No. 99-2047

In the

Supreme Court of the United States

October Term, 1999

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Rhode Island

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property.

2. Where a land-use agency has authoritatively denied a particular use of property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for "*less ambitious uses*" in order to ripen the takings claim.

3. Whether the remaining permissible uses of regulated property are *economically viable* merely because the property retains a value greater than zero.

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PETITION FOR WRIT OF CERTIORARI

Anthony Palazzolo respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Rhode Island.

OPINIONS BELOW

The opinion of the Supreme Court of Rhode Island is reported at 746 A.2d 707 (2000); it appears at Appendix A to the petition. The decision of the Superior Court of Rhode Island (Washington County) is not reported; it appears at Appendix B to the petition.

JURISDICTION

The judgment of the Supreme Court of Rhode Island was entered on February 25, 2000. Petition Appendix (Pet. App.) at A-1. On May 3, Justice Souter granted petitioner's timely application to extend the time within which to file the petition to and including June 23, 2000. No. 99A906. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

For more than four decades, Petitioner Anthony Palazzolo has been attempting to develop coastal property in Westerly, Rhode Island. Because nearly all of this property consists of "wetlands"—the contemporary name for what used to be called marshes or ponds—Mr. Palazzolo must fill the property to be able to develop it into single-family homes (for which it has long been subdivided) or into a recreational beach facility. But respondent Coastal Resources Management Council (CRMC) and its predecessors have repeatedly denied him permission to fill, such that the nominally private property is now de facto devoted to public use as "a refuge and feeding ground for fish, shellfish, and birds," as "a buffer for flooding," and as a filter for "run-off into the pond." Pet. App. at A–3. As a result of these repeated denials, Mr. Palazzolo filed this inverse condemnation action against CRMC and respondent the State of Rhode Island in the courts of that state, alleging that CRMC's actions effected a compensable regulatory taking of his property for public use within the meaning of the Fifth Amendment to the United States Constitution. Mr. Palazzolo did not prevail in that venue, and now he seeks relief from this Court for the federal constitutional errors committed by the court below.

A. Factual Background

The subject parcel consists of eighteen acres of wetlands and "a few additional" acres of uplands. Pet. App. at A–3 n.1. Mr. Palazzolo acquired a majority of the property in 1959 and 1960, and the remainder of the property in 1969. *Id.* at A–2 to –3. (The state courts put great stock in the fact that he owned the property by means of a sole-shareholder corporation until February of 1978, when he became the owner in his individual capacity. *Id.* at A–13 to –15.) In 1963, Mr. Palazzolo applied for state approval to fill the parcel; that application was denied. He applied again in 1966. Some five years later, CRMC's predecessor approved the application, *id.* at A–4; but the approval was revoked just seventeen days after Mr. Palazzolo received

it. He applied again in 1983; that application was denied. *Id.* at A–5. In 1985, Mr. Palazzolo applied yet again for approval to fill the property; yet again, his application was denied. *Id.*

B. Judicial Proceedings

After unsuccessfully seeking judicial review of the latest denial, Mr. Palazzolo timely filed this inverse condemnation action, alleging that he suffered a compensable regulatory taking at the hands of CRMC. *See id.* at B–1 ("plaintiff contends that the CRMC's actions violated the Fifth Amendment's just compensation clause as incorporated by the Due Process Clause of the Fourteenth Amendment"). In 1997, the state trial court issued a written decision rejecting that takings claim. *See id.* at B–1. Last year, in a published opinion, the Supreme Court of Rhode Island affirmed.

Observing that Mr. Palazzolo based his takings claim on both *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the court below ruled that he could prevail on neither theory. As to each, the court found dispositive the fact that Mr. Palazzolo did not take title to the property in his individual capacity until 1978, at which time regulations prohibiting the filling of wetlands were already in place. First, as to the *Lucas* theory, the court concluded categorically that "a regulatory takings claim may not be maintained where the regulation predates the acquisition of the property." Pet. App. at A–14. Second, as to the *Penn Central* theory, the court held essentially the same thing, that where the regulation predates the acquisition of the property, the owner categorically lacks "reasonable investment-backed expectations." *Id.* at A–17.

But even if Mr. Palazzolo could overcome those categorical hurdles, he still could not prevail. This particular case was not ripe, concluded the court below, because Mr. Palazzolo's four applications over a span of more than two decades were not enough: he needed to "file additional applications seeking

permission for less ambitious uses" before his claim would be ripe. *Id.* at A–12 n.6. Finally, the court gave another reason why Mr. Palazzolo could not satisfy the requirements of *Lucas* even if the case were ripe. Based solely on evidence that the property had a residual value greater than zero, the court concluded that Mr. Palazzolo "had not been deprived of all beneficial use of his property." *Id.* at A–13. For all these reasons, the court affirmed the dismissal of his regulatory takings claim.

