No. ____

In The
Supreme Court of the United States

PPI ENTERPRISES, LLC,
Petitioner,

v.

TOWN OF WINDHAM,
Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of New Hampshire

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

PPI Enterprises applied twice to the Town of Windham for a permit to develop its vacant, "limited industrial"-zoned property that sits sixty feet above the adjacent road. The Town twice denied the application based on its aversion to PPI's grading plan that requires blasting rock, a routine process in the Granite State. PPI pursued every possible appeal of the denials, to no avail.

Left with an inaccessible vacant lot, PPI alleged a federal takings claim that reached the New Hampshire Supreme Court. The court never reached the merits, instead deeming the case unripe due to the Town's assertion that it *might* grant a third application that includes new unidentified mitigation measures. Based solely on the Town's assertion, the court below held "as a matter of law" that the two application denials did not "present a final decision regarding the application of the regulations to the property at issue."

The question presented is:

Are two final denials of development applications sufficient to ripen a regulatory takings claim, where the government asserts that it *might* grant a third application if modified in some unspecified way?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE

Petitioner PPI Enterprises, LLC was the Plaintiff and Appellant below. PPI Enterprises, LLC is a limited liability company that has no parent corporation and no stock.

The Town of Windham, New Hampshire, is a public entity and was the Defendant and Appellee below.

STATEMENT OF RELATED PROCEEDINGS

PPI Enterprises, LLC v. Town of Windham, No. 2022-0707, 2024 WL 397790 (N.H. Feb. 2, 2024).

PPI Enterprises, LLC v. Town of Windham, No. 218-2021-CV-00959 (N.H. Super. Ct. Oct. 14, 2023).

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PETITION FOR A WRIT OF CERTIORARI

PPI Enterprises, LLC (PPI) respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of New Hampshire.

OPINIONS BELOW

The order of the New Hampshire Supreme Court is not published, but reported at 2024 WL 397790 (N.H. Feb. 2, 2024) and is reprinted at App.1a. The October 14, 2022, order of the New Hampshire Superior Court is unpublished and reprinted at App.10a.

JURISDICTION

This takings case arises under the Fifth Amendment to the United States Constitution, as incorporated via the Fourteenth Amendment, and Part I, Article 12 of the Constitution of the State of New Hampshire. The New Hampshire Superior Court for Rockingham County dismissed Petitioner's takings claim as unripe despite two formal application denials, and the New Hampshire Supreme Court affirmed. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION 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."

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

A property owner whose land is taken for public use is entitled to just compensation under both the

federal and New Hampshire Constitutions.[1] When government denies the taking, the property owner's sole recourse is to file a claim in inverse condemnation. Yet the application of prudential justiciability doctrines by lower courts—especially ripeness—continues to erect obstacles preventing access to courts. A prudential ripeness doctrine that bars property owners from a hearing on the merits of their taking claims cannot be reconciled with courts' "virtually unflagging" obligation to resolve constitutional claims within their jurisdiction. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (citation omitted); *O'Neil v. Thomson*, 114 N.H. 155, 159 (1974).

This case exemplifies governments' ability to evade accountability in court. *See Westgate, Ltd. v. State*, 843 S.W.2d 448, 459 (Tex. 1992) (Doggett, J., dissenting) ("Governmental accountability is the true issue" in inverse condemnation cases.). For more than four years, PPI participated in seven meetings of the Town of Windham Planning Board, revised its application to develop its property multiple times, and twice submitted a formal complete site plan application for development permits—both of which were denied. App.2a; Certified Record of Appeal ("CR") at 36–37, 96–97, 134–36, 151–54, 222–27, 282–87, 367–72, *PPI*

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[1] The New Hampshire Constitution does not expressly require payment of just compensation, but it "has always been understood necessarily to include, as a matter of right, and as one of the first principles of justice [that] due compensation must be provided" since, without such "indemnity provided by law[,]" the taking power "would be essentially tyrannical, and in contravention of other articles in the Bill of Rights." *Proprietors of Piscataqua Bridge v. New Hampshire Bridge*, 7 N.H. 35, 66 (1834).

Enterprises, LLC v. Town of Windham, No. 218-2021-CV-0959 (N.H. Super. Ct. Oct. 26, 2021).[2] These denials leave PPI's property bereft of all economically beneficial use, *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992), or, alternatively, constitute a regulation of property that "goes too far" and constitute a Fifth Amendment taking. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

The court below held that two denials of complete final site plans are not enough to ripen PPI's claims because the Town asserted that it would be willing to review yet another site plan, modified in some unspecified way, should PPI choose to submit one. App.8a. A property owner's mere ability to reapply following an unfavorable land use decision should not render a takings claim unripe. *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001) ("Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."). A takings claim is ripe for judicial review "once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are *known to a reasonable degree of certainty*[.]" *Palazzolo*, 533 U.S. at 620 (emphasis added).

In *Pakdel v. City and County of San Francisco*, this Court held that this "relatively modest" requirement asks property owners to show "how the 'regulations at issue apply to the particular land in question'" and "nothing more than *de facto* finality is necessary." 594

[2] The Board voted to deny PPI's site plan application first in June 2019, then again in August 2021, following PPI's successful appeal of the first denial. App.2a.

U.S. 474, 478–79 (2021) (quoting *Horne v. Dep't of Agric.*, 569 U.S. 513, 525 (2021)); *see also Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 739 (1997) (rejecting overly formalistic application of earlier finality precedents declaring claims unripe because "[t]hose precedents addressed the virtual impossibility of determining what development will be permitted," in favor of more practical approach). Despite *Pakdel*'s instruction, there is a continuing and deepening split of authority among federal appellate circuits and state supreme courts about finality and ripeness in Just Compensation Clause cases.

