No. 23-1045

IN THE

Supreme Court of the United States

835 HINESBURG ROAD, LLC,

Petitioner,

v.

CITY OF SOUTH BURLINGTON, ET. AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The only question teed up by this case is:

Whether the Second Circuit correctly applied this Court's decades-old, settled legal test when it held that petitioner's Takings Clause claim was not ripe because respondents have not made a final decision on petitioner's development plan.

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INTRODUCTION

A federal court cannot consider a claim under the Fifth Amendment's Takings Clause until the government has reached a "final decision." *Pakdel v. City and County of San Francisco*, 594 U.S. 474, 475 (2021) (per curiam); *see also Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). Before then, the claim is not ripe because a court would be "hard pressed to determine whether the plaintiff has suffered a constitutional violation." *Pakdel*, 594 U.S. at 475. So long as "avenues still remain for the government to clarify or change its decision," there is not yet an actionable takings claim. *Id.* at 480.

Petitioner 835 Hinesburg Road submitted a two-page building development plan that failed to specify the purpose of the buildings it intended to construct or how the development would take account of various environmental features on its land. The City of South Burlington conducted a "minimal assessment" and declined to sign off on the barebones submission in light of the many "unknowns" in both the submission and in the way the City's land development regulations might be amended in the coming weeks. Pet. App. 4a-5a. But 835 Hinesburg never resubmitted its plan to address those "unknowns." Nor did it apply for potentially available variances and modifications that might have allowed it to proceed with development. Instead, it went straight to federal court, filing a Takings Clause claim.

Decades of this Court's cases foreclose doing so because the City had not reached a final decision on 835 Hinesburg's development plan. Accordingly, the Second Circuit held that 835 Hinesburg's takings

claim was not yet ripe. Entirely ignoring the Second Circuit's reasoning, 835 Hinesburg purports to tee up a question about whether a plaintiff must resubmit a development proposal *after* a final decision. Pet. i. Because that purported question presented has nothing to do with this case, and because the Second Circuit correctly applied uncontested law to the facts, the petition should be denied.

STATEMENT OF THE CASE

A. Legal background

1. The Takings Clause of the Fifth Amendment forbids private property from being "taken for public use, without just compensation." U.S. Const. amend. V. The government may, of course, regulate property, imposing zoning, permitting, and other requirements. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). But "if a regulation goes too far it will be recognized as a taking." *Id.*

To "determine whether a regulation has gone 'too far,'" a court must know "how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986). But "how far the regulation goes"—the ultimate Takings Clause question—is generally not apparent from the face of the regulation alone. *See id.* at 348-49. It may be unclear how the regulation applies to a particular parcel of land, for instance, and in many cases, governments are willing to "soften[] the strictures" of a given regulation by granting variances or other exemptions. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001) (internal citations omitted).

To ensure federal courts know "how far the regulation" actually goes, this Court has identified a

final-decision requirement for takings claims. *MacDonald*, 477 U.S. at 348-49. As this Court put the point most recently in *Pakdel v. City and County of San Francisco*, a final decision exists once there is "no question" about "how the regulations at issue apply to the particular land in question." 594 U.S. 474, 478 (2021) (per curiam) (quoting *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 739 (1997)). The government's decision must make clear not only what development is prohibited by the regulations but also what development is permitted. *Palazzolo*, 533 U.S. at 624-25.

2. As relevant here, at least two kinds of situations preclude a land-use decision from being "final" under this Court's Takings Clause jurisprudence. First, a decision is not final if "avenues still remain" for "the government to clarify or change its decision." *Pakdel*, 594 U.S. at 480 (citing *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192-94 (1985)). In *Williamson County v. Hamilton Bank*, for instance, the government had denied plaintiff's proposal on eight bases but had the power to grant variances to resolve at least five of them. 473 U.S. at 181-82, 188. The Court concluded that until plaintiff sought—and the government denied—all five available variances, there remained "the possibility that [plaintiff] may develop the subdivision." *Id.* at 193-94. Of course, a plaintiff is not required to submit "futile applications" that are certain to be denied. *Palazzolo*, 533 U.S. at 626. But if there's a meaningful possibility of changing the government's mind, the Takings Clause claim is not yet ripe.

