No. ____

In The
Supreme Court of the United States

835 HINESBURG ROAD, LLC,
Petitioner,

v.

CITY OF SOUTH BURLINGTON, et al.,
Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The City of South Burlington, Vermont, established "Habitat Blocks" where all development is banned to preserve open space. It enacted an "interim" land use ordinance that restricted development between 2018 and 2022 while it contemplated the location of its Habitat Blocks. During that period 835 Hinesburg Road, LLC, submitted a development proposal for the construction of commercial and light industrial buildings on its 113.8-acre parcel of undeveloped land, which complied with all elements of the interim ordinance. The City formally rejected the plan as intruding partially into potential future Habitat Blocks. 835 Hinesburg filed a federal lawsuit claiming the City's rejection effected an unconstitutional taking without compensation. The district court dismissed the takings claim as unripe because 835 Hinesburg did not submit a second development proposal under subsequently adopted regulations that included the Habitat Blocks. The Second Circuit affirmed.

The question presented is:

Whether a takings claim is ripe when a city makes a final decision under existing ordinances denying a land use permit, or whether a property owner is required to submit subsequent development proposals for consideration under future or later-adopted regulations to ripen the claim?

PARTIES TO THE PROCEEDINGS AND RULE 29.6

835 Hinesburg Road, LLC, was the Plaintiff and Appellant in all proceedings below. 835 Hinesburg Road, LLC, is a limited liability corporation organized under the laws of the State of Vermont. It has no parent corporation and issues no shares.

The City of South Burlington and the South Burlington City Council are public entities.

Meaghan Emery, Timothy Barritt, and Helen Riehle are members of the South Burlington City Council sued in their official capacities.

RELATED PROCEEDINGS

835 Hinesburg Road, LLC v. City of South Burlington, No. 23-218, 2023 WL 7383146 (2d Cir. Nov. 8, 2023)

835 Hinesburg Road, LLC v. City of South Burlington, No. 5:22-cv-58, 2023 WL 2169306 (D. Vt. Jan. 27, 2023)

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PETITION FOR A WRIT OF CERTIORARI

835 Hinesburg Road, LLC, respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the Second Circuit Court of Appeals is unpublished but can be found at *835 Hinesburg Road, LLC v. City of South Burlington*, No. 23-218, 2023 WL 738146 (2d Cir. Nov. 8, 2023), and is reprinted at Pet.App.1a–12a. The District Court's decision granting the City's motion to dismiss is unpublished but can be found at *835 Hinesburg Road, LLC v. City of South Burlington*, No. 5:22-cv-58, 2023 WL 2169306 (D. Vt. Jan. 27, 2023), and is reprinted at Pet.App.13a–43a.

STATEMENT OF JURISDICTION

The lower courts had jurisdiction over this case under the Fifth Amendment to the United States Constitution, 42 U.S.C. § 1983, 28 U.S.C. § 1331 (district court) and 28 U.S.C. § 1291 (Second Circuit). The Second Circuit entered final judgment on November 8, 2023. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND ORDINANCE AT ISSUE

The Fifth Amendment to the U.S. Constitution provides in relevant part, "nor shall private property be taken for public use, without just compensation."

The City of South Burlington's Interim Bylaws, which were adopted November 13, 2018, and in place until February 7, 2022, are reprinted in relevant part at Pet.App.45a–49a.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

All property owners asserting their constitutional right to just compensation for a taking must establish Article III standing. Yet even when property owners demonstrate such standing, courts often decline to exercise jurisdiction "on grounds that are 'prudential,' rather than constitutional." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–26 (2014). This Court has long understood that idea of "prudential ripeness" sits "in some tension with . . . the principle, that 'a federal court's obligation to hear and decide' cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (quoting *Lexmark*, 572 U.S. at 126). For many years, takings claims were subject to special ripeness rules. The Court ultimately determined, however, that these claims are not "second class" with respect to other civil rights. It swept away one of the main atypical ripeness requirements for federal takings cases—exhaustion of state administrative and judicial processes—in *Knick v. Township of Scott*, 139 S. Ct. 2162, 2167 (2019). Subsequently, it explained that property owners bear only a "relatively modest" burden to demonstrate that government has staked out a "final" position to enable judicial review of its actions. *Pakdel v. City & Cnty. of San Franciso*, 594 U.S. 474, 478 (2021). These cases made clear that a case is ripe upon the government's de facto determination "how the 'regulations at issue apply to the particular land in question.'" *Id.* (quoting *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 739 (1997)).

Despite these developments, many lower courts, including the Second Circuit in this case, continue to *expand* the prudential ripeness doctrine to bar property owners from federal court. These lower courts erect unique "ripeness" hurdles for property owners that extend far beyond the simple requirement that the government's initial decisionmaker take a definitive position as to the application of the challenged land-use regulations to the property. *Pakdel*, 594 U.S. at 478 (citing approvingly to Judge Bea's opinion that the "'finality requirement looks only to whether the *initial decisionmaker* has arrived at a definitive position on the issue.'") (quoting *Pakdel v. City & Cnty. of San Francisco*, 952 F.3d 1157, 1170 (9th Cir. 2020) (Bea, J., dissenting) (emphasis added). These unique hurdles afford the government extraordinary deference to hold takings cases hostage while demanding that property owners ask for one more variance, submit one more application, or try for one more building configuration, in the vain hope that this time might be different. *See, e.g., N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1229, 1234 (10th Cir. 2021) (plaintiff whose development permit was denied met Article III standing and ripeness standards, but case was "not prudentially ripe" because it remained possible for the city to grant different requests). This is exhaustion by another name, and directly conflicts with this Court's precedents. *See Pakdel*, 594 U.S. at 480 ("Whatever policy virtues this doctrine might have, administrative 'exhaustion of state remedies' is not a prerequisite for a takings claim when the government has reached a conclusive position.") (citing *Knick*, 139 S. Ct. at 2167).

