No. _____

In The

Supreme Court of the United States

MATTHEW HANEY,
as Trustee of the Gooseberry Island Trust,

Petitioner,

v.

TOWN OF MASHPEE; MASHPEE ZONING BOARD OF APPEALS; JONATHAN FURBUSH; WILLIAM A. BLAISEDELL; SCOTT GOLDSTEIN; NORMAN J. GOULD; BRADFORD H. PITTSLEY; SHARON SANGELEER, in their official capacity as members of the Zoning Board of Appeals of the Town of Mashpee,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Matthew Haney sought to build a home on a small undeveloped island in Popponesset Bay, Massachusetts, zoned by the Town of Mashpee exclusively for single-family residential use. But building a home requires a variance from the Town's setback and frontage requirements. Haney twice sought this variance, and twice the Town rejected his requests. The Town's unqualified position that Haney could not obtain the necessary variance to build his home satisfies the usual indicators that a takings claim is justiciable. *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 736–37 (1997) (development plan plus one request for a variance ripens a takings claim). But when Haney sought just compensation in federal court, the First Circuit held the case does not present a ripe controversy because the Town suggested it may grant a third application for a variance if Haney first secured permission from the State of Massachusetts to build a steel bridge to the island.

The question presented is:

Can the government evade adjudication of constitutional takings claims on prudential ripeness grounds—after it has twice definitively denied necessary variances—by indicating that it may consider a third variance request if the property owner first obtains an additional permit from a different government agency?

Parties to the Proceedings and Rule 29.6

Matthew Haney, as Trustee of the Gooseberry Island Trust, was the Plaintiff and Appellant below.

The Town of Mashpee and Mashpee Zoning Board of Appeals are public entities.

Jonathan Furbush, William A. Blaisedell, Scott Goldstein, Norman J. Gould, Bradford H. Pittsley, and Sharon Sangeleer are members of the Zoning Board of Appeals of the Town of Mashpee, sued in their official capacities.

None of the parties are corporate entities.

Related Proceedings

Haney, as Trustee of Gooseberry Island Trust v. Town of Mashpee, No. 22-1446, 70 F.4th 12 (1st Cir. June 6, 2023).

Haney, as Trustee of Gooseberry Island Trust v. Town of Mashpee, No. 21-10718-JGD, 594 F.Supp.3d 151 (D. Mass. Mar. 22, 2022).

Haney v. Department of Environmental Protection, No. 19-P-1395, 100 Mass.App.Ct. 1105, 173 N.E.3d 55 (Aug. 10, 2021).

Haney v. Department of Environmental Protection, No. 1772CV00340, 2019 WL 13062016 (Mass. Super. Ct. Aug. 20, 2019).

Emmelluth, Trustee of the Gooseberry Island Trust v. Mashpee ZBA, No. 1372CV00579 (Barnstable Cnty. Super. Ct., Mass., matter taken under advisement on Oct. 11, 2023).

Wolpe v. Haney as Trustee of SN Trust, Nos. 14 Misc. 487495, 14 Misc. 486868, 2019 WL 5090528 (Mass. Land Ct., Barnstable Cnty. Oct. 10, 2019)

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Petition for a Writ of Certiorari

Matthew Haney, as Trustee of the Gooseberry Island Trust, respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit.

Opinions Below

The decision of the First Circuit Court of Appeals is published at 70 F.4th 12 (1st Cir. 2023) and reprinted at Pet.App.1a. The order of the district court for the District of Massachusetts is published at 594 F.Supp.3d 151 (D. Mass. 2022), and reprinted at Pet.App.20a. The district court's order denying reconsideration is published at 599 F.Supp.3d 32 (2022), and reprinted at Pet.App.38a.

Jurisdiction

The lower courts had jurisdiction over this case under the Fifth Amendment to the United States Constitution, 42 U.S.C. § 1983, 28 U.S.C. § 1331 (district court), and 28 U.S.C. § 1291 (First Circuit). The First Circuit entered final judgment on June 6, 2023. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1). Justice Jackson granted an extension of time to file a Petition for Writ of Certiorari up to and including October 31, 2023.

Constitutional Provisions at Issue

U.S. Constitution, Article III, § 2, provides in relevant part, "[t]he judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution."

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 for Granting the Petition

Like all civil rights claimants, property owners seeking federal court vindication of their constitutional right to just compensation must establish the justiciability of their case under Article III. *Horne v. Dep't of Agric.*, 569 U.S. 513, 526 n.6 (2013) ("A 'Case' or 'Controversy' exists once the government has taken private property without paying for it."). But even when a case satisfies Article III, courts may decline to exercise jurisdiction "on grounds that are 'prudential,' rather than constitutional." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–26 (2014). This usually turns on the fitness of the issues for decision, and the hardship to the parties caused by withholding judicial consideration. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014). This Court has recognized that prudential ripeness is "in some tension with our recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction is virtually unflagging." *See*, *e.g.*, *id.* (quoting *Lexmark*, 572 U.S. at 126).

