No. 17-393

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, ET AL.,
RESPONDENTS.

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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Can state entities perform an end-run around the Fifth Amendment's Taking Clause and this Court's precedents by offering a property owner something of only theoretical, future value in exchange for eliminating *all* uses of her property?

2. If they can, can that potential value be considered in determining whether a taking occurred or, under *Penn Central*, may the exchange of potential future value merely be considered when deciding how much more is owed to make compensation for the taking "just"?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case interests Cato because Florida's inability to enforce essential property rights allows state entities near-unfettered freedom to steal all valuable uses of property from owners without paying just compensation. This practice violates basic logic, fundamental property rights, and Fifth Amendment guarantees.

INTRODUCTION AND SUMMARY OF ARGUMENT

If you take a child's toy in exchange for the promise of a piece of candy that the child will not be able to eat, but *may* be able to trade sometime in the future, is it still a taking? Yes, and this is also true of real property. A token gift of potential future, unknown value in no way changes the character of the initial action. Under the categorical rule this Court announced in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), the Beyers' property was taken here.

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[1] Rule 37 statement: All parties received timely notice of intent to file this brief. Petitioners and Respondent City of Marathon filed a blanket consent; Respondent State of Florida's consent letter has been lodged with the Clerk. No counsel for any party authored any part of this brief and no person or entity other than *amici* funded its preparation or submission.

Gordon and Molly Beyers made an investment in their future when they bought Bamboo Key for $70,000 in 1970, intending to build a home and retire there. At the time of this purchase, the island was zoned for general use, with a restriction that only one home per acre (the island is nine acres) could be built. Years later, in 1986, new regulations restricted development on the island to only one home or major structure. While the Beyers could have challenged that action as significantly decreasing the value of their land, they elected not to because they were still permitted to put their land to the use they had originally intended: to build a retirement home. A decade later, their island was classified as a bird rookery, requiring the Beyers to leave the property in its natural state and eliminate all economic—or practical—use for the island. Only when all use of the island was regulated away, did the Beyers pursue administrative review and inverse-condemnation proceedings. In the state judiciary, the trial court ultimately determined that no uses other than primitive camping and picnicking were allowed on the property, but still ruled that no taking had occurred. Subsequent appeals also failed, *Ganson v. City of Marathon*, 222 So.3d 17 (Fla. Dist. Ct. App. 2016), and the Florida Supreme Court denied review.

In finding that the Beyers were not due just compensation for being deprived of all economically feasible use of their property, the court below exerted significant effort to avoid this Court's regulatory-takings jurisprudence. Property owners like the Beyers have usually had their claims analyzed under *Lucas*. Instead of taking that route, however, the court below attempted to squeeze the contours of this case into the ad-hoc, factual inquiry articulated by this Court in *Penn Central Transp. Co. v. New York City*, 438 U.S.

104 (1978). Not only was this a wholly inappropriate approach, but the court also failed to properly apply *Penn Central*. The decision below snakes around the edges of this Court's rulings in a way that would be impressive if it weren't so constitutionally fiendish.

Adding insult to injury, the court below agreed that, while the Beyers had no reasonable, investment-back expectations in their property, an award of 16 nonmonetary credits in the form of Rate of Growth Ordinance (ROGO) points was sufficient to satisfy any expectations they might have—so no taking occurred.

The Fifth Amendment's protections for property rights should be enforced and respected. The Court should take this case to clarify the proper application of both *Lucas* and *Penn Central*.

ARGUMENT

I. THE COURT BELOW IGNORED THIS COURT'S REGULATORY-TAKINGS JURISPRUDENCE

Regulatory-takings jurisprudence may be a "muddle," *see* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. Cal. L. Rev. 561 (1984), but it is not muddled enough to ratify Florida's actions here. While working their way through the takings quagmire, the lower court misapplied the Court's precedents to the Beyers' claims. They used an ad-hoc *Penn Central* analysis rather than evaluating the effect of the relevant regulations as a categorical taking. They shifted the burden from government to landowner and made one *Penn Central* factor—the reasonable investment-backed expectations prong—inappropriately dispositive, contrary to this Court's ruling in *Palazzolo v. Rhode Island*, 533 U.S. 606, 634

(2001) (O'Connor, J., concurring); *Penn Central*, 438 U.S. at 124. They thus assumed that constitutional rights come with an expiration date.

