No. 18-324

In The
Supreme Court of the United States

DOUGLAS LEONE, *et ux.*,

Petitioners,

v.

COUNTY OF MAUI, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Hawai'i

BRIEF IN OPPOSITION

PATRICK K. WONG
Corporation Counsel

BRIAN A. BILBERRY
Deputy Corporation Counsel
Counsel of Record
DEPARTMENT OF THE CORPORATION COUNSEL
200 S. High Street, 3rd Fl.
Wailuku, Maui, HI 96793
(808) 270-7462
brian.bilberry@co.maui.hi.us

Counsel for Respondents

December 12, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Petitioners urge this Court to resolve an alleged split in authority over the relevance of land value in determining whether there has been a categorical and permanent taking under *Lucas*. This case does not present the question raised by Petitioners.

Petitioners contend that a beachfront lot they purchased in Makena Maui in **2000**, was subject to a regulatory taking under a Community Plan designation of their parcel as "park" made in **1998**.

Several owners of adjacent beach lots, subject to the same community plan designation, built residences on their land. In **2004**, the Leones ordered their own consultants to stop work, and withdrew their permit applications, citing the "political climate." The Leones made no attempt further to build on their land. Rather, they sued the County three (3) years later in **2007**, arguing *a categorical* taking and *permanent* deprivation of all economically viable use of their land under *Lucas*, infra.

After receiving a substantial quantity of evidence at trial in **2015**, a jury found the County of Maui did not cause the Leones deprivation of use of their land, *for any period of time*. Attached Appendix, 79. On review, the Supreme Court of Hawai'i only ruled that "there is evidence to support the jury's verdict[.]" The Court did not rule that holding land as an "investment" or a "park" was economically viable use, or rule as to any diminution or residual value.

QUESTION PRESENTED – Continued

Petitioners' alleged split is not otherwise ripe for this Court's review. Petitioners and their amici identify, at best, two federal courts of appeals and one state supreme court that implicate the question they raise. And they offer no persuasive reason why that split requires resolution at this time.

The question presented is: Whether certiorari is warranted when the Hawai'i Supreme Court did not decide that investment value alone can defeat a categorical taking claim under *Lucas*, and when the alleged split in authority is, in any event, shallow at best.

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INTRODUCTION

The *Petition* principally asks the Court to grant review to resolve an alleged split in authority over whether value in land alone, implicated here by its potential as investment, can defeat a "categorical" taking claim under *Lucas*. The issue is not presented by the decision below, nor is it an issue over which there is substantial split in authority requiring urgent resolution by this Court.

Right up front the *Petition* makes the assertion that the County of Maui "sought to achieve th[e] objective [to convert privately owned beachfront land at Palau'ea Beach, Makena, Maui into a public park] through a regulatory blockade." *See*, *Petition* for Writ of Certiorari ("*Petition*"), filed September 10, 2018, p. i. This blanket mischaracterization is refuted by the fact that historically, at least seven (7) other privately owned beach lots at Palau'ea Beach were granted building permits by the County of Maui. The Leones' own trial lawyer made these salient facts known to the jury below, *in his opening statement at trial*. *See*, *Petition*, *Appendix* ("*App.*") *11a-12a*. All of those lots were subject to the same community plan "park" designation and regulatory regime applicable to the Leones' parcel.

Rather than build on their own beach front lot, however, in **2004** the Leones ordered their consultants to stop work, and withdrew their permit application because of a perceived unfavorable "political climate." *See*, *Petition*, *App. 6a*. The Leones subsequently never

attempted to build on their property, but sued the County of Maui three (3) years later in **2007**, ultimately arguing they had suffered *a categorical* taking and *permanent* deprivation of all economically viable use of their land.

Moreover, *it was the Leones who argued the relevance of value to the jury in support of their categorical taking claim*. Neither Respondents as Defendants below, nor the Supreme Court of Hawai'i have argued or held that land must be rendered valueless to constitute a categorical taking. Rather, the *Petition* erects this straw man (as the Leones did below), seeks to have this Court knock it down, and thereby undermine a valid state court jury verdict in the process.

In 2015, a jury found the Leones failed to prove the County of Maui caused them *any* loss of economically viable use of their land, and *nothing more*. *See*, attached Appendix ("Att. App."), 79.

