No. 18-324

IN THE

Supreme Court of the United States

DOUGLAS LEONE, *et al.*,

Petitioners,

v.

MAUI COUNTY, HAWAII, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

REPLY BRIEF

ANDREW V. BEAMAN
CHUN KERR LLP
999 Bishop Street, Suite 2100
Honolulu, HI 96813
(808) 528-8200

MICHAEL H. PARK
CONSOVOY MCCARTHY PARK PLLC
745 Fifth Avenue, Suite 500
New York, NY 10151
(212) 247-8006

WILLIAM S. CONSOVOY
Counsel of Record
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

Attorneys for Petitioners

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

STATUTES AND OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONERS

As the petition explains, whether an owner cannot maintain a takings claim under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), simply because its undeveloped land retains investment value and can be used as a park is an important question that has divided the lower courts. The amicus support that the petition has received confirms that the Court should grant certiorari. The business community, leading property-rights experts and advocates, and Hawaii landowners share the view that this is a significant takings issue, that there is a split, and that the Hawaii Supreme Court (like numerous other lower courts) has effectively made it impossible to successfully bring a *Lucas* claim.

It is understandable why these stakeholders all encourage the Court to hear this case: the decision below is indefensible. There is no disagreement that Maui County wants the Leones' property to be used as a public beach. Brief in Opposition ("BIO") 5-6. Indeed, the government often prefers that private property remain undeveloped so the public can enjoy it. But that is not a "basis for departing from our categorical rule that total regulatory takings must be compensated." *Lucas*, 505 U.S. at 1026. Just the opposite. That "the natural tendency," *id.* at 1014, is why compensation is required—without fail—when landowners are denied "all economically valuable use" of their property, *id.* at 1028. *Lucas* is a dead letter, however, if no categorical taking occurred here.

The brief in opposition is unpersuasive. Respondents concede the issue's importance, mostly ignore the split of authority among the lower courts, and barely defend the

decision below under *Lucas*. Instead, Respondents rewrite the Hawaii Supreme Court's decision and mischaracterize the record in the hope that it will convince the Court that the *Lucas* issue is not presented. But those efforts fail. The Leones pressed the arguments they are advancing here at every stage, the Hawaii Supreme Court squarely decided the question presented, and the judgment below turns on whether the Hawaii Supreme Court misinterpreted *Lucas*. The Court should grant the petition.

I. Respondents do not dispute the importance of the Fifth Amendment question.

The decision below raises an important issue of federal law: whether a *Lucas* claim can be defeated because the undeveloped property retains investment value or can be used as a park. Petition ("Pet.") 10-15. In rejecting the Leones' claim, the Hawaii Supreme Court effectively made it impossible for landowners to vindicate their right to categorical relief when land-use restrictions force them to "leave [their] property economically idle." *Lucas*, 505 U.S. at 1019; Pet. 11-13; *see also* Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of* Lucas*: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847, 1857 (2017). Respondents do not disagree. Indeed, they acknowledge that the Court's resolution of this issue would be "widely impactful" and that *Lucas* claims are now "harder to win." BIO 3, 25.

Amici reinforce that the Hawaii Supreme Court's reading of *Lucas* undermines "stability and uniformity in takings law," creates serious "uncertainty" for landowners, and leads to "uneven application," Amicus Brief of Pacific Legal Foundation, *et al.* ("PLF Br.") 5, of a

constitutional right that is "the very foundation of liberty," Amicus Brief of Center for Constitutional Jurisprudence ("CCJ Br.") 2. Businesses emphasize that the "resulting uncertainty . . . threatens economic development" by deterring investment in "real estate-related projects that bring capital, jobs, and educational and social opportunities to communities across the country." Amicus Brief of the Chamber of Commerce ("Chamber Br.") 2, 4; PLF Br. 20-21. And all of the *amici* recognize that this misguided legal rationale will provoke arbitrary, abusive, and manipulative enforcement of land-use regulations to negate the right to just compensation in an array of cases. Chamber Br. 17-19; PLF Br. 18-22; CCJ Br. 2-4 & n.3.

