No. 20-54

IN THE

Supreme Court of the United States

BRIDGE AINA LE ʻA, LLC,

Petitioner

v.

STATE OF HAWAII LAND USE COMMISSION,

Respondent.

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

BRIEF OF FOUR TAKINGS SCHOLARS IN SUPPORT OF PETITIONER

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Brown, Carol N. & Merriam, Dwight H., On the Twenty-Fifth Anniversary of *Lucas*: Making or Breaking the Takings Claim, 102 Iowa L. Rev. 1847 (2017).

STATUTES

CONSTITUTIONS

INTEREST OF AMICUS CURIAE[1]

Professors Carol N. Brown, David L. Callies, and James W. Ely, Jr. have taught land use law for decades, collectively over 100 years, and each has authored numerous scholarly articles and books on

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[1] Pursuant to the Court's Rule 37.3, this amicus brief is filed with the consent of the parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief, and no person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for Amicus Curiae gave each party ten days' timely notice of the intent to file this brief.

the subject. Dwight Merriam is a practicing attorney and former President of the American Institute of Certified Planners. He has taught land use as an adjunct professor for 40 years and is the co-editor of the land use law treatise, Rathkopf's The Law of Zoning and Planning 4th. Our academic and practical experience cuts across land use law, property rights, and takings. We are recognized for our objective advocacy for the development of land use law to serve the interests of all the stakeholders, including government, property owners, developers, interested citizens, and advocacy groups. We join in this brief in the interest of urging the Court to grant certiorari because this case provides an ideal opportunity to clarify and advance the law.

SUMMARY OF ARGUMENT

1. The opinion of the Ninth Circuit Court of Appeals illustrates the problems inherent in the present tests for takings. The confusion adversely affects all of the stakeholders and results in unnecessary litigation. This case provides a good opportunity to address the problems.

2. The chaos is caused largely by the failure to understand what "economically beneficial use" means in the real world of real property. The market value of property is not the basis on which regulatory takings should be determined; instead, it is the use left to the owner.

3. The categorical takings test in *Lucas* is correct, but has been misunderstood by litigants and the courts. The Court should reiterate the test, using the appropriate definition of "economically

beneficial use" to make clear when there is a *Lucas* categorical taking.

4. The local jury determined as a matter of fact that the Hawaii Land Use Commission totally eliminated any economic or productive use of the land in question and that jury's judgment based on the facts presented and the proper instructions issued ought to be respected, as such jury decisions should be in takings cases generally.

ARGUMENT

I
THE CHAOS CREATED BY THE UNCLEAR RULES FOR TAKINGS ADVERSELY AFFECTS THE INTERESTS OF ALL THE STAKEHOLDERS.

While we do not take sides on who ought to win in this case, we urge the Court to grant certiorari in the interest of all the stakeholders. There is confusion about what might be a taking because the *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) rules are unworkable and unclear as presently interpreted and applied. With clearer standards for takings, better decisions would be made, litigation reduced, and cases more quickly settled.

All the stakeholders are harmed by the current uncertainty. Government, in our experience, sometimes regulates too timidly out of fear of a successful 42 U.S.C. § 1983 taking claim and attorney's fees under 42 U.S.C. § 1988. But government also, as we have seen all too often, goes

beyond reasonable regulatory bounds and takes property by over-regulation when it is unable to find its way out of the mare's nest of confused and confusing precedent.

Property owners are similarly disadvantaged, not knowing how much use they must lose before they might have a valid claim for just compensation. Moreover, advocates for better planning and regulation for a sustainable future have little idea of what is possible, what will be constitutionally permissible, and what regulation risks taking private property for public use.

The problems with uncertain regulatory takings tests affect all no matter where they are on that long continuum from unbridled protection of all property rights to the principle that those rights must give way without compensation for the common benefit.

This Court helped all of the stakeholders with its decision in *Knick v. Township of Scott*, U.S. (2019). After the first couple of days of pontification in the press from both ends of the political spectrum, reality set in. *Knick* was not about a liberal or conservative agenda. It was about correcting a test that had proved unworkable.[2] This case provides a similar opportunity for the Court to revisit the long history of regulatory takings tests and to give guidance so desperately needed.

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[2] Callies, David L., Regulatory Takings after *Knick*, ABA (2020); Merriam, Dwight, Rose Mary Knick and the Story of Chicken Little, 47 Fordham Urb. L.J. 639 (2020).

II
AT THE ROOT OF THE PROBLEM IS THE CONFUSION OVER WHAT IS AN "ECONOMICALLY BENFICIAL USE".

A land use regulation totally "takes" property when it leaves the owner without any "economically beneficial use" of the land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). In *Lucas*, a beach management statute prohibited the landowner from building a single-family home on each of two lots. This Court there established the rule that when a regulation deprives a landowner of all economically beneficial use, the result is the functional equivalent of a physical taking under eminent domain, requiring just compensation under the Constitution's Fifth Amendment.