Here, PPI faces extensive public and official hostility that renders further applications futile, despite the Town's strategic tease that yet another permit application *might* be approved. *See, e.g.*, *Sprint Spectrum, L.P. v. Borough of Upper Saddle River Zoning Bd. of Adjustment*, 801 A.2d 336, 360 (N.J. Sup. Ct. App. Div. 2002) (property owner needn't engage in "fruitless waste of time" in light of government's unremitting hostile and suspicious attitude). PPI engaged in good faith efforts to satisfy the Town's demands and submitted two fully developed final site plan applications. App.1a–2a; *see MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 352 n.8 (1986) (a takings claim is ripe after denial of a "meaningful application"). Planning Board members repeatedly insisted that they would not approve PPI's proposals regardless of compliance with state and local laws and zoning ordinances because of the rock blasting necessary for *any* development. App.32a–33a; CR.96, 136, 225, 368–69, 371. The Board further responded to PPI's good-faith attempts to accommodate members' concerns with ever more extreme and contradictory demands. *See* App.24a–

25a. The Town's process rendered a plain conclusion that no regulation-compliant driveway could be built without some blasting, and the Town is dead set against any blasting. Further applications are an exercise in futility. *See Lost Tree Vill. Corp. v. City of Vero Beach*, 838 So.2d 561, 564–68 (Fla. Dist. Ct. App. 2002) (the combination of a "no bridgehead" ordinance with a "no development without a bridge" ordinance made any future attempts to obtain permits futile).

The New Hampshire Supreme Court's insistence that PPI return to the Planning Board yet again conflicts with this Court's ripeness jurisprudence, as expressed in *Palazzolo* and *Pakdel*. Like New Hampshire's approach here, the First, Fifth, Ninth, and Tenth Circuits all erect unreasonable ripeness barriers to takings cases. *See, e.g.*, *Haney v. Town of Mashpee*, 70 F.4th 12 (1st Cir. 2023) (property owner's takings claim held unripe despite two variance denials from the town board); *N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1229, 1234 (10th Cir. 2021) (although property owner met Article III standing and ripeness standards, takings claim held "not prudentially ripe" because it remained possible for the city to grant different requests).

Other courts, including the Sixth Circuit and Supreme Court of Nevada, do not demand futile acts prior to hearing land use claims on the merits. *See Cath. Healthcare Int'l, Inc. v. Genoa Charter Twp.*, 82 F.4th 442, 448 (6th Cir. 2023) (property owner's takings claim was ripe when the township denied both an initial application and an additional, more limited application); *City of Las Vegas v. 180 Land Co., LLC*, 546 P.3d 1239, 1252 (Nev. 2024) (property owner's takings claim was ripe after the city denied a single

development application because the city failed to provide a consistent reason for its denial, failed to give a reasonable indication of what would be required to obtain a variance, and "showed a general hostility to allowing any development on the site").

Palazzolo, *Pakdel*, and *Knick v. Township of Scott*, 588 U.S. 180, 189 (2019), say that local governments cannot engage in interminable cycles of administrative proceedings to avoid accountability for land use decisions that may effect regulatory takings. Yet many lower courts require property owners to spend dwindling time and money on pursuing futile permit applications—leaving them unable to hold the government accountable for taking private property without just compensation. *Cf. City of Sherman v. Wayne*, 266 S.W.3d 34, 42 (Tex. Ct. 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). This Court should grant certiorari to resolve the conflict between the lower courts and clarify that property owners are not required to engage in futile resubmissions of rejected plans to ripen their regulatory takings claims.

STATEMENT OF THE CASE

A. Factual Background

1. There Is No Building Without Blasting on This Property

Robert Peterson owns and operates PPI Enterprises, a small, family-owned real estate company. In 2017, it purchased a 45.47-acre property

in the Town of Windham, New Hampshire, to build a three-story, 93,000 square foot, self-storage facility with parking—an uncontroversially permitted use under the applicable "limited industrial" zoning regulations. App.35a; CR.18. It is taxed as a developable lot. App.18a. The front of the property contains a steep hillside and a large rock ledge sixty feet above the adjacent Ledge Road, which is the primary means of accessing the property. App.31a. To access any building on the property, PPI must construct a sloped driveway from Ledge Road to the parking area and building entrance. App.12a; CR.136.

The area is characterized by broken terrain, with steep hillsides quickly rising hundreds of feet from the creek beds below.[3] The area includes substantial numbers of hard granite dikes and outcroppings that further contribute to the ruggedness of the terrain.[4] The average depth of bedrock in New Hampshire is twenty feet, but it may be within five feet of the surface.[5] Developing difficult terrain like this,

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[3] Walsh, Gregory J. & Clark, Jr., Stewart, U.S. Geological Survey, Bedrock geologic map of the Windham quadrangle, Rockingham and Hillsborough Counties, New Hampshire (1999), https://ngmdb.usgs.gov/Prodesc/proddesc_19246.htm

[4] Gregory J. Walsh & Stewart F. Clark, Jr., Bedrock Geologic Map of the Windham Quadrangle, Rockingham and Hillsborough Counties, New Hampshire Open-File Report 1, 4–5 (1999), https://pubs.usgs.gov/of/1999/of99-8/of998pam.pdf.

