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 IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented are:

1. Was the court of appeals correct in holding that Petitioner's claim for a taking under *Lucas* did not become ripe upon the City's enactment of an ordinance that conformed its zoning regulations with its existing Comprehensive Plan, where the challenged ordinance was not limited to Petitioner's property, contained exceptions and permissible uses, Petitioner never sought a permit to determine how the ordinance applied to Petitioner's property, and Petitioner alleged that the ordinance was only one among other City actions that combined to cause the single taking?

2. Does an ordinance that permits private residential fishing platforms and docks, mitigation land banks, preservation lands on submerged land, does not impair or preclude judicially determined rights to fill and develop submerged land, and does not on its face preclude a floating home on submerged land, constitute a regulatory taking under *Lucas* irrespective of an increase in the property's value after the ordinance's enactment?

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STATEMENT OF THE CASE

I. Facts of the Case.

Respondent, City of Riviera Beach, Florida ("the City"), is a municipality in Palm Beach County, Florida. The City includes Singer Island, an area that lies between the Lake Worth Lagoon and the Atlantic Ocean. The Lake Worth Lagoon is an estuarine environment, home to endangered seagrasses, sea turtles and their habitat, manatees, and benthic communities. (App. 28a).

Petitioner, Fane Lozman ("Petitioner"), owns property at 5101 North Ocean Drive ("the Property"), consisting of approximately 0.2 acres of upland property and an indeterminate portion of adjacent submerged land in the Lake Worth Lagoon. Petitioner's parcel, both the upland and submerged land, lies wholly within the City. (App. 2a).

The precise boundaries of the entire parcel are unclear because of historic use of "commonly used corners" and reference to an unidentified "channel." The City's surveyor testified the submerged property is either 5.70 or .81 acres. (D. Ct. Doc. 134-19, at 2 (Dec. 19, 2022)). Petitioner claims the entire property is approximately 7.76 acres. (App. 44a).

The submerged property contains "high-quality and productive marine habitat" for sea turtles and manatees. (D. Ct. Doc. 134-5, at 3 (Dec. 19, 2022)).

Petitioner purchased the Property in 2014 from the previous owner who offered him the Property to dock his floating home after hearing about Petitioner's prior litigation with the City. Petitioner paid $24,000.00 for the Property. Petitioner claimed that he expected that the Property could be residentially developed, but he

intended to place a floating home on the Property when he bought it. In 2016, Petitioner brought a floating home on the property, but it was vandalized. Petitioner brought another floating home, which he secured to the lagoon bottom with concrete blocks. (App. 15a). Petitioner never sought a permit from the City, the Florida Department of Environmental Protection (FDEP), or the U.S. Army Corps of Engineers (USACOE) for the concrete blocks and floating home. (App. 5a).

Under Florida law, the City must adopt and maintain a Comprehensive Plan ("the Plan") governing future land uses. Florida law requires the City to adopt land development regulations ("LDR") to implement the Plan. The Plan prevails over the LDRs in cases of inconsistency. (App. 18a).

The City adopted the Plan in 1989—25 years before Petitioner purchased the Property. (D. Ct. Doc. 134-7 (Dec. 19, 2022)). The Florida Department of Community Affairs ("DCA") determined the Plan was "not in compliance" with state law, based in part on the allowance for residential development in the Lake Worth Lagoon, where the Property is located. DCA and the City executed a settlement agreement calling for a Special Preservation designation ("SP FLU"), defined as applying to "mangroves, wetlands, and special estuarine bottom lands." The SP FLU acknowledged existing state and federal regulation of development on submerged lands and largely prohibited construction within the area. However, the SP FLU provided, "[t]his policy objective shall not be construed, nor implemented to impair or preclude judicially determined vested rights to develop or alter submerged lands." The SP FLU became effective December 19, 1991. (D. Ct. Doc. 134-8, at 21 (Dec. 19, 2022)). The SP

FLU was amended to authorize "private residential fishing or viewing platforms and docks for nonmotorized boats." (App. 20a).

In the 1990s, two landowners within the SP FLU—Shillingburg and Taylor—challenged the SP FLU. Shillingburg was denied a permit for a dock on the property. *City of Riviera Beach* v. *Shillingburg*, 659 So. 2d 1174, 1177 (Fla. Dist. Ct. App. 1995). Taylor never applied to build on the property. *Id* at 1178. In *Shillingburg*, the trial court concluded neither claim was ripe but stayed proceedings to allow consideration of a Plan amendment. *Id.* The Plan was amended to allow a viewing dock. Nevertheless, the trial court held the Plan constituted a taking, accepting Shillingburg's claim that a dock was not an economically viable use. *Id.*, at 1179. The trial court then held it would be futile for Taylor to apply for a permit. *Id.*

The Florida Fourth District Court of Appeal reversed, first observing that it was unclear whether the takings claims were facial or as-applied claims. The court denied a facial inverse condemnation claim, holding that a facial claim could not be maintained because the Plan allowed a dock and required consideration of other uses. *Shillingburg*, 659 So.2d at 1179. Accordingly, the Florida appellate court concluded that the Plan had "built-in flexibility," and held the as-applied challenges were not ripe, citing *Williamson County Regional Planning Commission* v. *Hamilton Bank,* 473 U.S. 172 (1985). *Shillingburg*, 659 So.2d at 1180. In doing so, the court rejected the landowners' argument that under *Lucas* v. *South Carolina Coastal Council,* 505 U.S. 1003 (1992), ripeness did not apply to the pending claims.

In 1993, the City sought to amend the SP FLU to allow residential uses. Again, DCA found the Plan "not

in compliance," concluding that in the absence of a judicial determination of a vested right to develop, no development of submerged lands should be allowed. (App. 20a).

