NO. 18-1062

In the
Supreme Court of the United States

LOVE TERMINAL PARTNERS, L.P., and VIRGINIA AEROSPACE, LLC,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The decision below grants the federal government carte blanche to take nearly any undeveloped property nationwide, without paying any—let alone just—compensation. Moreover, in valuing property, it denies owners the benefit of widely anticipated regulatory changes. The combined effect of those rules allows the government to wipe out valuable property interests at the precise moment it enacts regulatory changes benefitting owners of comparable property. That regime violates basic Takings Clause precepts by eviscerating investment-backed expectations and allowing the government to visit disproportionate burdens on some while bestowing windfalls on others.

The government cannot really defend that regime or deny the importance of the decision below, so it leads off with an argument that the Court of Federal Claims rejected and the Federal Circuit declined to embrace. The government then attempts to dismiss the Federal Circuit's actual holdings as factbound. But factbound decisions do not attract more than a dozen amici. And there is no denying that the Federal Circuit decision wipes out $133.5 million in value and provides a roadmap for future uncompensated takings. Indeed, the decision would deny a *Lucas* taking in *Lucas* itself. Much private property does not generate immediate cashflow because the owner is gathering capital or waiting for an improved economic or regulatory environment. The decision below deems all that valuable property worthless in defiance of market valuations, common sense, and this Court's precedents. The decision cannot stand.

I. The Federal Circuit's No-Cashflow-No-Taking Rule Is Indefensible.

In the course of obscuring an obvious taking and wiping out the award of $133.5 million in just compensation, the Federal Circuit held that a taking of private property has no cognizable economic impact if the property was not generating positive cashflow at the time of the taking. That is an indefensible legal conclusion, Pet.21-25, so much so that the government goes out of its way not to defend it. It instead leads off its brief by arguing that this Court could affirm on a different theory that the Court of Federal Claims rejected and the Federal Circuit declined to address. BIO.12-15; *see* BIO.13 ("The court of appeals reserved judgment on [this] question.").

The government's effort to change the subject is understandable, as the rule the Federal Circuit embraced is clearly wrong. The just compensation due under the Takings Clause is the fair market value of property at the time it is taken. *Kirby Forest Indus. v. United States*, 467 U.S. 1, 10 (1984). And fair market value is a function of more than just the use to which property was being put in the regulatory environment that prevailed at the time. It is well-established that fair market value includes both "the prospect of demand for" "profitable use[s]" to which the property could be put, *Olson v. United States*, 292 U.S. 246, 255 (1934), and reasonably anticipated regulatory changes, *United States v. 33.92356 Acres of Land*, 585 F.3d 1, 7 (1st Cir. 2009).

The Federal Circuit's contrary conclusion—that property is worthless if it was generating a negative cashflow in the pre-existing regulatory environment—

is profoundly misguided. The market makes no comparable mistake. Measured just by revenues and expenses, Uber lost $1.8 billion in 2018, yet the market nonetheless valued the ride-sharing company at more than $80 billion. Eric Newcomer, *Uber Revenue Growth Slows, Losses Persist as 2019 IPO Draws Near*, Bloomberg (Feb. 15, 2019), https://bloom.bg/2S6XoPQ; Michael J. de la Merced & Kate Conger, *Uber I.P.O. Values Ride-Hailing Giant at $82.4 Billion*, N.Y. Times (May 9, 2019), https://nyti.ms/2HcT6Eh. Under the Federal Circuit's calculus, that valuation is both inexplicable and irrelevant. In the real world, it makes perfect sense, as "the open market … does not value property based merely on its temporary current use." Texas.Br.4.

