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 DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, applying this 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.

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STATEMENT OF THE CASE

I. MONROE COUNTY'S RATE OF GROWTH ORDINANCES ("ROGO")

In 1972, Florida created the "Areas of Critical State Concern Program." *See* Fla. Stat. § 380.05. This program protects resources and public facilities of major statewide significance, within designated geographic areas, from uncontrolled development that, if not protected, would cause substantial deterioration of these limited and valuable resources. *See ibid*. Later, in 1985, Florida implemented the Comprehensive Plan to preserve, protect, and enhance the quality of life for all citizens. *See* Fla. Stat. ch. 187, pt. II. This required every local government to adopt a local comprehensive plan consistent with state statutory standards. *See* Fla. Stat. ch. 163, pt. II. The state statutory standards are designed to carefully balance competing pressures which include rapid growth in population and manageable development. *See* Fla. Stat. ch. 187, pt. II. Florida's natural environment is a key factor for many residents' quality of life, which is why protecting the natural environment is included in Florida's Comprehensive Plan. *See ibid*.

Florida designated its Keys, a string of uniquely situated tropical islands in Monroe County, as an area of critical state concern.[1] *See* Fla. Stat. § 380.0552(2).

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[1] *See Areas of Critical State Concern Program*, FLA. DEP'T OF ECON. OPPORTUNITY, http://www.floridajobs.org/community-planning-and-development/programs/community-planning-table-of-contents/areas-of-critical-state-concern (last visited Dec. 17, 2017).

In 1992, Monroe County, Florida, implemented the Rate of Growth Ordinances ("ROGO"), which operate in conjunction with Monroe County's Comprehensive Plan. *See* Monroe Cnty. Code §§ 9.5-121 through 9.5-129. Upon incorporation, Monroe County's Comprehensive Plan and land-development regulations became the City of Marathon's ("City") interim comprehensive plan and land-development regulations, respectively.

ROGO is the primary tool used by the City to manage development and to control growth. *See ibid.* Due to the unique geographic nature of the Keys and the limited options for egress and ingress from the Keys to the mainland of Florida, the City, Monroe County, and all other municipalities in the Keys rely on the ROGO system to ensure the system does not interfere with public safety and welfare in the event of a natural disaster, such as a hurricane, by maintaining an established hurricane evacuation clearance time for permanent residents of no more than twenty-four hours. *See* Monroe Cnty. Year 2010 Comprehensive Plan, Objective 101.2, *available at* http://www.monroecounty-fl.gov/DocumentCenter/Home/View/32 ("Monroe County shall reduce hurricane evacuation clearance times to 24 hours by the year 2010.").[2]

For purposes of the ROGO system, landowners seeking to develop their land in the City compete against all other landowners seeking to develop their

[2] The "Monroe County Year 2010 Comprehensive Plan" available on Monroe County's website and the "1996 Plan" discussed below are the same document.

land for a limited number of allocations for development established by the state's land planning agency as part of its role in outlining the state statutory standards for the overall Comprehensive Plan. *See* Fla. Stat. § 380.0552. Landowners seeking to develop less natural areas receive more fungible "points" towards their application while those seeking to develop natural areas or specially protected areas will receive fewer or no points at all. *See* Monroe Cnty. Code §§ 9.5-121 through 9.5-129. ROGO points are freely bought and sold by those seeking to develop in the City. *See generally* Pet. App. 3c, 6c. Those with the most points are the most likely to earn an allocation. *See* Monroe Cnty. Code §§ 9.5-121 through 9.5-129.

II. ZONING HISTORY OF BAMBOO KEY

In February 1970, Gordon Beyer and Molly Beyer ("Beyers") purchased an offshore island known as Bamboo Key ("Property"). Pet. App. 2a. The Property is almost nine acres. *Ibid.* At the time of purchase, the Property was zoned for General Use ("GU"), which allowed the building of one single-family home per acre. *See ibid.* On September 15, 1986, Monroe County's 1986 Comprehensive Plan and Land Development Regulations ("1986 Regulations") went into effect. *See id.* at 2a n.1. The 1986 Regulations changed the Property's zoning from GU to Offshore Island ("OS"), which, among other things, imposed a density limit of one dwelling unit per ten acres. *Id.* at 2c-3c. The Property's OS zoning permitted the following uses as of right (subject to compliance with all other applicable regulations): detached dwellings; camping for the personal use of the owner of the property on a temporary basis; beekeeping; accessory

uses and home occupations (special use permit required); and tourist housing and vacation rental uses if they existed prior to January 1, 1996.[3] The Beyers did not challenge the adoption of the 1986 Regulations. *See* Pet. App. 4f.

In 1996, Monroe County adopted its new Comprehensive Plan ("1996 Plan"), which identified the Property as a bird rookery and prohibited future development of the Property. *Id.* at 2a-4a. The Beyers did not challenge the adoption of the 1996 Plan.

III. THE BENEFICIAL USE APPLICATION, HEARING, AND DETERMINATION

The City incorporated in November 1999, and the Property then became part of the City. *See id.* at 3a. The City adopted both the 1996 Plan and the Monroe County land-development regulations as its interim comprehensive plan and land-development regulations, respectively. *See id.* at 2e. Initially, the Beyers filed a Beneficial Use Determination ("BUD")[4] application with Monroe County.[5] *Id.* at 3a. After the City's incorporation, the Beyers filed a BUD application with the City, and a Beneficial Use Hearing

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[3] *See* Monroe Cnty. Code § 9.5-241.

[4] *See* Monroe Cnty. Code §§ 9.5-171 through 9.5-179.

