

**IN THE
Supreme Court of the United States**

BRIDGE AINA LE 'A, 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

**BRIEF OF MATTEONI, O'LAUGHLIN &
HECHTMAN AS *AMICI CURIAE* IN SUPPORT OF
PETITIONER**

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INTEREST OF THE *AMICI CURAE*¹

Amici are attorneys practicing law in the state of California. The firm's emphasis is on eminent domain, inverse condemnation, and land use. The firm principal, Norman E. Matteoni, is the primary author of California's Continuing Education of the Bar publication, *Condemnation Practice in California*, published annually since 1973.

Amici represent clients who have meritorious regulatory takings claims. Moreover, *amici* are familiar with the litigation of inverse condemnation cases and the fact-intensive nature of this inquiry. Accordingly, *amici* bring a practical as well as a legal perspective to the systemic imbalances that preclude an injured party from presenting a meritorious claim, to protecting their federally protected property rights.

Amici write this brief because a grant of review and reversal in this case will eliminate the chilling effects by this ill-considered opinion of the Ninth Circuit which effectively precludes any temporary regulatory taking claimant from being successful. Landowners and courts need guidance on how to apply *Lucas* and *Penn Central*.

¹ Counsel for the parties did not author this brief in whole or in part. No person or entity, other than the *amici*, made monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of *amicus* briefs in connection with the petition for certiorari, and they filed letters reflecting consent, with the clerk. Notice was provided to the respondent that *amice* would be filing this brief.

SUMMARY OF THE ARGUMENT

Regulatory takings jurisprudence is a confusing jumble and owners and regulators alike need guidance. The Ninth Circuit Court of Appeal's Opinion in *Bridge Aina Le'a, LLC v. State of Hawaii Land Use Comm'n*, 950 F.3d 610 (9th Cir. 2020) exemplifies the confusion surrounding regulatory takings and offers an excellent vehicle to provide needed clarifications concerning *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992), *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), and the role of the jury.

In reversing the jury determination that a taking had occurred under *Lucas* and *Penn Central*, the Ninth Circuit misinterpreted this Court's regulatory jurisprudence. First the decision erroneously contends that a taking pursuant to *Lucas* is, as a matter of law, impossible if the affected parcel retains any value. The emphasis on value as opposed to economically beneficial use of the land is illogical and effectively forecloses a *Lucas* taking. The similar misplaced focus on value results in the Ninth Circuit's adoption of a bright line formulaic short cut that undercuts the required analysis of *Penn Central*.

Ultimately, the Ninth District usurped the role of the jury and re-weighed the evidence and overturned the jury verdict that followed an eight-day jury trial. Inexplicably the Ninth Circuit found economically viable uses remained after the Reversion Order even though there was no evidence introduced at trial that any of the uses were economically viable.

If the categorical rule of *Lucas* or the ad hoc test of *Penn Central* is to have any meaning then factual

analysis by the jury and court must be tethered to the evidence introduced at trial, not conjecture or speculation by the reviewing court of what uses or value the land might still possess.

ARGUMENT

I. Temporary Takings Are Entitled to Fifth Amendment Protection

This Court's decisions have consistently confirmed that the Fifth Amendment does not differentiate between temporary or permanent takings. The cases resulting from the United States efforts in World War II requiring the government to pay for temporary possession of properties are examples. See *Pewee Coal Company v. United States*, 341 U.S. 114 (1951); *Kimball Laundry Company v. United States*, 338 U.S. 1 (1949); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

The Court has consistently rejected the contention the government action complained of must be possessory or permanent to rise to the level of a taking. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-319 (1987) [taking during period prior to invalidation of ordinance requires compensation]; *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23, 32 (2012) [government induced flooding though temporary in nature was not exempt from the takings clause].

Moreover, once the government's actions have worked a taking of property no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was

effective. *First English Evangelical Lutheran Church of Glendale*, 482 U.S. at 318-319; see also *Knick v. Township of Scott*, 139 S.Ct. 2162, 2171-2173 (2019) [a later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place].

Finally, nothing in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) precludes a temporary regulatory taking:

“We do not hold that the temporary nature of a land use restriction precludes finding that it affects a taking; we simply recognize that it should not be given exclusive significance one way or the other.”
535 U.S. at 337.

