No. 24-997

In the Supreme Court of the United States

JAMES DOYLE, DBA ROCKY MOUNTAIN VENTURES, DBA ENVIRONMENTAL LAND TECHNOLOGIES, LTD.,
Petitioner,

v.

UNITED STATES,
Respondent

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

BRIEF OF *AMICUS CURIAE* MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTION PRESENTED

Under *Knick v. Township of Scott*, 588 U.S. 180 (2019), a regulatory takings claim is ripe for adjudication in federal court when the government reaches a final decision concerning any restrictions on private property; exhausting state-litigation procedures is unnecessary. *Pakdel v. City and County of San Francisco*, 594 U.S. 474 (2021) (per curiam), likewise rejected administrative exhaustion as a condition of ripeness. Instead, *Pakdel* clarified that "nothing more than *de facto* finality is necessary"—meaning that "the government has reached a conclusive position" about how it will regulate the claimant's property. Yet the Federal Circuit held in the decision below that "*Knick* and *Pakdel* are inapplicable" to takings claims against the United States. The court of appeals added that such claims are unripe until the owner satisfies "federal administrative agency exhaustion" by submitting "a complete permit application."

The questions presented are:

1. Whether a regulatory takings claim against the United States is ripe when a property owner demonstrates "*de facto* finality."
2. Whether a property owner can show that his regulatory takings claim against the United States is ripe without obtaining the government's denial of a complete application for administrative relief.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Mountain States Legal Foundation (MSLF) is a nonprofit public-interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts issues that are vital to the defense and preservation of individual liberties: the right to equal justice under law, the right to speak freely, the right to own and use property, and the need for limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *Marvin M. Brandt Revocable Tr. v. U.S.*, 572 U.S. 93 (U.S., 2014) (MSLF serving as lead counsel); *Garland v. VanDerStok*, 144 S. Ct. 1390 (2024) (MSLF serving as co-counsel).

SUMMARY OF THE ARGUMENT

This should be a straightforward case. In the 1990s, the Fish and Wildlife Service (the Service) fenced off Mr. Doyle's land to save a threatened tortoise, blocking his access and making it impossible for him to develop the property as he originally planned. Despite enduring this deprivation for nearly three decades, the lower courts say his claim is

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[1] Per Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. And as required by Rule 37.2, *amicus*'s counsel notified counsel of record for all parties of *amicus*'s intention to file this brief at least 10 days prior to the due date for the brief.

"unripe" because he did not submit a prohibitively expensive incidental take permit application—one that almost certainly would have been denied anyway.

This outcome makes no sense: the government has physically excluded Mr. Doyle from his own land for thirty years, and under this Court's precedents like *Cedar Point*, that gives rise to a takings claim. Mr. Doyle should be able to exclude others, including the Service, from his property rather than have it unilaterally usurped by regulatory agencies. Yet the lower court says that Mr. Doyle has no valid takings claim because he never completed a futile, financially ruinous permit process. This Court should intervene to clarify that an owner's takings claim is ripe when government actions make it clear that property cannot be developed or even accessed. The Federal Circuit's ripeness analysis erroneously treats this as a simple regulatory restriction subject to administrative resolution, which flies in the face of this Court's jurisprudence that demands compensation for this highly intrusive, categorical taking.

ARGUMENT

I. Exclusive Ownership and the Right to Exclude Are Fundamental Property Rights.

The right to exclude others has historically been recognized as one of the most fundamental attributes of property ownership. This principle was not merely a common law innovation, but rather reflects an understanding of property rights that predates the Republic itself. As William Blackstone observed in his Commentaries, private property "consists in the free use, enjoyment, and disposal of all [one's] acquisitions,

without any control or diminution, save only by the laws of the land." 1 William Blackstone, Commentaries on the Laws of England 134 (1765). This Court has repeatedly affirmed the central importance of the right to exclude in its takings jurisprudence, recognizing it as the cornerstone of property ownership.

In *Kaiser Aetna v. United States*, this Court characterized the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." 444 U.S. 164, 176 (1979). The Court emphasized that this right is "so universally held to be a fundamental element of the property right" that the government "cannot take [it] without compensation." *Id.* at 179-80. This principle was reaffirmed in *Nollan v. California Coastal Commission*, where the Court recognized that "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" 483 U.S. 825, 831 (1987) (quoting *Kaiser Aetna*, 444 U.S. at 176).

