No. 20-54

In The
Supreme Court of the United States

BRIDGE AINA LE'A, LLC,

Petitioner,

v.

HAWAII LAND USE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
For the Ninth Circuit

AMICI CURIAE BRIEF OF NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES AND CALIFORNIA BUILDING INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Home Builders of the United States ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and constitute 80% of all homes constructed in the United States.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated.

The California Building Industry Association ("CBIA") is a statewide non-profit trade association comprising approximately 3,000 member companies involved in all aspects of the residential development industry. CBIA and member companies directly employ over one hundred

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

thousand people. CBIA is the recognized voice of the homebuilding industry in California.

NAHB and CBIA file this brief together as *amici curiae*. The vast majority of *amici curiae's* builder and developer members own and develop real property. These members engage in land development and construction activities that span the entire development process, from idea inception to maintenance after sale of a housing unit. Therefore, they are directly impacted and concerned with any decision that dilutes their rights under the Fifth and Fourteenth Amendments. U.S. CONST. AMENDS. V, XIV. Unfortunately, many of *amici curiae's* members have been forced to initiate their own regulatory takings lawsuits, and are well aware of the financial and emotional toll from protracted regulatory takings litigation. *Amici curiae* believe that its members would be greatly served if this Court grants the Petition and provides clarifying guidance on *Lucas* and *Penn Central* regulatory takings. *See Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

SUMMARY OF ARGUMENT

Similar to countless development projects across the United States, the Petitioner here went through heavy upfront investment and a rigorous due diligence process. Yet, the Ninth Circuit applied *Lucas* and *Penn Central* in such a way that ignores the countless steps developers must take and the expectations developers have when creating new communities. These expectations do not materialize at the final step of the sale of a housing unit, but rather throughout the entire development process.

Further, the impact from the lack of consistency from regulatory takings lawsuits goes beyond just the courtroom. Without clarification from this Court, such lawsuits will continue to be needlessly time intensive and financially burdensome. This not only impacts home builders and land developers, but also home buyers in the form of higher housing costs. *Amici* respectfully urge this Court to grant certiorari to resolve important *Lucas* and *Penn Central* questions that have a broad impact.

ARGUMENT

I. THIS CASE IS THE PERFECT VEHICLE FOR THIS COURT TO PROVIDE CLARITY ON *LUCAS* AND *PENN CENTRAL* REGULATORY TAKINGS; THE PETITIONER, FACTS, AND LOWER COURT RESULT HERE EXEMPLIFY COUNTLESS SIMILAR INSTANCES ACROSS THE COUNTRY.

The "ultimate constitutional question" that underlies the Takings Clause "is whether the concepts of fairness and justice" are served by categorical rules or by a *Penn Central* inquiry. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 334 (2002). In this case, Hawaii state courts, a jury, and the district court all found that various principles of fairness and justice were violated by the State of Hawaii Land Use Commission under both *Lucas* and *Penn Central*.

However, in the end, the Ninth Circuit has ruled in favor of the government, similar to 90% of regulatory takings lawsuits, thus providing the land owner with no relief. James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 Wm. & Mary L. Rev. 35, 58 (2016). The Petitioner, facts, and result in this case are emblematic of countless land use takings claims, making this the perfect vehicle for this Court to reexamine whether *Lucas* and/or *Penn Central* are exemplars that guarantee fairness and justice. *Amici,* therefore, respectfully urge this Court to grant certiorari.

A. The Ninth Circuit, Similar to Countless Courts Nationwide, Wholly Ignores the Realities of Development and Reasonable Expectations of Developers.

Residential construction is one of the most heavily regulated industries in the country. While the development approval process varies from one place to another, almost everywhere, builders must deal with numerous layers of local, state, and federal permits and approvals. As one academic states, "[d]evelopers typically obtain construction and permanent loan commitments early in the development process; such commitments will expire during a prolonged permitting process, leaving developers with the risk of interest rate increases and uncertainty as to the availability of any funds at all . . . ." Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts,* 48 Vand. L. Rev. 1, 44-45 (Jan. 1995).

