No. 17-262

In the
Supreme Court of the United States

BEACH GROUP INVESTMENTS, LLC,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition for a Writ of Certiorari to the Florida Fourth District Court of Appeal

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

J. DAVID BREEMER
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Email: jdb@pacificlegal.org

CHRISTINA M. MARTIN
Counsel of Record
Pacific Legal Foundation
8645 N. Military Trail,
Suite 511
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
Email: cmm@pacificlegal.org

Counsel for Amicus Curiae

QUESTIONS PRESENTED

1. Whether under *Williamson County*'s "final decision" requirement, a landowner must re-submit and have denied alternative, economically impracticable development plans to ripen a regulatory taking claim.

2. Whether *Williamson County*'s "final decision" requirement establishes a per se rule that a landowner must apply for a variance to ripen a regulatory taking claim, even where such variance is not authorized or, if authorized, was found to have been futile to pursue.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

RULES

OTHER AUTHORITIES

INTEREST AND IDENTITY OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioner, Beach Group Investment, LLC.[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property, individual liberty, and economic freedom. Founded over 40 years ago, PLF is the largest and most experienced legal organization of its kind. PLF maintains its headquarters office in Sacramento, California, and has regional offices in Bellevue, Washington; Arlington, Virginia; and Palm Beach Gardens, Florida. The Foundation is supported primarily by donations from individuals interested in the preservation of traditional individual liberties.

PLF attorneys have regularly appeared before this Court as lead counsel on behalf of landowners whose ability to use their property was unlawfully curtailed. *See, e.g.*, *United States Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016);

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been attached to this brief.

Pursuant to Rule 37.6, Amici Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). Regulatory takings claims are difficult to win. But because many local courts are confused about this Court's ripeness jurisprudence, takings plaintiffs frequently run out of resources before they can even press their takings claims. By participating as amicus curiae in this case, PLF hopes to assist property owners across the country by offering important insight on final decision ripeness.

SUMMARY OF ARGUMENT

The Petitioners raise yet another example of how the lower courts are struggling to interpret this Court's "final decision ripeness" rule in takings claims. The takings ripeness doctrine requires a final administrative decision to ensure that property owners come to court with a cleanly postured property rights claim. But ripeness does not require applications for their own sake or when less ambitious plans would not be economically viable.

Unfortunately, the lower courts have struggled with this Court's final decision ripeness decisions. As a result, state and local governments often have been able to take the use of property without ever paying the owner just compensation. The lower courts' confusion has robbed many property owners of the ability to vindicate their constitutional right to just compensation.

When courts create unnecessary hurdles to ripen a case, they force landowners through long, expensive, and doctrinally unnecessary administrative processes

and give incentives to government officials to complicate and stall the process. This is an issue of significant importance to property owners across the country.

REASONS FOR GRANTING THE PETITION

I

THE LOWER COURTS ARE CONFUSED ABOUT HOW TO APPLY THIS COURT'S FINAL DECISION RIPENESS DOCTRINE

A. Final Decision Ripeness

1. *Williamson County* and Origin of the "Final Decision" Requirement

Florida's takings ripeness doctrine is coextensive with the federal ripeness doctrine.[2] The federal ripeness doctrine was described by the Supreme Court in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

In *Williamson County*, the Supreme Court held that an as-applied regulatory takings claim is not ripe until "the government entity charged with

---

[2] *See, e.g.*, *Bogorff v. Scott*, No. SC17-1155, 2017 WL 2981848, at *2 (Fla. July 13, 2017) (Pariente, J., concurring); *Lost Tree Vill. Corp. v. City of Vero Beach*, 838 So. 2d 561, 570 (Fla. 4th DCA 2002) ("Florida courts have adopted the federal ripeness policy." (quoting *Taylor v. Vill. of N. Palm Beach*, 659 So. 2d 1167, 1173 (Fla. 4th DCA 1995))); *Collins v. Monroe County*, 999 So. 2d 709, 715-16 (Fla. 3d DCA 2008) (Florida courts adopted federal ripeness requirement articulated in *Williamson County*); *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1222 (Fla. 2011), *rev'd on other grounds*, 133 S. Ct. 2586 (2013) (Florida courts "interpret[] the takings clause of the Fifth Amendment and the takings clause of the Florida Constitution coextensively.").

implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 473 U.S. at 186. This "final decision" requirement is based on the substantial discretion land use law often grants government officials, as well as the fact-specific nature of regulatory takings law. *Palazzolo*, 533 U.S. at 620 ("*Williamson County*'s final decision requirement 'responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer.' " (quoting *Suitum*, 520 U.S. at 738)). The underlying rationale is that a court cannot know whether a regulation "goes too far" and causes a taking until it knows to a "reasonable degree of certainty" how officials will apply the subject regulation to the property. *Palazzolo*, 533 U.S. at 620. In *Williamson County*, the Court held the plaintiff's taking claim was unripe because county officials had the authority to approve the plaintiff's development through a variance, but the plaintiff had not applied for a variance. 473 U.S. at 190. The Court could not tell whether the regulations prohibited development unless this final process was utilized.

2. Finality Typically Requires Applications When the Government Has Discretion To Approve Projects

The rationale underlying the final decision rule gives rise to the default principle that a landowner must utilize available application processes and give the government a chance to exercise its discretion to permit the requested use before asserting that the land use restrictions deprive the owner of the use and value of property. The point of the application

requirement is not, however, to force a landowner to prove that the government will deny all economically beneficial use of the subject property. It is simply to coax the government to a "final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County*, 473 U.S. at 191. Decisions on applications show how restrictive a regulation is with regard to particular land. When the reach of land use regulation become clear to a reasonable degree, a court can apply takings standards, and a challenge to the regulation is ripe. *Palazzolo*, 533 U.S. at 620.

Whether the owner has alternative property use options (under regulatory policies) is immaterial. While the alternative use issue may go to the merits of a takings claim, it does not affect the ripeness of finally applied regulations. *Lauderbaugh v. Hopewell Township*, 319 F.3d 568, 575 (3d Cir. 2003) ("The [finality] ripeness doctrine prevents judicial interference 'until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" (quoting *Abbott Labs., Inc. v. Gardner*, 387 U.S. 136, 149 (1967))); *see also* 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.").

3. When the Government Lacks Discretion To Approve Development, Finality Exists Without Applications

The default final decision analysis outlined above hinges entirely on the assumption that the government has discretion to approve a landowner's proposed land use. *Palazzolo*, 533 U.S. at 620 (*Williamson County*'s final decision requirement is based on the high degree of discretion government officials typically wield). It does not apply, however, in all circumstances. Specifically, the finality ripeness analysis is truncated (1) where the impact of land use regulations are already known to a "reasonable degree of certainty" or (2) where the government has no meaningful discretion to reduce a land use law's impact. *Id.* ("[O]nce it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."); *Suitum*, 520 U.S. at 726 ("Because the agency has no discretion to exercise over her right to use her land, no occasion exists for applying *Williamson County*'s requirement that a landowner take steps to obtain a final decision about the use that will be permitted on the particular parcel."). Indeed, in these situations, a "final decision" exists, and a takings claim is ripe for review. *Palazzolo*, 533 U.S. at 620; *Suitum*, 520 U.S. at 738.

4. The Futility Exception Applies When Permit Applications Would Be Pointless

An additional exception to the final decision requirement provides that an owner need not submit an application when it would be futile. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 n.3

(1992) (a request for a decision granting a regulatory exemption is not required when it would be "pointless"). The reason for this exception is apparent: requiring applications when they will not or cannot be approved would force landowners to go through meaningless procedures and would do nothing to crystalize a takings claim for the courts. *See Palazzolo*, 533 U.S. at 622.

B. The Lower Courts Are Confused About How To Apply This Court's Ripeness Precedent, Resulting in Inconsistent and Often Unjust Outcomes

The requirements of *Williamson County* are reasonable, when constrained to their purpose. Donald J. Kochan, *Ripe Standing Vines and the Jurisprudential Tasting of Matured Legal Wines—and Law & Bananas: Property and Public Choice in the Permitting Process*, 24 BYU J. Pub. L. 49, 63 (2009) ("Ripeness standards serve as a valuable gate-keeping tool for the resolution of permitting disputes but also have developed in a manner to insulate regulators from accountability for their decisions."). But when *Williamson County* is interpreted broadly, the doctrine can be used to "whipsaw a landowner" and destroy property rights. *See Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50, 63 (Tex. 2006) (Hecht, J., dissenting).

