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 U.S. Court of Appeals for the Federal Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. In assessing whether the government has effected a compensable taking of private property, may courts treat real property as worthless simply because the owner was not generating positive cash flow 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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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States.[1] WLF promotes and defends free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has frequently appeared in this and other federal courts in cases involving claims arising under the Fifth Amendment's Takings Clause. *See, e.g., Horne v. Dep't of Agriculture*, 135 S. Ct. 2419 (2015); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned that the decision below, unless overturned by this Court, will seriously erode property rights by undermining the ability of owners to obtain just compensation when government regulation

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than 10 days before filing this brief, *amici* notified counsel for Respondent of their intent to file. All parties have provided written consent to the filing.

deprives their property of all economic value. The Federal Circuit does not dispute that 2006 federal legislation barred Petitioners from making any economically viable use of their leasehold interests at Dallas's Love Field. Nor is there any dispute that Petitioners invested millions of dollars in their property in the years before 2006. The appeals court nonetheless concluded that the legislation did not effect a *per se* taking of Petitioners' real property.

That conclusion cannot be squared with this Court's established case law. The Federal Circuit reasoned that no taking has occurred because Petitioners lacked a "reasonable investment backed expectation" in being able to use their property as an airline terminal. But a reasonable-investment-backed-expectation analysis is warranted only when a challenged regulation has deprived real property of some, but not all of its value. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). It is out of place when, as here, the courts determine that government regulation has rendered the property worthless. In such circumstances, the government action is deemed a *per se* taking, so the only issue is how much (if any) compensation is due.

The Court of Federal Claims concluded that Petitioners' compensable loss amounted to $133.5 million. *Amici* take no position on whether an award of that size is justified. But *amici* are deeply concerned by the appeals court's decision to by-pass that analysis by failing to recognize the existence of a *per se* regulatory taking—and thereby overlooking the substantial losses plainly incurred by Petitioners.

STATEMENT OF THE CASE

The facts of this case are set out in detail in the petition. *Amici* wish to highlight several facts of relevance to this brief.

Love Field is a thriving airport located near downtown Dallas, Texas. Its popularity is due largely to its central location; it is far closer to downtown than the rival Dallas-Fort Worth Airport (DFW), which is located halfway between the cities of Dallas and Fort Worth. For that very reason, it has earned the enmity of politicians and others from Fort Worth, who fear that significant expansion of flights out of Love Field might harm the financial viability of DFW.

To promote growth at DFW, Congress in 1980 adopted legislation that limited long-haul flights in and out of Love Field. Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980). Known as the Wright Amendment,[2] the law limited use of Love Field to servicing final destinations within Texas and its four contiguous neighboring States. Although Congress loosened those long-haul limitations somewhat in ensuing years, they remained in place until 2006. But the Wright Amendment imposed no limitation on the total number of commercial flights at Love Field.

Love Field thrived despite the Wright Amendment. The airport's success was keyed by Southwest Airlines, which operated a hub there. Passengers

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[2] The law was named in honor of its principal sponsor, House Majority Leader Jim Wright, the Congressman from Fort Worth.

flying in and out of Dallas often preferred Love Field to DFW given its proximity to downtown Dallas, and it was widely acknowledged that demand for Love Field flights would increase significantly if the Wright Amendment were repealed. Southwest Airlines became a leading and vocal proponent of repeal. A Master Plan spearheaded by Dallas and other interested parties envisioned expansion of Love Field into a 32-gate airport. Pet. App-57.

Love Field's significant expansion potential led Petitioners to purchase and develop real property interests at the airport. The City of Dallas (which owned Love Field) had leased a portion of Love Field to Braniff Airways in 1955. Petitioner Love Terminal Partners, L.P. (LTP) obtained a sublease on a portion of the Braniff property in 1999, and it invested $17 million to construct (in 2000) a six-gate terminal and parking facility on the leased property.[3] The airline industry experienced a sharp downturn following the September 11, 2001 terrorist attacks. But Petitioners remained optimistic about their Love Field property, as evidenced by the 2003 acquisition (by Petitioner Virginia Aerospace, LLC, an entity closely related to Petitioner LTP) of the entire Braniff lease for $6.5 million. Although Petitioners never realized an annual net profit on their Love Field investments, they continued to make regular lease payments to the City of Dallas.

