No. _____

In The
Supreme Court of the United States

RANDY RALSTON and LINDA MENDIOLA,
Petitioners,

v.

COUNTY OF SAN MATEO and
CALIFORNIA COASTAL COMMISSION,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Randy Ralston and Linda Mendiola (Ralstons) wish to build a retirement home on their residentially-zoned land in San Mateo County, California. However, their property sits entirely within an overlay zone, the Montecito Riparian Corridor (Corridor), which categorically bans residential development. The County nonetheless instructs landowners who wish to build a home to submit their "intention" to the Community Development (Planning) Director and County Counsel, who must undertake a "takings analysis" to decide whether to "override" the Corridor's absolute ban to prevent a taking. When the Ralstons followed this procedure, the Planning Director and County Counsel responded that there was no justification "to override the Local Coastal Plan limitations on development within wetland and riparian areas in order to accommodate a reasonable economic use." No procedure exists to challenge this decision. In short, the answer was an unambiguous and unappealable "no." The Ninth Circuit held that the Planning Director and County Counsel's response, though they were speaking for the County, was "informal," and that the Ralstons' takings claim is ripe only if they submit—and the County formally denies—a Coastal Development Permit application. The questions presented are:

1. Is a takings claim ripe when the government establishes a mandatory process requiring property owners to ask whether any development on their land is possible, and responds with a definitive and unappealable denial?

2. Are takings complaints subject to a higher pleading standard than other civil rights complaints?

STATEMENT OF RELATED PROCEEDINGS

Ralston, et al. v. San Mateo Cnty., et al., No. 21-16489, U.S. Court of Appeals for the Ninth Circuit (Nov. 1, 2022).

Ralston, et al. v. San Mateo Cnty., et al., No. 21-cv-01880-EMC, U.S. District Court for the Northern District of California (Aug. 26, 2022).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Randy Ralston and Linda Mendiola respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the Ninth Circuit is unpublished and reprinted at App.1. The Ninth Circuit's order denying rehearing is at App.31. The District Court's opinion dismissing the complaint is unpublished and reprinted at App.7.

JURISDICTION

This case arises under the Fifth and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983. The District Court had jurisdiction under 28 U.S.C. § 1331. The Ninth Circuit affirmed the District Court's dismissal on November 1, 2022; on January 30, 2023, the Ninth Circuit denied a timely motion for rehearing *en banc*. On April 3, 2023, Justice Kagan extended the time for filing this petition to June 19, 2023.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

The relevant portions of local ordinances and Cal. Pub. Res. Code § 30010 are reproduced in the Appendix at App.32, 39, 69.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

A takings claim is ripe for judicial review "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*[.]" *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001) (emphasis added); *Pakdel v. City and Cnty. of San Francisco*, 141 S.Ct. 2226, 2230 (2021) ("*de facto*" ripeness is a "relatively modest" requirement). Here, San Mateo County publicly identified the officials responsible for reviewing a property owner's intended proposal for building in the development-restricted Montecito Riparian Corridor (Corridor) and issuing a decision: the Community Development (Planning) Director and the County's lawyer. App.74. When the Ralstons submitted their general plan to build a home on their Corridor lot, these designated officials explicitly informed the Ralstons that "it would [not] be justifiable" to override the categorical ban on development in the Corridor. App.75. The County's unequivocal "no" ripened the Ralstons' takings claim because it was a "definitive position on the issue" by "the initial decisionmaker" that "inflict[ed] an actual injury." *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985).

Although the designated officials promptly and definitively performed their duty to provide a takings analysis, the Ninth Circuit belittled their response on behalf of the County as merely the officials' "personal opinion," and demanded that the Ralstons ignore the "no" and instead commit many years and hundreds of thousands of dollars to submit a formal Coastal

Development Permit (CDP) application to multiple agencies. App.5. The Ninth Circuit held that *only* the County's final decision on a CDP could serve as its final decision ripening a takings claim. *Id.* The court thus considered irrelevant the County's publicly-advertised, mandatory procedure for pursuing a decision about what development may be undertaken in the Corridor in favor of applying for a CDP, which the County now claims is the only process that obligates it to provide its position on proposed development.

Submitting a CDP application is certainly one way of obtaining the County's final position on development. But when the government establishes an alternative procedure and then responds with a definitive "no," the ripeness doctrine cannot require, as the Ninth Circuit did here, that owners should know the County's responses mean nothing, and they must chase additional answers. *See, e.g.*, *Wigton v. Berry*, 949 F.Supp.2d 616, 632 n.19 (W.D. Pa. 2013) (decrying "double secret" procedure that "would matter greatly to those it affects, but whose effect they cannot appreciate because they don't know that it is affecting them"); *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 908 (9th Cir. 2001) (refusing to "allow one party's 'double-secret' interpretation of a word to undermine the other party's justified expectations as to what that word means"). One denial is enough and no further applications are required. *See Palazzolo*, 533 U.S. at 621 ("Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision.") (citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999)); *see also Dupree v. Younger*, 143 S.Ct. 1382, 1390 (2023)

(rejecting the "empty exercise" of repetitive pleadings when the first answer is "no" and nothing has changed between the first request and subsequent requests). Once a property owner has been told "no" by a government official authorized to say "no," courts should not demand that property owners knock on every other possible door, on the theory that behind one of those doors just might be a "yes."

Property rights should not be subject to manipulation, *see Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2076 (2021), nor should property owners be subject to unreasonable procedural obstacles to takings claims to protect those rights. *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2170 (2019) (federal courts must be as receptive to constitutional property claims as they are to other federal civil rights claims). The goal of the ripeness requirement is not to force property owners to run a procedural gauntlet for its own sake, *Palazzolo*, 533 U.S. at 621, but to ensure "there [is] no question … about how the 'regulations at issue apply to the particular land in question.'" *Pakdel*, 141 S.Ct. at 2230 (quoting *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 739 (1997)).

Some lower courts have employed *Pakdel*'s common-sense and fact-focused approach to ripeness. *See Vill. Green at Sayville, LLC v. Town of Islip*, 43 F.4th 287, 298 (2d Cir. 2022) (town took a *de facto* definitive position even though it did not actually vote on owner's application, because its response "bears many indicia of finality"); *Megladon, Inc. v. Vill. of Pinecrest*, No. 1:21-cv-22819, 2023 WL 2324344, at *16, n.14 (S.D. Fla. Mar. 2, 2023) (at the motion to dismiss stage, "when we draw all reasonable inferences in the Plaintiff's favor, the Village's written

communications leave no 'potential ambiguities' about whether (or to what extent) it would require the land dedication"). But in addition to the court below, many others employ formalistic requirements that focus exclusively on the government's procedures and what it says it might do in the future, not on whether it actually made a decision. These courts force property owners to jump through repetitive procedural hoops even when the government plainly does not allow development—and has said so. There is no consistent approach, however, leading to conflicts among the Circuits.