Despite this tension, in civil rights cases challenging land use restrictions, the lower courts are expanding the prudential ripeness doctrine, and property owners must jump hurdles applicable to no other constitutional claim—all because takings claims are of "local" concern. *See*, *e.g.*, Pet.App.14a–15a (holding that a variance denial is not final unless it can be deemed "with prejudice" and incapable of a different future outcome); *Village Green at Sayville, LLC v. Town of Islip*, 43 F.4th 287, 293 (2d Cir. 2022) ("This concern about untimely adjudication is

especially pronounced in the land-use context … [because they] are 'matters of local concern more aptly suited for local resolution[.]'") (quoting *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 348 (2d Cir. 2005)). These expanded rules go beyond requiring the government to take a single "definitive position" on what uses it will allow or prohibit, but affords the government extraordinary deference by holding a case prudentially unripe because if the owner were only to ask for one more variance, try for one more annexation, or submit one more design proposal, the takings claim might be avoided. *See*, *e.g.*, *North Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1229, 1234 (10th Cir. 2021) (plaintiff whose development permit was denied met Article III standing and ripeness standards, but case was "not prudentially ripe" because it remained possible for the city to grant different requests). This is exhaustion by another name.

The lower courts' expansion of the prudential ripeness bar conflicts with this Court's decisions reopening the courts to property rights claims, and reducing the barriers to staying there. In *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2167 (2019), this Court overruled a prudential "state exhaustion" requirement for takings claims. And *Pakdel v. City and County of San Francisco* refocused the "final decision" ripeness inquiry and cautioned against de facto exhaustion. The Court recognized that in cases where a property owner has actually been injured by the defendant, prudential ripeness is a "relatively modest" requirement, satisfied by a *de facto* showing of "how the 'regulations at issue apply to the particular land in question.'" 141 S.Ct. 2226, 2230

(2021) (per curiam) (quoting *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 739 (1997)).

After *Knick* and *Pakdel*, all that is required is a single government no, and not elimination of every possibility by which the government suggests it might say yes. These decisions confirmed that takings claims are treated the same as every other civil rights claim, and are 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 v. Rhode Island*, 533 U.S. 606, 620 (2001) (emphasis added). After all, when courts refuse to consider a civil rights claim and instead defer to the very government claimed to be unconstitutionally interfering with an owner's constitutional rights, they shirk the federal judiciary's primary purpose to resolve constitutional questions. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (determining whether government action "be in opposition to the constitution" is "the very essence of judicial duty.").

Despite *Pakdel*'s "relatively modest" ripeness test, many lower courts continue to require takings claimants, in cases which are unquestionably ripe under Article III, to expend enormous amounts of additional time and money just to satisfy a prudential demand that the claimant should wait, in the often vain hope that the government might change its position if only the owner would keep on trying. Local governments are well aware that federal courts are very receptive to prudential ripeness arguments as a reason to dismiss takings claims. As here, the government knows if it dangles the barest discernible hope it might allow some use of property, the court is

likely to dismiss a takings claim as prudentially unripe. Pet.App.14a–15a (holding that the permit denial was not a final decision because it was not issued "with prejudice" such that no future permit application would be futile); *see also, e.g.*, *Bay-Houston Towing Co., Inc. v. United States*, 58 Fed.Cl. 462, 471 (2003) ("[A] strict interpretation of the ripeness doctrine would provide agencies with no incentive to issue a final decision."); *see also North Mill*, 6 F.4th at 1229 (claim met Article III justiciability requirements, but was not prudentially ripe because government might grant separate development application); *Laredo Vapor Land, LLC v. City of Laredo*, No. 5:19-CV-00138, 2022 WL 791660, at *5 (S.D. Tex. Feb. 18, 2022) ("The Court is unconvinced that Plaintiff did enough to obtain a final decision from the City. Even if the City did require that Plaintiff exceed the drainage regulation, Plaintiff must show that it sought clarification from the city, such that there remained 'no question' about what Plaintiff was required to do to get a building permit."). This petition illustrates the extremes to which property owners must go, simply to plead (merely *assert!*, not necessarily win) a federal civil rights takings claim.

When, as here, property is regulated by several different governments—a situation that arises with regularity as a consequence of the multiple governmental and regulatory layers that commonly burden the use and development of property—it should be sufficient for purposes of prudential ripeness that the defendant has definitively rejected at least one of the necessary approvals. The goal of the ripeness requirement is not to force property owners to run a procedural gauntlet for its own sake,

Palazzolo, 533 U.S. at 621, but to ensure "there [is] no question … about how the 'regulations at issue apply to the particular land in question.'" *Pakdel*, 141 S.Ct. at 2230 (quoting *Suitum*, 520 U.S. at 739). *See also Barber v. Charter Twp. of Springfield*, 31 F.4th 382, 390 n.6 (6th Cir. 2022) (adjudication of the merits of a takings claim is premature where there is speculation and conjecture about the magnitude of the harm caused to the plaintiff). Here, the only government with authority to grant or deny the frontage and setback variances denied them. That should be the beginning, middle, and end of the ripeness enquiry.

Yet lower courts remain in conflict about whether a government may avoid accountability for a taking by claiming it might reconsider its denial if some other government or agency grants a separate application for a separate use. The First Circuit decision, which requires property owners to seek *all* permits from *all* agencies in the order preferred by the government, Pet.App.11a–17a, conflicts with other courts addressing multiple permits from multiple entities. *See, e.g.*, *Blake v. Cnty. of Kaua'i Plan. Comm'n*, 131 Haw. 123, 133 (2013) ("[F]inality for purposes of ripeness involves a decision of the agency whose 'definitive position' on a matter is being challenged, and a decision of that agency is final for purposes of ripeness *even if there are other approvals or conditions that still need to occur*.") (emphasis added); *Strubel v. United States*, No. 06-112C, 2009 WL 1636355, at *20 (Fed. Cl. June 10, 2009) (denial of state permit obviated need to seek related permit from federal Bureau of Land Management); *MLC Auto., LLC v. Town of S. Pines*, No. 1:05CV1078, 2007 WL 9757526, at *11 (M.D.N.C. May 15, 2007) (per Town policy, "a landowner cannot even request a building permit

until 13 other steps are completed, including the acquisition of at least four other permits from other entities"); *Batchelder v. City of Seattle*, 77 Wash.App. 154, 162 (1995) (city used sequencing of approvals in strategic fashion).

