No. ----------

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Hawaii zoned for agricultural use land that it knew was not viable or appropriate for such use. At the property owner's request, it rezoned it for urban use but, after Plaintiff Bridge Aina Le'a began developing it, the State illegally (as the Hawaii Supreme Court later held) "reverted" the land to agricultural use. A jury found this to be a 5th Amendment taking under this Court's standards in both *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 Ninth Circuit reversed, in an opinion which effectively eliminates property owners' ability to recover for temporary regulatory takings of property, raising these questions:

1. As the Ninth Circuit's extensive, published ruling eliminates property owners' ability to recover for temporary property takings under ***any*** theory, and that ruling conflicts with decisions of other courts, including this Court, does this Court need to clarify the rules for recovery for temporary regulatory takings?

2. In light of the confusion in the lower courts as to the application of the *Penn Central* factors — to the point where it has become almost impossible for property owners to prevail on this theory — should this Court reexamine and explain how *Penn Central* analysis is supposed to be done — or dispensed with?

3. In light of the Ninth Circuit's holding that almost no value loss — no matter how great — can

ever establish a temporary taking under either *Lucas* or *Penn Central*, is it necessary for this Court to clarify the standards?

4. In light of *Penn Central*'s clear direction that cases like this are to be determined *ad hoc*, on their individual facts, and this Court's approval in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999) that takings liability be decided by a jury, do appellate courts need to stay their hands (as mandated by the 7th Amendment's Re-examination Clause) when — as here — reviewing jury findings of fact-based takings issues, particularly when the trial judge confirmed those findings?

PARTIES TO THE PROCEEDING

Petitioner Bridge Aina Le‘a was the plaintiff in the District Court and appellee/cross-appellant in the Court of Appeals.

Respondent State of Hawaii Land Use Commission was the defendant in the District Court and appellant/cross appellee in the Court of Appeals.

Although Bridge Aina Le‘a also sued the members of the State’s Land Use Commission in addition to the Commission itself, the issues that were tried and that are raised in this Petition relate solely to the State and its Land Use Commission. The Court of Appeals did not deal with issues regarding the individual commissioners, and no such issues are raised here.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Bridge Aina Le‘a certifies that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

DW Aina Le`a Development, LLC, et al. v. State of Hawai`i Land Use Commission, et al., Civil Nos. 11-1-0112K and 11-1-0969-05, Hawaii Circuit Court, judgment entered Feb. 8, 2013;

DW Aina Le`a Development, LLC, et al. v. Bridge Aina Le‘a Development, LLC, et al., Hawaii Supreme Court, No. SCAP-13-0000091, judgment entered Dec. 22, 2014;

Bridge Aina Le'a, LLC v. State of Hawaii Land Use Commission, et al, U.S. District Court for the District of Hawaii, Judgment filed March 30, 2018.

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INTRODUCTION

The law regarding regulatory takings of property under the 5th Amendment is in disarray for one reason: the standards for determining when a taking has occurred remain obscure notwithstanding more than 40 years of litigation and Court opinions in the modern era of takings law.

This case is the proverbial "Exhibit A" of much that is wrong. After an eight-day trial, a jury found — based on instructions agreed to by both sides — that ***both*** of this Court's announced standards had been met and that the State of Hawaii had taken property from Petitioner Bridge Aina Le'a within the meaning of the 5th Amendment. That is, the jury concluded that the evidence showed a "categorical" or *per se* taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and it also showed a taking under the *ad hoc* factual analysis prescribed by *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The District Court agreed that both findings were supported by evidence and sustained by this Court's decisions. The Ninth Circuit Court of Appeals reversed, holding that "the jury could not reasonably find for [the property owner]" (App. 32a) and, indeed, that "no reasonable jury could [so] conclude . . . ." (App. 46a.)

Certiorari is needed to make intelligible the standards by which to measure whether government regulations have taken private property for public use under the 5th Amendment and to establish the

importance of jury determinations under those standards.

More than three decades ago, Justice Stevens had this to say about the Court's takings decisions:

> "Even the wisest of lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence." *Nollan v. California Coastal Commn.*, 483 U.S. 825, 866 (1987) (dissenting opinion).

Notwithstanding numerous decisions since then, the Court has refrained from establishing any clear, bright line rules. See cases collected *post*, pp. 9-10.

Rather, the Court has held that — for almost all cases — the required process is the "*ad hoc* factual" analysis described in *Penn Central* although, as the Court conceded after twenty seven years of watching lower courts struggle to apply the *Penn Central* mode of analysis, "each [of the *Penn Central* factors] has given rise to vexing subsidiary questions . . . ." *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 539 (2005). Indeed, two commentators likened *Penn Central* litigation to a "high-stakes game of craps." R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731,735-36 (2011).

That *ad hoc* world may once have seemed appropriate. Experience shows that it is so no longer. Both property owners and regulators need clarity. The time is now, and this Ninth Circuit opinion provides an appropriate vehicle for

addressing these key constitutional issues. That appellate opinion also makes a mockery of *Del Monte Dunes*' requirement that such fact-bound cases be tried to juries.

OPINIONS BELOW

The Ninth Circuit Court of Appeals' opinion is published at 950 F.3d 610 (9th Cir. 2020) and is reproduced at App.1a. The District Court's Amended Judgment is not published and is reproduced at App. 54a. The District Court's Order denying the Respondents' Renewed Motion for Judgment as a Matter of Law is not published and is reproduced at App.56a. The jury's verdict form, finding liability under both *Lucas* and *Penn Central* is at App. 126a.