The unsettled question of what constitutes a meaningful application and response allows governments continually to move the goalposts of "finality" to studiously avoid making any decision that might be identified as ripening a regulatory takings claim. After all, as the district court suggested, other procedures always may or may not be available,[1] presenting an ever-shifting process without final resolution. This is exhaustion by another name.

This case is an excellent vehicle to clarify the final decision ripeness requirement and bring takings claims in line with the same Article III injury requirement as every other civil rights claim. This Court should grant the petition.

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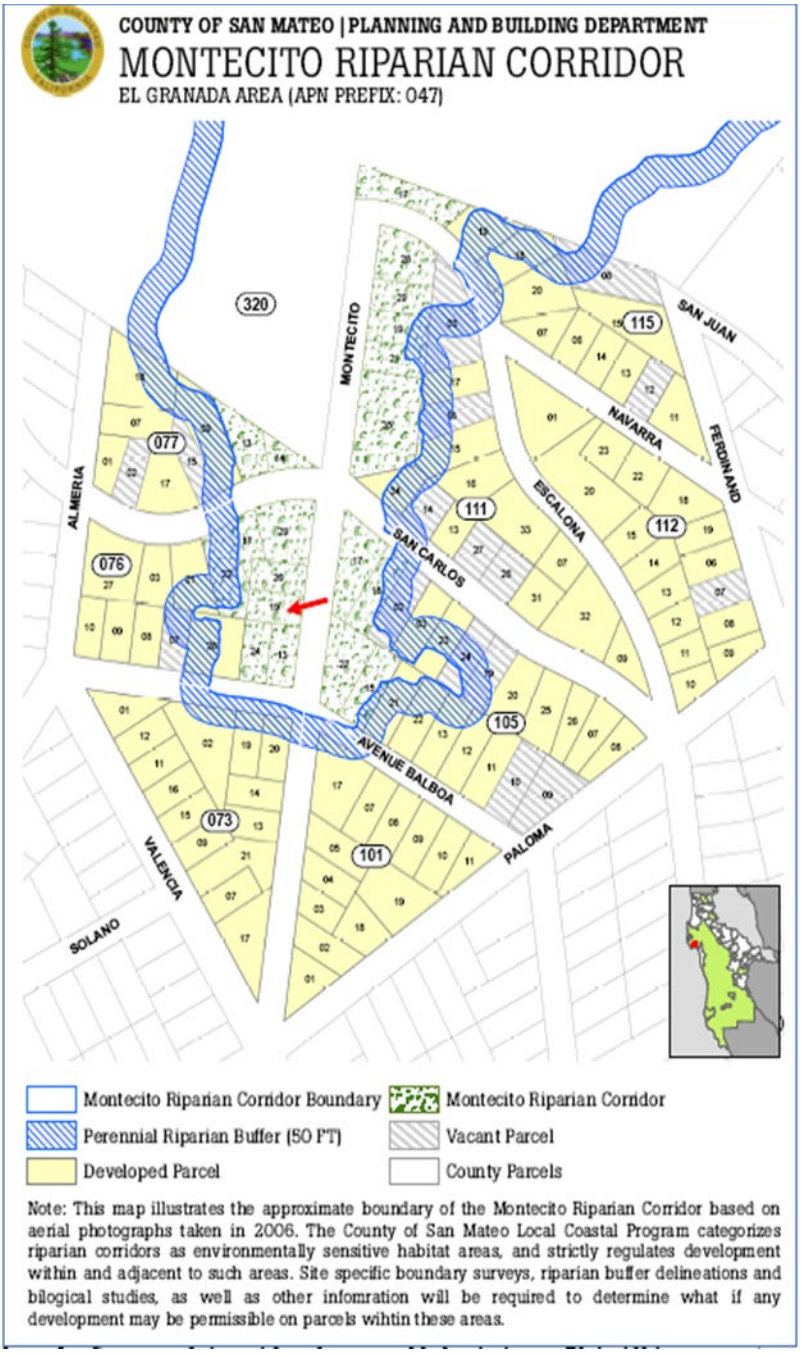
[1] App.5, 19 ("Four separate 'appropriate bodies' can adjudicate CDP applications in the County .... Which of these bodies 'acts on' a CDP application depends on the scope of the proposed project, which can vary in five ways …. [I]t appears the County might have to hold a public hearing on Plaintiffs' CDP application.").

STATEMENT OF THE CASE

I. The Ralstons Followed County Procedures to Obtain the County's Position as to Whether They May Build a House on Their Property and Received a Flat Denial in Response

The Ralstons own a vacant, 5,000-square-foot lot zoned "R-1" (single-family residential) in unincorporated San Mateo County, California. App.9. The lot sits entirely within the Montecito Riparian Corridor, a restrictive "overlay" zone established to preserve habitat for plants and wildlife. The County mapped the Corridor to comply with its Local Coastal Plan (LCP) ordinance. *See* App.35.


COUNTY OF SAN MATEO | PLANNING AND BUILDING DEPARTMENT
MONTECITO RIPARIAN CORRIDOR
EL GRANADA AREA (APN PREFIX: 047)
320
MONTECITO
115
SAN JUAN
NAVARRA
FERDINAND
077
ALMERIA
ESCALONA
111
112
076
SAN CARLOS
AVENUE BALBOA
105
073
VALENCIA
101
PALOMA
SOLANO
Montecito Riparian Corridor Boundary
Montecito Riparian Corridor
Perennial Riparian Buffer (50 FT)
Vacant Parcel
Developed Parcel
County Parcels
Note: This map illustrates the approximate boundary of the Montecito Riparian Corridor based on aerial photographs taken in 2006. The County of San Mateo Local Coastal Program categorizes riparian corridors as environmentally sensitive habitat areas, and strictly regulates development within and adjacent to such areas. Site specific boundary surveys, riparian buffer delineations and bilogical studies, as well as other infomration will be required to determine what if any development may be permissible on parcels wihtin these areas.

Declaration of Lisa Aozasa in Support of Defendant County of San Mateo's Supplemental Briefing, *Ralston v. County of San Mateo*, No. 3:21-cv-01880-EMC, docket no. 36-1 at 5 (filed July 28, 2021). The red arrow points to the Ralstons' lot.

