No. 24-908

IN THE

Supreme Court of the United States

FANE LOZMAN,
Petitioner,
v.
CITY OF RIVIERA BEACH, FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute works to restrain governmental overreach at all levels of government. The Buckeye Institute files lawsuits and submits amicus briefs to fulfill its mission—including briefs in takings cases like this one. *E.g.*, *Tyler v. Hennepin Cnty., Minnesota*, 598 U.S. 631 (2023); *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus* curiae or its counsel has made a monetary contribution to the preparation or submission of this brief. Parties received timely notice of the intent to file this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A regulation is a taking whenever it bans someone from using their land in *an* "essential" way. *E.g.*, *Curtin v. Benson*, 222 U.S. 78, 86 (1911); *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 412-14 (1922). *Lucas* refocused that rule thirty years ago, holding that the government cannot "den[y] an owner economically viable use of his land" without compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992).

Yet the Eleventh Circuit abandoned *Lucas*'s reasoning and holding in this case, allowing the government to expropriate an "essential use" of Fane Lozman's property—and perhaps the only realistic use—with near-total impunity. Lozman bought his waterfront property in the City of Riviera Beach, Florida, in 2014. At that time, the City "allowed the development of single-family homes." Pet. App. 3a. But after Lozman purchased his land, the city enacted an ordinance that banned Lozman from building a house on his property. Pet. App. 2a. Lozman sued the City, claiming that it violated *Lucas* because the ordinance "deprived his parcel of all beneficial economic use." Pet. App. 1a.

The courts below rejected that argument. The district court attempted to distinguish *Lucas* by suggesting no taking occurred because the "value of [the] property ha[d] not been wholly eliminated"—even though the City expropriated its essential use. Pet. App. 37a. The Eleventh Circuit affirmed. It held that the City did not take Lozman's property when it banned him from building a house on his land. Pet.

App. 11a-12a. And there was not a taking, the Eleventh Circuit reasoned, because the City's ordinance still let Lozman fish and sightsee on his land, meaning the City did not drive the property's value to zero—even though it banned the land's essential use. *Id*. at 11a.

That ruling flouts *Lucas* and the rest of this Court's regulatory-takings cases. And it further entrenches a 3-1 circuit split—one that has arisen only because this Court's regulatory-takings jurisprudence provides inadequate guidance for takings of "essential uses."

The Court should grant the petition to resolve that split. And it should hold—consistent with *Curtin*, *Mahon*, and *Lucas*—that a regulation is a taking when it deprives someone's property of an "essential use." *Curtin*, 222 U.S. at 86.

ARGUMENT

I. The decision below flouts *Lucas* and the rest of this Court's regulatory-takings cases.[2]

At their core, the Court's regulatory-takings cases are clear: The government cannot expropriate an "essential use" of someone's property. *E.g.*, *Curtin*, 222

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[2] The Court should address both questions presented, *see* Pet. i, even though the Eleventh Circuit focused largely on jurisdiction. As Petitioner explained in his brief, the Eleventh Circuit's ripeness analysis "bakes in an assumption about *Lucas*'s takings test." Pet. 3. And the district court also considered the merits of Petitioner's *Lucas* claim, so the Court wouldn't be working on a blank slate. *See Lozman*, 2023 WL 2911018, at *11.

U.S. at 86; *Mahon*, 260 U.S. at 414-15. The Eleventh Circuit abandoned that rule, allowing cities to take an, and perhaps the only, "essential use" of someone's property without compensation. The Court should correct that costly mistake.

A. The Takings Clause bars the government from expropriating an "essential use" of someone's property.

The Court has long banned the government from expropriating an "essential use" of someone's property. In one of its earliest regulatory-takings cases, the Court held that the government "take[s]" someone's property whenever it bans them from using their land in an "essential" way. *Curtin*, 222 U.S. at 86. *Curtin* bolstered that conclusion by observing that the Takings Clause "limit[ed]" the government's "powers [as] a sovereign," prohibiting the government from "destroy[ing] essential uses of private property" without just compensation. *Id.* And the Takings Clause prohibited that conduct, the Court explained, because "the prevention of a legal and essential use" of someone's property expropriates "the very essence of his proprietorship"—an action tantamount to a physical taking. *Id.* The Court did not find that the regulation took away all legal uses or all value. *See id.* Ultimately the Court concluded that neither the Secretary of the Interior nor the superintendent had the power "to limit the uses to which lands … held in private ownership may be put." *Id.* at 87.

Mahon followed *Curtin*'s lead, concluding that the government takes property whenever it "destroy[s] previously existing rights of property and contract."