Contrary to the repeated mischaracterizations in the *Petition*, on review the Supreme Court of Hawai'i did not hold "that the Leones had not been denied 'all economically beneficial or productive use of land.' " The Court never ruled that holding land as an "investment" or as a "park" was economically viable use. The Court did not make any factual or legally dispositive rulings pertaining to the use, value, or diminution of Lot 15. Rather, as the *Petition* notes on page 10, the Supreme Court of Hawai'i only held that there was "evidence to support the jury's finding that the County did not deprive the Leones of economically beneficial use of their land[,]" and that evidence of property value and

evidence of alternative uses presented at trial were not factors to be excluded from the jury's consideration.

Contrary to what is stated in the *Petition*, this Court's ruling in *Lucas* does not otherwise contain any "haphazard reference[s] – to 'use' and 'value.' The Court in *Lucas* clearly recognized the distinction. *Lucas*, infra (Scalia, J.), 505 U.S. at 1020, and FN 9. While expressly articulating its reservations to the South Carolina Court of Common Pleas' "finding that a beach-front lot loses all value because of a development restriction," the Court in *Lucas* recognized loss of value as *a factor* for the determination of permanent deprivation of economic "use" in a categorical taking analysis. *Id*.; *see also* 505 U.S. at 1033-34 (Kennedy, J., concurring).

It does not otherwise appear that there is an appreciable circuit split or confusion on the distinction of value and use. Rather, the confusion is in the *Petition*'s own conflating the factors of "use" and "value," both of which the Leones themselves raised and precariously argued at trial. Petitioners' offered notion that "the Hawai'i Supreme Court has effectively rendered *Lucas* a dead letter," is otherwise little more than rhetoric and hyperbole.

This case does not implicate the question Petitioners urge. Rather, the *Petition* improperly invites this Honorable Court to unnecessarily disturb precedent and make widely impactful rulings of law, in order to undo a valid state court jury verdict.

COUNTERSTATEMENT OF THE CASE

Petitioners' allegations regarding alleged community sentiment, the county's alleged official policy, and comments by one or more of the County's planning commissioners regarding the status of the Leones' land were not relevant to the jury's verdict in the trial of this case, not relevant to the Supreme Court of Hawai'i's decision and opinion affirming the jury verdict, and not relevant to the issues presented by the *Petition*.[1]

I. Factual background

In or around February 2000 Doug Leone and Patricia Perkins Leone (the "Leones") purchased an oceanfront parcel at Palau'ea Beach, Makena, Maui, Hawai'i (the "property" or "Lot 15") for $3.75 million. *See*, *Petition*, *App. 4a*. At that time Lot 15 had already been designated "park" under the applicable Kihei-Makena Community Plan since 1998. *See*, *Petition*, *App. 3a*.

Palau'ea Beach is located within the Special Management Area (SMA) pursuant to the Coastal Zone Management Act. *See*, *Petition*, *App. 3a*. Any "development" within the SMA is prohibited unless the developer applies for and receives a *discretionary* SMA permit. *Id.* at *3a-4a*; *see also* HRS §§ 205A-21 and 205A-26 (2001).

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[1] The allegations are cited to the Intermediate Court of Appeals decision, which reviewed an order dismissing the case on jurisdictional grounds, and as such, applied a standard of review which only *presumes* the factual statements taken in the Leones' Complaint below as true. Att. App. 2.

A single-family residence, which the landowner sufficiently demonstrates will not have a "cumulative impact or a significant environmental or ecological effect[,]" is among the uses exempt from the SMA permitting requirement. *Id.* at *10a*; *see also* HRS § 205A-22; *see also* SMA Rules § 12-202-12(c)(2)(F)(iii) and (iv); *see also Leone, et al. v. County of Maui, et al.*, 128 Hawai'i 183, 188, 284 P.3d 956, 961 (2012). An exempt use does not require a discretionary SMA permit, but rather only non-discretionary building permits.

At trial, Palau'ea Beach was demonstrated to be a fragile eco-system, unprotected by a reef barrier, and historically subjected to severe erosion. Att. App. 13-15 and 22-28. Evidence at trial demonstrated the existence of significant pre-colonial contact archaeological sites, including ancient Hawai'ian cultural burials across several adjacent lots fronting Palau'ea Beach.[2] Att. App. 15-16 and 29-36. Hawai'ian cultural human remains were also discovered on the Leones' parcel. Att. App. 36.

