DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
THIRD DISTRICT

RODNEY SHANDS, ROBERT SHANDS, KATHRYN EDWARDS, and THOMAS SHANDS,

Appellants/Plaintiffs,

v.

Case no. 3D21-1987
L.T. case no. 07-CA-99-M

CITY OF MARATHON, a municipality created under the laws of the state of Florida,

Appellee/Defendant,

_____/

1000 FRIENDS OF FLORIDA'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEE/DEFENDANT CITY OF MARATHON'S MOTION FOR REHEARING, REHEARING EN BANC, AND FOR CERTIFICATION

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I. IDENTITY AND INTEREST OF THE AMICUS CURIAE

1000 Friends of Florida, Inc. is a Florida not-for-profit corporation founded in 1986.[1] 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.[2]

1000 Friends has more than 10,000 members and actively pursues its purposes. Every legislative session, the organization participates in state 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 environmental conservation and

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[1] Articles of Incorporation 1000 Friends of Florida, Inc., 1-2 (September 5, 1986) (on file with Florida Department of State, document number N16667).

[2] *Id.*

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—including several times before Florida's Third District Court of Appeal—to provide a court with the perspective of a public-interest not-for-profit whose opinion regarding the law is not colored by an interest in the outcome of the underlying dispute.[3]

1000 Friends of Florida, Inc. has a special interest in the decision at bar because the decision will cause confusion as to what land use regulation might be regulatory taking for which the Fifth Amendment Takings Clause requires government to compensate a property owner and because the the decision will discourage government from using transferable development rights, a land use regulation tool that protects property rights and promotes environmental conservation.

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[3] *See*, *e.g.*, *Cruz v. City of Miami*, 259 So. 3d 97 (Fla. 3rd DCA 2018); *Fla. 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. 3rd DCA 2019); *Martin Cnty. v. Museum*, 690 So.2d 1288 (Fla. 1997); and *Monroe Cnty. v. Ambrose*, 866 So. 2d 707 (Fla. 3rd DCA 2003)

II. SUMMARY OF ARGUMENT

Through land use regulation, governments protect our homes, communities, and environment. As with any government power, land use regulation also impacts individual rights. The Takings Clause in the United States Constitution[4] is perhaps the most important protection for property rights against government's power to regulate land use.

The Supreme Court first recognized that land use regulation can violate the Takings Clause in the landmark case *Pennsylvania Coal v. Mahon*.[5] The court said, "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."[6]

The panel opinion conflicts with decisions of the Supreme Court of the United States, of the Florida Supreme Court, and of Florida courts of appeal to expand what a regulation going "too far" means. If it stands, the decision will limit local government use of

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

[5] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

[6] *Id.* at 415 (emphasis added).

transferable development rights—a sound and widely adopted land use regulation tool that protects property rights.

In its argument, amicus curiae shows that the state of Florida has long-used transferable development rights consistent with United States Supreme Court precedents. In reliance on the courts, the Florida Legislature and executive branch have made transferable development rights an important land use regulatory tool to protect property rights and conserve the environment. 1000 Friends of Florida will also present those precedents to make clear the *Penn Central* ad hoc balancing test is the appropriate test to determine whether a regulation that grants economically beneficial transferable development rights is a regulatory taking.

This Honorable Court should grant the city of Marathon's motion for rehearing, rehearing en banc, and for certification, should reject the panel opinion, should reaffirm that the *Penn Central* ad hoc balancing test is appropriate for evaluating whether a regulation that grants economically beneficial transferable development rights is a taking, and should reaffirm that the *Lucas* test categorizes regulations that deny a property all economic value as regulatory takings.

III. ARGUMENT

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.[7] These programs essentially make real estate development permits marketable to create value for landowners and market efficiencies in real estate development.

The panel opinion holds that existing transferable development rights are *never* relevant to determining whether a land use regulation constitutes a regulatory taking.[8] Instead, the panel decided that these rights are appropriate *only* for evaluating how a government has compensated a real property owner for a regulatory taking.[9]

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[7] Virginia McConnell & Margaret Walls, *U.S. Experience with Transferable Development Rights*, 3 Rev. of Env'tl Econ. and Pol. 288, 288 (summer 2009).

[8] *See Shands v. City of Marathon*, 48 Fla. L. Weekly D907 (Fla. 3rd DCA May 3, 2023).

