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 THE CATO INSTITUTE AND SOUTHEASTERN LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Founded in 1976, Southeastern Legal Foundation (SLF) is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic. For nearly 50 years, SLF has advocated, both in and out of the courtroom, for the protection of private property interests from unconstitutional governmental takings. SLF regularly represents property owners challenging overreaching government actions in violation of their property rights and frequently files *amicus curiae* briefs in support of property owners before the Supreme Court.

This case interests *amici* because it implicates the Fifth Amendment's protection of property rights against uncompensated takings.

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

The American Founders believed that secure property rights are an important constraint on the arbitrary exercise of government power. *See*, *e.g.*, U.S. CONST. amend. V (prohibiting the taking of private property "for public use, without just compensation"). And millions of Americans have financial independence and security because they own and can develop their real property. "[F]or what is the land but the profits thereof[?]" *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992) (quoting 1 E. COKE, INSTITUTES, ch. 1, § 1 (1st Am. Ed. 1812)). But secure property rights represent more than economic liberty. Liberal land use rules give Americans the freedom to order their private lives: to build churches, mosques, and synagogues, to plant and harvest their own food, and to make land improvements for multigenerational living, a home school, or a home business. However, too often these property rights are precarious and conditional. In many jurisdictions, local officials can destroy the economic or social value of a property through rezoning and downzoning ordinances.

In 2014, Fane Lozman bought over seven acres of submerged and waterfront property adjacent to a residential area of Riviera Beach, Florida. Pet. Br. 4. At the time, Lozman's parcel was zoned for residential use, and he planned to develop the land and build homes. *Id.* at 5. However, in 2020, the City Council adopted an ordinance to downzone Lozman's property as a "special preservation" district to conserve the natural environment along that stretch of land. *Id.* at 6. Among other restrictions, these regulations imposed a flat ban on homes on Lozman's parcel. *See* RIVIERA BEACH, FLA. CODE ORDINANCES § 31-522(a). And while

some Riviera Beach zoning ordinances list exceptions to the general rule, the "exceptions" list in the ordinance covering Lozman's property specifies, simply: "None." *Id.* at § 31-522(b).

Still, Lozman subsequently applied for permits to build a fence, install water and sewer infrastructure, and obtain permanent electrical service. Pet. Br. 7.[2] Each application was denied. *Id*. Lozman eventually concluded that the City had stripped the property of substantially all its economic value. He brought a § 1983 lawsuit, alleging that the ordinance amounted to a taking of his property without just compensation in violation of the Fifth Amendment. Pet. App. 14a. On appeal, the Eleventh Circuit sided with the City and dismissed Lozman's lawsuit. Citing this Court's decision in *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Eleventh Circuit panel held that Lozman's complaint is "unripe." Pet. App. 11a–12a. The court reasoned that an ordinance is "rarely a final decision" and that the effect of the downzoning ordinance on Lozman's property "remains unknown" because he had not filed for additional permits to develop it. Pet. App. 9a.

The court below stretched this Court's decision in *Williamson County* beyond its breaking point. Where an ordinance is codified and unambiguous, like Riviera Beach's, a court should consider that ordinance to be a final decision for the purposes of ripeness. And when a plaintiff alleges that a local land-use ordinance

[2] The antagonism between these parties is indicated by two prior disputes that reached this Court. *See Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013) (challenging the City's seizure and destruction of Lozman's floating home); *Lozman v. City of Riviera Beach*, 585 U.S. 87 (2018) (challenging the constitutionality of Lozman's arrest after he spoke at a City Council meeting).

deprives 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. *See* Pet. Br. 10–11 (citing decisions from the First, Third, Fifth, and Ninth Circuits).

This Court should grant the petition and resolve the circuit split. This Court's review is essential because lower courts' impermissible reading of *Williamson County* allows local governments to engage in gamesmanship that profoundly injures many Americans' property and constitutional rights.

ARGUMENT

I. THIS COURT SHOULD CLARIFY THAT RIPENESS IS A PRUDENTIAL DOCTRINE AND ADDS NOTHING TO THE CONSTITUTION'S ARTICLE III REQUIREMENTS.

