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

BRIEF OF *AMICI CURIAE* OWNERS' COUNSEL OF AMERICA, NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, NFIB SMALL BUSINESS LEGAL CENTER, REASON FOUNDATION, AND PROFESSOR SHELLEY ROSS SAXER IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

After an eight-day trial, the jury returned a verdict that the landowner, Bridge Aina Le‘a, established a regulatory taking by the Hawaii Land Use Commission when the commission re-zoned the landowner's property – a barren, rocky lava field – as agricultural land.

In light of this Court's clear direction in *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978), that cases like this are to be determined ad hoc, on their individual facts, and this Court's holding in *City of Monterey* v. *Del Monte Dunes*, 526 U.S. 687 (1999), that a jury decide the application of *Penn Central*, 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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES--Continued

Page

TABLE OF AUTHORITIES--Continued

Page

TABLE OF AUTHORITIES--Continued

Page

CONSTITUTIONS, STATUTES, AND RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES--Continued

Page

TABLE OF AUTHORITIES--Continued

Page

INTEREST OF *AMICI CURIAE*[1]

Owners' Counsel of America (OCA) is an international not-for-profit organization of lawyers dedicated to the principle that the right to own and use property is "the guardian of every other right" and the basis of a free society. James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3rd ed. 2007). OCA was specifically founded to level the playing field in situations where private landowners find themselves pitted against powerful governmental entities with eminent domain powers and unlimited resources. To that end, OCA works for property owners across the nation to protect and advance the rights of private property.

National Association of Reversionary Property Owners (NARPO) is a Washington State not-for-profit educational foundation whose purpose is to educate property owners concerning the defense of their property rights. NARPO has assisted tens of thousands of property owners nation-wide and has been involved in litigation protecting the individual's constitutional right to due process and just compensation as guaranteed under the Fifth Amendment. See, *e.g.*, *Preseault* v. *Interstate Commerce Comm'n*, 494 U.S. 1 (1990) (*amicus curiae*);

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[1] In accordance with this Court's Rule 37.2(a), all counsel of record for the parties received timely notice of the intention to file this brief. Petitioners and Respondent have consented to this brief. No counsel for any party authored any part of this brief, and no person or entity other than *amici curiae* made a monetary contribution intended to fund its preparation or submission.

Nat'l Ass'n of Reversionary Property Owners v. *Surface Transp. Bd.*, 158 F.3d 135 (D.C. Cir. 1998).

NFIB Small Business Legal Center (NFIB SBLC) is a not-for-profit, public interest law firm providing legal resources as the voice for small businesses in the nation's courts. The National Federation of Independent Business is the nation's leading small business association, representing members in Washington, DC, and all 50 state capitols. Founded as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB SBLC frequently files *amicus* briefs in cases that will impact small businesses.

Reason Foundation is a nonpartisan public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing and promoting libertarian principles and policies — including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, online commentary, and policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason files briefs on significant constitutional issues.

Professor Shelley Ross Saxer is the Laure Sudreau Chair in Law at Pepperdine University Caruso School of Law, where she has taught courses in real property, land use, community property, remedies, environmental law, and water law. She has also authored numerous scholarly articles and books on property and takings law. See, *e.g.*, Shelley Ross Saxer, David L. Callies & Robert H. Freilich, *Land*

Use (American Casebook Series) (7th ed.); Shelley Ross Saxer, Colleen Medill, Grant Nelson, and Dale Whitman, *Contemporary Property* (West Academic 5th ed. 2019).

SUMMARY OF ARGUMENT

For nearly a century, this Court has held out the promise that if a regulation goes "too far," it will be a taking. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). But "[t]akings law should be predictable *** so that private individuals confidently can commit resources to capital projects." Susan Rose-Ackerman, *Against Ad Hockery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988). In the intervening time, this Court has also recognized that there are a "nearly infinite variety of ways in which government actions or regulations can affect property interests[.]" *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 31 (2012). And despite much doctrinal confusion, this Court has repeatedly emphasized one thing: there are few bright lines or categorical rules.

Most takings claims are analyzed by avoiding "any 'set formula' for determining how far is too far, instead preferring to 'engag[e] in *** essentially ad hoc, factual inquiries" under the "storied but cryptic" three-factor test in the "polestar" decision of *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). See *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (quoting *Penn Central*, 438 U.S. at 124); *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (*Penn Central* as "polestar"); *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S.

528, 537 (2005) (the three factors are "storied but cryptic").

