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 APPEAL

BRIEF FOR *AMICUS CURIAE* 1000 FRIENDS OF FLORIDA, INC. IN SUPPORT OF PETITIONER, CITY OF MARATHON

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INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, 1000 Friends of Florida, Inc. respectfully submits this brief *amicus curiae* in support of Petitioner City of Marathon.[1]

1000 Friends of Florida, Inc. is a Florida not-for-profit corporation founded in 1986. Articles of Incorporation 1000 Friends of Florida, Inc., 1–2 (September 5, 1986) (on file with Florida Department of State, document number N16667). 1000 Friends' charitable purposes include: securing reasonable implementation of laws relating to land use planning and growth management in the State of Florida; providing legal support and representation to locally based citizens in plan formulation and implementation; securing consistency between and within local, regional and state plans; and participating in the development of growth management rules, policies and plans at all levels of government. *Id.*

1000 Friends has more than 10,000 members. Each year, the organization participates in Florida Legislative hearings related to environmental conservation and community development. 1000 Friends routinely holds educational events—including workshops throughout Florida and webinars—to educate professionals and interested citizens on the law, policy, and science of

1. No counsel for a party to this proceeding authored this brief, in whole or in part. No counsel for a party to this proceeding or a party to this proceeding has made a monetary contribution to fund preparation or submission of this brief. Only 1000 Friends of Florida, Inc. has contributed monetarily to the preparation and submission of this brief. The filing date of this brief is earlier than 10 days before the due date.

environmental conservation and community development. As a litigant, 1000 Friends of Florida has filed dozens of administrative petitions and judicial actions to enforce the laws in its areas of interest. And 1000 Friends of Florida has appeared numerous times as an *amicus curiae* to provide a court with the perspective of a not-for-profit advocate for planning in the public interest. *See*, *e.g.*, *Cruz v. City of Miami*, 259 So. 3d 97 (Fla. 3d DCA 2018); *City of Jacksonville v. Dixon*, 831 So. 2d 161 (Fla. 2002); *Fla. Retail Fed'n, Inc. v. City of Coral Gables*, 282 So. 3d 889 (Fla. 3d DCA 2019); *Martin Cnty. v. Yusem*, 690 So. 2d 1288 (Fla. 1997); and *Monroe Cnty. v. Ambrose*, 866 So. 2d 707 (Fla. 3d DCA 2003).

1000 Friends of Florida, Inc. has a special interest in whether this Court accepts this petition for a writ of certiorari because the decision of Florida's Third District Court of Appeal has caused confusion as to what land use regulation might be a regulatory taking for which the Fifth Amendment Takings Clause requires government to compensate a property owner; because the decision will discourage government from using transferable development rights, a land use regulation tool that protects property rights; and because the decision may impose liability for governmental regulation that permits valuable recreational land uses.

SUMMARY OF ARGUMENT

Through land use regulation, governments protect property values, human safety, and our environment. As with any government power, land use regulation also impacts individual rights. The Takings Clause in the

United States Constitution[2] is perhaps the most important protection for property rights against government's power to regulate land use.

This Court first recognized that land use regulation can violate the Takings Clause in the foundational case *Pennsylvania Coal Co. v. Mahon*. Recognizing the important balance between public and private interests, Justice Holmes wrote:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. * * * The general rule at least is that while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking.

Mahon, 260 U.S. at 413–15 (emphasis added).

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2. "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The decision of Florida's Third District Court of Appeal, *Shands v. City of Marathon*, conflicts with decisions of this Court to expand what a regulation going "too far" means. Specifically, the decision holds that a court may identify a regulatory taking without a detailed factual inquiry even when a landowner possesses economically valuable transferable development rights and possesses economically valuable rights to use property for recreational purposes. *See Shands v. City of Marathon*, 411 So. 3d 452 (Fla. 3d DCA 2025).