[5] The New Hampshire Association of Conservation Districts, *New Hampshire Soil Judging Contest Guide* at 11 (Aug. 2018), https://www.nrcs.usda.gov/sites/default/files/2022-11/NH%20Soil-judging-guide-2018.pdf. The hydrology expert hired at the Town's direction explained that blasting is a tightly regulated "tool used every day across the country," with 13.8 million pounds of explosives being used in New Hampshire alone in 2015. CR.328, 368.

common in the "Granite State," often necessitates blasting. *See* N.H. Dep't of Transp., *Blasting Fact Sheet* (Nov. 16, 2015) (noting necessity of blasting in road construction and established standards and safety measures).[6]

Some amount of controlled blasting is necessary for *any* development of PPI's property, App.23a–24a, as the Town "effectively concede[d]." App.3a. PPI was the second owner of this lot to attempt to make productive use of it. Unfortunately, eighteen years ago, a previous owner's negligent blasting damaged abutting residential properties, resulting in litigation. App.23a. To avoid a recurrence, the Town amended its blasting ordinance in 2008 to limit the duration and extent of blasting and require insurance and monitoring of groundwater for contamination. *Id*

2. The Town Denies PPI's Application Because of the Necessary Blasting

PPI proposed to construct the self-storage facility on the already disturbed portion of the property. It pursued a plan fully in compliance with the Town's new ordinances to minimize required blasting, conscious of the failures of the previous owner. App.2a, 11a; CR.136 (civil engineering firm providing technical review opined that blasting is necessary for any driveway construction and raised no concerns about collateral effects),[7] CR.368–69 (hydrology expert hired at Town's request explained safety

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[6] https://mm.nh.gov/files/uploads/dot/remote-docs/blast-factsheet-rev-03-22-17.pdf.

[7] The Planning Board Chairman insisted that these findings were merely "personal opinion" and speculated that other engineers might disagree. CR.136. The Town identified no such "other engineers."

practices PPI would follow and opined that there was little risk if proper procedures were followed). The Town Planning Board considered PPI's preliminary major site plan application in June 2018 and found that the Site Plan complied with the zoning regulations and satisfied the submission requirements. CR.51. Several abutting neighbors mobilized to oppose any development of the property that required blasting, CR.36–37, which is to say: any development. Their opposition was echoed by Planning Board members, despite acknowledging that PPI's plan "was an allowed use for the zone." CR.36–37.

At a Planning Board hearing concerning PPI's proposal, the company's engineer explained that the rocky terrain and significant ledge on the property foreclosed any development that didn't include some blasting. CR.96. And indeed, the plan contained a regulation-compliant 8% grade driveway that would require considerable blasting to carve out of the rock. The Planning Board's chairman responded that he "had trouble imagining a scenario where he would vote in favor of a plan for this site that involved blasting," eliciting cheers from some members of the audience. CR.96. The Board did not vote at that time, inviting PPI to revise its application before it reached a final decision. CR.97, 109.

Given the Planning Board's consistent opposition to blasting, PPI submitted an amended plan that reduced the amount of rock that needed to be removed by 58,000 cubic yards and anticipated that 10,000 of the remaining cubic yards could be removed via

jackhammering rather than blasting. CR.152.[8] PPI proposed that rock crushing would be done as far from neighboring residences as possible, and offered to construct an earthen berm along the northwestern side of the property to reduce noise audible to residential neighbors. CR.152. The neighbors were not assuaged. They continued vehemently to oppose the project based on the prior owner's failures, and multiple members of the public baselessly insisted that PPI was merely a front for the loathed prior owner. CR.153. The matter was continued until March 2019. CR.154.

At that hearing, PPI explained that "the only way that the plan could be done solely with hammering is if the existing road could be used," but that "the current roadway was too steep [per the Town's regulations, with a 14% grade] and lacked the required site distance at the intersection [with Ledge Road]." CR.225. PPI offered to conduct any blasting during the winter when abutting property owners would be less likely to be outside and the sound would be muffled by snow, as well as to pay for monthly testing of abutting property owners' well water. CR.225. The Planning Board remained opposed, with the chairman reiterating his position from the October 3 meeting, *see* CR.96, that he "personally did not feel he could vote for the project if it involved blasting," CR.225, and two members stating they "did not" think they could "potentially approve it" even with "more assurances the abutters would be taken care of." CR.225.

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[8] The plan also minimized surface disturbance and stormwater runoff. CR.111–32, 136.

PPI continued its good faith attempts to satisfy the Board and the neighbors, revising the driveway design again, increasing the grade from 8% to 10% to further reduce the amount of blasting and to direct any blasting "away from and down-gradient of residential abutters." CR.264–65. At the Planning Board's request, an expert on hydrology and blasting reviewed the proposal. He advised the Planning Board that blasting would not affect the aquifer below the property if good management procedures were followed by a licensed contractor. CR.368. He explained that proper procedures would eliminate vibrations on the neighbors' land and that no toxic residue would remain, even after a complete detonation. CR.368. The Planning Board, however, demanded the expert guarantee the impossible: that there could *never* be a negative impact on surrounding properties from blasting. CR.368–69. The expert could not presume to speak for any specific blasting company but opined that "in the case of a complete detonation[,] there would not be an environmental impact." CR.369. The Town's Assistant Deputy Fire Chief assured the Planning Board that he could and would suspend blasting if he received even one complaint, and further confirmed that "the plan met the zoning, [met] all site-specific ordinances, and that the blasting ordinance would be followed." CR.369, 371.

The Planning Board was unyielding, characterizing PPI's presentation as conjecture and asserting that "no data had been presented by the applicant that informed him that the severe circumstances the residents endured ten years ago would not repeat themselves." CR.371. The Town voted to deny the application under Section 100 of the

Town of Windham Zoning Ordinance (the general purposes provision). App.2a.

PPI appealed the Planning Board's decision to both the Town of Windham Zoning Board of Adjustment (ZBA) and the New Hampshire Superior Court. App.35a. The ZBA found the Planning Board's reliance on Section 100 of the Site Plan Regulations (the "general purposes" section) to be "improper" because it lacked factual findings, App.36a–38a, and remanded the matter to the Planning Board, a decision upheld by the New Hampshire Supreme Court. App.42a–43a.