Second, the rejection of an "exceedingly grandiose" proposal is not a final decision. *MacDonald*,

477 U.S. at 353 n.9. As this Court put the point, denying an application to build a "nuclear powerplant" in an agricultural zone may tell us about one use that is *prohibited*. *Id.* But it doesn't tell us anything about what other uses might be *permitted*. *See id.* For instance, in *MacDonald v. Yolo County*, this Court found no final decision where plaintiffs' application to build 159 homes was rejected. *Id.* at 342, 351. The proposed plan was "exceedingly grandiose" relative to how the property was zoned, and plaintiffs' plan failed to explain how they would provide sewage, water, and the like to those homes. *Id.* at 353 n.9, 343. This Court held that there was no final decision because the rejection of plaintiffs' plan said nothing about what uses might be made of the property. *See id.* at 351, 353 n.9. For all the federal courts knew, the regulation had not "gone too far" because the plaintiff still had plenty of building options. *Id.*

3. The final-decision requirement is distinct from exhaustion, another concept in Takings Clause jurisprudence. In 2019, this Court held that a plaintiff need not exhaust state remedies. *Knick v. Twp. of Scott*, 588 U.S. 180, 185, 187-89 (2019).

In particular, once no "avenues remain" for the government to sign off on a development, the plaintiff need not pursue state-court litigation to attempt to secure compensation. *Id.* at 202; *Pakdel*, 594 U.S. at 480. And once no "avenues remain" to the plaintiff, it doesn't matter if those avenues are not available due to the plaintiff's mistakes. For instance, in *Pakdel*, the plaintiffs had missed a deadline to request an exemption to a lifetime-lease requirement. 594 U.S. at 477-78. This Court nonetheless allowed their Takings Clause claim to proceed in federal court. *Id.* at 475. At

the point when the plaintiffs brought their federal court suit, there was a final decision: No "avenues remain[ed]" to them, because they'd missed the deadline and could no longer seek an exception. *Id.* at 477-78, 480-81. That the missed deadline was a result of the plaintiffs' "administrative missteps" didn't make the decision any less final. *Id.* at 480.

In short, once no "avenues remain" for the government to change its mind, a plaintiff's Takings Clause claim is ripe, period. *Id.* But so long as the application and assessment process is fluid and the government's ultimate position is unclear, a takings claim is not ripe *See id.*; *Knick*, 588 U.S. at 197.

B. Factual background

1. In November 2018, the City of South Burlington adopted interim zoning bylaws while it assessed whether and how to amend the existing Land Development Regulations (LDRs). Pet. App. 3a. The interim bylaws required the City to take temporary measures to balance development with protecting natural spaces and city resources. *Id.* The interim bylaws changed the default for development: Whereas ordinarily, development is permitted unless a regulation specifically bars it, during the period of the interim bylaws, development is forbidden absent permission. *Id.*; *see also* 24 V.S.A. § 4415(d). The interim bylaws also changed the decision-making process. Ordinarily, only the City's Development Review Board needed to sign off on a development proposal. Pet. App. 62a-63a. Under the interim bylaws, *both* the City Council *and* the DRB had to sign off. Pet. App. 48a-49a.

By summer 2021, the City had nearly settled on amended LDRs but had not yet formally adopted them. As most relevant to this case, the amended LDRs did three things. First, they identified "Habitat Blocks"— areas of open space that builders must take account of before building. Pet. App. 50a-61a. Developers can apply to move the location of a Habitat Block or ask for adjustments to the Habitat Block's boundaries. Pet. App. 51a-55a.

Second, the amended LDRs rezoned portions of the City from industrial to principally residential. C.A. J.A. App34, ECF No. 41. That zoning designation, however, allowed for—indeed, mandated—some commercial development and provided for "approval, in relation to context" of further commercial development. Resp. C.A. Br. & Addendum 314-15, ECF No. 51-2 (hereinafter Amended LDRs).

