No. 24-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Fane Lozman has a contentious relationship with the City of Riviera Beach, Florida. The City's mistreatment of Mr. Lozman has twice required this Court's intervention. See *Lozman* v. *City of Riviera Beach*, 568 U.S. 115 (2013); *Lozman* v. *City of Riviera Beach*, 585 U.S. 87 (2018).

In this third chapter, Mr. Lozman was forced to sue the City because its land-use restrictions have deprived his waterfront property of all economically beneficial use, causing a taking under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). The controlling City ordinance is clear: He can use this property for "[p]rivate residential fishing or viewing platforms" and small "docks for non-motorized boats," and nothing else. Yet the Eleventh Circuit held Mr. Lozman's *Lucas* claim unripe. In the court's view, because these scant private uses are permissible, Mr. Lozman must apply to the City for a "final decision" on how he can use his property.

The questions presented are:

1. Whether a claim that a local ordinance effected a regulatory taking upon enactment remains unripe until the landowner asks the local government for permission to develop his property in ways the ordinance plainly prohibits.

2. Whether a regulation that forbids any economically beneficial use causes a taking under *Lucas*, regardless of the property's residual value.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, plaintiff-appellant below, is Fane Lozman.

Respondent, appellee below, is the City of Riviera Beach, Florida.

No corporate parties are involved in this case.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the District Court for the Southern District of Florida and the Court of Appeals for the Eleventh Circuit:

Lozman v. *City of Riviera Beach*,
No. 9:22-cv-80118-DMM (S.D. Fla.); and

Lozman v. *City of Riviera Beach*,
No. 23-11119 (11th Cir.).

No other proceedings directly relate to this case.

A separate proceeding related to the same property is pending in the Eleventh Circuit between Mr. Lozman and the United States, but it raises different issues and does not relate directly to this case. See *United States* v. *Lozman*, No. 24-11477 (11th Cir.).

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PETITION FOR A WRIT OF CERTIORARI

Fane Lozman respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit in this case.

OPINIONS AND ORDERS BELOW

The Eleventh Circuit's opinion is reported at 119 F.4th 913 and reproduced at Pet. App. 1a–12a. The district court's opinion is available at 2023 WL 2911018 and reproduced at Pet. App. 13a–42a.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its judgment on October 16, 2024. On December 4, 2024, and January 27, 2025, respectively, Justice Thomas extended the time to file this petition to February 13, 2025 and then to February 20, 2025. 28 U.S.C. § 1254(1) supplies jurisdiction.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides, as relevant: "nor shall private property be taken for public use, without just compensation."

INTRODUCTION

Fane Lozman's relationship with the City of Riviera Beach has already produced two legal questions warranting this Court's review. This takings case raises two more, both the subject of lower-court disagreement: (1) whether a facial regulatory takings claim is ripe whether or not the plaintiff has filed a development application, and (2) whether a regulation that allows only private, non-occupiable uses causes a taking under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), even if the property still has value.

When Mr. Lozman bought his waterfront property in Riviera Beach, it was zoned for residential use, allowing the development of single-family homes, stilt homes, or floating homes—all of which he has investigated developing. But the City rezoned his property to fall within a "special preservation district." Now, he can use it only for small "fishing or viewing platforms and docks for nonmotorized boats." Riviera Beach Code § 31-522(a). The zoning ordinance lists the exceptions to this restriction: "None." *Id.* § 31-522(b)(1). To this day, after 11 years of ownership, Mr. Lozman has been unable to develop his property in any way.

Mr. Lozman thus sued the City, alleging that the zoning ordinance's enactment left his property "without economically beneficial or productive options for its use." *Lucas*, 505 U.S. at 1018. But the Eleventh Circuit held his claim unripe because he "never applied for a permit for development from Riviera Beach" and thus "never received a final, written denial of his application for the development of his land." Pet. App. 12a. The court identified no ambiguity as to which uses are permitted—and which are not. Yet it refused to hold that "a property owner who has not applied for *any* permit, variance, or rezoning to develop his land" ever has a ripe takings claim. *Id.* at 11a–12a.

This decision conflicts with rulings from at least four other circuits. Those courts correctly recognize that, when plaintiffs allege a taking caused by "the mere enactment of a regulation"—as opposed to "any particular decision . . . applying the [regulation] to their property"—no development or permit application is required to ripen the claim. *E.g.*, *Cnty. Concrete Corp.* v. *Town of Roxbury*, 442 F.3d 159, 164–65 (3d Cir. 2006).

And the Eleventh Circuit's approach is wrong. The "finality requirement" for ripe takings claims "is relatively modest," serving merely to ensure that "there is

no question about how the regulations at issue apply to the particular land in question." *Pakdel* v. *City & Cnty. of S.F.*, 594 U.S. 474, 478 (2021) (per curiam) (cleaned up). When, as here, a plaintiff *facially* challenges a clear regulation, no such question exists. Just as "[c]ommon sense . . . bears on judgments like whether a floating home is a 'vessel,'" *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2379 (2023) (Barrett, J., concurring), it bears on whether the flexible, prudential "finality" requirement is satisfied. Requiring development applications in this situation makes no sense.

