No. ____

In The
Supreme Court of the United States

LEMON BAY COVE, LLC,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the
U.S. Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Lemon Bay Cove, LLC, sought permission from the United States Army Corps of Engineers to develop coastal property in Charlotte County, Florida. After soliciting public comment concerning the environmental impact of the proposed project, the Corps told Lemon Bay to look for a different parcel to develop. More than three years later, the Corps denied Lemon Bay's permit application with prejudice. Lemon Bay sued, arguing that the denial of the permit deprived the land of all economically viable use and thus effected a per se taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The Court of Federal Claims held that Lemon Bay had not shown a denial of all economically viable use because it could have asked the Corps for permission to build a smaller development that might have been approved.

The question presented is whether a regulatory takings claim seeking just compensation under *Lucas* may be defeated by the mere possibility that a permitting authority might have approved a smaller development proposal.

LIST OF ALL PARTIES

The Petitioner is Lemon Bay Cove, LLC. The Respondent is the United States.

CORPORATE DISCLOSURE STATEMENT

Petitioner Lemon Bay Cove, LLC, hereby states that it has no parent corporation and there is no publicly held corporation owning ten percent (10%) or more of its shares.

RELATED PROCEEDINGS

There are no related proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lemon Bay Cove, LLC (Lemon Bay), respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The panel opinion of the Federal Circuit is reported at 2024 WL 959732 (Fed. Cir. 2024). Petitioner's Appendix (App.) 1a–2a. The opinion of the United States Court of Federal Claims is reported at 160 Fed. Cl. 593 (2022). App.4a–60a.

STATEMENT OF JURISDICTION

The Federal Circuit entered judgment on March 6, 2024. App.3a. This Court granted extensions to file the Petition for Writ of Certiorari to and including August 2, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Sup. Ct. R. 13.3.

CONSTITUTIONAL PROVISION AND ORDINANCE AT ISSUE

The Fifth Amendment to the Constitution provides, in relevant part, "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V.

INTRODUCTION

How long should a property owner have to plead with the government for permission to develop his own land before he may sue for relief? This is a recurring question that continues to plague courts and property owners alike. Disappointingly, governments have responded to this Court's robust protection of private property rights by redoubling their efforts to avoid merits decisions in takings cases, lengthening an already arduous process. No longer able to rely on the state-court litigation ripeness requirement this Court abrogated in *Knick v. Township of Scott*, 588 U.S. 180, 185 (2019), governments have advocated for an excessively restrictive finality requirement, hoping that courts will force property owners through more hoops before they can bring their cases to court. And they've been quite successful, despite this Court's unanimous admonishment in *Pakdel v. City & County of San Francisco*, 594 U.S. 474 (2021). This Court should again reiterate that property rights cannot be relegated to secondary status through ripeness avoidance, firmly shutting the door on this issue once and for all.

This case illustrates just how far the problem has gone. Seeking to build a modest 12-unit home development along Lemon Bay in Charlotte County, Florida, Lemon Bay Cove, LLC, went through the U.S. Army Corps of Engineers' permitting process for almost four years. The Corps decided relatively quickly that the expected environmental impact would preclude development, but it continued to drag out the permit process for years before denying Lemon Bay's application with prejudice. Yet even with this formal permit denial—typically a hallmark of

finality—Lemon Bay still cannot get a merits adjudication of its takings claim. Even after a full trial, the Court of Federal Claims concluded that the Corps' denial was not a final decision on whether Lemon Bay could develop its land. Although the court couched its ruling as one on the merits, its order effectively directed Lemon Bay to return to the Corps to seek authorization for a smaller development. This is not takings analysis, but a ruling that Lemon Bay's takings case is unripe and that it must return to regulatory purgatory.

