No. 17-1698

In the
Supreme Court of the United States

PACETTA, LLC, et al.,
Petitioners,

v.

TOWN OF PONCE INLET,
Respondent.

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

REPLY ON PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION AND SUMMARY

This case illustrates how state judges continue to block property owners from vindicating their fundamental property rights in court. A decade ago, the Town of Ponce Inlet destroyed the very plan it birthed alongside Simone and Lyder Johnson and their company Pacetta, LLC. The development plan was four years, millions of dollars, and countless hours in the making. App. at A-3–4. But when the Town reversed course and made clear that it would reject any economic use of their land, the Johnsons filed suit and proved the Town wanted to devalue their land for cheaper acquisition later. App. at B-49–50. The litigation on whether the Town's actions effected a taking has now dragged on for eight years. *See* App. at A-9.

Despite years of negotiations and legal wrangling, the Town argues this Court cannot hear Pacetta's claim. The Town claims the appellate court's decision reversing Pacetta's takings victory and remanding for a new trial precludes this Court's review. According to the Town, Pacetta must wait and appeal the latest trial court decision before it can seek review of the two questions presented in the petition. Response To Petition For a Writ of Certiorari (Opp.) at 12. The Town's reading of this Court's jurisdiction is too stingy. This Court recognizes jurisdiction over lower court decisions when the outcome on remand from that lower court decision is preordained. Thus there is no jurisdictional obstacle here.[1]

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[1] Pacetta telegraphed this rationale in its Petition, repeatedly calling the case on remand "doomed" under the Fifth District Court of Appeal's decision. *See* Pet. at 5, 13.

The Town implicitly concedes the importance of the questions presented, contesting only whether this case is the appropriate vehicle. Indeed, both questions are important. Property owners, government officials, practitioners, and lower courts have struggled for decades to divine a coherent standard from this Court's takings ripeness decisions and the partial takings test set out in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). The result tips the system to overwhelmingly favor the government. More than 90% of regulatory takings claims fail. Pet. at 30. Pacetta and its owners—the Johnsons—face an untenable interpretation of this Court's takings precedents in Florida. Without this Court's correction, they have only the naïve hope that the lower courts will reverse themselves and suddenly recognize the claim ripeness that was already evident in the record before them. The Court should grant review.

ARGUMENT

I

THIS COURT HAS JURISDICTION

This Court has jurisdiction when a state's highest court renders a "[f]inal judgment or decree." 28 U.S.C. § 1257. This Court has taken a "pragmatic approach" when deciding whether a decision qualifies as a "final judgment." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 487 (1975). Relevant here, this Court has recognized jurisdiction when state courts remand cases for entire trials, but "for one reason or another *the federal issue is conclusive or the outcome of further proceedings preordained*." *Id.* at 479 (emphasis added).

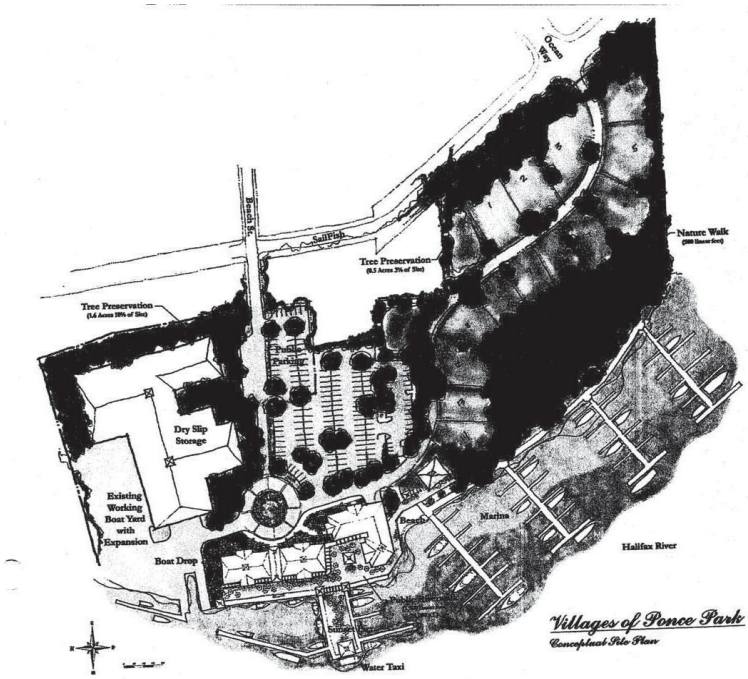
Mills v. State of Alabama, 384 U.S. 214, 217-18 (1966), is instructive. In *Mills*, this Court recognized as final a decision of the Alabama Supreme Court that rejected a free speech defense of the petitioner, Mr. Mills, and remanded the case for a trial. This Court recognized that on remand, Mr. Mills would lose without the aid of the First Amendment. *Id*. at 217. Although, Mr. Mills could again appeal the loss in state courts, it was unlikely that they would reverse previous holdings on the constitutional question. *Id*. Thus this Court recognized jurisdiction over the state court's decision as final under 28 U.S.C. § 1257, even though that decision was arguably interlocutory. *Id*. The Court explained that failure to recognize jurisdiction would cause "an inexcusable delay of the benefits Congress intended" and would "also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." *Id*.

