No. 22-872

IN THE
Supreme Court of the United States

EVANS CREEK, LLC,
Petitioner,
v.
CITY OF RENO,
Respondent.

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

Amicus Curiae Brief Of The
Small Property Owners of San Francisco Institute
Supporting Petitioner

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City of Monterey v. Del Monte Dunes,
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Florida Rock Indus., Inc. v. United States,
45 Fed. Cl. 21 (1999).....6

TABLE OF AUTHORITIES
(continued)

Hodel v. Virginia Surface Min. & Recl. Assn., Inc.,
452 U.S. 264 (1981).....15

Hornstein v. Barry,
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Kaiser Aetna v. United States,
444 U.S. 164 (1979).....14

Kempf v. City of Iowa City,
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Keystone Bituminous Coal Assn. v. DeBenedictis,
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Kirby Forest Indus., Inc. v. United States,
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Knick v. Township of Scott,
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Lingle v. Chevron U.S.A., Inc.,
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Lost Tree Village Corp. v. United States,
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Lucas v. South Carolina Coastal Council,
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Nekrilov v. City of Jersey City, 45 F.4th 662.....7

Nemmers v. City of Dubuque,
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TABLE OF AUTHORITIES
(continued)

Nollan v. California Coastal Commn.,
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Palazzolo v. Rhode Island,
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Pennsylvania Coal Co. v. Mahon,
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Ranch 57 v. City of Yuma,
731 P.2d 113 (Ariz. 1986) 11

Res. Inv., Inc. v. United States,
85 Fed. Cl. 447 (2009).....15

San Diego Gas & Elec. Co. v. City of San Diego,
450 U.S. 621, 653 (1981) 14

Schad v. Borough of Mount Ephraim,
452 U.S. 61 (1981).....15

Suitum v. Tahoe Reg. Plan Agency,
520 U.S. 725 (1997).....15

Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency,
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Terminiello v. City of Chicago,
337 U.S. 1 (1949).....10

TABLE OF AUTHORITIES
(continued)

United States v. Riverside Bayview Homes, 474 U.S. 121, 126 (1985) 15

Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987) 12

Williamson County Reg. Plan. Agency v. Hamilton Bank, 473 U.S. 172 (1985) 3, 12

STATUTES

Internal Rev. Code §501(c)(3) 1

OTHER AUTHORITIES

Berger, Michael M., *Whither Regulatory Takings?* 51 The Urban Lawyer 171 (2021) 6

Brown, Carol Necole & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847 (2017) 16

CALLIES, DAVID, REGULATORY TAKINGS AFTER KNICK (2020) 13

Cordes, Mark W., *Takings Jurisprudence as Three-Tiered Review*, 20 J. Nat. Resources & Envtl. L. 1 (2006) 9

Eagle, Steven J., *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn. St. L. Rev. 601 (2014) 8

TABLE OF AUTHORITIES
(continued)

Echeverria, John D., *Is the* Penn Central *Three-Factor Test Ready for History's Dustbin?* 52 Land Use L. & Zon. Dig. 3 (2000) 8, 9

Mandelker, Daniel R., *Litigating Land Use Cases in Federal Court: A Substantive Due Process Primer*, 55 Real Prop., Trust & Estate L.J. 69 (2020) 9

Oakes, James L., *"Property Rights" in Constitutional Analysis Today*, 56 Wash. L. Rev. 583 (1981) 17

Pomeroy, Adam R., Penn Central *After 35 Years: A Three Part Balancing Test or A One Strike Rule?* 22 Fed. Cir. B.J. 677 (2013) 9

Sax, Joseph L., *The Property Rights Sweepstakes: Has Anyone Held the Winning Ticket?*, 34 Vt. L. Re. 157 (2009) 8

Scalia, Antonin, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989) 7

Singer, Joseph William, *Justifying Regulatory Takings*, 41 Ohio N.U.L. Rev. 601 (2015) 9

Sterk, Stewart E., *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 Yale L.J. 203 (2004) 9

TABLE OF AUTHORITIES
(continued)

Williams, Norman Jr. & John M. Taylor,
American Land Planning Law
(2003 rev. ed.) 8

INTEREST OF THE AMICUS CURIAE

Amicus 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 home ownership and 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]

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.

