No. 99-2047

In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

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

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Rhode Island

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to the mission of the Institute is strengthening the ability of individuals to control and transfer property and demonstrating that property rights are inextricably connected to other civil rights.

The Institute's brief is co-authored with Professor Richard Epstein of the University of Chicago Law School, one of the nation's leading authorities on property law. The Institute also filed along with Professor Epstein *amicus curiae* briefs in *Lucas v. South Carolina Coastal Council*, *Dolan v. City of Tigard*, and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, among other important takings cases before this Court. The Institute's brief in this case addresses both the jurisdictional and substantive questions concerning regulatory takings.

The parties in this case consent to the filing of *amicus curiae* briefs in support of their respective positions and letters memorializing such consent have been filed with the clerk.[1]

STATEMENT OF THE CASE

The facts of this case have been well set out in the Petitioner's principal brief, so that only a short summary of them is offered here. This land use dispute swirls around a parcel of land consisting of eighteen acres of marshlands and wetlands, plus a few additional acres of uplands that had been independently developed. In 1959,

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[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

Mr. Palazzolo formed a corporation, Shore Gardens Inc. (SGI), with two partners, Natale and Elizabeth Urso. In 1961, he acquired their fractional interests to become sole shareholder of SGI. In 1963, SGI sought a state permit to fill in the submerged portions of the parcel; after this was denied, SGI renewed its original application in 1966. That application was approved in 1971, only to be revoked seventeen days later. Also in 1971, Rhode Island transferred all of its state powers over marshlands and wetlands to the Coastal Resources Management Council ("CRMC"), P.L. 1971, ch. 279, codified as G. L. 1956 chapter 23, title 46. In 1977, the CRMC issued comprehensive regulations – the Coastal Resources Management Program – that provided that coastal wetlands could be only filled after obtaining a special exemption from the CRMC. In 1978, Rhode Island's Secretary of State, in an unrelated action, revoked SGI's corporate charter so that the property devolved on Mr. Palazzolo in his individual capacity. Thereafter, Mr. Palazzolo renewed SGI's earlier application to fill in the wetlands in 1983 and 1985, the latter of which was denied in 1986. That last denial by the CRMC became the basis of Petitioner's inverse condemnation action, also filed in 1986, in which he alleged that he could *only* make beneficial use of his wetlands if he were allowed to fill in his *entire* parcel. At a 1997 bench trial, the trial judge held that Rhode Island's actions did not constitute a regulatory taking for which compensation was owed under the Fifth Amendment. That decision was affirmed by the Supreme Court of Rhode Island, 746 A.2d 707 (R.I. 2000). This Court granted certiorari on three interrelated questions:

> 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.

SUMMARY OF ARGUMENT

This case raises the important question of at what point in time can an aggrieved property owner obtain judicial review of a takings claim when the owner's proposed use of his land has been authoritatively denied by the relevant land use agency. Incredibly, the Supreme Court of Rhode Island ruled that the doctrine of estoppel makes Palazzolo's challenge too late, and the doctrine of ripeness makes it too early. The Supreme Court of Rhode Island found that Petitioner's challenge to the order came *too late* because Mr. Palazzolo obtained title to the land in his individual capacity only in 1978 after the state had issued the regulations that stymied his development. Rhode Island contends that in light of the climate at the time of the passage, he could not have held any reasonable investment-backed expectations of developing his land. This position is flatly inconsistent with this Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833, n.2 (1987), which noted that "[s]o 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."

As *Nollan* requires, Rhode Island must treat all subsequent owners as being in privity with the original owner of the property, so that any and all rights that the former owner had against the government are transferred to the new owner with the property unless specifically retained. That rule holds in the instant case where the transfer resulted from the involuntary dissolution of the corporation. It also applies with equal force to all voluntary

transfers by sale, exchange, gift, lease, mortgage, will or inheritance. One of the prized attributes of land ownership is the ability to alienate it to higher valued uses. The integrity of the real estate market can be preserved only if the new owner is allowed to "stand in the shoes" of his predecessor in title; otherwise, free exchange routinely carries with it the destruction of constitutional rights. Accordingly, CRMC's 1978 regulations can withstand a takings clause challenge from Mr. Palazzolo only if they could withstand a challenge brought by his predecessor in title, the corporation SGI.

The Supreme Court of Rhode Island also held that Petitioner's suit came too soon because the CRMC has not rendered the "final decision" on Mr. Palazzolo's application needed to make the case ripe for review. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). That well-established rule is itself highly problematic insofar as it induces state land use agencies to bog down a landowner's application with endless requests for further information in order to delay making the definitive decision that triggers judicial review. Rhode Island has taken this controversial principle one dangerous step further by insisting that the CRMC decision was not final because Petitioner might still reapply for "a less ambitious use" of the property, even though he had consistently asserted that his use would be economically viable *only* if he were allowed to fill in the entire land.

If the decision below is allowed to stand, Rhode Island and other states can cleverly avoid judicial review *in perpetuity* simply by standing ready to consider the new proposals for development that the landowner is unwilling to make. The apparent generosity of agencies thus postpones land use decisions until the owner drops from financial exhaustion. So long as state agencies need not pay interim damages for the delays their conduct induces, *see First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1982), they have at

their fingertips a painless way to evade their constitutional obligations to compensate for interim takings.