As a result of these rulings by the Rhode Island Supreme Court, particularly the first two, Mr. Palazzolo is forever barred from obtaining compensation for regulations that require his eighteen-plus acres of land "to be left substantially in its natural state." *Lucas*, 505 U.S. at 1018. Accordingly, Mr. Palazzolo now "owns"—if that term can be used ironically—nominally private property that has actually been "pressed into some form of public service under the guise of mitigating serious public harm." *Id.*

Mr. Palazzolo timely files this petition for certiorari.

REASONS FOR GRANTING THE WRIT

On three important questions of takings law and procedure, the court below issued decisions that are in conflict with the decisions of other lower courts, both state and federal. All of those conflicts warrant resolution by this Court.

I

WHETHER A POST-ENACTMENT PURCHASER IS CATEGORICALLY BARRED FROM ASSERTING A REGULATORY TAKINGS CLAIM IS AN IMPORTANT AND RECURRING QUESTION OF TAKINGS LAW ON WHICH THE LOWER COURTS ARE IN CONFLICT WITH EACH OTHER AND WITH THIS COURT

As described above, the Supreme Court of Rhode Island ruled that a *Lucas*-type "regulatory takings claim may not be maintained where the regulation predates the acquisition of the

property." Pet. App. at A–14. In addition, the court ruled that a *Penn Central*-type regulatory takings claim must necessarily fail in this situation as well, because a property owner can have no "reasonable investment-backed expectations" of developing property if, at the time he acquired it, "there were already regulations in place limiting [his] ability to" develop. *Id.* at A–17. Together, these two rulings operate to categorically bar regulatory taking claims whenever the enactment of the regulation predates the claimant's acquisition of the property. In this regard, the decision below conforms to a disturbing trend in the lower courts to strip property owners of the protections of the Fifth Amendment and to excuse governments from their "constitutional obligation to pay just compensation." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Because this decision and this trend cannot be reconciled either with the decisions of other lower courts or of this Court, it is incumbent upon this Court to resolve the issue.

A. The Issue and the Conflict

In *Lucas*, this Court "found categorical treatment appropriate . . . where regulation denies all economically beneficial or productive use of land." 505 U.S. at 1015. The Court thus went on to reaffirm the "categorical rule that total regulatory takings *must be compensated*." *Id.* at 1026 (emphasis added). The government was left with one escape from this obligation: "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027. In other words, the government can avoid paying compensation for land-use limitations that otherwise amount to categorical takings only if those limitations on use "inhere in the title itself, in the restrictions that *background principles* of the State's law of property

and nuisance already place upon land ownership." *Id.* at 1029 (emphasis added).[1]

It is not surprising that in the aftermath of *Lucas*, lower courts have been called on to decide whether a particular regulatory prohibition on land use was justified by a background principle of property or nuisance law. *See, e.g., Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1385 (Fed. Cir. 2000) (ruling that "in order to assert a defense [to a regulatory taking] under the navigational servitude, the Government must show that the regulatory imposition was for a purpose related to navigation"); *Boise Cascade Corp. v. State*, 991 P.2d 563, 570 (Or. Ct. App. 1999) (rejecting the state's "background principles" defense to a regulatory taking because there is "no authority for the proposition that knocking down a bird's nest on one's property has ever been considered a public nuisance"), *petition for review filed*, No. S47459 (Or. Apr. 18, 2000).

Other lower courts, however, have taken the background principles exception of *Lucas* far beyond its moorings in the common law of easements and nuisance. Rather than asking whether a recently prohibited land use was "*always* unlawful" under "relevant property and nuisance principles," *Lucas*, 505 U.S. at 1030 (emphasis in original), these other courts merely ask whether the use was "regulated" *before the present owner acquired the property*. In other words, these courts wholly dispense with the notion that, unless compensation is paid, a confiscatory regulation may "do no more than duplicate the result that could have been achieved in the courts" under the law of easements and nuisance. *Id.* at 1029. Instead, confiscatory

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[1] *Lucas* itself presented three examples of compensation-defeating background principles: (1) "a permanent easement that was a preexisting limitation on the landowner's title," such as the federal government's navigational servitude; (2) a prohibition against flooding adjacent property; and (3) a prohibition against locating a nuclear generating plant astride an earthquake fault. *See id.* at 1028-30.