[9] *Id.*

This holding conflicts with the landmark United States Supreme Court regulatory takings case *Penn Central Transportation Co. v. New York City.*[10] The *Penn Central* dispute concerned transferable development rights New York City had granted to property owners as part of a regulation that prohibited them from constructing an office building above Grand Central Terminal.[11]

In evaluating the "transferable development rights afforded"[12] to the property owner, the *Penn Central* decision unambiguously considered those rights as relevant to whether a regulatory taking had occurred *and* to whether New York City had appropriately compensated the property owner. The Court said, "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."[13]

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[10] 438 U.S. 104 (1978).

[11] *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

[12] *Id.* at 129.

[13] *Id.* at 137.

Inexplicably ignoring *Penn Central*, the decision at bar asserts that the "Supreme Court has yet to clarify this conundrum."[14] The panel then cited concurring and dissenting opinions of the United States Supreme Court that are at odds with *Penn Central* and other majority-held opinions. The panel's approach disregards the Court's instruction, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[15]

Adherence to precedent is a cornerstone of the law. The Florida Supreme Court has said, the "doctrine of stare decisis, or the obligation of a court to abide by its own precedent, is grounded on the need for stability in the law and has been a fundamental tenet of Anglo–American jurisprudence for centuries."[16] In this case,

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[14] *Shands v. City of Marathon*, 48 Fla. L. Weekly D907 (Fla. 3rd DCA May 3, 2023).

[15] *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citing *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)).

[16] *Strand v. Escambia Cnty.*, 992 So. 2d 150, 159 (Fla. 2008) (citing *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 637 (Fla. 2003)).

the decision at bar would destabilize regulatory takings law and create uncertainty around transferable development rights, a land use regulation tool the state has embraced for five decades.

A. Relying on judicial precedent, the Florida Legislature and executive branch have made transferable development rights an important land use regulation tool.

The state of Florida first embraced transferable development rights in 1974.[17] Today, Florida has some of the oldest and most notable transferable development rights programs in the country.[18] Thirty-one different transferable development rights programs exist across twenty counties, as some counties have multiple programs covering different geographic areas.[19] Relying on judicial precedent, both the legislature and the executive branch have endorsed, promoted, and approved of these programs.

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[17] Evangeline Linkous et al., *Why do counties adopt transfer of development rights programs?* 62 Journal of Env'tl Planning and Mgmt. 2352, 2360 (2019).

[18] *Id.* at 2354.

[19] Evangeline R. Linkous & Timothy S. Chapin, *TDR Program Performance in Florida*, 80 J. of Am. Plan. Ass'n 253, 256 (2014).

1. The Florida Legislature endorses transferable development rights in statutes and through appropriations.

The Florida Legislature explicitly recognizes the utility of transferable development rights programs numerous times in Florida Statutes. To begin, 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.[20] The Legislature says it "encourage[s] the use of innovative land development regulations which include provisions such as transfer of development rights… ."[21]

Next, 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."[22] Moreover, the Legislature has incentivized local governments to use transferable development rights in plans for developing agricultural enclaves by creating a presumption that development of those enclaves is not suburban

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[20] § 163.3203(3), Fla. Stat. (2023).

[21] *Id.*

[22] § 163.3162(4), Fla. Stat. (2023).

sprawl if the local government uses transferable development rights.[23] This presumption streamlines government review of real estate development plans by limiting the number of provisions a local government must consider when determining whether its comprehensive plan complies with the Community Planning Act.[24]

Finally, the Legislature explicitly requires local governments to use transferable development rights when planning for development of a rural land stewardship area.[25] 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."[26]

The Legislature also promotes transferable development rights through appropriations. The Florida Communities Trust, a division of the Florida Department of Environmental Protection, has broad

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[23] *Id.*

[24] *See generally* § 163.3164, Fla. Stat. (2023); § 163.3177, Fla. Stat. (2023).

[25] § 163.3148(7), Fla. Stat. (2023).

[26] § 163.3148(1), Fla. Stat. (2023).

powers to fund or undertake projects related to resource enhancement and preservation.[27]

For the Florida Communities Trust to fund a local government project, the local government project must utilize "innovative approaches that will assist in the implementation of the conservation, recreation and open space, or coastal management elements of . . . local comprehensive plan[s]."[28] Transferable development rights are one of only two examples the Legislature lists as qualifying innovative approaches.[29] Similarly, the Legislature requires the Florida Communities Trust to use and promote transferable development rights and other "creative land acquisition methods" when collaborating with local governments to reserve lands for purposes like for parks, wildlife habitat, historical preservation, or scientific study.[30]

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[27] *See* § 380.504, Fla. Stat. (2023) (defining the Florida Communities Trust); § 380.507, Fla. Stat. (2023) (defining the Florida Communities Trust's powers to undertake projects and other activities).

[28] § 380.503(6), Fla. Stat. (2023).