Finally, Rhode Island has adopted an approach as to what counts as a deprivation of all beneficial economic use that likewise *universally insulates* the state from any obligation to compensate when it imposes an outright ban on the development of privately owned wetlands. Any landowner may *always* make an open-space gift that will generate a tax deduction, in this case for a stated $157,000. The federal tax deduction cannot be allowed to excuse the state from its own obligation to pay just compensation – that is, full market value – for land it acquires under a regulatory taking.

Likewise, the Supreme Court of Rhode Island is surely incorrect in holding that the prior sale and development of an upland portion of the original tract requires a landowner to forfeit all compensation when all development is wholly prohibited on an adjacent wetland. This position is indistinguishable from one that allows the state to seize without compensation the remainder of a unified tract of land because part of it has been previously sold. That grotesque position mocks the Fifth Amendment by making the constitutional obligation of compensation turn on such inessential fortuities as to whether two plots of land were acquired at the same time or by the same entities.

Indeed, the conceptual difficulties in this area will remain so long as this Court continues to hew to the view that one set of rules apply to complete losses of economic value and a second, more lenient, set of rules apply to partial diminution in value. The only way to clear out this logjam is to apply the *same* rules to both partial and complete takings, so that the *Lucas* rules for total takings are extended to partial takings.

ARGUMENT

I. THE TAKINGS CLAIM OF A SUCCESSOR IN TITLE IS ALWAYS JUDGED BY THE SAME STANDARDS THAT ARE APPLIED TO HIS PREDECESSOR IN TITLE.

A. All Relevant Principles of Property Law Treat the Transferee of Property in Privity with his Transferor.

Land is permanent, but people are mortal. Of necessity, land passes through the hands of large numbers of individuals in a wide range of voluntary and involuntary transactions. It is routinely transferred by sale, exchange, lease, mortgage, gift or will. In this case the subject property was involuntarily distributed from Petitioner's solely owned corporation to the Petitioner when Rhode Island's Secretary of State ordered the dissolution of SGI. Land can also be transferred by the order of a bankruptcy court, by a property settlement incident to a divorce, or by a court-ordered partition of joint tenancy. Indeed, for all real estate, the typical question is not whether it will be transferred, but when it will be transferred. But no matter when or how that transfer takes place, the obligations of the state under the takings clause have traditionally been and should be left unaltered by any change in the identity of the owners of the land.

The soundness of this basic proposition of takings law is well illustrated by the analogous rules that govern adverse possession. Adverse possession is the set of rules that determines when any person who wrongly takes possession of the land of another (the quintessential taking) is able to obtain over time perfect title to the land, even against its original owner. *See* Ralph E. Boyer, et al., *The Law of Property: An Introductory Survey* 49 (4th ed. 1991). The operation of all systems of adverse possession is tied to the operation of a statute of limitations, which must run before the adverse possessor is able to claim an unencumbered title. One key rule in deciding whether or

not the appropriate statute of limitations has run concerns the operation of "tacking" for parties who are "in privity" so that one party takes by voluntary transfer the full interests of his predecessor in title.

To see how this privity rule applies, suppose that A takes land by adverse possession from O, and three years before the expiration of a 10 year statute of limitations, transfers that property by deed or will to B. The law in every jurisdiction holds that the voluntary transfer from A to B does not restart afresh the statute of limitations period for O's benefit. Rather, B steps in the shoes of A and need continue to hold the land only for three years to get the benefit of the 10 year statute of limitations. Any other rule results in a perversion of the basic statutory scheme. The purpose of an adverse possession rule is to quiet title by removing stale claims and to render land fit for conveyance. Henry W. Ballantine, *Title by Adverse Possession*, 32 Harv. L. Rev. 135, 135-36 (1918). A and B are said to be *in privity* so that B can *tack* his own period of occupation onto the prior period of A. *See American Law of Property* § 15.10 (J. Casner ed., 1952); Patrick J. Rohan, *Real Property: Practice and Procedure* § 2.06 (1981). To advance the free alienation of land, O's claim is barred after 10 years of continuous occupation whether A transfers the land to B or keeps it himself.[2]

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[2] The disregard of the privity rule creates weird incentives that disrupt the sound operation of the real estate market. If both A and B know the legal situation, they may postpone an otherwise beneficial transfer in order to protect A's title from O's: why should B accept a 10-year exposure when A had only three years to go to perfect title? Yet if that property is worth $200 to B and $150 to A, then the inability to go forward with the transaction results in a social loss of $50. Alternatively, if A and B are ignorant of the legal rule, then the refusal to tack B's period of occupation onto A's gives O an undeserved windfall, while forcing A and B to the expense of sorting out the loss between them should O prevail in the 15th year after he lost possession. Worse still, if B transfers the property to C, the

In this case, the state asks this Court to reject this sensible and well-established privity rule in the context of eminent domain. It insists that anyone who acquires title to property after the adoption of a complex regulatory scheme cannot protest its imposition against him. But nowhere do they justify the fetters that this unfortunate rule places on the alienation of private property. The analogy to the adverse possession cases is precise. Suppose that X owns land worth $150 to him and $200 to Y. Ordinarily, X will sell the land to Y for a social benefit equal to $50 less the cost of sale. But once the state's land use regulation may be challenged only by X, and not by Y, then the market shrinks or shuts down. Y will be leery of purchasing land that could become worthless in his hands solely because he has bought it. A valuable voluntary transaction is therefore undone by an unsound rule that against all reason treats a sale from X to Y as though it were a gift of X's takings claim to the state. Only by treating buyer and seller in privity is this ridiculous result avoided. Now Y stands in the shoes of X and can raise whatever objections that were available to the original owner. The state is not prejudiced in its administration of the legal scheme because it can defend its regulation against Y just as it could against X. No longer is land kept in idle or unproductive use. The situation, moreover, hardly improves in those cases, such as this one, when the transfer of title is brought about by operation of law. The new record owner should not be forced to forfeit his constitutional protections under the takings clause solely because of events utterly beyond his control.