As such, in order to show their proposed single-family residence as a use exempted from SMA permitting requirements, the Leones were required to submit to the Planning *Department* as the permitting authority, a current shoreline survey for determination of a shoreline setback [*See*, SMA Rules § 12-202-12(c)(2)(D)], as well submit an archaeological data collection and/or

[2] Palau'ea Beach fronted a 20-acre cultural preserve, containing the archaeological remains of an ancient Hawai'ian fishing village.

preservation plan for the known cultural Hawai'ian human remains on the property, *not exclusively*. *See*, SMA Rules § 12-202-12(e)(2)(A) and HRS §§ 6E-43 and 6E-43.6.

The *Petition* repeatedly suggests that a determination made by the Planning *Commission*, which is a reviewing agency of appointed Maui community members, had some bearing on the processing of their SMA permit application. The statements of Planning *Commission* members and the actions of that body had absolutely no bearing on the Planning *Department's* determination that the Leones' SMA permit application could not be processed.

Ultimately, Maui County's Planning Department was unable to process the Leones' application because the application failed to include an adequate shoreline survey, and failed to propose any monitoring, collection, or preservation plan for the Hawai'ian cultural human remains on the Leones' property, *not exclusively*. The shoreline survey had been prepared in **2002** for submission in **2003** with the original application. The shoreline survey had therefore expired five (5) years earlier, as had the license of the engineer who prepared the expired and deficient survey.

Rather than complete their application and make the required submittals and showing for the SMA permitting exemption, the Leones elected to file the lawsuit underlying this *Petition*. Att. App. 49-50.

Today, the Leones' Lot 15 is still undeveloped real estate only because the Leones have failed and/or

refused for eighteen (18) years to navigate the permitting requirements as all other adjacent parcel owners at Palau'ea Beach have done, *not* because of any community designation or county regulation.

II. Legal Background

Petitioners purport to have made their takings claims pursuant to *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). In *Lucas* the Court explained that a regulatory taking occurs when the "regulation denies *all* economically beneficial or productive use of land." *Id*., 505 U.S. at 1015. Notably, the Court in *Lucas* did not exclude the relevance of value in making the determination of a *categorical* and *permanent* deprivation. *See*, *Lucas*, 505 U.S. at 1034-35, 112 S.Ct. at 2903 (Kennedy, J., concurring) ("The South Carolina Court of Common Pleas found that petitioner's real property has been rendered valueless by the State's regulation. [record citation]. The finding appears to presume that the property has no significant market value or resale potential. This is a curious finding, and I share the reservations of some of my colleagues about a finding that a beach-front lot loses all value because of a development restriction.").

As this Court has further recognized, "*Lucas* was carved out for the 'extraordinary case' in which a regulation *permanently* deprives property of all use[.]" *See*, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 303, 122 S.Ct. 1465, 1469 (2002). (Emphasis added). "[T]he default

rule[,] [however][,] remains that a fact specific inquiry is required in the regulatory taking context." *See also Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) (takings analysis involves a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.).

III. Proceedings below

Contrary to what is stated in the *Petition*, on remand from the Intermediate Court of Appeals the Leones tried to maintain and argue *both* a temporary regulatory taking under *Penn Central Transportation Company v. City of New York,* infra, *and* a categorical taking under *Lucas v. South Carolina Coastal Council*, supra. Att. App. 4-7 and 65-66.

The Leones presented the jury with evidence of the Maui Planning Commission's deliberations on a proposed amendment to the Kihei-Makena Community Plan.[3] Those deliberations are not relevant to the Planning Department's review or determinations on the SMA permit application. The trial court ruled that by presenting this evidence completely irrelevant to their *Lucas* claim, the Leones opened the door to the jury hearing about the existence of numerous ancient

[3] As noted in the *Petition*, the Leones and other property owners independently also asked the Planning Commission to change the community plan. *See*, *Petition*, p. 6.

cultural Hawai'ian burial sites located at Palau'ea Beach. Att. App. 36-41. It was the failure of the Palau'ea lot owners' land use consultants to address the treatment of these archaeological sites which prompted the Planning Commission to seek additional archaeological studies. Att. App. 30-31. Notably, the Leones' land use consultants were again instructed to stop work, and did not respond to the Planning Commission. Att. App. 52-56.

