

No. 25-1251

IN THE
Supreme Court of the United States

CITY OF MARATHON, FLORIDA,

Petitioner,

v.

RODNEY SHANDS, ET AL.,

Respondents.

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

**BRIEF OF INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION AND FLORIDA
ASSOCIATION OF COUNTY ATTORNEYS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE¹

The International Municipal Lawyers Association (“IMLA”) is the nation’s largest and oldest organization devoted to local government law, encompassing more than 2,500 local government entities nationwide and comprising more than 8,000 local government attorneys representing cities, counties, towns, villages, townships, parishes, and others. IMLA’s mission is to advance the responsible development of municipal law through education and advocacy, including by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

IMLA files as an amicus in this case to demonstrate to the Court the prevalence of Transferable Development Rights (“TDRs”) as a long-recognized and judicially validated mechanism for protecting sensitive lands while ensuring the property owner retains value in the land despite development limitations.

The Florida Association of County Attorneys (“FACA”) is a nonprofit corporation “whose purpose is to provide a forum for research, advice and discussion in the development of local government law.” *Florida Association of County Attorneys*,

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made any monetary contribution to its preparation or submission. This brief complies with Rule 37.2 because it is being filed more than ten days before the due date.

<https://tinyurl.com/bddtdkxm> (last visited May 15, 2026). FACA has 299 members, including 47 counties represented, that regularly provide advice to member counties on land use matters, including property rights, takings, and TDRs.

Paramount to FACA's membership are: (a) clarity and consistency in legal doctrine; (b) the ability to exercise home rule powers consistent with state and federal law; and (c) efficiency in the administration of government. The decision below, should it stand, undermines each of these pillars of good and efficient government, not to mention the property interests and expectations of millions of Floridians.

SUMMARY OF ARGUMENT

Local governments create Transferable Development Rights as part of regulatory schemes to restrict development in a sensitive area, while simultaneously infusing a restricted property with additional value, granting it the right to sell development rights that may be utilized in a different geographic area. Local governments use their local expertise to designate certain areas to remain less developed (the "sending areas"), while granting the holders of properties in those areas the ability to transfer development rights to other areas that are better suited for new development (the "receiving areas"). TDRs are used as part of comprehensive local programs to manage and direct growth based on the locality's values, priorities, and goals.

TDRs are a longstanding, widely used, and judicially recognized land-use tool that allow local governments to protect sensitive lands and advance important public goals while preserving economic

value for affected property owners. These programs are not associated with liberal or conservative ideology. They are common sense, market-based solutions to dilemmas that all local governments face. Across the country, state and local governments rely on TDR programs to promote public safety, environmental protection, farmland and historic preservation, growth management, infrastructure planning, coastal resilience, and the protection of military installations.

TDRs provide a means for local governments to regulate land use in a fiscally responsible manner while at the same time infusing private value into the regulated property and promoting private market transactions. Because TDRs operate primarily through the private market, local governments generally implement TDR programs without raising taxes or incurring debt, setting the stage for private transactions and innovation. This market-based mechanism allows TDR programs to achieve important local police power goals while minimizing fiscal burdens, which is particularly important to municipalities with limited tax bases and competing obligations.

The decision below threatens those programs. By holding that the value of TDRs may not be considered in determining whether a regulation has effectuated a taking, the Florida appellate court departed from the framework established in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and deepened a split among lower courts. TDRs are not after-the-fact compensation for a “taking”; they are part of the regulatory scheme itself

and must be considered in assessing the economic impact of that scheme on the property owner.

If left standing, the decision below would inject serious uncertainty into land-use planning nationwide. Local governments, property owners, developers, and preservation organizations have structured decades of public and private decision-making around TDR programs. Excluding TDR value from the analysis of whether there has been a taking would undermine those reliance interests, weaken a fiscally responsible alternative to direct public acquisition, and expose local governments to substantial litigation and financial risk. The Court should grant review to restore clarity and to confirm that TDRs remain relevant under the *Penn Central* framework to determining whether a government regulation constitutes a “taking.”

ARGUMENT

Transferable Development Rights are a critical land and natural resource management tool for state and local governments across the country. Local governments use them to pursue important and diverse public policy goals, including public safety, conservation, historic preservation, environmental protection, growth management, aviation safety, and protection of military installations. TDRs are a valuable, innovative, market-based solution to problems that all local governments face.