Taylor then brought an as-applied inverse condemnation claim against the City after her permit for residential development was denied. *Taylor* v. *City of Riviera Beach*, 801 So. 2d 259 (Fla. Dist. Ct. App. 2001). The City claimed Taylor should first apply for a plan amendment, citing *Shillingburg*. The Florida Fourth District Court of Appeal disagreed, given the DCA's prohibition of a plan amendment allowing residential development in the absence of judicially determined vested rights. *Id.*, at 263. Florida later abolished the DCA and overhauled the plan amendment process.

The City amended the Plan on October 6, 2010, clarifying that "private residential fishing or viewing platforms and docks for non-motorized boats may be permitted subject to the following regulations":

1. Platforms and docks shall not exceed outward past the mean low water line.
2. Construction must be fully achievable from an on-shore location.
3. Permits must be obtained from DEP and/or all other applicable regulatory agencies.

(D. Ct. Doc. 134-12, at 36 (Dec. 19, 2022)).

The 2010 SP FLU policy again provided that "[t]his policy objective shall not be construed nor implemented to impair or preclude judicially determined vested rights to develop or alter submerged lands." The City updated the Plan in December 2021 to include the following language as part of the SP FLU:

"For properties found to have judicially determined vested rights to develop or alter submerged lands, a density of one unit per 20 acres will be assigned to the property." (D. Ct. Doc. 134-13, at 19 (Dec. 19, 2022)).

With this change, properties with a vested right to fill submerged lands may develop at one residential unit per 20 acres without a plan amendment or FLU redesignation. The City has never interpreted the policy's application to properties smaller than twenty acres, or to properties that have judicially determined vested rights for residential development at a higher density.

Under both Florida law and City process, all property owners may apply for a FLU redesignation. Accordingly, a property owner with vested rights may seek to redesignate upland resulting from the filling of submerged land, since the SP FLU applies to "mangroves, wetlands, and special estuarine bottom lands." A property owner may also apply to amend the SP FLU default density or invoke the vested rights exemption by showing that the density would impair or preclude vested rights. (App. 21a).

Separate from the City's regulation, FDEP and USACOE both instituted enforcement actions against Petitioner regarding the unpermitted floating home and concrete blocks. FDEP obtained a temporary injunction and final consent judgment against Petitioner requiring him to remove the concrete blocks and cease the use without a permit. (App. 28a). The USACOE filed its Notice of Violation on January 12, 2021, under the Rivers and Harbors Appropriation Act of 1899, alleging Petitioner created an obstruction to the navigable capacity of a water of the United States without authorization. The district court abated the USACOE case while Petitioner applied for a permit. The USACOE

never issued the permit, because Petitioner never provided requested information. (App. 16a). The district court ruled in the USCACOE's favor, which is on appeal. (App. 4a).

Petitioner sued FDEP and the Florida Board of Trustees for the Internal Improvement Trust Fund ("TIITF") for declaratory judgment in Florida circuit court, alleging that his deed allows him to bulkhead and fill without FDEP permits. TIITF and FDEP moved to dismiss. The court granted the motion, ordering Petitioner to pursue administrative remedies, appeal, or file an amended complaint. Petitioner instead agreed to a stipulation of dismissal. (App. 17a).

The Property bore an SP FLU designation since the SP FLU was adopted in 1991. However, the Property and others in the same area bore an inconsistent, residential zoning designation, RS-5. (App. 21a).

To conform the LDR to the Plan, the City adopted Ordinance 4147 on July 8, 2020, creating an SP zoning district for all property within the SP FLU area. The SP zoning district is virtually identical to the SP FLU, including the same "savings clause" for judicially determined vested right to fill and development submerged lands, and allowing the same "private residential fishing or viewing platforms and docks for non-motorized boats" as well as mitigation banks and preservation land. (D. Ct. Doc. 134-15, at 4 (Dec. 19, 2022)).

On September 15, 2021, the City adopted Ordinance 4178, to address floating structures and live-aboard vessels in light of this Court's prior ruling in *Lozman* v. *City of Riviera Beach*, 568 U.S. 115 (2013). Ordinance 4178 generally prohibits the mooring of floating structures within the City's waters, but contains an exception for private mooring expressly

permitted by state, federal, and local law and done with permits obtained from applicable state and federal agencies. (D. Ct. Doc. 144-8 (Dec. 28, 2022)).

Petitioner has never asked the City whether he may moor a floating structure on his property, and has not applied to the City to fill the property, rezone it, or change the property's FLU designation. He never applied to establish a residential use, or to build a dock or observation platform, before or after Ordinances 4147 and 4178.

Petitioner did apply for a fence permit from the City, which was denied after he failed to provide required information. Petitioner also applied for and received a temporary electrical permit, which was later terminated when he failed to identify a principal use for the Property. (App. 5a).

II. Procedural Posture.

A. The District Court

On January 24, 2022, Petitioner filed a complaint against the City in the district court, alleging that the City took a variety of actions against him which stripped his property of all economically beneficial uses. Petitioner alleged that the City denied his fence permit, revoked his temporary electrical permit, and obstructed his efforts to obtain a mailing address and homestead exemption. Petitioner also alleged that the City "down-zoned" his property by adopting Ordinance 4147. He claimed he had a right before the ordinance was adopted under his deed to bulkhead and fill the submerged land and develop it for residential purposes at a density of one unit per acre, based on the prior zoning. Petitioner did not reference Ordinance 4178 in the Complaint. (App. 43–50a).

The City moved to dismiss Petitioner's complaint, explaining that his claim was not ripe because he never applied to develop his property before or after Ordinance 4147. The City also explained that Ordinance 4147 did not change Petitioner's development potential because the Plan had always precluded residential development without judicially determined vested rights. The City further sought dismissal for failure to join TIITF as an indispensable party, as Petitioner claimed the TIITF deed gave him the right to bulkhead and fill the submerged property without further permission from the state. (D. Ct. Doc. 12, at 1-19 (Feb. 22, 2022)).

The district court denied the motion, calling Petitioner's claim a "total taking" claim under *Lucas* v. *South Carolina Coastal Council,* 505 U.S. 1003 (1992). The district court concluded the matter was ripe because Petitioner sufficiently alleged Ordinance 4147 was the "targeted type" that did not first require him to seek a variance. The court also initially ruled TIITF was not an indispensable party. (D. Ct. Doc. 85 (Sept. 29, 2022)).

