No. _____

In The
Supreme Court of the United States

CHARLES N. GANSON, JR.,
as Personal Representative of
the Estate of Molly Beyer,
Petitioner,

v.

CITY OF MARATHON, FLORIDA,
and the STATE OF FLORIDA,
Respondents.

On Petition for Writ of Certiorari to the
Florida Third District Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When Gordon and Molly Beyer purchased the nearly nine-acre Bamboo Key in Monroe County, Florida, zoning rules allowed them to put one residential home on each acre. In 1996, the local government adopted a Comprehensive Plan that deemed Bamboo Key a "bird rookery." The only allowable use for the property became temporary camping. The Beyers challenged the application of this zoning change to their property; the courts concluded no taking occurred because the Beyers could camp on the island and because they received sixteen "ROGO points," nonmonetary credits which the Beyers could apply toward a nonguaranteed permit for possible future development akin to transferable development rights. According to the courts, the credits plus the ability to camp met their reasonable economic expectations for the property.

The questions presented are:

1. Does the government unconstitutionally effect a total take of property when it denies *all* economically viable uses of land, but provides the owner with nonmonetary credits that have potential economic value?

2. If a total take has not occurred, then does the award of nonmonetary credits affect the determination of whether the government effected a *Penn Central* taking at all, or should the courts weigh the award of nonmonetary credits only when considering whether the government awarded just compensation for a taking?

LIST OF ALL PARTIES

The parties to the judgment from which review is sought are the Petitioner Charles N. Ganson, Jr., as Personal Representative of the Estate of Molly Beyer, and Respondents are the City of Marathon, Florida, and the State of Florida. Gordon Beyer and then his wife Molly passed away after they filed suit; Petitioner, Charles N. Ganson, Jr., was appointed to represent the Estate of Molly Beyer and was substituted as the proper party plaintiff/appellant before the Third District Court of Appeal for the State of Florida.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Florida Third District Court of Appeal is reported at *Ganson v. City of Marathon*, 197 So. 3d 563 (Fla. 3d DCA 2013), and is reproduced in Petitioner's Appendix (Pet. App.) at A. The opinion of the Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida, is not published, but is reproduced in Pet. App. at B. The beneficial use determination, the administrative decision underlying the petition, is not published but is reproduced in Pet. App. at C. The Florida Supreme Court's decision denying review of the Florida Third District Court of Appeal's decision is reported at __ So. 3d __, No. SC16-1888, 2017 WL 1365218 (Fla. Apr. 13, 2017), and is reproduced in Pet. App. at D. A prior decision of the Florida Third District Court of Appeal regarding this dispute, *Beyer v. City of Marathon*, is reported at 37 So. 3d 932 (Fla. 3d DCA 2010), and is reproduced in Pet. App. at E. Lastly, the denial of en banc review of the Florida Third District Court of Appeal 2013 decision, with dissent, is reported at 222 So. 3d 17 (Fla. 3d DCA 2016), and is reproduced in Pet. App. at F.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). Gordon and Molly Beyer filed an inverse condemnation lawsuit in the Florida state courts challenging the City of Marathon's administrative decision to take their property without just compensation as violating the Fifth and Fourteenth

Amendments of the United States Constitution, among other laws. Pet. App. G-1–5.

Gordon Beyer and then his wife Molly passed away after they filed suit; Petitioner, Charles N. Ganson, Jr., was appointed to represent the Estate of Molly Beyer and was substituted as the proper party plaintiff/appellant before the Third District Court of Appeal. The Florida Third District Court of Appeal entered judgment on November 6, 2013. That court denied the timely petition for rehearing *en banc* on September 14, 2016. The Florida Supreme Court then denied discretionary review of the case on April 13, 2017, making the Florida Third District Court of Appeal decision the final judgment of the highest court of the State of Florida in which a decision could be had. *See Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967) (explaining that where petitioner seeks discretionary review of State of Florida intermediate appellate court decision, and Florida Supreme Court denies review, then the intermediate appellate court's decision is the "highest court in Florida wherein a decision could be had.").

This Court granted an extension to file the Petition for Writ of Certiorari to and including September 8, 2017. *See* Sup. Ct. R. 13.5.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

INTRODUCTION

Nearly one hundred years ago, Justice Oliver Wendell Holmes emphasized that a "strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Here, the City of Marathon (Marathon) attempted a shorter cut toward improving the public condition—in this case, protecting the environment and wildlife—than the Constitution allows.