Most land, even under the most burdensome regulation, will likely still have value. It may even retain some limited, "salvage" uses like camping or trail walking. It certainly will have speculative value. "The law is dynamic, and this dynamism, with the potential of favorable future regulatory change for a property owner, creates speculative value at some price point."[3]

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[3] Brown Carol N. & Merriam, Dwight H., On the Twenty-Fifth Anniversary of *Lucas*: Making or Breaking the Takings Claim, 102 Iowa L. Rev. 1847 at note 55 (2017).

This Court determined in *Olson v. United States*, 292 U.S. 246, 257, 54 S.Ct. 704 (1934) that speculative elements affecting value should be not be considered in regulatory takings cases. The United States Court of Appeals, Federal Circuit, in *Lost Tree Vill. Corp v. United States*, 787 F.3d 1111, 1118 (Fed. Cir. 2015), relied upon this Court's *Olson* decision when it held that the takings inquiry does not consider speculative uses of land. The holding in *Olson* is nothing new because the Fifth Amendment does not employ the phrase "economically beneficial use." That phrase only has meaning in how this Court has used it.

In our view, property has no economically beneficial use, as this Court described it in *Lucas*, when the owner finds it is simply useless; not valueless in the marketplace, but devoid of any reasonable use, of no practical value to the owner in terms of its use.

Despite some later attempts both in state and federal courts to convert this economically beneficial use test to one in which the landowner must show the relevant parcel is deprived of all value, this Court has several times reiterated that the test for categorical or total regulatory takings remains as set out in *Lucas*. Thus, in summarizing the Court's takings jurisprudence, a unanimous Court restated the "all economically beneficial use" test in *Lingle v. Chevron USA*, 544 U.S. 528 (2005). Again in *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23 (2012) the Court repeated that a total regulatory taking occurs when a regulation permanently requires landowners to sacrifice all economically beneficial use of their land.

So what's the problem? How is it that in the case for which we are urging the Court to grant a petition for a Writ of Certiorari, a federal appeals court has refused to apply *Lucas* when a state Land Use Commission classifies as agricultural a parcel which is, on the record, totally unsuitable for agricultural use, on the ground that it might have value for growing rocks? Because value – which land always has – is different from the standard this Court set out in *Lucas*. Value is not the same as economically beneficial use.

Conventional appraisal techniques value property based on what the market is – what would a property sell for with a willing seller and a willing buyer and some reasonable time. Appraisers also value commercial properties like stores and apartment buildings using the income approach, considering return on investment. And finally, some valuation is based on replacement cost, what it would cost to replicate improvements.

The problem litigants and the courts have had with figuring out what is an "economically beneficial use" is that they fail to understand that just about anything that can be sold has some monetary value, even though it may have no use.

The leading treatises on eminent domain, C. Nichols, Eminent Domain (rev. 3d. ed. 2020 ongoing), and land use, Rathkopf's The Law of Zoning and Planning 4th (2020 ongoing), both devote entire chapters to how the probability of rezoning ought to be considered in valuing property in eminent domain cases. The market monetization of the speculative use makes sense in physical takings where the government takes land by eminent

domain. With eminent domain, the owner is divested of the property and to receive just compensation ought to receive the monetized speculative value if they can prove the future use is reasonably probable because the owner either paid that or has voluntarily held the property thereby investing in it.

It is far different with regulatory takings where the property owner is left owning property that cannot be put to any practical use, but still might be found to have some cash value in the marketplace. With inverse condemnation, to consider speculative market value as part of the economically beneficial use often means rejecting the taking claim thereby denying the owner fair compensation, while leaving the owner with no present use.

That construct that we can find "economically beneficial use" by determining if the property has a market price is based on speculation – someone believing they have the ability to come up with a more lucrative plan for development or the political power to get a needed zone change. It is the gambler's world of real estate, with some big winners and some big losers.

This Court in *Lucas,* at least as we understand the decision, did not consider speculative value to be any part of an "economically beneficial use." It is, unfortunately, the confusion among some over what the Court meant that has caused the difficulty in applying the *Lucas* categorical taking test.

Even if a property has speculative monetary value, its beneficial use, here and now, may be

nonexistent. The facts of this case suggest that this may be one of those instances, where there is no present practical use for this landscape of lava rocks under its state agricultural classification, though it might be economically developed if it were zoned for an urban use… when and if it was again reclassified.

It is that long-term, "over-the-horizon" speculation that is reflected in appraisals. That high-risk, potentially high-return, basis of valuation utterly fails to reflect current use as a practical matter, which ought to be the basis for determining if there is a compensable taking. And it is that misguided use of speculative valuation that has rendered the first part of the three-part *Penn Central* test unworkable.

What is needed is a clear pronouncement by the Court that use means actual, current, reasonable use, not the fact that an appraisal can put a dollar value on it.