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[3] The Claims Court found that Petitioners were sophisticated investors who conducted a thorough due-diligence review before investing in Love Field. *See, e.g.,* Pet. App-55 to App-57.

In response to Southwest Airline's lobbying effort to repeal the Wright Amendment (and opposition to repeal by, among others, DFW and the City of Fort Worth), several Members of Congress called on Dallas and Fort Worth to arrive at a negotiated solution. Pet. App-5. Those included at the negotiating table were Dallas, Fort Worth, DFW, Southwest Airlines, and American Airlines; Petitioners were excluded. The resulting "Five-Party Agreement" recommended to Congress: (1) gradually repealing all long-haul restrictions at Love Field; (2) permanently limiting Love Field to 20 gates, to be allocated to the main terminal (*i.e.*, not to the Lemmon Avenue terminal owned by Petitioner LTP); and (3) demolishing the Lemmon Avenue terminal, thereby assuring that it would never again be used for commercial passenger service.[4]

Three months later, Congress adopted the Wright Amendment Reform Act of 2006 ("WARA"), Pub. L. No. 109-352, 120 Stat. 2011, which essentially ratified the terms of the Five Party Agreement. Petitioners quickly realized the impact of WARA: its real property at Love Field had been deprived of all economically viable uses. For purposes of its ruling, the Federal Circuit accepted that assessment: "[P]laintiffs' theory as to the effects of the 2006 legislation is correct and ... the legislation effectively barred plaintiffs from using the Lemmon Avenue Terminal for commercial air passenger service." Pet.

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[4] The Five Parties recognized that, without congressional approval, the agreement to limit service would be subject to challenge under antitrust law.

App-12.[5] In light of their realization, Petitioners eventually ceased making payments on their lease. In response to that default, Dallas took possession of the leased property and demolished the Lemmon Avenue terminal.

Petitioners' optimism about the future of Love Field proved prescient. Commercial airline traffic in and out of the airport expanded significantly following the adoption of WARA in 2006. But Petitioners shared in none of that prosperity. In the aftermath of WARA, their Love Field property became worthless—it could no longer be put to any economically viable use.

Petitioners sued the United States in the Claims Court in July 2008, asserting that the Government had taken their property without just compensation, in violation of their Fifth Amendment rights. Afer trial, the Claims Court concluded *inter alia* that: (1) Congress's adoption of WARA was a *per se* regulatory taking of the property because it deprived Petitioners of all economically beneficial use of their real-property leasehold interests, Pet. App-94; and (2) Petitioners were entitled to just compensation of $133.5 million. *Id.* at App-154.

The Federal Circuit reversed. Pet. App-1 to App-29. It held that "there was no regulatory taking under either *Penn Central*'s three-factor analysis or the categorical approach described in *Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)]." *Id.*

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[5] Importantly, no one contends that the Lemmon Avenue Terminal had any other economically viable use.

at App-29. As noted above, the appeals court conceded for purposes of its decision that WARA "effectively barred plaintiffs from using the Lemmon Avenue Terminal for commercial air passenger service." *Id.* at App-12. It nonetheless held that WARA was not a *per se* regulatory taking because, it determined, the property could not profitably have been operated as an air-passenger terminal even before adoption of WARA—and thus had no pre-existing value. *Id.* at App-15 to App-16. The court held:

> [T]o establish regulatory takings liability, a plaintiff must show that a particular government action significantly diminished the value of its property. There cannot be a regulatory taking in the absence of economic injury. ... *This economic impact inquiry relates not to the amount of compensation, but to whether a taking has occurred at all.*

Ibid (emphasis added).[6] Noting that federal law imposed long-haul flight restrictions on Love Field before their repeal by WARA in 2006, the appeals court held that Petitioners failed to establish a regulatory taking because they failed to show that the property could profitably have operated as an air-passenger terminal before 2006, when those restrictions were still in effect. *Id.* at App-17.

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[6] To support that holding, the appeals court cited to its own case law only, not to decisions of this Court.

SUMMARY OF ARGUMENT

The Claims Court found that Congress's adoption of WARA deprived Petitioners of all economically beneficial use of their real property, and the Federal Circuit accepted that factual finding. The appeals court nonetheless held that the deprivation did not constitute a regulatory taking of the property. That holding directly conflicts with the decisions of this Court, which has repeatedly held that regulations that deprive real property of all value are *per se* takings—and that the only issue in such cases is how much (if any) compensation is due for the taking. *See, e.g., Lucas*, 505 U.S. at 1030.

