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

PETITIONER'S REPLY BRIEF

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The opposition's core premise—that this case doesn't implicate the ripeness test for facial takings claims—is false. The City conflates a facial *takings claim* with a facial *statutory challenge*. It thus misses the point by noting that Mr. Lozman did not attack its zoning ordinance as lacking any valid applications. Throughout, he has claimed the ordinance took his property by foreclosing any beneficial use, with no exceptions. As everyone recognized below, this is "a facial takings claim," City C.A. Br. 15, which at least five circuits would deem ripe. And the Eleventh Circuit's rule allows gamesmanship by local governments and imposes real costs on landowners and developers. NAHB Br. 5–8, 10–11; Cato/SELF Br. 11–13.

The City's arguments also confirm that the decision below rests on an implicit holding about *Lucas*'s scope. The City tries to muddy the waters by speculating about how Mr. Lozman could use his property, but the bottom line is that he can only build a small dock—not an economically beneficial use. And *Lucas* has long befuddled judges and scholars alike. Clarity is needed.

This case exemplifies the gamesmanship the Eleventh Circuit enables. The City has tried to duck Mr. Lozman's takings claim as too late, then too early, then too late again. Property owners like him are entitled to their day in court, and to rules that state clearly what the Takings Clause allows. Nor should this Court countenance the City's continued harassment of Mr. Lozman—with everything from pretextual arrests to slurs at public meetings, see ECF 138-15—even after the Court's two rebukes. Review should be granted.

I. The Court should review the ripeness question.

A. This is a facial takings claim.

A regulatory-takings claim can be (i) as-applied, attacking a flexible rule's application to the plaintiff's property, or (ii) facial, claiming a regulation's mere enactment caused a taking. This is the latter.

Mr. Lozman's complaint attacked "Ordinance No. 4147," which "downzoned" his land and "stripped [it] of all economically viable uses." App. 47a–49a. Before the ordinance, he made some progress toward securing permits to use his parcel; after, all permits were rejected. *Id.* at 48a–49a. And, far from challenging any separate land-use decision, the complaint alleged that the ordinance forecloses any such discretion. *Id.* at 48a. He thus alleged a facial takings claim.

Everyone understood this below. At the pleading stage, he argued—and the district court agreed—that his claim was ripe because it challenged the ordinance itself, which makes clear that "no development of his property is allowed." ECF 85 at 14–16. The court thus distinguished his claim from one requiring "a determination regarding how the county would apply [a] broad zoning ordinance … to the plaintiff's specific property." *Id.* at 16. At summary judgment, the City agreed. In its view, Mr. Lozman's "categorical taking [claim] under *Lucas* … is a facial takings claim" that is not too early, but "too late." ECF 135 at 11. And on appeal—as the petition noted, but the opposition conspicuously ignores—the City insisted that he raised an untimely "facial takings claim against the City's SP development restrictions." City C.A. Br. 15, 19, 30.

Backpedaling madly, the City now says Mr. Lozman "failed to preserve a facial takings claim" because he did not "allege that the ordinance is unconstitutional

in every instance." Opp. 15–16. This argument conflates distinct meanings of "facial."

Generally, a "facial challenge" is an effort to invalidate a law altogether, which requires showing no valid applications. *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). But in this context, "facial" can also refer to a claim that "the 'mere enactment' of [a law] constitutes a taking." *Hodel* v. *Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295–96 (1981). This Court has repeatedly stated the "straightforward" "test to be applied in considering a facial takings challenge"—not whether the law has valid applications, but whether "it denies *an owner* economically viable use *of his land*." *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1044 n.6 (1992) (emphasis added) (cleaned up); accord *Suitum* v. *Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 736 n.10 (1997). Indeed, that is the "*only question*" in such cases. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 493 (1987). The claim is "facial" not because the law is always invalid, but because, as written, it immediately forecloses any beneficial uses of *the plaintiff's* property. *Id.* at 495; see *Carman* v. *Yellen*, 112 F.4th 386, 402 (6th Cir. 2024) (for ripeness purposes, distinguishing "[f]acial challenges" generally from claims that "mere passage of a statute or regulation constitutes a taking").

Mr. Lozman asserted a facial takings claim, not a *Salerno*-type "facial challenge." And that's all he was saying in the summary-judgment brief the City touts (at 9, 14): His claim is not "a 'facial' challenge to Ordinance 4147" because he alleges simply "that *his property* had value" that the ordinance "wiped out." ECF 143 at 3.