Until this Court resolves the tension between the federal courts' constitutional obligation to resolve civil rights claims and a prudential rule of judicial avoidance applicable only to constitutional property claims, *see Susan B. Anthony List*, 573 U.S. at 167; *Lexmark*, 572 U.S. at 126, Haney and countless property owners nationwide are relegated by the courts to even more process by the very same local government officials who are alleged to be violating their federal civil rights.

This Court should grant the petition to resolve whether a regulatory takings claim is ripe when a government has flatly told a property owner "no" on any one of multiple necessary permits required to build his home.

Statement of the Case

A. Gooseberry Island and Haney's proposal to build a single-family home

Since 1955, the Nelson and Haney families have owned Gooseberry Island, located in Popponesset Bay in Mashpee, Massachusetts.[1] Pet.App.43a–44a. Only four acres in size, the island is separated from the mainland by a narrow channel that varies between 40–80 feet depending on the tides. Pet.App.2a–3a, 45a. A realty trust also controlled by Matthew Haney

[1] Gooseberry Island Trust currently holds title, and Matthew Haney serves as trustee.

owns land at the end of Punkhorn Point Road, the point of the mainland closest to the island. The channel between Punkhorn Point and Gooseberry Island is only two feet deep at low tide, giving people access to the island by wading. Pet.App.23a–24a, 44a–45a. The tidal waters are held by the State of Massachusetts in the public trust, as managed by the Town of Mashpee. Pet.App.51a–52a. The Mashpee Wampanoag Tribe, federally recognized in 2007, entered into an intergovernmental agreement with the Town in 2008 to obtain fishing rights to the shellfish living in the waters including the channel between the mainland and Gooseberry Island. This agreement includes the Town's pledge to "support all necessary steps to have [the Commonwealth tidelands surrounding Gooseberry Island] acquired in trust for the Tribe." Pet.App.26a, 49a–52a.

For ten years, Haney has been trying to build a single home on his island, which sits in a heavily developed waterfront residential area and is zoned exclusively for single-family residential use. Pet.App.3a–8a, 53a–67a. The Town holds exclusive authority to issue building development permits and related variances to the Town code. Pet.App.52a–53a. As the first necessary step in the process to build his home, in 2013 Haney applied to the Town Zoning Board of Appeals for variances from the frontage and roadway access zoning regulations. Pet.App.53a. These variances would eliminate the requirements of at least 150 feet of frontage on a street and an unobstructed paved access roadway within 150 feet—neither of which make sense on a tiny island with a single home. Pet.App.53a, 3a ("Gooseberry Island is entirely surrounded by water and thus does not have any frontage on a street and is located more than 150

feet away from a paved roadway."). The Town denied the requested variances on the grounds of "public safety" because no bridge links the island to the mainland, making emergency access difficult at high tide. Pet.App.4a, 8a, 53a, 67a.

Proceeding in good faith, Haney sought permission from the relevant agency—the Mashpee Conservation Commission—to build a single-lane timber bridge. Pet.App.4a, 54a–62a. This drew the ire of some nearby Town residents and the Mashpee Wampanoag Tribe, which alleged that its shell fishing rights in the tidal waters would be adversely affected by pilings in the salt marsh and by the shade cast over the water by an opaque timber bridge. Pet.App.4a, 54a–55a. In February 2015, the Commission denied the bridge permit. Pet.App.59a. Haney appealed to the Massachusetts Department of Environmental Protection. Pet.App.59a. The Commission's regional office advised Haney that a steel bridge would present fewer problems, so he revised his request to seek permission for a steel bridge. Pet.App.5a, 60a. Following an adjudicatory hearing by the Office of Appeals and Dispute Resolution, the Department issued a post-hearing memorandum concluding that the bridge permit appeal should be granted. Pet.App.6a, 60a. However, the final decision adopted by the Commissioner in 2017 chose not to review the steel bridge proposal because Haney's original application proposed a timber bridge and the Commissioner deemed the change to a steel bridge to be substantial enough to require Haney to return to Square One and start over. Pet.App.6a, 60a–61a; *Haney v. Dep't of Env't Prot.*, 100 Mass.App.Ct. 1105, 2021 WL 3502072, at *2 (2021). The Massachusetts appellate court affirmed the agency's refusal to

exercise discretion to review the revised proposal. *Id.* at *5.

While these state appellate court proceedings were pending, in 2018 Haney again sought variances from the Town zoning board to allow construction of a single home on the island without complying with the frontage and access requirements. Pet.App.6a–7a, 64a. This time, his application included proposed access to the island via a single-lane emergency access bridge. Pet.App.7a, 66a. It contained alternative plans for both timber and steel proposed bridges, noting that "[t]he final design of the bridge is subject to pending litigation, but it will be either the timber bridge or the steel bridge." *Haney v. Town of Mashpee*, No. 22-1446, App. 000393 (1st Cir. Oct. 12, 2022). Again, the Town said "no," unanimously denying the application because "the proposed Variance would not advance the Town's interest in maintaining the public safety and, further, [a] grant of a variance would in fact derogate from the under[lying] purpose and intent of the Zoning By-laws." Pet.App.7a–8a, 67a.

