No. 23-468

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

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

This is not a question of prudential ripeness, as framed by the Petitioner, it is much simpler. The question presented is:

> Whether this case should be heard where the Petitioner has not in good faith started the permitting process for the bridge that he knew would have to be constructed in order for him to build a single-family residence on the Island he purchased in 2011.

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. He purchased the property in 2011. At the time of purchase, the Town's zoning bylaws required a road with a minimum required amount of frontage for a single-family residence to be built as a matter of right which, in the case of the Island, required construction of a bridge and installation of a road.

The Massachusetts Wetland's Protection Act required Mr. Haney submit any such bridge proposal to the Town of Mashpee conservation commission in the first instance. Mr. Haney never submitted his steel bridge proposal to the conservation commission. Rather, he prematurely filed variance applications with the Town of Mashpee zoning board. When the zoning board advised him that he needed to go through the bridge permitting process with the conservation commission he chose to interpret this as a definitive "no" to his project in its entirety. He did not submit his steel bridge proposal to the conservation commission and, instead, proceeded to

file the underlying action seeking compensation under the takings clause of the Fifth Amendment.

Mr. Haney's claim was fundamentally unripe. Hence, the United States District Court for the District of Massachusetts decision dismissing his claim and the First Circuit Court of Appeals affirming the dismissal.

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STATEMENT OF THE CASE

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. A property he purchased in 2011. At the time of purchase, the Town's zoning bylaws required a road with the minimum required amount of frontage for a single-family residence to be built as a matter of right which, in the case of Gooseberry Island, required construction of a bridge and installation of a road.

Such bridge applications are governed by the Massachusetts Wetlands Protection Act, Massachusetts Department of Environmental Protection Regulations, and the Town wetlands ordinance.

Mr. Haney started the permitting process by applying for a variance with the zoning board in 2013 which advised him that he must first obtain permission for the construction of a bridge through the Mashpee conservation commission. Following the zoning board's direction, Mr. Haney filed a notice of intent to build a bridge with the Mashpee conservation commission.

However, the bridge plans he chose to submit proposed building a timber bridge in and across wetlands on which the Mashpee Wampanoag Tribe held a shellfish grant. A grant held by the Tribe prior to Mr. Haney's acquisition of the Island. The timber bridge proposal was denied by the Mashpee conservation commission specifically because the plan would involve destruction of areas of the salt marsh and because it would have had shading impacts that had an adverse effect on its productivity. The

Massachusetts Department of Environmental Protection (DEP) affirmed the conservation commission's decision.

In the course of the appeals process before the DEP, Mr. Haney discussed replacing the timber bridge plan with a significantly less intrusive steel bridge plan. The steel bridge plan removed any proposed pilings from within the salt marsh area and it allowed better light penetration.[1] DEP advised that the new proposal appeared to be compliant with regulations and was entitled to approval under the Wetlands Protection Act, but that Mr. Haney needed to submit it to the Town conservation commission in the first instance.[2] He never did.

Instead, Mr. Haney submitted a second premature application for variance to the zoning board asking it to issue him variances in anticipation of him going

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[1] Mr. Haney argues the cost and effort of submitting his steel bridge plans to the conservation commission according to the regulatory framework. Yet, as indicated in his Petition (p. 9) and in the record below, he has already obtained the steel bridge plans. His cost and effort argument is facetious. He has chosen to pursue this litigation instead of submitting the steel bridge plans to the conservation commission.

[2] Mr. Haney ridicules the various local interests involved. (Petition at pp. 2, 3, 7, 28). The Tribe holds a shellfish grant in the salt marsh, on public wetlands located in the area that Mr. Haney proposed to build a bridge. The abutters have the right to appear and be heard in the local hearings involved in the review of such land use petitions. The process is local in the first instance because the rights of those involved in the locality are accounted for in the state regulatory scheme, protecting Mr. Haney's rights as a landowner and the rights of those who may be impacted by his proposed development. The District Court and and the First Circuit's decision reminding Mr. Haney of the need to go through this process is not a prudential ripeness issue, it is a fundamental land use issue.

through the proper permitting process for the steel bridge. The zoning board advised Mr. Haney that he first had to go through the permitting process with the appropriate agency, the conservation commission. Rather than taking this simple and fundamental step, and despite the DEP's favorable guidance, Mr. Haney filed the underlying action against the Town of Mashpee, the Zoning Board, and the Zoning Board members in their official capacity, seeking compensation for a regulatory taking under the takings clause of the Fifth Amendment.[3]

Hence, the United States District Court for the District of Massachusetts and the First Circuit Court of Appeals conclusion:

> Haney must first obtain the government's conclusive and definitive position on the application of the Town's zoning bylaws to Gooseberry Island before proceeding in federal court. See Pakdel [v. City & Cnty. of San Francisco], 141 S. Ct. [2226,] 2230 [(2021)].