On remand in August 2021, the Planning Board said the public hearing on the application was closed and allowed no further testimony or public comment. App.25a; CR.390–92. Planning Board members read prepared statements that reiterated talking points from the initial denial and added a new concern over the 10% grade of the proposed driveway. CR.390–92. Planning Board members ignored that PPI altered the driveway design expressly to respond to the Planning Board's opposition to blasting. The Planning Board unanimously denied the final complete application, this time under Sections 501 (governing road grade and site distances), 504 and 602 (governing potential threats to public safety in general), 506 (governing treatment and disposal of sewage, refuse, and other waste), and 702 (governing site access requirements) of the Site Plan Regulations. App.25a–26a. CR.392, 95–96. The trial court made a factual finding that all these cited justifications "were based, either directly or indirectly, on the Board's concerns about blasting." App.25a.

B. Legal Proceedings Below

PPI appealed the Town's second vote to deny its site plan application to the ZBA and superior court, also raising a claim for inverse condemnation.[9] The superior court upheld the denial of the application, finding that "the Board's safety concerns arising from the grade of the proposed access road were sufficient" to justify denying the application. App.14a.

The court noted that the Board "seemed intent on preventing PPI from developing the Property at all, inasmuch as such development would necessarily

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[9] PPI formally asserted a claim for inverse condemnation in its lawsuit following the Planning Board's second denial of its site plan application, asserting rights under both the New Hampshire and United States Constitutions. App.44a–46a. PPI elaborated on its federal claim in its brief on inverse condemnation filed October 13, 2022. Pl.'s Mem. of L. (Inverse Condemnation) at 5–6, *PPI Enterprises, LLC v. Town of Windham*, No. 218-2021-CV-0959 (N.H. Super. Ct. Aug. 12, 2022) (citing federal law). Neither the New Hampshire Superior Court nor the New Hampshire Supreme Court explicitly stated that PPI's inverse condemnation claim was brought under both state and federal law, but it would not have altered the analysis. *See Spengler v. Porter*, 144 N.H. 163, 166 (1999) (majority opinion in joint federal and state takings case relied on New Hampshire law exclusively, while dissent also relied on federal caselaw). The New Hampshire Supreme Court opinion below relies on *Hill-Grant Living Trust v. Kearsage Lighting Precinct*, 159 N.H. 529 (2009), App. 6a–8a, which in turn relies on federal precedent including *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), *MacDonald, Sommer & Frates*, 477 U.S. 340, and *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). The federal issue is thus plainly presented. *See Milkovich v. Lorain J. Co.*, 497 U.S. 1, 10 n.5 (1990) (finding federal question was adequately raised to review state supreme court decision relying on state precedent that itself relied upon and was "interwoven with the federal law").

involve blasting," App.3a, 32a, and ordered further briefing on the inverse condemnation claim. The superior court observed that the Town:

> (1) considers the property "geographically challenged"; (2) effectively concedes that blasting is required to develop the property; (3) is "very concerned about blasting" on the property because of issues that arose from the previous owner's blasting; and (4) believes that the blasting ordinance "assumes a blank slate" and that "mere compliance with the ordinance would not be enough to gain approval" from the Board given the prior history of the property.

App.3a, 32a–33a. It noted that the Board twice denied PPI's application because of concerns about blasting "regardless of whether PPI's application complies with the Town's blasting ordinance," and that "mere compliance with the ordinance would not be enough to gain approval." App.3a, 33a. Thus, it "[struck] the Court as a foregone conclusion" that the Board would "certainly deny" a revised application with an 8% grade "since it would necessarily entail a greater amount of blasting than the application which ha[d] now been twice denied." *Id.* Despite these findings, the superior court held that PPI's inverse condemnation claim was not ripe for review because PPI might obtain access to the site "via an easement over an abutting commercial lot[,]" or, submit a revised site plan application with an 8% driveway grade because the Town "affirmatively asserted that the Board will fairly consider" it. App.3a–4a.

The New Hampshire Supreme Court affirmed. It acknowledged the trial court's findings that the Town's denials after "lengthy proceedings" and PPI's "good faith efforts to alleviate the Board's concerns" gave PPI good reason for "skepticism" that the Board would ever "fairly consider the merits" of a new application complying with its demand for an 8% grade. App.7a–8a. Nevertheless, the court below deferred to the Town's bare assertion that it would "not necessarily deny subsequent applications to develop the Property." App.8a. Justice Marconi reluctantly concurred:

> I write separately to point out that this applicant has become wedged between the proverbial "rock and hard place." First, the applicant was denied for concerns over the amount of on-site blasting and then, after increasing the road grade to reduce the blasting, the applicant was denied for the excessively steep road grade. The town has represented that a resubmitted application that "conforms with the 8% grade ... and with other mitigation or modification, could be found acceptable." I trust the Board will articulate the "other [reasonable] mitigation or modification" that will render the application acceptable.

App.9a. (citation omitted). The Planning Board has made no such articulation.

PPI now seeks this Court's review of the New Hampshire Supreme Court's decision holding that PPI's inverse condemnation claim is not ripe.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts with This Court's Finality Jurisprudence That Property Owners Needn't Pursue Futile Resubmissions

A takings claim is ripe for judicial review once "the permissible uses of the property are known to a reasonable degree of certainty[.]" *Palazzolo*, 533 U.S. at 620. This is no more than a "*de facto* finality" requirement. *Pakdel*, 594 U.S. at 479. The New Hampshire Supreme Court, in its decision below, nonetheless demanded that PPI expend further time and resources on a *third* application before the same Planning Board that has been crystal clear that it will permit no development of PPI's property. The decision below directly conflicts with this Court's finality jurisprudence.

