No. 18-324

In the

Supreme Court of the United States

DOUGLAS LEONE, et ux., as Trustees Under That Certain Unrecorded Leone-Perkins Family Trust Dated August 26, 1999, as Amended,
Petitioners,

v.

MAUI COUNTY, HAWAII,
Respondents.

On Petition for Writ of Certiorari to the Hawaii Supreme Court

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, OWNERS' COUNSEL OF AMERICA, SOUTHEASTERN LEGAL FOUNDATION, PROFESSOR DAVID L. CALLIES, LAND USE RESEARCH FOUNDATION OF HAWAII, AND NFIB LEGAL CENTER IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
TREVOR BURRUS
Cato Institute
1000 Massachusetts Ave. NW
Washington, DC 20001-5403
Telephone: (202) 842-0200
E-mail: tburrus@cato.org
E-mail: ishapiro@cato.org

BRIAN T. HODGES*
*Counsel of Record
Pacific Legal Foundation
10940 NE 33rd Place, Ste.210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail: BHodges@pacificlegal.org

CHRISTOPHER M. KIESER
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: CKieser@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, Cato Institute, Owners' Counsel of America, Southeastern Legal Foundation, Professor David L. Callies, Land Use Research Foundation of Hawaii, and NFIB Legal Center

QUESTION PRESENTED

1. Whether holding undeveloped property as an "investment" or using it as a "park" in its natural state constitutes economically beneficial or productive use of land under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Other Authorities

Rules

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF), the Cato Institute, Owners' Counsel of America (OCA), the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center), Southeastern Legal Foundation (SLF), Land Use Research Foundation of Hawaii (LURF), and Professor David L. Callies of the University of Hawaii's William S. Richardson School of Law, submit this brief amicus curiae in support of Petitioners Douglas Leone and Patricia Leone-Perkins, in their capacity as trustees of the Leone-Perkins Family Trust.[1]

PLF was founded over 40 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel or amicus curiae in several landmark Supreme Court cases in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *See*, *e.g.*, *Knick v. Township of Scott*, No. 17-647; *Horne v. Dep't of Agric.*, __ U.S. __, 135 S. Ct. 2419 (2015); *Koontz v.*

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any 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.

St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF has offices in Florida, California, Washington, and the District of Columbia, and regularly litigates matters affecting property rights in state courts across the country.

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies works to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

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* (3d ed. 2008). OCA is a nonprofit 501(c)(6) organization sustained solely by its members. 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 40 years, and OCA members have also authored and edited treatises, books, and law review articles on property law, eminent domain, and property rights.

NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

Founded in 1976, SLF is a national nonprofit, public-interest law firm and policy center that advocates individual liberties, limited government, and free enterprise in the courts of law and public opinion. For 42 years, SLF has advocated for the

protection of private property interests from unconstitutional takings. SLF frequently files amicus curiae briefs at both the state and federal level in support of property owners.

Established in 1979, LURF is a private, non-profit research and trade association, incorporated as a Hawaii non-profit, whose members include major Hawaii land-owners, developers, and a utility company. LURF focuses on the reasonableness of land use laws and regulations and has participated as amicus curiae in numerous cases in Hawaii courts and this Court, and possesses a long history and an intimate familiarity with Hawaii property law. It is participating here to voice its concern that the decision below, if left unreviewed by this Court, will do immeasurable harm to the constitutional protections afforded property owners in Hawaii and nationwide.

Professor David L. Callies is the Benjamin A. Kudo Professor of Law at the University of Hawaii's William S. Richardson School of Law, where he teaches land use, state and local government, and real property. Callies is one of the nation's recognized authorities on land use and takings law, especially how they relate to littoral property. He is a prolific author and scholar, and believes his perspective and extensive study of the law at issue in this case will aid the Court.

Amici believe that their perspectives and experience with property rights litigation will aid this Court in the consideration of the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises two important issues that have divided the lower federal courts and state courts of last resort in the quarter century since *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The petition first asks whether any residual value in a parcel of property that is rendered unbuildable by regulation will defeat a categorical total takings claim. If so, the petition asks to what extent the courts should consider any residual value when evaluating a total takings claim. Review by this Court is necessary to provide much needed stability and uniformity in takings law. As the law stands right now, a property owner's right to obtain compensation for a categorical taking varies depending upon seemingly irrelevant factors, such as the property's location. Constitutional rights should not be subject to such uncertainty and uneven application.