Marathon did so by destroying Gordon and Molly Beyers' ability to use their property without just compensation. Instead, Marathon offered the Beyers a form of nonmonetary credit to be used in conjunction with other property in exchange for taking away the Beyers' ability to economically use their land, and the Florida courts approved that unconstitutional taking. Pet. App. A-1. Although unacknowledged below, the Florida courts effectively answered two federal questions that this Court left unresolved in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). This case presents this Court with the opportunity to answer those important federal questions.

In *Suitum*, this Court sharply divided over what role nonmonetary credits offered a property owner might play in response to a regulatory taking claim.

Id. at 746-47. *Suitum* involved a landowner deprived of all beneficial use of her property by stringent environmental regulations administered by the Tahoe Regional Planning Agency (TRPA). Under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), such severe land use restrictions by themselves would be categorical violations of the Fifth Amendment Takings Clause. *See* U.S. Const. amend. V ("[P]rivate property (shall not) be taken for public use, without just compensation."); *see also Lucas*, 505 U.S. at 1015.

Although this Court did not reach the merits of the takings claim, *see Suitum*, 520 U.S. at 728, Justice Souter's majority opinion suggested that the ripeness of the claim for adjudication depended in part on whether the nature and value of the nonmonetary credits—called "transferable development rights" (TDRs) in that legislative scheme—available to Mrs. Suitum were known. *Id.* at 738-42.

Justice Scalia, along with Justices O'Connor and Thomas, did not join in this part of the opinion. *Id.* at 745. Instead, they held nothing relating to the agency's nonmonetary credits could be relevant to the issue of whether Mrs. Suitum's takings claim was ripe. *Id.* Justice Scalia explained when a regulation has rendered the property owner's land completely useless, nonmonetary credit to a landowner who finds his property regulated out of economic usefulness can serve only to compensate the landowner, *id.* at 747-48, not to absolve an agency of liability for a categorical taking as described in *Lucas*. *Id.* at 746-50.

This *Suitum* exchange identified two questions that have since remained unanswered by this Court, even though nonmonetary credit programs have

become popular ways for local governments to attempt to avoid takings liability.[1] The first question presented is whether nonmonetary credits can satisfy the Fifth Amendment's requirement for just compensation in a *Lucas* total taking case. And second, if there is not a total taking but rather a *Penn Central* partial taking alleged, then should the credits be considered in determining liability under the *Penn Central* factors, or should those credits instead be considered only when determining whether just compensation has been provided for the taking?

These questions are important not only because nonmonetary credit programs have become widely used, but also because the courts are split on how to answer these questions.

The questions are also important because the lower court in this case answered them in a way that took the Beyers' property—all of it—without just compensation. Pet. App. F-2. That makes this case the right vehicle for this Court to answer these important questions of federal law.

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[1] *See* Rick Pruetz & Erica Pruetz, *Transfer of Development Rights Turns 40*, Planning & Environmental Law, June 2007, Vol. 59, No. 6 at 3 (summarizing state of TDR laws in the nation and noting that at least 181 programs in 33 states existed at time of article).

STATEMENT OF THE CASE

Gordon and Molly Beyer were lifelong sweethearts, married for 59 years before their deaths in 2009 and 2016, respectively.[2] Gordon, a Korean War veteran and U.S. Marine, dedicated his life to his country, serving in the U.S. diplomatic corps after his discharge from the Marines.[3] Molly, a teacher, followed Gordon all over the world from post to post.[4] Gordon and Molly raised three children along the way—Theresa, Hugh, and Thomas. President Carter ultimately appointed Gordon to serve our nation as U.S. Ambassador to Uganda.[5]

Before that presidential appointment, in 1970, Gordon and Molly purchased an undeveloped, approximately nine-acre island in Monroe County (County), Florida, known as Bamboo Key, for $55,000. Pet. App. C-2 ¶ 1; Pet. App. F-3. Like many members of that generation, the Beyers bought this land in Florida with a hope to one day have a residence in the Sunshine State. Unfortunately, the government had other ideas.

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[2] *See* Passings, *Northwestern Magazine*, Winter 2010, http://www.northwestern.edu/magazine/winter2010/alumnilife/passings/passings_print.html.

[3] *See id*.