The emphasis on ad hoc factual inquiries means that most takings cases should be resolved on the facts, by the trier of fact. But the case at bar is the latest in a growing list of examples of an appellate court tossing aside a *Penn Central* verdict rendered by a trier of fact in favor of a categorical rule (invariably a categorical rule of "no liability" in which the "judicial thumb [is] firmly on the governmental side of the balance." Gideon Kanner & Michael M. Berger, *The Nasty, Brutish, and Short Life of* Agins v. City of Tiburon, 50 Urban Lawyer 1, 34 n.34 (2019)).[2]

Thus, although apparently designed to throw resolution of takings issues to trial courts and juries — where they belong — *Penn Central* has instead ironically become a tool that gives appellate courts an

[2] See, *e.g.*, *Colony Cove Prop., LLC* v. *City of Carson*, 888 F.3d 445 (9th Cir. 2018) (reversing district court's *Penn Central* verdict in favor of the property owner), *cert. denied*, 139 S.Ct. 917 (2019); *St. Bernard Parish Gov't* v. *United State*s, 121 Fed. Cl. 687, 746 (2015) (Under *Penn Central*, "[w]eighing all the evidence in this case, the court has determined that Plaintiffs established that flooding on Plaintiffs' properties that effected a temporary taking under the Fifth Amendment to the United States Constitution."), *rev'd*, 887 F.3d 1354, 1366 & n.13 (Fed. Cir. 2018) (benefits from the regulation must be considered), *cert. denied*, 139 S.Ct. 796 (2019); *Love Terminal Partners* v. *United States*, 126 Fed. Cl. 389, 428-29 (2016) (owners proved they possessed a reasonable, investment-backed expectation), *rev'd*, 889 F.3d 1331, 1345 (Fed. Cir. 2018) ("The reasonable, investment-backed expectation analysis is de-signed to account for property owners' expectation that the regulatory regime in existence at the time of their acquisition will remain in place, and that new, more restrictive legislation or regulations will not be adopted."), *cert. denied*, 139 S.Ct. 2744 (2019).

infinite arsenal of reasons to second-guess a trial court's view of the evidence. As a consequence, takings litigation often devolves into a pleadings game, not the fact-intensive inquiry the Court apparently contemplated in *Penn Central*. This incentivizes both sides to put the cart before the horse. Instead of focusing on the question at hand (what evidence supports a taking, and if there's been a taking, what compensation must be provided?), the key battle in many takings cases is whose narrative governs: the owner searches for a discrete property interest that has been rendered categorically useless so she can convince the court to treat it as a *per se* taking under one of the carve-outs, while government counsel advocates for a much broader view of the owner's expectations at stake (also known as the property interest) in order to water-down the economic impact of the regulation.[3] Here, the Petitioner covered both bases, and the jury found both

[3] See, *e.g.*, *Katzin* v. *United States*, 908 F.3d 1350, 1362 (Fed. Cir. 2018) (federal government asserting ownership of plaintiff's property was not a physical taking). See also *Alimanestianu* v. *United States*, 888 F.3d 1374, 1382-83 (Fed. Cir. 2018) (rejecting plaintiffs' efforts to characterize the regulation as effecting a physical invasion of property), *cert. denied*, 139 S.Ct. 1164 (2019); *Himsel* v. *Himsel*, 122 N.E.3d 935, 947-48 (Ind. Ct. App. 2019) (same); *Cranston Police Retirees Action Comm.* v. *City of Cranston*, 208 A.3d 557, 582 (R.I. 2019) (same). See Robert H. Thomas, *Restatement (SCOTUS) of Property: What Happened to Use in* Murr v. Wisconsin*?*, 87 UMKC L. Rev. 891, 898 (2019) (highlighting competing litigation strategies of pushing a case to either "*Lucas*-land" or "*Penn Central*-ville," because "[a]nswering that question one way or the other would, most likely, resolve the dispute on the merits").

a *Lucas* and a *Penn Central* taking. But even then, the Ninth Circuit would not hear of it.

ARGUMENT

I. This Court should grant the petition for certiorari to safeguard the landowner's fundamental right to a jury's determination of the effect of the government's taking.

An owner's constitutional right to trial by jury when the government takes his property was a clearly established principle of American law before 1791. *Bayard* v. *Singleton*, 1 N.C. 5, 1787 WL 6 (1787), demonstrates the point. North Carolina confiscated property owned by British sympathizers, including Samuel Cornell, "the richest man in North Carolina." Cornell deeded thousands of acres of land to his daughter, Elizabeth Cornell Bayard. *Id.* at *8. North Carolina confiscated Elizabeth Bayard's land and sold it to Spyers Singleton. In 1787, Elizabeth Bayard sued to recover title to her family homestead. Elizabeth Bayard argued North Carolina confiscated her property in violation of North Carolina's constitution guaranteeing a right to jury trial. Elizabeth Bayard prevailed, and the North Carolina Supreme Court declared the legislative act authorizing the confiscation of property without a jury trial to be unconstitutional.

