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 AMICI CURIAE AUDUBON WESTERN EVERGLADES, CONSERVANCY OF SOUTHWEST FLORIDA, TROPICAL AUDUBON SOCIETY, AND IZAAK WALTON LEAGUE OF AMERICA FLORIDA KEYS CHAPTER IN SUPPORT OF PETITIONER, CITY OF MARATHON

ELIZABETH FATA CARPENTER
Counsel of Record
S. ANSLEY SAMSON
FRANCESCA J. DIJULIO
EVERGLADES LAW CENTER
6815 Biscayne Blvd.
Suite 103 #449
Miami, FL 33138
(786) 496-3309
elizabeth@evergladeslaw.org

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Amici are nonprofit conservation organizations dedicated to protecting Florida's natural resources and supporting conservation and land-use planning efforts in South Florida and the Everglades ecosystem.

Audubon Western Everglades is a nonprofit organization founded in 1961 and dedicated to protecting and restoring Southwest Florida's natural resources and biodiversity through science-based policy, habitat stewardship, and community engagement.

Conservancy of Southwest Florida is a nonprofit environmental organization founded in 1964 and dedicated to protecting the water, land, wildlife, and future of Southwest Florida through science, policy, education, and environmental advocacy.

Tropical Audubon Society is a grassroots nonprofit conservation organization dedicated to conserving and restoring South Florida ecosystems

[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than Amici funded its preparation or submission. Counsel for Amici Curiae gave each party ten days' timely notice of the intent to file this brief.

and advocating for land-use policies that protect the Everglades, water resources, wildlife habitat, and environmentally sensitive lands in South Florida.

Izaak Walton League of America Florida Keys Chapter is a nonprofit conservation organization that works to conserve, protect, maintain, and restore the natural resources of the Florida Keys and South Florida through public education and advocacy.

These organizations (the "Environmental Amici") submit this brief because the decision below threatens conservation and land-use planning tools relied upon throughout Florida and nationwide, including transferable development rights programs used to direct development away from public resource lands. Amici are particularly concerned that the Florida Third District Court of Appeal's interpretation of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), creates uncertainty for planning and conservation frameworks that support ecosystem restoration, coastal resiliency, hurricane evacuation planning, and growth management in South Florida and nationwide.

SUMMARY OF ARGUMENT

State and local governments have long used their inherent police power to promote conservation goals and preserve public resources. Zoning and land use

planning schemes are critical to this effort, allowing governments to direct certain land uses into appropriate areas to protect human health, safety, and the environment. State and local governments are increasingly using zoning and planning tools to address impacts from hurricanes, flooding, wildfire, and sea level rise. Transferable development rights ("TDR") programs are but one of the many tools state and local governments can use to achieve conservation goals, and have been used successfully throughout the U.S. to protect ecologically sensitive, agricultural, coastal, and forested lands. The decision below, *Shands v. City of Marathon*, 411 So. 3d 452 (Fla. Dist. Ct. App. 2025), could upend decades of governments' reasonable, legitimate exercise of their planning authorities to promote responsible, sustainable development and environmental goals.

This Court recognized a categorical, per se taking occurs where private property has been deprived of "all economically beneficial use" by government regulation, requiring "just compensation" under the Takings Clause of the Fifth Amendment. *Lucas*, 505 U.S. at 1019. Where, however, residual property value exists after regulation, this Court has developed a balancing test to determine whether a taking has occurred. *Penn Central Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978). These tests strike a balance between impacts on private property and governments'

legitimate interest in regulating for the public interest.

The lower court's decision disrupts this balance, broadening the scope of *Lucas* categorical takings by excluding from its inquiry an entire category of potential economic use and value: any value that does not flow from cultivating or developing the property, including TDR credits. *Shands*, 411 So. 3d at 463. This reading of the law—that land in its natural state, even if retaining market value, lacks sufficient value to avoid a *Lucas* claim—runs counter to the fundamental principles of conservation law, which recognize the significant economic and public value of protecting natural resources. If this reading takes root, it could have a chilling effect on state and local planning authorities' ability to implement and enforce TDR programs and other conservation regulations by subjecting them to takings liability, regardless of the balance between the exercise of police power and private property rights struck by the factors in *Penn Central*. It will restrain governments' reasonable exercise of their traditional police powers, limiting their capacity to address conservation, climate, and land management issues.

