No. 17-1698

In The Supreme Court of the United States

PACETTA LLC, et al.,

Petitioners,

v.

TOWN OF PONCE INLET, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Fifth District

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the petition for writ of certiorari is premature, because the decision sought to be reviewed reversed only the total takings claim and remanded the partial takings claim for further evidentiary proceedings and rulings.

2. Whether the Florida Fifth District Court of Appeal's decision, remanding a partial takings claim to the state trial court—having held that the trial court erred in failing to treat the property at issue as a single parcel—to address whether there had been a partial takings, whether such a claim was ripe, and whether, if the trial court found that no development application had been filed, the futility exception to the ripeness doctrine applies, presents a constitutional question under the Fifth Amendment to the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTRODUCTION

Petitioners Pacetta, LLC and its affiliated entities ("Pacetta") have been litigating claims against the Town of Ponce Inlet ("the Town") arising from the Town's adoption of its 2008 and 2010 comprehensive development plans for the past 10 years. In the third appearance of this case before Florida's Fifth District Court of Appeal ("the Fifth District"), the court reversed the trial court's judgment against the Town on Pacetta's total takings claim and remanded for further proceedings on Pacetta's hitherto-undeveloped partial takings claim. *Town of Ponce Inlet v. Pacetta, LLC*, 226 So. 3d 303 (Fla. Dist. Ct. App. 2017), *review denied*, No. SC17-1897, 2018 WL 507415 (Fla. Jan. 23, 2018).

Because the Fifth District, the Florida Supreme Court, and the trial court all denied Pacetta's request to stay trial or appellate proceedings until Pacetta filed a petition for writ of certiorari in this Court, the partial takings trial was completed—with a judgment in the Town's favor—before Pacetta, having taken an extension to file its petition, commenced proceedings before this Court. Pacetta has appealed that judgment to the Fifth District, in which court the appeal is going forward because the court, once again, declined to stay its proceedings. It is in this procedural posture that Pacetta seeks review of the Fifth District's 2017 decision—that is, the decision that remanded to allow Pacetta an opportunity to try its untried partial takings claim. How that favorable ruling gives rise to claims that Pacetta may bring to this Court is left unexplained in the certiorari petition.

The purported weighty constitutional questions Pacetta nonetheless poses for this Court to address on certiorari are prematurely presented. The state appellate court, applying state law, held that the state trial court erred in failing to address a partial takings claim and remanded for the trial court to do exactly that. The trial court has now done so, and the Fifth District, will in due course, pass on the correctness of that ruling. Once there is a final decision from the highest state court on the partial takings claim, there will be a final judgment that may properly be brought before this Court on a completely developed record. Until that time, there is no judgment that may be reviewed by this Court.

Finally, the only question *actually* decided by the Fifth District on a partial takings claim was that the trial court was required further to address the claim on remand, for two reasons. First, in a holding that goes unchallenged before this Court, the Fifth District held that the trial court erred in separately addressing Pacetta's takings claim as to each of the several parcels that had been assembled for potential development, and that the entire 16-acre tract was the "relevant parcel" for takings analysis. Second, in a ruling that neither applies nor even involves federal constitutional law, the Fifth District held there had been "no mention of a partial taking" in the trial court's orders. Appendix ("App.") at A-17. The court accordingly held that it was "necessary to reverse the liability order and to remand for a new trial on whether there has been a 'partial taking' under the *Penn Central* criteria as applied to

this one sixteen-acre parcel of land." App. at A-18. That holding presents no constitutional issue for this Court's review.

STATEMENT

1. Pacetta's first action against the Town, filed in 2008, challenged an amendment to the Town Charter ("the Charter Amendment"), adopted by a referendum placed on the ballot by a citizen's initiative, which had "elevated land use restrictions already in place on Pacetta's property to the status of immutable charter provisions, most notably barring or restricting the construction and operation of dry boat storage facilities on the property." *Town of Ponce Inlet v. Pacetta, LLC (Pacetta I)*, 63 So. 3d 840, 840 (Fla. Dist. Ct. App. 2011), *review denied*, 86 So. 3d 1115 (Fla. 2012). The dispositive question was whether the Charter Amendment complied with a (since-repealed) statute prohibiting referenda on development orders or comprehensive plan amendments that affected five or fewer parcels. *Pacetta I*, 63 So. 3d at 840–41.

