No. 23-1277

IN THE

Supreme Court of the United States

PPI ENTERPRISES, LLC,

Petitioner,

v.

TOWN OF WINDHAM, NEW HAMPSHIRE,

Respondent.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

PPI Enterprises, LLC ("PPI") has submitted one application to the Town of Windham (the "Town"), seeking authorization to develop its property in a single, specified manner. This one application – which has been the subject of two votes by the Town's Planning Board (the "Planning Board"), and two state court appeals initiated by PPI – was lawfully denied, as affirmed by the New Hampshire Supreme Court.

Relying on the Certified Record below, and affirmative representations of the Town, the New Hampshire Supreme Court found that PPI's proposed development might be approvable with modification or mitigation. Further, the record reveals that the Planning Board may have approved PPI's application, as presented, had it been accompanied with sufficient information, and open questions remain regarding the potential for other access points, or other types or intensities of use.

In light of these outstanding issues, the question presented is as follows:

Whether a property owner states a ripe takings claim, where: (a) the property owner has only pursued a single use and manner of development, involving impacts that the Town lawfully and reasonably sought to regulate; and (b) where it is apparent that open questions remain regarding the type and intensity of development that is permissible under the Town's regulations.

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INTRODUCTION

The Court should deny PPI's Petition for Writ of Certiorari (the "Petition") for three principal reasons.

First, the New Hampshire Supreme Court's order does not conflict with this Court's well-established finality jurisprudence. To the contrary, the Certified Record before the New Hampshire Supreme Court demonstrated that a renewed application, containing some modification or mitigation measures, could result in approval, and therefore, questions remain open regarding whether PPI has yet to suffer a concrete constitutional injury. The Certified Record also demonstrates that the Planning Board might have been able to craft conditions of approval had PPI supplied the specific information that was requested. Further, the Certified Record shows that PPI has not explored other uses or access points for the parcel – i.e. other development potential – despite alleging a total taking of the parcel's economic value. Finally, requiring PPI to reapply after a lawful denial does not impose a de facto exhaustion requirement. Far from being futile, reapplication is a viable path to determine development potential of the parcel, and a necessary step to determine if PPI has suffered an actual concrete injury, opposed to a hypothetical harm.

Second, PPI fails to establish the existence of any split among lower courts in how to apply the holding in *Pakdel v. City and County of San Francisco*, 594 U.S. 474 (2021). To the extent PPI has identified differing outcomes among lower courts, those results are the product of distinguishable fact patterns, and are not indicative of

an inability of lower courts to apply the takings finality doctrine. As such, there is not a compelling reason for this Court to grant certiorari in order to revisit the finality doctrine recently honed in *Pakdel*.

Third, PPI's Petition is a poor vehicle to examine the holding in *Pakdel*. The New Hampshire Supreme Court did not engage in any specific analysis of this Court's holding in *Pakdel*, and its order has no precedential authority, even within the State of New Hampshire. Further, PPI's allegations failed to sufficiently state a claim for a total, or even partial taking. Therefore, the decision below is not likely to inform any other courts' analysis of takings claims, and, due to its non-precedential status, its applicability is limited to the specific facts of this case.

COUNTERSTATEMENT OF THE CASE

PPI suggests in its Petition that it has engaged in extensive efforts to develop its parcel, and that, but for the Planning Board's alleged obstinance, it would, and should have been approved to develop a self-storage facility. The facts below reveal a more nuanced history, involving a property owner who has only sought to develop a single use and point of access, notwithstanding legitimate concerns regarding the potential impacts of the development on surrounding properties.

I. PPI'S APPLICATION TO THE PLANNING BOARD.

PPI contends that it has submitted two applications for approval, and that the New Hampshire Supreme Court's order requires it to submit a third in order to ripen

its takings claim. Pet. at pp. 3-4. In actuality, PPI has only ever submitted one proposed form of development, presented as one application.