JURISDICTION

The Ninth Circuit Court of Appeals filed its opinion on February 19, 2020. There was no petition for rehearing. Under this Court's COVID-19 rule, the time to file this Petition is July 20, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: ". . . nor shall private property be taken for public use without just compensation."

The Seventh Amendment provides that "[i]n suits at common law, . . . the right of trial by jury shall be preserved, and *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.)

A state statutory provision is reproduced at App. 128a.

STATEMENT OF THE CASE

A. Bridge Aina Le'a's Land is Unsuited For Agricultural Use, But Hawaii Classified it as "Agricultural" Anyway.

The very first line of the Ninth Circuit's opinion says it all, describing the property as "1,060 acres of largely vacant and barren, rocky lava flow land . . . ." (App., p. 2a) In fact, as the District Court put it, it was akin to "a giant asphalt parking lot covered with big rocks." (App., p. 73a) The State's Land Use Commission (LUC) had formally concluded that its soils were "very poor," "not suitable for agriculture," and not adequate for grazing. (See App., p. 73a)[1]

Yet the State zoned it for "agricultural use" anyway. (App., p. 4a)

Dr. Bruce Plasch, an expert who testified for Bridge Aina Le'a, described the property as a vast "wasteland," and a barren, desert-like lava field with low winds, little rainfall and access only to brackish water that would be prohibitively expensive to use

[1] That is, of course, understatement; the evidence established that this hard, lava flow land had to be broken up with dynamite to be made useful at all. (RT 60 [March 13, 2018].) Hardly "agricultural."

and would kill crops. See RT 73-75 (3/14/18). For at least 75 years, the property had never been used for agricultural activities, having served only as a cattle trail for an old defunct ranch. RT 69-70 (3/14/18) Dr. Plasch concluded that the property "had extremely poor economic conditions because it is mostly a'a lava" coupled with "[e]xtremely low soil ratings, extremely low rainfall, and no existing water source for agriculture." RT 70, 73-90 (3/14/18).[2]

In a nutshell, inappropriateness of the agricultural zoning was what led to the State upgrading the land at the property owner's request to an "urban usage" zone. Indeed, The 1991 LUC Order contained findings supporting the reclassification from agricultural to urban use, including that: (1) "[t]he Land Study Bureau rated the Property's soils as Class E (very poor)" and (2) "[t]he Property is not suitable for agriculture and there are no agricultural activities on the site." Although Bridge Aina Le'a was in the early stages of developing the property, the LUC issued an Order to Show Cause why it should not "revert" the land to agricultural because the process was not proceeding fast enough to suit the LUC. By the time of the

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[2] The nature of "a'a lava" would have been well known to the Hawaiian jury. There are two kinds of Hawaiian lava. "The smooth variety is called pahoehoe, and the rougher variety is known as a'a (pronounced ah-ah). A'a is a Hawaiian word meaning 'stony with rough lava'. [¶] If you've ever been to the Big Island of Hawaii and gone for a hike, you've seen a'a lava. It's incredibly rough and jagged black rock that takes forever to walk across; and tears your shoes apart as you go." (www.universetoday.com) Hence the need for dynamite to make such property useful.

"reversion," more than $20 million had been spent on the project. *DW Aina Le'a Dev., LLC v. Bridge Aina Le'a, LLC*, 339 P.3d 685, 712 (Haw. 2014.) That reversion to a zone that no one actually believed was usable for this land was the genesis of this litigation.

Dr. Plasch concluded that none of the statutorily permissible uses would have been economically beneficial or productive for the five years the reversion order precluded use. In sum, "all the allowed economic activities in the agricultural district for that time period . . . would have been infeasible." See RT 90 (3/14/18)

Strangely, when Dr. Plasch had plainly 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", the Ninth Circuit took that as a concession that "growing rocks" was an economically viable, beneficial, productive use that could be made of this "agricultural" property. Really. (App., p. 30a)

Bridge Aina Le'a had a sale pending for $40.7 million. (App., p. 10a) The State's action in abruptly (and, as the Hawaii courts eventually held, illegally) removing the urban designation from the property and reverting it to agricultural use, ended the buyer's ability to finance the purchase, and the sale fell through. (App., p. 37a) Beyond that, as the District Court concluded, "[c]redible testimony" showed that the LUC's intent was to "force Bridge to sell the property to another owner/developer" (App., p. 117a), plainly not a proper function of a state regulator.

B. Proceedings Before the Lower Courts.

Bridge Aina Le‘a pursued an administrative appeal in the state circuit court to overturn the LUC's decision to "revert" the zoning on the property from urban to agricultural. That court concluded "[t]here was no evidence submitted in the order to show cause proceeding [leading to the reversionary order] that the [property] is suitable for agricultural use." (Plaintiff's Supplemental Excerpts of Record [9th Circuit], vol. 2, pp. 431-432.)

The circuit court overturned the State's reversion order and the Hawaii Supreme Court affirmed. *DW Aina Le‘a Dev., LLC v. Bridge Aina Le‘a, LLC*, 339 P.3d 685 (Haw. 2014.) In other words, the State action that prevented use of the property for more than five years and interdicted a pending sale of the property was invalid under state law.[3]

Bridge Aina Le‘a then filed this suit in the Hawaii state courts and the State removed it to federal court. The State's motion for judgment as a matter of law was denied (App., p. 56a) and the case was tried before a jury on the issue of liability for a taking. After eight days, the jury found that the State had taken property from Bridge Aina Le‘a under both of the takings standards established by

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[3] As the Chief Justice put it recently, regulatory takings law is designed to weigh "the effect of a regulation on specific property rights as they are established at state law." *Murr v. Wisconsin*, 137 S.Ct. 1933, 1955 (2017) (Roberts, C.J., dissenting).