Because Pacetta introduced "uncontroverted evidence that its land constituted a single [16-acre] parcel," the trial court granted a summary judgment in Pacetta's favor. *Id*. at 841–42. On appeal, the Fifth District upheld the summary judgment "[b]ecause the evidence was uncontroverted that the citizens' initiative referendum affected five or fewer parcels." *Id*. at 842.

2. It was undisputed in the state courts that Pacetta's proposed waterfront development "was absolutely prohibited under the Town's 2003 Comprehensive Land-Use Plan," as well as by a zoning ordinance known as the Riverfront Overlay District ("the ROD"). App. at A-9. When the Town adopted its 2008 comprehensive plan and declined to change the parcel's designation to allow for waterfront development such as Pacetta wished to pursue, Pacetta sued the town, raising four claims: (i) an "unconstitutional 'taking'/inverse condemnation" claim; (ii) denial of equal protection and substantive due process; (iii) denial of procedural due process; and (iv) a statutory claim under Florida's "inordinate burden" statute (known as "the Harris Act"). App. at A-9.[1]

The trial court conducted a bench trial on liability and thereafter entered an order finding the Town liable to Pacetta on all claims. App. at A-9–10 ("Liability Order"). "[T]he trial court believed the dispositive issue . . . was whether Pacetta had proved it had the vested right under the doctrine of equitable estoppel to require [the] Town to amend its Comprehensive Land-Use Plan and the ROD to allow it to build its proposed waterfront development." App. at A-10. The court ruled that Pacetta had established "a vested right in [its] favor based on the concept of equitable estoppel," such that, despite the prohibition in the comprehensive plan

[1] The first three claims purported to be brought under the United States Constitution and the Florida Constitution. *Id.* Pacetta's Florida equal protection claim was dismissed before trial. *Id.*

and ordinances, Pacetta's "vested right" allowed it "to nevertheless construct and build this mixed use planned waterfront development." *Id*. (alteration in original).

The court ultimately found that "there had been a 'taking' as to [four] parcels," although not as to the remaining six parcels that made up the assemblage. App. at A-10–11. On the Harris Act claim, "the court found that Pacetta had clearly established that the actions of [the] Town had inordinately burdened Pacetta's property." App. at A-11.

Invoking a state appellate rule that permits interlocutory appeals from Harris Act liability findings, Fla. R. App. P. 9.130(a)(3)(C)(viii), the Town appealed to the Fifth District from the Harris Act finding. App. at A-11. The Fifth District recited the governing facts, as set forth in the Liability Order:

> [Pacetta has] assembled a piece of riverfront real property on the shores of the Halifax River in Ponce Inlet, Florida, consisting of approximately 16 acres. The congruent waterfront property and two small adjoining residential parcels were acquired by Pacetta . . . between June 14, 2004 and May 10, 2006.
>
> . . . .
>
> [Pacetta's] claims assert that between June, 2004 and November 18, 2008, there had developed a beneficial relationship with the Town, its council, its planning department and, for the most part, with its citizens. In short

summary, as a result of the communications and representations by and between the parties, a casual observer might conclude that a delightful mixed use planned waterfront development was to be approved by the Town. . . .

. . . .

Nonetheless, approval for the project did require appropriate changes in the Comprehensive Land-Use Plan and land use development code regulations consistent with the discussions that the parties had over that long period of time.

. . . .

[T]he Comprehensive Land-Use Plan was in its renewal cycle and submitted to the State for approval in early 2008. All of the extensive planning was done, approved, submitted and agreed to by the State subject to its objections, recommendations and comments. The approval of the Comprehensive Land-Use Plan would be the first step in any land development changes to allow for the mixed use that the parties had come to desire. The new comprehensive plan was amended to address the objections by the State so it was in a form that, upon final reading and approval, would have essentially been approved by the State and become final which was until 2008, the apparent intention of all concerned. In 2008, there was a referendum passed motivated by opposition to the project and the three commissioners were elected who had announced

> opposition to the project. In November of 2008, when the [Comprehensive Land-Use Plan] was up for its final approval, the plan as originally expected by [Pacetta] was defeated based on a vote of the outgoing council.

