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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ARKANSAS, OKLAHOMA, AND UTAH, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici the States of Texas, Arkansas, Oklahoma, and Utah, believe that the defense and preservation of individual liberty requires the utmost respect for the right to own and control property, the free-enterprise system, and limited government. President John Adams put it starkly: "Property must be secured or liberty cannot exist." John Adams, *Discourses on Davila* 92 (Russell & Cutler 1805).

The obligation to reimburse owners when the government takes property keeps the 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). A uniform and predictable takings jurisprudence is valuable not only to property owners seeking compensation, but also to state governments tasked with assessing the likely cost of a particular action with regard to private property. *See generally Chicago, B & Q. R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) (Takings Clause applies to the States).

The Federal Circuit's decision below threatens property rights by treating any property without a current positive cash flow as worthless—letting the government take that private property for free. That reasoning works serious damage to takings law and to the security of investment-backed expectations, which underlie the commitment of current and future resources to capital projects. The amici therefore have an interest in this Court's review of the Federal Circuit's decision.

SUMMARY OF ARGUMENT

I. Property is not deemed worthless for takings purposes simply because it lacks a present cash flow. Rather, compensation for takings purposes turns on a property's fair market value, determined with reference to a property's highest and best use even if the carrying costs of investment real estate or other property make it cash-flow negative at the time of the taking.

To hold otherwise would carve out a significant segment of private property from the protections of the Takings Clause. But the Takings Clause in unequivocal and broad in stating that it protects "private property," without qualification. U.S. Const. amend. V. That broad scope is consistent with the pre-Founding history of protections for private property, public understanding at the Founding generation, and this Court's subsequent holdings. Yet the Federal Circuit's reasoning below in effect carves out from the Takings Clause any private property not generating a positive cash flow. That would carve out property whose market value arises not from current profit but from the prospect of appreciation. It would threaten properties such as churches and houses of worship. And it would carve out property owned by non-profit organizations and even many homeowners. The value of property is not negated by the fact that it is not current turning a profit.

II. The Federal Circuit's legally untenable dilution of the Takings Clause will have serious negative effects on nationwide investment. It will chill the private allocation of capital to projects requiring ramp-up periods before profitability, all to the detriment of the prosperity of our communities. Certiorari should be granted.

ARGUMENT

I. Just Compensation Is Due For The Taking Of Any Private Property, Including Property Held For Investment Or Nonprofit Use.

Protecting private property was of paramount importance to our Founders. As Alexander Hamilton explained at the Constitutional Convention of 1787, "one great obj[ect] of Gov[ernment] is [the] personal protection and the security of Property." 1 Records of the Federal Convention of 1787, at 302 (Max Farrand ed., 1911).

The Constitution itself reflects the importance of private property. Its enumerated rights include several provisions recognizing the rights of citizens in their property. *E.g.*, U.S. Const. art. III § 3 (restricting punishment by forfeiture of property); *id.* amend. V (requiring due process for deprivation of property by the federal government); *id.* amend. XIV, § 1 (same as to the States).

Notable among those provisions is the Takings Clause of the Fifth Amendment. It provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Constitution thus guarantees just compensation in the extraordinary circumstance in which the government uses its powers to confiscate a citizen's property for public use.

The Federal Circuit's decision below shrivels that vital protection by treating a property as *worth nothing to begin with* merely because the property is not producing "revenue [that] exceed[s] [the owner's] carrying costs." Pet. App. 19. That remarkable reasoning would shrink

the Taking Clause to a fraction of its proper scope, protecting only cashflow-positive property as opposed to *all* property that has a proven, objective market value.

For example, the Federal Circuit's reasoning would mean that *no compensation at all* is due when the government takes an inherited farm lying fallow until a new owner can be found to produce on it. Or when the government seizes a church, mosque, or synagogue, or another institution not operating for a profit. Likewise, although a building leased to a profitable store would be allowed a market value requiring compensation upon a taking, the same building being held for appreciation would have no market value under the reasoning below because its carrying costs exceed its current cashflow.

