No. 18-1062

In The
Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. In assessing whether the government has effected a compensable taking, may courts treat real property as worthless simply because the owner was not generating positive cashflow from the property at the time of the taking?

2. In determining whether the taking of property had any economic impact on its owner, may courts ignore reasonable investment-backed expectations that a regulatory environment is likely to change and, in fact, has been changed by the very law that effects the taking?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioners Love Terminal Partners, L.P., and Virginia Aerospace, LLC (collectively, Love Terminal).[1]

PLF was founded over 45 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel or amicus curiae in several landmark United States Supreme Court cases in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *See*, *e.g.*, *Knick v. Township of Scott*, No. 17-647; *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015); *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF has offices in Florida,

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[1] Pursuant to this Court's Rule 37.2(a), PLF has received written consent from all parties to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Pursuant to Rule 37.6

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

California, Washington, and the District of Columbia, and regularly litigates matters affecting property rights in state courts across the country. PLF believes its perspective and experience with property rights litigation will aid this Court in the consideration of the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises from the Federal Circuit's bizarre conclusion that Love Terminal, the owner of a passenger terminal at an airfield near Dallas, is not entitled to any compensation for a regulatory taking because, according to the decision below, the property has no value. Pet. App. 16–19. Over the years, this Court has established three distinct tests for determining when a regulation "goes too far" and constitutes a compensable taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). Two types of regulatory action will be deemed *per se* takings: "where government requires an owner to suffer a permanent physical invasion of her property," *id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982)), and where a regulation deprives an owner of "'*all* economically beneficial us[e]' of her property."[2] *Id.* (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis in original)). Anything less than a physical invasion or a deprivation of all beneficial use is

[2] *Lucas v. South Carolina Coastal Council* recognized a single exception to the total takings rule, which is not at issue here. 505 U.S. 1003, 1029 (1992) (A regulation does not effect a taking if it merely prohibits uses of property that were already impermissible under "background principles of the State's law of property and nuisance.").

analyzed under *Penn Central Transportation Co. v. City of New York*, which established a multifactorial balancing test directing courts to consider a number of case-specific factors, including the regulation's economic impact, the extent of the regulation's interference with the property owner's "distinct investment-backed expectations," and the "character of the governmental action." 438 U.S. 104, 124 (1978).

At issue here is the *Penn Central*'s investment-backed expectations inquiry. As adopted by this Court, the expectations inquiry asks whether the owner had invested resources in pursuit of some distinct use of the property (*Penn Central*, 438 U.S. at 124), and whether that expectation is reasonable. *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979). That inquiry was intended to provide just one part of a multifactor test, which is designed to balance numerous competing interests to determine whether the regulation "is so unreasonable or onerous as to compel compensation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 322 (2002) (The *Penn Central* test "is characterized by essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances." (internal quotation marks omitted)).

The Federal Circuit, however, drastically altered the *Penn Central* test by holding that the expectations inquiry, alone, will determine the value of the owner's investment in the property, and therefore is determinative of all regulatory takings claims. Pet. App. 22. The Federal Circuit further altered this Court's takings case law by holding that an owner's

expectations are "limited by the regulatory regime in place at the time [the owner] acquired the [property]." Pet. App. 22. Thus, despite acknowledging that the Wright Amendment Reform Act of 2006 (WARA) barred all economically productive use of Love Terminal's property (Pet. App. 15), the Federal Circuit held that Love Terminal could not, as a matter of law, have reasonably expected to make any productive use of the terminal (despite extensive due diligence and pending regulatory reforms). Pet. App. 50–55, 117–18. From that, the court leapt to the conclusion that the terminal had no value and, therefore, WARA's outright ban on its use had no "adverse economic impact" and reversed the Court of Federal Claims' award of $133.5 million in just compensation. Pet. App. at 19–22.

The decision below threatens to unmake this Court's regulatory takings jurisprudence by elevating the investment-backed expectations factor into an insurmountable presumption against property owners. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017) (measuring the value of the property by the terms of the challenged regulation unfairly distorts the takings equation in favor of the government). The conclusion that an owner cannot advance a regulatory takings claim if regulations in effect at the time of purchase barred his or her anticipated use is contrary to *Penn Central* and conflicts with *Palazzolo*, which held that an owner's rights and expectations in property cannot be defined solely by reference to the terms of the challenged regulation. 533 U.S. at 626. The decision also conflicts with *Lucas*, which holds that a property owner is categorically entitled to compensation upon the conclusion that a "regulation

denies all economically beneficial or productive use of land." 505 U.S. at 1015.