Such a cramped view of finality threatens to drain the life out of this Court's precedents protecting the right to productive use of one's property. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) (recognizing 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'"). *Lucas v. South Carolina Coastal Council* held that the government commits a taking when, through regulation, it "denies all economically beneficial or productive use of land" and forces the property owner to leave his land "substantially in its natural state." 505 U.S. 1003, 1015–18 (1992). But if courts permit the government to avoid that determination merely by holding out a speculative hope that some lesser development might be approved—even against all evidence to the contrary—then *Lucas*' protection is illusory. A permitting authority could continue to deny permit applications for ever less substantial development while suggesting that only if the owner filed another application, it might be granted. The Constitution should not—and this Court's precedents do not—require property owners to play such an

expensive, time-consuming game of "Mother, May I." After all, "endless battling depletes the spirit along with the purse." *Wilkie v. Robbins*, 551 U.S. 537, 555 (2007).

Pakdel aimed to settle the matter, confirming that lower courts should not impose administrative exhaustion under the guise of finality. 594 U.S. at 479–80. But recent developments show this Court's intervention is again necessary. Several lower courts have continued on as if *Pakdel* was never decided, requiring property owners to jump through hoops that have little to do with finality in order to ripen their takings claims. *Haney as Trustee of Gooseberry Island Trust v. Town of Mashpee*, 70 F.4th 12 (1st Cir. 2023); *North Mill St., LLC v. City of Aspen*, 6 F.4th 1216 (10th Cir. 2021); *Ralston v. Cnty. of San Mateo*, No. 21-16489, 2022 WL 16570800 (9th Cir. Nov. 1, 2022); *835 Hinesburg Road, LLC v. City of South Burlington*, No. 23-218, 2023 WL 7383146 (2d Cir. Nov. 8, 2023). Such cases effectively ignore this Court's numerous attempts to affirm equal status of the Takings Clause with other provisions in the Bill of Rights.

For the reasons stated herein, the Court should grant Lemon Bay's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. Lemon Bay Takes Control of Valuable Southwest Florida Bayfront Property

Plaintiff Lemon Bay, a limited liability company led by Dominic Goertz, owns 5.64 acres of submerged lands, mangroves, and small, scattered isolated upland spoil mounds on Sandpiper Key in Charlotte County, Florida. App.6a. As with most of Florida's coastline, Sandpiper Key is heavily built out with

development. A recent Zillow search for houses, townhomes, multi-family properties, condominiums, apartments, or manufactured homes returns approximately 100 properties for sale on or along the bay.[1]

Lemon Bay was formed in 2011, solely for the purpose of developing its property in the same manner as surrounding parcels. App.6a–7a. The property consists of three parcels that abut and lie partially beneath the tidal waters of the bay. *Id.* at 7a.

For purposes of this petition, the story of Lemon Bay's property begins in 1954. *Id.* That year, Earl Farr purchased the entirety of Sandpiper Key, containing 33.2 acres, from the Florida Trustees of the Internal Improvement Trust Fund—the Florida Governor and Cabinet. *Id.* At that time, section 253.15, Florida Statutes (1953), provided:

> In case any island or submerged lands are sold by the Trustees, according to the provisions of §§ 253.12 and 253.13, the purchaser shall have the right to bulkhead and fill in same, as provided by § 309.01, without, however, being required to connect the sale with the shore or with a permanent wharf.

Fla. Stat. § 253.15 (1953). According to the Florida Supreme Court, these rights constitute vested proprietary "special" riparian rights to bulkhead and fill in the lands conveyed which rights were "clearly necessary [in] order to reclaim these lands and [turn] them into useful property." *Trustees of Internal*

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[1] https://shorturl.at/OgiSU.

Improvement Fund v. Claughton, 86 So. 2d 775, 789 (Fla. 1956). Accordingly, Sandpiper Key "expressly carried with it by statute the right to bulkhead and fill" and its sale into private hands "is presumptively valid and based upon a determination by the Trustees that the public interest would not be impaired." *Zabel v. Pinellas Cnty. Water & Nav. Control Auth.*, 171 So. 2d 376, 379–80 (Fla. 1965).[2]

In 1955, Mr. Farr sold the entire Key, a portion of which contained the Lemon Bay property, along with his vested rights, to John Stanford. App.7a. In 1960, Charlotte County granted Mr. Stanford a permit to fill "portions of the parent tract, including the [Lemon Bay] Property" and, in 1961, both the Trustees and United States Army Corps of Engineers approved a fill permit for land that included the Lemon Bay property. *Id.*