This case arises from an adverse permitting decision in Maui County, Hawai'i. Petitioners Douglas and Patricia Leone purchased a beachfront lot in Maui in 2000. The Leones' parcel had been one of nine lots targeted by the County for purchase four years earlier as part of a plan to create a park. Due to budgetary concerns, however, the County could only afford to purchase two of the lots. The other seven were sold to private landowners subject to certain regulations. Most relevant here, the lots were (1) subject to a community plan which designated the land as "park;" (2) zoned "hotel-multifamily;" and (3) subject to

permitting requirements for all development under Hawai'i law.

The Leones sought to build a single-family home on their parcel. But while the owners of some of the other seven plats were permitted to build, the County rejected the Leones' application. According to the County, the Leones' proposed home was inconsistent with the community plan, which designated the property as "park" and permitted no development.

The Leones filed a lawsuit in state court, arguing that the County's decision had deprived them of all economically beneficial use of their property and, therefore, effected an uncompensated taking under *Lucas*. Importantly, the trial judge instructed the jury that the County had in fact prohibited all development on the Leones' parcel. But the court also permitted the jury to hear testimony that the land had a residual "investment use" because the Leones could have recovered some of their investment in the land by selling it. The jury ruled in the County's favor, concluding that the Leones had not been denied all economically beneficial use of their land. The Supreme Court of Hawai'i affirmed, relying mostly on testimony concerning the land's residual "investment use." *Leone v. County of Maui*, 404 P.3d 1257, 1277 (Haw. 2017). As a backstop, the court also noted that the undevelopable lot could be used for certain commercial activities consistent with the "park" designation, such as operating a concession stand, if the Leones obtained the proper permitting. *Id.* Combined with the residual investment value, the court thought this evidence sufficient to affirm the

jury's holding that the Leones' lot had a viable economic use.

The decision below exacerbated a significant split of authority over whether the mere prospect that land may be sold for some value will suffice to defeat a categorical takings claim under *Lucas*. This issue is significant for property owners across the country who want to put their land to productive use. A recent article demonstrated that *Lucas* claims are rarely successful; as of last year, landowners won just 1.6 percent of the time. Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of* Lucas*: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847, 1849–50 (2017). One of the reasons for this lack of success is the "considerable confusion" caused by "the distinction between value and use" in post-*Lucas* cases. *Id.* at 1856. After all, "[a]n understanding of the *Lucas* categorical regulatory takings rule as only applying when a government regulation deprives an owner of all value would significantly heighten the already substantial impediments to property owners' ability to mount successful *Lucas* challenges." *Id.* at 1857. Neither *Lucas* nor *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), limits categorical takings this way. This Court should grant certiorari to resolve the conflict and confirm that a categorical taking occurs when regulation denies all "economically beneficial *use*" of land.

Review is additionally warranted because the Hawai'i court's backup holding conflicts with *Lucas*, in which this Court explained that the typical

categorical taking involves the government "requiring land to be left substantially in its natural state" by prohibiting all development. 505 U.S. at 1018. That is precisely the case here. The County's community plan designates the Leones' land as "park," so the County will only issue permits for uses consistent with that designation. The Hawai'i court's conclusion regrading residual use also conflicts with cases from other jurisdictions, which hold that property will have a "negative value" when the only permitted use is not economically viable. Yet nothing in the lower court's opinion indicates that it considered whether operating a concession stand on the land would be viable, especially given the significant property tax liability and other operation costs inherent in such use. Guidance by this Court is necessary to resolve this confusion among the lower federal courts and state courts of last resort.

For the reasons set forth below, the Court should grant the Leones' petition.