Adding to a split in the lower courts, the Florida appellate court held that the value of TDRs granted as part of a regulatory land management program may not be considered in determining whether there has been a “taking” of property. That holding

needlessly undermines the ability of state and local governments to regulate development in the public interest, while protecting property value and reducing government regulation and costs to taxpayers. The decision below is wrong and the split in authority on this question creates intolerable uncertainty for local governments across the country. The Court should grant review.

I. TDRs are a well-recognized and widely used tool for land use management.

Local governments create TDRs as part of regulatory schemes to restrict development in a sensitive area, while simultaneously infusing a restricted property with additional value, granting it the right to sell development rights that may be utilized in a different geographic area. Rick Pruetz et al., Commentary, *Transfer of Development Rights Turns 40*, 59 *Plan. & Env't L.* 3, 3 (2007); Margaret A. Walls & Virginia McConnell, *Transfer of Development Rights in U.S. Communities: Evaluating Program Design, Implementation, and Outcomes* 8 (*Resources for the Future* ed., 2007), <https://tinyurl.com/2h6zjsf9> (last visited May 15, 2026). Local governments use their local expertise to designate certain areas to remain less developed (the “sending areas”), while granting the holders of properties in those areas the ability to transfer development rights to other areas that are better suited for new development (the “receiving areas”). Pruetz, *Transfer of Development Rights Turns 40*, *supra* at 3. TDRs are used as part of comprehensive local programs to manage and direct growth based on the locality’s values, priorities, and goals. *Id.*

At least twenty-six states have adopted TDR enabling legislation. *Id.* at 9. In a few states, TDR programs are authorized only for limited purposes, but most enabling statutes grant local governments broad authority to utilize TDRs to achieve their general land use goals. *Id.* Some municipalities have implemented TDR programs without an enabling statute, relying on their general police power authority to regulate land use and developments. *Id.* As of 2022, there were at least 341 active TDR programs nationwide. See Todd K. BenDor et al., *A National Inventory and Analysis of US Transfer of Development Rights Programs*, 65 J. Env't Plan. & Mgmt. 2276, 2287 (2022).

A. TDR programs have operated in multiple jurisdictions for decades.

TDR programs have been operating in multiple jurisdictions for decades. In 1916, New York City initiated a simple TDR program allowing owners of adjacent lots to combine their air rights so that “unused” height authority on one building could be “donated” to another building nearby, contributing to a block’s capacity for innovation, efficiency, and collaboration. N.Y. Dep’t of State, *Transfer of Development Rights* 1 (James A. Coon Loc. Gov’t Tech. Series, 2020), <https://tinyurl.com/sntm986v> (last visited May 15, 2026). Since that time, the City has experimented with more diverse and complex TDR programs to achieve planning and urban design goals. N.Y.C. Dep’t of City Plan., *Transferable Development Rights*, <https://tinyurl.com/7ydjxyzyc> (last visited May 15, 2026).

“The same site cannot support a landmark and a modern office tower, or a nature preserve and a

polluting industrial plant.” John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 Yale L.J. 75, 85 (1973). TDRs ameliorate this harsh “either/or” choice by permitting transfer of development potential to another geographic site. *Id.* at 85–86. For instance, building on the same concepts underlying the 1916 program of allowing adjacent lots to share air space, New York City has pursued its goals of preserving historic landmarks and “wells of light and air amid the skyscrapers” by imposing height restrictions in some areas while allowing landowners in those areas to sell their air rights for use in other areas. Joseph D. Stinson, *Transferring Development Rights: Purpose, Problems, and Prospects in New York*, 17 Pace L. Rev. 319, 330 (1996) (quoting *Development Rights Transfer in New York City*, 82 Yale L.J. 338, 349 (1972)). “By lessening the economic impact of protectively zoning critical property, TDR is designed to minimize the objections to such zoning.” *Id.* at 320 (citing *Development Rights Transfer in New York City*, at 349 (1972)).

The TDRs have substantial value. Katz’s Delicatessen—the famous 130-year-old family run deli—faced difficulties when property taxes skyrocketed in the Lower East Side. The Indicator from Planet Money, *The Market for Air*, NPR, at 01:35 (July 20, 2018), <https://tinyurl.com/48d3jbnt> (last visited May 15, 2026). The deli stayed in business by selling its air rights to a real estate developer for a reported seventeen million dollars. *Id.* at 07:42. Nonprofit organizations such as churches, theatres, and community centers have similarly capitalized on the TDR market. *Id.* at 06:50; Avison Young, *Market Study of TDR Values in the Theater Subdistrict 17–24* (2016) (prepared for N.Y.C. Econ. Dev. Corp.),

<https://tinyurl.com/2eaa35kw> (last visited May 15, 2026).

