No. 18-324

In the Supreme Court of the United States

DOUGLAS LEONE, ET AL., PETITIONERS

v.

MAUI COUNTY, HAWAII, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF CERTIORARI

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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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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[*]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber routinely advocates for the interests of the business community in courts across the nation by filing *amicus curiae* briefs in cases implicating issues of concern to the nation's business community.

The Chamber has long advocated for the constitutional protection of its members' property rights, which are essential to a broad range of business activities ranging from significant investment and redevelopment projects to financing small business initiatives. Clear rules for assessing the legal rights and expectation interests in the use of real property are central to the success and future of such ventures.

The Fifth Amendment provides that private property shall not be taken without just compensation. Applying this constitutional guarantee, this Court has held that "when the owner of real property has been

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[*]Pursuant to Rule 37.2(a), *amicus* provided timely notice of its intention to file this brief. All parties consented. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

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" for which just compensation is required. *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). Lower courts are divided on how to apply *Lucas*, and particularly its reference to "all economically beneficial uses," in so-called regulatory takings cases. The resulting uncertainty, exacerbated by the Hawaii Supreme Court's interpretation below, threatens economic development that is vital to businesses and communities across the country. Review is warranted.

SUMMARY OF ARGUMENT

Petitioners bought the property at issue in this case—a beachfront lot in Maui, Hawaii zoned for single-family residences—with the intent to build a family home. Today, several of the neighboring plots have been so improved. Maui County, however, wished to keep Petitioners' property undeveloped so that it could be used as a *de facto* public park. Unable to afford to buy the land for this purpose, the county used its regulatory authority to preclude Petitioners from developing the property, reasoning that if the county "can't buy" the land but says "no you can't develop it," then the public "ha[s] access to it, at least the beach." Pet. App. 72a–73a. Petitioners sued, arguing that this regulatory action converted the property to public use without just compensation.

The Hawaii Supreme Court disagreed, holding that Petitioners were not entitled to just compensation because the county's regulatory actions did not deny them "*all* economically beneficial uses in the name of the common good." *Lucas*, 505 U.S. at 1019 (emphasis added); Pet. App. 55a. Specifically, the court held that

because the land retained "investment use" or, alternatively, because Petitioners "could potentially conduct commercial activities on their property as a park," no taking occurred. Pet. App. 55a.

This ruling effectively nullifies *Lucas* because any plot of land presumably has some residual investment value, and a landowner presumably could always sell lemonade on property that has been converted by regulatory fiat into a *de facto* public park. Indeed, both of these presumptions would have applied with equal force to *Lucas* itself, yet this Court held that a categorical taking *had* occurred. See 505 U.S. at 1020. In disregarding this history and myopically overreading *Lucas*'s reference to "all economic beneficial uses," *id.* at 1019, the decision below erodes constitutional protections against government interference with property rights that are of exceptional importance not only to the Chamber and its members, but also to a broad range of communities and other beneficiaries of real estate-related development projects.

A clear legal framework for enforcing these protections is essential to providing some measure of predictability to the otherwise "'essentially ad hoc, factual inquiries'" that drive regulatory takings jurisprudence. *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). Participants in the real estate market—whether owners, lenders, developers, or other project beneficiaries (including schools, community centers, renters, and business employees)—will be able to support and rely on development projects knowing that, if the government upsets expectations by converting pri-

vate land to public use, the owners will be justly compensated. Governments, in turn, will be encouraged to weigh regulatory and eminent domain decisions responsibly, with a view to their impact on the public fisc and alternative cost-benefit choices for advancing community interests.

The decision below threatens this constitutionally calibrated balancing of public and private rights. The lower court's misreading of *Lucas* harms not only property owners such as Petitioners, but also a broad range of other stakeholders by increasing the risk and costs of financing or otherwise supporting real estate-related projects that bring capital, jobs, and educational and social opportunities to communities across the country.

The lower court's response—that this case does not implicate any of these issues because Petitioners retain "investment uses" of the property, Pet. App. 55a—does not withstand scrutiny under this Court's precedents or common sense. This Court has long recognized that "[t]he value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner." *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 328 (1893). The notion that Petitioners did not suffer a regulatory taking under this standard because they are free to operate a lemonade stand on private property the government *admits* it converted to public use, Pet. App. 55a, cannot be reconciled with the Fifth Amendment or this Court's decisions applying it.