regulations without compensation are automatically sustained by these courts so long as the regulations were simply "on the books" before the property was acquired by the present owner. Under this regime, a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property.[2]

Other courts have reached the very same result under the rubric of reasonable "investment-backed expectations," a term derived from *Penn Central*, 438 U.S. at 124, 127, 130 n.27. A recent example is *Good v. United States*, in which the Federal Circuit held that "[t]he requirement of investment-backed expectations 'limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation.' " 189 F.3d 1355, 1360 (Fed. Cir. 1999) (quoting *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994)), *cert. denied*, 120 S. Ct. 1554 (2000). That is, any person "who buys with knowledge of a [regulatory] restraint assumes the risk of economic loss"—no compensation will be granted. *Id.* at 1361; *accord id.* at 1363 ("Appellant's lack of reasonable investment-backed expectations defeats his takings claim as a matter of law."). Again, this is the principle that a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property.

There are many reasons why this legal principle cannot stand. The most obvious reason is its fundamental incompatibility with *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The respondent in that case was a land-use agency

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[2] *See City of Virginia Beach v. Bell*, 498 S.E.2d 414, 417 (Va.), *cert. denied*, 525 U.S. 826 (1998); *Kim v. City of New York*, 681 N.E.2d 312, 314-16 (N.Y.), *cert. denied*, 522 U.S. 803 (1997); *Grant v. South Carolina Coastal Council*, 461 S.E.2d 388, 391 (S.C. 1995); *Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995).

established by the California Coastal Act of 1972. Pursuant to the Act, "stringent regulation of development along the California coast had been in place since at least since 1976," and in particular, a deed restriction granting the public an easement for lateral beach access "had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract." *Id.* at 859 (Brennan, J., dissenting). Who could acquire property in this tract and possibly expect to develop it without having to submit to imposition of the lateral access deed restriction? Well, the Nollans bought a lot in the Faria Tract in 1982 or thereafter and sought to invalidate the restriction as a violation of the Takings Clause. This Court, of course, ruled in the Nollans' favor, holding that the restriction constituted a taking because it did not "substantially advance[] legitimate state interests." *Id.* at 834.

In dissent, Justice Brennan challenged the Court's holding on several grounds, including the fact that the Nollans were "on notice that new developments would be approved only if provisions were made for lateral beach access." *Id.* at 860. With such notice, the Nollans "could have no reasonable expectation of . . . approval of their [development] permit application without any deed restriction ensuring public access to the ocean." *Id.* What was the Court's response? *Nollan* opined:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Id. at 834 n.2.

The decision below cannot be reconciled with *Nollan*. If it were really true that "a regulatory takings claim may not be maintained where the regulation predates the acquisition of the

property," Pet. App. at A–14, then how could the Nollans have "maintained"—indeed, prevailed on—their regulatory takings claim? The relevant statute predated their acquisition of property in the Faria Family Beach Tract by at least a decade, the Commission's stringent anti-development regime predated it by at least six years, and the Commission's policy of explicit deed restrictions predated it by at least three years. While the court below rejected Mr. Palazzolo's takings claim because he "did not become the owner of the parcel until 1978," *after* "the regulations limiting his ability to fill the wetlands were already in place," Pet. App. A–17, this Court sustained the Nollans' takings claim even though "they acquired the land *well after* the Commission had begun to implement its policy," 483 U.S. at 834 n.2 (emphasis added).

Nor can the decision below be reconciled with decisions of other state courts and of the Ninth Circuit. The New Jersey courts have recently reaffirmed "the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge of the impediment to development." *Karam v. State*, 705 A.2d 1221, 1229 (N.J. Super. Ct. App. Div. 1998), *aff'd and adopted*, 723 A.2d 943 (N.J.), *cert. denied*, 120 S. Ct. 51 (1999); *accord Urban v. Planning Board of Manasquan*, 592 A.2d 240, 242-43 (N.J. 1991). In Florida, the rule is likewise: an owner's "bundle of property rights is as he purchased it." *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223, 1229 (Fla. Dist. Ct. App.), *rev. denied*, 613 So. 2d 3 (Fla. 1992). *Vatalaro* decisively rejected the government's argument that the owners could not possibly have suffered a compensable taking merely because they had "purchased their property after the enactment of the . . . Wetlands Protection Act of 1984 [and] were constructively aware that their property was subject to the provisions of the act." *Id. See generally Cottonwood Farms v. Board of County Commissioners*, 763 P.2d 551, 555 (Colo. 1988) (observing that "[t]he

majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations on constitutional grounds, but does constitute a factor").