As this case demonstrates, prudential ripeness is anything but modest in practice. The Second Circuit

held 835 Hinesburg's takings claim unripe despite a recorded City Council vote to reject its development proposal. To ripen this claim under the Court of Appeals' rule, 835 Hinesburg would have to expend enormous amounts of additional time and money in the unrealistic hope that South Burlington might—contrary to its own regulations—reverse itself. *See* Michael K. Whitman, *The Ripeness Doctrine in the Land-Use Context: The Municipality's Ally and the Landowner's Nemesis*, 29 Urb. Law. 13, 39 (1997) (futility doctrine exists because "a plaintiff property owner should not be required to waste his time and resources in order to obtain an adverse decision that it can prove would have been made if subsequent application were made"). The time and expense required to endlessly pursue a final decision deters needed development of housing and commercial space and deprives property owners of their right to adjudication of constitutional rights. Worse, since local governments know that courts are receptive to expansive ripeness arguments, they have "no incentive to issue a final decision." *Bay-Houston Towing Co. v. United States*, 58 Fed. Cl. 462, 471 (2003).

Other courts, conflicting with the Second Circuit, have faithfully applied *Pakdel*. *See Catholic Healthcare International, Inc. v. Genoa Charter Township*, 82 F.4th 442, 448 (6th Cir. 2023) (A land-use case is ripe following "a 'relatively modest' showing that the 'government is committed to a position' as to the strictures its zoning ordinance imposes on a plaintiff's proposed land use.") (citing *Pakdel*, 594 U.S. at 478–79). This post-*Pakdel* circuit split heightens the need for this Court's intervention. The split between the Second Circuit (joined by the

First and Ninth Circuits)[1] and the Sixth Circuit demonstrates that, despite *Pakdel*, the issue of how prudential ripeness applies in takings cases is not settled. Without this Court's review, most property owners continue to face stalling tactics from local governments, draining the owners' resources and diminishing the chances that their takings claims ever will be heard on the merits. No other constitutional civil rights plaintiff faces this type of hurdle, highlighting that more is needed to ensure that property rights are not the "poor relation" of the Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

This Court should grant 835 Hinesburg's petition for a writ of certiorari.

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[1] *See, e.g.*, *Haney as Trustee of Gooseberry Island Trust v. Town of Mashpee*, 70 F.4th 12 (1st Cir. 2023) (finding a takings claim unripe despite two variance denials from the town board); *Ralston v. Cnty. of San Mateo*, No. 21-16489, 2022 WL 16570800 (9th Cir. Nov. 1, 2022) (holding a property owner must present a futile application to ripen a takings claim even when applicable law confirms all development is precluded).

STATEMENT OF THE CASE

A. The City of South Burlington's Interim Bylaws and Designation of Habitat Blocks

To protect wildlife habitat and open space, the City of South Burlington adopted interim zoning bylaws in 2018. Pet.App.3a, 16a–17a, 45a–49a, 69a–70a. Where they applied, the interim bylaws prohibited new development. Pet.App.3a, 45a–49a. However, the City retained the authority to "authorize the issuance of permits for the development" that the interim bylaws otherwise prohibited "after public hearing preceded by notice" and "upon a finding by the [City] that the proposed use is consistent with the health, safety, and welfare of" South Burlington. Pet.App.3a, 48a–49a.

The City also formed the Open Space Interim Zoning Committee to consider "the prioritization for conservation of existing open spaces, forest blocks, and working landscapes in South Burlington in the sustenance of our natural ecosystem, scenic viewsheds, and river corridors." Pet.App.16a–18a, 45a–49a. The Committee assessed 190 parcels of undeveloped land and identified 25 highest priority parcels for conservation, Pet.App.3a, 17a–18a, 69a–74a, including 835 Hinesburg's 113.8-acre property. Pet.App.3a, 18a, 68a; JA.32.

Soon after, the City Council considered proposed amendments to the City's Land Development Regulations (LDRs) that established designated "Habitat Blocks" and "Habitat Connectors." Pet.App.18a–19a, 74a–75a. Under the proposed LDRs, all land labeled a "Habitat Blocks" or "Habitat Connectors," including those found within 835

Hinesburg's property and the other priority parcels, "must be left in an undisturbed, naturally vegetated condition." Pet.App.50a–61a, 68a–69a. On February 7, 2022, four years after it initially adopted the interim bylaws, the City voted to adopt the amended LDRs. Pet.App.5a, 68a.