Subsequently, in November 2020, the Mashpee Conservation Commission voted to acquire Gooseberry Island by eminent domain. Pet.App.31a–32a, 72a–73a. The Commission sought funding from the Mashpee Community Preservation Committee to purchase the island in January 2021, *id.*, but has not yet commenced eminent domain proceedings. While Haney's proposed home is dead in the water, the Tribe's shellfish farms are thriving, recently obtaining a $1.1 million U.S. Economic Development Administration grant to "fund three, full-time positions, and two part-time positions for Natural Resources Department staff to focus on shellfish farm

initiatives." Rachael Devaney, *First Light Shellfish Farm brings economic sustainability to Mashpee Wampanoag Tribe*, Cape Cod Times (Sept. 8, 2022).[2]

B. Procedural history

Having been denied variances to build one single-family home either with or without a bridge, Haney filed a regulatory takings claim in federal court against both the Town and the Board, alleging constitutional claims under both *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), as well as related state constitutional claims. Pet.App.76a.[3] The Town successfully moved to dismiss the case on the grounds that the claims were not yet ripe. Pet.App.20a–37a. The district court held the claims were not ripe because Haney did not pursue every possibility to obtain permission to build a steel bridge. Pet.App.32a–37a. Despite the Town's steadfast refusal to grant the variance over which it had exclusive authority, and the overall context of the Town's alliance with the Tribe, the court held that—as a matter of law—it was not futile for Haney to apply again for the variances after first seeking permission to build the steel bridge. Pet.App.35a–37a ("there is no clear statement from the Z[oning] B[oard of] A[ppeals] that there can never be a variance granted

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[2] https://www.capecodtimes.com/story/news/2022/09/08/mashpee-wampanoag-tribes-shellfish-farm-could-boost-jobs-economy/7929545001/.

[3] State takings claims under Article X of the Massachusetts Constitution are evaluated coextensively with the federal takings analysis. *Commonwealth v. Blair*, 60 Mass.App.Ct. 741, 748 (2004).

for the Subject Property, or that it would be futile for the Trust to seek a variance at the appropriate time"). Haney's failure to do so, therefore, was dispositive on the finality question because, if the bridge were approved, Haney could, based on that permission, seek variances from the Town's frontage and setback requirements. Pet.App.36a–37a. In other words, the third time *might* be the charm.[4]

The First Circuit affirmed in a published opinion. Pet.App.1a–18a. The First Circuit held that the Town was within its rights to demand that Haney pursue the bridge application to a final decision prior to seeking zoning variances from the Town, Pet.App.12a, and that the Town's failure to expressly include that demand in its decision denying the variances is of no consequence. Pet.App.13a–15a. Because the Town's decision states only that the reason for the denial is that permitting the project to proceed would "derogate from the underlying purpose and intent of the zoning bylaws," the First Circuit considered statements by individual Board members who expressed concern about granting variances absent approval for bridge construction. Pet.App.13a–14a.

The court then held that it would not be futile for Haney to apply again after obtaining a steel bridge permit. The court acknowledged that "[t]hrough *Pakdel*, our caselaw's futility exception is now simply part and parcel of the finality requirement." Pet.App.16a. Haney argued that "the finality requirement is met because the Trust should not be required to submit 'applications for a bridge permit when the denial of any application for a variance from

[4] The district court denied Haney's motion for reconsideration without further analysis. Pet.App.38a–40a.

the [Board] is a certainty.'" Pet.App.16a. The First Circuit held that it was *possible* that, with a bridge permit in hand, Haney's third request for a variance might receive favorable treatment. Pet.App.16a ("The Board has never represented that it would deny any and all variance applications[.]"). From Haney's perspective, this bare—and highly unlikely—possibility made it economically infeasible to pursue the costly bridge permit without obtaining the variances first. The First Circuit, however, disdained Haney's "strategic" "effort to save resources." Pet.App.16a. Unconcerned by the cost in time and money to a property owner who has already spent a *full decade* seeking permission to build *one home*, the court below held it "cannot conclude that the Board has 'committed to a position' with respect to the variances" because Haney "still has the option to pursue approval of the steel-bridge proposal and then present the Board with variance applications." Pet.App.17a. Thus, it concluded, the case is unripe and cannot proceed in federal court. *Id.*

Reasons for Granting the Petition

The doctrines of standing and ripeness "originate" from the same Article III limitation that federal courts may entertain only "cases or controversies," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006), and "boil down to the same question." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007). That is, the ripeness requirement exists so courts are confident that the plaintiff has really been injured. *Susan B. Anthony List*, 573 U.S. at 157–58 & n.5. In the land use context, the Court's rulings use the language of "finality" to determine whether government action has caused injury. *Williamson*

Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985) (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"). The Court describes the purpose of "finality" in as-applied regulatory takings cases to ascertain the "extent of permitted development" on the land in question. *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 351 (1986). This finality requirement is "relatively modest," and demands only that the "initial decisionmaker" make a final determination as to "how the 'regulations at issue apply to the particular land in question.'" *Pakdel*, 141 S.Ct. at 2229–30 (quoting *Suitum*, 520 U.S. at 739). The government's opportunity "to decide and explain the reach of a challenged regulation" does not require a landowner to "submit applications for their own sake," or when submission would be a futile act. *Palazzolo*, 533 U.S. at 620, 622, 626. Property owners need not cross off all requirements to get to a government's "yes." To establish an injury sufficient to pursue a federal case under Article III, the ripeness doctrine should require only one "no" from an agency with authority to issue the denial. That the denying agency may offer advice to a property owner about knocking on other doors does not affect the definitive denial of a request within the agency's sole authority. *See McKeithen, Trustee of Craig E. Caldwell Trust v. City of Richmond*, No. 210389, 2023 WL 6884689, at *8 (Va. Oct. 19, 2023) (takings claim cannot be thwarted by a City's claim that, "under no compulsion of law, [it] might show mercy … at some unspecified future date").