this Court, i.e., *Lucas* and *Penn Central* (App., p. 126a), findings that the District Court held "independently supported" the overall finding of a taking. (App., p. 105a) Curiously, although the District Court had allowed testimony from Steven Chee, Bridge Aina Le'a's appraiser, on the devastating fiscal impact of the State's action, it restricted use of that evidence to the liability issue (as showing sufficient economic impact to invoke the 5th Amendment), even though it also showed the scope of the compensation that would have been due. The District Court then awarded $1 nominal damages and denied Hawaii's renewed motion for judgment as a matter of law. (App., p. 56a)

C. Proceedings on Appeal

Both parties appealed. The State sought review of the repeated denial of its motion for judgment as a matter of law, and Bridge Aina Le'a sought review of the District Court's award of $1 as just compensation for the economic devastation wreaked on the value and utility of Bridge Aina Le'a's land. The Ninth Circuit reversed, disagreeing with the jury's findings that Hawaii had taken property from Bridge Aina Le'a. (App., p. 1a)

Thus, by reversing on factual grounds that no reasonable people could find in favor of Bridge Aina Le'a, the Ninth Circuit *de facto* "found" that (a) the Hawaii state courts, (b) the jury in this case, and (c) the district court were composed of unreasonable people because — and one cannot make this up — the property could be used for "growing rocks" (App., p. 30a), whatever that means.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari to Address the Fifth Amendment Rights of Property Owners Who Suffer Temporary Regulatory Takings.

A. There is Conflict and Confusion on How to Apply *Penn Central* — the Case This Court Calls its "Polestar" in this Field.

It would be easy to cite treatises and law reviews attesting to the absence of standards in regulatory taking law and the need for guidance from this Court.

Easy, but not necessary. The Court's own opinions make the point clearly, and decisions like the one below show the current need for pragmatic and comprehensive guidance.

> "In Justice Holmes' well-known, if less than self-defining, formulation, 'while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.'" *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) [quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)].
>
> "The rub, of course, has been — and remains — how to discern how far is 'too far.'" *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005).

> "[W]e have 'generally eschewed' any set formula for determining how far is too far, choosing instead to engage in 'essentially ad hoc factual inquiries.'" *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 326 (2002) [quoting *Lucas*, 438 U.S. at 1005 which, in turn, quoted *Penn Central*, 438 U.S. at 124].
>
> "Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking." *Palazzolo*, 533 U.S. at 617.
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> "Indeed, we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine 'a number of factors" rather than a simple 'mathematically precise' formula." *Tahoe-Sierra*, 535 U.S. at 326.
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> "Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings." *Tahoe-Sierra,* 535 U.S. at 326, n. 23 [quoting with approval from *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring)]

The Court has created a "rule" that provides no guidance to those who either have to live with it or apply it. There has been enough litigation of this

sort during the last four decades for the law to have developed meaningful guidelines.

And, yet, we have none. This case is an exemplar. The District Court rejected the State's motion for judgment as a matter of law (concluding that a proper claim had been pled) and then presided over an eight-day jury trial regarding the facts. After that process, the jury found that both of this Court's standards for analyzing takings (*Lucas* and *Penn Central*) had been met. After the District Court rejected the State's renewed demand for judgment as a matter of law after trial, the Ninth Circuit decided to second-guess both the jury and the trial judge in this "ad hoc factual" determination and conclude that no taking *could possibly* arise from these facts. Something is wrong with that picture.

B. Court Results Show — and the Experts Agree — That Application of *Penn Central* Almost Never Results in a Finding That a Taking Has Occurred. The Playing Field Needs to be Levelled.

The result of this Court's reluctance to provide guidance is anarchy. A prominent text summed up this Court's regulatory takings decisions as belonging to "the gastronomic school of jurisprudence," that is, an area governed by gut feeling in the individual case. 1 Norman Williams, Jr. & John M. Taylor, American Land Planning Law 103 (2003 rev. ed.).

Indeed, scholars from all points on the ideological spectrum have criticized *Penn Central* because it offers virtually no guidance to anyone.[4] Putting things in graphic perspective, Professor John Echeverria entitled his classic article *Is the* Penn Central *Three Factor Test Ready For History's Dustbin?* 52 Land Use L. & Zon. Dig. 3 (2000).

The reason for Professor Echeverria's caustic title was his conclusion that property owners almost never win *Penn Central* cases and any rule that is so one-sided is plainly unworkable. *Id.* at 4. He reached this conclusion notwithstanding that his sympathies generally lie with the regulatory agencies. That conclusion about *Penn Central* (which holds for *Lucas*, as well) has been echoed by others. See (***all emphasis added***) Joseph William

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[4] *See*, e.g., Joseph L. Sax, *The Property Rights Sweepstakes: Has Anyone Held the Winning Ticket?*, 34 Vt. L. Re. 157, 157 (2009) (the *Penn Central* inquiry is an "open-ended, I-(hope)-I-know-it-when-I-see-it approach" to takings adjudication); Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn. St. L. Rev. 601, 602 (2014) ("the [*Penn Central*] doctrine has become a compilation of moving parts that are neither individually coherent nor collectively compatible"); John D. Echeverria, *Is the* Penn Central *Three-Factor Test Ready for History's Dustbin?* 52 Land Use L. & Zon. Dig. 3, 7 (2000) ("the *Penn Central* test . . . is so vague and indeterminate that it invites unprincipled, subjective decision making by the courts."); David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 574 (1999) (surveying inconsistent judicial approaches and concluding that "state (and some lower federal) courts are not hearing (or not wanting to hear) the U.S. Supreme Court").