In May of 2018, PPI submitted an application to the Planning Board, proposing to develop a self-storage unit on its parcel. *See* Certified Record of Appeal (referred to hereafter as "CR")[1] at pp. 16-25 (Major Preliminary Site Plan Application for a proposed self-storage facility). Approximately one year later, on June 5, 2019, the Planning Board denied PPI's application. CR at p. 372. In the intervening year between submitting the application and receiving a decision, PPI revised its plan set – including increasing the grade of the access road to 10% and reducing the amount of blasting involved – but the use and access point remained substantially the same as initially presented. *See* CR at pp. 303-319 (showing final plan set submitted in support of PPI's application). PPI's application did not materially change in terms of type, location, or intensity of development, other than the increase in the access road grade, and a corresponding decrease in the amount of proposed material to be blasted, which was reduced from 85,000 cubic yards to 58,000 cubic yards. CR at p. 157.

Due to the appellate posture of the underlying proceedings, PPI's single application has been the subject of two votes by the Planning Board. In PPI's first appeal, the New Hampshire Superior Court found that the Planning Board's initial vote to deny PPI's application was based on a "fact-finding record" that was "insufficiently

1. The Certified Record of Appeal has not been paginated. Citation to page numbers in the Certified Record refer to the page number of the Certified Record PDF.

developed by the Planning Board" and clarification of the Planning Board's reasons for denial was needed. Appendix to PPI's Petition (referred to hereafter as "App.") at p. 37a (*PPI Enterprises, LLC v. Town of Windham*, No. 2020-0249 and No. 2020-0250, 2021 WL 2580598, at *4 (N.H. June 23, 2021)). Accordingly, the New Hampshire Supreme Court affirmed that remand to the Planning Board was necessary, and ordered the Planning Board to resume its prior deliberations without reopening PPI's application for public hearing. App. at p. 42a (stating, "[i]t is incumbent upon the planning board, consistent with the Town's assertions … that the public hearing on PPI's application has already closed, to resume its deliberations and issue a final decision on PPI's site plan application."). Consistent with the New Hampshire Supreme Court's ruling, PPI did not resubmit, nor amend its application in any way, and the Planning Board did not reopen the application for public comment. On remand, the Planning Board again denied the same application PPI had previously submitted to the Planning Board. PPI appealed that denial to the New Hampshire Superior Court, and then the New Hampshire Supreme Court, which became the basis for PPI's Petition.

The procedural posture, viewed as a whole, demonstrates that the Planning Board has only ever had the opportunity to consider a single application, and therefore a single proposal and record of supporting information, regarding PPI's parcel.

II. PPI'S TAKINGS CLAIM.

In its Complaint below, PPI alleged that due to "the unreasonable and illegal actions of the Planning Board, the Property cannot be used for an economically

reasonable use and the market value is nominal." App. at p. 45a, ¶ 136 (Complaint of PPI filed September 15, 2021). Likewise, in its Petition before this Court, PPI contends that "[s]ome amount of controlled blasting is necessary for *any* development of PPI's property." Pet. at p. 8.

In making these takings allegations, PPI does not challenge the legality of the Town's regulations generally – i.e., PPI is not asserting a physical taking of its property, or a facial challenge to the Town's regulation itself. Rather, PPI contends that it has been deprived of protected property rights under an as-applied analysis. Specifically, PPI alleges that the application of the Town's regulations to its property are unconstitutionally limiting its use and enjoyment of the parcel, therefore taking away the entire economic value of the parcel.

Despite alleging that the entire economic value of the parcel has been taken, PPI has never submitted an alternate plan to explore the potential for other economic development of the parcel. PPI has never proposed an alternate location for the access road; it has not presented adequate mitigation information to pursue its desired location for the access road; nor has it proposed other permitted uses of the parcel.