ARGUMENT

Amici environmental organizations urge this Court to grant certiorari to clarify the categorical rule established in *Lucas*. 505 U.S. at 1015-16. The Florida

Third District Court of Appeal (the "Third DCA") significantly departed from this Court's Fifth Amendment Takings Clause caselaw in its en banc ruling in this case. The Third DCA's opinion is representative of a split forming among the lower courts, many of which have struggled with defining "economic use" and "value" when applying *Lucas*.

The property at issue in this case, Shands Key, was downzoned in 1986 to "Conservation Offshore Island" and made subject to density reductions, a competitive permit allocation system, and a transferable development rights ("TDR") program. *Shands*, 411 So. 3d at 454-55. These policies designated Shands Key as a natural area to promote conservation and hurricane evacuation planning. *Id.* at 455, 472. The TDR program includes the property in a market-based system allowing "sending area" property owners, like the Shands, to sever and sell their development rights to "receiving area" owners, limiting development in sending areas and promoting higher density in receiving areas. City of Marathon, Fla., Code § 107-3 (2025).

After years of litigation and multiple appeals, a Florida state trial court, applying the *Penn Central* test, found the City's regulations did not amount to a taking because Shands Key had a market value of $60,000 if used for recreational activities, and of $147,000 if sold for TDR credits. *Shands*, 411 So. 3d

at 472-74. On appeal, the Third DCA reversed, holding that, despite this demonstrated value, the City's zoning regulations left the Shands with no "beneficial use" of their property, and only a "token interest in the property." *Shands*, 411 So. 3d at 464.

This holding threatens state and local governments' regulatory conservation schemes nationwide.

I. THIS COURT SHOULD RESOLVE THE LOWER COURTS' INCONSISTENT APPLICATION OF LUCAS.

The Fifth Amendment to the U.S. Constitution requires that no "private property be taken for public use, without just compensation". U.S. Const. amend. V. Courts have long held that government regulation may amount to a taking where it "goes too far". *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Determining whether a regulation amounts to a taking most commonly requires a court's fact-intensive review under the ad hoc balancing test established in *Penn Central*, 438 U.S. at 124. The *Penn Central* balancing test weighs the impact of a regulation on a property owner against, in part, the regulation's "promotion of the general welfare". *Id*. at 126, 131, 138. This test has been applied countless times over the past fifty years in circumstances where it is unclear whether a regulation amounts to a taking, or where regulation effects only a partial taking.

This Court has carved out two limited exceptions from the touchstone *Penn Central* balancing test for so-called total (or categorical, per se) regulatory takings: those that involve a permanent physical invasion of property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and those that have entirely stripped a property of value. *Lucas*, 505 U.S. at 1015, 1019 (finding categorical treatment appropriate where a "regulation denies all economically beneficial or productive use of land" and leaves it "economically idle"). The application of the *Penn Central* balancing test for partial regulatory takings and the use of the *Loretto* and *Lucas* tests for per se, total regulatory takings have been affirmed by this Court. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001); *id.* at 636 (O'Connor, J., concurring) (identifying *Penn Central* as the Court's "polestar"); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332, 335-36 (2002) (delineating the application of *Lucas* versus *Penn Central*: "the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry").

The Third DCA's en banc holding represented a marked shift from the *Penn Central* and *Lucas* standards. In finding that the City's zoning regulations did amount to a regulatory taking of the

Shands' property, the Third DCA held: (1) under *Lucas*, the relevant inquiry in examining whether a regulation effects a taking is whether the subject property retains any economically viable *use*, as opposed to *value*; and (2) any value associated with TDR programs is irrelevant to determining whether a taking has occurred, and may be weighed only in the assessment of just compensation. *Shands*, 411 So. 3d at 460-65. The Court found that even though the property had market value through recreational use, beekeeping operations, and TDR credits, this value was entirely outside the "economically beneficial use" contemplated by the *Lucas* standard. *Id.* at 454, 462-64. The Third DCA's ruling effectively removes some uses or sources of value from *Lucas*'s "economic use", drawing a hard line between the development of land and any other sources of economic value—including TDR credit and recreational value—that do not

involve the property's direct, physical development.[2]