260 U.S. at 413. In that case, the Pennsylvania Coal Company purchased the mineral rights to Mahon's land, which allowed the company to "remove all the coal under" Mahon's property. *Id.* at 412. But after the company bought those mineral rights, Pennsylvania passed a law that banned "the mining of anthracite coal" on that subsurface estate. *Id.* at 412-13.

The company challenged that law, and the Court found that the law effected a taking, reasoning that when the diminution of the value of the subject property "reaches a certain magnitude," it is a taking requiring compensation. *Id.* at 413. The company bought that property "to mine [the] coal [it] reserved." *Id.* So when Pennsylvania stopped the Company from mining, the state effectively "abolish[ed]" the company's mineral estate—a significant taking that had "very nearly the same effect … as appropriating or destroying" the company's land. *Id.* at 414.

Since then, this Court has looked to the essential-use test. In *PruneYard*, the Court recognized that certain rights are an "essential stick[] in the bundle of property rights." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980). And a regulation "amount[s] to a 'taking'" whenever it takes a right "essential to the use or the economic value" of the property. *Id.* at 84. A few years later, in *Keystone Bituminous Coal Association*, the Chief Justice observed that the Court has never let a "regulation destroy essential uses of private property" without compensation. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 514 (1987) (Rehnquist, C.J., joined by Scalia, O'Connor, and Powell, JJ., dissenting). Other cases

abound. *E.g.*, *United States v. Causby*, 328 U.S. 256, 261 (1946).

The Court's essential-use test eventually culminated in *Lucas*, which held that the government cannot "den[y] an owner economically viable use of his land" without compensation. 505 U.S. at 1016. Invoking *Mahon*, the Court recognized that "the government's power to redefine [property] interests"—and thereby remove property's essential use—is "necessarily constrained by constitutional limits." *Id.* at 1014 (cleaned up). The Court explained "[s]urely, *at least,* in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted," the regulation cannot be justified based on the claimed "'average reciprocity of advantage' to everyone concerned." *Id.* at 1017-18 (emphasis added). But "at least" does not mean "only." The holding is limited to the facts in that case where the regulation was a taking because it banned *all* of the "beneficial or productive use of land." *Id.* at 1015 (collecting cases). The regulation "prohibit[ed] the 'essential use' of land.'" *Id.* at 1031 (quoting *Curtin,* 222 U.S. at 86).

But *Curtin* did not say that a taking occurs *only* when the government action prohibits *all* economically viable uses of the land. Instead, the Court said that the government takes property when it bans "a legal and essential use" that gives it value—of which there can be multiple. *Curtin*, 222 U.S. at 86. As *Lucas* explained, "[t]hough our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment

will invite exceedingly close scrutiny under the Takings Clause." 505 U.S. at 1019 n.8.

Nevertheless, *Lucas* did set the absolute limit applicable to this case: If a regulation "prevent[s] the erection of any habitable or productive improvements on petitioner's land," there is "[l]ikely" a taking. *Id*. at 1031. That limit applies directly to this case. Pet. App. 1a.

B. The decision below thwarts the Court's regulatory-takings cases by allowing the government to expropriate an "essential use" of property with near-total impunity.

The Eleventh Circuit's decision contravenes *Lucas*'s core holding. In the case below, Lozman bought waterfront property in the City of Riviera Beach, Florida. Pet. App. 2a. When he bought his property, the City "allowed the development of single-family homes." Pet. App. 3a. But after he bought his land, the City changed the rules, enacting an ordinance that banned Lozman from building a house on his property. *Id.* Lozman then sued, claiming the City violated *Lucas* because the ordinance "deprived his parcel of all beneficial economic use." Pet. App. 1a.

The district court rejected Lozman's regulatory-takings claim. It tried to distinguish *Lucas*, claiming there was not a taking because the "value of [the] property has not been wholly eliminated"—even though the City expropriated its essential use. Pet. App. 37a. The Eleventh Circuit made the same point, holding that the City did not take Lozman's property when it banned him from building a house on his land.

Pet. App. 11a. And there was not a taking, the Eleventh Circuit reasoned, because the City's ordinance still let Lozman fish and sightsee on his land, meaning the City did not drive the property's value to zero—even though it banned at least one (if not all) of the essential uses of the land that give it value. Pet. App. 11a-12a.

That holding contravenes the concept of a Fifth Amendment taking and the holding and reasoning of *Lucas* and *Mahon*, and the rest of the Court's regulatory-takings doctrine. This Court should reverse the Eleventh Circuit.