In many cases, property owners submit their applications and variance requests to a single government agency, and when that agency says "no," the property owner may pursue a takings claim in federal court. *See, e.g.*, *Pakdel*, 141 S.Ct. at 2228 (San Francisco Department of Public Works had sole authority to grant or deny relief). In other cases, such as this one, a property owner seeking to make use of his land must obtain permission from more than one government agency. This Court has never addressed whether property owners in such situations must seek permission from *all* government agencies, or whether any single denial that kills the proposed development sufficiently injures the property owner to ripen his or her takings claim. Lower courts are divided on this point. Here, the Town of Mashpee twice rejected Haney's requests for the variances necessary to build his island home. Given these unconditioned refusals, Haney did not undergo the time and expense to seek a bridge permit from another agency. This case thus cleanly presents a recurring issue of prudential ripeness that bars property owners from pursuing constitutional takings claims in court.

I. The Decision Below Conflicts with This Court's Ripeness Doctrine

The First Circuit's rationale conflicts sharply with this Court's most recent decisions. In *Knick*, this Court abrogated the *Williamson County* state-court compensation exhaustion requirements and exhorted that the Takings Clause was to enjoy "full-fledged constitutional status," leaving in place only the requirement that landowners first seek a final decision on variances where available. 139 S.Ct. at 2170 (citing *Williamson County*, 473 U.S. at 186).

Shortly thereafter, in *Pakdel*, this Court elaborated that the finality requirement is "relatively modest," and requires only that the "initial decisionmaker" make a final determination as to "how the 'regulations at issue apply to the particular land in question.'" 141 S.Ct. at 2229–30.

The First Circuit's rule also conflicts with this Court's earlier decision in *Palazzolo*, which emphasized that landowners must simply provide land-use authority "an *opportunity* to exercise its discretion" before bringing a takings claim. 533 U.S. at 620 (emphasis added). This ensures that available uses of the property are "known to a *reasonable degree* of certainty," *id.* (emphasis added), and can be accomplished by a "meaningful application"[5] for relief from the challenged regulations. *MacDonald*, 477 U.S. at 352 n.8. Once the use (or lack thereof) of the property is known to a reasonable—but not absolute—degree as to the challenged regulations, any future contingencies are irrelevant. *Blanchette v. Conn. Gen. Ins. Corp. (Reg'l Rail Reorganization Act Cases)*, 419 U.S. 102, 143 & n.29 (1974).

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[5] Some courts have replaced "meaningful" with "reasonable," to establish that "exceedingly grandiose development plans" are insufficient to show that a land-use authority "does not intend to allow reasonable development." *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir. 1990) (quoting *MacDonald*, 477 U.S. at 353 n.9); *see also Palazzolo*, 533 U.S. at 619 ("[T]he 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."). Haney's proposed development, a single-family home on land zoned for single-family use, passes muster under either standard.

The First Circuit's opinion distorts this approach beyond recognition. As the court below recognized, the Board was the "initial decisionmaker" with regard to variances for the construction of a single-family home. Pet.App.16a–17a n.6. Indeed, under Massachusetts law, the Board was authorized to hear and decide *only* petitions for variances. Mass. Gen. Laws ch. 40A, § 14 (providing authority to hear variance requests under Mass. Gen. Laws ch. 40A, § 10); *see also* Pet.App.11a–12a. The Board *could not* issue any permits related to a bridge and is prohibited from considering matters outside of its control. *See, e.g.*, *Sealund Sisters, Inc. v. Planning Bd. of Weymouth*, 50 Mass.App.Ct. 346, 348 (2000) ("A planning board exceeds its authority if requirements are imposed beyond those established by the rules and regulations.") (quoting *Beale v. Planning Bd. of Rockland*, 423 Mass. 690, 696 (1996)); *F&D Cent. Realty Corp., Inc. v. Planning Bd. of Bellingham*, 86 Mass.App.Ct. 1115, 2014 WL 5150530, at *2 (2014) ("[A] board may not base its reasons for disapproval on standards for adjoining roadways not prescribed in the rules and regulations, or exercise its discretion to import its own standards …, absent such rule or regulation."); *Pelletier v. Bd. of Appeals of Leominster*, 4 Mass.App.Ct. 58, 62 (196) ("The [zoning] board's decision must be confined to the matter pending before the board and cannot validly determine matters not pending before the board."); *MacGibbon v. Bd. of Appeals of Duxbury*, 347 Mass. 690, 691–92 (1964) (a zoning board cannot deny a permit based on considerations outside the purview of the zoning board). The Board must decide whether to grant the requested variances regardless of whether Haney is or is not able to construct a bridge.

