

No. 25-

IN THE

Supreme Court of the United States

CITY OF MARATHON,

Petitioner,

v.

RODNEY SHANDS, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a taking has occurred under the categorical rule announced by this Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), even though the regulated property retains significant market value for both its transferable development rights and recreational uses.

PARTIES TO THE PROCEEDING

Petitioner is City of Marathon.

Respondents are Rodney Shands, Robert Shands,
Thomas Shands, and Kathryn Edwards.

No corporate parties are involved in this case.

RELATED PROCEEDINGS

This case arises from the following proceedings in the Supreme Court of Florida, the Third District Court of Appeal, and the Circuit Court for the Sixteenth Judicial Circuit, Monroe County:

City of Marathon v. Shands, et al.
Sc2025-0833 (Fla. Dec. 5, 2025).

Shands, et al. v. City of Marathon.
No. 3D2021-1987 (Fla. 3d Dist. Ct. App. May 14, 2025).

Shands, et al. v. City of Marathon, et al.
No. 2007-Ca-99 (Fla. Cir. Ct. Aug. 31, 2021).

Shands, et al. v. City of Marathon, et al.
No. 3D17-1859 (Fla. 3d Dist. Ct. App. Jan. 2, 2019).

Shands, et al. v. City of Marathon, et al.
No. 3D07-3288 (Fla. 3d Dist. Ct. App. Dec. 31, 2008).

No other proceedings directly relate to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner City of Marathon respectfully petitions for a writ of certiorari to review the judgment of the Florida Third District Court of Appeal.

OPINIONS AND ORDERS BELOW

The unreported order denying review by the Supreme Court of Florida is available at *City of Marathon v. Shands*, No. SC2025-0833, 2025 WL 3497005 (Fla. Dec. 5, 2025) and Pet. App. 1a–2a. The Third District Court of Appeal’s *en banc* opinions are reported at *Shands v. City of Marathon*, No. 3D21-1987, 411 So. 3d 452 (Fla. 3d Dist. Ct. App. May 14, 2025) (denying certification to the Florida Supreme Court) and Pet. App. 3a–7a and *Shands v. City of Marathon*, 411 So. 3d 452 (Fla. 3d Dist. Ct. App. 2025) and Pet. App. 8a–69a. The withdrawn panel opinion of the Third District Court of Appeal is available at *Shands v. City of Marathon*, No. 3D21-1987, 2023 WL 3214154 (Fla. Dist. Ct. App. May 3, 2023) and Pet. App. 70a–85a. The trial court’s opinions are available at *Shands v. City of Marathon*, No. 2007-CA-99, 2021 WL 11669206 (Fla. Cir. Ct. Aug. 31, 2021) (Final Judgment) and Pet. App. 86a–113a and *Shands v. City of Marathon*, No. 2007-CA-99, 2020 WL 13832755 (Fla. Cir. Ct. Sep. 16, 2020) (denying the Shands’ motion for partial summary judgment) and Pet. App. 114a–16a. There were two prior appeals in the case. They are reported at *Shands v. City of Marathon*, 261 So. 3d 750 (Fla. 3d Dist. Ct. App. 2019) (reversing grant of summary judgment to defendants and remanding to trial court) and *Shands v. City of Marathon*, 999 So. 2d 718 (Fla. 3d Dist. Ct. App. 2008) (reversing grant of motion to dismiss to defendants and remanding to trial court).

STATEMENT OF JURISDICTION

The Supreme Court of Florida issued its order denying review on December 5, 2025. On February 24, 2026, Justice Thomas extended the time to file this petition to May 4, 2026. The Court has jurisdiction under 28 U.S.C. § 1257(a). See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477–87 (1975).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, as relevant:

[N]or shall private property be taken for public use, without just compensation.

INTRODUCTION

For most of this nation’s history, the Takings Clause of the Fifth Amendment was reserved for direct appropriations of property by the government. That changed in 1922 when Justice Holmes, speaking for the Court, recognized a non-invasive category of takings: “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Determining when a regulation goes “too far” generally requires a fact-intensive examination of the regulated property. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (“The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.”).

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court recognized that sometimes a regulation’s impact is so total and extraordi-

nary that a court need not weigh the *Penn Central* factors to find a taking occurred. This case is about clarifying the boundaries of *Lucas*. Specifically, whether a taking has occurred under the categorical rule announced in *Lucas* when the regulated property retains significant market value for both its transferable development rights and recreational uses.

The *Lucas* Court announced that when “the owner of real property has been called upon to sacrifice *all* economically beneficial uses ... he has suffered a taking.” *Lucas*, 505 U.S. at 1019. The facts of *Lucas* and the Court’s explanation of how to apply its categorical rule demonstrated that the inquiry was about whether the regulation had rendered the property “valueless” or caused a “complete elimination of value.” *Id.* at 1007, 1019 n. 8. The Court’s use of the terms value and use interchangeably has caused confusion and a split among the lower courts about how to apply *Lucas* when a regulation appears to eliminate typical and sometimes the most profitable economic uses of a property, but not its value. On one side, the Fifth Circuit, the Federal Circuit, and the Supreme Court of Hawaii find evidence of a deprivation of economic use to be a sufficient basis to hold that a categorical taking has occurred under *Lucas*. For a time, the Ninth Circuit did too, but it later switched to the side of the Eighth Circuit, the D.C. Circuit, and the Supreme Court of Michigan, each of which finds evidence that a property retains significant market value, notwithstanding the government restrictions on the use of the property, to preclude a categorical finding of a taking under *Lucas*.