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limitation period will start yet again. The more rapid the movement in real estate, the more costly the rejection of tacking under the privity rule. The only sensible rule holds that O's position is not improved by any voluntary transfer by A or any of his successors in title.

B. The Decision of the Rhode Island Court Below is Fundamentally Inconsistent with this Court's Decisions in *Nollan* and *Lucas*.

The Petitioner's reliance on the standard rules of privity and tacking has already received explicit and resounding endorsement in this Court's decision in *Nollan*. Footnote 2 reads:

> 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.
> 483 U.S. 825, 833, n.2.

This principle makes perfectly good sense as a matter of both contract and constitutional law. The normal rules for the ownership of property do not refer to the "vulgar and untechnical" reference to the physical thing that is subject to ownership. Rather, under this Court's decisions it has been construed "in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors*, 323 U.S. 373, 377-378 (1945). *See generally* A. M. Honoré, *Ownership in Oxford Essays on Jurisprudence* 107 (A.G. Guest ed., 1961).

The interplay between the incidents of use and disposition is brought into high relief in this case. For the sake of argument, assume that land offers its owner two components of value. The first is the ordinary use value of the land – which includes not only the current uses but also includes "all the uses for which it is suitable." *Olson v. United States*, 292 U.S. 246, 255 (1934). The second is a possible takings claim against the government when and if the state seeks to restrict that present or otherwise suitable use. The contract question is whether X transfers to Y his right of action against the government along with the title to the land. In answering that question, the first

place to look is the agreement itself. If it transfers any right of action against the state from X to Y, that should dispositively establish that the takings claim was so transferred. No court should rule that this sensible business assignment of claims violates some undefined public policy. Typically, however, the parties do not address this issue, so law must adopt the *default* rule that best reflects their joint intention. That task is discharged by asking what rule is likely to maximize the value of their joint holdings at the conclusion of the transaction.

A moment's reflection makes it clear that virtually all parties would choose to allocate any future takings claim to the buyer. The passage of the restriction is only the first step in a complex process of regulation that may or may not run the course to completion. Yet in all cases it is the buyer, not the seller, who will have to let the state onto the premises to inspect the land; it is the buyer, not the seller, who must negotiate with the state about the scope of any future restrictions; it is the buyer, not the seller, who will have the best information on the adverse effects that the regulation has on his proposed plans for development. It makes no sense for the parties to allocate the takings claim to the former owner who has no knowledge of the particulars of the dispute, no ongoing interest in the property, and who may not even be alive or in the jurisdiction at the time that the dispute ripens. As a matter of constitutional law, therefore, any compensation owing should be determined on the assumption that the buyer and seller wished, as they are perfectly entitled to do, to preserve against the government their full rights under the takings clause. The appropriate default rule therefore must be that the takings claim rides through all voluntary and involuntary transfers.

The state will surely argue, as it did below, that its position is supported by the passage in *Lucas v. South Carolina Coastal Council* that states: "Where the state seeks to sustain regulation that deprives land of all economically beneficial use, we think 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." 505 U.S. 1003, 1027 (1992). That position surely implies that both the original owner and his successor in title are equally subject to the constraints of the nuisance law. It also implies that any servitudes that attach as a matter of general law, e.g., the navigation servitude, attach with equal force to the successor in title. *See, e.g., Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1383-1384 (Fed. Cir. 2000).

The state's position, however, goes far beyond the principle that this Court enunciated in *Lucas*. It claims that wetlands regulations consciously adopted by Rhode Island for its own advantage count as part of these background conditions and thus stripped Petitioner of all development rights before he acquired title to the land. In light of footnote 2 in *Nollan*, however, the only sensible reading of the passage in *Lucas* – one that gives due weight to its last three words – is "that the proscribed use interests were not part of his *chain of* title to begin with." The Rhode Island court, however, mangles this passage from *Lucas* by writing "when Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired." *Palazzolo*, 746 A.2d at 716; *see also Grant v. South Carolina Coastal Council*, 461 S.E.2d 388, 391 (S.C. 1995) (making similar mistaken holding).

This bald proposition, however, begs the essential question for it presupposes what is in issue, namely, that the regulations are valid in the first place. But if the regulations are themselves *invalid* because their application would lead to an uncompensated taking under *Lucas*, then Palazzolo *rightly* expects that he will be able to challenge them once the state turns down his permit application. The theory of reasonable expectations is a two edge sword that protects the *legitimate* expectations of the landowner at least as much as the regulatory ambitions of the state. *See Preseault v. United States*, 100

F.3d 1525 (Fed. Cir. 1996). *Preseault* decisively *rejected* the government's position

> that an owner's subjective expectations of keeping or losing her property under various possible scenarios define for that owner the extent of her title. Just the reverse is true. It is the law-created right to own private property, recognized and enforced by the Constitution, legislation, and the common law that gives the owner an historically rooted expectation of compensation. The expectations of the individual, however well- or ill-founded, do not define for the law what are that individual's compensable property rights.

Id. at 1540.