The court below reached its decision after describing this Court's holding in *Lucas v. S. C. Coastal Council*, 505 U.S. 1003 (1992) as requiring government to compensate a property owner for a regulation which deprives that owner of all *economically beneficial uses* of the property. The court then characterized economically valuable transferable development rights and economically valuable rights to use property for recreational purposes as not economically beneficial uses. *See Shands*, 411 So. 3d 452. Essentially, the *Shands* decision distinguishes the value of income-producing activities from a property's objective market value, and rejects objective market value as the appropriate measure of a regulation's impact.

1000 Friends of Florida asks this Court to grant the City of Marathon's petition for a writ of certiorari to resolve whether the *Lucas* rule relates to a complete loss of economically beneficial uses or to a complete loss of economic value and to hold that a categorical taking does not exist when a property owner possesses economically valuable transferable development rights or recreational land uses.

ARGUMENT

In this case, a Florida court found a government regulation constituted a taking even though the property-owner had economically valuable transferable development rights and economically valuable rights to use land for recreation.

This decision may discourage government from using transferable development rights, a land use regulation tool that protects property rights, and may require government to compensate property owners for regulation even when regulated property has significant economic value.

Transferable development rights are permissions to use land that a government allows property owners or permit holders to exchange. Local and state governments in the United States have used transferable development rights for more than half a century as a tool to protect property rights, facilitate building on land appropriate for development, and conserve sensitive areas. Virginia McConnell & Margaret Walls, *U.S. Experience with Transferable Development Rights*, 3 Rev. Env't Econ. & Pol'y 288 (2009). In areas where natural conditions constrain development, these programs create market efficiencies in real estate development and economic value for landowners.

I. This Court should confirm that the *Lucas per se* test requires governments to compensate property owners only for regulations which deny a property all economic value.

The Fifth and Fourteenth Amendments require that when government takes private property for public use it must pay just compensation. *Murr v. Wisconsin*, 582 U.S. 383, 392 (2017). This Court has held that the mechanism of the taking can be through regulation as well as through eminent domain, and it has developed an extensive set of rules to determine when government regulation simply balances the benefits and burdens of civic life or goes too far and imposes obligations on individual property owners that in all fairness should be borne by all. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Fifty years after this Court first recognized regulatory takings in *Mahon*, it identified three criteria for evaluating the effect of a governmental regulation to determine whether government must compensate a property owner: 1) the regulation's economic impact, 2) the regulation's interference with reasonable investment-backed expectations, and 3) the character of the governmental regulation. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–28 (1978).

Now referred to as "*Penn Central* balancing," this test remains the appropriate tool to assess the vast majority of regulatory takings claims. However, two circumstances obviate the need for balancing.

First, when the character of the government action is to impose a physical occupation of property, that fact alone is dispositive. *See Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (United States government could not require property owners to make a marina open to the public without compensation); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (law requiring property owner to accept television cables on property was a taking); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012) (government-induced flooding from dam release was a taking); and *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) (law granting labor organizations the right to enter an employer's property was a taking).

Second, in the "relatively rare situations" where properties "have been *rendered valueless*" because the economic impact of a "regulation *wholly eliminated the value* of the claimant's land", compensation is due without regard to other considerations. *Lucas*, 505 U.S. at 1018, 1020, 1026 (emphasis added).

These two so-called *per se* rules are not substitutes for the considerations that *Penn Central* balancing requires. Rather, they are logical extensions of the balancing test. When certain factors of *Penn Central* balancing reach an extreme, those factors alone can determine the outcome and balancing is no longer necessary.

Further, only exceptional circumstances invoke the *Lucas per se* test. Since deciding *Lucas* in 1992, this Court has not reviewed another case in which it found a regulation was a taking because it eliminated all value in

property,[3] though this Court has found numerous takings under the physical occupation test.

Against this backdrop, the *Shands* decision expands the *Lucas per se* test at the expense of *Penn Central* balancing by casting the *Lucas per se* test as one that evaluates whether a regulation allows "economically beneficial uses" rather than whether a property owner possesses "economic value."