Article III limits the judicial power to "cases" or "controversies." U.S. CONST. art. III, § 2, cl. 1. The original understanding of Article III set out three conditions for standing: a plaintiff must (1) "assert a legal right in a form prescribed by law," (2) not "deliberately manufacture a lawsuit," and (3) "present a legal question that called for interpretation by an independent federal judge who was an expert in federal law." Robert J. Pushaw, Jr., *The Court Continues to Confuse Standing: The Pitfalls of Faux Article III "Originalism,"* 31 GEO. MASON L. REV. 893, 895 (2024). More than 150 years later, this Court created a three-pronged standing test to satisfy the case-or-controversy requirement. That test requires a plaintiff to show (1) an "injury in fact," (2) causation, and (3) redressability. *See id.* at 896; *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560–61 (1992).

Beyond these Article III requirements, "a court may still utilize self-imposed 'prudential' limits to decline to hear the case when it seems wise not to do so." Michael A. DelGaudio, Note, *From Ripe to Rotten: An Examination of the Continued Utility of the Ripeness Doctrine in Light of the Modern Standing Doctrine*, 50 GA. L. REV. 625, 630 (2016). Importantly, ripeness is not derived from the case-or-controversy requirement; rather, its "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . and to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs v. Gardner*, 387 U.S. 136, 148–49 (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977).

Whether or not this prudential ripeness doctrine is compatible with the original design of Article III, this Court appropriately distinguishes the prudential ripeness doctrine from *jurisdictional* requirements. *See Lucas*, 505 U.S. at 1012–13. In *Lucas*, South Carolina enacted the Beachfront Management Act, which effectively barred Lucas from constructing any permanent habitable structures on his land. *Id.* at 1006, 1009. During litigation, however, the state amended the Beachfront Management Act to authorize the Council to issue "special permits" to erect prohibited structures in some circumstances. *Id.* at 1010–11. The government then argued before this Court that this amendment made Lucas's claim unripe because Lucas did not apply for a special permit. *Id.*

This Court rejected the state's argument, explaining that the availability of the special permit

procedure "goes only to the prudential 'ripeness' of Lucas's challenge, and . . . we do not think it prudent to apply that prudential requirement here." *Id.* at 1012–13. Namely, it was not prudent to apply ripeness doctrine in that case because "it would not accord with sound process to insist that Lucas pursue the late-created 'special permit' procedure before his takings claim can be considered ripe." *Id.* at 1012.

Similarly, Riviera Beach's ordinance bars Lozman from erecting *any* structures—no exceptions. *See* RIVIERA BEACH, FLA. CODE ORDINANCES § 31-522(b) (expressly prohibiting exceptions to the policy against development). Although the City argues that Lozman should have applied for a variance before filing suit, the law was clear at the time that he filed suit. *See id*. In fact, in *Lucas*, it was a closer call as to whether the claim was ripe—the relevant law (amended amid litigation) allowed special exemptions to the downzoning. 505 U.S. at 1010–11. There's no ambiguity here—exceptions for habitable structures are prohibited. RIVIERA BEACH, FLA. CODE ORDINANCES § 31-522(b). The Court below ignored this implication of *Lucas*, namely, that ripeness doctrine cannot be applied mechanically and should not be invoked where "the nature and extent of permitted development" are clearly outlined by the ordinance. *Lucas*, 505 U.S. at 1011 (citation and internal quotation marks omitted).

Still, more clarity is needed on ripeness doctrine. This Court has stated that "[r]ipeness reflects 'Article III limitations on judicial power,' as well as 'prudential reasons for refusing to exercise jurisdiction.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 (2010) (quoting *Reno v. Catholic Soc. Serv., Inc.*,

509 U.S. 43, 57, n.18 (1993)).[3] Lower courts remain uncertain about whether ripeness is a jurisdictional requirement, a prudential doctrine, or potentially either one depending on the circumstance. For example, the Fifth Circuit expressly requires the courts to consider ripeness as a jurisdictional requirement. *See Urban Devs. LLC v. City of Jackson*, 468 F.3d 281, 292 (5th Cir. 2006) ("Ripeness is a question of law that implicates this court's subject matter jurisdiction . . . ."). The Sixth Circuit also treats ripeness as "determinative of jurisdiction." *Dealer Comput. Servs. v. Dub Herring Ford*, 623 F.3d 348, 351 (6th Cir. 2010) (citation and internal quotation marks omitted). And other circuits recognize ripeness as both prudential and jurisdictional. *See Wyoming Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 48 (D.C. Cir. 1999) (requiring the claim to be both constitutionally and prudentially ripe). The Court now has an opportunity to provide clarity to the courts below about how ripeness doctrine interacts with Article III's Case or Controversy clause.