Despite this Court’s recognition that temporary takings are not conceptually different than permanent takings, the Ninth Circuit decision effectively creates a new “categorical” rule that *Lucas* liability can never attach to a temporary taking if the property has any residual value. *Bridge Aina Le’a*, 950 F.3d at 627-628 [there is no *Lucas* liability for less than the total deprivation of value]. The focus on residual value as opposed to loss of economical use is illogical since land will always have some value. The Ninth Circuit decision effectively precludes any temporary regulatory takings by relying exclusively on residual value of the property.

II. Temporary Regulatory Takings Logically Must Turn on the Loss of Economically Viable Uses.

This Court's regulatory taking jurisprudence recognizes if a regulation goes too far it will be a taking. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

One of the standards enunciated by this Court for determining whether a government regulation results in a taking was identified in *Lucas* where the Court determined that "with certain qualifications . . . a regulation which denies all economically beneficial or productive use of land will require compensation under the takings clause." 505 U.S. at 1015. "By declaring that the denial of all economically beneficial use of land constitutes a regulatory taking, *Lucas* stated what is called a "categorical rule"." *Murr v. Wisconsin*, 137 Sup. Ct. 1933, 1943 (2017).

Despite the express "economically beneficial or productive use" standard of *Lucas*, the Ninth Circuit focused on the residual value of the parcel under the agricultural use classification and found "that any diminution in value was less than the land's total value. . . . Absent more, there is no *Lucas* liability for less than a total deprivation of value." *Bridge Aina Le'a, LLC v. State of Hawaii Land Use Comm'n*, 950 F.3d 610-627 (9th Cir. 2020). The Ninth Circuit holding is directly contrary with this Court's express standard that a loss of all beneficial use of the property, not loss of all value, results in a *Lucas* categorical taking.

Conceptually, using residual value makes no sense in the temporary takings realm whether that taking is

based on a *Lucas* analysis or requires analysis under *Penn Central*. (See Section III below for further discussion of *Penn Central*.) Property that is subject to an improper regulation and then has the regulation lifted will always have some residual value to some speculator. Focusing on residual value effectively immunizes public entities from any liability for temporary takings. This Court observed this effect and rejected such an outcome with regard to just compensation in *Kimball Laundry*, 338 U.S. at 7:

“Indeed, if the difference between market value of the fee on the date of taking and that on the date of return were taken to be the measure, there might frequently be situations in which the owner would receive no compensation whatever because the market value of the property had not decreased during the period of the taker’s occupancy.”

In *Lucas*, the deprivation of beneficial use was for only two years (*Lucas* at 1011-1012), yet this Court focused on loss of use for those two years not whether there was residual value in the parcel. The *Lucas*’s loss of their property for two years is conceptually no different than *Kimball Laundry* in that the owner has lost all use of the property for a period of time. Yet this Court did not first analyze whether *Kimball Laundry* retained any residual value before compensation would be due.

Finally, the Ninth Circuit’s “residual value” approach conflicts with the Federal Circuit’s determination that *Lucas* does not require focusing solely on market value and residual resale value is not

sufficient to prevent a taking. *Lost Tree Village Corp. v. United States*, 787 F.d.3d 1111, 1117-1118 (Fed. Circ. 2015).

A. *Lucas* Does Not Require the Property Be Left with No Value.

The Ninth Circuit relied on imprecise language from *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528 (2005) and *Tahoe-Sierra* to support the conclusion that “loss of value is the determinative factor” in the *Lucas* analysis. *Bridge Aina Le’a*, 950 F.3d at 627. However the quoted language in both *Lingle* and *Tahoe-Sierra* cites to *Lucas* as the authority for that proposition. A review of *Lucas*, however, establishes the proper inquiry is not whether some residual value remains but whether there remains any economically viable uses.