Town of Ponce Inlet v. Pacetta, LLC (Pacetta II), 120 So. 3d 27, 27–28 (Fla. Dist. Ct. App. 2013) (alterations in original), *review denied*, 139 So. 3d 299 (Fla. 2014).

Based on its prior precedent, the Fifth District held that the trial court had misapplied the equitable estoppel doctrine and that Pacetta had no "vested right" to develop in violation of the Town's comprehensive plan and ordinances. *Pacetta II*, 120 So. 3d at 30. As the court explained, "equitable estoppel can be invoked only when a property owner relies in good faith upon some government action," and "[n]o such good faith reliance was established" by Pacetta, because:

> At the time Pacetta purchased its properties, Ponce Inlet's Comprehensive Land-Use Plan expressly prohibited the type of development which Pacetta proposed for its properties. Any assurances by town officials that the Comprehensive Plan would be amended so as to authorize Pacetta's development plans could not be relied upon in good faith by Pacetta, since town officials lacked the authority to unilaterally amend the Comprehensive Land-Use Plan. Recognition of a vested right based on assurances from town officials to amend the Comprehensive Land-Use Plan would also be in violation of public policy, in light of the

> public hearings and other government approvals required for Comprehensive Plan amendments.

Id. at 30–31 (internal citations omitted). The court accordingly reversed the Harris Act liability finding. *Id*. at 31.

3. The case then proceeded to a jury trial on damages on the remaining three claims. App. at A-12–13. The jury returned a verdict awarding $19.85 million on the takings claim, and the court entered final judgment for Pacetta. App. at A-13.[2]

On the Town's appeal from the final judgment, the Fifth District first ruled that the judicial estoppel doctrine barred Pacetta from seeking recovery on individual parcels that make up the 16-acre assemblage, because Pacetta had successfully argued in *Pacetta I* that its properties constituted a single parcel. *Town of Ponce Inlet v. Pacetta, LLC (Pacetta III)*, 226 So. 3d 303, 312 (Fla. Dist. Ct. App. 2017), *review denied,* No. SC17-1897, 2018 WL 507415 (Fla. Jan. 23, 2018). That is, "Pacetta took the position that its entire sixteen-acre property constituted one parcel of land to be developed as a single unit" and, "[h]aving successfully defeated the citizens' initiative referendum . . . based upon its position that its property was one parcel or unit,

[2] Taking into account prejudgment interest, the court entered a final judgment for Pacetta in the amount of $30,735,248.29. *Id*.

Pacetta is estopped from taking the diametrically opposite position here." *Pacetta III*, 226 So. 3d at 312.

The court then addressed the question whether there had been either a "total" or "partial" takings of the 16-acre parcel. *Id*. at 313. Because "the trial court found that six of the ten individual parcels maintained economically beneficial uses," and because "[t]he trial evidence established that Pacetta paid significant sums of money for these six parcels and that whatever were the permissible uses under the 2003 Comprehensive Land-Use Plan for these properties at the time of purchase remain intact . . . there has been no deprivation of *all* economically beneficial uses of the parcel." *Id*. at 313 (emphasis in original). The court accordingly held that there had been "no total taking" under *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). *Pacetta III*, 226 So. 3d at 313.

The court then turned to the question whether there had been a "partial taking," and noted that, in the first instance, while the trial court's Liability Order "referred to the criteria enunciated in [*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)] that must be analyzed in determining whether a 'partial' regulatory taking occurred," the court had "made no additional factual findings in its written order regarding the partial taking, determining that there were sufficient findings in its written order regarding the partial taking." *Pacetta III*, 226 So. 3d at 313. Instead, the Liability Order "repeatedly addressed whether there had been a 'total' taking, with

no mention of a partial taking." *Id*. Based on the trial court's failure to address a potential partial takings claim and the court's legal error in refusing to treat the parcels as a single relevant parcel, the Fifth District held that it was "necessary to reverse the liability order and to remand for new trial on whether there has been a 'partial' taking under the *Penn Central* criteria as applied to this one sixteen-acre parcel of land." *Id*. at 313–14.