Governments and government entities are increasingly using things like ROGO points to avoid takings claims. *See* 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).[2] If the lower court's decision stands, such "points" may allow governments to avoid takings inquiries all together.

"Regrettably, regulatory takings jurisprudence is cryptic and convoluted. The United States Supreme Court, in an effort to clarify its first regulatory takings test—outlined in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)—has left in its wake a collection of incongruous and inadequate takings inquiries." *Ganson*, 222 So.3d at 20 (Shepherd, J., dissental). In *Lucas*, this Court held that when regulation deprives an owner of all economically viable uses of their property, a categorical taking has occurred and just compensation is due to the owner. 505 U.S. at 1015–18. If a regulatory body attempts to evade *Lucas* by offering virtually dispossessed property owners a noneconomic credit in exchange for the loss of all valuable use of their property, a taking has still occurred and the credits would only adjust the compensation.

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[2] While ROGO points were applied in the regulatory scheme here, noneconomic credits permitting development in similar schemes are also known as future development rights (FDRs) or transferrable development rights (TDRs).

A. The Court Below Deviated from this Court's Regulatory-Takings Jurisprudence When It Failed to Apply *Lucas*'s Categorical-Taking Standard

The Beyers' experience with Bamboo Key is quite similar to the facts of *Lucas*: turning a once-developable property into a bird rookery is a categorical or *per se* taking that requires just compensation.

In *Lucas*, the Beach Front Management Act prohibited David Lucas from following through on his plans to develop each of his two waterfront lots. 505 U.S. at 1006–07. Just like the Beyers here, Lucas did not challenge the exercise of police power that stopped him from building the two homes, or the fit between the ends and means; he simply demanded the just compensation promised to him by the Constitution. *Id.* at 1009. Even though Lucas's land was made economically worthless, he was arguably better off than the Beyers are here: "Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer." *Id.* at 1044 (Blackmun, J., dissenting). In contrast, the Beyers are only allowed "temporary primitive camping by the owner, in which no land clearing or other alteration of the island occurs." *Ganson*, 222 So.3d at 29 (Shepherd, J., dissental).

Land that is converted from buildable site to a bird rookery—and, for the Beyers, little more than a place to sit—requires a *Lucas* analysis. The award of ROGO points does not change the nature of the action that deprived the owners of all economic use of their land. Noneconomic ROGO credits, which have no fixed value and may not even have a buyer, must be considered in the just-compensation stage, not the takings analysis.

B. The Court Below Failed to Properly Apply *Penn Central*'s Analysis of Reasonable, Investment-Backed Expectations

Although the facts of this case demand that it be considered in the context of *Lucas*, the lower court also fumbled the analysis under *Penn Central*. The court ignored the economic impact of the regulation on the Beyers' land and instead exclusively focused on the reasonable investment-backed expectations prong of *Penn Central*, in direct contravention of this Court's treatment of *Penn Central* in subsequent decisions. As Justice O'Connor explained in *Palazzolo*:

> The court erred in elevating what it believed to be [petitioner's] lack of reasonable investment-backed expectations to dispositive status. Investment-backed expectations, though important, are not talismanic under *Penn Central*. Evaluation of the degree of interference with investment-backed expectations instead is one factor that points toward the answer to the question whether the application of a particular regulation to particular property goes too far.

Palazzolo, 533 U.S. at 634 (O'Connor, J., concurring) (internal quotations omitted).

The court then compounded the error by considering the ROGO points in the first half of the equation—to determine whether or not a take occurred—rather than appropriately considering how those points *might* contribute towards any just compensation. As the dissent to denial of rehearing at the Florida District Court of Appeals noted, while both the district and appellate court claimed "to evaluate the Beyers' taking

challenge under *Penn Central*" it failed to do so according to this Court's instructions. *Ganson*, 222 So.3d at 24 (Shepherd, J., dissental).

Additionally, "the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005). After *Penn Central*, this Court has made clear in regulatory-taking cases that no one prong is dispositive.