PPI's failure to consider any alternatives is significant, because, as the Certified Record reflects, it was the relationship between the proposed use and the access road grade that were the basis for Planning Board denial. Specifically, the Planning Board was concerned that the proposed access road would be used by the general public, who would likely be inexperienced in driving the type of box trucks commonly used to transport belongings to

and from self-storage facilities. CR at p. 284 (meeting minutes recounting testimony of Planning Board member Carpenter, stating he "was not in favor of a 10% road grade, considering that many people who would be using it would be inexperienced in driving box trucks."). The proposed use as a storage facility dictates the grade at which the general public can safely navigate the access road, and the grade of the access road dictates the required amount of ledge blasting. It is only upon these specific circumstances and considerations that the Planning Board denied PPI's application, which is not tantamount to a blanket denial of any development or any access road.

It is logical and reasonable to conclude that an application for a different use, or even the same use involving less blasting or established mitigation measures, could pose fewer safety concerns and be approved. For example, pursuant to the Town's Zoning Ordinance, PPI could develop its parcel with a variety of permitted uses, some of which are traditionally open to the general public and some of which are not. *See* Windham Zoning Ordinance at pp. 36-37 (detailing permitted uses in the Limited Industrial District).[2] Therefore, PPI is entitled to develop a variety of uses on its parcel, which may not pose the same safety concerns raised in PPI's application.

In sum, there was no record before the New Hampshire Superior Court, the New Hampshire Supreme Court, or this Court, to evaluate if other uses, or even the same use involving less blasting or a more modest

2. The Windham Zoning Ordinance is available at www.windhamnh.gov/DocumentCenter/View/14860/2024-Zoning-Ordinance-.

grade, would be approved. This is because PPI has only ever proposed one type of use, with one point of access, necessitating a certain degree of blasting. Until such time that alternatives are explored, it is impossible to assess the extent to which the Town's regulations have limited the economic potential of PPI's parcel.

III. BASIS FOR THE PLANNING BOARD'S DENIAL.

The Planning Board denied PPI's application due to concerns about safety and adverse impacts from ledge blasting. Those concerns, however, did not arise in a vacuum during the Planning Board's final vote. Rather, those concerns solidified after numerous public hearings in which PPI failed to address the Planning Board's requests for more information; information that was needed to understand potential offsite impacts to abutters. CR at pp. 390-91. The impacts to offsite abutters were of great importance to the Planning Board due to a prior developer/landowner that engaged in significant blasting on the parcel now owned by PPI, which resulted in property damage to abutters and adverse impacts to air and groundwater quality. App. at p. 23a.

During deliberations, Planning Board members explained in detail that their inability to approve PPI's application was not because of the blasting, per se, but because they lacked the necessary information to assess the impact of blasting. *See* CR at pp. 390-92.

Member Heath Partington noted specific concern that the "lack of site-specific data" left him unable to determine if prior blasting concerns at the property were due to a prior owner or "contingent on something

about the site itself." CR at p. 390. Member Ruth-Ellen Post specifically noted that "she would never say that the application could not be approved at some point" but that the Planning Board had requested information from PPI that it had not received. CR at p. 390. She noted her specific concern regarding a prior request for a map showing the relationship of residential abutters to the proposed blasting, which was not provided. CR at p. 390. She further described concern with the record before them, stating:

> [I]t was an easy question to answer [regarding the map depicting potentially impacted abutters] but that at no time was a map with this information provided to the board. She said this map could have given the board the necessary information to properly mitigate a potential offensive use.

CR at p. 390.

Other concerns were raised with the lack of information regarding the disposal of waste associated with blasting; information regarding monitoring for ground water impacts; the timeline for rock crushing work; and missing information on dust control. CR at pp. 390-91. Member Post made clear that "with more complete information the board could have had the opportunity to craft good mitigation measures to protect the health and safety of the residents … very specific information was requested by the board and had not been supplied." CR at p. 391.