The County prohibits residential development in the Corridor because it "strictly regulates development within and adjacent to such areas" as "sensitive habitats requiring protection[.]" App.35. Consequently, potential uses within the Corridor are limited to environmental uses: "education and research," extremely limited "consumptive uses" permitted under federal and California environmental laws, "stream dependent aquaculture," and "logging operations," among others. The LCP does not permit building a home. *See id*.

To encourage local governments to contemplate potential takings liability when regulating land use, California Public Resources Code section 30010 (part of the California Coastal Act) creates a "narrow exception to strict compliance with restrictions on uses in habitat areas" if necessary to avoid an unconstitutional taking. *See McAllister v. Cal. Coastal Comm'n*, 169 Cal.App.4th 912, 939 (2008); App.69 (text of statute). The County and courts below interpret this statute to allow a local government to "override" the Corridor's restrictions and permit mitigated development on a case-by-case basis to avoid takings liability. However, this exception, rarely granted, depends on the Ralstons successfully convincing the County that strictly applying the Corridor's prohibition on residential uses would result in a taking. *Id*.

The County provides a procedure for owners to make this showing. Owners with "[a]ny intention to proceed with an application for development that would run counter to those policies *must* first be thoroughly reviewed by the Community Development [Planning] Director and County Counsel." App.74 (emphasis added). The Ralstons complied with this mandatory directive and submitted their intention to build a single-family home, along with other information requested by the County, to the Planning Director, who consulted with the County Counsel. *Id.*

The County's designated officials responded:

> I reviewed the information you submitted with County Counsel. It is our view that the totality of the circumstances surrounding the recent acquisition of the property, including its purchase price, does not establish that the property owners had a reasonable economic-backed expectation to develop the property as a separate single-family residence such that it would be justifiable to override the Local Coastal Plan limitations on development within wetland and riparian areas in order to accommodate a reasonable economic use.

Id. The Planning Director subsequently relied on this decision to refuse the Ralstons' request for a "buildability letter" that is required for a water hookup. App.75 ("I have been looking into the Department's history of issuing such letters, and do not think it would be appropriate for us to issue one in this case, given our response [quoted above] to the parcel ownership history you [Ralstons] previously

provided."). With these flat refusals in hand, the Ralstons asked the County Board of Supervisors to either reconsider the refusals or provide compensation for a taking. The Board of Supervisors rejected both requests. App.76.

II. Proceedings Below

Ralston filed a 42 U.S.C. § 1983 complaint in the district court against the County and the California Coastal Commission (Commission), alleging an as-applied regulatory taking in violation of the Fifth and Fourteenth Amendments. App.77, 79. Both the County and Commission moved to dismiss under Rules 12(b)(1) and 12(b)(6). The district court granted the County's motion without leave to amend, holding that the Ralstons' case was unripe.[2] App.29. The court held that there was no final decision whether the Ralstons could build a home on their Corridor property. *Id.*

The district court ignored the procedures the Ralstons followed and the answers given by the County. Instead, it focused on entirely different procedures. The court concluded the Ralstons deprived the County of the opportunity to make a final decision by not submitting a CDP application, even though the Planning Director and County Counsel had already informed the Ralstons that the County would not override the Corridor restrictions. *Id.* ("Plaintiffs may refile this action, if necessary, after they apply for a CDP and the County issues a final decision."). The court concluded that the County's

[2] Having resolved the case on the County's motion, the district court never addressed the Commission's motion to dismiss under the Eleventh Amendment.

responses to the request for takings analysis and application for a buildability letter and the Board of Supervisors' denial of reconsideration nonetheless had not "committed [the County] to a position." App.17. In sum, the district court held that "Plaintiffs' complaint has not established *de facto* finality because questions remain as to 'how the [County's LCP] appl[ies] to the [Property].'" App.18 (quoting *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 348 (1986)).

The Ninth Circuit affirmed. It held that the County's mandatory directive to owners to ask the Planning Director and County Counsel whether the County would override Corridor restrictions for their proposed development to avoid a taking merely elicits the Director's "personal opinion about the likelihood of success of Ralston's proposal[.]" App.5 (ignoring entirely the role of the County Counsel). The Ninth Circuit tested the validity of the complaint's allegations rather than accepting them as true, as is required on a motion to dismiss. The Ralstons' complaint expressly alleges their property is entirely within the Corridor. App.73. Yet the Ninth Circuit challenged this allegation, commenting that the County's map could not establish anything given the caveats on its usage. App.3. Whether the Ralstons' property does, in fact, lie entirely within the Corridor is not a question of ripeness but goes to the merits. *See Barber v. Charter Twp. of Springfield*, 31 F.4th 382, 389 n.4 (6th Cir. 2022) ("While the ripeness inquiry addresses unique issues in takings cases, courts must not use the ripeness doctrine as an opportunity to prematurely reach thorny merits questions."). The court below held that the only way the Ralstons could ripen their takings claim is to ignore the mandated

procedure with which they fully complied, submit a CDP application that includes "[s]ite specific boundary surveys, riparian buffer delineations and biological studies[,]" obtain the County's confirmation that their lot indeed is entirely within the Corridor and subject to its restrictions, and then seek an override under Section 30010, potentially requiring yet another CDP application. App.4. The court demanded the Ralstons pursue all these expensive, time-consuming, and ultimately pointless procedures regardless of the County's firm and multiple rejections.

The Ninth Circuit subsequently denied a motion for rehearing *en banc*. App.31.

REASONS FOR GRANTING THE PETITION

As instructed they "must" do, the Ralstons asked the County whether it would grant a Corridor override. App.74. The County answered with an unequivocal and unappealable "no." Nothing more should be necessary to ripen a takings claim. This Court does not require the filing of permit applications for the mere sake of it. *Palazzolo*, 533 U.S. at 622 ("Ripeness doctrine does not require a landowner to submit applications for their own sake."); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012 n.3 (1992) (claim was not unripe under *Williamson County* where submission of a development plan to the applicable state authority "would have been pointless, as [the defendant] stipulated below that no building permit would have been issued ... application or no application"); *MacDonald*, 477 U.S. at 353 n.8 (an owner need not make repeated "useless applications to state a taking claim"). Nor is there any requirement of a formal application or formal response, merely *de*

facto finality, *Pakdel*, 141 S.Ct. at 2230, meaning that the government's "initial decisionmaker" has taken a "definitive position on the issue" that "inflicts an actual injury." *Williamson County*, 473 U.S. at 193. Yet many lower courts continue to apply categorical rules that allow governments to avoid being deemed to have made a decision, depriving property owners of their day in court.