[29] *Id.*

[30] § 380.508(4)(g), Fla. Stat. (2023).

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

Like the Legislature, Florida's executive branch has embraced transferable development rights in several ways. Significantly, the state land planning agency—currently named the Florida Department of Commerce—has approved several local government transferable development rights programs within designated areas of critical state concern.

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.[31] Once the Legislature has designated an area of critical state concern, the state land planning agency must engage in heightened supervision of local government land development ordinances within the area.[32] Specifically, the department must

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[31] *See* § 380.05, Fla. Stat. (2023) (providing criteria for designating areas of critical state concern); § 380.055, Fla. Stat. (2023) (designating the Big Cypress Area as an area of critical state concern); § 385.0551, Fla. Stat. (2023) (designating the Green Swamp Area); § 380.0552, Fla. Stat. (2023) (designating the Florida Keys Area).

[32] *See generally,* § 380.05 Fla. Stat. (2023) (outlining the role of the state land planning agency).

approve or reject land-development regulations that any local government proposes in an area of critical state concern.[33]

The state of Florida created the areas of critical state concern program in 1972.[34] Since then, the state land planning agency has reviewed and embraced the transferable development rights programs of multiple Florida local governments within multiple areas of critical state concern.[35]

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.[36] This approval followed a 2015 department finding that an

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[33] § 380.0552, Fla. Stat. (2023).

[34] Ch. 72-317, Laws of Fla.

[35] *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) (Islamadora, 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 (March 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).

[36] Dep't of Econ. Opportunity, Div. Of Cmty. Dev. Final Order No. DEO-19-015, 45 Fla. Admin. R. No. 117 at 2683 (June 17, 2019).

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."[37]

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.[38]

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

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[37] Dep't of Econ. Opportunity, Div. Of Cmty. Dev. Final Order No. DEO-15-031, 41 Fla. Admin. R. No. 41 at 1087 (March 2, 2015).

[38] *See* Commerce Final Order No. COM-23-026, 49 Fla. Admin. Reg. No. 175 at 3308-09 (Sept. 8, 2023).

event of a natural . . . disaster."[39] Compared to these rejections, the state land planning agency's otherwise consistent approval of transferable development rights ordinances across decades and across counties is an endorsement of transferable development rights as a helpful land use regulation tool for achieving state goals in critical areas.

The panel opinion will require governments to compensate property owners for some land use regulations that authorize economically beneficial transferable development rights. This new application of the Takings Clause upends long-standing policy decisions the legislative and executive branches of Florida government made in reliance on binding judicial precedent. This court should promote stability in the law by rejecting the panel's decision.

B. When a regulation authorizes economically beneficial transferable development rights, the appropriate test to determine whether that regulation violates the Takings Clause is the *Penn Central* ad hoc balancing test.

In the years since the Supreme Court of the United States recognized a regulation could violate the Takings Clause, it has

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[39] *See* Commerce Final Order No. COM-23-027, 49 Fla. Admin. Reg. No. 175 at 3309-10 (Sept. 8, 2023).

organized the concept of regulatory takings into a few tests. The Court's 2017 decision in the case *Murr v. Wisconsin* summarizes two tests for evaluating whether a regulation violates the Takings Clause.

> First, with certain qualifications a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause. Second, when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on a complex of factors, including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[40]

These two tests, in the order presented above, also have the names *Lucas* test and *Penn Central* ad hoc balancing test for the cases in which the Court articulated them.

This court should acknowledge that the *Penn Central* ad hoc balancing test, not the *Lucas* test, is the appropriate test to apply when a regulation grants economically beneficial transferable development rights. Reversing the panel's decision would adhere to two regulatory takings principles the panel opinion disregards. One,

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[40] *Murr v. Wisconsin*, 582 U.S. 383, 393 (2017) (internal citations, quotation marks, and ellipses removed).

the *Penn Central* ad hoc balancing recognizes transferable development rights can be an economically beneficial property interest, in addition to possibly being compensation for a regulatory taking if one exists. Two, the *Lucas* test recognizes a regulation that deprives a property of all economic value is a regulatory taking. The *Lucas* test does not depend on whether a regulation limits the allowed uses of property.

1. Transferable development rights can be economically beneficial rights in property.

The panel decision cites a concurring opinion to the United States Supreme Court decision *Suitum v. Tahoe Regional Planning Agency* for this principal: "the relevance of [transferable development rights] is limited to the compensation side of the takings analysis."[41] As amicus curiae presented in the introduction to this argument, that principle conflicts with the majority-held

[41] *Shands v. City of Marathon*, 48 Fla. L. Weekly D907 (Fla. 3d DCA May 3, 2023) (internal brackets removed) (citing *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 750 (1997)).

opinion of *Penn Central*,[42] the decision that first applied the *Penn Central* ad hoc balancing test.[43]

The *Penn Central* ad hoc balancing test is a factual inquiry requiring consideration of the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" as well as the "character of the governmental action."[44] A court weighs these factors to determine whether the regulation is a regulatory taking.