Following *Lucas*, many courts have found "value" and "use" more intertwined than the Third DCA's reading proposes. First, many courts have found that "economically beneficial use" is simply market value, and that sufficient residual "value" or "use" exists where a regulation has effected less than a 99 percent

[2] The *Lucas* decision's language is somewhat inconsistent, using numerous variations of "economic value" and "economically beneficial use" throughout. *See* William Funk, *Revolution or Restatement? Awaiting Answers to Lucas's Unanswered Questions*, 23 Env't. L. 891, 893-94 (1993) (discussing *Lucas*'s "various verbal formulations" of "value" and "use"). Some courts have sought to navigate the perceived tension between "value" and "use", and their treatment of the issue has revealed the challenges in defining "economic use" outside of a determination of its "economic value." *E.g.*, *Leone v. Cnty. of Maui*, 141 Haw. 68, 83 (Haw. 2017) (stating that while "[t]here is a difference between economically beneficial use and value" and "a property that has value may not have 'economically beneficial use,'" property value remains relevant); *Gove v. Zoning Bd. of Appeals*, 444 Mass. 754, 762-64 (Mass. 2005) (considering both remaining uses and market value; concluding the property owner "cannot prove a total taking by proving only that one potential use of her property—i.e., as the site of a house—is prohibited"). The Ninth Circuit recently reaffirmed that "value is the determinative factor" in a *Lucas* determination, *Bridge Aina Le'a, LLC v. State Land Use Comm'n*, 950 F.3d 610, 627 (9th Cir. 2020), backing away from a previous decision that had concluded the "focus is primarily on use, not value." *Id.* at 628 (limiting *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1432-33 (9th Cir. 1996)).

diminution in market value.[3] *Compare Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 936 (Tex. 1998) (examining the "economically viable use of a property" as a function of "whether value remains in the property after the governmental action" and finding remaining market value precluded a taking claim), *with Loveladies Harbor v. United States*, 28 F.3d 1171, 1174-75 (Fed. Cir. 1994) (finding a taking occurred where it effected a more than 99 percent diminution of market value), *and City of Sherman v. Wayne*, 266 S.W.3d 34 (Tex. App. 2008) (applying *Mayhew* and finding no remaining market value). And this Court has expressly ruled that "value is the determinative factor" in a *Lucas* taking analysis. *Lingle v. Chevron, U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

Other courts have found a variety of residual value and uses beyond market value that do not "flow from cultivating or developing the property", *Shands*, 411 So. 3d at 463, yet nevertheless defeat a *Lucas* claim, including: fishing, shellfishing, outdoor recreation, floats, public boat launches and beaches (*Gove*, *supra* note 2); investment value or potential commercial use (*Leone*, *supra* note 2). *See also Dunes W. Golf Club, LLC v. Town of Mt. Pleasant*, 737 S.E.2d 601, 606 n.6,

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[3] The total regulatory wipeout of a property's market value is exceedingly rare. *See* Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of* Lucas*: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847 (2017).

618-19 (S.C. 2013) (rejecting a *Lucas* claim where zoning left a property with "numerous recreation and conservation uses" including some that only provided conservation value and open space (e.g., play fields and park land)).

Notably, some courts have expressly defended the value of TDR credits as relevant to the determination of whether a *Lucas* "total deprivation" has occurred; in other words, these rulings have considered TDR credits in their calculation of a property's remaining "economically beneficial use" after regulation. *E.g.*, *Good v. United States*, 39 Fed. Cl. 81, 106-08 (1997) (rejecting the exclusion of TDR credit value from the threshold question of whether a taking has occurred), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999); *W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007 (Sup. Ct. Suffolk Cnty. 1998) (recognizing that TDRs may be viewed either as compensation or as a factor in determining whether a taking occurred). Others have more implicitly suggested TDR credits are relevant to the *Lucas* determination. *E.g.*, *Deltona Corp. v. United States*, 657 F.2d 1184, 1192, n.14 (Ct. Cl. 1981) (noting TDR credits should factor into "considering the impact of regulation", i.e., whether a taking occurred); *Lemon Bay Cove, LLC v. United States*, 160 Fed. Cl. 593, 611-12 (2022) (declining to rule on the question of TDR credits as determinative of whether a taking has occurred, but noting "the property could potentially have retained beneficial economic value by generating

marketable [TDR credits]"); *Sierra Nevada Sw. Enters. v. Douglas Cnty.*, 506 F. App'x 663, 665 (9th Cir. 2013) ("We assume, without deciding, that the [TDRs] . . . constitute property rights for purposes of this federal constitutional analysis.").