Later, in *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court reiterated that the right to exclude is "one of the most treasured strands in an owner's bundle of property rights." 458 U.S. 419, 435 (1982). The Court explained that a physical occupation of property "is perhaps the most serious form of invasion of an owner's property interests" because "the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space." *Id.* at 435. This reasoning applies with even greater force when the

government physically excludes the owner from his own property.

Most recently, in *Cedar Point Nursery v. Hassid*, this Court reaffirmed that "the right to exclude is 'universally held to be a fundamental element of the property right' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" 594 U.S. 139, 146 (2021) (quoting *Kaiser Aetna*, 444 U.S. at 179-180). This right is not simply one of a bundle of property rights. It is part of the essential definition of what it means to 'own' property in our legal tradition. The Court further explained that "the right to exclude is 'one of the most treasured' rights of property ownership." *Id.* at 146 (quoting *Loretto*, 458 U.S. at 435).

The Court's consistent recognition of the right to exclude as a fundamental property right reflects the understanding that, without this right, private property would cease to exist in any meaningful sense. As Professor Thomas Merrill has observed, the right to exclude is the "*sine qua non*" of property—that is, the essential element without which property cannot exist. *See also* Thomas W. Merrill, PROPERTY AND THE RIGHT TO EXCLUDE, 77 Neb. L. Rev. 730, 730 (1998).

The government's actions against Mr. Doyle strike at the heart of these fundamental property rights. Not only has the government stripped him of the right to exclude others from his property, but it has also taken the extraordinary step of excluding him from his own land. The fences erected by the Bureau physically prevent Mr. Doyle from accessing his property, while government officials maintain unfettered access to patrol and enforce the Endangered Species Act's (ESA) regulations. This physical appropriation of Mr.

Doyle's right to access and control his own property directly contradicts this Court's jurisprudence protecting fundamental property rights.

The infringement on Mr. Doyle's property rights is not merely theoretical—it has resulted in tangible economic harm. Unable to develop or use his property for three decades, Mr. Doyle was forced into bankruptcy. App.63a. Here, the complete deprivation of Mr. Doyle's right to exclude—indeed, his outright exclusion from his own property—unquestionably "goes too far."

The Federal Circuit's dismissal of Mr. Doyle's takings claim as unripe fails to acknowledge the severity of the infringement on his fundamental property rights. By requiring Mr. Doyle to submit an expensive habitat conservation plan before his claim can ripen, the court below imposed an impossible burden that effectively denied him the constitutional remedy of just compensation. This approach misunderstands the nature of the Takings Clause, which, as this Court explained in *First English Evangelical Lutheran Church v. County of Los Angeles*, "is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." 482 U.S. 304, 315 (1987).

The Federal Circuit's ripeness doctrine effectively conditions Mr. Doyle's constitutional right to just compensation on his ability to navigate and finance a complex administrative process. This doctrine also misunderstands the self-executing nature of the Fifth Amendment's Taking Clause, which does not ask what the owner has received, but only what has the

owner lost. *See Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910) (stating "[T]he question is, What has the owner lost? not, What has the taker gained?").

The distinction between property rights and other legal interests is not merely semantic—it reflects a fundamental understanding that certain rights inhere in the ownership of property itself and cannot be separated from it without destroying the concept of property. As Justice Holmes observed, "we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U.S. at 416. This principle applies with particular force when the government not only restricts a property owner's use of his land but physically excludes him from it.

The Court's decision in *Dolan v. City of Tigard* further illustrates the constitutional importance of the right to exclude. There, the Court explained that requiring that the public be granted access to private property eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests. 512 U.S. 374, 384 (1994) ("deprive petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" (citation omitted). The government's actions against Mr. Doyle go even further—they not only grant the public access to his property but exclude him from it entirely.

The Federal Circuit's ripeness doctrine effectively recasts Mr. Doyle's property rights as mere privileges

contingent on administrative approval. This approach misconceives the nature of property rights in our constitutional system. As this Court explained in *Lynch v. Household Finance Corp.*, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights." 405 U.S. 538, 552 (1972). Mr. Doyle's right to exclude others from his property is not a mere regulatory privilege subject to administrative exhaustion; it is a fundamental constitutional right that demands judicial protection. The Service, through their regulatory actions, have not only deprived Mr. Doyle of his property rights but fundamentally usurped them.