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

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[1] Pursuant to Rule 37.6, The Small Property Owners of San Francisco Institute states that no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission. The parties were timely notified.

has occurred remain obscure notwithstanding more than 40 years of litigation and multiple Court opinions in the modern era of takings law.

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 voiced this complaint 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. 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 recently:

> "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. State of Hawaii Land Use Commission*, 141 S.Ct. 731 (2021) (Thomas, J, dissenting from denial of certiorari).

Rather than establishing clear bright line rules, the Court has held that — for almost all cases — the required process to determine whether a regulation constitutes a taking of property is the "*ad hoc* factual" analysis described in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) although, as the Court conceded after the first

27 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).

This case provides the Court with the opportunity to reexamine and revise the standards for 5th Amendment takings evaluation. Amicus prays that the Court take the opportunity and rationalize this confused area of constitutional law.

SUMMARY OF ARGUMENT

For the good of the judicial system, and the citizens who rely on it to protect their rights and resolve their disputes, this Court needs to do with *Penn Central* what it did with *Williamson County*.

In *Williamson County Reg. Plan. Agency v. Hamilton Bank*, 473 U.S. 172 (1985), the Court held that a regulatory taking case was not ripe for litigation in federal court until the property owner had first filed — and lost — the same case under parallel state law in state court. It took 34 years for the Court to acknowledge the harm done by the application of preclusion rules through *Williamson County* state court litigation, but the Court finally held in *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019), in unusually caustic language, that *Williamson County* was "not just wrong" but "exceptionally ill-founded" and "unworkable in practice."

Now the Court needs just as candidly to admit that it made a mistake in the *Penn Central* line of cases and sweep the decks clean of the multiple

confusing cases decided both by this Court itself and by federal appellate courts like the Ninth Circuit.

It is time to hit the reset button. In the 40-plus years that the courts have been deciding regulatory takings cases, they have failed to come up with a coherent legal standard. The hash that has become regulatory takings law serves no one, and the debris left behind creates only confusion. *Penn Central* — this Court's erstwhile "polestar" in the field — is neither law nor helpful. It is no more than an aspirational hope that lower courts will evaluate each case on its own merits. But all that has done is to allow courts (like the Ninth Circuit in this case and *Bridge Aina Le'a* and numerous others) to do whatever they please. They are tethered to no actual rules or standards nor, as *Bridge Aina Le'a* showed, do the appellate courts even feel bound by the 7th Amendment's reexamination rule regarding jury factual determinations.

It is time for the Court to retire the *Penn Central* confusion and focus the inquiry, as the Court attempted to do in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), on the impact of the questioned regulation on the property owner's ability to use the property.

ARGUMENT

I
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 review articles attesting to the absence of standards in

regulatory takings law and the urgent 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. We can hardly improve on this Court's own words to illustrate the problem. In essence, the Court has conceded that it has provided no guidance but continued in that manner anyway:

> "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.
>
> "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.
>
> "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 thus created a "rule" that concededly 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.[2] As Justice Thomas put it in his *Bridge Aina Le'a* dissent: "A know-it-when-you-see-it test is no good if one court sees it and another does not." 141 S.Ct. 732. What, for example, does one make of the courts applying the identical

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[2] See generally Michael M. Berger, *Whither Regulatory Takings?* 51 The Urban Lawyer 171 (2021).

Supreme Court precepts and concluding that a diminution in value of 83.4% is not sufficient to establish a taking (*Aina Le'a*, 950 F.3d at 632), while a diminution of 73.1% suffices (*Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 36 (1999))? In each case, of course, the goal was to determine whether the "economic impact" of the regulation on the property owner was sufficiently high to satisfy this Court's "standard." As Judge Bibas put it recently, "regulatory takings doctrine is a mess." *Nekrilov v. City of Jersey City*, 45 F.4th 662, 681 (concurring opinion).