It was also *the Leones* who put the value of Lot 15 in issue below. The Leones proffered testimony from an expert appraiser who prepared an appraisal report and testified that in **2007**, nine (9) years after the "park" designation was made, Lot 15 had an appraised value of $7.2 million dollars *for use as a single-family residence*. Att. App. 42-46. At the same time, citing to the Leones' experts in support of the Leones' motion for a directed verdict, the Leones' counsel argued that overnight Lot 15 was reduced to a value of zero ($0). Att. App. 58. The Leones offered the jury testimony from their own land use expert that since the Leones could not use their lot, it had zero ($0) value. *See*, *Petition*, *App. 20a-21a*. As counsel argued, the Leones' expert economist also testified that any residual value to Lot 15 was "speculative." Att. App. 60-61 and 63-64. Moreover, the Leones' economist testified about an alleged "magnitude of the diminution in value that has resulted from the County's actions[.]" Att. App. 65-66.

When it became apparent that the copious testimony, documents, and arguments presented pursuant

to *Penn Central* were going to backfire adversely to their takings claims, the Leones – **1)** elected to voluntarily dismiss the Fourteenth Amendment equal protection and due process claims made in their complaint after resting their case [*See*, *Petition*, *App. 64a-65a*], **2)** purported that their taking claims were being brought solely under the Fifth Amendment pursuant to *Lucas*, and **3)** then floated a raft full of limiting instructions to exclude much of the evidence and arguments adverse to their categorical takings claim, which they themselves placed in issue.

In rebuttal to the Leones' experts' unsupported opinions on value, the County sought to present the jury with an appraisal of Lot 15 prepared by its own expert. Despite allowing the Leones' land use and economist experts to offer completely incompetent opinions on value, the trial court erroneously excluded the County's rebuttal appraisal. The County's appraiser Ted Yamamura was permitted to testify only as to the investment character of Lot 15, but precluded from giving the jury his actual appraisal figure to rebut the Leones' experts' conclusions. *See*, *Petition*, *App. 16a-18a*.

Moreover, while the Leones argued county regulations prevented them from engaging in any commercial use of Lot 15, their legal expert testified on cross-examination that his own conclusions in this regard were apparently incorrect, and that certain commercial uses were permissible. *See*, *Petition*, *App. 22a-25a*.

In addition to the above, the Leones' own land use consultant presented testimony to the jury that demonstrated the Leones' consultants were not concerned with having their SMA permit application approved. Att. App. 68-70 and 73-76. This also explained why the application on which Doug Leone stopped work in **2004**, was not updated or complete when it was sent to the Planning Department three (3) years later in **2007**. Att. App. 75-76. The Leones' economist also testified about his direct knowledge regarding the Leones' election to willingly forego efforts to exempt their proposed single family residence from the SMA permitting requirements applicable to "developments," and file a lawsuit instead. Att. App. 48-50.

The Leones sued the County within a month after their deficient SMA permitting application was returned to them, rather than complete the assessments required for the application and resubmit it to the Planning Department. The Leones' argument to the jury at trial was that the County's refusal to process their incomplete and deficient application effected a *categorical* taking and *permanent* economic deprivation of their land without payment of just compensation.

On May 5, 2015, the jury rendered its verdict in favor of the County of Maui. *See*, *Petition*, *App. 65a*. Petitioners cannot demonstrate that any portion of the jury's verdict reflects a consideration of investment use *or* value as a determining factor. Att. App. 78-80. Rather, the jury was required to find that the County of Maui did not cause *any* deprivation of economic use to

the Leones' land for *any* period, as reflected in the Special Verdict Form question advocated by the Leones' counsel. *Id*.

Moreover, contrary to the principal question presented in the *Petition*, the Supreme Court of Hawai'i did not rule one way or the other regarding whether a categorical taking occurred, and did not rule that holding land as an "investment" or as a "park" was economically viable use. On review, the Supreme Court of Hawai'i only ruled that "there is evidence to support the jury's verdict[.]"

REASONS FOR DENYING THE PETITION

I. This case is inappropriate for Review

The *Petition* principally asks the Court to conclude that any consideration of residual value in land, implicated by its potential as investment, should be excluded from a "categorical" takings analysis under *Lucas*. Said another way, Petitioners want this Court to decide that investment value alone is not enough to defeat a categorical taking under *Lucas*. *See*, *Petition*, p. 20 ("The Leones did not suffer a categorical regulatory taking only if the legal rule is focused myopically on the property's residual value.").

The Supreme Court of Hawai'i did not hold or make any ruling, however, implicating that retained value in property was in-itself adequate to defeat a takings claim under *Lucas*. Moreover, numerous other

preserved questions in this case make it a poor vehicle for certiorari.

