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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

When South Burlington's City Council voted to deny 835 Hinesburg's development proposal, Pet.App.20a, 77a, it took a definite position "with a reasonable degree of certainty" about what uses its restrictions prohibit on the property. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001). The City's Brief in Opposition (BIO) never acknowledges the vote occurred. The City also downplays the City Council's decision to apply proposed but not yet enacted regulations that would place a large portion of 835 Hinesburg's land within categorically undevelopable "Habitat Blocks." Pet.App.77a. These omissions leave the Court with the misimpression that 835 Hinesburg could resubmit its development proposal tomorrow and stand a chance at approval. If that were the case, 835 Hinesburg would do it. Developers prefer development to litigation. But given newly adopted regulations that established categorically unbuildable Habitat Blocks on 835 Hinesburg's property, there is *no* chance that the City could approve development in that area. Pet.App.57a–59a, 77a.

Unfortunately, South Burlington is not alone among governments—and the Second Circuit not alone among courts—still imposing what amounts to "administrative exhaustion" as the price to ripen a takings claim. *Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474, 479 (2021) (hyphen omitted); *see, e.g.*, *Haney as Trustee of Gooseberry Island Trust v. Town of Mashpee*, 70 F.4th 12 (1st Cir. 2023) (takings claim is unripe even after the town board denied two variance requests). The practical effect is that property owners cannot vindicate their constitutional rights in court. Despite this Court's

many warnings to the contrary, the lower courts often still consign the Takings Clause "'to the status of a poor relation' among the provisions of the Bill of Rights." *Knick v. Twp. of Scott*, 588 U.S. 180, 189 (2019) (citing *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)).

This case arises after a motion to dismiss. The facts as pleaded clearly state that South Burlington's City Council denied 835 Hinesburg's development proposal. Pet.App.77a. This official act cannot be altered because the regulatory regime at the time of the vote to deny has since changed. Pet.App.77a. Nonetheless, the court below held that 835 Hinesburg is barred from pursuing its constitutional claims in court. Pet.App.6a–9a. As such, this case presents an ideal vehicle to take up the ripeness question. The continuing confusion over what constitutes a final decision by the government, even after *Pakdel*, 594 U.S. at 478, justifies granting the petition.

The Court need not address the merits of 835 Hinesburg's takings claim because no court below has considered them. Current ripeness doctrine not only permits but encourages courts to evade consideration of the merits of the takings claims. The petition should be granted.

ARGUMENT

I. GOVERNMENTS AND LOWER COURTS ARE IMPROPERLY REQUIRING EXHAUSTION IN TAKINGS CLAIMS, CLOSING THE COURTHOUSE DOOR

South Burlington argues that 835 Hinesburg still has avenues left to pursue a development application. The City is obfuscating.[1] BIO at 5, 15–16. In doing so, it only demonstrates how governments are still avoiding, after *Pakdel*, takings suits through processes that amount to administrative exhaustion. *Id.* at 5 ("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[.]"). This Court must again step in to clarify the situation.

The record here includes many indicia of finality. 835 Hinesburg submitted a development proposal to construct 24 commercial buildings with surrounding light industrial use, per the existing zoning and land use regulations. Pet.App.4a, 20a, 68a, 77a. The proposed development was consistent with the

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[1] This Court should disregard South Burlington's argument that 835 Hinesburg raised an ancillary question as to "whether a takings claim is ripe when a city makes a final decision," because the argument conflicts with the City's previous position that the City Council's "no" vote was a final decision rejecting the development. BIO at 11–14; Pet. at 17–18. *See New Hampshire v. Maine*, 532 U.S. 742, 749–51 (2001) (noting an equitable rule "prohibiting parties from deliberately changing positions according to the exigencies of the moment") (internal quotation marks and citation omitted).

already heavily developed surrounding area.[2] Pet.App.7a, 16a–17a, 20a, 68a. 835 Hinesburg asked for City approval under the regulations at the time, which generally allowed development "consistent with the health, safety, and welfare of the City of South Burlington[.]" Pet.App.48a. The City Council officially voted to reject the plan, in part relying on the future placement of a significant portion of the property within a Habitat Block. Pet.App.20a, 77a. Because 835 Hinesburg submitted its development proposal under interim regulations that are no longer operative, there is no active avenue for 835 Hinesburg to seek any further appeal or resubmittal. *See Athey Creek Christian Fellowship v. Clackamas Cnty.*, No. 3:22-cv-01717-YY, 2024 WL 3596969, at *8 (D. Or. July 30, 2024) (finding a Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") claim was ripe where a property owner's claim was based on regulations since expired). The question of whether some development may or may not be permitted under later enacted regulations, goes to the question of deprivation—a merits issue, not ripeness.

