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 A Writ Of Certiorari To The District Court Of Appeal Of Florida, Third District

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BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

(1) Does the government effect a total taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), when imposing restrictions that deny all economically beneficial uses of land, or does a *Lucas* taking require the total elimination of monetary value in the land?

(2) Is a regulatory regime denying all development opportunities more appropriately reviewed under *Lucas* or *Penn Central Transportation Co. v. New York*, 438 U.S. 108 (1978), where the only potential economic value hinges upon the possible future sale of non-monetary credits, or "transferable development rights"?

(3) To the extent non-monetary credits with supposed economic value are relevant, should such credits be considered in the takings analysis or only for the purpose of determining compensation owed upon a finding of takings liability?

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INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court.

For 40 years, SLF has advocated to protect private property interests from unconstitutional governmental takings. This aspect of its advocacy is reflected in regular representation of property owners challenging overreaching government actions in violation of their property rights. Additionally, SLF frequently files *amicus curiae* briefs in support of property owners. *See, e.g., Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

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[1] All parties have consented to the filing of this brief in letters on file with the Clerk of Court, and the parties were notified of *amici curiae*'s intention to file this brief at least 10 days prior to the filing of this brief. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

The National Federation of Independent Business Small Business Legal Center (NFIB SBLC) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB SBLC frequently files *amicus curiae* briefs in cases that will impact small businesses.

SUMMARY OF ARGUMENT

As one member of this Court recently suggested, the time has come to reexamine our regulatory takings jurisprudence, with an eye toward bringing takings

doctrine more in line with the original public meaning of the Fifth Amendment. This case presents an opportunity to do just that – but, in the context of a manageable and narrow question: Does a total regulatory taking occur with imposition of restrictions denying all economically beneficial uses, or should the test hinge upon the question of whether the subject property retains *de minimis* residuary value?

This question is of immense practical importance to landowners and regulators alike. For landowners the stakes are especially high because a requirement to demonstrate the total elimination of *all residuary value* is essentially impossible – as demonstrated by the fact that landowners win only 1.6 percent of the time under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 1018 (1992). *See* Carole Necole Brown & Dwight M. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847, 1848 (2017) (explaining this shockingly low success rate). With the decision below, one's property may be pressed into public service as a permanent nature preserve or as open space for the public's aesthetic interest – without any opportunity for "just compensation." As such, this case presents an ideal vehicle for this Court to resolve this lingering question that has now divided courts and legal scholars for a quarter century.

ARGUMENT

I. This Court should take this case to clarify the *Lucas* total takings test.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court held that a regulatory restriction effected a taking in extinguishing an estate in land. *Id.* at 413 (finding regulation amounted to a taking, notwithstanding the assumption that it advanced the public interest). Ever since, courts have struggled to define manageable and textually derived rules from Justice Holmes's cryptic assertion that a taking occurs when regulation "goes too far." *Id.* at 415; *see also Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting) (suggesting that the Court should reexamine its regulatory takings doctrine).[2] But although

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[2] Consistent with Justice Thomas' comments in *Murr*, *amici* submit that, in a future case, this Court should reconsider whether it is proper to assess regulatory takings claims under the standardless balancing test set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). As numerous scholars have explained, this ad hoc approach provides little guidance and lends itself to unpredictable and inconsistent results. *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (stressing that "law pronounced by courts must be principled, rational, and based on reasoned distinction . . . "); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989) (arguing that balancing tests undermine the rule of law). Commentators of all ideological stripes have asked the Court to provide further clarity as to how precisely to weigh the *Penn Central* factors. *See, e.g.*, Eric R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 Harv. Envtl. L. Rev. 339 (2006); J. David Breemer, *Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)reasonable in State Courts?*, 38 Urb. Law. 81 (2006); William W. Wade, *"Sophistical and Abstruse Formulas" Made Simple: Advances in Measurement of Penn*

the Court has persistently balked when called upon to provide more predictable and judicially manageable standards for assessing "partial takings" claims, the Supreme Court's 1992 decision in *Lucas*, provides a bright-line rule that should have brought some degree of clarity to our takings jurisprudence. 505 U.S. at 1015, 1018 (holding that government assumes takings liability where regulation "leave[s] the owner of land without economically beneficial or productive options for its use"). As restated by Justice O'Connor in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), the *Lucas* Court ruled that regulation effects a total taking where imposed restrictions "deprive an owner of 'all economically beneficial us[e]' of her property." *Id.* at 538 (citing *Lucas*, 505 U.S. at 1019).