A. Governments Cannot Employ Endless Processes to Avoid Accountability Under the Takings Clause

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.*, 473 U.S. at 186. "Finality" in the context of takings claims allows courts to ascertain the "extent of permitted development" on the land in question. *MacDonald, Sommer & Frates*, 477 U.S. at 351. The purpose of this "relatively modest" finality requirement is to "ensure[] that a plaintiff has actually 'been injured by the Government's action' and is not prematurely suing over a hypothetical harm," *Pakdel*, 594 U.S. at 478–79

(quoting *Horne*, 569 U.S. at 525), and therefore "nothing more than *de facto* finality is necessary." *Id.* *See also Suitum*, 520 U.S. at 739 (adopting practical approach to ripeness rather than formalism); *Lucas*, 505 U.S. at 1012 n.3 (finding case ripe even though Lucas never submitted a plan for development because "such a submission would have been pointless" in the face of the Council's categorical statement that no building permit would have been issued). The finality requirement is *not* an exhaustion requirement. A taking occurs once "a local government takes private property without paying for it ... without regard to subsequent state court proceedings." *Knick*, 588 U.S. at 189.

The Court has consistently rejected the recasting of "finality" as an exhaustion requirement. In *Palazzolo*, a property owner was repeatedly denied a permit to fill wetland on otherwise developable property and sued for inverse condemnation. 533 U.S. at 619. The Rhode Island Supreme Court held that the claim was unripe because, "notwithstanding the Council's denials of the applications, doubt remained as to the extent of development the Council would allow on petitioner's parcel." *Id.* This Court reversed, holding that Palazzolo had done enough. There was "no indication the Council would have accepted the application had petitioner's proposed beach club occupied a smaller surface area [as the state court speculated]." *Id.* at 619–20. The Court sought to avoid the moral hazard that exists when local governments "burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." *Id.* at 621 (citing *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999)). Thus, contrary to the judgments of the courts below in this

case, the "[r]ipeness doctrine does not require a landowner to submit applications for their own sake[,]" and governments may not "attempt to interject ambiguity" by speculating that some undefined development might be possible. *Id.* at 622.

B. Courts Are Split on How to Apply This Court's Finality Jurisprudence

Despite *Pakdel*, relatively few lower courts treat finality in inverse condemnation cases as a modest and pragmatic requirement that does not force property owners to "submit applications for their own sake." *See Palazzolo*, 533 U.S. at 622. While the Sixth Circuit and the supreme courts of Nevada and Ohio have properly allowed takings cases such as this one to proceed to the merits, the First, Fifth, Ninth, and Tenth Circuits have been *expanding* notions of prudential ripeness to erect exhaustion-like barriers that this Court has repeatedly commanded have no place in claims asserting constitutionally protected rights.

1. Like the New Hampshire Supreme Court, Several Circuit Courts of Appeal Impose Improper Exhaustion Requirements Under the Guise of Finality

At least four circuits have imported what are essentially administrative exhaustion requirements into their finality decisions and have continued to do so even after this Court's 2021 decision in *Pakdel*.[10]

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[10] The Second Circuit presents a mixed bag. In *835 Hinesburg Road, LLC v. City of South Burlington*, No. 23-218, 2023 WL 7383146, at *3 (2d Cir. Nov. 8, 2023), *pet. for writ of cert. pending*, No. 23-1045 (U.S. Mar. 19, 2024), the Second Circuit held a

In *Haney v. Town of Mashpee*, 70 F.4th 12 (1st Cir. 2023), the First Circuit held a takings challenge unripe despite two zoning 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 government body for a separate matter related to the proposed construction of the house. *Haney*, 70 F.4th at 21–22. Despite the obvious effect of the town's two denials to kill the project, the First Circuit refused the property owners' attempt to vindicate constitutional rights and hold the government accountable for taking his property without just compensation.[11]

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takings challenge to be unripe even though the city council voted to reject a property owner's development proposal because the owner did not submit a second development proposal under regulations adopted subsequent to the first denial. However, other decisions permit property owners' claims to proceed. *See, e.g.*, *Ateres Bais Yaakov Academy, Village Green at Sayville, LLC v. Town of Islip*, 43 F.4th 287, 296–99 (2d Cir. 2022); *Martin v. Town of Simsbury*, 735 F.App'x 750, 752 (2d Cir. 2018), In *Sherman v. Town of Chester*, 752 F.3d 554, 561–63 (2d Cir. 2014), the court vividly explained why finality/futility should not be a high bar in a context very similar to the one at issue here: "The Town will likely never put up a brick wall in between Sherman and the finish line. Rather, the finish line will always be moved just one step away until Sherman collapses. In essence, the Town engaged in a war of attrition with Sherman." *See also Kleinknecht v. Ritter*, No. 21-2041, 2023 WL 380536, at *3 (2d Cir. Jan. 25, 2023) (allowing property owners to proceed when future applications would be futile, noting "[t]here are no magic words necessary for a decision to satisfy the final-decision requirement").

[11] Adding to the confusion, the federal district court in New Hampshire conflicts with the New Hampshire Supreme Court's

In *Beach v. City of Galveston*, No. 21-40321, 2022 WL 996432, at *3 (5th Cir. Apr. 4, 2022), the Fifth Circuit held 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. Just as in *Pakdel*, neither of these failures affected the finality of the City's decision to refuse continued use of the property for multi-family housing. The City committed to a position, but the Fifth Circuit barred the property owner's takings claim until he complied with an administrative appeals process by requesting reconsideration of the city council.[12]

In *Ralston v. Cnty. of San Mateo*, No. 21-16489, 2022 WL 16570800, at *2 (9th Cir. Nov. 1, 2022), the Ninth Circuit faulted a property owner's failure to submit an application, even though applicable law explicitly precluded any development on the property, a fact confirmed by the county officials. And in *N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1229–34 (10th Cir. 2021), the Tenth Circuit held that while a

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approach by holding a takings claim to be ripe although the developer did not "incur the substantial cost of preparing a formal application" where it could not have been approved, even given the "existence of unspecified contingencies." *Brookline Opportunities, LLC v. Town of Brookline*, 682 F.Supp.3d 168, 182 (D.N.H. 2023).