By 1970, Mr. Stanford had filled the northwest portion of Sandpiper Key, but although development of Lemon Bay's present-day property had been approved, it remained unfilled and undeveloped. App.7a–8a. In 1980, Sandpiper Key Associates acquired the entire 33.2-acre tract of Sandpiper Key from Mr. Stanford for $1,726,699.93 and constructed a 79-unit condominium development on the filled

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[2] According to the Florida Supreme Court, "the statutory rights of [the landowners] to dredge, fill and bulkhead the land, subject to reasonable limitations, are [the landowner's] only present rights attributable to ownership of the submerged land itself," and constitute "'property' in the Fourteenth Amendment to the U.S. Constitution [that] includes the right to acquire, use and dispose of it for lawful purposes, and the constitution protects each of these essentials." *Id.* at 381 (quoting *Kass v. Lewin*, 104 So. 2d 572, 578 (Fla. 1958)). These rights may not be taken without compensation. *Id.*

portion of the property. *Id.* at 8a. The remaining portion—including Lemon Bay's property—was untouched. *Id.*

In August 1993, Gerald LeFave purchased three parcels of this unfilled tract, totaling 5.62 acres, at a tax sale from Charlotte County and sought to develop the property. *Id.* And in November 2007, Mr. LeFave obtained conditional, preliminary site plan approval from Charlotte County for a 39-unit development on the Lemon Bay property. *Id.* Thereafter, an appraiser valued the Lemon Bay property at $4.7 million if it were put to this use. *Id.* at 10a. This appraisal recognized that the Lemon Bay property, like many developed properties in the vicinity, contained mangroves and some wetlands. *Id.* Unfortunately, Mr. LeFave lost the property before he was able to develop it. *Id.* Lemon Bay then purchased the property.

B. Charlotte County Code Encourages Development of Lemon Bay's Property

The property Lemon Bay acquired was subject to Charlotte County's land development regulations, codified in Section 3-9-50 of Charlotte County's laws and ordinances. *Id.* at 12a. When Lemon Bay acquired the property, Charlotte County's land development regulations allowed for single- and multi-family residential use at a density of up to 7.5 units per acre. *Id.* This would have permitted 42 housing units on the bayfront property. *Id.* In 2012, Lemon Bay began efforts to develop the property, proposing to bulkhead and fill 1.95 acres of the 5.64-acre property to construct a 12-unit townhome development and to preserve the balance of the property in perpetuity. *Id.* at 17a.

But, as so often is the case with waterfront property, Lemon Bay had to obtain approvals from multiple government agencies. *Id.* at 12a–16a. In addition to Charlotte County's approval, it needed an Environmental Resource Permit from the Southwest Florida Water Management District and approval from the United States Army Corps of Engineers. *Id.* at 16a–17a. Lemon Bay cleared the state agency hurdle and then turned its attention to the Corps. *Id.*

C. Army Corps Tells Lemon Bay to Find a New Piece of Property to Develop

In April 2012, Lemon Bay filed an application with the Corps for a permit to fill approximately 1.95 acres of the submerged aquatic wetlands to construct a 12-unit single-family townhome development. *Id.* at 17a. In response, the Corps issued a public notice inviting comments on Lemon Bay's proposed plan on May 3, 2012. *Id.* The Corps received over 200 letters from agencies, other property owners, and residents in the surrounding area, objecting to Lemon Bay's plan for its property. *Id.* at 18a.

What happened next is elementary. In the face of public opposition, the Corps told Lemon Bay that, despite the surrounding developments, Lemon Bay would not get to develop its property on Sandpiper Key. *Id.* Just six months after Lemon Bay sought the Corps' approval, the Corps informed Lemon Bay that it believed the proposed project was not water dependent because it did not require access to water as the basic project purpose was to construct homes. *Id.* at 18a–19a. Thus, the Corps effectively told Lemon Bay to move on and develop a different piece of property. *Id.*