Here, it is likewise clear that the outcome below is as preordained as in *Mills*. Below, the Fifth District Court of Appeal held insufficient the trial court's finding of ripeness, stating it was "unclear as to whether Pacetta had in fact submitted an application for development" that was "meaningful" and whether the Town had "arrive[d] at a final, definitive position on the nature and extent of permitted development.'" App. at A-19 (internal quotes omitted). Moreover, applying the wrong legal test, the appellate court was unconvinced that permit applications would have been futile.

The appellate court did not dispute the trial court's various factual findings related to ripeness or

the Town's intent to drive Pacetta into a forced sale. Those key facts if left undisturbed include:

1. Pacetta did not submit a "formal" application for the 10-parcel mixed use development, but the Town fully understood its scope. Pacetta worked closely with the Town and spent millions of dollars planning it and presented the plan at a public hearing. *See* App. at B-4, 31-32, 43, *id*. The trial court included a copy of the site plan in its order:



App. at B-87.

2. Pacetta also pursued a significantly more modest development through submission of a detailed set of plans to build 10 homes on parcel 10, which had previously been permitted for 19 townhomes. *See* App. at B-25 ("there were no formal applications short of the Old Florida Club [parcel 10]"). The court found that Pacetta prepared and submitted to the Town "an application to build with a complete series of rolled plans containing the design submissions necessary for permitting" and they were "wrongfully refused by the Town." App. at B-49 n.7.

3. The only uses of Pacetta's property that the Town would approve were not economically viable. App. at B-55–56.

4. The Town intentionally devalued Pacetta's property, App. at B-60, "to destroy the Pacetta Group so the property could be acquired by the Town at a fraction of its cost and worth." *Id.* at B-49–50. The Town expected that the regulations and moratoria would cause such financial hardship to Pacetta and that the Town would have "practical immunity" from suit. *Id.* at B-51, 60. These activities almost worked, because they pushed Pacetta into

> default on a substantial loan. *See id.* at B-44.

Either of the last two findings alone should independently satisfy final decision ripeness. Yet the appellate court below applied a constitutionally unsound ripeness test. *See* App. at A-19–20. The court instructed that Pacetta would instead need to prove that it (1) submitted at least one "meaningful application" and the government entity charged with implementing the regulations had "arrived at a 'final, definitive position' on the 'nature and extent' of the permitted development," and; (2) that "any other development of Pacetta's property would be impermissible." App. at A-19–20 (quotation omitted).

Thus the court wrongly found that Pacetta's 10-parcel proposed development, as described in detail in the trial court's decision, was not "meaningful." Otherwise, the Court would have affirmed on the record. Likewise, the application for limited residential development on parcel 10 should have been considered "meaningful" enough to discern a ripe claim.

Similarly, the appellate court implicitly held that Pacetta could not satisfy futility by proving the Town would reject all economic uses of the land. Pacetta proved that in the trial court, but the Fifth District Court of Appeal rejected that as not sufficiently clear for proving futility ripeness. *See* App. at A-19-20. Instead, it held that Pacetta would have to prove that "any other development"—*i.e.*, all other developments—would be denied by the Town. *See id.*

In other words, unless Pacetta could prove that it had submitted more applications than it proved in the

first trial, it could not prevail on remand. And Pacetta cannot prove more—it already proved in the first trial exactly what occurred. Likewise, Pacetta already knew it could not prove "any other" development would be denied. The trial court recognized that only noneconomic uses were possible. *See* App. at-B-55–56 (The affected "property has no viable economic use. . . . [T]he property cannot be developed in any recognized rational way, other than as a park, which in turn reduces the value of this property for later governmental acquisition.").