This question is important. The Eleventh Circuit's approach invites gamesmanship by letting local governments dictate when—if ever—landowners' claims against them are ripe. And it imposes real barriers to vindicating property rights in court; even futile development applications can be prohibitively expensive.

The decision below also bakes in an assumption about *Lucas*'s takings test. By emphasizing that Mr. Lozman can still "develop" small private docks or fishing platforms, the court necessarily deemed those uses relevant to whether his property retains economically beneficial uses. If a private dock is not such a use, it does not matter whether a *Lucas* plaintiff can build one. In assuming that these scant private uses prevent a *Lucas* taking, the Eleventh Circuit perpetuated ongoing confusion about *Lucas*'s "standardless standard," see *Bridge Aina Le'a, LLC* v. *Haw. Land Use Comm'n*, 141 S. Ct. 731, 731 (2021) (Thomas, J., dissenting from the denial of certiorari). This Court "should make clear when [a regulatory taking] occurs," *id.* at 732, by holding that such private, non-occupiable uses do not avoid a taking—even if the property retains residual value.

STATEMENT OF THE CASE

1. Mr. Lozman, an inventor and former U.S. Marine Corps officer, first moved to Riviera Beach in 2006, taking up residence in a floating home on the City's marina. *Lozman* v. *City of Riviera Beach* (*Lozman I*), 568 U.S. 115, 118 (2013). He soon "became an outspoken critic of the City's plan to use its eminent domain power to seize homes along the waterfront for private development." *Lozman* v. *City of Riviera Beach* (*Lozman II*), 585 U.S. 87, 91 (2018).

After several failed attempts to evict Mr. Lozman, the City seized and vindictively destroyed his floating home at taxpayer expense, which led to this Court's ruling that the home was not a "vessel" under federal admiralty law. See *Lozman I*, 568 U.S. at 120. While the City's seizure attempts were ongoing, Mr. Lozman was arrested after a city council meeting where he criticized local officials. See *Lozman II*, 585 U.S. at 92. When he sued, this Court ruled that his First Amendment retaliation claim could proceed. See 585 U.S. at 101–02. The City has continued harassing Mr. Lozman throughout the dispute, including five false arrests. Pet. App. 61a–62a.

2. Mr. Lozman purchased the land at issue here in 2014. Pet. App. 2a. His parcel is over seven acres, mostly submerged in the Lake Worth Lagoon. *Id.* at 2a–3a. The State of Florida first sold this land, together with around 300 other acres nearby, in 1924. Until recently, all this land was zoned for residential use, and around 160 acres have been developed. See *id.* at 44a–45a.

In 1991, the City adopted a comprehensive plan governing development. Pet. App. 2a. The plan created a "Special Preservation Future Land Use" designation

for "[m]angrove, wetlands and special estuarine bottomlands," including the submerged portion of Mr. Lozman's parcel. *Id.* at 19a. The "expressed policy objective" of this designation was "to preclude any development of submerged lands," and the City announced its intent to "oppose any applications for dredge or fill pending permits before applicable State or Federal agencies" for lands in the Preservation Area. *Id.* In 2010, the plan was amended to allow "private residential fishing or viewing platforms and docks for non-motorized boats" by permit application. *Id.* at 20a.

But while the comprehensive plan purported to restrain the City's own decisionmaking on permit applications and the like, it was not implemented in the City's zoning laws until much later. When Mr. Lozman bought the property in 2014, it was still zoned for residential use, allowing development of single-family homes with a requirement of one-acre minimum dry lots. Pet. App. 45a–46a; Riviera Beach Code § 31-118. Mr. Lozman planned to use the property to develop conventional, stilt, or floating homes.[1] Pet. App. 52a; D. Ct. ECF 138-2; D. Ct. ECF 144-2; D. Ct. ECF 148 ¶ 17. A 2020 appraisal of "the highest and best use"—filling and developing the site as eight separate residential parcels—valued the land at almost $50 million. Pet. App. 17a.

After he bought the property, Mr. Lozman asked City officials to provide a street address, but they refused. Pet. App. 56a. Two zoning officials told him he "would never get an address" because the City did not

[1] In particular, Mr. Lozman has investigated developing the property for Arkups—an innovative home design that can float or sit on retractable pilings over water. *See* David Ovalle, *House or yacht? Legal fight looms over property taxes for floating Star Island mansion* (Mar. 29, 2022), https://shorturl.at/TlJHh.

want him to "be able to get any permit from the City." *Id.* Mr. Lozman was forced to sue the City, *pro se*, just to get a street address for his property—an almost-three-year process. He also sought and obtained a homestead tax exemption.