Finally, it must be emphasized that the decision below will apply to almost every takings claim brought against the federal government. *Preseault v. Interstate Commerce Comm'n,* 494 U.S. 1, 11–12 (1990). Thus, if the decision stands, it will encourage the government to enact the most intrusive regulations possible because doing so will be deemed to destroy the investment-backed expectations of private property owners, and allow the government to avoid takings liability. The Court should, therefore, grant the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

THE FEDERAL CIRCUIT'S DECISION IS CONTRARY TO *PENN CENTRAL* AND *PALAZZOLO* AND CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL AND STATE APPELLATE COURTS

A. The Federal Circuit's Formulation of the Investment-Backed Expectations Inquiry Conflicts with *Penn Central*

The Federal Circuit's conclusion that *Penn Central*'s expectations inquiry is dispositive of all regulatory takings claims raises an important question of constitutional law upon which this Court has issued conflicting opinions and the lower federal and state courts are deeply divided. Although *Penn Central* is considered the "polestar" of regulatory

takings jurisprudence,[3] this Court has largely refrained from elaborating on its "ad hoc" factors or explaining how the test is to be applied. *See Murr*, 137 S. Ct. at 1942–43; *see also Palazzolo*, 533 U.S. at 617 (The Court has "given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking."). This reluctance, however, has "given rise to vexing subsidiary questions" regarding *Penn Central*'s application.[4] *Lingle,* 544 U.S. at 538–39.

One topic on which this Court has provided only partial guidance is the investment-backed expectations factor. As adopted by *Penn Central*, the expectations inquiry asked simply whether the owner had invested resources in pursuit of some "distinct" use of the property. *Penn Central*, 438 U.S. at 124, 128 (citing Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of*

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[3] *Tahoe-Sierra Pres. Council*, 535 U.S. at 336; *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring).

[4] Scholars from both sides of the property rights debate have criticized the *Penn Central* framework as being vague, impossible to apply in a consistent manner, and an invitation to judicial subjectivity. *See*, *e.g.*, John D. Echeverria, *Is the* Penn Central *Three-Factor Test Ready for History's Dustbin?*, 52 Land Use L. & Zoning Dig. 3, 11 (2000) (declaring that the *Penn Central* framework "is not supported by current Supreme Court precedent, invites unprincipled judicial decision making, conflicts with the language and original understanding of the takings clause, would confer unjust windfalls in many cases, and creates seemingly insurmountable problems in terms of defining an appropriate remedy"); Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 Wm. & Mary L. Rev. 995, 995 (1997) (describing *Penn Central* as an "ill fitting piece [ ] left over from other puzzles long ago forgotten and now deserving abandonment").

Just Compensation Law, 80 Harv. L. Rev. 1165, 1233 (1967)). Professor Michelman introduced the concept of investment-backed expectations based on the understanding that property is comprised of "expectations founded on existing rules." Michelman, 80 Harv. L. Rev. at 1211–12. Under this view, security of expectations is essential if property is to be efficiently utilized for the betterment of society as a whole. *Id*. at 1211–13. Michelman did not intend to argue that every interference with property expectations be compensated. *Id*. at 1213. Rather, Michelman used this phrase to distinguish speculators who are not actively putting their land to some specific use from those owners who actually invest in such development and deserve protection for their investments in property. *Id* at 1234; Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land-Use Regulation* 146 (1997) ("[I]nvestment-expectations law distinguishes between an investor and a speculator. The speculator does not have a distinct use objective when he purchases the property. The courts are much more sympathetic to the distinct expectations of the investor as contrasted with the open-ended profit motive of the speculator.").

This Court later refined the expectations inquiry to require that the owner show that his or her expectations are objectively reasonable. *See*, *e.g.*, *Kaiser Aetna*, 444 U.S. at 175; *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (An owner's expectation "must be more than a 'unilateral expectation or an abstract need.'" (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980))). But beyond those two general criteria, this Court has provided little guidance on what the

expectations inquiry requires or how it is to be applied. *See* Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 Urb. Law. 735, 758 (1988) ("[I]n no case has the Court made any effort to either define these terms or to give guidance to lower courts in determining their meaning."). The lack of guidance on this critical inquiry has resulted in remarkably inconsistent decisions among the lower federal and state courts.