[12] Courts in the Fifth Circuit distinguish between takings challenges to permit denials, which face a steep ripeness hurdle if the owner could resubmit a revised plan, and takings challenges to laws that, by their express terms, allegedly take property without compensation, which are ripe as soon as the law goes into effect. *See MC Trilogy Texas, LLC v. City of Heath*, 662 F.Supp.3d 690, 701–02 (N.D. Tex. 2023).

property owner's takings claim was ripe under Article III standing and ripeness standards, it was "not prudentially ripe" because the property owner might conceivably pursue other avenues available for development.

2. The Sixth Circuit and Some State Supreme Courts Apply a Pragmatic Approach to Finality and Futility

In conflict with the Circuits above, other courts apply *Pakdel*'s "relatively modest" finality approach to takings cases.

In *Catholic Healthcare*, 82 F.4th at 445, a religious organization sought to create a prayer trail on forty acres of undeveloped wooded property. 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 because the district court conflated ripeness with exhaustion. *Id.* at 448. The court emphasized that "[r]ipeness does not require a showing that 'the plaintiff *also* complied with administrative process in obtaining that decision.'" *Id.* Because the Township clearly refused to grant Catholic Healthcare a permit for its prayer trail, the RLUIPA claim was ripe under *Pakdel*.

In *State ex rel. AWMS Water Solutions, LLC v. Mertz*, 162 Ohio St.3d 400 (2020), a property owner submitted two development applications that were

denied, but refused to waste time and money on a third application when the state adopted new standards and wanted to start the whole process over. The Ohio Supreme Court held the owner's takings claim was ripe after the first two applications were "rebuffed or ignored." *Id.* at 410. The court "decline[d] the state's invitation to issue a decision establishing precedent permitting the state to create moving targets." *Id.*

The Nevada Supreme Court conflicts with the Ninth Circuit's approach with the result that Nevadans may pursue some constitutional takings claims in state court that would be deemed unripe in federal court. *Cf. Knick*, 588 U.S. 180. In *180 Land Co.*, 546 P.3d 1239, the city denied the property owner's proposal to develop a 35-acre parcel adjacent to a golf course it also owned because "it was concerned with piecemeal development and there was public opposition" to the proposal. *Id.* at 1251. The court held that the property owner's inverse condemnation claim was ripe even though the property owner "submitted only one application specifically regarding residential development to the 35 acres," because that one denial, considered alongside the city's other actions, demonstrated that "any further submissions by 180 Land to residentially develop the 35 acres would have been futile." *Id.* at 1251–52. *Compare with Evans Creek, LLC v. City of Reno*, No. 3:20-cv-00724, 2021 WL 4173919, at *7 (D. Nev. Sept. 14, 2021) (City's "decision not to annex the Property is, in effect, a final decision about what may or may not be developed on the Property."), *rev'd*, No. 21-16620, 2022 WL 14955145 (9th Cir. Oct. 26, 2022).

Certiorari is warranted to resolve this split as to when a property owner has done enough to ripen a takings claim.

C. Lower Courts Need Guidance as to When Further Land Use Proceedings Are Futile

Futility is an established exception to the requirement that property owners must try, try again to obtain development approval. *Haney*, 70 F.4th at 21 ("Through *Pakdel*, our caselaw's futility exception is now simply part and parcel of the finality requirement."). Futility may be shown by the government's overt hostility to the project. This case presents far more than "mere allegations" of hostility. *See Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990). PPI faced consistent, unwavering hostility and rejection from the Planning Board, as the trial court stated:

> It strikes the Court as a foregone conclusion that, if PPI were now to submit a revised application with an 8% road grade (as it has expressed a readiness to do), the Board would certainly deny it, since it would necessarily entail a greater amount of blasting than the application which has now been twice denied.

App.14a–15a.

Fueled by simmering anger and mistrust over a previous property owner's mismanaged (later abandoned) project on the property years before, the Planning Board expressed hostility to PPI's development proposal from the very first hearing. *See* CR.36–37. The Town dismissed expert testimony as

"conjecture" and personal "opinion." CR.136, 371; *see supra* at 8 n.7, 11–12. The trial court cited the record that during public hearings, neighbors opined that the Town "should buy this land to keep it from ever being developed," to which the Planning Board responded they should "purchas[e] the land themselves or draft[] a warrant article for the [T]own to purchase the land if they wanted to be assured there would never be any development at the site." App.11a, 18a n.1. Apparently unwilling to do the right thing and purchase the property, the Town chooses instead to collect taxes on it as a "developable property," App.18a, while refusing to permit any productive use.

This resembles the circumstances in *Sprint Spectrum*, where the court noted that "[t]hroughout the proceedings, Board members were hostile and suspicious of plaintiffs' witnesses, often accusing them of lying or falsifying data. There is no reason to believe the Board's attitude will change if plaintiffs apply for variances to locate the monopole at an even more intrusive site." 801 A.2d at 615. Under these circumstances, the property owner was relieved of a "fruitless waste of time" and could proceed to argue the merits of its takings claim. *Id. See also Pittsfield Dev., LLC v. City of Chicago*, No. 17C1951, 2024 WL 579715, at *12 (N.D. Ill. Feb. 13, 2024) (city's action deemed final where evidence shows that "hostile political environment" made property owner's further pursuits "not a viable option").