The Second Circuit's decision requires 835 Hinesburg to reapply under a new regulatory scheme that categorically forbids development on portions of the property. Pet.App.7a–9a. That is despite this Court's repeated admonitions that "[r]ipeness

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[2] The surrounding area includes "[i]nterstate 89 and Burlington International Airport" directly to the north. "Heavy industrial development and a major state highway, [route] 116" directly to the east. "A major sports complex and hundreds of homes" to the west. And "[h]undreds of additional homes" to the south. Pet.App.68a. Additional development consistent with the surrounding area is neither "grandiose" nor "elaborate." *See Palazzolo*, 533 U.S. at 619–20.

doctrine does not require a landowner to submit applications for their own sake." *Palazzolo*, 533 U.S. at 622. Even the "meaningful application" standard some lower courts have adopted doesn't require a landowner to continue to submit applications once the government has rejected a reasonable proposal. *See, e.g.*, *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir. 1990) ("local decision-makers must be given an opportunity to review at least one reasonable development proposal," which "must be 'meaningful,'" such that "rejection of 'exceedingly grandiose development plans' is insufficient to show that the . . . agency does not intend to allow reasonable development" (quoting *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 353 n.9 (1986))); *Vill. Green at Sayville, LLC v. Town of Islip*, 43 F.4th 287, 297–98 (2d Cir. 2022) (property owner need only file a "meaningful application" and give the authority "an opportunity to commit to a position"). Instead, the process must only demonstrate "how the 'regulations at issue [apply] to the particular land in question.'" *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 739 (1997) (citing *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985)). That is exactly what happened here.

Contrary to South Burlington's assertions, 835 Hinesburg submitted a development proposal that offered the City a meaningful opportunity to determine whether 835 Hinesburg could proceed with its plans. Pet.App.20a, 77a. South Burlington responded with a flat "no." Pet.App.20a, 77a. Not a maybe or a "yes" with conditions but a clear unequivocal "no." Pet.App.20a, 77a. That "no" showed exactly how South Burlington's regulations both

interim and later adopted applied to 835 Hinesburg's property. Pet.App.57a–59a.

That lower courts continue to require exhaustion beyond an official "no" vote demonstrates the continued need for this Court's review, as exemplified by the Second Circuit's analysis. Pet.App.7a–9a. The court emphasized that "the amended LDRs were still in draft form" and thus the City "did not know for certain" how they would apply to 835 Hinesburg's property. Pet.App.7a. But the City Council could have approved the development, even a conditional approval, under the existing regulations. However, it squarely rejected the plan because 835 Hinesburg's proposal included proposed development in the Habitat Blocks. Pet.App.77a. The Court of Appeals' analysis flouts this Court's instruction that "nothing more than *de facto* finality is necessary." *Pakdel*, 594 U.S. at 479.

And the Second Circuit isn't alone. In just the last year, the Ninth Circuit has twice found takings claims unripe even where the applicable regulations clearly forbade development, and the local government failed even to respond to pleas for a potential exception. *Ralston v. Cnty. of San Mateo*, No. 21-16489, 2022 WL 16570800, at *1 (9th Cir. Nov. 1, 2022); *Mendelson v. San Mateo Cnty.*, No. 23-15494, 2024 WL 3518319, at *1 (9th Cir. July 24, 2024). The First Circuit and Seventh Circuit have also held takings claims unripe despite no real doubts about finality.[3] *Haney*, 70 F.4th

[3] Only the Sixth Circuit has faithfully followed *Pakdel*, finding in a RLUIPA case that a district court improperly conflated ripeness and exhaustion. *See Catholic Healthcare Int'l, Inc. v. Genoa Charter Twp.*, 82 F.4th 442, 448 (6th Cir. 2023) ("The

at 20–21; *Willan v. Dane Cnty.*, No. 21-1617, 2021 WL 4269922, at *2–3 (7th Cir. Sept. 20, 2021).

One explanation for this recent history is that this Court's ripeness doctrine is too difficult to apply, making South Burlington's confusion understandable. That itself would call on this Court to clarify. On the other hand, the City may simply be taking advantage of an environment where many lower courts have ignored *Pakdel* and continued to require exhaustion of remedies in takings cases. South Burlington's argument that 835 Hinesburg should have requested a variance or some other exception is an example of this. BIO at 5, 16. As no procedure existed for 835 Hinesburg to avoid the development restriction within the Habitat Blocks, a requirement that it seek a variance could serve no purpose other than futile expense and delay to achieve formal exhaustion. Pet.App.51a–56a. Either way, a problem exists and only this Court can solve it. The Court should grant the petition to do so.

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district court's mistake was to conflate ripeness (sometimes called 'finality' in this context) and exhaustion." The court reasoned that "'only if the local regulatory process was exhausted will a court know precisely how a regulation will be applied to a particular parcel or use.' That was the same mistake the Ninth Circuit made in *Pakdel*.") (internal citation omitted). That *Catholic Healthcare* was a RLUIPA case doesn't make it less persuasive—courts have already begun applying it in the takings context. *See Wineries of Old Mission Peninsula Ass'n v. Peninsula Twp.*, No. 1:20-cv-1008, 2024 WL 1152521, at *2–3 (W.D. Mich. Feb. 16, 2024).