All of those types of property could be sold for cash on the open market, which does not value property based merely on its temporary current use. *See Olson v. United States*, 292 U.S. 246, 255 (1934) ("The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable."); *State v. Cent. Expwy. Sign Assocs.*, 302 S.W.3d 866, 870-72 (Tex. 2009) (noting that the income approach to valuation considers future income). And the law puts a property owner in the pre-taking position by paying the "fair market value" of the property lost. *E.g.*, *United States v. 564.54 Acres of Land, More or Less, Situated in Monroe & Pike Ctys.*, 441 U.S. 506, 511 (1979). But the Federal Circuit's reasoning would let the government take such investment property for free.

That result comports with neither the original understanding of the Takings Clause nor its application by federal courts. Legal protection of private property traces to well before the Constitution. The Magna Carta contained a progenitor of the Takings Clause that required compensation for the taking of a person's property. *See* Magna Carta § 28, *reprinted in* William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 329 (2d ed. 1914). And the Massachusetts Body of Liberties of 1641—an early proto-constitution of that colony—contained a takings clause providing that "No mans Cattel or goods *of what kinde soever* shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the general Court, nor without such reasonable prices and hrie as the ordinary rates of the Countrie do afford." Massachusetts Body of Liberties § 8 (1641), *reprinted in* 13 *American Historical Documents 1000-1904*, at 70, 71-72 (2009 ed.) (emphasis added).

Our nation's Founders took those protections to heart. Rather than protecting only some types of property, the Founders drafted the Fifth Amendment to protect "private property" without qualification. U.S. Const. amend. V. As James Madison wrote in his famous 1792 essay: "Government is instituted to protect property *of every sort*." James Madison, *Property*, *reprinted in* 14 The Papers of James Madison 266-68 (William T. Hutchison et al. eds., University Press of Virginia 1977) (emphasis added). And Madison, of course, was the primary drafter of the Fifth Amendment. *See* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 77-78 (1998). Since the Founding, therefore, it has been

understood that the Takings Clause protects *all* of a citizen's private property.

For good reason. The Founders understood that private property is not merely the cornerstone of prosperity, but the cornerstone of freedom itself. Thomas Jefferson explained that "[t]he political institutions of America . . . open[ed a] certain resource to the unfortunate and to the enterprising of every country and ensured to them the acquisition and free position of property." Thomas Jefferson, *Declaration on Taking Up Arms* (1775), *reprinted in* 2 *The Works of Thomas Jefferson* 113 (Paul Leicester Ford ed., 1904). To respect that importance of private property, any exercise of federal power is constrained by the obligation to make just compensation to the owner of private property taken in that pursuit. Otherwise, the costs of the purported benefits to the public from the governmental taking would fall entirely on the owner—tantamount to theft.

This Court recently granted review to confirm that the Takings Clause protects *all* property, not just some subset of it. *Horne v. Dep't of Agriculture*, 135 S. Ct. 2419, 2426 (2015) (rejecting the notion that personal property enjoys less protection than real property: "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."). Yet the decision below violates that principle. On the Federal Circuit's reasoning, even taking a house owned in fee simple would require zero compensation if the owner is not currently renting out the house for more than the owner's property taxes and maintenance costs. After all, the property is not generating a positive cash

flow at the time of the taking. But that approach—treating zero- or negative-cashflow property as being without value on the open market—would effectively carve out big swaths of property from the Takings Clause's protections. That is contrary to *Horne*'s confirmation that the Takings Clause, by its plain text, reaches *all* property. The Court should grant certiorari again to reject the lower court's attempt to carve out property from the protections of the Takings Clause.