Finally, the amended LDRs increased protection for wetlands. Pet. App. 25a. State and federal law already forbade building on the wetlands themselves, and the City previously had protected an additional 50-foot buffer zone. The amended LDRs expanded that buffer zone to 100 feet for certain categories of wetlands. *Id.* Again, the amended LDRs provided for exceptions, including for necessary infrastructure. Amended LDRs at 173-74.

2. Petitioner 835 Hinesburg Road, LLC, owns an undeveloped 113.8-acre parcel of land in South Burlington. Pet. 6. In August 2021, 835 Hinesburg began the process to develop its land. Pet. App. 20a. At the time, 835 Hinesburg's land was governed by the interim bylaws. *Id.*

When 835 Hinesburg submitted its development plan, the City was in the process of adopting the amended LDRs. Pet. App. 5a. Under the amended LDRs, 835 Hinesburg's land contained a Habitat Block and had been rezoned from industrial to principally residential. C.A. J.A. App034. In addition, 835 Hinesburg's property contained a wetland, so the amended LDR's expanded buffer zone applied to the property. *Id.* at App035.

Notwithstanding those changes, 835 Hinesburg submitted a proposal sketching out a massive industrial complex, without taking account of—or even noting—the Habitat Block and without providing relevant information about where the wetland was located. C.A. J.A. App032, App038. 835 Hinesburg's plan included 24 commercial buildings with footprints as large as 66,000 square feet, including nearly 2,000 parking spaces. *Id.* at App048. The plan did not say how the buildings would be used. *Id.* Instead, it listed 23 potential uses, ranging from a cannabis dispensary to an animal shelter to a funeral home to a manufacturing plant. *Id.* at App046.

"Based on these unknowns and an initial review," the City Council declined to sign off on the plan. C.A. J.A. App035. After a "minimal assessment," the City Council thought the development "*could* be contrary to the amendments to the Land Development Regulations that the City eventually *may* adopt." *Id.* at App034-35. (emphases added). But the Council had "not completed the preparation of these amendments," so it did "not yet know for certain the standards that would apply to development of the subject property."

Id. at App034. As a result, it could not determine "the actual impact of this proposed development upon the open spaces, forest blocks, ecosystems, and other natural resources on the subject property." *Id.* Nor could it decide "whether the amendments will allow those impacts" or "whether or how" they might "alter the design of a proposed commercial industrial development." *Id.* The City Council concluded that "the proposed development [wa]s not consistent with the health, safety, and welfare of the City of South Burlington" and so did not pass muster under the interim bylaws. *Id.* at App035.

3. A few days after the City Council considered 835 Hinesburg's proposal, the City published a notice regarding a hearing on the amended LDRs. Under Vermont law, any development proposal from that point forward would be evaluated under the amended LDRs. *See* 24 V.S.A. § 4449(d).

At that point, one of the City Council's "unknowns"—what "standards" would "apply to the development" of 835 Hinesburg's property, *see* J.A. App034—became known. And 835 Hinesburg could have supplied the other "unknowns" by telling the City location of the Habitat Blocks and wetlands on its property and the intended purposes of its various buildings.

835 Hinesburg could also have taken advantage of various modifications available under the amended LDRs. Among other things, it could have applied to move the Habitat Block elsewhere on its property, taken advantage of requirements to build commercial buildings even in residential zones, or asked for

permission to build infrastructure in the wetland buffer zone.

835 Hinesburg did none of those things. Instead, it filed suit in federal court.

C. Procedural background

1. 835 Hinesburg filed suit in the U.S. District Court for the District of Vermont in February 2022. As relevant here, 835 Hinesburg argued that the amended LDRs, as applied, constituted an unconstitutional taking of its land. Pet. App. 67a. 835 Hinesburg sought both damages and an injunction barring enforcement of the amended LDRs. *Id.* 86a.

2. After briefing and oral argument, the district court dismissed 835 Hinesburg's takings claim. Pet. App. 15a, 23a. Because neither the City Council nor the Development Review Board had ruled on 835 Hinesburg's proposal under the amended LDRs, the district court concluded that 835 Hinesburg was "jumping the gun." *Id.* 34a-35a.

