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 NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* The National Association of Home Builders of the United States ("NAHB") states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents or subsidiaries, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Home Builders of the United States ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals are providing and expanding opportunities for all people to have safe, decent, and affordable housing, whether they choose to buy a home or rent. Founded in 1942, NAHB is a federation of more than 700 state and local associations. NAHB's approximately 140,000 members consists of home builders, suppliers, remodelers and other professionals supporting the home building industry. NAHB's membership builds 80% of all new homes constructed in the United States, both single-family and multifamily.

NAHB is a vigilant advocate in the nation's courts. As property owners, NAHB's members are concerned with all issues involving the Takings Clause. Thus, NAHB frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Court of Appeals for the Eleventh Circuit declared that the Petitioner must seek approvals from the City to ripen his facial takings case. When an ordinance clearly does not allow a landowner to use his property, such futile applications present real costs to landowners. Moreover, the lower court's ruling creates a new formula with respect to the futility doctrine and will create complications with respect to statutes of limitations. This Court should grant certiorari to keep the lower courts from creating inflexible takings rules that that will cause practical and legal problems for landowners.

ARGUMENT

I. AS APPLIED BELOW, THE FINAL DECISION RULE IS AN UNNECSSARY AND COSTLY BARRIER THAT ONLY WORSENS THE NATIONWIDE HOUSING CRISIS.

A. This Court Has Long Recognized That a Futile Application is Not Required.

In land use cases, one of the most significant and unjustified barriers to judicial review is the requirement that property owners submit a permit or variance application—even when it is doomed to fail—before they can challenge a government action in court. This procedural requirement, often called the "final decision" rule, is intended to ensure that courts only hear cases where local authorities have rendered a definitive ruling. *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186–87 (1985). However, when the law itself explicitly bars the proposed use, requiring landowners to submit an application is not only unnecessary but also a blatant exercise in futility. In *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-621 (2001), the Supreme Court held that further permit applications are not required when it is clear that the agency lacks discretion to approve the proposed use. Requiring applications in such circumstances does nothing to clarify legal issues and instead serves as an artificial barrier to judicial redress.

The U.S. Supreme Court has repeatedly recognized that property owners should not be required to engage in futile administrative procedures when the

outcome is predetermined. In *Palazzolo*, specifically, the Court reasoned that "once it becomes clear that the agency lacks discretion to permit any development, . . . further permit applications were not necessary." *Id.* Similarly, in *Lucas*, the Court held that Mr. Lucas's failure to submit a development plan did not bar the Court from addressing the merits of his takings claim. Because "such a submission would have been pointless." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012 n.3 (1992). Finally, in *Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474 (2021), the Court reaffirmed that excessive procedural hurdles should not prevent landowners from asserting their constitutional rights in court. The Court held that the "finality requirement" in regulatory takings cases must be applied flexibly and that property owners should not be forced to exhaust meaningless administrative processes before accessing federal courts. *Id.* at 480; *see also MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 359 (1986) (White, J., dissenting) ("Nothing in [the Court's] cases, . . . suggests that the decisionmaker's definitive position may be determined only from explicit denials of property-owner applications for development. . . . Although a landowner must pursue reasonably available avenues that might allow relief, it need not, . . . take patently fruitless measures.").

Federal appellate courts have also held that repetitive and futile applications are not necessary to establish ripeness. *See Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342 (2d Cir. 2005); *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013).

Despite these rulings, the Eleventh Circuit held that Lozman could not claim "futility" unless he first applied for an exception or permit, even when Ordinance 4147 categorically prohibited the proposed use. This contradicts Supreme Court precedent and unfairly limits property owners' ability to challenge unconstitutional actions.

B. Futile Applications Have Real Costs.

Such burdens are particularly indefensible at a time when the United States faces a worsening housing crisis, driven in part by local land-use regulations that increase the cost of construction, restrict housing supply, and delay (or prevent entirely) development timelines. It is widely understood that excessive procedural obstacles are a major driver of housing unaffordability. Delays and red tape—particularly those serving no legitimate government purpose—exacerbate these structural problems.