Here, the Board *twice* definitively stated its position as to Haney's frontage and setback variances, yet it points to an unrelated agency, and invokes an unrelated concern, to create the illusion (without any guaranty) that a future application might succeed. Yet the First Circuit held that these were not final decisions because they were not issued "with prejudice", such that it would deny "any and all" future variance applications. Pet.App.14a–16a. Under the First Circuit's holding, Haney can be required to apply, apply again, and also apply elsewhere (expending time and money), leaving a claim unripe unless and until the government has definitively stated that it will *never* change its position.

This Court's "cautious approach to prudential ripeness is a reminder that the doctrine constitutes a narrow exception to the strong principle of mandatory exercise of jurisdiction." *Revitalizing Auto Communities Env't Response Tr. v. Nat'l Grid USA*, 10 F.4th 87, 102 (2d Cir. 2021). Land use agencies are to be given an opportunity to *remove* requirements of the objective laws governing development. This recognizes that governments may desire to exercise their inherent discretion to allow use that is otherwise prohibited to avoid takings liability. But this Court's approach *does not* condone—as the First Circuit opinion does—the imposition of unwritten and unrelated requirements as a series of procedural hurdles for the landowner to navigate before he pursues constitutional protection in federal court.

In *Palazzolo*, this Court explained that landowners must take only "reasonable and necessary steps" to allow land use boards to use that discretion "to grant any variances or waivers allowed by law."

533 U.S. at 620–21. Once such steps have been taken, the denial of a permit by the "initial decisionmaker" constitutes a "definitive position on the issue" that "inflicts an actual, concrete injury." *Williamson County*, 473 U.S. at 193. Taken together, this Court's opinions stand for the simple proposition that once an agency has inflicted an "actual, concrete injury" by unconditionally denying use, the landowner's takings claim is ripe. *Id.* Because the First Circuit's opinion sharply conflicts with this Court's cases, this Court should grant the petition.

II. Lower Courts Conflict on What Ripens Takings Cases When Permits Are Required from Multiple Agencies

The First Circuit held that a property owner who seeks to develop property must seek to obtain permits from two separate, independent agencies to ripen a takings claim, even though a denial from either agency suffices to kill the proposed development. Pet.App.14a–17a. Some courts agree. *See, e.g.*, *North Mill Street*, 6 F.4th at 1229–34; *Beach v. City of Galveston*, No. 21-40321, 2022 WL 996432, at *3 (5th Cir. Apr. 4, 2022) (case unripe where avenues remained for further government consideration of development plans); *DiVittorio v. Cnty. of Santa Clara*, No. 21-cv-03501, 2022 WL 409699, at *7 (N.D. Cal. Feb. 10, 2022) (case unripe because denied application was "only the first of many hurdles" including "environmental assessment pursuant to CEQA, notice of the application to neighboring land owners and the public, a public hearing, action on the application, and acceptance of any conditions of approval"); *WG Woodmere LLC v. Town of Hempstead*, No. 20-CV-03903, 2022 WL 17359339, at *7 (E.D.N.Y.

Dec. 1, 2022) (takings claim unripe after landowner "expended significant resources" because town changed zoning rules midstream, requiring a new application).

Others, following this Court's lead, take a more reasonable approach. In *Blake v. County of Kaua'i Planning Commission*, an individual sought to challenge the Kaua'i Planning Commission's approval of a subdivision application. 131 Haw. at 130. The lower courts found that the subdivision approval was not final, because additional, related permits were needed from the state. On petition to Hawaii Supreme Court, one question presented was: "Is 'final agency approval' different than 'final project approval' when a developer must receive approval from multiple agencies?" *Id.* The court held that the takings challenge to the "definitive position" of the Board was ripe, "*even if there are other approvals or conditions that still need to occur*." *Id.* at 133 (emphasis added). In other words, the potential future approval (or denial) of required permits by other agencies was irrelevant to the *existing* challenged decision. *Id.* at 134 ("The Planning Commission's approval, while given without the BLNR's consent to an easement, was nevertheless final agency action for purposes of ripeness.").

In *Martin v. Town of Simsbury*, 735 F.App'x. 750 (2d Cir. 2018), Timothy Martin sought to build a single home on his property. The town told Martin that he needed to conduct a wetlands investigation and seek a variance for street frontage before it would consider his building permit. He applied for a variance from the frontage requirement and the town denied it. He appealed to the Zoning Board of Appeals, which

affirmed the denial. *Id.* at 751. He then sued for an unconstitutional taking. The district court held the case was not ripe because Martin could have sought a special permit under a different regulation or merged his property with an abutting lot and sought a permit for a tennis court or swimming pool. *Id.* at 752. The Second Circuit reversed: "Requiring Martin to exhaust all the potential uses of his property before bringing his constitutional claims would conflate prudential ripeness with the merits: he would have to demonstrate that he has a winning case before he even stepped through the courtroom door." *Id.*[6] Moreover, the town could not refuse a property owner's request to build a home and then avoid litigation by dangling potential approval of a swimming pool. *Id.* (citing *Macdonald*).

In *Church of Our Lord and Savior Jesus Christ v. City of Markham*, 913 F.3d 670 (7th Cir. 2019), the Seventh Circuit held that a RLUIPA[7] claim was ripe despite the church's failure to apply for variances from applicable parking regulations. The court held that the primary issue was whether operating a church on the property was a permitted or conditional use. The parking issue, therefore, was tangential and could not defeat the justiciability of the church's claims. *Id.* at 672–73. The city had made a final decision regarding

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[6] The Sixth Circuit corrected a district court that made the same error of conflation in *Barber v. Charter Twp. of Springfield*, 31 F.4th at 390, holding that allegations of damage anticipated by a proposed dam removal sufficed to ripen takings claim even if the property owner's allegations were insufficient for her to prevail on the merits.