[4] *See* Obituary of Mary Winsor Beyer, *Monadock Ledger-Transcript*, Mar. 10, 2016, http://www.legacy.com/obituaries/ledgertranscript/obituary.aspx?pid=177997017.

[5] *See* Passings, *supra,* note 2; https://en.wikipedia.org/wiki/United_States_Ambassador_to_Uganda#Ambassadors.

A. County Downzones the Beyers' Property Twice and Ultimately Makes Property a Bird Rookery, Forcing Beyers To Administratively Challenge the Second Downzoning as a Total Taking of Their Property

At the time of purchase, the County zoned Bamboo Key as "General Use," which allowed for one single-family home per acre on it. Pet. App. F-3. Fifteen years later, the Florida Legislature enacted a State Comprehensive Plan, effective July 1, 1985, ch. 85-57, 1985 Fla. Laws 295, *codified as amended at* Fla. Stat. ch. 187 (2000). Pet. App. A-2 n.1. Monroe County adopted that Plan as its own the following year. This Monroe County Comprehensive Land Use Plan (Plan) downzoned the island from General Use to "Conservation-Offshore Island," which allowed for one unit of development per ten acres. Pet. App. A-2 n.1; Pet. App. F-3. Under that 1986 Plan, the Beyers still could have built one single-family home on the island, Pet. App. C-3, consistent with the Beyers' plan.

The Beyers could have challenged the Plan's impact on Bamboo Key via an administrative process known as a "Beneficial Use Determination." Pet. App. F-3. The beneficial use determination is a process by which Marathon evaluates the allegation that no "beneficial use" of private property remains because of a zoning change, and can provide relief from the regulation change by granting additional development potential, providing just compensation, or extending a purchase offer for the property. Pet. App. A-3 n.4. The Beyers did not take that opportunity to challenge the first downzoning at the time; since

they retained the right to build a home and retire to the property, an obvious "beneficial use," any such challenge likely would have failed. Pet. App. F-4.

In 1996, the County revised its Plan and reclassified the Beyers' property, along with other environmentally sensitive lands, as a "bird rookery." Pet. App. A-2–3; Pet. App. F-4. The only permitted use of the property became "temporary primitive camping . . . in which no land clearing or other alteration" occurs. Pet. App. A-3 n.3; Pet. App. F-4.

Having now lost the chance to build a home and retire to their Florida property, the Beyers challenged this classification in 1997 by submitting a beneficial use determination application where they properly asserted that the revised Plan effectively denied *all* economically reasonable use of their property. Pet. App. F-4.

Two years later, the City of Marathon (Marathon) incorporated and the Beyers' island became part of Marathon. Pet. App. F-4. Neither the County nor Marathon acted on the Beyers' application for the ensuing five years. Pet. App. F-4–5. Instead, in 2002, Marathon demanded the Beyers submit a new beneficial use determination application and another $3,000 application fee. Pet. App. F-5. They did so. Pet. App. F-5.

Finally, in 2005, a "Beneficial Use Special Master" heard the case. Pet. App. F-5. The evidence showed the Plan enacted by Marathon reduced the Beyers' property's value by at least 98.37% from its original purchase price of $55,000—to $900. Pet. App. B-4; Pet. App. C-2 ¶ 1. That percentage, stark as it is, obviously

does not even account for inflation or the rise in Bamboo Key's property value in the thirty-five years between purchase and the 2005 hearing, should it have remained buildable.

The Special Master concluded the Plan only allowed camping on the island, which did not amount to "reasonable economic value" to the Beyers "in light of their investment in the property." Pet. App. C-6 ¶ 19. Nevertheless, the Special Master recommended denying them any relief for two reasons. First, the Beyers "sat on the . . . property for thirty years" without investing in it, holding that passage of time against them. Pet. App. C-6 at the second ¶ 19. Second, Marathon awarded the Beyers 16 "ROGO" points for the property, and those points plus the camping rights meant, according to the special master, that the Beyers retained economic value in the land sufficient to defeat their takings claim. Pet. App. C-6 at the second ¶ 19.

ROGO points—so-called because the name derives from the local "Rate of Growth Ordinance"—purportedly control growth by allocating "points" toward possible procurement of one of the limited number of development permits available in Monroe County. *See generally*, Monroe Cty., Fla. Land Dev. Code ch. 138; Pet. App. F-5 n.1. Here, the Special Master concluded that these 16 ROGO points had a value of $150,000 based on "recent transactions in the Marathon area[.]" Pet. App. C-3 ¶ 10. The Special Master further determined that 24 ROGO points had been enough "to indicate a property could be granted a residential permit" at a receiver site within Marathon. Pet. App. C-3 ¶ 9.