Neither does this Court. Indeed, as the petition pointed out, Pet.23-24, the conflict between the decision below and this Court's precedent is evident in the fact that the decision below would deny a *Lucas* taking in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), itself. The government resists that proposition, noting that the property at issue in *Lucas* was valued at $1.17 million before the taking. BIO.19. But that valuation reflected the market valuation of the property, which plainly considered its *potential* uses. There was no artificial rule that the vacant lots were "worthless" simply because they had not yet been developed. Moreover, had Lucas' development of the property been impeded by a rule that beachfront homes could be only one-story tall, and the Coastal Council then lifted that restriction for his neighbors while prohibiting *any* development of his lot (on the theory that net utilization of the beachfront would remain the same), it would make no

sense to say that Lucas was entitled to no compensation because his property had negative cashflow under the one-story regime. But that is precisely the rule that the Federal Circuit adopted.

Rather than squarely defend that rule, the government suggests that the decision below was factbound and did not actually "announce any … rule." BIO.17. But the government's own description of Judge Dyk's opinion belies its attempt to rewrite it. The court of appeals concluded (1) that "plaintiffs must show that their property had value in the regulatory environment that existed before the government action," Pet.App.18, and (2) that petitioners failed to make that showing—and the Wright Amendment Reform Act of 2006 (WARA) accordingly had "no adverse economic impact"—because "at no point [pre-WARA] did revenue exceed plaintiffs' carrying costs," Pet.App.19. Those two conclusions amount to a holding (or "rule") that evidence of economic impact is irrelevant *as a matter of law* when the property's carrying costs outpaced revenues.

Indeed, nothing short of such a rule can explain how the Federal Circuit managed to reverse a finding of a $133.5 million taking without the need for a remand for a new valuation of the property. The government claims that the Federal Circuit held that petitioners "failed to introduce *relevant* economic evidence … to establish the value of their leases" under the regulatory regime that existed pre-WARA. BIO.16 (emphasis added). But the key word there is "relevant." Not only did petitioners submit extensive evidence of their leasehold's substantial value, but the

United States' experts conceded that the leasehold had a substantial fair market value before WARA's enactment, *see* Pet.App.89-94; WLF.Br.22, and the Court of Federal Claims found that "the evidence demonstrates that there was a market for plaintiffs' property at the time of the taking," Pet.App.110.

The Federal Circuit did not deny the *existence* of that evidence. It denied its *relevance*, insisting that the property's pre-WARA value did not matter because petitioners "suffered a net income loss of roughly $13 million" on the property before WARA's enactment. Pet.App.19. It was only the Federal Circuit's application of that (misguided) legal rule—a rule that even the government did not advance—that obviated the need for a remand (or affirmance). Accordingly, petitioners "take issue" *not* "with the court of appeals' factual determination[s]," BIO.18, which were the province of the Court of Federal Claims in all events, but with the Federal Circuit's legal rule, which would gut the Takings Clause.

It is little surprise, then, that the government tries to change the subject by suggesting that WARA is not what did the taking here and "did not prohibit petitioners from using their leased property for" air-passenger service. BIO.13. The Court of Federal Claims rejected that argument, and the Federal Circuit declined to embrace it—with good reason. WARA "requir[ed] Dallas to reduce the number of gates available for passenger air service at Love Field to 20 as soon as practicable." BIO.6-7. WARA also "provided that Dallas should allocate gates 'in accordance with contractual rights and obligations' for certificated air carriers." BIO.14. That obviously

included the Five-Party Agreement, in which Dallas not only "agreed to an allocation of those 20 gates among the three airlines currently flying out of Love Field," "*all based out of the main terminal*[,]" but made that agreement contingent on Congress "enact[ing] legislation by December 31, 2006, that would allow the Parties to implement the terms and spirit of this Contract." Pet.App.6 (emphasis added).

WARA thus left only one option: consolidate all flights in the main terminal. Pet.12-13; *see* CCJ.Br.3. To say that WARA did not destroy the value of petitioners' gates is to deny reality, which likely explains why the court of appeals was unwilling to do so. *See* MSLF.Br.17; IJ.Br.21. Instead, the court reversed on the novel theory that a taking of property that the market (and the Court of Federal Claims) valued at $133.5 million had *zero* economic impact because the property was not generating a positive cashflow at the time of the taking. To state that theory is to refute it.