A. This Court's use of the terms "economically viable use," "economically beneficial use, " and "economic value."

This Court first articulated the term "economically viable use" in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The *Agins* test identifies a taking if a regulation "does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260 (internal citations omitted). This Court later rejected the "state interests" prong in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

In *Lucas*, the majority used the phrase "economically viable use" in direct reference to *Agins* at least four times. But the majority then summarized the standard over a dozen times by referring to "economically beneficial use." The decision also referred to the complete economic loss

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3. And only a very few lower court decisions have found a taking based on a complete loss of economic value. In a study of 1,600 *Lucas* claims, only four were successful (0.25%). *See* Carol Necole Brown, The Categorical Lucas Rule and the Nuisance and Background Principles Exception, 30 Touro L. Rev. 349 (2014).

test in terms of "economic value," using that term twice as often. Finally, the concurrence and the dissenting opinions in *Lucas* always used the term "value" rather than "beneficial use" unless citing directly to the *Agins* case.[4]

The fact that the majority used the "beneficial use" term interchangeably with "economic value," and the other opinions never used the "beneficial use" term suggests that this Court then understood the test to be about objective economic value, not income-producing activities.

The crux of the *Shands* decision depends on this statement from a concurrence to an opinion of this Court: transferable development rights "have nothing to do with the use or development of the land to which they are (by regulatory decree) 'attached.'" *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 747 (1997) (Scalia, J., concurring in part and concurring in the judgment). From *Mahon*'s initial determination that a diminution in value due to regulation can constitute a taking, through the *Lucas* decision recognizing a loss of all value constitutes a taking, the *Shands* decision has now articulated a *per se* regulatory takings rule that avoids considering a property's economic value altogether.

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4. Economically "beneficial" use was used by Justice Scalia, who wrote for the majority, 13 times and by Justices Kennedy, Souter, and Stevens twice each. The term "value" or "valueless" in reference to the economic impact of a regulation was used by Justice Scalia at least 24 times, by Justice Kennedy 5 times, by Justice Blackmun 30 times, and by Justice Stevens 15 times.

B. The value of a transferable development right is part of the economic value of property.

When governments design regulatory frameworks to limit the economic burden on those regulated, these efforts should lessen, not increase, the public's potential liability for compensation.

Whether transferable development rights are a property right and how a court should address them in a regulatory takings analysis are contentious questions. *Compare* Samantha Peikoff Adler, *Penn Cent. 2.0: The Takings Implications of Printing Air Rights*, 2015 Colum. Bus. L. Rev. 1120 (2015) *with* Arden H. Rathkopf et al., *Relation to Constitutional Taking Claims—As Factor on Merits of Claim*, in 3 Rathkopf's The Law of Zoning and Planning § 59:17 (4th ed. 2023).

Despite the policy debates, this Court has clearly stated that the value of transferable development rights affects a regulation's economic impact.

> [The transferable development] rights afforded are valuable. 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.

Penn Cent., 438 U.S. at 137.

Of course, in the context of eminent domain or physical occupation, where government takes title to or occupies land, the fact of the taking is not in dispute and any existing transferable development rights might constitute a part of the compensation due. *Horne v. Dep't of Agric.*, 576 U.S. 350, 364 (2015) (citing *Suitum*, 520 U.S. 725, 747–48 (Scalia, J., concurring in part and concurring in the judgment)) ("But once there is a taking, as in the case of a physical appropriation, any payment from the Government in connection with that action goes, at most, to the question of just compensation."). But when called upon to calculate the economic impact of regulation, a court must consider all factors relevant to value, including transferable development rights.

C. Evaluating a loss of "economically beneficial use" would be an unworkable test.

A categorical rule based on a loss of economically beneficial uses would prove unworkable. Whereas *Penn Central* balancing anticipates a holistic and fact-intensive analysis of how regulation impacts a property, the *Lucas per se* test is appropriate when clear evidence establishes a necessary dispositive fact: the complete loss of economic value. Measuring loss of economic value lends itself to objective measurement and can, therefore, provide the evidence the *Lucas per se* test requires. Evaluating a loss of economically beneficial uses, however, is inherently subjective.