The "Founders implicitly understood" that the right to a jury's determination of the facts in taking cases safeguarded individuals' property rights against government intrusion, and a review of juries' decisions has justified the Founders' action. Wanling Su, *What Is Just Compensation?* 105 Va. L. Rev. 1483,

1530-35 (2019). In fact, a recent study has shown that juries are more accurate than other methods of judging compensation in taking cases, such as government-appointed commissioners. See *id.* at 1535.

Since King John met the barons on the fields of Runnymede in 1215, the right to trial by jury has been accepted as a fundamental premise of Anglo-American jurisprudence. This Court observed:

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.
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> *Jacob* v. *City of New York*, 315 U.S. 752, 752-53 (1942).[4]

The Founders were very familiar with a sovereign's desire to deny civil jury trials. King George attempted to circumvent American colonists' right to jury trial by assigning disputes over the Stamp Act tax to admiralty courts that sat without a jury.

> John Adams voiced the American reaction: "But the most grievous innovation of all, is

[4] See also *United States* v. *Booker*, 543 U.S. 220, 239 (2005) ("the right to a jury trial had been enshrined since the Magna Carta").

> the alarming extension of the power of the courts of admiralty. In these courts, one judge presides alone! No juries have any concern there! The law and the fact are both to be decided by the same single judge." *** Colonists vehemently denounced admiralty courts because they worked without juries. *** [T]he colonists praised [Blackstone's] remarks [in his *Commentaries*] to the effect that trial by jury was the "sacred palladium" of English liberties ***."
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> Leonard W. Levy, *Origins of the Bill of Rights* (1999), p. 226.

Blackstone explained the philosophy animating the colonists' desire to preserve the right to a jury trial in civil disputes.

> The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices of the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias toward those of their own rank and dignity; it is not to be expected from human nature, that *the few* should always be attentive to the interests of *the many*.
>
> William Blackstone, *Commentaries on the Laws of England*, Book III, p. 379.[5]

[5] Emphasis in original.

High on the list of the Crown's offenses against American colonists, the Declaration of Independence included "depriving us, in many cases, of the benefit of trial by jury." One commentator summarized why the Founders so highly valued the right to trial by jury and were so offended by the King's effort to deprive them of this right.

> The basic argument is that civil jury trials were prized by the populace chiefly for their public law implications, that is for their utility in preventing possible oppression in tax suits, condemnation proceedings, and other administrative actions and, if necessary, in obtaining redress for consummated governmental wrongs through collateral suits for damages against officials.[6]

In *Federalist No. 83*, Hamilton wrote,

> The friends and adversaries of the [United States Constitution], if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists of this: the former regard is as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

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[6] George E. Butler, II, *Compensable Liberty: A Historical And Political Model of the Seventh Amendment Public Law Jury*, 1 Notre Dame J. of Law, Ethics & Public Policy 595, 635, n.44 (1985) (citing, among other authorities, *Damsky* v. *Zavatt*, 289 F.2d 46, 49-50 (2nd Cir. 1971) (Friendly, J.), and Hamilton, *Federalist No. 83*).

> *** I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases.[7]

Madison, likewise, noted and explained that trial by jury in civil litigation secured individual rights, stating, "In suits at common law, between man and man, the trial by jury, as one of the best securities to the right of the people, ought to be preserved." James Madison*, Writings 1772-1836* (The Library of America 1999), p. 444.

For these reasons the Founders included the Seventh Amendment in the Bill of Rights. See Wanling Su, *What Is Just Compensation?* 105 Va. L. Rev. at 1529, n.245 (citing Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. 1169, 1169 (1995) ("No idea was more central to our Bill of Rights *** than the idea of the jury.").

Alexis de Tocqueville observed, in *Democracy in America*, that "[t]he institution of the jury *** when once it is introduced into civil proceedings, it defies the aggressions of time and man. *** The civil jury did in reality at that time [of the Tudors] save the liberties of England." Tocqueville continued and noted the political importance of the right to trial by jury in civil litigation.

> The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all citizens; and this spirit, with the habits that attend it, is the

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[7] C. Rossiter ed., p. 499.

> soundest preparation for free institutions. *** It is especially by means of the jury in civil cases that the American magistrates imbue the lower classes of society with the spirit of their profession. Thus, the jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well.
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> *Id*. at Vol. I, Ch. XVI.