B. 835 Hinesburg's Development Proposal

835 Hinesburg is a Vermont limited liability company that seeks to provide needed housing and commercial rental space in the fast-growing South Burlington metropolitan area. *See* Chelsea Edgar, *Despite a Housing Crisis, South Burlington's City Council Adopts Regs to Slow Rural Development*, Seven Days (Feb. 9, 2022).[2] It owns property in a developed area of South Burlington, with Interstate 89 and Burlington International Airport directly to the north of the property, heavy industrial development and State Route 116 directly to the east, a major sports complex and hundreds of homes to the west, and hundreds of additional homes to the south, as shown below.

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[2] https://www.sevendaysvt.com/news/despite-a-housing-crisis-south-burlingtons-city-council-adopts-regs-to-slow-rural-development-34854443 (noting that restricting housing development "outsource[s] the housing shortage to farther-flung communities").

JA.36. In short, 835 Hinesburg's proposal—initially proffered to the City's Planning Commission in 2015, Pet.App.68a—accommodates growth without sprawl.

As directly by the City's interim bylaws then in effect, 835 Hinesburg submitted a preliminary "sketch plan" for a planned unit development, Pet.App.77a; JA.44, consisting of the construction of twenty-four commercial and industrial buildings, along with necessary infrastructure, on its 113.8-acre parcel of undeveloped land in the Industrial/Open Space Zoning District. Pet.App.20a; JA.32, 36. Proposed uses include an animal shelter, community center, light manufacturing, office space, restaurants, and storage. JA.46. Although the interim bylaws allowed the City to permit development "consistent with the

health, safety, and welfare of" South Burlington, the City Council voted to reject 835 Hinesburg's proposal.[3]

The City Council noted that the area designated as Habitat Blocks in the then-draft LDRs "is located along the westerly, northwesterly and southwesterly boundaries of the subject property and extends easterly to varying degrees across the parcel. This area of the subject property lies under the Habitat Block and Habitat Connector Overly District." JA.35. Because "the proposed development include[d] several buildings and associated infrastructures within the proposed Habitat Block Overlay District"—an area where "development is generally prohibited" under the LDRs—the City Council concluded that "the proposed project will or could be contrary" to future ordinances. Pet.App.20a–21a, 77a; JA.34–36. The City Council thus treated the proposed project as subject to the prohibition on development in Habitat Blocks that it anticipated adopting in the final LDRs. Pet.App.20a–21a; JA.35 ("[b]ased on these unknowns and an initial review of the application of the draft amendments approved by the Planning Commission, . . . the proposed project will or could be contrary to the amendments to the Land Development Regulations that the City adopts."). Specifically, the City Council stated:

> Under the draft LDR, development is generally prohibited on lands within a Habitat Block. The application does not include any information regarding the location of this overlay district, but [*it*] *is*

[3] Three City Counselors voted "nay" on the proposal. One City Counselor voted "yea" on the proposal. And one City Counselor was marked "not present." Pet.App.20a, 77a; JA.36.

> *apparent that the proposed development includes several buildings and associated infrastructure within the proposed Habitat Block Overlay District*.

JA.35 (emphasis added).

C. The City's Habitat Block Land Development Regulations

As the City's rejection of 835 Hinesburg's proposal anticipated, the amended LDRs created a Habitat Block overlay district that categorically prohibits any commercial development within a Habitat Block.[4] 2022 LDR § 12.04(F), (H); Pet.App.57a–59a. Specifically, the regulations require that "all lands within a Habitat Block must be left in an undisturbed, naturally vegetated condition." 2022 LDR § 12.04(F). The LDRs also prohibit "[t]he encroachment of new development activities into, and the clearing of vegetation, establishment of lawn, or other similar activities in Habitat Blocks." 2022 LDR § 12.04(H); Pet.App.57a.

The amended LDRs include procedures for limited Habitat Block modification, none of which would have changed the outcome for 835 Hinesburg's proposed development. Pet.App.51a–55a. A Minor Habitat Block Boundary Adjustment allows the City to modify a Habitat Block by 50 feet in any direction, so long as

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[4] The only permitted uses within a Habitat Block are narrow, unpaved, non-motorized trails; removal of dead or dying plants and invasive species that pose an imminent threat to buildings or infrastructure; and construction of certain fences. 2022 LDRs §§ 12.01(C), 12.04(G). Additionally, the City alone may develop necessary infrastructure, facilitate outdoor recreational uses, or allow research or educational purposes within a Habitat Block. 2022 LDRs §§ 12.02(B), 12.04(H).

it offsets the adjustment elsewhere so that the total area remains the same. 2022 LDR § 12.04(D)(1); Pet.App.52a. The Small On-Site Habitat Block Exchange permits an applicant to exchange two acres or ten percent of the application's total land area for an equal amount of land within the bounds of the same planned unit development. 2022 LDR §§ 12.04(D)(1), (2); Pet.App.52a–53a. Again, the total area of the Habitat Block remains the same. A Larger Area Habitat Block Exchange permits an exchange of a portion of Habitat Block for an equal amount of contiguous land within the same habitat block, once again preventing development on 835 Hinesburg's property. 2022 LDR § 12.04(D)(1)–(3); Pet.App.53a–55a. Finally, 835 Hinesburg is not eligible for the relief enumerated for lots with at least a 70% Habitat Block overlay, 2022 LDR § 12.04(E), as only 37.7% of its property is listed as Habitat Block. Pet.App.55a–56a.

