owners require compensation. The fact that some limitations may be for temporary periods of time merely affects the amount of compensation that would be due. (*see* 450 U.S. at 658-660.)[8]

In *First English*, Chief Justice Rehnquist began his analysis of this issue by pointing out the equivalence under the takings clause of the Fifth Amendment of physical invasions and regulations which have the effect of destroying an owner's property interest. Chief Justice Rehnquist went on to analyze cases of temporary physical invasion takings, from which he concluded that

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[8] *See Hendler v. United States*, 952 U.S. 1364, 1376 (Fed. Cir. 1991) ("[T]he fact that [the government's] action was finite went to the determination of compensation rather than to the question of whether a taking had occurred").

"[t]hese cases reflect the fact that 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation" (*First English*, 482 U.S. at 318). Temporary physical invasions constitute takings and regulatory takings are equivalent to physical invasion takings. *First English*, 482 U.S. at 319; *see also San Diego Gas and Electric Co.*, 450 U.S. at 653 (Brennan, J., dissenting). When the government's actions have already effected a taking of all economic 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. *First English*, 482 U.S. at 321.

First English thus recognizes a class of temporary regulatory takings, adopting Justice Brennan's reasoning in his dissent in *San Diego Gas and Electric Co.* In recognizing that compensation is due for temporary takings, the Court refined its economic impact criterion to encompass fairly short-term losses, and also recognized that takings of various kinds -- physical invasion or regulatory restrictions, permanent or temporary -- constitute a continuum of government actions, all of which require compensation.

Temporary takings, as this Court held in *First English*, are no different in kind from permanent takings. The duration of the taking merely affects the *quantum* of compensation, not entitlement to compensation.[9]

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[9] Requiring compensation for "temporary planning moratoria" will not paralyze land use planners and will not let loose rapacious developers. If a planning moratorium is longer than "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like . . . ." (*First English*, 482 U.S. at 321), but amounts to a reasonable development hiatus, the time value may be too little for an owner to have an incentive to undertake the lengthy and expensive legal proceedings to collect damages. If she does, the cost to the government agency will not be so prohibitive that

As Justice Brennan noted, from the property owner's perspective, there is no substantive difference between a government agency's decision to halt all use of property, even "temporarily," and a government agency's decision to physically take the property temporarily. Either way, the government prevents the owner's use of the property for whatever period it deems necessary or desirable. *See San Diego Gas & Elec. Co.,* 450 U.S. at 652 (dissenting opinion). "What stamps a government action as a taking is what it does to the property rights of each individual who is subject to its actions: nothing more or less is relevant." R. Epstein, *supra*, at 94.

When regulations deny an owner the use of his land through the exercise of the police power, whether it is a physical invasion or a regulatory limitation, there is no effective difference.[10] In both situations, the owner is deprived of the use and enjoyment of the land, and it is that deprivation, not the acquisition of title by the government, that constitutes a taking.

> [T]he deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

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the agency will be deterred from enacting the moratorium, if it deems such truly to be in the public interest.

[10] In *First English*, 482 U.S. at 319, this Court analogized regulatory taking for a period of years to the condemnation of a leasehold, which requires compensation: "The value of a leasehold interest in property for a period of years may be substantial, and the burden on the property owner in extinguishing such an interest for a period of years may be great indeed."

Justice Stevens, dissenting in *First English*, argued that what the Court called a "temporary regulatory taking" was in fact merely a small diminution of value:

> Why should there be a distinction between a permanent restriction that only reduces the economic value of property by a fraction-perhaps one-third-and a restriction that merely postpones development of a property for a fraction of its useful life-presumably far less than a third?

First English, 482 U.S. at 332. These are, according to Justice Stevens, "irreconcilable results." (*id.*)

Amici submit that Justice Stevens, dissenting in *First English*, was correct in pointing out the apparent anomaly, but *amici* also suggest that the results are not "irreconcilable." Justice Stevens' proposed solution -- in essence to ignore the "temporary" loss suffered by the property owners -- defeats the central purpose of the takings clause, to protect individual rights. The doctrinally consistent and constitutionally acceptable way to reconcile the results is for this Court to reiterate that both permanent regulatory restrictions that result in partial, but significant, reductions in economic value of property and regulations (or moratoria) that postpone development for a substantial time, require compensation.