II. The Federal Circuit's Rule That Market Value Excludes Value Attributable To Expected Regulatory Changes Is Indefensible.

The decision below parts ways with settled law and basic market realities in another critical respect. The Federal Circuit held that evidence of market value that reflects the market's expectation of future regulatory change is irrelevant to economic impact *as a matter of law*. Pet.27-32. Under the Federal Circuit's rule, only the pre-existing regulatory framework matters. The government's meager defense of that novel legal rule fails.

The government contends that recognizing the value the market assigned to petitioners' property based on anticipated regulatory changes "would premise takings liability on an investor's speculation that Congress might change the law in the future." BIO.21. But there is nothing speculative about relying on fair market value. Just compensation has long been measured by fair market value—"what a willing buyer would pay in cash to a willing seller"—at the time of the taking. *United States v. Miller*, 317 U.S. 369, 374 (1943). The fair market value does not reflect "a mere unilateral expectation" of regulatory change, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), but neither does it ignore the possibility of regulatory changes which could enhance or reduce the value of a property.

For example, it is commonplace for the value of real estate to be affected by zoning rules that could be repealed or relaxed by the granting of a variance. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 625 (2001). The fair market value of the property subject to such value-restricting rules reflects the market's best judgment about whether those rules are inflexible or subject to repeal or relaxation. There is no justification in law or logic for rejecting that basic element of market valuation and artificially valuing property as if the current regulatory environment were set in stone. Every day, "people buy property restricted to limited use in the hope that they can secure a regulatory change making the property more valuable. In those cases, the correct valuation asks whether the willing buyer will attach a positive value to the possibility that the restrictions will in fact be lifted." IJ.Br.16.

The government derides that rule as providing "an insurance policy for investors." BIO.21. The Founders called it something else—protecting private property by ensuring "just compensation," *see* Texas.Br.5-6—which explains why every other court to consider the issue has held that fair market value includes value attributable to reasonably anticipated regulatory changes reflected in prevailing market valuations. Pet.29. The government insists that those cases are different because the anticipated regulatory changes there "were unrelated to the government action alleged to constitute a taking." BIO.23. But that WARA combined a widely anticipated value-enhancing regulatory change with a provision limiting the benefits to a select few (who not coincidentally were in the negotiating room for the Five-Party Agreement) only makes the taking that much worse.

The relatedness concept or scope-of-the-project rule that the government and the Federal Circuit invoke is wholly misplaced in the context of *Lucas*-style takings, as opposed to the eminent domain context. After all, this is not a case in which the impending exercise of eminent domain caused property values to *increase*. This regulatory taking, like that in *Lucas*, did precisely the opposite, rendering worthless overnight property that the market had valued handsomely.

In that context, the fact that the government relaxes regulatory restrictions for some on the backs of specific property owners who are foreclosed from all further development makes the taking more egregious. After all, it is precisely when the current regulatory environment is widely perceived as

unsustainable that the government has a temptation to relax the rules for some while further restricting others in an effort to keep total beach development or flight volumes roughly equivalent. When the government yields to that temptation and combines regulatory relief for some with a *Lucas*-style taking for others, that only makes matters worse. If the Coastal Council in *Lucas* had combined a complete development prohibition for Lucas with a new relaxed regime for his neighbors, that would have only exacerbated the taking, notwithstanding that the taking and regulatory change were related. And if his pre-taking market value had reflected the market's assumption that the regulatory rules would be relaxed for all, denying Lucas that valuation would be adding insult to injury. But that is precisely what the Federal Circuit did here.