Member Post was not alone in her concerns regarding a lack of information. Member Matthew Rounds explained that "he had repeatedly asked for a hydrology study but

that no report had ever been supplied to the board even though state and federal resources should have made this easy information to gather and share." CR at p. 391. Further, Vice Chair Joe Bradley explained that he had concerns beyond blasting, such as stopping site distances for the access road. CR at p. 391. Member Jennean Mason expressed interest in working with PPI "to craft mitigation policies that would make development possible." CR at p. 392. In response, Chair Derek Monson noted his understanding that "the board was required to address the case as it existed when presented and they did not have the opportunity at this point to pursue working with the applicant." CR at p. 392. In sum, the Planning Board was limited to the record before it, and that record was deficient in providing the information that the Planning Board requested to address its concerns about blasting impacts.

IV. THE PROCEDURAL TIMELINE OF APPELLATE REVIEW.

PPI contends that the New Hampshire Supreme Court's order is forcing it into an endless cycle of futile applications. In support of this contention, PPI presents a narrative that it has already been subjected to a multi-year review process that has spanned a period of approximately six years, from May 2018 to the present. A more careful review of the procedural timeline belies PPI's characterization that it has been trapped, or will be trapped, in an endless cycle of local permitting.

As noted above, PPI's singular proposal was being actively addressed by the Planning Board for approximately one year, from May 2018 to June 2019. CR

at pp. 16-18 (initial site plan application); pp. 367-72 (June 5, 2019 Meeting Minutes). On June 5, 2019, the Planning Board denied PPI's application. CR at pp. 367-72.

PPI initiated a timely appeal to the New Hampshire Superior Court, and initiated a subsequent appeal to the New Hampshire Supreme Court. It was not until June 23, 2021 that the New Hampshire Supreme Court affirmed the New Hampshire Superior Court decision, and remanded PPI's application to the Planning Board for deliberations. App. at p. 35a. Deliberations on PPI's application were resumed by the Planning Board less than two months later, on August 18, 2021, at which time the Planning Board denied PPI's application. CR at pp. 388-93.

PPI again initiated a timely appeal to the New Hampshire Superior Court, this time incorporating a takings claim in conjunction with an appeal of the Planning Board denial. And, PPI again initiated an appeal to the New Hampshire Supreme Court when it was dissatisfied with the New Hampshire Superior Court decision. It was not until February 2, 2024 that the New Hampshire Supreme Court affirmed the New Hampshire Superior Court decision, determining that the Planning Board's denial was lawful and the takings claim was unripe. App. at p. 1a.

Accordingly, the duration of time cited by PPI is not attributable to the Planning Board, but rather, is a product of the strategic decisions made by PPI to twice appeal the Planning Board's decision. When taken together, PPI's choice of pursuing appeals accounts for roughly five of the approximately six years that this matter has been pending. The Planning Board, of course, has no control

over the amount of time that has been expended while appeals were pending before the New Hampshire Superior and Supreme Courts.

REASONS TO DENY THE PETITION

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S TAKINGS JURISPRUDENCE.

PPI implores this Court to grant its Petition based on the faulty argument that the New Hampshire Supreme Court misapplied the finality jurisprudence set forth in *Pakdel*. PPI's contention fails because the New Hampshire Supreme Court's determination that PPI has yet to obtain a final decision is consistent with the guidance set forth in *Pakdel* and its predecessor cases.

In order to ripen its claim of inverse condemnation under the Fifth Amendment, PPI bears the burden of establishing that it has been subjected to a final decision regarding the Town's regulations. This finality requirement "is relatively modest." *Pakdel*, 594 U.S. at 478. Yet, despite being a "modest" requirement, it imposes a substantive burden on a property owner. Specifically, it requires a plaintiff to present evidence tending to show that it has "actually 'been injured by the Government's action' and is not prematurely suing over a hypothetical harm." *Id.* at 479 (quoting *Horne v. Dep't of Agric.*, 569 U.S. 513, 525 (2013)).