Entering the fray, a divided Florida Third District Court of Appeals sitting *en banc* held in this case that the inquiry was primarily about economic use, not value. In doing so, the Court reinterpreted *Lucas* and

Penn Central to cast aside evidence that the property in question retained substantial value both for recreational uses and transferable development rights (“TDRs”) granted by the Petitioner, City of Marathon. That decision rewrites Takings law and ignores basic economics. It will lead to a windfall to the property owners who did not take investment backed steps to develop their property for decades, even prior to the challenged restrictions. It also calls into question TDRs, which are used by jurisdictions across the country. Even more regrettably is the effect on the residents of the City of Marathon, whose very safety is dependent on the use of TDRs and conservation zoning to limit development in one of the world’s busiest hurricane corridors. The Court should grant the petition and resolve the lower court conflicts by deciding the proper interpretation of its decision in *Lucas*.

STATEMENT OF THE CASE

1. The late Dr. R.E. Shands acquired an offshore island in the Florida Keys in 1956. Pet. App. 88a. Dr. Shands paid \$20,500 for the 7.9 acre island, which would become known as Shands Key. *Id.* At the time, the island was subject to the jurisdiction of Monroe County and zoned for “general use,” which allowed the construction of one home per acre. *Id.* at 90a–91a. When Dr. Shands passed in 1963, Shands Key remained undeveloped. The trial court found that the Shands family did not take any investment-backed steps to develop the property from 1963 through 2004. *Id.* at 89a.

Beginning in the late seventies, the islands that comprise the Florida Keys became subject to a series of regulations intended to ensure the safety of the residents and preserve the natural beauty of the Keys. In 1979, the Florida Legislature designated the

Florida Keys as an “area of critical state concern” in response to a rise in development. See Fla. Stat. § 380.0552(1) (1979). This subjected all land development regulations in the Keys to approval by the State’s land planning agency. In 1986, Monroe County adopted a Comprehensive Plan that led to Shands Key being rezoned from general use to “off-shore island.” Pet. App. 93a. This designation limited residential development to 1 dwelling unit per 10 acres. Because Shands Key is only 7.9 acres, no residence could be built. The county plan did allow for beekeeping, camping, and recreational uses of Shands Key. *Id.*

In 1993, Monroe County adopted a competitive permit allocation system for residential development, which guided development towards areas with infrastructure; the system set the maximum number of dwelling units in the County based on the number of persons the State estimated could be evacuated within a 24-hour period upon the approach of a major hurricane. Pet. App. 95a.

The City of Marathon was incorporated in 1999 and adopted an almost identical permit allocation system. Pet. App. 93a, 96a. Property was scored in a points system based on a number of factors. The more points an applicant had, the higher the applicant was placed on a list for the allocation of building permits for new residential dwellings. For example, scarified land is awarded more points than environmentally sensitive land. The city’s system also allowed points to be bought and sold among property owners, creating a market for development rights. Points could be obtained either by purchasing property and dedicating it to the City or by purchasing the development rights associated with the property. Shands Key was worth 12 Building Permit Allocation System (“BPAS”)

points and .6 TDRs. *Id.* at 97a. The property's BPAS points and TDRs could be sold and transferred to another property for use in developing the other property (because the City's BPAS points and TDRs are both transferable, they can be collectively referred to as "TDRs"). *Id.* at 96a–97a. Based on a review of six property sales from 2005-2008, the City's appraiser concluded that the Shands' property when sold for use as BPAS points was worth \$147,000 in 2007, a sixfold increase on Dr. Shands' initial investment in the property. *Id.* at 98a. And based on the sale of six offshore islands in Monroe County from 2001-2005, the City's appraiser also concluded that the market value of the land for recreational use was between \$46,000 and \$60,000 in 2007 or almost three times Dr. Shands' initial investment. *Id.*

2. In 2004, the Shands family filed an application for a dock permit for Shands Key; this was the first step the Respondents had taken in developing the island since it was purchased in 1956. Pet. App. 90a, 103a. Upon denial, the Shands filed a Beneficial Use Determination application. Following a public hearing, the Marathon City Council denied the application. The Shands brought suit against the City, claiming that the City's actions resulted in a regulatory taking of their property without just compensation, in violation of state and federal law. *Shands v. City of Marathon*, 999 So. 2d 718, 722 (Fla. 3d Dist. Ct. App. 2008).

The case took a winding journey to trial, including two appeals at the motion to dismiss and motion for summary judgment stages. Relevantly for this petition, following the second remand, the Shands family moved for partial summary judgment on the basis that they had established a categorical, as applied

taking under this Court’s decision in *Lucas*. Pet. App. 114a–115a.