The Rhode Island Court repeated that same error in this case in its blatant attempt to short-circuit *Lucas*'s entire apparatus for evaluating regulatory takings claims. After eviscerating footnote 2 in *Nollan*, the Rhode Island Court writes as though knowledge that the regulation has been promulgated ipso facto destroys the property rights of all subsequent transferees. In so doing, the court badly misconstrues the relevant factors under *Lucas* for deciding when a total destruction of economic use amounts to a compensable taking of land. *Lucas* looked explicitly to state *nuisance* law, and it cited extensively to the provisions of the *Restatement (Second) of Torts* §§ 826-831. It also noted that "[i]t seems unlikely that *common-law* principles would have prevented the erection of any habitable or productive improvements on petitioner's land." *Lucas*, 505 U.S. at 1031 (emphasis added). At no point did *Lucas* mention a single *statutory* provision that might have bound the subsequent transferee but not the original owner. To the contrary, *Lucas* stressed that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019.

The Constitution does not have one takings clause for beach land adjacent to water and another takings clause for land below water. *Lucas*'s emphasis on the Restatement and common law principles covers both cases, and it is wholly incompatible with the claim that any statutory or administrative concoction, whatever its content, automatically defeats any takings claim brought by transferees who acquire title thereafter.

There are, moreover, good structural reasons for singling out, as *Lucas* does, statutory rules for special scrutiny. The traditional common law of nuisance does not seek to privilege the position of the state against some fraction of its citizens. Rather, its general pronouncements apply equally to all landowners against all others, and thus does not have any disproportionate impact of one land owner against another. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). Its purpose is to maximize the value of all parcels of land by protecting each against the invasions of others while allowing all to make reasonable use of their own property. In those cases where the law relaxes the physical invasion requirement, e.g., those of lateral support, it again does so for the advantage of both parties. *See* Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Restraints*, 8 J. Legal Stud. 49, 94-98 (1979). The common law of nuisance thus secures the average reciprocity of advantage that has long been held to be the hallmark of a just legislative regime. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Rhode Island's regulatory scheme for wetlands offers no such protection. It is the product of factional legislative politics of the sort that the takings clause, like other constitutional provisions, guard against. The restrictions that these regulations impose on Petitioner are not designed to benefit his neighbors (who are similarly wiped out), but are consciously designed to provide benefits for the public at large. As such, these forms of wetlands regulations unquestionably meet any intelligible standard for public use, even under a neutral interpretive standard that does not give the state every benefit

of the doubt as does *Hawaiian Housing Authority v. Midkiff*, 467 U.S. 229 (1984). But the implication is clear: once it is decided that certain takings of private property have been for public use, the state is unambiguously required to make the payment of just compensation that is pointedly omitted here.

Nor is the Supreme Court of Rhode Island's decision justified under this Court's decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). On its facts, that case is easily distinguishable because it did not involve a total prohibition against all beneficial use, which makes *Lucas* the closer precedent. But after wholly ignoring the different contexts, the Rhode Island Court treated *Penn Central* as if it barred Petitioner's claim by limiting the protection of the takings clause solely to "investment-backed expectations". In particular, *Palazzolo*, 746 A.2d at 717, n.9, explicitly rejected the proposition that "a party to whom property passes through operation of law could assume the investment-backed expectations of the original owner."

Palazzolo's logic is flawed on many grounds. First, its reading of *Penn Central* eviscerates the full holding of that case. *Penn Central* "identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, *relevant* considerations. So, too, is the character of the governmental action." *Penn Central*, 438 U.S. at 124 (emphasis added) (internal citations omitted).

Left to its own devices, the Rhode Island Court, without justification, elevated its own (misguided) interpretation of investment-backed expectations from relevant consideration to dispositive status. Yet nowhere did *Penn Central* so much as mention any rule that makes it impossible for the transferee to raise takings objections available to the transferor, even though that ostensible rule would have applied on *Penn Central*'s facts. In *Penn Central*, the City designated the Grand Central Terminal

as a landmark in *1967* while the lessee and co-plaintiff in the case, UGP, a British Corporation, had acquired its interest only in *1968*. *Penn Central*, 438 U.S. at 115-116. Yet UGP, the subsequent transferee, was rightly allowed to raise the same challenges against the regulation as *Penn Central*, thus avoiding the unnecessary inconsistent treatment of takings claims that the estoppel rule would require.

More generally, as noted in *Preseault*, 100 F.3d at 1540, "investment-backed expectations" has never been construed by this Court to eviscerate the constitutional protections for private property. That phrase, for example, has never been read to hold that a state may seize land from a *donee* without compensation because he made no investment in the property. Nor could the reference to investment-backed expectations make sense if every state announcement of future legislative intentions could shatter the expectations of property owners that they will be allowed to hold and transfer the ordinary rights to possess, use and dispose of property that have been part and parcel of all schemes of private property from Roman times forward. Rather, the right response is that this state claim of system-wide estoppel is invalid on its face, so that subsequent takers have every expectation of being able to stand in the shoes of their predecessors in raising challenges to state regulations.

C. Federal and State Courts Should No Longer Be Allowed to Depart from the Teachings of *Nollan* and *Lucas*.

The principles of *Nollan* and *Lucas* set a general constitutional framework for evaluating takings challenges by original owners and their subsequent transferees. Their principles apply across the board to both facial and as-applied challenges. They also apply to both cases of physical occupation (*Nollan*) or a regulatory taking (*Lucas*). Yet many federal circuits and the state courts have joined Rhode Island in departing from the teachings of both cases.