Citing *Pakdel*, the district court explained: "It is possible that the 'Habitat Block' located on Plaintiff's property may preclude any commercially viable development plan. Or the 'Habitat Block' may be no more than one consideration among others in a relatively flexible planning process. Or the owner's needs may be met through a land exchange or boundary adjustment reached through agreement with the zoning authority. But that is just it—the court does not yet know." Pet. App. 33a.

3. 835 Hinesburg appealed to the Second Circuit, which affirmed the district court in an unpublished summary order. Pet. App. 3a. Also citing *Pakdel*, the

Second Circuit explained that the final decision requirement for ripening a takings claim is "relatively modest," but a plaintiff still must show that the government is "committed to a position." *Id.* 6a-7a.

Applying those principles, the Second Circuit held that the City had not reached a final decision on 835 Hinesburg's proposed development. Because the amended LDRs "were still in draft form" when 835 Hinesburg submitted its proposal, and because "the City Council did not yet know for certain how the proposed Amended LDRs would apply to the Property, the City Council could conduct only a minimal assessment" of 835 Hinesburg's proposal. *Id.* 7a. Moreover, 835 Hinesburg's proposal "lacked information that the City Council advised that it needed," "such as information about wetland buffers, floodplains, and the precise location of the Habitat Block relative to the proposed development." Pet. App.7a-8a.

The Second Circuit further reasoned that under the amended LDRs, the City had "several options to shape how it applie[d] the regulations to a given parcel," including granting variances from the amended LDRs' requirements. Pet. App. 8a-9a. Since 835 Hinesburg had not asked the City for those variances, the Second Circuit "simply [did] not 'know how far the regulation [went].'" *Id.* (quoting *MacDonald*, 477 U.S. at 348).

This petition followed.

REASONS FOR DENYING THE WRIT

The Second Circuit affirmed the dismissal of 835 Hinesburg's claim because the City had not yet reached a final decision. Entirely ignoring that

holding, 835 Hinesburg suggests that the City reached "a final decision under existing ordinances," and asks this Court to resolve whether, under *that* circumstance, a property owner is "required to submit subsequent development proposals for consideration under future or later-adopted regulations." Pet. i (emphasis added). 835 Hinesburg has no stake in the outcome of the question it presented; what a property owner is required to do when there *has* been a final decision has no bearing on this case, because there has been no final decision.

In reality, this case involves nothing more than the factbound application of well-settled legal principles, and no circuit would have decided the case any differently.

This Court should deny certiorari.

I. 835 Hinesburg presents a hypothetical question that has nothing to do with this case.

1. The petition for certiorari asks this Court to resolve "[w]hether a takings claim is ripe *when a city makes a final decision* under existing ordinances denying a land use permit, or whether a property owner is required to submit subsequent development proposals for consideration under future or later-adopted regulations to ripen the claim?" Pet. i. (emphasis added).

That question misconstrues the Second Circuit's holding. It presumes the City reached a final decision. But the Second Circuit held that the City had *not* made a "final decision under existing ordinances." *See* Pet. i; Pet. App. 8a ("[T]he City Council's November 2021 decision was not a 'final decision regarding the application of the regulations to the property at

issue.'"). The Second Circuit did not hold that 835 Hinesburg had to "submit subsequent development proposals" *notwithstanding* a final decision. Pet. i.

835 Hinesburg thus has nothing more than a theoretical stake in the question presented. Whether an applicant who *received* a final decision must resubmit a proposal after the legal regime changes doesn't matter to 835 Hinesburg—835 Hinesburg did *not* receive a final decision. This Court, of course, should not provide the advisory opinion 835 Hinesburg seeks. *See Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 378-79 (2024).

Moreover, the question presented was neither pressed nor passed upon below. To the Second Circuit, 835 Hinesburg presented only the question "[w]hether 835 Hinesburg's regulatory takings claims are ripe where the City of South Burlington's Land Development Regulations ('LDRs') categorically forbid development within Habitat Blocks on 835 Hinesburg's property and the City rejected 835 Hinesburg's development proposal." Petr. C.A. Br. 1. That is, it asked the Second Circuit to rule on whether there had been a final decision, not whether, despite a final decision, it had to submit another proposal.