ARGUMENT

I

APPLICATION OF *LUCAS*'S DENIAL OF "ALL ECONOMICALLY BENEFICIAL USE" STANDARD FOR CATEGORICAL TAKINGS HAS CAUSED CONFUSION IN THE LOWER COURTS

There is widespread confusion among the lower federal courts and state courts of last resort regarding *Lucas*'s use of the phrase "denial of all economically beneficial use." Some courts hold that compensation is categorically required when a landowner shows that the government action has denied all economically viable use of the property. Other courts, like the Hawai'i court below, add an additional element to this test, requiring that the landowner also show that the property is rendered completely valueless by the government action that denied all viable use. This Court's intervention is necessary to resolve that important division of authority.

Although property without value by definition has no economically beneficial use, the opposite is not necessarily true. Property with no viable use may retain some value. Think of a "clunker" automobile, for instance. Even a car that no longer runs is worth something to a junkyard. The same is true of real property. As the concurring and dissenting opinions in *Lucas* recognized, even a total restriction on development likely leaves a property owner with some value—he "still can enjoy other attributes of

ownership, such as the right to exclude others," "can picnic, swim, camp in a tent, or live on the property in a movable trailer[,]" and "retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house." *Lucas*, 505 U.S. at 1044 (Blackmun, J., dissenting); *see also id.* at 1034 (Kennedy, J., concurring in the judgment), *id.* at 1065 & n.3 (Stevens, J., dissenting). To various extents, the same is surely true of most (if not all) property saddled with development prohibitions. As a result, a court's distinction between use and value in a regulatory takings case will often be outcome determinative.

The use-versus-value confusion is actually rooted in *Lucas's* procedural history. The state trial court found that South Carolina's Beachfront Management Act, which prohibited the development of any permanent structure on Lucas's property, had rendered the lot "valueless." *Id.* at 1019 (majority opinion). The *Lucas* majority accepted that finding without elaboration. *See id.* at 1034 (Kennedy, J., concurring in the judgment). The Court then held that a categorical taking occurs when "regulation denies all economically beneficial or productive use of land." *Id.* at 1016. The Court justified the categorical rule—as distinct from the multifactor analysis of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978)—on the ground that "regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public

service under the guise of mitigating serious public harm." *Id.* at 1018. Given the trial court's finding that the state's actions had rendered the property "valueless," the majority had little trouble finding a categorical taking. *Id.* at 1031–32. After all, if property retains *no value*, it must follow that the property has no economically beneficial use.

Lucas promised to bring some certainty to regulatory takings law by holding that a landowner "who has been called upon to sacrifice all economically beneficial uses in the name of the common good" will be categorically entitled to just compensation. *Id.* at 1019. But, because the Court did not distinguish between use and value, the lower federal courts and state courts of last resort are still confused about how to apply the *Lucas* rule in circumstances where the property is denied all viable use but retains some minimal value. That is why one of the most persistent areas of confusion stems directly from the *Lucas* Court's acceptance of the state court's "valueless" finding. Must a property be rendered "valueless"—in addition to the owner being denied all "economically beneficial use"—before *Lucas* will apply? Lower courts diverge. This case represents a good vehicle to address this question.

A. The "Valueless" Finding and the *Lucas* Rule in the Supreme Court

The *Lucas* Court was careful to describe its holding in terms of *use*, rather than *value*. In the first description of the categorical rule, Justice Scalia wrote: "The second situation in which we have found categorical treatment appropriate is where regulation

denies all economically beneficial or productive *use* of land." *Id.* at 1015 (majority opinion) (emphasis added). Some variation of this formulation—always concerned with denial of use—appears no less than nine times in the body of the majority opinion, even in direct response to the maxim that government could not go on if regulation were not permitted to affect property values without compensation. *See id.* at 1018 (noting that the maxim "does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses").

Footnotes 7 and 8 leave no doubt that the *Lucas* inquiry turns on denial of use rather than a 100 percent diminution of value. Footnote 7 refers to "loss of value" in the context of the "denominator problem" the Court addressed in *Murr v. Wisconsin*, 133 S. Ct. 1933 (2017). But the hypothetical regulation the Court posed in that footnote dealt with land use—a development restriction covering 90 percent of a large tract of land—was a restriction on the beneficial use of the property. *Lucas*, 505 U.S. at 1016 n.7. Footnote 8 responded to Justice Stevens's criticism that the Court's rule would result in windfalls for landowners who suffer a total loss of value, but no recovery at all for those who suffer a 95 percent loss of value. *Id.* at 1019 n.8. The majority opinion, again, emphasized that the *Lucas* rule pertained specifically to a denial of *use*, noting that, while the Court had historically been concerned with "the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite

exceedingly close scrutiny under the Takings Clause." *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982)).