A. This case does not implicate the issue presented

According to the *Petition*, "[t]he Hawai'i Supreme Court's holding that there has been no 'categorical' regulatory taking – even though the land is economically idle – because it has 'investment value' or has use as a 'park' dismantles th[e] framework and makes it impossible for landowners to prevail under Lucas." *See*, *Petition*, p. 11. The *Petition* concludes "[t]o prevail, in other words, a landowner must 'demonstrate that a regulation destroyed all land value, regardless of its source.'" *Id.* (citing *Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1118 (Fed. Cir. 2015)).

First, contrary to the *Petition*'s assertion, the Supreme Court of Hawai'i did not hold or find that residual value in property was enough to defeat a categorical takings claim. Rather, the Court held:

> "*Although the value of subject property is relevant* to the economically viable use inquiry, *our focus is primarily on use*, *not value*" and that "the mere fact that there is one willing buyer of the subject property, especially where that buyer is the government, does not, as a matter of law defeat a taking claim."
>
> Thus, *Del Monte Dunes I* established that, *while property value should not be considered to the exclusion of other factors*, it is

> still a relevant factor in the economically viable use analysis.
>
> * * *
>
> In the present case, Yamamura testified that the Leones' property had 'investment use' or, in other words, that the property had value because the Leones could hold on to [the] property, wait until it increased in value, and sell it for a profit. While *Del Monte Dunes I* established that property values should not be the sole focus in an economically viable use inquiry, the Ninth Circuit did not foreclose the admissibility of such evidence. In fact, the Ninth Circuit noted that "the value of the subject property is relevant." *Del Monte Dunes I*, [*infra*,] 95 F.3d at 1433.

See, *Leone, et al. v. County of Maui, et al.*, 141 Hawai'i 68, 83, 404 P.3d 1257, 1272 (2017) (Emphasis original) [*Petition*, *App. 40a-41a*].

Moreover, even assuming a finding of residual investment value by the jury below, Petitioners cannot remotely demonstrate here that the jury verdict could only have been based on that finding alone. As the Supreme Court of Hawai'i also noted in *Leone*:

> Additionally, the circuit court took mitigating measures in order to ensure that the jury did not improperly give the "value" evidence more weight than it was legally entitled. For example, Jury Instruction No. 23 instructed the jury that:

> There is a difference between economically beneficial use and value. *A property that has value may not have "economically beneficial use."* To determine whether a defendant denied Plaintiffs economically beneficial use of their property, you may consider whether Plaintiffs were able to use their property in an economically beneficial way.
>
> (Emphasis added). This instruction specifically explained to the jury that the determination of whether property has any economically beneficial use does not turn on whether the property has value.

See, *Leone,* 141 Hawai'i at 83, 404 P.3d at 1272. (Emphasis original) [*Petition*, *App. 41a-42a*].

In light of these holdings by the state supreme court, and in light of the fact that as demonstrated above, *it was the Leones who specifically placed the value of their property in issue*, the argument in the *Petition* is a mischaracterization of the case below.

Second, separate and apart from any relevance of investment value, the Supreme Court of Hawai'i only ruled that the jury was not required as a matter of law to find a categorical taking under *Lucas*. This was in part because there was evidence, *in the form of the Leones' own expert Brian Tsujimura's testimony*, of the legal permissibility of alternative commercial uses for the Leones' property. *See*, *Petition*, *App. 55a-56a*. The state supreme court made no finding whatsoever as to what those uses might be, nor was it required to.

Moreover, contrary to the *Petition*'s assertion, the Supreme Court of Hawai'i did not "conclude[] that the trial court did not err in endorsing the investment-as-use theory." *Id*. at 44-46. As regarding the Leones' complaint about the County's expert Paul Yamamura being allowed to testify about the "investment use" of land, as noted above Mr. Yamamura's expert testimony was offered specifically in rebuttal to the Leones' experts' assertion of a total loss in value to their Property.[4]

B. Petitioners' principal issue(s) pertain to alleged error in the evidence and instructions below

This case is also an inappropriate vehicle to address the issue(s) presented because Petitioners cannot demonstrate that the jury considered investment value or use in its Special Verdict Form finding that neither the "Defendant County of Maui or Defendant Planning Director deprived Plaintiffs of economically beneficial use of their land[.]" Att. App. 79. Rather, the *Petition* alleges what were only errors in the admission of testimonial evidence and instructions given below. The evidence and instructions complained about in the

[4] The Supreme Court of Hawai'i otherwise ruled that Mr. Yamamura's testimony was supported by evidence that could be adduced in the record showing *the Leones' actual use of the property as an investment*. *See*, *Petition*, *App. 55a*. This ruling did not say that evidence of such use was alone enough to defeat a takings claim, or that the evidence supported an independent or alternative rationale for the jury's verdict, as the *Petition* suggests.

appeal to the state supreme court cannot otherwise be shown as dispositive to the jury verdict.

