No. 24-908

# In The
# Supreme Court of the United States

**FANE LOZMAN,**

*Petitioner*,

v.

**CITY OF RIVIERA BEACH**,

*Respondent*.

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

## Amici Curiae Brief of Small Property Owners of San Francisco Institute; KDP II, LLC; Franklin Conklin Foundation; and Owners Counsel of America Supporting Petitioner

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

## TABLE OF AUTHORITIES (continued)

## TABLE OF AUTHORITIES (continued)

## TABLE OF AUTHORITIES (continued)



### OTHER AUTHORITIES

## TABLE OF AUTHORITIES
## (continued)

**TABLE OF AUTHORITIES**
**(continued)**

## INTERESTS OF AMICI CURIAE

**The Small Property Owners of San Francisco Institute** ("SPOSFI") is a California nonprofit corporation (Internal Revenue Code § 501(c)(3)) and organization of small property owners that advocates for the rights of property owners in San Francisco. SPOSFI's members range from young families to the elderly on fixed incomes, and its membership cuts across all racial, ethnic, and socio-economic strata.1[1]

SPOSFI is also involved in education, outreach and research. Through education, it helps owners better understand their rights and learn how to deal with local government; through outreach to community groups and to the public, it demonstrates how restrictive regulations harm both tenants and landlords, and through research projects, it aims to separate hyperbole from fact on the effect of rent control on housing stock. Through legal advocacy, SPOSFI seeks to protect the rights of small property owners against unfair and burdensome regulations.

SPOSFI has appeared as amicus curiae in this Court in support of petitions seeking to protect the rights of property owners.

**KDP II, LLC** is the owner of over 100 acres on the southwest end of Kiawah Island in South

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[1] No counsel for any party has authored this brief in whole or in part and no person other than the amici has made any monetary contribution to this brief's preparation or submission. The parties were timely notified of intent to file.

Carolina. This amicus had a vested right under a development agreement with the local government to develop 50 lots on 20 of those acres. This limited development depended on obtaining permits from the state regulatory agency for an erosion control structure along a portion of a tidal river abutting the property to protect access to the property. Your amicus tried for 13 years to obtain the permits but was denied on the basis of state statutes and regulations. Because the erosion continued unabated during this time, there is no longer access to the property; it has been rendered entirely undevelopable, with no productive use.

The South Carolina statutes and regulations applied to deny this amicus the permits to protect its property are the same as those in the *Lucas* case. The South Carolina Supreme Court upheld the denial of the permits in three separate decisions. See *Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control, et al*, 411 S.C. 16, 766 S.E.2d 707 (2014); *Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control, et al*, 422 S.C. 632, 813 S.E.2d 691 (2018); *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control, KDP, II, LLC, and KRA Development, LP*, 434 S.C. 1, 862 S.E.2d 72 (2021).

This amicus is now prosecuting an action in state court seeking just compensation under the Fifth Amendment for this regulatory taking. The amicus has a direct interest in obtaining the clarification on the holding in *Lucas* sought by the Petitioner in this case.

**Franklin Conklin Foundation** is a nonpartisan 501(c)(3) charitable foundation founded in 1997. It is participating here because of its deep interest in important issues involving municipal efforts throughout our Country to circumvent the unequivocal intent behind The Takings Clause "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States*).

**Owners' Counsel of America (OCA)** is an invitation-only national network of the most experienced eminent domain and property rights attorneys. They have joined together to advance, preserve and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (2d ed. 1998). As the lawyers on the front lines of property law and property rights, OCA brings unique perspective to this case. OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. OCA seeks to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and OCA member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide. Additionally, OCA members and their firms have been counsel for a party or *amicus* in many of the property cases this Court has considered in the past forty years, including most recently

*Sheetz v. County of El Dorado*, 601 U.S. 267 (2024); *Tyler v. Hennepin County,* 598 U.S. 631 (2023); *Sackett v. EPA*, 598 U.S. 651 (2023); *Wilkins v. United States*, 598 U.S. 152 (2023); *Pakdel v. San Francisco* 594 U.S. 474 (2021); and *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). OCA members have also authored and edited treatises, books, and law review articles on property law and property rights.[2]