The argument that *Tahoe-Sierra* limited or modified *Lucas* is similarly wrong. In that case, it was undisputed that regulations placing certain parcels in a "stream environment zone" had, at least temporarily, denied owners of affected lots all economically beneficial use of their land. *See* 535 U.S. at 330–31. The issue there was whether the temporary nature of the deprivation of use gave rise to a categorical taking. The Court held that it did not, concluding that "the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period." *Id.* at 331. The rule that emerged was that only permanent deprivations of all economic use are categorical takings under *Lucas*.

To be sure, some dicta in *Tahoe-Sierra* appears to equate use and value. For example, the Court stated that "the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value." *Id.* at 332. But that is inconsistent with the Court's earlier agreement that the regulations in place had denied property owners all economically viable use of their parcels for 32 months,[2] even as the Court

[2] At least one court has characterized *Tahoe-Sierra* this way. *See State ex rel. Shemo v. Mayfield Heights*, 775 N.E.2d 493, 495 (Ohio 2015) ("In *Tahoe–Sierra*, the court held that moratoriums,

recognized that the parcels retained some value during this period. *Id.* at 316 & n.12. And as Justice Blackmun recognized in his *Lucas* dissent, even land ordered to be left permanently in its natural state has some remaining value. 505 U.S. at 1044 (Blackmun, J., dissenting). As such, *Tahoe-Sierra* does not alter the Court's statement one Term previous that "a State 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).[3]

The bottom line is that, while *Tahoe-Sierra* did not alter the nature of the *Lucas* rule, some dicta in the opinion contributed to the current conflict among the lower courts. That conflict, described in the next section, is the primary reason the Court should grant the petition in this case.

B. The Distinction Between Economic Use and Property Value Creates Significant Conflict Among Lower Courts

The decision below is just the latest example of the unsettled state of the law in this area. The confusion

---

totaling 32 months, on development in the Lake Tahoe Basin did not constitute a compensable taking *although the moratoriums temporarily deprived affected landowners of all economically viable use of their property*." (emphasis added)).

[3] Chief Justice Rehnquist's *Tahoe-Sierra* dissent attacked the Court's dicta, *see Tahoe-Sierra*, 535 U.S. at 350 (Rehnquist, C.J., dissenting), but that does not expand the majority's holding. As Justice Jackson observed long ago, "[t]he technique of the dissenter often is to exaggerate the holding of the Court beyond the meaning of the majority and then to blast away at the excess." Robert H. Jackson, *The Supreme Court in the American System of Government* 18–19 (1955).

within the opinion itself is illustrative: although the Hawai'i Supreme Court acknowledged a distinction between use and value, it ultimately held that the Leones were required to show a deprivation of all viable use and that the property is without any residual value. *See Leone*, 404 P.3d at 1271–72. The Hawai'i court was aware that the lower federal courts and state courts of last resort are conflicted on this question, citing the Ninth Circuit's decision in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1432–33 (9th Cir. 1996), *aff'd* 526 U.S. 687 (1999). Contrary to the holding below, *Del Monte Dunes* cautioned *against* relying too heavily on diminution of property value in the *Lucas* analysis. Indeed, the *Del Monte Dunes* court rejected the city's argument that an opportunity to make a significant profit selling the land precludes a *Lucas* claim. *Id.* at 1432. It further opined that "the mere fact that there is one willing buyer of the subject property, especially where that buyer is the government, does not, as a matter of law, defeat a taking claim." *Id.* at 1433. Despite citing this analysis, the court below allowed the existence of sale value to control the outcome. *Leone*, 404 P.3d at 1277.