Review is warranted to resolve that conflict. Review is particularly warranted because federal law requires all Takings Clause claims against the federal government to pass through the Federal Circuit. Unless the decision below, and similarly erroneous Federal Circuit decisions, are overturned, litigants' ability to obtain Fifth Amendment just compensation from the federal government will be severely compromised. No other federal appeals court has adopted the Federal Circuit's constricted approach to *per se* regulatory takings of real property.

The Federal Circuit premised its no-regulatory-taking holding on its finding that WARA inflicted no additional "economic injury" on Petitioners because they could not have profitably operated the Lemmon Avenue terminal even before Congress adopted that statute. Pet. App-15 to App-17. That analysis was doubly flawed. First, as noted above, the extent of the loss caused by new government regulations is not

relevant to whether a taking has occurred. Second, the Federal Circuit adopted a flawed method for determining the extent of the loss. This Court has repeatedly held that Fifth Amendment "just compensation" should be based on the fair market value of the property immediately prior to the taking. The Federal Circuit never conducted a fair-market-value analysis. Had it done so, it inevitably would have concluded that a buyer would have been willing to pay a substantial amount for Petitioners' real property in early 2006. We note, for example, that in early 2006 (before WARA's adoption) Petitioners engaged in serious negotiations with Pinnacle Airlines over "a possible sale of the [Braniff] Lease" for as much as $100 million. Pet. App-65. The appeals court scoffed that Petitioners "never received an actual offer," *id.* at App-19, but the fact that substantial sales prices were being seriously negotiated undermines any contention that the property had a fair market value of zero in early 2006.

Rather than analyzing fair market value, the Federal Circuit based its no-loss-and-thus-no-taking holding on its conclusion that the Wright Amendment's long-haul restrictions prevented profitable operation of the property as an air-passenger terminal. Pet. App-15 to App-17. But that is akin to holding that a developer cannot establish a regulatory takings claim if, at the time that the government declares that development of property will never be permitted, a routine zoning variance stands in the way of immediate commencement of construction at the property site.

That approach is inconsistent with traditional understandings of property valuation. Even if one

accepts the Federal Circuit's dubious proposition that Petitioners' lacked a "reasonable investment-backed expectation" that Congress would repeal the Wright Act's long-haul restrictions, many knowledgeable observers predicted (correctly) that repeal was imminent, and those expectations must be factored in when computing the fair market value of Petitioner's property in early 2006. If, as the Claims Court found, willing buyers would have paid substantial sums for that property in expectation that Love Field air traffic would increase substantially, it is irrelevant for fair-market-value purposes that the property was still a net-loss proposition in early 2006. The Claims Court found that Petitioners could have sold their property for a substantial sum in early 2006; the Federal Circuit's assertion that Petitioners had no right to rely on changes in the regulatory environment does nothing to undermine the saliency of the Claims Court's finding.

WARA changed the regulatory environment considerably. Before its enactment, Petitioners were permitted to operate the Lemmon Avenue terminal as an air-passenger terminal, albeit profitable operations might remain difficult for so long as Love Field's long-haul restrictions remained in place. After its enactment, operation of the Lemmon Avenue terminal became impossible; indeed, the terminal had become slated for demolition.

The Federal Circuit's holding means that the federal government can never be required to pay just compensation for regulatory bombshells of this nature. Review is warranted to restore the ability of American property owners to seek redress from their

Government.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. For at least a century, the Fifth Amendment has been understood to require the government to pay "just compensation" to owners of real property whenever it adopts regulations that deprive the property of all economically viable use. The Federal Circuit's decision breaks sharply from that consensus; it held that Petitioners did not even suffer a taking, despite Claims Court findings that federal government regulation rendered their property worthless and inflicted more than $133 million in damages. Review is warranted, particularly because the decision below cuts off all possibility of compensation for those facing similar federal-government regulation.