Some courts acknowledge that, while procedures to revise, amend, and resubmit an application may technically exist, this does not necessarily indicate that a local government has any intention of revisiting its position, particularly in the light of fierce public

opposition. *See 180 Land*, 546 P.3d at 1252 (public opposition and city's general hostility exemplified by city officials' statements showed futility of further attempts to obtain development approval). No property owner should have to engage in futile gestures simply to gain access to courts. In this case, the Town convinced the court below that PPI could try again, App.9a, but has yet to provide the property owner with any guidance that would lead to approval for a project that, if it includes an 8% graded driveway, inherently requires *more* blasting than the previous applications that were denied because of the Town's opposition to any blasting on the property. *See* App.33a (trial court accepted this reasoning). "[T]he approving body cannot implement a vague standard, refuse to define it, fail to vote on an applicant's compliance with the standard, and then fault the applicant for not receiving a final decision on its compliance." *Lilly Invs. v. City of Rochester*, 674 F.App'x 523, 529 (6th Cir. 2017) (commission claimed it would vote on the project, but court found that "the record [told] a different story"). *See also Anaheim Gardens v. United States*, 444 F.3d 1309, 1316 (Fed. Cir. 2006) (the existence of avenue for administrative relief did not defeat finality because the responsible agency's "delays or refusals to provide the requisite appraisals" rendered the process futile).

The futility rule is particularly relevant here, where the Planning Board has a history of changing its tune depending on its litigation needs. Property owners are entitled to invoke the accountability provided by requiring government to defend against an inverse condemnation claim on the merits. By demanding "finality" on shifting sand, courts allow local government invested with highly discretionary

zoning authority simply to continue denying a property owner's application for slightly different reasons indefinitely, winking as it wishes the property owner better luck next time. The doctrine of judicial estoppel "prohibit[s] parties from deliberately changing positions according to the exigencies of the moment" to avoid inadvertent judicial complicity in this deprivation of rights. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). Here, the Planning Board candidly based its first denial of PPI's application on the issue of blasting and asserted that PPI's application violated the "general purposes" section of the local zoning ordinances. App.1a–2a, 37a. When the New Hampshire Supreme Court faulted this justification as improper, the Board pivoted to concerns about the grade of PPI's proposed driveway. App.24a–25a. Notwithstanding this pivot, the trial court found that the newly stated reasons for the second denial were based on the same reason as the first denial: opposition to blasting. App.25a.

Despite this, the court below credited the Town with good faith in its anticipated *third* review of PPI's proposed development. App.8a–9a. Such deference is unwarranted. The Planning Board earlier advised the court that "[t]he record in this case reveals significant abutter opposition. The Board is not at liberty to 'work with' the applicant," and would not do so. Def.'s Mem. of L. at 12, *PPI Enterprises, LLC v. Town of Windham*, No. 218-2021-CV-0959 (N.H. Super. Ct. Mar. 28, 2022) (citation omitted). Only when the court sought additional briefing on the takings question did the Town claim that it would "fairly consider" a new application. App.8a. Courts should reject such incompatible statements to obtain a litigation advantage. *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8

(2000) (judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase"); *see also Heimbecher v. City and Cnty. of Denver*, 97 Colo. 465, 473 (1935) ("Litigants are not allowed to blow both hot and cold at the same time."); *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 665–66 (2012) (Scalia, J., dissenting) ("self-serving litigating positions are entitled to no weight"). The Planning Board should not be permitted to coyly assert that it will fairly consider any further amended applications PPI submits, when all other prior statements and consistent actions since 2018 indicate otherwise. *See Beta Analytics Int'l, Inc. v. United States*, 61 Fed.Cl. 223, 226 (2004) (rejecting the idea that a court should accept a litigant's self-serving statements as evidence of good faith when the litigant's actions indicate otherwise because "rare indeed would be the occasions when evidence of bad faith will be placed in an administrative record, and to insist on this—and thus restrict discovery regarding bad faith to cases involving officials who are both sinister *and* stupid—makes little sense") (citing *Lucas*, 505 U.S. at 1025–26 n.12). Government rarely is self-destructively candid.

After years of hostility, culminating in two votes officially denying PPI's proposed plan, the Town of Windham has made its position "known to a reasonable degree of certainty[.]" *Palazzolo*, 533 U.S. at 620. This Court should grant certiorari to hold that further, futile applications are unnecessary and PPI's takings claims are ripe for adjudication.

II. This Question of National Importance Can Be Resolved Only by This Court

The New Hampshire Supreme Court's decision will encourage governments to evade responsibility for takings with false promises that a developer might someday, somehow receive approval to build something on their land even when a permit denial has made it clear enough "how the 'regulations at issue apply to the particular land in question.'" *Pakdel*, 594 U.S. at 478 (citation omitted). Taking the Town at its word, when it conflicts with every action the Town has taken since 2018, was either naïve or willfully blind. "[C]ourts cannot permit themselves to be deceived." *Graham v. Folson*, 200 U.S. 248, 253 (1906).

Governments always want to reduce their risk of liability for unconstitutional takings. *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).[13] Delay in decision-making benefits only the government, with its deep pockets and endless time, while grinding down property owners' monetary and spiritual resources. *See Bay-Houston Towing Co., Inc. v. United States*, 58 Fed.Cl. 462, 471 (2003) ("[A] strict interpretation of the ripeness doctrine would provide

[13] "[T]he City [can] change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again." *Id.* (quoting James Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO Mun. L. Rev. 175, 192–93 (1975)).