Home builders and land developers of all sizes have reasonable investment-backed expectations at various stages of development. In particular, complex and large-scale projects such as the one in this case routinely take decades to complete and require heavy investment up front. The Ninth Circuit dismisses these expectations and labels them no different to a "starry eyed hope of winning the jackpot if the law changes." *Bridge Aina Le'a, LLC v. Land Use Comm'n,* 950 F.3d 610, 633-35 (9th Cir. 2020). While this makes no sense, it is unfortunately emblematic of how little governments and lower courts understand about the development process. Home builders and land developers do not

acquire and invest millions of dollars[2] in land to "grow rocks."

A successful developer understands that a vision for development must go through an initial investigation process, well before even approaching the locality on any permitting issues. Certainly, this initial step includes research on market trends, economic conditions, site constraints, regulatory factors and off-site conditions. Daisy Linda Kone, *Land Development*, BuilderBooks (10th Ed. 2006) at 4. This involves hiring or retention of a number of professionals, including market research and financial analysis consultants and project planners (land planners, architects, landscape architect, land use attorneys, engineers, and interior designers). *Id.* at 11-16. The market professionals will research the necessary data required to identify appropriate buyer demographics, discern buyer preferences, advertising campaigns, land acquisition costs, pro forma and cash flow analysis. At the same time, the project planners direct the actual project proposal and can include issues such as the development of the conceptual master plan, design, geotechnical conditions, soil analysis, topographic factors, site-

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[2] *Amici* note that small development projects also face significant hurdles. For example, one replacement single family home on an existing single family lot, which received community and *all* government approvals was held up for 11 years including Supreme Court review. The project was ultimately abandoned by the homeowner who moved his family to a different city. *Berkeley Hillside Pres. v. City of Berkeley,* 184 Cal.Rptr.3d 643 (March 2, 2015); *Berkeley Hillside Pres. v. City of Berkeley,* 241 Cal.App.4th 943 (Oct. 15, 2015), *reh'g denied,* 241 Cal.App.4th 943 (Feb. 03, 2016), *review denied*.

specific issues (such as dealing with hazards, rights-of-way, existing structures, historical districts). *Id.* at 3.

After all that, the development team looks at the regulatory scheme for the property. For example, residential construction is one of the few industries in which a government-issued permit is typically required for each unit of production. The rules do not stop there, as a constricting web of regulatory requirements affects every aspect of the land development and home building process, adding substantially to the cost prior to construction. The breadth of these regulations is largely invisible to the public, and even the regulators themselves, yet nevertheless has a profound impact on housing affordability and homeownership.

Regulations that stem from federal legislation include: Clean Water Act, National Environmental Policy Act, Endangered Species Act, Energy Policy Act, Occupational Safety and Health Act, Fair Housing Act, and Safe Drinking Water Act. Paul Emrath, *How Government Regulation Affects the Price of a New Home,* Special Studies, (July 5, 2011), *http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=161065&channelID=311* (*last visited* Aug. 15, 2020). Regulations imposed by state and local governments are even more numerous, covering zoning, earth moving, sediment and erosion control, land dedication, gas service, impact fees, tree preservation, long-term facility maintenance, public service impacts, transportation, setback requirements and burning restrictions.

Land development in Hawaii is particularly difficult. As Hawaii land use expert David Callies notes, "[l]and use in Hawai'i continues to be the most regulated of all the fifty states. According to many sources, going from raw land to the completion of a project may well average ten years, given that such raw land is almost certainly classified by the State Land Use Commission initially as either Conservation or Agriculture (still, between them, compromising 95 percent of the land area of the state)." *Regulating Paradise: Land Use Controls in Hawai'i* (2d Ed. 2010) at 1, *https://pdfs.semanticscholar.org/dcbb/ac8af6e99ba94717ead8a8e767485db04485.pdf.*

A land use zoning reclassification in Hawaii from agriculture to urban is no simple affair, as it requires "public hearings, detailed plans and a lot of time . . . . opponents of a development have an opportunity to testify, provide their own expert witnesses and cross-examine the witnesses for the developer. Consequently, disputed cases can be laborious affairs." Dennis Hollier, *Why Big Development is so Difficult in Hawaii,* Hawaii Business Magazine (April 8, 2013), *https://www.hawaiibusiness.com/why-big-development-is-so-difficult-in-hawaii/*.