Yet here, not only did the lower court improperly emphasize one factor over the others, but it also failed to properly examine the Beyers' claim under that factor, resulting in "cursory analyses" that are "confused and fundamentally flawed." *Ganson*, 222 So.3d at 24–25 (Shepherd, J., dissenting). The state judiciary invented an expiration date for rights, determining—in the absence of any possible statute of limitations—that "the Beyers waited too long to assert their constitutional rights in the face of ever tightening restrictions, thereby forfeiting any expectations to develop their land." *Id.* at 25. This conclusion defies the language of the Fifth Amendment—which includes no such expiration date—and this Court's decision in *Palazzolo*, which held that even a property owner who purchased real property with regulations already in place was free to challenge the land use restrictions that prevented using the property for a particular purpose. 533 U.S. 606. The lower court's decision was based on a fundamental "misunderstanding that regulations passed after the acquisition of property, if not challenged quickly enough, diminish a property owner's expectations so as to extinguish constitutionally pro-

tected property rights." *Ganson*, 222 So.3d at 25 (Shepherd, J., dissental). This fundamental flaw, combined with the lower court's unmooring of "investment-backed" from the reasonable expectations requirement, led to an analysis that insists on a property owners "non-investment-backed expectations at an unspecified point in time within a post-acquisition regulatory scheme." *Id.* at 25 (cleaned up).

In light of this Court's precedents and commonsense logic, this simply cannot be the appropriate analysis. Instead, "[i]nvestment-backed expectations held by property owners arise at the time of purchase and the information they have *then* about their property gives them meaning." Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 Urb. Law. 215, 235-36 (1995) (emphasis added).

Even though the definition of "investment-backed expectations" is somewhat unclear, such expectations do not exist apart from any intent or action of the owner or the regulating body. If it were otherwise, reasonable investment-backed expectations could not function as a point of analysis in the *Penn Central* test. It is constitutionally incoherent to claim that invest-backed expectations, necessarily formed at the time of the acquisition, can be subsequently shaped and limited by land-use restrictions implemented after acquisition. As this Court held in *Palazzolo*, some "enactments are unreasonable and do not become less so through the passage of time or title," and allowing the state to insist that the passage of time changed the potential character of its regulatory actions, "would absolve the State of its obligation to defend an action restricting land use, no matter how extreme or unreasonable." *Palazzolo*, 533 U.S. at 627. Contrary to what

the court below held, the *Palazzolo* Court explained that, if the investment-backed-expectations rule was based on the passage of time, "[a] state would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule." *Id.*

The lower court also inappropriately found that the Beyers had no claim because they "failed to produce any evidence of their subjective expectations." *Ganson*, 222 So.3d at 25 (Shepherd, J., dissental). But there is no requirement for property owners to provide evidence of their particular investment-backed expectations. To the contrary, the reasonableness of investment-backed expectations is an objective rather than subjective test. As the *Lucas* Court explained, "[t]he expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved." *Lucas*, 505 U.S. at 1035. The state courts' willingness to resort to inappropriate burden-shifting on one prong of an already misapplied inquiry—based in *Penn Central* rather than *Lucas*—further illustrates a dire need for this Court's involvement.

As Justice O'Connor noted in her *Palazzolo* concurrence, an important, objective factor in determining the reasonableness of investment-backed expectations is "the regulatory regime in place at the time the claimant acquires the property at issue." 533 U.S. at 633 (O'Connor, J., concurring). Investments are made at the time of acquisition; the rules of the game at that time are what shape owners' expectations. The Beyers reasonably expected to be able to build a home because, at the time of purchase, Bamboo Key permitted the building of one home per acre. *Beyer v. City of Marathon*, 197 So.3d 563, 564-65 (Fla. Dist. Ct. App. 2013).

Further undermining the lower court's bizarre approach to reasonable, investment-backed expectations is the argument's internal contradiction: the Beyers' expectations cannot be shaped by the regulations at the time of acquisition, but their expectations are (or should have been) shaped and changed by subsequent regulations restricting use. This reasoning is nonsensical, cyclical, and elucidates the lengths government is willing to go to avoid paying constitutionally promised just compensation when a taking occurs.

Finally, the Florida appellate court also determined that any investment-backed expectations the Beyers may have had were fully satisfied by the award of 16 ROGO points. *Beyer*, 197 So.3d at 565. This reasoning is particularly odd in light of their determination that the Beyers had *no* reasonable investment-backed expectations. If there were no "economic expectations," then how and why was the awarding of a non-monetary chit sufficient to satisfy non-existent expectations? Were the ROGO points just magnanimous gift from the government and not intended to compensate the Beyers for their reasonable, investment-backed losses? *Ganson,* 222 So.3d at 27-28 (Shepherd, J., dissental). This attempt to avoid providing just compensation twists this Court's regulatory-takings jurisprudence beyond recognition.

