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,
and the STATE OF FLORIDA,
Respondents.

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

At least 181 transferable development rights (TDR) programs, across 33 of the 50 states, exist in the United States—of which the program in the Florida Keys at issue here is but one. *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 at time of article). Neither the State of Florida nor the City of Marathon (collectively, the Government) dispute that fact. Yet the Government contends that the TDR program at issue in this case, a program that when applied took the Beyers' property in everything but name—leaving them with nothing but a bird rookery and a possible credit *to sell to a third-party* in the future—does not present the Court the right opportunity to review TDRs that a majority of the states rely upon to manage private property. The Government is wrong. This case presents the Court with just the right vehicle to answer the questions the Court left open in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). Ever since *Suitum*, local governments have taken advantage of this Court's silence to take property without paying just compensation.

ARGUMENT

I

THE GOVERNMENT CONCEDES THE CASE PRESENTS THE QUESTION OF WHETHER TDRS CAN SATISFY THE REQUIREMENT FOR JUST COMPENSATION IN *LUCAS* TAKINGS CASES

The Government effectively concedes the case presents a worthy question for the Court to review in the way it re-frames the questions presented in its Brief in Opposition. Whereas Petitioner set out two questions presented, the Government re-wrote them into one:

> Whether, applying the Court's well-established Takings Clause jurisprudence to the facts of this case, Florida's intermediate appellate court correctly determined that the City of Marathon's land development regulations did not deprive Gordon and Molly Beyer of all economically beneficial use of their property.

Brief in Opposition (BIO) at i. So reframed, the questions presented by this case become more stark yet no less compelling: can the government give you a "peculiar kind of chit," *see Suitum*, 520 U.S. at 747 (Scalia, J., concurring in part and concurring in the judgment), and by doing so avoid a *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), total taking because the chit amounts to some beneficial use of the underlying property even though the owner

can no longer use the underlying property itself? Justice Scalia identified this very question as one that must be answered "no" to be constitutional. *Id.* In its Brief in Opposition, the Government contradicts Justice Scalia and says the answer is "yes."

Both cannot be right.

The Government claims it is right, not Justice Scalia, because Gordon and Molly Beyer retained value in the property by virtue of the TDRs—the Rate of Growth (ROGO) points—and the Beyers' continued right to use the property for primitive camping. Then the Government asserts that the value of the chit transformed this case from a *Lucas* taking into a *Penn Central* taking. Finally, the Government argues that the Beyers had no reasonable investment-backed expectations when they purchased their nine-acre property in the Florida Keys and thus no taking could have occurred. In other words, the Government submits its convoluted retelling of the facts of the case makes it the wrong vehicle to address the important questions presented in the Petition. The Government is wrong. The lower court decision distills the legal question of where to weigh TDRs to its essence such that the case makes the perfect vehicle for the Court to answer the question left open after *Suitum*.

A. The Government's Argument About the Value of the ROGO Points and Primitive Camping Distracts from the Actual Legal Questions Presented

First, the Government asks this Court to accept the lower court's *ipse dixit* ruling on a motion for summary judgment that the Beyers' property retained

$150,000 in value by virtue of the ROGO "points," a kind of TDR, the court ascribed to the property for the Beyers to then apply toward another property or to sell. But that argument simply evades the point Justice Scalia made in *Suitum*: does the award of transferable development rights mean the government has not taken property at all, or are TDRs only something to weigh when deciding whether the government paid just compensation? The Government does not answer that question in its Brief in Opposition; it avoids it by claiming the facts of *Suitum* make Scalia's opinion there irrelevant here (BIO at 21). The Government does so because the answer advanced by Justice Scalia in *Suitum* is compelling: the exchange of TDRs does not mean the government avoids a Fifth Amendment taking, but rather TDRs only speak to whether, after a taking has occurred, the Government has provided just compensation by way of the chit.

Likewise, the argument that *Lucas* cannot apply because the Beyers may use the property for primitive camping is a red herring. This Court held in *Lucas* that a categorical taking occurs when government "regulation denies all economically beneficial or productive *use* of land." *Lucas*, 505 U.S. at 1015 (emphasis added). That's at least in part because, "requiring land to be left substantially in its natural state" suggests "that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 1018.

In other words, it is unfair to force one property owner to lose the use of his land in the name of the common good, because it forces him to bear the burden

of keeping land in its natural state—something which is purportedly for the good of all. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). Whether the owner may pitch a tent and temporarily camp somewhere on the land makes no difference to *Lucas*. Indeed, the government made the identical argument in *Lucas* and this Court rejected it. *See* Respondent's Brief on the Merits, *Lucas v. South Carolina Coastal Council*, 1992 WL 672613 at *45 (Jan. 31, 1992) (arguing landowner's property "retain[ed] substantial economic value" and could be used for "passive and recreational use").