In contrast, the Third DCA joins several lower courts that have strayed from using value as the determinative factor in a *Lucas* analysis, concluding instead that "economically beneficial use" excludes uses that provide environmental value or market value stemming from speculation that development might be economically feasible in the future. *See Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1113-19 (Fed. Cir. 2015) (finding a property's residual "environmental value as a wetland" insufficient to defeat a *Lucas* taking claim); *DM Arbor Ct., Ltd. v. City of Houston*, 150 F.4th 418, 423-26 (5th Cir. 2025) (finding a *Lucas* categorical taking even where considerable market resale value remained, because development was not "economically viable" *at present*); *but cf. Leone*, 141 Haw. at 85 (concluding the *Lucas* inquiry is about "use" but finding value as an investment "a reasonable, economically viable use").

The interpretations of the *Shands*, *Lost Tree, DM Arbor* courts—and, to a certain extent, the *Leone* court—significantly narrow the *Lucas* inquiry to exclude measurable value that other courts would consider sufficient to avoid a per se taking. This

reading of the law allows claimants to potentially avoid the appropriate *Penn Central* balancing test, which applies where some value remains, but a partial taking may have occurred. These rulings' departure from these standards, the considerable amount of discussion and litigation generated by this issue, and the implications for governments' ability to regulate to protect conservation and related public health and safety interests justify this Court's acceptance of certiorari to clarify and reaffirm the bounds of *Lucas*.

II. THE THIRD DCA'S READING OF THE LAW RISKS UNDERMINING WELL-ESTABLISHED LAND USE PLANNING PRINCIPLES AND REGULATORY CONSERVATION SCHEMES.

As population and development pressures increase, as worsening storm systems threaten human lives and infrastructure, and as sea level rise claims more coastal lands, local governments' planning and zoning authority is becoming increasingly central to their ability to protect public health and safety. The Third DCA's reading of *Lucas* complicates governments' exercise of their legitimate police power, limiting the categories of "uses" that governments may regulate without risking a categorical taking claim; this reading risks undermining the principles underlying countless conservation and land management policies and

directly undermines the efficacy of TDR programs—which have been successfully employed by state and local governments across the nation.

By excluding the consideration of various measures of the value of land in its natural state, the lower court's decision also endorses a view of land use and value antithetical to principles of conservation. Natural lands, whether used for preservation, conservation, or recreation, have value. This value may be reflected by market values, or as a measure of ecosystem benefits or an incremental contribution to conservation or resilience goals. State and local governments may reasonably exercise their police power to regulate to protect and promote this value. While the Takings Clause provides protection against regulatory actions that impose public burdens on private property owners in some circumstances, it does not support the Third DCA's dismissal of measurable, marketable value where it is clearly retained by a property owner. As here, where a regulation has *not* effected a complete wipeout of value, *Penn Central* provides the appropriate test to balance a regulation's burden on property owners against the public benefit; this test properly balances both landowners' property rights and governments' police power to protect natural lands and the full scope of public value they provide.

A. The Third DCA's reading of Lucas threatens state and local governments' ability to regulate land use and development, and to protect land for conservation and related public safety goals.

The Third DCA argues that, for Taking Clause purposes, the only use of property that is "economic" lies in the "traditional framework of ownership", meaning the ability to "cultivat[e] or develop[]" the property. *Shands*, 411 So. 3d at 463. However, this conclusion fails to account for both the public value and the actual market value of conservation land.