On December 19, 2022, the City filed a motion for summary judgment. (D. Ct. Doc. 135). Petitioner cross-moved for partial summary judgment. (D. Ct. Doc. 137 (Dec. 22, 2022)). In his cross-motion for partial summary judgment, response to the City's motion, and reply in support of his own motion, Petitioner argued that under *Eide* v. *Sarasota County*, 908 F.2d 716 (CA11 1990), and *South Grande View Development Co.* v. *City of Alabaster,* 1 F.4th 1999 (CA11 2021), the SP FLU was not ripe for a facial challenge until it was specifically applied to Petitioner's property through the zoning redesignation from Ordinance 4147, even though the two regulations

were virtually identical and the Plan was controlling. (D. Ct. Doc. 137 (Dec. 21, 2022), D. Ct. Doc. 143 (Dec. 27, 2022), and D. Ct. Doc. 168 (Jan. 6, 2023)). Petitioner also stated that his *Lucas* takings claim was not a facial challenge to Ordinance 4147. (D. Ct. Doc. 143, at 3 (Dec. 27, 2022)).

On April 3, 2023, the district court granted the City's motion and denied Petitioner's motion. The district court held that Petitioner never had any right or reasonable expectation to change the essential nature of the submerged land because of the federal government's navigational servitude under the Rivers and Harbors Act and the Florida public trust doctrine. The district court also held that the Plan was mandatory and the Plan's decades-old prohibition against residential development defeated Petitioner's claim that he had a right to fill and residentially develop the submerged portion of his property prior to the adoption of Ordinance 4147. As to the upland property, the district court held Petitioner "had what he always had," a sliver of upland that is likely worth more now than what he paid. The district court further concluded that any unpled claims regarding Ordinance 4178 or as-applied claims under *Penn Central Transportation Co.* v. *New York City*, 458 U.S. 104 (1978), would not be ripe since Petitioner had not applied for development. (App. 37-39a). The district court noted, "[Petitioner] has also supplemented the summary judgment record with permits which he claims indicate that the state and federal government 'will allow a sizeable dock (big enough to accommodate floating homes, registered vessels, livable yacht-ArKup) over the water portion of the Lagoon which spans [the Property].' (DE 193). But he has yet to seek such a permit." (App. 39a).

B. Petitioner's Appeal to the Eleventh Circuit

Petitioner appealed the district court's final judgment to the Eleventh Circuit. Petitioner stated the appeal did not involve any conflict of law and that "[t]he district court's entry of summary judgment was inconsistent with *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), and this [c]ourt's decisions in *Eide* v. *Sarasota County*, 908 F.2d 716 (CA11 1990), and *South Grande View Development Co.* v. *City of Albaster*, 1 F.4th 1299 (CA11 2021)." Petitioner challenged the district court's conclusions regarding background principles based on the federal navigational servitude and Florida's public trust doctrine, and the district court's conclusion that the SP FLU barred Petitioner's claims. (C.A. Doc. 16, at 2 (May 2, 2023)).

In appellate briefs, Petitioner argued that his claim satisfied ripeness under *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Finally, Petitioner claimed that the Property retained no "economically productive use" despite increasing property values after regulation and his failure to explore permissible uses through permitting. (C.A. Doc. 38 (Sept. 7, 2023)).

The Eleventh Circuit held oral argument on September 27, 2024. Before the argument session, the panel directed the parties to be prepared to address the issue of ripeness. (C.A. Doc. 59 (May 2, 2023)). Following oral argument, the court requested supplemental briefing from the City on the comprehensive plan amendment process.

The City's supplemental brief explained that it has a procedure for, and routinely processes, privately

initiated plan amendments. The City further advised the court that if Petitioner filled his submerged land pursuant to the savings clause, he could seek a future land use map redesignation for the newly created upland without requiring the City to reconsider the SP FLU. (C.A. Doc. 70 (Oct. 4, 2024)). Petitioner filed a reply letter brief contending that an application for permits to develop his land would be futile and arguing that *Knick* v. *Township of Scott, Pennsylvania*, 588 U.S. 180 (2019), meant he could not be required to seek a judicial determination of his property's vested rights to satisfy *Williamson County*'s finality requirements. However, Petitioner did not dispute that *Williamson County*'s finality requirement applied to his claim. (C.A. Doc. 75 (Oct. 11, 2024)).

The Eleventh Circuit issued its amended opinion on October 16, 2024, concluding that the case was not ripe for judicial review, vacating the district court's judgment, and ordering that Petitioner's complaint be dismissed without prejudice for lack of subject-matter jurisdiction. (App. 1-12a).

The Eleventh Circuit's opinion followed the finality requirement under *Williamson County* that "a takings claim challenging the application of a land use regulation is not ripe for judicial review 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." (App. 7a). The court held that, under *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001), "a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." (App. 7a). Because precedents "'uniformly reflect an insistence on knowing the nature and extent

of permitted development before adjudicating the constitutionality of the regulations that purport to limit it,' a claim under *Lucas* requires a final decision on the 'extent of permitted development' on the land in question." (App. 7a).

The Eleventh Circuit rejected Petitioner's contention that the ordinance was narrow and targeted, finding that the Plan and ordinance did not constitute a final decision "[u]ntil a local government decides how it intends to apply a broad, locality-wide 'regulation to a specific piece of property. . . ." (App. 7a). The Eleventh Circuit applied its ripeness test for a final decision under *Eide* v. *Sarasota County*, 30 F.3d 1412 (CA11 1994), *South Grande View Development Company* v. *City of Alabaster*, 1 F.4th 1299 (CA11 2021), and *Reahard* v. *Lee County*, 30 F.3d 1412 (CA11 1994), which all follow this Court's holding in *Williamson County* that a claim alleging a regulation effects a taking of property interest is not ripe until a final decision regarding the application of the regulation to the property. (App. 8a).