One judicial line of cases undermines these precedents by denying that the subsequent transferee even has *standing* to mount a takings challenge in the first place. In *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993), the Ninth Circuit denied takings and due process challenges to California's Mobile Home Residency Law, which prohibited park owners from increasing rents upon termination of a tenancy or sale of a mobile home. *See also Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994) (same). Any landlord who purchased his mobile home park after the passage of the Residency Law was forever barred. As the position was stated in *Carson Harbor*:

> Because Carson Harbor 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 . . . . A landowner who purchased land after an alleged taking cannot avail himself of the Just Compensation Clause because he has suffered no injury. The price paid for the property presumably reflected the market value of the property minus the interests taken. Carson Harbor has no standing to assert facial claims based on the loss of the premium and the loss of the right to dispose of property.

37 F.3d at 476.

Not so. As stated, this misguided rule would have quite literally forced tens or hundreds of landowners to bring suit instantly upon passage of the Residency Law to protect their rights. As such, *Levald* and *Carson Harbor* gratuitously invite a torrent of lawsuits long before any concrete dispute has arisen when it makes sense to allow the landowner the option to delay the facial challenge until some specific dispute arises. No discernible reason of public policy precludes the assignment of either facial or as-applied constitutional causes of action along with the property if the parties so desire. And there is no reason to depart from the default rule that presumes such

assignment in facial challenges. Certainly, Footnote 2 in *Nollan* draws no distinction between the two kinds of claims. This Court should reaffirm that position in the instant case.

In addition, some state courts have read *Lucas* to allow a state to treat its own regulations as a background condition even in the context of physical occupation by the state. Consider the plight of the plaintiff in *Kim v. City of New York*, 681 N.E.2d 312 (N.Y. 1997). His car wash was located on a plot of land abutting a public road. In 1978, the City published a map indicating that the street would have a new legal grade some four feet higher than its then-current actual grade. Some ten years later, plaintiff purchased the land with constructive notice of the map, and he was held estopped when the City's public construction project brought the street up to legal grade by placing side fill on top of about 2,400 square feet of his property to keep the road physically in place. The New York Court of Appeals held that Kim could not receive any compensation for this physical invasion because he purchased the land with constructive notice of the legal grade, by virtue of the common law *and* City Charter obligation of lateral support to a public roadway. It then concluded, with an erroneous reliance on *Lucas*, that plaintiff's title never encompassed the property interest that the claim had been taken. *See id.*

Yet, as the dissent perceptively pointed out, the reference to the common law obligations of lateral support were pure window-dressing, for they could *never* have justified *forcing* one person to accept side fill from another without his consent. Beyond doubt, the common law rules only required that a person not remove his own land in ways that withdraws support from his neighbor. *See Restatement (Second) of Torts* § 817; *Kim*, 681 N.E.2d at 324 (Smith, J., dissenting). In truth, the state's entire case turned on the utterly asymmetrical obligation that requires private individuals to accept side fill for public benefit, but which never would have tolerated so much as an inch of fill on public property to prop up any private

lands. The test of average reciprocity of advantage requires an *even* distribution of benefits and burdens between the affected parties. But that test is clearly flunked by a decision that imposes the full burdens of occupation on the private owner and gives the full benefits to the public at large.

The entire situation cries out for immediate redress, but note that the government taking goes utterly unchallenged on the view that Rhode Island takes here. For starters, the filling of plaintiff's land constitutes a per se taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve"). Yet it seems wholly impractical to put the plaintiff's predecessor in title to the cost of challenging a map designation when there is a high probability that the actual grade alteration may never be made. Nor can he be expected to maintain that challenge 10 years later just before he sells the property, or 12 years later when New York City commences its improvement of property now owned and occupied by plaintiff. The upshot of this case is clear: the constitutional obligation to compensate for physical occupation under *Loretto* has been effectively side-stepped by the simple maneuver of announcing in 1978 actions that were only undertaken in 1990. The incentive for the state to make broad announcements to defeat private rights is too painfully evident to require further elaboration. Any state could render that constitutional protection wholly nugatory within a generation by the simple expedient of enacting today a blanket rule that henceforth subjects any and all use of private property to the unfettered discretion of state officials.

Fortunately, not all state and lower federal courts have pursued this destructive legal course. In *Preseault*, 100 F.3d at 1525, Preseault's predecessor in title conveyed in 1899 to the Rutland-Canadian Railway right-of-way that allowed it to use the subject property for railroad purposes. The Railroad was to return the property to the

fee owner on the succession of that use. Thereafter, the Transportation Act of 1920, ch. 91, 41 Stat. 456 (1920), restricted the power of railroads to abandon their lines; and in 1976, Congress passed the Rail Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), Pub. L. No. 94-210, 90 Stat. 31 (1976) (codified as amended in scattered sections of 45 U.S.C., 49 U.S.C., 15 U.S.C., and 31 U.S.C.), which authorized the use of abandoned railroad lines as bike trails for the public at large, without paying any compensation to the underlying holder of the fee interest. The United States had urged that the appropriate time to bring a takings claim was either in 1920 or 1976, and claimed that Preseault was accordingly barred from suing the United States for compensation when Vermont (pursuant to federal grant) built the bike path through the middle of his property and barred Preseault's access to it. The Federal Circuit thus refused to accept an argument that either the 1920 Transportation Act or the 4-R Act counted as a background condition under *Lucas*, noting that its background principles were "state-defined nuisance rules." *Preseault*, 100 F.3d at 1538. It further rejected the contention that the Preseaults had no reasonable expectations to recover their property because they "should have anticipated that at some time in the future the Government might exercise its general regulatory powers in a way that could frustrate the Preseault's interest in obtaining the land free of the easement upon its abandonment by the railroad." *Id.* at 1539.