Yet as axiomatic as Justice O'Connor's restatement may sound – and as correct as it may be – this case demonstrates that there remains tremendous confusion as to how courts should apply *Lucas* in practice. *See* Luke A. Wake, *The Enduring (Muted) Legacy of Lucas v. South Carolina Coastal Council: A Quarter Century Retrospective*, 28 Geo. Mason U. C.R. L.J. 1, 22

Central's Economic Prongs and Estimation of Economic Damages in Federal Claims and Federal Circuit Courts, 38 Urb. Law. 337 (2006); John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. Envtl. L. & Pol'y 171 (2005); Gideon Kanner*, Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transp. Co. v. City of New York*, 13 Wm. & Mary Bill Rts. J. 679 (2005); *see also* R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central*, 38 Ecology L.Q. 731, 732, 735-36 (2011) (arguing that *Penn Central* provides no meaningful guidance and amounts to a high stakes game of craps).

(forthcoming Fall 2017) (discussing competing interpretations, and observing that the Court's comments on the elimination of value, in portions of the opinion, have "proven helpful for those seeking to limit *Lucas*'s 'footprint' in takings law").[3] In the immediate wake of the decision, commentators raised vital questions as to what constitutes a *per se* "total taking." *See, e.g.*, William Funk, *A Colloquium on Lucas: Revolution or Restatement? Awaiting Answers to Lucas' Unanswered Questions*, 23 Envtl. L. 891, 893-94 (1993).[4] And these questions persist a quarter-century later.

Some have argued that *Lucas* should be limited strictly to its (improbable) facts, so as to recognize takings liability only in the extraordinary scenario where restrictions completely sup the land of all residual value.[5] *Lucas*, 505 U.S. at 1034 (Kennedy, J.,

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[3] *Available* online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2960341 (last visited Oct. 11, 2017).

[4] The *Lucas* majority refers to the "denial of 'all economically beneficial or productive use of land,' of 'economically viable use of [the owner's] land,' of 'all economically feasible use,' of 'all economically valuable use,' and of the 'only economically productive use.'" *Id*. at 893-94 (internal citations omitted). The opinion also "refers to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted,' to the situation where the owner is left 'without economically beneficial or productive options,' where the owner must 'sacrifice *all* economically beneficial uses . . . , to leave his property economically idle,' [and] where the regulation 'wholly eliminated the value of the claimant's land.'" *Id*. at 894 (same).

[5] *See, e.g.*, Ann T. Kadlecek, *The Effect of Lucas v. South Carolina Coastal Council on the Law of Regulatory Takings*, 68 Wash. L. Rev. 415, 427 (1993) (construing *Lucas* as requiring consideration of whether the assailed regime eliminates economically

concurring) (agreeing with the dissenters that it was unlikely that beachfront property had truly been rendered valueless – notwithstanding the findings of the South Carolina courts); *see also* Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 Stan. L. Rev. 1411, 1427-28 (1993) (arguing that successful *Lucas* claims would be exceedingly rare because "environmental protection laws almost never result in total economic deprivations," and that the *Lucas* decision would (ironically) lead courts to treat takings claimants more harshly under *Penn Central*). By contrast, other commentators argued – consistent with Justice O'Connor's restatement – that the *Lucas* Court meant what it said when repeatedly stressing that restrictions denying "all economically beneficial uses" amount to a *per se* taking. *See* David L. Callies, *Takings: An Introduction and Overview*, 24 U. Haw. L. Rev. 441, 445 (2002) (explaining that *Lucas* recognizes a total taking when regulation "leaves the owner without any 'economically beneficial use'" and emphasizing that "[t]he land may still have value . . . [i]t may even retain some limited uses"); *but see* Richard C. Ausness, *Wild Dunes and Serbonian Bogs: The Impact of the Lucas Decision on Shoreline Protection Programs*, 70 Denv. U. L. Rev. 437, 462-63 (1993) (suggesting that, in a future case, this Court should flesh out the categorical rule in *Lucas* because essential concepts remain "indeterminate").