Turning first to *Tahoe-Sierra* Justice William Rehnquist, in his dissent, correctly identified the majority was improperly characterizing *Lucas* as being concerned fundamentally with value rather than with the denial of “all economically beneficial or productive use of the land”. *Tahoe-Sierra*, 535 U.S. at 350 (Rehnquist, C.J., dissenting). Justice Rehnquist thoroughly detailed how *Lucas* repeatedly discusses its holding as applying where no productive or economically beneficial use of the land is permitted:

“Total deprivation of beneficial use is, from the landowner’s point of view, equivalent of physical appropriation.” *Id.* [quoting *Lucas*, 505 U.S. at 1017];

“The Fifth Amendment is violated when land-use regulation . . . denies an owner economically viable use of his land.” *Id.* [quoting *Lucas*, 505 at U.S. 1016];

“The functional basis for permitting the government, by regulation, to effect property values without compensation . . . does not apply to the relatively rare situations where the government has deprived a landowner of all the economically beneficial uses.” *Id.* [quoting *Lucas*, 505 U.S. at 1018];

“The fact that regulations leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service.” *Id.* [quoting *Lucas*, 505 U.S. at 1018];

“When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is to leave his property economically idle he has suffered a taking.” *Id.* [quoting *Lucas*, 505 U.S. at 1019].

Similarly, the Ninth Circuit cited *Lingle* for support that residual value is the “determinative factor” in a *Lucas* analysis. *Bridge Aina Le’a*, 950 F.3d at 627. But the full citation made by Justice O’Connor in *Lingle* does not support that conclusion:

“In the *Lucas* context, of course, the complete elimination of a property’s value is the determinative factor.” See *Lucas*, 505 U.S. at 1017. Positing that “Total deprivation of

beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lingle*, 544 U.S. at 539-540.

Justice O'Connor's citation is to *Lucas*'s statement regarding beneficial use and does not address residual value at all. Moreover, earlier in *Lingle*, Justice O'Connor described the categorical rule enunciated in *Lucas* to be triggered by a regulation that completely deprived an owner of all economically beneficial use of the property. *Lingle*, 544 U.S. at 538.

In summary, *Lucas* does not provide authority for the statements in *Tahoe-Sierra* and *Lingle* that residual value is the determinative factor. *Lucas* focuses on economically beneficial uses. See, *Arkansas Game & Fish Comm'n v. United States*, 586 U.S. 23 at 32 (2012) [*Lucas* taking where owner is required to "sacrifice all economically beneficial uses].

A loss of beneficial use approach is supported by *Pennsylvania Coal v. Mahon* 260 U.S. 393 (1922), where the regulation was a taking because it was "commercially impracticable" to mine the coal (260 U.S. at 414). Similarly *Penn Central* focused on whether the regulation prevented the owner from a profit or earning a reasonable return on its property (438 U.S. at 136).²

² The Ninth Circuit prior to *Tahoe-Sierra* and *Lingle* found that "[f]ocusing the economically viable use inquiry solely on market value or on the fact that a landowner sold his property for more than he paid . . . is inappropriate." *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1432-1433 (9th Cir. 1996).

This Court needs to provide guidance that the proper consideration in *Lucas* is economically viable uses not value.

III. *Penn Central's* “Economic Impact” Analysis is Not Simply a Before and After Analysis of the Regulated Property’s Value.

The Ninth Circuit compounds its erroneous emphasis on residual value in *Lucas* with an erroneous interpretation of how to analyze the economic impact of a regulation under *Penn Central*. In effect the Ninth Circuit uses an almost identical test for both analyses—is the residual value of the land virtually zero—and ignores any other considerations. *Bridge Aina Le’a*, 950 F.3d at 630-631 [economic impact is determined by comparing the value that has been taken from the property with the value that remains in the property]. As noted previously, temporary takings analysis is particularly ill-suited for a residual value consideration because this approach has the practical effect of precluding all temporary takings since the property will have value once the regulation is removed. (See pp. 5-6 ante.)

The Ninth Circuit’s limitation of the analyses of the economic impact of the regulation to solely residual value is not supported by *Penn Central*. In *Penn Central* this Court upheld a New York City Landmark Ordinance on two grounds -- First, the law “permitted” and “contemplated” the continued use of the property as a rail station. Secondly, the record indicated that after imposition of the regulation Penn Central was able to

both “profit” and “obtain a reasonable return”. *Penn Central*, 438 U.S. at 136. Neither of these grounds focused on the before and after value of the regulated parcel.