1. While "economic value" is objective, "economically beneficial use" is subjective.

Whether property has value is an objective question of fact, dependent on expertise in real estate appraisal. Whether a given land use is an economically beneficial use, however, is inherently subjective.

In the expertise of appraisal, the word "value" is nuanced.[5] Appraisers refer to different types of value to give clear information about property. For this discussion, distinguishing between market value and other types of value is instructive.

Before defining appraisal terms, consider this hypothetical. Operating a data center is an economically beneficial use for Google and running a drive-through restaurant is an economically beneficial use for Starbucks. But if those two companies swapped property, neither would have the expertise to competitively operate the other's assets as a going concern. Regardless of the owner, a data center or a drive-through restaurant will have the same economic value if sold. Whether a use is economically beneficial, however, changes with the user.

When possible, appraisers use a property's market value to measure its economic value. "[M]arket value results from the collective value judgments of market participants. An opinion of market value is based on

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5. "In appraisal practice, the use of the term value alone is often incomplete and is a potentially misleading description of an opinion of the relative worth of an asset." *The Appraisal of Real Estate* 47 (Appraisal Inst. ed., 15th ed. 2020).

objective observation of the collective actions of the market." *The Appraisal of Real Estate* 48 (Appraisal Inst. ed., 15th ed. 2020) (emphasis added).

Real property appraisal does not have a single term approximating economically beneficial use. But appraisers use comparable concepts of value such as "investment value," "use value", and "business value." These are all subjective measures of value relating to the worth of real property to a specific owner or for a specific use.[6]

2. A property may have no economically productive use for a reason beyond government regulation.

Even where evidence that a property has no economically beneficial use exists, to apply the *Lucas per se* takings test based on that criterion, a court would need to have further evidence attributing the loss to government regulation. Often, the character of real property itself prevents economically productive use. Erosion or frequent flooding, for example, might be the

6. "[I]nvestment value is the value of a property to a particular investor based on that person's (or entity's) investment requirements, rather than market norms. In contrast to market value, investment value reflects the subjective relationship between a particular investor and a given investment." *The Appraisal of Real Estate* at 54; "[*V*]*alue in use* is the value the real estate (or any asset) contributes to the enterprise of which it is a part." *Id.* at 53.; "[U]use value is the value that a specific property has for a specific use." *Id.* at 52; "[S]ome properties may have special importance or value to their owners or users (use value) that does not reflect the value the property may have in its market (market value)." *Id.* at 196.

reason a property has no productive use, even when a regulation limits development.

Shands Key is an example. The island lacks the essential public services that make land usable: potable water, wastewater, solid waste disposal, electricity, and access. *Shands*, 411 So. 3d at 473. Knowing whether a property would have an economically beneficial use *but for* government regulation requires a court to consider the limiting characteristics of the property itself and their relative contributions. *Penn Central* balancing is suited to this inquiry; a *per se* test is not.

D. Recreational land uses can have economic value.

In addition to characterizing the *Lucas per se* test as about economically beneficial uses, and not about economic value, the *Shands* decision further erred in holding that the *Lucas per se* test does not take into account land's economic value for recreational uses.

1. $60,000 is not a "token".

Even assuming *arguendo* that a loss of economically beneficial use is sufficient to establish a *per se* taking, the City of Marathon ordinance allowed the Shands' property economically beneficial recreational land uses.

> An active, private market existed in the Keys for transferable development rights. Based on comparable sales, if sold for those rights, the island had a fair market value of $147,000. Also, an active, private market existed in the Keys

> for islands with their uses limited to recreation. Based on the comparable sales of islands in the Keys sold for recreational uses, the island had a fair market value of $60,000.

Shands, 411 So. 3d at 473.

The *Shands* decision rejected the $60,000 value due to recreational land uses saying the city regulations "left appellants with only a *token* interest in the property." *Id.* at 464 (emphasis added). A categorical rule that recreational land uses are not economically beneficial uses ignores the reality that activities dependent on recreation land—such as fishing, diving, and wildlife viewing—are essential to tourism, the most important industry to the economy of the Florida Keys. *About Us*, Key Largo Chamber of Commerce, https://www.keylargochamber.org/about-us/ (last visited May 13, 2026) ("the Florida Keys as a whole relies totally on its major industry—tourism").

