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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly held that Petitioner did not suffer a taking where the State rezoned Petitioner's property because Petitioner repeatedly agreed to and failed to satisfy conditions precedent to its existing classification, and where the property retained additional economically productive uses and most of its economic value after the rezoning.

2. Whether this Court should overrule *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978)—a 42-year-old precedent it has repeatedly reaffirmed—in a record-intensive case where Petitioner is eligible only for nominal damages and despite Petitioner's failure to propose any alternative test.

3. Whether the panel correctly held that, on the facts of this case, the State was entitled to judgment as a matter of law.

PARTIES TO THE PROCEEDING

Bridge Aina Le‘a, LLC, petitioner on review, was the plaintiff-appellant and cross-appellee below.

The State of Hawaii Land Use Commission is respondent on review.

The State of Hawaii Land Use Commission, Vladimir P. Devens, Kyle Chock, Normand Robert Lezy, Duane Kanuha, Charles Jencks, Lisa M. Judge, and Nicholas W. Teves, Jr. were the defendants-appellees and cross-appellants below.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioner Bridge Aina Le‘a, LLC ("Bridge") asks this Court to review the Ninth Circuit's application of settled takings law—or, failing that, to jettison this Court's takings precedents altogether. But Bridge identifies no cert-worthy issue arising under existing law; indeed, many of the issues it identifies are not implicated by this case, most are purely fact-bound, and none presents a circuit split. And even if this Court wished to revisit *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978)—a landmark, 42-year old precedent—this case would be an exceptionally poor vehicle to do so.

The Fifth Amendment's Takings Clause prohibits the taking of "private property * * * for public use, without just compensation." U.S. Const. amend. V. More than forty years ago, this Court in *Penn Central* identified three factors to guide courts in assessing whether a government regulation rises to the level of an unconstitutional taking: (1) the regulation's economic impact on the claimant; (2) the extent to which it interferes with investment-backed expectations; and (3) the character of the governmental action. 438 U.S. at 124. Fifteen years later, the Court clarified in *Lucas* v. *South Carolina Coastal Council* that "where [a] regulation denies *all* economically beneficial or productive use of land," it constitutes a "categorical" taking. 505 U.S. 1003, 1015 (1992) (emphasis added). In the decades since, this Court has consistently reiterated these twin standards, explaining that the hallmark of *Lucas* is its bright-line total loss requirement, and the hallmark of *Penn Central* is its flexibility. *See, e.g.*, *Murr* v. *Wisconsin*, 137 S. Ct. 1933, 1942-43 (2017).

This case concerns Bridge's claim that the State of Hawaii effected an unconstitutional regulatory taking when, after Bridge's repeated failure to abide by its promises to use its land to construct habitable residences for low-income residents, the State reverted a portion of Bridge's land from urban to agricultural use. Faithfully applying this Court's standards, the Ninth Circuit held that Bridge did not suffer a taking under either *Lucas* or *Penn Central*. Bridge takes issue with this decision on several fronts, but none warrants this Court's review.

First, there is no need to reconsider the panel's fact-bound (and correct) application of *Lucas* and *Penn Central*. The Ninth Circuit properly held that

Lucas requires a complete loss, and that Bridge failed to satisfy that standard because the land retained both more than *de minimis* value and the potential for economically beneficial uses. It likewise rejected Bridge's *Penn Central* claim, finding that the State's order did not have a sufficient economic impact and did not interfere with Bridge's reasonable investment-backed expectations. Petitioner has failed to identify any flaws in those holdings, let alone a circuit split or other "compelling reason[]" that would warrant this Court's review. *See* Sup. Ct. R. 10. Nor is there any need to clarify the law about temporary takings; nothing in the decision below undermines this Court's holding that temporary deprivations are compensable under the Takings Clause. *See First English Evangelical Lutheran Church of Glendale* v. *Los Angeles County*, 482 U.S. 304, 318 (1987).

Second, certiorari is not warranted to reconsider the three-factor *Penn Central* framework, which this Court has time and again endorsed. Petitioner does not even attempt to demonstrate that any of the usual *stare decisis* factors warrant overturning this seminal precedent. Rather, its argument boils down to the idea that this test must be flawed because plaintiffs do not typically win their takings claims. That argument is as meritless as it sounds. And this case would be an exceptionally poor vehicle to revisit *Penn Central* in any event, including because the Ninth Circuit found that Petitioner's argument failed at multiple steps, and because Bridge does not articulate *any* alternative test to replace *Penn Central*—let alone one under which it would prevail.

Third, certiorari is unwarranted to review the Ninth Circuit's application of the standard for judg-

ment as a matter of law to the facts of this case. Bridge does not even purport to identify any circuit split on this question. And reexamining this wholly fact-bound issue is not an appropriate use of this Court's certiorari jurisdiction.

The petition for certiorari should be denied.

STATEMENT

A. Factual Background

1. Hawaii has four major land use classifications: urban, rural, agricultural, and conservation. Haw. Rev. Stat. § 205-2(a). Land zoned for agricultural use may be developed for various purposes, including farming, aquaculture, geothermal resources development, and wind and solar farms. *Id.* § 205-2(d). A landowner may petition the Land Use Commission (the "Commission") to allow her to use agricultural land for other "unusual and reasonable uses." *Id.* § 205-6(a). A landowner may also petition the Commission to reclassify land from one category to another. *See id.* § 205-4(a).

This case involves 1,060 acres of a 3,000 acre parcel of land located on the island of Hawaii. For over forty years, the 1,060 acre parcel was zoned for agricultural use. Pet. App. 4a. In 1987, the then-owner, Signal Pukao Corporation, petitioned the Commission to reclassify the 1,060 acres from agricultural to urban, to allow for the development of a mixed residential community. *Id.* at 5a. The Commission approved the petition in 1989, but required as a condition of that approval that the landowner make 60% of the residential units affordable. *Id.* The Commission later specified that failure to adhere to this requirement "may result in reversion" to an agricultural classification. *Id.* at 6a.

2. The property remained subject to these conditions—but undeveloped—when Bridge acquired it in 1999 for $5.2 million. *Id.* at 7a. Nearly six years later, in 2005, Bridge moved to amend the Commission's order to reduce the percentage of affordable units from 60% to 20%. *Id.* The Commission agreed, but in so doing, specified that the landowner must "provide occupancy certificates for all affordable housing units by November 17, 2010," or risk reversion. *Id.* Bridge accepted these conditions and repeatedly "assure[d]" the Commission that it would comply with them. *Id.* at 8a.