II. COURTS SHOULD APPLY THE LAW THAT EXISTS AT THE TIME A TAKINGS CLAIM IS FILED

At the core of the City's argument is its contention that 835 Hinesburg erred in not waiting to submit its development proposal until after it adopted the "Habitat Block" regulations it was considering at the time the proposal was made. BIO at 15–17. But that argument presupposes that 835 Hinesburg's original development proposal, submitted under the extant prior regulations, was in some way deficient. It wasn't.

At the time 835 Hinesburg submitted its development proposal, the City had "interim" development regulations in place. Pet.App.47a–49a. Those regulations had been law for almost four years while the City engaged in a process of considering and adopting new land development regulations. The interim regulations permitted development on land like 835 Hinesburg's as long as the "proposed use [was] consistent with the health, safety, and welfare of the City of South Burlington[.]" Pet.App.48a. 835 Hinesburg's submitted development proposal was filed in August 2021, almost three years into the interim regulation's establishment and months before they were ultimately displaced by new ordinances.[4] South Burlington's argument that 835 Hinesburg should have waited months longer to submit its proposal under potential future regulations it had no

[4] Whether the plan was submitted at the beginning, middle, or end of the interim regime has no legal relevance. The plan was submitted in accordance with the governing regulations. Developers need not consult a crystal ball to discern future potential regulations before submitting plans.

way of knowing would actually be formally adopted has no basis in law.

Despite the City's ability to fully evaluate and rule on 835 Hinesburg's development proposal under the existing interim regulations, the City speculated that someday the then-draft Habitat Block regulations could affect the viability of 835 Hinesburg's proposal. Pet.App.7a–8a, 31a, 77a. As substantial authority has recognized, this cannot possibly be required. *See Gabric v. City of Rancho Palos Verdes*, 73 Cal. App. 3d 183, 189 (1977) (finding the City's probable future, yet undetermined, zoning action could not justify denying the permit under the existing regulations); *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 126 (1973) (holding the applicable law for reviewing a development proposal is the law at the time when the application is made, even if the law later changes); *Gramatan Hills Manor, Inc. v. Manganiello*, 213 N.Y.S.2d 617, 620–21 (1961) (finding a property owner was entitled to pursue development under the existing ordinance not a future nonadopted ordinance); *A to Z Paper Co. v. Carlo Ditta, Inc.*, 775 So. 2d 42, 47 (La. 2000) ("The issuance of a permit must be determined with reference to the existing [law], not one that is planned for the future.").

The Second Circuit conflicts with these cases, allowing local governments to apply whatever law they contemplate may be adopted in the future. Pet.App.7a. Such uncertainty threatens the basic principle of access to courts for deprivations of property rights. *See Canal/Norcrest/Columbus Action Comm. v. City of Boise*, 137 Idaho 377, 379 (2002) ("[T]o permit retroactive [or future] application

of an ordinance would allow a zoning authority to change or enact a zoning law merely to defeat an application, which would result in giving immediate effect to a future or proposed ordinance before that ordinance was properly enacted.") (internal citation omitted); *Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 65 n.4 (9th Cir. 2024) (noting the discretionary nature of the prudential ripeness analysis). This Court should clarify that ripeness must be evaluated according to the law as it exists at the time property owners seek to make use of their property and the government says "no."

This Court's decision in *Pakdel* offered clear guidance that courts should consider the merits of a takings claim once the government stakes out its position. 594 U.S. at 475–80. Unfortunately, as this case demonstrates, significant confusion remains surrounding takings ripeness and the application of relevant law. Here, though, 835 Hinesburg submitted a development proposal during the City's interim regulations that permitted development. Pet.App.48a–49a, 77a. The City reviewed the proposal and formally voted to reject that proposal in anticipation of new regulations, which categorically would have prohibited all development over a significant portion of 835 Hinesburg's property. Pet.App.68a–69a, 77a. That formal vote made the City's position clear—it would under its existing law not now (nor ever) permit 835 Hinesburg to make full use of its property because of the planned Habitat Blocks. Pet.App.57a–59a, 77a. That is enough to ripen Hinesburg's claim. *Pakdel*, 594 U.S. at 481 ("For the limited purpose of ripeness, however, ordinary finality is sufficient."); *see also Lost Lake Holdings LLC v. Town of Forestburgh*, No. 22 CV 10656 (VB), 2023 WL

8947154, at *5 (S.D.N.Y. Dec. 28, 2023) (finding any attempt by the developer to seek a variance would be "useless and perfunctory" based on the Town's assertion that they "have no obligation to comply" with environmental review procedures).

Ordinary notice pleading standards apply in takings claims. No heightened standard exists. *United Affiliates Corp. v. United States*, 143 Fed. Cl. 257, 263 (2019). There should be no impediment, under these facts as pleaded, to a federal court ascertaining whether the City's vote to deny 835 Hinesburg's development proposal effected a taking without just compensation. The lower courts' application of the prudential ripeness doctrine that bars them from reviewing constitutional takings claims warrants this Court's review and clarification.

CONCLUSION

This Court should grant the petition.

DATED: August 2024.

Respectfully submitted,

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