Cultivation or development of property is not the only measure of *economic* value. As economists have long recognized, the market value of a property may not capture the externalities associated with conservation.[4] A strip of natural land in the Everglades watershed in southeast Florida, for example, allows freshwater to percolate into the groundwater, refreshing the underlying Biscayne Aquifer, which provides drinking water to nine million people. It also allows water to move naturally over its surface, returning freshwater flows to coastal

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[4] Urban3, *Economics of Rural Land Use in Florida* 11-13 (2025), https://1000fof.org/wp-content/uploads/2025/09/Urban3RuralLandUseReport.pdf.

waterways that support terrestrial, aquatic, and avian species and myriad recreational and economic activities. The health of these coastal waterways is directly tied to the region's tourism and fishing industries, coastal property values, and the economy as a whole. During storm events, natural lands also serve as sponges, absorbing water and protecting communities from flooding exacerbated by paved, impervious surfaces.[5] These "ecosystem benefits" carry immense economic value, even if not captured by the market price. *See, e.g.*, Hazen, *Biscayne Bay Economic Study Update* ES-8 (Sept. 15, 2023) (concluding Biscayne Bay contributed nearly $64 billion in economic output to Miami-Dade County in 2022); Cousins, et al., *supra* note 5, xii (concluding the "current combined economic value of the Greater Everglades System is at least $31.5 billion per year or $1.01 trillion over 50 years").

Markets do, however, often recognize at least *some* of the value of conservation land—as they did in *Shands* itself. There, trial court evidence based on comparable sales demonstrated Shands Key, even zoned as "Conservation Offshore Island" and in its

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[5] Ken Cousins, et al., Earth Econ. & Everglades Found., *Thriving Everglades, Thriving Economy: Nature's Value in the Everglades* 34-35 (2025) https://b797e412-2757-4f33-af72-a0f87d5b59ea.usrfiles.com/ugd/d45609_d489ae3e21024e3da5e8024227993854.pdf.

natural state, had a market value of $60,000 for recreational and beekeeping use, with *additional* TDR credit value on top of this. *Shands*, 411 So. 3d at 472-74. As Judge Logue notes in his dissent, "studies have shown that land in its natural state can have substantial monetary value for hunting, fishing, camping, and other nature-oriented uses." *Shands*, 411 So. 3d at 479 (citing L. Macaulay, *The Role of Wild-Life Associated Recreation in Private Land Use and Conservation: Providing the Missing Baseline*, 58 Land Use Pol'y 218-33 (2016) (noting nearly a third of all private land in the U.S. is either leased or owned for wildlife-associated recreation, including hunting, wildlife-watching, and fishing)). An island like Shands Key could serve a number of recreational uses highly valuable to anyone interested in camping, fishing, native wildlife, or other outdoor pursuits—as evidenced by the property's value on the market in its current designation as conservation land.

Shands, however, effectively defines land preservation uses—even those with clear market value—as non-economic uses, interpreting *Lucas* to fundamentally and uniquely burden governments' ability to protect lands' preservation-based uses and values as part of their traditional police power. The Takings Clause does not support this categorically different approach to assessing the constitutionality of local governments' reasonable exercise of their police power to accomplish environmental and

conservation goals in the public interest. As this Court has aptly stated:

> The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. *See Pennsylvania Coal Co.*, 260 U.S. at 413 ("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").

Palazzolo, 533 U.S. at 627.

State and local governments in the U.S. have long exercised their inherent police power to promote "public safety, public health, morality, peace and quiet, law and order." *Berman v. Parker*, 348 U.S. 26, 32 (1954) (noting these "examples of the traditional application of the police power" are not the limit of this broad authority); *see also Brown v. Maryland*, 25 U.S. 419, 443 (1827) (describing inherent state powers); Brian W. Ohm, *Some Modern Day Musings on the Police Power*, 47 The Urb. Law. 625 (2015) (describing the broad scope of state and local police powers). This police power extends to the protection of the environment, and the value of environmental protections and natural lands is reflected in the extensive systems of environmental regulation in effect across the U.S. *Keystone Bituminous Coal Ass'n*

v. DeBenedictis, 480 U.S. 470, 488 (1987) (upholding a state's exercise of the police power "to protect the public interest in health, the environment, and the fiscal integrity of the area"); *Dep't of Cmty. Affairs v. Moorman*, 664 So. 2d 930, 932 (Fla. 1995) (affirming the state has a "legitimate interest in protecting [its] natural habitat"; writing, "The clear policy underlying Florida environmental regulation is that our society is to be a steward of the natural world, not its unreasoning overlord.").