New York City is far from alone in using TDRs. Since the 1980s, New Jersey has operated one of the largest TDR programs, the Pinelands Development Credit Program. *See generally* Jordan P. Howell et al., *The Pinelands Development Credit Program: Using Market Mechanisms to Achieve Preservation Goals*, 6 Case Stud. Env't 1, 1–2 (2022). In 1990, Washington State enacted the Growth Management Act, which encourages cities and counties to use TDRs as a land use management technique. Wash. Rev. Code § 36.70A.090 (enacted 1990); Cascade Land Conservancy, *A Resource Guide to Designing Transfer of Development Rights Programs in Washington State* 9 (2009) (prepared for Wash. State Dep't of Cmty., Trade & Econ. Dev.), <https://tinyurl.com/4nwdz7jn> (last visited May 15, 2026). And counties in Florida and California have used TDR ordinances for over thirty years. Julia Freedgood et al., Am. Farmland Tr., *Saving American Farmland: What Works* 123 (1997), <https://tinyurl.com/mkkfk3db> (last visited May 15, 2026).

B. TDRs are used to achieve multiple important public policy objectives.

Local governments use TDR programs to achieve multiple important public policy objectives through their general police powers, including preserving historical landmarks, protecting farmland, addressing environmental and safety concerns, managing growth and infrastructure, and creating buffer zones around military facilities. These programs are not associated with liberal or conservative ideology. They are common sense,

market-based solutions to dilemmas that all local governments face.

1. Preserving Historical Landmarks.

Municipalities in Illinois, Hawaii, Idaho, Louisiana, Tennessee, Texas, and California all use TDR programs to preserve historical landmarks. See 65 Ill. Comp. Stat. 5/11-48.2-1; Haw. Rev. Stat. § 46-163; Idaho Code § 67-4619; La. Stat. Ann. § 33:4722; Tenn. Code Ann. § 13-7-101; Dallas, Tex., Dev. Code § 51A-11.302; S.F., Cal. Plan. Code § 128.

Dallas, Texas used TDRs as part of its West End Historic District preservation strategy. A rehabilitated warehouse or commercial building in the West End could sell its unused development capacity to a downtown receiving site, giving the historic owner economic value while keeping the historic building intact. See Rick Pruetz, *Dallas, Texas*, Smart Preservation, <https://tinyurl.com/4hf5t722> (last visited May 15, 2026).

San Francisco, California also adopted a TDR ordinance allowing unused development rights to be transferred from historic properties to receiving sites in specific zoning districts. S.F., Cal. Plan. Code §§ 128, 1101. TDRs have assisted San Francisco in “accommodat[ing] orderly growth while preserving historic buildings and incentivizing owners of historic properties to maintain the City’s cultural resources.” S.F. Plan., *Preservation Incentives*, <https://tinyurl.com/4fbmvj22> (last visited May 15, 2026). San Francisco’s TDR program has reportedly saved at least 83 historical buildings downtown. Seifel Consulting Inc. et al., *San Francisco’s Transfer of Development Rights Program II-1* (prepared for S.F. Plan. Dep’t) (2013),

<https://tinyurl.com/mvdtun4h> (last visited May 15, 2026).

2. Preserving farmland and addressing environmental and safety concerns.

In over 200 cities, towns, and counties, TDR programs are used to preserve farmland and rural areas. Mike Pelletier et al., *Transfer Development Rights Innovations and Gunnison County's Residential Density Transfer Program*, Am. Plan. Ass'n (2010), <https://tinyurl.com/mryskevp> (last visited May 15, 2026). The use of TDRs has preserved over 50,000 acres of land in two Maryland counties, and 31,000 acres in the New Jersey Pinelands. Nadejda Mishkovsk et al., *Smart Growth Network: Putting Smart Growth to Work in Rural Communities* 14, Int'l City/Cnty. Mgmt. Ass'n (2010), <https://tinyurl.com/mrx6wpd5> (last visited May 15, 2026); Rick Pruetz, *Recent Trends in TDR*, Am. Plan. Ass'n (2002), <https://tinyurl.com/ykacebss> (last visited May 15, 2026). King County, Washington's TDR program is reported to have saved around 148,000 acres of rural land. King Cnty., Wash., *Transfer of Development Rights Program Overview*, <https://tinyurl.com/3nk8tx5h> (last visited May 15, 2026).