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beneficial uses *and* renders a property valueless, in a two-step inquiry).

As this case illustrates, the courts have taken divergent approaches – yielding *dramatically* different results. And the questions raised in this petition will persist until this Court grants certiorari to provide essential guidance as to what constitutes a total taking.[6] The difficulty remains in that the *Lucas* Court articulated its categorical rule in various ways – at times oscillating between talking in terms of (a) economically beneficial uses and (b) elimination of all economic value. *See* Ausness, 70 Denv. U. L. Rev. at 462-63 (suggesting that key concepts in *Lucas* should be interpreted "consistent with the rationale behind [the] categorical rule"); Wake, 28 Geo. Mason U. C.R. L.J. at 21-22 (suggesting that the majority viewed the denial

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[6] In a study of "1,700 cases in state and federal courts[,]" Carol Necole Brown and Dwight H. Merriam found "only 27 cases in 25 years in which courts found a categorical taking under *Lucas*." Brown & Merriam, 102 Iowa L. Rev. at 1849. They explain that this 1.6 percent success rate is the product of courts invoking the parcel as a whole rule in analyzing the economic impact of regulation. Their scholarship confirms that while courts often state "[t]he *Lucas* rule [as] establish[ing] that private property owners are entitled to compensation . . . when a government 'regulation denies all economically beneficial or productive use of land[,]' " *id*. at 1847, the reality is that courts almost universally limit application of the *Lucas* test in practice: "In determining whether the regulation at issue meets this standard, courts have traditionally used an 'economic value fraction.' " *Id*. at 1849. And the disconcerting reality is that *Lucas* claims are even less likely to succeed under this approach given this Court's recent decision allowing governmental defendant's greater leverage in defining the "parcel as a whole." *See Murr*, 137 S. Ct. at 1954-55 (Roberts, C.J., dissenting) (observing that the majority's decision will encourage the government to "aggregate legally distinct properties into one 'parcel,' " for the purpose of evading takings liability).

of economically beneficial uses and the elimination of value as conceptually coextensive).

Amici contend that the best interpretation would recognize takings liability in a case where the owner has been denied all development opportunities (as in the present case) – regardless of whether there may be some nominal value remaining in the land itself.[7] This interpretation would be most appropriate given the *Lucas* Court's emphasis on economically beneficial uses throughout the opinion and especially given Justice Scalia's explanation that a total regulatory taking may be analogized to a physical taking. *Lucas*, 505 U.S. at 1014, 1017. Under this approach, regulatory restrictions completely denying development opportunities should be understood – as necessarily – going "too far."[8]

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[7] *See Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (emphasizing that "a State may not evade the duty to compensate on the premise that the landowner is left with a token interest"); *see also Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1113 (Fed. Cir. 2015) (ruling that a regulatory regime effected a *Lucas* taking, notwithstanding 5.6 percent residuary value remaining).

[8] To the extent diminution in value is relevant, the Court should clarify that the elimination of meaningful economic uses necessarily results in a diminution in value sufficient to state a total takings claim. *Lucas*, 505 U.S. at 1017-18 ("Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life,' . . . in a manner that secures an 'average reciprocity of advantage' to everyone concerned. . . .") (internal citations omitted); *cf. Armstrong v. United States*, 364 U.S. 40, 49 (1960).

This interpretation also makes the most sense considering the majority's emphasis on the common law right to make reasonable use of one's land, which was stressed in Justice Scalia's discussion of background principles of property law. The *Lucas* majority places the right to make at least some economically beneficial use of one's land on par with the fundamental right to exclude the public from private property. *Lucas*, 505 U.S. at 1017, 1031 (stressing that historically the law had almost always recognized the right to put one's land to productive use) (citing 1 E. Coke, Institutes, ch. 1, § 1 (1st am. ed. 1812) ("For what is the land but the profits thereof[?]")).