State and local governments have used this authority to develop a large variety of land use management and planning tools, such as broad, overarching policies like comprehensive plans and jurisdiction-wide zoning regulations, as well as more targeted schemes, like urban development boundaries and TDR programs.[6] Planning tools help state and local governments direct certain forms of development toward areas with required infrastructure and low environmental risk, while discouraging development in fragile environments or areas prone to flooding, fire, or other natural disaster. Doing so serves many purposes, both environmental and socio-economic,

[6] *See* Dennis J. McEleney, *Using Transferable Development Rights to Preserve Vanishing Landscapes and Landmarks*, 83 Ill. B. J. 634, 637 (1995) ("TDR programs are exercises of the police power under which the government regulates the use and enjoyment of private property to protect the general public health, safety, and welfare.")

including: reducing impacts to native species, air, and waterways; reducing the loss of environmentally sensitive lands (e.g., wetlands) or productive lands (e.g., agricultural or silvicultural); reducing nuisances; and promoting human health and safety.[7]

The Third DCA's logic in *Shands* is grounded in the premise that some exercises of police power — those regulatory schemes that would protect property in its natural, undeveloped state—must be evaluated under a different, more stringent Takings Clause standard than other exercises of police power, *regardless* of whether land in its natural state retains significant economic value, evidenced by market transactions or otherwise. Such a fundamental rewriting of the Constitution's Takings Clause uniquely burdens governments' ability to enact critical conservation and environmental regulations, representing an exceedingly narrow view of "economic use" that directly contradicts many of the foundations of environmental law and environmental economics.

[7] *See generally* Daniel R. Mandelker & Michael Allan Wolf, *Land Use Law* §§ 10.02, 12.01, 12.05, 12.08, 12.14 (6th ed. 2026); John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law,* 26 Harv. Env't L. Rev. 365, 365-407 (2002).

B. The Third DCA's reading threatens TDR programs, which are successful nationwide.

By discounting the value of TDR credits, the Third DCA's interpretation significantly broadens the scope of what amounts to a regulatory taking under *Lucas*. TDR programs have proven an effective means of protecting the environment, conserving public resources, and promoting public safety, while conveying meaningful market value to landowners. These programs are successful precisely because they create and support active markets for development rights that allow individual property owners to retain economic value, even when their property is regulated to protect conservation, public safety, and other legitimate public purposes. The limited definition of "use" under *Lucas* presented by the Third DCA would have a chilling effect on state and local planning authorities' TDR programs and other conservation regulations.

While the Third DCA dismisses the market value of TDR credits, active markets for TDR programs exist nationwide. The first TDR programs were implemented in the 1960s and there are now nearly 350 active programs operating across thirty-eight U.S. states today. Michael D. Kapowitz, et al., *Planners' experiences in managing growth using transferable development rights (TDR) in the United States*, 25

Land Use Pol'y 378 (2008); Todd K. BenDor, et al., *A National Inventory and Analysis of U.S. Transfer of Development Rights Programs*, 65 J. Env't Plan. & Mgmt. 2276 (2022). These programs have protected countless acres of agricultural lands and ecologically and economically significant lands, forests, and coastlines. For example, King County, Washington's TDR program has protected over 148,000 acres of rural and resource lands.[8] New Jersey's Pinelands Development Credit Program—a TDR program that redirects growth from within the state's forested Pinelands area to areas designated for regional growth—has preserved over 62,000 acres of agricultural and preservation land, generating $4.4 million in sales in 2025 alone.[9]

Through TDR programs, developers can augment their density allowances in receiving areas by buying credits from sending areas, building upward rather than developing on larger, sprawling parcels. This is

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[8] King Cnty., Wash., Transfer of Development Rights Program Overview https://kingcounty.gov/en/dept/dnrp/buildings-property/green-sustainable-building/transfer-of-development-rights/overview (last visited May 27, 2026); King Cnty., Wash., Code § 21 A.37 (2026).