Singer, *Justifying Regulatory Takings*, 41 Ohio N.U.L. Rev. 601, 606 (2015) ("it is ***really hard to win*** a regulatory takings claim"); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 Yale L.J. 203, 227 (2004) ("***Whenever*** the Court conducts a *Penn Central* analysis of a state or local regulation, ***the regulation stands***"); Daniel R. Mandelker, *Litigating Land Use Cases in Federal Court: A Substantive Due Process Primer*, 55 Real Prop., Trust & Estate L.J. 69, 96-97 (2020) ("a takings claim is ***almost impossible to win***"); Carol N. Brown & Dwight Merriam, *On the Twenty-Fifth Anniversary of* Lucas: *Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847 (2017) (*Lucas* plaintiffs succeed in ***only 1.7%*** of cases); Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or A One Strike Rule?* 22 Fed. Cir. B.J. 677 692 (2013) (***only 4 of 45*** cases studied resulted in the property owner prevailing); Mark W. Cordes *Takings Jurisprudence as Three-Tiered Review*, 20 J. Nat. Resources & Envtl. L. 1, 35 (2006) ("the *Penn* Central factors have ***rarely*** resulted in takings being found"); *District Intown Properties Ltd. Partnership v. District of Columbia,* 198 F.3d 874, 886 (D.C. Cir. 1999) (Williams, J., concurring) ("***Few*** regulations will flunk this nearly ***vacuous*** test.").

It simply cannot be true that virtually no regulatory taking case has merit. In sum, it is time for this Court to reconsider its vague "polestar" *Penn Central* opinion and make the parameters clear to

lower courts and litigants.[5] The current judicial approach de facto transforms American common law — to borrow Justice Frankfurter's tart imagery — into the law of "a kadi sitting under a tree" and dispensing idiosyncratic justice by the seat of his pantaloons, "according to considerations of individual expediency". *Terminiello v. City of Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting). Or, as Justice Scalia put it with typical directness, "[r]udimentary justice requires that those subject to the law must have the means of knowing what it prescribes." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989).

C. There is Chaos Under Both *Lucas* and *Penn Central* as to The Extent of the Economic Impact a Property Owner Must Demonstrate to Prove a Taking.

Penn Central noted three key "factors" to analyze to determine whether government regulation effects a taking. The first was the "economic impact" on the property owner. Regularly, since *Penn Central*, this

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[5] See generally, e.g., Gideon Kanner & Michael M. Berger, *The Nasty, Brutish And Short Life Of* Agins v. City Of Tiburon, 50 The Urban Lawyer 9 (2019); Michael M. Berger, *Ruminations on Takings Law in Honor of David Callies*, 7 Brigham-Kanner Prop. Rts. Conf. J. 17 (2018); Michael M. Berger, *The Joy of Takings*, 53 Wash. U.J.L. & Pol'y 189 (2017); Michael M. Berger & Gideon Kanner, *The Need for Takings Law Reform: A View From the Trenches*, 38 Santa Clara L. Rev. 837 (1998); Michael M. Berger, *They Found the Quark — Why Not a Takings Formula?* 47 Land Use Law & Zoning Digest, no. 5 , p. 3 (May, 1995).

Court has repeated that, if a regulation deprives property owners of the "economically viable use" or "economically beneficial or productive use" of their property, a taking has occurred. (The first formulation appeared initially in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1981); the latter refinement appeared in *Lucas*, 505 U.S. at 1015.)[6] And it has continued to stress the importance of "economic impact" as a determinative *Penn Central* factor. E.g., *Lingle*, 544 U.S. at 539

However, in *none* of those cases did the Court explain the parameters of that economic impact. The concept was simply stated and lower courts have been left to fend (or flounder) for themselves.

> "The Supreme Court has never given us definite numbers—it has never said that a value loss less than a specified percentage of pre-regulation value precludes a regulatory taking or that one greater than some threshold (short of a total taking) points strongly toward a taking." Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, 334 (2007).

Lower courts have developed no consistent, or even predictable, definition, leaving litigants (as well as those who would prefer to order their lives

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[6] This Court has repeated these terms almost as a mantra in virtually every regulatory taking case it has reviewed. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984).

by clear rules and avoid litigation) adrift. See Richard A. Epstein, *From* Penn Central *to* Lingle: *The Long Backwards Road*, 40 J. Marshall L. Rev. 593, 604 (2007) ("No one knows how much diminution in value is required.")

This case is a paradigm. In the teeth of this Court's clear statement in *Lucas* that a taking would occur upon deprivation of all *economically beneficial or productive use*, the Ninth Circuit concluded that "there is no *Lucas* liability for this ***less than total deprivation of value***." (App., p. 25a; emphasis added). In so holding, the court relied on cases concluding that losses of 92% or 78% of value or, indeed, anything less than 100% of the property's value was not sufficient economic impact to satisfy either mode of analysis. (App., pp. 25a-26a)

Notwithstanding the Ninth Circuit's analysis, neither *Penn Central* nor *Lucas* could have required a *total* deprivation in order to meet their thresholds. Had that been this Court's intent, it could simply have done away with the "ad hoc factual" analysis of *Penn Central* or it could have said "all use" in *Lucas*. By interjecting either "viable," or "beneficial," or "productive" between "all" and "use" this Court must have intended something else. It should not require reference to a dictionary to conclude that "economically viable, beneficial, or productive use" means a use that is capable of producing a present (or at least foreseeable or potential) income.[7] A "use"

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[7] See *Kirby Forest Indus., Inc. v. United States.*, 467 U.S. 1, 14 (1984) ("curtailment" of the "ability to derive income"); *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987)

that engenders a loss (or lacks even the possibility of producing a gain) cannot be considered to be "economically viable, beneficial, or productive."[8] If anything, such a use is economically moribund.