Yet, numerous lower courts, including the Florida courts in this case, reject this formulation and impose an impossible requirement that landowners must demonstrate complete elimination of all residuary economic value. *See, e.g., Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998) ("Determining whether all economically viable use of a property has been denied entails a relatively simple analysis of whether value remains in the property after the governmental action."). But, this interpretation yields a strangely arbitrary rule. *See Lucas*, 505 U.S. at 1064 (Stevens, J., dissenting) ("[T]he Court's new rule is wholly arbitrary. A landowner whose property is diminished in value 95 percent recovers nothing, while an owner whose property is diminished 100 percent recovers the land's full value."); *see, e.g., CAA Assoc. v. United States*, 667 F.3d 1239, 1244 (Fed. Cir. 2011) (rejecting a takings despite a Court of Federal Claims

finding that the assailed restriction caused the owner to lose 81.25 percent [over $700,000] of return on its equity over a five-year period that the regulation was in force). While these courts would recognize a restriction devaluing a property by 100 percent as effecting a categorical taking under *Lucas*, they hold that any *de minimis* remaining value is enough to trigger review under *Penn Central*'s much more flexible balancing test – under which landowners will almost inevitably lose, regardless how significant the economic impact may be.[9]

Another unfortunate by-product of this (far more demanding) version of the *Lucas* test is that it invites "regulatory pioneering." Almost immediately, savvy attorneys began advising land use authorities that they could avoid *Lucas* while still imposing heavy-handed restrictions, so long as they allowed for some modest development opportunity.[10] But, as courts began holding that *Lucas* requires a showing of total elimination of residual value, more aggressive regulators took this

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[9] For that matter, in the wake of *Lucas*, some courts have held that a finding of any residual value cuts against the landowner under the *Penn Central* balancing test. *See, e.g.*, *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 700 (1999) (reciting jury instructions calling for Takings Clause liability if regulations failed to substantially advance legitimate interests or deprived the property of all economically viable use); *see also* Adam R. Pomeroy, *Penn Central After 35 Years: A Three-Part Balancing Test or a One-Strike Rule?*, 22 Fed. Cir. B.J. 677, 696 (2012) (surveying *Penn Central* cases).

[10] *See, e.g.*, Gerald M. Finkle & Gilbert Scott Bagnell, *The Coast is Clear: Lucas Court Sheds Light on Regulatory Takings*, 2 S.C. Envtl. L.J. 28, 47-50 (1992).

approach to the extreme in developing inventive regimes that prohibited development altogether, while (theoretically) preserving some residual value for the owner in awarding non-monetary credits (*i.e.*, "transferable development rights" or "TDRs"). That is precisely what happened here. *See* Pet. App. C-16 ¶ 19 (explaining that the Special Master concluded "there is absolutely no allowable use of the property"). The Beyer family has been pressed to maintain their property in an undeveloped state just the same as Mr. Lucas was compelled to hold his beachfront property as an effective nature preserve. Accordingly, this case presents the ideal vehicle for this Court to clarify essential questions that have now percolated in the lower courts for 25 years.

II. Regimes awarding transferable development rights in lieu of just compensation are constitutionally suspect.

Numerous jurisdictions across the country have sought to avoid liability under *Lucas* by awarding nonmonetary credits that *only potentially* have monetary value, while prohibiting all economically beneficial uses. This is necessarily unconstitutional if *Lucas* is understood as holding that government must pay just compensation when a landowner is denied all economically beneficial uses for his or her property. *See Horne v. U.S. Dep't of Agriculture*, 135 S. Ct. 2419, 2429 (2015) (emphasizing that "once there is a taking . . . any payment from the Government in connection with that

action goes, at most, to the question of just compensation[,]" and rejecting the suggestion that contingent reserve value may satisfy the requirement to pay fair market value). To be sure, this Court has held time and again that when a taking occurs the owner is entitled to be paid for the "full and perfect equivalent" of what has been taken. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). As such, courts must reject compensation awards that fall short of paying fair market value for the subject property – especially where the award is predicated upon *speculation* on future markets. *Olson v. United States*, 292 U.S. 246 (1934); *cf. Bauman v. Ross*, 167 U.S. 548, 584 (1897) (allowing consideration of direct benefits accruing to a property only to the extent "capable of present estimate and reasonable computation . . . ").

A. Local governments transparently employ TDR programs to evade their Fifth Amendment obligations to pay just compensation.