This is not a prudential ripeness doctrine case. Mr. Haney's case was fundamentally unripe.

[3] Mr. Haney's petition makes it appear as though the only government agency action of relevance to his case is that of the zoning board generally referring to the Respondents as "the government." He does not appear to acknowledge the distinct role of the conservation commission, which is not named as a party.

REASONS FOR DENYING THE PETITION

Preliminarily, the First Circuit held that Mr. Haney waived any argument that the 2018 variance decision shows that the zoning board reached a final decision. Haney v. Town of Mashpee, 70 F.4th 12, 21 (1st Cir. 2023). The District Court and First Circuit found that the zoning board members denied Mr. Haney's 2018 variance application without prejudice because Mr. Haney still needed to file his bridge plans with the conservation commission which must first decide the permitting of the bridge.

Mr. Haney asked the lower courts to view the 2018 variance denial with tunnel vision. He argued that the District Court and the First Circuit should not consider the reasons for the zoning board's denial without prejudice (i.e. denied because Mr. Haney needed to go through the bridge permitting process), just that the lower courts should have only focused on the general fact that he made variance requests which were denied. His theory was not rooted in the facts of his case or takings law but upon a hypothetical scenario he has devised to support his arguments.

Thus, the District Court dismissed Mr. Haney's case for failure to state a claim and the First Circuit affirmed. The First Circuit rejected Mr. Haney's myopic arguments, finding them underdeveloped and otherwise waived. The Court found that he offered no support for his contention that the Court should disregard the rationale of the zoning board members. The Court also found that he offered no argument as to why the denial of his 2018 variance applications should be interpreted as with prejudice. Id. In this respect, many of the statements in his Petition (i.e. "[h]aving been denied variances to build one single-

family home either with or without a bridge") are materially overgeneralized and fundamentally inaccurate.

Contrary to what is stated in Mr. Haney's Petition, he has never received a final decision from the appropriate government agency, a result of his own doing. Mr. Haney twice filed premature applications with the zoning board, which is not the agency that decides the permitting of a bridge over protected wetlands. The zoning board twice denied his applications, without prejudice, directing him to the conservation commission. He did submit plans to the conservation commission in the first instance but his plans involved installation of pilings directly into protected wetlands, destroying actual areas of salt marsh and a roadway surface design which destroyed its productivity. His steel bridge plans appeared to avoid such destruction but he never presented them even though they received favorable guidance from the Massachusetts DEP.

Any statements within Mr. Haney's petition which conflict with the First Circuit's waiver findings, summarized above, should be rejected.

I. The First Circuit Court of Appeals Did Not Apply a Prudential Ripeness Bar. Mr. Haney's Regulatory Takings Claim was Fundamentally Unripe.

"When a plaintiff alleges a regulatory taking in violation of the Fifth Amendment, a federal court should not consider the claim before the government has reached a 'final' decision." Pakdel v. City & Cnty. of San Francisco, 141 S. Ct. 2226, 2228 (2021) (per curiam) (quoting Suitum v. Tahoe Reg'l Plan. Agency, 520 U.S. 725, 737 (1997)). This finality requirement

"is relatively modest[:] [a]ll a plaintiff must show is that there is no question about how the regulations at issue apply to the particular land in question." Id. at 2230. To do so, "a developer must at least resort to the procedure for obtaining variances and obtain a conclusive determination by the [the appropriate government agency as to] whether it would allow the proposed development in order to ripen its takings claim." Suitum, 520 U.S. at 737.

A developer cannot apply for the incorrect land use determination with the wrong government agency, twice, and present his claim as if it is a "ripe" regulatory takings case under the Fifth Amendment. This is what Mr. Haney did.

Hence, the First Circuit's finding:

> Under the State Wetlands Protection Act, DEP's regulations, and Mashpee's local wetlands ordinance, any notice of intent seeking a permit to build a bridge would need to be accompanied by permits, variances, and approvals required "with respect to the proposed activity." See Mass. Gen. Laws ch. 131, § 40 (emphasis added); 310 Mass. Code Regs. § 10.05(4)(e). The relevant proposed activity for the notice of intent is construction of a bridge to span from the end of Punkhorn Point Road to Gooseberry Island. Variances for the construction of a single-family residence on Gooseberry Island are not, for purposes of the filing of a notice of intent, related to construction of the bridge. Accordingly, the assertion that

> the Trust could not obtain approval for construction of the bridge without the Board first granting it variances for relief from frontage and roadway access requirements is mistaken.