This approach achieves a basic objective of the law: clarity, coherence, predictability and substantial consistency in application. It recognizes a "temporary" moratorium as a taking for the duration of the moratorium. When government action interferes substantially with, or limits, the ability of a property owner to use his land in an economically viable way a taking has occurred and compensation is due:

> The language of the Fifth Amendment prohibits the "tak[ing]" of private property for 'public use' without payment of 'just compensation.' As soon as

> private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered. This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a 'taking,' compensation *must* be awarded."

San Diego Gas & Elec. Co., 450 U.S. 621 at 654 (Brennan, J., dissenting; citations and internal quotation marks omitted; emphasis in original.)

Temporary development moratoria, if not clearly and closely limited in duration, work significant hardships on the property owners prevented from developing the economic potential of their land, and this constitutes a taking as clearly as does a temporary physical taking. Requiring compensation for temporary, but economically significant, restraints on use and enjoyment of private property will ensure that the burdens of achieving a socially desirable goal will be equitably allocated among all taxpayers, and it will ensure that the electorate makes informed decisions about policy choices and priorities.

This Court need not, in this case, determine whether there is a "bright line" between the "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" described in *First English*, 482 U.S. at 321, and a temporary regulatory interference with ownership rights that amounts to a taking.[11] The fact that in this case the regulatory agency has

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[11] As Judge Kozinski put it "[T]here is no clear-cut distinction between a permanent prohibition and a temporary one. Governmental policy is inherently temporary while land is timeless. Even a permanent prohibition

adopted a consecutive series of "temporary" moratoria that has prevented Petitioners from building single family residences on their land for two decades clearly falls on the "takings" side of any such line.

The Ninth Circuit dismissed the relevance of *First English* case by describing it as "not even a case about what constitutes a taking." (*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 216 F.3d 764, 777 (9th Cir. 2000). The Circuit Court simply ignored plain language in *First English*, where this Court stated the issue thus: "We now turn to the question whether the Just Compensation Clause requires the government to pay for 'temporary' regulatory takings." (482 U.S. at 313). Indeed, the phrase "temporary regulatory taking" or its equivalent appears throughout the majority and dissenting opinions in *First English*. This Court apparently thought that case was about whether a "temporary" regulatory limitation on ownership rights is a "taking."

This Court had no problem dealing directly with the question whether compensation is required when the landowner's bundle of property rights is "temporarily" abrogated, nor in holding that such a deprivation was compensable. The facts of this case warrant no different outcome.

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can be rescinded and, in the fullness of time, almost certainly will be." *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 228 F.3d 998, 1001 (9th Cir. 2000).

CONCLUSION

Amici respectfully submit that this Court has already held that both regulatory takings and physical takings require the government to compensate the owner of the private property taken. *Amici* also respectfully submit that this Court has recognized that "temporary" limitations on the exercise of property ownership rights can be a taking if they exceed quite modest duration. These doctrines are, in fact, necessary to effectuate a core constitutional protection.

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

September 18, 2001

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ADDENDUM

DESCRIPTION OF THE *AMICI*

American Association of Small Property Owners is a nonpartisan, nonprofit 501(c)(3) corporation. Since 1993, AASPO has been working for the right of small property owners to prosper freely and fairly -- to make possible the American dream of building wealth through real estate. Based in Washington, DC, AASPO is the only national organization for small landlords, property owners and real estate investors to share information and strategies on important issues of the day. AASPO has chapters in more than 25 states.

American Land Rights Association is a national clearinghouse and support coalition, encouraging private property ownership, family recreation, multiple use of federal lands, commodity production, and access to federally controlled lands. ALRA has a membership of 10,000.

