No. 18-324

In the

Supreme Court of the United States

DOUGLAS LEONE, et ux.,
Petitioners,

v.

MAUI COUNTY, et al.,
Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of Hawai'i

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional Jurisprudence
c/o Dale E. Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether holding undeveloped property as an "investment" or using it as a "park" in its natural state constitutes economically beneficial or productive use of land under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual right to own and use property at issue in this case. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing the Takings Clause, including *Knick v. Township of Scott*, No. 17-647; *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012); and *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010).

SUMMARY OF ARGUMENT

The Hawai'i Supreme Court ruled that that a regulation requiring land to be maintained in its natural state is not a taking because the owner could sell the property. The state court essentially adopted the view of the dissent in *Lucas* rather than the opinion of the Court. In doing so, the Hawai'i Supreme Court created a conflict between itself and the Ninth Circuit Court of Appeals. Regulations that only allow the property owner to hold the property for future sale are

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[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

a taking requiring compensation. The individual rights in property recognized by the Constitution are rights to *use* property – not simply to hold it for investment.

The individual right to own and use property is at the very foundation of liberty. The Takings Clause is meant to spell out conditions for government interference with this natural right in those instances where public necessity requires that the ownership and use of the property be transferred to the government. The Takings Clause allows the government to force a sale of the property – distinguishing the right in property from other rights recognized in the Bill of Rights. Yet the County of Maui in this case seeks to circumvent even this rather modest requirement for the violation of a fundamental right. It seeks in this case to require the property owner to hold its property in its natural state. The County wants the property for a park but is unwilling to pay for it. In this circumstance, the County may not require the owner to hold the property in its natural state as a park for public use.

REASONS FOR GRANTING THE WRIT

I. The Hawai'i Decision Conflicts with this Court's decision in *Lucas* and the Ninth Circuit Courts of Appeals' Decision in *Del Monte Dunes*.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court ruled that a regulation that denied economically beneficial use of land by requiring that it be left in its natural state was a categorical taking. *Id*. at 1018. Although the Court noted that it was deciding the case on the record, which included a finding that the property in question retained

no value, the Court frequently focused on whether there was a use that the owner could make of the property. For instance, the Court noted that the inquiry was into whether common law would have permitted the "prohibition of the 'essential use'" of the property. *Id*. at 1031. This Court also constantly referred to the requirement that the property be left in its natural state as the key defect of the regulation. *Id*. at 1016 n.7, 1018. In examining regulations that prohibit "use" of property, this Court noted that the Takings Clause protected against *more* than the "development uses" of property. *Id*. at 1020 n.8. Nonetheless, this Court noted that "our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land." *Id*.

The dissent in *Lucas* argued that the property retained value because it could be sold, and this residual value was a sufficient use to avoid a categorical taking. *Id*. at 1044 (Blackmun, J., dissenting); 1065 n.3 (Stevens, J., dissenting). The majority of this Court was not swayed by the argument.

The Hawai'i Supreme Court, however, apparently followed the dissenters' analysis and ruled that the investment value in the property was a sufficient use to avoid a categorical taking. Petitioners Appendix at A30-32. This finding puts the Hawai'i Supreme Court in conflict with the Ninth Circuit Court of Appeals on this issue.

The Ninth Circuit, in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), recognized that the inquiry into economic beneficial use under this Court's decision in *Lucas* looks at whether the land is required to be left in its natural

state. *Id*. at 1432. The Ninth Circuit expressly rejected the notion that ability to sell the property, even at a profit, constituted proof of an economically viable use.[2] *Id*. at 1432-33. In contrast to the Hawai'i Supreme Court, the Ninth Circuit ruled that "focusing solely on property values confuses the economically viable use inquiry with the diminution of value inquiry normally applied only where no categorical taking exists." *Id*. at 1433.[3]

The Hawai'i Supreme Court created a conflict because it lost sight of what the Takings Clause protects. It is the right to put property to economically productive use, to build one's home, or to create a space where the owner has the right to exclude all others.

II. Individual Rights in Property Are at the Foundation of Individual Liberty.

One of the founding principles of this nation was the view that liberty and individual rights in property are inextricably intertwined. St. George Tucker, *On the Several Forms of Government*, in VIEW OF THE CONSTITUTION AND SELECTED WRITINGS, at 41 (Liberty Fund (1999). In 1768, the editor of the Boston Gazette

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[2] By contrast, the Hawai'i Supreme Court determined that the ability to sell the property was itself a use for purposes of the Takings analysis under *Lucas*. Petitioners' Appendix at A30-32.

[3] The diminution of value inquiry is part of the confusion created by this Court's decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Using the analysis from that case a court could find that a regulation that requires land to be left in its natural state (i.e., one that prohibits use) does not result in a taking. This *Penn Central* confusion is another reason why the Court must preserve the categorical taking rule lest rights in property preserved by the Constitution be converted into mere privileges that can be revoked by state regulation.

wrote: "Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd, that we cannot be said to possess the one without the enjoyment of the other." Editor, Boston Gazette, Feb. 22, 1768, at 1. This widespread association of liberty and property, particularly fueled by the availability of land, grew from the background and influence of English law and philosophy.