Even assuming Petitioners could sell the ocean of lemonade it would take to cover taxes and operating expenses on the property in issue, that is not the point.

The point is that the decision below deepens a troubling split over the proper application of *Lucas* and the Fifth Amendment rights it protects, Hawaii's side of which breaks from constitutional moorings to a degree that is bound to deter or destabilize a broad range of economic activity. This case presents a compelling opportunity to resolve this division and reaffirm the fundamental protections the Fifth Amendment grants those who, like Petitioners and the Chamber's many members, invest in real property subject to government regulation to further an array of important private and public interests.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Deepens Lower Court Division Over the Proper Application of This Court's Precedents

In *Lucas*, this Court observed that:

> [R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically * * * by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

505 U.S. at 1018. That is what happened here, except without the pretext of "mitigating serious public harm." *Id.* In a rank display of regulatory overreach, a municipality that could not afford to purchase Petitioners' land for public use admittedly employed zoning authority to achieve the same result. Pet. App. 55a. Petitioners sought just compensation under the settled principle that the county's actions forced them

to leave their property "economically idle." *Lucas*, 505 U.S. at 1019.

The Hawaii Supreme Court denied relief on the grounds that *Lucas*, which at times speaks interchangeably of "use" and "value," *id.* at 1019 n.8, does not require just compensation if a property owner retains some "investment use" of the property. Pet. App. 54a–56a. In so doing, the court exacerbated a deep and economically consequential split of authority on the "distinction between value and use[,] [which] has caused considerable confusion." Carol N. Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of* Lucas*: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847, 1856 (2017).

As the petition explains, courts apply *Lucas* in at least three different ways: (1) loss of "economic use" triggers *Lucas*, regardless of any "residual [land] value," *e.g.*, *Lost Tree Vill. Corp.* v. *United States*, 787 F.3d 1111, 1116 (Fed. Cir. 2015); (2) *Lucas* requires that the "focus [be] primarily on use, not value," but value "is relevant to the economically viable use inquiry," *e.g.*, *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996); and (3) a *Lucas* claim requires the "depriv[ation] of *all value* in the property," *e.g.*, *Robinson* v. *City of Baton Rouge*, No. 13-375, 2016 WL 6211276, at *40 (M.D. La. Oct. 22, 2016).[1] The decision below takes the third line

[1] Although the *Lucas* record included a trial court finding that the regulations in issue rendered the Lucas property "valueless," 505 U.S. at 1020, several members of this Court did not rely on that finding in deciding the just compensation question presented. See *id.* at 1034 (Kennedy, J., concurring in the judgment) ("I share the reservations of some of my colleagues about a finding

of cases even further away from the Fifth Amendment guarantees it purports to address by precluding just compensation in any case in which the government can identify some speculative "investment use" for private property that the government has admittedly converted to *de facto* public use. Left to percolate, this view of *Lucas* will erode, if not effectively nullify, the Fifth Amendment protections this Court has long and rightly enforced on factual records far less compelling than this one.

"When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe-Sierra*, 535 U.S. at 322 (citing *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). So, too, with "minor but permanent physical occupation of an owner's property authorized by the government." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982). And, of course, compensation is required "where regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015.

The decision below distorts the language in the foregoing quote to "strip[] [*Lucas*'s] economically viable use test of all meaning because property is rarely, if ever, rendered completely *valueless*." John M. Groen & Richard M. Stephens, *Takings Law,* Lucas*, and the Growth Management Act*, 16 U. Puget Sound L. Rev. 1259, 1276 (1993) (emphasis added). "The law is dynamic, and this dynamism, with the potential of favorable future regulatory change for a property owner,

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that a beach-front lot loses all value because of a development restriction.").

creates speculative value at some price point." Brown & Merriam, 102 Iowa L. Rev. at 1857–1858. Accordingly, "[i]t is difficult to imagine a situation in which a speculator could not be found who would pay some *de minimis* amount for a property even if the property had been completely deprived of all development rights and even temporarily deprived of all rights of use." *Id.* at 1857. Take, for example, Chicago's Manhattan Beach, which has been submerged completely under Lake Michigan since "a huge storm hit the lakefront" in 1917. Sam Cholke, *These Super Rare Chicago Properties Are Underwater—Literally*, DNAinfo.com (Sept. 29, 2017).[2] Notwithstanding that the land has been underwater for a century, a local resident "bought the 29,250 square-foot property" because it was "valuable to her" "to protect what would block your view." *Id.* (quotations omitted).