And even if 835 Hinesburg had raised the question, there would have been no reason for the Second Circuit to consider it. The Second Circuit's conclusion that there was no final decision was sufficient to affirm the dismissal of the case. There was no need to consider what effect later-adopted regulations might have on a hypothetical final decision.

2. It's not clear the rest of 835 Hinesburg's question presented applies here, either. 835

Hinesburg's question presented presupposes a final decision under rules in effect at time 1 ("existing ordinances") and then a requirement to submit again under rules in effect at time 2 ("future or later-adopted regulations"). *See* Pet. i.

But of the eight cases that 835 Hinesburg claims split over its question presented, seven don't even involve a decision under an "existing ordinance" followed by a "future or later-enacted regulation."[1] The only federal case that even plausibly implicates the factual scenario teed up by the question presented is an unpublished Fourth Circuit decision from nearly fifteen years ago. *See Acorn Land, LLC v. Baltimore Cnty.*, 402 F. App'x 809 (4th Cir. 2010). And even in that case, the question presented was irrelevant to the legal analysis. No one raised the argument that the change in legal regimes made any difference there, nor did the court comment on that possibility. *Id.* at 815-16. Instead, the Fourth Circuit concluded that plaintiff was not required to take further administrative action to ripen its claim in light of the city's "unfair and unreasonable" tactics. *Id.* at 815.

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[1] *Haney as Tr. of Gooseberry Island Tr. v. Town of Mashpee*, 70 F.4th 12 (1st Cir. 2023), *cert. denied* 144 S. Ct. 564 (2024); *Beach v. City of Galveston*, No. 21-40321, 2022 WL 996432 (5th Cir. Apr. 4, 2022); *Catholic Healthcare Int'l, Inc. v. Genoa Charter Twp*, 82 F.4th 442 (6th Cir. 2023); *Willan v. Dane Cnty.*, No. 21-1617, 2021 WL 4269922 (7th Cir. Sept. 20, 2021); *Ralston v. Cnty. of San Mateo*, No. 21-16489, 2022 WL 16570800 (9th Cir. Nov. 1, 2022), *cert. denied* 144 S. Ct. 101 (2023); *N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216 (10th Cir. 2021); *S. Grande View Dev. Co., Inc. v. City of Alabaster*, 1 F.4th 1299 (11th Cir. 2021); *Barlow & Haun, Inc. v. United States*, 805 F.3d 1049 (Fed. Cir. 2015).

Indeed, 835 Hinesburg waffles over how to categorize the rules in *this* case. Its primary argument seems to be that the decision here was *not* based on the legal regime at time 1—that is, it was not made "under existing ordinances," Pet. i—but was instead based on the anticipated legal regime at time 2, the impending amended LDRs. *See, e.g.*, Pet. 29 (characterizing City Council's decision as "reject[ing] application in anticipation of new regulations"). Given 835 Hinesburg's flipflopping on the premise of the question presented, this is not the right case for this Court to consider what happens "when a city makes a final decision under existing ordinances," Pet. i.

II. The Second Circuit's actual decision involves the factbound application of settled law.

Rather than addressing "[w]hether a takings claim is ripe when a city makes a final decision under existing ordinances," *see* Pet. i, the Second Circuit concluded that the City in this case simply had not made a final decision with respect to 835 Hinesburg's development aspirations. That issue is not certworthy. Indeed, this Court has twice in recent Terms denied certiorari on similar questions (a fact counsel neglects to mention, despite litigating both cases and citing them in its petition).[2]

The Second Circuit applied well-settled and recently reaffirmed precedent to a specific set of facts (a set of facts bound up in questions of state law, to boot). Plus, this case would be a poor vehicle for

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[2] *See Haney as Tr. of Gooseberry Island Tr. v. Town of Mashpee*, 70 F.4th 12, 19 (1st Cir. 2023), *cert. denied*, 144 S. Ct. 564 (2024); *Ralston v. Cnty. of San Mateo*, No. 21-16489, 2022 WL 16570800, at *1 (9th Cir. Nov. 1, 2022), *cert. denied*, 144 S. Ct. 101 (2023).

expounding on takings law. And no circuit would have decided this case differently.