Once the Corps told Lemon Bay to find another piece of property to develop, Lemon Bay had a final decision. It would not get to develop the property. Even so, Lemon Bay went along with the Corps permitting process and repeatedly asked the Corps to reconsider. *Id.* at 19a–31a. But the Corps refused. On February 1, 2016—three years after the Corps originally told Lemon Bay to find another property—the Corps denied Lemon Bay's application *with prejudice*. *Id.* at 31a. The Corps explained that it had determined that, after "carefully consider[ing] all information provided subsequent to the initial submittal of the application," "the proposed project [did] not comply with" Corps' guidelines for development along waters of the United States, and "[was] contrary to the public interest." *Id*. Lemon Bay filed an administrative appeal on March 29, 2016, and on December 19, 2016, the Corps unsurprisingly denied the appeal of its own decision. *Id.*

D. Lemon Bay Sues for a Taking and Its Claims Are Purportedly Denied on the Merits, But Are in Reality Denied as Unripe

With nowhere left to turn, Lemon Bay sued in the Court of Federal Claims under the Tucker Act. It alleged that the Corps' refusal to allow it to develop its property had denied it all economically viable use of the land—a per se taking under *Lucas*.[3] The case proceeded to a full trial, but the lower court dodged Lemon Bay's *Lucas* claim. The court found that

[3] Lemon Bay also argued, among other things, that the denial effected a taking under the ad hoc test in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). These claims are not relevant to the petition.

Lemon Bay's "persistence in limiting its proposed development to a 12-unit footprint for its own financial reasons prevented the Corps' consideration of any other economically viable uses of the property." App. 43a–44a. The ruling meant Lemon Bay would have to go back through the Corps' burdensome permitting process before it might expect consideration of its *Lucas* claim.

The Federal Circuit affirmed without opinion. This petition followed.

REASONS FOR GRANTING THE PETITION

I.

THE JUDGMENT BELOW SIDESTEPS THIS COURT'S PRECEDENT, FORCING PROPERTY OWNERS INTO A NEVER-ENDING LOOP OF ASKING PERMISSION TO RIPEN A TAKINGS CLAIM

Few rules are as deeply embedded in this Court's caselaw as the maxim that civil rights plaintiffs need not exhaust administrative remedies before asserting their constitutional rights in federal court. After all, allowing jurisdictions to impose burdensome exhaustion requirements as a prerequisite to seeking relief in federal court frustrates the very purpose of 42 U.S.C. § 1983, which is "to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

These concerns apply to all constitutional claims. But until recently, it was not so clear that the promise of a federal remedy for a federal right extended to takings claims. For decades, this Court maintained that a property owner could not bring such a claim in

federal court until he had "been denied just compensation" in state court. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985). This rule rendered the Fifth Amendment's property rights protections illusory in many cases, as the very act of "ripening" such a claim would force the property owner into state court. *See San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., concurring in the judgment).

Fortunately, the Court recently recognized its error and overruled *Williamson County*. *See Knick*, 588 U.S. at 194 (labeling the state litigation ripeness requirement an impermissible "exhaustion requirement"). And while it remains true that "an administrative action must be final before it is judicially reviewable," *Williamson Cnty.*, 473 U.S. at 192–93, subsequent cases have exposed that exhaustion requirements are often disguised as concerns over finality.

Perhaps the paradigmatic example of this is the saga that led to this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). There the developer proceeded through "five years, five formal decisions, and 19 different site plans" before finally concluding—quite rationally—that "the city would not permit development of the property under any circumstances." *Id.* at 698. Yet even after all that, the district court found the developer's takings claim was unripe because it had not "obtained a definitive decision as to the development the city would allow." *Id.* Fortunately for the developer, the Ninth Circuit decided that 19 applications were enough and that to

require any more would raise "concerns about disjointed, repetitive, and unfair procedures." *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1506 (9th Cir. 1990).[4] Others haven't been so lucky.

Later decisions have explained that this finality requirement was never intended to trap takings claims in purgatory while the property owner goes through an illusory exhaustion process. *See Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 731 (1997) (reversing a lower court's decision holding a developer's case was unripe because the property owner had not sought to transfer her development rights under the existing procedure); *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001) (holding a landowner's claim was ripe because it was clear from the previous actions that "the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands").