Instead of disputing the importance of the question, Respondents (at 23-26) assert that any split is "shallow" and thus does not justify the Court's review. But the lower courts are deeply divided and thoroughly confused. Pet. 18-20; Chamber Br. 5-11; PLF Br. 14-18, 22-24; *see also* Brown & Merriam, *supra*, at 1857 ("The distinction between value and use has caused considerable confusion."). The Hawaii Supreme Court "exacerbated a significant split of authority over whether the mere prospect that land may be sold for some value will suffice to defeat a categorical takings claim under *Lucas*." PLF Br. 7. Whether the government can defeat a *Lucas* claim by labeling the undeveloped land a park where concessions can be sold is likewise "subject to a conflict among the lower federal courts and state courts of last resort." *Id.* at 22.

This confusion is especially troubling because it has divided the Ninth Circuit and the Hawaii Supreme Court. Pet. 19-20; PLF Br. 15-16. The Ninth Circuit "cautioned

against relying too heavily on diminution of property value in the *Lucas* analysis." PLF Br. 15 (discussing *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996)). There can be a *Lucas* taking, then, "even where the 'taken' property retained significant value." *Del Monte Dunes*, 95 F.3d at 1433. But in the Hawaii courts, that is not the case. Pet. 20; Chamber Br. 6-7; PLF Br. 15; CCJ Br. 3-4. Given the decision below, a *Lucas* claim will fail there unless the owner can prove "that the property is without *any* residual value." PLF Br. 15 (citing *Leone*, 404 P.3d at 1271-72) (emphasis added).

Respondents (at 13-14) counter that the Hawaii Supreme Court discussed *Del Monte Dunes* and expressed agreement with the Ninth Circuit's conception of *Lucas*. That is unconvincing, however, given the Hawaii Supreme Court's myopic focus on property "value" to the exclusion of all else. Pet. 18. The Hawaii Supreme Court can only be seen as siding with those courts that have adopted "loss of value as the *Lucas* rule" given its rejection of the Leones' takings claim. Brown & Merriam, *supra*, at 1856; *see* PLF Br. 14-15.

In sum, the petition raises a fundamental question that lower courts have inconsistently answered: whether land "use" or "value" is the yardstick for measuring *Lucas* claims. "This Court should grant certiorari to resolve the conflict and confirm that a categorical taking occurs when regulation denies all 'economically beneficial *use*' of land." PLF Br. 7; *see also* Chamber Br. 10-11.

II. Respondents' defense of the Hawaii Supreme Court's decision is unpersuasive.

Respondents (at 22-23) barely muster a defense of the Hawaii Supreme Court's resolution of the *Lucas* issue. Indeed, they never even attempt to defend a rule primarily focused on residual value. For good reason. If investment value is an "economically beneficial or productive" use," *Lucas*, 505 U.S. at 1015, then categorical taking claims are "a dead letter" given that "all property will retain some hypothetical residual value even where all uses are denied." PLF Br. 15-16; *see* Chamber Br. 7-8. "It is difficult to imagine a situation in which a speculator could not be found who would pay some *de minimis* amount for a property even if the property had been completely deprived of all development rights and even temporarily deprived of all rights of use." Brown & Merriam, *supra*, at 1857. To be sure, as Respondents state, a *Lucas* taking "is the rare exception." BIO 25. But that exception shifts from rare to nonexistent under the Hawaii Supreme Court's reasoning. The "investment" value holding is an indefensible reading of *Lucas*. Pet. 15-17.[1]

Respondents incorrectly suggest that *Lucas* did not decide this issue because this Court assumed that the land "had been rendered valueless" by the restrictions. BIO 22. In that case, the trial court had ruled that the challenged restriction "rendered Lucas's parcels 'valueless.'" *Lucas*, 505 U.S. at 1007. But this Court's holding rested not on the

1. Respondents (at 23) suggest, in passing, that the ruling below fairly considered both use and value and did not "displace value for use as determinative." That is incorrect. *See supra* p.4. Even if residual value is a relevant consideration, the Hawaii Supreme Court's ruling cannot be upheld under *Lucas*. Pet. 18-20.

property's lack of value, but on *why* it was now valueless: "a permanent ban on construction" that fundamentally "deprived Lucas of any reasonable economic use of the lots." *Id.* at 1009 (citations an alteration omitted). In other words, the justification for "categorical treatment" was the land-use restriction's denial of "all economically beneficial or productive use"—not the property's purported lack of residual value. *Id.* at 1015; Chamber Br. 11-13.