Take this case for example. It is undisputed that Love Terminal invested significant sums in the terminal property with the distinct expectation that pending regulatory reforms would allow them to use the terminal for commercial passenger services. *See Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring) (neighboring uses are relevant to the expectations inquiry); *Kaiser Aetna*, 444 U.S. at 179 (Representations made by government officials can "lead to the fruition of a number of expectancies embodied in the concept of 'property.'"). The outcome of regulatory reform could have vindicated this expectation, or (as it turned out) extinguished it. But, according to some courts, the outcome alone cannot determine whether an owner's expectations were sufficiently reasonable or distinct to warrant a full evaluation of the *Penn Central* factors. *See*, *e.g.*, *Cienega Gardens v. United States*, 331 F.3d 1319, 1346 (Fed. Cir. 2003) (The expectations inquiry requires the court to determine "whether a reasonable developer confronted with the particular circumstances facing the Owners would have expected the government to nullify [restrictive] regulations."); *Lost Tree Vill. Corp. v. United States*, 115 Fed. Cl. 219, 232 (2014), *aff'd on other grounds by* 787 F.3d 1111

(Fed. Cir. 2015) (owner's expectation that the government will permit development of a parcel subject to regulations banning all use were not unreasonable).

Purporting to apply the same expectations inquiry, the Federal Circuit below held that an owner's expectations are "limited by the regulatory regime in place at the time they acquired the [property]." Pet. App. 21–22. Thus, as a matter of law, the court refused to consider the reasonableness of Love Terminal's due diligence and investment plan, which had anticipated that adoption of WARA would lift the restrictions on its airport property. Pet. App 20–21 ("This expectations analysis is not designed to protect private predictions of regulatory change."). Nor would the court consider the fact that WARA did in fact lift the restrictions on other terminal owners at the airfield. Pet. App. 20–22. Instead, the court simply concluded that "[t]he failure to establish 'reasonable, investment-backed expectations' . . . defeats [a regulatory] takings claim as a matter of law." Pet. App. 22. Thus, the Federal Circuit concluded that WARA did not result in a taking without considering the remaining *Penn Central* factors.

The remarkable lack of consistency on this question is unfortunately all too common due to the lack of clear guidance from this Court on what the expectations factor requires. *See* Robert Meltz, et al., *The Takings Issue: Constitutional Limits on Land-Use Control and Environmental Regulation* 134 (1999) (criticizing the "amorphous" standard, noting that "[i]ts parameters remain uncertain even today"); *see also* Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45

Stan. L. Rev. 1369, 1370 (1993) ("[W]e should be deeply suspicious of the phrase 'investment-backed expectations' because it is not possible to identify even the paradigmatic case of its use."); R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzalo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. Envtl. L.J. 449, 449 (2001) ("Although more than two decades have elapsed since *Penn Central*, neither courts nor commentators have been able to agree on the meaning or applicability of investment-backed expectations in takings law."); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Doctrine*, 77 Cal. L. Rev. 1299, 1324 (1989) ("It is not at all clear . . . what role 'interference with reasonable expectations' plays in the Court's takings analysis.").

Review by this Court is necessary to bring clarity to this critical question of regulatory takings law.

B. The Decision Below Raises an Important Question of Takings Law Left Unanswered by *Palazzolo*

Review is particularly warranted in this case because the Federal Circuit's conclusion that an owner's expectations are limited by all regulations in effect at the time of acquisition conflicts with *Palazzolo*, in which this Court confirmed that a property owner's right to make reasonable use of his land does not evaporate simply because a restrictive regulation predates his ownership. 533 U.S. at 626–28 (rejecting such a per se defense as "quixotic" and "capricious in effect"); *see also Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1350 n.22 (Fed.

Cir. 2001) (en banc) ("Where a regulatory taking of real property is alleged, the state cannot defeat liability simply by showing that the current owner was aware of the regulatory restrictions at the time that the property was purchased."). And in this regard, the decision below is also contrary to this Court's repeated admonition that the *Penn Central* test cannot be reduced to a "set formula." 438 U.S. at 124; *see also Tahoe-Sierra*, 535 U.S. at 321 (Courts must resist "[t]he temptation to adopt what amount to *per se* rules in either direction."). On those bases alone, this Court should grant review and reverse the Federal Circuit decision.