I. THE DECISION BELOW CONFLICTS WITH SETTLED PRECEDENT THAT REGULATIONS DEPRIVING REAL PROPERTY OWNERS OF ALL VALUE CONSTITUTE *PER SE* TAKINGS, REGARDLESS WHETHER THE REGULATIONS CREATE A COMPENSABLE LOSS

Critical to an understanding of this case is an understanding of what Congress sought to accomplish through enactment of WARA. It sought simultaneously to satisfy the interests of Southwest Airlines and the City of Dallas (who wanted to expand Love Field from a regional airport into one that could serve nationwide travelers) and the interests of DFW and the City of Fort Worth (who wanted assurances that Love Field

would never expand to the point that it would threaten DFW's long-term viability). WARA successfully balanced those interests, but it did so on the backs of Petitioners—who were never invited to the bargaining table. Critical to satisfying DFW's and Fort Worth's interests were absolute assurances that Love Field would never expand beyond a 30-gate airport. WARA (and the Five-Party Agreement it ratified) provided those assurances by not only prohibiting the use of the Lemmon Avenue terminal for air-passenger service but also guaranteeing its demolition.

The Claims Court's two decisions included detailed factual findings explaining why WARA deprived Petitioners of all economically viable use of their real property. *See, e.g.*, Pet. App-76 to App-115. The Federal Circuit never disputed those findings.[7] The appeals court nonetheless held that WARA did not effect a *per se* taking of Petitioners' real property. That decision conflicts with settled precedent from both this Court and other appellate courts.

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[7] The appeals court stated:

> We assume, without deciding, that plaintiffs' theory as to the effect of the 2006 legislation is correct and that the legislation effectively barred plaintiffs from using the Lemmon Avenue Terminal for commercial air passenger service.

Pet. App-12. The appeals court never suggested that the terminal had any other economically viable uses. Indeed, as the Claims Court found, the Braniff lease specified that the property could only be put to aviation-related uses. *Id.* at App-77.

A. The *Penn Central* Reasonable-Investment-Backed-Expectations Analysis Plays No Role Play in *Per Se* Takings Cases

The Takings Clause is "designed to bar 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). The Court recognizes that "no magic formula enables a court, in every case" to determine whether government regulation so unfairly burdens individual property owners so as to constitute a compensable "taking." *Arkansas Game and Fish Comm'n*, 568 U.S. at 32 (stating that "[i]n view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.").

To guide courts in carrying out these "essentially ad hoc, factual inquiries," the Court has identified three factors relevant to Takings Clause determinations: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the government action." *Penn Central*, 438 U.S. at 124.

The Court nonetheless has carved out two discrete categories of government action deemed *always* to constitute a compensable taking, without any need for courts to engage in a detailed *Penn Central* inquiry. Such *per se* takings occur if the government either: (1) takes title to or authorizes permanent

physical occupation of property; or (2) imposes regulations that deny all economically beneficial or productive use of land. *Arkansas Game and Fish Comm'n*, 568 U.S. 31-32; *Lucas*, 505 U.S. at 1015.[8] Importantly, the Court has made clear that analysis of the three *Penn Central* factors is unwarranted in *per se* takings cases; if, for example, government regulation denies all economically beneficial or productive use of land, that is the end of the "taking" inquiry—and the only remaining inquiry is the amount of "just compensation" (if any). *See, e.g. Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (courts should undertake a *Penn Central* analysis only "[w]here a regulation places limitations on land that fall short of eliminating all economically beneficial use"); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017).

In conflict with those decisions, the Federal Circuit employed a *Penn Central* analysis in concluding that WARA did not amount to a "taking" of Petitioners' property. Pet. App-19 to App-26. The appeals court held that no taking occurred because (per the second *Penn Central* factor) Petitioners' lacked any reasonable

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[8] *Lucas* added one caveat to the *per se* takings rules: a regulation that denies all economically viable use of real property will not require compensation if the challenged land-use restriction "inhere[s] ... in the restrictions that background principles of property and nuisance already placed upon land ownership." 505 U.S. at 1029. No one contends that that caveat is relevant here; no one contends, for example, that operation of the Lemmon Avenue terminal for air-passenger service would constitute a public nuisance. Evidence, as here, that "other landowners, similarly situated, are permitted to continue the use denied to the claimant" is strong evidence that the claimant's proposed use is *not* barred by background principles of property law. *Id.* at 1031.

investment-backed expectation of profitability so long as the long-haul restrictions remained in place at Love Field, and that such expectations could not, as a matter of law, be based merely on a hope of future repeal:

> The reasonable, investment-backed expectation analysis is designed to account for property owners' expectation that the regulatory regime in existence at the time of their acquisition will remain in place, and that new, more restrictive legislation or regulations will not be adopted. As we said in *Cienega Gardens* [*v. United States*, 331 F.3d 1319, 1328 (Fed. Cir. 2003)], "the purpose of consideration of plaintiffs' investment-backed expectations is to limit recoveries to property owners who can demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." 331 F.3d at 1346. This expectations analysis is not designed to protect private predictions of future regulatory change. To the contrary, what is relevant and important in judging reasonable expectations is the regulatory environment at the time of the acquisition of the property.