The objections that the concurrence and dissents lodged eliminate any doubt. Justice Kennedy concurred in the judgment only because, *inter alia*, he believed that the ruling should have been narrowly premised on what he saw as the rather questionable finding "that the property has no significant market value or resale potential." *Lucas*, 505 U.S. at 1034-35. The dissents pressed the point even more forcefully, concluding that the Court should *not* have held that "compensation must be paid in cases where the State prohibits all economic use of real estate" given that Lucas could sell the property or enjoy the land in its natural state. *See id.* at 1044-45 (Blackman, J., dissenting); *id.* at 1065 n.3 (Stevens, J., dissenting). The dissenters disagreed with the Court's focus on "'*economically* beneficial or productive use'" as the inquiry's touchstone. *Id.* Yet Respondents (and the Hawaii Supreme Court) read *Lucas* as if the dissenting position was in fact the majority's holding. CCJ Br. 3; PLF Br. 9-10, 14-15.

This is not to suggest that *Lucas* is altogether clear on this score. Far from it. The decision's interchangeable invocation of "use" and "value" has produced considerable confusion. That is of course why the Court's intervention is now needed. But those courts which understand the *Lucas* inquiry to turn on the landowner's ability to beneficially

use their property unquestionably have the better reading. PLF Br. 12-13; CCJ Br. 2-3.

Finally, Respondents do not even try to defend the Hawaii Supreme Court's holding "that the Leones could potentially conduct commercial activities on their property as a park." App. 55a. Instead of responding on the merits, they try to wish the problem away by mischaracterizing the proceedings and decision below. *See infra* p.7-11. That is because there can be no response on the merits. Forcing the Leones to use their property in its undeveloped state as a park, which is a paradigmatic example of "public purpose" for which "just compensation" should be required, *United States v. Reynolds*, 397 U.S. 14, 16 (1970), simply is not an economically beneficial use that can defeat an otherwise-meritorious *Lucas* claim, Pet. 17-18; Chamber Br. 12, 19; PLF Br. 22-24. The ruling below "conflicts with relevant decisions of this Court." S. Ct. R. 10(c).

III. This is an appropriate case in which to decide the question presented.

Respondents devote most of their brief in opposition to trying to convince the Court that the petition does not raise the question presented. But even a cursory review of the Hawaii Supreme Court's opinion refutes that assertion. The *Lucas* issue is squarely presented, and Respondents' mischaracterization of the proceedings below should not deter the Court from granting certiorari.

Respondents' assertion (at 1, 11-13) that the Hawaii Supreme Court "never ruled that holding land as an 'investment' or as a 'park' was economically viable use" is

demonstrably wrong. In reviewing "whether the County's land use regulations constituted a regulatory taking of the Leones' property," App. 2a, the court correctly explained that the Leones were arguing that "'investment use' is not an economically beneficial use as a matter of law," App. 39a. In rejecting this argument on the merits, the Hawaii Supreme Court squarely held that the "property retained a reasonable, economically viable use, *specifically in the form of an investment*." App. 55a (emphasis added). The court's alternative holding, that the property could be used as a beach park at which concessions could be sold, is clear too. The Leones' "property had economically beneficial use in the commercial context," according to the Hawaii Supreme Court, because it could be used "as a park." App. 55a. The Court therefore held that the trial record substantiated a finding that "the Leones could engage in commercial sales of concessions on their lot." App. 22a.

Respondents' suggestion that there is just no way to discern the basis for the Hawaii Supreme Court's judgment because it "only affirmed there was evidence to support the jury's verdict" is equally misplaced. App 17a; *see* 1a, 11a-12a, 21a-22a. Of course there needed to be "evidence to support a jury verdict" in Respondents' favor to affirm the trial judgment. App. 34a (citation omitted). But the *only* evidence to which the Hawaii Supreme Court pointed was the testimony about using the property as an investment or as a park. App. 53a-56a. It was because of that specific evidence—and not some undisclosed factual basis—that "the circuit court did not err in denying the Leones' motion for judgment as a matter of law." App. 56a. If that trial evidence of investment use is insufficient as a matter of law to defeat the Leones' *Lucas* claim, *i.e.*, the exact question presented here, then the Leones are entitled to have the jury verdict overturned.