D. Procedural History

Having received a formal City Council "no" vote on its development proposal, 835 Hinesburg sued the City and members of the City Council in federal court. Pet.App.64a–87a. It alleged that the denial violated the Takings Clause and the Due Process Clause, among other claims. Pet.App.83a–87a.[5] The district court granted the City's motion to dismiss the takings claims on ripeness grounds. Pet.App.35a–38a, 43a. The district court held the takings claims unripe because 835 Hinesburg's development proposal was

[5] 835 Hinesburg raised additional claims under Vermont's Common Benefits Clause, both the federal and Vermont Equal Protection Clauses, and several other state constitutional claims. Only the federal takings claims are at issue here.

insufficiently comprehensive. Pet.App.35a–38a. Although submitting the proposal was a required step under the City's own regulations, 2022 LDR § 15A.05A., Pet.App.62a–63a, the district court reasoned that 835 Hinesburg could have applied for a variance to adjust the Habitat Block overlay, under one of the modification procedures noted above. Pet.App.31a–32a. Thus, despite the formal "no" vote, the district court perceived "considerable uncertainty about how South Burlington will apply the 'Habitat Block' provisions of the amended LDRs." Pet.App.31a.

The Second Circuit affirmed. Pet.App.3a–12a. It held that the City was within its rights to demand that 835 Hinesburg pursue another development proposal under its newly adopted LDRs. Pet.App.7a–8a. Because 835 Hinesburg submitted its required "sketch plan" development proposal under the interim bylaws, "the City Council did 'not yet know for certain' how the proposed Amended LDRs would apply to the Property," and could conduct only a "'minimal' assessment" of the proposed development Pet.App.7a–8a. The panel also concluded that it would not be futile for 835 Hinesburg to submit a new application because, in its view, the possibility for modification under the LDRs meant that the court could not assess the effect of the regulations on the property until such modifications were made or denied. Pet.App.7a–8a. Consequently, the Second Circuit discounted the City Council's formal vote and held 835 Hinesburg's takings claim unripe. Pet.App.7a–9a, 12a. This petition follows.

REASONS FOR GRANTING THE PETITION

The doctrines of standing and ripeness originate from the same Article III limitation that federal courts may entertain only "case[s] or controvers[ies]." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006). They ultimately "boil down to the same question" of whether the plaintiff properly alleged an injury. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007). In the land use context, a takings claim is ripe when "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). "Finality" in as-applied regulatory takings cases allows courts to ascertain the "extent of permitted development" on the land in question. *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 351 (1986). This pleading requirement is "relatively modest," and demands that property owners show only that the "initial decisionmaker" made a final determination as to "how the 'regulations at issue apply to the particular land in question.'" *Pakdel*, 594 U.S. at 478 (citation omitted). Landowners needn't "submit applications for their own sake," or engage in futile acts. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 622, 626 (2001).

This Court has never addressed whether rejected property owners must reapply under subsequently adopted laws to ripen a takings claim that arose when the government rejected a development proposal under a previous legislative regime. Property owners submit development applications under the laws applicable at the time. They don't propose

development to comply with repealed laws or potential future laws. When the government says "no," thwarting development of private property to achieve a public purpose such as conservation, a property owner may pursue a takings claim in federal court. *See, e.g., Pakdel*, 594 U.S. at 475. Whether land use laws, the composition of a city council, or any other factor may change in the future should be of no consequence. *See McKeithen, Trustee of Craig E. Caldwell Trust v. City of Richmond*, 893 S.E.2d 369, 378 (Va. 2023) (a takings claim cannot be thwarted by the potential that, "under no compulsion of law, [it] might show mercy . . . at some unspecified future date").

I. Lower Courts Conflict as to What *Pakdel* Requires, with Most Imposing an Improper Exhaustion Requirement on Property Owners

This Court consistently reinforces the rule that plaintiffs need not exhaust administrative remedies before asserting their federal rights in federal court via 42 U.S.C. § 1983. By the time this Court directly so held in *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982), it had already declined to require exhaustion several times, *see id.* at 500 (collecting cases). The unbroken line of precedent reflects the purpose of Section 1983: "to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

But even as this Court cleared the way for access to federal court for most constitutional claims, it continued to erect barriers for property owners seeking to vindicate their Fifth Amendment rights.

Not long after *Patsy*, the Court held that a takings claim is not ripe in federal court until the property owner "has used" the State's "adequate procedure for seeking just compensation" and "been denied just compensation." *Williamson Cnty.*, 473 U.S. at 195. Recognizing the stark contradiction between *Patsy* and *Williamson County*, the Court later repudiated *Williamson County*'s state-litigation rule, describing it as an impermissible "exhaustion requirement." *Knick*, 139 S. Ct. at 2173.

Knick promised to reopen the federal courthouse doors to takings claims. *Id.* at 2177. But it left *Williamson County*'s "finality" requirement untouched. *Id.* at 2177–79. The Court acknowledged that the line between finality and exhaustion is blurry and the concepts "often overlap," but noted that "whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable." *Williamson Cnty.*, 473 U.S. at 192–93. "[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury," *id.* at 193, in contrast to "administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate" *Id.* As an example, the Court explained that property owners need not appeal an initial decision-maker's rejection of a development proposal when the reviewing board cannot itself engage in decision-making. *Id.* However, this minimal guidance left substantial room for both lower courts and creative local governments to stave off the moment a takings claim becomes ripe.