Pet. App-20 to App-21.

The entire line of Federal Circuit case law relied on by the court below is unsound and sharply conflicts with this Court's *per se* taking case law. As explained

above, once it was determined that WARA deprived Petitioners of all economically viable use of their land, *Lucas* dictates that the statute effected a "taking," and the Federal Circuit's challenges to the reasonableness of Petitioner's investment-backed expectations are irrelevant to the analysis.

Moreover, the appeals court's reasonable-investment-backed-expectations analysis makes little sense. Petitioners are not challenging regulations that were already in place when they purchased the Love Field property and constructed a $17 million terminal. Indeed, they correctly predicted that the in-place regulations (the long-haul restrictions) would be repealed. Their Fifth Amendment claims are based on Congress's adoption of entirely new (and much more onerous) regulations that (the Federal Circuit concedes) deprived the property of all value.

In support of its reasonable-investment-backed-expectations analysis, the Federal Circuit cited *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984):

> In *Ruckelshaus*, for instance, the Supreme Court concluded that plaintiffs only had a reasonable expectation in the confidentiality of trade secrets disclosed to the EPA in pesticide registration applications to the extent that the relevant statute explicitly guaranteed confidentiality at the time of submission. 467 U.S. at 1005-06. The Court explained that plaintiffs could not have had a reasonable expectation of trade secret confidentiality prior to 1972, when the

> statute was silent as to how the EPA could use and disclose data, or after 1978, when the statute explicitly allowed disclosure of all data after ten years.

Pet. App-21 to App-22 (citing 467 U.S. at 1006-10).

Ruckelshaus is wholly inapt. The property at issue in that Takings Clause case was intangible personal property (trade secrets), and the *per se* taking rule at issue here (the rule governing regulations that deprive property of all value) applies only to land, not to personal property.[9] So the Court's rationale for undertaking a *Penn Central* reasonable-investment-backed-expectations analysis in *Ruckelshaus* is inapplicable here. Moreover, *Horne* explained that *Ruckelshaus*'s holding is far more limited than the Federal Circuit suggests. *Ruckelshaus* holds that when a business seeks a "government benefit" (in that case, a license to market a hazardous chemical), part of its "voluntary exchange" with the government is surrender of trade secrets necessary to determine the chemical's safety. *Horne*, 135 S. Ct. at 2430. Unlike the plaintiff in *Ruckelshaus*, Petitioners have not sought any government benefit; locating air-passenger services at the Lemmon Avenue terminal (rather than

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[9] Explaining the rationale for the differing degrees of protection afforded to real and personal property, *Lucas* stated: "[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings [the property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." 505 U.S. at 1027-28.

at the other Love Field locations specified by WARA) "cannot remotely be described as a 'government benefit.'" 135 S. Ct. at 2430 (quoting *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825, 834 n.2 (1987)).

Importantly, the no-taking holding is erroneous and warrants review even if the Federal Circuit correctly determined that Petitioners' property had no economic value in early 2006 (and as explained in detail in Part II, that determination was incorrect as a matter of law). *Brown* expressly held that when one of the two *per se* taking rules applies, a taking has occurred, and the issue of whether the taken property had economic value should only be considered as part of a court's subsequent, "just compensation" analysis.

Brown was a challenge to the constitutionality of a rule adopted by the State of Washington that required lawyers holding small amounts of client cash in escrow accounts to pay interest earned on those accounts to the State. Two clients sued, claiming that they were the rightful owners of any interest. The Court agreed and held that Washington's seizure of the interest constituted a *per se* taking of their property. *Brown*, 538 U.S. at 235 (citing *Phillips*, 524 U.S. at 172). *Brown* went on to conclude that the "just compensation" to which the plaintiffs were entitled was zero because they could not have generated any net interest from their funds if left to their own devices, *id.* at 240, but that conclusion did not alter its finding that a *per se* taking had occurred.