Thus the outcome on remand and in subsequent appeals is as preordained as it was in *Mills*. Like the circumstances in *Mills*, "the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a [loss]." *Mills*, 384 U.S. at 217. After the trial court loss, another state appellate loss would follow "whereupon the case could then once more wind its weary way back to [this Court] as a judgment unquestionably final and appealable." *Id.* In the instant case, after the remand, the trial court predictably held Pacetta's applications not meaningful and its takings claim unripe. Pacetta's only hope of prevailing below is that either the intermediate appellate court reverses its ripeness decision—an exceedingly unlikely possibility—or that the Florida Supreme Court opts to grant review after having previously declined. This is at least as unlikely, if not more so.

This Court recognized in *Mills* that requiring a petitioner to work his way through state courts that have already rejected his arguments once would be "a roundabout process" that would cause an "inexcusable delay," *id.*, in a case that had already taken 3.5 years

and thus would likely take another 3.5 to get back to the Supreme Court. *Id*. at 217 n.4. Here, litigation on Pacetta's takings claim has already taken eight years. *See* App. at A-9. Pacetta should not be required to continue to pursue the lower court appeals on the slim hope Florida courts will reverse themselves and reinterpret federal takings ripeness. Nor should Pacetta be forced to come back to this Court on appeal from the new trial after a minimum of two more appeals. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2433 (2015) ("This case, in litigation for more than a decade, has gone on long enough."). Pacetta may not be able to complete that journey. Unlike the Town, Pacetta has neither unlimited time nor resources.

II

THIS CASE RAISES A CRITICAL QUESTION ABOUT THE UNREALISTIC BURDEN PROPERTY OWNERS MUST MEET TO RIPEN THEIR TAKINGS CLAIMS

The Town does not contest the importance of the ripeness question raised by Pacetta. Instead, it argues that the lower court "closely adhered" to federal ripeness doctrine in deciding the claim unripe. Opp. at 21. The Town goes so far as to argue that the lower court's "harmonious application of federal takings law bars any contention by Pacetta that this Court should review that court's decision." Opp. at 22.

In other words, the Town avoids the important question posed to this Court by the Petitioner. Pacetta seeks review from this Court to clarify and correct the federal takings ripeness requirements. *See* Pet. at 18-26. Pacetta argues the lower court, like some federal

jurisdictions, imposed unfair, rigid ripeness requirements. *See* Pet. at 18-24. Lower courts, like the court in this case, still do not know what constitutes a meaningful land use application or how to decide when an application would be futile. *See* Pet. at 18-21. Moreover, many of the lower courts, like the court in this case, ignore the burden that failure to review imposes on the parties. *See* Pet. at 14, 24; App. at A-19–20. Litigants asserting other constitutional rights are subject to a more sensible standard of ripeness that consider that burden. *See* Pet. at 13-14; *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

By placing the burden overwhelmingly and disproportionately on property owners to ripen their takings claims, courts have created incentives for government officials to stall and complicate the permitting process. *See* Pet. at 22. Yet it is the governmental entities that have the power and discretion to decide permissible uses and amend land use plans. Governments like the Town know the law overwhelmingly favors them when they dodge applications rather than giving a clear, formal denial. Indeed, the appellate court below could not even recognize as ripe a claim where the government intentionally devalued land and blocked any economically viable development of that land. *Compare* App. at A-19 to App. at B-49–51, 55–56, 60. The Town submits this "just the way it goes" for landowners under this Court's takings jurisprudence. That's exactly the problem.

III

THIS CASE PRESENTS THE COURT WITH A RARE OPPORTUNITY TO CORRECT THE LOWER COURTS' CONFUSED APPLICATION OF *PENN CENTRAL*

Conceding the importance of the second question presented, the Town instead argues that the facts or state law preclude review. The Town is wrong.