Respondents are thus badly confused in arguing that the Leones' actual objection is to "errors in the admission of testimonial evidence and instruction given below." BIO 16. The Leones do not ask this Court to correct trial errors. For purposes of further review, they accept that evidence was adduced at trial that their property has investment value and can be used as a park. They ask this Court to decide, as a matter of law, if "holding undeveloped property as an 'investment' or using it as a 'park' in its natural state constitutes economically beneficial use of land" under *Lucas*. Pet *i*. Contrary to Respondents' belief, the answer to that question is in fact "dispositive to the jury verdict." BIO 17.

Respondents also repeatedly state that the Leones introduced evidence of value and commercial use at trial, but without explaining the assertion's relevance. App. 2a, 9a-10a, 15a-16a, 18a-19a. If they mean to argue that the Leones somehow invited error, the argument is baseless. The Leones' summary-judgment motion, trial objections, proposed jury instructions, and motions for judgment as a matter of law all advanced the same argument they make here. Pet. 8-9; Pet. App. 2a-3a. The question presented thus was pressed and passed on below, and the Hawaii Supreme Court never suggested otherwise. App. 14a, 16a, 29a, 37a-39a, 45a, 53a-56a.[2]

2. Although it is irrelevant to the question before this Court, the Leones introduced evidence of the land's fair market value to prove damages—not in support of their *Lucas* claim. *See Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 9-10 (1984). Respondents' appendix makes this quite clear. *See* Resp. App. 7a-8a. Respondents' contention that the Leones' expert testified that "certain commercial uses were permissible," BIO 10, that the Hawaii Supreme Court "made no finding whatsoever as to what

Finally, Respondents argue that alternative grounds for affirmance make the petition a poor vehicle. BIO 19-22. They are again incorrect. In particular, Respondents claim that the Leones were unable to develop their land because they abandoned the permitting process and instead filed this lawsuit. BIO 5-7; 19-20. Respondents fail to mention, however, that the intermediate appellate court rejected that argument and the Hawaii Supreme Court declined discretionary review. Pet. 8, App. 78a-95a. As the appellate court explained, the Leones were not denied an exemption because they failed to complete the permitting the process. Instead, their "application could not be processed because the proposed Single-Family dwelling is inconsistent with the Community Plan." App. 87a (alteration omitted). That refusal to process their application, accordingly, "satisfied the finality requirement for ripeness by setting forth a definitive position regarding how Maui County will apply the regulations at issue to the particular land in question." App 87a.

Respondents also complain about a jury instruction that, in their view, "improperly shift[ed] the burden of proof to [them] to demonstrate alternative economically viable use." BIO 21. As noted above, however, the jury instructions are irrelevant at this juncture. The Leones argument is that they have suffered a *Lucas* taking as a matter of law even crediting all of the evidence adduced at

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those uses might be," BIO 15, and that those uses did not depend on using the land as a park, BIO 17-19 & n.3, is an especially egregious mischaracterization. It was Respondents that persistently claimed that using the land as a park was economically beneficial, that was the only supposed commercial use raised at trial, and the Hawaii Supreme Court relied on that testimony to sustain the jury verdict. App. 22a-27a, App. 53a-55a.

trial. Regardless, this is not a genuine alternative ground for affirmance. If the argument were meritorious, which it is not, App. 29a-30a, 47a-50a, it still would require a new trial on remand.

More fundamentally, these kind of questions are not considered vehicle issues in takings cases, especially those on review from state court. There will always be remand proceedings in such cases. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). In *Lucas* itself, this Court saw the need for remand proceedings, including on a permitting dispute similar to the one that Respondents raise. *See* 505 U.S. at 1010-14. The need for remand proceedings did not deter the Court from hearing that important constitutional case. It should not deter the Court from granting review here to resolve the confusion over *Lucas* that has developed in the last two decades, and which ultimately led the Hawaii Supreme Court astray on this fundamental question.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

ANDREW V. BEAMAN
CHUN KERR LLP
999 Bishop Street, Suite 2100
Honolulu, HI 96813
(808) 528-8200

MICHAEL H. PARK
CONSOVOY MCCARTHY
PARK PLLC
745 Fifth Avenue, Suite 500
New York, NY 10151
(212) 247-8006

WILLIAM S. CONSOVOY
Counsel of Record
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY
PARK PLLC
3033 Wilson Boulevard,
Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

Attorneys for Petitioners

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