[9] N.J. Pinelands Comm'n, New Jersey Pinelands Development Credit Program (Nov. 19, 2025), https://www.nj.gov/pinelands/infor/fact/PDCfacts.pdf; N.J. Admin. Code § 7:50-5.41-48 (2026).

particularly practical in South Florida, where typically population centers have developed on the coasts, abutting the remaining Everglades and agricultural areas further inland. TDR programs have been instrumental in protecting Florida wetlands and agricultural lands, both of which are facing increasing threats of encroaching sprawl as the state's population booms and population centers expand inland. For example, Collier County, Florida's TDR program has, to date, protected over 7,800 acres of rural lands across 470 properties, reducing urban sprawl by allowing rural landowners to trade density credits to developers in designated denser areas.[10] The program has an active market, with sixty-nine transfers over twenty years, totaling $58 million in expenditures. *Id.* Palm Beach County's TDR program is similarly successful—as of 2014, it had preserved or protected over 14,000 acres of environmentally sensitive and agricultural lands. Evangeline R. Linkous & Timothy S. Chapin, *TDR Program Performance in Florida*, 80 J. Am. Plan. Ass'n 253, 258-60 (2014).

TDR programs have proven to be an important tool for encouraging development in planned, appropriate

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[10] Collier Cnty., Fla., Collier County Transfer of Development Rights (TDR) Program (Sept. 22, 2025), https://storymaps.arcgis.com/stories/3d314dac38454f6093e65ae9fa1fc5d1.

areas with infrastructure, balancing the protection of conservation lands and preserving economic value for landowners. TDR programs thus offer a balanced approach that conforms to traditional constitutional takings analyses. By excluding TDR value from *Lucas* inquiries, the Third DCA's ruling upends this balance. Under *Shands*, local governments could either have to pay out significant compensation for a growing number of regulatory takings claims—rather than providing value through TDR programs—or rely on acquisition or purely voluntary programs instead of regulation, hamstringing their ability to adequately protect their communities against an increasing number of environmental and related threats.

C. The Third DCA's reading threatens national conservation policies and initiatives.

In many cases, state and local government policies to manage development and preserve land in its natural state can work in support of broader regional or national goals, including flood control, emergency preparedness, ecosystem restoration, and climate resilience.[11] Using *Lucas* to carve out additional

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[11] *See* FEMA, Local Mitigation Planning Handbook (2025), https://www.fema.gov/sites/default/files/documents/fema_hmd_2025-local-mitigation-planning-handbook_06122025.pdf (discussing effective land use schemes to discourage development in hazard-prone areas and mitigate impacts).

exceptions to *Penn Central*'s longstanding holistic balancing test creates additional hurdles to governments' reasonable exercise of their traditional police power, limiting their ability to protect these "conservation uses" and threatening their capacity to effectively address these critical, broader—and increasing—challenges.

The regulations at issue in *Shands* were developed by the City and Monroe County in accordance with a Florida state directive to ensure safe hurricane evacuation in the Florida Keys by reducing residential development. *Shands*, 411 So. 3d at 455; Fla. Stat. § 380.0552(9)(a)2. (2025) (enacted 1979) (requiring that Florida Keys governments develop comprehensive land management plans to ensure hurricane evacuation is feasible within 24.5 hours). While Florida and the Keys are uniquely at risk from worsening hurricane seasons and rising sea levels (Pet. 27), all fifty states have an interest in proactive planning for resilience and safe evacuation methods during natural disasters and emergencies. *See* Nat'l Oceanic & Atmospheric Admin., Global and Regional Sea Level Rise Scenarios for the United States (2022) (predicting between four and eighteen inches of sea level rise along U.S. coasts by 2050); *see generally* Shelley Saxler, *Building Climate Resilience with Local Tools*, 58 Ga. L. Rev. 1663 (2024) (describing state and local planning responses to climate-related risks).