This Court rejected the conflation of finality and exhaustion in *Pakdel*. There, owners of apartments in a San Francisco row house held their interest as a tenancy-in-common that they sought to convert into individually-owned condominiums. 952 F. 3d at 1160. One set of apartment owners, the Pakdels, leased to a tenant and, as a condition for the condo conversion, San Francisco required them to grant the tenant a lifetime lease, a requirement the Pakdels challenged as an unconstitutional taking. *Id.* at 1160–62. The district court originally dismissed the case because *Williamson County* required the Pakdels to exhaust state litigation procedures. *Id.* at 1161. When the case reached the Ninth Circuit, *Knick* had eliminated that hurdle. The Ninth Circuit majority pivoted and held the case unripe for lack of finality. *Id.* at 1163–64. It faulted the property owners for failing to pursue an exemption to the lifetime lease requirement. *See id.* at 1165–66. The panel majority's interpretation of finality amounted to an administrative exhaustion requirement—precisely what *Knick* had disavowed.

This Court squarely rejected the Ninth Circuit's new exhaustion rule. The unanimous per curiam opinion declared that the Ninth Circuit's approach "mirrors our administrative-exhaustion doctrine" and is thus "inconsistent with the ordinary operation of civil-rights suits." *Pakdel*, 594 U.S. at 478–79. *Pakdel* clarified that local governments may not avoid takings lawsuits by requiring property owners to jump through administrative hoops to "ripen" a claim. Instead, "administrative missteps do not defeat ripeness once the government has adopted its final position." *Id.* at 480–81. Because the City had plainly imposed the lifetime lease requirement, the property

owners achieved "de facto finality" and their challenge was ripe. *Id.* at 478–79.

A. Lower Courts Conflict as to When Finality Morphs into Exhaustion

Pakdel clarified that takings claims, like all other constitutional claims, are not subject to an impermissible exhaustion requirement under the guise of "finality." *Id.* Yet many lower courts marginalize *Pakdel* by limiting it to its facts and continue to require administrative exhaustion. Property owners are thus barred even from seeking vindication of their constitutional rights in federal court.

Here, the Second Circuit failed to apply the "de facto finality" standard, instead holding that the development prohibition was not final because 835 Hinesburg had not submitted a formal application under the now-permanent LDRs. Pet.App.6a–9a. But requiring a developer to pursue procedures after the initial decision-maker formally rejects a proposal—as the City Council did when it voted on 835 Hinesburg's plan—is administrative exhaustion. All that is required for a final decision is that the government "is committed to a position," *Pakdel*, 594 U.S. at 478–79, and the City Council's decision is as final as can be. It refused to permit 835 Hinesburg's development because a substantial portion of the land the property owner seeks to develop is inside a Habitat Block. Whether the Habitat Block can be minimally modified in its coverage may affect the size or valuation of the taking, but under no circumstances will the City approve a development proposal that eliminates the Habitat Block overlay entirely.

So long as the overlay exists in any configuration, preventing any development within its boundaries, so does the property owner's takings claim. *See Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 & n.29 (1974) ("where the inevitability of the operation of a statute against certain individuals is patent," particular future contingency was "irrelevant to the existence of a justiciable controversy"). The City lacked discretion under its own ordinances to reconsider its decision halting 835 Hinesburg's project. Worse, the Second Circuit decision pointlessly demands that 835 Hinesburg seek reconsideration from the same body that already voted to reject the proposed development and subsequently finalized regulations permanently banning development on a portion of the property. Pet.App.6a–9a. Even before *Pakdel*, this sort of exhaustion was not required. "Ripeness doctrine does not require a landowner to submit applications for their own sake." *Palazzolo*, 533 U.S. at 622.

Unfortunately, 835 Hinesburg is far from the only landowner kept out of court on these grounds since *Pakdel*. In *Haney*, 70 F.4th 12, the First Circuit held a takings challenge unripe despite *two* variance denials from the Town Board that precluded the owner from building a single-family home. Despite *Pakdel*'s insistence that the finality burden is "modest," 594 U.S. at 478–79, the First Circuit faulted the property owner for not seeking approval from a different body for a separate matter related to the proposed construction of the house. *See Haney*, 70 F.4th at 21–22. Despite the obvious effect of the Town's two denials, the First Circuit required the property owner to jump through still more administrative hoops—before an entirely different

government agency—before it could "ripen" a takings claim against the Town for the Town's actions. *Id.* Although the court cited *Pakdel*, the rule the court actually applied was akin to an exhaustion requirement. *Id.* A final "no" on the variance requests was not good enough.

The Fifth Circuit also retains an exhaustion requirement in the guise of finality. *Beach v. City of Galveston*, No. 21-40321, 2022 WL 996432 (5th Cir. Apr. 4, 2022), like the Ninth Circuit in *Pakdel*, relied on older circuit precedent to hold that a property owner waived his takings claim by failing to appeal the loss of the property's grandfather status—which had allowed a previous multi-family development on the land—and by failing to *reapply* after his application for a special use permit was denied by the city council. *Id.* at *3. Just as in *Pakdel*, neither of these failures were relevant to whether the City's decision to refuse continued use of the property for multi-family housing was *final*. The City had committed to a position, but the Fifth Circuit required compliance with an administrative appeals process that amounted to a request for reconsideration to the city council. Once again, that is not finality, but exhaustion.