The upshot is that, rather than following the qualified language of *Del Monte Dunes*, the court below aligned itself with those who "contend that the Court's opinion in [*Tahoe-Sierra*] endorses loss of value as the *Lucas* rule." Brown & Merriam, *supra*, at 856 (footnote omitted). For the reasons discussed above, such a construction would render *Lucas* a dead letter—as the dissenting opinions in *Lucas* point out, all property will retain some hypothetical residual

value even where all uses are denied. That is why several courts have chosen a different path, recognizing that the touchstone of the *Lucas* inquiry is *use*, not value.

Perhaps the most prominent case to reject the value-based rule is *Lost Tree Village Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015). There, a permit denial required the property owner to leave a large parcel vacant. Evidence showed the parcel would have been worth over $4 million if development were permitted, but its value was no more than $30,000 as a vacant lot. *Id.* at 1114. The court held that the existence of such residual value does not defeat a *Lucas* claim when the value is not derived from an "economic use." *Id.* at 1116–17. Most importantly, *Lost Tree* rejected the government's argument that the sale of a parcel is necessarily an economic use, holding instead that "[w]hen there are no underlying economic uses, it is unreasonable to define land *use* as including the sale of the land." *Id.* at 1117. That is because "[t]ypical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel." *Id.* Under this reasoning, even the ability to sell the parcel for a profit would not preclude a *Lucas* claim unless the parcel's value derived from potential economic uses of such land. *See Del Monte Dunes*, 95 F.3d at 1432.

While *Lost Tree* rejected the argument that any sale value precludes a *Lucas* claim, the Connecticut Supreme Court has developed perhaps the best approach to a use-based categorical takings rule.

Under its "practical confiscation" doctrine, "zoning reclassifications can constitute an unconstitutional taking when they leave a property owner with *no economically viable use of his land other than exploiting its natural state*." *Bauer v. Waste Mgmt. of Connecticut, Inc.*, 662 A.2d 1179, 1197 (Conn. 1995) (quoting *Gil v. Inland Wetlands & Watercourses Agency*, 593 A.2d 1368, 1373 (Conn. 1991)). According to the court, that longstanding doctrine is indistinguishable from the *Lucas* categorical takings rule—both involve "a regulation that require[s] the landowner to leave his land in a natural, undeveloped state." *Id.* at 1197 n.17. What is more, the court has applied it in a use-centric manner, holding that "a landowner, who purchased property with a reasonable expectation of residential or commercial development, has suffered a taking if regulatory constraints allow him to use his land only in its natural state without any economically viable alternative use thereof." *Gil*, 593 A.2d at 1373–74. It has essentially ignored the land's post-regulation value, focusing instead on whether the applicable regulation has totally restricted development. *See Bartlett v. Zoning Comm'n*, 282 A.2d 907, 910 (Conn. 1971) (zoning designation prohibiting all development and limiting uses to walkways and wharves and the like constituted a taking even though the property maintained a value of $1,000); *Dooley v. Town Plan & Zoning Comm'n*, 197 A.2d 770, 772–74 (Conn. 1964) (rezoning from residential to a flood plain district, entirely prohibiting development and limiting uses to those consistent with parks, was a taking even though the property retained about a quarter of its previous

value); see also *Chapel Hill Title & Abstract Co., Inc. v. Town of Chapel Hill*, 669 S.E.2d 286, 290 (N.C. 2008) (Brady, J., concurring) ("As a result of the RCD Ordinance, petitioners are left with no developable property. Thus, the wooded residential lot, which measures slightly over a half acre, has been depleted of all practical use and reasonable value.").

The salient point is that "several courts have found a taking even where the 'taken' property retained significant value." *Del Monte Dunes*, 95 F.3d at 1433. These courts have avoided conflating the *Lucas* use inquiry with the diminution of value metric normally relevant only in *Penn Central* ad hoc cases. *Id.* They have focused "primarily on use, not value[,]" *id.*, and have taken seriously *Lucas*'s statement that the "typical" categorical taking involves "requiring land to be left substantially in its natural state," *Lucas*, 505 U.S. at 1018.

Only this Court can resolve the deep conflict between these cases and those, like the decision below, that hold a property must be rendered valueless before *Lucas*'s categorical rule kicks in. Review is necessary to ensure that property owners across the country can count on uniform constitutional rules to protect them from potentially confiscatory regulations.