In holding that the residual value of land in its natural state defeats a takings claim, the Hawaii Supreme Court's decision breaks from these and other precedents to deepen an entrenched split among state courts over the proper application of *Lucas*. Three decisions illustrate this division on records that highlight the business and economic concerns the Chamber respectfully urges the Court to consider in assessing the Petition.

In *Jefferson Street Ventures, LLC* v. *City of Indio*, the city approved Jefferson's "application for development of a shopping center [conditioned] upon Jefferson leaving approximately one-third of its property undeveloped to accommodate the reconstruction of a major

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[2] Available at https://www.dnainfo.com/chicago/20170926/south-shore/lake-michigan-private-beach-underwater-property (visited Oct. 14, 2018).

freeway interchange that was in the planning stages." 187 Cal. Rptr. 3d 155, 161 (Cal. Ct. App. 2015). Although the city "intended to eventually acquire the development-restricted property through either eminent domain or negotiated purchase," it ultimately lacked the funds to do so. *Id.* The one-third development ban reflected the city's effort "to avoid additional costs (e.g., for relocation of tenants and demolition of buildings) [until] such time as it was ready to acquire the property." *Id.* at 177. The appellate court agreed with the property owners that these "conditions were imposed to 'bank' the otherwise developable property so it could potentially be condemned at some unknown time in the future, in an undeveloped (and, consequently, less costly) condition." *Id.* (quotations omitted). Against this backdrop, the appellate court agreed that Jefferson suffered a Fifth Amendment taking of the "banked" portion of its property. *Id.* at 178–179.

Similarly, in *People ex rel. Department of Transportation* v. *Diversified Properties Co. III*, the city conditioned approval of a development plan involving approximately 17 acres of land on the "set aside" of 4.5 acres that could not be developed "until [the] California Department of Transportation confirms future freeway corridor across the site." 17 Cal. Rptr. 2d 676, 679 (Cal. Ct. App. 1993). There, too, the court found a Fifth Amendment taking of the "bank[ed]" property. *Id.* at 682.

And in *Moroney* v. *Mayor & Council of Old Tappan*, the borough denied the Moroneys a hardship variance to build a single-family home on their undersized lot. 633 A.2d 1045, 1046 (N.J. Super. Ct. App. Div. 1993). The court agreed that this effectively "zoned [the

Moroneys'] property into idleness. Denial of permission to build a home upon the lot deprives it of all productive or beneficial use." *Id.* at 1049 (quotations omitted). A *Lucas*-style taking thus occurred, requiring compensation. *Id.* at 1050.

All of these decisions rely on this Court's observation in *Lucas* that "governmental regulation of the development of land rises to the level of a taking if it denies an owner *economically viable* use of his land." *Jefferson St. Ventures*, 187 Cal. Rptr. 3d at 176 (emphasis added); *Diversified Props.*, 17 Cal. Rptr. 2d at 680 (quotations omitted); see also *Moroney*, 633 A.2d at 1049–1050. But under the Hawaii Supreme Court's interpretation of the same language, all of these takings claims would fail. In both California cases, the set-aside land likely retained at least some residual value, based on the possibility that plans for the proposed freeways would be changed or abandoned. So, too, in the New Jersey case, where a differently constituted zoning board might grant a future owner the necessary hardship variance. See *Bridge Aina Le'a, LLC* v. *Haw. Land Use Comm'n*, No. 11-00414, 2018 WL 3149489, at *10 (D. Haw. June 27, 2018) ("[T]he jury could have reasonably concluded that any residual market value was not the result of some extant, permissible, and economically beneficial use, but derived instead from the change that the land would be reclassified as urban."). In short, all three cases recognized and enforced Fifth Amendment just compensation rights even though the property restrictions in issue would apparently have permitted the prospective investment or concession uses the Hawaii Supreme

Court relied upon to deny relief below.[3] The Court should grant the Petition to resolve this division.

