

NO. 18-324

IN THE

**SUPREME COURT OF THE UNITED STATES**

DOUGLAS LEONE AND PATRICIA A. PERKINS-LEONE,  
AS TRUSTEES UNDER THAT CERTAIN UNRECORDED LEONE-PERKINS  
FAMILY TRUST DATED AUGUST 26, 1999, AS AMENDED,

Petitioners,

v.

COUNTY OF MAUI, A POLITICAL SUBDIVISION OF THE STATE OF HAWAII,  
AND WILLIAM SPENCE, IN HIS CAPACITY AS DIRECTOR OF THE  
DEPARTMENT OF PLANNING OF THE COUNTY OF MAUI,

Respondents.

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**RESPONDENTS' APPLICATION FOR AN EXTENSION  
OF TIME TO FILE A BRIEF IN OPPOSITION TO THE PETITION  
FOR WRIT OF CERTIORARI TO THE SUPREME COURT  
OF HAWAII, FILED ON SEPTEMBER 10, 2018**

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To the Honorable John G. Roberts, Jr., as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Pursuant to the Rules of the Supreme Court of the United States, Rule 30.3, Respondents County of Maui and William Spence, as Planning Director of the County of Maui (“Respondents” or “County”), respectfully request that the time to file their brief in opposition to Petitioners Douglas Leone’s and Patricia Leone-Perkins’ (the “Petitioners” or “Leones”) Petition for a Writ of Certiorari be extended for an additional thirty (30) days to November 14, 2018. After Petitioners were granted two extensions of time to file, their Petition for a Writ of Certiorari (“Petition”) was docketed on September 10, 2018. Absent an extension of time, the brief in opposition would be due on October 15, 2018. Respondents are filing this application at least ten (10) days before that date. Respondents have not previously requested an extension of time.

**Substance of the Petition**

The Petition asks this Court to review a decision by the Supreme Court of Hawaii issued on October 16, 2017. *See*, Petition, filed September 10, 2018, Appendix (“App.”) at 1a-58a. According to the Petition, the Question presented for review is:

Whether holding undeveloped property as an “investment” or using it as a “park” in its natural state constitutes economically beneficial or productive use of land under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *See*, Petition at p. i.

Respondents' brief in opposition will demonstrate that the Petition's very presentation of this question as a purported legal ground mischaracterizes the Supreme Court of Hawai'i's decision on the underlying state circuit court case. Moreover, the underlying state circuit court case reviewed by the Supreme Court of Hawai'i was decided by a jury upon a substantial amount of evidence, demonstrably independent of the narrow issue presented by the Petition.

### **Background of Underlying Case**

The Leones contend they have been unable to build a residence on land they purchased in February 2000, over eighteen (18) years ago, at Palau'ea Beach, Makena, Maui, Hawai'i, because the applicable Maui community plan designated their parcel as "park" land in 1998. *See*, Petition at pp. 5-6. Several adjacent parcels on Palau'ea Beach, subject to the same community plan designation, state and county land use regulations, have all historically and contemporaneously been developed with single-family residences. *See*, Petition, App. at pp. 11a-12a.

Rather than navigate these applicable regulations as their neighbors did, the Leones withdrew their permitting application and elected to "hold" their parcel pending a more favorable "political climate." *See*, Petition, App. at p. 6a. Two of the Leone's own percipient witnesses, a legal advisor, and a separate land-use consultant, presented testimony to the jury that demonstrated the Leone's application submitted three (3) years later was not intended to be approved, but rather, was submitted to manufacture a takings claim.

The evidence presented to the jury also reflected that within a month after the Leone's deficient permitting application was returned to them as incomplete,<sup>1</sup> the Leones sued the County rather than resubmit a properly completed application. *Perhaps most critically*, the Leones themselves presented to the jury a licensed appraiser as an expert witness. This witness testified that in 2007, *nine (9) years after the Leone's land was designated "park"* by the allegedly offending community plan designation, the parcel had an appraised value of \$7.2 million dollars *for use as a single-family residence*.

In light of all of the substantial evidence at trial, the jury had a number of independent bases to conclude not only that the Leones failed to demonstrate a permanent loss of economic use of their land, but also that the County was not the cause of *any period of loss* of the use of their land.

### **Reasons for Granting an Extension of Time**

The time for Respondents to file a brief in opposition to the Petition should be extended for an additional thirty (30) days, to November 14, 2018, for several reasons:

1. As required by Sup. Ct. R. 15.2, the forthcoming brief in opposition will be compelled to present "perceived misstatement[s] of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted," as well as "objection[s] to consideration of [the] question presented based

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<sup>1</sup> The Leone's application included a shoreline survey which had expired five (5) years prior to the submission of the application, and failed to include required archaeological plans to recover or preserve ancient Hawai'ian cultural human remains known to be buried on the Leone's parcel, among other deficiencies.

on what occurred in the proceedings below[.]” While Respondents are confident this presentation can and will be done succinctly in the brief in opposition, it will require careful, extensive review, and concise excerpting of the voluminous trial transcripts, testimony, and exhibits admitted into evidence and deliberated on by the jury.

2. The Supreme Court of Hawai‘i *did not*, anywhere in its decision, rule that retained value in land as an investment, or any residual value in land, constitutes economically viable use. Nevertheless, the brief in opposition will need to reference and review a significant number of federal cases, inclusive of *Lucas*, *infra*, to demonstrate why the Petition fails to show and cannot show that the Supreme Court of Hawai‘i’s decision in *Leone* “conflicts with the decision of a United States court of appeals,” “decided an important question of federal law that has not been, but should be, settled by this Court,” and/or “conflicts with relevant decisions of this Court.” *See*, Sup. Ct. R. 10(b) and (c). Notably, while this Court in *Lucas v South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) held that a taking occurs when the state *permanently* deprives land of all economically viable use, it did not disregard or exclude the relevance of value in making the determination of *a permanent* deprivation.<sup>2</sup>

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<sup>2</sup> *See, Lucas*, 505 U.S. at 1034-5, 112 S.Ct. at 2903 (J. Kennedy concurring) (“The South Carolina Court of Common Pleas found that petitioner’s real property has been rendered valueless by the State’s regulation. [record citation]. The finding appears to presume that the property has no significant market value or resale potential. This is a curious finding, and I share the reservations of some of my colleagues about a finding that a beach-front lot loses all value because of a development restriction.”).

3. No prejudice would arise from the extension. As Petitioners have already noted in their own two prior requests for extensions, “[w]hether it is permitted or not, the case would be heard next Term should the Court choose to grant review.”

**Conclusion**

The Petition seeks to have this Honorable Court make a broadly impactful substantive ruling(s) of law, despite a jury determination and verdict that is supported by a significant quantity of testimonial facts and volumes of documentary evidence independent of the narrow issue presented in the Petition.

For the foregoing reasons, Respondents respectfully request that the time to file their brief in opposition to Petition for a Writ of Certiorari in this matter be extended thirty days to and including November 14, 2018.

Date: October 1, 2018.

Respectfully submitted,

/s/ Brian A. Bilberry

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