C. A Value-Based Rule Would Be Arbitrary, Contrary to First Principles, and Encourage "Regulatory Pioneering"

One of the main criticisms the *Lucas* dissenters leveled at the Court's categorical rule was its

supposed arbitrariness. Justice Stevens wrote that "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." *Lucas*, 505 U.S. at 1064 (Stevens, J., dissenting). In a way, he was right: the value-based categorical rule he described, which mirrors the rule applied by the Hawai'i court below, is "strangely arbitrary." Luke A. Wake, *The Enduring (Muted) Legacy of* Lucas v. South Carolina Coastal Council*: A Quarter Century Retrospective*, 28 Geo. Mason U. Civil Rts. L.J. 1, 28 (2017). Justice Stevens's formulation would make the *Lucas* determination dependent on whether the landowner could convince a trial court that the regulations entirely extinguished the market for the property. That showing might depend on factors independent of the government's regulation, such as the property's location. After all, open space on the Maui beachfront is almost certainly worth substantially more than the same size lot in a less desirable locale. Yet, if diminution of value is all that matters, the same government action might result in a *Lucas* taking in one case but not the other.

A use-based rule avoids arbitrariness by focusing on the property owner's permitted uses under challenged regulations. Remaining uses can be more easily determined than residual value, which will often be negligible and require the fact-finder to assess conflicting testimony from appraisers and the like. Land use as the touchstone is also consistent with the *Lucas* Court's placement of "the right to make economically beneficial use of one's land on par with the fundamental right to exclude the public from

private property." *Id.*; *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) (recognizing the right to build on one's property). Just like the denial of the right to exclude constitutes a taking even if there is only a *de minimus* intrusion, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the denial of the right to put one's land to productive use effects a taking even if the property retains some value as open space. In both situations, the government retains ample power to get the interest it wants, so long as it is willing to pay. *See Nollan*, 483 U.S. at 831. The use-based interpretation of *Lucas* preserves these principles and prevents local governments from regulating away all uses of property without compensation. Far from being arbitrary, the use-based interpretation is easier to apply in a consistent and predictable manner, it removes variability based on appraiser testimony, and it is more consistent with fundamental principles of property ownership.

What is more, the arbitrary nature of the value-based rule invites "regulatory pioneering" on the part of governments. Wake, *supra*, at 28–29. After all, if regulators need only leave property with some value to avoid a categorical taking, they are free to dream up all sorts of "inventive regimes that may prohibit development altogether, while theoretically preserving some residual value for the owner." *Id.* This is not a speculative fear; several jurisdictions already employ "transferrable development rights (TDRs)," which landowners affected by regulation may theoretically sell to others who own buildable parcels. *See Suitum v. Tahoe Reg'l Planning Agency*,

520 U.S. 725, 730 (1996). The TDR is "a clever, albeit transparent, device that seeks to take advantage of a peculiarity of our Takings Clause jurisprudence." *Id.* at 748 (Scalia, J., concurring in the judgment). Unfortunately, a value-based interpretation of *Lucas* encourages regulators to use such devices, which leave land undeveloped while avoiding categorical takings liability by reserving for the landowner a token interest.

With such divergent views among the lower courts, this Court has the opportunity to choose a rule that lends itself to reasoned and uniform application, adheres to traditional property rights principles, and does not encourage gamesmanship. The use-based interpretation does all three. A value-based rule, however, fails on all counts. Such an approach, moreover, invites "regulatory pioneering" on the part of governments. Wake, *supra*, at 28–29. If regulators can avoid *Lucas* by leaving affected property with some residual value, they might dream up all sorts of "inventive regimes that may prohibit development altogether, while theoretically preserving some residual value for the owner." *Id.* This Court's guidance is necessary to halt the further proliferation of such an arbitrary rule.