In support of their motion, they submitted testimony establishing that Shands Key was downzoned from general use to off-shore island, limiting its uses to beekeeping and personal camping. Pet. App. 14a. The family argued this rendered the property “economically idle” under *Lucas*. *Id.* (quoting 505 U.S. at 1019). The City of Marathon opposed the motion on the ground that the award of TDRs infused the property with value, precluding an as-applied taking under *Lucas*. *Id.* In addition, Marathon presented an expert affidavit demonstrating that the property could be sold to a willing buyer for recreational value or TDRs. *Id.* The trial court denied the Shands family’s motion for summary judgment. *Id.*

After a two-day, non-jury trial in late May 2021, the trial court found that no taking had occurred under *Penn Central* and entered judgment in favor of the City. Pet. App. 103a–104a. The trial court stated that “[t]he evidence at trial also demonstrates that the Property could be sold for use as BPAS points for \$147,000, a sixfold increase on the initial investment.” *Id.* at 101a–102a. The court additionally found that Shands Key retained “significant value after the alleged taking... for sale for personal recreational use (between \$46,000 to \$60,000)....” *Id.* at 108a. This evidence of value was coupled with the absence of any investment backed expectations—the Shands family were “unable to present evidence that they took any meaningful, investment backed steps to develop the Property in the decades they or their immediate predecessor in interest owned the Property.” *Id.* at 103a.

3. On appeal, a panel of the Third District Court of Appeal found that the Shands family had established a per se as-applied takings claim under *Lucas* and

was entitled to partial summary judgment. Pet. App. 85a. Rehearing *en banc* was granted and the panel opinion was withdrawn and substituted. *Id.* at 9a.

The *en banc* court explained that the case presented a sharply debated question about the role of TDRs in the regulatory takings context.

Some legal commentators have opined that TDRs are irrelevant to the takings side of the equation because they do not impact the nature and extent of the property interest taken by the government. Others have posited that TDRs necessarily mitigate the economic impact of regulation by infusing the property with value and therefore should be relevant in determining whether the government has effectuated a taking.

Pet. App. 20a–22a. The *en banc* court noted that “[t]he Supreme Court has yet to clarify this conundrum.” *Id.*

The *en banc* court applied *Lucas* and found that the Shands family had been deprived of any economically productive uses of the property, thus warranting a taking. Pet. App. 25a–31a. In doing so, the majority cast aside the relevance of the trial court’s finding that the land had value both for its recreational uses and its TDRs. *Id.* Their rationale was that recreational uses were not economic uses of land, and TDRs ought to be considered only in the compensation side of the takings analysis. *Id.* The *en banc* court therefore reversed and remanded to the trial court to enter partial summary judgment in favor of the Shands family.

4. Judge Logue dissented, noting that it was undisputed that the unique economy of the Florida Keys offered an “active, competitive market among private

buyers for (1) transferable development rights, and (2) islands in their natural state available for recreational uses.” Pet. App. 44a. Judge Logue went on:

In an extraordinary feat of legal acrobatics, however, the majority opinion somersaults over these facts, as well as decades of well-established U.S. Supreme Court and Florida precedents, to reverse the trial court and find a taking. In doing so, it inserts the courts into land use policy issues that the U.S. Constitution assigns to the political branches of government.

Pet. App. 44a.

The dissent catalogued the many issues with the *en banc* court’s opinion. Critically, the majority avoided consideration of the “value of the parcel as a whole” in two ways; first, it excluded the value of TDRs from the takings analysis, despite *Penn Central* and a uniform body of precedent including TDRs in determining whether a taking has occurred. Pet. App. 45a (quoting *Penn Cent.*, 483 U.S. at 130 n.27 (1978)). Second, the majority excluded the value of the property for recreational uses based on a misreading of *Lucas*; the majority interpreted that case to switch the focus of the takings analysis “from objective ‘market value’ to subjective ‘productive use.’” *Id.* at 46a. This interpretation has been rejected twice by the Supreme Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 332 (2002) and *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). The majority stumbled further by defining productive or economic use in so limited a fashion that it did not even include the sale of the property for substantial economic value. “It is simply illogical, however, to maintain that a use that generates economic value is not an economic use...

Nothing in the Constitution requires such a counter-intuitive result.” Pet. App. 63a.

Worse still, the majority’s holding freed the way for courts to quickly and easily declare laws a categorical taking in order to avoid the fact-intensive approach of *Penn Central*. Judge Logue asked: “does it promote the Constitutional separation of powers to hand every judge the power to override the acts of executive and legislative bodies in a faster, easier, less deliberative way?” And then answered: “I am particularly concerned that the majority opinion uses its quick and easy ‘categorical’ approach to strike down laws that the other branches of government determined were necessary to protect the lives of the residents of the Florida Keys from hurricanes.” Pet. App. 68a

The majority’s denial of certification to the Florida Supreme Court generated two additional dissents. Judge Scales, with Judge Emas concurring, wrote that the case was “one of great public importance passed upon by this Court’s groundbreaking, February 5, 2025, *en banc* opinion.” Pet. App. 7a. Judge Logue also dissented from the denial of certification, writing that the “en banc majority substantially reinterprets two seminal U.S. Supreme Court decisions along lines never before adopted by a court.” *Id.* at 4a.