[5] The BUD process is a mechanism designed to ensure that every landowner has beneficial use of his property. "[I]t accounts for both facial and as-applied takings," as it provides for relief by "either outright purchase of the property (in the case of a per se taking) or grant of Transferable Development Rights (TDRs), Rate Of Growth Ordinance (ROGO) points, variances and building permits (in the case of an as-applied taking)." *Collins v. Monroe Cnty.*, 999 So. 2d 709, 716 (Fla. 3d DCA 2008).

Officer ("Hearing Officer") conducted a BUD hearing. *See ibid.* The Beyers retained legal counsel to argue that the City's land-development regulations, as applied to the Property, effected a taking for which the City was obligated to pay compensation. *See id.* at 1c.

Neither Gordon Beyer nor Molly Beyer attended or testified at the BUD hearing; nor did the Beyers' legal counsel submit any testimony, affidavits, or sworn statements from the Beyers regarding their intended use of the Property, or how the City's land-development regulations interfered with the Beyers' investment-backed expectations. Simply stated—and contrary to Petitioner's assertion—there is no evidence in the record that the Beyers acquired the Property with the intent of building anything, much less a single-family home. *See* Pet. 6-9 (asserting, without any supporting citation to the record, that the Beyers intended to build a single-family home and retire to the Property).

Thereafter, the Hearing Officer issued his written Beneficial Use Determination and Statement of Remedial Action. Pet. App. 1c-7c. Among the findings made by the Hearing Officer was that, under the 1996 Plan, Bamboo Key was a designated bird rookery, and therefore, the Property was undevelopable. *Id.* at 3c. Notwithstanding this finding, upon considering and evaluating all the evidence and testimony submitted at the BUD hearing, the Hearing Officer recommended denial of the BUD application. *Id.* at 6c-7c. In support of that recommendation, the Hearing Officer made, *inter alia*, the following findings:

- "There was a singular lack of any investment in the property [by the Beyers] after its acquisition." *Id*. at 4c.

- "The [Beyers] waited 30 years before applying for any form of development on the property," *id*. at 3c, which application was for "a single dock permit," *id.* at 4c.

- "No evidence whatsoever of a plan for development of the property . . . existed [at] any time from the purchase of the property through the time of the Hearing." *Id*. at 4c.

- "[I]t is not possible to determine the [development] expectations of the [Beyers]." *Id*. at 5c.

- "[T]he [Beyers] lacked a reasonable investment backed expectation that [they] would obtain the regulatory approval needed to develop the property at issue here." *Ibid*.

- "The property has been . . . assigned 16 ROGO points which have substantial value . . . I compute . . . to be $150,000.00." *Id*. at 4c.[6]

- "Although the lot is . . . unusable for development, the issuance of 16 ROGO points [and the right to use the property for camping and recreational uses] under the circumstances of this case

[6] The Beyers made no attempt to dispute the Hearing Officer's finding that the ROGO points translated into $150,000 of property value.

constitutes a reasonable economic use of the property." *Id.* at 5c.

- "There must have been governmental action depriving the [Beyers'] reasonable investment based expectations for use of the property, in order for the[m] . . . to establish a right to relief." *Ibid.* (emphasis in original).

- "[The Beyers] sat on the investment in the property for 30 years watching the environmental restrictions on the use of the property become more and more strict," which "restrict[ed] the expectations of the[m] . . . from reasonably anticipating a greater development value in the property than presently exists." *Id.* at 6c.

Based upon the Hearing Officer's recommendation, the City denied the BUD application. *See id.* at 4a.

IV. TRIAL-COURT PROCEEDINGS AND SUBSEQUENT APPEALS

The Beyers then sued the City and the State of Florida ("State") for inverse condemnation. *See* Pet. App. 1g-5g. Initially, the trial court granted summary judgment in favor of the City and State, finding that the Beyers' Complaint asserted a per se takings claim that was barred by the statute of limitations. *See id.* at 4a. The Beyers appealed the grant of summary judgment to the Third District Court of Appeal ("Third District"), *see id.* at 1e-6e, which reversed the trial court after determining the Beyers' claim was ripe for review, *see id.* at 6e. The court also referenced the Hearing Officer's finding that, because "the [Beyers]

sat on the investment in the [P]roperty for 30 years[,] . . . the award of ROGO points and recreational uses allowed [the Beyers], reasonably met [the Beyers'] investment-based expectations." *Id.* at 3e (alterations in original). The Third District remanded the case. *Id.* at 6e.

On remand, the trial court again granted summary judgment in favor of the City and State, concluding that the Beyers failed to produce any evidence that the 1996 Plan deprived them of reasonable economic use of their Property or frustrated their reasonable investment-backed expectations.[7] *See id.* at 3b, 6b. In so doing, it "consider[ed] the frustration of [the Beyers'] investment-backed expectations as a necessary element of their taking claim." *Id.* at 3b. (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Collins*, 999 So. 2d at 713). Noting that "[t]he investment-backed expectations factor requires evidence that a particular regulation interfered with a plaintiff[']s 'reasonable, distinct, investment-backed expectations held at the time he purchased the property,'" Pet. App. 3b (citing *Dep't of Envtl. Prot. v. Burgess*, 772 So. 2d 540, 543 (Fla. 1st DCA 2000) (citing, in turn, *Penn Central*)), the trial court found that, "[f]or over 30 years, in the face of ever tightening regulation of this property, [the Beyers] made no effort to do anything to develop it." Pet. App.

[7] In its Motion for Summary Judgment, the City advised the trial court the City repeatedly attempted to schedule the depositions of both Gordon Beyer and Molly Beyer. The Beyers, however, through their counsel, refused to make themselves available. Consequently, neither Gordon Beyer nor Molly Beyer gave any sworn testimony in support of their claims in this case.