1. *Merits.*

a. The opinion below breaks no new ground. Recall that a final decision must make clear "how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986). And, as this Court recently reaffirmed, a decision is not final if "avenues still remain for the government to clarify or change its decision," for instance, by approving a request for a variance. *Pakdel,* 594 U.S. at 480 (citing *Williamson Cnty.*, 473 U.S. at 192-94).

Under that established precedent, there was no final decision in this case. Far from making clear "how far the regulation goes," *see MacDonald*, 477 U.S. at 348, the City Council was able to conduct only a preliminary "minimal assessment" of the application in light of various "unknowns" with both the evolving regulations and the development plan itself. C.A. J.A. App034-35. As for the evolving regulations: The Council had "not completed the preparation of these amendments" when it reviewed 835 Hinesburg's plan. C.A. J.A. App034. It did "not yet know for certain the standards that would apply to development of the subject property." *Id.*

As for the unknowns with the development plan itself: 835 Hinesburg has never told the City what it wants to build. It presented a list of twenty-three "potential land uses," which run the gamut from a food hub to a crematorium to a cannabis dispensary, some of which (the food hub) might be permissible and some of which are not. C.A. J.A. App040, App046. Nor has it

told the City where the Habitat Blocks or wetlands fall on its land. *Id.*

Moreover, multiple "avenues still remain" for the City to "clarify or change its decision." *See* Pet. App. 7a-9a. 835 Hinesburg can still request variances or other modifications to resolve most of the concerns with its plan. Most dramatically, 835 Hinesburg could explore moving the Habitat Block so that it overlapped with the federally protected wetlands on its property—an area that 835 Hinesburg was already foreclosed from building on even before the amended LDRs. *See* Pet. App. 53a. 835 Hinesburg could also ask to swap the Habitat Block for another parcel of land, take advantage of various provisions that allow (and sometimes require) commercial buildings even in residential zones, or request to build infrastructure in the wetland buffer area. Pet. App. 8a-9a, 51a-55a; Amended LDRs at 173-74. Because all those avenues remain open to 835 Hinesburg, the Second Circuit correctly held there was no final decision.

b. 835 Hinesburg makes two arguments against the Second Circuit's conclusion. As a threshold matter, it doesn't suggest that those two arguments amount to anything other than error correction of an unpublished opinion. Indeed, 835 Hinesburg acknowledges that the Second Circuit's *published* precedent correctly analyzes finality. Pet. 23 (discussing *Village Green at Sayville, LLC v. Town of Islip*, 43 F.4th 287, 297-98 (2d Cir. 2022)). In any event, both of its arguments are wrong.

First, 835 Hinesburg protests that the Second Circuit's decision is "exhaustion by another name" and

"directly conflicts with" this Court's decision in *Pakdel*. Pet. 3. But *Pakdel* holds only that *once* no "avenues still remain," it doesn't matter *why* there are no remaining avenues (and, in particular, it doesn't matter if plaintiff's "administrative missteps" are the reason why no avenues remain). 594 U.S. at 478-480. Indeed, *Pakdel* reiterated that when avenues *do* remain, a decision is not final. *Id.* at 480. In this case, avenues remain: 835 Hinesburg could, today, seek the relevant variances, for instance.

Second, 835 Hinesburg contends that so long as "the [Habitat Block] overlay exists in any configuration" on its property "so does the property owner's takings claim." Pet. 18. That's wrong twice over. To start, the Takings Clause analysis focuses on the impact on the "parcel as a whole," not on "discrete segments." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978). So even if there were some "discrete segment" of 835 Hinesburg's property that it couldn't build on because of the Habitat Block, that wouldn't suffice.

And in any event, it's not even clear that there *is* some such "discrete segment." As the Second Circuit put the point, the Habitat Block "may preclude" some amount of "commercially viable development, but that is just it—the court does not yet know." Pet. App. 8a (internal citations omitted).