Similarly, in *Ralston*, 2022 WL 16570800, the Ninth Circuit failed to apply *Pakdel*'s "*de facto* finality" standard, demanding that a property owner present a futile application for a Coastal Development Permit to build a single-family home when applicable law required denial *and* the county planning director, in consultation with county counsel, confirmed that no home could be built. *See id.* at *2; *Ralston v. Cnty. of San Mateo*, No. 21-16489, Excerpts of Record at 12–21

(9th Cir. Nov. 1, 2022). This result conflicts with *Pakdel* as well as a long line of this Court's precedent confirming that property owners need not file applications for their own sake. *See, e.g.*, *Palazzolo*, 533 U.S. at 620; *Suitum*, 520 U.S. at 739 (agency made a final decision by determining that the subject was within a Stream Environment Zone that permitted no development).

In *North Mill St.*, 6 F.4th at 1229, a property owner's plan for a "combined use" of the subject property required rezoning, which was denied. But the court held the takings claim was prudentially unripe because "[a]lthough its rezoning application was denied, 'avenues still remain for the government to clarify or change its decision.'" *Id.* at 1230–31 (quoting *Pakdel*, 594 U.S. at 480–81). The owner might have "submitted a development proposal for [Planned Development] review" which would eliminate the need for rezoning. *Id.* Thus, the only way an owner can demonstrate a final decision in the Tenth Circuit is to submit a formal proposal that is then formally denied, and then pursue every other possible option that conceivably could lead to approval. *Id.* at 1233. Similarly, in *Willan v. Dane County*, No. 21-1617, 2021 WL 4269922, at *3 (7th Cir. Sept. 20, 2021), the Seventh Circuit held that takings claims were not ripe because the owners had not sought a conditional use permit exempting their property from a recent rezoning. *See also Barlow & Haun, Inc. v. United States*, 805 F.3d 1049, 1059 (Fed. Cir. 2015) (requiring formal application even where likelihood of approval is "not high").

Contrary to the cases above, other Circuits faithfully follow this Court's "de facto" approach to

finality. In *Catholic Healthcare International, Inc. v. Genoa Charter Township*, 82 F.4th 442 (6th Cir. 2023), a religious organization sought to create a prayer trail on 40 acres of undeveloped wooded property. *Id.* at 445. The government treated the prayer trail as a church, which required special land use and site plan approval. *Id.* The organization submitted two separate unsuccessful permit applications—one before and one after it filed suit. *Id.* at 446. The district court dismissed the organization's suit under the Religious Land Use and Institutionalized Persons Act (RLUIPA) as unripe. *Id.* at 447. The Sixth Circuit reversed. Citing *Pakdel*, the panel held the district court had conflated ripeness with exhaustion. *Id.* at 448. It explained that a land-use case is ripe following "a 'relatively modest' showing that the 'government is committed to a position' as to the strictures its zoning ordinance imposes on a plaintiff's proposed land use." *Id.* (citing *Pakdel*, 594 U.S. at 478–79). Importantly, the court emphasized that "[r]ipeness does *not* require a showing that 'the plaintiff also complied with administrative process in obtaining that decision.'" *Id.* (emphasis added). Because the Township clearly refused to grant Catholic Healthcare a permit for its prayer trail, Catholic Healthcare's RLUIPA claim was ripe under *Pakdel*.

The Eleventh Circuit also does not require denial of a formal application to understand the permissible uses of the property to a reasonable degree of certainty. In *South Grande View Dev. Co., Inc. v. City of Alabaster*, 1 F.4th 1299 (11th Cir. 2021), the city rezoned 142 acres of a 547-acre property that had been developed pursuant to a master plan approved by the city. *Id.* at 1302. The rezoning affected only a single owner. *Id.* The court held that the takings claim was

ripe because "the zoning ordinance itself was the City's final decision on the matter." *Id.* at 1307. The court distinguished "between a targeted zoning ordinance where the plaintiff contested the application to his or her land, and a general ordinance where a plaintiff has not asked the city to rezone his or her property," holding that no applications need be made in the former situation. *Id. See also, Acorn Land, LLC v. Baltimore Cnty.*, 402 F. App'x 809, 815 (4th Cir. 2010) (where targeted rezoning "cut the property's maximum residential density by half and placed the property in the lowest water/sewer classification," landowner need not seek a variance to ripen takings claim).

By taking *Pakdel*'s directives seriously, these Circuits conflict with the First, Second, Seventh, Ninth, and Tenth Circuits. While this Court granted certiorari in *Pakdel* to confirm the modest nature of the ripeness requirement, already a new split has developed. Despite this Court's guidance, lower courts continue to impose barriers on property owners seeking access to federal courts. Making matters worse, many of these decisions are unpublished—which permits incorrect, poorly reasoned decisions to fly under the radar, eluding en banc rehearing or this Court's review. *See, e.g.*, Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 Am. U. L. Rev. 757, 799–800 (1995) (unpublished opinions "give the impression of arbitrary, cavalier action by the appellate court and threaten confidence in the judicial process"). Without this Court's intervention, property owners and governments will be subject to wildly different ripeness rules. This

Court should grant the petition to ensure that the lower courts adhere to the same modest rules allowing property owners their day in court to challenge land use regulations.