The Eleventh Circuit distinguished Petitioner's situation from *South Grande View*, finding Ordinance 4147 was not "targeted" "*precisely* and *only*" to Lozman's property. The Court held that Ordinance 4147 was adopted to cure the inconsistency between the LDR and the Plan, and "was a 'general plan … that only coincidentally ended up affecting a discrete portion' of Lozman's property." Likewise, the Eleventh Circuit held it would not "have been futile for Lozman to seek a final decision from Riviera Beach." (App. 9a). The Eleventh Circuit, consistent with its prior opinions, stated, "[w]e 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." (App. 11-12a).

Petitioner did not move for rehearing or rehearing en banc, opting instead to seek review in this Court.

SUMMARY OF THE ARGUMENT

Petitioner's questions presented are not properly before this Court. Petitioner's first question masks that he did not argue below that a regulatory taking occurred "upon enactment" of Ordinance 4147 but that Ordinance 4147 was part of several acts that accomplished the alleged taking. For the first time in this litigation, Petitioner now refers to his claim as a "facial challenge" to set up his argument that the Eleventh Circuit applied the wrong test to determine his claim's ripeness. Petitioner argued below that his claim satisfied *Williamson County* finality—the test the Eleventh Circuit applied—but never argued below that a different ripeness test applies to his claim. Petitioner's chief reason for granting certiorari is an alleged circuit split on the ripeness standard. But the decision below does not conflict with the decision of another circuit. To the contrary, the Eleventh Circuit applied *Williamson County* finality to Petitioner's as-applied claim just like every other circuit that Petitioner cites. Further, the decision below does not conflict with a decision of this Court. *Lucas* itself was an as-applied case and the majority would have upheld a dismissal for lack of ripeness had the state supreme court not skipped to the merits. Accordingly, the Court should deny certiorari on Petitioner's Question One.

As to Petitioner's second question, neither court below found or held that the ordinance "forbids any

economically beneficial use." Petitioner is asking this Court to render an advisory opinion upon a hypothetical state of facts. Further, Petitioner's second question concedes that the property is not "valueless," and Petitioner's arguments demonstrate that Petitioner seeks an expansion of *Lucas* to compensate for his failure to proceed under *Penn Central*. The Court should therefore decline to review Petitioner's Question Two.

REASONS FOR DENYING THE PETITION

I. The First Question Presented is Not Properly Before the Court.

A. Petitioner Failed to Allege and Argue a Facial Taking in the Court Below.

Petitioner's First Question incorrectly assumes that he alleged and argued below a facial regulatory taking based on the mere enactment of Ordinance 4147. In fact, Petitioner's complaint alleged that adoption of Ordinance 4147 was one of multiple "act*s*" that stripped his property of all economically beneficial use. In response to the City's motion for summary judgment, Petitioner stated that his *Lucas* takings claim was *not* a facial challenge to Ordinance 4147. (D. Ct. Doc. 143, at 3 (Dec. 27, 2022)).

Petitioner recasts his claim as a "facial challenge" for the first time in this Court to set up his argument that the Eleventh Circuit applied the wrong test to determine his claim's ripeness (even though he never argued a different test should have applied below). Petitioner's argument that his claim is a facial claim also appears to conflate the categorical regulatory takings acknowledged in *Lucas* with facial takings

claims. However, the settled cases demonstrate the difference.

To mount a facial challenge to Ordinance 4147, Petitioner was required to allege that the ordinance is unconstitutional in every instance, regardless of the property to which it is applied. See *United States* v. *Hansen*, 599 U.S. 762, 769 (2023) (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)); *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 449 (2008). In a facial takings claim, "the only question . . . is whether the mere enactment of the statutes and regulations constitutes a taking." *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 493 (1987) (quoting *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 581 F. Supp. 511, 512 (W.D. Pa. 1984)).

The requested relief is also relevant when evaluating whether a challenge is facial or as-applied. If the relief sought "reaches beyond the particular circumstances of these plaintiffs[,] [t]hey must therefore satisfy our standards for a facial challenge to the extent of that reach." *John Doe No. 1* v. *Reed*, 561 U.S. 186, 194 (2010).

Petitioner only pleaded a *Lucas*-type total regulatory taking claim. *Lucas* addressed an as-applied regulatory takings claim, not a facial one. See *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1042, (1992) (Blackmun, J. dissenting) *(*"Lucas has brought an as-applied challenge. . . . Facial challenges are ripe when the Act is passed; applied challenges require a final decision on the Act's application to the property in question."). And, the majority in *Lucas* stated that it would have upheld a dismissal for lack of ripeness had the state supreme court not skipped to the merits. *Id.*, at 1011.

Just as Petitioner failed to preserve a facial takings claim, Petitioner failed to preserve his argument regarding the Eleventh Circuit's alleged misapplication of the finality test set forth in *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). Below, far from arguing that *Williamson County* finality does not apply to his claim, Petitioner argued to the Eleventh Circuit in his reply to the City's supplemental letter brief that his claim *did* meet the *Williamson County* finality test. After the Eleventh Circuit's decision, Petitioner did not move for rehearing to argue that the *Williamson County* finality requirement did not apply because his claim was facial. Therefore, Petitioner forfeited the argument underpinning his circuit split theory. *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 37–38 (2015) ("That argument was never presented to any lower court and is therefore forfeited.").[1]

B. There is No Conflict Among the Circuits.

Because Petitioner's claim is not facial, the asserted conflict between the circuits is not genuine. In *Asociacion de Suscripcion Conjunta del Seguro de Responsabilidad Obligatorio* v. *Juarbe-Jimenez*, 659 F.3d 42, 48 (CA1 2011), the First Circuit held that a request for injunction to prevent enforcement of a resolution was a facial challenge, "rather than a

[1] Petitioner does not argue to this Court that the Eleventh Circuit applied the correct test but came to the wrong conclusion. See *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 527 (1994) ("These contentions were not presented in the petition for writ of certiorari, and therefore they are not properly raised here. See this Court's Rule 14.1(a).").

request for a declaration that a particular interpretation or application of Rule LXX effects a taking." *Id.* The First Circuit noted that the plaintiff's allegations focused exclusively on the regulation, unlike here where Petitioner's complaint recites a significant history of interactions between Petitioner, the City, and other agencies and concludes "the City's actions" (plural) stripped Petitioner's property of economically beneficial uses.