2. *Vehicle.* This case would also be a poor vehicle to expound on takings law because there's a ready basis for finding there was no final decision even apart from the reasons given by the Second Circuit. Recall that, in *MacDonald, Sommer & Frates v. Yolo County*, this Court held that rejecting an "exceedingly grandiose" proposal—an application to build "a

nuclear powerplant" in an agricultural zone, for instance—is not a final decision. 477 U.S. at 353 n.9. In *MacDonald*, the rejected plan entirely failed to address critical questions about feasibility—how it would handle sewers, water supply, and the like. *Id.* at 343. Rejecting such a plan gives no indication about "what use, if any, may be made of the affected property." *See id.* at 350.

Here, too, the City's rejection of 835 Hinesburg's "grandiose" plan gives no indication about "what uses might be made of the property." *Cf. id.* at 353 n.9, 350. And as in *MacDonald*, 835 Hinesburg's plan did not address critical questions about feasibility—how the plan interacted with wetland buffers, the Habitat Block, and other environmental features. *See* C.A. J.A. App034-35.

The City Council rejected a plan to build some unspecified sort of commercial development (anything from a cannabis dispensary to a crematorium) in a residential zone without any regard for Habitat Blocks, wetlands, or other environmental considerations. C.A. J.A. App034-36, App046. By all accounts, 835 Hinesburg can still build some commercial buildings, plus hundreds of residential housing units, so long as it plans around the relevant environmental features. But until 835 Hinesburg submits something that bears a resemblance to the kind of development the City might plausibly allow, and until that plan addresses critical environmental features of the land, the federal courts have no idea "what use, if any" might be made of 835 Hinesburg's property. *Cf. MacDonald*, 477 U.S. at 350.

3. *Split.* Finally, there is no circuit split. As explained *supra*, at 13, none of 835 Hinesburg's cases address the question presented. And none of them would decide this case any differently, either.

835 Hinesburg claims the decision below splits with two circuits, the Sixth and Eleventh. Pet. 20-22. The only Sixth Circuit case 835 Hinesburg cites is a Religious Land Use and Institutionalized Persons Act case that doesn't even mention the Takings Clause. *See Catholic Healthcare International, Inc. v. Genoa Charter Township*, 82 F. 4th 442, 447 (6th Cir. 2023). And in that case, the government twice refused to grant plaintiffs a permit, and the zoning board of appeals denied relief. *Id.* at 448. This case isn't a RLUIPA case, and there has been no such repeat denial.

As for the Eleventh, the case cited in the petition involved a "specific ordinance that target[ed] precisely and only" the plaintiff's property. *See South Grande View Dev. Co., Inc. v. City of Alabaster*, 1 F.4th 1299, 1307 (11th Cir. 2021). This case features no such "specific ordinance"—the City designated more than two dozen Habitat Blocks, only one of which was on 835 Hinesburg's property. *See* Pet. App. 3a.

835 Hinesburg also cites seven cases about *state*-law questions, which of course could not have decided this case any differently. Pet. 27-30. To be sure, in each of those cases, as a matter of the particular state's law, the decisionmaker should not have considered future changes to regulations in denying a development

permit.[3] But if 835 Hinesburg's gripe is that the City Council should not have considered the amended LDRs in denying its application, its recourse is with the Vermont courts, not this one.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 11, 2024

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[3] *See Gabric v. City of Rancho Palos Verdes*, 73 Cal. App. 3d 183, 189 (1977); *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 126 (1973); *Gramatan Hills Manor, Inc. v. Manganiello*, 213 N.Y.S.2d 617, 620-21 (1961); *A to Z Paper Co. v. Carlo Ditta, Inc.*, 775 So. 2d 42, 46-47 (La. 2000); *Zachary House Partners, LLC v. City of Zachary*, 185 So. 3d 1, 7-9 (La. App. 2013); *Canal/Norcrest/Columbus Action Committee v. City of Boise*, 137 Idaho 377, 379 (2002); *Bracken v. City of Ketchum*, 537 P.3d 44, 49-58 (Idaho 2023).