Indeed, this Court has repeatedly said that this economic analysis must include the ability to profit from the use, not merely to find something — regardless of its economic productivity — that could theoretically be done with the property (as the Ninth Circuit concluded here (App., p. 30a). In *Penn Central*, for example, this Court emphasized that the regulations permitted Penn Central "not only to *profit* from the Terminal, but also to obtain a 'reasonable return' on its investment" (438 U.S. at 136; emphasis added), which is what saved the regulation from being a taking of Penn Central's

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("potential for producing income or an expected profit"); *Nemmers v. City of Dubuque*, 764 F.2d 502, 504-05 (8th Cir. 1985) (return on investment); *Orion Corp. v. State*, 747 P.2d 1062, 1073 (Wash. 1987) ("some present, possible, and reasonably profitable use"); *Ranch 57 v. City of Yuma*, 731 P.2d 113, 122 (Ariz. 1986) ("a use is not reasonable unless the landowner can make it economically productive"); *Corrigan v. City of Scottsdale*, 720 P.2d 528, 538 (Ariz. App. 1985) ("reasonable economic return on his investment"); *Hornstein v. Barry*, 530 A.2d 1177, 1185 (D.C. App. 1987) ("reasonable financial return").

[8] *Bowles v. United States*, 31 Fed. Cl. 37, 48-49 (1994) (no economically viable use where carrying and operating costs associated with proposed use would result in economic loss); *Kempf v. City of Iowa City*, 402 N.W.2d 393, 398 (Iowa 1987) ("the cash flow income would not retire the debt"); *Wheeler v. City Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987) ("an injury to the property's potential for producing income or an expected profit").

property. A few years later, in *Williamson County Reg. Plan. Agency v. Hamilton Bank*, 473 U.S. 172, 186 (1985), this Court said that one indicator that a taking had occurred was if the regulation interfered with the owner's "investment-backed *profit* expectations." (Emphasis added.) In *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987), the Court upheld Pennsylvania's coal mining restrictions because there was no indication that they inhibited the mine operators' ability to "profit" from their properties. (480 U.S. at 485, 496.) And, in *Lucas*, the Court quoted Lord Coke's famous observation, "for what is the land but the profits thereof[?]" (505 U.S. at 1017.) Contrary to this Court's demonstrated understanding of the need to consider the ability to profit from land use, both the Ninth Circuit (as shown here) and the Second Circuit (*Park Avenue Tower Associates v. City of New York*, 746 F.2d 135 (2d Cir. 1984) have flaunted their disregard of the concept:

> "the inability of appellants to receive a reasonable return on their investment by itself does not, as a matter of law, amount to an unconstitutional taking. [¶] The crucial inquiry . . . is not whether the regulation permits plaintiffs to use the property in a 'profitable' manner, but whether the property use allowed by the regulation is sufficiently desirable to permit property owners to 'sell the property to someone for that use.'" *Id*. at 138, 139.

In consequence, the failure to explain the parameters of the concept has left lower courts to

take the easy way of simply concluding that *Lucas* requires a total wipe-out before liability may be found, and that *Penn Central* requires virtually the same thing. That makes no sense from either a logical or constitutional perspective, and this Court's attention is sorely needed.

D. There is Conflict Under *Lucas* as to Whether a Property Owner Must Demonstrate Deprivation of *Use* or *Value*.

Lucas seemed clear in its conclusion that elimination of economically beneficial or productive ***use*** was the key to whether a categorical taking had occurred. However, the Ninth Circuit and several others have converted that standard into one of ***value***, rather than use. That allows them to hold, as here, that *any* residual value eliminates the possibility of *Lucas* liability. That does not fit with *Lucas* and needs correction here.

The legal analysis in *Lucas* uses the term "use" (generally in conjunction with "economically beneficial" or "economically productive") thirty one times. It does not equate a deprivation of use with elimination of value. The Court understood the difference. As the dissent noted there, a number of ostensible "uses" remained for Mr. Lucas to "make", thus confirming that the property retained some value (as one would expect of virtually any property, particularly the coastal property involved there). The issue however, as the majority knew, was whether these remaining uses (see *Lucas*, 505 U.S. at 1044 (Blackmun, J., dissenting) ["[p]etitioner can

picnic, swim, camp in a tent, or live on the property in a movable trailer"]) were economically productive, not merely that they existed *in vacuo*.

Nor was *Lucas* alone. It built on the Court's earlier decisions. For example, in *Pennsylvania Coal*, a taking was found because the regulation made removal of coal "commercially impracticable." 260 U.S. at 414. In *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), this Court found a taking based on a confiscatory rate of return, regardless of the lifetime value of the utility. And in *Penn Central*, the Court upheld the regulation because the owner was able "to obtain a 'reasonable return' on its investment." (438 U.S. at 136.)

Moreover, the decision below directly conflicts with the Court of Appeals for the Federal Circuit — the court that hears all appeals involving 5th Amendment takings claims against the United States. That court has repeatedly recognized that *Lucas* is based on use, not value. See, e.g., *Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1117-18 (Fed. Cir. 2015):

> "Contrary to the government's assertion, Lucas does not suggest that a land sale qualifies as an economic use. . . . [I]n the context of real property, focusing Lucas 'solely on market value' allows 'external economic forces,' such as inflation, to artificially skew the takings inquiry."