The Ninth Circuit, too, has rejected the rule adopted by the Rhode Island Supreme Court. In *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 470-71 (9th Cir. 1994), the defendant city enacted a mobilehome space rent control ordinance in 1979 and two mobilehome conversion ordinances in 1982; however, the plaintiff property owner did not purchase the subject mobilehome park until 1983. Based on that chronology, the Ninth Circuit dismissed the property owner's *facial* regulatory takings claims. The court held that a facial taking occurs, if at all, at "the time of a statute's enactment" and that because the owner "did not own the property when the statutes were enacted and when the alleged facial takings occurred, it has incurred no injury entitling it to assert a facial claim." *Id.* at 476. With respect to *as-applied* takings claims, by contrast, the Ninth Circuit recognized that a post-enactment purchaser may indeed "suffer injury" and thus have standing to assert the claims. *Id.* n.8. This recognition stands in marked contrast to the principle adopted by the court below, under which a post-enactment purchaser is categorically barred from asserting *any* kind of regulatory takings claim. *See also Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1425 (9th Cir. 1996) (affirming a compensation award of $1.45 million in favor of a property owner that had purchased the regulated property at the very *end* of a six-year permit application process), *aff'd*, 526 U.S. 687 (1999).

B. The Appropriateness of Resolving the Issue Here

In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 311 (1987), the Court observed that "[c]oncerns with finality left us unable to reach the remedial question in the earlier cases where we have been asked to

consider the" no-compensation rule adopted by the California courts. In the circumstances presented by those cases, "[c]onsideration of the remedial question . . . , we concluded, would be premature." *Id.* In the present case, the question may arise whether consideration of the first question presented would be premature as well, given the lower court's ruling that the regulatory takings claim asserted by Mr. Palazzolo "was not ripe for judicial review." Pet. App. at A–12. For the following reasons, such consideration would ***not*** be premature.

As in *First English*, "[t]he posture of the present case is quite different" from those cases in which the Court declined to address the question presented. 482 U.S. at 311. Here, the Rhode Island Supreme Court squarely held that—regardless of whether a regulatory takings claim is otherwise ripe for judicial review, regardless of whether the regulation deprived the property of all economically viable use, and regardless of whether the regulation might otherwise effect a taking under the *Penn Central* test—such a takings claim categorically "may not be maintained where the regulation predates the acquisition of the property." Pet. App. at A–14. Accordingly, the constitutional question whether a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property is "squarely presented here." *First English*, 482 U.S. at 312.

Consistent with *First English*, the Court should reject any "suggestion that, regardless of the state court's treatment of the question, we must independently . . . resolve the takings claim on the merits before we can reach the" question presented. *Id.* at 312-13. As in *First English*, the important point here is that the state courts themselves deemed the case "sufficient to present the issue," *id.*, and that the state courts actually decided the issue presented. *See* Pet. App. at A–14 (opining that "the trial justice's determination that a regulatory takings claim may not be maintained where the regulation predates the acquisition of the property is a question of law that we review de novo.").

To be sure, this case differs from *First English* in that the court below determined that Mr. Palazzolo's takings claim was not ripe. But this difference is non-essential, and it provides no reasoned basis for refusing to address the first question presented. In the first place, the question whether *every* regulatory takings claim is categorically barred whenever enactment of the regulation predates the claimant's acquisition of the property is logically antecedent to the question whether a *particular* takings claim is ripe. More importantly, perhaps, there is no worry that the Court's resolution of the question presented will contravene Article III limitations on judicial power. As noted in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-34 & n.7 (1997), the ripeness principles fashioned by this Court in the takings context—which principles provided the basis of the lower court's ripeness ruling, *see* Pet. App. at A–10 to –11—do not implicate the "case or controversy" requirement of Article III. Rather, those principles are "*prudential* hurdles" to the assertion of regulatory takings claims. 520 U.S. at 734 (emphasis added).