I. The Ninth Circuit's Formalistic Rule Conflicts With This Court's Requirement of a *De Facto* Decision on a Meaningful Application

The Ninth Circuit's bright-line rule that a takings claim can never ripen until the owner submits a formal development application that results in a formal denial conflicts with this Court's requirement of a "*meaningful* application"—not a *formal* one. *See MacDonald*, 477 U.S. at 353 n.8. In *Pakdel*, this Court clarified that the finality requirement is "relatively modest" and requires only *de facto* finality, not that a formal development application be finally rejected. 141 S.Ct. at 2230. The Ninth Circuit's rule also conflicts with *Palazzolo*, which emphasized that ripeness is satisfied not only by a formal development application and formal decision—as long as there is a concrete indicator about what uses the challenged regulation does and doesn't allow. Thus, a takings claim is ripe "once it becomes clear … [that] the permissible uses of the property are known to a *reasonable degree of certainty*[.]" 533 U.S. at 620.

The Ralstons did not submit a CDP application. But they need not have because the County had already firmly declared that it would not override the Corridor restrictions that forbade them from building

a home. And told them so. App.74–75. Even though the County does not provide for any review of an override decision, the Ralstons tried anyway, and were repeatedly rebuffed: they asked the Director for a buildability letter, which he rejected. They also asked the Board of Supervisors to either overrule the Director's override decision or pay compensation. The Board refused. App.76. Under *Pakdel* and *Palazzolo*, the County's multiple decisions made its position known "to a reasonable degree of certainty." Indeed, it is crystal clear: no home, no compensation.

This Court has never held that a formal application for a development permit is the *only* way to ripen a takings claim, especially where the government itself instructs owners to pursue an alternative procedure. *See MacDonald*, 477 U.S. at 359 (White, J., opining for four dissenting Justices) ("Nothing in our cases ... suggests that the decisionmaker's definitive position may be determined only from explicit denials of property owner applications for development."); *see also Blanchette v. Conn. Gen. Ins. Corp. (Reg'l Rail Reorganization Act Cases)*, 419 U.S. 102, 143 & n.29 (1974) ("where the inevitability of the operation of a statute against certain individuals is patent," particular future contingency was "irrelevant to the existence of a justiciable controversy").

While a formal application for a development permit may be *one* way to elicit government's decision about permissible uses, it is not the *only* way. *See Knight v. C.I.R.*, 552 U.S. 181, 194 (2008) ("There is more than one way to skin the cat."). When the government establishes an alternative procedure to elicit a decision applying its regulations to the

claimant's property, the government's answer ripens a takings claim. *See, e.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 112 (1978) (noting that the City's historical preservation ordinance included an administrative review process to consider landowners' claims that the rule barred sufficient return (in other words, effected a taking)); *Shands v. City of Marathon*, 999 So.2d 718, 725 (Fla. Dist. Ct. App. 2008) (takings claim was ripe because owner pursued a "Beneficial Use Determination," a procedure by which the City informed the owner whether it would override its zoning restrictions on use to avoid a taking) (citations omitted).[3]

When the government tells property owners that they "must" use a procedure that isn't a formal application for a development permit, and the owners do so and the government responds, the response is a *de facto* decision and the owner need not chase further procedures, even if that might result in an approval. *Pakdel*, 141 S.Ct. at 2230 ("The Ninth Circuit's contrary approach—that a conclusive decision is not 'final' unless the plaintiff *also* complied with administrative processes in obtaining that decision—is inconsistent with the ordinary operation of civil-rights suits.").

The Ninth Circuit's requirement of a formal decision conflicts with *Pakdel* because the "relatively

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[3] *See* Marathon, Fla., Code of Ordinances § 102.99(A). *See also* City of Thousand Oaks, Cal., Muni. Code § 9-10.604(a) ("A developer may request that the requirements of this chapter be adjusted or waived based on a showing that applying the requirements of this chapter would effectuate an unconstitutional taking of property or otherwise have an unconstitutional application to the property.").

modest" ripeness rule requires only a *de facto* decision, not a formal application followed by a formal rejection. *Pakdel*, 141 S.Ct. at 2230 ("The rationales for the finality requirement underscore that nothing more than *de facto* finality is necessary."); *id.* ("Once the government is committed to a position, however, these potential ambiguities evaporate and the dispute is ripe for judicial resolution."). The response by the Planning Director and County Counsel to the Ralstons' request for an override is enough to clear the modest ripeness bar because the County instructs owners they must ask these officials to review "[a]ny intention to proceed with an application for development" inconsistent with the Corridor's residential prohibition, and most importantly, both officials actually responded to the Ralstons' request for an override.[4] To paraphrase the Second Circuit, "[w]e cannot fathom why [the Ralstons] should now be penalized for having believed" them. *Vill. Green*, 43 F.4th at 299; *see also Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970) ("To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government.").

By submitting their override request to the officials designated by the County to answer—and receiving their unequivocal decision—the Ralstons ripened their takings claim because the "permissible uses of the property are known to a reasonable degree

[4] The Planning Director is not a low-level staffer whose decisions carry little influence. For example, beyond the takings analysis necessary for an LCP override, he also applies the statutes and regulations to approve, condition, or deny Coastal Development Permits. *See, e.g.*, San Mateo County Zoning Regulations § 6328.9, https://www.smcgov.org/media/101461/download?inline=.

of certainty[.]" *Palazzolo*, 533 U.S. at 620; *see also Doe v. City of Butler*, 892 F.2d 315, 322 (3d Cir. 1989) (no formal application needed for development because "[n]o prospective operator of a transitional dwelling is likely to spend the time, effort and expense required to initiate a project which is patently barred by the ordinance"). The Planning Director and County Counsel's decision "inflict[ed] an actual, concrete injury" because the "initial decisionmaker has arrived at a definitive position[.]" *Williamson Cnty.*, 473 U.S. at 193.

In the Ninth Circuit's view, however, as long as the Ralstons might have obtained a different answer if they pursued different channels, then no answer—not even one as definitive as the Planning Director's—is ever a final decision.

II. The Lower Courts Conflict About Whether Governments Can Only Make Decisions Through Formal Processes

A. The Second and Eleventh Circuits and some other courts do not require formal denials of formal permit applications to ripen takings claims

The Second Circuit conflicts with the Ninth. In *Village Green*, a developer wanted to build a 64-unit apartment complex on Long Island but first needed to alter the Town's existing development requirements. 43 F.4th at 287. It applied, but in the face of local opposition, Town officials avoided making a decision on Village Green's request. After multiple attempts to force the Planning Board to decide, a Board member moved to approve the application, but received no second. Even though the Board had not actually

decided anything, the Town's lawyer informed Village Green that "the Town is treating the failed motion to approve as a denial[.]" *Id.* at 292.