II. THIS COURT SHOULD CLARIFY THAT THE CODIFICATION OF AN ORDINANCE IS TYPICALLY FINAL FOR RIPENESS PURPOSES.

The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that "[n]o person shall . . . be deprived of life, liberty, and property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This Court has

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[3] Further, this Court clarified that "administrative 'exhaustion of state remedies' is not a prerequisite for a takings claim when the government has reached a conclusive position." *Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474, 480 (2021).

recognized that "not all takings are so direct" because "[g]overnments can infringe private property interests for public use not only through appropriations, but through regulations as well." *Murr v. Wisconsin*, 582 U.S. 383, 408 (2017). Thus, a regulatory taking occurs when a "regulation goes too far." *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

In regulatory takings cases, a claim is generally 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.*, 473 U.S. at 186, *overruled in part by Knick v. Twp. of Scott*, 588 U.S. 180 (2019). But, as this Court explained recently in *Pakdel*, "[t]he finality requirement is relatively modest. All a plaintiff must show is that 'there [is] no question . . . about how the 'regulations at issue apply to the particular land in question.'" *Pakdel*, 594 U.S. at 478 (quoting *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 739 (1997)) (brackets omitted). The final decision rule "ensures that a plaintiff has actually 'been injured by the Government's action' and is not prematurely suing over a hypothetical harm." *Id.* at 479 (quoting *Horne v. Dep't of Agric.*, 569 U.S. 513, 525 (2013)). Finality is satisfied, though, "[o]nce the government is committed to a position" and "potential ambiguities evaporate." *Id.*

This finality and ripeness rule makes sense in some takings disputes, like when the land-use policies at issue include disputes over tentative planning documents, conditional approvals, and reversals in policy. *See Williamson Cnty*, 473 U.S. at 177, 181. However, after this Court's decision in *MacDonald, Sommer & Frates v. Cnty. of Yolo*, 477 U.S. 340 (1986), many

lower courts have specified that the final decision rule requires the claimant to submit at least "one meaningful proposal." *See* Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 FLA. ST. U. J. LAND USE & ENV'T L. 37, 49 (2018). Whether a proposal to develop land is "meaningful" is fraught with uncertainty and can take years to resolve. For instance, the Connecticut Supreme Court held in one case that a developer's claim was unripe even though he submitted four applications because "[the court] cannot say that the agency would have rejected a more modest proposal if one had been offered by the plaintiff." *See Gil v. Inland Wetlands & Watercourses Agency*, 593 A.2d 1368, 1375 (Conn. 1991).

Here, the Eleventh Circuit announced a novel, perplexing rule found nowhere in this Court's precedent: "An ordinance is rarely a 'final decision.'" This Court should clarify that an unambiguous ordinance is typically a "final decision" for ripeness purposes. In *Suitum*, the Court held that an ordinance itself could be a final decision where it was clear how that ordinance applied to the property at issue. 520 U.S. at 739. The Court distinguished *Williamson County*, which "addressed the virtual impossibility of determining what development will be permitted on a particular lot of land when its use is subject to the decision of a regulatory body invested with great discretion, which it has not yet even been asked to exercise." *Id.* Such concerns of unpredictability are inapplicable when an ordinance clearly defines how the property at issue can be developed.

Here, there is no question about how the regulation applies to Lozman's property. The ordinance imposes definite limitations on Lozman's use of his property—

only "fishing or viewing platforms and docks for nonmotorized boats," "mitigation land banks," and "preservation land" are permissible uses. RIVIERA BEACH, FLA. CODE ORDINANCES § 31-522(a). There are no exceptions that apply to Lozman, and the ordinance clarifies that any use "not specifically stated as a use permitted within this section" is "prohibited." *Id.* at § 31-522(c). Nevertheless, the Eleventh Circuit reasoned that ordinances are rarely final decisions and, "[b]ecause Lozman has not received a final, written denial of an application for the development of his land from Riviera Beach, his claim is not ripe for judicial review." Pet. App. 2a.