Beginning in 2008, however, several Commissioners began to "express[] concern[]" that Bridge had not made any progress on the affordable-unit requirement. *Id.* Accordingly, in December 2008, the Commission issued an order to show cause ("OSC") why the land should not revert to the prior agricultural use classification. *Id.* Following a hearing, the Commission unanimously determined by a voice vote on April 30, 2009 to revert the 1,060 acre parcel to agricultural use. *Id.* at 9a. But "[t]he Commission never put the result of the [voice] vote into a final written order," and so it did not take effect. *Id.*

While these OSC proceedings were pending, Bridge agreed to sell the 1,060 acres to DW Aina Le'a Development, LLC ("DW") for $40.7 million in two phases: 60 acres in December 2009 and the remainder in February 2010. *Id.* at 8a-11a. In August 2009, Bridge and DW asked the Commission to rescind the OSC, and represented that, if the Commission did so, they would "provide[]" the affordable units by the original November 2010 deadline. *Id.* at 10a. The Commission agreed to rescind the OSC subject to that commitment. To ensure that Bridge and DW

followed through, the Commission also set a benchmark: Bridge and DW had to construct approximately 4% of the affordable units—sixteen in total—by March 31, 2010. *Id.*

In June 2010, DW told the Commission that it had completed the sixteen units by the March deadline, as promised. *Id.* at 11a. But the Commission discovered that DW's representation was false. On investigation, it determined that those units "lacked water, a sewage system, electricity, and paved road access," and so "were not habitable." *Id.* Because Bridge and DW had yet again failed to fulfill the conditions they had agreed to, the Commission unanimously voted to reopen the OSC and "reiterat[e]" the deadline from the 2005 Order requiring delivery of all affordable units by November 2010. *Id.*

When Bridge and DW missed that deadline, too, the Commission voted to revert the land. The final Reversion Order was issued on April 25, 2011. *Id.* at 12a. Despite agreeing to do so by February 2010, DW had not yet purchased the remaining 1,000 acres from Bridge by the time the Commission issued the Reversion Order. *Id.* at 12a-13a.

3. Bridge and DW appealed the Reversion Order to a Hawaii circuit court, which found that the Commission had violated certain procedural requirements and Bridge's due process and equal protection rights, and rescinded the Reversion Order. *Id.* at 13a. The Hawaii Supreme Court affirmed in part and vacated in part. *DW Aina Le'a Dev., LLC* v. *Bridge Aina Le'a, LLC.*, 339 P.3d 685 (Haw. 2014). The Hawaii Supreme Court agreed that the Reversion Order violated certain statutory requirements,

because the Commission had not issued a decision within 365 days of the OSC finding that the reversion was reasonable and consistent with Hawaii law. *Id.* at 714. But it concluded Bridge's due process rights had not been violated because Bridge received adequate notice of the reversion and the Reversion Order "was not arbitrary and unreasonable." *Id.* at 716-717 (internal quotation marks omitted). The Hawaii Supreme Court also held that the Commission had not treated Bridge unfairly in violation of the Equal Protection Clause. *Id.* at 717-718.

B. Procedural History

1. Bridge sued the Commission and several Commissioners in their official and individual capacities in Hawaii state court in June 2011, alleging that by temporarily depriving it of the right to develop the 1,060 acres, the Reversion Order constituted a taking in violation of both the Fifth Amendment and Hawaii Constitution, among other things.[1] *See* Pet. App. 15a-16a. The State removed the case to federal court and moved to dismiss. *Id.* at 16a. The District Court dismissed several of Bridge's claims, including its claims against the individual defendants, but allowed its takings claims to proceed to trial.

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[1] In 2017, DW brought a separate takings challenge against the Commission under federal and state law, which the district court dismissed. On appeal, the Ninth Circuit certified a question concerning the statute of limitations for taking claims under Hawaii law to the Hawaii Supreme Court. Because the answer to the certification order may bear on DW's federal takings claims, the Ninth Circuit has not yet ruled on those claims. *DW Aina Le'a Dev., LLC* v. *State of Hawai'i Land Use Comm'n*, 918 F.3d 602 (9th Cir. 2019).

At trial, a Senior Planner at the State Land Use Commission testified that agricultural districts had previously been approved for a variety of special-use permits, including:

> rock quarrying operations; cinder and sand mining facilities; concrete batching plants; construction waste facilities; landfills; public and private sewage treatment plants; gardens and zoos; schools, everything from pre-kindergarten up to college; memorial parks, including crematoriums; agricultural tourism facilities[;] * * * commercial facilities, including post office[s] [and] gas stations; * * * private storage facilities; construction yards; maintenance facilities; [and] telecommunications facilities and structures.

2 SER 423, at 5-6[2]; *see* Haw. Rev. Stat. § 205-6(a). Bridge's witness explained that Bridge planned to build a sewage treatment plant on the adjacent 2,000 acre property. *See* Pet. App. 30a. Yet Bridge's land-use economist testified that he had not studied whether the 1,060 acre parcel was suitable for any special uses. 2 SER 420, at 6. Bridge also presented testimony from an appraiser who evaluated the land's change in value before and after the voice vote, but did not similarly evaluate the difference in value before and after the Reversion Order. *See* PSER 232-233, 258; Pet. App. 24a-25a.

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[2] SER refers to the State's Supplemental Excerpts of Record and PSER refers to Bridge's Supplemental Excerpts of Record. Both are available on the Ninth Circuit's docket.

After Bridge's case in chief, the State moved for judgment as a matter of law (JMOL) based on *Lucas* and *Penn Central*. The State argued that Bridge had not established a taking, but that even if it had, Bridge was entitled to only nominal damages because it lacked admissible evidence of compensation. The district court denied JMOL as to takings liability but agreed that Bridge was entitled at most to nominal damages. Pet. App. 17a. The jury then found that a taking had occurred pursuant to both *Lucas* and *Penn Central*, and the District Court "awarded $1 in nominal damages." *Id.* at 54a-55a. The State renewed its motion for JMOL on the question of takings liability, which the District Court again denied. *Id.* at 56a-125a.

3. The Ninth Circuit unanimously reversed the District Court's denial of JMOL for the takings claims. Writing for the court, Judge Milan Smith (joined by Judges Graber and Watford) held that Bridge had not suffered a taking under either *Lucas* or *Penn Central*.