The finality standard requires a careful analysis of the facts of each case to determine if any questions remain regarding "how the 'regulations at issue apply to the particular land in question.'" *Pakdel*, 594 U.S. at 478

(quoting *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 739 (1997)). This finality doctrine exists to ensure that in cases where a plaintiff alleges that a "regulation has gone 'too far,'" there must be a record to enable a court to review "how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986).

The finality standard is not a novel doctrine, but continues to be refined. In particular, in *Pakdel,* this Court held that a property owner does not need to exhaust state remedies available to it before bringing a takings claim, so long as "there is no question that the government's 'definitive position on the issue [has] inflict[ed] an actual concrete injury' of requiring petitioners to choose between surrendering possession of their property or facing the wrath of the government." 594 U.S. at 478-79 (quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985)).

The *Pakdel* Court, quoting *Knick v. Township of Scott*, 588 U.S. 180 (2019), explained that the Fifth Amendment creates a right to full compensation that arises at the time of a taking, and therefore, state law cannot "infringe or restrict the property owner's federal constitutional claim." 594 U.S. at 477. To hold otherwise would mean that the existence of a state law right to compensation could eliminate claims under the Fifth Amendment. *Knick*, 588 U.S. at 180 ("The fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right.").

The prohibition on state exhaustion requirements, however, does not remove the need for a plaintiff to pursue

other avenues or options available to it, in order to establish finality, "… *if* avenues still remain for the government to clarify or change its decision." *Pakdel*, 594 U.S. at 480 (emphasis in original). In other words, while state or administrative exhaustion is not a blanket prerequisite to establishing a takings claim, a plaintiff may still need to pursue state procedures or administrative processes, if those forums will allow the government to clarify or change its position, which in turn shapes the extent to which a regulation is applied to a property.

The distinction between the prohibition on exhaustion of remedies, and pursuing open avenues for relief, exists for good reasons, which are illustrated by the facts in *Pakdel*. In *Pakdel*, the Ninth Circuit held that the petitioners were required to have pursued an administrative exemption process that was available to them while they were seeking approvals from the City of San Francisco. 594 U.S. at 477-78. The petitioners had not done so, and therefore, the City argued, in sum, that the petitioners had lost their right to pursue a subsequent takings claim. *Id.* The Ninth Circuit's ruling determined that, when a property owner sits on available procedures – procedures which might prevent a deprivation of property rights – it may bar a later claim of takings injury. The Ninth Circuit's analysis did not comport with the protections of the Fifth Amendment, or the ripeness jurisprudence arising out of the then-newly adopted *Knick* case, precisely because it made a constitutional remedy dependent upon exhausting administrative procedures.

In contrast, PPI is alleging a distinguishable set of facts from the petitioners in *Pakdel*. Specifically, PPI's argument, at its core, is that *Pakdel* removes the need for

PPI to explore other uses of its property, or other variations of its application, which might be approved if submitted for Planning Board consideration. In other words, PPI asked the New Hampshire Supreme Court, and now this Court, to recognize a right to pursue a takings claim under the Fifth Amendment when the record does not yet reveal "how far the regulation goes," precisely because the property owner has not yet adequately explored the reach of the Town's regulations. Stated differently, PPI seeks a right to pursue a takings claim where there is only one decision on one specific type and configuration of use, despite there being obvious avenues for alternative uses and configurations.

PPI's argument, that it need not pursue any other option for development – while alleging a total takings claim – has been rejected by this Court under similar facts. In particular, in *MacDonald*, the property owner submitted one intensive subdivision proposal prior to alleging a takings claim. 477 U.S. 340. The property owner did not pursue other options for development. *Id.* at 347. Under those facts, the Court explained that "the final decision requirement is not satisfied when a developer submits, and a land-use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted." *Palazzolo v. Rhode Island*, 533 U.S. 606, 619 (2001) (describing holding in *MacDonald*).