However, this case also implicates the broader question of whether a court should consider restrictive regulations in effect at the time an owner takes title to his or her property, and, if so, how such an inquiry impacts the court's evaluation of the other *Penn Central* factors. *Palazzolo*, 533 U.S. at 629. This unanswered question, and conflicts in this Court's case law, have resulted in widespread confusion among courts, litigants, and scholars regarding what the *Penn Central* factors actually require and how the test is to be applied.[5]

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[5] *See, e.g.,* Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan. Envtl. L.J. 525, 528 (2009) (noting the "indeterminacy" of the "ad hoc, multi-factor balancing test"); James R. Gordley, *Takings: What Does Matter? A Response to Professor Peñalver*, 31 Ecology L.Q. 291, 291 (2004) (*Penn Central* is an ad hoc balancing test); Gary Lawson, et al., "*Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 Notre Dame L. Rev. 1, 30 (2005) ("[T]he validity of the regulation will depend on an examination and balancing of three elements . . . ."

Early decisions from this Court disagree about whether any one *Penn Central* factor can be dispositive of a regulatory takings case. In *Andrus v. Allard*, for example, the Court stated that, for the purpose of the *Penn Central* analysis, an owner's property interest is the full bundle of rights inhering in property—an owner has no reasonable expectation in the individual "strands" that make up the bundle. 444 U.S. 51, 65 (1979). Thus, the claimant's failure to allege a total deprivation was fatal to his case. *Id*. But one month later, in *Kaiser Aetna,* the Court found that a regulatory action interfering with a marina owner's right to exclude—one "strand" from that bundle—impacted a right that is so fundamental to property that it effected a taking. 444 U.S. at 179–80. In *PruneYard Shopping Ctr. v. Robins*, however, the Court rejected a takings claim upon finding that a mall owner had no reasonable expectation to exclude others. 447 U.S. 74, 84 (1980) (defining "reasonable investment backed expectations" as a right that is "essential to the use or economic value of the[] property"). Then, in *Ruckelshaus*, the Court concluded "that the force of [a single] factor [may be] so overwhelming, [. . .] that it disposes of the taking question." 467 U.S. at 1005–06 (suggesting that the reasonableness of investment-backed expectations depends primarily on whether the owner knew of the challenged restrictions); *but see Hodel v. Irving*, 481 U.S. 704, 715 (1987) (finding a regulatory taking even where evidence of investment-backed expectations was "dubious," because the other factors weighed heavily in favor of the owner's claim). This line of

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(quoting Appellees' Brief, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978))).

contradictory cases is particularly relevant here because, as discussed in more detail below, the Federal Circuit read *Ruckelshaus* as creating a per se defense to a regulatory takings claim. *See* Pet. App. 22; *see also Good v. United States*, 39 Fed. Cl. 81, 95 (1997), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999) (concluding that *Ruckelshaus* had implicitly adopted a categorical, single-factor defense to a regulatory takings claims).

Besides a footnote in *Nollan v. California Coastal Commission*, refusing to apply *Ruckelshaus* in the context of a property regulation, this Court has never addressed the circumstances in which a single factor can be dispositive of a regulatory takings claim. 483 U.S. 825, 833 n.2 (1987). Nor has this Court explained how any one factor can rise to determinative weight where "the *Penn Central* factors are completely incommensurate." John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171, 208 (2005).

Instead, since *Palazzolo*, this Court has repeated that courts must "examine 'a number of factors' rather than a simple 'mathematically precise' formula" or a per se rule when determining whether a regulation gave rise to a taking in *Tahoe-Sierra*, 535 U.S. at 326. This is because "[t]he Takings Clause requires careful examination and weighing of all the relevant circumstances" and that "interference with investment-backed expectations is one of a number of factors that a court must examine." *Id.* at 326 n.23 (quoting *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring)).

Murr confirmed that the expectations inquiry, alone, "should not necessarily preordain the outcome

in every case." 137 S. Ct. at 1944. The Court further reiterated that an owner's expectations cannot be "shape[d] and define[d]" by reference to restrictive state and local laws. 137 S. Ct. at 1944–45. *Murr* explained that defining property by the terms of a restrictive regulation would leave "landowners without recourse against unreasonable regulations" and "improperly would fortify the state law against a takings claim, because the court would look to the retained value in the property as a whole rather than considering whether individual holdings had lost all value." *Id.*; *see also Palazzolo*, 533 U.S. at 635 ("If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title." (O'Connor, J., concurring)). With these principles in mind, *Murr* explained that courts must consider more than the regulatory environment to "determine whether reasonable expectations about property ownership would lead a landowner to anticipate that [the anticipated use may be allowed]." 137 S. Ct. at 1945.