The explicit goal in developing a transferable development rights regime is to impose *Lucas*-style regulation (*i.e.*, prohibiting all development opportunities), without incurring takings liability. Whereas a government would have to pay fair market value in simply prohibiting development opportunities, TDR regimes seek to avoid those costs by awarding credits (at no cost) that may potentially be sold to other landowners seeking to develop their properties in areas that the government has deemed more desirable for

development. But the supposed market for TDRs is an artificial construct – entirely a product of regulation manipulating the private real estate market. *See, e.g., Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 728-35 (1997) (comparing TDR regimes to cap-and-trade programs, whereby another owner might obtain a variance authorizing more intense development by purchasing a TDR). TDR markets only exist to the extent the government has leveraged its regulatory powers to coercively force some owners to pay money for permission to exercise their common law property rights. Put another way, the government holds hostage the right to develop one's land on a requirement to pay money for an ostensibly public purpose – *i.e.*, mitigating the government's risk of taking liability in completely denying development opportunities to other owners.

Advocates readily admit that TDRs exist to immunize government from takings liability. As one scholar has explained, "the fact that TDRs have sometimes been promoted solely on the grounds that they can provide the state with a way of taking property without paying for it." R.S. Radford, *A Last Word on 1998 Recent Development: Takings and Transferable Development Rights in the Supreme Court: The Constitutional Status of TDRs in the Aftermath of Suitum*, 28 Stetson L. Rev. 685, 688 n.30, 697 (1999). And crucially, TDR advocates acknowledge that *Lucas*-immunity hinges upon convincing the lower courts that a total taking occurs only when the subject property is supped

of all value – which is unlikely in any event, and impossible when owners are awarded credits with *potential* future economic value. *See, e.g.*, Julian Conrad Juergensmeyer, et al., *Transferable Development Rights and Alternatives After Suitum*, 30 Urb. L. 441, 465 (1998); Steven Levine, *Environmental Groups and Land Regulation: Avoiding the Clutches of Lucas v. South Carolina Coastal Council*, 48 U. Miami L. Rev. 1179, 1209-1212 (1994); *see also* John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 Colum. J. Envtl. L. 1, 28 (1993) ("Perhaps the easiest way to inoculate land use laws against *Lucas* will be to create limited systems of transferable development rights so that no property in land could ever be considered entirely without economically beneficial use.").

But, if the proper inquiry focuses on the denial of economically beneficial uses, TDR credits are relevant (only potentially) in determining what monetary compensation the owner is entitled to receive. Indeed, when entirely denied development rights, the Fifth Amendment's inquiry should shift to the question of whether just compensation has been paid for the taking. And while it is possible that a flourishing TDR market may, in some cases, offer a benefit that may count toward a just compensation award, the burden should rest on the government to demonstrate that assigned non-monetary credits have objective and nonspeculative value that fully compensates the owner for the full extent of his or her loss.

B. The speculative nature of TDRs makes them difficult, if not impossible, to properly consider in a takings analysis.

Even if we were to assume that the *Lucas* Court intended for courts to question whether a regulatory regime preserves some economic value, it would be inappropriate to assume that an award of non-monetary credits should necessarily suffice to insulate the government from takings liability. While in some cases it is possible that the government may demonstrate that a TDR may have some concrete and objective market value, the reality is that such value will fluctuate tremendously depending on shifting regulatory and economic conditions.[11] And even more problematic is the fact that, in many cases, the supposed residuary value in awarded TDR credits is prospective and hypothetical – based on the assumption that at some point in the indefinite future there may be a willing buyer.

For example, some jurisdictions award TDR credits to landowners denied development opportunities, but without any functioning TDR market. In those jurisdictions, developers might obtain land use permits without need to purchase TDRs – perhaps opting against seeking special variances. Other jurisdictions may have a functioning market at times, but there may be so many TDRs "for sale" at any given point that they have only nominal (or perhaps illusionary) value. For

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[11] A TDR worth $100 today may be worth $0 or $200 one month from now. This is because a TDR is not a sum certain payment. As set forth above, the value derives from the particular jurisdiction's market for development rights.

that matter, even where a fully functioning TDR market exists, there is never a *guarantee* that a suitable property will be available for development that may qualify to use a TDR credit – meaning that there is no *guarantee* of residual value in the restricted property to which the TDR is assigned.[12]

This point cannot be overstated. Unless and until a TDR is sold at market there is no way to know definitively that it has value (or what value it may hold). Today there may be no market for TDRs because of a lack of buyers or lack of suitable property. Perhaps that may change with passage of enough time. But this Court should question whether speculative assertions of future economic value is enough to shield the government from takings liability. It may be that an award of non-monetary TDR credits may never materialize – perhaps because the government may liberalize its land use restrictions with time, or perhaps because of economic demands that may shift real estate markets toward development in surrounding areas. In such a case, the owner of a completely restricted property is left with useless and valueless TDRs – even years later.