The Florida Supreme Court denied review on December 5, 2025. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION**I. The Court should grant review to resolve a split in the lower courts regarding how to apply *Lucas* when there are no “economic uses” of the land but it retains significant market value.**

Only this Court can resolve the confusion in its own opinions and among the lower courts over whether the test announced in *Lucas* is the complete elimination of a property’s value or the denial of all economically beneficial or productive uses. The circuits and state supreme courts have split into two camps. The Fifth Circuit, the Federal Circuit, and the Supreme Court of Hawaii have focused on economic uses of land. While the Eighth Circuit, Ninth Circuit, D.C. Circuit, and the Supreme Court of Michigan focus primarily on the market value of the land. This Court’s review is clearly warranted.

A. This Court’s opinions do not fully resolve whether the proper test under *Lucas* is based on use or value.

The seminal takings case of *Lucas v. South Carolina Coastal Council* began when Lucas purchased two residential lots on the Isle of Palms in Charleston County, South Carolina. *Lucas*, 505 U.S. at 1006. Lucas’ development plans were halted when the state enacted a law that flatly prohibited any development of the lots. *Id.* at 1008–09. In assessing whether a taking had occurred, this Court explained that there were “at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint.” *Id.* at 1015. The first was physical invasions of property, which were not at issue in *Lucas*. The second was when a “regulation denies all economical-

ly beneficial or productive use of land.” *Id.* Of this category, the Court explained that such a deprivation was “from the landowner’s point of view, the equivalent of a physical appropriation.” *Id.* at 1017. Quoting the English jurist Sir Edward Coke, the majority asked: “for what is the land but the profits thereof?” *Id.* (quoting, 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812)).

To be sure, the majority used the phrase “economically beneficial use” to describe generally the standard for a non-invasive categorical taking. *Id.* at 1015–19. The Court, however, did not purport to define what an economic use was, and the majority even acknowledged that “[r]egrettably, the rhetorical force of our ‘deprivation of all economically feasible use’ rule is greater than its precision” *Id.* at 1016 n.7. But the facts of the case demonstrated that the *Lucas* standard is essentially about whether a regulation deprives the land of all value. The trial court had found that the regulation in question rendered Lucas’s property “valueless.” *Id.* at 1020. And the majority thus framed the case as requiring it “to decide whether the Act’s dramatic effect on the economic value of Lucas’s lots accomplished a taking of private property” *Id.* at 1007. The Court held that it had.

The majority even defended the holding against the dissent’s criticism that the landowner whose property is diminished in value 95% recovers nothing, while the landowner who suffers a complete elimination of value recovers the land’s full value. *Id.* at 1019 n.8. “Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, ‘[t]he economic impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinct investment-backed expectations’ are keenly relevant to

takings analysis generally.” *Id.* (quoting *Penn Cent.*, 438 U.S. at 124). In other words, the majority used the diminution of value as the benchmark for measuring if a regulation has denied all economic use. The Court could have fashioned the inquiry as whether the regulation required the land to be kept in its natural state, but chose not to. In fact, the majority was only willing to say that such a regulation carried a “heightened risk that private property is being pressed into some form of public service....” *Id.* at 1018 (emphasis added). In short, value appeared to be the measure for a categorical taking under *Lucas*.

This Court’s subsequent decisions have not fully resolved whether value or use is determinative. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the petitioner brought a takings claim against the state after his property was designated as protected wetland, save for an upland parcel worth \$200,000 in development value. *Id.* at 615–16. Upon review, the Rhode Island Supreme Court held there was no *Lucas* taking because the property retained value. And this Court agreed, holding, “the court was correct to conclude that the owner is not deprived of all economic use of his property because the value of upland portions is substantial.” *Id.* at 616. *Palazzolo*’s holding suggests that value is determinative in resolving a *Lucas* claim. But in explaining the decision, this Court also pointed to the development potential of the upland parcel. “A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property ‘economically idle.’” *Id.* at 631. As a result, *Palazzolo* could be read as holding that the value of the upland parcel negated a *Lucas* taking or that value plus the possibility of development was the determinative factor. Some ambiguity remained.

In most cases applying *Lucas*, a property's use and value rise or fall together. A regulation that denies all uses of a property will typically eliminate all value, as was the case in *Lucas*. Whereas the property that retains some uses, also retains some value, as was the case in *Palazzolo*. Whether the reviewing court relies on use or value as the test will not change the result. But some cases present a fact pattern where typical economic uses of the property have been practically or totally prohibited, and yet the property retains significant market value. Without question, it is possible that there are more valuable uses for the property, but those considerations are part of the investment backed expectations of the property owner that are properly evaluated under *Penn Central*.

Unsurprisingly, lower courts have split on how to evaluate such a case under *Lucas*: should loss of use or loss of value be determinative? Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847, 1856 (2017) ("The distinction between value and use has caused considerable confusion. In fact, courts and other legal authorities differ on this point."). In a sign of the extent to which this issue has percolated, both the Fifth Circuit and Eighth Circuit issued relevant and conflicting opinions in the last year. Compare *DM Arbor Ct., Ltd. v. City of Houston*, 150 F.4th 418 (5th Cir. 2025) with *Becker v. City of Hillsboro*, 125 F.4th 844 (8th Cir. 2025), *cert. denied*, 145 S. Ct. 2777, 222 L. Ed. 2d 1076 (2025).