The decision below plainly conflicts with the principles recognized by *Murr*, *Taheo-Sierra*, and *Palazzolo* by giving the mere existence of a regulation determinative force without regard to the other *Penn Central* factors. Indeed, the per se nature of the Federal Circuit's expectations rule flouts the careful analysis envisioned by *Tahoe-Sierra* and *Murr* by absolving the government of its obligation to justify a regulation that outright prohibits any use of a passenger terminal located at an airfield otherwise regulated for commercial air travel.

C. The Question Whether Any One *Penn Central* Factor Can Dispose of a Takings Claim Is Subject to a Deep Split of Authority

The lack of guidance from this Court regarding regulations in effect at the time an owner takes title to his or her property, when combined with the conflict between *Ruckelshaus* and this Court's post-*Palazzolo* case law, has given rise to an irreconcilable split of authority among the lower federal courts. Karen M. Brunner, Note, *A Missed Opportunity:* Palazzolo v. Rhode Island *Leaves Investment-Backed Expectations Unclear As Ever*, 25 Hamline L. Rev. 117, 146 (2001) (noting the difficulty courts have evaluating an owner's investment-backed expectations against a backdrop of regulation); *see also 1256 Hertel Ave. Assocs., LLC v. Calloway*, 761 F.3d 252, 266 n.10 (2d Cir. 2014) (This Court has not "clarified how long a legislative enactment must remain in force before it becomes . . . sufficiently embedded in a state's legal tradition that it defines property holders' rights and investment-backed expectations.").

All too often, in the absence of guidance, courts give excessive weight to a regulation in place at the time of purchase. *Columbia Venture, LLC v. Richland Cty.*, 413 S.C. 423, 449 (2015), to the extent that many jurisdictions simply readopt the notice rule repudiated by *Palazzolo*. *See*, *e.g.*, *In the Matter of Thaw*, 769 F.3d 366, 371–72 (5th Cir. 2014) (holding that *Palazzolo* is a "narrow exception" and does not apply where a purchaser has actual knowledge of restrictions on property); *see also Guggenheim v. City of Goleta*, 638 F.3d 1111, 1121–22 (9th Cir. 2010) (holding that a post-enactment purchaser lacked

standing to being a takings claim because "whatever unfairness . . . might have been imposed by [the regulation], it was imposed long ago, on someone earlier in the . . . chain of title"); *Prosser v. Kennedy Enterprises, Inc.*, 342 Mont. 209, 214 (2008) ("[A] party cannot complain regarding alleged diminution in value caused by a government action when she purchased the property after the government action."); *Matter of Gazza v. New York State Dep't of Envtl. Conservation*, 89 N.Y.2d 603, 615 (1997) (holding that a plaintiff must show "an absolute right to build on his land without a variance" to advance a takings claim). The Texas courts, by contrast, simply hold that "no single *Penn Central* factor is determinative; all three must be evaluated together, as well as any other relevant considerations." *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 840 (Tex. 2012); *see also Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 139 (Tex. Ct. App. 2013).

The Federal Circuit, meanwhile, is all over the map on this question. The decision below marks one extreme, holding that an owner's expectations are defined by all regulations in effect at the time of acquisition. Pet. App. 22. Other decisions hold that, "[w]hile evaluation of the *Penn Central* factors 'is essentially an "ad hoc, factual" inquiry,' it is possible for a single factor to have such force that it disposes of the whole takings claim." *Mehaffy v. United States*, 499 F. App'x 18, 22 (Fed. Cir. 2012). And still other decisions require courts to go beyond the mere existence of a regulatory restriction and evaluate multiple sub-factors related to the reasonableness of an owner's investment-backed expectations. *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004).

This deep and irreconcilable split of authority cannot be resolved without this Court's clarification.

II

THE FEDERAL CIRCUIT'S DECISION IS CONTRARY TO *LUCAS* AND CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL AND STATE APPELLATE COURTS

The Federal Circuit's alternative conclusion that Love Terminal was not entitled to compensation for a total regulatory taking conflicts with this Court's regulatory takings case law. *Lucas* holds the government categorically liable for a taking if it imposes a regulation that deprives an owner of "'*all* economically beneficial us[e]' of her property." 505 U.S. at 1019. Indeed, *Lucas* plainly commands that "total regulatory takings must be compensated," without the need to engage in the type of "case-specific inquiry" appropriate in a *Penn Central* claim. *Lucas*, 505 U.S. at 1019 n.8, 1026; *see also Lingle*, 544 U.S. at 528 (*Lucas* established a "per se" rule).