4. The Fifth District also directed the trial court to "address two other issues regarding Pacetta's partial taking claim": (i) "whether the claim is ripe," *i.e.*, the trial court "shall make a specific factual determination as to whether Pacetta's partial taking claim is ripe for adjudication by having submitted the requisite meaningful application"; and (ii) "if the court finds that Pacetta did not file this application for development, . . . whether the 'futility' exception to the ripeness doctrine applies." *Id.* at 314.[3]

After the Fifth District declined to stay its mandate pending Florida Supreme Court discretionary review, and the Florida Supreme Court denied a similar request, the case went forward on remand in the state trial court in March 2018. Non-Jury Trial Sheet,

[3] The court rejected the Town's argument that "the 'partial' taking claim is not ripe because Pacetta failed to submit at least one meaningful application for development approval specifying its proposed uses for the property." *Id*. The court "conclude[d] that the trial court's findings of fact in its liability order were unclear as to whether Pacetta had in fact submitted an application for development," such that further proceedings were required. *Id*.

Pacetta, LLC v. Town of Ponce Inlet, No. 2010 31696 CICI (Fla. 7th Jud. Cir. Mar. 15, 2018), Doc. No. 1134. The state trial court entered final judgment in favor of the Town on April 9, 2018, entered an amended final judgment on April 13, 2018, and denied Pacetta's motion for rehearing on April 27, 2018. *Id*. at Doc. Nos. 1153, 1154, 1156. Pacetta filed its notice of appeal on May 24, 2018, and the appeal is presently pending before the Fifth District. *Id*. at Doc. Nos. 1159, 1162.

REASONS FOR DENYING THE PETITION

1. The Petition is premature. The Fifth District's decision—far from having "lost its bearings when it comes to analyzing takings claims" (Petition at 25)—merely afforded Pacetta one more opportunity to prove a takings claim after having held (in a holding that is not challenged here) that Pacetta had failed to prove a total taking of its property. The Fifth District ordered further proceedings on remand, which proceedings have been concluded in the state trial court in a final judgment adverse to Pacetta. A decision from the highest state court on the now-pending appeal will determine whether the trial court correctly applied governing takings law to the facts, at which point there will be a true final judgment that would be reviewable by this Court.

28 U.S.C. § 1257(a) "establishes a firm final judgment rule":

> To be reviewable by this Court, a state-court judgment must be final in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. *It must be the final word of a final court*.

Jefferson v. City of Tarrant, 522 U.S. 75, 81 (1997) (emphasis added; citation and internal quotation marks omitted).

This Court "should not address the constitutional issues until the proceedings in the trial court are finally concluded *and* the state appellate courts have completed their review of the trial court record." *Minnick v. Cal. Dep't of Corrs.*, 452 U.S. 105, 127 (1981) (emphasis added). If the Fifth District affirms the trial court's final judgment, as entered after remand, Pacetta would be in a position to seek review on his partial takings theory before this Court. *See Johnson v. California*, 541 U.S. 428, 430–31 (2004).[4] "It has long

[4] Pacetta has not sought to invoke any of the exceptions to the final-judgment rule, as set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479–83 (1975), nor could it do so. This is not a case in which, "if this Court does not consider the constitutional claims now, there may well be no opportunity to do so in the future," *Pennsylvania v. Ritchie*, 480 U.S. 39, 48 (1987), or in which a state appellate court has "finally adjudicated" a constitutional issue and "so has left 'the outcome of further proceedings preordained,' " such that this Court should be "satisfied that we are presented with the State's last word" on the constitutional issue. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 306–07 (1989) (citation omitted). Here, the state appellate court will apply partial

been established . . . that [w]e have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of [state proceedings]." *Hathorn v. Lovorn*, 457 U.S. 255, 261 (1982) (alterations in original; citations and internal quotation marks omitted); *see also California v. Rooney*, 483 U.S. 307, 313 (1987).