[7] Religious Exercise in Land Use and by Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq.*

the church's zoning use classification and that was all that was required. *Id.* at 678–79.

Some lower federal courts take a similarly practical approach to ripeness. For example, in *Empire Pipeline, Inc. v. Town of Pendleton*, 472 F.Supp.3d 25 (W.D.N.Y. 2020), the plaintiffs needed multiple permits to construct a pipeline and compression station, including the town's building permit. When the town denied the permit, the plaintiffs sought to challenge whether this regulation requiring this permit was preempted by the federal Natural Gas Act. The court held that they "need not wait until they have in hand every other permit required for construction and operation of the compression station and interstate pipeline." *Id.* at 46. Similarly, in *S. Nassau Bldg. Corp. v. Town Bd. of Town of Hempstead*, 624 F.Supp.3d 261, 270–71 (E.D.N.Y. 2022), a property owner whose property was declared a landmark by the Landmarks Commission and Town Board over his objections could challenge the designation as working a taking without seeking a zoning variance to build a new house, or to move, alter, or demolish the house. The court held that, having already applied to the Town, the owner need not apply to the Landmarks Commission. "[A] plaintiff's decision to forgo a game of the kind described in Joseph Heller's Catch-22 does not render government action any less final or a case any less ripe." *Id.* at 271. *See also Strubel*, 2009 WL 1636355, at *20 (property owner seeking to conduct hydraulic mining operation could sue for a taking when state denied his petition for water rights when Bureau of Land Management advised owner that his mining plan could not be approved without the water rights).

The Florida Court of Appeals considered a case remarkably similar to this one. In *Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561, 564 (Fla. Dist. Ct. App. 2002), a property owner alleged facial and as-applied takings claims for his inability to develop housing on two groups of islands in the Indian River Lagoon, designated the Inner Islands and Outer Islands. The islands were under the jurisdiction of the Town of Indian River Shores but the bridge would require permission from the City of Vero Beach, to which it would be connected. The City denied Lost Tree's application to build a bridge based on its "no bridgehead" ordinance. *Id.* at 565. The Town, meanwhile, rejected a plat approval application because there was no bridge. *Id.* at 566. The combined effect of the City's "no bridgehead" ordinance with the Town's "no development without bridge" ordinance, effectively deprived Lost Tree from using its property in an economically viable manner. The City and Town each argued that "because their respective regulations do not solely deprive Lost Tree from using its property, neither can be liable for payment of compensation." *Id.* at 568. The court rejected that reasoning. *Id.* The court explained that the Constitution protects against uncompensated taking of property, not the governmental units responsible for the taking. *Id.* (citing *Ciampetti v. United States*, 18 Cl.Ct. 548, 556 (1989) ("Assuming that no economically viable use remains for the property, the Constitution could not countenance a circumstance in which there was no fifth amendment remedy merely because two government entities acting jointly or severally caused a taking."). The court concluded, "As a general principle, two levels of government should not be able to avoid responsibility for a taking of

property merely because neither of their actions, considered individually, would unconstitutionally infringe upon private property rights.... Government decisions are not produced in a vacuum." *Id.* at 569 (quoting Charles E. Harris, *Environmental Regulations, Zoning and Withheld Municipal Services: Takings of Property by Multi-Government Action*, 25 U. Fla. L. Rev. 635, 683 (1973)). In these circumstances, further applications to develop the Inner Islands would be futile and the case was ripe for litigation. *Id*. at 573.

In *Dunn v. County of Santa Barbara*, 135 Cal.App.4th 1281, 1286–87 (2006), David Dunn owned 6.05 acres of land zoned for single-family residential use with a minimum parcel size of three acres. Dunn needed permission from both the county and the California Coastal Commission to build a home on his land. Dunn submitted an application to the County to subdivide his parcel into two separate lots of roughly three acres. *Id.* The County denied the subdivision application because it found wetlands on the property, *id.* at 1287, and Dunn therefore never applied for a building permit for the home. *Id.* at 1299. Because of this, the lower court concluded that Dunn's takings claim was not ripe. *Id.* The Court of Appeals reversed: "Because the County has made it clear that its wetland and ESHA regulations effectively limit the development of Dunn's property to one residence, his takings claim is ripe for adjudication even though he has not sought permission to build that residence." *Id.* at 1300. Relying on *Palazzolo*, the court held that any uncertainties that may exist with respect to any possible setbacks or alternative configurations do not "undermine[] the unequivocal and final nature of the County's decision denying the lot split." *Id.* at 1301.

Once the County took a clear position as to what Dunn could build (and not build), the case was ripe. *Id.*

Denial of one necessary permit obviates the need for property owners to continue seeking other permits that would be required for the project to move forward. Government certainly allocates its own resources with this understanding. For example, in *Riverbend Landfill Co. v. Yamill Cnty.*, 314 Or.App. 79, 86 (2021), the Oregon Court of Appeals held that when the county denied the property owner's site design review application, there was no need for the Land Use Board of Appeals to spend time considering the related flood development permit: "Denial of the SDR rendered the FDP application unnecessary[.]" *Id.* This Court should grant certiorari to ensure that property owners' efficient use of resources receive as much consideration as the government's own.