B. Some lower courts have decided that *Lucas* requires a focus on economically viable use.

The Fifth Circuit recently decided a takings case involving a Houston, Texas property owner who was

denied a repair permit for an apartment complex damaged by Hurricane Harvey. *DM Arbor Ct.*, 150 F.4th at 420. The owner argued that a *Lucas* taking had occurred because there was no “viable way to redevelop” the property. *Id.* at 423. Both sides experts had agreed that redevelopment was not economically feasible given the costs of demolition, construction, and compliance with the city’s regulation. *Id.* at 424. Nevertheless, the property retained between half a million and a million dollars in market value. *Id.* Despite the evidence of substantial value remaining and the absence of a regulation prohibiting redevelopment, the Fifth Circuit held that a taking had occurred under *Lucas* because the property owner had been denied “all economically viable use” of the property. *Id.* at 426. The court argued that whether the property retained any residual value was “immaterial” to the analysis. *Id.* at 424 n.4. The Circuit also explicitly rejected the argument that holding the property for investment purposes or selling the property at a bargain was an economic use relevant for the *Lucas* inquiry. *Id.* at 424–25.

The Federal Circuit has similarly held that the market value of the property or its potential sale did not preclude finding a categorical taking under *Lucas*. *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1116–18 (Fed. Cir. 2015). In *Lost Tree Village*, the property in question was just under five acres of submerged lands and wetlands on two islands off the coast of Florida. *Id.* at 1113. The owner was denied a permit to fill the property for purposes of development and brought suit. *Id.* at 1114. Competing experts valued the property without the fill permit at \$25,000 to \$30,000. *Id.* The Federal Circuit held that these facts constituted a “per se regulatory taking under *Lucas* because Plat 57’s residual value is not

attributable to any economic uses.” *Id.* at 1119. Rather, the Circuit found that the residual value stemmed from “environmental value as wetland.” *Id.* at 1116. Like the Fifth Circuit, the Federal Circuit concluded that a sale of the land was not an economic use either— “[t]ypical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel.” *Id.* at 1117.

The Ninth Circuit’s decision in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), is in accord. There, a property owner was denied an application to build a residential complex on the property. *Id.* at 1425. Ultimately, the owner sold the undeveloped property to the State of California for \$800,000 more than it paid. *Id.* at 1432. The Ninth Circuit explained that focusing the “economically viable use inquiry solely on market value or on the fact that a landowner sold his property for more than he paid could inappropriately allow external economic forces, such as inflation, to affect the takings inquiry.” *Id.* at 1432–33. The court identified several cases where a property was found to have been taken even when it retained “significant value.” *Id.* The court explained that while value is relevant, “our focus is primarily on use, not value.” *Id.* The Court proceeded to find that the city’s actions “denied all economically viable uses” of the property and affirmed the district court’s denial of the city’s motion for judgment notwithstanding the verdict. *Id.* at 1434.

The confusion engendered by *Lucas* and its progeny is dramatically shown by how the Ninth Circuit more recently changed its interpretation of *Lucas* to focus on value. *Bridge Aina Le’a, LLC v. Land Use Comm’n*, 950 F.3d 610, 626–27 (9th Cir. 2020). The

Circuit explained that subsequent Supreme Court decisions made clear that “[i]n the *Lucas* context, ... the complete elimination of a property’s value is the determinative factor.” *Id.* at 627 (alteration in original) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 125 S.Ct. 2074, 2082 (2005)). The Circuit thus stated that “anything less than a complete elimination of value, or a total loss would require the kind of analysis applied in *Penn Central*.” *Id.* (cleaned up). The Ninth Circuit’s position today is therefore squarely at odds with the decisions of the Fifth and Federal Circuits and more in line with its sister circuits that focus on value. Though *Bridge Aina* did not explicitly overrule *Del Monte Dunes*, it explained that the lower courts reliance on “our discussion on value versus use in *Del Monte Dunes*... was error because, as we have explained, the Supreme Court’s precedents underscore that value is determinative.” *Id.* at 628.

The Supreme Court of Hawaii has weighed in as well in a case involving an inconsistent zoning of property, which had frustrated the owner’s attempts to build a residence. *Leone v. County of Maui*, 141 Haw. 68, 72, 404 P.3d 1257, 1261 (2017). As a result, the property remained in its natural state. *Id.* at 85. The Supreme Court of Hawaii approvingly cited the rule in *Del Monte Dunes* and concluded that “the determination of whether property has any economically beneficial use does not turn on whether the property has value.” *Id.* at 83. The Supreme Court then defined economic value to include “investment use” or “that the property had value because the Leones could hold on to property, wait until it increased in value, and sell it for a profit.” *Id.* That places the Hawaii Supreme Court in tension with the Fifth and Federal Circuits, which did not allow an economic use

to include holding and selling the property. Compare *Leone*, 141 Haw. at 82–83, with *DM Arbor Ct.*, 150 F.4th at 424–25 and *Lost Tree Vill.*, 787 F.3d at 1117.