B. Other Appellate Courts Have Eschewed the Federal Circuit's Constricted Understanding of *Per Se* Takings

Federal Circuit case law is an outlier. No other appellate court decision of which *amici* are aware has emulated the Federal Circuit's approach to *per se* takings claims. Instead, other courts uniformly review claims that a regulation has effected a *per se* taking by addressing only the issues as framed by *Lucas*: does the challenged regulation take title to the plaintiff's property, or does it deprive the plaintiff's land of all economically beneficial or productive use? 505 U.S. at 1015. Review is warranted to resolve that conflict.

The decision below included citations to *Brown*, but it failed to address *Brown*'s holding that whether the regulated property had pre-regulatory value is not relevant to the *per se* taking analysis. Those appellate courts that have addressed *Brown*'s relevant holding reached results that directly conflict with the decision below: they have concluded that the *per se* taking analysis is unaffected by the government's claim that the "just compensation" is zero because the plaintiff's property was economically worthless. *See, e.g., Goldberg v. Frerichs*, 912 F.3d 1009, 1010-11 (7th Cir. 2019) (Easterbrook, J.); *Hall v. State of Minnesota*, 908 N.W.2d 345, 355 (Minn. 2018); *Canel v. Topinka*, 212 Ill.2d 311, 331-33 (2004).

Delaying review to allow additional percolation of the issue makes little sense in light of the Federal Circuit's unique jurisdiction. The Tucker Act, 28 U.S.C. § 1491, requires all Takings Clause claims

against the federal government to pass through the Federal Circuit. Thus, the conflict between the Federal Circuit and other state and federal appellate courts is unlikely to become any more pronounced, because no future conflicting decisions will involve claims against the federal government. But in the meantime, takings claimants against the federal government will continue to be at a unique disadvantage in comparison to claimants against state and local governments.

II. THE FEDERAL CIRCUIT'S NOVEL APPROACH CAUSED IT TO FORGO ANY ANALYSIS OF THE PROPERTY'S FAIR MARKET VALUE, AN ANALYSIS THAT CONFIRMS THE CLAIMS COURT'S FINDINGS OF SUBSTANTIAL LOSS

A. The Court Below Never Considered the Early-2006 Fair Market Value of the Property

The United States is likely to respond to the foregoing argument (that the Federal Circuit erred in failing to find a *per se* taking) by arguing, "No harm, no foul. Review is unwarranted because even if the Federal Circuit's legal analysis was faulty, it reached the correct bottom line: no "just compensation" is due because (as the Federal Circuit correctly determined) the pre-WARA value of Petitioner's property was zero."

That argument is unavailing, because the Federal Circuit plainly applied an incorrect method in determining the value of Petitioners' property in early 2006, just prior to passage of WARA.

This Court has repeatedly held that "just

compensation" for a Takings Clause violation should be based on the fair market value at the time of the taking. *Olson v. United States*, 292 U.S. 246, 255 (1934); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5-6 (1949) (stating that the "measure" of just compensation is the amount of cash or equivalent that a purchaser would have paid "had a voluntary exchange taken place"); *United States v. Miller*, 317 U.S. 369, 374 (1943) (just compensation is "what a willing buyer would pay in cash to a willing seller" at the time of the taking). Courts are directed to determine fair market value based on the price:

> that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate, there should be taken into account all considerations that fairly might be given substantial weight in such bargaining.

Olson, 292 U.S. at 257.

The Court has explicitly recognized that "future events or combinations of occurrence" may play a role in determining fair market value. *Ibid.* Future events "shown to be reasonably probable" are relevant factors, but they should be "excluded from consideration" if they are based on "mere speculation and conjecture. " *Ibid.*

In conflict with that case law, the court below adopted a far more restricted view of property valuation. The appeals court concluded that value could only be based on the property's current income-

producing capability in light of current government regulations, regardless how likely it was that those regulations would be altered. Pet. App-18. The court never examined how much willing buyers would have been willing to pay for Petitioners' property in early 2016, a time when (according to the Claims Court's findings) informed observers were correctly predicting that Congress would soon lift the long-haul restrictions at Love Field—and a time when air-traffic operations were still permissible at the Lemmon Avenue terminal. Review is warranted to resolve the conflict between this Court and the court below regarding property-valuation methodologies.