II. The Taking is Evidenced by the Permit Requirement Imposed on Doyle.

The Fifth Amendment's Takings Clause establishes an unequivocal constitutional mandate: private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. This fundamental protection against government appropriation without compensation is an essential safeguard of individual liberty. As Justice Holmes famously observed in *Pennsylvania Coal Co. v. Mahon*, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. 393, 415 (1922). Mr. Doyle's case presents a classic example of regulatory action that has unmistakably "gone too far."

The ESA's regulatory framework, as applied to Mr. Doyle's property, has effectively appropriated his land without providing just compensation. For nearly three decades, the federal government has maintained a regulatory regime that prohibits virtually all

economically beneficial use of his property without providing compensation. It has eviscerated his right to exclude others, and erected physical barriers preventing his access to his own land. These actions constitute a taking under the Fifth Amendment.

The chronology of the government's actions against Mr. Doyle's property reveals a systematic deprivation of use rising to the level of a compensable taking. In 1990, the Service listed the Mojave Desert Tortoise as threatened under the ESA. By 1994, the Service had designated Mr. Doyle's entire property as critical habitat, imposing significant restrictions on land use. This designation was followed in 1996 by the Service approval of a habitat conservation plan that explicitly prohibited development on his land. The culmination of these restrictions occurred when the Bureau of Land Management (the Bureau) erected physical barriers that "blocked access to the tortoise reserve, including Doyle's property." App.60a.

Perhaps most tellingly, as Mr. Doyle testified, "[t]he gate to my property is controlled by the government. I do not have a key to the lock that controls access to my own property." App.74a. This stark declaration encapsulates the complete inversion of property rights that has occurred—Mr. Doyle has been physically excluded from accessing his own land while government officials maintain unrestricted ingress and egress to monitor and enforce ESA regulations. The physical manifestation of this taking through fences and locked gates provides tangible evidence of the government's appropriation of his property rights.

This Court has consistently recognized that the right to exclude others represents "one of the most

treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). In *Kaiser Aetna v. United States*, the Court characterized this right as "so universally held to be a fundamental element of the property right" that the government "cannot take [it] without compensation." 444 U.S. 164, 179-80 (1979). Yet here, the government has not merely compromised Mr. Doyle's right to exclude others—it has executed a complete inversion of this fundamental property right by excluding him from his own land, while itself claiming unfettered access.

The physical appropriation of Mr. Doyle's right to exclude (and indeed, the right to enter) represents a *per se* taking under this Court's precedents. In *Cedar Point Nursery v. Hassid*, this Court unequivocally held that "government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation." 594 U.S. 139, 153 (2021). While *Cedar Point* involved the government authorizing third parties to enter private property, the principle applies with equal (or greater) force when the government itself physically excludes an owner from accessing his own property via regulatory action.

The physical exclusion of Mr. Doyle from his property through government-erected barriers is more severe than the temporary access rights granted to union organizers in *Cedar Point*. As this Court has recognized, "a 'permanent physical occupation' has occurred... where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan v.*

California Coastal Commission, 483 U.S. 825, 832 (1987). Here, government officials maintain precisely such a "permanent and continuous right" to traverse Mr. Doyle's property, while he remains physically excluded by government-erected barriers.

The government's enforcement scheme imposes a particularly perverse burden on Mr. Doyle, if it is valid: he can neither use his land nor be compensated for this restriction unless he submits a complete permit application, with his own habitat conservation plan. Yet the cost of preparing such a plan can exceed one million dollars, a prohibitive expense that transforms the regulatory requirement into a *per se* taking. The conditioning of Mr. Doyle's property rights on such an onerous and expensive permitting process demonstrates that the government has effectively appropriated his land for public use without just compensation.

This permit requirement itself constitutes strong evidence of a taking—not just a "regulatory taking," but a *per se* taking. True, this Court explained in *United States v. Riverside Bayview Homes, Inc.*, that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." 474 U.S. 121, 126 (1985). However, the Court qualified this principle by noting that the application of a general zoning law to particular property may effect a taking if it "denies an owner economically viable use of his land." *Id.* at 126 (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). Here, the government has gone far beyond merely asserting regulatory jurisdiction—it has physically excluded

Mr. Doyle from his property, and conditioned any use on prohibitively expensive permit requirements.