The blunt fact is that none of the Court's post-*Mahon* opinions — regardless of the author or the side of the philosophical/jurisprudential divide on which the author sat or whether the vote was close or unanimous — improved on the directness and simplicity of the Holmes formulation. That is what led Justice Thomas to say: "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. State of Hawaii Land Use Comm'n*, 141 S. Ct. 731 (2021) (Thomas, J., dissenting from denial of certiorari).

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).

II
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 no guidance to anyone.[3] Putting things in

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[3] *See*, e.g., Joseph L. Sax, *The Property Rights Sweepstakes: Has Anyone Held the Winning Ticket?*, 34 Vt. L. Rev. 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").

graphic perspective, Professor John Echeverria titled 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 prevailing regulatory agencies.

That conclusion about *Penn Central* has been echoed by others. See (***all emphasis added***) Joseph William 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***"); 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. The problem is with the manner in which such regulations are evaluated. 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. 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).

III
The Key to Property Ownership is the Right to Make Productive *Use*. This Court's Opinions Have Strayed From That Fundamental Precept, Creating a Need For Clarification.

Regularly, since *Penn Central*, 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 initially in *Agins v. City of*

Tiburon, 447 U.S. 255, 260 (1981); the latter refinement appeared in *Lucas*, 505 U.S. at 1015.)[4]

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.[5] A "use" that engenders a loss (or lacks even the possibility of producing a gain) cannot be considered to be "economically viable, beneficial,

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[4] 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).

[5] 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) ("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").

or productive."[6] If anything, such a use is economically moribund.

Indeed, this Court has repeatedly said that the proper analysis must include the ability to profit from the use. 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 property. A few years later, in *Williamson County*, 473 U.S. at 186, 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

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[6] *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").

the land but the profits thereof[?]" (505 U.S. at 1017.)

As shown in the Petition for 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 a proper constitutional level of the protection of property owners intended by the 5th Amendment.

IV
Lucas Requires Clarification Because Conflict Has Developed 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 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 by this Court. See David Callies, REGULATORY TAKINGS AFTER KNICK at 7 (ABA 2020) ("Note that the Court writes of use and not value.").

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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[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

It does not equate a deprivation of use with elimination of value. The Court understood the difference.

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.) Indeed, this Court has repeatedly framed its test for a regulatory taking in terms of the ability of landowners to *use* their land.[8]

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beneficial use"); 1017 ("beneficial use"; "productive or 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] In addition to the cases cited above, see *Kaiser Aetna v. United States*, 444 U.S. 164, 174, n. 8 (1979); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting); *Schad v. Borough of Mount Ephraim*,

The idea that use is a key right in the property rights bundle is not restricted to takings law. As this Court concluded in a tax case:

> "We have little difficulty accepting the theory that *the use of valuable property . . . is itself a legally protectible property interest.* Of the aggregate rights associated with any property interest, the *right of use* of property is perhaps of the highest order." *Dickman v. Commissioner*, 465 U.S. 330, 336 (1984) (emphasis added).

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 federal government, thus providing that court with significant experience in this field. 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):

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452 U.S. 61, 68 (1981); *Hodel v. Virginia Surface Min. & Recl. Assn., Inc.*, 452 U.S. 264, 296 (1981); *Kirby*, 467 U.S. at 14; *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. Cal. Coastal Commn.*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Suitum v. Tahoe Reg. Plan Agency*, 520 U.S. 725, 736, n. 10 (1997); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 700 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

> "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.)

Nonetheless, a recent 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." 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).

To be sure, part of the confusion has its roots in two of 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. As shown here, that is not what *Lucas* said. Clarification is in order and it can only come from the Court that wrote all the opinions.

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. As the late Judge James 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 . . . ."[9] 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.

Respectfully Submitted,

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