After securing a court order to assign a street address—5101 North Ocean Drive—Mr. Lozman moved a floating home onto his property, installed a mailbox, and started getting mail. Pet. App. 46a; *id.* at 60a. Vandals sunk this first floating home, so Mr. Lozman replaced it with another. *Id.* at 59a.

City officials were not content with this state of affairs. In 2018, a zoning official told Mr. Lozman that "he was going to see to it that Lozman's mail delivery was terminated and that Lozman would never receive any permits." Pet. App. 46a. The City then instructed the Postal Service to stop delivering mail to Mr. Lozman's address, which it did. *Id.* at 47a; *id.* at 60a. And after the City's chief building official issued Mr. Lozman a permit for temporary electrical service, the City fired her. *Id.* at 47a.

In 2020, over Mr. Lozman's objections, the city adopted Ordinance No. 4147—the operative legal restriction at issue. This ordinance created a new zoning district, "SP special preservation district," which covers Mr. Lozman's property. Riviera Beach Code § 31-521. The only uses "permitted" in the district are small "fishing or viewing platforms and docks for nonmotorized boats"; "mitigation land banks"; and "preservation land." *Id.* § 31-522(a). Any use "not specifically stated as a use permitted within this section" is "prohibited." *Id.* § 31-522(c). Underscoring the point, the ordinance states this "exception": "The following uses may be

permitted in the SP special preservation district: (1) None." *Id.* § 31-522(b).[2]

Only "judicially determined vested rights to develop or alter submerged lands" are exempt from these restrictions. *Id.* § 31-523. But that exception does not apply to Mr. Lozman's seven-acre property under a 2021 amendment to the City's comprehensive plan, which mandates "a density of one unit per 20 acres" for such exempt property. Pet. App. 21a.

After the City downzoned Mr. Lozman's property, it terminated his homestead exemption, which he had for five years (from 2016 to 2020). Pet. App. 60a. Mr. Lozman applied for permits to build a fence, install water and sewer services, and for permanent electrical service, all of which were denied. *Id.* at 60a–61a. The City also terminated his permit for temporary electrical service. *Id.* at 49a. And the City later explicitly prohibited "anchor[ing], moor[ing], ty[ing] off, or otherwise affix[ing] a floating structure upon, or to the Waters of the City," barring any floating homes. City Code § 13-53(a).

3. Mr. Lozman thus brought this case, alleging that the City's restrictions deprived him of all economically beneficial or productive use of his property under *Lucas*. Pet. App. 49a. The district court granted summary judgment for the City, rejecting Mr. Lozman's *Lucas* claim on the merits. The court concluded that "both federal and state law" already restricted "any right to fill the submerged portion of his land"; that it "remains uncertain whether he can build a dock or moor his floating home at the property"; and that he "continues to have what he has always had," which is

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[2] The kind of small dock allowed by the Ordinance is not sufficient to moor a floating home because it cannot "extend outward past the mean low water line." Riviera Beach Code § 31-522(a)(1)(a).

"a narrow strip of dry land" that was "likely worth more than he paid." *Id.* at 37a–39a.

The Eleventh Circuit also ruled for the City, but on different grounds. It held this suit unripe because Mr. Lozman had not sought a permit, variance, or rezoning for his property. Pet. App. 11a–12a. The court relied on the general rule that a regulatory takings claim is not ripe "until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulation to the property at issue." *Id.* at 7a (quoting *Williamson Cnty. Reg'l Plan. Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985)) (cleaned up). The court said "the application of the ordinance . . . to Lozman's property remains unknown" because he has not sought any permit to develop it. *Id.* at 9a.

The Eleventh Circuit also held that applying to develop the property would not have been "futile." Pet. App. 9a. The Eleventh Circuit will not require "a 'futile' *repeated* application" to the same body that has already denied a prior development application, but "Riviera Beach has not received any application from Lozman to develop his land." *Id.* at 10a (emphasis added). And this is not a case where "no viable variance is available," the court said, because "the ordinance here contains an exception permitting development" in two ways: (1) the "regulations permit 'private residential fishing or viewing platforms and docks for non-motorized boats,'" and (2) "the ordinance's 'savings clause' exempts 'judicially determined vested rights' from the limitations of the regulations." *Id.* at 10a–11a. The court summed up its rule: "We have not held that a property owner who has not applied for *any* permit, variance, or rezoning to develop his land may utilize the futility exception. And we will not do so here." *Id.* at 11a–12a.

REASONS FOR GRANTING THE PETITION

I. The Court should grant review to make clear that a development application is not required to ripen a facial regulatory takings claim.

Generally, a regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cnty. Reg'l Plan. Comm'n* v. *Hamilton Bank of Johnson City,* 473 U.S. 172, 186 (1985), *overruled in part by Knick* v. *Twp. of Scott*, 588 U.S. 180 (2019). This makes sense; "because a plaintiff who asserts a regulatory taking must prove that the government regulation has gone too far, the court must first know how far the regulation goes." *Pakdel*, 594 U.S. at 479 (cleaned up). And the regulation itself usually does not answer that question, as most land-use regulations give permitting authorities substantial discretion to allow development in some form or another.