"This case fits within no exceptional category. It presents the typical situation in which the state courts have resolved some but not all of petitioners' claims." *Jefferson*, 522 U.S. at 84.

2. The Fifth District's decision rests upon an independent and adequate state ground: upon determining that the trial court had failed to make partial-takings findings, the Fifth District was barred by Florida law from making initial findings of fact on appeal. That the court elected not to affirm for lack of sufficient findings by the trial court, but rather to extend an opportunity to Pacetta for further litigation on a partial takings claim is not only a ruling favorable to Pacetta, but—more importantly—one that presents no constitutional question. That this is so, and that Pacetta will, as set forth above, have an opportunity to raise its constitutional claims if the currently pending appeal is decided in the Town's favor, makes it particularly appropriate to apply the final-judgment rule.

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takings principles in passing on the trial court's judgment, and—if the Town prevails—the constitutional issue will be before this Court, after the "state appellate court[ ] [has] completed [its] review of the trial court record." *Minnick*, 425 U.S. at 127.

Under Florida law, "an appellate court should affirm a trial court that reaches the right result, but for the wrong reasons if there is support for the alternative theory or principle of law in the record before the trial court." *Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co. of Fla.*, 97 So. 3d 204, 212 (Fla. 2012) (citation and internal quotation marks omitted); *accord Sexton v. State*, 221 So. 3d 547, 555 (Fla. 2017).[5] That doctrine cannot be applied, however, when the trial record is insufficient for the appellate court to perform its review function. *Robertson v. State*, 829 So. 2d 901, 908–09 (Fla. 2002); *Meyer v. Meyer*, 25 So. 3d 39, 42 (Fla. Dist. Ct. App. 2009). Accordingly, a Florida appellate court "cannot employ the tipsy coachman rule where a lower court has not made factual findings on an issue and it would be inappropriate for an appellate court to do so." *Featured Props., LLC v. BLKY, LLC*, 65 So. 3d 135, 137 (Fla. Dist. Ct. App. 2011) (quoting *Bueno v. Workman*, 20 So. 3d 993, 998 (Fla. Dist. Ct. App. 2009)). This is so because, "[s]itting as an appellate court, we are precluded from making factual

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[5] This principle has acquired the sobriquet "tipsy coachman doctrine" in Florida, deriving from the Florida Supreme Court's quotation from Oliver Goldsmith's 18th Century poem "Retaliation," which first appears in an 1879 Georgia Supreme Court decision:

> The pupil of impulse, it forc'd him along,
> His conduct still right, with his argument wrong;
> Still aiming at honour, yet fearing to roam,
> The coachman was tipsy, the chariot drove home. . . .

Carraway v. Armour & Co., 156 So. 2d 494, 497 (Fla. 1963) (quoting *Lee v. Porter*, 63 Ga. 345 (1879)).

findings ourselves in the first instance." *Featured Props.*, 65 So. 3d at 137 (citations omitted). To do so "would require [the appellate court] to weigh the evidence and usurp the role of the fact finder." *Wood v. Blunck*, 152 So. 3d 693, 695 n.1 (Fla. Dist. Ct. App. 2014).

The appropriate remedy when "effective appellate review is made impossible by the absence of specific findings" is a "remand with directions to the issuing courts to make the necessary findings." *Featured Props.*, 65 So. 3d at 137 (citations omitted); *accord Stills v. State*, 154 So. 3d 524, 528 (Fla. Dist. Ct. App. 2015). And that is precisely what the Fifth District did here: because there were no partial-takings findings in the trial court's Liability Order—and because such findings as the trial court made were based on its erroneous treatment of each parcel individually (a ruling that is not challenged here)—the Fifth District remanded for a partial-takings analysis of the unified relevant parcel, if necessary, after making a ripeness/futility inquiry. App. at A-17–20.

Because that result is compelled by state law, there is an independent and adequate state ground for the Fifth District's decision. The rule that "[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment," *Coleman v. Thompson*, 501 U.S. 722, 729 (1991), is controlling here.