For thirty years, Mr. Doyle has been denied economically beneficial use of his property. The extended duration of this deprivation further evidences its character as a taking. In *Arkansas Game & Fish Commission v. United States*, this Court noted that "once the government's actions have worked a taking of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 568 U.S. 23, 33 (2012) (internal quotation marks omitted). The three-decade deprivation of Mr. Doyle's property rights cannot be dismissed as a mere temporary restriction awaiting administrative resolution.

Despite submitting an application for an incidental take permit, the Service has refused to process it because it did not include a personalized habitat conservation plan—a requirement that effectively renders the application process financially impossible for most property owners. The Federal Circuit's determination that Mr. Doyle's takings claim is unripe fundamentally misconstrues this Court's jurisprudence and imposes an intolerable burden on property owners seeking compensation for takings.

Even in the "regulatory" context, the government's actions against Mr. Doyle exemplify what Justice Holmes warned against in *Pennsylvania Coal*: regulation that "goes too far" becomes a taking. 260 U.S. at 415. When the government erects physical barriers excluding a property owner from his land, requires prohibitively expensive permits for any economically beneficial use, and maintains this

restrictive regime for three decades, it has unquestionably "gone too far." The Fifth Amendment demands just compensation for such regulatory appropriation.

III. Supreme Court Precedent Confirms That Regulations Authorizing Physical Invasion or Effectively Extinguishing Property Rights Constitute *Per Se* Takings.

This Court's takings jurisprudence has developed along two principal tracks: physical takings and regulatory takings. The Court has consistently recognized that government actions physically appropriating private property or denying all economically beneficial use constitute *per se* takings requiring just compensation. *See Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The Federal Circuit's decision to require Mr. Doyle to obtain a final agency decision before his takings claim actually ripens, while locking him out of his own property, fundamentally misunderstands this Court's holdings regarding takings.

The distinction between categories is not merely academic—it determines the analytical framework that courts must apply when evaluating takings claims. As this Court explained in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." 535 U.S. 302, 322 (2002). In contrast,

regulatory takings that do not involve physical invasions or complete deprivations of all economically beneficial use are analyzed under the multi-factor balancing test established in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

In *Cedar Point*, this Court provided its most recent and comprehensive articulation of the physical takings doctrine, holding that "government-authorized physical invasions" are *per se* takings. 594 U.S. at 153. The Court clearly rejected the notion that the government may avoid the duty to compensate by restricting the property owner's right to exclude, rather than acquiring the right to invade. *Id.* at 151-52. This principle applies with even greater force when the government not only invades the property, but physically bars the owner from accessing it. The fences erected by the Bureau around Mr. Doyle's property constitute precisely the type of physical appropriation that *Cedar Point* recognized as a *per se* taking.

The Court's reasoning in *Cedar Point* directly contradicts the Federal Circuit's analysis in this case. In *Cedar Point*, the Court expressly rejected the argument that "the access regulation cannot amount to a *per se* taking because it did not allow for permanent and continuous access '24 hours a day, 365 days a year.'" *Id.* at 150. The Federal Circuit's focus on the government's contention that it has not permanently appropriated Mr. Doyle's property ignores this obvious instruction from *Cedar Point*.

The physical nature of the government's appropriation is evident in the record. The Bureau erected fences that physically exclude Mr. Doyle from

his property. App.60a. Mr. Doyle testified that he "do[es] not have a key to the lock that controls access to [his] own property." App.74a. In *Hendler v. United States*, the Federal Circuit correctly recognized that "the concept of permanent physical occupation does not require that in every instance the occupation be exclusive, or continuous and uninterrupted." 952 F.2d 1364, 1378 (Fed. Cir. 1991). Instead, the relevant inquiry is whether the government "behave[s] as if it ha[s] acquired an easement." *Id.* Here, the government has gone beyond merely acquiring an easement—it has physically excluded the owner while maintaining its own access rights.

The Federal Circuit's analysis ignores the physical dimension of the government's actions. By requiring Mr. Doyle to demonstrate ripeness through the permit application process, the court below failed to recognize that the physical exclusion from his property through government-erected fences already constitutes a taking. The physical nature of this appropriation renders administrative exhaustion requirements irrelevant. As this Court stated in *Cedar Point*, "When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." 594 U.S. at 145.