Still, this "finality requirement is relatively modest." *Id.* at 478. It requires only "*de facto* finality," meaning a takings claim is ripe as soon as "there is no question about how the regulations at issue apply to the particular land in question." *Id.* (cleaned up). The Eleventh Circuit's holding that Mr. Lozman must nevertheless apply to the City to develop his property—even though the development restrictions are clear and he challenges the ordinance on its face—conflicts with other circuits' decisions and this Court's prudential approach to finality.

A. The decision below conflicts with other circuits' rulings.

1. When a plaintiff alleges that the enactment of a local land-use regulation has deprived his property of all economically beneficial use, at least four circuits hold that no application to the local government is required to ripen the claim.

The First Circuit distinguishes between (1) "a claim that the mere enactment of a statute constitutes a taking" and (2) "a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation." *Asociacion de Suscripcion Conjunta del Seguro de Responsabilidad Obligatorio* v. *Juarbe-Jimenez*, 659 F.3d 42, 49 (1st Cir. 2011) (quoting *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 494 (1987)). The former accrues and "becomes ripe" "at the time the offending statute or regulation is enacted or becomes effective." *Id.* at 50–51. Thus, such claims "are not subject to the [finality] portion of *Williamson County*'s ripeness analysis." *Id.* at 49–50.

The Third Circuit's decision in *County Concrete* is similar. Landowners alleged that a local zoning ordinance had "regulated [their] property 'into a state of economic inutility' without just compensation." 442 F.3d at 164. The district court held this claim unripe, but the Third Circuit reversed. No permit or development application is required when the plaintiff alleges that "the mere enactment of a regulation . . . constitutes a taking without just compensation." *Id.* Because the *County Concrete* plaintiffs did "not challenge any particular decision . . . applying the Ordinance to their property" and instead alleged "that the mere enactment of the Ordinance has denied them all economically viable use of their property," their "facial Fifth

Amendment Just Compensation Takings claim need not comply with the finality rule." *Id.* at 165.

The Fifth Circuit likewise holds that "*Williamson County*'s final-decision rule . . . presents no barrier" to adjudicating "*facial* challenges" to zoning ordinances. See *Opulent Life Church* v. *City of Holly Springs*, 697 F.3d 279, 287 (5th Cir. 2012).

The Ninth Circuit has the most developed body of law on this subject: "It is fairly well-settled in this Circuit that the first *Williamson County* ripeness requirement, the 'finality' requirement, is not germane to facial taking claims." *Sinclair Oil Corp.* v. *Cnty. of Santa Barbara*, 96 F.3d 401, 406 (9th Cir. 1996). That is so because such claims, "by definition, derive from the ordinance's enactment, not any implementing action on the part of governmental authorities." *Ventura Mobilehome Cmtys. Owners Ass'n* v. *City of San Buenaventura*, 371 F.3d 1046, 1052 (9th Cir. 2004); accord *Guggenheim* v. *City of Goleta*, 638 F.3d 1111, 1117 (9th Cir. 2010); *Hacienda Valley Mobile Ests.* v. *City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003). This is an exception to the general principle, followed in a number of lower courts, that a ripe regulatory takings claim typically requires "*at least one* meaningful application for a development project." See *Lake Nacimiento Ranch Co.* v. *San Luis Obispo Cnty.*, 841 F.2d 872, 876–77 (9th Cir. 1987) (cleaned up); see also *Bannum, Inc.* v. *City of Louisville,* 958 F.2d 1354, 1363 (6th Cir. 1992); *Gilbert* v. *City of Cambridge*, 932 F.2d 51, 62 (1st Cir. 1991).

2. The Federal Circuit takes a somewhat different path to reach essentially the same place. In *Brubaker Amusement Co.* v. *United States*, the court similarly noted the distinction between "facial" "mere enactment" takings claims and "as applied" claims attacking how the government has applied a regulation to a

specific property. 304 F.3d 1349, 1356 (Fed. Cir. 2002). And it agreed that the former are immediately ripe while the latter may not be. But—conflating this use of the term "facial" with its use to describe the breadth of a statutory challenge generally—the court said that "plaintiffs pursuing a facial challenge must show that the provision is unconstitutional in all its applications." *Id.* (Other circuits, by contrast, use "facial" in this context merely to denote claims aimed at regulations themselves rather than discretionary decisions implementing them, *e.g.*, *County Concrete*, 442 F.3d at 165.)

Even so, the Federal Circuit acknowledged two kinds of as-applied challenges: The more common type "focuse[s] on discretionary statutes or regulations, where the governmental authority has discretion to decide to whose property the regulation will apply"; these claims become ripe only "after the property owner has sought and been denied a favorable decision from the governing body." *Brubaker*, 304 F.3d at 1357–58. But in some cases, "the regulation is not discretionary" and "there is no doubt as to whose property it applies." *Id.* at 1358. In these latter cases, takings claims are ripe "once the rule goes into effect." *Id.* So the upshot is that, if a plaintiff alleges that an ordinance's enactment deprived his property of all economically beneficial use, with no discretion on the government's part, his claim is ripe without an application to the government.