First, the Town argues that the appellate court remanded for a new trial because Florida law requires the trial court to be the factfinder. Opp. at 13. Pacetta agrees. The appellate court cannot engage in factfinding. Pacetta instead presents a simple question on the *law*: Does government effect a taking when it intentionally devalues private property because it plans to later purchase the property at a discount?

In this case, the trial judge found that the Town intentionally devalued Pacetta's property so that the Town could acquire the property at a steep discount. App. at B-49–51, 60. The Town effectively froze Pacetta's property in order to purchase or condemn it later for public benefit. *See id.*

Rather than recognize the Town's actions effected a taking, the appellate court remanded for a new liability trial based partly on its determination that the trial court used the wrong relevant parcel to evaluate whether a taking occurred. App. at A-18. Pacetta asked the appellate court to affirm the partial taking on the record before it, regardless of the relevant parcel. And as the Town acknowledges, under state law, the appellate court should have affirmed the trial court's judgment, if the factual

record was sufficient to find a taking on an alternative principle of law. *See* Opp. at 14 (citing *Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co. of Fla.*, 97 So. 3d 204, 212 (Fla. 2012)).

The Town further suggests that Pacetta's Petition is "untethered" from the facts. Opp. at 16. The Town suggests the appellate court rejected the original trial court's factual findings when it "directed the state trial court to address" ripeness and the partial takings claim on remand. *Id.* But the appellate court nowhere questioned the relevant factual findings of the trial court.[2] Rather, it held that the trial court failed to apply the appropriate legal standard and failed to make *additional* necessary findings. App. at A-17–18. Specifically, the court held that it could not on the record decide whether the Town effected an unconstitutional *Penn Central* (partial) taking. *Id.* The court ordered a new trial, because the original trial judge was no longer available to hear the case and modify his original order accordingly. App. at A-20 n.6.

The Town further muddies the waters by arguing that no taking occurred because, under state law, Pacetta's right to develop the full 10-parcel project never vested. *See* Opp. at 20. That state law argument failed in the state appellate courts and must also fail here because this Court's takings tests do not require a property owner to first prove a vested right. *Cf. Penn Central*, 438 U.S. at 124; *Lucas v. S. Carolina*

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[2] Nor did the appellate court reject relevant factual findings in the previous Harris Act appeal. Instead, it held that rights to a specific use could not vest under the Harris Act where that use was barred by the Comprehensive Land Use Plan. *See* App. at A-11–12.

Coastal Council, 505 U.S. 1003, 1015 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The possible uses of land (and consequently any vested rights therein) could potentially inform the investment-backed expectations prong in the *Penn Central* test, but it is not dispositive, and it may not have any bearing on whether a taking occurred. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001).

Indeed, after the Town got the Harris Act judgment reversed based on the vested use theory, the Town raised the same vested rights argument to the trial court. *See* App. at A-9. The trial court rejected it, holding that its original order provided "sound support" for the federal takings claim. *See* App. at A-12, C-3. Likewise, when the Town appealed the takings decision, the court of appeal rejected the same vested rights arguments from the Town, logically omitting any mention of vested rights from its takings analyses. *See* App. at A-13–18.

The lack of vested rights to the full 10-parcel development has no bearing on Pacetta's takings theory proposed for review by this Court. Pacetta asks this Court to decide whether the government effects a taking when it targets property with oppressive regulatory actions to devalue it for cheaper government acquisition later. The lower court failed to recognize this as a taking.

That failure is consistent with the overall landscape for federal takings plaintiffs. Many other lower courts, too, have rendered the property rights protections arising from the Takings Clause so feeble that owners have virtually no hope of proving a regulatory taking under *Penn Central*, even when the government acts egregiously. *See* Pet. at 29-31.

Review of this case would provide this Court with a much needed opportunity to clarify how *Penn Central* should operate. In cases like this one, the Court should hold that the *character of the government action* factor alone may weigh so heavily in favor of the landowner that he must prevail without regard to the extent of investment-backed expectations or economic loss to the property owner.

CONCLUSION

The Court should grant the Petition to answer the two important federal questions this case presents.

DATED: August 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the REPLY ON PETITION FOR A WRIT OF CERTIORARI contains 2,960 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 1, 2018.

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