Surely that decision is the soul of good sense. It makes no sense to require every landowner to sue upon the passage of a general regulatory scheme years before any actual conflict arises. Preseault deserved a fair shot at the government's action when the physical occupation took place, whether he was the original owner or a subsequent transferee. *Preseault* should govern here. The decision of the Rhode Island Court should be reversed on this point.

II. PALAZZOLO'S CLAIM IS RIPE FOR HEARING ON THE CURRENT RECORD.

As noted earlier, this Court's position in *Williamson* holds as a general proposition that an administrative agency must issue a final decision on the takings issue in order for the landowner to obtain review of that decision in state or federal court. In so holding, this Court's position is at sharp variance with its view that individuals who claim violation of their First Amendment rights are entitled to a prompt and effective judicial review. Under First Amendment law, any general licensing scheme is viewed under a presumption of distrust. The grounds for decision must be narrowly and clearly defined, and procedures at the very least must be introduced to allow for a prompt review of the administrative decision. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (striking down standard licensing ordinance for placement of newspaper vending racks on public streets); *Freedman v. Maryland*, 380 U.S. 51, 59 (1965) (noting the need for "prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

It is hornbook law that the strict scrutiny required under the First Amendment manifests a deep and deserved suspicion of government motives. For these purposes, it is only necessary to argue that some fraction of that healthy skepticism about government discretion should carry over to the takings area. All the signs of government abuse that are subject to powerful scrutiny under the First Amendment are present in abundance in the wide range of government initiatives that impact property rights, such as wetlands regulations, government actions under the Endangered Species Act, zoning statutes, eminent domain actions, and landmark preservation laws: broad discretion, standardless rules, endless procedural delays, evidentiary presumptions in favor of

state action all combine to often insulate takings challenges from judicial review in either federal or state court. This abuse was perfectly evident in the endless string of false administrative promises in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), that strung out over several years, as proposals to develop 344, then 264, then 224, and finally 190 units all were rejected for one reason or another over a period of over five years, before the first lawsuit was filed.

That strong whiff of administrative malfeasance is equally manifest in the instant case, given that the Petitioner had to wait 28 years to get his case to court and another 10 years to obtain an adverse trial ruling. But if the Supreme Court of Rhode Island is to be believed, the case has still not resulted in a controversy ripe for judicial review. Justice delayed, justice denied. In principle, the sting of these endless delays could be compensated for in money, which is one reason why takings cases do not present as compelling a case for immediate judicial intervention as First Amendment cases that strike down various licensing systems. But the landowner's interim losses are nonetheless irreversible unless state compensation is paid once the state action is found to constitute a regulatory taking.

In this case, Rhode Island seeks to extend the period of uncompensated interim loss by imposing a further condition that the Petitioner reapply for a grant, even after he has already reduced the number of acres that he wishes to develop. In so doing, it brings into view a qualification to the *First English* rule requiring compensation for interim takings: "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *First English*, 482 U.S. at 321. Unfortunately, the basic rule of *First English* is frequently swallowed up by this

exception when administrative agencies expand the "normal delays" of permit process without any temporal limitation at all. Some effort should be made to redress this manifest imbalance.

In this case, the Petitioner only asks that this Court take a first modest step toward a restoration of that balance; he only asks for the right to *now lose* definitively before the administrative agency in order to clear the path to judicial review. He insists that he be taken at his word when he claims that any lesser use of the wetlands than that he now proposes will not result in some net benefit.

In assessing the reasonableness of that request, it is imperative to look at the possible errors both ways from a prompt and clear decision. One possibility is that the reviewing court will sustain the position of the administrative agency by denying that the regulations in question work a partial or total taking of the subject property. If so, the agency is put to some additional expense. But these are hardly large on net, for the judicial hearing has likewise permitted it to economize on additional expenses that would otherwise take place for the further gear-grinding within the regulatory process. In addition, if the agency achieves a judicial victory then it may obtain some protection under the doctrine of *res judicata*, or, at the very least, gain the opportunity to further prolong the administrative process. Wholly apart from any ripeness prohibition, an aggrieved landowner has strong incentives not to bring rash actions that are likely to result in an adverse decision.

The costs to the landowner, however, are quite high if the administrative agency has issued an incorrect denial. Here the gist of Petitioner's claim is that any coherent development of his land requires adding fill to the entire wetland portion of his plot. If this Court requires that he put forward some "less grandiose plan," then he will *never* be able to obtain any clear judicial determination that addresses the question of whether his demand is right or wrong. At this point, the landowner runs the risk

of *obtaining* approval of a less ambitious plan. That "victory" will then give him the right to construct a project that will enable him to lose more money than he already has. But it will not give him the right to obtain a judicial decision on the merits of what he claims is his bare minimum proposal. In *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), this Court rebuffed a planning agency's effort to extend *Williamson* by holding that a planning denial for new construction was final even though the agency held out the possibility that the landowner in time could receive just compensation by assembling enough transferable development rights to build somewhere else at some indefinite future time. *Suitum* helps point the way here. In its simplest terms, the convoluted logic of the Supreme Court of Rhode Island implicates not only the substantive concerns raised under the takings clause, but also the elementary requirements for procedural due process binding on the states under the Fourteenth Amendment.