Despite this Court's previous attempts to clarify the ripeness doctrine, lower courts are still confused. Thomas E. Roberts, *Facial Takings Claims Under* Agins-Nectow*: A Procedural Loose End*, 24 U. Haw. L. Rev. 623, 623 (2002) ("Establishing ripeness and determining the appropriate forum in regulatory takings litigation requires sorting through a confusing

body of law."). For example, lower courts disagree about whether the futility doctrine is narrow and rigid, or flexible, or discretionary. *Compare Lilly Investments v. City of Rochester*, 674 Fed. App'x 523, 527 (6th Cir. 2017) (applying flexible application of finality doctrine because "rigid application . . . would allow states to avoid the strictures of the Takings Clause"), *with County of Alameda v. Superior Court*, 34 Cal. Rptr. 3d 895, 902 (2005) (futility exception is extremely "narrow" and doesn't apply just because allowable uses are not economically viable), *and with Sherman v. Town of Chester*, 752 F.3d 554, 563 (2d Cir. 2014) (holding final decision ripeness under *Williamson County* is prudential and a claim is ripe as futile when government will use "repetitive and unfair procedures"), *and Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 (9th Cir. 2010) (en banc) (holding ripeness under *Williamson County* is prudential and exercising discretion to hear case).

Similarly, courts disagree about whether the ripeness doctrine requires a permit application, even when the only uses that local government has discretion to permit would not be economically viable. *Compare Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932 (Tex. 1998) ("The ripeness doctrine does not require a property owner . . . to seek permits for development that the property owner does not deem economically viable."), *with County of Alameda*, 34 Cal. Rptr. 3d 896 (futility exception doesn't apply just because allowable uses are not economically viable), *and Accent Group, Inc. v. Village of North Randall*, No. 85757, 2005 WL 2467388, at *4-5 (Ohio 8th DCA Oct. 6, 2004) (requiring application even where only allowable use would fall $1,800 short of monthly mortgage and tax payments).

Other courts go even further, finding a claim unripe unless the government issued a decision that denies a property owner all or substantially all economically beneficial use of property. *See, e.g.*, *Adrian v. Town of Yorktown*, No. 03 Civ. 6604 (MDF), 2007 WL 1467417, at *8 (S.D.N.Y. 2007) ("In order for a decision to be deemed final, the decision must deny Plaintiffs 'all reasonable beneficial use of [their] property.'" (quoting *Williamson County*, 473 U.S. at 194)); *Gil v. Inland Wetlands & Watercourses Agency*, 593 A.2d 1368, 1374-75 (Conn. 1991) (lack of finality even though property owner submitted four permit applications for a residence, including one application for a home of only 1,500 square feet).

While some courts recognize that one application may be enough to ripen a claim, others unjustly make it so difficult to ripen a claim, that property owners must submit numerous modest applications, or wait for years on pending applications before they may enforce their right to just compensation. *See* Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 52-53 (1995) (explaining "one meaningful application" is all that is required by this Court). For example, in *Good v. United States*, 39 Fed. Cl. 81, 101-03 (1997), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000), the property owners submitted eight applications to build a subdivision over a nine-year period. The U.S Army Corps of Engineers denied the application for a wetlands permit, but according to the court the decision was not "final" under *Williamson County* because "neither the Clean Water Act nor Corps regulations limit plaintiff's ability to submit a new

application reflecting a different, less intensive plan." 39 Fed. Cl. at 102.

The lower courts' wide-ranging conflict and confusion can only be resolved by this Court.

II

COURTS UNDERMINE CONSTITUTIONAL PROPERTY RIGHTS WHEN THEY REQUIRE UNNECESSARY APPLICATIONS

Ripeness does not require applications for their own sake. *Palazzolo*, 533 U.S. at 622. A contrary rule invites government agencies to create a long, costly application process, with unstable application requirements. William M. Hof, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After* Palazzolo v. Rhode Island, 46 St. Louis U. L.J. 833, 857 (2002) ("Agencies know that ripeness requirements make it difficult, if not nearly impossible, for landowners to bring regulatory takings claims in court. Therefore, rather than making concessions to landowners, regulatory agencies 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." (footnote omitted)).