III. This Important Question Can Be Resolved Only By This Court

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).[8] Delay in decision-making benefits only the government, with its deep pockets and endless time, while grinding down property owners' monetary and

[8] "[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 Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, in 38B NIMLO Municipal Law Review 192–93 (1975)).

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 agencies with no incentive to issue a final decision."); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 98 (1995) ("[M]unicipalities may have an incentive to exacerbate this problem [of the delay inherent in 'ripening' a case], as stalling is often the functional equivalent of winning on the merits."); Luke A. Wake, *Righting a Wrong: Assessing the Implications of* Knick v. Township of Scott, 14 Charleston L. Rev. 205, 214 (2020) ("agency staff can often threaten permit denial without actually pulling the trigger").

The effect is well known to this Court and others, which decry the "shell game" and "shifting goal post" manipulations incentivized by the existing ripeness doctrine. *See Donnelly v. Maryland*, 602 F.Supp.3d 836, 842 (D. Md. 2022) ("As Plaintiffs see things, the protracted history of the County's and State's maneuvers seems to be little more than a governmental shell game."); *State ex rel. AWMS Water Solutions, L.L.C. v. Mertz*, 162 Ohio St.3d 400, 410 (2020) (after property owner twice submitted applications that were rejected, and state suggested a third application to meet newly adopted standards, court "decline[d] the state's invitation to issue a decision establishing precedent permitting the state to create moving targets"). This Court, unlike the First Circuit, has shown sympathy rather than disdain for property owners seeking 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*

& Mineral Group 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 Counties v. Commw., Dep't of Env't Prot.*, 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. *See, e.g.*, *Sherman v. Town of Chester*, 752 F.3d 554, 562–63 (2d Cir. 2014) (town "engaged in a war of attrition" after repeatedly changing the zoning laws, rejecting landowner's proposals, and forcing him to spend millions of dollars over the course of 10 years); *Laredo Vapor Land, LLC*, 2022 WL 791660, at *4–*5 (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). And if a government is allowed to 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. *City of Sherman v. Wayne*, 266 S.W.3d 34, 42 (Tex. App. 2008) ("[W]e are mindful that 'government can use [the] ripeness requirement to whipsaw a landowner. Ripening a regulatory-takings claim thus becomes a costly game of 'Mother, May I', in which the landowner is allowed to take only small steps forwards and backwards until exhausted.") (citation

omitted); *see also HRT Enterprises 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").

While property owners bear the brunt of the delays and costs, governments bear some risk as well. Under *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 319 (1987), property owners can recover for temporary takings which may be more likely when a local government drags out its decision-making. By forcing property owners to apply, appeal, revise, re-apply, etc., governments "make it more likely that the interim taking will have been for long enough to merit litigation" that, if successful, warrants just compensation. Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493, 503 (2006).

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 Int'l, Inc. v. Genoa Charter Twp.*, 82 F.4th 442, 448 (6th Cir. 2023) (quoting *Pakdel*, 141 S.Ct. at 2230); *see also Knick*, 139 S.Ct. at 2169–70 (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 Urban Cnty. Gov't*, No. 5:21-043-DCR, 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*, 140 S.Ct. 2183, 2196 (2020) (separation of powers challenge to agency action was ripe before "the 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"). Accordingly, the usual rule is that the government rejecting a single development application, and a request for a variance where such is available, is a "definitive position" sufficient to ripen a takings claim. *Suitum*, 520 U.S. at 736–37 ("[W]here the regulatory regime offers the possibility of a variance from its facial requirements, a landowner must go beyond submitting a plan for development and actually seek such a variance to ripen his claims."). 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*, 141 S.Ct. at 2230 (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 2231 (emphasis added).[9]

Even though this Court rejects the hamster wheel approach, *see Blanchette*, 419 U.S. at 143 & n.29 ("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—have taken advantage of the "tension" and resulting uncertainty noted in *Susan B. Anthony List* and *Lexmark* and assumed that the takings ripeness doctrine remains unchanged or even expanded. *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"); *Village Green*, 43 F.4th. at 294 ("the final-decision

[9] These holdings call into question lower courts' assumption that they must consider ripeness in constitutional takings claims separately from 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) ("Because the ripeness inquiry differs for taking claims, that claim is analyzed separately."); 13B Wright & Miller, *Federal Practice & Procedure* § 3532.1.1 (3d ed.) ("A special category of ripeness doctrine surrounds claims arising from government takings of property.").

requirement not only remains good law but has been expanded").

The First Circuit's opinion thus reflects a longstanding trend where the courts have *de facto* authorized governments' evasion of the Fifth Amendment's protections. As property owners find their properties saddled with ever more restrictive land-use regulations, they also find themselves denied their day in court through doctrines of ripeness that seem designed to ensure that any "no" can be interpreted as "maybe." *See* Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, 30 Touro L. Rev. 297, 305 (2014) ("Anyone who thinks that he can get a planning agency to tell him what he CAN do on his land … doesn't understand the planning process."); 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)[10] (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"). But when courts refuse to consider the issues and 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. at 178 (determining whether government action "be in opposition to the constitution" is "the very essence of judicial duty").

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

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 twice clearly said "no" and "'no' means no." *TrafficSchoolOnline, Inc. v. Clarke*, 112 Cal.App.4th 736, 741 (2003). If landowners must seek an answer from government, government must be required to actually provide one and be bound by that answer. *Niz-Chavez v. Garland*, 141 S.Ct. 1474, 1486 (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.").

Conclusion

This Court should grant the petition.

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