This Court has repeatedly affirmed the fundamental importance of the right to trial by jury. In *Galloway* v. *United States*, 319 U.S. 372, 398-99 (1943), Justice Black summarized the history animating adoption of the Seventh Amendment.[8]

> [T]he first Congress adopted the Bill of Rights containing the Sixth and Seventh Amendments, intended to save trial in both criminal and common law cases from legislative or judicial abridgment ***.***
>
> [Patrick] Henry, speaking in the Virginia Constitutional Convention, had expressed the general conviction of the people of the Thirteen States when he said, "Trial by jury is the best appendage of freedom ***. We are told that we are to part with that trial by jury with which our ancestors secured

[8] Justice Black's statement was in an opinion dissenting on other grounds. See also *Solem* v. *Helm*, 463 U.S. 277, 286 (1893) (explaining the fundamental nature of the right to trial by jury and tracing the origin of this right to Magna Carta).

> their lives and property ***. I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common law suits. The unanimous verdict of impartial men cannot be reversed." The first Congress, therefore provided for trial of common law cases by a jury, even when such trials were in the Supreme Court itself.

This Court's Seventh Amendment jurisprudence holds the "right of trial by jury" is guaranteed as it existed under English common law in 1791 when the Seventh Amendment was adopted. See *Custis* v. *Loether*, 415 U.S. 189, 193 (1974) ("[T]he thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791."). The Seventh Amendment guarantees "the right of trial by jury" for all suits involving legal rights – as opposed to proceedings in admiralty or equity. See *Parsons* v. *Bedford, Breedlove & Robeson*, 28 U.S. 433, 446 (1830) ("By [suits at] 'common law,' [the Framers] meant *** suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were regarded, and equitable remedies were administered; or where, as in admiralty, a mixture of public law and of maritime law and equity was often found in the same suit.").[9]

An owner's action to be justly compensated for land the government took is historically a "suit at common law" in which the owner has the right to trial by jury. This Court explained, "The Seventh

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[9] Emphasis in original.

Amendment thus applies not only to common-law causes of action but also to statutory causes of action 'analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.'" *Del Monte Dunes*, 526 U.S. at 708-09 (citations omitted).

Chief Justice Roberts recalled that the Fifth Amendment right of compensation arises from Magna Carta:

> [The Fifth Amendment] protects "private property" without any distinction between different types. The principle reflected in the Clause goes back at least 800 years to Magna Carta ***. Clause 28 of that charter forbade any "constable or other bailiff" from taking "corn or other provisions from any one without immediately tendering money therefor ***." The colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property.
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> *Horne* v. *Department of Agriculture*, 135 S.Ct. 2419, 2426 (2015).[10]

In England, before 1791, actions by landowners seeking compensation for property taken by the King were tried to a jury. Magna Carta, Sections 39 and

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[10] Quoting Magna Carta, Cl. 28 (1215), in W. McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* (2nd ed. 1914), p. 329.

52, guaranteed the right to a jury when the King took property.

> No free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land ***. If anyone has been dispossessed or removed by us, without the legal judgment of his peers, from his lands, castles, franchises, or from his right, we will immediately restore them to him; and if a dispute arise over this, then let it be decided by the five-and-twenty barons of whom mention is made below in the clause for securing the peace.
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> Magna Carta[11]

In *De Keyser's Royal Hotel Ltd.* v. *the King*, ch. 2, p. 222 (1919), Swinfen Eady M.R. described English law between 1708 and 1798:

> It appears then to be fully recognized [that by 1708] the land of a subject could not be taken against his will, except under the provisions of an Act of Parliament. Accordingly, in 1708, was passed the first of a series of Acts to enable particular lands to be taken compulsorily *** provision is made for the appointment of Commissioners to survey the lands to be purchased, and in

[11] James K. Wheaton, *The History of the Magna Carta* (2012).

> default of agreement with the owners, *the true value is to be ascertained by a jury*.[12]

The Seventh Amendment guarantee of a right to jury trial is especially applicable to actions an individual brings against the government.

The Founders were very familiar with a sovereign's desire to avoid jury trials. King George attempted to circumvent American colonists' right to jury trial by assigning disputes over the Stamp Act tax to admiralty courts that sat without a jury.

The Declaration of Independence included "depriving us, in many cases, of the benefit of trial by jury" in its list of Britain's offenses against the American colonies.