The City's preservation argument (at 16) is thus mistaken. Mr. Lozman argued that his claim is ripe for the same reason it is facial—the ordinance is "crystal-

clear," admitting no ambiguity or exceptions. Ltr. Br. Reply, 2024 WL 4513042, at *1. True, he said finality is "satisfied," *id.* at *3, not that it doesn't apply. But those are just two ways of saying the claim is ripe, as both courts below recognized. ECF 85 at 15 (an "ordinance can itself be a final decision"); App. 9a (same).

B. In other circuits, this claim would be ripe.

1. The Eleventh Circuit also understood Mr. Lozman's claim. But it rejected his ripeness argument, while other circuits would have accepted it.

As the court acknowledged, Mr. Lozman challenged the "comprehensive plan and ordinance that restricted development." App. 1a, 5a, 9a. Since a "comprehensive plan alone cannot constitute a final decision" for ripeness purposes, the court correctly focused on the ordinance. *Id.* at 8a. But, it said, an "ordinance is rarely a 'final decision.'" *Id.* at 9a. Under circuit precedent, "no final decision exists until an aggrieved landowner has applied for at least one variance to a contested zoning ordinance." *Id.* (cleaned up). The sole exception applies when an ordinance "target[s] *precisely* and *only* the developer's property," which isn't true here. *Id.* (cleaned up).

The court thus recognized that Mr. Lozman attacked the ordinance itself, whose enactment allegedly destroyed his property value. Yet it held that ripening a regulatory-takings claim *always* requires at least one (costly, time-consuming) development application, unless the City is foolish enough to pass a law that says "No development on Mr. Lozman's parcel only." And lest any confusion linger, the court just applied the decision below to deem a similar takings claim unripe on the same grounds. It so held even though it recognized that the plaintiff's parallel due-process claim must be

"a facial challenge" *because* "he never applied for a permit or variance." *Corey* v. *Rockdale Cnty.*, No. 23-13097, 2025 WL 1325325, at *4–5 & n.3 (11th Cir. May 7, 2025) (per curiam). In the Eleventh Circuit, even such a facial takings claim is unripe absent "at least one" development application. *Id.* at *4.

2. In at least five other circuits, this claim would be ripe. Pet. 10–12. That Mr. Lozman did not claim the ordinance "was unconstitutional in all applications" (Opp. 17–18) does not avoid the conflict. Again, the other circuits are (mostly) not talking about *Salerno*-type "facial challenges"; they are using "the Supreme Court's definition of a facial taking": "a claim that the mere enactment of a statute constitutes a taking." *E.g.*, *Asociacion de Suscripcion Conjunta* v. *Juarbe-Jimenez*, 659 F.3d 42, 48 (1st Cir. 2011) (citation omitted). Indeed, these courts have rejected similar attempts to conflate "facial challenges" with facial takings claims. See *id.* at 49 (rejecting reliance on *Citizens United* for this reason). Likewise, it does not matter that the Eleventh Circuit has applied *Salerno*'s "facial challenge" formulation to *non-takings* claims. Opp. 19–20.

Because Mr. Lozman "allege[d] that the mere enactment of the Ordinance has denied [him] all economically viable use of [his] property," the First, Third, Fifth, and Ninth Circuits would hold that he leveled a ripe "facial attack." *Cnty. Concrete Corp.* v. *Twp. of Roxbury*, 442 F.3d 159, 165 (3d Cir. 2006); Pet. 10–11. These courts treat such claims as ripe *without asking* whether the plaintiff claimed the law lacks any valid applications or whether the complaint "use[d] the word

'facial.'" *Contra* Opp. 17; *e.g.*, *Asociacion*, 659 F.3d at 48 (reciting relevant allegations).[1]

Only the Federal Circuit agrees with the City that a "facial" takings claim must "show that the provision is unconstitutional in all its applications." *Brubaker Amusement Co.* v. *United States*, 304 F.3d 1349, 1356 (Fed. Cir. 2002). But even there, an "as-applied" takings claim is ripe when the regulation takes effect, *unless* the government "has discretion to decide" its application. *Id.* at 1357. So if a "regulation is not discretionary"—as Mr. Lozman alleges—the claim is ripe "once the rule is in effect." *Id.* at 1358; see *Anaheim Gardens* v. *United States*, 444 F.3d 1309, 1316 (Fed. Cir. 2006) (no final decision needed "if the agency lacks any discretion"); Pet. 11–12, 17–18.