Moreover, this Court would not, in resolving the question presented, be issuing an advisory opinion. On the one hand, if the lower court's "post-enactment purchaser" ruling is not reversed, that ruling will bar Mr. Palazzolo from *ever* being able to assert a regulatory takings claim with respect to the subject property *even if* he satisfies the most stringent of ripeness requirements.[3] On the other hand, if this Court does reverse the

[3] In brief, no matter what steps Mr. Palazzolo may take to surmount ripeness hurdles, he cannot possibly change the fact that the regulation predates his acquisition of the property. Therefore, the judgment below will forever preclude him from asserting a regulatory takings claim with respect to the property. *See, e.g., DiBattista v. State*, 717 A.2d 640, 642 (R.I. 1998) ("The doctrine of res judicata renders a prior judgment by a court of competent jurisdiction in a civil action between the same parties conclusive as to any issues actually litigated in the prior action . . . .").

"post-enactment purchaser" ruling, nothing else in the decision below would preclude Mr. Palazzolo from successfully asserting a *Penn Central*-type claim once he surmounts the requisite ripeness hurdles. *See* Pet. App. at A–17 (declining to consider any aspect of Mr. Palazzolo's *Penn Central*-based regulatory takings claim other than the fact that he became the owner of the property after the regulations were "already . . . in place"). In this situation, resolution by this Court of the first question presented by the petition would have significant and concrete consequences for Mr. Palazzolo, the very opposite of an advisory opinion.

Finally, it is appropriate to resolve the issue at this time because there will be no further proceedings between the parties, either in this litigation or in any other. As noted above, if allowed to stand, the ruling below will bar Mr. Palazzolo from ever being able to assert a regulatory takings claim. *See supra* note 3. Future judicial denial of relief to Mr. Palazzolo would be justified by the doctrine of res judicata, *see id.*, an adequate and independent state ground that would deprive this Court of jurisdiction to address the issue.

For all these reasons, this Court should resolve the conflict in the lower courts by granting the petition and addressing the important question whether a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property.

II

WHETHER A PROPERTY OWNER MUST SUBMIT "ADDITIONAL APPLICATIONS" IN ORDER TO RIPEN A REGULATORY TAKINGS CLAIM IS AN IMPORTANT AND RECURRING QUESTION OF TAKINGS PROCEDURE THAT DIVIDES THE LOWER COURTS

Mr. Palazzolo's 1983 application to respondent CRMC "sought permission to fill the entire eighteen acres of wetlands" owned by him. Pet. App. at A–11. His most recent application

in 1985 sought permission to fill a smaller portion of the property. *See id.*[4] At this time, CRMC regulations "prohibit[ed] the filling, removing or grading in coastal wetlands adjacent to Type 1 and 2 waters 'unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area or buffer against storms.'" *Id.* at B–3 (quoting the Coastal Resources Management Plan 300.2.B(1)). Since Mr. Palazzolo's property is "adjacent to Type 1 waters," it is subject to these regulations. *Id.* Because Mr. Palazzolo's purpose in filling the wetlands concededly was not to preserve or enhance a conservation area or a storm buffer, but rather to build single-family homes or a recreational beach facility, it is hardly surprising that "CRMC denied the 1985 application" outright. *Id.*

Was this denial based on the magnitude of the wetlands proposed to be filled? Would an application to fill a smaller area have been approved by CRMC? The answer to both of these questions is *no*. As the trial court found, Mr. Palazzolo testified—without reported contradiction on this point—that "CRMC informed him that ***any*** proposal involving the filling of wetlands would be denied." *Id.* at B–5 (emphasis added). On the other hand, CRMC staff testified (also without contradiction) that "CRMC would have approved the [non-wetland] eastern end of Shore Gardens Road as a home site." *Id.*; *see also id.* at A–11 ("There was undisputed evidence in the record that it would be possible [for Mr. Palazzolo] to build at least one single-family home on the existing upland area, with no need for additional fill."). Thus, the uncontradicted evidence was that CRMC *would* permit Mr. Palazzolo to develop one single-family home on the small upland portion of his property

[4] Although the opinions of the lower courts do not specify the precise acreage sought to be filled by the 1985 application, the opinions do make clear that such application sought to fill ***less*** acreage than the 18.0 acres of wetlands sought to be filled by the 1983 application. *See id.*; *id.* at B–3. In fact, the 1985 application sought to fill just 11.4 acres of wetlands.

but *would not* permit him to fill any of the eighteen acres of wetlands, thereby precluding any development of that portion.

These facts satisfy this Court's ripeness requirements for regulatory takings claims, for "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985). CRMC, charged with implementing the Coastal Resources Management Plan, finally decided that the Plan barred Mr. Palazzolo from filling ***any*** wetlands. In other words, the "nature and extent of permitted development" on Mr. Palazzolo's eighteen-plus acres of land is perfectly clear: one single-family home and nothing more. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986). Accordingly, "[t]he demand for finality is satisfied by [Palazzolo's] claim, . . . there being no question here about how the 'regulations at issue apply to the particular land in question.'" *Suitum*, 520 U.S. at 739 (quoting *Williamson County*, 473 U.S. at 191).