Across the country, TDRs have preserved more than 400,000 acres of land. Pelletier et al., *supra* at 1. Another New York TDR program—the Pine Barrens Credit program—protects “the quality and quantity of surface water and groundwater and the long-term integrity of the pine barrens ecosystem.” Cent. Pine Barrens Joint Plan. & Pol'y Comm'n, *Program Overview*, <https://tinyurl.com/3x3872zx> (last visited May 15, 2026). Counties in Washington State have adopted programs to protect forests, rural lands, and

environmentally critical areas like wetlands and fish and wildlife habitat conservation. Wash. State Dep't of Com., *Transfer of Development Rights (TDR)*, <https://tinyurl.com/4bmxejch> (last visited May 15, 2026); King Cnty., Wash., *Sending Site Information*, <https://tinyurl.com/bp9fessd> (last visited May 15, 2026).

Local governments in Florida have been leaders in the use of TDR programs, relying on them to preserve environmentally sensitive wetlands and to direct growth away from coastal zones. The Mitigation Banking Grp., Inc., *Transfer of Development Rights (TDR) Available in Florida*, <https://tinyurl.com/b57v255f> (last visited May 15, 2026). The dissent below identifies multiple counties and municipalities in Florida that have adopted ordinances using TDRs to achieve salutary public policy goals—a mechanism that overwhelmingly benefits the larger community while providing affected landowners with a market-driven medium of exchange and source of value. Pet. App. at 54a–55a & nn.20–21.

This case provides a prime example of a local government using TDRs to protect public safety. As the decision below and the petition explain, the TDR program is designed to limit population density to facilitate orderly and safe hurricane evacuation during an emergency. Pet. at 5; Pet. App. at 12a. Protecting the ability of law enforcement, emergency management, and rescue professionals to function during a natural disaster so that they may help the community is an essential function of local government and a core use of a local government's general police powers. Pet. at 28; Pet. App. at 20a.

3. Managing growth, preserving open space and infrastructure coordination.

Local governments have also used TDR programs to preserve open space. In Utah, for example, a county successfully implemented a TDR program to preserve open space while allowing owners to transfer their development rights to higher density areas. John M. Janson et al., *Transfer of Development Rights and Land Trusts Practical Tools to Preserve Community Character*, The Utah Land Use Institute, at 5 (2023), <https://tinyurl.com/v3pk8u2h> (last visited May 15, 2026). “The agricultural fields, the orchards, the open hillsides, and the historic character of Main Street, are changing in ways not always viewed as positive. Growth is generally seen as good but losing our character is increasingly seen as a problem.” *Id.*

Similarly, in New Mexico, Santa Fe County utilizes TDRs to preserve open space while encouraging development in designated growth areas. “Developers in designated areas are able to increase the intensity of a project through acquisition of TDRs in order to put additional dwelling units, height, or non-residential square footage in their projects.” Herbert Foster, *Transfer of Development Rights (TDR) Program*, Santa Fe Cnty., N.M., <https://tinyurl.com/2s4hdjp2> (last visited May 15, 2026). And in Delaware, local governments are utilizing TDRs to encourage development of residential lots in designated “Growth Zones.” Kent Cnty., Del., *Kent County Comprehensive Plan 7-12–7-13* (2018), <https://tinyurl.com/y2bm3ax7> (last visited May 15, 2026).

Beaufort County, South Carolina uses TDRs as a mechanism to shift future residential units away from

areas surrounding the Marine Corps Air Station. Beaufort Cnty. Plan. and Dev., *Beaufort County Transfer of Development Rights: Frequently Asked Questions*, at 1, <https://tinyurl.com/wza7kpuz> (last visited May 15, 2026). The program protects the security of the military facility. *Id.*

In Washington, the TDR system is guided by the state's Growth Management Act, which recognizes TDR programs as an innovative land use management technique. Wash. State Dep't of Com., *supra* p. 11. Through comprehensive plans and development regulations, communities can identify specific areas that are suitable to grow at higher intensities. *Id.* Additionally, jurisdictions can customize elements of their TDR programs to reflect conservation and development goals, as well as specific market conditions and growth patterns. *Id.*

