No. 20-54

In The
Supreme Court of the United States

BRIDGE AINA LE'A, LLC,
Petitioner,

v.

STATE OF HAWAII LAND USE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, NEW ENGLAND LEGAL FOUNDATION, PROF. FRANK SCHNIDMAN, AND DAVID COLLINS, ESQ., IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The State of Hawaii zoned for agricultural use land that it knew was not viable or appropriate for such use. At the property owner's request, it rezoned it for urban use but, after Plaintiff Bridge Aina Le'a began developing it, the State illegally (as the Hawaii Supreme Court later held) "reverted" the land to agricultural use. A jury found this to be a 5th Amendment taking under this Court's standards in both *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The Ninth Circuit reversed, in an opinion which effectively eliminates property owners' ability to recover for temporary regulatory takings of property, raising these questions:

1. As the Ninth Circuit's extensive, published ruling eliminates property owners' ability to recover for temporary property takings under any theory, and that ruling conflicts with decisions of other courts, including this Court, does this Court need to clarify the rules for recovery for temporary regulatory takings?

2. In light of the confusion in the lower courts as to the application of the *Penn Central* factors—to the point where it has become almost impossible for property owners to prevail on this theory—should this Court reexamine and explain how *Penn Central* analysis is supposed to be done—or dispensed with?

3. In light of the Ninth Circuit's holding that almost no value loss—no matter how great—can ever establish a temporary taking under either *Lucas* or

Penn Central, is it necessary for this Court to clarify the standards?

4. In light of *Penn Central*'s clear direction that cases like this are to be determined *ad hoc*, on their individual facts, and this Court's approval in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999) that takings liability be decided by a jury, do appellate courts need to stay their hands (as mandated by the 7th Amendment's Re-examination Clause) when—as here—reviewing jury findings of fact-based takings issues, particularly when the trial judge confirmed those findings?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(a),[1] Pacific Legal Foundation (PLF), the Cato Institute, New England Legal Foundation, Professor Frank Schnidman, and David Collins submit this brief amicus curiae in support of Petitioner Bridge Aina Le‘a, LLC.

PLF was founded over 40 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel or amicus curiae in several landmark Supreme Court cases in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *See*, *e.g.*, *Knick v. Township of Scott, Pa.*, __ U.S. __, 139 S. Ct. 2162 (2019); *Horne v. Dep't of Agric.*, 576 U.S. 350 (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); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF has offices in California, Florida, and Virginia, and

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amici Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

regularly litigates matters affecting property rights in courts across the country.

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies works to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The New England Legal Foundation (NELF) is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England and the nation, protecting the free-enterprise system, and defending individual economic rights and the rights of private property. NELF believes that the rights of private property are not second-class constitutional rights. The expansion of regulatory law that has taken place at all levels of government has adversely affected the exercise of those rights. Since its founding, NELF, through its amicus briefs, has supported property owners in their efforts to vindicate their Fifth Amendment rights against all forms of improper government encroachment.

Professor Frank Schnidman (Retired) is the former Distinguished Professor of Urban and Regional Planning and former John M. DeGrove Eminent Scholar Chair at Florida Atlantic University, and the former Director of the Graduate Program in Real

Property Development at the University of Miami School of Law. He spent two years as a Visiting Scholar at Harvard Law School, is a Fellow of the Urban Land Institute, and is the 2019 recipient of the ABA Section of State and Local Government Law Lifetime Achievement Award. He is the co-author of *Handling the Land Use Case*, a well-respected practice manual for attorneys, published since 1984. Professor Schnidman is also the Chair of the ABA's Land Use Institute, an annual program that he has organized and chaired for more than 30 years. Professor Schnidman previously submitted amicus curiae briefs in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

David Collins is an appellate attorney from San Francisco, California. He has spent most of his career litigating eminent domain and inverse condemnation cases, exclusively representing property owners. As part of his practice, he is frequently asked by property owners to explain precisely what is required to satisfy this Court's regulatory takings tests, including the total regulatory takings test of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Given the longstanding split of authority on this question, he must answer "it depends on where you live and what court you file your lawsuit in." Only clarification of this rule by this Court will empower Mr. Collins to provide his clients with a clear answer to what should be a basic question.