The Supreme Court of Hawaii made two other relevant conclusions in the case. First, the Court held that the property owners were not entitled to a jury instruction that land left in its natural state would never have an economically beneficial use. *Leone*, 141 Haw. at 85. And second, the Court held that the plaintiffs were not entitled to a judgment as a matter of law in favor of a taking because there was evidence that the property “retained a reasonable, economically viable use, specifically in the form of an investment.” *Id.* at 88. In fact, the property, despite being left in its natural state, had garnered at least two offers at a premium to the purchase price. *Id.* In short, despite announcing that the test was about economic use, the Supreme Court of Hawaii defined such use broadly enough to include situations where the property’s value supported its use as an investment.

C. Some lower courts have rejected use and focus on value in deciding whether to apply *Lucas* or *Penn Central*.

The Eighth Circuit’s opinion in *Becker v. City of Hillsboro*, contrasts strikingly with the approach of the Fifth Circuit. Here, the property owners faced a regulation that rendered it “not financially feasible” to develop their lots, given the cost of complying with the City’s water supply regulations (which were estimated to be greater than the value of the property). 125 F.4th at 850, 854. The owners additionally claimed that such costs deterred buyers from purchasing their lots. The Eighth Circuit rejected the argument that a taking had occurred under *Lucas* because the property was not “rendered valueless by the City’s ordinances.” *Id.* at 854. The court found a dim-

inution of 70% of the property's value, which still left \$477,000. Without engaging in an analysis like the Fifth Circuit's on the economic feasibility or viability of development, the Eighth Circuit stated, "[i]t is only when those regulations eliminate *all* economically valuable use that *Lucas* requires compensation, and the trustees have failed to establish that Hillsboro's regulations render their property valueless." *Id.* at 855.

The D.C. Circuit reached a similar conclusion in *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999). There, the property consisted of nine lots, eight of which were landscaped lawns. *Id.* at 877. The owner was denied a permit to develop the lawns. *Id.* at 877–78. The D.C. Circuit issued two holdings regarding the *Lucas* analysis. First, the Court expanded the relevant parcels under consideration to include an apartment building. *Id.* at 880–82. When considering this greater parcel, the denial of a *Lucas* taking was "unremarkable." *Id.* But the D.C. Circuit went on to say that even limiting the parcels in question to the lawns, "the record does not support the conclusion that Lots 107 through 114 are rendered 'valueless' by the regulation at issue." *Id.* The Circuit explained that "[t]he *Lucas* Court consciously recognized that it was drawing an arbitrary line between total destruction of economic value and something marginally less than total destruction." *Id.* *Lucas* was inapplicable to this case because the property owners offered no evidence that "the lawns' economic value was totally destroyed as is required by *Lucas*, nor did [the owners] offer evidence of the plots' fair market value after its construction permits were denied." *Id.* The court did not attempt to parse what economic or productive uses could be made of a lawn.

Finally, the Supreme Court of Michigan has indicated that even “some financial value” remaining in a property is enough to defeat a *Lucas* categorical claim. In *K & K Construction, Inc. v. Department of Natural Resources*, 456 Mich. 570, 575 N.W.2d 531 (1998), the property owners were denied a permit to fill wetlands in order to develop a restaurant and sports complex. *Id.* at 574–75. The state court of appeals, like the one in this case, held that a taking had occurred because the property was essentially worthless as commercial real estate. *K & K Const., Inc. v. Dep’t of Nat. Res.*, 217 Mich. App. 56, 68–69, 551 N.W.2d 413, 419 (Mich. Ct. App. 1996), *rev’d*, 456 Mich. 570 (1998). The Supreme Court of Michigan reversed for two reasons. First, it expanded the inquiry to include other parcels under common ownership, which could be developed. *K & K Const.*, 456 Mich. at 586. Because economic uses were available on those parcels, the Supreme Court found *Lucas* inapplicable. *Id.* at 586–87. But the Court went further, contending that even if the analysis were limited to the parcel where development was prohibited, the Court of Appeals was wrong to find a categorical taking because the trial court had found that “some financial value” remained. *Id.* at 587 n.13 (emphasis omitted). “Thus, while the regulations may have diminished the value of plaintiffs’ land, this diminution in value would not give rise to a categorical taking. Instead, it should be analyzed under the traditional case-specific inquiry.” *Id.*

* * *

The Third District Court of Appeal of Florida, the Fifth Circuit, the Federal Circuit, and the Supreme Court of Hawaii have each held that *Lucas* requires looking at the economic uses of a property to determine whether a categorical taking has occurred. The

Ninth Circuit was in accord, but appears to have shifted to the other side of the split after *Bridge Aina Le'a*. Meanwhile, the Eighth Circuit, the D.C. Circuit, and the Supreme Court of Michigan have held that a *Lucas* taking can be defeated by evidence that the property retained market value even though development was either infeasible or prohibited. Because the split of authority involves the proper interpretation of this Court's decisions, it should intervene now to clarify the law of Takings.