The City also questions whether the Fifth and Ninth Circuits really treat facial takings claims as immediately ripe. Opp. 17. They do.

In the Fifth Circuit's view, this Court has already "held *Williamson County* to be inapplicable to facial challenges." *Opulent Life Church* v. *City of Holly Springs*, 697 F.3d 279, 287 (5th Cir. 2012). That being so, the court of appeals could hardly hold otherwise. And while *Opulent Life* was an RLUIPA case that drew on takings doctrine, the court has applied the same rule to takings claims. See *Money* v. *City of San Marcos*, No. 24-50187, 2025 WL 429980, at *3 (5th Cir. Feb. 7, 2025) ("[Plaintiffs] allege that the Ordinance constitutes a taking, both facially and as applied," and "*Williamson County*'s finality test does not apply to facial challenges.").

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[1] That *Asociacion* "did not involve land use" (Opp. 17) is irrelevant. It addressed the ripeness of "a facial taking" claim based on the denial of "any beneficial use of" property. 659 F.3d at 48.

In the Ninth Circuit, it has been "well-settled" for decades that "the 'finality' requirement[] is not germane to facial taking claims," *i.e.*, claims that "mere enactment of a statute effects an unconstitutional taking." *Sinclair Oil Corp.* v. *Cnty. of Santa Barbara*, 96 F.3d 401, 406 (9th Cir. 1996); accord *Richardson* v. *City & Cnty. of Honolulu*, 124 F.3d 1150, 1165 (9th Cir. 1997). That *Lingle* partly abrogated *Sinclair*'s view of the facial-takings *merits* test (Opp. 19) is irrelevant to its ripeness analysis, which the Ninth Circuit continues to apply. See *Guggenheim* v. *City of Goleta*, 638 F.3d 1111, 1117 (9th Cir. 2010) (en banc); *Equity Lifestyle Props., Inc.* v. *Cnty. of San Luis Obispo*, 548 F.3d 1184, 1190 n.12, 1194 n.17–19 (9th Cir. 2008). Nor can the City dismiss all this as dicta. *Guggenheim* squarely held: The rule that "a regulatory takings claim is not ripe until … a final decision … has no application to this facial challenge." 638 F.3d at 1117. What the court "assumed" (Opp. 19) was the separate, now-defunct "exhaustion" requirement. *Id.* at 1118.

"There is no question" in other circuits that "the finality rule[] does not apply to a claim that the mere enactment of a regulation constitutes a taking." *Knick* v. *Twp. of Scott*, 862 F.3d 310, 323 (3d Cir. 2017) (cleaned up), *vacated on other grounds*, 588 U.S. 180 (2019). Not so in the Eleventh Circuit. And the City cites no case from any other circuit holding (i) that a challenge to a zoning ordinance is unripe unless the law specifically targets the plaintiff's property, App. 9a, or (ii) that a "mere enactment" claim is unripe unless it alleges the law "*always* operates unconstitutionally," Opp. 20. The circuits are split.

C. The decision below is wrong.

On the question presented, the City says only this: The Court has not *already* held that facial takings claims are ripe upon enactment. Opp. 23. True—but

it should. Requiring a development application to ripen a facial claim clashes with the doctrine's prudential rationale; contradicts precedent; and imposes pointless and expensive hurdles before suit, akin to an exhaustion requirement. Pet. 14–17. At bottom, the majority rule "makes sense": "if the mere enactment of the ordinance constitutes a taking, there [is] no need to wait for any [further] 'final decision.'" *Knick*, 862 F.3d at 323; Cato/SELF Br. 4–7.[2]

The City instead argues that Mr. Lozman cannot show that "all of [his] economically beneficial uses have been taken" because there is too much regulatory "uncertainty." Opp. 24–25. But again, in response to a facial claim, this is a *merits* argument. Pet. 17. The City is saying Mr. Lozman cannot have a facial claim because the law is not clear enough. But Mr. Lozman is "the master of the complaint," *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 398–99 (1987), and he chose to sue without applying for a variance because he thinks the law *is* clear enough. Plaintiffs will make this choice advisedly. Because facial takings claims are tough to win, *Keystone*, 480 U.S. at 495, this approach is worthwhile only if it won't just produce a quick merits loss. So, generally, landowners will facially challenge only non-discretionary schemes. Pet. 15. Regardless, Mr. Lozman made his choice, and the City cannot unripen his claim by treating it as something else. *E.g.*, *Ciba-Geigy Corp.* v. *EPA*, 801 F.2d 430, 439 (D.C. Cir. 1986) (courts "assume the challenging party's view of the merits in determining ripeness").