With respect to *Lucas*, the panel explained that the evidence demonstrated that Bridge's land retained both substantial economic value and economically beneficial uses, thereby precluding its categorical takings claim. Even accepting Bridge's expert testimony at face-value (despite the fact that it rested on "demonstrably wrong" assumptions), the land had suffered—at most—an 83.4% diminution in value, far short of the "total" deprivation required under *Lucas*. *Id.* at 24a-25a. The panel also held that Bridge had failed to demonstrate that the Reversion Order "deprived Bridge of *all* economically feasible uses of the land," because Bridge had not addressed whether all of the permissible agricultural uses were

infeasible and had not "account[ed] for any of the uses for which the Commission had granted special permits in the past, such as a sewage treatment plant or rock quarrying." *Id.* at 30a.

The panel further concluded that Bridge had failed to show a taking under the three-part *Penn Central* test. First, the court explained that the Reversion Order's economic impact "weigh[ed] strongly against a taking." *Id.* at 37a. Much of Bridge's evidence turned on the land's value before and after the Commission's *voice vote*, which did not actually constitute a taking. Accordingly, no reasonable jury could have relied on this evidence in determining the economic impact of the *Reversion Order*, nearly two years later. *Id.* at 33a-37a. And even if that timetable had been correct, Bridge's expert "substantially overstate[d] the relevant diminution in value Bridge could have suffered." *Id.* at 34a. In fact, using the damages amount Bridge pursued at trial as a baseline, Bridge suffered "a roughly 48% diminution in value." *Id.* at 35a-36a. And when that figure was further adjusted to "account for the reversion's actual one-year duration," Bridge suffered—at most—a 16.8% diminution in value. *Id.* at 36a.

Second, given the state of the land when Bridge purchased it, the Reversion Order did not interfere with Bridge's "reasonable investment-backed expectations." *Id.* at 38a-43a. Bridge did not have "a reasonable expectation that the Commission would not revert the land" after Bridge had purchased it, given that Bridge itself agreed that the land could be reverted if Bridge failed to satisfy the affordable-housing requirement. *Id.* at 41a. And there is no dispute that Bridge continually failed to meet the Commission's deadlines for that requirement; in

light of that, "Bridge could [not] reasonably expect that the Commission would not enforce the conditions" and revert the land. *Id.* at 42a-43a.

Third, the court held that "much of [Bridge's] evidence was insufficient to establish that" the "character of the government action" weighed in favor of a taking. *Id.* at 43a-44a. The Reversion Order "reflect[ed]" Hawaii's "generally applicable * * * land use reclassification procedure" and so did not unfairly single out Bridge for unfavorable treatment. *Id.* at 44a. And although the Hawaii Supreme Court had invalidated the Reversion Order, it had done so on "statutory procedural" grounds, which carried no "constitutional significance." *Id.* at 45a. In any event, the panel explained, "[e]ven if" the character of the government's action favored Bridge, that was not enough to outweigh the first two factors. *Id.* at 44a-46a. Thus, it concluded, "no reasonable jury could find that Bridge's evidence satisfied the *Penn Central* test." *Id.* at 46a.

Because the panel held that "the district court should have granted the State's motion" for JMOL on both *Lucas* and *Penn Central*, it did "not address" the other takings issues the parties had "raise[d] on appeal." *Id.* at 46a-47a.[3]

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[3] The State also argued that the District Court had erred in failing to permit the jury to consider whether 1,060 or 3,000 was the relevant denominator for Bridge's taking claim. For its part, Bridge raised several claims concerning the nominal damages issue, sought review of the dismissal of its claims against several Commissioners, and argued that it was not precluded from raising an equal protection challenge in federal court. *See* Commission CA9 Second Br. on Cross-Appeal 3-4. The panel reached only the last of these claims, holding that

REASONS FOR DENYING THE PETITION

Bridge seeks certiorari on three questions. First, it asks this Court to review the Ninth Circuit's application of *Lucas* and *Penn Central* to the facts of this case. Second, it asks this Court to overrule its seminal 1978 decision in *Penn Central*. Third, it argues that the panel did not grant adequate deference to certain jury findings. None of these questions presents a split of authority or otherwise merits this Court's review.

I. CERTIORARI IS UNWARRANTED TO REVIEW THE PANEL'S APPLICATION OF *LUCAS* AND *PENN CENTRAL*.

The Takings Clause prohibits the taking of "private property * * * for public use, without just compensation." U.S. Const. amend. V. A classic taking occurs when the "government directly appropriates private property or ousts the owner from his domain." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). "[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all." *Id*. at 537 (quoting *Lucas*, 505 U.S. at 1028 n.15). Nevertheless, in 1922, this Court began recognizing that a regulation "can be so burdensome as to become a taking." *Murr*, 137 S. Ct. at 1942 (citing *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922)).

Two categories of regulatory takings are relevant here. First, a regulation that " 'denies *all* economically beneficial or productive use of land,' " known as

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the Hawaii Supreme Court's dismissal of Bridge's equal protection claim was entitled to preclusive effect. Pet. App. 52a.

a *Lucas* taking, "will require compensation under the Takings Clause." *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 617 (2001) (quoting *Lucas*, 505 U.S. at 1015) (emphasis added). Second, even when a regulation does not rise to the complete deprivation required by *Lucas*, a taking still may be found based on the *Penn Central* factors: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Murr*, 137 S. Ct. at 1943 (citing *Palazzolo*, 533 U.S. at 617; *Penn Central*, 438 U.S. at 124).

The panel correctly applied these precedents and held that the Reversion Order was not a taking under either *Lucas* or *Penn Central* because (1) it did not deny Bridge *all* economically beneficial use or value of the 1,060 acre parcel, Pet. App. 24a-31a, and (2) at least two of the three *Penn Central* factors "weigh decisively against" finding a taking, *id.* at 46a. Bridge does not identify any respect in which these holdings merit this Court's review.

A. The Ninth Circuit Correctly Held that *Lucas* Requires A Complete Loss.

Bridge first argues that the Ninth Circuit erred by holding that a *Lucas* taking requires "a total deprivation." Pet. 16. In its view, *Lucas* "must have intended something else." *Id.* But the Ninth Circuit straightforwardly and correctly applied *Lucas*, and Bridge does not identify any court that has interpreted *Lucas* differently.

1. *Lucas*, by its terms, requires a "total loss." 505 U.S. at 1019 n.8. It reiterated *seven* times that "categorical treatment [is] appropriate" only "where

[a] regulation denies *all* economically beneficial or productive use of land." *Id.* at 1015 (emphasis added); *accord id.* at 1018, 1019, 1027, 1028, 1029, 1030; *see also id.* at 1018 (explaining that a total loss typically occurs when the land is required "to be left substantially in its natural state"). This Court has consistently interpreted and applied *Lucas* accordingly. *See, e.g.*, *Murr*, 137 S. Ct. at 1949 ("Petitioners have not suffered a taking under *Lucas*, as they have not been deprived of all economically beneficial use of their property."); *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) ("*Lucas* states that compensation is required when a regulation deprives an owner of '*all* economically beneficial uses' of his land.'" (quoting *Lucas*, 505 U.S. at 1019)); *Palazzolo*, 533 U.S. 606 (rejecting *Lucas* claim where landowner suffered 93% loss).

The Ninth Circuit articulated and applied that rule correctly here. In the decision below, the panel held that, even accepting much of Bridge's flawed evidence, it had demonstrated at most "an 83.4% diminution in value." Pet. App. 25a. That was well short of a "total deprivation." *Id.* Because Bridge had failed to show "that the [R]eversion [Order] deprived Bridge of *all* economically feasible uses of the land," its *Lucas* claim failed. *Id.* at 30a.

2. Not surprisingly, other circuits and state high courts have interpreted *Lucas* the same way as the panel below. As the Ninth Circuit explained, its approach is consistent with that of the Federal Circuit. *Id.* at 25a-26a; *see, e.g.*, *Appolo Fuels, Inc.* v. *United States*, 381 F.3d 1338, 1347 (Fed. Cir. 2004) ("a 92% loss of the value of one lease and a 78% loss of the other is manifestly insufficient" under *Lucas*); *Cooley* v. *United States*, 324 F.3d 1297, 1304-05 (Fed.

Cir. 2003) (same, for 98.8% loss). Other courts have likewise denied *Lucas* claims where the property owner did not suffer a total loss. *See, e.g.*, *Front Royal & Warren Cty. Indus. Park Corp.* v. *Town of Front Royal*, 135 F.3d 275, 286 (4th Cir. 1998) (finding no *Lucas* taking where loss was—at most—50%); *Tennessee Scrap Recyclers Ass'n* v. *Bredesen*, 556 F.3d 442, 455 (6th Cir. 2009) (holding that, because the regulation "d[id] not render the scrap dealers' property a total loss," it was "not a taking under *Lucas*" (internal quotation marks omitted)); *Columbia Venture, LLC* v. *Richland County*, 776 S.E.2d 900, 912 n.19 (S.C. 2015) (same, where 30% of the property was not subject to the relevant restriction).[4]

Bridge's authorities are not to the contrary. In support of its claim that "*Lucas* could [not] have required a *total* deprivation," Bridge quotes articles discussing the degree of loss required under *Penn Central*. Pet. 15-16. But the Ninth Circuit did not hold that a total deprivation is required to satisfy *Penn Central*. Indeed, it made clear just the opposite

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[4] *See also, e.g.*, *McAndrews* v. *Fleet Bank of Massachusetts, N.A.*, 989 F.2d 13, 18 (1st Cir. 1993); *1256 Hertel Ave. Assocs., LLC* v. *Calloway*, 761 F.3d 252, 264-265 (2d Cir. 2014); *Ass'n of New Jersey Rifle & Pistol Clubs, Inc.* v. *Attorney Gen. New Jersey*, 910 F.3d 106, 124 (3d Cir. 2018); *United States* v. *Fuller*, 453 F.3d 274, 278 (5th Cir. 2006); *Muscarello* v. *Ogle Cty. Bd. of Comm'rs*, 610 F.3d 416, 421 (7th Cir. 2010); *Hawkeye Commodity Promotions, Inc.* v. *Vilsack*, 486 F.3d 430, 441 (8th Cir. 2007); *New Port Largo, Inc.* v. *Monroe County*, 95 F.3d 1084, 1089 (11th Cir. 1996); *Dist. Intown Props. Ltd. P'ship* v. *District of Columbia*, 198 F.3d 874, 882 (D.C. Cir. 1999); *Machipongo Land & Coal Co.* v. *Commonwealth*, 799 A.2d 751, 769-770 (Pa. 2002); *Kavanau* v. *Santa Monica Rent Control Bd.*, 941 P.2d 851, 863 (Cal. 1997).

was true. *See* Pet. App. 46a (explaining "Bridge's own evidence established a diminution in value that is *proportionately* too small" (emphasis added)).[5]

Bridge also cites (at 16-18 & nn.7-8) several cases that predate *Lucas* by nearly a decade, which addressed *what* must be lost to constitute a taking, not whether the loss must be total and complete. *See, e.g.*, *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 14-15 (1984) (discussing landowner's loss of the "ability to derive income from his land," and citing *Penn Central*); *Wheeler* v. *City of Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987) ("The landowner's compensable interest, therefore, is the return on the portion of fair market value that is lost as a result of the regulatory restriction."). These authorities hardly establish inconsistency or confusion about this Court's subsequent decision in *Lucas*.

3. Bridge is also incorrect that reading *Lucas* as establishing a total-loss requirement would be overly strict. Unlike *Penn Central*, which requires a case-by-case analysis, "the categorical rule in *Lucas* was carved out for the 'extraordinary case' * * * ; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry." *Tahoe-Sierra*, 535 U.S. at 332. It is therefore no surprise that so few cases clear this bar, *see* Pet.

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[5] Along similar lines, Bridge says that "*Penn Central* * * * could [not] have required a *total* deprivation in order to meet [its] threshold[]." Pet. 16; *see id.* at 27. Neither did the panel. It used the total diminution standard only in applying *Lucas*'s categorical rule. *See* Pet. App. 36a (holding that "an approximately 16.8% diminution in value * * * weighs against the conclusion that the reversion constituted a taking" under *Penn Central*).

App. 21a n.7—as this Court has explained, under *Lucas*, even a "landowner with 95% loss will get nothing." *Lucas*, 505 U.S. at 1019 n.8; *accord, e.g.*, *Palazzolo*, 533 U.S. 606 (93% loss insufficient).

Of course, failure to satisfy *Lucas*'s complete loss requirement does not doom a litigant's claim. It simply means she must instead prevail under *Penn Central*. That non-categorical framework does *not* require a complete and total loss, but instead balances the "economic impact of the regulation" against other factors. *Penn Central*, 438 U.S. at 124.

B. Certiorari Is Not Warranted To Determine Whether A Categorical Taking Turns On Loss of Use or Loss of Value.

Bridge next claims (at 19-21) that certiorari is warranted to address whether a *Lucas* taking requires total loss of use or instead total loss of value. This case, however, does not implicate that question, and it would not merit this Court's review even if it were properly presented.

1. This case does not present an opportunity for this Court to resolve whether a *Lucas* taking turns on loss of use or loss of value. The Ninth Circuit expressly examined whether the Reversion Order deprived Bridge of *either* the total value *or* all economically viable use of the parcel at issue, and it found that Bridge's *Lucas* claim fails under either approach.

The panel first concluded that "the land retained substantial economic *value*" because, using Bridge's own figures, the land retained at least 16.6% of its value, which "was neither *de minimis*, nor * * * derive[d] from noneconomic uses." Pet. App. 24a-28a (emphasis added; capitalization omitted); *see, e.g.*, *id.*

at 27a ("In the end, the relevant inquiry for us is whether the land's residual value reflected a token interest or was attributable to noneconomic use."). The panel then held that "the reversion did not deprive Bridge of all economically viable *uses* of the land" because Bridge had failed to show that none of the potential remaining uses for the land were viable or economically feasible. *Id.* at 28a-31a (emphasis added; capitalization omitted). Both the remaining value *and* the remaining use thus precluded Bridge's *Lucas* argument. The choice between those two measurements would make no difference to the outcome of this case.

2. Even if the choice between use and value were implicated here, Bridge fails to identify any division between the Ninth Circuit's approach and the test applied by other circuits.

As the panel noted, the Federal Circuit has consistently taken the same approach to *Lucas* takings—that is, by looking to *both* use *and* value to determine whether a categorical taking has occurred. *Id.* at 25a-26a (collecting cases). For example, in *Lost Tree Village Corp.* v. *United States*, the Federal Circuit explained that, as long as "the landowner [is] left with value attributable to economic uses," a *Lucas* taking has not occurred. 787 F.3d 1111, 1116 (Fed. Cir. 2015). By contrast, "a token interest," or some "residual value * * * not attributable to economic uses" will not defeat a *Lucas* claim. *Id.* (internal quotation marks omitted); *see also, e.g.*, *Appolo Fuels*, 381 F.3d at 1346-47 (where company could continue using 8-22% of its land for mining purposes, the land retained "economically viable use" and had not lost all "value"); *Palm Beach Isles Assocs.* v. *United States*, 231 F.3d 1354, 1357 (Fed. Cir. 2000)

("A 'categorical' taking is, by accepted convention, one in which *all* economically viable use, i.e., all economic value, has been taken by the regulatory imposition.").

Other circuits have applied the same approach: They have considered whether property both retains value and has some economically beneficial use before denying a *Lucas* claim. *See, e.g.*, *Hawkeye Commodity Promotions, Inc.* v. *Vilsack*, 486 F.3d 430, 441 (8th Cir. 2007) (rejecting *Lucas* claim where property retained some "market value" and was not deprived of "*all* economically beneficial uses" (internal quotation marks omitted)); *Dist. Intown Props. Ltd. P'ship* v. *District of Columbia*, 198 F.3d 874, 882 (D.C. Cir. 1999) (same, where property was not rendered "valueless" or "deprived * * * of all economically beneficial use" (internal quotation marks omitted)); *Henry* v. *Jefferson Cty. Comm'n*, 637 F.3d 269, 276 (4th Cir. 2011) (same, where the land "retained permitted uses that obviously possessed economic value").[6] Bridge identifies no meaningful difference

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[6] Some of Bridge's amici claim that a split exists on the issue of use versus value. *E.g.*, Pac. Legal Found. et al. Amicus Br. 10-15. Many of their cases simply recited the *Lucas* standard in the general background discussion and did not have occasion to apply that test or are otherwise inapposite. *See, e.g.*, *State ex rel. Shemo* v. *City of Mayfield Heights*, 775 N.E.2d 493, 496-497 (Ohio 2002) (finding *Tahoe-Sierra* did not apply, and not citing *Lucas*); *SDDS, Inc.* v. *State*, 650 N.W.2d 1, 10 (S.D. 2002) (finding there was no question that *Lucas* did not apply). The others are consistent with the Ninth Circuit's approach here. *See, e.g.*, Pac. Legal Found. et al. Amicus Br. 11-13 (citing *Lost Tree* and *District Intown*); *see also Caruso* v. *Zoning Bd. of Appeals of City of Meriden*, 130 A.3d 241, 247 (Conn. 2016) (evidence that "a reasonable use of the property remain[s]" such

between the approach taken by those courts and the decision below.

3. The view that both value and use are relevant to the *Lucas* inquiry is once again firmly supported by this Court's cases. Start with *Lucas*. There, this Court affirmed the trial court's holding that Lucas's property was "rendered valueless" because it retained "no economically viable use." 505 U.S. at 1020; *see id.* at 1009, 1031-32. Of course, the land was not actually *worthless*—as the dissent noted, Lucas still retained "the right to exclude others," and could "picnic, swim, camp in a tent, or live on the property in a movable trailer." *Id.* at 1043-44 (Blackmun, J., dissenting). But the "value" of those uses was not "economically productive." *See id.* at 1030 (majority opinion). As one commentator has explained, *Lucas* therefore looked to two related factors to determine whether the property retained "an economically viable use": whether the landowner could use the property in an economically productive manner, and "the remaining market value of the land," because a property that is truly "valueless" necessarily retains "no economically viable use." Ann T. Kadlecek, Note, *The Effect of* Lucas *v.* South Carolina Coastal Council *on the Law of Regulatory Takings*, 68 Wash. L. Rev. 415, 427 (1993).

Despite Bridge's suggestion (at 21), *Tahoe-Sierra* is not to the contrary. There, the Court explained that *Lucas* held that "a statute that 'wholly eliminated the value' of" the property "clearly qualified as a taking," but only in "the extraordinary circumstance

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that the property "retain[s] some value" "precludes a finding of practical confiscation" (internal quotation marks omitted)).

when *no* productive or economically beneficial use of land is permitted." 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1017). Although the Court later said that *Lucas* applies only where "a regulation permanently deprives property of all value," *id.* at 332, this earlier discussion demonstrates that it understood that to mean "value derived from economically beneficial use."

This Court's other cases are in accord. In *Murr*, for example, the Court held a *Lucas* taking had not occurred because the property had "not lost all economic value" and could still be used in an "economically beneficial" manner. 137 S. Ct. at 1949. Likewise, in *Palazzolo*, the Court rejected a *Lucas* claim where the property "retain[ed] $200,000 in development value" and so was not " 'economically idle.' " 533 U.S. at 630-631 (quoting *Lucas*, 505 U.S. at 1019); *see also, e.g.*, *Lingle*, 544 U.S. at 539-540, (stating in *dicta* that "the complete elimination of a property's value is the determinative factor" because "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation" (internal quotation marks omitted)).[7] As Bridge ultimately concedes (at 21), its quarrel is with "this Court's opinions" describing and applying *Lucas*. Certiorari is unwarranted to review the Ninth Circuit's faithful application of those opinions here.

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[7] Nor is there any inconsistency with this Court's cases looking to "profits"—there needs to be an economically productive use available such that the landowner could profit from (i.e., derive value from) that use of the land. *See* Pet. 17-18.

4. Implicitly conceding that the court below looked to both use and value, Bridge also launches a fact-bound assault on the Ninth Circuit's finding that the land retained some economically productive uses. Bridge repeatedly asserts (at 6, 8, 25) that the Ninth Circuit erred by relying on one witness's testimony that the land might be "good for growing rocks." According to Bridge, its land-use economist, Dr. Plasch, provided this testimony after he had "tired of the State's mode of questioning and figuratively threw up his hands by sarcastically suggesting that the land might be 'good for growing rocks.' " Pet. 6.

Reviewing the Ninth Circuit's interpretation of a single snippet of trial testimony is not, of course, a worthwhile use of this Court's certiorari jurisdiction. But Bridge's charge is inaccurate. *John Baldwin*, Bridge's founder, *volunteered* this testimony on direct examination, without prompting or badgering. 2 SER 419, at 8. And it is far from clear that this was "sarcas[m]." Pet. 25. Lava can produce igneous rock, and agricultural land can be used for rock quarrying operations (removing rocks produced in one place for use in another). *See* 2 SER 423, at 6; *see also* Pet. 4, 5 n.2 (describing the land as "covered with big rocks" and "stony with rough lava" (internal quotation marks omitted)).

In any event, the Ninth Circuit separately found that the land was potentially suitable for additional uses. As the panel explained, the Commission had previously approved agriculturally-zoned land for a variety of "special" uses, including a sewage plant, as allowed by Hawaii law. Pet. App. 30a; *see* Haw. Rev. Stat. § 205-6(a); 2 SER 423, at 6. There was evidence that "Bridge intended to place a sewage treatment plant on the adjacent 2,000 acres of agriculturally

zoned land," Pet. App. 30a, and there was no evidence that the 1,060 acre-parcel was not similarly suited. Nor did Bridge present any evidence as to why the myriad other special uses were not feasible here. Indeed, Bridge's expert testified that he had not considered whether the 1,060 parcel was suitable for *any* such use.

Because there were other possible "permissible uses" for this property, Bridge was not denied all "economically viable use of [its] property," and its *Lucas* claim must fail. *Id.* at 28a (internal quotation marks omitted).

C. This Court Should Not Grant Certiorari To "Clari[fy]" That "Temporary" Takings Are Actionable.

Finally, Bridge claims that the Ninth Circuit erred by holding that there was no taking because any loss of use was only temporary. Pet. 24. It asks this Court to grant certiorari to hold that temporary losses of value may also be unconstitutional takings, and should be analyzed exactly the same as permanent takings. *Id.* at 21-29. Once again, that request is unwarranted.

1. Like Bridge's other claims, this argument rests on an erroneous premise. The Ninth Circuit did not conclude that a temporary loss could *never* amount to a taking. It concluded there was no temporary taking here because Bridge did not suffer a sufficient loss during *any* period of time to constitute a taking under either *Lucas* or *Penn Central*. Pet. App. 46a;

see id. at 36a ("account[ing] for the reversion's actual one-year duration").[8]

As a result, this case once again does not implicate the issue Bridge raises. Indeed, the Ninth Circuit's approach is indistinguishable from the rule that Petitioner advocates. *See* Pet. 28. The court did not dispute that temporary takings exist and can require compensation. But it concluded that even the temporary taking at issue here did not qualify under *Lucas* because it was not "severe enough to eliminate all economically productive use for" *any* period of time. *See id.*; Pet. App. 21a-31a. It also examined "all factors" under *Penn Central* and held that "the severity of the impact" of the Reversion Order did not "cause[] a compensatory taking." *See* Pet. 28; Pet. App. 31a-46a (finding that, on balance, "no reasonable jury could conclude that the reversion effected a taking pursuant to the *Penn Central* analysis").

2. Given that the Ninth Circuit did not propound the rule Petitioner claims, this issue is not certworthy.

First, there is no circuit split on this question, and Bridge does not even attempt to claim otherwise. The only circuit court case Bridge cites in support of this argument (at 26) was not "a regulatory-takings case" and is therefore inapposite. *Caquelin* v. *United*

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[8] Bridge faults the Ninth Circuit for "relegat[ing]" its discussion of temporary takings to the *Penn Central* analysis, rather than separately considering whether the *Lucas* standard was met. Pet. 24-26. But given that the Ninth Circuit found that any temporary loss of value or use was less than total, Bridge's temporary takings claim would *a fortiori* have failed under *Lucas* as well.

States, 959 F.3d 1360, 1368 (Fed. Cir. 2020). Furthermore, that case merely stands for the principles that "physical takings are compensable, even when temporary," *id.* at 1364 (internal quotation marks omitted), and that the specific type of taking at issue there qualified as "categorical," even though it was "temporary," *id.* at 1367.

Second, the Ninth Circuit correctly applied this Court's precedents. It is undisputed that temporary deprivations are compensable under the Takings Clause. *First English*, 482 U.S. at 318. It is also undisputed that "the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim" under *Penn Central*. *Tahoe-Sierra*, 535 U.S. at 342. And it is undisputed that a regulation gives rise to a *Lucas* taking only when it results in a complete deprivation. *Supra*, pp. 13-17.

Here, the Ninth Circuit held that the Reversion Order did not constitute a taking under *Lucas* because it did not effect a complete and total deprivation. And it held—in light of its duration, among other facts—that the Reversion Order did not constitute a taking under *Penn Central*, either. Neither of those holdings amounts to a categorical rejection of temporary takings claims.[9]

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[9] This Court recently granted certiorari to resolve a circuit split concerning "whether the uncompensated appropriation of an easement that is limited in time effects a *per se physical* taking under the Fifth Amendment." Pet. for a Writ of Certiorari at i, *Cedar Point Nursery* v. *Hassid*, No. 20-107 (U.S. July 29, 2020) (emphasis added). That case has no bearing on the questions presented here: As Petitioners there explained, *Cedar Point* "involves * * * physical invasions * * * which, unlike regulatory

II. CERTIORARI IS UNWARRANTED TO RECONSIDER *PENN CENTRAL*.

Evidently unable to identify any cert-worthy question regarding the application of existing law, Bridge makes a bolder ask: It urges the Court to grant certiorari to decide whether to overrule *Penn Central* itself. This Court has time and again declined similar requests.[10] It should do the same here. Whatever the cert-worthiness of that broader question, this case presents an exceptionally poor vehicle to address it. And Bridge has failed to make anything close to the showing necessary to overcome the *stare decisis* to which *Penn Central* is entitled.

1. This case would be an extremely unsuitable vehicle to reconsider the validity of *Penn Central*.

To start, this case is highly record-intensive. The Reversion Order has already prompted three cases, which in turn have spawned one appeal to the Ha-

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use restrictions, are not subject to *Penn Central*'s multifactor test." *Id.* at 13. Indeed, the *Cedar Point* Petitioners did not even raise a *Penn Central* claim. Br. in Opp'n at 7-8, 12, *Cedar Point*, No. 20-107 (U.S. Oct. 2, 2020).

[10] *See, e.g.*, Pet. for a Writ of Certiorari at i-ii, *Smyth* v. *Conservation Comm'n of Falmouth*, 140 S. Ct. 667 (2019) (No. 19-223); Pet. for a Writ of Certiorari at i, *Charles A. Pratt Constr. Co.* v. *California Coastal Comm'n*, 555 U.S. 1171 (2009) (No. 08-668); *see also, e.g.*, Pet. for a Writ of Certiorari at i, *Colony Cove Props., LLC* v. *City of Carson*, 139 S. Ct. 917 (2019) (No. 18-573); Br. Amicus Curiae of Center for Constitutional Jurisprudence in Support of Petitioners, *Kitsap All. of Prop. Owners* v. *Central Puget Sound Growth Mgmt. Hearings Bd.*, 566 U.S. 904 (2012) (No. 11-457); Pet. for a Writ of Certiorari at i, *Rose Acre Farms, Inc.* v. *United States*, 559 U.S. 935 (2010) (No. 09-342); Br. in Opp'n at 8, *Hsu* v. *County of Clark*, 544 U.S. 1056 (2005) (No. 04-1282).

waii Supreme Court, three appeals to the Ninth Circuit, and one certification order. *See* Pet. App. 13a, 15a-16a & n.4. In this case alone, the trial ran eight days, the excerpts of record in the Ninth Circuit spanned twenty-two volumes, and the parties raised a combined total of nine issues on appeal. *See* Commission CA9 Second Br. on Cross-Appeal 3-4. These factual and procedural complexities would make this case a challenging vehicle to review any issue, let alone to reexamine one of this Court's seminal constitutional precedents.

Further, it is difficult to see how Bridge suffered a taking under *any* reasonable understanding of the Takings Clause. For one, it is highly unlikely that Bridge would win under any alternative formulation of *Penn Central*. Bridge specifically challenges only the formulation of the first *Penn Central* factor. *See* Pet. 14-16. But because Bridge *agreed* to and then failed to satisfy the very conditions that triggered the reversion, the second factor also "weighs strongly against finding a taking." Pet. App. 43a; *see, e.g.*, *Good* v. *United States*, 189 F.3d 1355, 1361-62 (Fed. Cir. 1999) (where buyer knew of regulatory restrictions on development at the time of purchase, he "could not have had a reasonable expectation that he would obtain approval to [develop it]"). There were likewise serious flaws in Bridge's argument under the third factor—the character of the government action. Pet. App. 43a-46a; *supra*, p. 11.

And it is not readily apparent whether Bridge would win under an alternative test, either, because

it does not propose one. Neither do its amici.[11] Perhaps Bridge thinks the first *Penn Central* prong should be subject to some specific percentage-threshold? But Bridge's own evidence establishes that it suffered *at most* a 16.8-48% diminution, Pet. App. 36a, and there does not appear to be *any* case "in which a court has found a taking where diminution in value was less than 50 percent." *Colony Cove Props., LLC* v. *City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018) (internal quotation marks omitted), *cert. denied,* 139 S. Ct. 917 (2019); *CCA Assocs.* v. *United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011). Or maybe Bridge hopes this Court will replace *Penn Central*, which has long been the "polestar" of its takings jurisprudence, with something else entirely? *Tahoe-Sierra*, 535 U.S. at 336 (quoting *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring)). The State, and the Court, can only speculate as to what.

Nor is it clear that overruling *Penn Central* would result in a victory for Bridge, even assuming Bridge could prevail under some unknown new test. Because the Ninth Circuit held that Bridge had failed

[11] Scholars are also divided on this issue. *Compare, e.g.*, Kenneth Miller, Penn Central *for Tomorrow: Making Regulatory Takings Predictable*, 39 ELR 10457, 10457 (2009) (proposing two-prong test, which collapses the first and second *Penn Central* factors into one, and adds sub-prongs to the third factor); *with* Lise Johnson, Note, *After* Tahoe Sierra*, One Thing Is Clearer: There Is Still A Fundamental Lack of Clarity*, 46 Ariz. L. Rev. 353, 376 (2004) (proposing a due process-oriented approach that "gives more deference to the decisions of legislatures and zoning boards"), *and* Michael M. Berger, *They Found the Quark–Why Not a Takings Formula?*, 47 Land Use L. & Zoning Dig. 3, 4 (1995) (suggesting a 30% cutoff for the first factor).

to establish a taking as a matter of law, it declined "to consider the other taking issues that the parties raise[d] on appeal." Pet. App. 19a. That includes the State's claim that the District Court used the wrong property denominator and its alternative argument for a new trial.

The stakes in this case are also particularly low. Even if this Court were to grant certiorari and hold that a taking had occurred, as the District Court found, Bridge is entitled to only $1 in nominal damages. *See id.* at 17a. If this Court is inclined to review *Penn Central*, it should wait for a case in which the issue is of more than academic interest to the parties. If the problems with *Penn Central* are as widespread as Petitioner claims, it will not need to wait long.

2. Vehicle problems aside, Bridge also fails to make anything close to the showing necessary to overcome the *stare decisis* that *Penn Central* is due. *See, e.g.*, *Franchise Tax Bd. of California* v. *Hyatt*, 139 S. Ct. 1485, 1499 (2019) (identifying relevant factors). And when, as here, matters of "property and contract rights" are at issue, "considerations favoring *stare decisis* are at their acme." *Kimble* v. *Marvel Entm't, LLC*, 576 U.S. 446, 457 (2015) (internal quotation marks omitted).

Bridge does not attempt to demonstrate that *Penn Central* was wrongly decided. It does not, for instance, identify any flaw in its reasoning or attempt to show that it was incorrect as a matter of text, precedent, or history. In fact, *Penn Central* followed from and was consistent with this Court's precedents. 438 U.S. at 124 ("[T]he Court's decisions * * * identif[y] several factors that have particular signifi-

cance" in determining whether a regulatory taking has occurred.). "[T]he leading case," *Pennsylvania Coal*, 260 U.S. 393, recognized that "a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Penn Central*, 438 U.S. at 127. The Court's decision in *Goldbatt* v. *Town of Hempstead*, 369 U.S. 590 (1962), looked to "[t]he economic impact of the regulation on the claimant," and "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. Yet Bridge does not call for this Court to overrule those decisions, too.

Nor does Petitioner claim that *Penn Central* is out-of-step with this Court's subsequent decisions. To the contrary, as Bridge acknowledges (at 9-10), this Court has reaffirmed numerous times that, except for those rare cases governed by bright-line rules, "regulatory takings challenges are governed by the standards set forth in *Penn Central*." *Lingle*, 544 U.S. at 538; *accord, e.g.*, *Murr*, 137 S. Ct. at 1943; *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 32 (2012); *Tahoe-Sierra*, 535 U.S. at 315 n.10, 330; *Lucas*, 505 U.S. at 1019 n.8; *see also, e.g.*, *Hodel* v. *Irving*, 481 U.S. 704, 713-714 (1987); *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 349 (1986).

Instead, the petition boils down to a purely policy-based critique of *Penn Central*, claiming (at 11-14) that this fact-dependent standard fails to offer sufficient guidance and that it cannot be correct because plaintiffs do not win enough under it. Neither criticism holds water, let alone justifies overruling a longstanding precedent of this Court.

Bridge first claims that because *Penn Central* is a fact-dependent standard, it cannot possibly be applied fairly by the lower courts. Nonsense. The law is replete with such standards, and courts have no trouble applying them in other contexts. *See, e.g.*, *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984) (Sixth Amendment: ineffective assistance of counsel); *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968) (Fourth Amendment: reasonable suspicion for *Terry* stop). A "flexible" standard is especially appropriate for the takings context, as it allows courts "to reconcile two competing objectives": the individual's right to the interests and freedoms inherent in private property ownership, and the state's inherent need to "adjus[t] rights for the public good." *Murr*, 137 S. Ct. at 1943 (internal quotation marks omitted). Only by performing "a careful inquiry informed by the specifics of the case" can a court "proper[ly] balanc[e] * * * these principles." *Id.*; *accord Tahoe-Sierra*, 535 U.S. at 322 (explaining that *Penn Central* "allow[s] careful examination and weighing of all the relevant circumstances" (internal quotation marks omitted)).

Nor is it a problem that plaintiffs often do not prevail on takings challenges. The mere fact that a rule is demanding is not a reason it is wrong. *See, e.g.*, Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 Fla. L. Rev. 251, 257 (2011) (explaining that plaintiffs rarely succeed on Title VII disparate impact claims); Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 Va. L. Rev. 283, 352 (2008) ("successful ineffective assistance claims are infrequent at best"). Indeed, it is often by design. *E.g.*, *Strickland*, 466 U.S. at 689 (explaining that this standard "must be highly deferential" because "[i]t is all too tempting for a

defendant to second-guess counsel's assistance"). Likewise, "governmental land-use regulation" is supposed to "amount to a 'taking'" only "under extreme circumstances." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (citing *Penn Central*); *see, e.g.*, John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envt'l L. & Pol'y 171, 179 (2005) (identifying "numerous, diverse reasons why a high level of economic impact should be necessary to establish a regulatory taking"). Petitioner has failed to provide any reason why that feature is, in fact, a bug.

III. CERTIORARI IS UNWARRANTED TO REVIEW THE PANEL'S FACT-BOUND DECISIONS CONCERNING THE RECORD.

Finally, Bridge asks this Court to review the Ninth Circuit's determination of various issues under Rule 50. These fact-bound questions plainly do not merit certiorari.

There is no dispute that "whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question * * * for the jury" under the Seventh Amendment. *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720-721 (1999). Bridge seizes on this to argue that the Ninth Circuit violated the Seventh Amendment in granting JMOL for the Commission. Pet. 30-31.

That is wrong. It has been "settled" for decades that "there is no constitutional bar to an appellate court granting [JMOL]." *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 321-322 (1967); *see Weisgram* v. *Marley Co.*, 528 U.S. 440, 449-450 (2000) (explaining that *Neely* applies to JMOL). The issue

is not whether the Ninth Circuit violated Bridge's constitutional right to a jury trial, but whether it correctly applied Rule 50(b).

That fact-bound question does not warrant certiorari. As required by Rule 50, the Ninth Circuit evaluated all the evidence presented and concluded that no reasonable jury could have ruled for Bridge. *See, e.g.*, *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149-150 (2000) (stating standard). None of the five "[i]tems" Bridge identifies are to the contrary.

As to the first and second items, Bridge's owner testified—without prompting—that there was at least one permissible remaining special use for the land, and Bridge's expert witness testified that he had not considered whether the land was suitable for that, or any other of the permissible special uses identified by the State. 2 SER 419, at 8; 2 SER 420, at 6; *supra*, pp. 8, 22-23. Based on this, no reasonable jury could have concluded that *no* economically beneficial uses of the land remained. Pet. App. 30a.

With respect to valuation, the Ninth Circuit cogently explained why no reasonable jury could have credited Bridge's economic-loss calculation. Bridge's expert estimated the land's change in value as of the voice vote, which occurred *two years* prior to the actual taking. *Supra*, pp. 8, 10. That evidence thus was so legally deficient that "the jury could not properly have relied on it." Pet. 32. And even assuming that timeline was correct, Bridge's own damages figures showed that its expert vastly overstated the actual diminution in value that occurred as a result of the taking. Pet. App. 34a-36a.

The evidence concerning the sales agreement with DW suffers from the same flaw: Because DW defaulted on the sale of the remaining 1,000 acres more than a year before the taking occurred, the jury could not have concluded that the Reversion Order caused that default. *Id.* at 11a, 13a, 37a-38a.

Finally, the Ninth Circuit correctly determined that, given the clear conditions in the Commission's various orders and the corresponding risk of reversion, no reasonable jury could have credited Bridge's inflated assessment of its investment-backed expectations. *Id.* at 40a-43a. In latching onto the phrase "we do not see what this proves," Bridge misses the forest for the trees. Pet. 33. The Ninth Circuit used that language to explain that, *even if* Bridge's factual assertions were correct, they were legally insufficient to show that Bridge's investment-backed expectations were *reasonable*. That is precisely the purpose of JMOL.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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