Similar to home builders and land developers across the county, the Petitioner here went through enormous hurdles and processes at the front end of the development process. Thus, the developer had expectations of seeing the project through completion. The Ninth Circuit's decision wholly ignores these expectations and shows why *Penn Central* in particular needs this Court's clarification.

Thus, we urge this Court to grant certiorari in this case.

B. While Project Planning is Fluid, Development Expectations Still Exist Throughout the Decades of Time and Investment Needed to Complete a Development Project.

It is high time to move past the notion that the determinative criteria for determining investment-backed expectations is "the regulatory environment at the time of the acquisition of the property." *Bridge* at 634, citing *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331 (Fed. Cir. 2018); *but see*, William I. Gulliford, III, *The Effect of Notice of Land Use Regulations Upon Investment-Backed Expectations and Takings Challenges*, 23 Stetson L. Rev. 201, 217 (Fall, 1993) ("Distinct" implies that the expectation must have some sharply defined and tangible manifestation, such as a set of construction plans, loan agreements, or a building permit.").

Developers who have reasonably invested $20 million in up-front costs have expectations that the property will be developed. *See, e.g.,* Robert M. Washburn, *"Reasonable Investment-Backed Expectations" As a Factor in Defining Property Interest*, 49 Wash. U. J. Urb. & Contemp. L. 63, 71 (Summer 1996)(citations omitted)(suggesting a more holistic view of what constitutes expectations, such as the degree of impairment of the property, the uses available before the restriction, the expectedness of the governmental action, whether existing uses were permitted to continue, and the harshness of the local regulatory and legal climate.).

These countless development steps mean nothing to the Ninth Circuit, concluding "Bridge did not expect any profit from its purchase of the property unless and until the Commission amended the 1991 Order's affordable housing condition." *Bridge* at 634. But this is not true. The Petitioner invested heavily at the front end of project development, including countless steps of due diligence, financing, marketing, and more.[3] This was a true investment in the project, not just mere land speculation. *See, e.g., Florida Rock Indus. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987)("In determining the severity of economic impact, the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored."). Additionally, sudden changes that affect these expectations cannot be dismissed as mere fluctuations like the Ninth Circuit has done here. *See Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984)("We have frequently recognized that a radical curtailment of a

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[3] Just compensation calculation in the eminent domain context requires consideration of the "highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future . . . to the full extent that the prospect of demand for such use affects the market value while the property is privately held." *Olson v. United States*, 292 U.S. 246, 255 (1934). Why is it that the Ninth Circuit literally ignored these considerations? *But see, Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1118 (Fed. Cir. 2015) (holding in the regulatory takings context that the highest and best use of a parcel is "the reasonably probable and legal use of vacant land or improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value.").

landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property.").

In no other manufacturing or service industry is a business required to provide 60% of its product at a subsidized rate as the Petitioner was originally required to do. Builders construct affordable housing across the country, but it is offensive when the very government requirement of building subsidized and below market rate units is used by the Ninth Circuit to explain why the developer has no reasonable investment-backed expectations! *Bridge* at 634 (citing to the fact that the Petitioner would need to invest more than $286 million in infrastructure and development costs before seeing a return, and uses this to justify its holding that there is no reasonable investment-backed expectation at the time of the taking.).

There is often an assumption that any sort of delay in the development process is natural and reality, and that if a developer is estopped from building now, he may simply build in the future. How is it fair that the very government that causes the delay can then use such common delays to argue that no taking has occurred. The notion that investors and investment-backed expectations are not affected and that builders can easily start over time and time again is seriously misguided. The impact on developers is severe but effectively ignored by lower courts and now requires this

Court's intervention. We respectfully urge this Court to grant certiorari.

II. THE NUANCES OF TAKINGS LAW ARE NOT SIMPLY ACADEMIC EXERCISES – THE COUNTRY'S HOUSING CRISIS IS EXACERBATED BY THE LACK OF CLARIFYING STANDARDS.