Moreover, *Asociacion* did not involve land use. Instead, the resolution at issue required the plaintiff insurance association to claw back wrongly-distributed profits from its members. The resolution—on its face—specifically targeted the plaintiff after an audit and is a far cry from the generally-applicable zoning designation Petitioner challenges in this litigation.

Similarly, the Third Circuit distinguished facial challenges—where "mere enactment" is the taking and "any application of the regulation is unconstitutional"—from an "as-applied challenge," where the "landowner is only attacking the decision that applied the regulation to his or her property, not the regulation in general." *Cnty. Concrete Corp.* v. *Town of Roxbury*, 442 F.3d 159, 164–65 (CA3 2006).

Below, Petitioner did not use the word "facial" in his complaint at all. Petitioner also did not plead that the ordinance in general—not just applied to his property—was unconstitutional in all applications. (App. 43–50a). Ordinance 4147 applies to several properties along the lagoon, yet Petitioner sought damages stemming from the ordinance's application to his specific property, rather than more general relief. Petitioner has treated this as an as-applied case throughout this litigation until his certiorari petition.

Because Petitioner did not bring a facial challenge, there is no conflict between the Eleventh Circuit's decision below and the facial takings cases cited by Petitioner.

In fact, each circuit court cited agrees that the *Williamson County* final decision test applies to as-applied takings challenges. *Brubaker Amusement Co., Inc.* v. *United States*, 304 F.3d 1349, 1356 (CA Fed. 2002) (as-applied case); *Hacienda Valley Mobile Estates* v. *City of Morgan Hill*, 353 F.3d 651, 656 (CA9 2003) (same); see also *Cnty. Concrete Corp.* v. *Town of Roxbury*, 442 F.3d 159, 165 (CA3 2006) (explaining facial challenge is distinct from as-applied challenges which need to meet *Williamson County* finality); *Asociacion de Suscripcion Conjunta del Seguro de Responsabilidad Obligatorio* v. *Juarbe-Jimenez*, 659 F.3d 42 (CA1 2011) (decided on statute of limitations grounds; distinguished as-applied from facial challenges).

Other allegedly "conflicting" circuit court decisions are inapposite. For instance, the Fifth Circuit "conflict" case analyzed a RLUIPA claim and, in dicta, mentioned the ripeness standard for facial takings challenges. *Opulent Life Church* v. *City of Holly Springs, Miss.*, 697 F.3d 279, 287 (CA5 2012). The Ninth Circuit said it is "fairly well-settled" that *Williamson County* finality is not required in a facial takings challenge, but cited to an earlier decision that expressly declined to answer the question. *Sinclair Oil Corp.* v. *Cnty. of Santa Barbara*, 96 F.3d 401, 407 (CA9 1996) (citing *S. Pac. Transp. Co.* v. *City of Los Angeles*, 922 F.2d 498, 506, n. 9 (CA9 1990)). The other case cited to in *Sinclair Oil* as "fairly well-settled" included both an as-applied and a facial claim, but the court of appeals only analyzed the ripeness of the as-applied

claim, remaining silent about the facial claim's ripeness when ruling on the merits against the landowner's facial challenge. *Lake Nacimiento Ranch Co.* v. *San Luis Obispo Cnty.*, 841 F.2d 872, 877–78 (CA9 1987). Petitioner's other Ninth Circuit citations are to dicta. *Guggenheim* v. *City of Goleta*, 638 F.3d 1111, 1118 (CA9 2010) (ripeness assumed without deciding); *Hacienda Valley Mobile Estates* v. *City of Morgan Hill*, 353 F.3d 651, 656 (CA9 2003) (as-applied case; discussion of facial ripeness standard is dicta).

Further, the "ripe" "federal facial taking" claim in *Sinclair Oil* contended that the plan in question "does not substantially advance a legitimate state interest." *Sinclair Oil Corp.* v. *Cnty. of Santa Barbara*, 96 F.3d 401, 407 (CA9 1996). This Court has since held that "the 'substantially advances' formula is not a valid takings test, and . . . that it has no proper place in our takings jurisprudence." *Lingle* v. *Chevron USA, Inc.*, 544 U.S. 528, 548 (2005). Accordingly, the Eleventh Circuit below did not conflict with *Sinclair Oil*, and *Sinclair Oil*'s ripeness analysis applies to an obsolete class of facial takings challenges not at issue here.

Similarly, Petitioner's Federal Circuit "conflict" falls flat because the court analyzed an as-applied claim. Thus, the statements about facial ripeness were dicta and not contrary to the decision below. *Brubaker Amusement Co., Inc.* v. *United States*, 304 F.3d 1349, 1356–58 (CA Fed. 2002).

The Eleventh Circuit's decision below is silent on the ripeness standard for facial challenges because it analyzed Petitioner's claim as an as-applied challenge—consistent with Petitioner's arguments in that court. However, in cases involving properly asserted facial claims, the Eleventh Circuit has described facial challenges as an assertion "that a law

'*always* operates unconstitutionally,'" and concluded that "[i]n the context of a facial challenge, a purely legal claim is presumptively ripe for judicial review because it does not require a developed factual record." *Harris* v. *Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (CA11 2009). Thus, the Eleventh Circuit's rulings on ripeness in facial claims comport with similar rulings by sister circuits—but they do not apply to Petitioner. Since there is no true split between the circuit courts, certiorari review is not warranted under this Court's Rule 10.