II

THE REMAINING USES OF THE LEONES' PROPERTY ARE MARGINAL AND LIKELY NOT ECONOMICALLY VIABLE

Review is further warranted because the Hawai'i court's focus on the property's residual value obscured the central question posed by *Lucas*: whether any of the property's remaining uses (such as operating a concession stand) would be economically viable. In the operative portion of the opinion below, the Hawai'i Supreme Court wrote: "Although the Leones were prevented from building a single-family residence on the property, evidence was presented showing that the property had value as an investment property and *could potentially be used in the commercial context as well*." *Leone*, 404 P.3d at 1277 (emphasis added). The court's holding rested primarily on the property's investment value; even the evidence the court cited to support the property's use in the "commercial context" failed to mention whether such use would be economically viable on its own. *See id.* (citing the testimony of two experts on cross-examination who conceded that the property could potentially be used in the commercial context as a park). This analysis is incomplete and undermines *Lucas* by identifying marginal residual uses with no analysis whether the potential uses are economically viable.

This issue, too, is subject to a conflict among the lower federal courts and state courts of last resort. Several jurisdictions hold that permitted uses must actually be "viable" in order to defeat a *Lucas* claim.

For example, in *State ex rel. Greenacres v. Cincinnati*, 56 N.E.3d 335 (Ohio Ct. App. 2015), the Ohio Court of Appeals affirmed a judgment in favor of a landowner who was denied a permit to demolish a home that had been uninhabited for decades. The structure had apparently been the home of a son of one of the founders of Proctor & Gamble, so the city argued the structure could be used as a museum. The court rejected this, explaining that "[i]f Greenacres were to use the property as a museum . . . then it would need an additional six to eight million dollars to fund maintenance on the property." *Id.* at 344. In other words, maintaining a museum on the land would not have been economically viable, so withholding the demolition permit had effected a categorical taking.

The court in *City of Sherman v. Wayne*, 266 S.W.2d 34 (Tex. App. 2008), affirmed the trial court's finding of a *Lucas* taking even though it applied the Texas Supreme Court's value-based interpretation of *Lucas and* the property owner could build residential dwellings on the land. It did so based on evidence that "the property with residential zoning had a negative value because of holding costs like maintenance, taxes, and insurance." *Id.* at 44–45. While building residential units on the property surely qualifies as *use*, the credited evidence showed that such use would not be economically viable given the costs inherent in holding real estate and the lack of demand for such units in the area. *Id.*; *see also Dunlap v. City of Nooksack*, 158 Wash. App. 1016, 2010 WL 4159286, at *5 (2010) (affirming a finding of a categorical taking even though the property owners were permitted to build a 480-square-foot home on the land,

since such construction "would not be economically viable and there is no other economically viable use for the property other than residential development").[4]

These cases demonstrate that even substantial residual uses of property, such as residential development, must truly be economically viable to defeat a *Lucas* claim. This principle is essential to *Lucas*, and especially relevant in a case like this. The property taxes on the Leones' lot in 2014 were over $68,000. *See Leone*, 404 P.3d at 1267. Moreover, that sum does not even take into account the other significant expenses that one must incur in order to run a concession stand, such as land use permitting, food service licensing, insurance, maintenance, and labor costs. With all these costs, it is likely that the only potential use of the Leones' empty lot would not be economically viable—that determination must be made before a residual use can defeat a *Lucas* claim.

This case presents a good vehicle for the Court to answer this important question of federal regulatory takings law affecting property owners across the country. The confusion regarding whether a property owner must show that a regulation has deprived his property of all *value*, rather than all *economically beneficial use*, has divided the state and federal courts for the last quarter century.

---

[4] This case is unpublished under Washington law and of course cited only for its persuasiveness.

CONCLUSION

For the foregoing reasons, this Court should grant the Leones' petition for a writ of certiorari.

DATED: October, 2018.

Respectfully submitted,

ILYA SHAPIRO
TREVOR BURRUS
Cato Institute
1000 Massachusetts Ave. NW
Washington, DC 20001-5403
Telephone: (202) 842-0200
E-mail: tburrus@cato.org
E-mail: ishapiro@cato.org

BRIAN T. HODGES*
*Counsel of Record
Pacific Legal Foundation
10940 NE 33rd Place, Ste.210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail: BHodges
@pacificlegal.org

CHRISTOPHER M. KIESER
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: CKieser
@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, Cato Institute, Owners' Counsel of America, Southeastern Legal Foundation, Professor David L. Callies, Land Use Research Foundation of Hawaii, and NFIB Legal Center