2. Estimates of market value are forward-looking, not speculative.

The *Shands* decision inappropriately rejects the market value of the property as relevant to the takings inquiry in part because a future sale is speculative and "*speculative land uses* are not considered as part of takings inquiry." *Shands*, 411 So. 3d at 462 (citing *Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1117 (Fed. Cir. 2015)).

But the market value of land is not speculative in the same way that a hypothetical use of land may be speculative. As Justice Holmes wrote, "[a]ll values are

anticipations of the future." *Lincoln v. Commonwealth*, 164 Mass. 368, 378 (Mass. 1895). And expert opinions in real estate typically "forecast anticipated future market benefits and analyze their present value." *The Appraisal of Real Estate*, at 414. This forward-looking nature of appraisal does not make market value estimates speculative or inherently untrustworthy as a matter of law.

II. The Florida Keys regulatory framework at issue in the *Shands* case illustrates why transferable development rights exist and why governments rely on them to balance private property rights with government's responsibility to protect public safety and the environment.

The *Shands* decision deals primarily with two related aspects of the City of Marathon's land use regulations. The city's Building Permit Allocation System limits the number of residential building permits the city may issue and the city's Rate of Growth Ordinance allows property owners to transfer development rights. *Shands*, 411 So. 3d at 454. These are state and local government-created regulations. But they exist because actual physical limitations constrain real property development in the Keys.

The Florida Keys have value as a place to live, vacation, and work because of their fragile environment and natural beauty. These traits create growth pressures despite the limited infrastructure that exists to support real property development and even though the archipelago is uniquely vulnerable to hurricanes.

Unsurprisingly, the history of land use regulation and growth management in this special place is long and complex. For nearly the last half-century, a defining characteristic of this history has been state-directed growth management for the essential protection of human safety and the Florida Keys' environment.

The state of Florida designated the Keys an area of critical state concern in 1979. *See* Ch. 79–73, 1979 Fla. Laws. An area of critical state concern is a region the Legislature has identified as important for the entire state and as particularly vulnerable because of its environmental, historical, or economic characteristics. *See* Fla. Stat. § 380.05 (2025) (providing criteria for designating areas of critical state concern). Once the Legislature has designated an area of critical state concern, the Florida Department of Commerce[7] has a heightened responsibility to supervise local government land regulations within the area. *See generally* Fla. Stat. § 380.05 (2025) (outlining the role of the state land planning agency in areas of critical state concern).

Florida's Third District Court of Appeal has acknowledged the area of critical state concern designation "expresses a legislative intent to establish a land use management plan to protect the Florida Keys environment, preserve the Keys' unique character, promote orderly and balanced growth, and protect and improve water quality." *Mattino v. City of Marathon*, 345 So. 3d 939 (Fla. 3d DCA 2022).

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7. The Florida Department of Commerce is currently Florida's state land planning agency. The Department of Economic Opportunity and the Department of Community Affairs preceded the Department of Commerce in this role.

A practical aspect of the area of critical state concern designation is that state government and local government responsibility for land development regulations are intertwined. Of paramount concern to both the state and local governments in the Florida Keys is the threat to human safety hurricanes pose.[8]

To address this, Florida Statutes require Florida Keys local governments to "protect the public safety and welfare . . . by maintaining a hurricane evacuation clearance time for permanent residents of no more than 24 hours." Fla. Stat. § 380.0552(9)(a)2. (2025). The state enforces this hurricane evacuation standard and other requirements by reviewing local plans that regulate real property development within the area of critical state concern. [9]

A 1995 order from the Florida Administration Commission—a body comprising Florida's Governor and Cabinet—made extensive findings about the Keys' unique and extreme vulnerability to hurricanes. *DCA v. Monroe Cnty.*, 1995 Fla. ENV LEXIS 129 (Fla. Admin. Comm'n Dec. 12, 1995). The commission found:

> [n]o local government in Florida faces a more unique and serious challenge to protecting its citizens from the impacts of hurricanes[;]

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8. Florida law requires local government comprehensive plans to "protect human life . . . in areas that are subject to destruction by natural disaster." Fla. Stat. § 163.3178(1) (2025).