But the zeal of permitting authorities for forcing applicants through hoops knows few bounds. *See San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655 n.22 (1981) (Brennan, J., dissenting) (noting that lawyers for permitting authorities actually plan to respond to land use challenges by simply changing their laws, forever avoiding an actual takings decision on the merits). And once this Court jettisoned *Williamson County*'s state litigation exhaustion requirement, finality became the only ticket to avoid

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[4] Monterey's argument in that case is exemplary of how far governments will push the finality requirement. To ripen his case, the city said that the developer should have had to "submit enough proposals to enable the City to pinpoint all the features of an acceptable development project." *Id.* at 1502.

a merits decision. And yet, even after this Court reminded lower courts just three years ago that ripeness does not require exhaustion, it has already become necessary to do so again. *See Pakdel*, 594 U.S. at 480 ("[A]dministrative 'exhaustion of state remedies' is not a prerequisite for a takings claim when the government has reached a conclusive position.") (quoting *Knick*, 588 U.S. at 185).

A. The Judgment Below Compounded the Errors of Other Courts by Requiring Lemon Bay to Enter an Indeterminate Finality Loop

The lower courts in this case skirted this long line of precedent. Seeking a permit from the Corps is not a trivial matter. "The costs of obtaining such a permit are 'significant,' and . . . 'the permitting process can be arduous, expensive, and long.'" *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 661 (2023) (quoting *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 594–95 (2016)). But Lemon Bay went through it already. Indeed, Lemon Bay did so despite the Corps repeatedly advising it to find another piece of land to develop. Even though the Corps first made its determination in just six months, it took *three more years* to complete the process, at which point the Corps denied Lemon Bay's application with prejudice. This Court's finality precedent does not require anything more to ripen a takings claim. <

Despite this Court's admonishment in *Pakdel*, courts continue to conflate exhaustion and ripeness. *See Haney*, 70 F.4th 12 (finding a takings claim unripe despite two variance denials from the town board); *North Mill St., LLC v. City of Aspen*, 6 F.4th 1216 (10th Cir. 2021) (takings claim unripe even where

rezoning application was denied); *Ralston v. Cnty. of San Mateo*, No. 21-16489, 2022 WL 16570800 (9th Cir. Nov. 1, 2022) (property owner must present a futile application to ripen a takings claim even when applicable law confirms all development is precluded); *835 Hinesburg Road*, 2023 WL 7383146 (takings claim unripe even after City Council vote to reject application and clear law precluding development in particular zones).

Lower court defiance of such recent precedent is alone a sufficient reason to take another case. But the exceptional nature of this case demonstrates the dire need for this Court's intervention. Here, the Court of Federal Claims conducted a full trial on the merits before effectively declaring Lemon Bay's takings claim unripe. Lemon Bay languished for four years only to be told post-trial that it should have gone back and pleaded with the Corps for a smaller development The Court of Federal Claims' analysis effectively imposed a ripeness hurdle after the fact.

What is more, Lemon Bay's 12-unit development proposal was reasonable and typical of the area. It was certainly not so exorbitant or grandiose that the application could not be considered meaningful. *See Palazzolo*, 533 U.S. at 619; *see also 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"). On the contrary, Lemon Bay's ask was substantially smaller than the 39-unit development Lemon Bay's predecessor had received conditional approval from the local government to build in 2007. Under such circumstances, the Corps' denial should have been understood as final.

That the Court of Federal Claims and the Federal Circuit—courts that handle virtually all takings cases against the United States—would disabuse *Pakdel* and general ripeness principles, heightens the urgency for this Court's review. As this case shows, *Pakdel* has not been enough. Lower courts need more guidance in setting the line between finality and exhaustion. The Court should grant this petition to address that ongoing question and give certainty to property owners, governments, and courts across the country.

B. The Lower Courts' Definition of Finality Would Make It Nearly Impossible to Obtain a Merits Decision in a Regulatory Takings Case

Aside from the lower courts' evasion of this Court's ripeness precedent, this case presents a more fundamental question about regulatory takings—just how hard should it be to bring a *Lucas* claim? *Per se* regulatory takings claims are already extremely difficult to win. Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of* Lucas*: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847, 1849–50 (2017) (finding property owners

only win *Lucas* claims 1.6% of the time). If *Lucas* is to retain vitality as a bulwark against the heavy-handed regulation of the right to use one's property, it should not be so easy to avoid a decision on the merits.