Many states and municipalities have used their planning powers to prepare for and mitigate the impacts of rising seas and worsening storms by discouraging or limiting development in coastal areas. *E.g.*, Saxler, *supra*, at 1685-86 (describing zoning provisions in Boston, Massachusetts that limit development in flood hazard areas and ecological lands; noting more zoning and planning measures are "under way"); *see also* Devon Applegate, Note, *The Intersection of the Takings Clause and Rising Sea Levels*, 43 B.C. Env't. Aff. L. Rev. 511, 514-17 (2016) (discussing various climate-oriented coastal planning schemes); Mandelker, *supra* note 7, § 12.14 (same). Norfolk, Virginia, for example, adopted a new zoning code in 2018 to encourage development away from coastal areas, on higher elevation, by creating a coastal resiliency overlay district with more onerous building standards; this system included a "resilience quotient", a TDR-like system that rewards developers for adopting risk reduction measures. Norfolk, Va., Zoning Ordinance §§ 3.9.18, 3.9.19, 5.12 (Jan. 23, 2018). In areas at risk of extreme sea level rise, local planning measures may be essential to facilitating managed retreat from soon-uninhabitable coastal areas. *See, e.g.*, Alice McLean, et al., Univ. of Haw., *Transfer of Development Rights for Sea Level Rise Adaptation: An Analysis for O'ahu* (2024) (examining TDR programs to manage inland migration in Hawaii).

States and municipalities have begun planning for worsening wildfire events, as well. Saxler, *supra*, at 1679-80 (describing local planning for wildfires); *id.* 1709-11 (describing the role of local governments in disaster response planning). To reduce the spread and impact of wildfire, the City of Sisters, Oregon has passed zoning ordinances that limit development density in its urban/rural interface. Saxler, *supra*, at 1686-87; Sisters, Or., Mun. Code ch. 8.20 (2025); *see also* Pima Cnty., Ariz., Code § 18.92 (2026) (Pima County, Arizona's TDR program shifting development away from its fire-prone wildland-urban interface).

The federal government, too, has an interest in conserving natural lands and protecting population centers from climate-related risks, as evidenced by its significant investment in restoration and resilience projects across the country. The U.S. Army Corps of Engineers ("Corps"), through its Coastal Storm Risk Management ("CSRM") authorities under 33 U.S.C. §§ 426(e), 2213, has conducted over 150 coastal storm risk studies and projects with the aim of "safeguarding communities from . . . coastal storms, reducing vulnerabilities, enhancing resilience, and reducing risk to property and natural resources."[12]

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[12] U.S. Army Corps of Eng'rs, Flood Risk Management & Coastal Storm Risk Management, https://www.usace.army.mil/Missions/Civil-Works/Flood-and-Coastal-Storm-Risk-Management/ (last visited May 27, 2026).

Local government planning initiatives can work in tandem with these federal projects, enhancing their effectiveness. For example, after the Corps initiated a CSRM project in the area, Ocean City, Maryland's TDR program allowed it to acquire the Corps-mandated easements—otherwise unaffordable for the city—necessary to widen its beaches for the project. Judd Schectman & Michael Brady, Nat'l Oceanic & Atmospheric Admin., *Cost-Efficient Climate Change Adaptation in the North Atlantic* 175-76, 177-78 (2013); McLean, *supra*, at 10-11.

State and local emergency preparedness and resilience planning can reduce disaster impacts, creating communities that are protected from and can appropriately respond to extreme storms, floods, and wildfires. Saxler, *supra*, at 1667-69. As these efforts ramp up nationwide, it is essential governments are not inappropriately constrained in their exercise of reasonable planning regulations. Yet the Third DCA's ruling in *Shands* does exactly that, limiting local planning authorities' ability to regulate in the public interest by proposing a new, narrow definition of "economic use" under *Lucas* that includes only those uses that directly develop the land. This holding is at odds with responsible emergency, conservation, and land use planning. This Court should review the case below to provide the legal clarity necessary to support governments' efforts to prepare for the future.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

ELIZABETH FATA CARPENTER
Counsel of Record
S. ANSLEY SAMSON
FRANCESCA J. DIJULIO
EVERGLADES LAW CENTER
6815 Biscayne Blvd. Suite 103 #449
Miami, FL 33138
(786) 496-3309
elizabeth@evergladeslaw.org
Counsel for Environmental Amici

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