II. The Decision Below Is Divorced from Market Realities and Basic Economics

This Court observed 125 years ago that "[t]he value of property, generally speaking, is determined by its productiveness—the profits which its *use* brings to the owner." *Monongahela Nav. Co.*, 148 U.S. at 328 (emphasis added). Accordingly, "[w]hen there are no underlying economic uses, it is unreasonable to define land *use* as including the sale of land. Typical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel." *Lost Tree Vill. Corp.*, 787 F.3d at 1117 (citing cases). These rulings reflect settled law and a basic economic truth: "in the real world, real estate investors do not commit capital * * * to undevelopable property[.]" *Id.* at 1118 (quotations and alteration omitted); see *Palm Beach Isles Assocs.* v. *United States*, 231 F.3d 1354, 1363 (Fed. Cir. 2000) ("A purchaser who pays a substantial price for a parcel can be assumed to have expectations that the parcel can be used for some lawful purpose.").

The portion of *Lucas* endorsing just compensation when regulations force a property owner "to leave his property economically idle," 505 U.S. at 1019, aligns with these principles. The ruling below does not. It stands them on their head by allowing any residual value to defeat a *Lucas* takings claim. "To be sure, the

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[3] Under the Hawaii Supreme Court's reasoning, the New Jersey claim would presumably fail on the grounds that the Moroneys could "engage in commercial sales of concessions on their lot," Pet. App. 22a, to service the nearby "fire department and * * * ambulance corps," 633 A.2d at 1048.

complete elimination of a property's value may be *sufficient* to establish a categorical taking" because valueless property "would usually have no lawful economically viable use. Yet the lack of value is not *necessary* to effect a taking, as a parcel will retain some quantum of value even without economically viable use." *Resource Invs., Inc.* v. *United States*, 85 Fed. Cl. 447, 487–488 (2009) (footnote omitted); see *Bridge Aina Le'a*, 2018 WL 3149489, at *9 (criticizing the "false belief that *Lucas* takings *demand* a complete elimination of economic value" (quotations and alterations omitted)).

This case aptly illustrates why such residual value arguments should not preclude just compensation claims. The notion that Petitioners' land retained economically viable use because they could operate a concession stand on it to offset the (unconstitutional) cost of privately underwriting a public park, ignores market realities memorialized in the compelling case record here. For one thing, it is unlikely that concession revenues would even cover Petitioners' annual property taxes. See, *e.g.*, *Resource Invs.*, 85 Fed. Cl. at 490 (finding *Lucas* analysis appropriate because proposed use of land would not cover property taxes and was therefore "*not* economically viable") (emphasis added). But regardless, the theoretical prospect of some economic use, however strained or impractical, should not preclude a just compensation claim.

The *Bridge Aina Le'a* court explained why in rejecting an analogous revenue-at-any-price hypothetical: "[A] landowner, for example, might purchase rare Picasso paintings to lay on the land and sell viewing rights for one dollar. This 'Picasso use' would generate ticket revenue, probably at an enormous net loss."

2018 WL 3149489, at *8. While the state in that case—like the state in this one—would have such a use defeat a *Lucas* claim, the *Bridge Aina Le'a* court correctly recognized that "[t]his reading of *Lucas* would make a nullity of the very concept of a *Lucas* taking." *Id.* The Hawaii Supreme Court held exactly the opposite on a case record that presents a clear and compelling vehicle for review.

III. The Decision Below Exacerbates a Growing Threat to Economic Development

"Takings law should be predictable * * * so that private individuals confidently can commit resources to private projects" important to a broad range of stakeholders. Susan Rose-Ackerman, *Against Ad Hockery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988).

The ruling below disregards this fundamental principle—and over a century of this Court's precedents—in holding that Fifth Amendment protections do not reach government decisions that convert private property to public use by zoning the property into an economic straightjacket. Left undisturbed, this approach will devalue existing property rights and deter investment—both directly and indirectly—by increasing the risk and cost of financing or otherwise supporting real estate development projects.