In many cases, a strong exhaustion requirement effectively prevents property owners from ever pressing a *Lucas* claim. If lack of finality can doom the case even after a nearly four-year permitting process and then a trial, permitting authorities can evade a merits decision indefinitely. Such delay in decision-making benefits only the government, with its deep pockets and endless time, while grinding down property owners' resources. *Bay-Houston Towing Co. v. United States*, 58 Fed. Cl. 462, 471 (2003) ("[A] strict interpretation of the ripeness doctrine would provide agencies with no incentive to issue a final decision."); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 98 (1995) ("stalling is often the functional equivalent of winning on the merits").

This Court has often expressed concern about governments' ability to manipulate malleable legal doctrines to deprive property owners of their rights. *See Cedar Point Nursery v. Hassid*, 594 U.S. 139, 158 (2021) (rejecting the invitation to apply a balancing test because "[w]e cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure"); *Horne v. Dep't of Agric.*, 576 U.S. 350, 365 (2015) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982)) ("In *Loretto*, we rejected the argument that the New York law was not a taking because a landlord could avoid the requirement by ceasing to be a landlord. . . . [P]roperty rights 'cannot

be so easily manipulated.'"). *Pakdel*'s functional definition of finality represented a substantial step towards avoiding that fate. But what's happened to Lemon Bay shows that more is necessary to prevent finality from becoming a sinkhole that effectively devours *Lucas*' protection of the fundamental right to productive use of one's own property.

Were a speculative possibility of some lesser development enough to preclude finality, many *Lucas* cases could be held up indefinitely. Such a regime places the onus on property owners to continuously ask for less and less development, with no corresponding responsibility for governments to provide certainty to permit applicants. The Corps here has no incentive to ever *officially* tell Lemon Bay that it can't develop its land, as it can achieve the same result by trapping Lemon Bay in a finality loop. That way, Lemon Bay is deprived of all economically viable use of its land but can never even bring a *Lucas* claim.

Even after *Pakdel*, only another decision of this Court can clear up the confusion and explain how property owners like Lemon Bay can effectively assert their right to productively use their land in federal court. The Court should grant this petition to do just that.

II.

THE LOWER COURTS ARE DIVERGING AFTER *PAKDEL*

Certiorari is also warranted because the lower courts have diverged after *Pakdel*. The Court might have thought that its unanimous summary disposition in *Pakdel* would effectively signal to lower courts that the finality requirement should not be a

particularly high hurdle. But that message has not been universally received. As noted above, cases in at least five different circuits (including this case) have effectively sidestepped *Pakdel* and continued to apply a more stringent finality doctrine more akin to exhaustion.

Other circuits, however, appear to have taken *Pakdel*'s direction to heart. In *Catholic Healthcare International, Inc. v. Genoa Charter Township*, the Sixth Circuit reversed a district court's dismissal on the ground that the lower court had conflated finality with exhaustion. 82 F.4th 442, 448 (6th Cir. 2023). Relying on *Pakdel*, the panel made it clear that "[r]ipeness does not require a showing that 'the plaintiff *also* complied with administrative process in obtaining that decision.'" *Id.* (quoting *Pakdel*, 594 U.S. at 479). Hence, the denial of two applications for a special use permit to construct a "prayer trail" was sufficient to establish finality. And the Eleventh Circuit interpreted *Pakdel* to hold a takings claim ripe even without a formal application where the government had enacted a targeted rezoning ordinance applicable only to the plaintiff's property. *South Grande View Dev. Co. v. City of Alabaster*, 1 F.4th 1299, 1307 (11th Cir. 2021).

This case is an ideal vehicle to clear up this confusion. It squarely presents the question whether property owners still need to jump through additional hoops once it has become clear that development will not be possible. After all, if it is true that "nothing more than de facto finality is necessary," *Pakdel*, 594 U.S. at 179, surely Lemon Bay's almost four years of wrangling with the Corps—mostly after having been told to find another property inland—would be

enough. Since that is not clear in several circuits, certiorari should be granted to address the conflict and once again give lower courts guidance on the finality doctrine.

CONCLUSION

This Court should grant the petition.

DATED: August 2024.

Respectfully submitted,

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