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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PAUL REVERE, III
Law Offices of
Paul Revere, III
226 River View Lane
Centerville, MA 02601
Telephone: (508) 237-1620

JEREMY TALCOTT*
**Counsel of Record*
DEBORAH J. LA FETRA
ROBERT H. THOMAS
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
JTalcott@pacificlegal.org

Counsel for Petitioner

Table of Contents

Table of Authorities

Cases

U.S. Constitution

Statute

Regulations

Introduction

The Town of Mashpee concedes that lower courts conflict on the question presented by this case: whether a property owner who must obtain permission from multiple government agencies to build a home must be denied permission from *all* of them to ripen a takings claim. *See* Pet.App.11a–17a. When the Town denied the variances necessary to build Matthew Haney's home, the project was dead. Requiring Haney to continue to pursue additional permits creates an improper exhaustion requirement, *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2167 (2019), not the "relatively modest" showing of ripeness. *Pakdel v. City & Cnty. of San Francisco*, 141 S.Ct. 2226, 2230 (2021). The Town describes the Court's holding as based on "waiver," BIO.4–5, but the First Circuit based its decision squarely on ripeness and futility. Pet.App.15a–16a ("Through *Pakdel*, our caselaw's futility exception is now simply part and parcel of the finality requirement. Here, Haney argues that … [he] should not be required to submit 'applications for a bridge permit when the denial of any application for a variance from the [Board] is a certainty.'").

Instead of addressing the question presented, the Town presents a counter-factual narrative lacking any citation to the record, town ordinances, or relevant state statutes and regulations, in which Haney would be entitled to build his home if only he obtains the state's permission to build a steel bridge. BIO.7–9. First, neither state nor town laws and regulations require construction of a bridge over the shallow channel to Gooseberry Island, less than 100 feet from the mainland. Pet.App.2a–3a, 23a–24a, 44a–45a (shallow channel varies 40–80 feet wide and

drops to a wadable 2-foot depth at low tide). The Town does not cite any laws or regulations because they do not exist. Second, the Town appears to assert—again without citation to the record or relevant ordinances—that the construction of a bridge somehow obviates the need for Haney to obtain variances, and that a building permit can therefore be approved ministerially. BIO.8 n.4. Although the Town's brief treats the variances to its setback and frontage road requirements as merely ministerial, *id.*, the frontage and setback requirements are entirely distinct, and the Town plainly has discretion to deny the requirements, as it has twice demonstrated. Pet.App.4a, 7a–8a, 53a, 67a. Finally, the Town does not—cannot—dispute that courts continually expand the prudential ripeness doctrine to avoid hearing cases that they are otherwise duty-bound to resolve. U.S. Const. art. III, § 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803); Pet.25–32. The petition should be granted.

Argument

I. No State Law, Town Ordinance, or Regulation Requires a Bridge

The Town argues that Haney is required to obtain bridge access to Gooseberry Island first, BIO.9, and that, once he does so, it is merely a ministerial matter to approve the sought-after development. BIO.8 n.4. It offers no citation for either of these assertions and, in fact, they are completely backward. There is no law or regulation at the state, town, or commission level that requires construction of a bridge for emergency access at all, much less before a property owner may seek any other relevant permits. The Town asserts—without any support—that Haney "knew or reasonably should

have known that to build a single-family residence he would need to construct a bridge." BIO.10. Again, the Town's lack of citation reveals its incorrect assumptions. Haney—and before him, the Nelson family—have always accessed Gooseberry Island by wading.[1] Pet.App.43a–45a. The Town council first expressed its preference for a bridge to provide emergency access in 2013. Pet.App.4a, 8a, 53a, 67a.