Amici believe that their experience with property rights litigation will aid this Court in the consideration of the issues presented in this case. This case interests Amici because the decision below

threatens the protections this Court has provided to fundamental attributes of property ownership. Fidelity to the Fifth Amendment demands that these rights be secured and accorded the same protection from state interference as those of life and liberty, the other two pillars of the Lockean political philosophy that is the foundation of our Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises an important question that has divided the lower federal courts and state courts of last resort since this Court held that the government will be held categorically liable for a total regulatory taking where a regulation denies a property owner "all economically beneficial or productive use" of his land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Specifically, the petition asks whether *Lucas* requires that a property owner demonstrate that a regulation has deprived his property of all *economically beneficial use*, or whether the owner must show that the regulation extinguished all *value* in the property.

Although value and use are related concepts (and can, at times, overlap), they encompass qualitatively different inquiries into a regulation's impact on an owner's rights. An inquiry into a property's residual use is narrowly aimed at determining whether a regulation has extinguished an owner's fundamental right to make some productive use of his property. *Id*. at 1015–16. On the other hand, an assessment of a regulation's economic impact in terms of value raises a host of ancillary questions, such as how the benefits and burdens of a regulation are spread among the population. *Id.* at 1017. Such inquiries, however, are

only appropriate in a noncategorical takings claim under the multifactorial test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). *Lucas*'s categorical rule was meant to avoid those questions by focusing on deprivation of use as particularly problematic. 505 U.S. at 1017.

Clarifying this test is a matter of utmost importance to property owners, who are subject to these divergent constitutional standards based solely on the jurisdiction their property is located in, or whether the adverse action was taken by state or federal government. Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of* Lucas*: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847, 1856–58 (2017) (surveying inconsistent applications of *Lucas*). Some courts, like the Federal Circuit, hold that compensation is categorically required when a landowner shows that the government action has denied all economically viable use of the property, regardless of residual value. *See, e.g.*, *Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1116–17 (Fed. Cir. 2015). Meanwhile, courts like the Ninth Circuit below require that, in addition to proving that a government action extinguished all economically beneficial use of the property, the landowner also show that the economic impact of the regulation rendered the property valueless. App. 22a–31a. That line of inquiry allows the government to evade *Lucas* altogether because our courts have long recognized that all property has value[2]—even

[2] *See Kimball Laundry Co. v. United States*, 338 U.S. 1, 20 (1949) ("Since land and buildings are assumed to have some transferable value, when a claimant for just compensation for

property that is subject to a total prohibition on use. *See*, *e.g.*, *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 902 (Fed. Cir. 1986) (concluding that property with no current use has investment value because the government may eventually lift the regulations). Thus, a rule that focuses on "value" as the determinative factor in establishing liability in a total regulatory takings claim threatens to render *Lucas* a dead letter. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 350 (2002) (Rehnquist, C.J., dissenting).

Review is additionally warranted in this case because the underlying decision shows how a faithful reading of *Lucas* is necessary to prevent the government from unlawfully manipulating zoning laws to destroy valuable property rights and harm a community that is in dire need of new housing. *DW Aina Le'a Dev., LLC v. Bridge Aina Le'a, LLC*, 339 P.3d 685, 707–14 (Haw. 2014). At issue in this case is Bridge's proposal to privately develop over a thousand new market-rate homes and nearly four hundred low-income homes on property that the Hawaii Land Use Commission had rezoned from "agricultural use" to "urban use" after determining that its soils were "very poor," "not suitable for agriculture," and not adequate for grazing. *Id.* at 688; App. 2a, 73a. The Commission's rezone decision also concluded that the proposed housing development would be consistent with state and local land use policies. 339 P.3d at 692, 707–08, 714. If a zoning decision is to be accepted as a presumptively valid determination of the land's best use (*Village of Euclid v. Ambler Realty Co.*, 272 U.S.

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their taking proves that he was their owner, that proof is ipso facto proof that he is entitled to some compensation.").

365, 395 (1926)), then the Commission's decision to revert the property to "agricultural use" (without revisiting its prior findings) unquestionably operated to "prevent the best use" of Bridge's land, which is per se violative of the Fifth Amendment. *Lucas*, 505 U.S. at 1018; *see also Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980), *abrogated on other grounds by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 528 (2005) ("Although the ordinances limit development, they [may] neither prevent the best use of appellants' land . . . , nor extinguish a fundamental attribute of ownership.") (internal citations omitted).