The Rhode Island Court sought to justify its continued evasion of its judicial obligations by insisting that "this [Rhode Island] Court will not render advisory opinions or function in the abstract." *Palazzolo*, 746 A.2d at 713; *see also Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). But this is no abstract dispute when the Petitioner wishes to fill in a wetland that Rhode Island wishes to keep in its natural state. It is already quite clear that Petitioner has alleged that *any* acceptable program must allow him to fill in at the very least that portion of the wetland designated in his proposal, so the case is ripe no matter what plan is ultimately implemented. *Accord Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1576 (11th Cir. 1989); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999).

To be sure, once Petitioner obtains his initial fill permit, then subsequent supervision is necessary to make sure that any site development will not result in discharge that harms either public waters or wetlands

owned by neighbors. But current law, virtually everywhere, already requires that any landowner receive myriad permits before he pours the first ounce of dirt on any wetlands site. It cannot be the law that a landowner has to simultaneously put in requests for all the permits needed for fill before he is allowed to challenge the threshold determination of the overall regulatory scheme.

And that challenge is all the more appropriate when it appears that the CRMC will deny any and all proposals for development as a matter of course by announcing by regulation that it is only prepared to issue a special fill permit if Petitioner's "proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests." *See* Coastal Resource Management Program § 130(A). The construction of any number of private homes or of a beach club do not meet this standard, which in any event is suspect after *Lucas* for failing to distinguish restrictions that seek to create benefits for the public at large (for which compensation is required) and those which prevent the creation of nuisance, which have yet to be implicated at this stage of argument. The ripeness requirement performs a useful function in forcing the parties to join issues before there is any expenditure of judicial resources. But that requirement should not be converted to the ignoble end of making sure that an aggrieved landowner never receives his day in court.

III. THE SUPREME COURT OF RHODE ISLAND HAS EVISCERATED THE CONSTITUTIONAL REQUIREMENT OF JUST COMPENSATION FOR REGULATORY TAKINGS THAT DEPRIVE LANDOWNERS OF ALL BENEFICIAL ECONOMIC USE.

The third roadblock that the Rhode Island Court has thrown in the path of Petitioner's claim for compensation stems from its interpretation of the just compensation requirement in the event that the regulations in question, as is clearly the case here, deprive the landowner of all

beneficial use. As a matter of general theory, this Court has already held that the loss of all such beneficial use amounts to a taking of the land in question. That equivalence was highlighted in *Lucas* proper when the trial judge ordered Lucas to provide a fee simple deed to the state once it found that he had been deprived of all economic value. The same remedy could clearly be imposed in this case, and once a deed memorializes the transaction, then it becomes evident that the *only* acceptable level of compensation is the fair market value of the property taken prior to imposition of the wetlands restrictions condemnation. *See, e.g., Monongahela Navigation Co. v. United States,* 148 U.S. 312 (1893).

Yet in this case, the state seeks to wiggle out from this requirement by pointing to two related factors. First, that Petitioner could have made an open-space gift of the wetlands that would "have value in the amount of $157,000," presumably as a charitable deduction from both federal and state income taxes. *Palazzolo,* 746 A.2d at 715. In the next breath, however, the Rhode Island Court concedes that this amount is far less than "the speculative $3,150,000 profit that Palazzolo alleged he could earn from filling and developing the wetlands." *Id.* The adjective "speculative" does nothing, however, to avoid the serious conceptual issue here, for even if the rock-bottom fair market value for the unregulated land were, say, $1,000,000, the question remains why Palazzolo is not entitled to receive that amount in compensation for his loss.

It is instructive to note that Lucas could have also made an open-space gift of his beachfront property, and yet that point was never advanced as a reason to deny him full market value of the land once the total restriction on development was imposed. One obvious reason why these open-space gift values have never been taken into account is that *Lucas* requires compensation when the land has been deprived of all beneficial *use*. To speak of a use presupposes that the landowner remains in possession of the land, which cannot be done if the property is

given away. The larger issue in this case does not depend ultimately, however, on how narrowly or broadly the word "use" is construed. It depends on the larger structure and functions of the just compensation language found in the takings clause. The central problem with the State's position is that it guts the operation of the takings clause for all takings, both regulatory and possessory. In each and every case the state can avoid its obligation to pay just compensation by the simple expedient of announcing that it will accept an open-space gift of the property, or by finding some private conservation organization with tax-exempt status that can so receive the property. At this point, the state never has to face the hard question of whether it thinks the property in public hands is worth as much to the state as it was to the private owner. It becomes all too easy to force the open-space "gift" via a threat of condemnation on property that is worth millions for development – development that benefits real people – and thousands in private hands. The Constitution does not state, "Nor shall private property be taken for public use without a tax deduction equal to a small fraction of its overall value." Yet that is exactly how it has been construed by the Rhode Island Court.

The second argument advanced to justify the total wipe-out imposed by the CRMC refers back to the famous "denominator problem" that has troubled this Court in both *Penn Central* and *Lucas*. *See Penn Central*, 438 U.S. at 130-31; *Lucas*, 505 U.S. 1016, n.7; *see also Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987); *Palm Beach Isles Associates*, 208 F.3d at 1380; *Loveladies Harbor Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Florida Rock Indus. Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994); Jan G. Laitos, *Law of Property Rights Protection: Limitations on Governmental Powers* § 11.08 (1998).