The crucible for these issues before the Supreme Court of Hawai'i was the Leones' appeal from the state trial court's denial of their motion for judgment notwithstanding the verdict. As such, the issues taken up by the Hawai'i Supreme Court pertained to alleged errors in the allowance of evidence and instructions to the jury. As acknowledged in the *Petition*, the Supreme Court of Hawai'i's decision in *Leone* only affirmed there was evidence to support the jury's verdict. *Petition*, p. 10. That is, the state supreme court found there was evidence of legally permissible commercial use, as well as evidence of investment value.[5] *See*, *Petition*, *App. 55a-56a*.

The state supreme court did not rule one way or the other as to whether factually or actually there was alternative use, value, or diminution to the Leones' property. Rather, it sustained the trial court's ruling denying the Leones' motion for judgment notwithstanding the verdict, *and* the trial court's finding that the jury was not required to believe the Leones' experts' unsupported opinions asserting a complete loss

[5] Petitioners assert this finding as a positive reason for taking the case by mischaracterizing it as "instructing the owner to put the land to the very use that motivated the restriction in the first place." *See*, *Petition*, p. 17. The state supreme court did not say that "the Leones' property could be used as a park," but rather only that there was evidence of legally permissible commercial uses which could have supported the jury verdict – and not just selling lemonade, as one amici pejoratively asserts.

of use, or the opinions as to any alleged diminution in value.

Moreover, the *Petition* misleadingly characterizes the state supreme court as holding that the Leones' *Lucas* claim was defeated because the evidence showed they could alternatively use their Property as a park. *See*, *Petition*, pp. 9-10. The Supreme Court of Hawai'i ruled nothing more than, the trial court's refusal to include an incorrect statement of law in a jury instruction proposed by the Leones did not make the instruction improper. *See*, *Petition*, *App. 45a-47a*. All the Supreme Court of Hawai'i ruled, correctly, was that the trial court properly determined that whether land *argued* to have been left "substantially in its natural state" was deprived of all economically beneficial use *was a factual issue for the jury*. *See*, *Petition*, *App. 47a*.

In reality, the *Petition*'s focus on "value" appears as a distraction intended to avoid the simple truth that the Leones and their experts failed to convince the jury that a variety of permissible commercial uses, which their own expert admitted were legally permissible on the property, were *not* economically viable. *Cf.*, *Bridge Aina Le'a, LLC v. Hawai'i Land Use Commission*, 2018 WL 3149489 *8 (Dist. Hawai'i 2018) ("Bridge Aina Le'a presented evidence that a wide variety of potential permissible uses were not economically viable, including uses expressly permitted by statute or common or prevalent within the geographical area.").

The *Petition*'s assertion that the Supreme Court of Hawai'i held that "park" use could defeat a takings

claim is wrong. This is not only because the state supreme court made no such finding or ruling, but also because it improperly assumes the burden of proof at trial *was on the County* to show alternative economically viable uses.

C. The County has preserved an appeal below over whether the Leones are barred from residential use

Even if this Court were to take up this case, its ruling might not alter the outcome because the County was compelled to file a cross-appeal below, which remains preserved. *See*, *Petition*, *App. 57a-58a*. Specifically, the County objected to and preserved its right to contest several instructions to the jury by the trial court which wrongly concluded the Kihei-Makena Community Plan "park" designation precluded the Leones' right to an SMA permitting exemption for a single-family residential use *as a matter of law*.[6]

The *Petition* relies on *GATRI v. Blaine*, 88 Hawai'i 108, 962 P.2d 367 (Haw. 1998) for the proposition that the Kihei-Makena Community Plan precluded approval and construction of their single-family residence as a matter of law. Consistency with the community plan as required by *GATRI* applies to "developments," however, and not to exempt uses. *See*, *GATRI*, 88 Hawai'i at 112-13, 962 P.2d at 371-72; *see also*

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[6] *See*, *e.g.*, *Petition*, *App. 53a* ("the circuit court instructed the jury that the County's regulations prohibited the Leones from building a single-family residence on their property.").