Even absent the physical barrier, the government's regulatory scheme effectively deprives Mr. Doyle of all economically beneficial use of his property. Under *Lucas*, a regulation that "denies all economically beneficial or productive use of land" constitutes a categorical taking. 505 U.S. at 1015. For more than three decades, Mr. Doyle has been unable to develop his property as initially planned. This

sustained denial of all economically viable use demonstrates a *per se* taking under *Lucas*.

The *Lucas* Court recognized "that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017, 112 S. Ct. 2886, 2894, (1992). The government's actions against Mr. Doyle have rendered his property economically worthless for its intended use, placing this case squarely within Lucas's categorical rule.

The Washington County HCP itself acknowledges that Zone 3, where Mr. Doyle's property is located, is "the core of the Reserve" and permits only "[a] narrow set of land development and land use activities." App.83a, 89a. These activities are limited to "recreation uses; utility, water development, and flood control activities; management of the Reserve; and certain other specific uses." App.83a. Notably absent from these permitted activities is the residential development that Mr. Doyle originally planned. This regulatory prohibition, combined with the physical barriers excluding Mr. Doyle from his property, constitutes a *per se* taking under both *Cedar Point* and *Lucas*.

The Court's decision in *Horne v. Department of Agriculture* further illustrates this principle. There, the Court held that "a physical appropriation of property g[ives] rise to a *per se* taking, without regard to other factors." 576 U.S. 350, 360 (2015). Similarly, in this case, the government has taken possession and control of Mr. Doyle's property through physical barriers and regulatory prohibitions. The Federal Circuit's ripeness analysis erroneously treats this as a mere regulatory restriction subject to

administrative resolution rather than a physical and categorical taking that demands immediate compensation.

The Federal Circuit tried to place Mr. Doyle's injury in the traditional regulatory takings category and impose an onerous permit-exhaustion process. Its approach fails those terms. As shown, the government has engaged in the kind of physical appropriation of private property that *Cedar Point* recognizes as a *per se* taking: the Service and the Bureau fenced Mr. Doyle out, kept their own key, and retained the exclusive right of entry. That alone is enough to trigger a *per se* rule, ***without*** administrative exhaustion.

Regulations may be so severe that they produce the functional equivalent of a physical appropriation—either because they forbid all beneficial use, see *Lucas*, or because they authorize near-constant intrusion, see *Nollan* and *Cedar Point*. Here, the government has effectively extinguished both Mr. Doyle's right to exclude and his ability to access the property himself. That is precisely the sort of deprivation that "goes too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), and therefore demands compensation under the Takings Clause. And under *Knick* and *Pakdel*, a claim is ripe once the government's position is clear—"nothing more than de facto finality is necessary." *Pakdel*, 594 U.S. at 479. Three decades of fencing, gating, and unyielding opposition to any meaningful development confirm that the Service has "reached a conclusive position about how it will treat the property." *Id. at 480.*

This is a regulatory taking that has gone so far as to constitute a *per se* taking, and Mr. Doyle's claim is

therefore ripe under this Court's jurisprudence. The Federal Circuit's ruling that Mr. Doyle must expend enormous sums on a futile permit process misreads *Pakdel,* and gives the government a backdoor to avoid paying constitutionally mandated compensation.

IV. The Lower Courts' Errors in Applying the Ripeness Doctrine Highlight the Need for Certiorari Review.

The Federal Circuit's application of ripeness doctrine to Mr. Doyle's takings claim conflicts with this Court's recent decisions in *Knick v. Township of Scott*, 588 U.S. 180 (2019), and *Pakdel v. City & County of San Francisco*, 594 U.S. 474 (2021). This conflict underscores the urgent need for this Court's intervention to resolve a misunderstanding of the ripeness requirements for takings claims.

Specifically, the lower court imposed an exhaustion requirement that this Court rejected in *Pakdel*. The court held that Mr. Doyle's takings claim is unripe until he satisfies "federal administrative agency exhaustion" by "receiv[ing] a final decision from FWS on an Incidental Take Permit." App.10a. Yet *Pakdel* said that "administrative 'exhaustion of state remedies' is not a prerequisite for a takings claim[.]" 594 U.S. at 480.