There is no need for the Court to engage in the task of determining the extent to which federal law was involved in the Fifth District's decision to remand for further proceedings, *see, e.g., Florida v. Powell*, 559 U.S. 50, 57 (2010), because the face of the Fifth District's opinion demonstrates that it did not rely on federal takings law to hold that a remand was appropriate. And, to the extent that the Fifth District directed the trial court to apply federal law, the trial court has now done so, and the Fifth District will address the correctness of that ruling in the pending appeal.

3. Even if Pacetta could bypass these procedural hurdles, its partial takings argument before this Court presents no issue that warrants this Court's consideration. Pacetta's fulsome discussion of partial takings law is completely untethered to the Fifth District's decision in this case. Petition at 13–24. Its brief argument on why the Fifth District's decision is a "good vehicle" for addressing broad takings issues (Petition at 24–26) utterly fails to set forth any basis for certiorari.

This is so, in the first instance, because Pacetta relies on assertions that it demands be treated as issues of immutable fact—which are the very questions that the Fifth District directed the state trial court to address on remand (and which have since been addressed and resolved against Pacetta). For example, Pacetta begins its argument on this point with this assertion: "Pacetta developed and presented a specific site plan proposal for the 10-parcel mixed-use development, investing millions of dollars on architects, lawyers, and

preliminary and permitted improvements to the land." Petition at 24. The cited support for this assertion is the trial court's (now-reversed) Liability Order—but even the cited pages refer to the purported "specific site plan proposal" as Pacetta's "*concept* presentation." App. at B-24–25 (emphasis added). Similarly, Pacetta's reliance on development moratoria adopted by the Town over the years (Petition at 25), runs afoul of both the trial court's finding that the moratoria did not "inordinately burden" Pacetta's property under the less-onerous Florida Harris Act standard (much less the more stringent federal takings standard) (App. at B-68), and the decision in *Pacetta II*. 120 So. 3d at 29–31 (moratoria did not constitute "inordinate burden").[6]

Moreover, the Fifth District, after reviewing the record, determined that "the trial court's findings of fact in its liability order *were unclear* as to whether Pacetta had in fact submitted an application for development." *Pacetta III*, 226 So. 3d at 314 (emphasis

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[6] Another equally egregious example of ignoring the state appellate court's determinations is Pacetta's assertion that it also "pursued a significantly more modest development." Petition at 25. Even the trial court's purported finding was that the Town had "refused to accept an application to build with a complete series of rolled plans containing the design submissions necessary for permitting." App. at B-49 n.7. The trial court made no finding that this purported submission was a *meaningful* application within the meaning of this Court's partial-takings precedent; rather, to the trial court, this purported scenario was merely "consistent with the theme of denying [Pacetta] any effort to improve [its] property." *Id*. Thus, this finding—such as it was—was made solely in support of the trial court's (now-overturned) *total* takings determination.

added).[7] That determination is entitled to deference by this Court. *E.g., California v. Ramos*, 463 U.S. 992, 1010 n.24 (1983). Pacetta cannot be heard to request this Court "to set aside" the Fifth District's determination "before passing upon the constitutional questions" raised in the Petition, at least in the absence of "exceptional circumstances." *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952). No such circumstances are asserted here.

4. To the extent that Pacetta seems to believe the Fifth District's instructions to the trial court on the manner in which the trial court was to proceed on remand present a federal constitutional question, Pacetta is incorrect. The Fifth District's opinion recites the partial takings elements set forth by this Court in *Penn Central Transportation v. City of New York*, 438 U.S. 104 (1978) (App. at A-14–15), and, after determining that the trial court had failed to make findings that would allow meaningful judicial review and that the trial court had erred in treating each sub-parcel individually, remanded for appropriate findings to be made. App. at A-18–19.[8]

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[7] Indeed, the Fifth District rejected the Town's argument that the record was sufficient to show that the partial takings claim was not ripe. *Id*.

[8] The Fifth District noted that the trial judge who had conducted the original bench trial on liability had recused himself after the *Pacetta II* decision, such that, "because the first judge is not available to enter an amended liability order based upon his recollection of the evidence and the law of the case provided in this opinion, a new trial on the single claim that a 'partial' taking has occurred is necessary." App. at A-20 n.6.