A. Private Real Estate Investment Benefits a Broad Range of People and Communities

This case is about a beach house. But the decision below would apply with no less force to an array of real estate development projects that provide myriad benefits to local communities, from capital infusion and

support for small businesses to job creation and increased property values. Such projects range widely in scope, and the overall contribution to the economy is staggering: in 2017 alone, private investment in North American real estate exceeded $70 billion. See McKinsey & Co., *The Rise and Rise of Private Markets: McKinsey Global Private Markets Review*, at 6 (Feb. 2018).[4]

Communities experiencing the economic opportunities associated with these investments generally see an increase in both employment and wages, as well as increased demand for residential and commercial real estate. See, *e.g.*, Enrico Moretti, *The New Geography of Jobs*, at 60 (Houghton Mifflin 2012) ("A healthy traded sector benefits the local economy directly, as it generates well-paid jobs, and indirectly as it creates additional jobs in the non-traded sector."). According to the Bureau of Economic Analysis, every $1 invested in real estate development corresponds to approximately $1.58 in all industries in the community, and on average every additional job from such investment corresponds to approximately 1.6 new jobs in the community. See Bureau of Economic Analysis, Real Estate Type II, RIMS II Multipliers (2007/2016).

On the more robust end of the return spectrum, every job created directly by a new corporate headquarters in a metropolitan area results in approximately two-and-a-half more skilled and unskilled jobs

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[4] Available at https://www.mckinsey.com/~/media/mckinsey/industries/private%20equity%20and%20principal%20investors/our%20insights/the%20rise%20and%20rise%20of%20private%20equity/the-rise-and-rise-of-private-markets-mckinsey-global-private-markets-review-2018.ashx (visited Oct. 14, 2018).

across the area. See Jeff Malehorn, *Why Corporate Headquarters Matter to Chicago*, World Business Chicago (Feb. 18, 2016)[5]; see also Moretti at 60 ("What is truly remarkable is that this indirect effect on the local economy is much larger than the direct effect."). The statistics on Google's 2006 data center in Lenoir, North Carolina illustrate the point. Each directly created job correlated to an estimated "additional 1.77 new jobs created statewide." Jonathan Q. Morgan, *Analyzing the Benefits and Costs of Economic Development Projects* (U.N.C. Apr. 2010).

These benefits are not confined to purely private investments. Businesses have also fostered recognized economic growth in cooperation with local governments. See generally Kriston Capps, *Why Washington, D.C. Is Leading the Way on Partnering With the Private Sector*, CityLab (Jan. 12, 2018).[6] Among other benefits, "strategic [public-private partnerships] can potentially mitigate the overruns and schedule delays that plague traditional infrastructure project delivery by clearly delineating governance, allocating shared risk, integrating resources, applying best practices, and establishing a life cycle-long perspective of costs and accountability." Michael D. Rocca, *The Rising Advantage of Public-Private Partnerships* (McKinsey & Co. July 2017).[7]

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[5] Available at http://www.worldbusinesschicago.com/corporate-headquarters-matter/ (visited Oct. 14, 2018).

[6] Available at https://www.citylab.com/equity/2018/01/public-private-partnership-washington-dc-fairfax-virginia-p3s/550262/ (visited Oct. 14, 2018).

[7] Available at https://www.mckinsey.com/industries/capital-projects-and-infrastructure/our-insights/the-rising-advantage-of-public-private-partnerships (visited Oct. 14, 2018).

But all of these ventures operate in reliance on certain foundational premises, chief among them that the risk of investment loss through government action will be offset by the guarantee of just compensation. See, *e.g.*, *Lost Tree Vill. Corp.*, 787 F.3d at 1118.

B. Granting the Petition and Resolving Lower Court Division Over the Proper Application of *Lucas* Would Promote Responsible Government and Business Investment Essential to Growth

Given the opportunity to take something for nothing, governments—like other rational actors—will be inclined to do so. "[G]overnments act much as private actors do in particular markets. They employ the same means toward their ends." Robert C. Hockett & Saule T. Omarova, *"Private" Means to "Public" Ends: Governments as Market Actors*, 15 Theoretical Inquiries in Law 53, 55–56 (2014). Maui County did just that, and under the Hawaii Supreme Court's ruling, governments are free—if not encouraged—to do the same. As a consequence, all participants involved in real property investment are likely to see their risks and attendant costs rise.

Few, if any, market actors would elect to bear the cost and burden of owning land that the government mandates be kept "substantially in its natural state." *Lucas*, 505 U.S. at 1018. *Lucas* itself explains why. "On remand [from this Court], the South Carolina Supreme Court ordered the state of South Carolina to purchase the Lucas property." Henry N. Butler, *Regulatory Takings After* Lucas, 3 Regulation 76, 81 (Cato Rev. of Bus. & Gov't 1993). The state, unable to sell the land with the zoning restriction that spurred the case, ended up selling it with permission for the new

owner to pursue the same kind of residential development the Lucases had proposed in the first place.