5b. The court determined that the Beyers' "failure to provide *any* evidence of investment-backed expectations in the face of the undisputed evidence cited by the Defendants makes summary judgment in favor of Defendants appropriate." *Id.* at 6b (emphasis in original).

Once again, the Beyers appealed the summary judgment order. *See* 2a, 4a. Consistent with its prior ruling, the Third District determined that "the Beyers were not deprived of all economically beneficial use of the property," *id.* at 8a, and had "provided no evidence of investment backed expectations at or since the time the property was purchased . . . . ," *id.* at 6a. Regarding the latter holding, the Third District reiterated that the "existence or extent of the Beyers' investment-backed expectations to develop [the Property] is a fact-intensive question." *Id.* at 5a.[8]

The Third District issued a per curiam denial of Petitioner's Motion for Rehearing and Rehearing En Banc. *See id.* at 1f. Three members of the court dissented from the denial of rehearing en banc. *See id.* at 2f-27f (Shepherd, J., dissenting). In their view, the court's disposition "dispense[d] with *applicable* Takings Clause precedent," in contravention of the already-established "constitutional principle that

[8] *See also* Pet. App. 6a ("They provided no evidence of investment-backed expectations at or since the time the property was purchased, nor demonstrated any reasonable expectation of selling the property for development. We therefore affirm the trial court's conclusion on this issue.").

excessive economic injuries caused by government action be compensated." *Id*. at 2f (emphasis added).

Petitioner sought to invoke the Florida Supreme Court's discretionary jurisdiction, asserting that the Third District's decision conflicted with this Court's per se categorical takings decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The Florida Supreme Court unanimously declined to review the case. *See* Pet. App. 1d.

REASONS TO DENY THE PETITION FOR A WRIT OF CERTIORARI

According to Petitioner, the Court should grant certiorari for one of two reasons: (1) the Florida court's opinion implicates two unresolved, important Fifth Amendment questions, *see* Pet. 14-19, and (2) a conflict among the lower courts exists that is ripe for harmonization, *id.* at 19-27. Petitioner is incorrect.

First, Florida's Third District applied well-settled Fifth Amendment law when it adjudicated Petitioner's case, and its disposition raised no unresolved legal issue, significant or otherwise. Instead, the petition for certiorari, distilled to its core, merely takes issue with the Florida court's fact-laden conclusion that no taking occurred in the particular circumstances of this case. Those circumstances, as the court below emphasized, included the highly unusual fact that the Beyers "provided *no* evidence of investment-backed expectations at or since the time the property was purchased, nor demonstrated *any* reasonable expectation of selling the property for development," Pet. App. 6a (emphases added). In addition, the factual record developed in the proceeding below established the "landowners' inactivity over thirty years despite increasingly strict land use regulations," the fact that the property retained "a value of $150,000," and "current recreational uses [still] allowed on the property." Pet. App. 4a, 7a.

Applying settled law to "these facts," the court held, the Beyers failed to establish a regulatory taking. *Id.* at 7a-8a. That holding was correct as a matter of law; but, even more importantly for present purposes,

any arguable error arising out of the lower court's application of existing law to the unusual facts of this case is not sufficiently important to warrant this Court's review.

Second, Petitioner fails to establish a split among the lower courts, and still less does he establish the kind of split that calls for this Court's review. Since this Court decided *Penn Central*, 438 U.S. 104, nearly forty years ago, the lower courts have adhered to the Court's observation that the existence of transferable development rights (analogous to the ROGO points at issue here) "mitigate whatever financial burdens" a regulation imposes, and they have likewise heeded the Court's conclusion that the existence of such transferable rights may be "taken into account in considering the impact of regulation"—in other words, in determining whether a taking occurred, *id.* at 137. The cases Petitioner cites are not to the contrary, nor do they conflict with the decision below.

Third, this case is a poor vehicle for addressing the questions Petitioner presents. Among other considerations, the ruling below was predicated on the trial court's unusual factual finding that the Beyers had "fail[ed] to provide *any* evidence of investment-backed expectations in the face of undisputed evidence cited by the Defendants," Pet. App. 6b (emphasis in original). In addition, Petitioner's primary submission to this Court—that the challenged governmental conduct gave rise to a "total taking" that left the owners without *any* economically beneficial or productive options for its use, *see* Pet. 14-18—cannot be squared with the lower court's conclusion, in an earlier round of this same litigation, that Petitioner's "as-applied"

claim was not time-barred as a matter of state law *because*—and only because—his property *did* retain "additional beneficial economic value" for purposes of this Court's Takings Clause cases, Pet. App. 4e (bold emphasis omitted).

Finally, this case does not raise issues of national importance. Petitioner offers no basis for concluding that the use of transferable development rights to avoid a taking is a significant, nationwide phenomenon. Indeed, the cases cited in the petition support just the opposite conclusion. In any event, the decision below is not apt to have broader implications because it was expressly predicated on a variety of highly unusual facts that are not likely to recur. In addition, the Third District's decision is not binding on other district courts of appeal in Florida, and still less does it tie the hands of the Florida Supreme Court. Accordingly, any residual concerns regarding the fact-specific holding of the court below may be resolved without this Court's review.

The petition for a writ of certiorari should be denied.

I. THE THIRD DISTRICT CORRECTLY APPLIED THIS COURT'S WELL-ESTABLISHED TAKINGS-CLAUSE JURISPRUDENCE TO THE FACTS OF THIS CASE.

A. This Case Turns On The Application Of Settled Legal Principles.

The dispositive issue in the Third District's opinion was whether the City subjected the Beyers' property to a "taking" for purposes of the Fifth Amendment. Fifth Amendment takings challenges

divide into three categories. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-38 (2005). Cases falling into the first category arise when the government forces an owner to succumb to a permanent physical occupation of his property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). When this happens, a per se taking occurs, no matter how slight the intrusion, and the property's owner must receive just compensation. *See id.* at 426-27. Petitioner makes no claim that any physical occupation occurred here.