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."); *AWMS Water Sols.*, 162 Ohio St.3d at 410 (declining to allow the state to "create moving targets" and thereby defeat ripeness). Property owners reasonably seek to manage costs by choosing more efficient routes to judicial resolution of their claims. *See Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 173 (1967) (noting injury caused by "substantial" costs of delaying lawsuit); *Wayne Land & Min. Grp. LLC v. Delaware River Basin Comm'n*, 894 F.3d 509, 523 (3d Cir. 2018) ("granting or denying Wayne's requested declaratory relief will conclusively determine whether Wayne can forego the expense of applying to the Commission"); *Home Builders Ass'n of Chester & Delaware Cntys. v. Commonwealth*, 828 A.2d 446, 452 n.6 (Pa. Commw. Ct. 2003) (case was ripe where property owner would suffer "tremendous costs" by delay).

Some courts recognize the perverse incentive for local governments to avoid a final decision, if that decision will ripen a takings claim. *Compare Sherman*, 752 F.3d at 562–63 (town "engaged in a war of attrition" against landowner), *with 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). When government may point to a *hypothetical* approval for some future application to restrict property in fact and in the present, it can evade entirely the requirements of just compensation until the landowner simply gives up. *See Vill. Green*, 43 F.4th at 297 (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); *HRT Enters. v. City of Detroit*, No. 12-13710, 2022 WL 3142959, at *3 (E.D. Mich. Aug. 5, 2022) (detailing decade-long litigation and describing city's "attempt to contrive a *fifth* bite [of] the apple" of ripeness to prevent a ruling on landowner's takings claim) (emphasis added); 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").

A relatively modest ripeness rule affords no special deference to "local concerns," nor does it impose any

special burdens: it simply treats land use cases like every other. "In land-use cases, the necessary event is simply that the government has adopted a 'definitive position' as to 'how the regulations at issue apply to the particular land in question.'" *Cath. Healthcare*, 82 F.4th at 448 (quoting *Pakdel*); *see also Knick*, 588 U.S. at 189 (property rights claimants cannot be denied access to federal courts while "[p]laintiffs asserting any other constitutional claim are guaranteed a federal forum"); *Lamar Co., LLC v. Lexington-Fayette Urb. Cnty. Gov't*, No. 5:21-043, 2021 WL 2697127, at *5 (E.D. Ky. June 30, 2021) (contrasting "relaxed" ripeness requirements for First Amendment claims to stringent ripeness requirements for Fifth Amendment takings claims); *cf. Susan B. Anthony List*, 573 U.S. at 167–68 (free speech case was ripe without need for further factual development when delayed judicial review would impose a substantial hardship on petitioners); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 212 (2020) (separation of powers challenge to agency action was ripe before "th[e] provision is actually used"); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99, 131 n.136 (2000) (decrying "a huge and unjustified difference between land use ripeness cases and all other ripeness cases"). No special ripeness rule for takings cases is warranted or justified, and requiring more is "exhaustion" of administrative remedies—not required in any civil rights claim—by another name. *Pakdel*, 594 U.S. at 479 (ripeness in takings cases must be consistent with the "*ordinary* operation of civil-rights suits") (emphasis added). In short, "[f]or

the limited purpose of ripeness, … *ordinary* finality is sufficient." *Id.* at 481 (emphasis added).[14]

Even though this Court rejects the hamster wheel approach, *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 message has not been received by many lower courts. To avoid deciding takings claims, many courts—including the court below—assume that the ripeness doctrine in the takings context remains unchanged or even expanded in recent years. *See*, *e.g.*, *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198, 203 (6th Cir. 2021) (*sua sponte* declining to bar a case as prudentially unripe because "the status of the prudential ripeness doctrine is uncertain"); *Vill. Green*, 43 F.4th at 294 ("the final-decision requirement not only remains good law but has been expanded").

The decision below thus reflects a trend whereby, as a practical matter, courts authorize governments' evasion of the Fifth Amendment's protections. As property owners find their properties saddled with ever more restrictive land-use regulations, they are denied their day in court through a ripeness doctrine designed to ensure that any "no" can be interpreted as

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[14] These holdings cast doubt on the prevalent assumption that courts consider ripeness in constitutional takings claims differently than ripeness for all other claims. *See, e.g.*, *Dolls, Inc. v. City of Coralville*, 425 F.Supp.2d 958, 988 n.18 (S.D. Iowa 2006) ("the ripeness inquiry differs for taking claims"); 13B Wright & Miller, *Fed. Prac. & Proc.* § 3532.1.1 (3d ed.) ("A special category of ripeness doctrine surrounds claims arising from government takings of property.").

"maybe." *See* Anastasia Boden et al., *The Land Use Labyrinth: Problems of Land Use Regulation and the Permitting Process*, released by the Regulatory Transparency Project of the Federalist Society 21 (Jan. 8, 2020)[15] (Nationwide, "there is always the potential for [a land use] authority to, in effect, deny authorization to begin a project indefinitely without ever giving a definitive answer on a permit application."). When courts defer to the very government claimed to be unconstitutionally interfering with an owner's property rights, they bypass the federal judiciary's primary purpose to resolve constitutional questions. *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (determining whether government action "be in opposition to the constitution" is "the very essence of judicial duty").

Although the per curiam *Pakdel* opinion offered apparently clear guidance, permit applicants continue to struggle to access federal courts when the government denies them the ability to build on their property. Here, the Town clearly said "no"—twice—and "'[n]o' means no." *TrafficSchoolOnline, Inc. v. Clarke*, 112 Cal.App.4th 736, 741 (2003). If landowners must seek an answer from government, government should be required to provide one and be bound by that answer. *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.").

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[15] https://rtp.fedsoc.org/paper/the-land-use-labyrinth-problems-of-land-use-regulation-and-the-permitting-process/

CONCLUSION

This Court should grant the petition.

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Respectfully submitted,

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