The requirement also conflicts with *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982), which established that "federal courts may create exhaustion requirements only where doing so is consistent with congressional intent." *Accord Williams v. Reed*, 145 S. Ct. 465, 476 (2025) (Thomas, J., dissenting). *Patsy* emphasized that "this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have

not deviated from that position in the 19 years[.]" 457 U.S. at 500. This principle applies to takings claims, as the Court recognized in *Knick*. 588 U.S. at 195.

Neither the Tucker Act nor the ESA prescribes administrative exhaustion as a condition for bringing a takings claim. The Tucker Act simply provides jurisdiction in the Court of Federal Claims for "any claim against the United States founded...upon the Constitution." 28 U.S.C. § 1491(a)(1). It does not require administrative exhaustion as a prerequisite to judicial review. Similarly, the ESA does not mandate that property owners exhaust administrative remedies before seeking just compensation for takings effectuated by the Act's provisions. The Federal Circuit's imposition of an exhaustion requirement without congressional authorization contradicts Patsy and this Court's later jurisprudence.

The record shows that the government has reached a "conclusive position" regarding Mr. Doyle's property. For thirty years, the government has prevented Mr. Doyle from developing his land. The Bureau erected fences preventing his access to his property. App.60a. The Washington County HCP designated his land as being within Zone 3, "the core of the Reserve," where only "[a] narrow set of land development and land use activities" are permitted—none of which include the residential development Mr. Doyle originally planned. App.83a, 89a. These facts establish "*de facto* finality."

The Federal Circuit's insistence that Mr. Doyle submit a complete permit application with his own habitat conservation plan imposes an intolerable burden on his constitutional right to just compensation. Preparing a habitat conservation plan can millions of dollars—a prohibitive expense for Mr.

Doyle, who has already been forced into bankruptcy by the government's actions. App.77a-78a. Conditioning constitutional rights on such expensive administrative processes effectively denies those rights to all but the wealthiest property owners.

This Court's intervention is necessary to resolve the conflict between the Federal Circuit's ripeness doctrine and this Court's decisions in *Knick* and *Pakdel*. By granting certiorari, this Court can clarify that the "*de facto* finality" standard applies equally to takings claims against the federal government and that property owners need not exhaust expensive administrative remedies before seeking just compensation. The right to just compensation is not illusory, it provides meaningful protection against government appropriation of private property.

The artificial distinction between takings local governments and takings by the federal government undermines constitutional rights. As this Court explained in *Knick*, the Takings Clause secures compensation for otherwise proper deprivations. 588 U.S. at 192 ("government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation.") This guarantee applies regardless of which government effects the taking. The Federal Circuit's holding that *Knick* and *Pakdel* are "inapplicable" to takings by the federal government creates a two-tiered system of constitutional rights that this Court should reject.

V. The Burden of ESA Permitting Is Prohibitive.

The Federal Circuit's requirement that Mr. Doyle submit an ESA application with ignores the

prohibitive burden that the requirement imposes on property owners. This burden itself is a taking.

Preparing a habitat conservation plan is an expensive and complex undertaking that requires scientific expertise, environmental studies, and financial resources. As the record indicates, "a recent article in the Journal of the Society for Conservation Biology found that the median cost for the implementation stage of an HCP was $71,018,570 for large-scale HCPs and $908,507 for project-scale HCPs." App.77a-78a. These figures do not include the costs of preparing the plan itself, which typically requires hiring environmental consultants, wildlife biologists, and other specialized experts.

For landowners like Mr. Doyle, who has already lost his property due to the government's actions, these costs are prohibitive. As Mr. Doyle testified, he has gone into bankruptcy twice because of the government's actions. App.63a-66a. The Federal Circuit's requirement that he spend millions of dollars on a permit application process with no guarantee of success ignores these economic realities.

This Court has recognized that imposing such burdensome requirements on property owners can itself constitute evidence of a taking. In *Nollan v. California Coastal Commission*, the Court observed that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'" 483 U.S. 825, 833 n.2 (1987). Similarly, in *Koontz v. St. Johns River Water Management District*, the Court recognized that "land-use permit applicants are especially 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." 570 U.S. 595, 605 (2013).