See also *Res. Inv., Inc. v. United States*, 85 Fed. Cl. 447, 486 (2009): "Both in its holding and its

reasoning, Lucas thus focuses on whether a regulation permits *economically viable use* of the property, not whether the property retains some value on paper." (Emphasis in original.)

To be sure, part of the confusion has its roots in this Court's opinions, in which the difference between "use" and "value" appears muddled. For example, in *Tahoe-Sierra*, 535 U.S. at 332, the Court said that the *Lucas* rule applies where "a regulation deprives property of all value." In *Lingle*, 544 U.S. at 539, the Court said that "complete elimination of value is the determinative factor" in a *Lucas* evaluation. That is not what *Lucas* said. Clarification is in order.

E. There is a Need For Clarity About the Ability of Property Owners to Prevail in Temporary Regulatory Takings Cases.

The Constitution requires just compensation for *all* takings. Thus, the issue is ***not*** whether property was taken temporarily, but whether it was taken at all. The words of the 5th Amendment are clear and general: "nor shall private property be taken for public use without just compensation." There is no restriction regarding the type of property or duration of the taking.[9]

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[9] Decisional law is replete with eminent domain cases in which private property was taken "for the duration" of a war. Compensation was mandatory for that period. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Kimball Laundry Co. v. United States*. 338 U.S. 1 (1949).

The Court dealt with this issue in the context of land use years ago. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-319 (1987), this Court plainly held that the 5th Amendment's just compensation guarantee applies to *all* takings, whether they be physical or regulatory, permanent or temporary.

> "[T]emporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. . . . Where th[e] burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during th[e] period [the regulation was in effect]."

In *First English*, 483 U.S. 304, the Court took direct aim at the remedy for government regulatory action that took the use of private property for any period of time. That, held the Court, would require compensation because "invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy." (482 U.S. at 322.) Compensation for the lost use of the property while the regulation precluded use of the property was held constitutionally mandatory. The duration of the taking goes to the quantum of compensation, not liability.

First English built on an odd dissenting opinion (odd because five Justices agreed on its substance) in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting).[10] As summarized there:

> "The fact that a regulatory 'taking' may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional 'taking.' Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory 'taking' render compensation for the time of the 'taking' any less obligatory. This Court more than once has recognized that temporary reversible 'takings' should be analyzed according to the same constitutional framework applied to permanent irreversible 'takings.'"[11]

Thus, temporary takings are conceptually the same as permanent takings. In *Tahoe-Sierra,* the Court concluded that *Penn Central*'s three-factor

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[10] Justices Stewart, Marshall, and Powell joined Justice Brennan's dissent. In addition, although Justice Rehnquist concurred with Chief Justice Burger and Justices Blackmun, White and Stevens that the case was not final, he then noted his agreement with Justice Brennan's group of four on the merits. 450 U.S. at 633 (Rehnquist, J., concurring).

[11] As this Court later noted, *First English* "endorsed" Justice Brennan's view and concluded that "nothing that we say today qualifies [*First English*'s] holding." *Tahoe-Sierra*, 535 U.S. at 328.

test supplied the correct "approach [for] claims that a regulation has effected a temporary taking," because that approach permitted "careful examination and weighing of all the relevant circumstances." (535 U.S. at 333-36.) The reason the Court did not evaluate *Tahoe-Sierra* as a *Penn Central* temporary taking was that the property owners there did not raise that issue. They claimed solely that they had suffered a categorical *Lucas* taking. 535 U.S. at 333. See also *Lucas*, 505 U.S. at 1010-14 (State's amendment of statute did not preclude taking during the time original statute was in effect); *Id*. at 1032-33: "If this deprivation amounts to a taking, its limited duration will not bar constitutional relief." (Kennedy, J., concurring.) Thus, under this Court's teachings, *Penn Central* cannot be construed in a manner that would preclude the viability of temporary regulatory taking claims.

Nonetheless, the Ninth Circuit's decision below adds a needless complication to this already complex area of the law by concluding for obscure reasons that the substantive standards for permanent and temporary takings are different.

The Ninth Circuit held that there could be no temporary taking under *Lucas* as a matter of law and thus truncated this Court's *Lucas* formulation. Its superficial analysis was that *Lucas* liability can *only* attach to deprivations of "***all*** economically beneficial or productive use" and, by definition, a temporary taking cannot ever satisfy the "all" criterion. That, however, is too crabbed a view of *Lucas*. As noted above, *Lucas* did not deal with a

loss of "all use." Instead, this Court carefully modified that phrase by inserting between "all" and "use" the words "economically beneficial or productive." Thus, analysis under *Lucas* cannot end with the conclusion that "some" use might remain without considering further whether that use is economically beneficial or productive. Here, for example, there was no evidence that this hard, rocky slab of lava could be economically used for anything under the state's reverted agricultural zoning. The best proof of that may be the Ninth Circuit's rather flip conclusion that the property owner's expert testified that the property was useful for "growing rocks." (App., p. 30a) Really? Plainly, he was being sarcastic in response to the Respondent's counsel's goading. The evidence was clear that this property lost all of its economically beneficial or productive use for the period of time from announcement of the reversionary order through the Hawaii Supreme Court's holding that the State's action was invalid.

The Ninth Circuit appears to have over-read *Tahoe-Sierra* in another way. There, this Court held that a regulation that was *designed* to be temporary, having a designated ending point, could not be construed as a *Lucas* taking because its duration was known in advance. However, *Tahoe-Sierra* did not hold that no temporary taking could ever be found. On the contrary, it relegated most temporary taking analysis to *Penn Central*; but nothing in *Tahoe-Sierra* holds that a *Lucas* finding cannot be made where the regulation is *not* designed to be temporary but merely becomes so where — as here — the regulation is struck down by a court. See *First English*. In that instance, the facts need to be

examined to determine whether the impact is severe enough to invoke *Lucas* for the period of time before the regulatory action was invalidated, i.e., while the regulatory action precluded all economically productive or beneficial use.