The Second Circuit held this ripened Village Green's takings claim. The court rejected the Town's argument that lacking a Board vote, it had not formally made a decision denying Village Green's request; thus, no additional action was needed to reach a final decision. The takings claim was ripe because the Town had actually made a decision, even if it might have approved or disapproved the rezoning request in some other way. Certainly, the Town's Board could have made a decision by voting on a motion to approve or deny Village Green's request, but "[t]he town declined to give its position this way." Unlike the Ninth Circuit, which stopped its analysis there, the Second Circuit continued, and "assess[ed] the more unusual route it did take." *Id.* at 298.

The court concluded that the Board's resolution noting the failure of the motion to rezone—although not a formal denial—"bears many indicia of finality." *Id.* The language ("the motion to approve fails") "can naturally be read as constituting that decision." *Id.* The resolution did "not contemplate future proceedings." *Cf. Dupree*, 143 S.Ct. at 1390 (denial of summary judgment on legal grounds leaves nothing further to determine at trial). Moreover, "[i]t gives no further instructions to Village Green." *Id.* The court held that "[t]aking these events together, it was far from 'merely speculative' that Village Green's application had failed." *Village Green*, 43 F.4th at 299.

Compare this to the Planning Director's response to the Ralstons, which bears even more indicia of a definitive decision:

- The Planning Director did not reject the Ralstons' application, tell them that his response would merely be his personal opinion, or advise them to apply for a CDP to obtain an official decision from the County. *See* App.74 ("I reviewed the information you submitted with County Counsel.").[5] Instead, the Planning Director and County Counsel explicitly responded to the Ralstons' request for a takings analysis and override.
- The response confirmed that the Ralston property is entirely in the Corridor, and that the Planning Director and County Counsel applied the section 30010 criteria to determine whether strict application of the Corridor restrictions to the Ralstons would be a taking. *See id.* ("It is our view that the totality of the circumstances surrounding the recent acquisition of the property, including its purchase price, does not establish that the property owners had a reasonable economic-backed expectation to develop the property as a separate single-family residence ….").
- The Planning Director's language "can naturally be read" as making an actual decision. *See id.* (It would not "be justifiable to override the Local Coastal Plan limitations on development within

[5] *See Brody v. Vill. of Port Chester*, 434 F.3d 121, 132 (2d Cir. 2005) (detailing due process obligation to provide notice of decisions).

> wetland and riparian areas in order to accommodate a reasonable economic use."). In short, no override.[6]

In contrast to the Second Circuit's conclusion that this was enough to allege the defendant had "arriv[ed] at a definitive position on the issue that inflict[ed] an actual, concrete injury[,]" *Village Green*, 43 F.4th at 298, the Ninth Circuit held this meaningless; the only way the Ralstons can ripen their claim is to spend years, and tens of thousands of dollars creating studies, then apply for a CDP and await the inevitable "formal" denial. App.5.[7]

The Second Circuit also conflicts with the Ninth in another significant way. In *Village Green*, the court rejected the Town's argument that its lawyer was not authorized to make a decision, and his telling Village Green that its rezoning request was ineffective. 43 F.4th at 299 ("The district court faulted Village Green for citing no 'relevant binding precedent suggesting that [the town attorney's] utterance, such as it may

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[6] *See Republic of Sudan v. Harrison*, 139 S.Ct. 1048, 1056 (2019) (choosing "most natural reading" out of several "plausible" readings of statute); *Village Green*, 43 F.4th at 298 (term "the motion to approve fails" "can naturally be read as constituting that decision").

[7] *See also Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 348, 349 (2d Cir. 2005) ("the finality requirement is not mechanically applied" and "a property owner need not pursue such applications when a zoning agency lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied"); *Kleinknecht v. Ritter*, No. 21-2041, 2023 WL 380536, at *3 (2d Cir. Jan. 25, 2023) (where deed restriction prevented construction of a dock, there was no need to petition for relief from village regulation with identical language; "[t]here are no magic words necessary for a decision to satisfy the final-decision requirement").

be, constitutes a final decision, or is otherwise binding on the Town Board.'"). The court concluded that although the Town lawyer didn't make the decision, he was authorized to communicate it. *Id*. "We cannot fathom why Village Green should now be penalized for having believed him." *Id*. The communication was an additional indication of a decision.

Here, by contrast, the Ninth Circuit faulted the Ralstons for complying with the mandatory procedure and accepting the word of the Planning Director and County Counsel explaining there would be no override of the Corridor's residential development ban. These officials were as authorized to speak for the County as Islip's lawyer was for the Town. Yet the Ninth Circuit held that this response was only personal opinion. App.5. *See Brandt*, 427 F.2d at 57; *United States v. Harris*, 349 F.Supp.3d 221, 224 (E.D.N.Y. 2018) ("[R]epresentative democracy rests on officials and the trust they engender.") (citation omitted).

When government officials make and communicate decisions to their constituents that are within their authority, those statements indicate that a reliable decision has been made. *See, e.g.*, *Haney as Tr. of Gooseberry Island Tr. v. Town of Mashpee*, No. 22-1446, __ F.4th __, 2023 WL 3834051, at *6 (1st Cir. June 6, 2023) (holding claim unripe even though Town formally denied a variance, because two members of the Zoning Board of Appeals stated they might grant another variance application if owner first built infrastructure that would make a variance moot; the court concluded the statements were "plausibly related" to Town's position and therefore may be considered); *see also McGarry v. Bd. of Cnty. Comm'rs of Cnty. of Pitkin*, 175 F.3d 1193, 1200 (10th Cir. 1999)

(discriminatory comments of county's Personnel Director, who oversaw general management policies of the personnel department but did not exercise hiring authority, were properly attributed to the county in lawsuit challenging racial discrimination in county hiring and could not be ignored as personal opinion); *Demery v. Arpaio*, 378 F.3d 1020, 1032 (9th Cir. 2004) (sheriff's webcam streaming communications were not "*personal* communications;" "Absent his official position, Sheriff Arpaio could not have obtained or transmitted the images. The speech was therefore that of a governmental executive officer acting in his official, managerial capacity, … not the personal speech of a government employee."). *Cf. Arizona v. Evans*, 514 U.S. 1, 14–15 (1995) (*government* agents are entitled to rely in good faith on government information even when it contains errors).