B. Extensive Negotiation with the Government Is Not a Prerequisite to Finality

In *Village Green at Sayville, LLC v. Town of Islip*, 43 F.4th 287, 297–98 (2d Cir. 2022), the Second Circuit held that a property owner's takings claim was ripe after years of fruitless negotiations even without an up-or-down council vote. The Court should grant this petition to clarify that constitutional standing and ripeness does not depend on property owners' engaging in a years-long back-and-forth dialogue with a governmental entity that plainly forbids a proposed project. Nothing in this Court's precedent suggests that such "give-and-take negotiation," *see id.* at 297 (quoting *Sunrise Detox V, LLC v. City of White Plains*, 769 F.3d 118, 124 (2d Cir. 2014)), is required to satisfy the final decision requirement. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 698–721 (1999) (appellant did not have to go through with a protracted application process to meet the final decision requirement). Instead, finality is a "modest" requirement, and all that is necessary to ripen a claim is for the government to have "committed to a position." *Pakdel*, 594 U.S. at 478–79.

Cases like *Village Green* show developers' overwhelming efforts to gain approval before resorting to a lawsuit. For example, the developer in *Del Monte Dunes* went back and forth with the government for years as it sought to reach a position acceptable to the City. *See Del Monte Dunes at Monterey, Ltd. v. City of*

Monterey, 920 F.2d 1496, 1503–06 (9th Cir. 1990) (detailing *19* iterations of proposals prior to suing). But *Village Green* and *Del Monte Dunes* cannot exemplify what developers *must* do to ripen a regulatory takings claim, when this Court describes the finality requirement as "modest." Lower courts adopting this standard are not demanding finality, but exhaustion of both available processes and the property owner's resources. *See City of Sherman v. Wayne*, 266 S.W.3d 34, 42 (Tex. App. 2008) ("[W]e are mindful that 'government can use [the] ripeness requirement to whipsaw a landowner. Ripening a regulatory-takings claim thus becomes a costly game of 'Mother, May I', in which the landowner is allowed to take only small steps forwards and backwards until exhausted.") (citation omitted).

Lower courts demanding that property owners continually return to government decisionmakers with altered plans apparently fear that enforcing a "modest" ripeness requirement will flood the federal courts with takings cases. *See, e.g.*, *Sherman v. Town of Chester*, 752 F.3d 554, 562–63 (2d Cir. 2014) (town "engaged in a war of attrition" after repeatedly changing the zoning laws, rejecting landowner's proposals, and forcing him to spend millions of dollars over the course of 10 years); *Laredo Vapor Land, LLC v. City of Laredo*, No. 5:19-CV-00138, 2022 WL 791660, at *4–*5 (S.D. Tex. Feb. 18, 2022) (takings case unripe where plaintiff failed to seek variance or make "alternative proposal" or "obtain a proportionality review" or "engag[e] in back-and-forth conversations with City officials" to pursue every possible alternative). But developers want to *build*, not litigate. They are generally willing to engage in negotiation and compromise when they have reason to

believe the government ultimately will permit them to make productive use of their property.

Give-and-take exhaustion also improperly conflates ripeness with the merits of regulatory takings claims. Whether the denial of a development permit has deprived the owner of all economically beneficial use of his land or has otherwise gone too far in regulating away the owner's right to use his land are difficult questions in many cases. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). But these are merits questions to be resolved typically after substantial factfinding. Such questions are distinct from whether the government has in fact decided to limit an owner's use by denying permission to develop his land. J. David Breemer, *Ripening Federal Property Rights Claims*, 10 Engage: J. Federalist Soc'y Prac. Groups 50, 55 (2009) ("Final decision ripeness is not concerned with whether a property owner has a winning [denial of all use] claim; it is simply concerned with ensuring that a land use decision is concrete enough to allow a court to even consider whether it [causes] a taking."). Requiring exhaustion through substantial negotiation effectively prevents property owners from asserting their rights on the theory that perhaps the government will permit some lesser development that would avoid takings liability. This not only outsources the merits determination to the local governments, but presents the risk that the property owner will be subject to undue delay or unfair procedures as he tries to ripen his claim. *See Del Monte Dunes*, 920 F.2d at 1501.

C. Without This Court's Intervention, Property Owners Are Uniquely Deprived of Federal Court Adjudication of Constitutional Claims

Local governments have every incentive to avoid reaching "merits" decisions. *See San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655 n.22 (1981) (Brennan, J., dissenting) (quoting article advising city attorneys on legal tactics to avoid judicial resolution of regulatory takings claims). Delay in decision-making benefits only the government, with its deep pockets and endless time, while grinding down property owners' monetary and spiritual resources. *Towing Co.*, 58 Fed. Cl. at 471 ("[A] strict interpretation of the ripeness doctrine would provide agencies with no incentive to issue a final decision."); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 98 (1995) ("[M]unicipalities may have an incentive to exacerbate this problem [of the delay inherent in 'ripening' a case], as stalling is often the functional equivalent of winning on the merits."); Luke A. Wake, *Righting a Wrong: Assessing the Implications of* Knick v. Township of Scott, 14 Charleston L. Rev. 205, 214 (2020) ("agency staff can often threaten permit denial without actually pulling the trigger").