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[2] *See*, *e.g.*, Michael M. Berger, *Theft, Extortion, and the Constitution: Land Use Practice Needs an Ethical Infusion*, 38 Touro L. Rev. 755 (2023); Michael M. Berger, *Whither Regulatory Takings*, 51 The Urban Lawyer 171 (2021); Michael M. Berger & Gideon Kanner, *The Nasty, Brutish And Short Life Of* Agins v. City Of Tiburon, 50 The Urban Lawyer 9 (2019); William G. Blake, The Law of Eminent Domain—A Fifty State Survey (Am. Bar Ass'n 2012) (editor); Leslie A. Fields, Colorado Eminent Domain Practice (2008); John Hamilton, Kansas Real Estate Practice And Procedure Handbook (2009) (chapter on *Eminent Domain Practice and Procedure*); John Hamilton & David M. Rapp, Law and Procedure of Eminent Domain in the 50 States (Am. Bar Ass'n 2010) (Kansas chapter); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 Wm. & Mary Bill of Rts. J. 679 (2005); Dwight H. Merriam, Eminent Domain Use and Abuse: *Kelo* in Context (Am. Bar Ass'n 2006) (coeditor); Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?", 4 Alb. Gov't L. Rev. 154 (2011);* Randall A. Smith*, Eminent Domain After Kelo and Katrina,* 53 La. Bar J. 363 (2006); (chapters on Prelitigation Process and Flooding and Erosion).

## 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 recent litigation and multiple opinions from this Court.

Certiorari is needed to make intelligible the standard by which to determine whether government regulations have taken private property for public use under the 5th Amendment.

More than three decades ago, Justice Stevens complained:

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

After 30 more years of litigation and numerous opinions from this Court, the situation has not improved, leading Justice Thomas to lament:

> "If there is no such thing as a regulatory taking, we should say so. And if there is, we should make clear when one occurs." *Bridge Aina Le'a v. Hawaii Land Use Commission*, 141 S.Ct. 731, 732 (2021) (dissenting from denial of certiorari).

One of this Court's efforts at clarification came in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). There, the Court focused on the impact of the questioned regulation on the property owner's ability to ***use*** the property and obtain a beneficial

return on investment. Unfortunately, lower courts have made a hash of this Court's *Lucas* effort to provide clarity and guidance. The decision below is a paradigm, with its focus on remaining ***value*** under a ***presumed*** use, rather than the ***actual uses*** remaining under the government's regulatory scheme and whether they are productive. This is an ideal case to straighten out the meaning of *Lucas* once and for all.

## SUMMARY OF ARGUMENT

Notwithstanding decades of effort, this Court's regulatory taking jurisprudence is hardly a model of clarity. To be fair, the Court has made strides in its efforts to protect the rights of private property owners. Candidly, it is time to do more in order to clarify this field. The decision here and in *Lucas* needs to blend with the Court's decisions generally protecting those rights. The Court recently summarized that history this way:

> "As John Adams tersely put it, '[p]roperty must be secured, or liberty cannot exist.' [Citation]. This Court agrees, having noted that protection of property rights is 'necessary to preserve freedom' and 'empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.'" *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021).

In order to provide that protection, the law must have understandable rules for the interactions between government regulators and property

owners. The Court's effort in *Lucas* provides the basis for such clarity. But the parameters must be strengthened. This is the case to provide those guideposts. Making it clear that *Lucas* requires a focus on actual use, with factual parameters to be determined at trial, and the key being the ability to make productive use, will go a long way toward clarification.

## ARGUMENT

### I
### The Key to Property Ownership is the Right to Make Productive *Use*.

Regularly, this 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 in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); the latter refinement appeared in *Lucas*, 505 U.S. at 1015.)[3]

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.[4] A "use" that engenders a loss (or

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[3] This Court has repeated these terms almost as a mantra in virtually every 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).