Building a bridge, even across a short 80-foot span, is a costly endeavor. Such construction requires builders to obtain wetlands permits from the Conservation Commission, which is both expensive and time consuming. Pet.App.5a, 30a. The Town of Mashpee Wetlands Protections Bylaw requires property owners to pay for consultant studies and reports as well as mitigation plans for any damage or diminishment of biodiversity.[2] *See Jefferson v. Conservation Comm'n of Boxford*, 78 Mass.App.Ct. 1128, 2011 WL 537484, at *1 (2011). The Town disparages Haney's attempt to steward his resources by seeking the necessary zoning variances prior to seeking a bridge permit. BIO.2 n.1. Many governmental agencies disdain their citizens' efforts to budget their resources in time and money; an attitude that, unfortunately, some courts endorse. *See*

---

[1] Haney's family is not alone in valuing privacy over "emergency access." Americans generally may choose to live in remote locations, trading the risks of inaccessibility for the risks of urban living. *See, e.g.*, *Wilkins v. United States*, 598 U.S. 152, 155 (2023).

[2] Town of Mashpee Regulations—Chapter 172 of the Mashpee Code (The Mashpee Wetlands Protection Bylaw, as revised and approved as of Aug. 3, 2006), https://www.mashpeema.gov/sites/g/files/vyhlif3426/f/uploads/172_regulations_0.pdf (105 pages of regulations).

Schafer v. City of Los Angeles, 237 Cal.App.4th 1250, 1264 (2015) ("Courts have found much more severe financial hardships not to constitute 'grave injustice' in the land use context" and "avoidance of injustice does not justify overriding the current zoning restrictions and the normal land use approval process.").

This Court does not share that view. *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017) ("Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."); *cf. Sackett v. Environmental Protection Agency*, 598 U.S. 651, 660–61 (2023) (rejecting "capacious" definition of "waters of the United States" in Clean Water Act advocated by government agencies where such expansive definition "imposes what have been described as 'crushing' consequences 'even for inadvertent violations.'") (citation omitted). Instead, as this Court and others agree, the Constitution's protection of individual rights—including property rights—provides the necessary corrective. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604–05 (2013) (Landowners are vulnerable to "the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take."); *In re Times and Seasons, LLC*, 190 Vt. 163, 168 (2011) (property rules should further "practicality of administration, avoidance of extended litigation and maneuvering, and certainty in the law"); *Town of Lima v. Harper*, 55 A.D.2d 405, 409–10 (N.Y. App. Div. 1977), *aff'd mem.*,

43 N.Y.2d 980 (1978) (protecting developers property rights against "protracted delay by [] public officials").

For a decade, Haney has tried to work with the Town to build a single home on his island. When the Town definitively denied his first request for variances in 2013, he could have sued for a taking at that time. Nonetheless, Haney submitted proposals for a timber bridge to the state Department of Environmental Protection, which announced it would reject a timber bridge as damaging both the environment and the Mashpee Wampanoag Tribe's shellfishing operation. Pet.App.59a. At the agency's suggestion that a steel bridge would alleviate adverse impacts, Haney modified his request from a timber bridge to a steel bridge. Pet.9; Pet.App.5a, 60a. The Department had authority to either grant or deny that proposal, but instead it refused to consider it, demanding that Haney start the entire process anew. Pet.App.6a, 60a–61a. Given the concurrent Town plans to purchase Gooseberry Island via eminent domain as part of its agreement with the Tribe,[3] it would have been futile and foolhardy for Haney to continue his efforts.

Moreover, Haney's second application to the Town for variances *included* plans for *either* a wood or steel bridge, Pet.10. The Town said "no," 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. This denial made no

[3] The Town voted to authorize acquisition of the island in August 2020, and voted to acquire it in November 2020. Pet.App.31a–32a, 72a–73a.

reference to a bridge; merely a generalized concern for "public safety" and the "purpose and intent" of zoning laws. *Id*. The Town never explains why it didn't approve the requested variances conditioned upon Haney obtaining final approval for a bridge. The bridge is little more than a red herring, diverting attention from the Town's twice-made decision to deny Haney's request for variances from the zoning code.