Nevertheless, the court below ruled that Mr. Palazzolo's claim was not ripe because he did not seek "permission for less ambitious development plans," specifically permission for uses of the property that "would involve filling substantially less wetlands or would involve development only of the upland portion of the parcel." Pet. App. at A–11. More generally, the Rhode Island Supreme Court reached what it called the "self-evident conclusion that a landowner who is denied regulatory approval to use his or her property in a particular way must file additional applications seeking permission for less ambitious uses before a takings claim may be sustained." *Id.* at A–12 n.6; *accord id.* at A–11 (chiding Mr. Palazzolo because he had not "explored development options less grandiose"). The court did not cite any authority for this conclusion, but it apparently drew inspiration from the statement in *MacDonald* that "[r]ejection of exceedingly grandiose development plans does not logically

imply that less ambitious plans will receive similarly unfavorable reviews." 477 U.S. at 353 n.9.

This use of *MacDonald*—to impose a per se requirement that landowners denied permission to use their property in a particular way must *always* file "additional applications" seeking permission for "less ambitious" uses in order to ripen their takings claims, Pet. App. A–12 n.6—cannot be squared with the decisions of the Supreme Court of Texas or the Court of Appeals for the Eleventh Circuit.

In *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999), the property owners sought approval for planned development of 3,600 homes, but the town council unequivocally refused approval. Without requesting a variance or filing additional development applications, the property owners sued the town for a regulatory taking *See id.* at 931. Crucial to this claim was the allegation by the property owner that "only improvements along the lines of their 3,600 unit proposed planned development would avert a regulatory taking." *Id.* The Supreme Court of Texas considered whether, in these circumstances, the asserted takings claim was ripe under this Court's jurisprudence.

In contrast to the view of the Rhode Island court below, the Texas court held that "[t]he United States Supreme Court has indicated that such a claim may be ripe *without* the necessity of seeking a variance or filing a subsequent application." *Id.* (emphasis added). In support of this holding, the court cited none other than *MacDonald* itself! Observing that this Court had noted in that decision that "the applicant did not 'contend that *only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking*,' " the Texas court construed *MacDonald* to "impl[y] that the result [i.e., dismissal for lack of ripeness] may have been different if the applicant's complaint had been that the only way to avert a regulatory taking was for the county to approve the subdivision proposal."

Mayhew, 964 S.W.2d at 932 (emphasis in original) (quoting *MacDonald*, 477 U.S. at 352 n.8). Therefore, "[t]he ripeness doctrine does not require a property owner . . . to seek permits for development that the property owner does not deem economically viable." *Id.*

The Texas court then applied these principles to the case at hand. Because the property owners alleged that "anything less than approval for 3,600 units on their property constitutes a regulatory taking"—that is, the failure to approve the 3,600 units in and of itself effected a taking—*MacDonald* and other ripeness decisions did not require them "to submit additional alternative proposals . . . to ripen [their] complaint." *Id.* This holding is in marked contrast to the holding of the court below: unlike Mr. Palazzolo, the property owners in *Mayhew* were ***not*** required to file "additional applications" seeking permission for "less ambitious" uses in order to ripen their takings claims. Pet. App. A–12 n.6. Because the property owners in *Mayhew* were willing in essence to concede that permission for less intensive development might be granted, *while at the same time denying that such permission would avert a regulatory taking*, their claim was deemed ripe.

In *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989), the Court of Appeals for the Eleventh Circuit applied this Court's regulatory takings ripeness requirements to a substantive due process claim arising from a city's refusal to rezone the claimant's property. Though the property owner had sought (and finally been denied) the rezoning necessary to consummate its proposed development, the city nevertheless argued that the court's "consideration of this claim is barred by the *MacDonald* 'reapplication' requirement." *Id.* at 1575-76. Like the court below, the city sought to impose a "requirement that, where one comprehensive plan for the property has been rejected, the property owner must seek a final determination as to alternative, *less ambitious* schemes of development." *Id.* at 1576 (emphasis added). But the Eleventh Circuit demurred:

because the record made clear that no conceivable alternative would permit the level of development alleged to be constitutionally required, the case was now ripe. In other words, where "there is no uncertainty regarding the level of development that would be permitted, *MacDonald*'s reapplication requirement serves no purpose," and the decision of the land-use agency is necessarily "final and conclusive." *Id.*