Similarly, here, PPI has sought an approval for a highly specific use and singular point of access, but has not explored other options for use or materially different forms of access. These facts are distinctly different from the petitioner in *Palazzolo*, who had explored

multiple options for developing his property, but had been consistently blocked due to the need to fill wetlands, and an inability to escape a prohibition on wetlands fill. *Palazzolo*, 533 U.S. at 621.

In *Palazzolo,* the record revealed that the petitioner had gone to great lengths to explore options for development before he could assert a concrete constitutional injury. Specifically, the record presented a ripe takings claims because the following had become clear:

> There can be no fill [of wetlands] for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use. And with no fill [of wetlands] there can be no structures and no development on the wetlands. Further permit applications were not necessary to establish this point.

Palazzolo, 533 U.S. at 621. In contrast, in this case, PPI has not explored if blasting would be permissible for other uses; it did not explore if a steeper grade access road would be acceptable for uses not involving the general public driving box trucks; it did not explore if other means of access could be secured over abutting properties; and it did not provide the Planning Board with requested information that the Planning Board sought for the purpose of evaluating if impacts from the proposed blasting could be mitigated. Accordingly, unlike the petitioner in *Palazzolo*, and unlike the petitioners in *Pakdel*, the reach and impact of the Town's regulations cannot be known until and unless alternative development plans are pursued.

In light of the above, PPI cannot genuinely contend that the New Hampshire Supreme Court's decision was in error or in conflict with this Court's finality jurisprudence following *Pakdel*. While the New Hampshire Supreme Court rendered its decision on state law grounds, and therefore did not directly analyze *Pakdel* or other federal cases, it nevertheless reached a decision that comports with the Fifth Amendment and this Court's finality jurisprudence.

To be clear, the New Hampshire Supreme Court correctly found that the Town retains the discretion to grant approval for PPI to develop its parcel, provided: (a) some modification or mitigation is made; or (b) if other access is provided; or (c) if some other use or development were proposed. App. at pp. 1a-8a. This result does not deprive PPI of any right secured under the Fifth Amendment, nor does it present a compelling reason for further review by this Court.

II. THERE IS NO CONFLICT AMONG LOWER COURTS REGARDING HOW TO APPLY THE HOLDING IN *PAKDEL*.

PPI's Petition goes to lengths in an attempt to illustrate a split among lower courts in their treatment of takings claims after *Pakdel*. To the extent PPI has identified different outcomes between its cited cases, they are the product of distinguishable facts, and not indicative of a broader split among courts, or confusion regarding *Pakdel's* finality requirement.

A. The Circuit Courts are not imposing an improper exhaustion requirement, rather, their decisions reflect the proper application of well-established standards for evaluating ripeness in the takings context.

PPI contends that in *Haney v. Town of Mashpee*, 70 F.4th 12 (1st Cir. 2023), the First Circuit erred in holding a takings claim to be unripe where an applicant had received two zoning variance denials for construction of a residential structure. PPI's analysis overlooks that those denials were due in part to the applicant being unable to demonstrate that it had secured rights to access the property, which in turn, raised concerns regarding emergency vehicle access. *Haney*, 70 F.4th at 21-22. Reviewing these facts, the First Circuit ruled that the applicant retained the option to pursue approval of access rights and to resubmit variance applications. *Id.* Accordingly, the applicant did not have a final decision and did not have a ripe takings claim. *See also Haney as Tr. of Gooseberry Island Tr. v. Town of Mashpee, Massachusetts*, 144 S. Ct. 564 (2024) (denying petition for writ of certiorari).