The root of the problem is conceptual, and not easily avoided or resolved under current law. A consistent and straightforward version of the takings clause would begin

by triggering the amount of the compensation owing in both regulatory and possessory takings, to the diminution in fair market value of the land attributable to the loss of any stick contained in the bundle of rights. If the state decided to take 10 acres from a 50 acre plot, then presumptively the compensation owing would equal 20 percent of the overall value. Subsequent adjustments in the payments could then be made if the severance of a unified parcel increased or decreased the value of the 40 acres that remained in private hands. In effect, the state would not have the proper incentives on the decision of whether or not to take, and it would receive credit for the positive spillovers that the takings created for the retained land (e.g. access to a public road), and it would have to pay additional compensation for any negative spillovers of its action (e.g. the inability to make efficient use of the smaller parcel).

In principle, regulatory takings could – and should – be governed by the same principles. *See* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, 93-125, 195-215 (1985). The first step of the inquiry would ask solely the question of whether the government took by regulation some portion of the customary bundle of rights associated with ownership – including the rights of use and disposition necessarily involved with regulatory takings. The reduction in value from that government action thus represents the first approximation of the amount of money owed by way of just compensation. Next, just as in *Lucas*, the question is whether the government could justify all or part of those restrictions by showing that these were necessary to prevent the occurrence of a common law nuisance, as that expression has been traditionally understood. To the extent that the regulation in question counteracts a nuisance, the loss in question is not compensable to the owner, even if it should turn out to be total. Finally, it is critical to ask whether the regulation in question sweeps more broadly than the single owner who receives some implicit in-kind compensation from the imposition of like

restrictions on the parcels owned by neighbors. Any such compensation should be credited against the amounts owed by the government. That credit is more likely to be relevant in regulatory takings cases (which are not directed toward single parcels) than in physical takings cases. Nonetheless it cannot be presumed, because comprehensive regulation (as of the rebuilding of beachfront property in *Lucas*) could work to the uniform detriment of all the regulated parties. And at the end of the day, therefore, what is ultimately compensated is the *net* loss in value attributable to regulation that is not justified in the name of nuisance prevention.

In effect, the only way to bring overall coherence to the law of takings is to recognize that the *Lucas* framework cannot be artificially truncated with total takings, when its logic rightly extends to all forms of partial regulatory takings brought about by government action. There is no magic point at which the constitutional world flips over, such that regulations that require the loss of 99 percent of value *always* generate zero by way of compensation, while losses of 100 percent of value generate full compensation unless the state can offer an antinuisance justification for its action. The single thread that links all the cases together is this proposition: *the greater the legal restrictions on the traditional common law bundle of ownership rights, then the more the state has to pay.*

That one rule eliminates the conceptual conundrums under current takings law. The so-called denominator problem disappears because it no longer matters whether the owner has lost all of a small parcel or some of a larger parcel. No matter which characterization is used, the compensation is measured by net loss in economic value subject to the nuisance defenses. Unfortunately, however, under *Lucas*, the definition of "the" property matters in regulatory (but not possessory) takings, the requirement of compensation only kicks in once the landowner has been deprived of *all* beneficial economic use of the property. But no one has developed a coherent account of what that property might be. *See Laitos, supra,* at § 11.08.

Thus if the air rights were considered separately in *Penn Central*, then the restriction against further building would be fully compensated. But if they are treated as part of a single unit that contained the terminal on the location, then some beneficial use remains and no compensation is owing. Likewise, if the value of the underground coal in *DeBenedictis* is treated separately, then full compensation for the lost mineral rights is owing. But if it is treated as part of the fee, then it is not.

Within the confines of *Lucas* and *Penn Central*, the general approach of this Court has been to treat all limited interests in some designated parcel of land as part of the property, so long as it is owned by a single party at the onset of regulation. *See Penn Central,* 438 U.S. at 130-31. That approach, however, makes it difficult to deal with cases in which the mineral rights or the air rights had been severed from the fee simple long before the imposition of the state regulation. The individual owner *is* fully wiped out, but receives nothing in compensation. Worse still, this test has generated endless difficulties when the issue is how it applies to contiguous parcels of land that fall under common ownership. In some cases, the parcels are acquired at one time; but on other occasions they are acquired in separate transactions. In some cases, the parcels are subject to the same zoning restrictions; but in other cases they are not. In some cases title is taken by the same legal entity; but in other cases, different parcels may, for example, be acquired by different corporate entities that have overlapping shareholder interests. In these cases, the willingness to treat each parcel separately increases, *see Palm Beach Isles,* 208 F.3d at 1381, especially where some portion of the land has been sold off long before the state has adopted its current regulatory framework.

By that standard, the pre-1978 sale of the upland parcel does not seem to have any effect on the outcome, since the title to that plot of land appears to be separately held, and its use was not regulated by the wetland statutes. It appears therefore that under current law, such as

it is, the Petitioner is entitled to treat his wetland holdings as "the" property without regard to any uplands interest that he previously sold off. To hold otherwise is to penalize retroactively thousands of landowners who entered into perfectly normal commercial transactions without any knowledge that subsequent articulation of takings law renders them defenseless against any and all land use regulations. And its implications are, frankly, frightening for the law of possessory takings by raising the possibility that the state could confiscate all the Petitioner's current land because he had the misfortune to sell off one fraction of it. The dangers of this system can only be avoided by taking the consistent position that the more the state takes by regulation, the more it must pay. But its inconveniences can be obviated by a simple approach that treats parcels as separate when they have been separately acquired unless their owner unites them into a single parcel. In this case, no such unification has taken place, so that the judgment of the Supreme Court of Rhode Island should be reversed on this point.

CONCLUSION

For the reasons stated above, the decision of the Supreme Court of Rhode Island should be reversed.

Respectfully submitted,

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