B. The Early-2006 Fair Market Value Was Substantially Greater than Zero

Review is particularly warranted because the conflicting property-valuation methodologies are plainly outcome-determinative. Had the Federal Circuit adopted a fair-market-value methodology, it would have concluded that Petitioners' property had a substantially-greater-than-zero value in early 2006, a value that should have been employed in computing "just compensation."

Amici note initially that the Federal Circuit's zero-value determination flies in the face of *all* of the expert testimony at trial, as well as the district court's factual findings. For example, Michael Massey, one of Petitioners' expert witnesses (who testimony was credited by the Claims Court), valued Petitioner's 9.3-acre sublease at $20.5 million. Pet. App-86. The United States's experts *conceded* that the sublease had a substantial fair market value in early 2006; their

principal defense was that the sublease retained substantial value even after adoption of WARA. In other words, the Federal Circuit's no-value finding is not even supported by the testimony of the Government's expert witnesses.

The substantial fair market value of the property is also supported by the huge financial investments that Petitioners continued to make in the property between 1999 and 2006—including building a $17 million terminal in 2000, purchasing the entire Braniff lease in 2003, and making lease payments to the City of Dallas throughout the period. Such expenditures by sophisticated investors are inconsistent with a determination that the property was worthless. As *Kimball Laundry* recognized, business assets can have considerable fair market value, "even in a business losing money"; and "[s]ince land and buildings are assumed to have some transferable value, when a claimant for just compensation for their taking proves that he was their owner, that proof is ipso facto proof that he is entitled to some compensation." *Kimball Laundry*, 338 U.S. at 19, 20. Moreover, in light of the Claims Court's findings that knowledgeable observers were confident in the years preceding 2006 that Congress was preparing to repeal Love Field's long-haul restrictions, Pet. App-117 to App-126, the likelihood of repeal is appropriately factored into the fair-market-value computation. *Olson*, 292 U.S. at 257.

The Federal Circuit cited *Miller* in support of its refusal to ascribe pre-WARA value to the property. Pet. App-24 to App-25. Its reliance on that decision was misplaced. *Miller* held that "just compensation"

does not include increases in property value caused by knowledge of government plans to acquire property through condemnation. 317 U.S. at 281. But this case does not involve any government acquisition of property. Rather, a reason for fair-market-value increases in this case was knowledge of the increasing likelihood that the government would relax long-haul restrictions. Those increases are unrelated to the government's later decision to "take" Petitioners' property by adopting restrictions that deprived the property of all economically beneficial use.

While appraisal experts may differ on the precise valuation of Petitioners' property, the evidence at trial conclusively demonstrated that the property had a substantial fair market value before the 2006 enactment of WARA. Review is warranted to address the Federal Circuit's refusal to conduct a fair-market-value analysis, which would have disclosed that substantial value.

C. The Appeals Court's Decision to Forgo a Fair-Market-Value Analysis Undermines Private Property Rights

Review is particularly warranted because the decision below seriously undermines private property rights. Petitioners invested millions of dollars at Love Field to operate an air-passenger terminal. By all objective criteria, that was a reasonable investment decision. Petitioners were authorized to operate their terminal under existing governments regulations, and they had good reason to believe that those regulations would be relaxed—thereby increasing profitability. Then Congress unexpectedly adopted legislation that

prohibited Petitioners operations and deprived their property of all economically beneficial use.

Historically, the Takings Clause has been invoked to ensure compensation to property owners in precisely these sorts of circumstances. Yet, the Federal Circuit has now decreed that the federal government need not provide compensation. The appeals court has, in effect, declared irrelevant that the property may have had substantial fair market value at the time of the new regulation. Instead of undertaking a fair-market-value evaluation, it has directed trial courts to deny all compensation if, at the time of the new regulation, any other regulations interfered with the owner's profitable operations.

This highly restrictive view of Fifth Amendment rights seriously undermines property owners' ability to obtain "just compensation" for draconian restrictions on their property rights. The decision below is akin to a holding that a developer cannot establish a regulatory takings claim if, at the time that the government declares that development of property will never be permitted, a routine zoning variance stands in the way of immediate commencement of construction at the property site. According to the Federal Circuit, the property's appraised value can never take into account the likelihood that the variance will be granted, no matter how great that likelihood. This serious intrusion on property rights warrants review and reversal.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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