II. The Town Has Discretion to Deny Variance Requests and Twice Exercised That Discretion

1. The Town of Mashpee has exclusive jurisdiction over the issuance of building permits, which are issued to properties that comply with all relevant zoning code requirements; otherwise, applicants must obtain a variance from the Mashpee Zoning Board of Appeals. Pet.App.52a–53a (citing M.G.L. ch. 40A, § 10[4] and Mashpee Zoning Bylaw § 174-95).[5] Had Gooseberry Island been able to accommodate the

---

[4] Reprinted at Pet.App.65a.

[5] *See also* Mashpee Zoning Bylaw § 174-86(F), which provides:

> Any owner of a lot which is buildable at the time of the effective date of this Article, but which is made unbuildable due to its requirements, may apply to the Board of Appeals for a variance from the requirements of this Article. The Board of Appeals shall consult the Conservation Commission in making its decision, and in no case shall the grant of relief be more than the minimum necessary *to allow a reasonable use of the lot*. The Board of Appeals, in considering applications hereunder, shall give primary importance to the protection of the environment.

https://www.mashpeema.gov/sites/g/files/vyhlif3426/f/uploads/2021_zoning_bylaws.pdf (last visited Dec. 12, 2023) (emphasis added).

mandated setback and frontage road requirements, the Town would have no reason—or opportunity—to deny him a permit to build the single-family residence for which the island is zoned, even without a bridge. The need for these variances, however, gave the Town leverage to make demands. Pet.9–10; *see Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841 (1987) (conditions on building permits present "heightened risk that the purpose is avoidance of the compensation requirement").

The Town, perhaps inadvertently, crystalizes the question presented when it states, "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 ...." BIO.3 n.3. This is what Haney asks this Court to determine: when multiple government agencies exercise authority over portions of a development project, must the property owner receive denials from *all* of them to ripen a takings claim? Here, in contrast with their exclusive jurisdiction to issue building permits and variances from the zoning bylaws, the Town and Zoning Board of Appeals have no authority whatsoever to issue a permit to build a bridge, as they admit. *Id.* (noting the "distinct role of the conservation commission," a non-party that *does* have such authority), BIO.8 n.5 ("The zoning board cannot permit the bridge, it must be the conservation commission.").

The Town argues that its denials are not final decisions because Haney could try, try again. BIO.4–5 (repeatedly describing the denials as "without prejudice"). As a practical matter, all permit denials are "without prejudice" if the property owner is willing to make changes and try again. *See, e.g.*, *Gustafson v.*

Zoning Bd. of Review of City of Warwick, 77 R.I. 73, 73 (1950) (property owner may "institute completely new proceedings … if he so desires"); *Elysian Fields, Inc. v. St. Martin*, 600 So.2d 69, 77 (La. Ct. App. 1992) (after denial, property owner "can apply for a variance at a later date"); *Just Dirt, Inc. v. City of Bonney Lake*, 152 Wash.App. 1064, 2009 WL 3723800, at *1 (2009) (same). Demanding that denials be "with prejudice" empowers government officials to change the rules, offer potential relief someday, and hide behind ripeness doctrine as a form of immunity from the Fifth Amendment's protections. "[T]he Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992). At some point, the Fifth Amendment "lessen[s] ... the freedom and flexibility of land-use planners." *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 321 (1987).

2. The Town does not deny that it planned to take Gooseberry Island by eminent domain, Pet.10, or that it contracted with the Mashpee Wampanoag Tribe to keep the Island area undeveloped so as to assist the Tribe's shellfishing operation. BIO.1; *see also* Pet.9. In a written communication to Haney, Mashpee's Town Counsel forthrightly described the Town's commitment to tribal interests:[6]

> [T]here are certain Town/Tribe legal obligations and understandings pursuant to our Intergovernmental Agreement and

[6] Haney in no way "ridicules" these interests (*see* BIO.2 n.2). The coordination between the Tribe and Town simply provides useful context for the Court's consideration. *See In re Marshall*, 721 F.3d 1032, 1044 (9th Cir. 2013) ("context matters").