Under the reasoning of the Texas Supreme Court and of the Eleventh Circuit, Mr. Palazzolo's regulatory takings claim would have been found ripe. Similar to the property owners in *Mayhew*, Mr. Palazzolo alleged that anything less than granting him permission to fill wetlands would result in a taking. *See* Pet. App. at B–4 (Mr. Palazzolo "contended that the CRMC's rejection of his 1983 and his 1985 applications constituted a taking of his property by denying him all beneficial use of his property in violation of the United States Supreme Court's decision in *Lucas* . . . ."). To frame the allegation another way, CRMC's undisputed refusal to permit Mr. Palazzolo to fill ***any*** wetlands in and of itself worked a regulatory taking—regardless of whether Mr. Palazzolo might have obtained permission to develop one single-family home on his more than eighteen acres of coastal property. In Texas, Mr. Palazzolo would ***not*** have been "required to submit additional alternative proposals . . . to ripen [his] complaint." The same is true in the Eleventh Circuit: because there was no uncertainty regarding the level of development that would be permitted by CRMC—just one single-family home on eighteen-plus acres—*MacDonald*'s reapplication requirement would serve no purpose, and CRMC's decision would be deemed final and conclusive for purposes of ripeness.[5]

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[5] In addition to the fact that Mr. Palazzolo did not seek permission for "less ambitious" development plans, the Rhode Island Supreme Court based its ripeness determination on one other "fact," namely, that "although Palazzolo claimed that his property was taken when

(continued...)

This way of considering ripeness makes eminent sense. The ripeness of a takings claim should not turn on the accuracy of the property owner's allegations about the economic impact of the regulation on his property. In general, ripeness concerns "fitness for review," *Suitum*, 520 U.S. at 742; it should not be the review itself. Thus, although *Mayhew* found the case to be ripe because 3,600 homes was "the minimum number of units the Mayhews *believed* [i.e., alleged] necessary to make an economically viable use of their land," 964 S.W.2d at 931 (emphasis added), the court also found, *on the merits*, that the city's failure to approve the 3,600-unit planned development did not deprive the property of economically viable use, *see id.* at 937.

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[5] (...continued)
he was *denied permission to develop a seventy-four-lot subdivision*, he never applied for permission to develop such a subdivision." Pet. App. at A–11 (emphasis added). This statement is inaccurate, to say the least. As the very first sentence of the supreme court's opinion indicates, Mr. Palazzolo actually "alleg[ed] that the CRMC's *denial of his application to fill eighteen acres of coastal wetlands* constituted a taking." Pet. App. at A–2 (emphasis added); *accord id.* at B–1 (observing that Mr. Palazzolo "claim[ed] that [CRMC's] *denial of his application to fill approximately 18 acres of wetlands* constitutes an inverse condemnation taking" (emphasis added)).

Nevertheless, this "fact" led the supreme court to conclude that because Mr. Palazzolo "has not applied for permission to develop a seventy-four-lot subdivision, he has not 'received a final decision regarding the application of the regulations to the property at issue.'" *Id.* at A–11 (quoting *Williamson County*, 473 U.S. at 186). This conclusion is a complete non sequitur. As described in the text above, the pertinent "regulations" are regulations that "prohibit the filling, removing or grading in coastal wetlands" of the very type owned by Mr. Palazzolo. Pet. App. B–3. Mr. Palazzolo's application to fill wetlands unequivocally "was denied by the CRMC on February 18, 1986." *Id.* at A–5. That denial—coupled with uncontradicted testimony that "any proposal involving the filling of wetlands would be denied," *id.* at B–5—undoubtedly constituted a "final decision" regarding application of CRMC's regulations to the property.

Likewise, although the Eleventh Circuit in *Greenbriar* found the property owner's claim to be ripe because "there was no uncertainty regarding the level of development to be permitted," 881 F.2d at 1576, the court also found, on the merits, that the Constitution did not actually require the city to permit this level of development, *see id.* at 1577-80.

In the present case, Mr. Palazzolo's allegations that the failure to permit any filling of the wetlands effected a taking under both *Lucas* and *Penn Central* may conceivably fail even under a correct view of takings law, *but see supra* Part I, *infra* Part III, but that possibility does not render the takings claim unripe. Rather, given the uncontradicted evidence that CRMC will allow no filling whatsoever, those substantive issues are fit for immediate review. When the Supreme Court of Rhode Island ruled otherwise, it created a conflict with the Supreme Court of Texas and the Eleventh Circuit. This Court should grant certiorari to resolve the conflict.