Similarly, in *Megladon, Inc. v. Vill. of Pinecrest*, the district court held that an email from the planning director left "no 'potential ambiguities' about whether (or to what extent)" it was applying its regulations to the plaintiff's property, and the case was ripe. 2023 WL 2324344, at *16 n.14. The government argued that an email from the planning director advising the owner that the county would not approve any development until the owner dedicated a right-of-way, was not a final decision. *Id.* at *13. The government asserted that the only way to ripen a takings challenge to the right-of-way exaction was a formal application and a formal decision demanding the exaction. The court rejected the argument, holding that Megladon's takings claim was ripe because the planning director's email plainly established the county's position: "a certificate of occupancy *will not*

be issued until dedication of the right-of-way is complete." *Id.* at *13 (emphasis added by court). The court noted that, regardless of the planning director's intentions, the language of the email "clearly evince[d] a final decision" and the county's argument that the director's response "was not a refusal to continue processing the application" was "bordering-on-frivolity." *Id.* at *14. Having made this final decision, the court held that *Pakdel* confirmed that the property owner need not pursue appeals. *Id.*

The Eleventh Circuit also does not require a formal denial of a formal application to understand the permissible uses of the property to a reasonable degree of certainty. In *S. Grande View Dev. Co., Inc. v. City of Alabaster*, 1 F.4th 1299 (11th Cir. 2021), the city rezoned 142 acres of a 547-acre property that had been developed pursuant to a master plan approved by the city. *Id*. at 1302. The rezoning affected only a single owner. *Id.* The court held that the takings claim was ripe because "the zoning ordinance itself was [the city's] final decision on the matter." *Id*. at 1307. The court distinguished "between a targeted zoning ordinance where the plaintiff contested the application to his or her land, and a general ordinance where a plaintiff has not asked the city to rezone his or her property," holding that no applications need be made in the former situation. *Id*. *See also Acorn Land, LLC v. Baltimore Cnty.*, 402 F.App'x 809, 815 (4th Cir. 2010) (where targeted rezoning "cut the property's maximum residential density by half and placed the property in the lowest water/sewer classification," landowner need not seek a variance to ripen takings claim).

The Ninth Circuit's decision also conflicts with lower courts that do not require a formal permit application, but focus instead on whether there has been a "meaningful" application that elicits government's position about what uses it allows or denies.

In *Fox Run I, LLC v. City of Springville*, No. 2:20-cv-00223, 2021 WL 3511093, at *2 (D. Utah Aug. 10, 2021), the court held that an incomplete formal application suffices for ripeness purposes when it elicits the government's position. There, the community development director indicated that the decision to reject the permit "was final and 'further review of the application ... precluded.'" *Id.* at *3. Even though the owner could still appeal, nothing more was required to ripen the case. *Id.* (citing *Pakdel*). In short, when an owner proposes a use for approval and an official empowered to speak on the government's behalf offers a definitive response—yes or no—this fits into *Pakdel*'s characterization of a "meaningful" application.

In *BJA Enterprises LLC v. City of Yuma*, No. CV-20-01901-PHX-ROS, 2021 WL 3912857, at *2–3 (D. Ariz. Aug. 31, 2021), a district court concluded that a landowner who sought to sell property near a military airport to make way for a car dealership was not required to submit a construction permit application when Yuma officials informed "BJA's prospective buyers that no approvals for construction on the property would be issued and [that] further discussions of development were futile." The court concluded that BJA had alleged more than enough to establish ripeness, even though it "did not administratively exhaust all remedies, *e.g.*, by seeking

a permit." *Id.* at *4. Following *Pakdel*, the district court held that Yuma's "decision here [was] similarly conclusive." *Id.*[8]

In sum, the Second Circuit and other lower courts conflict with the Ninth Circuit and hold that a takings claim is ripe once the government acts in a way that possesses indicia of a decision applying the regulations to the property. An authorized official communicating that decision is another critical indicator. Ripeness does not turn on—and courts do not defer to—the government's own characterization of its actions as unofficial or informal. Rather, ripeness is a *de facto* inquiry, concerned with whether the government's action is in fact a decision, not whether the government says it is a final decision, even where additional or alternate procedures might yield a different response.

B. Other courts demand formal denials of formal applications to ripen takings claims

Other courts adhere to rigid, formal rules and demand that owners pursue every possible avenue for approvals, despite this Court's admonition that exhaustion is unnecessary, and that *de facto* finality suffices. For example, the Tenth Circuit held that a takings claim was jurisdictionally ripe under Article III because the city denied an application to upzone

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[8] *See also O'Neil v. Cal. Coastal Comm'n*, No. 2:19-cv-07749, 2020 WL 2522026, at *6 (C.D. Cal. May 18, 2020) (accepting a letter drafted by a County's staff employee "clearly demonstrat[ing]" that a variance would be denied as a final decision for ripeness purposes even where the employee's opinion is not binding on the County).

property. The denial demonstrated the likelihood of economic injury. *N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1229 (10th Cir. 2021). But the court also held the takings claim was prudentially unripe because "[a]lthough its rezoning application was denied, 'avenues still remain for the government to clarify or change its decision.'" *Id.* at 1230–31 (quoting *Pakdel*, 141 S.Ct. at 2231). The owner might have "submitted a development proposal for [Planned Development] review." *Id.* Planned Development review does not require a rezoning in order to make combined uses. Thus, the only way an owner can demonstrate a final decision in the Tenth Circuit is to submit a formal proposal that is then formally denied, and then pursue every other possible option that conceivably could lead to approval. *Id.* at 1233. Similarly, in *Willan v. Dane Cnty.*, No. 21-1617, 2021 WL 4269922, at *3 (7th Cir. Sept. 20, 2021), the Seventh Circuit held that takings claims were not ripe because the owners had not sought a conditional use permit exempting their property from a recent rezoning (even though rezoning is a legislative matter). *See also Barlow & Haun, Inc. v. United States*, 805 F.3d 1049, 1059 (Fed. Cir. 2015) (requiring formal application even where likelihood of approval is "not high").