The ultimate removal of the development prohibition at issue in *Lucas* tells a cautionary tale about "the results of the majoritarian political process seeking to impose the costs of a public good on a single owner." Aaron N. Gruen, *Takings, Just Compensation, and the Efficient Use of Land, Urban, and Environmental Resources*, 33(3) The Urban Lawyer 517, 536 (Am. Bar Ass'n 2001). "This role reversal demonstrates that actions that may appear to be in the public interest when they are 'free'—that is, when the political decisionmakers don't bear the costs—are not necessarily attractive government programs once the political decisionmakers must bear the budgetary costs of their actions." Butler, 3 Regulation at 81.

The Fifth Amendment's just compensation guarantee is essential to encouraging governments to exercise their regulatory and eminent domain authority with this principle in mind. "The compensation requirement can be understood as a way to force public policymakers to consider the opportunity costs of their proposed actions. Policies that 'take' private property would then have concrete budgetary impacts that would be immediately reflected in tax bills or borrowing capacity." Rose-Ackerman, 88 Colum. L. Rev. at 1706; see *Nollan* v. *Cal. Coastal Comm'n*, 483 U.S. 825, 842 (1987) ("[I]f [the commission] wants an easement across [private beachfront] property, it must pay for it."). Otherwise, governments, acting in their own self-interests and purportedly in the public interest, will foist these costs on private landowners. The Takings Clause operates as a necessary check against such abuses.

The decision below removes this check, and injects "an element of uncertainty into investors' choices that has nothing to do with the underlying economics of the situation," which "creates two problems. First, investors do not know whether or not damages will be paid. Second, in the event damages are not paid, investors will be left bearing the costs of an uninsurable risk." Rose-Ackerman, 88 Colum. L. Rev. at 1706. "[I]n the face of this uncertainty, investors may forgo otherwise profitable activities, and thus * * * produce an inefficiently low level of investment." *Id.*

This investment impact is not limited to direct investors. Uncertainty regarding a property's continued economic viability due to intervening regulation is known to increase indirect investment costs like lending fees. See Freddie Mac, *Real Estate Appraisals: Common Issues and Best Practices* (Feb. 2012) ("Zoning and other legal issues are important determinants of value, even for an existing, stabilized property.").[8] The loan-underwriting process "involves a simultaneous analysis of the creditworthiness of the borrower and the economic value of the property *as an income-producing investment*." U.S. Dep't of Agriculture, Rural Housing Serv., Handbook HB-1-3565, ch. 3 (Lender Underwriting) § 3.1 (Rev. Mar. 15, 2017) (emphasis added).[9] Unsurprisingly, a "change in zoning" "could cause material changes to reported [property] values" and impact the "useful life of an appraisal or evaluation" of property, and thus its value and cost of capital. Bd. of Governors of the Fed. Reserve Sys., Branch &

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[8] Available at https://mf.freddiemac.com/docs/real_estate_appraisal_reports_best_practices.pdf (visited Oct. 14, 2018).

[9] Available at https://www.rd.usda.gov/files/3565-1chapter03.pdf (visited Oct. 14, 2018).

Agency Examination Manual § 3100.1 (Real Estate Loans) at 13–14 (Sept. 1997).

These economic impacts are starkly illustrated on the record here. Petitioners lost their *Lucas* claim based on the putative value of their land for a hypothetical use (concession operations) that would not even cover their property taxes, never mind the other myriad costs documented in the record below, notably: sanitation, maintenance, and security costs associated with public land use that should be borne by all taxpayers. See Pet. 7 (recounting one commissioner advocating "to preserve the public's illegal camping, which had resulted in littering, defecating, and parking on the private beach lots, and bemoaning the landowners' resort to hiring security guards to remove the trespassers" (quoting Pet. App. 73a)). Against this backdrop, the Hawaii Supreme Court's denial of just compensation strikes at the heart of Fifth Amendment protections essential to economic growth and development.

* * * * *

The decision below encourages governments to "zone[] [land] into [economic] uselessness," *Moroney*, 633 A.2d at 1047, in contravention of bedrock Fifth Amendment guarantees and precedents from this Court and many others upholding the right to just compensation where, as here, "private property is being pressed into some form of public service." *Lucas*, 505 U.S. at 1018. Review is warranted.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

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