PPI next contends that in *Beach v. City of Galveston, Texas*, No. 21-40321, 2022 WL 996432 (5th Cir. Apr. 4, 2022), the Fifth Circuit subjected the property owner's takings claim to an administrative appeals process in violation of the standards articulated in *Pakdel*. PPI's analysis overlooks the Fifth Circuit's findings that the property owner could have reapplied for the desired permit, but simply failed to do so. No. 21-40321, 2022 WL 996432, at *3. Given the specific facts of the case, the Fifth Circuit was correct in ruling that the property owner failed to reapply to explore other avenues available for development, therefore the takings claim was not ripe. *Id.*

PPI further contends that in *Ralston v. Cnty. of San Mateo*, No. 21-16489, 2022 WL 16570800 (9th Cir. Nov. 1, 2022), the Ninth Circuit erred in faulting the property owner for failing to submit a required application because, under PPI's analysis, the regulation precluded development. PPI's analysis overlooks the fact that no determination had been made as to whether the regulation at issue applied to the property owner. The only decision that had been reached was an informal opinion that the property owner had requested of a local official. *Ralston*, 2022 WL 16570800, at *2. These facts fall far short of demonstrating a final decision, and did not impose any exhaustion requirement on the property owner. Therefore, the Ninth Circuit correctly ruled that the claim at issue was not ripe. *See also Ralston v. San Mateo Cnty.*, 144 S.Ct. 101 (2023) (denying petition for writ of certiorari).

Lastly, PPI contends that in *N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216 (10th Cir. 2021), the Tenth Circuit erred in dismissing the property owner's claims on grounds of prudential ripeness, where it otherwise found that a final decision had issued. PPI's analysis overlooks that even when a final decision has issued, a case may still not be ripe because the facts simply do not evidence a taking, even at the earliest stage of litigation. As the Tenth Circuit explained, "[u]nder Rule 12(b)(6), 'a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *N. Mill St.*, 6 F.4th at 1230. This decision turns on baseline pleading standards, which the property owner did not satisfy.

B. There is no distinction between the above-cited cases, and the cases addressed below, to indicate a split amongst lower courts in appropriately applying *Pakdel*.

PPI relies on three decisions – arising from the Sixth Circuit, Ohio Supreme Court, and Nevada Supreme Court – for its assertion that a more "pragmatic approach to finality and futility" is appropriate in light of *Pakdel*, and that there is a split amongst circuits in how to apply *Pakdel*. In fact, the cases cited below do not present a split in legal analysis or the application of *Pakdel*. Rather, the cases demonstrate that lower courts have a firm grasp on the application of *Pakdel*, and in those cases, the specific facts constituted a ripe takings claims.

In *Catholic Healthcare Int'l, Inc. v. Genoa Charter Twp., Michigan*, 82 F.4th 442, 446 (6th Cir. 2023), the property owner submitted multiple land use applications to the Township. The first application sought to build a chapel and other features. *Id.* After its initial application was denied, the property owner submitted a revised and reduced plan that sought only to restore certain religious displays along a prayer trail on its property. *Id.* at 446-47. This second application was also denied. *Id.* This decision was appealed to the Township's Zoning Board of Appeals, which also denied relief. *Id.* Under these circumstances, the Sixth Circuit held that the property owner had received a final decision, and that the District Court had erred in dismissing the claim on ripeness grounds. The Sixth Circuit, relying on *Pakdel*, explained that "the district court's mistake was to conflate ripeness (sometimes called 'finality' in this context) and

exhaustion." *Id*. at 448. The Sixth Circuit did not find any error in the fact that the property owner was required to explore the available avenues for relief. Rather, the claim was deemed to be ripe precisely because those avenues had been explored. The result in *Catholic Healthcare* contrasts to the facts in the Petition, where PPI has not explored any alternatives.