Because of the nature of takings litigation and this Court only recently having reopened federal courts to such claims, *see Knick*, 139 S.Ct. at 2170, most cases dismissing takings claims on ripeness grounds remain at the district court level. In *Botts Marsh, LLC v. City of Wheeler*, No. 3:22-cv-00115, 2023 WL 3615379, at *1 (D. Or. May 24, 2023), the district court summarized, "[t]he law continues to require a plaintiff in a federal takings claim to seek a

variance before filing suit where a variance may be available, and Plaintiff has failed to show that a variance was unavailable to it here." Courts in other districts follow suit. In *W.G. Woodmere LLC v. Town of Hempstead*, No. 20-CV-03903, 2022 WL 17359339, at *6 (E.D.N.Y. Dec. 1, 2022), the court held that because "there remains the possibility that a more modest subdivision application" than the one the plaintiffs offered "will be approved," it would be premature to label the town's current position as its final one. Although acknowledging *Pakdel*'s *de facto* finality requirement, the court held that "where an opportunity to file a variance application exists, plaintiffs must avail themselves of that opportunity." *Id.* at *5. *See also Houston Land and Cattle Co., LC v. Bisso*, No. 3:21-cv-247, No. 3:21-cv-248, 2023 WL 2971769, at *4 (S.D. Tex. Apr. 17, 2023) (correspondence indicating denial does not suffice for ripeness when property owner failed to apply to city council).

III. This Court Should Grant Review to Ensure That Constitutional Property Rights Claims Are Held to the Same Pleading Standards as Other Civil Rights Cases

The Ralstons' complaint alleged that their property is entirely within the Corridor, and referred to the County's map on the website showing their property entirely within the Corridor. *See* App.73; *supra* at 7. Thus, it is plausible that their property is entirely within the Corridor. On appeal the County asserted this allegation was "flat wrong." *See* San Mateo County's Answering Brief, *Ralston v. San Mateo County*, No. 21-16489, at 33 (Mar. 23, 2022). The Ninth Circuit accepted the County's assertion,

refusing to apply the usual rule that every plausible allegation in a complaint must be accepted as true. *See Barber*, 31 F.4th at 389 n.4 (noting confusion generated because the district court and parties "merge their discussion of *merits* questions with *ripeness* questions").[9] Instead, the Ninth Circuit focused on the language of the Ralstons' complaint describing the County's map as "*depict[ing]*" the property entirely within the Corridor. App.3a, 73a (emphasis added). The court narrowly defined "depict,"[10] holding this allegation didn't plead the facts with enough plausibility. The court viewed this as a matter of ripeness, not pleading. It held that the Ralstons' takings claim is ripe only after the County confirms that their property is entirely in the Corridor, and the only way to do so is for the Ralstons to submit a CDP application with "[s]ite specific boundary surveys, riparian buffer delineations and biological studies." App.3.

In no other civil rights cases do courts require that, to survive a motion to dismiss for failure to state a claim, a government defendant must agree with the complaint's allegations that the challenged regulation applies to the plaintiff. Civil rights claims in general

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[9] *See* J. David Breemer, *Ripening Federal Property Rights Claims*, 10 Engage: J. Federalist Soc'y Prac. Groups 50, 51 (2009) ("Final decision ripeness is not concerned with whether a property owner has a winning [denial of all use] claim; it is simply concerned with ensuring that a land use decision is concrete enough to allow a court to even consider whether it [causes] a taking.").

[10] *United States. v. Dayton*, 426 F.App'x 582, 601 (10th Cir. 2011) (Briscoe, C.J., dissenting) ("depict" is defined as "[t]o portray, delineate, figure anyhow," and "[t]o represent, as a painting or picture does." (quoting Oxford English Dictionary (2d ed. 1989; online version Nov. 2010)).

are not subject to special pleading requirements. *Leatherman v. Tarrant Cnty.*, 507 U.S. 163, 164 (1993) (federal courts do not "apply a 'heightened pleading standard'" in § 1983 cases); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167–68 (2014) (free speech case was ripe without need for further factual development when delayed judicial review would impose a substantial hardship on petitioners); *Revitalizing Auto Communities Env't Response Tr. v. Nat'l Grid USA*, 10 F.4th 87, 102 (2d Cir. 2021) ("[T]he Supreme Court's cautious approach to prudential ripeness is a reminder that the doctrine constitutes a narrow exception to the strong principle of mandatory exercise of jurisdiction.").

This Court recently unanimously recognized that a takings complaint is subject only to the usual pleading rules; plaintiffs need not affirmatively negate possible defenses. "At this initial stage of the case, [a takings plaintiff] need not definitively prove her injury or disprove the County's defenses. She has plausibly pleaded on the face of her complaint that she suffered injury from the County's actions, and that is enough." *Tyler v. Hennepin Cnty.*, 143 S.Ct. 1360, 1375 (2023).[11]

The bar for plausibly pleading a takings claim is no different than for any other civil claim. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007), this Court held that "[a]sking for plausible grounds to

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[11] This comment came in the Court's discussion of Article III standing, not ripeness, but federal cases involving takings claims frequently combine analysis of standing and ripeness. *See* Nora Coon, *Ripening Green Litigation: The Case for Deconstitutionalizing Ripeness in Environmental Law*, 45 Env't. Law 811, 838 (2015).

infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" supporting the claim. The Court continued, "[a]nd, of course," a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, 'and that a recovery is very remote and unlikely.'" *Id.* (internal citation omitted). In *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), the Court further explained that "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Takings claimants need not allege, much less prove at the pleadings stage, that the government agrees its regulations apply to the plaintiff or that the regulations have the effect the plaintiffs allege. The County will have opportunity enough to disagree when it answers the complaint. Fed. R. Civ. P. 8(b); *U.S. Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 488 (1932) ("[T]he question before us arises upon a motion to dismiss, which admits the facts, so far as they are well pleaded, only for the sake of the argument. What might be disclosed by an answer and upon a hearing, we do not know and are not permitted to conjecture.").

Yet there remains "a huge and unjustified difference between land use ripeness cases and all other ripeness cases." Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99, 131 n.136 (2000). This Court should grant the petition to ensure that owners bringing takings claims are not uniquely

saddled with pleading requirements applicable to no other civil rights claimants.

IV. This Case Is an Excellent Vehicle for Clarifying Ripeness

The lower courts' confusion has facilitated governments dodging the constitutional consequences of their overly-restrictive regulations. Before property owners can have their takings claims considered on the merits, they must endure a Sisyphean odyssey of seemingly endless—and endlessly changing—procedures, which seem designed more to avoid any decision than to actually yield a yes or a no. With increasing confidence, governments construct opaque and Byzantine procedures designed to prevent owners from ever ripening takings claims. *See* Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, 30 Touro L. Rev. 257, 304 (2014) ("Anyone who thinks that he can get a planning agency to tell him what he CAN do on his land … doesn't understand the planning process."); *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 680 (Tex. 2004) ("The City argues, candidly but remarkably, that using delay to extract concessions from landowners is a legitimate governmental function. We disagree, ...").