II. THE DECISION BELOW IS WRONG.

This Court's takings cases, while not free of ambiguity, establish that the Florida Third District Court of Appeal applied the wrong standard under *Lucas* by focusing primarily on economic uses of the property, as opposed to the property's market value. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), which postdated *Lucas*, the regulation created a temporary moratorium on any development of property near Lake Tahoe. It was clear that all economic uses were prohibited during the moratorium, but nevertheless, the property retained substantial value. *Id.* at 316. This Court interpreted *Lucas* to hold that "[a]nything less than a complete elimination of value, or a total loss, the Court acknowledged, would require the kind of analysis applied in *Penn Central*." *Id.* at 330. Applying that rule, this Court explained that "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Id.* at 332. This Court thus held that the categorical rule in *Lucas* did not apply in that case. *Id.* Instead, a closer analysis under *Penn Central* was called for: "the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation

permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry.” *Id.*

In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), this Court again explained that value was the linchpin under *Lucas*. “In the *Lucas* context, of course, the complete elimination of a property’s value is the determinative factor.” *Id.* at 539.

Lucas’s focus on measurable value was eminently sensible. *Lucas*’s categorical rule applies to the “extraordinary” case where the government’s action is of such an extreme nature that a court need not engage in a fact-intensive inquiry. *Lucas*, 505 U.S. at 1017–18. Such clarity arises when a property has been determined to be valueless or worthless because of government restrictions. Contrast this simple approach to the more intensive consideration of what uses of a property are “economic” for purposes of the Takings Clause. See Pet. App. 25a–27a. Such a test is prone to fall into matters of opinion about whether an “investment use,” land sale, or recreational use should count. See *Leone*, 141 Haw. at 83; *Lost Tree Vill.*, 787 F.3d at 1117–18; Pet. App. 25a–27a. Such inquiries, if they are warranted, are best left for a more careful review under *Penn Central*, not *Lucas*.

It is important to emphasize that interpreting *Lucas* to be about value does not mean that a regulation that eliminates 95% or 99% of a property’s value will never be a taking. Where a regulation falls short of what *Lucas* demands, a taking may still be determined to have occurred under the proper *Penn Central* factors, which include the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Penn Central*, 438 U.S. at 124.

A review of the Third District Court of Appeal's reasoning reveals several issues with interpreting *Lucas*'s holding to be about economic use. The majority first announces that the regulation deprived the Shands family of "any use of the property beyond beekeeping or personal camping[;]... these activities are not economically productive." Pet. App. 25a. But this begs the question: what is an economically productive use? The majority thinks a "typical" economic use is one where a landowner derives benefits from land ownership, as opposed to any benefit from selling the land. *Id.* (quoting *Lost Tree Vill.*, 787 F.3d at 1117). The majority cites some examples of such uses: logging, landfilling, and livestock grazing. *Id.* Setting aside the propriety of that definition, beekeeping, which was permitted on Shands Key, would certainly qualify as an economic use not relevantly different from livestock grazing. But Shands Key can be used for far more than beekeeping, because camping and recreational uses of the land are also permitted. *Id.* at 97a. The dissent catalogues the many recreational attractions that draw visitors to the Florida Keys each year: hunting, fishing, snorkeling, scuba diving, spearfishing, lobstering, kayaking, sailing, motorboating, windsurfing, wildlife observing, and camping. *Id.* at 60a. The ability to fish around Shands Key is a use for which the owners can derive benefit or value.

The best indication, however, of the economic use of land is not the opinion of the petitioner or respondent, it is the opinion of the market. Pet. App. 64a ("the only way to determine if a use is 'economic' is to estimate its 'value.' The only way to estimate value is to turn to the market and determine sales price."). The trial court established that Shands Key had appreciated in value based on twelve sales of similar

properties in Monroe County. *Id.* at 51a. That objective proof is much better evidence of the benefits of owning property than seeking to divine what a typical beneficial use of land is. The latter approach is subjective and likely to overlook beneficial uses the market of buyers and sellers observe.

Having concluded that the land has no economic uses, the majority then has to explain why selling the land for a healthy profit is not “economic.” Pet. App. 63a–64a (“In any system of free market capitalism, provided there is an active and competitive market as exists here, the sale of property is ‘the most profitable use of [a property owner’s] property.’” (quoting *Andrus*, 444 U.S. at 66)). For residential property owners, it is the time of sale and not the duration of ownership, when any profits can be realized. Same too for professional real estate developers and amateur home flippers. A definition of “economic” that excludes such business activity is mistaken.

The majority offers one plausible rationale for excluding property sales: “[s]peculative land uses are not considered as part of a takings inquiry.” Pet. App. 25a–26a That could be right in some cases, but is beside the point for this case. The trial court found as a fact that the land had value based on the sale of similar properties in the county. *Id.* at 51a. This is not a case where a party has speculated about a sale without any evidence that there is a market for the property. *Id.* at 65a (“The cases the majority cites for its misreading of *Lucas* all involved factual circumstances where a regulation left a property in its natural state but there was also no competitive, private market for the property in its natural state.”). Thus it’s not even a case where the property’s value is negligible and based upon sheer speculation. Shands Key

has appreciated several multiples in value since its purchase. *Id.* at 51a.