> otherwise that would absolutely preclude the Town from agreeing to any terms and conditions relative to construction of a bridge at this location without the consent of the Tribe. I understand that the zoning appeals do not involve the Tribe as a party, but since any stipulated resolution thereof would be predicated upon the construction of a bridge for access purposes we would want to assure the Tribe's assent to the proposed bridge in advance. You noted that, thus far, efforts to obtain Tribe approval of a bridge to the Island have been unsuccessful. … [I]t is essential that the Tribe be on board with the construction of a bridge as a preliminary matter.

Pet.App.69a–70a (citation omitted).

To recap: The Town says, "no variance without a bridge." The Tribe aligned with the Town says, "no bridge." This mirrors the situation in *Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561, 564–68 (Fla. Dist. Ct. App. 2002), where the combination of one government's "no bridgehead" ordinance with another government's "no development without bridge" ordinance made any future attempts to obtain permits futile. Lost Tree Village was entitled to pursue its regulatory takings claim. The First Circuit's decision cannot be reconciled with *Lost Tree Village* and similar cases cited in the Petition, and the Town's opposition brief makes no attempt to do so.

III. The Expansion of the Prudential Ripeness Doctrine Is Replacing the Defunct Prudential Exhaustion Requirement as a Means for Government to Avoid Takings Accountability

The final decision rule was not intended to require a search for some metaphysical future time when the government finally admits its decision about the possible uses of the landowner's property is utterly and absolutely unchangeable. *See, e.g.*, *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 350 n.7 (1986) ("A property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a final] determination."); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990) (city's position was final enough to make the case ripe for review). Instead, the rule should take into account the reality of the land use planning and entitlement process where property owners often work with government officials before, during, and after a development application is submitted. Property owners tailor their proposals to answer government concerns and to maximize the chances that they can make reasonable use of their property. Yet government officials can *always* say "maybe if you make one more change, we'll reconsider." Requiring a definitive statement to the contrary—"with prejudice"—converts prudential ripeness into a desert mirage—landowners moving forward in the process will always find that their day in court is still just out of reach.

Property rights should not be subject to manipulation, *see Cedar Point Nursery v. Hassid*, 141

S.Ct. 2063, 2076 (2021), nor should property owners be subject to unreasonable procedural obstacles to takings claims to protect those rights. *Knick*, 139 S.Ct. at 2170 (federal courts must be as receptive to constitutional property claims as they are to other federal civil rights claims); *State Center, LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 591 (2014) (describing ripeness as one "hurdle" of justiciability). The goal of the ripeness requirement is not to force property owners to run a procedural gauntlet for its own sake, *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001), 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 v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 739 (1997)). Where, as here, a property owner consults with the government for ten years, proposes multiple alternatives for development, and the government refuses to grant the necessary permission to proceed, then its denials are final enough to allow a takings case to proceed to the merits. *See Ateres Bais Yaakov Academy of Rockland v. Town of Clarkstown*, No. 22-1741-cv, 2023 WL 8494453, at *5 (2d Cir. Dec. 8, 2023) ("[F]ederal courts have an obligation to adjudicate cases that invoke our jurisdiction, and we do not close our doors to litigants properly seeking federal review simply because their grievances touch on local zoning matters.").

Conclusion

This case reflects a lower court trend of ignoring *Pakdel* and effectively imposing an exhaustion requirement on property owners who suffer regulatory takings. Ten years and a categorically

preclusive "no" is long enough and clear enough for the "modest requirement" of ripeness.

The petition should be granted.

DATED: December 2023.

Respectfully submitted,

PAUL REVERE, III
Law Offices of
Paul Revere, III
226 River View Lane
Centerville, MA 02601
Telephone: (508) 237-1620

JEREMY TALCOTT*
**Counsel of Record*
DEBORAH J. LA FETRA
ROBERT H. THOMAS
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
JTalcott@pacificlegal.org

Counsel for Petitioner