As the Court emphasized in *Pakdel*, courts should not require compliance with endless layers of review when the agency has made a conclusive decision. The constitutional rights of property owners should not depend on compliance with administrative steps that are arbitrary, unnecessary, or counterproductive—especially when those steps directly worsen the housing crisis.

Requiring an applicant to file a permit request that has no realistic chance of success imposes unnecessary costs that drive up the price of housing. According to Table 2 of *Government Regulation in the Price of a New Home: 2021*, published by the

National Association of Home Builders (NAHB), the average cost of compliance with zoning and subdivision requirements—including permits, impact studies, and procedural delays—is $38,110 per home. These costs are ultimately passed on to renters and homebuyers. In areas with high demand and low supply, every procedural hurdle further constrains affordability and access.

Moreover, the Eleventh Circuit objects to Lozman's failure to seek a federal permit from the Army Corps of Engineers. *Lozman v. City of Riviera Beach, Fla.*, 119 F.4th 913, 915 (11th Cir. 2024). Lozman would have needed to seek an "individual permit" to add fill to his tidal wetlands. *See Reissuance and Modification of Nationwide Permits*, 86 Fed. Reg. 2744, 2761 (Jan. 13, 2021) (explaining that the general permit for Residential Construction has "a 1⁄2-acre limit for losses of non-tidal waters of the United States, including non-tidal wetlands".) (emphasis added). Obtaining an individual permit is not a small undertaking. In *Rapanos v. United States,* 547 U.S. 715, 721 (2006) the Court cited to a 2002 study that found "[t]he average applicant for an individual permit spends 788 days and $271,596 in completing the process, . . . not counting costs of mitigation or design changes." In today's dollars, that is equivalent to $479,056. *See generally*, United States Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm.

It is irrational to require landowners to spend substantial amounts of money seeking permits when the underlying ordinance clearly does not allow the desired use.

C. Requiring Futile Applications Leads to Procedural Gamesmanship and Arbitrary Governance.

Municipalities have exploited the permitting requirement as a strategic tool to deter legal challenges. By demanding that landowners apply for a permit, variance, or rezoning—even when regulations expressly prohibit the use—local governments construct procedural mazes to exhaust applicants into submission. This tactic delays judicial review indefinitely and insulates unlawful government decisions from scrutiny.

Local officials may also use these procedures inconsistently, granting relief to favored applicants while denying it to others. In *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985), the Supreme Court held that government regulations must be applied equally and rationally. Yet this kind of procedural manipulation invites favoritism, uncertainty, and a chilling effect on investment—particularly in communities most in need of development.

Moreover, requiring futile applications often leads to economic hardship. Landowners may be unable to sell or develop their land, investors may withdraw, and lenders may deny financing due to regulatory ambiguity. As *County of Sacramento v. Lewis*, 523

U.S. 833, 845–46 (1998), makes clear, government action that is arbitrary, oppressive, or divorced from legitimate purpose violates substantive due process. The burdens of procedural delay and denial are felt not just by individual property owners but by entire communities facing housing underproduction and rising costs.

In some cases, municipalities stall projects without formally rejecting them. They may repeatedly request additional documents, impose new environmental studies, or simply refuse to act. This creates a *de facto* ban on development without offering a clear basis for judicial review. As *Lucas*, 505 U.S. at 1015 (1992), and *Knick v. Twp. of Scott, Pa.*, 588 U.S. 180 (2019), establish, such tactics are incompatible with the Takings Clause of the Fifth Amendment and undermine the property rights guaranteed by the Constitution.

D. Lozman Did Not Need to Seek Approvals to Determine it Was Futile to Submit a Permit or Seek a Variance.

Below, the District Court held that Lozman's case was ripe for review. It reviewed Ordinance 4147 and considered the City's claim that the "Savings Clause" in the ordinance required Lozman to present evidence of a "judicially determined vested right" before its decision was final. The District Court rejected that argument. It explained that in this case, the Ordinance itself was a final decision because there was no ambiguity as to how it would

be applied. *Lozman v. City of Riviera Beach, Fla.*, No. 22-80118-CV, 2022 WL 19919679, at *8 (S.D. Fla. Sept. 29, 2022).