The government cannot deny that the Federal Circuit's rule creates perverse incentives. Pet.32. Had Congress passed two statutes one week apart, the first repealing the extant restrictions on Love Field and the second precluding the use of petitioners' property for those flights, there would be no question that the second statute effectuated a taking. Nor would there be any question that petitioners would be entitled to the value of the Love Field property based on the reality that the artificial restrictions had been lifted, just as the market anticipated. *See* JetBlue.Br.12 (discussing increase in value post-relaxation of Wright Amendment's restrictions). Congress' decision to combine those two statutes into one should not enable the government to evade its constitutional obligation to compensate petitioners for

the value of their property that WARA took away. Pet.31-32.

With no compelling response to petitioners' legal arguments, the government claims that petitioners did not "actually expect[] the repeal of the Wright Amendment when they invested in their leases." BIO.20. That is both wrong and beside the point. While the Federal Circuit may have "expressed skepticism that petitioners had any such expectation," BIO.20, it left undisturbed the finding by the Court of Federal Claims that "it is abundantly clear that they did," Pet.App.117. But whatever petitioners' unilateral expectations might have been, what matters is *the market's* perception and resulting valuation. And even the government's own experts admitted that the market assigned considerable value to petitioners' property based on the (prescient) prediction that the restrictions on Love Field were unsustainable. *See* Pet.App.89-92.[1]

III. The Decision Below Is Enormously Consequential.

As evidenced by the number and nature of amici supporting certiorari, this is a case of surpassing importance. *See* Pet.32-36. "The notion that a cashflow-negative property has no market value is inconsistent with real world investment practices and

[1] To be sure, petitioners did not consummate an airline deal before WARA. BIO.18, 22. But just as the fact that a developer did not sell every new house in a tract before an arbitrary and unforeseen deadline does not mean that the unsold homes were worthless, that petitioners did not consummate a deal before WARA does not mean that the fair market value of the property was zero.

market decisions." Texas.Br.10; *see also, e.g.*, NFIB.Br.5; IJ.Br.16. So is the notion that widely anticipated regulatory changes are irrelevant to fair market value. NFIB.Br.16. Accordingly, "[i]f the Federal Circuit's decision is allowed to stand, investors will be quick to realize the dangerous incentives for government to seize property without paying what the owner could receive on the open market." Texas.Br.9. That, in turn, will create "a significant impediment to future competition and growth in the airline and other sectors that depend on long-term private financing for capital-intensive investments." JetBlue.Br.13. It also will "provide[] government entities and rent-seeking private parties a clear road map for uncompensated takings." MSLF.Br.27. In short, left standing, the below decision will effectively immunize the government from its constitutional obligations to respect private property and not visit disproportionate burdens on property owners not in the negotiating room.

It is little surprise, then, that the government does not deny the "far-reaching consequences" that the decision below will have. CCJ.Br.6. *Compare, e.g.*, Br. for the United States as Amicus Curiae 19, *RPX Corp. v. ChanBond LLC*, No. 17-1686 (U.S. May 9, 2019) ("the practical effect of the court of appeals' decision is limited"); Br. for the United States as Amicus Curiae 11, *Atlantic Richfield Co. v. Christian*, No. 17-1498 (U.S. Apr. 30, 2019) ("the decision below will have limited practical consequences"). The government likewise has no response to the fact that further percolation is not an option here, as every significant takings case against the federal government must be brought in the Federal Circuit. WLF.Br.19-20.

Indeed, because of the Federal Circuit's exclusive jurisdiction, the decision below poses a threat to vacant buildings and undeveloped land across the nation.

The decision below is the latest and greatest chapter in a series of Federal Circuit decisions undermining the protections the Framers and this Court have erected against federal government takings. The hard part of showing a *Lucas* taking is to show that the property ended valueless. But the Federal Circuit has now made it difficult to establish that the property started with value, even though the market has no such difficulty. Indeed, by the Federal Circuit's logic, there was no *Lucas* taking in *Lucas* itself. This Court should not allow the one and only circuit in which the federal government may be held accountable for taking private property to embrace rules that gut both the Takings Clause and this Court's cases enforcing its mandate.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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