Apartment Association of South Central Wisconsin, located in Madison, has been in existence since 1969, and is the only organization serving the rental housing providers of Columbia, Dane, Green, Sauk, and Iowa Counties in Wisconsin. Its mission is "To unite and serve area apartment owners, managers, investors, and the community; and promote an environment in which members may successfully conduct their businesses while serving their residents and their communities with honesty, integrity, fairness and the highest degree of professionalism." It has approximately 500 members.

Apartment Owners Association of Southern California, Inc. is a trade association that provides educational and support services to apartment owners throughout the State of California. Located in Van Nuys, AOA was founded in 1978 and currently has 12,000 members.

Berkeley Property Owners Association of Berkeley, California, has been defending the rights of small property owners for over twenty years. It is a nonprofit association of rental housing providers and has approximately 650 members.

Chicago Creative Investors Association provides educational, motivational and networking support to real estate investors in the Chicagoland area. It was founded in 1983 and currently has approximately 500 active members.

Genessee Landlord Association is a nonprofit trade association and has served the needs of landlords in the Flint, Michigan area for more than 25 years. It has more than 500 members.

Georgia Real Estate Investors Association, Inc. is the largest real estate investors association in the United States. With 2200 members, Atlanta-based GaREIA brings together the novice, the part-time and the experienced investor with education, networking, publications and a monthly meeting of educators and business associates to share information. GaREIA started in the early 1980's. Its mission is to assist its members in succeeding in their real estate investment plans by providing continuing education, motivation, and opportunity in a positive and mutually supportive environment.

Greater Dayton Real Estate Investors Association is a nonprofit educational association of real estate investors and rental housing

providers serving eight counties in Southwestern Ohio. It has more than 350 members.

Illinois Rental Property Owners Association is an organization of rental property owners, investors, and managers in Illinois. It unites numerous member organizations from around the state, comprising approximately 4,000 property owners. Illinois Rental Property Owners Association's mission, in part, is to provide a unified voice for Illinois rental property owners.

Ohio Real Estate Investors Association is a state-wide business league that provides education and resources to enable property owners to realize the full potential of their real estate investments. It has 18 member groups in the state representing some 5,000 active members.

Property Owner's Association of Greater Baltimore, Inc. was established in 1957, and is a voluntary trade association consisting of hundreds of owners and/or managers of rental property in the Greater Baltimore metropolitan area. Its members own or control tens of thousands of rental units in the Baltimore area and range from owners of a few single family rental units to owners of hundreds of single and multi-family dwellings. The Association provides services to its members and the community in general, including educational seminars and mediation in landlord-tenant disputes. It also provides guidance and support to the Governor of Maryland and the Maryland General Assembly.

Property Owning Women is a nonprofit association of small rental building owners in New York City. It has approximately 100 members. Property Owning Women's mission, in part, is to educate the public about the role that small property owners play in the maintenance of New York City's diversity, economic health, and quality of life.

Real Estate Investors Association of Cincinnati is the largest and most active real estate investor group in Ohio and one of the biggest in the country. It has over 500 members.

Real Estate Investors Association of Toledo serves the needs of real estate investors in Northwest Ohio. The nonprofit association encourages all levels of investors to expand their knowledge by networking, attending meetings and participating in educational programs. It is active in public affairs with many of its members serving on various community boards. The Toledo REIA has approximately 300 members.

Suncoast Real Estate Investors Association, Inc. has 400 members, who provide safe and affordable housing to Tampa, Florida. It is a nonprofit corporation that exists to inform and educate its members in all aspects of real estate investing.

Certificate of Service

Martin S. Kaufman, an attorney admitted to practice before the bar of this Court, hereby declares under penalty of perjury that two copies of the foregoing brief of *amici curiae* American Association of Small Property Owners, *et al.* in support of the petitioner and motion for leave to file the *amicus* brief out of time were served on the following counsel of record for the parties on the 19th day of September, 2001, by depositing same in a postal depository box under the care of the United States Postal Service, in a properly addressed, first class postage prepaid envelopes addressed to them at:

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