3. The Eleventh Circuit, by contrast, held below that Mr. Lozman's regulatory takings claim is unripe even though (like the plaintiffs in these other circuits) he alleges his property was taken by the enactment of the ordinance itself, not any discretionary decision applying it to his property.

The parties litigated, and the Eleventh Circuit addressed, the specific basis for Mr. Lozman's claim. In fact, the City argued that his claim was "untimely" because "the statute of limitations on *a facial takings claim* against the City's SP development restrictions expired before Lozman took ownership of the property." Appellee Br., *Lozman*, 119 F.4th 913 (No. 23-11119), 2023 WL 7548794, at *15 (emphasis added). This was so, the City claimed, because the relevant restriction was first adopted as part of the City's comprehensive plan in 1991, and "a facial challenge to a comprehensive plan adopted under Florida law ripens when the plan is first adopted." *Id.* at *19. Mr. Lozman responded that his claim ripened when "the city adopted Ordinance 4147," because that is when the relevant "land-use restrictions" were "applied to [his] property." Reply Br., *Lozman*, 119 F.4th 913 (No. 23-11119), 2023 WL 8743151, at *2. And he emphasized that there is "no "uncertainty as to the land's permitted use" because "Ordinance 4147 is crystal-clear," allowing no exceptions. Ltr. Br. Reply, *Lozman*, 119 F.4th 913 (No. 23-11119), 2024 WL 4513042, at *1. Indeed, "there is nothing Lozman can ask for that any city official is allowed to give him." *Id.* at *2.

The Eleventh Circuit acknowledged that Mr. Lozman challenged the "comprehensive plan and ordinance that restricted development," not any discretionary decision thereunder: "Lozman brought this lawsuit alleging that the comprehensive plan and ordinance deprived him of all economically beneficial or productive use of his parcel." Pet. App. 1a, 5a. But despite his claim's facial nature, the court said the ordinance was not "a 'final decision' sufficient to satisfy the ripeness requirement" because Mr. Lozman "has not applied for a permit, variance, or rezoning." *Id.* at 7a–8a.

The Eleventh Circuit thus imposed precisely the requirement under *Williamson County* that other circuits do not apply to this kind of claim. In the First, Third, Fifth, Ninth, or Federal Circuits, the ripeness issue would come out the other way. Those courts recognize that such claims "are not subject to the [finality] portion of *Williamson County*'s ripeness analysis." *Juarbe-Jimenez*, 659 F.3d at 49–50. In other words, because Mr. Lozman did "not challenge any particular decision . . . applying the Ordinance to [his] property," instead alleging "that the mere enactment of the Ordinance has denied [him] all economically viable use of their property," his *Lucas* claim "need not comply with the finality rule." *County Concrete*, 442 F.3d at 165.

B. The decision below is wrong.

The Eleventh Circuit was wrong to hold that even Mr. Lozman's *Lucas* claim—asserting a taking by the enactment of a law itself, not some specific implementation thereof—is unripe absent an application for a permit, variance, or rezoning. That wooden requirement conflicts with this Court's practical, "*de facto* finality requirement." *Pakdel*, 594 U.S. at 478.

1. To start, *Williamson County*'s finality rule is not an application of Article III's case-or-controversy requirement. Rather, it reflects "prudential ripeness principles." *Suitum* v. *Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 733 (1997); see *Lucas*, 505 U.S. at 1013 (discussing "the prudential 'ripeness' of Lucas's challenge"). Because evaluating a *Lucas* claim requires knowing "how far the regulation goes"—and given "the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer"—the Court has sensibly required plaintiffs to confirm how a regulation will apply to their property before they sue. *Suitum*, 520 U.S. at 738; *Pakdel*, 594 U.S. at 479. A

court will often need to know, for example, "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." *Williamson Cnty.*, 473 U.S. at 190–91. But once "there is no question about how the regulations at issue apply to the particular land in question . . . these potential ambiguities evaporate and the dispute is ripe for judicial resolution." *Pakdel*, 594 U.S. at 478–79.

If a regulation confers substantial discretion, this kind of clarity will generally require an application for a permit, variance, or other approval so the government can define "the reach of a challenged regulation." *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 620 (2001); *Williamson Cnty.*, 473 U.S. at 191. So "where the regulatory regime offers the possibility of a variance from its facial requirements, a landowner must . . . actually seek such a variance to ripen his claim." *Suitum*, 520 U.S. at 736–37. But that is not true if the plaintiff alleges that the regulation itself, *on its face*, effects the taking. "Such 'facial' challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed," as this Court has already noted in *dictum*. *Id.* at 736 n.10. And such a claim is viable when a regulation lacks the "flexibility or discretion" that typically characterizes local land-use rules. See *id.* at 738.