The Eleventh Circuit was wrong. In common usage and understanding, a codified ordinance is typically final. City leaders certainly view their zoning ordinances as final decisions. They typically impose immediate obligations on property owners and are enforced with severe penalties. Here, for instance, if Lozman violates these ordinances, he faces "a fine not exceeding $500.00" and "imprisonment for a term not exceeding 60 days" where *each day* of a violation constitutes a separate offense. *See* RIVIERA BEACH, FLA. CODE ORDINANCES § 1-11.[4] It would be odd, indeed, for a landowner to reject an ordinance penalty with the Eleventh Circuit's new rule—"an ordinance is rarely a final decision"—and treat an ordinance as akin to an opening offer in a negotiation.

The Eleventh Circuit's rule would also lead to implausible outcomes. Suppose a municipality passed an ordinance segregating neighborhoods by race. Would the Eleventh Circuit hold that no one could challenge that ordinance until they sought—and the

[4] Available at https://tinyurl.com/3b46r6ky.

municipality rejected—one or several "variances" from that facially unconstitutional law? *See Buchanan v. Warley*, 245 U.S. 60 (1917) (rejecting a racial zoning ordinance as a violation of the Fourteenth Amendment). Requiring property owners to pursue futile variance applications in the face of an unambiguous ordinance unfairly burdens plaintiffs in takings cases. This Court should grant the petition to clarify that when an ordinance is clear on its face, the ordinance itself satisfies the finality requirement.

III. MODERN RIPENESS DOCTRINE ENCOURAGES LOCAL GOVERNMENTS TO ENGAGE IN GAMESMANSHIP.

When ripeness doctrine is strictly applied, property owners face steep costs just to get their day in court. Local governments have unbridled discretion to prolong the application process to keep landowners from ripening their claims. As a result, local governments often argue that a claim is unripe as a means to avoid litigation over regulatory takings altogether. Here, the City selectively used ripeness doctrine to bar Lozman from court. Riviera Beach argued that Lozman brought his claim too late when at the district court, only to argue the opposite—that he brought his claims too early—when his claims reached the Eleventh Circuit. Pet. Br. 23.

Lower courts have made it difficult for property owners to know whether a claim is ripe. While some jurisdictions follow the "one meaningful proposal" rule, others require the property owner to apply for a specific use or variance. *See* Michael M. Berger, *The Ripeness Game: Why are We Still Forced to Play?*, 30 TOURO L. REV. 297, 305 (2014) (summarizing the

number of approaches to the finality prong of *Williamson County*).

The result is that local governments use this uncertainty to their advantage to keep property owners from bringing takings claims. A case in the Second Circuit highlights the human cost and profound injustice associated with such gamesmanship. *See Sherman v. Town of Chester*, 752 F.3d 554 (2d. Cir. 2014). In *Sherman*, the plaintiff spent over 10 years and $5.5 million, including "taxes, interest charges, carrying costs, and expenses," just to have his takings claim dismissed at the district court for being unripe. *Id.* at 560.

In fact, the town in *Sherman* stalled the plaintiff's development proposals for so long that the plaintiff died while the case was pending on appeal, and after he was "financially exhausted to the point of facing foreclosure and possible personal bankruptcy." *Id.* The town eventually settled with the plaintiff's widow for $3.75 million after 14 years of litigation. Chris McKenna, *$3.75M settlement reached in 14-year lawsuit over thwarted Chester housing project*, TIMES HERALD-RECORD (Nov. 8, 2022).[5] If this is the price plaintiffs must bear to have their claims heard, then the fundamental right to property is a right in name only.

As scholars have noted, "[n]o other constitutional claimant is made to run a litigation gauntlet like the one established for property owners." Berger, *supra*, at 301. There is no question that it would be unconstitutional to require a plaintiff to petition the government before bringing suit in a First Amendment claim. Yet, property owners are required to do so by applying for a variance before filing a takings claim.

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[5] Available at https://tinyurl.com/ytw2339h.

Because the cost and uncertainty of navigating ripeness doctrine in the courts are high, many landowners will avoid the process of going to court altogether and thus abandon their property rights. It is implausible that landowners seeking to preserve their property rights must navigate such uncertainty in our constitutional system, where property rights are enumerated and fundamental.

CONCLUSION

For the foregoing reasons this Court should grant the petition.

Respectfully submitted,

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