In other words, the nine-acre island the Beyers owned for over thirty years now remained in their name and remained their responsibility, although they could not build upon it. But, they had received a form of nonmonetary credit that amounted (at best) to two-thirds of enough credit to obtain a building permit—for what exactly is never explained—somewhere else in Monroe County. According to the Special Master, this meant that Marathon had not taken their property within the meaning of the Fifth Amendment. Pet. App. C-6 at the second ¶ 19. Instead, their reasonable investment-based expectations had been met.

The City of Marathon then adopted the Special Master's findings. Pet. App. A-4; Pet. App. F-5.

B. Beyers Bring Inverse Condemnation Suit Against Marathon for the Total Taking of Their Property Without Just Compensation

In response to the administrative decision and its adoption by Marathon, the Beyers brought an inverse condemnation action against Marathon in state court. Pet. App. G-1–5. They alleged they had "been deprived of all or substantially all reasonable economic use of the subject property" regardless of the ROGO points and camping rights they retained after the Beneficial Use Determination. Pet. App. G-4 ¶ 21. They asked for full and just compensation for this total taking. Pet. App. G-4–5.

Initially, the trial court held the statute of limitations had run on the Beyers' claim but Florida's Third District Court of Appeal reversed. Pet. App. E-6. On remand, the trial court then granted summary

judgment based on laches and on the notion that the Beyers had no reasonable investment-backed expectations when they purchased the island. Pet. App. B-6–7.

In the decision from which this petition for writ of certiorari arises, the Third District Court of Appeal for the State of Florida rejected the conclusion that laches precluded the Beyers' claims. Pet. App. A-6–7. Nevertheless, the court affirmed. Pet. App. A-7–8. It held the Beyers had no reasonable investment-backed expectations for the property, and that the award of ROGO points combined with the right to camp precluded a conclusion that Marathon had taken the Beyers' property. Pet. App. A-7–8. The court also counted the Beyers' failure to develop the property against them, a sort of *de facto* waiver of their constitutional right to use their property. Pet. App. A-5 n.5.

The Beyers asked the lower court to rehear the case and to hear it *en banc*. Pet. App. H-1–15. They argued the original three-judge panel erred in its original ruling when it concluded that no taking occurred because the ROGO points plus the retained right to camp met the Beyers' reasonable investment-backed expectations. Pet. App. H-3 ¶ II.C. They also argued that the total taking they alleged could not be remedied via ROGO points that had indeterminate value—that only financial compensation would be *just* within the meaning of the Fifth Amendment. Pet. App. H-14.

The panel denied rehearing and the court denied hearing the case en banc 6-3. Pet. App. F-1–2. Judge Frank Shepherd, on behalf of the dissenters,

explained that the court had erred by not considering the case an example of a *Lucas* total taking, instead of evaluating the case, as the lower court had, as a possible partial taking using the *Penn Central* factors. Pet. App. F-14. If the proper test had been applied, then the reasonable investment-backed expectations of the Beyers would simply never have come into play. Pet. App. F-14.

Judge Shepherd also rejected the Special Master and trial court's emphasis on the passage of time without development as a factor to count against the Beyers. Pet. App. F-18–20. And lastly, Judge Shepherd explained why the ROGO points could never amount to just compensation—in that once a taking is established, the government "may not evade the duty to compensate on the premise that the landowner is left with a token interest." Pet. App. F-25 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001)).

Judge Shepherd concluded:

> Although the intricacies of the various takings inquiries are without a doubt complicated and imprecise, one thing is certain: the Beyers have been singled out to suffer significant economic injuries in the name of the public good. They purchased an island zoned for residential development that the government transformed into a "bird rookery . . . ." If this is not a situation where justice and fairness require that economic injuries caused by public action be compensated by the government, I do not know what

> is. The decision of this Court that the Beyers have no constitutional taking claim against [Marathon] for what are indisputably excessive economic injuries is, well, for the birds.

Pet. App. F-26.