Cases falling into the second and third categories arise when government "regulation goes too far" and, accordingly, will be "recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *see also Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015). Regulatory takings cases, in turn, fall into two categories. The first type arises when—and *only* when—government regulation deprives a property owner of "'*all* economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019 (emphasis in both *Lingle* and *Lucas*)). In such cases, courts find that a taking occurs per se and, accordingly, the property owner is entitled to just compensation. *See id.*

But if a case involves a regulation that does not result in "complete extinguishment of [the] property's value," *Lucas*, 505 U.S. at 1009, a court must determine, as a threshold matter, whether a Fifth Amendment taking occurred. Resolution of this question is "governed by the standards set forth in *Penn Central*," *Lingle*, 544 U.S. at 538, an "ad hoc, factual inquir[y]" that instructs courts to consider

(1) the economic impact of the regulation; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the character of the governmental action, *Penn Central*, 438 U.S. at 124. "The finding of no value *must* be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations." *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring in the judgment) (emphasis added) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Cent.*, 438 U.S. at 124 (1978)). As part of this inquiry, transferable property rights, such as transferable development rights ("TDRs") or the ROGO points at issue here, "undoubtedly mitigate whatever financial burdens the law has imposed . . . and, for that reason, are to be taken into account" in considering whether a taking occurred. *Id.* at 137.

B. The Third District Correctly Applied This Court's Well-Settled Law.

The petition for certiorari, distilled to its core, takes issue with the Florida court's fact-laden conclusion that no taking occurred in the particular circumstances of this case. Those circumstances, as the court below emphasized, included the highly unusual fact that the Beyers "provided *no* evidence of investment-backed expectations at or since the time the property was purchased, nor demonstrated *any* reasonable expectation of selling the property for development," Pet. App. 6a (emphases added). In addition, the factual record developed in the proceeding below established the "landowners' inactivity over thirty years despite increasingly strict land use regulations," the fact that the property retained "a

value of $150,000," and "current recreational uses [still] allowed on the property." Pet. App. 4a, 7a.

Applying settled law to "these facts," the court held, the Beyers failed to establish a regulatory taking. *Id.* at 7a-8a. That holding was correct as a matter of law; but, even more importantly for present purposes, any arguable error arising out of the lower court's application of existing law to the unusual facts of this case is not sufficiently important to warrant this Court's review. Petitioner's argument also fails for the additional reasons set out below.

1. The Third District Correctly Applied *Penn Central* Rather Than *Lucas*.

i. As noted above, the *Lucas* categorical approach does not apply unless a regulation results in "*complete* extinguishment of [the] property's value." *Lucas*, 505 U.S. at 1009 (emphasis added). This Court has made plain that "complete" does in fact mean "complete" for purposes of regulatory takings cases. Indeed, *Lucas* expressly contemplated that, "in at least some cases[,] [a] landowner with 95% loss will get nothing, while the landowner with total loss will recover in full." *Id.* at 1019 n.8. "Takings law," as this Court observed, "is full of these 'all-or-nothing' situations." *Ibid.* (emphasis omitted).

Here, the Third District determined that the Beyers had *not* experienced a "total regulatory taking," *id.* at 1026. In the Third District's first opinion, it reversed the trial court's ruling that Petitioner's claim was barred by the statute of limitations. Pet. App. 6e. This reversal was premised on the Hearing Officer's conclusions that the City's land-development

regulations did not deprive Petitioner of all reasonable economic use of the Property and that "the [Beyers] sat on the investment in the [P]roperty for 30 years watching the environmental restrictions on the use of the [P]roperty become more and more strict." *Id*. at 3e, 4e. The Third District remanded the case to the trial court for further consideration. *Id*. at 6e.

In the Third District's second opinion, the court had before it the trial court's second order granting summary judgment in favor of the City. *Id.* at 4a. In affirming the trial court, the Third District expressly found that Petitioner's claim was not a categorical *Lucas* taking, because the Beyers had not experienced a total deprivation of all economic use of their property and because "the landowners' inactivity over thirty years despite increasingly strict land use regulations restricted any reasonable expectation that the property would hold a greater development value." *Id*. at 3a-4a, 6a-8a. In other words, the lower court made a factual determination that the Beyers' property retained economic value. It also resolved a second "fact-intensive question"—the existence *vel non* "of the Beyers' investment-backed expectations"—when it found "[t]he record before [it] . . . devoid of fact evidence that the Beyers had any specific plan for developing the property, dating from the time of purchase in 1970, up to the present." *Id*. at 5a. Based on these findings, it properly applied a mode of analysis consistent with the standards enunciated in *Penn Central*. *See id*. at 7a-8a.

That the property had significant economic value was well supported by the record. Specifically, the Third District found that the Beyers' "undevelopable"

property nonetheless (1) retained $150,000 in value (between two- and three-times the price the Beyers paid to purchase the nine-acre island), due to the Property's sixteen ROGO points; and (2) could be used for certain recreational purposes. *See id.* at 7a-8a. Taken together, the Third District correctly concluded that, notwithstanding the development restrictions, the Property still met the reasonable economic expectations the Beyers had when they purchased it.

ii. Despite the straightforward application of this Court's well-settled Takings Clause jurisprudence, Petitioner insists that the Florida court (incorrectly) answered an unresolved, certiorari-worthy question in rejecting his takings claim. In Petitioner's view, the Third District's conclusion—that "a total taking did not occur because the Beyers received" $150,000 worth of ROGO points—"conflicts with *Lucas*." Pet. 17. According to Petitioner, the Beyers' property suffered a total deprivation of beneficial use (and, accordingly, a per se taking under *Lucas*), notwithstanding the property's substantial value, when the City restricted the ability to develop it.