The evidence here showed the Plan enacted by Marathon reduced the Beyers' property's value by more than 98.37%, from its original purchase price of $55,000 to $900. Pet. App. B-4; Pet. App. C-2 ¶ 1. That the land was worth $900 and not $0 does not move this case from *Lucas* into *Penn Central*.[1] *See Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) ("[A] State may not evade the duty to compensate on the premise that the landowner is left with a token interest.").

[1] Even land that cannot be put to economically productive use has some monetary value. *See* James Burling, *Can Property Value Avert a Regulatory Taking When Economically Beneficial Use Has Been Destroyed?*, Takings Sides on Takings Issue: Public and Private Perspectives at 456, 471 n.7 (2002) ("About the only conceivable instance where land has no value . . . might be where its liabilities—say, from toxic waste contamination—exceed its utility.").

B. The Government Misstates the Role of Reasonable Investment-Backed Expectations To Obscure the Important Questions Presented by This Case

Next, the Government avoids its own restatement of the questions presented when it says that it is a *Penn Central* taking that occurred here, not a *Lucas* taking. But assuming arguendo that the Government and the lower court correctly reached that conclusion, they nevertheless err by concluding that the Beyers' *Penn Central* claim fails because they did not put into evidence their reasonable investment-backed expectations for the property when they purchased it in 1970. That argument flies in the face of the law and common sense.

This Court has recognized "[i]nvestment-backed expectations, though important, are not talismanic under *Penn Central*." *Palazzolo*, 533 U.S. at 634. Instead, it is only "one factor" in determining whether a regulation effects a taking. *Id.* Moreover, the underlying argument that a property owner must prove investment-backed expectations with testimony from the buyer is unrooted from the law: "Neither *Penn Central* nor subsequent [cases] have contained even the hint of a suggestion that an owner would have a less viable claim if the property were an inherited family business, a devise from a distant relative, or even a prize in a lottery." Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U. L. Rev. 899, 913 (2007). Rather, the prong is more interested in "an appeal to fairness in the intuitive sense that the pang of the loss of a sought after advantage might be

greater than the pang of a windfall not received." *Id.*; *see also Kaiser Aetna v. United States*, 444 U.S. 164, n.2 (1979) (Blackmun, J., dissenting).

To accept the Government's position (as well as the lower court's), the Court would have to accept that the Beyers purchased a nine-acre island in the Keys in 1970 for $55,000 and paid decades of property taxes on the land merely because they liked the idea of owning an undeveloped island. That argument is for the birds. The lower court should have instead considered the purchase price and the land development regulations in place at the time of purchase in regards to the Beyers' reasonable investment-backed expectations. The Government concedes that at the time the Beyers bought the land, they could have put one home per acre on the island according to the "General Use" zoning in place (BIO at 3). Later, the Government sets out that it downzoned the property in 1986, but that even afterwards the Beyers could have put a permanent home on the island as long as they complied with the other applicable regulations in place (BIO at 3). In other words, for the first 26 years the Beyers owned their property, they had every reason to think they could place a home on the island—the applicable law specifically allowed it. Once the Government took away the right to build a home, the Beyers took action to protect their property rights by initiating the case that is now before this Court 20 years later. The Beyers' actions, combined with the state of the zoning regulations in 1970 when they purchased the property and through the years hence, demonstrate their reasonable expectations for the property beyond cavil.

For its part, the Government asks this Court to ignore the state of the zoning regulations in place when weighing what the Beyers expected to do with their property. The Government boldly asserts the Court should deny the Petition because there is no way to know what the Beyers expected to do with this nine-acre island. Not so. They bought a valuable piece of property in Florida to use it, and when the Government completely took away that right in order to protect the environment on behalf of the community, the government balanced the needs of the community on the backs of the Beyers without compensating them for their sacrifice. That is the very kind of regulatory taking that caused Justice Holmes to emphasize 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).

The Government says the lower court based its decision on "well-settled" law (BIO at 11). Since in *Suitum* this Court left open the very questions the case presents, the lower court *couldn't* rely upon settled law in reaching its decision. This Court should take this opportunity to settle the questions now.

II

THE GOVERNMENT CASTS NO DOUBT ON THE SPLIT OF AUTHORITY AMONG THE COURTS ON HOW TO TREAT TDRS IN A TAKINGS ANALYSIS

The Government asserts that no conflict exists among lower court decisions on the questions presented by this case. Not so.