III

THE LOWER COURTS ARE ALSO IN CONFLICT AS TO WHETHER REMAINING USES OF REGULATED PROPERTY ARE ECONOMICALLY VIABLE MERELY BECAUSE THE PROPERTY RETAINS SOME VALUE

Mr. Palazzolo argued in this case that he has suffered a regulatory taking under both *Lucas* and *Penn Central*. As detailed in Part I, the Rhode Island Supreme Court erroneously rejected both of these arguments based on the "post-enactment purchaser" rule. The court also rejected the *Lucas* argument on another ground, namely, that Mr. Palazzolo's property could not have been deprived of all economically viable use because, despite the regulatory restraint, it retained a value greater than zero. In so ruling, the court below created a conflict with the Court of Appeals for the Ninth Circuit.

In *Lucas* itself, the state trial court found—and the state supreme court did not disagree—that the challenged regulatory

prohibition "rendered Lucas's parcels 'valueless.'" 505 U.S. at 1006. Thus, the Court had no occasion to flesh out what it meant by an "economically viable use," the denial of which is a "categorical" taking. *Id.* at 1015-16. *Cf. id.* at 1076 (statement of Souter, J.) (observing that "[b]ecause the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total . . . taking on which it rests"). The Rhode Island courts, however, have read *Lucas* to require that property be rendered valueless in order for a property owner to establish a categorical regulatory taking. Thus, when the court below considered whether Mr. Palazzolo "has been deprived of all beneficial and reasonable use of his land," Pet. App. at A–12, the court considered one piece of evidence—and one piece of evidence only. The supreme court concurred with the trial court that Mr. Palazzolo "had not demonstrated such a deprivation" solely on the fact that "had he developed the upland portion of the land, its value would have been $200,000" and that "the wetlands would have value in the amount of $157,500 as an open space gift." *Id.* That is, the court did not consider such things as whether the development would even be economically feasible in light of its costs, whether Mr. Palazzolo would receive a viable return on his more than four-decade-long investment in the property, or whether the residual value was economically significant in light of the $3.15 million in lost profits he has suffered.

The lower court's refusal even to consider any facts other than a nonzero residual value stands in marked conflict with the approach taken by the Ninth Circuit in *Del Monte Dunes*. There, a jury had found that the property owner had suffered a compensable regulatory taking, and the trial court had denied the city's motion for a judgment notwithstanding the verdict. The court of appeals affirmed, concluding (inter alia) that "the jury was not compelled to find that the City's actions left Del Monte with an economically viable use of [its property]." 95 F.3d at 1434. In so concluding, the Ninth Circuit expressly

rejected the argument that "because Del Monte sold the [property] to the State of California for $800,000 more than it paid, economically viable uses for the property must have existed." *Id.* at 1432. Thus, whereas the Rhode Island courts found an economically viable use merely because Mr. Palazzolo, "unlike the plaintiff in *Lucas*," could not prove that his property was rendered valueless, Pet. App. at B–9, the Ninth Circuit upheld a finding of no economically use where the property not only retained value, but was sold for nearly a *million dollars* more than its purchase price. *See also Del Monte Dunes*, 95 F.3d at 1433 (observing that "several courts have found a taking even where the 'taken' property retained significant value"). This Court, of course, affirmed the Ninth Circuit's decision in *Del Monte Dunes*. *See* 526 U.S. 687 (1999).

Before *Lucas*, the Ninth Circuit observed that "the precise meaning of 'economically viable use of land' is elusive and has not been clarified by the Supreme Court." *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir.), *cert. denied*, 488 U.S. 827 (1988). Because the facts of *Lucas* "precluded [the Court] from attempting to clarify the concept" of economically viable use, *Lucas*, 505 U.S. at 1076 (statement of Souter, J.), that decision did not render the concept any less elusive. *See, e.g.,* William S. Walter, *Appraisal Methods and Regulatory Takings*, 63 Appraisal J. 331, 340-41 (1995) (arguing that *Lucas* does not itself define economically viable use but rather "*portends a search* . . . for methodologies to define when a property is economically idle and denied all economically viable use" (emphasis added)). As evidenced by the conflict between the Rhode Island Supreme Court and the Ninth Circuit, that search is not bearing fruit, and the elusiveness remains. This Court should grant certiorari to bring much needed clarification to this important area of constitutional law.

CONCLUSION

The petition for writ of certiorari should be granted.

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