Haney v. Town of Mashpee, 70 F.4th 12, 19 (1st Cir. 2023).

Likewise, the First Circuit found:

> Relative to [the] Power [afforded to it by Mass. Gen. Laws ch. 40A, § 10], the Board received evidence about construction of a bridge that fell under the jurisdiction of the [Mashpee conservation commission] in the first instance. However, the Board never determined whether that permit should or should not issue. Accordingly, the Board did not exceed its jurisdiction or consider evidence it should not have.

Id. at 20. The District Court and the First Circuit both found that Mr. Haney was referring to the zoning board's decision as "final" even though it was not, in fact, final. The zoning board very specifically told Mr. Haney that it was not the agency with the authority to decide the issue. Mr. Haney incorrectly interprets this as if the zoning board told him "no" and that its decision was final. Both lower courts found that Mr. Haney attempted to self-servingly disregard parts of the zoning board's decision to fit his argument that the zoning board's decisions were "with prejudice" or

"final" even though the record showed to the contrary for a multitude of reasons.[4]

Mr. Haney's various arguments regarding the interpretation of ripeness doctrine are irrelevant as he fails to appreciate the fundamental issues of his case. He first argues his theory as:

> 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.[5]

(Pet. at p. 15). Indeed, he cites this Court's decision in Pakdel, supra, as support for the following statement:

> 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

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[4] Whether Mr. Haney will even need a variance from the bylaws if his steel bridge plans are approved by the appropriate agency is an entirely different question. This question speaks to the fundamental lack of ripeness of his regulatory takings claim in this case. Assuming, *arguendo*, he obtained payment for a regulatory taking on his theory. Nothing would prevent him from thereafter seeking permission for his steel bridge with the conservation commission and proceeding with construction of a single-family residence by right.

[5] Mr. Haney fails to appreciate the part of the phrase that states that the agency must be one "with authority to issue the denial." The zoning board cannot permit the bridge, it must be the conservation commission.

> Public Works had sole authority to grant or deny relief).

But, again, he fails to appreciate or is otherwise willfully rejecting the bridge permitting process before the conservation commission that must take place in the first instance pursuant to state law. Instead, he argues a version of prudential ripeness doctrine should apply such that if a local board denies a variance, regardless of the reason or the issue involved, that the one "no" answer should suffice as "the government's" final decision to ripen a regulatory takings claim. According to his theory, it does not matter that the zoning board's denial was conditional and without prejudice in light of the specific circumstances of Gooseberry Island and the known fact that a bridge would be required for the construction of a single-family residence. His theory is detached from the reality of his case and it illustrates clearly that this is not a matter of prudential ripeness, Mr. Haney simply has failed to state a takings claim on a very fundamental level.

II. Mr. Haney's Second Argument Misses the Point Entirely. The First Circuit did not Hold that a Property Owner Must Seek to Obtain Permits from Two Separate, Independent Agencies to Ripen a Takings Claim. The First Circuit held that Mr. Haney failed to submit his steel bridge proposal even though the Massachusetts Department of Environmental Protection Found it Compliant with the Regulations.

Mr. Haney points to Blake v. County of Kaua'i Planning Commission to suggest that the Hawaii Supreme Court found that a property owner seeking

to develop land did not need to seek a final decision from multiple agencies. 131 Haw. 123, 133 (2013). But he disregards the logic of the decision. The Hawaii Supreme Court canvassed its cases and found:

> From these cases, it appears that finality 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.

Id. (internal citations omitted). *If* the zoning board issued final decisions on zoning issues essential to him constructing a single-family residence on the island such that it did not matter whether he obtained all other required permits, the definitive position of a single agency could ripen a takings claim. But it did not. When Mr. Haney acquired the Island in 2011 he knew or reasonably should have known that to build a single-family residence he would need to construct a bridge. Once constructed, the question becomes whether Mr. Haney needs a variance at all in order to complete his single-family development project.

Contrary to the arguments made in Mr. Haney's Petition, the First Circuit did not hold that a property owner who seeks to develop property must obtain final decisions from two separate, independent agencies. It held that Mr. Haney must go through the regulatory process correctly before attempting to claim that the government is taking his property, particularly where the record showed that the Massachusetts Department of Environmental Protection opined that his steel bridge proposal

complied with the state Wetlands Act, just that it needed to go through the local process.

Mr. Haney has not presented any issues of Constitutional significance. The First Circuit correctly decided his case.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny Mr. Haney's Petition for Writ of Certiorari.

Respectfully submitted,

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