Petitioner is wrong. In *Lucas*, "there was no question" that the landowner established "reasonable, investment-backed expectations of developing his land." *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999). In addition, not once did *Lucas* suggest that, if a regulation renders a property "unbuildable" or "undevelopable," it means that the property has been rendered "valueless," and therefore "taken," for purposes of the Fifth Amendment. *See Lucas*, 505 U.S. at 1033. Central to *Lucas* was the trial court's determination, based upon the record developed in that

case, that the South Carolina Beachfront Management Act "render[ed]" the property at issue there "*valueless*." *Id*. at 1009 (emphasis added). Because a property's "value" is not limited to the extent of its "developable" or "buildable" nature, a finding that property is "undevelopable" does not, per *Lucas*, necessarily result in a categorical taking. Instead, *Lucas* held that a per se taking occurs only when a governmental regulation deprives a property owner of "*all* economically beneficial uses" of his property. *Id*. at 1019 (emphasis in original). And because the property at issue here retained substantial value—specifically, $150,000 and the allowance of certain recreational activities, *see* Pet. App. 7a-8a—*Lucas* is inapposite.

iii. Petitioner takes issue with the Third District's conclusion that the Property's $150,000 residual value in ROGO points meant that the property was not rendered "valueless" by the City's development restriction. In Petitioner's view, the ROGO points at issue here, and TDRs more generally, are "widespread schemes" that "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." Pet. 15 (emphasis in original). That submission, however, cannot be reconciled with this Court's decades-long recognition that TDRs count towards a land's economic-use value.

In *Penn Central*, for instance, the petitioner argued that New York City's Landmark Law effectuated a Fifth Amendment taking because the law deprived the petitioner of its previously recognized right to build on its property. *Penn Central*, 438 U.S. at 129-30. Finding this argument "untenable," *id*. at 130,

the Court reasoned that "it is not literally accurate to say that [Penn Central] has been denied *all* use [of its property]." *Id.* at 137 (emphasis in original). In support, this Court expressly held that "the [transferable development] rights" afforded to the petitioner "are valuable." *Ibid.* For that reason," the Court held that they must "be taken into account in considering the impact of regulation." *Ibid.*

Thus, the Third District properly applied *Penn Central*'s holding when it found that the Property's residual $150,000 value, combined with the other facts found by the Hearing Officer, supported the conclusion that the City's land-use restriction did not constitute a per se, categorical taking under *Lucas*. Pet. App. 7a-8a. Petitioner fails to grapple with this rule from *Penn Central*, choosing instead to accuse the City of perpetuating a "scheme" that "disguise[s] [its] takings of land" and "that effectively swallow[s] the Fifth Amendment." Pet. 14. The fact remains, however, that the Property has residual value in the ROGO point market (which, at $150,000, is between two and three times the Beyers' purchase price of the land). *See* Pet. App. 3c. Under both *Penn Central* and *Lucas*, this residual value defeats Petitioner's argument that the City's land-use restrictions rendered the Property "valueless" and indicating that a per se *Lucas* taking had occurred.

2. The Third District Correctly Considered The ROGO Points When Determining Whether The City's Land-Use Restriction Constituted A Taking.

Petitioner's additional argument—that the Third District should have considered whether the ROGO points constituted just compensation in exchange for a taking instead of considering whether their existence meant that no taking had occurred—fares no better. As noted above, this Court, in *Penn Central*—a case that addressed *solely* whether a city's land-use restriction amounted to a regulatory taking—explicitly held that TDRs "undoubtedly mitigate whatever financial burdens the law has imposed . . . and, for that reason, are to be taken into account in considering" whether a taking occurred. *Penn Central*, 437 U.S. at 137. The Third District correctly applied *Penn Central*, and for that reason alone, certiorari is not warranted.

Petitioner's reliance on *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), is misplaced. In holding that Suitum's regulatory taking claim was ripe, the Court did not overrule or otherwise cast doubt upon *Penn Central*. To the contrary, it expressly declined to address the relevance of TDRs to the question whether a taking had occurred. *Id.* at 739. Justice Scalia's separate concurrence suggested that *Penn Central* might, in an appropriate case, be distinguished from the kind of facts at issue in *Suitum* or else overruled. *See id.* at 748-49 (Scalia, J., concurring in part and concurring in the judgment). But neither Justice Scalia nor the Court addressed—or had any occasion to address—the merits question whether a claimant could establish a regulatory taking in the highly unusual and substantially different facts present here. *See* Pet. App. 4a-6a.

Petitioner's reliance on *Horne* similarly fails to advance his cause. In *Horne*, the Court determined the

Department of Agriculture's implementation of the Agricultural Marketing Agreement Act of 1937 effected a physical appropriation of Horne's raisin crop without compensation. *See* 135 S. Ct. at 2428-31. Physical appropriation of property by the government constitutes a taking per se, which always triggers "a categorical duty to compensate the former owner . . . ." *Id*. at 2429. Once this duty is triggered—i.e., "once there is a taking," *ibid*.—then, according to the Court, "any payment from the Government in connection with that action goes, at most, to the question of just compensation." *Ibid*.

II. THE PURPORTED LOWER COURT CONFLICT IDENTIFIED BY PETITIONER IS ILLUSORY.

Notwithstanding the Court's clear language in *Penn Central* regarding the relevance of TDRs in takings cases, Petitioner asserts that this Court's intervention is needed because there is a conflict in how lower courts apply *Penn Central*. According to Petitioner, some courts consider TDRs in determining if a taking has occurred, while other courts only consider them in determining if governments have provided just compensation *after* a court determines a taking has occurred. Petitioner is incorrect.