C. The Court's Ruling Does not Require the Exhaustion of Administrative Remedies in Violation of *Pakdel* and *Knick*.

Petitioner next claims that the Eleventh Circuit's decision should be reviewed and reversed because it conflicts with the Court's opinions in *Pakdel* v. *City & County of San Francisco, California*, 594 U.S. 474, 476 (2021), and *Knick* v. *Township of Scott, Pennsylvania*, 588 U.S. 180, 197 (2019), both of which held that administrative remedies are not required to be exhausted before a takings claim is ripe.

In *Pakdel*, this Court affirmed the requirement that a final decision be reached before an inverse condemnation claim ripens, observing that "until the government makes up its mind, a court will be hard pressed to determine whether the plaintiff has suffered a constitutional violation." *Pakdel*, 594 U.S., at 475. As a part of this requirement, "[t]he municipal entity responsible for the relevant zoning laws must also have an opportunity to commit to a position." *Vill. Green At Sayville, LLC* v. *Town of Islip*, 43 F.4th 287, 297 (CA2 2022) (citing *Pakadel*, 594 U.S., at 478). Petitioner's failure to apply "for a permit, variance, or

rezoning from either the comprehensive plan or ordinance" has precluded the City from having the "opportunity to commit to a position." (App. 8a). Mere speculation is insufficient under *Pakdel*. See *74 Pinehurst LLC* v. *New York*, 59 F.4th 557, 565 (CA2 2023), cert. denied, 218 L. Ed. 2d 66 (Feb. 20, 2024). The *Pakdel* Court did not retreat from these well-established rules, but instead held that the Ninth Circuit erred in concluding that an injured property owner was required to both apply for a final decision and exhaust administrative remedies. *Pakdel*, 594 U.S., at 475.

In *Knick*, a property owner attempted to challenge regulation requiring public access to cemeteries on private property but was denied the right to proceed with an inverse condemnation claim in federal court without first having brought a state claim for compensation. *Knick*, 588 U.S., at 186. *Knick* removed *Williamson County*'s requirement that a plaintiff obtain a state court determination about the extent of a taking and compensation before filing a federal lawsuit, but left intact *Williamson County's* requirement that a final decision be reached.

Nothing in this case requires a state court determination about the extent of a taking. Instead, the City's judicially-determined vested rights language refers to the need for a landowner to demonstrate the existence of property rights before determining the application of the Plan and ordinance in the first instance—not whether a taking of rights occurred or how much compensation is owed. The extent of Petitioner's pre-enactment rights is unknown because Petitioner has not presented the City with a judicial determination of the metes and bounds of his submerged property or the disputed title and naviga-

ble waters issues that Petitioner has with USACOE and FDEP. The City's regulation requires the rights to be "judicially determined" because Florida law imbues the state circuit court, not the City, with jurisdiction to declare the respective property rights flowing from TIITF's conveyance of sovereign submerged lands. See, *e.g.*, *Trustees Internal Imp. Fund* v. *Claughton*, 86 So. 2d 775 (Fla. 1956) (considering quiet title action resolving the rights to fill and develop arising from a TIITF deed for submerged land); see also § 26.012(1)(g), Fla. Stat. (2024) (providing circuit courts with the authority over "all actions involving the title and boundaries of real property.").

If Petitioner obtains a judicial determination establishing vested pre-enactment rights, the ordinance does not even apply to his property in the first place, let alone effect a taking. Petitioner did not join USACOE or FDEP or attempt to resolve any of those issues below. The City's judicially-determined vested rights language does not violate *Knick* or *Pakdel*, as Petitioner suggests, but it does underscore the ripeness problem here and demonstrate why this case is a poor vehicle for review.

D. The Eleventh Circuit's Ruling is Correct.

Petitioner and amici suggest that the Eleventh Circuit's opinion is wrong in determining that, because Petitioner's claim is unripe, the Court has no subject matter jurisdiction over the matter. Petitioner and amici argue that the Eleventh Circuit has grounded its decision in Article III jurisdictional ripeness requirements, rather than prudential considerations of ripeness. This Court has held that ripeness is grounded both in Article III limitations on judicial power and in prudential reasons for refusing to

exercise jurisdiction. See *Nat'l Park Hospitality Ass'n* v. *Dep't of Interior*, 538 U.S. 803, 808 (2003). However, this Court has also explained that, even in cases raising only prudential concerns, a reviewing court has the power to consider ripeness on its own initiative. *Id.* So, the Eleventh Circuit was procedurally within its authority to consider ripeness, even though the matter was not raised by the parties during the appeal, regardless of whether the Court determines ripeness for this type of takings claim to be an Article III requirement or a prudential consideration.

Substantively, the Eleventh Circuit correctly determined that the City's actions have not yet reached the requisite finality for the Court to determine whether all of Petitioner's economically beneficial uses have been taken. Therefore, the petition does not raise a question deserving of the Court's discretionary review regarding the correctness of the Eleventh Circuit's exercise of prudential ripeness.

Petitioner next claims the Eleventh Circuit was wrong in requiring a final decision, because finality is not required for facial challenges under *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). The claim at issue in *Suitum* was not a facial claim, but dicta in the case referred to facial challenges based on claims that the "'mere enactment' of a piece of legislation 'deprived [the owner] of economically viable use of [his] property.'" 520 U.S., at 736, n. 10.

The Court held the as-applied claim in *Suitum* satisfied the final decision requirement because the agency determined it had no ability to permit land coverage or other permanent land disturbance, and there was no uncertainty regarding the application of the legislation to the property. *Id.* at 739. The land was "ineligible for development" and the only question

remaining was whether transfer of development rights ("TDR") was available to compensate the lost development potential. *Id.*

Petitioner contends he is in the same position as the claimant in *Suitum*. The record establishes the contrary. Petitioner has refused to properly seek any permits, variances, or a judicial determination of his vested rights. The savings clause for properties with judicially determined vested rights is not permissive; rather, the exemption provides that the SP policies "*shall* not be construed nor implemented to impair or preclude judicially determined vested rights to develop or alter submerged lands." If a property owner obtains a judicial determination of vested rights, neither the Plan nor the zoning will impair or preclude such development or alteration. What that means for Petitioner or his neighbors cannot be determined without the context of an initial application.