This phenomenon is deep and well-developed. Across the country, land use regulators are making it ever more difficult for owners to obtain a definitive answer to a straightforward question: "What do *your* regulations allow me to do on my land?" In most cases, the government's only response is "apply and find out." *See* Anastasia Boden et al., *The Land Use Labyrinth: Problems of Land Use Regulation and the Permitting Process*, released by the Regulatory

Transparency Project of the Federalist Society 21 (Jan. 8, 2020)[12] (concluding that nationwide "there is always the potential for a [land use] authority to, in effect, deny authorization to begin a project indefinitely without ever giving a definitive answer on a permit application"). And if we say no, try asking us again—we just maybe might say yes. Wielding their discretion and administrative opacity as weapons, land use regulators "effectively move the goalposts with ever-new demands for redesign after redesign. ... This can be maddening for an individual trying to navigate the system on his own. But it's frustrating even with outside help." *Id.* at 22. *See also* William M. Hof, Note, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After Palazzolo*, 46 St. Louis U. L.J. 833, 856 (2002) (likening a "landowner's search for finality ripeness to 'chasing a feather in the wind'") (citation omitted); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1506 (9th Cir. 1990) ("Requiring appellants to persist with this protracted application process to meet the final decision requirement would implicate the concerns about disjointed, repetitive, and unfair procedures[.]").

This is especially pernicious because of the power imbalance between parties. *See, e.g.*, *Sherman v. Town of Chester*, 752 F.3d 554, 562 (2d Cir. 2014) (town "engaged in a war of attrition" after "repeatedly chang[ing] the zoning laws and rejected [the] plaintiff's proposal, forcing [him] to spend millions of dollars over the course of 10 years"); *Laredo Vapor Land, LLC v. City of Laredo,* No. 5:19-CV-00138, 2022

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[12] https://regproject.org/wp-content/uploads/RTP-State-and-Local-Working-Group-Paper-Land-Use.pdf.

WL 791660, at *4–*5 (S.D. Tex. Feb. 28, 2022) (takings case unripe where plaintiff failed to seek variance or make "alternative proposal" or "obtain proportionality review" or "engag[e] in back-and-forth conversations with City officials" to pursue every possible alternative). The government has more time and money than owners who simply seek to make reasonable use of their own land. *See HRT Enterprises v. City of Detroit*, No. 12-13710, 2022 WL 3142959, at *3 (E.D. Mich. Aug. 5, 2022) (detailing decade-long litigation and describing city's "attempt to contrive a *fifth* bite of the apple" of ripeness to prevent a ruling on landowner's takings claim) (emphasis added); Michael K. Whitman, *The Ripeness Doctrine in the Land-Use Context: The Municipality's Ally and the Landowner's Nemesis*, 29 Urb. Law. 13, 39 (1997) (futility doctrine exists because "a plaintiff property owner should not be required to waste his time and resources in order to obtain an adverse decision that it can prove would have been made if subsequent application were made"). And most importantly, land use regulators have the ability to shape their own rules to catch property owners in a lather-rinse-repeat cycle, indefinitely. Agencies holding all the power have little incentive to compromise. They "can simply require landowners to submit more applications, each asking for less intensive development. Without the ability to make a credible threat to bring a claim in court, landowners are stripped of perhaps their most important bargaining chip." Hof, 46 St. Louis U. L.J at 857.

This case presents a paradigmatic example. The County instructed property owners they "must" ask designated officials whether the County would override the Corridor regulations and allow uses in

conformity with the residential zoning. App.74. The Ralstons complied. The County officials didn't decline to consider the Ralstons' request for an override or tell them the officials have no obligation to respond because the only way to get a straight answer from the County is to apply for a CDP,[13] or tell them that the officials' response was only their personal opinion. No, the officials considered the Ralstons' request, and provided an official response: no override, meaning no residential development.

The Ninth Circuit held that it is acceptable—indeed *routine* (the decision is unpublished)—for the County on one hand to insist owners seek a decision from the Planning Director, yet on the other hand tell courts that this process is merely advisory—a pointless exercise designed only to elicit a personal opinion. Opacity and playing hide-the-ball may be an effective litigation strategy to avoid confronting takings claims on the merits. But should citizens really expect their government to tell them they must do something, after receiving a decision to tell them that we really didn't mean it? To the Ninth Circuit, the Ralstons are chumps for having taken the County at its word. *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 825 (2015) (Roberts, C.J., dissenting) ("What chumps!"). But "[i]f men must turn square corners when they deal with

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[13] In another Ninth Circuit appeal raising similar issues, in response to a question from Judge Bumatay, the County's attorney characterized the override process as "informal," and "not part of the formal application process, so it doesn't trigger any obligation on the part of the County to respond." *See* Oral Argument recording, *Mendelson v. Cnty. of San Mateo*, No. 20-17389 (9th Cir. Nov. 3, 2021) at 25:21 https://youtu.be/pXSELAX8t88?t=1541.

the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 141 S.Ct. 1474, 1486 (2021). The Ninth Circuit has endorsed a standard of government conduct that falls below even minimal levels of what citizens should rightly expect from their government.

Despite *Pakdel*, courts such as the Ninth Circuit continue to create incentives for government to be opaque where it should be clear; to create a maze of procedures designed not to reach a final decision, but mostly to exhaust property owners, financially and spiritually. Gregory Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 98 (1995) ("[M]unicipalities may have an incentive to exacerbate this problem [of the delay inherent in "ripening" a case], as stalling is often the functional equivalent of winning on the merits."); Luke A. Wake, *Righting a Wrong: Assessing the Implications of Knick v. Township of Scott*, 14 Charleston L. Rev. 205, 214 (2020) ("agency staff can often threaten permit denial without actually pulling the trigger"); Laura D. Beaton & Matthew D. Zinn, *Knick v. Township of Scott: A Source of New Uncertainty for State and Local Governments in Regulatory Takings Challenges to Land Use Regulation*, 47 Fordham Urb. L.J. 623, 625 (2020) (government attorney authors suggest methods to block property owners from pursuing takings claims in federal court).

A government knowing it holds all the cards can indefinitely avoid paying the takings piper for the consequences of its restrictive regulations. It will always claim it might grant approvals at some indefinite point down the road, even in the face of its

own express denials, and even when its laws flatly prohibit development. *City of Sherman v. Wayne*, 266 S.W.3d 34, 41 (Tex. Ct. App. 2008) ("[W]e are mindful that "government can use [the] ripeness requirement to whipsaw a landowner. … Ripening a regulatory-takings claim thus becomes a costly game of 'Mother, May I', in which the landowner is allowed to take only small steps forwards and backwards until exhausted.") (quotation marks and internal citations omitted).

CONCLUSION

This Court should grant the petition.

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