Conversely, the Reversion Order in the present case precluded Bridge Aina Le’a from continuing the existing use of the property for residential purposes even though residential units had been partially or completely constructed.³ Evidence at trial indicated that the limited residential uses and other permitted uses available under the agriculture classification were not profitable. *Bridge Aina Le’a, LLC v. State of Hawaii Land Use Commission* (U.S. Dist. Court for Dist. of Hawaii) 2018 U.S. Dist. Lexis 107583 at 25-26. Unlike *Penn Central*, there is no question the Reversion Order interfered with the existing use of the property and precluded Aina Le’a’s ability to earn a “profit” and “obtain a reasonable return”.

The Ninth Circuit never addresses these facts and relied on the Court’s own analysis of the remaining value as the determinative factor. Ironically, the Ninth Circuit has adopted the very “bright line test” that this Court expressly eschews in determining regulatory takings under *Penn Central*.

If *Penn Central* is to serve any purpose then it must be interpreted to require a court to conduct a thorough ad hoc analysis turning on the individual facts of each case.

³ This investment was not inconsequential as the Hawaii Supreme Court determined substantial use and construction had commenced and Aina Le’a had spent more than \$20,000,000 on the development. See *DW Aina Le’a Dev., LLC v. Bridge Aina Le’a, LLC*, 339 P.3d 685, 712 (2014).

For this individualized fact finding to have any meaningful effect it is critical this Court reject the formulaic, one size fits all approach of before and after market value that the Ninth Circuit and other courts have adopted for determining the economic impact of the regulation.

IV. The Jury, Not the Court, Decides if the Facts Support a Taking under *Lucas* and *Penn Central*.

This Court consistently reiterates regulatory takings law is characterized by “ad hoc, factual inquiries, design to allow careful examination and weighing of all the relevant circumstances”. *Tahoe-Sierra*, 535 U.S. at 322.

City of Monterey v. Del Monte Dunes, 526 U.S. 687, 720-721 (1999), held that “the issue whether a landowner has been deprived of all economically viable use of [the] property is a predominantly factual question.” The same logic would apply to assessing the *Penn Central* factors which are predominantly factual determinations.

In the present case, the jury spent eight days learning the facts of the case as well as assessing the credibility of the witnesses. In other words, the jury conducted an extensive ad hoc analysis far in excess of what a reviewing court can accomplish on appeal. There is no disagreement that the jury was properly instructed on the law. Ultimately the jury determined there was no evidence of any economically viable use of the property under *Lucas* and that the *Penn Central* factors weighed in favor of a taking.

Yet, the Ninth Circuit held a reasonable jury could not have reached these conclusions. A review of the case reveals, however, that the Ninth Circuit's conclusions are not supported by the evidence.

The Ninth Circuit concluded there were various uses available under the new agricultural classification that preclude a finding of all loss of use under *Lucas*. *Bridge Aina Le'a*, 950 F.3d at 630. The Ninth Circuit's conclusion ignored the fact the Land Commission "put forth no evidence concerning the economic viability of any alternative use". *Bridge Aina Le'a, LLC v. State of Hawaii Land Use Commission* (U.S. Dist. Court for Dist. of Hawaii) 2018 U.S. Dist. Lexis 107583 at 21-22. The owners on the other hand, put on evidence that none of the permitted agriculture uses would be economically viable. *Id.* at 22. Quite simply, the Ninth Circuit had no evidence in the record to determine that any economically viable uses remained.

Incredibly the Ninth Circuit actually opined that "some of the specially permitted uses may have been especially suited for this land" (*Bridge Aina Le'a*, 950 F.3d at 630) when there was zero evidence introduced on the subject (*Bridge Aina Le'a*, 2018 U.S. Dist. Lexis 107583 at 21-22) [state failed to "present *any* evidence concerning the economic viability of potential unusual uses"]. If the land was so suitable for these special uses why did the Land Commission fail to present such evidence to the jury? Additionally, the Ninth District's conjecture was inappropriate as "speculative land uses are not considered as part of the takings inquiry." *Lost*

Tree, 787 F.3d at 1118 referencing *Olson v. United States*, 292 U.S. 246, 257 (1934).