A. Land Use Regulations and Litigation Are Extremely Time and Cost Intensive; the Lack of Uniform Application of Regulatory Takings Standards Adds to This Cost.

One of the oft-overlooked aspects of housing affordability is the impact of regulation[4] and the impact of land use litigation. *See, e.g.,* Tim Iglesias, *Housing Impact Assessments: Opening New Doors for State Housing Regulation While Localism Persists*, 82 Or. L. Rev. 433, 436-37 (Summer 2003)(noting that "housing issues are often ignored by local decision-makers" and that "the prospective beneficiaries of thoughtful housing policies are often not involved in decisions affecting them; [and]

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[4] Scholars at the University of California, Berkeley surveyed planners and builders and found that the "only one factor on which all interviewees and focus group participants agreed: the most significant and pointless factor driving up construction costs was the length of time it takes for a project to get through the city permitting and development processes." Carolina Reid and Hayley Raetz, *Perspectives: Practitioners Weigh in on Drivers of Rising Housing Construction Costs in San Francisco,* U.C. Berkeley Terner Center (Jan. 2018), at 2, *https://ternercenter.berkeley.edu/uploads/San_Francisco_Construction_Cost_Brief_-_Terner_Center_January_2018.pdf*.

decisions harming housing are often practically irreversible. . . .").

Of course, not all regulations are barriers to housing, but as a federal publication notes, there is a cost that should not be discounted:

> Government rules requiring developers . . . to undertake environmental impact analyses are likely to generate higher costs and lead to a diminished supply of housing for two reasons. First, the review itself . . . could be very costly. Second, potential lawsuits . . . could be even more problematic. . . . the developer would have to factor into the project the costs of delay and settlement. In some instances, this uncertainty actually may deter builders from undertaking projects, thereby reducing the overall supply of housing and increasing price.

Michael H. Schill, *Regulations and Housing Development: What We Know,* Cityscape: A Journal of Policy Development & Research, Vol. 8, No. 1 (U.S. Dept of Housing & Urban Development, 2005) at 10, *https://www.huduser.gov/periodicals/cityscpe/vol8num1/ch1.pdf*.

On average, *all* regulations imposed by government at all levels account for 24.3 percent of the final price of a new single-family home built for sale. Sixty percent of this -- 14.6 percent of the final house price -- results from regulations imposed during the lot's development. Further, regulation accounts for almost 55 percent of a price of a developed lot sold to a builder. The remaining 40 or

so percent -- 9.7 percent of the final house price -- is the result of costs incurred by the builder after purchasing the finished lot. Paul Emrath, *Government Regulation in the Price of a New Home*, Special Studies, May 2, 2016, *https://www.nahbclassic.org/generic.aspx?genericContentID=250611*.

Higher litigation costs invariably translate into higher home prices, and this is not simply the fault of the home builder. *See, e.g., Lost Tree* at 1118 (noting that the land owner "persuasively argues that in the real world, real estate investors do not commit capital either to undevelopable property or to long, drawn-out, expensive and uncertain takings lawsuits.").

The lack of discernable regulatory takings standards plays a direct role in housing affordability. Due to the lack of clear regulatory standards, takings lawsuits require heavy time and financial resources. Even the *Lucas* case took over five years to get to the Supreme Court and the legal fees incurred were in excess of half a million dollars. Sylvia R. Lazos Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in A Mixed Bag of Tricks,* 23 Fla. St. U. L. Rev. 315, 400 (Fall, 1995).

Unfortunately, when landowners are faced with the possibility of a decades-long court battle, they often either acquiesce to the harsh demands of the government, or they "scale down their plans (more, perhaps, than the law requires), sell their land, give up, go out of business, or are otherwise frustrated." Stein at 47.