[4] *See Kirby,* 467 U.S. at 14 ("curtailment" of the "ability to derive income"); *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987) ("potential for producing income or an

lacks the possibility of producing a gain) cannot be considered to be "economically viable, beneficial, or productive."[5] If anything, such a use is economically moribund. Indeed, as the Court concluded in *Lingle v. Chevron*, "total deprivation of beneficial use is, from the landowner's point of view, the *equivalent of a physical appropriation*." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539-40 (2005) (emphasis added) (quoting *Lucas*).[6]

To emphasize its focus, the legal analysis in *Lucas* employs the term "use" (generally in conjunction with "economically beneficial" or "economically productive") 37 times.[7]

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expected profit"); *Nemmers v. City of Dubuque*, 764 F.2d 502, 504-05 (8th Cir. 1985) (return on investment); *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").

[5] *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").

[6] Many decades earlier, the Court had concluded that "[c]onfiscation may result from a taking of the use of property without compensation as from the taking of the title." *Chicago, Rock Island & Pac. Ry. Co. v. United States*, 284 U.S. 80, 96 (1931).

[7] E.g., *Lucas*, 505 U.S. at 1016 ("economically viable use"); 1016, n. 6 ("economically viable use"; "economically beneficial use"); 1016, n. 7 ("economically feasible use"; "economically beneficial use"); 1017 ("beneficial use"; "productive or

Indeed, this Court has repeatedly said that the proper analysis must include the ability to *profit* from the use. In *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978), 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. In *Williamson County Reg. Plan. Commn. 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. 470 485, 496 (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. And, in *Lucas* itself, the Court approvingly quoted Lord Coke's famous observation, "for what is the land but the profits thereof[?]" 505 U.S. at 1017.[8]

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economically beneficial use"); 1018 ("economically beneficial uses"; "economically beneficial or productive options for its use"); 1019 ("developmental uses"; economically beneficial uses"; "economically idle"); 1019, n. 8 ("economically beneficial use"; "productive use"); 1027 ("economically beneficial use"); 1028 ("economically valuable use"); 1029 ("economically beneficial use"); 1030 ("economically productive or beneficial uses").

[8] See also *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987) ("the landowner's loss takes the form of an

*Lucas* seemed clear in its conclusion that elimination of economically beneficial or productive ***use*** was the key to the takings issue.[9] This focus on productive use was what led the *Lucas* court to conclude that precluding all economically productive use of two subdivided residential parcels showed "the practical equivalence in this setting of negative regulation and appropriation." 505 U.S. at 1019.

However, courts like those below have converted that standard into ***value***, rather than use. That allows them to hold that *any* residual value (even "value" based on hypothetical "uses" that may have no basis in reality) eliminates the possibility of takings liability.

In sum, it is not the land itself, but instead, the ability to make actual economically beneficial ***use*** of the land that is the key to the Fifth Amendment question. That is the stick taken from the property rights bundle.[10] As shown in the Petition for

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injury to the property's potential for producing income or an expected profit.")

[9] The idea that deprivation of the right to use property is a serious infringement of ownership may be found in even the most general of texts: ". . . if one is deprived of the use of his or her property, little but a barren title is left in his or her hands." 63C AM. JUR. 2D, Property § 3 at 69 (1997).

[10] The Court expressly reaffirmed Justice Brennan's *San Diego Gas* analysis that deprivation of economically productive use is, from the owner's viewpoint, the same as taking physical possession. *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 651 (1981) (dissenting but expressing the substantive views of five Justices [see the concurring opinion of Rehnquist, J., agreeing with the majority that the case was not ripe, but noting agreement with Justice Brennan's dissent if it had been ripe]).

Certiorari, the Court needs to return its focus in regulatory takings cases to impact on use, rather than vague examinations of value. Only that return to basics will provide the protection of property owners intended by the 5th Amendment.

## II
## Lower Courts — and Sometimes Even This Court — Have Strayed from the *Lucas* Reliance on Impaired *Use*, Injecting Confusion into the Law of Regulatory Takings.