II. The Court should grant this petition to clarify *Lucas*.

The Eleventh Circuit's decision was wrong but not surprising. Although *Lucas* applied the Court's essential-use test, it applied it only to a taking of all economically beneficial use of the land—nothing more. That limited application of the "essential use" test has created a 3-1 split, with some courts finding a taking when a regulation makes property useless—but not valueless—and other courts finding a taking only when a regulation makes property valueless. The Court should refine the *Lucas* test to provide better guidance and protection against governmental takings.

A. *Lucas* did not clarify the Court's regulatory-takings test.

Lucas left unanswered: What is the meaning and scope of the "essential use" test? Throughout *Lucas*, the Court repeatedly held that a regulation is a taking

whenever it "denies all economically beneficial or productive *use*"—a test that requires compensation whenever the government bans a property's essential uses. 505 U.S. at 1015 (emphasis added). But elsewhere in the opinion, the Court said a regulation is a taking only when it "complet[ly] eliminat[es] *value*," *id*. at 1019 n.8—a novel test that would break from the essential-use framework that *Curtin*, *Causby*, and *Mahon* all endorsed. And since *Lucas*, that ambiguity—*i.e.*, "use" versus "value"—has "caused considerable confusion" at this Court and throughout the circuits. Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of* Lucas, 102 Iowa L. Rev. 1847, 1856 (2017).

Lately, the problem has only gotten worse. A few years after *Lucas*, the Court said a regulation was a taking only when it "denies all economically … productive use of land." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (quoting *Lucas*, 505 U.S. at 1015). But a year later, the Court changed course, holding that a regulation is a taking whenever it "permanently deprives property of all value." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 332 (2002). Three years after that, the Court changed course once more, observing that "a property's value is the determinative factor," while noting that "beneficial use" is still relevant. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539-40 (2005) (quoting *Lucas*, 505 U.S. at 1017). Yet another course change came five years after that when the Court held that a regulation takes someone's property whenever it "deprives [them] of all economically beneficial use" *or* "destroy[s]" the "value" of their property. *Stop the Beach*

Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 713, 715 (2010) (citations omitted). The upshot, "nobody—not States, not property owners, not courts, nor juries—has any idea how to apply [*Lucas*'s] standardless standard." *Bridge Aina Le'a, LLC v. Hi. Land Use Comm'n*, 141 S. Ct. 731 (2021) (Thomas, J., dissenting from denial of certiorari).

B. The lower courts are split 3-1 on *Lucas*'s holding.

The fallout from *Lucas* has "irreparably divided" the lower courts, creating a well-documented split over "the distinction between use and value." Michael M. Berger, *Whither Regulatory Takings?*, 51 Urb. Law. 171, 185 (2021). As it stands, the Eighth and Eleventh Circuits, and (sometimes) the Ninth Circuit, have held that "economic value" is the touchstone of any regulatory-takings claim. But the Federal Circuit and (sometimes) the Ninth Circuit have said that "economic use" is the lodestar. Taken together, the Eighth and Eleventh Circuits have split with the Federal Circuit—and the Ninth Circuit has split with itself.

Consider the economic-value circuits first. According to the Ninth Circuit, "the complete elimination of a property's value is the *determinative* factor" in "the *Lucas* context." *Bridge Aina Le'a, LLC v. Hi. Land Use Comm'n*, 950 F.3d 610, 627 (9th Cir. 2020) (cleaned up). So "a landowner cannot succeed on a *Lucas* claim," the Eighth Circuit has said, "if the landowner's property still has substantial value following the regulation." *Becker v. City of Hillsboro*, 125 F.4th 844, 854 (8th Cir. 2025). And the Eleventh Circuit has

agreed, rejecting Lozman's claims because the economic value of his property "has not been wholly eliminated"—even though its essential use had been taken. Pet. 22; *accord Lozman v. City of Riviera Beach, Fla.*, 2023 WL 2911018, at *12 (S.D. Fla. Apr. 3) ("[I]n the *Lucas* context, the complete elimination of a property's value is the determinative factor.").

The economic-use circuits have taken a different approach. "Although the value of the subject property is relevant to the economically viable use inquiry," the Ninth Circuit has elsewhere said, "our focus is primarily on use, not value." *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996), *aff'd,* 526 U.S. 687 (1999); *but see Bridge Aina Le'a, LLC*, 950 F.3d at 627 (Ninth Circuit reaching the opposite conclusion). So there's a regulatory taking, the Federal Circuit has held, "[w]hen there are no underlying economic uses." *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1117 (Fed. Cir. 2015).

The Court should, at a minimum, resolve the circuit split. Beyond that, the Court should clarify that taking any property right that is essential to the value or use of a property is a taking. And in this case, the government took a right of the property owner which was essential to its use, if not its value.

CONCLUSION

For these reasons, the Court should grant the petition and reverse the decision below.

Respectfully submitted,

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