The "temporary" duration of the Commission's zoning order should not prevent the Court from granting the petition to decide this important question. After all, this Court has unequivocally held that "'temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304, 318 (1987). *Tahoe-Sierra* explicitly refused to disturb this holding. 535 U.S. at 328. Thus, this case falls squarely within the purview of *Lucas*, where this Court adjudged a severely restrictive regulation to effect a categorical taking despite the fact that the state legislature had partially rescinded the law while the case was pending before this Court. *See* 505 U.S. at 1011–12, 1030 n.17 (majority opinion); J. David Breemer, *Temporary Insanity: The Long Tale of* Tahoe-Sierra Preservation Council *and Its Quiet Ending in the United States Supreme Court*, 71 Fordham L. Rev. 1, 51 (2002). Therefore, a decision in favor of Bridge on the *Lucas* question would entitle it

to compensation for the nearly five years its property was rendered useless by the reversion order.

For the reasons set forth below, this Court should grant Bridge's petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I.

CERTIORARI SHOULD BE GRANTED TO CLARIFY *LUCAS*'S DENIAL OF "ALL ECONOMICALLY BENEFICIAL USE" STANDARD FOR CATEGORICAL TAKINGS

Much of this Court's modern takings jurisprudence arose out of *Penn Central*'s attempt to fashion a test that could determine, once and for all, whether a particular infringement on property rights effectively forced "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central*, 438 U.S. at 123 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). *Penn Central* instructed courts to consider the totality of the circumstances, focusing particularly on three factors: the economic impact of the regulation, its effect on "reasonable" investment-backed expectations, and the "character of the government action." 438 U.S. at 124. But this Court soon found that some impingements on property rights are of such "unusually serious" character that they should be considered categorical takings, irrespective of the *Penn Central* balancing test. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 435 (1982).

One example is a regulation that effects a physical occupation of property, depriving the property owner

of the right to exclude trespassers. *Id.* at 435–36; *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979). Another example is the right to transfer one's property. *Horne v. Dep't of Agric.*, 576 U.S. 350, 364 (2015) (a law effected a taking where the owners "lose any right to control the[] disposition" of their property); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (holding that a taking occurred where statute effected a "total abrogation" of the right to devise one's property, which is "one of the most essential sticks in the bundle of rights that are commonly characterized as property").These core attributes of ownership are said to be such "fundamental element[s] of the property right" that they cannot be taken without just compensation, *Kaiser Aetna*, 444 U.S. at 179–80, even if the economic impact is minimal, *see Horne*, 576 U.S. at 363 ("[I]n *Loretto*, we held that the installation of a cable box on a small corner of Loretto's rooftop was a per se taking, even though she could of course still sell and economically benefit from the property.").

Lucas's categorical rule also protects a fundamental property right: "the right to make economically beneficial use of one's land," which the Court concluded was "on par with the fundamental right to exclude the public from private property." Luke A. Wake, *The Enduring (Muted) Legacy of* Lucas v. South Carolina Coastal Council*: A Quarter Century Retrospective*, 28 Geo. Mason U. Civil Rts. L.J. 1, 28 (2017); *see also Nollan v. Cal. Coastal Comm'n*, 483 U.S. at 834 n.2 (recognizing that "[t]he right to build on one's own property" is indeed a right, rather than a government privilege). *Lucas* judged a categorical rule protecting the fundamental right to productive use appropriate in part because denial of this right "is,

from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017. And further, the Court thought that, in the case of such a severe use restriction, "it is less realistic to indulge" in the "usual assumption" in *Penn Central* cases—namely "that the legislature is simply 'adjusting the benefits and burdens of economic life,'" *Lucas*, 505 U.S. at 1017 (quoting *Penn Central*, 438 U.S. at 124), in such a way that a regulation's economic impact "secures an 'average reciprocity of advantage' to everyone concerned." *Id.* at 1018 (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). Instead, when a landowner is forced to leave his land idle, the *Armstrong* principle requires compensation, in "all fairness and justice." 364 U.S. at 49.