Moreover, if the property owner does decide to go to court, even a cursory examination of land use

cases included in just this brief presents a dreadful outlook, as the arrival of the grim reaper often occurs before resolution of the case. *See e.g.,* Stein at 47 ("A foreclosure sale purchaser, for example, was the landowner in [a lawsuit]: The claim survived even though the original developer did not."); Press Release, Pacific Legal Foundation, *PLF Client Coy Koontz Jr. is Honored by Owners' Counsel of America* (Jan. 27, 2014), *https://pacificlegal.org/press-release/plf-client-coy-koontz-jr-is-honored-by-owners-counsel-of-america/* (Coy Koontz, Sr. filed the original lawsuit 20 years before the Supreme Court made its decision in 2013. Koontz Sr. passed away in 2000). *Sherman v. Town of Chester*, 752 F.3d 554, 560 (2d Cir. 2014) (" . . . . Sherman became financially exhausted to the point of facing foreclosure and possible personal bankruptcy. And while the case was pending on appeal, Sherman died.").

B. Large Litigation Costs Are Partially Borne By the Homebuyer in One Way or Another.

Land use decisions in particular have an impact far beyond administrative hearing rooms and courtrooms. These decisions impact whether safe and decent housing units are built, regardless of whether these units are market rate or subsidized by the builder.[5] These units provide fundamental

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[5] Some land use litigation even impacts housing *after* it is built. One anecdotal example concerns a 299-unit tower (with 45 below-market units). After the building was completely constructed and new residents moved in, a lawsuit was filed challenging the city's approval of the project claiming that the developer did not properly preserve part of a 1920s-

benefits that are essential to the well-being of families, communities, and the Nation.

Homeownership in particular is beneficial: it is crucial for wealth creation, as a portion of a homeowner's mortgage payment every month is set aside and becomes part of the homeowner's equity. The latest of the Survey of Consumer Finances, published by the Board of Governors of the Federal Reserve System, reports that the primary residence accounts for about one-quarter of all assets held by households by 2016, ahead of other financial assets, business interests and retirement accounts. Jesse Bricker, Arthur B. Kennickell, et al., *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances*, Federal Reserve Bulletin, June 2012, Vol. 98, No. 2, *https://www.federalreserve.gov/pubs/bulletin/2012/PDF/scf12.pdf*. Yet, owning a suitable home is increasingly out of financial reach for many households.

Land use regulatory takings cases are extremely expensive, and are aggregated into the cost of a housing project. Future homeowners bear the burden of these litigation costs in the form of higher housing costs.

NAHB economists have studied the impact of increases in housing prices on the number of eligible

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era restaurant that was an Old Spaghetti Factory location. All the residents were evicted for three years while the case was pending. California News Wire Servs., *Vacant Sunset Gordon Tower Approved for Apartments,* Dec. 12, 2018 9:44pm, *https://patch.com/california/hollywood/vacant-sunset-gordon-tower-approved-apartments*.

buyers in a given market. Na Zhao, *NAHB 2020 "Priced-Out" Estimates,* Eye on Housing Blog (Jan. 24, 2020), *http://eyeonhousing.org/2020/01/nahb-2020-priced-out-estimates/* (last visited Aug. 18, 2020). These studies are based on mortgage underwriting standards, through which it is possible to calculate the number of households that can qualify for a mortgage before an increase in a representative home price and the number that can qualify for a mortgage after a price increase. The difference in these two numbers represents the number of households that are "priced out" of the market for a representative home.

Even a modest increase in the price of a home has drastic effects on housing affordability for a large number of potential home buyers. Nationally, each $1,000 increase in home price to the ultimate buyer result in 158,857 households "priced-out" of a median-priced new home in 2020. *Id.* Thus, the cost of litigation takes its toll, as even a modest housing price increase by the builder due to litigation has drastic effects on housing affordability for a large number of potential home buyers.

The cost and time associated with delays and litigation can therefore add tens of thousands of dollars to the cost of building a modest single-family home. It is important for this Court to recognize that regulatory takings litigation is needlessly complicated and that regulatory taking standards have not been uniformly applied, thus needing this Court's intervention. We urge this Court to grant certiorari.

CONCLUSION

For the foregoing reasons, *amici curiae* the National Association of Home Builders of the United States and the California Building Industry Association respectfully submit the Petition should be granted.

Dated: August 21, 2020

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