Suitum, for example, held that finality was irrelevant where the regulatory agency undisputedly could "permit no additional land coverage or other permanent land disturbance on the parcel": "Because the agency has no discretion to exercise over Suitum's 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 a particular parcel." *Id.* at 739

(cleaned up). And in *Lucas* itself, the Court declined to require the landowner to apply for further permits because the statutory scheme made clear the only two uses for his land that were available. 505 U.S. at 1011–12. At bottom: "Ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use." *Palazzolo*, 533 U.S. at 622. No uncertainty means no applications are required.

Three overlapping strands of doctrine confirm the point. First, this Court has said (and lower courts have generally recognized) that *Williamson County*'s finality requirement does not mandate *futile* applications. See *Palazzolo*, 533 U.S. at 625–26 ("Where the state agency['s] . . . denial of the application makes clear the extent of development permitted . . . federal ripeness rules do not require the submission of further and futile applications . . . ."); *MacDonald, Sommer & Frates* v. *Yolo Cnty.*, 477 U.S. 340, 352 n.8 (1986). Second, this Court has made clear that "exhaustion of state remedies is not a prerequisite to" a takings claim. *Pakdel*, 594 U.S. at 475 (cleaned up). Third, this Court overruled *Williamson County*'s *other* prudential ripeness requirement—requiring plaintiffs to sue in state court before asserting takings claims in federal court—because "the presence of a state remedy" is irrelevant to whether a federal constitutional claim has ripened. *Knick*, 588 U.S. at 191.

Together, these holdings confirm that when a regulation prohibits any meaningful uses and confers no discretion to grant exceptions, requiring a landowner to apply for exceptions anyway is pointless and improper. Imposing such requirements "relegates the

Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights." *Id.* at 189.

2. Under the correct standard, the decision below is wrong. As already explained, Mr. Lozman asserted—in the City's words—"a facial takings claim against the City's SP development restrictions." Appellee Br., 2023 WL 7548794, at *15. His complaint asserted, and his appellate briefs emphasized, that it was the City's adoption and enforcement of the zoning ordinance itself, not any specific interpretation thereof, that took his property under *Lucas*. And under *Lucas*, "the test to be applied in considering a facial takings challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land." 505 U.S. at 1016 n.6 (cleaned up) (emphasis omitted). That is what Mr. Lozman asserted here. The Eleventh Circuit thus erred by requiring him to submit applications that are, under his legal theory, irrelevant.

To be sure, facial takings claims "face an uphill battle" *on the merits*. *Keystone*, 480 U.S. at 495. But if the Eleventh Circuit's ruling reflects skepticism that Mr. Lozman can show that "the 'mere enactment' of [the zoning ordinance] constitutes a taking" because the ordinance may allow economically beneficial uses, the court mistakenly conflated the merits with ripeness. See *id.* at 494; *infra* § II. For ripeness purposes, it suffices that Mr. Lozman chose to attack the ordinance directly.

But even if a facial-takings plaintiff were required to prove the regulations' clarity to establish ripeness, "there is no question about how the regulations at issue apply to the particular land in question." *Pakdel*, 594 U.S. at 478–79. The zoning ordinance is crystal clear: "The following uses are permitted in the SP spe-

cial preservation district: (1) Private residential fishing or viewing platforms and docks for non-motorized boats . . . (2) Mitigation land banks[;] (3) Preservation land." See Pet. App. 47a–48a. Unlike the typical land-use regulation, the ordinance confers no discretion to allow any exceptions: "Special exception. The following uses may be permitted in the SP special preservation district: (1) *None*." *Id.* (emphasis added). And if any ambiguity remains: "The following uses shall be prohibited in the SP special preservation district: (1) Any use not specifically stated as a use permitted within this section." *Id.* These restrictions must be enforced under the City's zoning code, which says that a variance that "permits a use that is not generally or by specific exception permitted in the zoning district" is not allowed "under any circumstances." Riviera Beach Code § 31-42(d)(1).

Given the ordinance's clarity, Mr. Lozman could seek approval to develop his property only by securing a "rezoning," Pet. App. 8a, 11a—in other words, by asking the City Council to enact new legislation amending the City's zoning code (and perhaps the underlying comprehensive plan) to permit development that is currently prohibited by law. But even setting aside the fanciful notion that Mr. Lozman could secure such relief from the City Council (which loathes him), that possibility cannot prevent ripeness. A landowner can *always* ask to change the governing law, so if that option make a takings claim unripe, no claim would ever be ripe. Ripeness is concerned with how "a challenged land-use regulation" will be "enforce[ed]," not with the chance that it may someday be changed. *Palazzolo*, 533 U.S. at 625.