Petitioner cites seven cases as examples of lower courts that, like the Third District in this case, follow the Court's pronouncement in *Penn Central* and consider the existence of TDRs when evaluating whether a taking occurred.[9] Petitioner then lists three

[9] *See* Pet. 22-24 (citing *Good v. United States*, 39 Fed. Cl. 81, *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999); *Shands v. City of Marathon*,

cases that, in his view, show that some lower courts disagree and consider TDRs *after* concluding that a taking occurred and *only* to determine whether the requisite just compensation has been paid. Upon closer examination, however, the split Petitioner alleges is illusory; as explained below, the lower courts are in accord with each other regarding *Penn Central*'s TDR holding.

A. The only state court of last resort cited by Petitioner is *Fred F. French Investing Co., Inc. v. City of New York*, 350 N.E.2d 381 (N.Y. 1976). In that case, the challenged City of New York regulation forced a property owner to perpetually open to the public two private parks. *Id*. at 382-83. In other words, the property owner was prohibited from any private use of the property. In this case, however, Petitioner retains the right to "exclude others" from the Property, he can use it for certain recreational activities, and he can sell it (or sell the ROGO points assigned to it). *See* Pet. App. 7a-8a. For this reason, *Fred F. French* is inapposite.

Aside from this factual distinction, Petitioner's reliance on *Fred F. French* is flawed, for two additional reasons. The first is that *Fred F. French* was decided two years before this Court's 1978 *Penn Central* decision. A case that predates *Penn Central* cannot indicate a lower-court split regarding the proper

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999 So. 2d 718 (Fla. 3d DCA 2008); *Collins v. Monroe Cnty.*, 999 So. 2d 709 (Fla. 3d DCA 2008); *Matter of Russo v. Beckelman*, 204 A.D.2d 160 (N.Y. App. Div. 1994); *Shubert Org., Inc. v. Landmarks Pres. Comm'n of N.Y.*, 166 A.D.2d 115 (N.Y. App. Div. 1991); *Toussie v. Cent. Pine Barrens Joint Planning and Policy Comm'n*, 700 N.Y.S.2d 358 (N.Y. Sup. Ct. 1999); *City of Chicago v. Roppolo*, 447 N.E.2d 870 (Ill. App. Ct. 1983)).

application of *Penn Central*. Thus, even if *Fred F. French* supported Petitioner's favored use of TDRs (and it does not), *Penn Central*'s TDR holding would have abrogated any such ruling.

The second is the decision in *Fred F. French* did not turn on the takings analysis. Instead, the court resolved it under the due-process clause. Specifically, the court in *Fred F. French* concluded that "[s]ince there was no taking within the meaning of constitutional limitations, plaintiff's remedy, at this stage of the litigation, would be a declaration of the amendment's invalidity, if that be the case." 350 N.E.2d at 386. For that reason, it found it necessary to determine "whether the zoning amendment was a valid exercise of the police power under the due process clauses of the State and Federal Constitutions." *See also id.* at 387 ("[T]he zoning amendment is unreasonable and, therefore, unconstitutional because, without due process of law, it deprives the owner of all his property rights."). For this reason, it says little about the proper role of TDRs in takings cases.

B. Petitioner's reliance on *W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007 (N.Y. Sup. Ct. 1998), *aff'd*, 267 A.D.2d 233 (N.Y. App. Div. 1999), fares no better. This case, adjudicated by a New York state trial court, did not conclude, as a matter of Fifth Amendment Takings Clause law, "that TDRs could only be weighed when deciding whether just compensation for a taking has been afforded." Pet. 26. In *W.J.F.*, the regulatory scheme at issue expressly defined "transfer of development rights (TDR)" as a type of "compensation provided under the act." *Id.* at 1010. The question the *W.J.F.* Court answered was: "Assuming, *arguendo*,

that a taking exists, is a TDR sufficient compensation under the 5th Amendment?" *Ibid.*

In other words, *W.J.F.*'s holding says nothing about the question that, in Petitioner's view, has split the lower courts—i.e., whether TDRs may be relevant for purposes of determining if a taking has occurred. Dicta from *W.J.F.*, on the other hand, suggest that the court in that case would join the Third District in this case had it been presented with the same issue. Specifically, the *W.J.F.* Court observed that TDRs "*do* assure preservation of the very real economic value of the development rights as they existed when still attached to the underlying property." *Id.* at 1011 (emphasis in original). In other words, the existence of TDRs affects a property's value, and if they remain despite land-use restrictions, then the property cannot be considered "valueless." *See Lucas*, 505 U.S. at 1033. This reasoning is wholly consistent with the approach articulated in *Penn Central* and applied by the Third District here.

C. Finally, Petitioner's reliance on *Corrigan v. City of Scottsdale*, 720 P.2d 528 (Ariz. Ct. App. 1985), *aff'd in part, vacated in part*, 720 P.2d 513 (Ariz. 1986), is misplaced. In *Corrigan*, the City of Scottsdale apparently *intended* an offer of TDRs to constitute compensation in exchange for a regulatory taking. *See* 720 P.2d at 538 ("The city . . . attempts a form of compensation by way of transfer of density credits."). In other words, the Arizona Court of Appeals had no occasion to decide whether TDRs were more appropriately considered when determining whether a taking occurred.

Instead, given the posture of *Corrigan*, the Arizona Court of Appeals was tasked only with deciding a subsidiary question—"whether fair compensation can be given by transferring development rights." *Id.* The Arizona Constitution, like the Fifth Amendment, prohibits a taking of property without just compensation, but unlike the Fifth Amendment it specifically requires compensation for a taking to be made by a payment of money. *See* ARIZ. CONST. art. II, § 17. The court held that, "under Section 17, article 2 of the Arizona Constitution[,] the transfer of density credits does not constitute just compensation for property taken"; instead, the "state constitution requires compensation for such a taking to be made by payment of money." *Corrigan*, 720 P.2d at 565. That state-law holding does not conflict with the decision below.