Several counties in Texas have also used TDR programs to achieve important growth and planning goals. For example, San Antonio uses a TDR mechanism to promote compact growth in hamlets, villages, and regional centers. Rick Pruetz, *San Antonio, Texas, Smart Preservation*, <https://tinyurl.com/k7pnap2e> (last visited May 15, 2026); S.A., Tex., Unified Dev. Code § 35-361. Under this system, the TDR program shifts development away from environmentally sensitive land and directs it into targeted growth zones where higher density is encouraged. Pruetz, *San Antonio, Texas, supra*. Development rights transferred from these protected areas allow developers to exceed baseline density limits, promoting compact growth while preserving open space elsewhere. *Id.*

TDRs are also used to shift development away from shorelines and high-risk coastal areas, and toward more suitable inland locations. Louanne Cooley et al., *Zoning for Municipal Resilience*, Univ. of Conn. (2022), <https://tinyurl.com/2w44z6c7> (last visited May 15, 2026). Specifically, coastal communities can use TDR programs to retreat from the shoreline by designating parcels along the coast as sending zones. *Id.*

Many local governments are evaluating TDR programs as a potential tool for addressing a range of climate-intensified hazards, including flood and sea level rise, soil hazards, wildfire, erosion, and landslides. *Id.*

II. TDR programs enable local governments to achieve important public policy objectives in a fiscally responsible manner without unduly burdening property owners.

TDRs provide a means for local governments to regulate land use in a fiscally responsible manner while at the same time infusing private value into the regulated property and promoting private market transactions. The regulated property becomes a source of rights that can be sold to other properties. Freedgood et al., *supra* p. 8, at 121. Unlike other conservation tools, TDR programs operate primarily through the private market. *Id.* Although some jurisdictions have experimented with the public purchase and “banking” of development rights, most TDR transactions are between private landowners and developers. *Id.* As a result, local governments generally implement TDR programs without raising taxes or incurring debt and setting the stage for private transactions and innovation. *Id.* TDRs thus

shift transactions from the public to the private market.

This market-based mechanism allows TDR programs to achieve important local police power goals while minimizing fiscal burdens, which is particularly important to municipalities with limited tax bases and competing obligations. Reduced fiscal pressure allows local governments to focus funding on other important public services, such as education, parks, roads, sidewalks, utilities, police, fire, and other vital needs. At the same time, TDRs infuse the regulated properties with market value.

The fiscal accommodation to landowners is considerable. Montgomery County, Maryland—home to the most famous, most studied, and most emulated farmland preservation program in the country—has preserved over 52,000 acres of agricultural land through its TDR program alone, generating approximately \$117 million in private market transactions. Montgomery Plan., *Agricultural Land Preservation*, <https://tinyurl.com/4z9phvdh> (last visited May 15, 2026). These TDRs infused the land with market value and provided the County with a way forward; had it been required to acquire those development rights through a Purchase Development Rights program or fee-simple purchase, the cost would have fallen entirely on the public treasury, and likely would have been cost prohibitive.

Other TDR programs are similarly remunerative and effective in advancing public goals. From 2003 to 2011 alone, New York City's programs facilitating sales of air rights generated over one billion dollars in private transactions, and the market for air-rights credits has remained active in the decades since.

Furman Ctr. for Real Est. & Urb. Pol'y, *Buying Sky: The Market for Transferable Development Rights in New York City* 2, N.Y.U. (2013), <https://tinyurl.com/4d8rhapt> (last visited May 15, 2026); N.Y.C. Zoning Resol. §§ 74-79, 81-744.

New Jersey's Pinelands Development Credit Program, operating since 1980, had preserved over 55,000 acres of ecologically sensitive Pinelands land through more than 1,200 transactions representing approximately \$63 million in private economic value as of 2022; by June 2024 the Commission reported the total at 58,078 preserved acres. Howell, *supra* p. 8, at 6–7; N.J. Pinelands Comm'n, *Pinelands Development Credit Program*, <https://tinyurl.com/wbu3napa> (last visited May 15, 2026). King County, Washington's TDR exchange has protected approximately 148,000 acres of rural land, redirecting development potential for more than 3,000 potential dwelling units away from the rural landscape and toward designated urban receiving areas. King Cnty., *Transfer of Development Rights Program Overview*, *supra* p. 10. In both programs, the conservation outcomes were achieved without commensurate public expenditure. Governments faced with the collapse of those programs would have to choose between abandoning hard-won conservation gains or bearing the costs of direct acquisition programs on a scale that would strain any municipal budget.