According to the Court's *Penn Central* analysis, when evaluating whether a regulation effects a taking, a court must consider the value of transferable development rights as one part of a regulation's economic impact.[45] Florida courts have considered and followed this oft-cited and relied-upon regulatory takings principal.

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[42] *See* discussion *supra* pp. 6-8.

[43] *See, Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

[44] *Id.* at 124.

[45] *See* discussion *supra* pp. 6-8.

In one case, *Hollywood v. Hollywood*, the Fourth District Court of Appeals applied *Penn Central* to a developer's claim that a zoning ordinance worked a taking.[46] The ordinance at issue created transferable development credits which allowed a developer to significantly increase housing density in exchange for dedicating land to the city as open space.[47]

When the court evaluated the regulation's economic impact on the appellant developer it said the following.

> As to the economic impact of the transfer, it involves the loss of the right to build 79 single family units vis-a-vis the gain of 368 more multi-family units on adjoining land, both parcels already owned by the developer. We cannot quarrel with the economics of that exchange especially when the value of all the multi-family units will be enhanced because the buildings will have an uninterrupted ocean-front position and view.[48]

The role that the transferable development rights played in this analysis was clearly as a part of the assessment whether a regulatory taking had occurred.

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[46] *Hollywood v. Hollywood*, 432 So. 2d 1332 (Fla. 4th DCA), rev. denied, 441 So. 2d 632 (Fla. 1983).

[47] *Id.* at 1333.

[48] *Id.* at 1338.

2. The *Lucas* test finds a regulation has violated the Takings Clause only when the regulation has rendered property entirely without value.

The panel opinion also conflicts with Florida and federal precedent by recasting the bright-line *Lucas* test as one that hinges on the *uses* government allows a given property. Contrary to the panel's decision, the *Lucas* test finds a regulatory takings exists when a regulated property has no economic *value*.

The panel opinion cites the United States Supreme Court decision *Lingle v. Chevron U.S.A. Inc.*[49] for this proposition: "Under *Lucas*, the 'determinative factor' is whether the regulation effectively eliminates *any economic use* associated with the property."[50] This quote distills the essence of the panel's error. One the cited page of the *Lingle* decision, the United States Supreme Court actually said "[I]n the *Lucas* context, of course, the complete elimination of *a property's value* is the determinative factor."[51] By swapping the

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[49] 544 U.S. 528 (2005).

[50] *Shands v. City of Marathon*, 48 Fla. L. Weekly D907 (Fla. 3d DCA May 3, 2023) (emphasis added, citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005)).

[51] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (emphasis added).

concept of *use* for the concept of *value*, the decision at bar rewrites the *Lucas* test into something new.

This error is perhaps understandable because, in *Lucas*, the Court stated the rule that regulations which "deny all economically beneficial or productive use of land"[52] are takings. The phrase 'economically beneficial or productive use of land' fails to clearly distinguish between value and use. But the facts of *Lucas* itself and the *ratio decidendi* of other regulatory takings decisions make clear that the *Lucas* test depends on whether a regulation denies a landowner all *value* in property.

In the *Lucas* decision, the Court repeatedly and in a variety of phrases describes regulations which meet the *Lucas* rule as regulations which eliminate a property's economic value. The Court says regulations meeting the *Lucas* test: "affect property values,"[53] "rendered valueless"[54] property, "affect property values by regulation,"[55] "wholly eliminated the value of the claimant's land,"[56]

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[52] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

[53] 505 U.S. at 1018 (1992).

[54] *Id.* at 1020.

[55] *Id.* at 1023.

[56] *Id.* at 1026.

or cause "regulatory diminution in value."[57] None of these restatements of the rule support the characterization of the *Lucas* holding that the panel asserts.

Beyond *Lucas* and *Lingle*, another United States Supreme Court decision describes the *Lucas* categorical rule as applying to regulations that eliminate all *value* of land. In *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency,* the Court explained that "the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of *all value*."[58] In a dissent to *Tahoe-Sierra*, Justice Rehnquist made clear that the Court majority did not assert this point idly. Rehnquist criticized the Court for describing *Lucas* "as being fundamentally concerned with value."[59]

Florida, for its part, has correctly described the *Lucas* rule as recognizing regulations which deprive property of all value as takings. In *Joint Ventures, Inc. v. DOT*, the Florida Supreme Court asserted: "The modern, prevailing view is that any substantial

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[57] *Id.* at 1026.