The Federal Circuit, however, held that Love Terminal was required to first satisfy *Penn Central*'s expectations inquiry in order to advance its *Lucas* claim. Pet. App. 22. Thus, despite acknowledging that WARA barred all economically viable use of the airport property, the Federal Circuit held that the regulation did not result in a compensable taking based solely on its objectionable formulation of the expectations factor.

There is no basis in this Court's case law for courts to consider any of the *Penn Central* factors when evaluating a categorical total taking. Indeed, *Penn Central* and *Lucas* are premised on very different

considerations. The *Penn Central* decision responds to the maxim that a property regulation is presumed to "adjust[] the benefits and burdens of economic life . . . in a manner that secures an average reciprocity of advantage to everyone concerned." *Lucas*, 505 U.S. at 1017–18 (internal quotation marks omitted). Accordingly, *Penn Central* directs the courts to balance several case-specific factors in order to determine "the actual burden imposed on property rights, [] how that burden is allocated, [and] when justice might require that the burden be spread among taxpayers through the payment of compensation." *Lingle*, 544 U.S. at 543.

Lucas, by contrast, is premised on the recognition that a regulation can have such a severe impact on property "that its effect is tantamount to a direct appropriation or ouster."[6] *Lingle*, 544 U.S. at 537; *see also Lucas*, 505 U.S. at 1017 (A "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."). The competing interests considered by *Penn Central*'s balancing test are simply not at issue "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." *Lucas*, 505 U.S. at 1019. Thus, the *Penn Central* factors "do[] not apply to the relatively rare situations where the government has deprived a landowner of all

[6] *Lucas* emphasized this point by comparing a deprivation of all beneficial use to a regulation that compels a physical taking, wherein the government will also be held categorically liable "no matter how minute the intrusion, and no matter how weighty the public purpose behind it." 505 U.S. at 1015 (citing *Loretto,* 458 U.S. at 435–40).

economically beneficial uses." *Lucas*, 505 U.S. at 1017–18. The Federal Circuit's decision to require that Love Terminal satisfy a single *Penn Central* factor in order to advance its *Lucas* claim undermines this Court's careful and purposeful distinction between those categories of takings claims.

Review is additionally warranted because there is tremendous confusion among the lower federal and state courts as to how courts should apply *Lucas* in practice. *See* Pet. App. 22 n.6 ("We note that there appears to be conflict between circuits as to whether reasonable, investment-backed expectations are relevant to the *Lucas* analysis."); *see also* Carole Necole Brown & Dwight M. Merriam, *On the Twenty-Fifth Anniversary of* Lucas*: Making or Breaking the Takings Claim,* 102 Iowa L. Rev. 1847, 1858–59 (2017) (discussing the confusion between *Lucas* and *Penn Central* tests).

The Federal Circuit, itself, is deeply conflicted on this question. The Federal Circuit first addressed this issue in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). There, the court opined that *Lucas* intended only to eliminate the substantially advances a legitimate government interest inquiry from the total takings test. *Id.* at 1179. The Federal Circuit followed suit in *Good v. United States*, opining that *Lucas* did not actually intend to displace the multifactorial *Penn Central* test when it created the total takings test. 189 F.3d at 1363. A year later, however, a different panel of the court rejected both *Loveladies* and *Good*, holding instead that, if a land use restriction amounts to a categorical taking under *Lucas*, the property owner is entitled to a recovery "without regard to the nature of

the owner's initial investment-backed expectations." *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1358–61, 1364 (Fed. Cir. 2000); *see also Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1115 (Fed. Cir. 2015) (Courts must not "consider[] . . . the landowner's investment-backed expectations" when adjudicating a claim of an alleged total taking."); *Rith Energy, Inc. v. United States,* 247 F.3d 1355, 1362 (Fed. Cir. 2001) ("[A] categorical taking . . . does not require an inquiry into whether the plaintiff had reasonable investment-backed expectations that were defeated by the regulatory measure that gave rise to the takings claim.").