Since the Beyers both passed away during the long pendency of this case, Charles Ganson, Personal Representative for Molly Beyer's Estate (Ganson), sought discretionary review from the Florida Supreme Court of the Third District Court of Appeal decision. Pet. App. D-1–2. The Florida Supreme Court denied review, meaning the Third District's decision is the law for all of the State of Florida.[6] Pet. App. D-1–2. Thus, Ganson has standing to bring the Third District Court of Appeal decision to this Court for review. Ganson respectfully asks this Court to issue a writ of certiorari and provide much needed direction on the important questions of federal law decided below.

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[6] *See Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) ("in the absence of interdistrict conflict, district court decisions bind all Florida trial courts") (citation omitted).

REASONS FOR GRANTING THE WRIT

I

THE FLORIDA APPEALS COURT'S REFUSAL TO CONSIDER THIS A TOTAL TAKING AND TO FIND INSTEAD THAT NONMONETARY CREDITS OFFERED FOR FUTURE DEVELOPMENT ELSEWHERE SATISFIED THE FIFTH AMENDMENT RAISES IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW THAT THIS COURT SHOULD SETTLE

The Florida appeals court ignored the Takings Clause's guarantee that governments are barred "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). If the decision is allowed to stand, the court's opinion threatens to effectively strip millions of Florida property owners of this important constitutional right.

And if the Court does not grant review, then these schemes will continue to flourish nationwide. To avoid takings liability, land use agencies and local governments will disguise their takings of land behind nonmonetary credit schemes that effectively swallow the Fifth Amendment. That is anything but idle speculation. Nonmonetary credit schemes, like the TDRs in *Suitum* and the ROGO points here, "have [already] come to play a major, widespread role in land use planning." R.S. Radford, *Takings and Transferable Development Rights in the Supreme Court: The Constitutional Status of TDRs in the*

Aftermath of Suitum, 28 Stetson L. Rev. 685, 686 (Winter 1999) (citing Julian Conrad Juergensmeyer et al., *Transferable Development Rights and Alternatives After* Suitum, 30 Urb. Law. 441, 462-63 (1998)). And these widespread schemes often hide the take by cloaking it behind these credit exchanges, and then claiming that the exchange gives rise to economic use *of the res* by the landowner.

Such schemes are a ruse. Three justices of this Court have made clear that a government attempt to elide a take through the exchange of nonmonetary credits violates the Takings Clause:

> The right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop *his* land. The latter is valuable, to be sure, but it is a *new* right conferred upon the landowner in exchange for the taking, rather than a *reduction* of the taking.

Suitum, 520 U.S. at 747 (Scalia, J., concurring in part). And more recently, this Court recognized the plain meaning of the *Suitum* concurrence for government schemes to avoid the Takings Clause, noting that "*any* payment from the Government in connection with [a taking] goes, at most, to the question of just compensation." *Horne v. Dep't of Agriculture*, 135 S. Ct. 2419, 2429 (2015) (emphasis added) (citing *Suitum*, 520 U.S. at 747-48 (Scalia, J., concurring in part)).

This constitutional logic flows directly from this Court's precedents. In *Nollan v. California Coastal*

Commission, 483 U.S 825 (1987), this Court referred to "the right to build on one's own property" as something inherent to land ownership, not as a benefit received from the government. *Id.* at 833 n.2. Later, in *Lucas*, this Court noted that building a home is an "essential use of land." *Lucas*, 505 U.S. at 1031. The Beyers lost that ability to build a home or anything else on their property, yet the Florida court approved the loss without compensation. That misses the point of *Lucas*, as do all of these schemes when they result in the government taking all use of property without paying for it.

In *Lucas*, the property owner purchased two residential beachfront lots later rendered undevelopable by South Carolina's Beachfront Management Act. 505 U.S. at 1006. Mr. Lucas contended that the law extinguished his property's value, entitling him to compensation, *id.* at 1009. The Court in *Lucas* stated a constitutional rule: "[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking." *Id.* at 1019.

The Special Master in this case concluded "there is absolutely no allowable use of the property under the City of Marathon Land Development Regulations." Pet. App. C-3 ¶ 7. That conclusion fits the *Lucas* total taking rule, depriving the Beyers of any ability to make economic use of their property. The Beyers have no choice but to leave their property in its natural state so that Marathon may use the property as a bird rookery. *See Lucas*, 505 U.S. at 1018 (explaining that a *Lucas* taking occurs when

regulations "leave the owner of land without economically beneficial or productive options for its use—typically, as here, [requiring] land to be left substantially in its natural state"). For the Third District to conclude a total taking did not occur because the Beyers received nonmonetary credits conflicts with *Lucas*.