II. THE OPINION BELOW UNDERMINES THIS COURT'S PRECEDENTS AND PERMITS RECCURRING MISAPPLICATION OF TAKINGS LAW, WHICH UNDERMINES ENVIRONMENTAL REGULATIONS

A. There Is Significant Disagreement in the Lower Courts about How to Apply this Court's Decisions and When to Consider Noneconomic Credits in Regulatory-Takings Claims

Unfortunately, Florida's courts are not alone in failing to adhere to this Court's takings decisions. The ad hoc, factual nature of a *Penn Central* analysis results in innumerable interpretations and outcomes, which is expected. But courts should be able to achieve some consistency in applying per se rules, like the one this Court announced in *Lucas*: the "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017.

ROGO points are—at best—of potential economic value to property owners like the Beyers. To convert their chits to value they can use, they must find a purchaser with property in an area permitting development who is willing to purchase less than the minimum number of ROGO points necessary to develop. But uncertainly valuable ROGO points don't change the fact that the Breyers' property was converted into a bird rookery, prohibiting any alteration whatsoever to the island. And yet courts are split as to when, in a takings inquiry, nonmonetary "chits" can be considered. *See Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 747 (1997) (Scalia, J., concurring in part and concurring in the judgment).

Some courts hold that, despite nonmonetary credits having no attachment to or source in the regulated property itself, the giving of such credits prevents finding that a taking has occurred, either because the value still attaches in the property or because the credits allow for some (potential) economic use. Pet. for Cert. at 22-24 (discussing court decisions finding that nonmonetary credits preclude takings liability). Other courts only permit consideration of nonmonetary credits when evaluating just compensation. *Id.* at 25-26.

B. Without this Court's Intervention, the Decision Below May Contribute to a "Race to Develop," Undermining the Very Purpose of Environmental Regulations

The Beyers' case is an ideal opportunity for this Court to clarify *Penn Central* and *Lucas* in light of an ever-expanding regime of land-use regulations utilizing some form of future or transferable development rights to avoid takings liability. *See* Radford, *Takings and Transferable Development Rights*, supra.

"The most troubling aspect of a regime of uncompensated natural resource preservation regulation may be that it encourages investors to accelerate development." David A. Dana, *Natural Preservation and the Race to Develop*, 143 U. Penn. L. Rev. 655, 669 (1995). The Beyers' situation illustrates why, if this Court fails to intervene, it is possible, even likely, that a sanctified regime of unrestricted government control over property for natural preservation purposes will result in unintended overdevelopment.

The Beyers owned one parcel, the entirety of Bamboo Key. When they purchased the island for $70,000 it was zoned for general use and, had they not planned

to eventually build one retirement home there, they would have been permitted to build nine homes—one on each acre of the property. *Beyer*, 197 So.3d at 564. Regulations began restricting the available use of the island years later. Still, the Beyers did not challenge the changes that restricted development to one habitable structure on the island because that was all they planned to do—to build a single retirement home. When even that was regulated away, the Beyers pursued administrative review and inverse condemnation proceedings, where it was determined that no valuable uses remained in the property but that no taking had occurred. *Id.* at 564-66. If the Beyers had to do it over again, the smart move would be to avoid the loss by immediately developing the property to its fullest after purchasing the island. That may have altered their plans for eventual retirement, but it would have been far preferable to losing all value of the land without receiving compensation.

This kind of "race to develop" may arise for many reasons, but "[t]he absence of a compensation requirement encourages property owners to accelerate development in order to avoid regulatory losses from future preservation regulation." Dana, *Natural Preservation*, at 656. Property owners like Lucas and the Beyers face difficult decisions. "Had Lucas perceived himself as operating in a regime in which the unavailability of compensation for losses resulting from natural preservation was a certainty, he presumably would have built summer houses on the lots before the Beachfront Management Act went into effect." *Id.* at 668. The risks associated with future regulations are likely to tempt investors to respond to the real potential of loss by attempting to "beat the regulatory clock." *Id.* at 677.

CONCLUSION

Courts should be reminded that a regulatory action that deprives a property of all value is a categorical taking and requires just compensation. This Court should also clarify the *Penn Central* factors, making clear that any noneconomic credit must be considered only after a taking has been identified. Both would mitigate the potential race to develop.

For the foregoing reasons, and those stated by the petitioners, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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