Pacetta faults the Fifth District for doing so, asserting that "[t]he Town's stifling *new regulations* that deprived Pacetta of all economically viable development of four of the vacant parcels substantially interfered with reasonable, investment-backed expectations of at least residential development of those parcels." Petition at 35 (emphasis added). According to Pacetta, "the Town's response to Pacetta's development applications and cumulative regulatory action had, by 2010, made clear 'to a reasonable degree of certainty' that the Town would block *any* economic use of Pacetta's stretch of riverfront." *Id*. at 25 (emphasis in original). Pacetta is once again asking this Court to step into the state appellate court's shoes to find a basis for certiorari review.

As the trial court found, *all* of Pacetta's claims—takings, due process and equal protection, and the state-law Harris Act claim—were based "on the assumption that [Pacetta] had a vested interest in the option or obligation to construct and operate [a] mixed use . . . development" on the Town's riverfront. App. at B-6. The trial court ruled that Pacetta had "established by equitable estoppel a vested right" to require the Town to amend its comprehensive plan to allow for Pacetta to develop is property as it wished, free of constraints imposed by the adopted comprehensive plan and zoning code. App. at B-46–47.

Pacetta contends that this Court should accept the trial court's ruling and reject the Fifth District's decision, because "[t]argeting property with land use regulations so that government can more affordably

acquire it later . . . should require just compensation." Petition at 25–26, 34–36. What this argument ignores is the state appellate courts utterly rejected the notion that Pacetta had either *any* cognizable right created by equitable estoppel *or* a right to seek a judgment compelling the Town to allow development in violation of its adopted comprehensive plan.

The Fifth District's 2013 decision in *Pacetta II* made short shrift of Pacetta's equitable estoppel contention, holding that Pacetta could not obtain relief "on the . . . theory that it had a vested right, through the application of the principle of equitable estoppel, to develop its properties as negotiated by the parties, notwithstanding the fact that such development would violate Ponce Inlet's Comprehensive Land-Use Plan." 120 So. 3d at 30. The court rejected the claimed "vested right":

> At the time Pacetta purchased its properties, Ponce Inlet's Comprehensive Land-Use Plan expressly prohibited the type of development which Pacetta proposed for its properties. Any assurances by town officials that the Comprehensive Plan would be amended so as to authorize Pacetta's development plans could not be relied upon in good faith by Pacetta, since town officials lacked the authority to unilaterally amend the Comprehensive Land-Use Plan. Recognition of a vested right based on assurances from town officials to amend the Comprehensive Land-Use Plan would also be in violation of public policy, in light of the public hearings and other government approvals

> required for Comprehensive Plan amendments.

Id. at 30–31 (internal citations omitted). Thus, far from having "[t]arget[ed] [Pacetta's] property with land use regulations," the Town merely continued the regulatory scheme that had been in place *at the time Pacetta purchased its properties*.

The Fifth District reaffirmed that holding in its most recent decision, leaving open only whether Pacetta had submitted a development application so as to support a partial takings claim. *Pacetta III*, 226 So. 3d at 311, 313–14. While Pacetta may disagree with the current state of partial takings law (Petition at 13–26), it cannot avoid the "important principle," to which the Fifth District closely adhered, *Pacetta III*, 226 So. 3d at 314, that "a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001). The ripeness doctrine teaches that "a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law." *Id.* at 620–21. "As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established." *Id*. at 621.

This is so because the *Penn Central* factors "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985).

The exception to that general rule, as Pacetta acknowledges (Petition at 18, 21), is futility. Applying Florida law that follows these precedents, the Fifth District ordered that "the trial court on remand should determine whether [the] Town has effectively determined that any other development of Pacetta's property would be impermissible, thus causing any application by Pacetta for development or for an amendment to the plan to be futile." *Pacetta III*, 226 So. 3d at 314–15. The Fifth District's harmonious application of federal takings law bars any contention by Pacetta that this Court should review that court's decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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