The fact that an appraiser, bound by the Uniform Standards of Professional Appraisal Practice (USPAP),[4] may be required to factor in the speculative value is not helpful most of the time. This is, as we said, different than eminent domain. If the test in an indirect taking is not one of actual use, property owners may be impressed into becoming unwilling stewards of properties held for future use at their own expense, the government

[4] 2020-2021 Uniform Standards of Professional Practice (USPAP) Eff. Jan. 1, 2020 through Dec. 31, 2021 available at https://uspap.org/.

shifting the burden of meeting the public's interest onto the shoulders of the private property owner.

The apparent frustration of the government in this case with the failure of several developers to move forward, and the government's desire to force a change to some new developer by reclassifying the land from urban back to agriculture may be the sort of abuse that should be compensated if it is determined that there is no actual current use. As it stands now, the Ninth Circuit's application of the first part of the *Penn Central* test appears to miss the mark because it is grounded in the USPAP-driven formulation that always places market speculation over actual use.

Did the jury, in its wisdom, see through the shibboleth of market value and correctly discern that there was no use and that the property owner should be compensated for becoming what appears to be an unwilling, unpaid custodian? We do not know. We were not there for the trial, have not read the trial transcript, and were not privy to the deliberations; but then neither was the Ninth Circuit.

To determine if there is a compensable Fifth Amendment taking, we must look only to the here and now, to what is an appropriate and reasonable use as currently provided for by government plans and regulations.

III
LUCAS PROVIDES A CLEAR STATEMENT OF THE CATEGORIAL OR TOTAL REGULATORY TAKING, AND THE COURT NEEDS TO REITERATE IT

The Court's test in *Lucas* is a good one, and it works - if it is applied as to use, not speculative value. The reason for relatively few successful *Lucas* claims is that courts have misapplied the test and permitted vague and speculative claims about possible future value to obscure the fact that an owner has been denied all economically viable of his or her land. This amounts to an end run around *Lucas*.

IV
COURTS SHOULD RARELY OVERRIDE THE JUDGMENT OF THE FACTFINDING JURY IN TAKINGS CASES.

The precedent for a judge's power to take the decision away from the jury comes from *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 659 (1935),[5] where the Court noted that it had "distinctly recognized that a federal court may take a verdict subject to the opinion of the court on a question of law" and upheld a trial court's decision to take the case away from the jury because the "evidence was

[5] Citing Brent v. Chapman, 5 Cranch, 358, 3 L.Ed. 125; Chinoweth v. Haskell, 3 Pet. 92, 94, 96, 98, 7 L.Ed. 614; Suydam v. Williamson, 20 How. 427, 434, 15 L.Ed. 978.

insufficient to support the verdict for the plaintiff." This Court in that case characterized a question of fact as a question of law within the province of the court.

The notion that judges may be more "rational" than juries is at the foundation of our willingness to allow them to nullify the work of the juries. While who is more rational might be an apt consideration in some highly-technical matters, there is nothing highly-technical about regulatory taking cases.

To the contrary, what distinguishes these taking cases from most others is that they are fundamentally fact-specific and grounded, literally, in the local experience. They involve land, a form of property so unique that specific performance is available as a remedy to enforce real property contracts.

In this case, who would know more than a jury of local people about lava fields, one type of lava versus another, and what the local experience has been as to the practical use of those areas? School children in Hawai'i know the difference between pahoehoe and a'a. They go on field trips to volcanos.[6] It is around them all the time.

People who live and work in Hawai'i know what the landscape can support, and what an economically beneficial use is. While they, as jurors in regulatory taking cases, should consider the appraised value, we need them to determine what an economically beneficial use is from their

[6] "Public school students view new Kilauea lava," Hawaii State Department of Education (Dec. 8, 2014), available at http://www.hawaiipublicschools.org/ConnectWithUs/MediaRoom/PressReleases/Pages/lava-field-trip.aspx.

particular perspective. The district court judge recognized that in this case, but the Ninth Circuit, yet one more step removed from those lava flows, rejected it.

We believe that the rule of law and the ends of justice require that taking cases, direct and indirect, should be tried by juries because they involve the taking of private property. Private property, second only to liberty interests, is at the core of our democracy and constitutional government.

The standard for wresting the decision away from the jury in a taking case should be a strict one. The determination by a jury that property has been taken by overregulation is a profoundly factual one based on the judgment of local citizens who know best whether the land has any reasonable, economically beneficial economic use. That judgment may sometimes rationally disregard under the rule of law, at least to some degree, an appraisal report that has monetized speculation.

To alchemize that factual determination into one of a pure question of law is unwarranted and unwise in taking cases and should be reserved for those instances where letting a jury verdict stand would be manifestly unjust and akin to "shocks the conscience." Other than that, jury verdicts in taking cases should stand, even when they depart from the rigid construct of diminution in value, because local jurors know more than anyone else about use and community values as to who should bear the burden.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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