This, by the way, is precisely how the Court of Appeals for the Federal Circuit treats temporary takings (which may last for no more than 180 days) under the federal Rails-to-Trails Act. They are *Lucas* takings because there is a total deprivation of use for a period of time. See the most recent holding in *Caquelin v. United States*, 959 F.3d 1360 (Fed. Cir. 2020).

And, under *Penn Central*, this Court placed in sharp focus the "economic impact" of the regulation on the property owner, albeit precisely what the Court meant by that has never been clearly explained. The lack of a clear explanation is evident from the confusion in the lower courts in trying to apply it. Here, for example, the Ninth Circuit relied on cases concluding that virtually ***no*** reduction in value — even if that reduction approaches 100% — would be a sufficient "economic impact" to invoke the 5th Amendment's protection via *Penn Central*. In this very case, the evidence was not disputed that the mere action of voting to revert the zoning from urban to agricultural caused a radical and dramatic overnight loss in value:

> "Chee [the owner's expert] calculated the land's value at $40 million on *the day before the vote* and as $6.36 million on *the day of the vote*. The parties agree, uncritically, that

> Chee's opinion shows that the land suffered an 83.4% diminution in fair market value." (App., p. 33a; emphasis added.)

Relying on cases that refused to find *Penn Central*'s "economic impact" factor satisfied by losses ranging up to 100% of the property's value (App., p. 25a), the Ninth Circuit concluded that there could be no taking here "as a matter of law." (App., p. 28a)[12] That, however, only demonstrates the conflict that rages in the lower courts. A prime example is the long-running *Florida Rock* litigation in the Court of Federal Claims and the Court of Appeals for the Federal Circuit.[13] In the final chapter of that litigation, the court concluded that Corps of Engineers' regulations that reduced the value of the property by 73.1% established a taking that required compensation. *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 36 (1999). Note, however, that a 73.1% diminution in value was sufficient there, while an 83.4% reduction was held

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[12] To the extent that other courts have relied on similar analysis, they have relied on decisions of this Court that were decided long before the Court's current takings jurisprudence (which essentially began in 1978) and announced the concepts of economically viable, beneficial, or productive use and economic impact on the property owner in the 5th Amendment context. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926 (75% devaluation); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (88% devaluation).

[13] See, e.g., (all cases bearing the name *Florida Rock Indus., Inc. v. United States*), 18 F.3d 1560 (Fed Cir. 1994); 21 Cl. Ct. 161 (1990); 791 F.2d 893 (Fed Cir. 1986); 8 Cl. Ct. 160 (1985).

not to be enough here. That is the upshot of the Court's standardless "polestar" ruling.

Distilling this Court's cases yields this result: (1) under *First English*, a temporary taking can require compensation; (2) under *Lucas*, if the taking is designed to last only for a limited period, then it is a question of fact whether the impact was severe enough to eliminate all economically productive use for a significant period of time; (3) under *Penn Central*, if the regulation is temporary only because the government later decided to eliminate it or because a court later invalidated it, then all factors should be examined to determine whether the severity of the impact caused a compensatory taking.

The lower courts, and the government agencies and property owners served by them, need guidance. It should be apparent that the Court's desire to refrain from establishing overly firm rules has not served well. It goes to the other extreme and allows so much flexibility to lower courts that this constitutional field is left with no real standards at all. As the late Judge Oakes of the Second Circuit put it, "[*Penn Central*] jurisprudence permits purely subjective results, with the conflicting precedents simply available as makeweights that may fit pre-existing value judgments . . . ."[14] The result is a continuous roiling of the litigational waters, with a steady stream of academic criticism and certiorari

[14] James L. Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 Wash. L. Rev. 583, 613 (1981).

petitions to this Court, which should be unnecessary.[15]

II. This Court Should Grant Certiorari to Consider How the 7th Amendment's "Re-examination Clause," With its Deferential Standard of Review, Applies to the "Ad Hoc Factual" Determinations Made by Juries Under *Penn Central*.

The right to a jury trial is the bulwark of American liberties, *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Chauffeurs, Teamsters, etc. v. Terry*, 494 U.S. 558, 565 (1990), that "should be jealously guarded by the courts," *Jacob v. City of New York*, 315 U.S. 752, 752-53 (1942). In the context of liability for regulatory takings, the Court held that the parties have a 7th Amendment right to a jury trial. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 708, 720-21 (determination of loss of economically viable use "is for the jury" to decide.

Here, a complex set of facts was presented at an eight-day trial. Sifting those facts and applying the standards provided by the trial court (on

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[15] There is no end to the academic criticisms of takings law. See, e.g., Joseph L. Sax, *Takings and Police Power*, 74 Yale L.J. 36, 37 (1964) ("a welter of confusing and apparently incompatible results"); Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 Harv. L. Rev. 1165, 1170 (1967) ("liberally salted with paradox"); Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 Am. U.L. Rev. 297, 299-300 (1990) (regulatory takings law is a "chameleon of ad hoc decisions that has bred considerable confusion.").

instructions agreed to by the parties) was a classic jury function. *See United States v. Gaudin*, 515 U.S. 506, 512-13 (1995) ("the application-of-legal-standard-to-fact sort of question[s] ha[ve] typically been resolved by juries"); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976) (recognizing that a jury is well suited to weigh the "delicate assessments of the inferences a 'reasonable [decisionmaker]' would draw from a given set of facts"). As this Court explained:

> "Once those officials who have the power to make official policy on a particular issue have been identified, *it is for the jury to determine whether their decisions have caused the deprivation of rights at issue*." *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989); emphasis added.