Leone, et al. v. County, 128 Hawai'i 183, 187, 284 P.3d 956, 960 (2012).

The *Petition*'s reliance on *GATRI* is also belied by the fact that at least seven (7) other private lot owners at Palau'ea Beach built exempt and approved single-family residences on their parcels. Four (4) of these lots were developed *before* the Leones sought permits, and three (3) *after* the Leones claimed their parcel was permanently deprived of all economically viable use. Maui County's former planning director Jon Min testified for the jury about the assessment and exemption process. Att. App. 12-20.[7]

The County maintained and preserved the argument as delineated above on cross-appeal that the Leones', and the state trial court's reliance on *GATRI* and on the Intermediate Court of Appeals' *Leone* decision to conclude a legally preclusive effect of the community plan "park" designation, was wrong.

The Supreme Court of Hawai'i recognized the County's cross-appeal as permissible, but determined the cross-appeal moot because it affirmed the trial court judgment in favor of the County. *See*, *Petition*, *App. 58a*.

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[7] The Leones argued to the jury that all seven (7) of those lots were exempted *in violation of the law*. Two (2) of the exemptions were rescinded by Jon Min's successor Mike Foley, it appears because cultural human remains were discovered on those parcels after residences exempted from permitted requirements and constructed. In any event, the Planning Commission reinstated those exemptions upon an administrative appeal.

D. The county has preserved an appeal below over the trial court improperly shifting the burden of proof on economically viable use to the County

One of the results of the trial court's incorrect instructions was also to improperly shift the burden of proof to the County to demonstrate alternative economically viable use. This error was not addressed in the Supreme Court of Hawai'i's *Leone* opinion which, based on the trial court's instructions to the jury, determined it could skip the question of whether the Leones were even caused *any* period of deprivation of use by the County's regulations. *See*, *Petition*, *App. 53a*. This is despite both the state trial court and state supreme court expressly recognizing that it was the Leones' burden to demonstrate to the jury "that 'it is more likely true than not that there remains no economically viable use for their property.'" *See*, *Petition*, *App. 49a*. Indeed, the basis for the trial court denying the Leones' motion for judgment notwithstanding the verdict was in largest part its conclusion that the jury did not have to find the Leones' experts' testimony and opinions of total deprivation and no economic viable use credible.

* * *

In sum, the *Leone* decision did not offer an opinion as to whether a finding of residual value, or investment use, could defeat a categorical takings claim. The *Leone* decision did not make any legally dispositive ruling on the facts of this case. Rather, the state supreme court can only be viewed as having sustained the trial court's

denial of the Leones' request for judgment notwithstanding the verdict.

For its part, the trial record is clear that as a matter of evidence the Leones failed to persuade the jury in their prima facie case that their land had no economically viable use because of the County's regulations. *See*, Att. App. 78-80. It was/is otherwise inconsistent for the trial court to find that the jury did not have to believe the Leones met their evidentiary burden of proof on economically viable use, while its instructions to the jury concurrently shifted the burden of proof to demonstrate economically viable use to the County.

II. *Leone* does not conflict with *Lucas*

Petitioners and their amici incorrectly argue that this Court recognizes a categorical regulatory taking under *Lucas* only when there are no developmental uses available, exclusive of any relevance of value. The relevance of value to the categorical takings analysis was/is apparent in *Lucas*. Specifically, *Lucas* observed that the trial court's finding that Lucas's two beachfront lots had been rendered valueless by enforcement of the coastal-zone construction ban was not challenged below. *See*, *Lucas*, 505 U.S. at 1020, 112 S.Ct. 2896. The Court further noted that "[t]his finding was the premise of the petition for certiorari[.]" *Id*.

While the Court in *Lucas* did not have to address the specific relevance or weight of value on the facts of the case before it, it certainly did not discount it. In

footnote 8 the Court expressly rejected the dissent's argument that the majority opinion focused only on "developmental uses" of property. In footnote 7 the Court explained that in determining the "deprivation of all economically feasible use" it must determine the loss of value. Petitioners clearly understand this relevance of value to their categorical takings claims (contrary to the argument they make now), which is why they attempted in their case-in-chief at trial to persuade the jury that their property had no value. *See*, Att. App. 58; *see also Petition*, *App. 20a-21a*.