In short, the cases Petitioner cites do not conflict with the decision below.

D. Assuming *arguendo* that the decision below is in tension with other lower-court decisions, Petitioner fails to establish a disagreement sufficiently entrenched or important to warrant this Court's intervention.

The decision below was handed down by one of Florida's intermediate appellate courts. The Florida Supreme Court then determined that it should decline to accept jurisdiction, and, as a matter of Florida law, that jurisdictional ruling does not constitute an adjudication on the merits. *See, e.g.*, *Harrison v. Hyster Co.*, 515 So. 2d 1279, 1280 (Fla. 1987) (explaining that, where Florida Supreme Court declined to exercise

discretionary review, the lower court's decision "was never reviewed on the merits"). In other words, Florida's other district courts of appeal are not bound by the Third District's ruling;[10] and, even more importantly, nothing prevents the Florida Supreme Court from coming to a different conclusion in a future case.

The other cases Petitioner cites likewise do not establish the kind of *authoritative* conflict sufficiently important to merit this Court's review. Petitioner cites only three cases that purportedly conflict with the decision below. *See* Pet. 25-26. Of those three cases, only one was decided by either a state court of last resort or a federal court of appeals. *See id.* And that case, *Fred F. French*, is not only consistent with the holding of Florida's intermediate appellate court, *see supra*; its purported teaching, according to Petitioner himself, has not yet attained the status of law in New York, as "multiple state courts in New York have [subsequently] held that TDR's *should be weighed* when determining whether the government effected a taking," Pet. 23 (emphasis added).

In sum, this is not a case in which "a state court *of last resort* has decided an important federal question in a way that conflicts with the decision *of another state*

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[10] Petitioner cites *Pardo v. State*, 596 So.2d 665, 666 (Fla. 1992), for the broad and unqualified proposition that "the Third District's decision is the law for all of the State of Florida." Pet. 13 & n.6. *Pardo* held that "in the absence of an interdistrict conflict, district court decisions bind all Florida *trial* courts." 596 So.2d at 666 (emphasis added). Under Florida law, however, the Third District's decision does not bind other district courts of appeal or the Florida Supreme Court. *See ibid.*

court of last resort or of a United States court of appeals," U.S. Sup. Ct. R. 10(b) (emphases added); *see also Huber v. N.J. Dep't of Envtl. Prot.*, 562 U.S. 1302, 1302 (2011) (statement of Alito, J., joined by Roberts, C.J., and Scalia and Thomas, J.J.) ("[B]ecause this case comes to us on review of a decision by a state intermediate appellate court, I agree that today's denial of certiorari is appropriate."); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, SUPREME COURT PRACTICE 180 n.50 (10th ed. 2013) (explaining that this Court "may be less willing to grant certiorari to review a decision from [a] state intermediate appellate court"). Thus, and assuming *arguendo* that the lower court decisions Petitioner cites are in tension, any such tension may be resolved without this Court's intervention.

III. THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE ISSUES PETITIONER PRESENTS FOR THIS COURT'S REVIEW.

In light of various eccentricities of the case—including certain factual findings credited by the court below and state-law rulings issued over the long course of this litigation—this case does not supply a good vehicle for considering the federal constitutional questions Petitioner asks this Court to resolve. At least four considerations support that conclusion.

First, the court below "consider[ed] the frustration of the Beyers' investment-backed expectations as a necessary element of their taking claim," Pet. App. 3b, and it credited the trial court's finding that the Beyers had "fail[ed] to provide *any* evidence of investment-backed expectations in the face of the undisputed evidence cited by the Defendants," *id.* at 6b (emphasis in original). Petitioner does not dispute the trial court's factual finding; nor does his argument to this Court address the lower court's legal ruling that at least *some* evidence of reasonable investment-backed expectations is "a necessary element" of the kind of takings claim at issue here. *See* Pet. 14-18.

Petitioner's failure to engage that aspect of the ruling below is understandable in light of this Court's precedents. *See, e.g., Lingle*, 544 U.S. at 538-39 (explaining that this Court has "identified 'several factors that have particular significance'" in assessing whether there is a taking under *Penn Central*, and that "[p]rimary among those factors are '[t]he economic impact of the regulation on the claimant and *particularly*, the extent to which the regulation has

interfered with distinct investment-backed expectations'" (quoting *Penn Central*, 438 U.S. at 124)) (emphasis added); *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring in the judgment) (citing *Kaiser Aetna*, 444 U.S. at 175, for the proposition that "[t]he finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations"); *id.* ("Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations."); *see also Good*, 189 F.3d at 1363 (affirming grant of summary judgment in favor of the government because the property owner "lacked the reasonable, investment-backed expectations that are necessary to establish that a government action effects a regulatory taking").

Hence, and regardless of whether his claim is analyzed under *Lucas* or *Penn Central*, that claim must be adjudicated in the highly unusual context of a record in which the takings claimant "fail[ed] to provide *any* evidence of investment-backed expectations in the face of the undisputed evidence cited by the Defendants," Pet. App. 6b (emphasis in original). That factual scenario is unlikely to recur often, and it might well implicate "vexing subsidiary questions," *see Lingle*, 544 U.S. at 539, of a kind that would impede clean resolution of the questions Petitioner presents for this Court's consideration.