But in any event, *amici* strenuously urge this Court to take this case to clarify that a finding of some *de minimis* residuary value is not enough to defeat a *Lucas* claim, and that an award of non-monetary TDR

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[12] For the same reason, there is no guarantee of just compensation, which is constitutionally required if the restriction prohibiting development is understood as effecting a taking.

credits should be considered only in determining what compensation is owed for the land in question. Moreover, the constitutional infirmities inherent in TDR regimes are highlighted even more when viewed through a valuation lens. Admittedly, there is precedent for offsetting valuation awards in consideration of non-monetary payments in the context of eminent domain actions where a public project results in concrete and non-speculative economic benefits to the owner. By analogy these cases may have application in valuing benefits conferred by a TDR regime. *See Bauman*, 167 U.S. at 538. But this Court has always stressed that it is unacceptable to make a promise of some form of compensation that may fail to materialize. *See Kennedy v. Indianapolis*, 103 U.S. 599, 605 (1881) (holding that construction of a canal might confer benefits amounting to just compensation, but only if that project is completed).

For this reason, an award of TDR credits would be problematic even if considered during the just compensation phase of the analysis. Just as most courts recognize that it is inappropriate to offset a compensation award in consideration of conjectural or speculative benefits that might (or might not) accrue to a residuary parcel in an eminent domain proceeding, courts should recognize that speculative TDR valuations are insufficient to offset against the government's obligation to pay fair market value for property taken through total regulation. *See, e.g., Richardson v. Big Indian Creek Watershed Conservation Dist.*, 181 Neb. 776, 781 (1967)

(observing that "courts are agreed that remote, uncertain, contingent, imaginary, speculative, conjectural, chimerical, mythical, or hypothetical benefits cannot, under any circumstances be taken into consideration"); *Oregon v. Montgomery Ward Dev. Corp.*, 79 Or. App. 457, 512 (1986) (explaining that consideration of special benefits in property valuation "must not be speculative but must be shown to be reasonably probable").

Here, the Beyers are left with property that lacks any economically beneficial use and TDRs with questionable value. And that assumes there is a present market value for their credits. But again, in many of these cases TDR credits are awarded on the speculation (i.e., the potentially empty promise) that they will attain some meaningful value in the indefinite future. Accordingly, the only way to *guarantee* that private property will not be taken without payment of just compensation is for this Court to expressly endorse the view that a total taking occurs with denial of all economically beneficial uses and to therein require payment for the fair market value of the land in question.

C. There are other reasons to view TDRs as constitutionally suspect.

Finally, there is an additional (and under-appreciated) reason why TDR programs are constitutionally suspect under this Court's takings case law. As explained in Section II.A., TDR regimes are predicated entirely upon the government's ability to leverage its

permitting government. More specifically, TDR regimes work only where they can compel owners to purchase TDRs – which they will do only when acquisition of a TDR is made an affirmative requirement for permit approval for their own development plans. But in *Koontz v. St. Johns River Mgmt. Dist.*, 133 S. Ct. 2586 (2013), this Court ruled that it is generally unconstitutional to require a permit applicant to pay money – to advance a public objective – as a condition of permit approval. *Id.* at 2591.

The unconstitutional conditions doctrine prevents government from "requir[ing] a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *see also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). Thus, a "government may not condition the approval of a land use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz*, 133 S. Ct. at 2591. And while the Petitioner has not invoked this line of exaction cases, this constitutional infirmity is nonetheless relevant because it raises yet another question as to whether TDR regimes will deliver on the future economic value that they promise to owners denied development opportunities on their own

lands.[13] Moreover, it would be odd to allow the government to insulate itself from a constitutional violation by instituting a regime that is unconstitutional on its face.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and this *amici curiae* brief, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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[13] It is unlikely that a TDR program will actually preserve economic value at all since property owners can now object to the constitutionality of the very requirement to buy a TDR under *Nollan*, *Dolan* and *Koontz*.