Despite the simplicity of the *Lucas* rule, it has failed to deliver the clarity that property owners and governments need. Instead, the lower federal courts and state courts of last resort are irreparably divided and mired in "[c]onsiderable confusion" about "the distinction between use and value." Brown & Merriam, *supra*, at 1856. The confusion has its roots in the history of *Lucas* itself, where the state trial court found that the challenged regulation—which prohibited all permanent development—rendered Lucas's lot "valueless." 505 U.S. at 1019. The *Lucas* majority accepted that finding without elaboration. *See id.* at 1034 (Kennedy, J., concurring in the judgment). So, although the majority expressly framed the *Lucas* test in terms of use repeatedly,[3]

[3] *See*, *e.g.*, *id.* at 1017 ("[T]otal deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."); *id.* at 1016 ("[T]he Fifth Amendment is violated

lower courts have seized on the "valueless" finding of the state trial court and read *Lucas* as requiring a deprivation of all property value. *See, e.g.*, *Dist. Intown Props. Ltd. P'Ship v. District of Columbia*, 198 F.3d 874, 882 (D.C. Cir. 1999) ("To come within *Lucas*, a claimant must show that its property is rendered 'valueless' by a regulation."); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998) ("Determining whether all economically viable use of a property has been denied entails a relatively simple analysis of whether value remains in the property after the governmental action.").

These courts ignored the fact that *Lucas*'s holding did not—and rationally, could not—turn on the deprivation of all economic value. After all, Lucas himself retained some value in his vacant lots—he could, for example, "still . . . enjoy other attributes of ownership, such as the right to exclude others," "picnic, swim, camp in a tent, or live on the property in a movable trailer[,]" and "alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house."

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when land-use regulation . . . '*denies an owner economically viable use of his land*.'" (quoting *Agins*, 447 U.S. at 206)); *id.* at 1018 ("[T]he *functional* basis for permitting the government, by regulation, to affect property values without compensation . . . does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses."); *id.* ("[T]he fact that regulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service . . . ."); *id.* at 1019 ("[W]hen the owner of real property has been 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.").

Lucas, 505 U.S. at 1044 (Blackmun, J., dissenting); *see also id.* at 1034 (Kennedy, J., concurring in the judgment), *id.* at 1065 & n.3 (Stevens, J., dissenting). That's why the Court explained that the categorical rule applies where a government action "requir[es] land to be left substantially in its natural state" by prohibiting all development. *Id.* at 1018 (majority opinion); *see also Lingle*, 544 U.S. at 528 ("Although the ordinances limit development, they [may] neither prevent the best use of appellants' land . . . , nor extinguish a fundamental attribute of ownership.").

The confusion inherent in *Lucas* was exacerbated by *Tahoe-Sierra*, which conflated the terms "use" and "value" without any supporting explanation or rationale. Then, in dicta, the *Tahoe-Sierra* Court described *Lucas* as limited to "the 'extraordinary case' in which a regulation permanently deprives property of all value." 535 U.S. at 332. That statement was both incorrect (Lucas, in fact, retained some value in his lots) and unnecessary to the Court's resolution of the question presented because the lower court had purposefully avoided "the sticky issues surrounding" use and value, choosing to rely instead on evidence that the challenged regulation did not eliminate all productive use of the land. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 780–81 (9th Cir. 2000). Even so, numerous courts, including the Ninth Circuit below, have seized on *Tahoe-Sierra*'s conflicting dicta as having substantially altered the *Lucas* rule. *See* App. 26a (decision below) (noting that property value is "determinative" in a *Lucas* claim); *see also*, *e.g.*, *State ex rel. Shemo v. Mayfield Heights*, 775 N.E.2d 493, 495 (Ohio 2015) ("In *Tahoe-Sierra*, the Court held that moratoriums, totaling 32 months, on development in

the Lake Tahoe Basin did not constitute a compensable taking *although the moratoriums temporarily deprived affected landowners of all economically viable use of their property*." (emphasis added)); *SDDS, Inc. v. South Dakota*, 650 N.W.2d 1, 10 (S.D. 2002) ("In its most recent case, *Tahoe-Sierra*, the Court reaffirmed the case-specific analysis of *Penn Central* as the default procedure. '[T]he categorical rule in *Lucas* was carved out for the "extraordinary case" in which a regulation *permanently* deprives property of *all* value; the default rule remains that, in the regulatory takings context, we require a more fact-specific inquiry.'" (quoting *Tahoe-Sierra*, 535 U.S. at 332)).