Likewise, as noted above, the Supreme Court of Hawai'i in *Leone* did not displace value for use as determinative, but expressly held that "our focus is primarily on use, not value" and "while property value should not be considered to the exclusion of other factors, it is still a relevant factor in the economically viable use analysis." *Leone*, 141 Hawai'i at 83, 404 P.3d at 1272 (citing *Del Monte Dunes I*, 95 F.3d 1422, 1433 (1996); *see also Bridge Aina Le'a, LLC*, 2018 WL 3149489 *8 (Dist. Hawai'i 2018) (recognizing agreed upon instruction that "[e]vidence that the land had positive economic value notwithstanding the action of the Land Use Commission may be strong evidence of the availability of economically beneficial or productive uses.").

III. There is no split in authority or urgency

Finally, the *Petition* identifies what is only a very shallow split, at best, among the federal circuits and

state supreme courts at this time. Only two circuit court cases are cited in the *Petition*, and only one state supreme court decision by the Pacific Legal Foundation's amicus curiae brief. This is hardly evidence that the lower courts are "deeply confused" (*See*, *Petition*, p. 18), or that there is "deep conflict" (*See*, Pacific Legal Foundation Amicus Curiae Brief, p. 18).

Moreover, the *Petition* only discusses one appellate court that focuses analysis on "'use" – not "value – a[s] the touchstone in determining whether a total regulatory taking has occurred." *See*, *Petition*, p. 19 (citing *Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1117-19 (2015)). What is more, this case does not hold that "use" is fully determinative, to the exclusion of any relevance of value. In *Lost Tree Village Corp.*, 787 F.3d at 1116, the United States Court of Appeals for the Federal Circuit distinguished the circumstance where residual value "does not reflect any economic use," and stemmed solely from environmental value.

Also, contrary to what the *Petition* argues, the Supreme Court of Hawai'i's *Leone* decision is also *not* among the cases cited in the *Petition* that have considered the relevance of value *as determinative*, which is the essential complaint and premise of the *Petition*. *See*, *Petition*, p. 20 (citing to *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 441 (8th Cir. 2007)). The *Leone* decision is clearly distinguished from this line of cases about which the *Petition* complains, because as clearly demonstrated above, the Supreme Court of Hawai'i in *Leone* is *not* "focused

myopically on the property's residual value" as mischaracterized in the *Petition*. *See*, *Petition*, p. 20.

In sum, neither the *Petition* or the amicus curiae briefs offer any credible reasons why this Court needs to take up this distinction now. There is hardly a split in authority, much less a deep or established one.

What the Petitioners really seem to suggest is that this Court should take up their case because the *Leone* decision somehow made their *Lucas* claim harder to win. As majority and dissenting opinions have recognized, however, *Lucas* claims are supposed to be reserved for rare circumstances and regulations which have an "extreme effect." *See*, *Murr v. Wisconsin*, 137 S.Ct. 1933, 1952 (2017) (Roberts, C.J., dissenting) ("For the vast array of regulations that lack such an extreme [categorical] effect, a flexible approach is more fitting."); *see also Tahoe Sierra*, 535 U.S. at 330, 122 S.Ct. at 1483 ("our holding [in Lucas] was limited to 'the extraordinary circumstance when no productive or economically beneficial use of land is permitted.'").

As recognized in *Lucas* itself, the ad hoc factual inquiry of *Penn Central* is the test/analysis that should ordinarily apply to takings claims, while *Lucas* is the rare exception. The *Petition* seeks to turn this framework on its head, mischaracterizing *Penn Central* as a "gauntlet." Petitioners' position reflects a fundamental misunderstanding of the *Lucas* test, which is not intended to be an easier claim than *Penn Central*. *Lucas* claims are an exception to the *Penn Central* analysis, which recognizes certain considerations are irrelevant

where a regulation is extreme. It is recognized as a difficult standard to meet.

As delineated above, the Leones originally attempted to make a case under *Penn Central* in the state trial court below. Now, they are here arguing to expand the availability of *Lucas* only because they voluntarily gave up their *Penn Central* claims when it was not going well for them in front of the jury. *See*, *Petition*, *App. 64a-65a*.

CONCLUSION

For these reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

PATRICK K. WONG
Corporation Counsel

BRIAN A. BILBERRY
Deputy Corporation Counsel
Counsel of Record
DEPARTMENT OF THE
CORPORATION COUNSEL
200 S. High Street, 3rd Fl.
Wailuku, Maui, HI 96793
(808) 270-7462
brian.bilberry@co.maui.hi.us

Counsel for Respondents

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