[58] 535 U.S. 302, 332 (2002) (emphasis added).

[59] *Id.* at 350.

interference with private property which *destroys or lessens its value* . . . is, in fact and in law, a 'taking' in a constitutional sense."[60]

District Courts in Florida have likewise restated the *Lucas* rule as concerning value. In *Lost Tree Vill. Corp. v. City of Vero Beach,* the Fourth District Court of Appeal evaluated a property owner's claim that a set of local government regulations effected a taking of their property.[61] Quoting *Tahoe–Sierra* the decision stated "*[a]nything less than a 'complete elimination of value,' or a 'total loss,' … would require the kind of analysis applied in Penn Central.*"[62]

In *Hunt v. State*, after the Florida Legislature outlawed bump-stocks, owners of bump-stocks sued the state alleging a categorical taking.[63] The First District Court of Appeal dismissed this claim, stating that this was not a taking because owners could sell their

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[60] *Joint Ventures, Inc. v. DOT*, 563 So. 2d 622, 624 n.6. (Fla. 1990) (quoting J. Sackman, Nichols' The Law of Eminent Domain § 6.09, at 6-55 (rev. 3rd ed. 1985) (emphasis added).

[61] *See Lost Tree Vill. Corp. v. City of Vero Beach*, 838 So. 2d 561, 572 (Fla. 4th DCA 2002).

[62] *Id.* at 572 (emphasis in original) (footnote omitted).

[63] *Hunt v. State*, 310 So. 3d 1123, 1126 (Fla. 1st DCA 2021).

property. The court said that the law "allowing owners to avoid a total *loss in economic value* by selling their bump-fire stocks supports dismissal of a categorical takings claim."[64]

Finally, in *Gulf Coast Transp., Inc. v. Hillsborough Cty.,* the Second District Court of Appeal stated that property owners have suffered a regulatory taking and "must be compensated if and when future legislative amendments *eliminate or reduce the value* of their rights or privileges."[65] Although that decision found no regulatory taking could exist in the facts before the court because no cognizable property right exists in a taxi medallion,[66] the decision is yet another statement that the *Lucas* rule hinges on the value of the property.

C. Conclusion

The state of Florida has embraced transferable development rights for half a century. The Florida Legislature calls them "innovative"[67] and credits them with "protecting landowner

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[64] *Hunt v. State*, 310 So. 3d 1123, 1127 (Fla. 1st DCA 2021) (emphasis added).

[65] *Id.* at 377.

[66] *Gulf Coast Transp., Inc. v. Hillsborough Cty.*, 352 So. 3d 368, 371 (Fla. 2d DCA 2022) (emphasis added).

[67] § 163.3203(3), Fla. Stat. (2023).

rights."[68] Through law and executive action, the state has made transferable development rights a part of statewide efforts like the areas of critical state concern program that protect Florida's environment while promoting our economy.[69]

The panel opinion undermines the transferable development rights programs the state and many local governments have created. By departing from binding precedent of Florida and federal courts—including and especially decisions of the United States Supreme Court—the opinion will confuse governments and landowners alike as to whether a regulation granting transferable development rights might be a regulatory taking.

This confusion will frustrate the state's ability to protect our environment and regulate land use. But these are priorities of the people of Florida and of the state government. The Florida Constitution says the policy of the state is to "conserve and protect its natural resources."[70] And the Florida Legislature has created a coordinated system of planning and land use regulation to enable

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[68] *Id.* at § 163.3162(4).

[69] *See* discussion *supra* pp. 13-16.

[70] Art. II, § 7(a), Fla. Const.

local governments to "encourage the most appropriate use of land, water, and resources"[71] and "deal effectively with future problems that may result from the use and development of land within their jurisdictions."[72]

This Honorable Court should grant the city of Marathon's motion for rehearing, rehearing en banc, and for certification, should reject the panel opinion, should reaffirm that the *Penn Central* ad hoc balancing test is appropriate for evaluating whether a regulation that grants economically beneficial transferable development rights is a taking, and should reaffirm that the *Lucas* test categorizes regulations that deny a property all economic value as regulatory takings.

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[71] § 163.3161(4), Fla. Stat. (2023).

[72] *Id.*

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief was served by e-mail on this 28th day of May, 2024 on the following:

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CERTIFICATE OF COMPLIANCE

This document complies with applicable font and word count limitations of the Florida Rules of Appellate Procedure.

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