In his 1765 Commentaries on English Law William Blackstone explained the application of the Magna Carta and defined private property rights as both sacred and inviolable. It was the "absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution." William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND 135 (Univ. of Chicago Press 1979) (1765).

John Locke, who influenced the framers of our Constitution, taught that the right to own private property was natural and in fact preceded the state's political authority. Locke's 1690 *Two Treatises of Government* suggested that rights in property were inseparable from liberty in general, and that the only purpose of government was to protect property and all of its aspects and rights. James W. Ely, Jr., PROPERTY RIGHTS: THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 17 (1997). "The great and chief end therefore, of Men's uniting into Commonwealths, and putting themselves under Government, is the preservation of Property." John Locke, TWO TREATISES OF GOVERNMENT 380 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690). Property ownership was identified with the preservation of political liberty.

This view of property and liberty was at the root of the revolution and later, the Constitution. As Arthur Lee of Virginia declared in his revolutionary 1775 publication, "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty". Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain*, *in* PRESENT DISPUTE WITH AMERICA 14 (4th ed. 1775).

In 1776, the Declaration of Independence solidified this tie between political liberty and private property. In drafting the Declaration, Thomas Jefferson did not distinguish property from other natural rights, borrowing heavily from John Locke. Ely, PROPERTY RIGHTS, *supra*, at 17. Locke described the natural rights that government was formed to protect as "life, liberty, and estates." Jefferson substituted "pursuit of happiness" for "estates," but this should not be misunderstood as any de-emphasis of property rights. Instead, the acquisition of property and the pursuit of happiness were so closely transposed that the founding generation found the naming of either one sufficient to invoke both. Willi Paul Adams, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 193 (1980).

"Liberty and Property" became the first motto of the revolutionary movement. Ely, PROPERTY RIGHTS, *supra*, at 25. The new Americans emphasized the centrality and importance of the right to property in constitutional thought. Protection of property ownership was integral in formation of the constitutional limits on governmental authority. *Id.* at 26. As English pol-

icies continued to threaten colonial economic interests, they strengthened the philosophical link between property ownership and the enjoyment of political liberty in American's eyes. Adams, *supra*, at 193.

The widespread availability of land did not alter the view that rights in property could not be overcome by a simple public desire. Instead, it strengthened the view that property was central to the new American social and political order. *Id.* Early State constitutions explicitly reflected this fundamental principle in their language. New Hampshire's 1783 Constitution was one of four to declare that "All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting property; and, in a word, of seeking and obtaining happiness." N.H. Const. pt. 1, art. 2.

Revolutionary dialogue and publications emphasized the interdependence between liberty and property. In 1795, Alexander Hamilton wrote: "Adieu to the security of property adieu to the security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, *The Defense of the Funding System*, in 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973). When the delegates to the Philadelphia convention gathered in 1787, they echoed this philosophy. Delegate John Rutledge of South Carolina, for instance, argued that "Property was certainly the principal object of Society." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 534 (Max Farrand ed., Yale Univ. Press rev. ed. 1937).

The order in which James Wilson listed the natural rights of individuals in his 1790 writing is telling—

property came unapologetically first: "I am first to show, that a man has a natural right to his property, to his character, to liberty, and to safety." James Wilson, 2 COLLECTED WORKS OF JAMES WILSON ch. 12 (Kermit L. Hall & Mark David Hall eds., 2007). Also in 1790, John Adams proclaimed "Property must be secured, or liberty cannot exist." John Adams, *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851).

The founding generation believed that all that which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Noah Webster, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 58-61 (Oct. 10, 1787).

But the rights in property considered essential to liberty were not simply ownership or the ability to sell land to a neighbor. The right to put the property to use was seen as the key to liberty. *See* John Locke, *Second Treatise* §§ 31-45, *supra*. Blackstone also noted that rights in property were rooted in its use. William Blackstone, COMMENTARIES, *supra*.

The founding generation agreed with this view. Gouverneur Morris argued that a free society must recognize in "every Citizen … the Right freely to use his Property." Gouverneur Morris, *Political Inquiries*, in 1 THE FOUNDERS' CONSTITUTION 588 (Philip B. Kurland and Ralph Lerner, eds. 1987). James Madison insisted that the United States could not allow even indirect interference with these vital individual rights

to own and use property. James Madison, *Property*, in 1 THE FOUNDERS' CONSTITUTION 598.

The conception of the individual rights in private property held by the founding generation (and protected by the Takings Clause) did not include a state power to require that land be left in its natural condition. Review should be granted in this case to settle that the Constitution's protection of property still includes the right to use that property.

CONCLUSION

The individual right in property is the right to use that property. A government that wishes to take away that right need only pay just compensation. The County of Maui refused to do that in this case. This Court should grant the petition to resolve the conflict between the Hawaii Supreme Court and the Ninth and Federal Circuit Courts of Appeals.

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Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional Jurisprudence
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae