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

REPLY IN SUPPORT OF

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

What stands out starkly in the State of Hawaii Land Use Commission (LUC)'s Brief in Opposition is its inability to discuss any of the legal issues without relying on the 9th Circuit's usurpation of the jury's fact finding and consequent violation of the 7th Amendment's Re-examination Clause.

This distortion of the case starts on page 1 and continues throughout the brief. See discussions of what the 9th Circuit "found" (pp. 3, 17, 22, 24), or what "finding" the 9th Circuit made (pp. 3, 22, 24), or noting that the issues are "fact-bound" (pp. 1, 2, 4, 22, 32, 33), without acknowledging that the making of "findings" and resolution of "fact-bound" questions is the province of the jury in takings cases—as this Court held in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999)—not the reviewing court.

Contrary to LUC's attempt to reframe the Petition, the issue here is not whether the Court should correct the way the 9th Circuit acted under Fed.R.Civ.P. 50. That issue, in the ubiquitous words of LUC, would not be "cert-worthy." The cert-worthy issue is whether the 9th Circuit violated the 7th Amendment by redeciding factual issues (and making credibility determinations and reweighing evidence in a manner precluded by *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000)) on which the jury has the decisive voice.

Beyond that overreaching by the 9th Circuit,[1] the Petition demonstrated the legal problems in applying this Court's directions in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The 9th Circuit purported to apply those decisions by requiring a total wipeout in value before either of them would authorize the finding of a 5th Amendment taking. If that is the law, then this Court wasted time and energy in writing those opinions and property rights are once again relegated to the status of a "poor relation" to other guarantees in the Bill of Rights. See *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

ARGUMENT

I. The 9th Circuit Eviscerated the Concept of a Temporary Taking.

LUC says matter-of-factly that "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)." (p. 3; see also p. 23.) That is untrue.

First, by holding that a temporary taking cannot be found under either *Lucas* or *Penn Central* unless there has been either an absolute or near absolute

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[1] Similar 9th Circuit overreaching appears in *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020); *Cedar Point Nursery v. Hassid*, No. 20-107, cert. granted Nov. 13, 2020.

deprivation of value, the decision below robs the concept of vitality.

Second, the result below wholly undermines *First English*. Under *First English*, there is no need for a finding of complete wipeout in order to establish the basis for a temporary taking.

Third, by positing that no *Lucas* taking can occur without a "complete loss" (p. 3), LUC eliminates the possibility of a temporary *Lucas* taking. But nothing in *Lucas* eliminates the possibility of recovery for a "complete loss" for a temporary period of time. Indeed, such a temporary taking is wholly in line with *First English*, which held that either invalidation of a regulation or voluntary removal of the regulation would still leave the regulator liable to compensate for a taking during the interim.

Moreover, LUC is simply mistaken when it asserts that "the Ninth Circuit did not hold that a total deprivation is required to satisfy *Penn Central*." (Br. in Opp., p. 15.) It applied essentially the same "total loss" test to both *Lucas* and *Penn Central*. (App. p. 32a.)

LUC insists that there cannot be a temporary taking under *Lucas* because "any temporary loss of value or use was less than total" (Br. in Opp., p. 24, fn. 8). That plainly misses the point. Speaking temporally, there could be a "total" loss of use for a period of time, as the jury found in this case, and that "total" loss of use should be compensated under *Lucas*.

Caquelin v. United States, 959 F.3d. 1360 (Fed. Cir. 2020) belies LUC's omnipresent assertion that there are no circuit conflicts noted in the Petition. That case, as LUC concedes, found that even a temporary taking can qualify as "categorical" under *Lucas*.

II. Both the 9th Circuit and the LUC Fail to Understand the *Lucas* Standard.

LUC's brief repeats 15 times the key phrase this Court used in *Lucas*, and says that is what the 9th Circuit applied. The key phrase is denial of "all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992).

LUC demonstrates its failure to comprehend this Court's meaning by emphasizing one word in the formula. Emphasis is warranted, but LUC emphasizes the wrong word. LUC emphasizes the word "all." But the key is the rest of the phrase that "all" refers to: "economically beneficial or productive use of land." If this Court had intended to apply its *Lucas* test to a loss of "all use," it could have said so directly. But it did not. It carefully said that its concern was with "all economically beneficial or productive use." It said so 37 times. Those extra words had to have been inserted for a reason. It seems clear to Bridge that the Court wanted courts and parties to focus on the actual uses allowed, ***and*** the extent to which those uses were "economically beneficial or productive."

LUC cites some cases in which there was a substantial loss of value but still no taking was

found. (pp. 14-15.) There are three responses. First, as shown in the Petition (pp. 19-21), *Lucas* was concerned with loss of *use*, not diminution in *value*. The Court plainly recognized that, and focused on use. Second, to the extent that LUC found some cases with substantial losses in value that were not held to be takings, they were largely cases in which there remained economically beneficial or productive use. If so, no *Lucas* taking. Third, to the extent that there are some lower courts that refuse to find takings even where there is both a loss of value and use (pp. 14-15), then the existence of those cases fortifies the need for certiorari review. If *Lucas* is to have meaning, it must be applied as written, not as LUC or other regulators would like it to be.

LUC actually understands this. It notes that, in *Lucas* (see Justice Blackmun's dissent), the owner could still "picnic, swim, camp in a tent, or live on the property in a movable trailer." (p. 20.) But in the next sentence, LUC concedes "[b]ut the 'value' of those uses was not 'economically productive.'" (p. 20.) Exactly. And that is the point. Mere "use" is not enough. To satisfy *Lucas*, the use must be economically beneficial or productive. The testimony here is that there were no such uses available for this property (App., p. 75a) and that evidence formed the basis for the jury's finding that there had been a constitutional taking. This conclusion is emphasized by LUC in its conclusion that any reference to "value" in *Lucas* must be "understood . . . to mean 'value derived from economically beneficial use.'" (p. 21.) QED. Value

is important *only* to the extent that it derives from economically beneficial or productive use.

Other cases from this Court cited by LUC (p. 21) are not to the contrary. For example, in *Murr v. Wisconsin,* 137 S. Ct. 1933 (2017), the property retained valuable use. No one disputed that. The same is true of *Palazzolo v. Rhode Island,* 533 U.S. 606, 617 (2001), where the property consisted of unusable wetlands and a valuable and developable upland parcel. Because of the latter, the property retained economically beneficial use. Indeed, as the Court concluded in *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 539-40 (2005), "total deprivation of beneficial use is, from the landowner's point of view, the *equivalent of a physical appropriation*." (Emphasis added.) And that is the point. The focus is not on the existence of *any use* whatever, but the existence of a use that is economically beneficial or productive. On a parcel that the 9th Circuit insisted was "good for growing rocks" (App. p. 30a), there was no such economically beneficial or productive use.

III. It is Time to Explain to Courts Like the 9th Circuit and Regulators Like the LUC How *Penn Central* Must be Applied so the 5th Amendment is Enforced, Not Frustrated.

It has been 40 years since the Court decided *Penn Central* and laid down a rule that was general in its terms and confusing to lower courts and litigants. (See Pet., pp. 9-19.) As LUC notes, the Court "has time and again declined" to review the inner

workings of that rule. (See p. 26, and particularly fn. 10, collecting recent cases seeking certiorari.)

Forty years is long enough for the kinks to have been worked out of the rule. And yet, every scholar who has examined the rule and its aftermath has concluded that confusion reigns. (See Pet., pp. 12-13, 28-29.)

First, it is not the "formulation" of the rule (p. 27), but its application. The Court has concededly provided so little guidance (cases quoted in Pet., pp. 9-10) that lower courts flounder.

Second, LUC drags out the old chestnut about people who buy into a regulated industry essentially getting what they deserve when the rules change. (Br. in Opp., p. 27.) But this Court settled that issue in *Palazzolo*, when it held that merely acquiring property after enactment of the challenged regulation is not sufficient to defeat a property owner's "reasonable investment-backed expectations." 533 U.S. at 626-27.

Third, instead of worrying about what new or alternative test Bridge might substitute (p. 3), we suggest two things: Literal application of the words of *Penn Central*, in light of the protection sought to be provided property owners under the 5th amendment, coupled with deference to the jury under the 7th Amendment after it has fully examined the evidence. Contrary to LUC's conclusion (p. 3), Bridge prevailed when a properly instructed jury considered the case.

Fourth, LUC's protestation rings hollow. In its words, "If the problems with *Penn Central* are as widespread as Petitioner claims, it will not need to wait long [to find a better case than this one]." (p. 29.) Perhaps. However, the answer lies three pages earlier in LUC's brief, where it collected failed efforts to have this Court reconsider *Penn Central*, a listing that is clearly only illustrative. (p. 26, fn. 10.)

The depth to which LUC had to sink to respond to the Petition is encapsulated in this purported—and erroneous—summary of the Petition: "Bridge first claims that because *Penn Central* is a fact-dependent standard, it *cannot possibly be applied fairly* by lower courts." (p. 31; emphasis added.) To this rhetorical construct, LUC "replies" "Nonsense." (p. 31.) We agree. That statement would be "nonsense" no matter who said it—and it was neither Bridge nor its counsel. What we actually said was that it *has not* been fairly applied. One need look no further than the 9th Circuit's opinion. Rather than giving the jury the benefit of the doubt, and (as discussed in the next section) neither reexamining witness credibility nor reweighing evidence, the 9th Circuit decided it did not like the result and hijacked the case to redecide it as if it were a jury rather than an appellate court.

IV. The Brief in Opposition Flaunts the 9th Circuit's Abuse of the 7th Amendment's Re-examination Clause.

The parties agree that the decision in *Del Monte Dunes* established the right to a jury determining the "predominantly factual question" of a taking.

(p. 32 ["no dispute"].) We part company on LUC's assertion that Bridge wants this Court to review the 9th Circuit's determination under Rule 50. (p. 32.) Untrue. The issue is the 9th Circuit's usurpation of the jury's fact-finding authority. Rule 50, of course, authorizes no such thing.

Although true that Rule 50 has been generally upheld under the 7th Amendment (*Neely v. Martin K. Eby Const. Co.*, 386 U.S. 317, 321 (1967)), that power is subject to restrictions that the 9th Circuit and LUC ignored.

Rule 50, of course, is subject to the 7th Amendment's admonition that "no fact tried by a jury, shall be *otherwise re-examined* in any Court of the United States, than according to the rules of the common law." (Emphasis added.) What the 9th Circuit ignored was the bedrock this Court laid down in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000) to enforce the Re-examination Clause:

> "the court must draw all reasonable inferences in favor of the nonmoving party, and it ***may not make credibility determinations or weigh the evidence***. [Citations.] 'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are ***jury functions***, not those of a judge.' [Citations.]" (Emphasis added.)

The things that the Court held in *Reeves* "may not" constitutionally be done are precisely the things that the 9th Circuit did here, and which LUC emphasizes when it asserts, e.g., that the 9th Circuit

"found" that LUC's order did not deprive Bridge of "*either* the total value *or* all economically viable use of the parcel . . . ." (p. 17; emphasis original.)

Contrary to its intent, when LUC says the 9th Circuit decided that the reversion to agricultural use "did not deny Bridge *all* economically beneficial use or value" (p. 13) and that "at least two of the three *Penn Central* factors 'weigh decisively against' finding a taking" (p. 13), it is supporting the Petition by highlighting the extremes to which the 9th Circuit went to retry the case by reweighing evidence and reconsidering witness credibility, which the jury had already done when it reached the opposite conclusion. Those "findings" by the 9th Circuit fly in the face of the 7th Amendment.

The same is true of the assertion that Bridge "failed to show that none of the potential remaining uses for the land were viable or economically feasible." (p. 18.) In fact, there was testimony that there was *no* economically productive use that could be made of this land under the agricultural zoning. (App., pp. 73a-75a.) That the 9th Circuit purported to have "separately found" potential uses for the property (p. 22) only emphasizes that court's constitutional violation. The jury had already made its findings on that issue and those findings were based on the jury's analysis of the evidence and the credibility of the witnesses.[2]

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[2] LUC's comment that Bridge planned to build a sewage treatment plant on adjoining property and that the owner's expert should have considered that as a potential

Moreover, when LUC asserts that "Bridge's own damage figures showed that its expert vastly overstated the actual diminution in value" (p. 33), it took away a determination that was for the jury and which the jury had made in Bridge's favor. Likewise, when LUC repeatedly asserts that the "actual taking" did not occur upon the voice vote to change the zoning, but only upon entry of the formal order (pp. 10, 33), it redecided a question of fact that was for the jury to decide under *Del Monte Dunes* and *Penn Central*. The jury could logically have decided that the voice vote—by itself—had a severe and immediate impact on the value and utility of the property, regardless of when LUC got around to issuing a formal order. The testimony showed that the economic impact was immediate and felt overnight. (App., p. 33a.) The jury was entitled to credit that evidence.[3] Nor was there any reason (as LUC asserts at p. 8) for the witness to re-examine the change in value after the eventual formal order was entered. The damage was already done. As shown in the Petition (Pet., p. 33), that voice vote

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use for the residentially planned part of the property (pp. 22-23) is bewildering. Is LUC seriously suggesting that there should be multiple sewage treatment plants in the middle of this barren slab of rock? Moreover, the purpose of the one on adjacent land was to service the residential units to be built on the site in question.

[3] Compare *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991), where the court held that a city regulatory action had immediate impact on property use and value upon its announcement, regardless of the fact that the "actual" impact did not occur until years later.

killed the buyer's ability to obtain financing, thus costing Bridge a $35.7 million sale. Moreover, as the 9th Circuit noted (with apparent surprise), LUC did not challenge this testimony. (App., p. 33a.)

LUC may view with disdain the illustrations in the Petition (see pp. 33-34), but they demonstrate the 9th Circuit's power grab precisely. And that is the reason why this case is "cert-worthy"—not, as LUC suggests to review the 9th Circuit's "interpretation of a single snippet of trial testimony" (i.e., its "finding" that the property was "good for growing rocks" (p. 22))—but because the 9th Circuit usurped the jury's role and violated the 7th Amendment's Re-examination clause.

As this Court has so far determined that its *ad hoc* factual approach is to guide any *Penn Central* determination, the place for that determination to be made is in the jury room. There is no principled basis on which to overturn a jury's findings that a regulatory action has "gone too far" in the words of *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). Otherwise, the system becomes one of judicial whim on the part of appellate courts which never heard any testimony and are thus unable to judge the credibility of witnesses.

CONCLUSION

The petition for certiorari should be granted.

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