Meanwhile, the alternatives to TDRs are hardly compelling. Most tools available to local governments for regulating development require substantial expenditure of public funds. For example, a local government may acquire title to property. Hanover, N.H., *Protection Options*, <https://tinyurl.com/336>

hbyny (last updated Jan. 3, 2023). Absent a donation, fee simple acquisition requires the government to purchase the property outright. *Id.* This approach is extremely costly and may also result in loss of tax revenue, as the acquired property is typically removed from the local tax base. *Id.*; Dep't of Tax'n and Fin., *Compensating Local Governments for Loss of Tax Base due to State Ownership of Land*, N.Y. (1996), <https://tinyurl.com/yyjatfvn> (last visited May 15, 2026).

Alternatively, local government may acquire only a partial interest in property. Hanover, N.H., *supra*. Conservation easements and trail easements, for example, allow landowners to transfer specific rights while retaining ownership, giving the government less than a fee simple interest. *Id.* Although acquiring partial interests in land is generally less expensive than fee simple acquisition, it also entails ongoing responsibilities, including monitoring and enforcement in the event of an easement violation. *Id.*

Purchase development rights (“PDR”) programs are another tool available to local governments. Those programs permit a government agency or land trust to purchase the development rights to a particular property, which are then “retired” through deed restriction. Kevin Cheshire, *Market-Based Planning Tools: An Overview of TDRs and PDRs* 4, Coastal Res., L., Plan. and Pol’y Ctr. (2007), <https://tinyurl.com/sr39x99w> (last visited May 15, 2026). Thus, unlike TDRs, PDRs do not typically involve a transfer of development from one area to another. *Id.* And PDRs typically involve a significant expenditure of public funds. *Id.*

III. Local governments have relied for decades on the *Penn Central* framework for evaluating whether a regulatory program utilizing TDRs constitutes a “taking,” and that framework should continue to govern.

For decades, local governments have relied on the framework this Court established in *Penn Central*, allowing myriad TDR programs to proliferate in service of important local public policy goals. 438 U.S. at 137. Under a *Penn Central* analysis, TDRs do not involve any “taking” of property by the government, unless they so diminish the remaining value of the regulated property as to render it valueless. *See id.* at 130–31 (listing opinions that found no taking where the land-use regulation promotes the general welfare and merely diminishes the property value). The *Penn Central* test requires careful factual consideration of the economic effect of a regulation on the property owner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government’s action. *Id.* at 124; Pet. at 22.

The court below erred by holding that the regulations here constitute a categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In reaching that result, the lower court failed to recognize that the TDRs issued to the property owner were an integral part of a comprehensive regulatory scheme designed to assure public safety. As the petition explains, the Shands property retained substantial value after the regulation, not simply because of the regulated property’s value for recreational and other purposes

but also because of the value of the TDRs. Pet. at 21–26.

A TDR is not compensation for a “taking.” A TDR is an administrative regulatory exercise that prescribes the location of a property’s development rights. *Penn Central* properly considered the TDRs in that case as part of the analysis of whether there had been a “taking,” not as an element of “just compensation” for a “taking.”

Local governments have relied for decades on the *Penn Central* framework governing whether a TDR program constitutes a “taking.” See Patricia E. Salkin et al., *Land Use Planning and Development Regulation Law* § 9:10 (3d ed. 2013) (explaining how TDRs are fairer to landowners than Euclidean zoning and find support in the Court’s opinion in *Penn Central*). A holding that use of TDRs is not properly considered in determining whether there has been a “taking” would destabilize planning systems that have been in continuous operation for decades—systems around which local governments have written comprehensive plans, property owners have structured transactions, developers have made capital commitments, and preservation organizations have accepted conservation easements. The reliance interests at stake are extensive, long-settled, and deeply embedded in the land-use fabric of jurisdictions across the country. Pet. App. at 44a.

Beyond that, the current split of authority in the lower courts regarding how TDRs fit into the “takings” analysis has created intolerable uncertainty. In designing their land use management policies, local governments and property owners need to know the rules of the road. The Court should grant review to

resolve the split of authority in the lower courts and provide owners and local governments with the certainty they need.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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