The ESA's incidental take permit scheme and the related measures taken thereto, as applied to Mr. Doyle, exhibit the characteristics of a regulatory taking identified in *Penn Central*, 438 U.S. 104. The economic impact on Mr. Doyle has been severe—he has been unable to develop his property for three decades, and has been forced into bankruptcy twice. App.63a-66a. The interference with his distinct investment-backed expectations is manifest—he acquired the property for development purposes before the desert tortoise was listed as threatened. And the character of the government action reflects an effort to place the entire burden of species conservation on individual property owners rather than distributing that burden across society as a whole.

Even the permit requirement can be considered substantial evidence of a regulatory taking because it fundamentally restricts Mr. Doyle's ability to freely use his property. By necessitating a permit process—often involving fees, administrative hurdles, and uncertainty about eventual approval—such regulation effectively conditions the owner's utilization of their land on government oversight. This oversight goes beyond mere guidelines or zoning classifications; it wields the power to deny or delay productive uses, drastically undermining the property's value and its owner's reasonable investment-backed expectations. Even beyond the fencing off of the property, the permitting process

itself works a *de facto* appropriation of significant control over the property.

The Federal Circuit's ripeness doctrine creates an insurmountable catch-22 for property owners: they must either spend hundreds of thousands on a permit application process with no guarantee of success, or forfeit their constitutional right to just compensation. This approach effectively shields the government from liability for regulatory takings by imposing financial barriers that most property owners cannot overcome.

The record establishes that Mr. Doyle's property is within Zone 3 of the reserve, which is "the largest block of contiguous [desert tortoise] Habitat and is considered the core of the Reserve." App.89a (emphasis added). The Washington County HCP allows only "[a] narrow set of land development and land use activities" within this zone, including "recreation uses; utility, water development, and flood control activities; management of the Reserve; and certain other specific uses." App.83a. Notably absent from these permitted activities is the residential development that Mr. Doyle originally planned.

While the Washington County HCP contains language suggesting that "the HCP will place no restrictions on the use of [private] property within the Reserve" and that "[i]t is possible that a private landowner * * * may * * * ultimately develop lands within the Reserve," App.12a, these statements are contradicted by the HCP's specific provisions regarding Zone 3. The HCP itself acknowledges that Zone 3 is "the core of the Reserve" and permits only limited activities that do not include residential development. App.83a, 89a. The Federal Circuit's reliance on these general statements ignores the

specific restrictions that the HCP places on Mr. Doyle's property within Zone 3.

The Federal Circuit's insistence that Mr. Doyle must submit a complete permit application ignores the futility of such an application. In *Palazzolo v. Rhode Island*, this Court recognized that "[r]ipeness doctrine does not require a landowner to submit applications for their own sake." 533 U.S. 606, 622 (2001). The Court explained that "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, a takings claim is likely to have ripened." *Id.* at 620. Here, the government's actions over the past three decades, including the physical exclusion of Mr. Doyle from his property and the designation of his land as "the core of the Reserve," demonstrate that the permissible uses of his property are known with reasonable certainty and do not include residential development.

Even the Federal Circuit acknowledged that "there may be good reason to suspect that even a complete permit application—one containing an individualized conservation plan—would have been denied by [the Service]." App.15a (emphasis added). This concession undermines the court's ripeness analysis. If there is "good reason to suspect" that a complete permit application would be denied, requiring Mr. Doyle to expend hundreds of thousands of dollars on such an application serves no purpose other than to erect an insurmountable barrier to seeking just compensation.

The futility exception to the ripeness doctrine, recognized by this Court in *Palazzolo*, applies with particular force here. The Court explained that

"federal ripeness rules do not require the submission of further and futile applications with other agencies." 533 U.S. at 625-26. Given the government's actions over the past three decades, including its physical exclusion of Mr. Doyle from his property and the designation of his land as "the core of the Reserve," any permit application seeking to develop residential housing on his property would be futile.

The burden of the ESA permitting process, combined with the government's clear indication that development will not be permitted on Mr. Doyle's property, confirms that a regulatory taking has occurred. The Federal Circuit's insistence on administrative exhaustion as a condition of ripeness effectively denies Mr. Doyle his constitutional right to just compensation. This Court should grant certiorari to clarify that property owners need not exhaust prohibitively expensive administrative remedies before seeking just compensation for regulatory takings.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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