Yet even after *Tahoe-Sierra*, the value-based rule is not universal. By focusing "primarily on use, not value[,]" "several courts have found a taking even where the 'taken' property retained significant value." *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999). Perhaps most prominent among these is the Federal Circuit's decision in *Lost Tree*, which held that the existence of residual value in regulated property will not defeat a *Lucas* claim if that value is not derived from an "economic use." 787 F.3d at 1116–17. *Lost Tree* rejected the proposition that the ability to sell property for value will defeat a *Lucas* claim; the court instead reasoned that "[t]ypical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel." *Id.* at 1117. In other words, *Lost Tree* recognized that an economic use is something a property owner can do *with* the land, as opposed to an "investment use," which depends entirely on the property's value as useless open space. *Cf. Leone v.*

Cty. of Maui, 404 P.3d 1257, 1272 (Haw. 2017) (noting testimony that a "property had 'investment use' or, in other words, that the property had value because the Leones could hold on to property, wait until it increased in value, and sell it for a profit").

The Connecticut Supreme Court, through its "practical confiscation" doctrine—which that court considers indistinguishable from the *Lucas* categorical takings inquiry, *see Bauer v. Waste Mgmt. of Conn., Inc.*, 662 A.2d 1179, 1197 n.17 (Conn. 1995)—has also rejected the "valueless" rule. Under the doctrine, "zoning reclassifications can constitute an unconstitutional taking when they leave a property owner with no economically viable use of his land other than exploiting its natural state." *Id.* at 1197 (quoting *Gil v. Inland Wetlands & Watercourses Agency*, 593 A.2d 1368, 1373 (Conn. 1991)). The court has effectively ignored residual value and focused on whether "regulatory constraints allow [a property owner] to use his land only in its natural state without any economically viable alternative use thereof." *Gil*, 593 A.2d at 1373–74. As such, it has found a taking where property was rezoned from residential to a flood plain district, limiting its uses to those consistent with a park, even though the land retained a quarter of its value. *Dooley v. Town Plan & Zoning Comm'n*, 197 A.2d 770, 772–74 (Conn. 1964). And in another case, a zoning designation limiting development to things such as wharves and walkways was judged a taking even though it left the property with $1,000 in residual value. *Bartlett v. Zoning Comm'n of Town of Old Lyme*, 282 A.2d 907, 910 (Conn. 1971). In short, rather than focusing on property value, the Connecticut Supreme Court has followed *Lucas*'s suggestion that "typical" categorical taking involves

"requiring land to be left substantially in its natural state," *Lucas*, 505 U.S. at 1018.

This split of authority is extremely consequential to property owners who want to put their land to productive use. A recent analysis demonstrated that *Lucas* claims are rarely successful; as of 2017, landowners won just 1.6 percent of the time. Brown & Merriam, *supra*, at 1849–50. One of the primary culprits for the exceptionally low success rate is the widespread adoption of the value-based rule. After all, "[a]n understanding of the *Lucas* categorical regulatory takings rule as only applying when a government regulation deprives an owner of all value would significantly heighten the already substantial impediments to property owners' ability to mount successful *Lucas* challenges." *Id.* at 1857.

Only this Court can resolve this conflict and provide certainty to lower courts, property owners, and regulators. Most urgently, review is necessary to ensure that property owners across the country can count on uniform constitutional rules to protect them from potentially confiscatory regulations.

II.

THE NINTH CIRCUIT'S FOCUS ON VALUE, RATHER THAN USE, THREATENS TO RENDER *LUCAS* A DEAD LETTER

Certiorari is also warranted because the value-based interpretation of *Lucas* threatens to render *Lucas* all but irrelevant. Interpretations of *Lucas* that require a 100 percent diminution of value fundamentally misunderstand the reason for the categorical rule in the first instance. A *Lucas* taking is not simply a more extreme version of a regulatory restriction that requires compensation under *Penn Central*. While the *Penn Central* inquiry primarily concerns the economic impact of a regulation on property value, *see Penn Central*, 438 U.S. at 124, the categorical *Lucas* rule targets a specific type of regulatory action; one that requires a property owner to forego development of vacant land and leave his property as open space, *see Lucas*, 505 U.S. at 1019. Interpreting *Lucas* as applicable only when the economic impact of a regulation is 100 percent obscures this crucial difference and renders *Lucas* little more than a curiosity.