Second, and somewhat relatedly, there is a conspicuous disconnect between the ruling below and Petitioner's formulation of the first question presented. *See* Pet. i. As Petitioner sees it, "for the Third District

to conclude that a total taking did not occur *because* the Beyers received nonmonetary credits conflicts with *Lucas*." *Id.* at 17 (emphasis added). As Petitioner himself acknowledges, however, the court below did not rely solely on the ROGO points attached to the Property. Instead, the Third District "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. 11 (citing Pet. App. 7a-8a (emphases added)); *see also id.* (noting that "[t]he court also counted the Beyers' failure to develop their property against them") (citing Pet. App. 5a n.5). Accordingly, the question in this case is whether, given all the facts and circumstances established in the proceedings below, the Third District properly concluded that Petitioner made the rare and extraordinary showing that the challenged regulations have completely deprived the Property of all economically viable use. That question is distinct from the question whether transferable development rights, standing alone, may be sufficient to prevent a taking.

Third, certain of the arguments that Petitioner might otherwise have been able to raise are intertwined with, and appear to be barred by, the lower court's state-law ruling concerning the applicable statute of limitations. When the Beyers' case first arrived at the Third District, it was on appeal from the trial court's determination that, because the Beyers had advanced a "facial" takings claim, the limitations period began to run with the enactment of the 1996 Plan, and, accordingly, their 2005 inverse-condemnation complaint was time barred. *See* Pet. App. 3e-4e. Under Florida law, the Third District

explained, "'[a] facial taking, also known as a per se or categorical taking, occurs when the mere enactment of a regulation precludes all development of the property, and deprives the property owner of all reasonable economic use of the property." *Id.* at 4e (quoting *Collins*, 999 So. 2d at 713); *see id.* (quoting trial court's consistent ruling that, as a matter of state law, a "facial taking claim accrues, and the statute of limitations begins to run, on the date of enactment of the regulation alleged to have caused the taking"). The Third District reversed the statute-of-limitations dismissal for purposes of the Beyers' "as-applied" claim, but only because "[t]he Property . . . **has additional beneficial economic value**" in the form of "transferable development rights." Pet. App. 4e (emphasis in original); *see id.* at 6e (finding that "the City's adoption of the special master's BUD denial on September 27, 2005 effectively started the limitations on the Beyers' *as-applied* taking claim and, *therefore*, the inverse condemnation complaints against the City and the State of Florida were timely filed") (emphases added).

Notwithstanding that state-law ruling, Petitioner's primary submission to this Court is that the challenged regulations constitute a per se or categorical taking (what the state court termed a "facial" taking)—*i.e.*, that the challenged regulations have completely deprived the property of beneficial economic value of a kind germane to his claim. *See* Pet. 14-18; Pet. App. 4e. Assuming that argument has merit, any such holding would, in effect, reverse the very determination that allowed this case to progress in the first place—i.e., the Third District's ruling that, *because* the Beyers' property had value and thus a

categorical or per se taking had *not* occurred, their inverse condemnation claim was not barred by the statute of limitations. *See* Pet. App. 4e. Right or wrong, this Court should not be asked to disturb that state-law ruling, and it should not have to adjudicate the merits of a constitutional claim no longer available to Petitioner as a matter of state procedural law.

Fourth, and notwithstanding Petitioner's heavy reliance on Justice Scalia's concurrence in *Suitum*, this case supplies a less than ideal vehicle for considering the view set out in that separate opinion. As Justice Scalia saw it, *Penn Central*'s TDR holding "would deserve to be overruled" if that part of the Court's analysis could not be distinguished. *Suitum*, 520 U.S. at 749 (Scalia, J., concurring). Petitioner has not argued, in the alternative, that this Court should overrule *Penn Central*. *See* Pet. i, 14-27. Nor did he raise such a claim in the proceeding below. If and when this Court elects to consider the argument advanced by the *Suitum* concurrence, it should have the full range of options contemplated in that opinion. This is not that case.

IV. THE PETITION DOES NOT RAISE ISSUES OF NATIONAL IMPORTANCE.

This case does not have the level of national import suggested in the petition for a writ of certiorari. Although Petitioner claims that millions of Florida's property owners' constitutional rights are at risk, the land-development regulations Petitioner challenges are limited to the jurisdictional boundaries of the City, which has a population of approximately 9,000 residents. And although Petitioner mentions that there

are "at least 181 [TDR] programs in 33 states," Pet. 5 n.1, he does not mention that this figure amounts to a fraction of the thousands of counties (3,031), municipalities (19,522), townships (16,364), and special districts (37,203) across America. *See Census Bureau Reports There Are 89,004 Local Governments in the United States*, U.S. CENSUS BUREAU, https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html (Aug. 30, 2012).

It does not help Petitioner's cause to assert that TDRs in general "play a major, widespread role in land use *planning*," Pet. 14 (emphasis added; quotation marks and citation omitted). There is nothing "undesirable or devious about TDRs themselves," as such rights "can serve a commendable purpose in mitigating the economic loss suffered by an individual whose property use is restricted, and property value diminished, but not so substantially as to produce a compensable taking." *Suitum*, 520 U.S. at 749 (Scalia, J., concurring in part and concurring in judgment). Of particular relevance here, Petitioner offers no basis for concluding that the use of TDRs to avoid a taking is a significant, nationwide phenomenon. To the contrary, he cites only a handful of cases for the proposition that some jurisdictions have used TDRs in that manner at some point in the past. *See* Pet. 22-24. Of the seven cases cited, five were decided before the turn of the century; six involved alleged takings in only two of the Nation's 50 states; and none sets out the settled law of the state as enunciated by a state court of last resort. *See id.* Indeed, three of the seven cases Petitioner cites were handed down by lower courts in New York; and Petitioner himself later cites a decision of "New York's highest court" for the proposition that TDRs "do not

allow a government to avoid the finding of takings liability, but only count towards compensation for a taking," *id.* at 25.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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