In all events, the City is wrong. Across two pages of argument—with zero citations—it identifies nothing he could actually do with his land. It emphasizes that

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[2] The problem is not that the court below grouped a prudential rule under Article III (Opp. 22–23), but how it applied the rule.

he sought no development permits. Opp. 24–25. But permits *to do what?* The ordinance is clear, categorical, and contains these exceptions: "None." App. 48a. And when he sought approval for basic things like a fence, the City said no. *Id.* So he cannot even exclude others from his land—"one of the most essential" property rights. *Nollan* v. *Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987). Locals thus use his land as a public beach, dog park, and parking lot. ECF 134-3 at 133, 139. If that's not a taking, what is?

The City emphasizes the "vested rights" clause (Opp. 21–22, 24), but it does not claim Mr. Lozman currently has any such rights. Nor does it dispute that a plaintiff need not resort to state court to ripen a takings claim. Pet. 19. Anyway, Mr. Lozman's parcel falls below the clause's 20-acre density threshold. Pet. 7. The City hints (at 24) it could "harmonize" the law to say otherwise, but the 20-acre minimum applies *specifically* to this clause. App. 21a. Thus, even if Mr. Lozman had a vested right to *fill* his submerged land, cf. *Askew* v. *Taylor*, 299 So. 2d 72, 74 (Fla. App. 1974), he couldn't build on it. So the savings clause is doubly irrelevant.[3]

The City also says the zoning ordinance doesn't bar floating homes—and while a separate ordinance does so, it "has a savings clause of its own." Opp. 24–25. But the City does not claim this mystery clause could save Mr. Lozman. Indeed, that would be surprising, since this ordinance was a response to *Lozman I*. ECF 144-8 at 1–2. And even if floating homes were allowed, the zoning ordinance plainly bars "single-family residential" development—Mr. Lozman's intended use, and the parcel's highest and best use. App. 46a.

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[3] That the savings clause doesn't apply is distinct from the point that *rezoning* requires legislative action. Pet. 18; *contra* Opp. 25.

So what *can* Mr. Lozman do? He can seek a permit for a small "dock or platform." Opp. 25. Thus, even if ripening a facial claim required some threshold showing of clarity, that requirement is satisfied. Pet. 17–18.

* * *

The City cannot dispute the ripeness question's importance. Opp. 32. Letting local governments play these games imperils property interests and reduces the Takings Clause to a second-class right. NAHB Br. 5–8, 10–11; Cato/SELF Br. 11–13.

II. The Court should review the *Lucas* question.

The City says the Eleventh Circuit did not "address *Lucas*'s scope." Opp. 26. But it nowhere disputes that the ripeness ruling depends on exactly that. The possible dock-or-platform uses are relevant only if their availability could avoid a *Lucas* taking. The City's arguments confirm as much. It repeatedly invokes the court's ripeness reasoning to argue the *Lucas* merits. Opp. 28, 31.

To be clear: Building a small dock or platform is the only possible use. Whether Mr. Lozman can build one has no bearing on whether the ordinance takes all economically beneficial uses *unless* that option constitutes such a use—which is the *Lucas* question. Pet. 19, 22.

The City also says "such a dock" might "facilitate a floating home." Opp. 32. But again, the City separately barred floating homes in response to *Lozman I*. Regardless, permissible docks "shall not extend outward past the mean low water line," making mooring a floating home impossible. App. 47a. And while the City claims Mr. Lozman's parcel might be tiny (Opp. 1,

31), the district court, the County Appraiser, and the City's own pleadings all say otherwise. See App. 15a; County Appraiser, https://shorturl.at/IiC08; ECF 91 ¶ 6.

Beyond that, the City just insists *Lucas* is clear. No one agrees. For years, judges and scholars have emphasized "considerable confusion" resulting from the "distinction between value and use" under *Lucas* (Pet. 21)—a distinction the City doesn't see. Opp. 27–28. Clarity is overdue. SPOSFI Br. 7–11; Buckeye Br. 8–11.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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