The state court decisions cited by PPI – *In State ex rel. AWMS Water Sols., L.L.C. v. Mertz*, 162 Ohio St. 3d 400 (2020) and *City of Las Vegas v. 180 Land Co., LLC*, 546 P.3d 1239 (2024) – similarly turn on the specific facts, as applied to well-established finality jurisprudence. In those cases, unlike the present case, the factual record left no question that final decisions had been reached. The Ohio Supreme Court explained that the existence of other avenues for relief need not be pursued "where [an] agency's decision makes clear that pursuing remaining administrative remedies will not result in different outcomes." *In State ex rel. AWMS Water Sols., L.L.C.*, 162 Ohio St. 3d at. 409. The Nevada Supreme Court explained that, where the government showed hostility to any development of a site, and could not clarify its unspecified concerns in order for an applicant to resolve those concerns and submit a new application, the government had rendered a final decision for purposes of a ripe takings claim. *City of Las Vegas v. 180 Land Co., LLC*, 546 P.3d 1239, 1251-52 (Nev. 2024). In these two state court decisions, the governments had made firm decisions to deny any further development, making any administrative remedy futile. This is in stark contrast to the present matter, where the government has made affirmative statements that it is open to development on PPI's property, and a return to the Planning Board is needed to determine what uses are available.

PPI incorrectly leads this Court to believe that these cases are indicative of a more lenient standard, in which an applicant need not pursue administrative remedies to establish a ripe takings claim. To the contrary, these cases illustrate the same doctrine as set forth in the cases above – that each takings claim will turn on a specific set of facts, and administrative remedies only need to be explored if it would give the government a meaningful opportunity to change its position on the extent to which a regulation will impact a property. Put differently, both the cases cited above, and the cases herein, appropriately apply the *Pakdel* holding, that administrative and state law exhaustion can never be a blanket prerequisite to a takings claim, but in some circumstances, administrative and state law procedures must be explored in order to reach a final determination of how far a government regulation will go.

In sum, the cases relied on by PPI show a consistent application of ripeness jurisprudence among the lower courts, and any variations in the outcome of those cases is due to factual distinctions between the cases.

III. THE UNDERLYING DECISION IS A POOR VEHICLE TO ADDRESS THE STANDARDS FOR FINALITY ARTICULATED IN *PAKDEL*.

The underlying order from the New Hampshire Superior Court is a poor vehicle to examine the holding in *Pakdel*, and is equally ill suited to assess the broader finality doctrine as it applies to takings cases.

First, as addressed in detail above, the New Hampshire Supreme Court's order is not in error, and

comports with the finality doctrine set forth in *Pakdel* and its predecessor cases. Accordingly, this case does not present a meaningful opportunity to explore new or unique facts or to address a novel question of federal law. Rather, it calls on the Court to address a common fact pattern, wherein a plaintiff alleges a final decision, but where the record reflects numerous open questions about alternative development potential and the reach of the government regulations are still unknown.

Second, the New Hampshire Supreme Court's decision is set forth in a non-precedential order. As a result, the New Hampshire Supreme Court has specifically determined that its decision would have limited reach or utility beyond the confines of this case. Further, the New Hampshire Supreme Court based its legal analysis and ultimate decision on New Hampshire case law, without specific analysis of *Pakdel* or other related federal decisions. Because the New Hampshire Supreme Court rendered a decision on state law grounds, and declined to analyze *Pakdel* or other federal takings jurisprudence, it is not foreseeable that other jurisdictions would look to the underlying decision in this case for guidance in interpreting federal takings law.

Third, even assuming, *arguendo*, that this Court were to determine that the New Hampshire Supreme Court erred in its determination that PPI's takings claim was not ripe, it would not meaningfully change the outcome of this matter. In this case, PPI alleges a total taking of its parcel, but it has failed to set forth sufficient facts to support a total, or even partial, taking. Specifically, PPI has failed to sufficiently define the economic impact of the Town's regulation on PPI's parcel, and has failed to put

forth facts tending to show that the Town has interfered with reasonable investment backed expectations. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). As a result of its pleading deficiency, even PPI's best outcome – i.e. this Court granting PPI's Petition and ultimately reversing the New Hampshire Supreme Court's decision – would still not create a viable takings claim for PPI.

CONCLUSION

For the reasons set forth above, PPI's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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