Petitioner argues that assignment of a default density category to the SP FLU renders the savings clause meaningless because he does not have 20 acres to allow for the development of a single home. This argument was never pled at the trial court level. Even if it were preserved, the same savings clause would apply to prevent the default designation from prohibiting vested development. The City has never been given the opportunity to harmonize the savings clause and the default density designation with respect to a specific property and the record contains no interpretation of the provisions in relation to one another.

Likewise, the plain language of the City's Plan and Ordinance 4147 does not state whether floating homes are permissible in the SP zoning district where prohibited upland construction is not proposed. Both the Plan and Ordinance 4147 are entirely silent as to

floating homes. Ordinance 4178 has a savings clause of its own, contemplating instances of private mooring in the City's waters. The summary judgment record is entirely devoid of witness testimony regarding the interplay between the City's Plan and Ordinances 4147 and 4178. Accordingly, uncertainty abounds regarding how the challenged regulation applies to Petitioner's property, and the Eleventh Circuit was correct in determining he was required to meet, and had not already met, the final decision requirement in *Williamson County*. The same variables defeat Petitioner's claim that he is excused from applying for a permit on the grounds of futility.

Petitioner then argues that his claim is ripe because he cannot be required to seek a rezoning or a redesignation under the Plan, because such purely legislative applications are not required for finality. Even if this were true, Petitioner would not be required to rezone or redesignate his property to alleviate the uncertainty regarding his potential uses. While a request for redesignation is available to Petitioner, particularly after Petitioner has filled the property and the SP FLU is no longer definitionally appropriate, the savings clauses of both the Plan and the ordinance are facially self-executing, providing that the SP FLU and zoning district "shall not impair" development rights that have been judicially determined regardless of the Property's acreage. Thus, Petitioner cannot avoid the operation of the savings clause by claiming it requires further legislative action—it does not. Likewise, an application regarding a floating home exception under Ordinance 4178 does not require legislative action, nor does a corresponding dock or platform permit application.

II. The Second Question is Not Properly Before the Court Because There Were No Findings or Record Evidence Supporting its Assumptions.

The second question presented seeks a finding that no economically viable use exists by operation of Ordinance 4147, even though it allows for docks and viewing platforms and acknowledges the potential for filling and development where judicially determined vested rights are shown and Petitioner's property value rose significantly after the ordinance was adopted. The Eleventh Circuit did not rule on the merits in this case or address *Lucas*'s scope when it vacated and remanded for dismissal on ripeness grounds. Likewise, the record contains little information regarding the economic benefits available for permitted uses beyond the property's rise in value and the comparable sales in the area for passive uses and environmental mitigation. This directly contrasts with *Lucas*, where the trial court found the property had no value, a finding that was not challenged by the brief in opposition. *Lucas*, 505 U.S., at 1022, n. 9. For the same reasons, this case is not ripe, and without a full record on the question of residual economic benefit available under the ordinances' plain language, this Court is being asked to address a matter not found in the decision below and without a proper record. Such a request does not justify certiorari review.

III. This Case is an Improper Vehicle to Consider Expanding the Scope of *Lucas*, Which Would Be Required to Accommodate Petitioner's Claims.

In asking the Court to "clarify that private, non-occupiable uses are not economically beneficial under *Lucas* even if the property retains value" (Pet. 19),

Petitioner ignores the well-established distinctions between a *Lucas* claim and one under *Penn Central*. Petitioner has repeatedly emphasized that he pled only a *Lucas*-type of claim, instead of the more fact-specific *Penn Central* claim. This Court has held that, "the categorical rule in *Lucas* was carved out for the "extraordinary case" in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry." *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 332 (2002). Petitioner is not an "extraordinary case."

A regulatory taking "occurs categorically whenever a regulation requires a physical intrusion, [*Loretto*] or leaves land 'without economically beneficial or productive options for its use,' [*Lucas*]. *But such cases are exceedingly rare*." *Bridge Aina Le'a, LLC* v. *Hawaii Land Use Comm'n*, 141 S. Ct. 731 (2021) (THOMAS, J. dissenting) (emphasis added). Contrary to Petitioner's contention, the 'standardless standard' in JUSTICE THOMAS's dissent is not referring to *Lucas* claims, but to those assessed pursuant to *Penn Central*, a claim specifically disavowed by Petitioner. *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); see also *Gardens* v. *United States*, 174 Fed. Cl. 700, 721 (2025) ("Justice Thomas has urged a fresh look at the "standardless standard" of the *Penn Central* test for determining when regulation of property constitutes a compensable taking under the Fifth Amendment."); Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or A One Strike Rule?*, 22 Fed. Circuit B.J. 677, 706 (2013).

The "confusion" alleged by Petitioner between "economic use" and "economic value" (Pet. 22) does not

exist in the record. The Eleventh Circuit held, "[t]he permitted uses and exception in Ordinance 4147 amply support the necessity of a final decision from Riviera Beach before a court determines whether Lozman was denied 'all economically beneficial or productive use of [his] land.'" (App. 11a). The district court held, "[n]ot only does the takings clause not require compensation when an owner is barred from putting land to a use that is proscribed by existing rules or understandings, but a *Lucas* taking also requires an owner to be denied all economically productive or beneficial uses of land beyond what the relevant background would dictate" (App. 36a), and "in the *Lucas* context, the complete elimination of a property's value is the determinative factor." (App. 38a). The concepts that Petitioner claims are in opposition, "economic use" and "economic value," are simply two descriptions of the same underlying concept to demonstrate the extraordinary, rare, circumstances where a *Lucas* taking has occurred.