As explained above, the categorical rule in *Lucas* stems from the serious character of a regulation that destroys an owner's right to make reasonable, productive use of his property. *Loretto*, 458 U.S. at 426 ("In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative."). Just as where a physical invasion deprives a property owner of the right to exclude, the "special" nature of the injury suffered by a property owner forced to leave his land as idle open space is not

the mere diminution of property value, but the deprivation of a fundamental property right. *Id.* at 436. Thus, a requirement that a property owner show his land has been rendered valueless would undercut the justification for the categorical rule in the first place. It would also force landowners who cannot use their land to prove a taking under a single factor of the *Penn Central* theory, without the benefit of its other balancing factors. *See* Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 Fed. Circuit B.J. 677, 691–92 (2013) (even considering all three balancing factors, *Penn Central* claims are extremely difficult to win). Should *Lucas* morph into an "extreme *Penn Central*" test, it would provide no actual relief from the vagaries of the multifactor test. *See* Petition at 19–21.

Indeed, a value-based interpretation would render *Lucas* nearly as useless as the rocky lava flow land at issue in this case. After all, even property that must be left "substantially in its natural state," *Lucas*, 505 U.S. at 1018, retains value—both as open space and as a speculative investment. *See Florida Rock Industries*, 791 F.2d at 902 ("We do not perceive any legal reason why a well-informed 'willing buyer' might not bet that the prohibition of rock mining, to protect the overlying wetlands, would some day be lifted."). In practice, a requirement that land be "valueless" limits *Lucas* to cases where the trial court makes an "implausible" finding that the regulated land retains no value. *See Lucas*, 505 U.S. at 1036 (Blackmun, J., dissenting). But it is truly implausible that this Court would have announced a categorical regulatory takings rule that does not apply unless a particular trial judge disregards the economic reality that all property has some value. The alternative—that *Lucas*

protects the reasonable, productive use of property—is consistent with the first principles of takings law, the opinion in *Lucas* itself, and common sense.

What is more, a value-based rule is inherently arbitrary and capable of manipulation. In his *Lucas* dissent, Justice Stevens lamented that, under a value-based total takings rule, "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." *Id.* at 1064 (Stevens, J., dissenting). He was right—if that were the rule, it would indeed be "strangely arbitrary." Wake, *supra*, at 28. Application of the value-based rule would hinge on whether the landowner could convince a trial court that the regulations entirely extinguished the market for the property—a showing that might depend on factors independent of the government's regulation, such as the property's location, rather than a simple, quantifiable determination of whether permitted uses are "economically viable."[4] And the no-value rule could be easily manipulated through "inventive regimes that may prohibit development altogether, while theoretically preserving some residual value for the owner." Wake, *supra*, at 28–29. A common example is the transferrable development right, which Justice Scalia described as "a clever, albeit transparent, device that seeks to take advantage of a peculiarity of our Takings Clause jurisprudence." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 748 (1997) (opinion concurring in the judgment). A

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[4] *See* Petition at 6 ("Dr. Plasch concluded that none of the statutorily permissible uses would have been economically beneficial or productive for the five years the reversion order precluded use.").

focus on use, on the other hand, ensures that *Lucas*'s important protection is not read out of existence.

In the nearly thirty years since *Lucas*, its initial promise as a bulwark against regulation destroying the fundamental right to use one's own property has withered away. As the previous section demonstrates, many courts now regard *Lucas* as essentially having been limited to its facts. Yet *Lucas*—like *Loretto*—remains an important recognition that the government categorically owes compensation when it takes a fundamental property right. This case presents an opportunity for the Court to breathe some much-needed life into the *Lucas* principle through a recognition that it protects the right to make reasonable, productive use of land.

III.

THE TEMPORARY DURATION OF THE REVERSION ORDER DOES NOT PRECLUDE APPLICATION OF *LUCAS*

The Court should not be dissuaded from granting the petition by the Ninth Circuit's alternative conclusion that a temporary deprivation of all use can never give rise to a *Lucas* claim. Contrary to the decision below, *Tahoe-Sierra* cannot be read to require such a result. More importantly, *First English* expressly forecloses the Ninth Circuit's conclusion, holding instead that regulations which temporarily "deny a landowner all use of his property . . . are not different in kind from permanent takings." *First English*, 482 U.S. at 318. Thus, *Tahoe-Sierra* should not preclude the application of *Lucas*'s categorical rule in this case. Akke Levin, *Camping in Lake Tahoe: Does a Temporary Deprivation of All Beneficial Use of*

Land Justify Rejection of the Categorical Lucas *Rule?*, 4 Nev. L.J. 448, 459 (2004).