As noted, the instructions the jury was given on the two takings standards were agreed to by the parties and approved by the District Court. 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.

The Ninth Circuit's reversal of the jury's determinations is replete with illustrations of the appellate court taking it upon itself to become the trier of fact and redecide the *ad hoc* factual issues itself. By so doing, the Ninth Circuit violated the Re-examination Clause of the 7th Amendment and deprived the litigants before it of a cherished constitutional right. As Professor Tribe put it, the

Re-examination Clause "was adopted principally to protect jury verdicts from after-the-fact judicial interference, especially by appellate courts." Laurence Tribe, American Constitutional Law, § 3-32, "The Seventh Amendment Right to Trial by Jury as a Limit on Federal Judicial Power," at 624. Professor Amar agrees that the Re-examination Clause, "limiting appellate relitigation of facts found by a local jury, further illustrates the notion that appellate review was generally not seen as authorizing a 'new trial' by the appellate judges." Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. Chi. L. Rev. 443, 472-73 (1989).

The Ninth Circuit's appellate review is not compatible with the 7th Amendment and this Court's cases construing it. Its opinion is replete with appellate re-evaluation of the facts, re-weighing of evidence evaluated by the jury, and credibility determinations contrary to those made by the jury.

— Item: The Ninth Circuit concluded that the land "retained substantial residual value in its agricultural use classification" which "allowed Bridge to use the land in economically beneficial ways." (App., pp. 23a) The court recited no evidence to support this conclusion, merely its determination that nothing short of a total elimination of value would suffice. (App., p. 25a) But the jury heard evidence that there was no economically beneficial use that could be made of this property as agricultural land. And the jury was entitled to accept that evidence — particularly as this was a

Hawaiian jury dealing with a peculiarly Hawaiian form of lava-impacted land.

— Item: Disregarding the jury's conclusion that there was no economically beneficial or productive use that could be made of this land in an agricultural zone, the Ninth Circuit simply recited a laundry list of theoretically available uses set forth in the statute. But the jury heard about those "uses." It also heard testimony that none of those uses was economically beneficial (and no contrary testimony that such uses could productively be made on ***this*** land [App., p. 75a]), and was entitled to resolve the evidence by agreeing with Bridge Aina Le'a's expert that none of those theoretical uses was viable.

— Item: The Ninth Circuit chose not to believe Bridge Aina Le'a's expert, Chee, even though the jury relied on him. (App., p. 34a) Chee concluded that the property suffered a massive loss in value as a result of the State's action, amounting to an 83.4% reduction overnight — a conclusion that the State did not dispute. (App., pp. 107a-108a) In the Ninth Circuit's words, "[t]he parties agree, uncritically" to this conclusion. (App., p. 33a) Nonetheless, the Ninth Circuit took it upon itself to re-examine that same evidence and conclude that the evidence was so defective, that the jury could not properly have relied on it. That was not the Ninth Circuit's job.[16]

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[16] This brings to mind the Court's recent decision in *United States v. Sineneng-Smith*, 140 S.Ct. 1575 (2020). There, reversing another Ninth Circuit panel, this Court noted that "[i]nstead of adjudicating the case presented by the parties" the panel called for additional briefing by amici curiae on issues of

— Item: The jury heard evidence showing that the State's action derailed a $35.7 million sale. Its analysis shows only that it disagrees with how the jury evaluated the evidence. (App., pp. 37a-38a) But those factual resolutions were for the jury, not for the Ninth Circuit. The 7th Amendment's Re-examination Clause is directly contrary to what happened here on appeal.

— Item: The Ninth Circuit did the same thing when evaluating *Penn Central*'s "investment-backed expectations" criterion. The jury heard the testimony of Bridge Aina Le'a's manager, John Baldwin, a man with many years of investment and property management experience, as to the anticipated profits from this project. That the Ninth Circuit chose not to credit his testimony is no reason to hold that the jury could not do so. Typical is this statement: "We will assume that Bridge reasonably expected an amendment to the 1991 Order's affordable housing condition, but we do not see what it proves." (App., p. 41a) But the jury plainly did. And that is what matters. The same kind of appellate second-guessing relates to the Hawaii Supreme Court's conclusion (when it invalidated the State's reversion of the property from urban to agricultural) that development of the property was underway. Said the Ninth Circuit: "But again, we do not see what this proves." (App., p. 41a) But again, the question is whether the jury saw what it

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its own design. This Court refused to allow it. So, here, where the parties agreed as to what the evidence showed, it was not for the appellate court to reconfigure the issue and decide it anew.

proved. And the jury found that it showed unconstitutional action by the State.

If *Penn Central* is to remain the "polestar," as the Court seems intent on maintaining it, then the *ad hoc* factual examination required by it needs to be enforced. Indeed, if *ad hoc* factual determinations are the rule, and there is only generalized guidance from this Court on how to analyze the issues, then 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*. Courts like the one below cannot be allowed to pronounce *ex cathedra* that the severe regulatory actions before them are not severe enough to warrant constitutional condemnation. More, the judicial system's traditional fact-finder — the jury — needs to be allowed to do its job of examining each set of *sui generis* facts and determining whether, under proper instructions, they pass the legal threshold. Otherwise, the system becomes one of judicial whim on the part of appellate courts far removed from the actual facts.

CONCLUSION

The Court decided *Penn Central* in 1979. It is now 2020. We submit that 40 years of confusion is enough. The petition for certiorari should be granted.

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