Petitioner equates his position with the position of those in cases where the property retains a market value but no permitted uses. In such cases, regulation may still form the basis of a takings analysis. See, *e.g.*, *Lost Tree Village Corp.* v. *United States*, 787 F.3d 1111 (CA Fed. 2015) (holding that the ability to sell but no beneficial use in property does not defeat a taking). In *Lost Tree*, the Federal Circuit held that the ability to sell is not an economic use where no underlying economic uses exist. *Id.*

The *Lost Tree* plaintiff attempted to distinguish between value and use, claiming that *Lucas* is about use, not value. *Id.* at 1116. The government argued the reverse, claiming a residual market value defeats a *Lucas* claim without more. *Id.* The Federal Circuit

explained that *Lucas* lies somewhere in the middle. *Id.* In essence, the Federal Circuit reasoned that if there is a residual use and that residual use has more than a token value, the property retains sufficient economic beneficial use to defeat a *Lucas* claim. If there is no use and the land can be held only for future sale, a takings claim may proceed.

Here, even with the uncertainty caused by Petitioner's failure to obtain a final decision, there remain permitted uses available that are economically valuable, as reflected by comparable sales for those uses and a significant rise in property's market value. *Nekrilov* v. *City of Jersey City*, 45 F.4th 662, 671 (CA3 2022) ("the central question for a total taking is not whether the regulation allows operation of the property as 'a profitable enterprise' for the owners, but whether others 'might be interested in purchasing all or part of the land' for permitted uses."). Thus, the facts and holding of this case do not provide an opportunity to revisit *Lucas* to distinguish the use/value dichotomy addressed in *Lost Tree*.

This Court's *Tahoe-Sierra* decision underscores this point, holding that *Lucas* applies when a regulation

> "wholly eliminated the [property's] value" and is limited to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." The emphasis on the word "no" in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a "complete elimination of value," or a "total loss," the Court acknowledged, would require the kind of analysis applied in *Penn Central*.

Tahoe-Sierra Pres. Council, Inc. v. *Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 330 (2002). Such a holding is vastly different than Petitioner's request that *Lucas* be expanded to circumstances where, even if residual uses have significant economic value recognized by the market, a categorical taking can still be found if such uses are "non-occupiable," by which Petitioner apparently means do not include the right to construct occupiable structures.

The cases cited by Petitioner do not support such an expansion. In *Becker,* the court of appeals held that "[i]t is only when those regulations eliminate all economically valuable use that *Lucas* requires compensation, and the trustees have failed to establish that Hillsboro's regulations render their property valueless." *Becker* v. *City of Hillsboro, Missouri*, 125 F.4th 844, 855 (CA8 2025). *Becker*, which involved a *Penn Central* analysis, did not treat economic value and economic use as two distinct concepts. Similarly, in *Bridge*, the court stated: "we do not see how this case is like *Lucas*. The mere reclassification of the 1,060 acres from urban use to an agricultural use did not prohibit all development, nor did it require leaving the land in an idle state." *Bridge Aina Le'a, LLC* v. *Land Use Comm'n*, 950 F.3d 610, 629 (CA9 2020). The court held "we think that the notion underlying Bridge's *Lucas* theory is that the inability to pursue a particular development and to obtain its value was a total taking. This view is unsupported by the law." *Id*., at 630. The *Bridge* court also conducted a *Penn Central* takings analysis.

Bridge also addressed *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 95 F.3d 1422, 1432 (CA9 1996), aff'd, 526 U.S. 687 (1999), which Petitioner claims adds to the "confusion." The Ninth Circuit

stated that in its earlier *Del Monte* decision "the fact that the government purchased the land subject to the challenged regulation that the government put in place did not defeat a *Lucas* theory." *Bridge*, 950 F.3d at 628. The *Bridge* court was clear "the relevant inquiry for us is whether the land's residual value reflected a token interest or was attributable to noneconomic use." *Id.*

In this case, the district court found that Petitioner failed to establish a categorical, *per se* regulatory taking under *Lucas*. The court of appeals similarly held, "[t]he permitted uses and exception in Ordinance 4147 amply support the necessity of a final decision from Riviera Beach.... The ordinance allows two forms of development for which [Petitioner] could have applied to understand the 'nature and extent of [his] permitted development'… And the ordinance's 'savings clause' exempts 'judicially determined vested rights' from the limitations of the regulations." (App. 11a). The district court held, "[Petitioner] has also supplemented the summary judgment record with permits which he claims indicate that the state and federal government 'will allow a sizeable dock (big enough to accommodate floating homes, registered vessels, livable yacht-ArKup) over the water portion of the Lagoon which spans Plaintiff's property.' (DE 193). But he has yet to seek such a permit." (App. 39a). Thus, the decisions below apply *Lucas*'s requirements as to both "economic use" and "economic value."

Simply put, this case is particularly fact-bound and a poor vehicle to resolve any *Lucas* confusion. Petitioner has a small sliver of dry land on his property—0.2 acres. The remaining acreage is underwater and the metes and bounds and reliability of historic surveys are disputed. Those with an

interest in the boundary dispute are not parties to the case.

The Property had been designated SP for decades when Petitioner bought it. This is not, as in *Lucas*, a waterfront property with buildable dry land that once had development rights but was rendered "valueless" with the enactment of an ordinance.

Much of Petitioner's property is subject to the navigational servitude in the Rivers and Harbors Act, and is highly regulated by state and federal authorities. Both USACOE and FDEP took separate legal action against Petitioner to stop unpermitted activities on the Property in question. Petitioner never resolved his permitting issues with either agency but chose instead to sue the City for millions without even applying for a permit to develop a primary use.

Petitioner purchased his property to place a floating home on the submerged portion of the property. The district court and Eleventh Circuit rightly pointed out that the Ordinance in question allows him to build a dock to support non-motorized vessels. Whether such a dock could support or facilitate a floating home remains unexplored. Despite such uncertainty, the property is worth many times what Petitioner paid for it.

These facts demonstrate what a poor vehicle this case is to answer Petitioner's and amici's desire to clarify or expand *Lucas*. While Petitioner and amici claim that the questions presented are important and recurring, concerns regarding facial claims are not properly answered in the context of this as-applied, poorly developed, factually unique claim.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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