If government may forcibly deprive property owners of the right to make any use of their property, in exchange for the tentative opportunity to possibly make use of another piece of property, then how can the right to own property and use it be considered a right at all? As Justice Scalia explained: nonmonetary credit schemes "have nothing to do with the use or development of the land to which they are (by regulatory decree) 'attached.'" *Suitum*, 520 U.S. at 747. Rather, they are a "peculiar type of chit" from the government which enables the landowner "not to get cash from the government" but to exchange the peculiar chit with a third party who can then use his land in ways the government would otherwise not allow. *Id.*

To be sure, there may be nonmonetary credit schemes that could avoid the constitutional problem framed in this case. If the scheme merely restricts the range of options open to property owners for their property, and doesn't simply wipe out the use of the property as Marathon did to the Beyers, then the program may pass constitutional muster. *Cf. Andrus v. Allard*, 444 U.S. 51, 65 (1979) (no taking where the property owner is prohibited from marketing feathers of endangered species, but other remunerative uses are allowed). Or if the exchange program is voluntary,

then a landowner could hardly argue that his constitutional rights have been violated. *See* Juergensmeyer, *supra*, at 449-50. But here the Beyers were not offered meaningful options for their property. Their rights were destroyed, and the take was anything but voluntary. They have been forced to provide the community with a bird rookery and have borne the cost of that alone, contrary to *Armstrong*, 364 U.S. at 49.

At bottom, as Justice Scalia noted, there is nothing inherently wrong with nonmonetary credit exchanges like the TDRs in *Suitum*—but the devil is in the details. *See Suitum*, 520 U.S. at 749-50. Marathon implemented a scheme where the details allowed Marathon to take the Beyers' property and avoid liability by promising credits towards some possible building permit somewhere else in Monroe County at some indeterminate time in the future, perhaps to be enjoyed by some third party. This cannot be so.

This Court should take the case both to address what happened here and to ensure other communities stop using similar schemes to avoid paying just compensation after rendering properties completely without value by imposing restrictions of the sort this court has found to implicate the "need [for] compensation [under] the power of eminent domain." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (discussing hypothetical height limitations that make property unbuildable.).

II

THERE IS A CONFLICT AMONG THE LOWER COURTS ABOUT WHETHER NONMONETARY CREDITS, BE THEY TRANSFERABLE DEVELOPMENT RIGHTS OR "ROGO POINTS," SHOULD BE CONSIDERED WHEN WEIGHING WHETHER A *PENN CENTRAL* TAKING OCCURRED OR IN DETERMINING WHETHER THE GOVERNMENT HAS PROVIDED JUST COMPENSATION FOR THE TAKING

In *Penn Central*, this Court merged the concepts of takings liability and just compensation in dictum concerning TDRs. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978). Writing for the majority, Justice Brennan said that New York City's TDRs "undoubtedly mitigated" the burden of the Landmark regulations upon Penn Central. *Id.* Regulatory agencies interpreted this sentence to mean that the mere existence of a TDR program should obviate any liability for a regulatory taking. *See, e.g.*, Brief for Respondent at 33, *Suitum*, No. 96-243, 1997 WL 7574 (U.S. Jan. 9, 1997) ("Hence, it is settled precedent that TDRs are relevant to the question (of) whether a 'taking' has occurred in the first instance." (citing *Penn Central*, 438 U.S. at 137)). But Justice Scalia's *Suitum* concurrence sets out why those agencies assumed more than *Penn Central* delivered.

First, the regulations at issue in *Penn Central* were upheld *not* because the landowner received TDRs, but rather because it earned a reasonable return on its property by operating the railway terminal, concessions, and office space on the site,

regardless of the TDRs. *Penn Central*, 438 U.S. at 130; *see also Suitum*, 520 U.S. at 749 (Scalia, J., concurring in part) (explaining the distinction between the TDRs in *Penn Central* and what was going on in *Suitum*). That is a far cry from the Beyers' case, where the regulation at issue was upheld because the Beyers received nonmonetary credits akin to TDRs. These TDRs purportedly created economic value in their property. Pet. App. A-1. But they certainly did not retain any economic value in Bamboo Key itself, unlike the property owners in *Penn Central*. The Beyers were left with a bird rookery; the owners of Penn Central had a working railroad station.