*Lucas* does not equate a deprivation of ***use*** with elimination of ***value***. This Court understood the difference when it wrote the opinion

However, some lower courts have converted that standard into one of ***value***, rather than use. That allows courts to hold, as below, that *any* residual value eliminates the possibility of *Lucas* liability.[11] A survey of litigation under *Lucas* showed that lower courts are irreparably divided and mired in "[c]onsiderable confusion" about "the distinction between use and value."[12] That does not fit with

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[11] See also, e.g., *Dist. Intown Props. Ltd. P'Ship v. District of Columbia*, 198 F.3d 874, 882 (D.C. Cir. 1999) ("To come within Lucas, a claimant must show that its property is rendered 'valueless' by a regulation."); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998) ("Determining whether all economically viable use of a property has been denied entails a relatively simple analysis of whether value remains in the property after the governmental action.").

[12] Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847, 1856 (2017).

*Lucas* and needs correction.[13] *Lucas* does not equate a deprivation of use with elimination of value. This 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 coastal property). The issue however, as the majority knew, was whether these remaining uses[14] were economically productive, not merely that they existed *in vacuo*. Converting the *Lucas* rule to one of value rather than use, as Brown and Merriam note, "would significantly heighten the already substantial impediments to property owners' ability to mount successful *Lucas* challenges."[15]

Nor was *Lucas* alone in its concern about the impact of regulations on use. It built on the Court's earlier decisions. For example, in *Pennsylvania Coal Co. v. Mahon*, a taking was found because the regulation made removal of coal "commercially impracticable."[16] In *Federal Power Comm'n v. Hope Natural Gas Co.*,[17] the 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

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[13] See David Callies, Regulatory Takings After *Knick* (ABA 2020), at 7-8 ("Note that the Court writes of *use* and not *value*").

[14] 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").

[15] Brown & Merriam, *supra* at 1857.

[16] 260 U.S. 393 414 (1922).

[17] 320 U.S. 591 (1944).

was able "to obtain a 'reasonable return' on its investment."[18]

To be sure, part of the confusion has its roots in Supreme Court opinions in which the difference between "use" and "value" appears muddled. For example, in *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S 302 (2002) the Court said that the *Lucas* rule applies where "a regulation deprives property of all value."[19] In *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005), the Court said that "complete elimination of value is the determinative factor"[20] in a *Lucas* evaluation. That is not what *Lucas* said. Clarification from this Court is in order, and the sooner the better.

## III
## Some Lower Courts Misread *Lucas* as Applying Only to Deprivations of *All* Use.

A classic misread of *Lucas* places total focus on the word "all." That plainly fails to understand the opinion. *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.

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[18] 438 U.S. at 136.

[19] 535 U.S. at 332.

[20] 544 U.S. at 539.

If this Court had intended to apply its *Lucas* test to a loss of "all use," it could have said so directly. But it did not. It carefully said that its concern was with "all *economically beneficial or productive* use." (Emphasis added.) It said so 37 times. Those extra words had to have been inserted for a reason. It seems clear to these amici that the Court wanted courts and parties to focus on the actual uses allowed, ***and*** the extent to which those uses were "economically beneficial or productive."

In *Lucas*, for example, the regulations allowed Mr. Lucas to maintain a deck on his property (though not a home). Compare that to the regulation here, which allows Mr. Lozman to maintain a dock on his property, though not a home. Deck? Dock? Is there a significant difference? In either case, the regulator allowed the property owner to assemble some planks of wood and sit on them. But nothing productive.

Nonetheless, courts like the one below merely look at the theoretically possible "uses" allowed by the challenged regulation and *assume* that they are both possible and valuable. But factual determinations cannot be made on the pleadings or by supposition. "Legal" issues are those that "can be resolved *without* reference to *any disputed facts*." *Dupree v. Younger*, 598 U.S. 729, 735 (2023) (emphasis added). Distinguishing "law" from "fact" is not always easy. Indeed, this Court has noted "the vexing nature of the distinction between questions of fact and questions of law." *E.g.*, *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). As this Court has noted before, the extent of the impairment, and the compensation due, is an issue

of fact for trial. *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978).

## CONCLUSION

It should be apparent that this Court's desire to refrain from establishing overly firm rules has not served well. That desire leads to the other extreme and allows so much flexibility to lower courts that this constitutional field is left with no real standards at all. The result is a continuous roiling of the litigational waters, with a steady stream of academic criticism and certiorari petitions which should be unnecessary. Certiorari should be granted, the result overturned, and the law rationalized.

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