Tahoe-Sierra, moreover, is readily distinguishable from this case. There, this Court considered whether a prospectively temporary restriction (i.e., a 32-month "moratorium" on all development), which concededly deprived affected landowners of all economic use of their properties for that defined period, effected a categorical taking under *Lucas*. *See Tahoe-Sierra*, 535 U.S. at 316 & n.12. The Court held *Lucas* inapplicable; it characterized the property owners' argument as an attempt to "disaggregate[]" the property into "temporal segments corresponding to the regulations at issue" and claim a denial of economic use during each period separately. *Id.* at 331. According to the Court, that position was untenable because "[w]ith property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings." *Id.* Instead, *Tahoe-Sierra* reasoned that "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Id.* at 332.

At the same time, however, *Tahoe-Sierra* reaffirmed *First English*. *Id.* at 328. Therefore, it cannot be true that *Tahoe-Sierra* forecloses all *Lucas* claims based on a temporary deprivation of use. It follows that its holding must be limited in some way to preserve *First English*'s recognition that permanent and temporary regulatory takings should be treated the same when they deny an owner of all use of property. And indeed, *Tahoe-Sierra* and *First English* are reconcilable in two related ways.

First, there is a critical distinction between *prospectively temporary* regulations like the one at issue in *Tahoe-Sierra* and *retrospectively temporary* regulations like the reversion order at issue here. A "prospectively temporary" regulation is one that is "at the outset . . . intended to be temporary" (allowing the owner to formulate reasonable expectations of future use) while a "retrospectively temporary" regulation is "intended to be permanent" but is "subsequently rescinded." Daniel L. Siegel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 Vt. J. Envtl. L. 479, 496 (2010). *Tahoe-Sierra* established a rule that "prospectively temporary" regulations do not implicate *Lucas*. *See id.* at 483–84. Indeed, the Federal Circuit recognized this distinction and expressed skepticism that *Tahoe-Sierra* would preclude *Lucas* claims based on permanent regulations later rescinded or invalidated—such as the reversion order here. *See Seiber v. United States*, 364 F.3d 1356, 1368 (Fed. Cir. 2004) ("[O]ur case law suggests that a temporary categorical taking may be possible. In [*Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002)], we explained that the Supreme Court may have only 'rejected [the] application of the per se rule articulated in *Lucas* to temporary development moratoria,' 296 F.3d at 1350, and not to temporary takings that result from the rescission of a permit requirement or denial, *id.* at 1351–52."). So did the Ninth Circuit in *Tahoe-Sierra* itself. 216 F.3d at 778 ("What is 'temporary,' according to [*First English*'s] definition, is not the regulation; rather, what is 'temporary is the taking, which is rendered temporary only when an ordinance that effects a taking is struck down by a court."). And the

Court of Federal Claims explicitly held that *Lucas* applies to a retrospectively temporary regulation "cut short" by a court order, because the invalidation "does not transmute the interests that it had taken, but instead informs the amount of just compensation." *Resource Investments, Inc. v. United States*, 85 Fed. Cl. 447, 484 (2009).

And second, *Tahoe-Sierra* involved a *facial* takings claim, whereas this case is as-applied, which permitted the district court to assess the impact of the regulation on a particular parcel. This Court has always stressed that facial takings claims are "an uphill battle" for property owners. *Tahoe-Sierra*, 535 U.S. at 320 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *see also Suitum*, 520 U.S. at 736 n.10 (majority opinion) (noting that it is easier to ripen facial takings claims, but extremely hard to win them). Since the denial of all economically viable use is "easier to establish in an 'as-applied' attack[,]" *Pennell v. City of San Jose*, 485 U.S. 1, 18 (1988) (Scalia, J., concurring in part and dissenting in part), limiting *Tahoe-Sierra*'s holding to facial claims makes sense as a prudential matter.

To extend *Tahoe-Sierra* to preclude as-applied *Lucas* claims where a permanent regulation was rendered temporary due to a court order or subsequent rescission would "elevate[] form over substance and def[y] economic realities." *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 873 (Fla. 2001). It would also defy the realities of regulation—after all, even "[t]he 'permanent' prohibition that the Court held to be a taking in *Lucas* lasted less than two years." *Tahoe-Sierra*, 535 U.S. at 347 (Rehnquist, C.J., dissenting). *Tahoe-Sierra* is no obstacle to a *Lucas*

claim in this case, which makes it a suitable vehicle to address the confusion that has proliferated as to the interpretation of *Lucas*'s "denial of all economically viable use" standard.

CONCLUSION

The petition for certiorari should be granted.

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Respectfully submitted,

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