Finally, the Eleventh Circuit was wrong to invoke "the ordinance's 'savings clause,'" which "exempts 'judicially determined vested rights' from the limitations

of the regulations." Pet. App. 11a. As noted, his plot is too small for this exception to apply. *Supra* p. 7. Anyway, Mr. Lozman does not currently have any such judicially determined rights, so there is no ambiguity about how the ordinance applies to his property today. And requiring a plaintiff to resort to state-court litigation before asserting a federal takings claim is exactly what *Knick* prohibits. 588 U.S. at 185.

In short, Mr. Lozman's claims are not subject to *Williamson County*'s final-decision requirement because he attacks the zoning ordinance on its face—it is the ordinance's enactment that deprived his property of economically beneficial use. And even if a plaintiff in his shoes must make some threshold showing of regulatory clarity to reach the merits, he has done so here. The Eleventh Circuit's ripeness holding is wrong.

II. The Court should clarify that private, non-occupiable uses are not economically beneficial under *Lucas* even if the property retains value.

As just explained, the Eleventh Circuit's ripeness holding makes little sense; since Mr. Lozman challenged the zoning ordinance on its face, the possibility that he could build "[p]rivate residential fishing or viewing platforms and docks for non-motorized boats," as the ordinance allows, Pet. App. 11a, is relevant only to the merits. Indeed, the decision below apparently rests on an implicit merits ruling: The Eleventh Circuit assumed that these permissible uses can prevent a *Lucas* taking. Only on that view does their availability bear any relevance to Mr. Lozman's claims. But the Eleventh Circuit's assumption is mistaken, and it perpetuates continued confusion over *Lucas*'s standard. The Court should clarify that such private, non-occupiable uses do not avoid a taking under *Lucas*—even if they leave the property with residual value.

1. *Lucas* addressed a state law that "flatly prohibited" the "construction of occupiable improvements" on Mr. Lucas's beachfront property, "on which he intended to build single-family homes." 505 U.S. at 1006, 1009. The question presented was "whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of 'just compensation.'" *Id.* at 1007.

The Court reviewed its regulatory takings jurisprudence, noting that it had "generally eschewed any set formula for determining how far is too far, preferring to engage in essentially ad hoc, factual inquiries." *Id.* at 1015 (cleaned up). But past cases had "described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Id.* As relevant, one was "where regulation denies all economically beneficial or productive use of land." *Id.*

Lucas reaffirmed that rule, but with the caveat that such a regulation will not cause a "total taking" unless it "goes beyond" "the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1019, 1029–30. Since the state trial court "found Lucas's two beachfront lots to been rendered valueless by . . . enforcement of the coastal-zone construction ban," *id.* at 1020, the state had to "identify background principles of nuisance and property law that prohibit the uses [Mr. Lucas] now intends in the circumstances in which the property is presently found," *id.* at 1031. The Court thus reversed the judgment against Mr. Lucas.

Although *Lucas* aimed to adopt a general, bright-line rule, it has produced only confusion. *Lucas*'s holding offers none of the certainty, predictability, or judicial restraint that clear rules are supposed to create. See

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989). Justices and scholars have recognized as much; "nobody—not States, not property owners, not courts, nor juries—has any idea how to apply this standardless standard." *Bridge Aina Le'a*, 141 S. Ct. at 731 (Thomas, J., dissenting from denial of certiorari). *Lucas* "further muddied the already murky regulatory takings waters, increasing the unpredictability and ambiguity in regulatory takings," Carole Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847, 1855 (2017), and "[l]ower courts have struggled to implement the *Lucas* rule in close cases in part because they cannot make sense of [its] disparate directives," Lynn E. Blais, *The Total Takings Myth*, 86 Fordham L. Rev. 47, 74 (2017). "Clarification [on *Lucas*] from the Supreme Court is in order, and the sooner the better." Michael M. Berger, *Whither Regulatory Takings?*, 51 Urb. Law. 171, 186 (2021).

In particular, *Lucas* did not clearly distinguish between economic use and economic value. While mainly referring to "use"—thirty-seven times, in fact—the Court also used the term "value" throughout, describing the "deprivation of all economically beneficial use" as "a complete elimination of value." *Lucas*, 505 U.S. at 1019 n.8. "The distinction between value and use has caused considerable confusion" leading "courts and other legal authorities [to] differ on this point." Brown & Merriam, *supra*, at 110.

Some courts thus hold that "a landowner cannot succeed on a *Lucas* claim if the landowner's property still has substantial value following the regulation." *E.g.*, *Becker* v. *City of Hillsboro*, 125 F.4th 844, 854 (8th Cir. 2025); *Bridge Aina Le'a, LLC* v. *Haw. Land Use Comm'n*, 950 F.3d 610, 627 (9th Cir. 2020) (similar);

Mayhew v. *Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998) (similar). Others hold that, "[w]hen there are no underlying economic uses, it is unreasonable to define land *use* as including the sale of the land." *E.g.*, *Lost Tree Vill. Corp.* v. *United States*, 787 F.3d 1111, 1117 (Fed. Cir. 2015); see also *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996) (noting that "several courts have found a taking even where the 'taken' property retained significant value"), *aff'd,* 526 U.S. 687 (1999).