Having swept away the economic uses of Shands Key, the majority then finds reason to exclude the value of the property's TDRs. The majority chiefly relies on Justice Scalia's concurrence in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), where he argued that TDRs are relevant only to the just compensation side of the takings analysis. Pet. App. 28a–29a. There are reasons to doubt Justice Scalia's concurrence's validity, chief among them that the majority in *Penn Central* included the value of TDRs in its analysis of whether a taking had occurred and did not confine its role to whether just compensation had been paid. *Penn Central*, 438 U.S. at 137 (“While these rights may well not have constituted ‘just compensation’ if a ‘taking’ had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.”). Elevating a concurrence above a majority opinion that remains good law is obviously an error. In addition, the courts of appeals have followed *Penn Central*'s guidance in considering TDRs in determining whether a taking has occurred. See *Pulte Home Corp. v. Montgomery County*, 909 F.3d 685, 696 (4th Cir. 2018); *Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 357 (2d Cir. 1990).

The *en banc* majority in *Shands* was concerned that TDRs could create a “Fifth Amendment loophole” if included in the takings side of the equation. Pet. App. 28a. The argument goes that the state can avoid paying just compensation if it can provide just enough value in the form of a TDR to defeat a taking in the

first place. But that premise is invalid. It is possible that the state can avoid a *Lucas* taking by granting valuable TDRs to the property owner; but the TDRs must withstand further review under *Penn Central*, which requires examination of the regulation's economic impact. As such, TDRs are no more a loophole than the regulation that diminishes a property's value rather than eliminating it. (For example, a regulation that reduces a property's value by 50% has the same economic impact as a regulation that grants a TDR worth 50% of the property's value and eliminates all else). In short, there is no loophole in this Court's takings jurisprudence.

III. THIS CASE IS AN IDEAL VEHICLE TO DECIDE THIS IMPORTANT AND RECURRING ISSUE FOR SMALL TOWNS AND CITIES AS WELL AS RURAL COUNTIES ACROSS THE COUNTRY.

This petition presents a perfect chance to resolve the deep and growing split on whether *Lucas*'s categorical rule is primarily concerned with economic use or market value. The facts in this case are simple, undisputed, and tee up the constitutional question. The issue of *Lucas*'s application was pressed and passed upon at each level below. And an *en banc* state court of appeals has issued a thorough majority opinion and dissent interpreting this Court's takings cases.

In addition, this case presents an issue likely to re-occur across the country. Three judges sitting in the Third District Court of Appeals dissented from the majority's denial of certification to the Florida Supreme Court, arguing that the case presented an issue of "great public importance." Pet. App. 4a, 7a. As Judge Scales explained, "the land development regulations of Florida local governments generally, and

the Florida Keys in particular, rely heavily on transferable development rights (TDRs) as a means to effect land conservation.” *Id* at 7a. Florida is not alone in its use of TDRs. A 2022 scholarly article found that there were 341 active TDR programs in the United States spread out across 38 states, most of which were established between 1992 and 2011. Todd K. BenDor, et al., *A National Inventory and Analysis of US Transfer of Development Rights Programs*, 65 J. Env’t Plan. & Mgmt. 2276, 2277 (2022). These include parts of the country famed for their natural beauty. *Id.* (listing New Jersey’s Pinelands, California’s Lake Tahoe Basin, and Washington’s Puget Sound). Given the widespread use of TDR programs across the country, this issue is important and likely to reoccur.

And finally, this issue is vitally important to the safety of the residents in the Florida Keys. As the dissent explained:

The regulations at issue are part of a network of laws that the political branches determined are necessary to protect lives and property values in the Keys from hurricanes. The Keys are a half-mile wide scattering of reefs and small islands that lie barely above sea level. They project over a hundred miles into one of the busiest hurricane corridors on Earth. They are connected to the mainland by a single narrow road. The property values of the residents depend on water quality; their lives depend on timely hurricane evacuation.

Pet. App. 47a. The regulations at issue in this case were designed to ensure that the population of the Florida Keys can be safely evacuated during hurricanes. As the state’s annual report explained: “No hurricane shelters are available in the Florida Keys for Category 3-5 hurricane storm events. A system of

managed growth was developed to ensure the ability to evacuate within the 24-hour evacuation clearance time as required by section 380.0552(9)(a)2., Florida Statutes.” *Id.* (quoting, Div. of Cmty. Dev., Fla. Dep’t of Econ. Opportunity, Fla. Keys Area of Critical State Concern ANN. REP. 3–4 (2020)). The law at issue in this case is not just an economic plan. It is a necessary tool to ensure the health and safety of the Florida Keys community. The majority’s use of a “quick and easy ‘categorical’ approach to strike down laws that the other branches of government determined were necessary to protect the lives of the residents of the Florida Keys” is all the more problematic. Pet. App. 68a.

The lower court’s rush to find a taking under *Lucas* means the small towns, cities, and county that make up the Keys can expect a flurry of suits from property owners seeking the benefit of the now expanded categorical rule. These municipalities do not have the resources to withstand such litigation. And judges will inevitably be drawn into the policy making role of determining the minimum lot size for a residence or how to structure the municipality’s TDR program. These are questions the judiciary is ill-equipped to resolve. The Constitution does not require this outcome. Nor do this Court’s opinions.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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