> The basic argument is that civil jury trials were prized by the populace chiefly for their public law implications, that is for their utility in preventing possible oppression in tax suits, *condemnation proceedings*, and other administrative actions and, if necessary, in obtaining redress for

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[12] Citing Statute 7 Anne c. 26 (emphasis added). See *Baron de Bode's Case*, 8 Q.B. Rep. 208 (1845), and Levy, *Origins of the Bill of Rights*, p. 211 ("Under an ordinance of 1164 known as the Constitutions of Clarendon, the sheriff, acting at the instigation of the bishop, could swear twelve men of the countryside to give a verdict – that is, to speak the truth on issues involving property rights ***. No one could be evicted or disposed of his land without the prior approval of a jury verdict. A verdict in his favor restored him to possession of the land. Thus trial by jury emerged as the legal remedy for a person who had faced dispossession.").

> consummated governmental wrongs through collateral suits for damages against officials.[13]

The Founders well understood that the right to a jury's determination of the facts in taking cases safeguarded individuals' property rights against government intrusion. This Court should grant Bridge Aina Le'a's petition for certiorari in order to protect its fundamental right to have a jury determine the effect of the government's taking.

II. This Court should grant the petition for certiorari to reaffirm the Seventh Amendment guarantee of right to trial by jury.

After eight days of weighing evidence, the Ninth Circuit believed the jury was wrong in the jury's factual determination that the Hawaii Land Use Commission's agricultural zoning deprived the landowner of economically viable use of the land even though the state's own studies showed "the soils were rated poorly and were not adequate for grazing."[14]

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[13]George E. Butler, II, *Compensable Liberty: A Historical and Political Model of the Seventh Amendment Public Law Jury*, 1 Journal of Law, Ethics & Public Policy 595, 635, n.44 (1985) (emphasis added) (citing *Damsky* v. *Zavatt*, 289 F.2d 46, 49-50 (2nd Cir. 1971) (Friendly, J.), and *Federalist*, No. 83 (Hamilton)).

[14] *Bridge Aina Le'a, LLC v. State Land Use Comm'n*, 950 F.3d 610, 630 (9th Cir. 2020).

The Seventh Amendment guarantees:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, *and no fact tried by a jury, shall be otherwise reexamined in any court of the United States*, than according to the rules of the common law.[15]

In *Del Monte Dunes*, 526 U.S. at 687, this Court last addressed the right to a jury trial in the takings context. This Court held that a Section 1983 action against the City of Monterey for an alleged taking was an action at law that fit within the "Suits at common law" to which the Seventh Amendment applies. *Id.* at 710-11.

In *Del Monte Dunes* this Court held an inverse condemnation action was subject to the Seventh Amendment's guarantee of right to trial by jury. See 526 U.S. at 712-13, 720-21, 708-09 ("The Seventh Amendment thus applies not only to common-law causes of action but also to statutory causes of action 'analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.'").

This Court, in *Del Monte Dunes*, explained that landowners have a right to a jury when the state fails to provide just compensation because such actions to recover just compensation are founded in tort law:

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[15] Emphasis added.

> Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation. When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution. In those circumstances the government's actions are not only unconstitutional but unlawful and tortious as well.
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> 526 U.S. at 717.[16]

And specifically, with regard to regulatory taking actions, this Court explained that "determinations of liability in regulatory takings cases [are] 'essentially ad hoc, factual inquiries' requiring 'complex factual assessments of the purposes and economic effects of government actions." *Del Monte Dunes*, 526 U.S. at 720 (quoting *Lucas* at 1015, *Penn Central*, 438 U.S. at

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[16] Citing *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987), and *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933) (citations omitted). See also *Del Monte Dunes*, 536 U.S. at 715-16 ("when the government has taken property without providing an adequate means for obtaining redress, suits to recover just compensation have been framed as common-law tort actions") (citing *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1872); *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Peters 243 (1833); William Blackstone, *Commentaries on the Laws of England*, Book III, chs. 12-13 (1768)).

124, and *Yee* v. *City of Escondido*, 503 U.S. 519, 523 (1992) (citations omitted). Thus, this Court clarified, "we hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question," and "in actions at law otherwise within the purview of the Seventh Amendment, this question is for the jury." *Del Monte Dunes*, 526 U.S. at 720-21.

The jury in this case performed an ad hoc factual inquiry and concluded that the landowner had established a regulatory taking under both *Lucas* and *Penn Central*. The Ninth Circuit should have stayed its hand as mandated by the Seventh Amendment.

CONCLUSION

The Ninth Circuit tossed aside a *Penn Central* verdict rendered by a jury weighing eight days of complex evidence, including assessing credibility of the testimony about the value of the property, to determine the facts of the government's taking. The trial judge confirmed the jury's determination. This Court should grant the petition for certiorari to safeguard the landowner's fundamental right to a jury's determination of the effect of the government's taking and to reaffirm the Seventh Amendment guarantee of right to trial by jury.

Respectfully submitted,

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