The Eleventh Circuit misread the City's variance ordinance and improperly vacated the District Court's decision. Ordinance 4147 only allows for "fishing and viewing platforms" and docks for sail or row boats.[2] Pet. App. 3a, 47a. And it allows for no exceptions. Pet. App. 48a. Additionally, the City's code that controls variances forbids a variance that "permits any use that is expressly or by implication prohibited by terms of the land development ordinance in the subject zoning district." Riviera Beach, Fla. Code 31-42(d)(1). There can be no question that a home or floating home is neither a "fishing or viewing platform" nor a dock for non-motorized boats. *See Lozman*, No. 22-80118-CV, 2022 WL 19919679 at *7-8 (explaining that the language of the Ordinance "seem[s] to communicate rather clearly to Lozman that no development of his property is allowed."). Thus, building a home or floating home "is expressly or by implication prohibited" by Ordinance 4147. Riviera Beach, Fla. Code 31-42(d)(1). Therefore, it would have been fruitless for Lozman to seek a variance to build a home or floating home on his property.

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[2] Note that the Ordinance uses the term "boat." Floating homes which are not powered are not vessels. *Lozman v. City of Riviera Beach, Fla.,* 568 U.S. 115, 121-22 (2013). "Boats" are small vessels. *Boat*, Merriam-Webster's Collegiate Dictionary (10th ed. 1994). Thus, non-powered floating homes are not boats.

The Court should review the Eleventh Circuit's analysis to ensure that the lower courts do not create indiscriminate formulations concerning when submitting plans for approval would be futile.

II. THE DECISION BELOW CREATES PROBLEMS FOR LANDOWNERS WITH RESPECT TO STATUTES OF LIMITATIONS.

The Eleventh Circuit's opinion will create friction with respect to statutes of limitations. A facial takings claim's limitation period accrues when the ordinance at issue is enacted. A*sociacion de Suscripcion Conjunta del Seguro de Responsabilidad Obligatorio v. Juarbe-Jimenez*, 659 F.3d 42, 50 (1st Cir. 2011); *Clayland Farm Enterps., LLC v. Talbot Cnty., Md.*, 672 F. App'x 240, 244 (4th Cir. 2016) ("When an ordinance on its face is alleged to have effected a taking, . . . the claim accrues when the ordinance interferes in a clear, concrete fashion with the property's primary use."); *Colony Cove Props., LLC v. City Of Carson*, 640 F.3d 948, 956 (9th Cir. 2011) (explaining that "the statute of limitations for facial challenges to an ordinance runs from the time of adoption"); *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 521 (6th Cir. 1997) (recognizing that a facial takings claim accrues for statute of limitations purposes when "the resolution was enacted".); *see* Patricia E. Salkin, American Law of Zoning § 16:18 (5th ed.) (explaining that "facial challenges accrue upon the enactment of the challenged law or regulation".). The Eleventh Circuit, in an analogous case, addressed a facial due

process challenge to an ordinance that required certain landowners to convey a portion of their property as a condition for receiving a development permit. *Hillcrest Prop., LLC v. Pasco Cnty.*, 754 F.3d 1279, 1281 (11th Cir. 2014). In that case, the court held that the landowner's claim accrued upon the passage of the ordinance because the land became encumbered at that time, and it should have been apparent to the owner. *Id.* at 1283.

Under the Eleventh Circuit's decision below, however, a facial challenge is not ripe until the property owner has submitted a development plan that has been disapproved or sought a variance. Thus, the Eleventh Circuit has set up a paradigm whereby claims may accrue for statute of limitations purposes but are not ripe. Obviously, it takes time (and resources) for landowners to navigate the development permit and variance process. The Eleventh Circuit's paradigm will inevitably lead to instances where the statute of limitations has run out (because it begins when the ordinance is enacted), yet the property owners' case is not ripe (because she is still waiting for the locality to finish the approval/denial process).

The Court should review the lower court's decision to address the tension that it has created between when statute of limitations accrue and ripeness.

CONCLUSION

The Eleventh Circuit's opinion requires landowners to apply for unnecessary and costly approvals before allowing them to assert facial takings claims. Moreover, its analysis creates conflicts with statute of limitations precedent. For the reasons asserted above, NAHB respectfully requests the Court to grant certiorari in this matter.

Dated: March 26, 2025

Respectfully submitted,

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