The Ninth Circuit's conclusion that the landowner retained beneficial uses also ignored reality. There was credible evidence that the motivation for the Commission's reversion decision had nothing to do with preserving agricultural uses of what was a lava field. *Bridge Aina Le'a*, 950 F.3d at 636. Rather the Commission hoped the reversion "would encourage [the owner] to sell the property so that a new developer could make a new proposal suggesting that Bridge could have sold the land in a competitive market with a possibility of a regulatory change." *Id.* at 630.

The Ninth Circuit finding that there were beneficial uses under the agricultural classification when the public entity itself had no intention to allow an agricultural use is a factual and legal absurdity. It was reasonable for the jury to conclude that the Commission would be unwilling to consider any use proposed by the very landowner the Land Commission wished to jettison.

Similarly, in reweighing the facts before the jury on economic impact under *Penn Central*, the Ninth Circuit found dispositive its own calculation focused solely on a before and after analysis of the market value. This formulaic approach ignored all the other evidence the jury considered on the issue of economic impact on the landowner.

There was sufficient evidence for a jury to have reasonably determined the issues in this case under *Lucas* and *Penn Central*. The fact the Ninth Circuit

panel might have weighed the evidence differently is not a sufficient basis to render a jury's verdict unreasonable. The Ninth Circuit's legal contortions to evade the jury's determinations is contrary to the Seventh Amendment's "Redetermination Clause" and review should be granted to reaffirm the importance of the jury in regulatory takings cases.

V. A Token Interest Will Not Defeat a *Lucas* Claim.

A government entity "may not evade the duty to compensate on the premise that the landowner is left with a token interest." *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). The facts of the case are sufficient for the jury to have determined Bridge Aina Le'a was left with nothing but a token interest. While the Ninth Circuit properly acknowledged the law, it misapplied the law in determining Bridge Aina Le'a had more than a "token interest" for the years the regulation was in place.

The Ninth Circuit recognized the District Court concluded that the jury heard credible testimony that the Commission's sole purpose was to cause Bridge Aina Le'a to sell the property and that this was the first time in the Commission's 50-year history that the Commission had ordered a reversion. *Palazzolo*, 533 U.S. at 636.

Accordingly, this is not the typical case where a change in zoning classification is undertaken with the expectation by the regulatory body to preserve the property for future generations i.e. preserve the land for agricultural uses. Nor is this like *Penn Central* where the landmark designation did not interfere with the existing

use of the property. *Penn Central*, 438 U.S. at 136. Rather, the sole purpose of the Reversion Order was to force Bridge Aina Le'a to sell the property so someone else who would in turn develop the property as residential not an agricultural use.

The jury had sufficient evidence to conclude that the only permissible use the Land Commission envisioned or intended was a forced sale and nothing more. After all, the Land Commission believed the Reversion Order would force a sale, why couldn't the jury agree? Moreover, *Lost Tree*, 783 F.3d at 1117, recognized “[w]hen there are no underlying economic uses, it is unreasonable to define land *use* as including the sale of the land. Typical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel. See, e.g., *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 104 S. Ct. 2187, 81 L. Ed. 2d 1 (1984) (logging); *United States v. 50 Acres of Land*, 469 U.S. 24, 105 S. Ct. 451, 83 L. Ed. 2d 376 (1984) (landfilling); *United States v. Fuller*, 409 U.S. 488, 93 S. Ct. 801, 35 L. Ed. 2d 16 (1973) (livestock grazing).”

Contrary to the Ninth Circuit's decision the right to sell is not an economically viable use sufficient to defeat a *Lucas* claim. See *Lost Tree*, 787 F.3d at 1117-1118. The jury was right when it determined that Bridge possessed nothing more than a token interest.

CONCLUSION

This Court recognizes that a regulation can effect a taking. Yet, landowners face a herculean task of prevailing as the tests in *Lucas* and *Penn Central* can be

(and have been) manipulated to ensure that the owner always loses. To then allow a reviewing court to make determinations on economically viable uses without any evidence supporting the economic viability of the uses, substitutes the reviewing court's opinion for the jury's reasoned determination. This Court needs to provide guidance so owners and regulators understand the proper contours of regulatory takings jurisprudence. The Petition for Certiorari should be granted to rectify the errors below and to provide guidance on these issues.

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