The effect is well known to this Court and others, which decry the "shell game" and "shifting goal post" manipulations incentivized by the existing ripeness doctrine. *See Donnelly v. Maryland*, 602 F. Supp. 3d 836, 842 (D. Md. 2022) ("As Plaintiffs see things, the protracted history of the County's and State's maneuvers seems to be little more than a governmental shell game."); *State ex rel. AWMS Water*

Solutions, L.L.C. v. Mertz, 162 Ohio St. 3d 400, 410 (2020) (after a property owner twice submitted applications that were rejected, and the state suggested a third application to meet newly adopted standards, the court "decline[d] the state's invitation to issue a decision establishing precedent permitting the state to create moving targets"); *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 572 (S.D.N.Y. 2006) (finding that any successive applications or modifications would simply waste time and delay justice). If this Court fails to reinvigorate *Pakdel*, one can expect these "shell games" to continue. *But see Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021) ("If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.").

II. The Petition Raises the Important, Unsettled Question of Whether Property Owners Whose Land Use Application Is Rejected Must Reapply Under Later-Adopted Regulations to Ripen a Takings Claim

Many local governments enact interim land use regulations for long periods of time while future permanent regulations are drafted and adopted. A constitutional problem arises when property owners submit development proposals that comply with the interim rules, only to be denied because the government anticipates future regulation that would ban the proposed use. The court below, and some others, tacitly approve this approach by holding that a property owner's takings claim is unripe if he fails to reapply pursuant to the later-adopted regulations.

In this case, such reapplication would be futile because the language of the regulations plainly forbids any development in a Habitat Block. In a larger sense, this application of ripeness doctrine bars property owners from federal court to challenge any project denials under so-called interim regulations.

Governments have long used this tactic to try and avoid liability. In *Gabric v. City of Rancho Palos Verdes*, 73 Cal. App. 3d 183, 189 (1977), a property owner applied to build a home under interim regulations that permitted such use. The City denied the permit on the grounds that it could, and probably would, in the future, enact zoning laws that would prohibit the development of any and all buildings. *Id.* at 188–89. The California appellate court disagreed, holding the City's probable future, yet undetermined, zoning action could not justify denying the permit under the current regulations. *Id.* at 189; *see also, Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 126 (1973) (examining and concluding that when an applicant complies with all of the requirements for a building permit the applicable law is the law at the time when the application was made, even if the law has been changed prior to the decision). And yet the Second Circuit would hold the opposite here, conflating "legislative authority with administrative duty," *Gabric,* 73 Cal. App. 3d at 192, by requiring 835 Hinesburg to comply with future law and not the law at hand. This cannot be the case. *See Gramatan Hills Manor, Inc. v. Manganiello*, 213 N.Y.S.2d 617, 620–21 (1961) (finding a property owner was entitled to pursue development under the existing ordinance not a future nonadopted ordinance).

Some courts agree with *Gabric*. The Louisiana Supreme Court examined whether the government and later a reviewing court should utilize existing or future law when examining development permits. *A to Z Paper Co. v. Carlo Ditta, Inc.*, 775 So. 2d 42, 46–47 (La. 2000). And just as California did, Louisiana held that "[t]he issuance of a permit must be determined with reference to the existing [law], not one that is planned for the future." *Id.* at 47; *see also, Zachary Hous. Partners, L.L.C. v. City of Zachary*, 185 So. 3d 1, 7–9 (La. App. 2013) (finding the City Council's reliance on a future master plan over its existing zoning ordinance "teeters dangerously on the edge of becoming an unconstitutional taking of property and a due process violation."). Idaho, too, has followed suit, holding in *Canal/Norcrest/Columbus Action Committee v. City of Boise* that "to permit retroactive [or future] application of an ordinance would allow a zoning authority to change or enact a zoning law merely to defeat an application, which would result in giving immediate effect to a future or proposed ordinance before that ordinance was properly enacted." 137 Idaho 377, 379 (2002); *see also, Bracken v. City of Ketchum*, 537 P.3d 44, 49–58 (Idaho 2023) (same).

Although *Pakdel* offered apparently clear guidance, property owners continue to struggle to gain access to federal courts, while facing often opaque and shifting regulations that local governments and courts may invoke to avoid deciding takings claims on the merits. Here, the South Burlington City Council enacted interim regulations that permitted development, reviewed an application submitted in compliance with those regulations, and rejected the application in anticipation of new regulations flatly

prohibiting any development over a significant portion of 835 Hinesburg's property. Pet.App.68a–69a; JA.34–36, 42–43, 51. The courts below nonetheless require 835 Hinesburg to apply under a newly-adopted regulatory scheme. Pet.App.6a–9a. The City's vote to deny the application made its position clear. It denied the project because no development would, in the future, be permitted in Habitat Blocks and now the Habitat Blocks are in place. Pet.App.57a–59a; JA.35–36. There should be no impediment to a federal court ascertaining whether this effected a taking without just compensation.

CONCLUSION

This Court should grant the petition.

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Respectfully submitted,

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