Second, the landowners in *Penn Central* could use New York City's TDRs to transfer their own development activity to at least eight other parcels they owned near the terminal. *Suitum*, 520 U.S. at 749 (Scalia, J., concurring in part) (citing *Penn Central*, 438 U.S. at 137). Thus, the development the city would not permit on one site could simply be transferred to another of the plaintiffs' properties in the same part of Manhattan. *Id.* The TDRs were valuable to the Penn Central owners themselves. Again, this is not the case here. The Beyers own no property elsewhere in the Keys, Pet. App. H-14, and the market for these ROGO points is at best speculative. Pet. App. F-25–26.

In *Suitum*, the agency prohibited any permanent disturbance of the soil on Mrs. Suitum's land—an ordinary residential subdivision lot—unlike the regulation at issue in *Penn Central*. Radford, *supra*, at 690. Thus, the agency's underlying regulations plainly violated *Hudson County Water*'s proscription

against "mak[ing] an ordinary building lot wholly useless." *Hudson County Water*, 209 U.S. at 355. Those are the facts here as well—the special master having found that in fact the Plan rendered Bamboo Key "unusable for development." Pet. App. C-5.

Despite the differences between the nonmonetary credit offer to a landowner who retained economic value in *Penn Central* and the total taking of *Suitum*, several lower courts have failed to pay heed to the distinction when evaluating governmental nonmonetary credit schemes used in land regulation. This ignores what Justice Scalia explained:

> The right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop *his* land. The latter is valuable, to be sure, but it is a *new* right conferred upon the landowner in exchange for the taking, rather than a *reduction* of the taking . . . . Just as a cash payment from the government would not relate to whether the regulation "goes too far" (*i.e.*, restricts use of the land so severely as to constitute a taking), but rather to whether there has been adequate compensation for the taking; and just as a chit or coupon from the government, redeemable by and hence marketable to third parties, would relate not to the question of taking but to the question of compensation; so also the marketable TDR, a peculiar type of chit which

> enables a third party not to get cash from the government but to use his land in ways the government would otherwise not permit, relates not to taking but to compensation.

Suitum, 520 U.S. at 747. The distinction Justice Scalia drew has been lost on some lower courts, including the lower court in the instant case. The Court should take the case to resolve this conflict on an important question of federal law.

A. The Florida Court Rule Conflicts with Other Courts Facing This Same Fifth Amendment Question

1. Some Courts Hold That Nonmonetary Credits Preclude the Finding of Takings Liability

Like the court in the instant case, some courts have held that the government can avoid takings liability entirely by the artifice of giving property owners nonmonetary credits, because the credits qualify as an economic "use" of the property. That the government prevents landowners from actually using their land does not matter in these cases. The courts instead hold that it is not the property but the economic use that matters, and transferring that use to another property means there has been no taking, even if the potential transfer of use is only speculative.

For example, in *Good v. United States*, 39 Fed. Cl. 81, 107 (1997), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999), the Federal Court of Claims held that TDRs must be

considered when determining whether a taking occurred, not when determining whether the government paid just compensation. The court explicitly rejected Justice Scalia's concurrence. *Id.*

Likewise, multiple state courts in New York have held that TDRs should be weighed when determining whether the government effected a taking. Relying on *Penn Central*'s mention of TDRs, the New York appellate court, in *Russo v. Beckelman*, 204 A.D.2d 160, 161 (N.Y. App. Div. 1994), rejected a takings claim from a landowner who challenged the designation of her property as an historic landmark because the local government granted the owner TDRs. *See also Shubert Org. v. Landmarks Preserv. Comm'n of N.Y.*, 166 A.D.2d 115, 122 (N.Y. App. Div. 1991) (rejecting takings claim because "transferable development rights inure to the owners of these buildings, which . . . must be presumed to have economic benefit"); *Toussie v. Central Pine Barrens Joint Planning and Policy Comm'n*, 700 N.Y.S.2d 358 (N.Y. Sup. Ct. 1999) (rejecting takings claim brought under state constitution, because of award of nonmonetary TDRs).