9. The state land planning agency must approve or reject land-development regulations that any local government proposes in an area of critical state concern. Fla. Stat. § 380.0552 (2025).

> nothing greater than a 24-hour evacuation clearance time is acceptable given the geographic and infrastructure constraints[; and,]
>
> a hurricane evacuation time of more than 24 hours is not acceptable if the health, safety and welfare of the citizens and visitors . . . is the goal.

Id. at 293 ¶ 777, 43–44, 321.

While Florida law uses quantifiable hurricane evacuation capacity as the measuring stick for the development capacity of the Florida Keys, the Administration Commission also found in 1995 that "the nearshore waters cannot tolerate the impacts from sewage treatment and stormwater from additional development . . . " *Id.* at 204 ¶ 407. And the commission ordered that "additional development, if any, will be limited to that amount which may be accommodated while maintaining a hurricane evacuation time of 24 hours *and* . . . meet[ing] environmental carrying capacity constraints." *Id.* (emphasis added).

In the ensuing decades, the state of Florida has reiterated this shared commitment. Here, for example, is a description of the ongoing growth management framework from a 2018 report by the Florida Department of Economic Opportunity on the Florida Keys Area of Critical State Concern.

> Access to and from the Keys is primarily by U.S. Highway 1. Evacuation of the Keys' population in advance of a hurricane strike

> is essential for public safety. 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.

Florida Department of Economic Opportunity, *Florida Keys Area of Critical State Concern Annual Report* 4 (2018).

This regulatory framework—coordinated at the state level in response to actual limits on the Florida Keys' population—has applied to all undeveloped lands in the Florida Keys for decades. State law requires these rules. The state, Monroe County, and the several cities in the Florida Keys apply them comprehensively. And the rules exist to protect human life and the unique Florida Keys' environment.

In this context, transferable development rights cannot be likened to a government coupon awarded in consolation for lost development rights. Reality limits development. By allowing landowners to exchange development rights, transferable development rights programs (like the City of Marathon's) use a market to allocate what constrained development potential exists and maximize the number of landowners who can monetize a share of the limited development potential.

III. Like many states, Florida has used transferable development rights for decades consistent with U.S. Supreme Court precedents.

Apart from the Florida Keys, governments across the country use transferable development rights. This widespread adoption has occurred in light of federal courts acknowledging the tool such as this description from *Good v. United States*, 39 Fed. Cl. 81, 107 (1997).

> [Transferable development rights] programs aim to direct development away from environmentally sensitive land to land more suitable for development by creating a market for development rights. Logistically, [transferable development rights] programs achieve this result by quantifying the development potential of sensitive properties ("sending sites"), and providing that this development potential may be sold to landowners to increase building density in areas suitable for development ("receiving sites").

The pervasive use of transferable development rights in Florida exemplifies both how ingrained they are in land use regulation and how disruptive the Shands decision may be to land development regulation.

A. The Florida Legislature endorses transferable development rights.

The state of Florida first embraced transferable development rights in 1974. Evangeline Linkous et al., *Why Do Counties Adopt Transfer of Development Rights*

Programs?, 62 J. Env't & Plan. Mgmt. 2352, 2360 (2019). Today, Florida has some of the oldest and most notable transferable development rights programs in the United States. *Id.* at 2354. Thirty-one different transferable development rights programs exist across twenty counties, as some counties have multiple programs covering different geographic areas. Evangeline R. Linkous & Timothy S. Chapin, *TDR Program Performance in Florida*, 80 J. Am. Plan. Ass'n 253 (2014). The Florida Legislature explicitly recognizes the utility of transferable development rights programs numerous times in Florida Statutes.