2. This confusion reared its head below. The district court held on the merits that Mr. Lozman's *Lucas* claim failed because he "continues to have what he has always had, a narrow strip of dry land, likely worth more than he paid," so the "*value* of his property has not been wholly eliminated." Pet. App. 37a (emphasis added). And the Eleventh Circuit similarly assumed that Mr. Lozman's property is not valueless because he can still build "[p]rivate residential fishing or viewing platforms and docks for non-motorized boats." *Id.* at 11a. After all, there is no serious argument that these are economically beneficial *uses*; *Lucas* itself makes clear they are not. The law at issue there similarly allowed "small wooden decks," 505 U.S. 1009 n.2; that did not stop this Court from holding that the land had "no economically viable use," *id.* at 1020. Indeed, "requiring land to be substantially left in its natural state" generally triggers *Lucas* because of the "heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 1018. So, for these private, non-occupiable uses to be relevant, the court must have relied on their contribution to the property's residual value.

That was wrong. "Typical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel." *Lost Tree*, 787 F.3d at 1117. Thus, "the mere fact that there is one willing buyer of the subject property" should not "defeat a taking claim." *Del Monte*, 95 F.3d at 1433. And *Lucas* itself "does not suggest that a land sale qualifies as an economic use." *Lost Tree*, 787 F.3d at 1117; see *Lucas*, 505 U.S. at 1018–20 & n.8. Indeed, "in the context of real property, focusing *Lucas* 'solely on market value' allows 'external economic forces,' such as inflation, to artificially skew the takings inquiry." *Lost Tree,* 787 F. 3d at 1118 (quoting *Del Monte*, 95 F.3d at 1433).

III. This case is a good vehicle to decide these important and recurring issues.

1. The Court should take this opportunity to resolve the questions presented. Whether Mr. Lozman's *Lucas* claim is ripe was the sole basis for the Eleventh Circuit's published decision, and this issue was both pressed and passed upon below. If the Eleventh Circuit was wrong, Mr. Lozman's claim may proceed to the merits. And because the Eleventh Circuit's decision rests on an assumption about the merits, the second question is squarely presented too.

2. Both issues are important and recurring. Local governments increasingly use ripeness and statute-of-limitations arguments as a shell game to avoid ever having to defend regulatory takings on the merits. This case is a prime example. Below, the City initially claimed that Mr. Lozman's claim was time-barred because he should have challenged the 1991 comprehensive plan. After Mr. Lozman thoroughly rebutted that claim in his appellate briefing, the City pivoted and the Eleventh Circuit held that he sued not too late, but too early. This kind of "gamesmanship in the lower

courts" based on *Williamson County* is unfortunately not uncommon. See *Arrigoni Enters., LLC* v. *Town of Durham*, 136 S. Ct. 1409, 1410 (2016) (Thomas, J., joined by Kennedy, J., dissenting from the denial of certiorari).

And requiring landowners to submit applications to ripen their claims puts *defendants* in control of whether claims against them are ripe; governments can delay issuing final decisions and thus prevent plaintiffs from suing them. Nor are such applications just a box-checking exercise: the cost of ripening a takings claim through such applications is prohibitive to many individual landowners, who are left with no choice but to cede their property rights because they cannot pry open the courthouse doors. Because of this ripeness game, property owners have "lost substantial interests in property." Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, 30 Touro L. Rev. 297, 300 (2014).

The *Lucas* standard is equally important—but equally obstructive. As Justice Thomas has noted, out of 1,700 takings cases from 1996 to 2021, "there were only 27 successful takings claims under *Lucas*." *Bridge Aina Le'a*, 141 S. Ct. at 731 (Thomas, J., dissenting from denial of certiorari) (citing Brown & Merriam, *supra*, at 1849–50). That is unsurprising, as "lower courts have interpreted the decision . . . in several different ways, providing no reliable indication of when the regulation would be considered a taking and when compensation would be required." Christie Olsson, *Takings Law in the Aftermath of* Lucas *v.* South Carolina Coastal Council*: Does the Background Principles Exception Clarify or Complicate Regulatory Takings Law?*, 45 Santa Clara L. Rev. 707, 727, 737 (2005). In particular, an "understanding of the *Lucas* categorical

regulatory takings rule as only applying when a government regulation deprives an owner of all value"—as various courts have held, including the court below—"significantly heighten[s] the already substantial impediments to property owners' ability to mount successful *Lucas* challenges." Brown & Merriam, *supra*, at 110–111.

The result is that Justice Scalia's *Lucas* opinion is rendered impotent. Without any clear standard to judge regulatory-takings claims, courts cannot protect this basic right, and the law does not provide the clarity and stability required for landowners and businesses to properly order their affairs. In short, the Court's "current regulatory takings jurisprudence leaves much to be desired," and would benefit from clarification. *Bridge Aina Le'a*, 141 S. Ct. at 731 (Thomas, J., dissenting from denial of certiorari).

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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