For example, the Government asserts that *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 383 (N.Y. 1976), does not conflict with the instant case for the curious reason that it predates *Penn Central* (*see* BIO at 23-24). But the conflict is not between *Penn Central* and *Fred F. French*, it is between the instant case and *Fred F. French* in terms of whether TDRs avoid a taking or simply provide a form of compensation for a taking. In that case, 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). To be sure, the case also turned on a due process violation, but the court nevertheless explained about TDRs that "the attempted severance of the development rights with uncertain and contingent market value did not adequately preserve" property rights in the property itself. *Id.* at 383.

Likewise, another New York court returned to this topic 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 *W.J.F. Realty* court concluded that it could only weigh TDRs when deciding whether just compensation for a taking has been afforded via the

TDRs. *Id.* That this case arises from a New York trial court does not militate against recognizing the conflict on these vital questions of law. Takings cases often do not make it beyond trial courts because litigating them is expensive, time-consuming, and exhausting. *See, e.g., Regulatory Takings and Proposals for Change* at 13, U.S. Congressional Budget Office (1998) ("[T]he process of filing [takings] claims and getting them heard by the courts may deter some property owners because it is often complicated, expensive, and time-consuming."); Margaret Strand and Lowell Rothschild, Wetlands Deskbook, 4th at 150 ("Takings litigation is expensive and time-consuming."). The case demonstrates the existence of the conflict and the need to answer the questions posed and left unanswered in *Suitum*.

Finally, the Government contends that *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), does not conflict because it dealt with state law rather than federal. This obvious point, acknowledged in the Petition itself, does not undercut the point that the question of where to weigh TDRs has led to conflicting answers in the lower courts. *See also Orion Corp. v. State*, 747 P.2d 1062, 1086 (Wash. 1987) (*en banc*) ("Local agencies charged with administering land-use regulation have a variety of compensation tools at their disposal including . . . transferring development rights.").

That some courts recognize that TDRs are only a form of compensation, as opposed to other courts like the lower court in this case that conclude otherwise, cannot be reasonably disputed. Another state

appellate court recently recognized that TDRs are simply an alternative way to compensate a landowner when the government takes their property in favor of protecting the environment or history. *See Hahn v. Hagar*, 153 A.D.3d 105, 110, 60 N.Y.S.3d 49, 53 (N.Y. App. Div. July 2017) ("[T]ransferable development rights, a creature of statute, may be reduced to credits and transferred as part of a legislative scheme designed to incentivize growth in desired areas *and to provide compensation for* the preservation of natural or historic resources.") (emphasis added). The conflict exists and this Court should resolve it.[2]

III

THE CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE

If the Court does not grant review, other property owners will lose their property without compensation through TDR sleight-of-hand schemes in which the taking itself is denied because of the ersatz value of the chit.[3] *See, e.g., Shands v. City of Marathon*, No. 07-CA-99-M, slip op. at 3-4 (Fla. Cir. Ct. Jul. 17, 2017),

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[2] The Government alternatively submits that this Court should deny the petition because it arises from a Florida intermediate appellate court (BIO at 26-28). This Court regularly grants petitions arising from the Florida intermediate appellate courts after the Florida Supreme Court declines review. *See, e.g., Graham v. Florida*, 560 U.S. 48 (2010).

[3] If the courts treated TDRs as *compensation* for a taking, then at least the landowner could bring in expert appraisers to opine on the value of the TDRs, which was not allowed here.

appeal docketed, No. 3D17-1859 (Fla. Dist. Ct. App. Aug. 16, 2017).[4]

Contrary to the Government's argument (BIO 29-33), this case presents questions of national importance. 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)).

After twenty years, the time is ripe for this Court to address the ambiguity it left in *Suitum*, to wit: whether courts should put TDRs on the takings side of the equation as the lower court did, or on the just compensation side of the equation, as Justice Scalia said. *See* Trevor D. Vincent, *Exploiting Ambiguity in the Supreme Court: Cutting Through the Fifth Amendment with Transferable Development Rights*, 58 William & Mary Law Review 285 at 308-16 (Oct. 2016) (recommending local governments exploit the "ambiguity" left in *Suitum* by continuing to rely on TDRs, despite their often-times speculative value, by "flying under the radar" of this Court's "purview" in the way they implement TDR programs).

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[4] https://pacificlegal.org/wp-content/uploads/2017/12/Shands-Order-on-Appeal.pdf.

While some TDR programs may be constitutional, this one, as applied to the Beyers, is not. Marathon attempted a shorter cut toward improving the public condition—protecting the environment in the Florida Keys—than the Constitution allows. Other local and state governments have done the same, and they do so by exploiting the vexing takings questions left unanswered in *Suitum*. This Court should issue the writ so it can answer these questions.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

DATED: December, 2017.

Respectfully submitted,

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