The Florida Community Planning Act—the state law establishing rules for local government planning and land development regulation—encourages local governments to adopt transferable development rights programs. Fla. Stat. § 163.3203(3) (2025). The Legislature "encourage[s] the use of innovative land development regulations which include provisions such as transfer of development rights. . . ." *Id.*

Also, within the Agricultural Lands and Practices Act, the Legislature says transferable development rights are "appropriate" for local governments to use to "discourage urban sprawl while protecting landowner rights." Fla. Stat. § 163.3162(4) (2025).

Finally, the Legislature explicitly requires local governments to use transferable development rights when planning for development of a rural land stewardship area. Fla. Stat. § 163.3148(7) (2025). The Legislature designed the rural land stewardship area program to "protect[] the natural environment, stimulate economic growth and diversification, and encourage the retention of land for

agriculture and other traditional rural land uses." Fla. Stat. § 163.3148(1) (2025).

B. Florida's executive branch has approved many specific transferable development rights programs.

Like the Florida Legislature, Florida's executive branch has embraced transferable development rights in several ways. Significantly, the state land planning agency has approved local government transferable development rights programs within the state's several designated areas of critical state concern. *See*, *e.g.*, Dep't of Cmty. Affs., Div. of Cmty. Plan., DCA Order No. DCA08-OR-048, 35 Fla. Admin. W. No. 8 at 1029–30 (Feb. 27, 2009) (Islamorada, in the Florida Keys Area); Dep't of Cmty. Affs., Div. of Cmty. Plan., DCA Order No. DCA09-OR-065, 35 Fla. Admin. W. No. 11 at 1364 (Mar. 20, 2009) (City of Marathon, in the Florida Keys Area); Dep't of Cmty. Affs., Div. of Cmty. Dev. Order No. DEO-13-043, 39 Fla. Admin. W. No. 34 at 2597–98 (May 14, 2013) (City of Auburndale, in the Green Swamp Area).

In one recent example from 2019, the state land planning agency approved an Islamorada, Village of Islands ordinance updating the city's existing transferable development rights program and found the ordinance furthered statutory objectives. Dep't of Econ. Opportunity, Div. of Cmty. Dev. Final Order No. DEO-19-015, 45 Fla. Admin. Reg. No. 117 at 2683 (June 17, 2019). This approval followed a 2015 agency finding that an expansion of eligibility for Islamorada's transferable development rights program would "ensure the maximum well-being of the Florida Keys and its citizens through

sound economic development." Dep't of Econ. Opportunity, Div. of Cmty. Dev. Final Order No. DEO-15-031, 41 Fla. Admin. Reg. No. 41 at 1087 (Mar. 2, 2015).

These approvals are the product of a meaningful review process, as evidenced by the Department of Commerce's rejection of transferable development rights proposals that would not serve the Legislature's goals. In 2023, for example, the department rejected a City of Marathon proposal that would have made the city's transferable development rights standards less stringent because the weaker standard would not have adequately empowered the city to protect its resources. *See* Commerce Final Order No. COM-23-026, 49 Fla. Admin. Reg. No. 175 at 3308–09 (Sept. 8, 2023).

In another 2023 example, the department rejected a City of Marathon proposal that would have, *inter alia*, allowed the city to permit property owners to transfer liveaboard rights from one marina site to another, thereby failing to provide "adequate alternatives for the protection of public safety and welfare in the event of a natural . . . disaster." *See* Commerce Final Order No. COM-23-027, 49 Fla. Admin. Reg. No. 175 at 3309–10 (Sept. 8, 2023).

Compared to these rejections, the state land planning agency's approvals of transferable development rights ordinances are a recognition of transferable development rights as a necessary land use regulation tool for achieving state goals in critical areas.

CONCLUSION

For the reasons stated above, this Court should grant the City of Marathon's petition for a writ of certiorari and confirm that the *Lucas per se* regulatory takings test identifies regulations which result in a complete loss of economic value as takings. In doing so, this Court would put to rest arguments that economically valuable transferable development rights and economically valuable rights to use land for recreation purposes are not relevant to a *per se* regulatory takings analysis as a matter of law.

Respectfully submitted,

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