Today, "the cost of even a routine land use application (with the attendant engineering and architectural submissions) is substantial." Amy Brigham Boulris, *Ripeness and Exhaustion of Remedies: Getting to the Merits*, CLEI Regulatory

Takings (Feb. 2005).[3] Indeed, the cost of pursuing a development application may exceed the value of the property itself. *See, e.g.*, *McKee v. City of Tallahassee*, 664 So. 2d 333, 334 (Fla. 1st DCA 1995) ("the substantial cost of the preparation of a complete development plan, $28,000 to $50,000 according to this record, might well exceed the value of the property under the uses allowed by the City's ordinance").

It can also take years—sometimes decades—to secure a final decision on some permit applications. *See, e.g.*, *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1067 (11th Cir. 1996) (19-year takings dispute over permit denial for warehouse, including 10 years to secure ripeness holding); *Beyer v. City of Marathon*, 37 So. 3d 932, 933-34 (Fla. 3d DCA 2010) (it took 9 years to receive a final decision on an application and to ripen the as-applied taking claim); *Villas of Lake Jackson, Ltd. v. Leon County*, 796 F. Supp. 1477 (N.D. Fla. 1992) (developers spent 17 years trying to secure permits for a multi-family housing project).

The high costs of development, combined with the difficulty of getting a final application decision and thus judicial review, can turn the application process into high-stakes gambling, enough to cause many property owners to call it quits at the first sign of resistance. Patrick Maraist, *The Ripeness Doctrine in Florida Land Use Law*, The Florida Bar Journal, Feb. 1997, at 58, 61 (ripeness determinations increase the cost of enforcing property rights, and cause "many landowners decide to forego a takings claim"); Roger

---

[3] *Available at* http://www.brighammoore.com/library/Ripeness%20and%20Exhaustion%20of%20Remedies%20Getting%20to%20the%20Merits.pdf

Marzulla, et al., *Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 Admin. L.J. Am. U. 253, 269 (1995) ("[T]he typical regulatory takings case brought before the Court of Federal Claims takes a decade or more to litigate and costs hundreds of thousands or even millions of dollars to pursue.").

Pursuing a final decision on a doomed application often requires landowners to leave their property unused "while mortgage or other overhead expenses accumulate." Maraist, *supra*, at 61. A strict ripeness interpretation, with its attendant costs and delays generally precludes anyone but the most wealthy landowners from persevering long enough to bring a regulatory taking claim. *See* Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 11 (1992) ("The time and money required to comply with myriad ripeness requirements will prevent most middle-class property owners from pursuing their constitutional right to just compensation [and] make substantive review virtually impossible[.]"); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 43 (1995) ("Practically speaking, the universe of plaintiffs with the financial ability to survive the lengthy ripening process is small."); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 284 (4th Cir. 1998) (the re-application process causes landowners to "pass [] through procedural purgatory" only to "wend[] [their] way to procedural hell").

In light of the expense and difficulty of applying for development permits, courts should only demand

applications for ripeness when they are truly needed to clarify how challenged land use regulations apply to private property. Decisions, like that issued by the court below, which force landowners to submit applications when the regulatory effect on their land is already clear, and requiring them to pursue futile or economically infeasible permit applications—mean many valid regulatory takings claims will never be heard. Hof, *supra*, at 856 ("the great majority of landowners' regulatory takings claims have been dismissed on ripeness grounds").

CONCLUSION

The Court should provide guidance to lower courts on final decision ripeness to ensure that property owners may vindicate their constitutional right to just compensation.

DATED: September, 2017.

Respectfully submitted,

J. DAVID BREEMER
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Email: jdb@pacificlegal.org

CHRISTINA M. MARTIN
Counsel of Record
Pacific Legal Foundation
8645 N. Military Trail,
Suite 511
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
Email: cmm@pacificlegal.org

Counsel for Amicus Curiae