Loveladies and *Good*, however, remain on the books and continue to be cited for the proposition that *Lucas* did not create a categorical rule because a decision of one panel "cannot be overruled by a subsequent decision of the Federal Circuit absent en banc consideration." *Cane Tennessee, Inc. v. United States*, 62 Fed. Cl. 703, 712 (2004); *see also*, *e.g.*, *Fla. Dep't of Env. Prot. v. Burgess*, 772 So. 2d 540 (Fla. 1st DCA 2000) (relying on *Loveladies* and *Good*); *Westside Quik Shop, Inc. v. Stewart,* 341 S.C. 297, 534 S.E.2d 270 (2000) (following *Good*); *McQueen v. S.C. Coastal Council*, 329 S.C. 588, 605 (Ct. App. 1998) (following *Loveladies*), *rev'd*, 340 S.C. 65, 530 S.E.2d 628 (2000), *cert. granted, judgment vacated sub nom. McQueen v. Dep't of Health & Envtl. Control*, 533 U.S. 943 (2001); *Moore v. United States*, 943 F. Supp. 603, 610 (E.D. Va. 1996) (following *Loveladies*).

This split of authority reaches far beyond the Federal Circuit. Massachusetts, for example, requires that courts consider several "pre-*Lucas* principles" before applying the categorical rule. *Zanghi v. Bd. of*

Appeals of Bedford, 61 Mass. App. Ct. 82, 87 (2004) (court must determine several pre-*Lucas* questions, including "(i) the validity of the by-law as applied to [the] property; (ii) [the owner's] reasonable investment-backed expectations; (iii) the economic impact on [the] property; and (iv) the character of the governmental action"). Minnesota, too, requires that owners demonstrate reasonable expectations before the courts will apply the *Lucas* test. *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 553 n.4 (Minn. 1996). And the Eleventh Circuit holds that courts must first determine "the extent to which the regulation has interfered with investment-backed expectations" in order to "resolve the question of whether the landowner has been denied all or substantially all economically viable use of his property." *Reahard v. Lee Cty.,* 968 F.2d 1131, 1136 (11th Cir. 1992).

Other federal and state courts disagree, holding that investment-backed expectations are not a proper part of the total takings analysis. *See*, *e.g.*, *Anderson v. Charter Twp.,* 266 F.3d 487, 493 (6th Cir. 2001); *Clay County v. Harley & Susie Bogue, Inc.,* 988 S.W.2d 102, 106–07 (Mo. Ct. App. 1999); *Dodd v. Hood River County,* 136 F.3d 1219, 1228 (9th Cir.), *cert. denied,* 119 S. Ct. 278 (1998); *Adams Outdoor Advertising v. City of East Lansing,* 591 N.W.2d 404, 411–12 (Mich. Ct. App. 1998), *K & K Constr., Inc. v. Department of Natural Resources,* 456 Mich. 570, 576, *cert. denied,* 119 S. Ct. 60 (1998); *Bormann v. Board of Supervisors,* 584 N.W.2d 309, 316 (Iowa 1998), *cert. denied,* 119 S. Ct. 1096 (1999); *Kavanau v. Santa Monica Rent Control Bd.,* 941 P.2d 851, 860 (Cal. 1997); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey,* 95 F.3d 1422, 1432 (9th Cir. 1996), *aff'd,* 526 U.S. 687 (1999); *Chioffi v. City of Winooski,* 165 Vt. 37, 42 (1996);

Guimont v. City of Seattle, 896 P.2d 70, 76 (Wash. Ct. App. 1995); *Central Colo. Water Conservancy Dist. v. Simpson,* 877 P.2d 335, 346–47 (Colo. 1994); *Anchorage v. Sandberg,* 861 P.2d 554, 557 (Alaska 1993); *Woodbury Place Partners v. City of Woodbury,* 492 N.W.2d 258, 260 (Minn. Ct. App. 1992).

This split of authority is deeply entrenched and cannot be resolved without this Court's guidance.

CONCLUSION

The clear goal of this Court's takings jurisprudence is to prevent the government from over-regulating without compensating the landowner, because the Takings Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). That principle should not be twisted to allow the government to avoid liability by enacting the most restrictive regulations possible. But the Federal Circuit decision below encourages the government to do exactly that, creating numerous conflicts with decisions of this Court and other federal and state courts. PLF urges this Court to grant the Petition for Writ of Certiorari.

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Respectfully submitted,

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