The lower court in the instant case has also held in other cases that nonmonetary credits should be weighed when determining whether regulations effect a taking. For example, in *Shands v. City of Marathon*, 999 So. 2d 718 (Fla. 3d DCA 2008), the court found that the availability of ROGO allocation points and TDRs for at least six acres of the upland portion of the island at issue in that case meant that some economic value remained *in the property*. *See id.* at 725; *see also Collins v. Monroe County*, 999 So. 2d 709 (Fla. 3d DCA

2008) (noting that TDRs and ROGO points allow government to avoid takings claims). But nonmonetary credits do not mean the property retains economic value, but rather that the government is giving the property *owner* something in exchange for taking the property.

In *City of Chicago v. Roppolo*, 447 N.E.2d 870, 883 (Ill. App. Ct. 1983), the court held that property owners did not lose economic value in their properties that local legislation deemed historic, because the owners received "compensation" with TDRs. This decision reflects the confusion engendered by *Penn Central* and Justice Brennan's one-sentence conflation of the question of whether a take occurred or whether just compensation had been paid. *Penn Central*, 438 U.S. at 137 ("While these [transferable development] rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation."). These are two different questions. Yet in all of the above cases, the courts found that the nonmonetary credit peeled off from the res was enough to give the res economic value. But while the economic value of the nonmonetary credits may be useable, that is separate, distinct, and apart from the underlying economic value of a piece of property put to its own use. The latter is what the Fifth Amendment protects.

2. Other Courts Find Nonmonetary Credits To Be Relevant to Compensation only After a Finding of a Taking

Contrary to the holdings of courts reviewed above, a number of courts have recognized that nonmonetary credits do not allow a government to avoid the finding of takings liability, but only count towards compensation for a taking.

In *Fred F. French Investing Co. v. City of New York*, New York's highest court recognized that TDRs amounted to nothing more than an attempt to provide just compensation after a taking. 350 N.E.2d 381, 383 (N.Y. 1976). The City of New York prevented a landowner from developing land previously used as a park, requiring him instead to maintain the land for public use. In an effort to mitigate the harms and losses resulting from this restriction, the city granted the landowner TDRs "usable elsewhere." *Id.* at 382. Despite the existence of a TDR program, the Court of Appeals of New York held that the restriction "render[ed] the property unsuitable for any reasonable income productive or other private use for which it [was] adapted and thus destroy[ed] its economic value." *Id.* at 387. Further, in a foreshadowing of Justice Scalia's later insight, the court explained: "the attempted severance of the development rights with uncertain and contingent market value did not adequately preserve those rights." *Id.* at 383.

Another New York court returned to these takings-avoidance schemes in *W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007 (N.Y. Sup. Ct. 1998). Like

the court in *Fred F. French*, the New York court in *W.J.F. Realty* concluded that TDRs could only be weighed when deciding whether just compensation for a taking has been afforded via the TDRs. *Id.*

In *Corrigan v. City of Scott*sdale, 720 P.2d 528, 540 (Ariz. Ct. App. 1985), *aff'd in part*, *vacated in part on other grounds*, 720 P.2d 513 (Ariz. 1986), the Arizona Court of Appeals held that the state Constitution requires government to pay money when it takes the use of property. That court recognized that "density credit" TDRs must be analyzed on the compensation side of the equation, and ultimately rejected nonmonetary compensation for a taking as *per se* inadequate.

These decisions conflict with the instant case, where the Beyers' property was rendered unsuitable for any reasonable income or other private use, yet the lower court found no taking had taken place because of the nonmonetary credits offered by the government. Both of these results cannot be constitutional.

B. Resolving the Split of Authority Is Necessary and Warranted in This Case

This petition provides the Court with an excellent opportunity to resolve the split of authority on the ability of local governments to use nonmonetary credits to evade the Takings Clause and the rule of *Lucas*. There is no question that if *Lucas* applies to Marathon's Plan, then a taking has occurred. The petition, therefore, squarely asks whether *Lucas* applies to land use regulations that compel a landowner to dedicate real property to public use without financial compensation, when government

has offered nonmonetary credits for possible development elsewhere. The case also squarely presents the question whether Justice Scalia was correct when he opined that nonmonetary credits can be weighed only in determining if just compensation has been paid for a taking. Land use plans with nonmonetary credit schemes that this Court last addressed in *Penn Central* and *Suitum* are widely used today. There is a split in authority over whether governments can evade the Takings Clause through their use. Until this Court answers these questions, local government regulators will continue to take advantage of the gap, and property owners will remain unprotected.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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Respectfully submitted,

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