The Federal Circuit's reasoning below is also inconsistent with this Court's decision in *Lucas v. South Carolina*, 505 U.S. 1003 (1992). In that case, Davis Lucas owned two residential lots in Charleston County, South Carolina, on which he intended to build single-family homes. *Id.* at 1006-07. Although the lots were subject to property taxes and doubtless other maintenance costs, *see* S.C. Code § 12-37-210, they were vacant and thus not producing income at the time of the state regulatory action challenged as a taking. *See Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 895 (S.C. 1991), *reversed*, 505 U.S. 1003. But although Lucas's property was not cashflow-positive at the time of the state regulatory action, this Court ruled for him and remanded so that "compensation must be paid" if the Court's test for a taking was met. *Lucas*, 505 U.S. at 1030. On the Federal Circuit's reasoning, however, the Court should have ruled against Lucas because the vacant lots were not generating income at the time of the alleged taking. The decision below is as equally hard to square with *Lucas* as with first principles of valuation under the Takings Clause.

II. Diluting The Takings Clause Based On Current Cashflow From A Property Will Have Serious Negative Effects On Investment Nationwide.

Treating property as having no market value simply because the property is not currently producing "revenue [that] exceed[s] [the owner's] carrying costs," Pet. App. 19, will put a serious drain on investment across the Nation. The fair market value of property is not determined by just its current use. Rather, "the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held." *Olson,* 292 U.S. at 255.

That is not just how the law values property. It is how the market values property. Carrying costs creating a negative cashflow do not mean that a property has no value. For example, investors often pay good money to buy real estate that the investor holds for appreciation or to develop for future use, even though the land has carrying costs while held as investment. *See, e.g.*, John F. McDonald & Daniel P. McMillen, *Urban Economics and Real Estate: Theory and Policy* 245 (2d ed. 2011) ("The completion of a real estate development may take several years. During this time there will be 'carrying costs' associated with the land (e.g., property taxes)."); G. Timothy Haight & Daniel D. Singer, *The Real Estate Investment Handbook* 215 (2005) ("As a general rule, investments in undeveloped land generate a negative cash

flow. . . . [T]he investor [must] bear explicit carrying costs such as property taxes and financing costs . . . .").

The decision below remarkably transforms that common feature of investment property into a free pass for the government to gobble up private property. That is not only legally unsupportable, *see infra* Part I, but it would drastically hamper private investment in property. If 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. The market's private-ordering ability to steer money to its best use would crumble under the inability to have concrete expectations about the risk of government interference with ownership. *See* Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity*, 63 St. John's L. Rev. 433, 457-58 (1988) ("Insofar as property is conceptually a set of expectations, any rule which tends to settle expectations is, in that respect at least, a good rule."). In other words, expectations about the security of property rights should be firm and predictable, "so that private individuals confidently can commit resources to capital projects." Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988).

Concrete expectations that property will be protected from uncompensated takings are essential to the vibrancy of private ordering. *See id.*, 88 Colum. L. Rev. at 1702 (arguing against arbitrary takings rules that "introduce[] an element of uncertainty into private invest-

ment decisions that could make the coexistence of democracy and private property more, rather than less, difficult"). Investors with assurance that a regulatory regime "better protects their expectations" would be expected to "commit more resources to capital projects, therefore enabling the highest and best use of property." Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal. L. Rev 609, 620 (2004). Clear rules "ensure fair and value-neutral coherence, regularity, and predictability across disparate, individual cases." *Id.* at 619.

In short, the Federal Circuit's decision undermines important interests that are vital to the protection of private property rights. The notion that a cashflow-negative property has no market value is inconsistent with real world investment practices and market decisions. Such an arbitrary rule is no more sustainable than the arbitrary rule rejected by this Court that a government action is not a taking unless "the volume of space it occupies is bigger than a breadbox." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 n.16 (1982). The investment-backed expectation of a property owner "cannot be so easily manipulated." *Id.* at 439 n.17. The Court should reject the idea that the lack of positive cash flow disqualifies a property interest from the protection of the Takings Clause.

And the issue is an important one in this case, because it arises from the Court of Appeals for the Federal Circuit, which hears all takings cases involving the federal government. There will be no opportunity for further doctrinal development in the circuit courts. See Ryan Stephenson, *Federal Circuit Case Selection at the*

Supreme Court: An Empirical Analysis, 102 Geo. L.J. 271, 288 (2013).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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